

RESEARCH THAT MATTERS

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# ENFORCEMENT OF HIV CRIMINALIZATION in Arkansas

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Nathan Cisneros  
Moriah L. Macklin  
Will Tentindo  
Brad Sears

## OVERVIEW

The Williams Institute analyzed data from the state of Arkansas about individuals who came into contact with the state's criminal system through allegations of HIV-related crimes. We analyzed both law enforcement arrest data and data from the state's Department of Corrections and sex offender registries to understand the beginning and end stages of the criminalization cycle. In total, we estimate that at least 108 people have had contact with Arkansas' criminal system because of allegations of HIV crimes.

## FINDINGS

- There have been at least 119 charges at arrest for allegations of HIV-related crimes since 1990, including four charges for failure to disclose one's HIV status to a medical professional.
- Arrests continue to the present day, with the latest arrest in 2022—the latest year for which data were available.
- Enforcement is highly concentrated by geography:
  - 18% of all arrests originated with Little Rock Police Department, followed by Fort Smith Police Department (10%).
  - Likewise, Pulaski County originated one-third of all HIV-related arrests, followed by Sebastian County with 12% of arrests, and Miller County with 5% of arrests. In contrast, most counties had one or no arrests.
- The racial composition of people arrested for allegations of HIV-related crimes skews Black: Black people were 48% of all HIV-related arrests, but only 15% of the state's population, and 43% of people living with HIV in the state:
  - Black men in particular were overrepresented—7% of the state's population, 31% of people living with HIV, and 44% of HIV-related arrests.
- Four in five arrests (80%) that proceeded to the prosecution phase resulted in a guilty outcome. Only one case resulted in a not guilty outcome, and the remaining cases had charges dropped or prosecutors declined to pursue the case.
- The youngest person with an HIV-related conviction was 18 years old.
- Fourteen people were currently on the sex offender registry for an HIV-related conviction in 2023.
  - Half of these people were Black men, although Black men made up only 22% of the overall sex offender registry.
- Twenty-one people across two snapshots of people in Arkansas Department of Corrections (DOC) custody (in 2007 and 2023) had HIV-related convictions mandating a sentence:
  - The average sentence per count for the HIV-related conviction was 24 years.
  - Four people only had HIV-related convictions; they had no other current or prior convictions.
  - Black men were 57% of all people with an HIV-related DOC sentence, compared to 38% of all people in DOC custody.

## BACKGROUND

HIV criminalization is a term used to describe statutes that criminalize otherwise legal conduct, or increase the penalties for illegal conduct, based upon a person's HIV-positive status.<sup>1</sup> While there is only one federal HIV criminalization law,<sup>2</sup> more than half of states and territories across the United States have HIV criminal laws. Most HIV criminal laws do not require actual transmission of HIV or an intent to transmit HIV. Often, these laws criminalize conduct that poses no actual risk of transmission, such as spitting or biting.<sup>3</sup> Most laws criminalizing HIV were created in the early years of the HIV/AIDS epidemic,<sup>4</sup> long before there were effective tests for the virus,<sup>5</sup> before treatments became available that allow people living with HIV (PLWH) to live normal lifespans in good health,<sup>6</sup> and before extremely effective methods for preventing transmission of the virus became widely available.<sup>7</sup>

<sup>1</sup> From "Criminalization of HIV Exposure: A Review of Empirical Studies in the United States," by D. Harsono, C. Galletly, E. O'Keffe, & Z. Lazzarini, 2017, *AIDS and Behavior*, 21(1), p. 27-50. doi: [10.1007/s10461-016-1540-5](https://doi.org/10.1007/s10461-016-1540-5).

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

<sup>3</sup> From "Expert consensus statement on the science of HIV in the context of criminal law," by F. Barré-Sinoussi, S.S. Abdool Karim, J. Albert, L.G. Bekker, C. Beyrer, P. Cahn, A. Calmy, B. Grinsztejn, A. Grulich, A. Kamarulzaman, N. Kumarasamy, M. Loutfy, K.M. El Filali, S. Mboup, J. S.G. Montaner, P. Munderi, V. Pokrovsky, A.M. Mandamme, B. Young, ... & P. Godfrey-Faussett, 2018, *Journal of the International AIDS Society*, 21(7), p.251-61. DOI: [10.1002/jia2.25161](https://doi.org/10.1002/jia2.25161); "Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States," by J.S. Lehman, M.H. Carr, A.J. Nichol, A. Ruisanchez, D.W. Knight, A.E. Langford, S.C. Gray, ... & J.H. Mermin, 2014, *AIDS and Behavior*, 18, p. 997-1006. [add doi]

<sup>4</sup> From "Criminalization of HIV Exposure: A Review of Empirical Studies in the United States" by D. Harsono, C. Galletly, E. O'Keffe, & Z. Lazzarini, 2017, *AIDS and Behavior*, 21(1), p. 27-50. doi: [10.1007/s10461-016-1540-5](https://doi.org/10.1007/s10461-016-1540-5); "Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States," by J.S. Lehman, M.H. Carr, A.J. Nichol, A. Ruisanchez, D.W. Knight, A.E. Langford, S.C. Gray, ... & J.H. Mermin, 2014, *AIDS and Behavior*, 18, p. 997-1006. DOI: [10.1007/s10461-014-0724-0](https://doi.org/10.1007/s10461-014-0724-0).

<sup>5</sup> From "A Timeline of HIV/AIDS," by HIV.gov, 2023, (<https://files.hiv.gov/s3fs-public/aidsgov-timeline.pdf>) (last visited Aug. 30, 2022).

<sup>6</sup> From "Survival of HIV-Positive Patients Starting Antiretroviral Therapy Between 1996 and 2013: A Collaborative Analysis of Cohort Studies," by A. Trickey, M. May, J.J. Vehreschild, N. Obel, H.M. Crane, C. Boesecke, S. Patterson, S. Grabar, C. Cazanave, M. Cavassini, L. Shepherd, A. D'Arminio Monforte, A. Van Sighem, M. Saag, F. Lampe, V. Hernando, M. Montero, R. Zangerle, A.C. Justice, & J.A. Sterne, 2017, *The Lancet HIV*, 4(8), p. 349-356. DOI: [10.1016/S2352-3018\(17\)30066-8](https://doi.org/10.1016/S2352-3018(17)30066-8); "Expert consensus statement on the science of HIV in the context of criminal law," by F. Barré-Sinoussi, S.S. Abdool Karim, J. Albert, L.G. Bekker, C. Beyrer, P. Cahn, A. Calmy, B. Grinsztejn, A. Grulich, A. Kamarulzaman, N. Kumarasamy, M. Loutfy, K.M. El Filali, S. Mboup, J. S.G. Montaner, P. Munderi, V. Pokrovsky, A.M. Mandamme, B. Young, ... & P. Godfrey-Faussett, 2018, *Journal of the International AIDS Society*, 21(7), p.251-61. DOI: [10.1002/jia2.25161](https://doi.org/10.1002/jia2.25161); "Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States," by J.S. Lehman, M.H. Carr, A.J. Nichol, A. Ruisanchez, D.W. Knight, A.E. Langford, S.C. Gray, ... & J.H. Mermin, 2014, *AIDS and Behavior*, 18, p. 997-1006. DOI: [10.1007/s10461-014-0724-0](https://doi.org/10.1007/s10461-014-0724-0).

<sup>7</sup> From "For HIV, Treatment is Prevention," by F. Collins, 2019, <https://directorsblog.nih.gov/2019/01/22/for-hiv-treatment-is-prevention/>; "HIV viral load and transmissibility of HIV infection: undetectable equal untransmittable," by R.W. Eisinger, C.W. Dieffenbach, & A.S. Fauci, 2019, *Journal of the American Medical Association* DOI: [10.1001/jama.2018.21167](https://doi.org/10.1001/jama.2018.21167); "Maximizing the Benefits of HIV Preexposure Prophylaxis," By S.P. Buchbinder, *Topics in antiviral medicine*, 25(4), p. 138.

## ARKANSAS' HIV CRIMINAL LAWS

Arkansas has two HIV-specific criminal laws, which we describe below. In addition, PLWH who are charged under some other criminal laws for conduct unrelated to their HIV status are subject to additional burdens and requirements that stem from their status.

### Criminal Exposure Felony

The Arkansas criminal code makes “exposing another person to human immunodeficiency virus” a crime.<sup>8</sup> In Arkansas, PLWH who know of their HIV-positive status commit a felony if they expose another person to HIV through the “parenteral<sup>9</sup> transfer of blood or a blood product” or through “sexual penetration”<sup>10</sup> without first informing the other person of the “presence of HIV.”<sup>11</sup>

The mental state of a person who was charged and required to sustain a conviction under this law was questioned in its early years.<sup>12</sup> When enacted, the legislation was titled, “An Act to Create a Crime for Knowingly and Willfully Exposing Another Person to Human Immunodeficiency Virus,” suggesting that a person must have the willful intent to expose another person to HIV in order to be convicted under the statute. However, the text of the statute required only that a person know that they previously tested positive for HIV and exposed another person to HIV through the transmission routes mentioned above in order to be convicted; willful intent was not required. Following the language of the statute, courts in Arkansas have since held that a person can be convicted under the statute if they “knowingly engaged in sexual penetration with another person without having first informed the other person of the presence of the HIV risk.”<sup>13</sup>

Furthermore, the statute does not require transmission of HIV to sustain a conviction. It does not even require the “transmission of semen” to establish exposure through sexual penetration.<sup>14</sup> The law also does not account for mitigation strategies, such as condom use, or current HIV treatments, including medication that can eliminate the risk of getting HIV through sexual contact if a person does not have HIV, and medications that prevent a person living with HIV from passing on HIV through sexual contact.

<sup>8</sup> ARK. CODE § 5-14-123 (2023).

<sup>9</sup> Parenteral means “administered by any way other than through the mouth.” Oxford Reference. (n.d.). *Parenteral*. <https://www.oxfordreference.com/display/10.1093/oi/authority.20110810105549698>. A statutory definition of parenteral is not provided. Under this definition, splitting or biting may be excluded from prosecution.

<sup>10</sup> Sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into a genital or anal opening or another person’s body.” ARK. CODE § 5-14-123(c)(1) (2023). “Emission of semen is not required.” ARK. CODE § 5-14-123(c)(2) (2023).

<sup>11</sup> ARK. CODE § 5-14-123(b) (2023).

<sup>12</sup> ARK. CODE § 5-14-123(b) (2023); See Galen Fountain, Survey of Legislation: 1989 Arkansas General Assembly, 12 Univ. of Ark. Little Rock L.J. 593, 622 (1989) for a discussion of the confusion at enactment over the mens rea required for a conviction under the statute. In 1998, a Michigan Court referenced the lack of mens rea requirement in Arkansas when it discussed the state’s own HIV criminalization statute. That court held that a specific mens rea was not required in Michigan’s statute because “the requisite intent is inherent in the HIV-infected person’s socially and morally irresponsible actions.” *People v. Jensen*, 586 N.W.2d 748, 754 (Mich. Ct. of App. 1998).

<sup>13</sup> *Howton v. State*, 619 S.W.3d 29, 37-38 (Ark. Ct. of App. Div. II 2021).

<sup>14</sup> Emission of semen is not required.” ARK. CODE § 5-14-123(c)(2) (2023).

Indeed, Arkansas' law incorrectly characterizes the current science of HIV transmission. The statute declares that a person with an AIDS diagnosis or a person

“...who tests positive for the presence of human immunodeficiency virus [HIV] antigen or antibodies is infectious to another person through the exchange of a body fluid during sexual intercourse and through the parenteral transfer of blood or a blood product and under these circumstances is a danger to the public.”<sup>15</sup>

In fact, a person who is taking medications and is virally suppressed cannot pass on HIV through sexual contact, although that person may still test positive on an antigen/antibody test.<sup>16</sup>

The crime of exposing another person to HIV is a Class A felony under Arkansas law.<sup>17</sup> Class A felonies carry the second-highest term of imprisonment under Arkansas law.<sup>18</sup> A person convicted under the HIV exposure law may be sentenced to a term of between six and 30 years in prison,<sup>19</sup> and may be required to pay a fine not exceeding \$15,000.<sup>20</sup> It is not mandatory that those convicted under the statute be sentenced to prison.<sup>21</sup> Instead, a court may suspend imposition of a sentence or place the defendant on probation.

A person convicted under Arkansas' HIV exposure law may also be required to register as a sex offender<sup>22</sup> “when ordered by the sentencing court.”<sup>23</sup> Under state law, certain offenses, including the HIV exposure law, are classified as sex offenses, and Arkansas labels those “adjudicated guilty...of a sex offense” as “sex offenders.”<sup>24</sup> If a sentencing court orders an individual to register a sex offender, that person must register and report any change of address, employment, or education.<sup>25</sup> Failure to abide by these requirements is a Class C felony.<sup>26</sup> Sex offenders in Arkansas are subject to additional legal restrictions on where they live and work,<sup>27</sup> and must verify their registration every six months in person at a local law enforcement agency.<sup>28</sup> Those convicted of a sex offense after April 7, 2006 are also subject to electronic monitoring for at least ten years from the date of their release.<sup>29</sup>

<sup>15</sup> ARK. CODE § 5-14-123(A) (2023).

<sup>16</sup> From “Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV,” by Center for Disease Control and Prevention, 2022 (<https://www.cdc.gov/hiv/risk/art/evidence-of-hiv-treatment.html>); “Here's why you test positive for HIV if you're undetectable,” by San Francisco Aids Foundation, 2019 (<https://www.sfaf.org/collections/beta/heres-why-you-test-positive-for-hiv-if-youre-undetectable/>).

<sup>17</sup> ARK. CODE § 5-14-123(D) (2023).

<sup>18</sup> ARK. CODE § 5-4-401(A) (2023).

<sup>19</sup> ARK. CODE § 5-4-401(A)(2) (2023).

<sup>20</sup> ARK. CODE § 5-4-201(A)(2) (2023).

<sup>21</sup> ARK. CODE § 5-4-301 (2023).

<sup>22</sup> ARK. CODE § 12-12-903(13)(A)(P) (2023).

<sup>23</sup> ARK. CODE § 12-12-903(13)(A)(N) (2023).

<sup>24</sup> ARK. CODE § 12-12-903(12)(A) (2023).

<sup>25</sup> ARK. CODE § 12-12-904 (2023).

<sup>26</sup> ARK. CODE § 12-12-904 (2023).

<sup>27</sup> See generally ARK. CODE § 5-14-128 TO 135 (2023); ARK. CODE § 12-12-929 (2023).

<sup>28</sup> ARK. CODE § 12-12-909 (2023).

<sup>29</sup> ARK. CODE § 12-12-923 (2023).



## Failing to Inform a Doctor or Dentist Misdemeanor

In addition to the exposure crime, a person living with HIV in Arkansas must inform their doctor or dentist of their HIV status prior to receiving treatment.<sup>30</sup> Failure to do so is a Class A misdemeanor.<sup>31</sup> People convicted under this statute may be subject to up to one year in prison<sup>32</sup> and/or a \$2,500 fine.<sup>33</sup>

## General Criminal Laws

Finally, PLWH in Arkansas may also be subject to heightened criminal charges based on other statutes because of their HIV status. At least one person living with HIV has been charged with aggravated assault related to his HIV status.<sup>34</sup> In that instance, a 41-year-old man allegedly spat blood at a police officer.<sup>35</sup> Spitting blood at a person is not an HIV transmission route.

## OTHER ARKANSAS LAWS AFFECTING PEOPLE LIVING WITH HIV

The Arkansas legislature has facilitated access to the private health information of PLWH in the state. These laws allow government employees and victims of sexual offenses to access private health information under certain circumstances. First, prosecutors may obtain information about HIV status from the Department of Public Health. Physicians are required to report patients who test positive for HIV or have been diagnosed with AIDS to the Department of Health.<sup>36</sup> Prosecutors may subpoena these reports to prosecute someone charged with HIV exposure.<sup>37</sup>

Second, parole and probation officers are provided with information about HIV status of individuals under their jurisdiction. Upon release from incarceration, Arkansas requires that a medical representative of the correctional institution notify the person's parole or probation officer if the person tests positive for or has been diagnosed with HIV or AIDS.<sup>38</sup>

Additionally, several provisions provide for release of health information, including HIV status, in the context of sex offenses. Prosecutors are able to access, after obtaining a warrant, the medical records of a person charged with committing a sexual offense against another person.<sup>39</sup> This information may be released to the victim if the prosecutor "determines that a victim is subject to a health risk

<sup>30</sup> ARK. CODE § 20-15-903(A) (2023).

<sup>31</sup> ARK. CODE § 20-15-903(B) (2023).

<sup>32</sup> ARK. CODE § 5-4-401(B)(1) (2023).

<sup>33</sup> ARK. CODE § 5-4-201(B)(1) (2023).

<sup>34</sup> From "HIV Criminalization in the United States: Arkansas," by Center for HIV Law and Policy, 2021 (<https://www.hivlawandpolicy.org/sites/default/files/Arkansas%20-%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S.pdf>).

<sup>35</sup> From "HIV Criminalization in the United States: Arkansas," by Center for HIV Law and Policy, 2021 (<https://www.hivlawandpolicy.org/sites/default/files/Arkansas%20-%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S.pdf>).

<sup>36</sup> ARK. CODE § 20-15-904(B) (2023).

<sup>37</sup> ARK. CODE § 20-15-904(C)(2) (2023).

<sup>38</sup> ARK. CODE § 16-93-1402 (2022).

<sup>39</sup> ARK. CODE § 5-14-202 (2023).

as a result of a sex crime” based on the medical records.<sup>40</sup> Furthermore, people accused of certain sex offenses may be required to undergo HIV testing.<sup>41</sup> The results of the court-ordered test are immediately disclosed to the victim.

Courts have upheld these disclosure laws in response to constitutional challenges. For example, on one occasion, an individual convicted of HIV exposure appealed their conviction, arguing in part that their medical records were obtained in violation of their rights under the United States Constitution because the prosecutor did not obtain a search warrant.<sup>42</sup> The state court upheld the conviction, however, holding that the prosecutor did not need to obtain a search warrant because state law permits prosecutors to get the same information through a subpoena. The court further held that the defendant’s rights were not violated because the prosecutor did not obtain the medical records “for police purposes,” but rather for the prosecutor to determine if the defendant had violated Arkansas’ HIV exposure law.<sup>43</sup>

## ARKANSAS PUBLIC HEALTH RULES FOR PEOPLE LIVING WITH HIV

The Arkansas Department of Health is authorized to take certain actions to facilitate prosecution and commitment of PLWH. The Department of Health may issue a cease-and-desist order “if the Director [of the Department of Health] has reasonable cause to suspect that any person who is HIV positive is intentionally engaging in conduct that is likely to cause the transmission of the virus.”<sup>44</sup> Violation of the cease-and-desist order is reported to a prosecuting attorney for “appropriate action.”<sup>45</sup> Additionally, the Director is authorized to have an individual “apprehended and detained for the necessary tests and examination” if the Director has “grounds to believe that [the individual] is suffering from... HIV.”<sup>46</sup> The Director may also “commit any commercial prostitute, or other persons apprehended and examined and found afflicted with [HIV],” to a hospital or other facility where the person would receive treatment “even over the object of the person so diseased.”<sup>47</sup>

Violation of the Department of Health’s orders, rules, or regulations is a misdemeanor and carries a fine between \$100 and \$500, a maximum one month in prison, or both.<sup>48</sup>

<sup>40</sup> ARK. CODE § 5-14-202(c) (2023). An Arkansas Court has held that the HIV status of a person who was the victim of a rape was protected under the state’s rape-shield statute. *Fells v. State*, 207 S.W.3d 498 (Spr. Ct. of Ark. 2005).

<sup>41</sup> ARK. CODE § 16-82-101 (2023).

<sup>42</sup> *Weaver v. State*, 990 S.W.2d 572 (Ark. Ct. of App. 1999).

<sup>43</sup> *Weaver v. State*, 990 S.W.2d 572 (Ark. Ct. of App. 1999).

<sup>44</sup> 007-15-004 ARK. CODE R. § VIII (LexisNexis 2023) (concerning communicable disease control). *See also* 007-15-008 ARK. CODE R. § VIII (LexisNexis 2023), which contains identical language but is located in the regulations section concerning reportable diseases.

<sup>45</sup> *Id.* “Appropriate action” is not defined in either regulation section. *Id.* But *see*, ARK. CODE § 20-7-101 for penalties for violating the Department of Health rules.

<sup>46</sup> 007-15-008 ARK. CODE R. § XXI(D) (LexisNexis 2023).

<sup>47</sup> 007-15-008 ARK. CODE R. § XXI(E) (LexisNexis 2023).

<sup>48</sup> ARK. CODE § 20-7-101 (2023).

## HISTORY OF HIV CRIMINAL LAWS IN ARKANSAS

Arkansas' HIV exposure criminal law was enacted in 1989 as "An Act to Create a Crime for Knowingly and Willfully Exposing Another Person to Human Immunodeficiency Virus."<sup>49</sup> It was referred to as "Exposing another to AIDS" by some.<sup>50</sup> That same year, the legislature also created the misdemeanor offense for failure to notify doctors and dentists of one's HIV-positive status.<sup>51</sup>

The felony statute criminalizing exposure to HIV, which labeled people living with HIV or AIDS as a "danger to the public," also contained provisions requiring physicians to report diagnoses to the Department of Health, allowing a prosecutor to subpoena that information, and granting the court permission to test an individual charged with certain sex offenses for HIV and to inform the victim.<sup>52</sup> Once signed into law, the statute took immediate effect because the legislature passed it with an emergency provision.<sup>53</sup>

The Arkansas Code was amended in 1993 to allow a victim to request that someone convicted of the listed sex offenses be forced to submit to testing to determine if they are living with HIV. It also gave the victim the right to receive counseling, testing, and referral or delivery of health care and support services.<sup>54</sup>

Both of Arkansas' HIV criminal laws were written before effective medications to treat HIV were identified and made widely available in 1996,<sup>55</sup> and before widespread access to medication that prevents HIV transmission was available. Since 1996, a person in effective medication treatment cannot transmit HIV through sexual contact.<sup>56</sup> Moreover, a person who does not have HIV can take medication to prevent the transmission of HIV through sexual contact.<sup>57</sup>

In 2001, the Arkansas state legislature enacted the law giving prosecutors the ability to access a medical record with a warrant for those charged with committing a sex crime.<sup>58</sup> In 2011, the law was amended to require that the prosecutor disclose the results of an HIV test to the victim, the victim's parents or guardian if the victim is a minor, and the defendant if the testing was done under a

<sup>49</sup> 1989 Ark. Acts No. 614, <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FACTS%2F1989%2FPublic%2F614.pdf>

<sup>50</sup> GALEN FOUNTAIN, *Survey of Legislation: 1989 Arkansas General Assembly*, 12 Univ. of Ark. Little Rock L.J. 593, 621 (1989).

<sup>51</sup> 1989 Ark. Acts No. 614, <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FACTS%2F1989%2FPublic%2F614.pdf>; 1989 Ark. Acts No. 413, <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FACTS%2F1989%2FPublic%2F413.pdf>.

<sup>52</sup> 1989 Ark. Acts No. 614, <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FACTS%2F1989%2FPublic%2F614.pdf>.

<sup>53</sup> *Id.* at § 8.

<sup>54</sup> 1993 Ark Acts No. 616.

<sup>55</sup> From "HIV Criminalization in Georgia: Evaluation of Transmission Risk," by B. Sears & S., Williams Institute at UCLA School of Law, 2020 (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Crim-Transmission-GA-Mar-2020.pdf>).

<sup>56</sup> See "Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV", by Center for Disease Control and Prevention, 2022 (<https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html>).

<sup>57</sup> See "Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV", by Center for Disease Control and Prevention, 2022 (<https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html>).

<sup>58</sup> 2011 Ark. Acts No. 1186.



specific section of Arkansas Code. However, that code section was never enacted with the intended corresponding law. As a result, in 2013, Arkansas undid the changes made in 2011.<sup>59</sup>

## RELEVANT CASE LAW

### Sanjay Johnson Case

In 2017, James Booth filed a criminal complaint against Sanjay Johnson, leading to the arrest of Johnson for exposing Booth to HIV.<sup>60</sup> Johnson and Booth later spoke publicly about Johnson's arrest and the ensuing legal battle as the case gained greater attention.<sup>61</sup> The two engaged in consensual sexual activity in 2015 but did not remain in contact.<sup>62</sup> Johnson, who was living with HIV at the time, was undetectable and allegedly did not disclose that he had HIV to Booth, although Johnson said he could not remember if the two discussed HIV status.<sup>63</sup> About one month after their sexual encounter, Booth was diagnosed with HIV.<sup>64</sup> Booth's complaint was filed about a year and a half later, after the two had reconnected and developed a friendship.<sup>65</sup> The then-Director of the Arkansas Department of Health, Nathaniel Smith, testified on behalf of Johnson, who was also Smith's patient.<sup>66</sup> Smith said Johnson could not have transmitted HIV because Johnson's viral load was suppressed at the time.<sup>67</sup> Despite this evidence, the court did not dismiss the case against Johnson, who faced up to 30 years in prison and sex offender registration.<sup>68</sup> As a result of the stress from the charge, Johnson lost his job and contemplated suicide.<sup>69</sup>

<sup>59</sup> 2013 Ark. Acts No. 1125.

<sup>60</sup> From "Sex With HIV Still a Crime? Updated Laws Divide Advocates," by S. Thanawala, Associated Press and the Fayetteville Observe, 2019 (<https://www.fayobserver.com/story/news/2019/07/23/sex-with-hiv-still-crime-updated-laws-divide-advocates/4628927007/>); "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

<sup>61</sup> See generally, "Sex With HIV Still a Crime? Updated Laws Divide Advocates," by S. Thanawala, Associated Press and the ASSOC. PRESS, THE FAYETTEVILLE OBSERVE, 2019 (<https://www.fayobserver.com/story/news/2019/07/23/sex-with-hiv-still-crime-updated-laws-divide-advocates/4628927007/>).

<sup>62</sup> From "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

<sup>63</sup> From "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

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<sup>65</sup> From "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

<sup>66</sup> From "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

<sup>67</sup> From "Sanjay Johnson Faces Prison Sentence in Arkansas HIV Crime Trial," by R. Lee, 2018 (<https://www.thebody.com/content/81289/sanjay-johnson-faces-prison-sentence-in-arkansas-h.html>).

<sup>68</sup> From "Sex With HIV Still a Crime? Updated Laws Divide Advocates," by S. Thanawala, Associated Press and the The Fayetteville Observe, 2019 (<https://www.fayobserver.com/story/news/2019/07/23/sex-with-hiv-still-crime-updated-laws-divide-advocates/4628927007/>);

<sup>69</sup> From "Sex With HIV Still a Crime? Updated Laws Divide Advocates," by S. Thanawala, Associated Press and the Fayetteville Observe, 2019 (<https://www.fayobserver.com/story/news/2019/07/23/sex-with-hiv-still-crime-updated-laws-divide-advocates/4628927007/>);

Ultimately, Johnson agreed to a plea deal and was sentenced to five years of probation and a \$750 fine in February 2019 under an alternate sentencing statute.<sup>70</sup> Johnson's attorney, Cheryl K. Maples, said Johnson received a lesser sentence under the "rarely used" Arkansas Code § 16-93-303,<sup>71</sup> which allows courts to sentence an individual to at least one year of probation and a fine not exceeding \$3,500 if the defendant pleads guilty or no contest to the charge and has no previous felony convictions.<sup>72</sup> The statute explicitly prohibits records being sealed for those charged with exposing another to HIV.<sup>73</sup> However, as part of the plea deal, Johnson pled no contest to an aggravated assault charge rather than a charge of "exposing another person to HIV" statute.<sup>74</sup> Maples indicated at the time that she intended to bring a further challenge to the constitutionality of Arkansas' HIV exposure statute.<sup>75</sup> However, Maples died later that year—before she could challenge the constitutionality of the exposure law.<sup>76</sup>

## Other Cases

An Arkansas state court upheld the state's felony HIV exposure law as constitutional in 2021.<sup>77</sup> The plaintiff in the case had argued that the law was a bill of attainder, violated the equal protection clause, carried a cruel and unusual punishment, and was unconstitutionally vague.<sup>78</sup> Throughout their arguments, the plaintiff emphasized that they could not transmit HIV to another person and that the law neglected advancements in medicine.<sup>79</sup>

A bill of attainder "legislatively determines guilt and inflicts punishment upon an individual without...a trial."<sup>80</sup> The plaintiff argued that the law was a bill of attainder because it criminalized those who were living with HIV.<sup>81</sup> The court ruled against the plaintiff, holding that the law criminalized the conduct of the person living with HIV, namely their failure to inform others of their HIV status.<sup>82</sup>

<sup>70</sup> From "Poz Man Saved from Prison for Alleged Non-Disclosure," by D. Guerrero, HIV PLUS MAGAZINE, 2019 (<https://www.hivplusmag.com/stigma/2019/2/26/sanjay-johnson-gets-5-year-probation-hiv-crime-case#toggle-gdpr>).

<sup>71</sup> From "Poz Man Saved from Prison for Alleged Non-Disclosure," by D. Guerrero, HIV PLUS MAGAZINE, 2019 (<https://www.hivplusmag.com/stigma/2019/2/26/sanjay-johnson-gets-5-year-probation-hiv-crime-case#toggle-gdpr>).

<sup>72</sup> ARK. CODE § 16-93-303 (2023).

<sup>73</sup> ARK. CODE § 16-93-303(A)(1)(B)(v) (2023).

<sup>74</sup> From "Sex With HIV Still a Crime? Updated Laws Divide Advocates," by S. Thanawala, Associated Press and the Fayetteville Observer, 2019 (<https://www.fayobserver.com/story/news/2019/07/23/sex-with-hiv-still-crime-updated-laws-divide-advocates/4628927007/>).

<sup>75</sup> From "Poz Man Saved from Prison for Alleged Non-Disclosure," by D. Guerrero, HIV PLUS MAGAZINE, 2019 (<https://www.hivplusmag.com/stigma/2019/2/26/sanjay-johnson-gets-5-year-probation-hiv-crime-case#toggle-gdpr>); "Sanjay Johnson Criminalization Case Closes with 5-Year Probation Sentence," by K. Farrow, 2019 (<https://www.thebody.com/article/sanjay-johnson-probation-hiv-criminalization>).

<sup>76</sup> From "Cheryl Maples, Lawyer Advocate for Gay Rights, Dies at 69," by M. Brantley, 2019 (<https://arktimes.com/arkansas-blog/2019/08/23/cheryl-maples-lawyer-advocate-for-gay-rights-dies-at-69>).

<sup>77</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>78</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>79</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>80</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>81</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>82</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

The plaintiff argued that the law violated the equal protection clause because it treated PLWH differently than those living with other sexually transmitted infections. The state argued it was permitted to treat HIV differently from other diseases. The court found that the law was not subject to heightened scrutiny as it did not involve a suspect class, and thus agreed with the state that it could criminalize the failure to disclose. The court said, “The fact that HIV is more easily treatable now than in the past does not change our analysis.”<sup>83</sup>

The plaintiff argued that his six-year sentence was so disproportionate to the offense that it amounted to a violation of the Eighth Amendment prohibition against cruel and unusual punishment.<sup>84</sup> The court held that the plaintiff was sentenced to the statutory minimum, and it presumed the constitutionality of the statute. Further it held that his “sentence is not grossly disproportionate to his crimes...once a person is infected with HIV, that person will have HIV forever, and there is currently no cure.”<sup>85</sup>

Additionally, the plaintiff argued that the statute was unconstitutionally vague, and that the statute could not apply to the plaintiff since the plaintiff was in medical care and therefore could not transmit HIV.<sup>86</sup> The court dismissed these claims, saying that his “claim that [the plaintiff] cannot expose anyone to HIV because of the advancements of medical science is simply not accurate.” The court also held that the statute was not vague because it explicitly prohibits conduct even when there is no risk of HIV transmission,<sup>87</sup> ultimately concluding in part by saying: “[T]he issue of whether or not a person has a detectable or undetectable viral load of HIV is irrelevant to the offense.”<sup>88</sup>

## PREVIOUS STUDIES OF HIV CRIMINAL ENFORCEMENT

This report builds on a series of studies analyzing the enforcement of HIV criminal laws using state-level data. Since 2015, the Williams Institute has published similar studies for California,<sup>89</sup> Georgia,<sup>90</sup>

<sup>83</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>84</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>85</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>86</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>87</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021) (citing ARK. CODE § 5-14-123(c)(2) that prohibits conduct “even where there is no emission of semen”).

<sup>88</sup> Howton v. State, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021).

<sup>89</sup> From “HIV Criminalization in California: Penal implications for People Living with HIV/AIDS,” by A. Hasenbush, A. Miyashita, & B. Sears, The Williams Institute at UCLA School of Law, 2015 (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-CA-Dec-2015.pdf>).

<sup>90</sup> From “HIV Criminalization in Georgia: Penal Implications for People Living with HIV/AIDS,” by A. Hasenbush, The Williams Institute at UCLA School of Law, 2018 (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-GA-Jan-2018.pdf>).

Florida,<sup>91</sup> Missouri,<sup>92</sup> Nevada,<sup>93</sup> Kentucky,<sup>94</sup> Virginia,<sup>95</sup> Tennessee,<sup>96</sup> and Louisiana.<sup>97</sup> These studies show the following:

- Thousands of people have been prosecuted for HIV crimes.
- The number of HIV-related arrests and prosecutions has not decreased in recent years.
- The vast majority of arrests, prosecutions, and convictions are pursuant to state laws that do not require actual transmission of HIV, the intent to transmit, or even conduct that can transmit HIV.
- Black people and women are disproportionately affected by HIV criminal laws.
- Sex workers are often disproportionately affected by HIV criminal enforcement.
- In most states, arrests are concentrated in just a few counties and appear to be driven by local law enforcement practice.
- Convictions for HIV crimes can carry long sentences and create lifelong collateral consequences from a felony conviction. Some states also require registration on the state's sex offender registry.
- Enforcement of HIV criminal laws has cost states tens of millions of dollars in incarceration costs alone.

The Williams Institute reports follow several earlier studies analyzing the enforcement of HIV criminal laws in other states.<sup>98</sup> For example, Trevor Hoppe, analyzing 431 HIV-related criminal convictions in six

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<sup>91</sup> From "HIV Criminalization in Florida: Length of Incarceration and Fiscal Implications," by N. Cisneros & B. Sears, The Williams Institute at UCLA School of Law, 2021(<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Incarceration-FL-Jul-2021.pdf>).

<sup>92</sup> From "Criminalization of HIV and Hepatitis B and C in Missouri: An Analysis of Enforcement Data From 1990 to 2019," B.Sears, S. Goldberg, & C. Mallory, The Williams Institute at UCLA School of Law, 2020(<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-MO-Feb-2020.pdf>).

<sup>93</sup> From "Enforcement of HIV Criminalization in Nevada," by N. Cisneros & B.Sears, The Williams Institute at UCLA School of Law 2021 <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-NV-May-2021.pdf>.

<sup>94</sup> From Nathan Cisneros & Brad Sears, Enforcement of HIV Criminalization in Kentucky, by N. Cisneros & B.Sears, The Williams Institute at UCLA School of Law, 2021 (<https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-ky/>).

<sup>95</sup> From Nathan Cisneros & Brad Sears, Enforcement of HIV criminalization in Virginia, by N. Cisneros & B.Sears, The Williams Institute at UCLA School of Law, 2021(<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-VA-Dec-2021.pdf>).

<sup>96</sup> From Nathan Cisneros, Brad Sears, & Robin Lennon-Dearing, Enforcement of HIV Criminalization in Tennessee, by N. Cisneros, B. Sears, & R. Lennon-Dearing, The Williams Institute at UCLA School of Law,2022 (<https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-tennessee/>).

<sup>97</sup> From, "Enforcement of HIV Criminalization in Louisiana," by N. Cisneros & B. Sears, The Williams Institute at UCLA School of Law, 2022 (<https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-louisiana/>).

<sup>98</sup> See "Criminalization of HIV Exposure: A Review of Empirical Studies in the United States," by D. Harsono, C. Galletly, E. O'Keffe, & Z. Lazzarini, 2017, *AIDS and Behavior*, 21(1), p. 27-50. doi: 10.1007/s10461-016-1540-5; "Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010," by C. Galletly & Z. Lazzarini, 2013, *AIDS and Behavior*, 17, p. 26-24. DOI: 10.1007/s10461-013-0408-1; "Historical and Current Trends in HIV Criminalization in South Carolina: Implications for Southern HIV Epidemic," by D. Cann, S.E. Harrison, & S. Qiao 2019, *AIDS and Behavior*, 23, p.233. doi: 10.1007/s10461-019-02599-1; "From Sickness

states, concluded that victim characteristics drive uneven patterns of enforcement and sentencing.<sup>99</sup> Hoppe found that there were disproportionately high rates of convictions among heterosexual white male defendants, yet at sentencing, Black defendants were punished more severely, and women were treated more leniently. Men accused of not disclosing to women were punished more harshly than those accused by men.

Prior attempts to analyze the enforcement of Arkansas' HIV criminal law, primarily based on media reports and court cases, have turned up only a handful of cases. For example, the Center for HIV Law and Policy, which maintains a comprehensive resource of state-level HIV criminal laws and their enforcement, documented one prosecution under Arkansas Code § 5-14-123.<sup>100</sup> The Center pointed to several additional court cases where Arkansas prosecuted PLWH under "general criminal laws," rather than Arkansas Code § 5-14-123 or where the state prosecuted individuals with other STIs.<sup>101</sup> Our independent searches into caselaw and news databases uncovered three cases where courts considered appeals of convictions under Arkansas Code § 5-14-123.<sup>102</sup>

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to Badness: The Criminalization of HIV in Michigan," by T. Hoppe, 2014, *Social Science and Medicine*, 101, p. 139-47. DOI: 10.1016/j.socscimed.2013.11.007; "Disparate Risks of Conviction under Michigan's Felony HIV Disclosure Law: An Observational Analysis of Convictions and HIV Diagnoses 1992-2010," by T. Hoppe, 2015, *Punishment & Society*, 17(1), p. 73-93. <https://doi.org/10.1177/1462474514561711> ; "Punishing Disease: HIV and the Criminalization of Sickness," by T. Hoppe, 2018, University of California Press; "Beyond Criminalization: Reconsidering HIV Criminalization in an Era of Reform," by T. Hoppe, A. McClelland, & K. Pass, 2022, *Current Opinion in HIV & AIDS*, 17(2), p. 100-105. DOI: 10.1097/COH.0000000000000715.

<sup>99</sup> From "Punishing Disease: HIV and the Criminalization of Sickness," by T. Hoppe, 2018, University of California Press.

<sup>100</sup> From "HIV Criminalization in the United States: Arkansas," by Center for HIV Law and Policy, 2021 (<https://www.hivlawandpolicy.org/sites/default/files/Arkansas%20-%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S.pdf>).

<sup>101</sup> From "HIV Criminalization in the United States: Arkansas," by Center for HIV Law and Policy, 2021 (<https://www.hivlawandpolicy.org/sites/default/files/Arkansas%20-%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S.pdf>).

<sup>102</sup> A review of LexisNexis resulted in three primary results: *White v. State*, 259 S.W.3d 410 (Ark. Sup. Ct. 2007), *Weaver v. State*, 1998 Ark. LEXIS 466, 1998 WL 4017391999 (Ark. Sup. Ct.); and *Howton v. State*, 619 S.W.3d 29 (Ark. Ct. of App. Div. II 2021). Two lower court decisions in *Weaver v. State* were also available: *Weaver v. State*, 939 S.W.2d 316 (Ark. Ct. of App. Div. I 1997) (*aff'd* in *Weaver* 1998 Ark. LEXIS 466) and *Weaver v. State*, 990 S.W.2d 572, (Ark. Ct. of App. Div III 1999) (*cert. denied* *Weaver v. Arkansas*, 528 U.S. 913 (1999)). One additional result, *Fells v. State*, 207 S.W.3d 498 (Ark. Sup. Ct. 2005) (holding that HIV status is protected from admission as evidence under certain circumstances by Arkansas' rape-shield statute) referenced the statute in dissent but did not concern a prosecution under ARK. CODE § 5-14-123. Westlaw returned the same results with the addition of the non-Arkansas case *People v. Jensen*, 586 N.W.2d 748, 754 (Mich. Ct. of App. 1998). On Bloomberg Law, an additional case appeared in which a man previously convicted of exposing another person to HIV challenged his designation on the sex offender registry: *Doering v. Wood*, Case # 5:16-cv-00165-BSM (E.D. Ark. 2016). Sanjay Johnson's prosecution was not reported in caselaw but received media attention.



## ANALYSIS OF HIV CRIMINAL ENFORCEMENT DATA

### DATA AND SOURCES

We obtained data about the enforcement of Arkansas' HIV criminal laws from three different sources. First, in November 2022, the Williams Institute received de-identified data from the Arkansas Department of Public Safety's Arkansas Crime Information Center (ACIC). ACIC maintains a database of arrests and prosecutions in its Arkansas Criminal History Repository.<sup>103</sup> The Repository provided a list of arrests and prosecutions for the felony HIV exposure crime and the misdemeanor failure to notify medical providers crime. It is possible that the ACIC data do not include all HIV-related arrests across Arkansas since 1989. The numbers presented here are therefore an absolutely minimum for the number of people criminalized because of their HIV status in Arkansas.

In February 2023, we received data through Information Network of Arkansas (INA), a public-private partnership with the state of Arkansas that handles bulk data requests for the state's sex offender registry (SOR) and Department of Corrections (DOC). We received snapshots of all people currently on Arkansas's SOR as of February 27, 2023. We also received two snapshots in time of people in DOC custody—one of those in custody on July 31, 2007, and, later, one of those in custody on June 5, 2023.

The SOR and DOC data represent the other end of the criminalization cycle, after arrest, charging, prosecution, conviction, and sentencing. These data, however, are just snapshots in time, rather than cumulative data like that received from ACIC. The number of people in DOC custody or on the SOR are therefore necessarily much smaller, but they nevertheless reveal information about who winds up incarcerated in prison and later on the sex offender registry because of their HIV status.

In the sections that follow we present an analysis of Arkansas' primary HIV-related criminal statute—the felony exposure statute. We also include some analysis of Arkansas' misdemeanor failure to notify medical providers statute.

### ANALYSIS OF ARRESTS AND PROSECUTIONS

Up to 108 people have been arrested for HIV-related offenses in Arkansas since 1989.<sup>104</sup> In total, 119 separate HIV-related offenses have been charged at arrest.

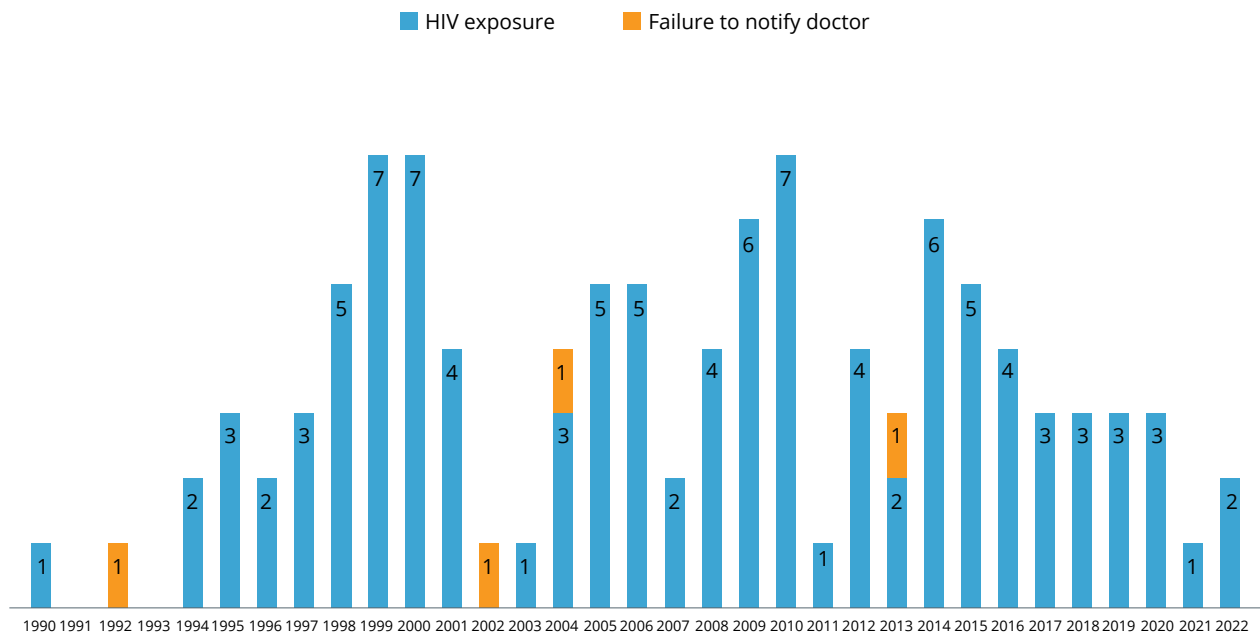
<sup>103</sup> The Williams Institute requested incident-based arrest data from the state of Arkansas but was told that they were unable to provide such records.

<sup>104</sup> We received de-identified data from the Arkansas Criminal History Repository without unique person identifiers. We therefore counted each distinct combination of *arrest date x age at arrest x sex x race x arresting agency* as a separate person. (Date of birth was not available.) We have no way of knowing, given the data, if the same person was arrested more than once, on separate days. We therefore conclude that up to 108 unique people have been arrested for allegations HIV-related offenses. Williams Institute reports on HIV criminalization in other states revealed that while most people have only one HIV-related arrest, some people do indeed have more than one such arrest. For example, in Virginia, 82% of people had only one HIV-related arrest, and in Missouri 84% of people had only one HIV- or hepatitis-related arrest.

**Table 1. Number of people arrested and number of charges for HIV-related offenses in Arkansas**

	NUMBER OF PEOPLE	NUMBER OF CHARGES
Knowingly/willingly exposing another to HIV	104	115
Failing/refusing to advise medical staff of HIV infection	4	4

HIV-related arrests go back in time to just after the state's HIV-related criminal law was enacted in 1989. The earliest arrest for which we have data was in June of 1990, while the most recent arrest was at the end of October 2022, shortly before the Williams Institute received arrest data from the state of Arkansas. As Figure 1 shows, arrests have waxed and waned over time, without a clear overall trend. On average, there have been about three people arrested for HIV-related charges each year from 1990 to 2022. There were a maximum of seven people arrested in 1999 and 2000, and again a decade later in 2010. The overall picture is of continued enforcement over time, including in the early years of the present decade (the 2020s) despite the COVID pandemic that depressed overall arrests across the state.<sup>105</sup>

**Figure 1: Number of HIV-related arrests in Arkansas from 1990 to 2022**

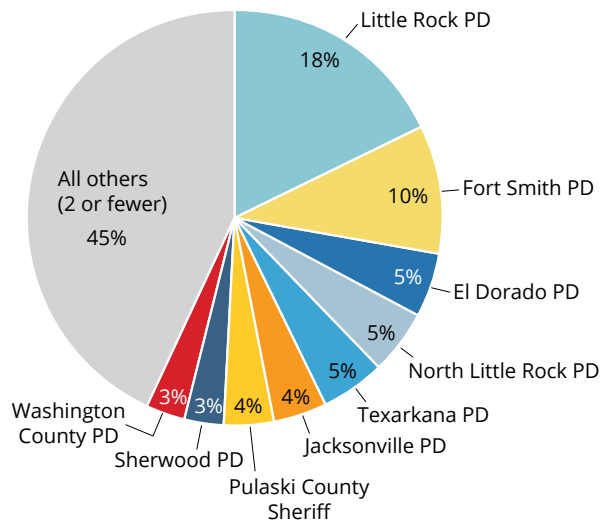
## Geography of Arrests

HIV-related arrests were spread across the law enforcement agencies in Arkansas. In all, 49 law enforcement agencies reported at least one HIV-related arrest. Nearly two thirds (63%) of law enforcement agencies reported only one arrest. Nine law enforcement agencies reported more than two arrests. The Little Rock Police Department accounted for 18% of all arrests. Fort Smith Police

<sup>105</sup> For example, arrests in 2020 (49,174) and 2021 (52,392) were fewer than in 2019 (68,794) or 2018 (71,497), according to the Arkansas Crime Information Center's annual *Arrest By Contributor* figures.

Department accounted for another 10% of arrests. Little Rock is the state's most populous city (about 203,000 people in 2020), while Fort Smith is the state's third largest (about 89,000 people in 2020).<sup>106</sup> There appears to be no HIV-related arrests from the state's second most populous city, Fayetteville (about 94,000 people), and only two from the fourth most populous city (Springdale, about 84,000 people in 2020).<sup>107</sup> Seen this way, it appears that enforcement in Fort Smith is an outlier—arrests were not commensurate with the city's population.

**Figure 2. Number of HIV-related arrests by police department in Arkansas<sup>108</sup>**



Enforcement patterns look similar when aggregated to the county level. Pulaski County, home to Little Rock, accounted for exactly one-third of all HIV-related arrests, followed by Sebastian County, with about 12% of all HIV-related arrests.<sup>109</sup> Pulaski County is the state's most populous, however Sebastian County (Fort Smith) is the state's fourth most populous.<sup>110</sup> The state's number two and number three most populous counties—Benton and Washington—combined only accounted for 9% of all HIV-related arrests, again underscoring the Fort Smith enforcement hot-spot.<sup>111</sup> (Fort Smith PD accounted for 11 arrests originating in the county; two additional arrests originated with the county Sheriff's office.) Indeed, Pulaski and Sebastian Counties together accounted for a little less than half (45%) of all HIV-related arrests. On the other hand, 28 counties had two or fewer arrests, and combined accounted for only about a third (36%) of all HIV-related arrests.

<sup>106</sup> United States Census Bureau, QuickFacts : Fayetteville City, Arkansas; Fort Smith City, Arkansas; Little Rock City, Arkansas, (Accessed June 27, 2023) <https://www.census.gov/quickfacts/fact/table/fortsmithcityarkansas,fayettevillecityarkansas,littlerockcityarkansas/POP010220>.

<sup>107</sup> United States Census Bureau, QuickFacts : Springdale City, Arkansas, (Accessed June 27, 2023) <https://www.census.gov/quickfacts/fact/table/springdalecityarkansas/POP010220>

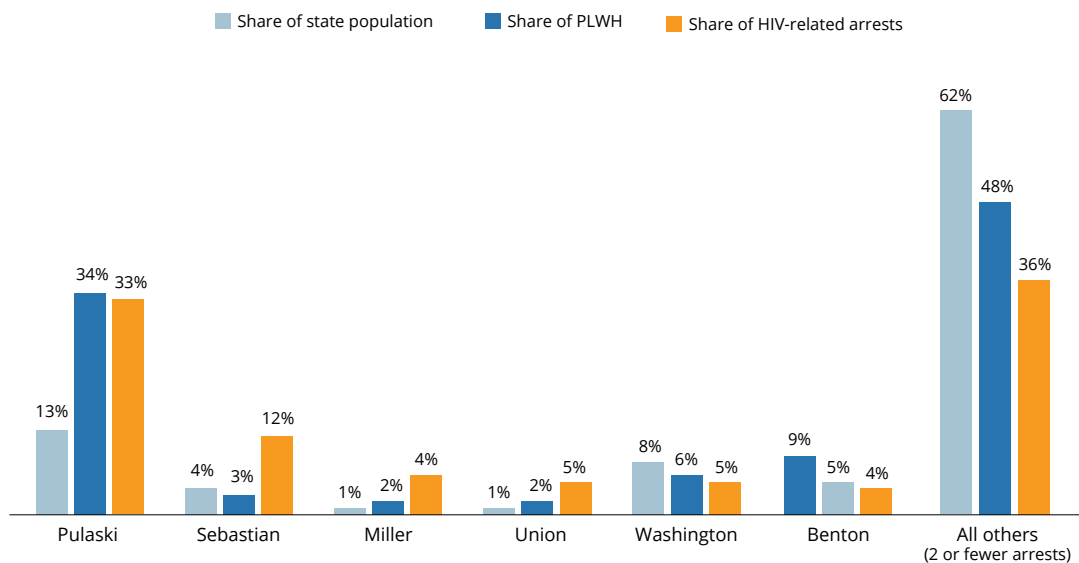
<sup>108</sup> Due to rounding, values do not add to 100%.

<sup>109</sup> U.S. Census Bureau, Census 2000 Summary File 1 (SF1), 2010 Census Summary File 1 (SF1), 2020 Census Demographic and Housing Characteristics File (DHC): Pulaski County.

<sup>110</sup> U.S. Census Bureau, Census 2000 Summary File 1 (SF1), 2010 Census Summary File 1 (SF1), 2020 Census Demographic and Housing Characteristics File (DHC): Sebastian County.

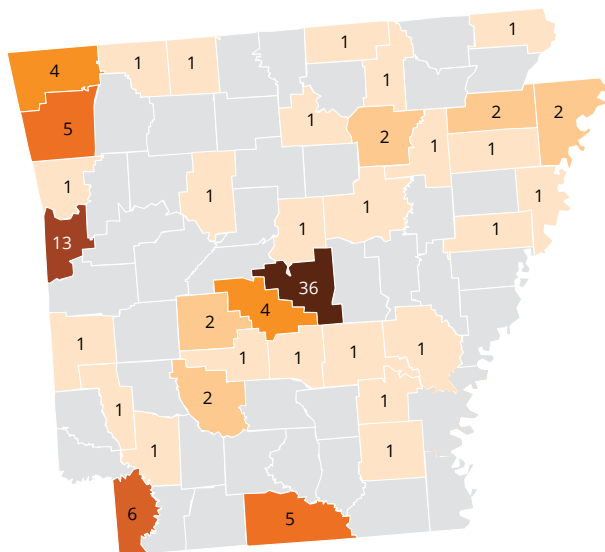
<sup>111</sup> U.S. Census Bureau, Census 2000 Summary File 1 (SF1), 2010 Census Summary File 1 (SF1), 2020 Census Demographic and Housing Characteristics File (DHC): Benton County and Washington County.

Figure 3. Share of HIV-related arrests, population share, and share of people living with HIV by county in Arkansas



When compared to the population of people living with HIV in Arkansas, Sebastian County again stands out, and again the comparison to Pulaski County is notable. Just a fraction more than one-third of all people living with HIV resided in Pulaski County in 2020, which lines up nearly exactly with the county's share of HIV-related arrests.<sup>112</sup> However, Sebastian County accounted for just about 3% of people living with HIV in 2020 compared to 12% of all HIV-related arrests, a disproportionality of about 3.5.<sup>113</sup> Likewise, Miller and Union counties, although accounting for a smaller share, also exhibited disproportionality of a factor of roughly three and two respectively.

Figure 4. Map of number of HIV-related arrests by county in Arkansas



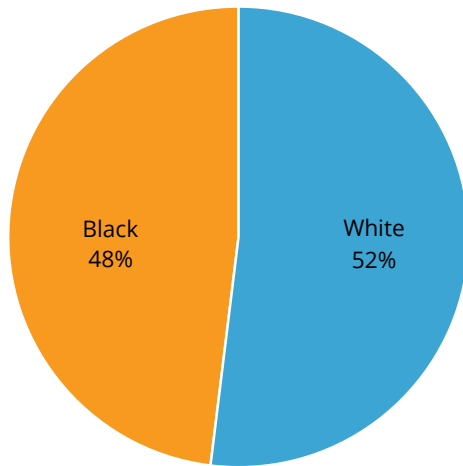
<sup>112</sup> In 2020, there were 2,009 people living with HIV residing in Pulaski County. AIDSvU, “2020 County Prevalence Data” ([https://aidsvu.org/wp-content/uploads/2022/11/AIDSvU\\_County\\_Prev\\_2020.xlsx](https://aidsvu.org/wp-content/uploads/2022/11/AIDSvU_County_Prev_2020.xlsx)).

<sup>113</sup> In 2020, there were 204 people living with HIV residing in Sebastian County. AIDSVu, “2020 County Prevalence Data” ([https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu\\_County\\_Prev\\_2020.xlsx](https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu_County_Prev_2020.xlsx)).

## Arrestee Demographics

Of the 108 people arrested for HIV-related offenses in Arkansas, just over half were identified as white (52%) and just under half (48%) were identified as Black. No other race/ethnicity groups were identified in the arrest data.<sup>114</sup>

**Figure 5. Racial distribution of people arrested for HIV-related offenses in Arkansas**



In contrast, Black Arkansans made up just 15% of the state's population in 2020.<sup>115</sup> Non-Hispanic white people in Arkansas were 70% of the population, and Hispanic/Latino people comprised 8% of the state's population.<sup>116</sup> Other race/ethnicity groups were 9% of all people in Arkansas in 2020. However, when compared to the state's population of people living with HIV, the racial disproportionality nearly closes; about 44% of people living with HIV were Black in 2020, while 43% were white.<sup>117</sup> Again, however, Hispanic/Latino and other race/ethnicity groups are completely absent from the arrest data, although they comprised 8% and 6% respectively of people living with HIV in 2020.<sup>118</sup>

When looking at the two counties with the most HIV-related arrests, Pulaski and Sebastian, we observed greater racial disparities. In Pulaski County, 78% of HIV-related arrests were of Black people, although the county was only 38% Black in 2020, and only 56% of people living with HIV in 2020 were Black.<sup>119</sup> In Sebastian County, Black people were only 7% of the population, and 22% of the people

<sup>114</sup> We do not have evidence that the Arkansas criminal history data separately record Hispanic/Latino ethnic identity. It is possible that people who would identify as Hispanic/Latino are instead categorized as Black, white, or another racial group.

<sup>115</sup> United States Census Bureau, Annual Estimates of the Resident Population for Selected Age Groups by Sex for Arkansas: April 1, 2020 to July 1, 2022 (SC-EST2022-AGESEX-05), Updated June 2023.

<sup>116</sup> United States Census Bureau, Annual Estimates of the Resident Population for Selected Age Groups by Sex for Arkansas: April 1, 2020 to July 1, 2022 (SC-EST2022-AGESEX-05), Updated June 2023.

<sup>117</sup> AIDSVu, "2020 State Prevalence Data" ([https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu\\_State\\_Prev\\_2020.xlsx](https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu_State_Prev_2020.xlsx)).

<sup>118</sup> Other race/ethnicity groups include: American Indian/Alaska Native, Asian/Asian American, people with more than one racial identity, and Native Hawaiian/Other Pacific Islander.

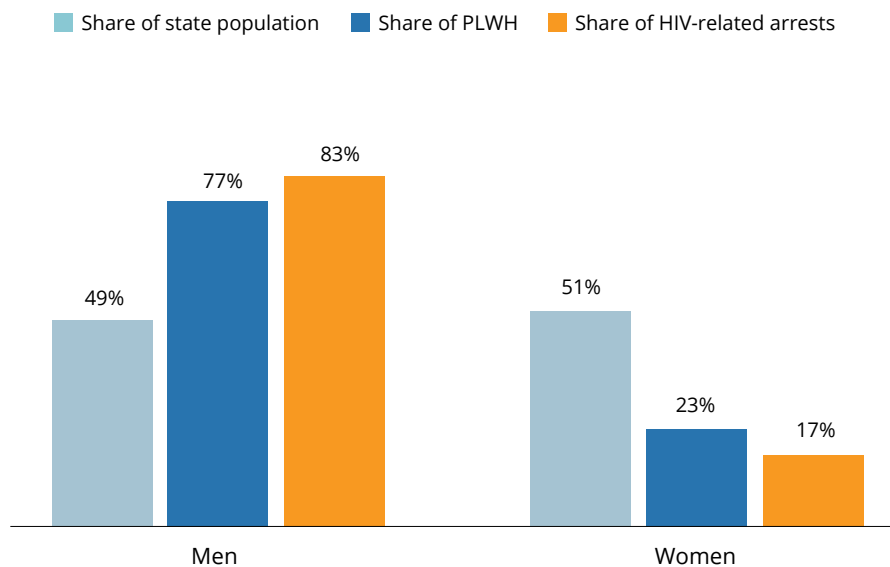
<sup>119</sup> In 2020, there were 1,135 Black people living with HIV residing in Pulaski County. AIDSVu, "2020 County Prevalence Data" ([https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu\\_County\\_Prev\\_2020.xlsx](https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu_County_Prev_2020.xlsx)).



living with HIV in 2020, but 46% of people arrested for HIV-related offenses.<sup>120</sup> Indeed, there was one Black person arrested for every 7.3 Black people living with HIV in Sebastian County.

We observed a strong gender component to HIV-related arrests in Arkansas.<sup>121</sup> Men were five times more likely to be arrested for HIV-related offenses than were women (83% of all arrests compared to 17%). This is the largest disproportionality in favor of men arrestees observed across Williams Institute reports on HIV enforcement in the United States. Men are also over-represented among people living with HIV in the state—77% of the total in 2020—but the disproportionality persists whether comparing to the state population as a whole (49%) or the population of people living with HIV.

**Figure 6. Gender distribution of people arrested for HIV-related offenses in Arkansas, state gender distribution in 2020, and gender distribution of people living with HIV in Arkansas in 2020**

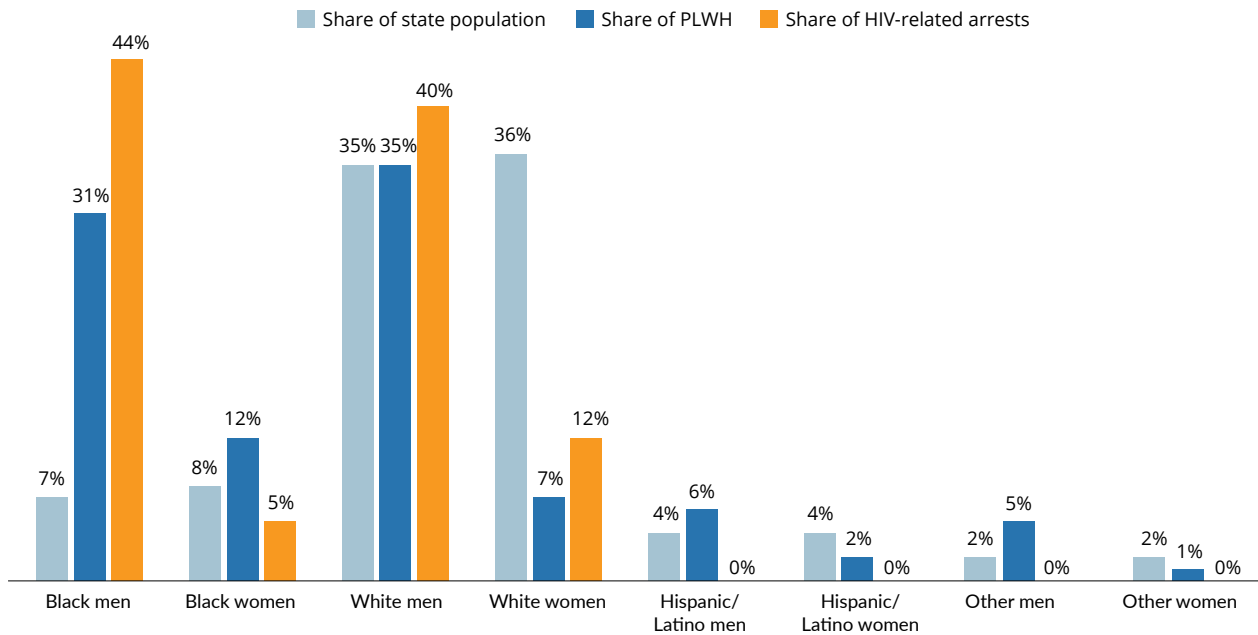


When looking at separate race/ethnicity and gender groups, Black men were found to be the most over-represented group among those arrested for HIV-related offenses. While Black men were 7% of the state’s population in 2020 and 31% of people living with HIV, they were 44% of all HIV-related arrests. In contrast, Black women were under-represented: 8% of the state’s population, 12% of people living with HIV, but only 5% of HIV-related arrests. White men were fairly proportional across categories: 35% of both the state’s population and population of people living with HIV, and 40% of HIV-related arrests. White women, however, were slightly over-represented: 36% of the state’s population, 7% of people living with HIV, but 12% of HIV-related arrests. All other race/ethnicity groups, including Hispanic/Latino, representing 13% of the state’s population and 14% of people living with HIV in the state, were entirely absent from the arrest data.

<sup>120</sup> In 2020, there were 44 Black people living with HIV residing in Sebastian County. AIDSVu, “2020 County Prevalence Data” ([https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu\\_County\\_Prev\\_2020.xlsx](https://aidsvu.org/wp-content/uploads/2022/11/AIDSVu_County_Prev_2020.xlsx)).

<sup>121</sup> We do not have information on gender identity and expression for people arrested in Arkansas. We received data on arrestees’ “sex,” but we do not know if this refers to a person’s biological sex assigned at birth or to gender, or how the “sex” field was filled in—whether or not the arrestee was able to self-select. It is possible that people identified as male or female here would themselves identify differently.

Figure 7. Demographic profile of people arrested for HIV-related offenses in Arkansas, state population profile in 2020, and population profile of people living with HIV in 2020

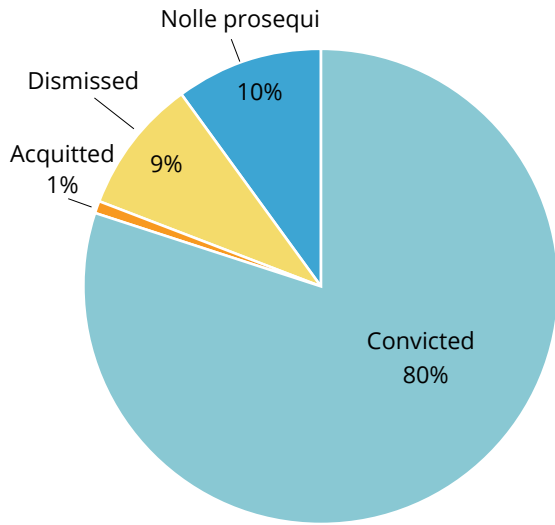


There was also a racial difference between the two HIV-related charges—exposure and non-disclosure to a medical provider. Black men were 44% of the exposure charges (53 arrests), but none of non-disclosure charges.

## Case Outcomes

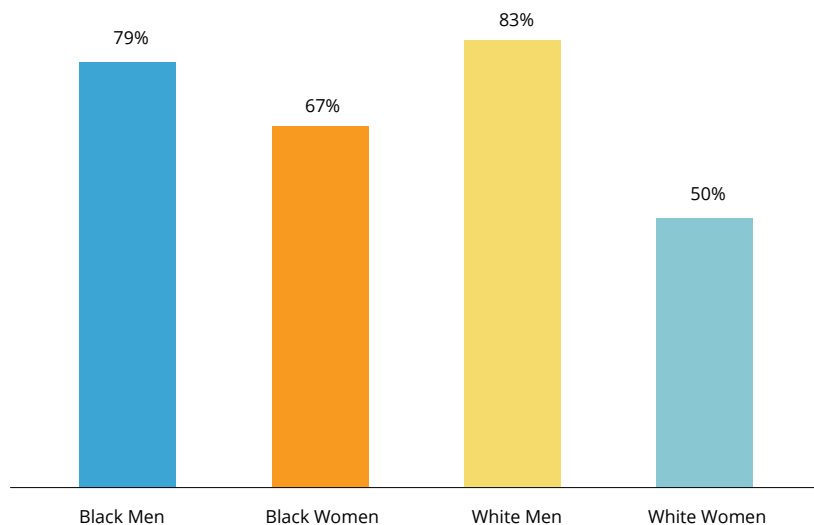
We have final case outcomes (dispositions) for 71 HIV-related arrests in Arkansas.<sup>122</sup> Of those 71 cases, six cases had two HIV-related charges, and one case had three HIV-related charges. The remainder had a single HIV-related charge. All of the cases with multiple charges were for exposure. (There were 79 total HIV-related charges with final dispositions available across all cases.) In total, 57 cases (79% of all cases with final dispositions), accounting for 63 separate charges (80% of all charges), resulted in a conviction. One case with a single charge resulted in acquittal. Six cases, with a combined seven charges, were dismissed, and a further eight charges across eight cases were *nolle prosequi* (voluntarily dismissed by the prosecution).

<sup>122</sup> Because of the structure of the data received, we are unable to link the arrests data to the dispositions data. The dispositions data also do not contain individual identifiers, so we counted each unique combination of *agency name x age at arrest x sex x race x final [disposition] date* as a separate person's final disposition, for a total of 76 unique person dispositions. Two of those dispositions contained no actual final case information, yielding 74 cases, however two did not contain any actual final counts or dispositions information, and one case did not include final dispositions information, and were therefore excluded, yielding 71 unique cases with dispositions information. We interpret this to mean that the cases proceeded to prosecution, but that the case had not concluded or the case outcome was not available. The three cases without counts or dispositions data were included in the demographic analysis where appropriate.

**Figure 8. Final disposition of HIV-related charges in Arkansas**

The person convicted with the youngest age at arrest was 18 years old; the person convicted with the oldest age at arrest was 57 years old. Of the two cases for non-disclosure to medical professional for which we have dispositions, one resulted in a conviction and the other resulted in dismissal. Sentencing information was not available.

The demographic profile of people with final dispositions looks roughly similar to the demographic profile of arrestees. Black people were 48% of all HIV-related arrests and 49% of all HIV-related dispositions. Likewise, men were 83% of HIV-related arrests and 85% of HIV-related dispositions. There were, however, demographic differences in conviction rates. White men had the highest conviction rate (83%), followed by Black men (79%). Women overall had lower conviction rates, but the number of cases was also much smaller: two of the three Black women received a conviction (67%), while four of the eight white women received a conviction (50%). An equal number of *nolle prosequi* cases (four each) went to Black and white defendants.

**Figure 9. Conviction rates by demographic group for HIV-related convictions in Arkansas**

## ANALYSIS OF DEPARTMENT OF CORRECTIONS DATA

The Williams Institute received two snapshots of people in Arkansas Department of Corrections custody. As with the SOR data analyzed in the next subsection, these two snapshots are moments in time, showing only people who happened to be in DOC custody on the day of the snapshot. They therefore cannot tell us about the cumulative number of people who have been incarcerated for HIV-related convictions. Nevertheless, they provide important details about who gets incarcerated because of their HIV status, other convictions they might have, and their sentencing information.

In total, we identified 21 people in DOC custody with an HIV-related conviction. All 21 people were convicted of the felony HIV exposure offense.<sup>123</sup> People with an HIV-related conviction were very rare—just a fraction of a percent of all people in DOC custody at any given time. Four people (19%) appeared to be in DOC custody *only* because of the HIV-related conviction—they had no other current convictions mandating prison, and no prior convictions. In other words, the HIV-related conviction is the sole reason they were incarcerated. The remaining people, in contrast, all had at least one concurrent non-HIV-related conviction.

In total, we counted 27 separate counts with an HIV-related conviction. The average sentence length per count was about 24 years. The minimum sentence length for an HIV-related conviction was six years; the maximum was 50 years. This compares with an average sentence length of 35 years for rape in 2022 and 26 years for aggravated assault. In fact, the average HIV-related sentence appears to be longer than most violent crimes, including sexual assault, robbery, and first-degree battery.

**Table 2. Ten most common convictions and average sentence length among people in Arkansas Department of Corrections custody in 2022**

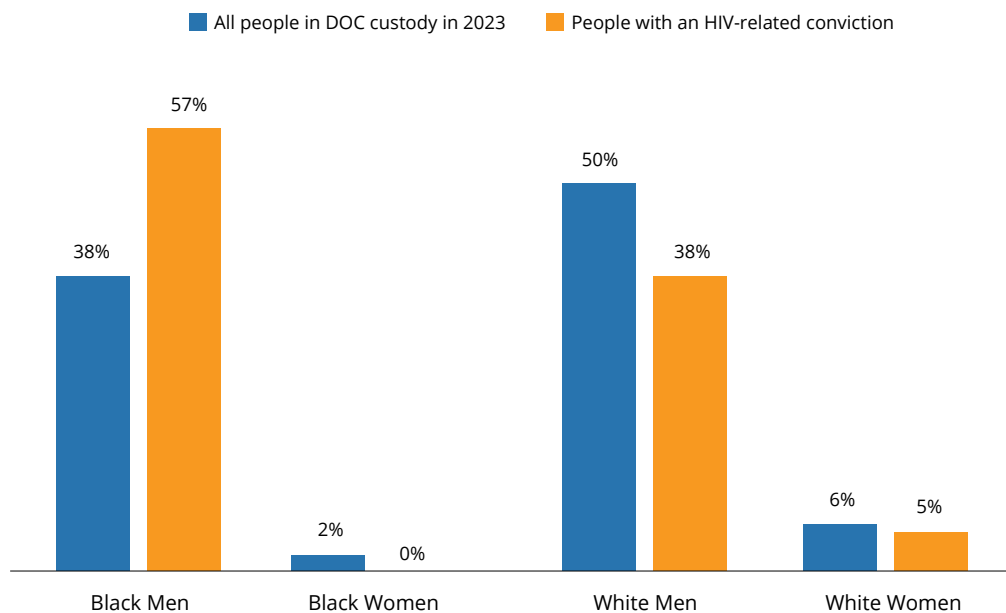
OFFENSE	TOTAL	% OF POPULATION	AVERAGE SENTENCE LENGTH
Rape	1,540	9.9%	35 years, 5 months, 3 days
Murder 1st- Degree	1,380	8.9%	42 years, 7 months, 2 days
Aggravated Robbery	1,230	7.9%	26 years, 5 months, 4 days
Sexual Assault	1,035	6.6%	19 years, 6 months, 11 days
Residential Burglary	934	6.0%	13 years, 6 months, 15 days
Robbery	716	4.6%	17 years, 4 months, 15 days
Battery 1st Degree	671	4.3%	19 years, 5 months, 19 days
Capital Murder	531	3.4%	Life Sentence or Death Sentence
Murder 2nd Degree	464	3.0%	33 years, 0 months, 25 days
Possession with propose of delivering, Methamphetamine or Cocaine (10g<200g)	420	2.7%	16 years, 3 months, 16 days

<sup>123</sup> Of the 21 people with an HIV-related conviction, 10 were in DOC custody in 2007 with a current HIV-related conviction, and 10 were in DOC custody because of an HIV-related conviction in 2023. One additional person in 2023 had a prior HIV-related conviction, but was currently incarcerated for a different offense. We included this person in our analysis. In total, only two people across the snapshots had a prior conviction for an HIV-related offense. In 2007, there were 14,444 people in DOC custody. In 2023, there were 18,824 people in DOC custody. In both periods, people with HIV-related convictions were less than one-tenth of one percent of all people in DOC custody.

The median age at sentencing for HIV-related convictions was 36 years old. The youngest person at sentencing for an HIV-related conviction was 18 years old. The oldest person was 52 years old.

We observed a similar racial disparity in the DOC data to that observed in the SOR data (see below). Black men were overrepresented when compared to the general population. While Black men were 38% of the overall prison population in the recent snapshot from 2023, they were 57% of all people with HIV-related sentences. In contrast, white men were exactly half of the prison population, but only 38% of people with an HIV-related sentence. Black women and white women were roughly proportional between the overall population of those incarcerated and those with HIV sentences, and were in the single digits.

**Figure 10. Demographic profile of people with HIV-related prison sentences in Arkansas Department of Corrections custody and of all people in Department of Corrections custody**



## ANALYSIS OF SEX OFFENDER REGISTRY

In Arkansas, a court may order a person convicted of HIV exposure to register as a sex offender.<sup>124</sup> Registration happens once a person is discharged from custody. We therefore looked at the state's SOR for additional information on people who have been convicted of an HIV-related offense. In total, we identified 14 people with an HIV-related conviction in Arkansas' SOR out of 9,968 total registrants in February 2023, representing just 0.1% of the overall SOR.

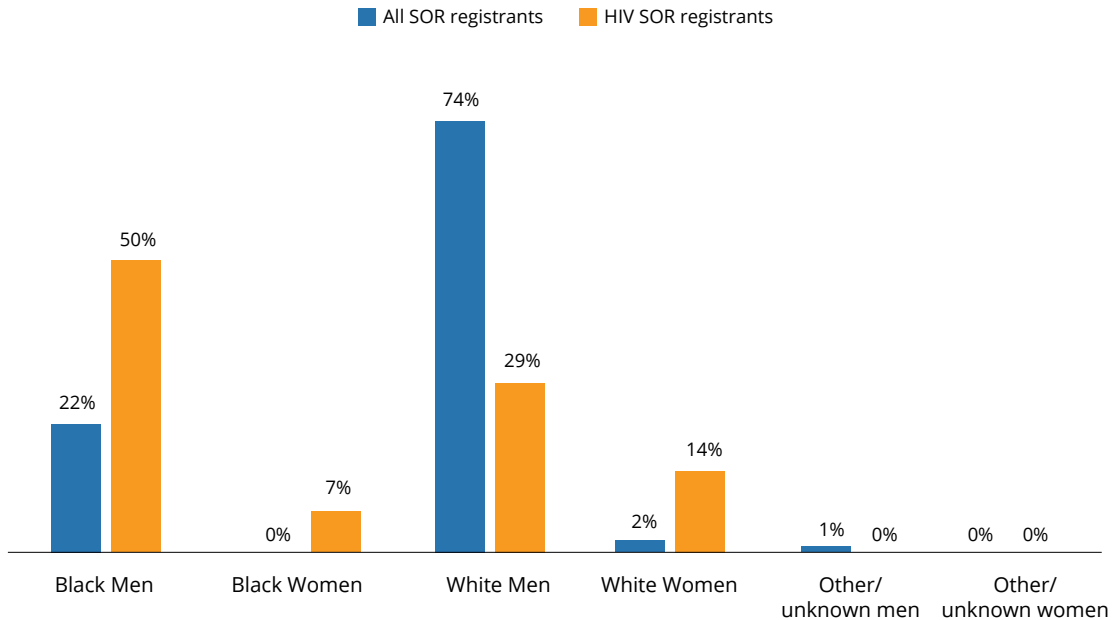
By demographic group, HIV registrants on the SOR look different to the demographic profile of the overall SOR. While Black men were about a quarter (22%) of the overall SOR, they were half (50%) of HIV registrants. Likewise, Black women were less than 1% of the overall SOR, but 7% of all HIV registrants, and white women were 2% of the overall SOR but 14% of all HIV registrants. In contrast, white men were nearly three-fourths (74%) of the SOR, but a little over one-quarter (29%) of HIV

<sup>124</sup> ARK. CODE § 12-12-903(13)(A)(i)(p) (2023); ARK. CODE § 12-12-905(A)(1)-(4) (2023); ARK. CODE § 12-12-903(12)(A) (2023); ARK. CODE § 12-12-906(A)(1)(A)(ii) (2023).



registrants. Put differently, an HIV conviction was much more likely to be the reason a Black woman was on the SOR compared to a white man: about 2.9% of all Black women on the SOR had an HIV-related conviction; for white men the figure was only 0.1%.

**Figure 11. Demographic profile of Arkansas' sex offender registry and HIV registrants on Arkansas' sex offender registry**



Median and mean age at registration was fairly similar between all registrants and HIV registrants, between 46 years old and 48 years old, however the spread of ages was much greater for the overall SOR. For example, the minimum age in the entire SOR was about 17 years old, while the youngest HIV registrant was 25 years old.

In all, about 10% of SOR registrants had more than one conviction mandating sex offender registration. The figure was slightly higher (14%) for HIV registrants. The non-HIV-related convictions among HIV registrants was in both cases rape; additionally one HIV registrant had two convictions for HIV exposure.

Arkansas gives each SOR registrant a risk level, from II to IV. Overall, just over half (53%) of all registrants received a designation of level III, while 43% received a designation of II. All 14 HIV registrants, however, received a designation of level III "High Risk."<sup>125</sup>

<sup>125</sup> Registered sex offenders in Arkansas are required to submit a risk assessment by the State Offender Screening and Risk Assessment Program and are assigned a risk level based on the results of their assessments. There are four levels offenders can be assigned to; Level 1: Low Risk; Level 2: Moderate Risk; Level 3: High Risk; and Level 4: Sexually Violent Predator. Any offender who fails to register is automatically assigned Risk Level 3. Offenders with Risk Levels 3 and 4 are determined to pose the highest risk to the public. See <https://www.dps.arkansas.gov/crime-info-support/arkansas-crime-information-center/community-information/sex-offender-information/#::~:~:text=Based%20on%20information%20obtained%20from,Level%204%3A%20Sexually%20Violent%20Predator.>

Nearly eight in ten (78%) of SOR registrants with a known address reported an Arkansas address, followed by 4% who reported a Texas address. In contrast, HIV registrants were much more likely to reside out of state. Only 57% of HIV registrants reported an in-state address, with the remainder in Tennessee, Texas, Louisiana, and Nevada. None of the HIV registrants appeared to be incarcerated or otherwise detained by law enforcement or immigration agencies.

Arkansas requires SOR registrants to report employer information. In the overall SOR, we identified an employer address for at least one third (34%) of all registrants, including those who are incarcerated or otherwise detained by law enforcement or immigration agencies.<sup>126</sup> In contrast, only 14% of HIV registrants indicated employment.

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<sup>126</sup> We counted everyone with an employer city or listed as self-employed as employed. People who were incarcerated or had been deported or absconded were included in the denominator for the calculation.

## AUTHORS

**Nathan Cisneros, M.S.**, is the HIV Criminalization Project Director at the Williams Institute.

**Moriah L. Macklin** is a Research Data Analyst at the Williams Institute at UCLA School of Law.

**Will Tentindo, J.D.**, is a Staff Attorney at the Williams Institute.

**Brad Sears, J.D.**, is the Roberta A. Conway Distinguished Scholar of Law and Policy and Founding Executive Director at the Williams Institute.

### ABOUT THE WILLIAMS INSTITUTE

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

### FOR MORE INFORMATION

The Williams Institute, UCLA School of Law  
(310) 267-4382

[williamsinstitute@law.ucla.edu](mailto:williamsinstitute@law.ucla.edu)  
[williamsinstitute.law.ucla.edu](http://williamsinstitute.law.ucla.edu)

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