

RESEARCH THAT MATTERS

ENFORCEMENT OF HIV CRIMINAL LAWS in Virginia

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EXECUTIVE SUMMARY

The Williams Institute analyzed data from the state of Virginia about individuals who came into contact with the state's criminal legal system through allegations of committing crimes related to HIV, Hepatitis B, and syphilis (HIV-related crimes).¹ The analysis reveals that

- At least 97 people in Virginia have been arrested for allegations of at least 147 separate HIV-related criminal offenses since the year 2001.
 - Arrests for consensual sexual contact without disclosing HIV status accounts for about four in ten (41%) of all HIV-related arrests.
 - About six in ten arrests (59%) alleged “intent to transmit” HIV or another disease.
- Arrests for HIV crimes fall disproportionately on Black Virginians: Black people account for 20% of Virginia's population, but 58% of the state's people living with HIV (PLWH), and 68% of all those arrested for HIV-related offenses.
- Men are 75% of the state's PLWH, but 87% of people arrested for HIV-related offenses.
 - Black men are 40% of PLWH in Virginia, but 59% of all people arrested for HIV-related offenses.
- Over 40% of those arrested for HIV offenses in Virginia come from Richmond (18%), Norfolk (10%), Newport News (5%), Virginia Beach (4%) and Amherst County (4%).
- In all, 18% of those arrested for HIV-related crimes only came into contact with the criminal legal system because of allegations of HIV-related offenses—they had no other criminal history.
- Until 2021, Virginia's HIV-related criminal statute did not require contact that can transmit HIV, nor did it require actual transmission.
- Charges were filed in over 70% of HIV-related arrests in Virginia.
 - Overall, over half (54%) of all charges filed resulted in a guilty outcome.
- Guilty outcomes resulted in a sentence of 2.1 years on average.
 - In total, people were sentenced to 121 years for HIV-related convictions.
 - Incarcerating people for HIV-related offenses has cost Virginia at least \$3.2 million.

¹ Virginia's HIV criminalization law provides the same criminal sanctions for HIV, syphilis, and Hepatitis B. We are not able to identify arrests or prosecutions based on each specific disease status. However, we are unable to locate any press reports of a person prosecuted for Hepatitis B. We were able to locate only one press report of a prosecution for syphilis. Moreover, our research from other states that criminalize HIV along with other diseases has shown that the vast majority of arrests involve HIV. For example, in California there were 1,174 incidents related to the state's HIV crimes, but only 74 where either the crime was related to another disease or was not discernible. In other words, at least 94% of disease related criminal incidents involved HIV. See Amira Hasenbush, Ayako Miyashita, and Bianca Wilson, The Williams Institute, University of California Los Angeles School of Law, *HIV Criminalization in California: Penal Implications for People Living With HIV/AIDS* (2015) (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-CA-Dec-2015.pdf>). Accordingly, we use the phrase “HIV-related” throughout as a shorthand for HIV, syphilis and Hepatitis B.

BACKGROUND

VIRGINIA'S HIV CRIMINAL LAWS

HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct, or that increase the penalties for illegal conduct based on a person's HIV-positive status.² The Virginia General Assembly initially criminalized donation or sale of blood and tissue infected with HIV in 1989.³ In 2000, the legislature added an "infected sexual battery" statute that made it a felony for a person living with HIV, Hepatitis B, or syphilis who knows their status to engage in sexual activity of any kind "with the intent to transmit the infection to another person."⁴

An annual survey of Virginia criminal law from the year 2000 notes that the state's statute was adopted "in the wake of the AIDS crisis and highly publicized stories involving intentional infections."⁵ Since the law's inception, there has been a requirement that the accused *intended* to infect their partner with HIV to sustain a felony conviction.⁶ However, prosecutors have charged individuals with the intent to transmit offense for failing to disclose their positive status.⁷ Moreover, the statute includes behaviors such as oral sex that cannot be a transmission route, and it does not take into consideration whether or not the person living with HIV is in treatment and virally suppressed, and therefore cannot transmit HIV.⁸

The Virginia General Assembly added a misdemeanor charge for engaging in sexual activity without disclosing one's HIV, Hepatitis B, or syphilis status in 2004.⁹ Under this statute, a person must have knowledge of their HIV-positive status at the time of the activity, but it does not require the intent to transmit.¹⁰ Similar to the felony offense, the misdemeanor offense includes behaviors that cannot transmit HIV, and it ignores whether the person living with HIV is virally suppressed and therefore cannot transmit HIV.

In 2017, the Virginia legislature amended its HIV blood and organ donation criminal statute to carve out organ donation and transplant from a person living with HIV where the recipient has notice and consent, as long as other federal requirements are met.¹¹ In 2021, the legislature amended its infected sexual battery statute, removing the misdemeanor nondisclosure offense, and amending the felony

² Dini Harsono, Carol Galletly, Elaine O'Keffe, & Zita Lazzarini. "Criminalization of HIV Exposure: A Review of Empirical Studies in the United States." *AIDS and Behavior* 21, no. 1 (2017): 27-50.

³ 1989 Bill Text VA H.B. 1974.

⁴ VA Code Ann. § 18.2-67.4:1 (2000).

⁵ O'Neill, ANNUAL SURVEY OF VIRGINIA LAW ARTICLE: CRIMINAL LAW AND PROCEDURE, 34 U. Rich. L. Rev. 749, 790 (2000).

⁶ 2000 Bill Text VA H.B. 141.

⁷ Jen McCafferty, "Va. Beach woman guilty of not disclosing HIV," *news9.com* (March 13, 2013) (<https://www.news9.com/story/5e34e17ce0c96e774b35a828/trial-set-for-chickasha-man-accused-of-infecting-women-with-hiv>).

⁸ National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Division of HIV/AIDS Prevention, Centers for Disease Control and Prevention. "Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV" (2020) (<https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf>).

⁹ 2004 Bill Text VA H.B. 871.

¹⁰ VA Code Ann. § 18.2-67.4:1(B).

¹¹ 2016 Bill Text VA H.B. 1798.

offense to require actual transmission. It also expanded the scope of the offense to include other sexually transmitted infections. The new statute reads

Any person who is diagnosed with a sexually transmitted infection and engages in sexual behavior that poses a substantial risk of transmission to another person with the intent to transmit the infection to that person and transmits such infection to that person is guilty of a Class 6 felony.¹²

DATA SOURCE

In July 2021, the Williams Institute obtained de-identified criminal history data of individuals who came into contact with Virginia's criminal legal system through the state's HIV-related criminal statutes. The data were supplied by the Criminal Justice Information Services Division of the Virginia Department of State Police, and include all arrests reported under Virginia Code §18.2-67.4:1, "Infected sexual battery," which covers both the felony intent to transmit offense, and the misdemeanor nondisclosure offense.¹³ There were no arrests under Virginia's blood and tissue donation statute. In the analysis below we divide HIV-related offenses into these two groups: (felony) intent to transmit, and (misdemeanor) nondisclosure.

¹² VA Code Ann. § 18.2-67.4:1 (2021).

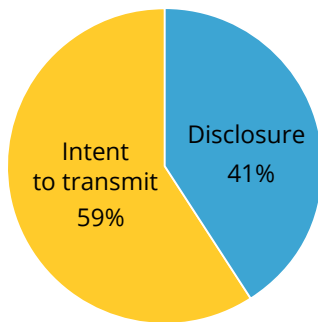
¹³ The Virginia data provide several descriptors for each offense category. The following were coded as intent to transmit: "SEXUAL BATTERY: W/ INTENT TO TRANSMIT INFECTION", "SEXUAL BATTERY, W/ INTENT TO TRANSMIT INFECTION", "ATTEMPT TO INFECT WITH HIV HEPATITIS B", and "INFECTED SEXUAL BATTERY." We included "INFECTED SEXUAL BATTERY" because over 90% of these were classed as a felony, which applies only to the intent to transmit offense. Additionally, one intent to transmit offense was mislabeled as attempted sexual assault, although the code citation was to infected sexual battery. The following were coded as nondisclosure: "SEXUAL BATTERY: SEX W/O DISCLOSING INFECTION", "SEX BATT: W/O DISCLOSE INFCTN", "SEXUAL INTERCOURSE, ETC., WITHOUT DISCLOSING", "SEXUAL BATTERY W/O DISCLOSING INFECTION", "SEXUAL BATTERY, SEX W/O DISCLOSING INFECTION", and "SEX WITH TRANSMITTABLE DISEASE(18.2-67;4:1(B))." In total there were only two attempted sexual battery charges, both at the arrest phase. Both were dropped after the arrest phase.

RESULTS

NUMBER AND FREQUENCY OF CHARGES

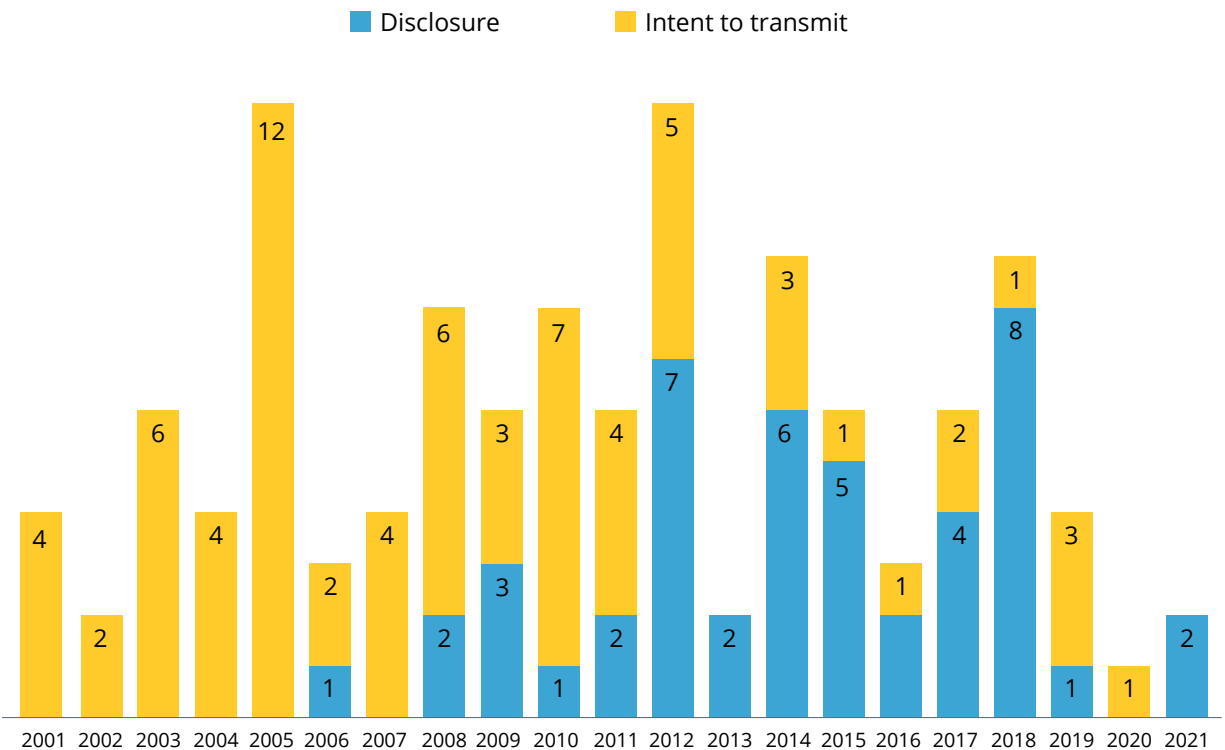
In Virginia, 97 people have been arrested for 147 separate alleged HIV-related offenses since the year 2001. Nearly six in ten offenses cited at the time of arrest were for the felony offense of intent to transmit, which required the person to have engaged in sex acts with the intention to transmit HIV, Hepatitis B, or syphilis to their partner.

Figure 1. Percentage of HIV-related offenses cited at arrest in Virginia



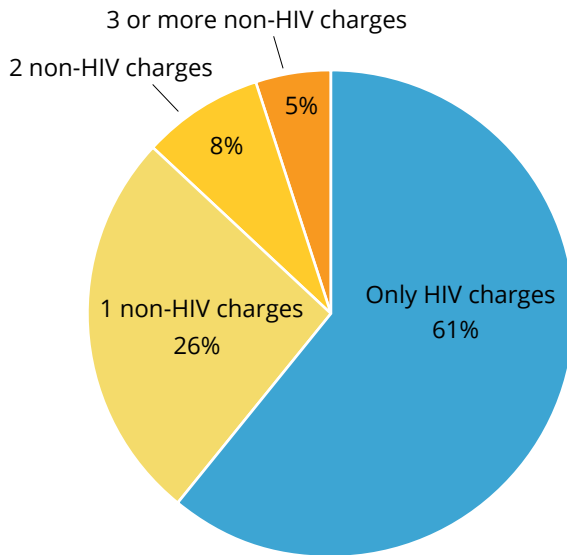
There were about seven arrests per year on average in the 2010s—about the same as the average for the preceding ten years. While enforcement has not changed much from decade to decade, intent to transmit offenses predominate until 2012, after which the misdemeanor nondisclosure offense, which was added in 2004, becomes more common.

Figure 2. Number of HIV-related arrests with each offense type by year in Virginia



The 147 offenses were spread across 117 separate arrest cycles. (A person can be arrested for multiple alleged offenses in a single arrest cycle.) In the majority of these arrest cycles (61%), HIV-related offenses were the only offenses cited. When there were concurrent offenses (39%), the most frequent ones were: “Causing or encouraging acts rendering children delinquent, abused” (8), and “Assault and battery” (7).

Figure 3. Arrest cycles by number of non-HIV-related charges



About four-fifths (82%) of people arrested for HIV-related offenses had only one arrest cycle. No one had more than three HIV-related arrest cycles. In other words, the overwhelming majority of people arrested for HIV-related offenses were only arrested once. This includes about 18% of people arrested for HIV-related offenses who came into contact with the criminal legal system only because of the HIV-related arrests; they have no other arrest cycles.

A total of 105 HIV-related offenses continued past the arrest phase. Whereas the HIV-related nondisclosure misdemeanor offense accounted for about four in ten offenses at arrest, it accounted for nearly seven in ten (69%) offenses that progressed to the charging phase. In fact, the total number of nondisclosure charges increases, from 60 to 72, while intent to transmit charges drops from 87 to 32 between the arrest and charging phases: 20 HIV-related intent to transmit felony offenses were changed to nondisclosure charges, 23 charges were dropped, and 12 were changed to non-HIV-related charges. In contrast, only five nondisclosure offenses were dropped after arrest, and only four were changed to non-HIV-related charges. Only one nondisclosure charge was changed to an HIV-related intent to transmit charge.

Figure 4. Percentage of HIV-related charges in Virginia by offense

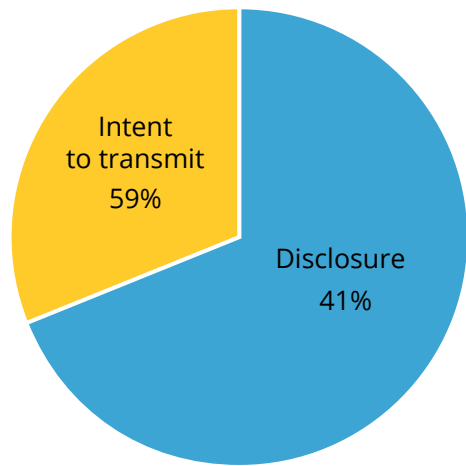


Figure 5. Flow of HIV-related charges from arrest phase to charging phase

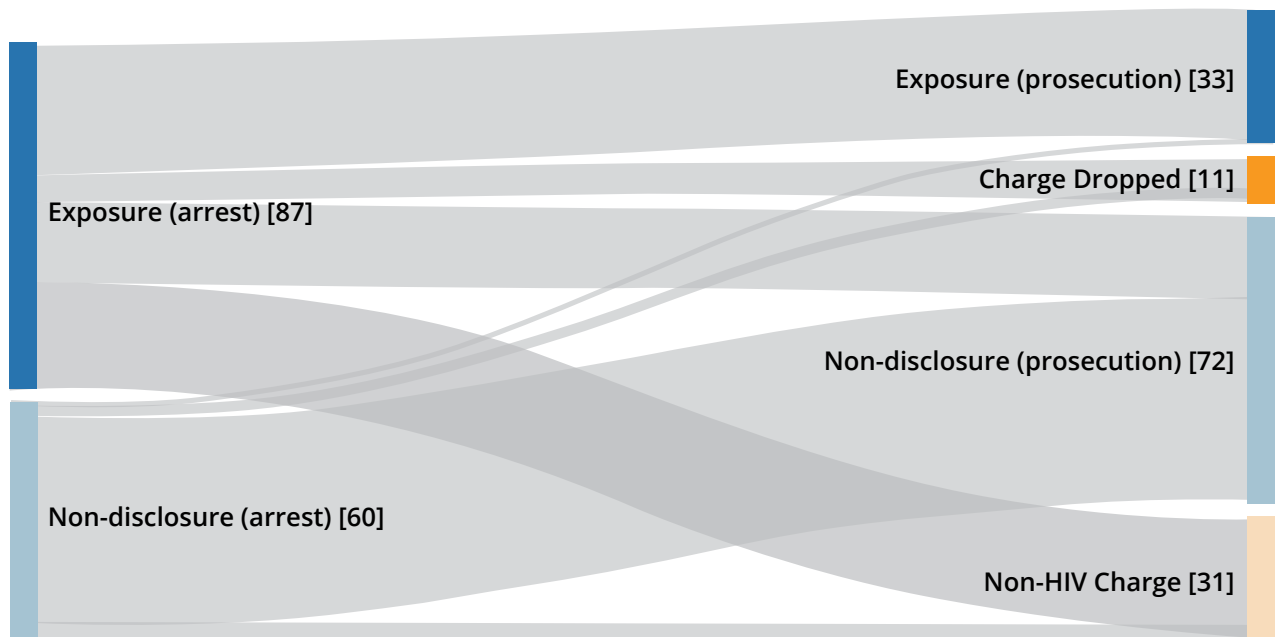
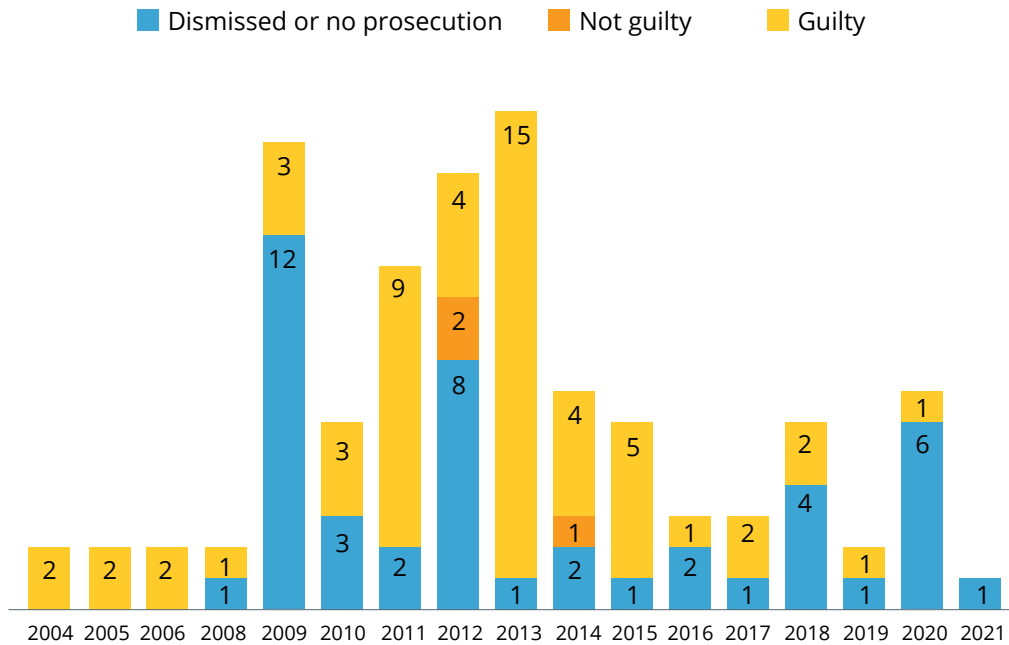
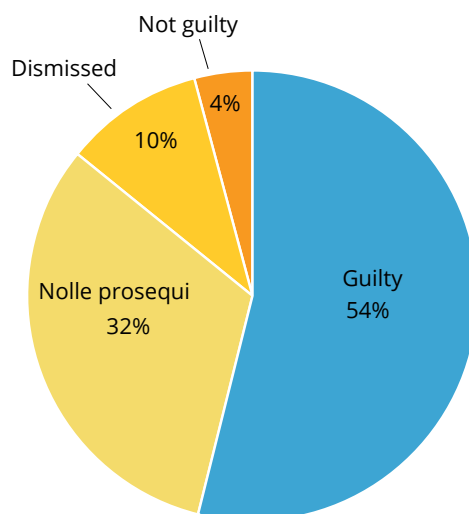


Figure 6. Number of final dispositions of HIV charges by outcome and year



Once arrested, a decision is made on whether or not to bring formal charges of a crime. Of the 154 HIV-related offenses cited at the time of arrest, nearly three-fourths (72%) became formal charges of an HIV-related offense. The majority (54%) of HIV-related arrests that advanced to the charging phase eventually resulted in a guilty outcome. In nondisclosure cases, 54% of all charges ended in a guilty outcome, along with 55% of intent to transmit cases. Only three charges that advanced to the charging phase resulted in a not guilty outcome, all for the misdemeanor nondisclosure charge.¹⁴ The year 2013 was the peak year for guilty outcomes; in that year one person was convicted for 13 counts of nondisclosure.¹⁵

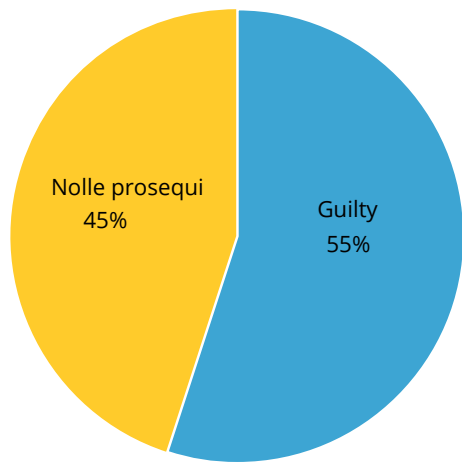
Figure 7. Final disposition of nondisclosure charges



¹⁴ Of 105 HIV-related charges filed, 45 were dismissed or prosecutors declined to proceed (*nolle prosequi*). Of the remaining 60 charges, 57 resulted in a guilty outcome; three resulted in a not guilty outcome.

¹⁵ Two of the three nondisclosure not guilty outcomes come from this same arrest cycle.

Figure 8. Final disposition of intent to transmit charges



Sentences for HIV-related convictions ranged from six months to five years for each charge. The median sentence per charge was one year; the mean length was 2.1 years. In total, people were sentenced to 121 years for HIV-related convictions.

COST OF INCARCERATION

The 121-year combined sentence length for HIV-related convictions can be divided into sentences of one year or less served in a county jail, and sentences of more than one year served in a state prison. The state of Virginia provides annual estimates of the cost to house a person incarcerated in both jails and prisons. (See Appendix below.) The average annual cost per person incarcerated in Virginia prisons was \$29,704 in 2020 dollars. The total combined prison sentence for HIV-related offenses was 97 years, of which, at least 85% of a prison term must be served.¹⁶ Virginia taxpayers therefore paid at least \$2.5 million dollars in prison incarceration costs related to HIV crimes. For jails, the average annual cost was \$30,450 in 2020 dollars, and the total sentence length was 24 years, of which people incarcerated generally serve 50% of their sentence.¹⁷ This implies at least \$366,000 in jail incarceration costs to Virginia taxpayers related to HIV crimes. We estimate at least \$3.2 million in direct incarceration costs for HIV-related convictions in Virginia.

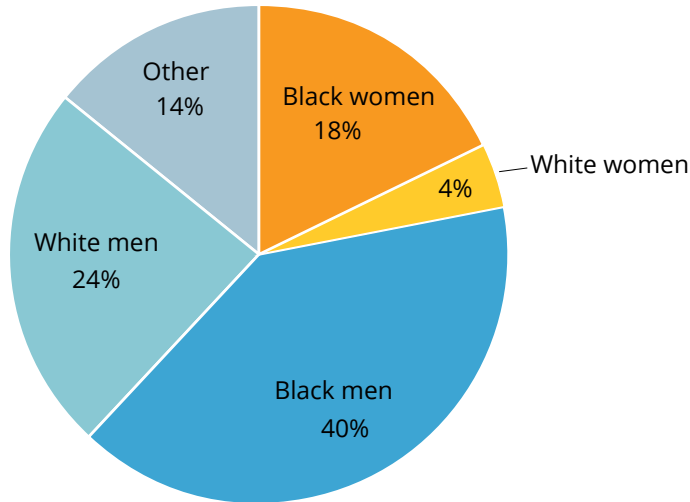
¹⁶ See Virginia State Crime Commission. "Earned Sentencing Credits" (2020) (<http://vscc.virginia.gov/2020/VSCC%20Presentation%20-%20Earned%20Sentence%20Credits.pdf>). In 2020 the Virginia legislature revised the minimum sentencing guidelines, which enter into effect in July 2020. (See 2020 Bill Text VA H.B. 5148.)

¹⁷ See Virginia Department of Corrections Operating Procedure 830.3 (March 1, 2019) (<https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf>) and

ARRESTEE DEMOGRAPHICS

In Virginia, both men and Black people are overrepresented in HIV-related arrests: men comprised 75% of PLWH in 2019, but 87% of those arrested for HIV-related offenses; Black people were 58% of PLWH, but 68% of those arrested. Black men alone were 40% of the state's PLWH in 2019, but 59% of people arrested for HIV-related offenses.

Figure 9. Demographics of PLWH in Virginia in 2019



The disproportionality persists through charging and conviction. Black men account for about 40% of all people arrested for HIV-related offenses and 59% of all people convicted. In contrast, white men account for 28% of all people arrested for HIV-related offenses, and 35% of all people convicted.

Figure 10. Demographics of people arrested for HIV-related offenses in Virginia

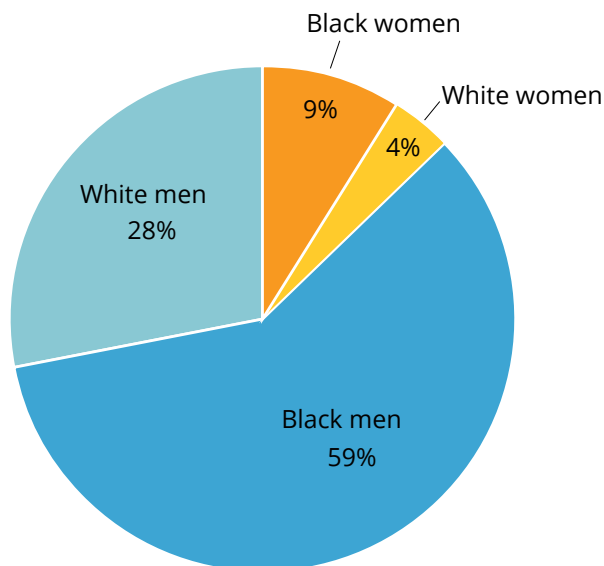
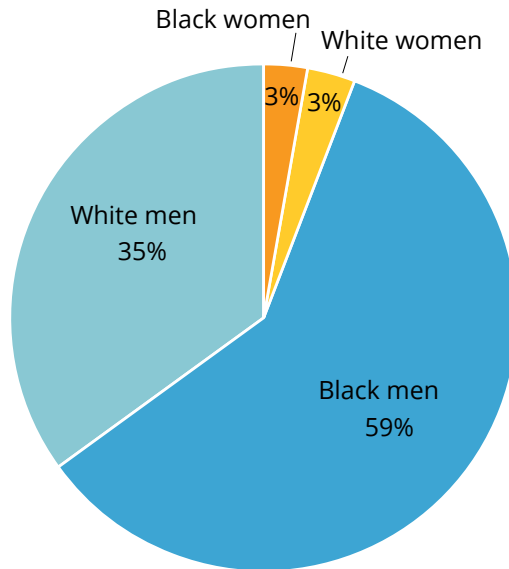


Figure 11. Demographics of people convicted of HIV-related offenses in Virginia



There are also racial differences across offense type. Black men account for nearly three-quarters of all arrests and prosecutions for nondisclosure. In contrast, Black men account for about half of all intent to transmit arrests, which falls to just under four in ten at the prosecution phase. In contrast, white men account for nearly six in ten of all intent to transmit charges at the prosecution phase.

Figure 12. Share of nondisclosure offenses by race and gender at arrest and prosecution in Virginia

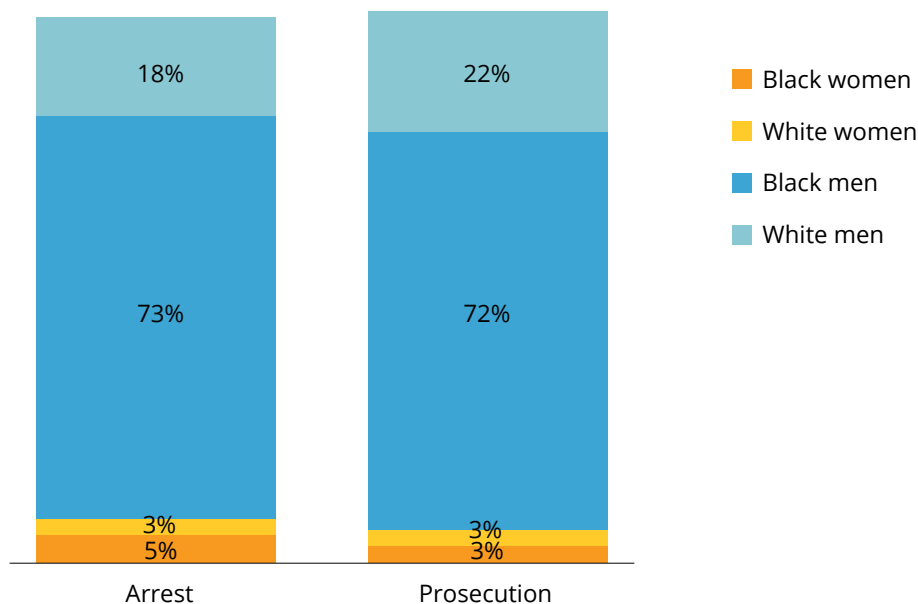
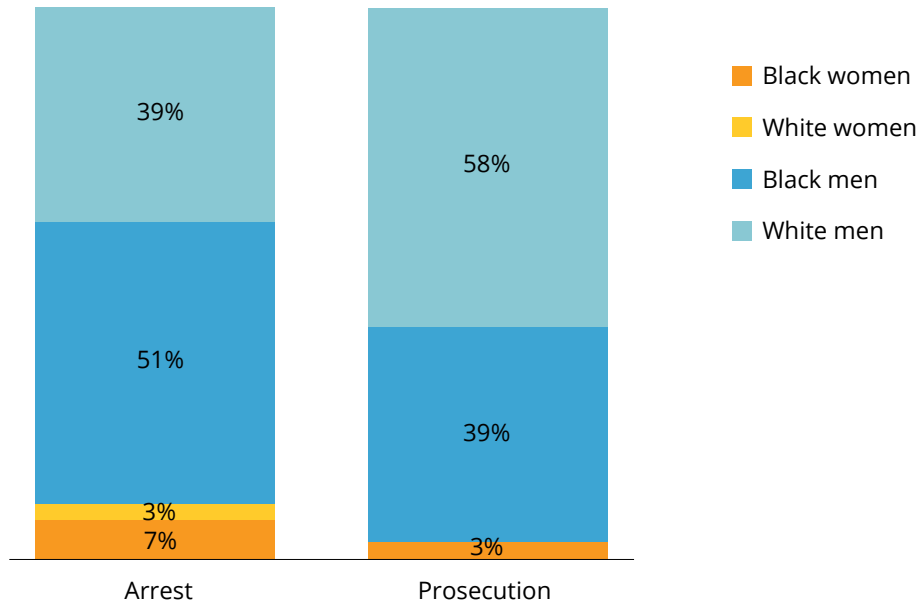


Figure 13. Share of intent to transmit offenses by race and gender at arrest and prosecution in Virginia

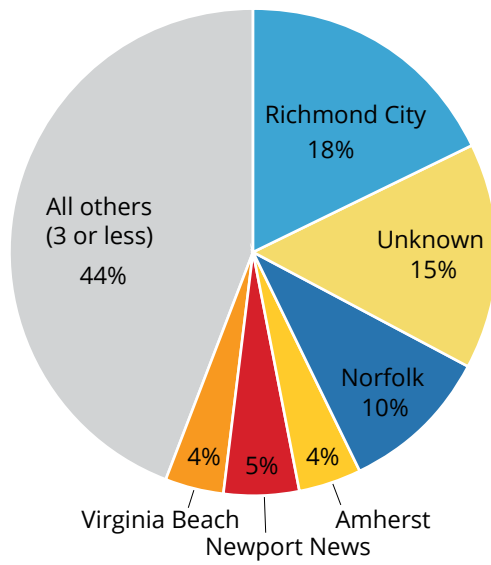


Although 14% of PLWH in Virginia identified as a race or ethnicity other than Black or white, those arrested for HIV-related offenses were only identified as either Black or white in the data provided by the state of Virginia. Moreover, the data did not include information about ethnicity, which the U.S. Census uses for those who identify as Hispanic or Latino.¹⁸

About 95% of all people arrested for HIV-related offenses were U.S. citizens; 89% of people arrested were born in the United States. Richmond was most often identified as the city of residence for people arrested, followed by Norfolk and Newport News.

¹⁸Although 9% of PLWH in Virginia are Latinx and 2% are Asian/Pacific Islander (API), see https://www.vdh.virginia.gov/content/uploads/sites/10/2021/10/Annual_Report_2020.pdf, none of those arrested for HIV-related crimes in the state were identified as Latinx or API. This may be the result of law enforcement misidentification of Latinx and API individuals. In other states where we have analyzed HIV crime enforcement data, Latinx and API people are misidentified in those data systems as white, reducing the actual disparity in the impact of enforcement on people of color compared to white people.

Figure 14. Arrestee residence location Location



AUTHORS

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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.

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APPENDIX

COST OF INCARCERATION

The Virginia Department of Corrections publishes an annual department report, available online back to 2001 when Virginia's first felony HIV conviction was recorded.¹⁹ Each report provides a per-inmate average cost of incarceration for the whole prison system for the year. The average annual cost-per-person incarcerated was then adjusted for inflation using the U.S. Bureau of Economic Analysis Gross Domestic Product Implicit Price Deflator.²⁰ The average of the annual cost to house a person in Virginia's prisons in 2020 dollars was \$29,704 in 2020 dollars.

The Virginia Compensation Board publishes an annual jail expenditures and revenues report, available online back to 2004 when Virginia's first misdemeanor HIV conviction was recorded.²¹ Each report provides a per-inmate average cost of incarceration for the whole jail system per day, which was scaled up to a 365-day annual cost. The average annual cost-per-person incarcerated was then adjusted for inflation using the U.S. Bureau of Economic Analysis Gross Domestic Product Implicit Price Deflator. The average of the annual cost to house a person in Virginia's jails in 2020 dollars was \$30,450 in 2020 dollars.

We multiply the average cost of incarceration for prisons by the sentence length for sentences greater than one year that resulted from a single arrest cycle to find the upper bound on the cost of incarceration in prisons for HIV-related convictions. We do the same for jails using sentences of one year or less. This results in \$2.9 million and \$731,000 respectively, for a combined total of up to \$3.6 million dollars in incarceration costs alone. These figures are scaled to the minimum incarceration periods for prisons (85% of total sentence) and jails (50% of total sentence) to arrive at \$2.5 million and \$366,000 respectively. We therefore estimate at least \$3.2 million in direct incarceration costs across prisons and jails.

¹⁹ Annual reports can be found at: <https://vadoc.virginia.gov/general-public/agency-reports/> .

²⁰ Available through the St. Louis Federal Reserve's online Federal Reserve Economic Data (FRED) interface: <https://fred.stlouisfed.org/series/GDPDEF> .

²¹ Jail Cost Reports can be found at: <https://www.scb.virginia.gov/reports.cfm> .

Table 1. Estimated average annual cost of incarceration per person in Virginia

FISCAL YEAR	AVERAGE ANNUAL COST PER INMATE (NOMINAL)		GDP DEFLATOR	AVERAGE ANNUAL COST PER INMATE (ADJUSTED)	
	PRISON	JAIL		PRISON	JAIL
2001	\$20,979	--	70.23%	\$29,872	--
2002	\$19,775	--	71.34%	\$27,719	--
2003	\$20,142	--	72.66%	\$27,721	--
2004	\$20,401	\$20,006	74.62%	\$27,341	\$26,811
2005	\$21,248	\$21,418	76.94%	\$27,616	\$27,837
2006	\$23,123	\$22,152	79.27%	\$29,169	\$27,944
2007	\$22,830	\$22,283	81.40%	\$28,046	\$27,374
2008	\$24,332	\$24,079	82.99%	\$29,318	\$29,014
2009	\$24,665	\$25,718	83.62%	\$29,496	\$30,755
2010	\$24,024	\$25,754	84.59%	\$28,400	\$30,445
2011	\$24,380	\$26,455	86.36%	\$28,230	\$30,633
2012	\$25,498	\$26,641	88.02%	\$28,969	\$30,268
2013	\$27,112	\$27,375	89.56%	\$30,272	\$30,566
2014	\$27,462	\$28,200	91.22%	\$30,106	\$30,915
2015	\$27,928	\$28,937	92.09%	\$30,327	\$31,423
2016	\$28,997	\$31,087	93.05%	\$31,162	\$33,408
2017	\$29,967	\$31,328	94.80%	\$31,610	\$33,046
2018	\$31,240	\$31,828	97.08%	\$32,180	\$32,786
2019	\$32,146	\$33,569	98.81%	\$32,532	\$33,973
2020	\$33,994		100.00%	\$33,994	
Average				\$29,704	\$30,450