

HIV Criminalization and Sex Work in California

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CITATION

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Executive Summary

“HIV Criminalization” is a term used to describe the effect of statutes that either (1) criminalize otherwise legal conduct or (2) increase penalties for criminal conduct based on a person's HIV-positive status. In California, 95% of HIV-related criminal incidents fall under California's PENAL CODE §647F, a felony statute that applies to individuals living with HIV purported to be engaging in solicitation while HIV-positive (also referred to as simply “felony solicitation”). This collaborative study between the Williams Institute, the California Women's Law Center, and the California HIV/AIDS Policy Research Center sought to further explore the characteristics and experiences of women in California who had contact with the criminal system related to sex work. For the purposes of this study, the terms “women” and “men” refer to those categorized as such within the criminal justice statistics data systems. This study is focused on sex work as it is defined through the Attorney General's Criminal Justice Statistics Center.

The researchers analyzed California Department of Justice criminal history data on people who had felony solicitation while HIV-positive arrests from 2005 to 2013 and compared the demographics and frequencies with arrest data on prostitution over the same time period. The primary goal of this analysis was to answer questions about the relationship between rates of HIV criminalization arrests and rates of general solicitation arrests, including whether the rates appear related and which groups seem most impacted. It is important to note that criminal records do not record gender identity separately from sex assigned at birth, so we have no definite understandings about the experiences of transgender people in this context from these data. Key findings included:

- Arrests for both felony solicitation while HIV-positive and prostitution declined over the time period reviewed, by 68% for felony solicitation while HIV-positive arrests and by 27% for arrests for the more general category of prostitution. Interestingly, the number of people living in California and the number of people living with HIV in California both increased during the same time period (by 9% and 35%, respectively).
- Over the time period reviewed, women accounted for approximately two-thirds of prostitution arrests, but less than half of arrests for felony solicitation while HIV-positive. However, when compared to the underlying populations that could be arrested (i.e. women in California for prostitution and women living with HIV in California for felony solicitation while HIV-positive), the overrepresentation of women in felony solicitation while HIV-positive arrests was greater than the overrepresentation of women in the more general category of prostitution arrests. Women were arrested for prostitution at a rate that was about 1.4 times their proportion of the general population in California, and women were arrested for felony solicitation while HIV-positive at a rate that was about 3.1 times their proportion of the statewide population of people living with HIV.
- Even while the overall number of arrests related to sex work decreased across the state from 2005 to 2013, Black women over this time period made up an increasing proportion of those being arrested for prostitution. In 2005, Black women were arrested at a rate about 11 times their general rate in the California population. By 2013, that rate was closer to 14 times their rate in the population.

- While not as striking as the overrepresentation in the more general category of prostitution arrests, Black women were still the most overrepresented group for felony solicitation while HIV-positive arrests when compared to the underlying population of people living with HIV in California. White women and Black men were also consistently overrepresented when compared with their proportion of the population living with HIV.

These findings indicate a clear disproportionate representation of Black women among those being arrested for sex work, in the context of HIV and in general. Given others' work on the topic, this overrepresentation of Black women in sex work arrests in California is likely related to a host of factors, including policing practices and racial/ethnic stratification of sex workers according to venue (e.g. street-based sex work as opposed to indoor or online venues). However, more research is needed on the wellbeing and experiences of sex workers to further understand this phenomenon.

Glossary of Terms

Sex Work – a general term used to describe an exchange of sexual services for money, goods, or anything of value.

Sex Worker – a person who offers sexual services in exchange for money, goods, or anything of value.

Prostitution – throughout this report, “prostitution” is used as a technical term to refer to the forms of sex work that are criminalized under California law, as defined by the Attorney General’s Criminal Justice Statistics Center. These include CAL. PENAL CODE §266 (Inveiglement or enticement of unmarried female under 18 for purposes of prostitution, etc.; aiding and abetting; procuring female for illicit intercourse by false pretenses), CAL. PENAL CODE §315 (Keeping or residing in house of ill-fame), CAL. PENAL CODE §316 (Keeping disorderly houses, etc., which disturb immediate neighborhood), CAL. PENAL CODE §647(b) (Solicitation or prostitution), CAL. PENAL CODE §653.22(a) (Loitering in any public place with the intent to commit prostitution), CAL. PENAL CODE §653.23(a)(1) (Directing, supervising, recruiting, or otherwise aiding a prostitute), CAL. PENAL CODE §653.23(a)(2) (Collecting or receiving all or part of the proceeds earned from an act of prostitution committed by another person), and CAL. BUS. & PROF. CODE §25601 (Keeping a disorderly house or place in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience).

Solicitation – throughout this report, “solicitation” is used through its legal definition under CAL. PENAL CODE §647(b), as a misdemeanor which is committed by soliciting or agreeing to engage in, or engaging in any lewd act between persons for money or other consideration, when, with specific intent to so engage, a person manifests an acceptance of such an offer and takes some act in furtherance of that acceptance. The act signifying acceptance may not necessarily include sexual contact.

Felony Solicitation – this term may be used interchangeably with “felony solicitation while HIV-positive,” and refers to the offense defined under CAL. PENAL CODE §647f, which increases a misdemeanor solicitation offense to a felony if a person has a positive HIV test result in their criminal record when they are arrested for solicitation.

I. Introduction

“HIV Criminalization” is a term used to describe the effect of statutes that either (1) criminalize otherwise legal conduct or (2) increase penalties for criminal conduct based on a person's HIV-positive status. In California, 95% of HIV-related criminal incidents fall under California's PENAL CODE §647F, also known as felony solicitation while HIV-positive.¹ In California, solicitation and other sex work offenses² are generally classified as misdemeanors. However, if a person is convicted of a sex work offense, the law requires the person convicted to undergo mandatory HIV testing, and the results are to be provided to the person and recorded in their criminal record.³ If a person who has a positive HIV result recorded in their criminal record gets arrested for sex work, what would normally be a misdemeanor offense can be increased to a felony charge under CAL. PENAL CODE §647F.

Previous analyses of the California Department of Justice's Criminal Offender Record Information (CORI) data revealed that in California, women and people of color are disproportionately arrested under HIV criminal laws in comparison to their percentages in the statewide population of people living with HIV (PLWH).⁴ Additionally, once in the system, women⁵ and people of color were more likely to be charged with felony solicitation while HIV-positive and less likely to be released with no charges when compared to white men who had arrests related to felony solicitation while HIV-positive.⁶ Overall data showed that arrests for felony solicitation while HIV-positive decreased fairly consistently between 2005 and 2013, the latest years for which the Williams Institute had access to full years of data. However, the question remained whether patterns seen in the enforcement of felony solicitation while HIV-positive were reflective of underlying patterns related to the criminalization of sex work more generally or whether felony solicitation while HIV-positive incidents represented a unique segment of the population of sex workers in California. Here, the Williams Institute, the California Women's Law Center and the California HIV/AIDS Policy Research Center collaborated to gather data on the criminalization of sex work and population demographics more generally in California in order to explore

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

² Sex work offenses in California include CAL. PENAL CODE §§ 266 (enticing a girl under the age of 18 to prostitution); 266i (pandering); 315 (keeping or residing in a house of ill fame); 316 (running a brothel); 318 (bringing a person to visit a place of prostitution); 647(b) (solicitation or prostitution); 647F (solicitation while HIV-positive); 653.22 (loitering with intent to commit prostitution); 653.23 (supervising or otherwise aiding a prostitute); 261.9 (hiring an underage sex worker); 266h (pimping); and), and CAL. BUS. & PROF. CODE §25601 (Keeping a disorderly house or place in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience).

³ CAL. PENAL CODE §1202.6 (2017).

⁴ HASENBUSH, MIYASHITA & WILSON, *supra* note 1.

⁵ In that study, like here, gender identity was not recorded separately in the data from sex assigned at birth, so there is no way to know definitively how transgender people were recorded. It is likely that most transgender women were categorized based on sex assigned at birth, anatomy, and/or gender markers on ID documents, which likely resulted in most transgender women being categorized as men.

⁶ HASENBUSH, MIYASHITA & WILSON, *supra* note 1.

this question more fully and to continue the analysis of the interaction between race/ethnicity and sex and enforcement of sex work laws in California.

II. Data

The analyses that follow are based on four data sources:

- ❖ American Community Survey One-Year Estimates of the California population, disaggregated by race and sex from 2005 to 2013⁷
- ❖ California Department of Justice Criminal Justice Statistics Center reports on statewide prostitution⁸ arrests by race and sex from 2005 to 2013⁹
- ❖ California Department of Public Health statewide estimates of the number of people living with HIV, disaggregated by race and sex from 2005 to 2013¹⁰
- ❖ California Department of Justice Criminal Offender Record Information (CORI) de-identified data on all individuals who had contact with criminal system related to felony solicitation while HIV-positive (CAL. PENAL CODE §647F), including the race and sex of such individuals, from 2005 to 2013¹¹

III. Analyses and Results

The first issue that prompted our analysis of sex work data was the fairly consistent decrease from 2005 to 2013 in the number of felony solicitation while HIV-positive criminal arrests (see Figure

⁷ Accessible through the American Factfinder database, *available at* <https://factfinder.census.gov/>. Select "Advanced Search" and then "Show Me All." Under "Geographies," select "State" for geographic type, and then select "California" and "Add to Your Selections," and then close the Geographies pop-up. Under "Race and Ethnic Groups," click on the "Detailed Groups" tab and select codes "001 – Total Population," "400 – Hispanic or Latino (of Any Race)(200-299)," "451 – White Alone, Not Hispanic or Latino," and "453 – Black or African American Alone, Not Hispanic or Latino," by searching for the codes in the top search box, clicking "Go," and then selecting the checkbox next to them and selecting "Add." Close the Race and Ethnicities popup. Under "Refine your search results: topic or table name," type "S0201," and select "Go." The remaining tables contain the demographics used in this report for the years 2009 to 2014. To find the tables for 2005 to 2008, clear the "Total Population" filter from the search.

⁸ Prostitution was defined by the Criminal Justice Statistics Center as the following offenses: CAL. PENAL CODE §266 (Inveiglement or enticement of unmarried female under 18 for purposes of prostitution, etc.; aiding and abetting; procuring female for illicit intercourse by false pretenses), CAL. PENAL CODE §315 (Keeping or residing in house of ill-fame), CAL. PENAL CODE §316 (Keeping disorderly houses, etc., which disturb immediate neighborhood), CAL. PENAL CODE §647(b) (Solicitation or prostitution), CAL. PENAL CODE §653.22(a) (Loitering in any public place with the intent to commit prostitution), CAL. PENAL CODE §653.23(a)(1) (Directing, supervising, recruiting, or otherwise aiding a prostitute), CAL. PENAL CODE §653.23(a)(2) (Collecting or receiving all or part of the proceeds earned from an act of prostitution committed by another person), and CAL. BUS. & PROF. CODE §25601 (Keeping a disorderly house or place in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience). Unfortunately, given the limitations of the publically available data, there was no way to disaggregate these offenses for the purposes of our analyses.

⁹ Accessible through the online CJSC Arrest Statistics, *available at* <https://oag.ca.gov/crime/cjsc/stats/arrests>.

¹⁰ With thanks to the Office of AIDS for provision of these specific data, on file with the author.

¹¹ With thanks to the Department of Justice for provision of these specific data, on file with the author.

2).¹² Researchers and policymakers were curious to know whether that decrease was reflective of a decrease in arrests for prostitution more generally or whether felony solicitation while HIV-positive was an anomaly. Given this overarching question regarding changes over time in arrests, we extended the analysis to also examine whether changes in and rates of arrests for this area of sex work were related to various demographic variables and broader changes in the state population.

Figure 1. Prostitution Arrests

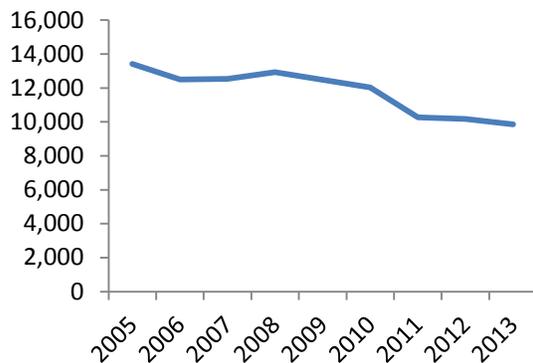
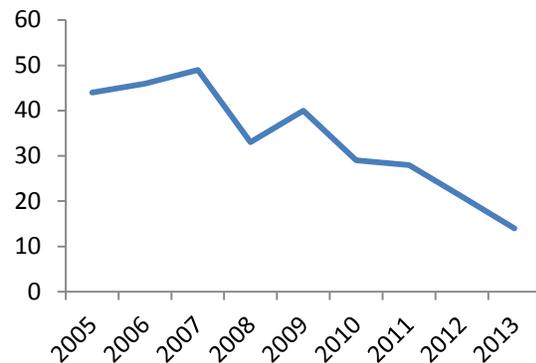


Figure 2. Felony Solicitation Arrests



Are changes in felony solicitation arrests related to general changes in prostitution arrests?

While the overall number of the more general category of prostitution arrests for sex work was on a completely different scale from the number of felony solicitation while HIV-positive arrests (over 10,000 arrests annually compared to under 50 arrests annually), it did appear that there was also a decline in arrests for the more general category of prostitution over the same time period (see Figures 1 and 2). The decline in felony solicitation while HIV-positive arrests (68%) was steeper than that for arrests for the more general category of prostitution (27%). Though it is unclear why the rates of decrease are different, it appears that the trends were similar. It seems logical to assume that perhaps the rates of prostitution and felony solicitation arrests decreased as a function of parallel rates of decreases in the base populations, either the general population or the population of people living with HIV. However, the number of people living in California and the number of people living with HIV in California both increased during the same time period (by 9% for the statewide population overall and by 35% for people living with HIV). Thus, it seems unlikely that the observed decreases in sex work arrests can be explained by changes in the sizes of these related populations.

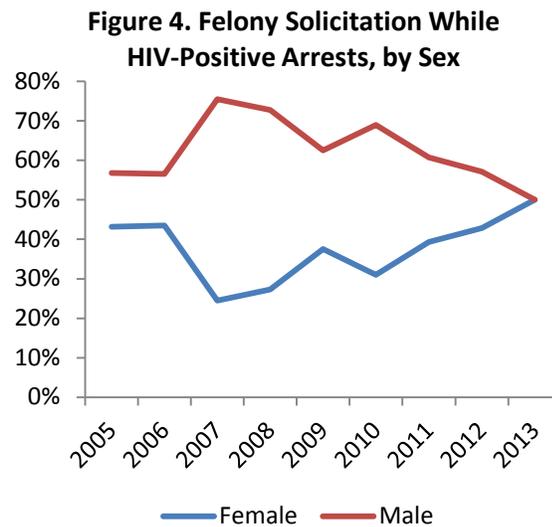
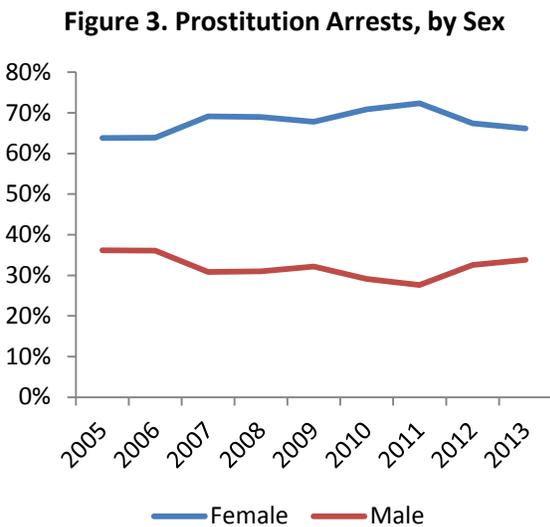
Does gender matter in sex work arrests?

When assessing the significance of gender in arrest rates, it is important to note that criminal records do not separately identify gender identity and sex assigned at birth, so it is likely that most transgender people are miscoded as their sex assigned at birth rather than their current gender identity.

¹² For simplicity, we will use "arrests" to describe felony solicitation while HIV-positive incidents, even though, for many incidents, the felony charges don't arise until after arrest, since the HIV test result must be found in a person's criminal record before the charges can be increased to a felony.

Women made up approximately two-thirds of arrests for prostitution (see Figure 3). On the other hand, women were generally less than half of those arrested for felony solicitation while HIV-positive (Figure 4).

In order to examine whether there was any evidence of disproportionate attention on women in sex work arrests, we compared the proportions of women arrested under each of the two types of sex work-related statutes to a commensurate set of women in the general population (i.e. comparing women with prostitution arrests to women in the general population and comparing women with felony solicitation while HIV-positive arrests to the population of women living with HIV). Between the two types of sex work categories, there was a greater disproportionality of criminalization among women living with HIV. Over the nine years reviewed, on average, women were arrested for prostitution at a rate that was about 1.4 times their proportion of the general population in California.¹³ However, during that same time, on average, women were arrested for felony solicitation while HIV-positive at a rate that was about 3.1 times their proportion of the statewide population of people living with HIV.¹⁴



How do race and gender intersect when it comes to sex work arrests?

When the populations were broken out by both race and sex, a very clear disparity emerged among prostitution arrests. Even while the overall number of arrests related to sex work was decreasing across the state from 2005 to 2013, Black women over this time were making up a growing proportion

¹³ This average was calculated using the following formula:

$$\frac{\text{sum of women arrested for prostitution from 2005 to 2013} / \text{sum of all individuals arrested for prostitution from 2005 to 2013}}{\text{sum of population of women from 2005 to 2013} / \text{sum of total population from 2005 to 2013}}$$

¹⁴ This average was calculated using the following formula:

$$\frac{\text{sum of women arrested for felony solicitation from 2005 to 2013} / \text{sum of all individuals arrested for felony solicitation from 2005 to 2013}}{\text{sum of population of women living with HIV from 2005 to 2013} / \text{sum of total population living with HIV from 2005 to 2013}}$$

of those being arrested. This increase was seen even more starkly when compared to their overall percentage of the population in California (see Table 1 and Figure 5).¹⁵ In 2005, Black women were arrested at a rate about 11 times their general rate in the California population. By 2013, that rate was closer to 14 times their rate in the population. Black women were approximately three percent of the population of California throughout the timespans reviewed. Notably, the only other demographic overrepresented in the criminalization of sex work was Black men. When compared to their representation in the overall population, Black men were arrested for sex work at about 1.5 to 2 times their population rate.

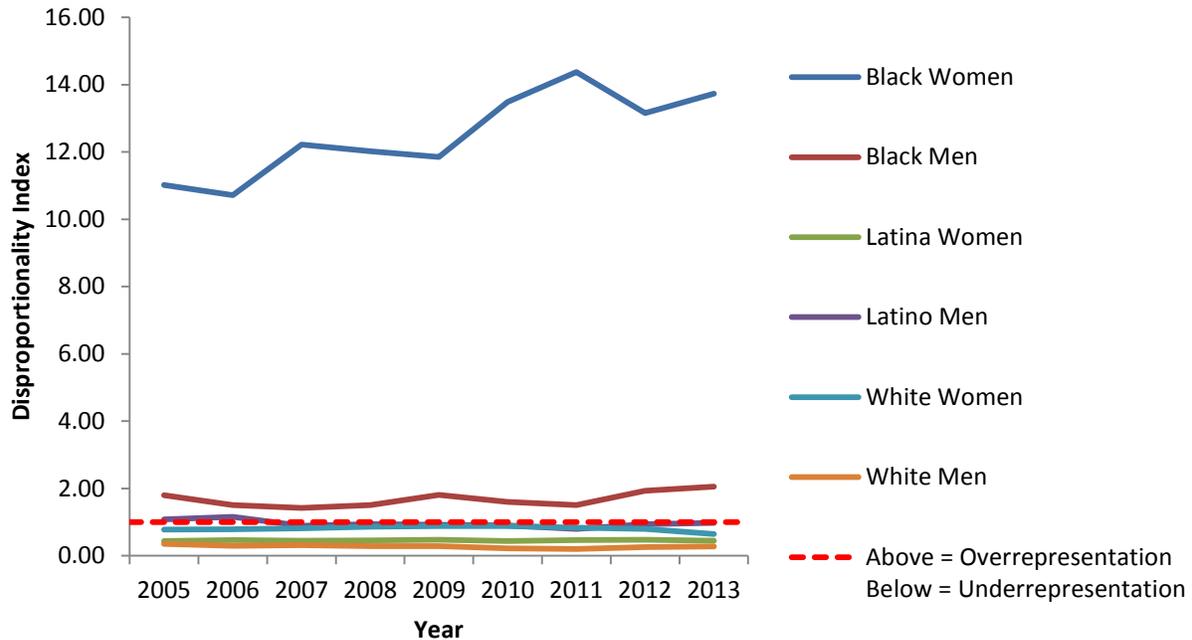
Table 1. Annual Percent of California Population and Annual Percent of California Prostitution Arrests, by Race/Ethnicity and Sex

| Year | Black Women | | Black Men | | Latina Women | | Latino Men | | White Women | | White Men | |
|-----------|-------------|---------|------------|---------|--------------|---------|------------|---------|-------------|---------|------------|---------|
| | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests |
| 2005 | 3% | 34% | 3% | 5% | 17% | 8% | 18% | 19% | 22% | 17% | 21% | 7% |
| 2006 | 3% | 33% | 3% | 4% | 17% | 8% | 18% | 21% | 22% | 17% | 21% | 6% |
| 2007 | 3% | 37% | 3% | 4% | 18% | 8% | 19% | 16% | 21% | 18% | 21% | 7% |
| 2008 | 3% | 36% | 3% | 4% | 18% | 8% | 19% | 18% | 21% | 18% | 21% | 6% |
| 2009 | 3% | 35% | 3% | 5% | 18% | 9% | 19% | 17% | 21% | 18% | 21% | 6% |
| 2010 | 3% | 40% | 3% | 5% | 19% | 8% | 19% | 17% | 20% | 18% | 20% | 4% |
| 2011 | 3% | 41% | 3% | 4% | 19% | 9% | 19% | 15% | 20% | 17% | 20% | 4% |
| 2012 | 3% | 38% | 3% | 5% | 19% | 9% | 19% | 18% | 20% | 16% | 20% | 5% |
| 2013 | 3% | 39% | 3% | 6% | 19% | 9% | 19% | 19% | 19% | 13% | 19% | 5% |
| 2005-2013 | 3% | 37% | 3% | 5% | 18% | 8% | 19% | 18% | 21% | 17% | 20% | 6% |

¹⁵ This comparison is referred to in Figures 5 and 6 as the Disproportionality Index. It is calculated using the following formula for prostitution: $\frac{\% \text{ of prostitution arrests that are a specific race and sex}}{\% \text{ of population that is that specific race and sex}}$

and for felony solicitation: $\frac{\% \text{ of felony solicitation arrests that are a specific race and sex}}{\% \text{ of population living with HIV that is that specific race and sex}}$

Figure 5. Prostitution Arrests by Race/Ethnicity and Sex, Compared to Population Demographic Rates

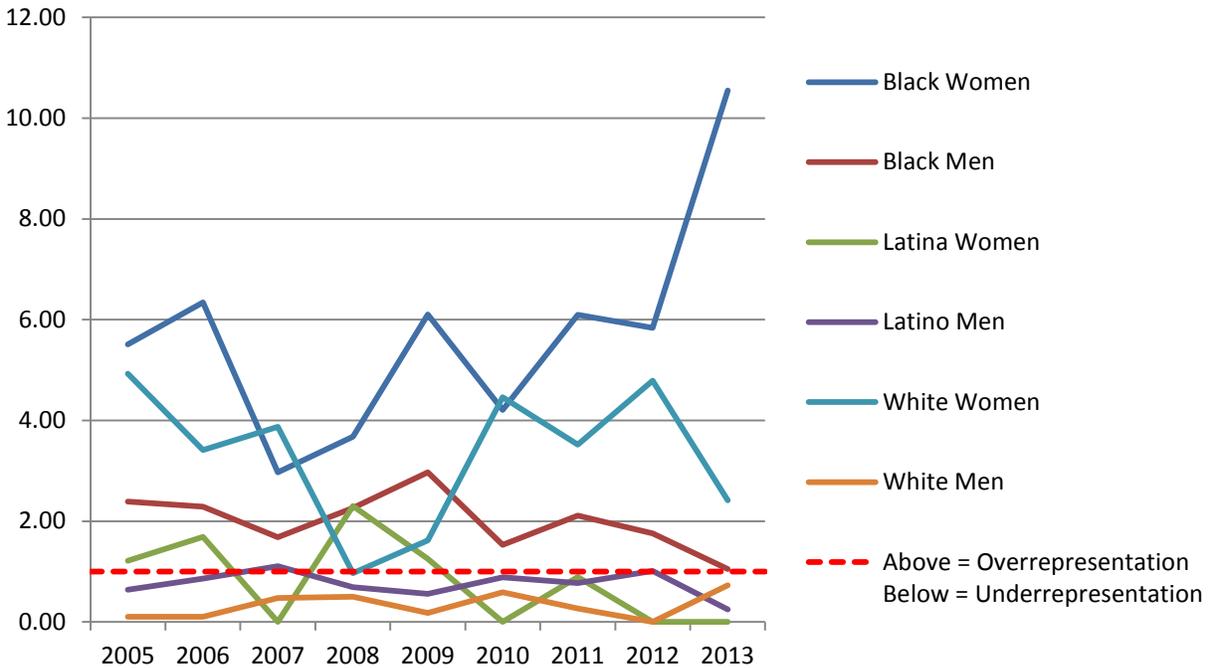


While not as striking as the overrepresentation of Black women among the more general category of prostitution arrests, Black women were still the most overrepresented group for felony solicitation while HIV-positive arrests when compared to the underlying population of people living with HIV in California (see Table 2 and Figure 6). White women and Black men were also consistently overrepresented when compared with their proportion of the population living with HIV. All other groups hovered around representative or under-representative proportions.

Table 2. Annual Percent of California Population Living with HIV and Annual Percent of California Felony Solicitation While HIV-Positive Arrests, by Race/Ethnicity and Sex

| Year | Black Women | | Black Men | | Latina Women | | Latino Men | | White Women | | White Men | |
|-----------|-------------|---------|------------|---------|--------------|---------|------------|---------|-------------|---------|------------|---------|
| | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests | Population | Arrests |
| 2005 | 4% | 23% | 13% | 32% | 4% | 5% | 25% | 16% | 3% | 16% | 44% | 5% |
| 2006 | 4% | 26% | 13% | 30% | 4% | 7% | 25% | 22% | 3% | 11% | 44% | 4% |
| 2007 | 4% | 12% | 13% | 22% | 4% | 0% | 26% | 29% | 3% | 12% | 43% | 20% |
| 2008 | 4% | 15% | 13% | 30% | 4% | 9% | 26% | 18% | 3% | 3% | 42% | 21% |
| 2009 | 4% | 25% | 13% | 40% | 4% | 5% | 27% | 15% | 3% | 5% | 42% | 8% |
| 2010 | 4% | 17% | 14% | 21% | 4% | 0% | 27% | 24% | 3% | 14% | 41% | 24% |
| 2011 | 4% | 25% | 14% | 29% | 4% | 4% | 28% | 21% | 3% | 11% | 40% | 11% |
| 2012 | 4% | 24% | 14% | 24% | 4% | 0% | 28% | 29% | 3% | 14% | 40% | 0% |
| 2013 | 4% | 43% | 14% | 14% | 4% | 0% | 29% | 7% | 3% | 7% | 39% | 29% |
| 2005-2013 | 4% | 22% | 13% | 28% | 4% | 4% | 27% | 21% | 3% | 11% | 42% | 13% |

Figure 6. Felony Solicitation While HIV-Positive Arrests by Race/Ethnicity and Sex, Compared to Population of People Living with HIV Demographic Rates



IV. Discussion, Limitations and Policy Implications

One of the main aims of this report was to document whether there is evidence of disproportionate representation of women among those arrested for prostitution and for felony solicitation. A recent study in Nashville, Tennessee, found a similar trend found here—there were proportionally more women arrested for HIV exposure than there were women among those living with HIV in the same geographic area.¹⁶ What we found in California that was not found in Nashville were indications of further disparities according to gender and race/ethnicity.

A significant limitation in understanding these results, however, is the lack of overall demographic data regarding sex workers both in California and domestically in the United States.¹⁷ Identified studies on the overall population of sex workers exclude figures for the United States.¹⁸ National surveillance systems in the U.S., unlike those of other countries, fail to collect data on sex worker-specific HIV infection and risk behaviors, making HIV prevalence data among those engaged in

¹⁶ Carol L. Galletly and Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS BEHAV. 2624 (2013), available at <https://link.springer.com/content/pdf/10.1007%2Fs10461-013-0408-1.pdf>.

¹⁷ Michele R. Decker, Chris Beyrer & Susan G. Sherman, *Ending the Invisibility of Sex Workers in the US HIV/AIDS Surveillance and Prevention Strategy*, 28 AIDS 2325 (2014).

¹⁸ Judith Vandepitte, Rob Lyerla, Gina Dallabetta, François Crabbé, Michel Alary & Anne Buvé, *Estimates of the Number of Female Sex Workers in Different Regions of the World*, 82 SEX TRANSM INFECTION iii18 (2006).

sex work elusive.¹⁹ Some researchers have sought to fill this gap through focusing on specific geographic areas in their research efforts.²⁰ While these studies describe and provide some insight into different populations engaged in sex work, they cannot replace these significant gaps in data.

The lack of demographic data on sex workers means that we do not currently have the ability to document the burden of HIV among this population.²¹ While generally it is understood that female sex workers are vulnerable to HIV infection due to a variety of risk factors (multiple sexual partners, unsafe working conditions, inability to negotiate condom use, high prevalence of sexually transmitted infections and injection drug use),²² and other countries have been able to document the ways in which female sex workers are a primary driver of heterosexual HIV transmission,²³ this is neither confirmed nor proven in the U.S.

Thus, without knowing the size of the underlying population of individuals engaged in sex work, it is difficult to know whether the observed differences in rates of representation among those arrested for sex work offenses are related to differences in policing practices related to sex work or demographic differences in populations engaging in sex work. It is difficult to derive any definitive assumptions about what these data tell us. However, a few clear conclusions stand out. Most noticeably, Black women are much more likely than any other demographic group to be arrested for sex work offenses when compared to their underlying population numbers, and this disproportionality is increasing. This may reflect some combination of several different phenomena. Debates about whether policing of sex work is ethical or socially useful notwithstanding, there is evidence that Black women and girls experience extreme and frequent profiling, police harassment and abuse, and incarceration.²⁴ It is logical that

¹⁹ Decker et al., *supra*, note 17 at 2325-26.

²⁰ Janet Lever, David E. Kanouse, & Sandra H. Berry, *Racial and Ethnic Segmentation of Female Prostitution in Los Angeles County*, 17 JOURNAL OF PSYCHOLOGY & HUMAN SEXUALITY 107 (2005); Lydia Sausa, JoAnne Keatley & Don Operario, *Social Networks Among Transgender Women of Color who Engage in Sex Work in San Francisco: Implications for HIV Interventions*, 36 ARCH SEX BEHAV. 768 (2007); Kate Shannon, Vicki Bright, Janice Duddy & Mark W. Tyndall, *Access and Utilization of HIV Treatment and Services Among Women Sex Workers in Vancouver's Downtown Eastside*, 82 J. URBAN HEALTH 488 (2005); Gordon James Knowles, *Heroin, Crack, and AIDS: Examining Social Change Within Honolulu, Hawaii's Street Sex Trade*, 30 CRIME LAW SOC CHANGE 379 (1999).

²¹ Stefan Baral, Chris Beyrer, Kathryn Muessig, Tonia Poteat, Andrea L. Wirtz, Michele Decker, Susan G. Sherman & Deanna Kerrigan, *Burden of HIV Among Female Sex Workers in Low-Income and Middle-Income Countries: A Systematic Review and Meta-Analysis*, 12 LANCET INFECTIOUS DISEASES 538 (2012).

²² WORLD HEALTH ORGANIZATION, PREVENTION AND TREATMENT OF HIV AND OTHER SEXUALLY TRANSMITTED INFECTIONS FOR SEX WORKERS IN LOW AND MIDDLE-INCOME COUNTRIES: RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH (2012), available at http://www.who.int/hiv/pub/guidelines/sex_worker/en/.

²³ Elisa Mountain, Michael Pickles, Sharmistha Mishra, Peter Vickerman, Michel Alary & Marie-Claude Boily, *The HIV Care Cascade and Antiretroviral Therapy in Female Sex Workers: Implications for HIV Prevention*, 12 EXPERT REVIEW OF ANTI-INFECTIVE THERAPY 1203 (2014).

²⁴ Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012), available at http://heinonline.org/HOL/Page?handle=hein.journals/uclalr59&div=41&g_sent=1&collection=journals; Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012), available at <http://www.uclalawreview.org/blind-discretion-girls-of-color-delinquency-in-the-juvenile-justice-system/>; AFR. AM. POL'Y F. & CTR. FOR INTERSECTIONALITY & SOC. POL'CY STUD., SAY HER NAME: RESISTING POLICE BRUTALITY

overpolicing of Black women extends to arrests of Black female sex workers, particularly in this context where law enforcement officers are literally required to police bodies and sex.

Additionally, it is important to note that police criminal history data do not record gender identity separately from sex. Therefore, it is likely that many, if not all, transgender people are misgendered in their criminal records, and designated according to their sex assigned at birth, rather than their current gender identity. This may, in fact, result in an undercounting of Black women who are being arrested and charged with sex work offenses, both those involving women living with HIV as well as prostitution offenses more generally. According to the 2015 US Transgender Survey, 42% of Black transgender women reported engaging in sex work at some point in their lives, and 15% reported being profiled by police as sex workers when they were not engaged in sex work.²⁵ Additionally 19% of Black transgender women in the same study reported living with HIV.²⁶ Putting these overlapping vulnerabilities together indicates that Black transgender women are at a high risk of being arrested for solicitation, whether they are currently engaging in sex work or not, and are also more likely to be living with HIV, putting them at risk of having charges increased from a misdemeanor to a felony.

Interestingly, White women appeared to be underrepresented among prostitution arrests as compared to their population numbers, but overrepresented among felony solicitation while HIV-positive arrests when compared to their numbers among people living with HIV. This overrepresentation of White women among those prosecuted under HIV criminalization laws has also been documented in Michigan.²⁷ There is some evidence to support a possible bias that results in leniency towards White women to a certain threshold of criminality, and then results in more severe punishment beyond that threshold. A study of youth reflects similar findings: White girls with low- or average-level offenses received more leniency when compared to girls of color; however, when "White girls surpass[ed] what the juvenile justice system consider[ed] acceptable offending behavior for their racial group, it react[ed] in an increasingly punitive manner," and those girls were punished more harshly than their female counterparts of other racial and ethnic groups.²⁸ The study went on to explain, "The juvenile justice system appears to be unmoved by above-average levels of Black girls' offending behavior, perhaps because judges *expect high levels of deviance from this group*."²⁹ This explanation could also apply in the context of the adult criminal system. Additionally, many studies

AGAINST BLACK WOMEN (2015), *available at* http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf.

²⁵ SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 159, 162 (2016), *available at* <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

²⁶ *Id.* at 10.

²⁷ Trevor Hoppe, *Disparate Risks of Conviction under Michigan's Felony HIV Disclosure Law: An Observational Analysis of Convictions and HIV Diagnoses, 1992–2010*, 17 PUNISHMENT & SOCIETY 73 (2015).

²⁸ Nanda, *supra* note 24 at 1526 (citing Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 FEMINIST CRIMINOLOGY 263 (2010)), *available at* <http://dx.doi.org/10.1080/0735648X.2011.651793>).

²⁹ *Id.*

have shown harsher punishment against girls and women who act un-femininely or with an "unladylike" demeanor.³⁰ These studies reflect what may be a general tendency to dole out harsher punishments against people who defy societal expectations or stereotypes of any kind. While societal bias may result in expectations that gay men and/or people of color are more likely to be living with HIV, such stereotypes are not pervasive with respect to White women. Therefore, harsher punishments for White women living with HIV under the felony solicitation law may be connected to their stereotype rule-breaking. This may also reflect some of the disproportionate representation of White women among felony solicitation arrests involving HIV, but not misdemeanor prostitution arrests. However, more research is needed that provides evidence for explanations of the differences in rates of arrest and punishments that we see in these data.

Another issue to consider when interpreting the findings is the lack of specificity with regard to the kind of sex work captured in the prostitution arrest data. The prostitution arrest data included arrests under statutory code sections that included pimping and running a brothel.³¹ Therefore, it is possible that the comparisons made between prostitution arrests and felony solicitation arrests are imperfect, as prostitution arrests cover a broader type of activity and group of people. Nevertheless, despite increasing attention towards arrest and prosecution of pimps and traffickers, arrests of sex workers are much more common than arrests of pimps or other managers or brothel owners.³² Therefore, it is likely that the data would not look significantly different if smaller groups of non-direct sex workers were able to be excluded from the prostitution arrest data.

As mentioned above, the data are also limited by a lack of measurement of gender identity separate from sex assigned at birth, as well as sexual orientation. Therefore, no definite conclusions can be drawn about how sex work laws may or may not impact sexual and gender minorities differently from others. Challenges to collecting such data in criminal records include the risk of discrimination, harassment, or abuse from law enforcement officers or other officials in the criminal system who may have access to such information. Given the documentation of pervasive and systematic mistreatment of LGBT people, especially transgender individuals and people of color, by law enforcement,³³ the risk of abuse of such information is more than *de minimis* and argues against sexual orientation and gender identity data collection in criminal enforcement contexts. Nevertheless, a lack of information in these contexts prevents further analysis and specific knowledge development.

³⁰ Nanda, *supra* note 24 at 1529-30; AFR. AM. POL'Y F. & CTR. FOR INTERSECTIONALITY & SOC. POL'CY STUD., *supra* note 24 at 24.

³¹ For a full list of the code sections covered by the prostitution data, see footnote 8, *supra*.

³² MEREDITH DANK, BILAL KHAN, P. MITCHELL DOWNEY, CYBELE KOTONIAS, DEBORAH MAYER, COLLEEN OWENS, LAURA PACIFICI & LILLY YU, THE URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 214 (2014), *available at* <http://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities.pdf>.

³³ CHRISTY MALLORY, AMIRA HASENBUSH & BRAD SEARS, THE WILLIAMS INST. UNIV. OF CAL. L.A. SCH. OF LAW, DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY (2015) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

Despite these data limitations, the research here clearly and unequivocally demonstrates the disproportionate burden of sex work criminalization and HIV criminalization on Black women in California. Yet, the multiple reasons that Black women may be overrepresented among those engaged in sex work (in general or in street-based work specifically) cannot be overlooked and deserve greater research and exploration as a potential factor in the high rates of arrest for sex work offenses. Future research could delve more deeply into an exploration of the influence (or lack thereof) of poverty and discrimination,³⁴ addiction,³⁵ housing,³⁶ and violence and abuse³⁷ on both the decision to engage in sex work and the venues in which sex workers engage in their work (e.g. street-based, brothels, online escort services, etc.) and examine explicitly these factors' connections to vulnerability to criminalization in the context of sex work and HIV, above and beyond criminalization of women and people of color more generally.³⁸ Additionally, future research may want to consider how transgender status and race may also interact to impact law enforcement outcomes among sex workers living with and without HIV.

V. Conclusion

Sex work takes on many forms in many venues, and a broad range of people engage in this form of work across the U.S. Unfortunately, in California, Black women bear the heaviest burden of the criminalization of sex work generally and the felonization of sex work while living with HIV. Despite decreased enforcement in the last decade, Black women have made up an overwhelmingly increasing share of those involved in prostitution arrests and felony solicitation arrests. This is unlikely to change without drastic shifts in societal bias and discrimination or the decriminalization of sex work.

³⁴ Martin S. Weinberg, Frances M. Shaver & Colin J. Williams, *Gendered Sex Work in the San Francisco Tenderloin*, 28 ARCHIVES OF SEXUAL BEHAV. 503 (1999); Charles H. McCaghy & Charles Hou, *Family Affiliations and Prostitution in a Cultural Context: Career Onsets of Taiwanese Prostitutes*, 23 ARCHIVES OF SEXUAL BEHAV., 251 (1994).

³⁵ John J. Potterat, Richard B. Rothenberg, Stephen Q. Muth, William W. Darrow & Lynanne Phillips-Plummer, *Pathways to Prostitution: The Chronology of Sexual and Drug Abuse Milestones*, 35 J. SEX RES. 333 (1998); Merrill Singer, *A Dose of Drugs, a Touch of Violence, a Case of AIDS: Conceptualizing the SAVA Syndemic* 24 FREE INQUIRY IN CREATIVE SOC. 99 (1996).

³⁶ Ian Shaw & Ian Butler, *Understanding Young People and Prostitution: A Foundation for Practice?*, 28 BRIT. J. SOC. WORK 177 (1998); Andrew S. Walters, *HIV Prevention in Street Youth*, 25 J. ADOLESCENT HEALTH 187 (1999).

³⁷ Melissa Farley, Isin Baral, Merab Kiremire & Ufuk Sezgin, *Prostitution in Five Countries: Violence and Posttraumatic Stress Disorder*, 8 FEMINISM & PSYCHOL. 405 (1998); Fred Molitor, Juan D. Ruiz, Jeffrey D. Klausner & William McFarland, *History of Forced Sex in Association with Drug Use and Sexual HIV Risk Behaviors, Infection with STDs, and Diagnostic Medical Care: Results from the Young Women Survey*, 15 J. INTERPERSONAL VIOLENCE 262 (2000); but see Susan M. Nadon, Catherine Koverola & Eduard H. Schludermann, *Antecedents to Prostitution: Childhood Victimization*, 13 J. INTERPERSONAL VIOLENCE 206 (1998).

³⁸ We note that there is some research that covers HIV-related issues among sex workers globally. These studies, however, are focused on the spread of HIV, sex workers as "vectors" of disease, prevalence, and testing interventions for prevention and treatment (e.g. condom use). See Ine Vanwesenbeeck, *Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990–2000*, 12 ANN. REV. OF SEX RES. 242 (2001).