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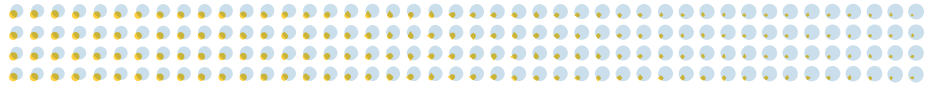
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ENFORCEMENT OF HIV CRIMINALIZATION in Kentucky

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BRIEF / DECEMBER 2021

OVERVIEW

The Williams Institute analyzed data from the state of Kentucky about individuals who came into contact with Kentucky's criminal system through allegations of HIV-related offenses. The analysis shows that

- Crimes related to sex work accounted for the vast majority (97%) of all of Kentucky's HIV-related arrests.
- Women in general, and white women in particular, are heavily overrepresented in Kentucky's HIV-related arrests, accounting for nearly two-thirds (62%) of the total.
- Enforcement is geographically concentrated: on a per-capita basis, Kenton County in Northern Kentucky had about eight times more HIV-related arrests than Jefferson County, the state's most populous county. Northern Kentucky is part of the Cincinnati metropolitan area and has historically been a site for Cincinnati's sex work industry.

BACKGROUND

HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct or that increase the penalties for illegal conduct based upon a person's HIV-positive status.¹

HIV is criminalized in Kentucky through both HIV-specific laws and the state's general criminal laws. Ky. Rev. Stat. §§ 529.090(3) & (4) creates a Class A misdemeanor for a person who engages in prostitution if that person has a positive non-STD test, and a Class D felony for a person living with HIV who engages in prostitution "likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive

¹ 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.

for human immunodeficiency virus and knew or had been informed that he had tested positive for human immunodeficiency virus and that he could possibly communicate the disease to another person through sexual activity.”²

Ky. Rev. Stat. § 311.990(31)(b) creates a Class D felony for a person living with HIV who donates organs, skin, or tissue and who both knows their positive status and has been informed that they may transmit HIV by donating.³

Kentucky also criminalizes people who expose law enforcement officers to bodily fluids. Ky. Rev. Stat. § 508.025(2) makes it a Class B misdemeanor to cause a police officer engaging in their official duties to come into contact with a person’s bodily fluids.⁴ If the person knows that they have a “serious communicable disease and competent medical or epidemiological evidence demonstrates that the specific type of contact caused by the actor is likely to cause transmission of the disease or condition” then the offense is upgraded to a Class A misdemeanor.⁵

Kentucky has also prosecuted people living with HIV under the state’s wanton endangerment law.⁶ Ky. Rev. Stat. § 508.060 makes it a Class D felony for a person who “under circumstances manifesting extreme indifference to the value of human life...wantonly engages in conduct that creates a substantial danger of death or serious injury to another person.”⁷ Kentucky’s wanton endangerment law was first used to prosecute a person living with HIV for not disclosing their status to a sexual partner in 1998.⁸ Over the years there have been many cases of people living with HIV being prosecuted under this general criminal statute.⁹

Data Source

In December 2021, the Williams Institute obtained de-identified criminal history data of individuals who came into contact with Kentucky’s criminal legal system through the state’s HIV-related criminal statutes. The data were supplied by the Uniform Crime Reporting Section of the Kentucky State Police, and include all arrests reported under Kentucky Revised Statute §§ 529.090(3) & (4) (Prostitution and procuring prostitution) and Ky. Rev. Stat. § 311.990(31)(b) (organ, skin, and tissue donation). These are Kentucky’s HIV-specific criminal laws. We excluded from the analysis the wanton endangerment offense and the bodily fluid exposure offense because they are not HIV-specific, and because we are unable to identify which arrests might be HIV-related in the data provided by the Kentucky State Police.

² KY Rev. Stat. §§ 529.090(3) & (4) (2005).

³ KY Rev. Stat. § 311.990(31)(b) (2021).

⁴ KY Rev. Stat. § 508.025(2) (2018).

⁵ *Id.* “Serious communicable disease” is defined as “a non-airborne disease that is transmitted from person to person and determined to have significant, long-term consequences on the physical health or life activities of the person infected.”

⁶ KY Rev. Stat. § 508.060 (1975).

⁷ *Id.*

⁸ *Hancock v. Commonwealth*, 998 S.W.2d 496, 497 (Ky. Ct. App. 1998). See also Center for HIV Law and Policy, “Kentucky: Analysis & Codes,” *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* (2021), pg. Kentucky 3-5 (<https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20081621.pdf>).

⁹ *Id.*

NUMBER AND FREQUENCY OF ARRESTS

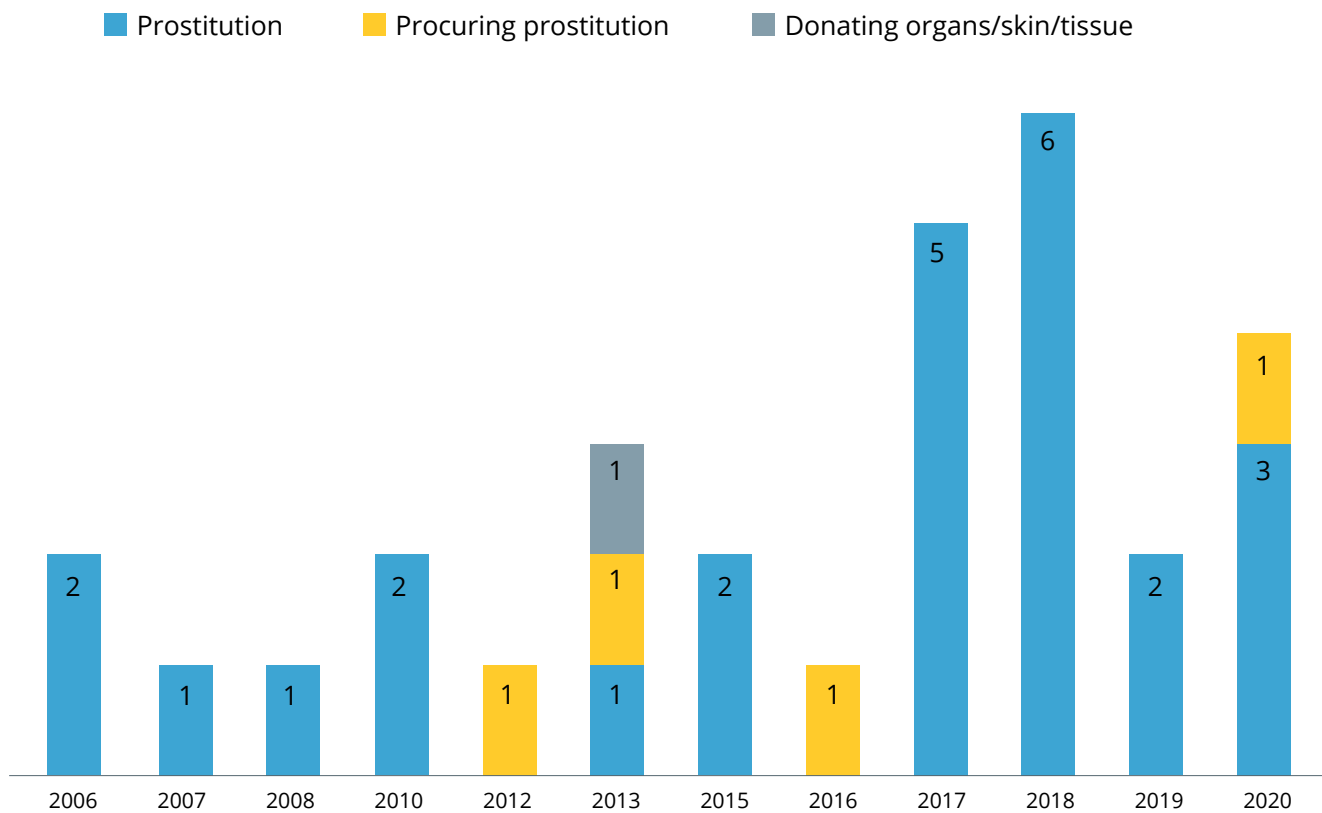
There have been at least 32 arrests for HIV-specific offenses in Kentucky since the year 2006. All but one arrest was for the prostitution-related offense (including four for “procuring” sex work). There was one arrest for organ, skin, or tissue donation.

Table 1. Number of HIV-related arrests in Kentucky

CHARGE	NUMBER OF ARRESTS
Prostitution	27
Procuring prostitution	4
Donating organs, skin, or tissue	1

On average, there were 2.5 arrests per year, with the peak year of enforcement in 2018. The number of arrests has increased over time: from 2016 to 2021, there were on average 3.8 arrests per year compared to 1.8 arrests in the years 2006 to 2010.

Figure 1. Number of HIV-related arrests per year in Kentucky



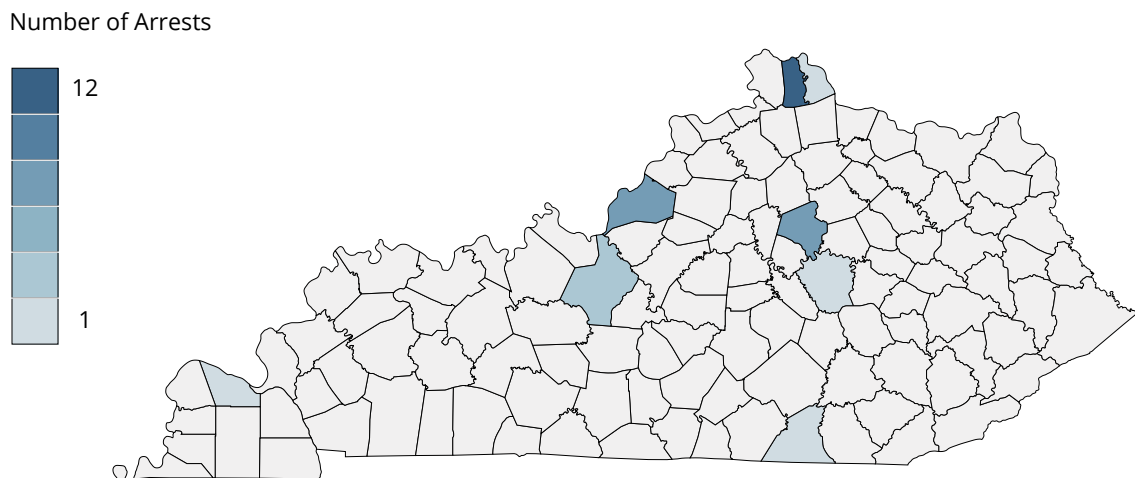
LOCATION OF ARREST

Kenton County in the northern corner of the state saw the highest number of HIV-related arrests (38%). Kenton County is part of the three-state Cincinnati metro area and is the state's third-most populous county. Neighboring Campbell County also reported one HIV-related arrest. Northern Kentucky has a long history of sex work and other "vice" related activities.¹⁰ As one court noted in describing the area:

Newport [across the Ohio River from Cincinnati] long ago gained a reputation as home to a veritable smorgasbord of vice, attracting patrons from across the nation ... [T]he court notes the following statements in a national magazine's satirical Chapter on Newport's big sister, the city of Cincinnati. "The city's streets fairly shine; ... So clean. No X-rated movie theaters, no adult-book stores, no bare-breasted night joints soil these streets, all of them long ago jettisoned over to the Kentucky side of the river.... Newport's image affects that of all of Northern Kentucky, a community of nearly 300,000 people."¹¹

The state's most populous county, Jefferson County, which is home to the state's largest city, Louisville, had the second-highest number of arrests (22%), as did Fayette County, the state's second-most populous county. On a per-capita basis, Kenton County had about eight times more HIV-related arrests than Jefferson County. All other counties combined had a total of five arrests (15%).

Figure 2. HIV-related arrests by county in Kentucky



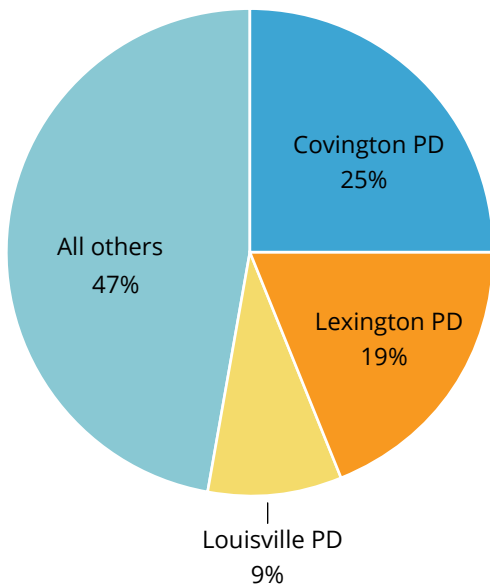
Covington Police Department in Kenton County was the origin of a quarter of all HIV-related arrests in the state (8), followed by the Lexington Police Department (6) and Louisville Metro Police Department (3). All other law enforcement agencies had two or fewer arrests.¹²

¹⁰ Jeremy D. Shea, "Our Rich History: Prostitution, progressivism, and prohibition all part of Newport's colorful past," *Northern Kentucky Tribune* (Online), Sept. 14, 2020 (<https://www.nkytribune.com/2020/09/our-rich-history-prostitution-progressivism-and-prohibition-all-part-of-newports-colorful-past/>).

¹¹ *Bright Lights, Inc., v. City of Newport*, 830 F. Supp. 378, 380-81 (E. D. Ky. 1993) (citing Peter Richmond, "Town Without Pity," *Gentlemen's Quarterly*, July 1993, at 102, 104.).

¹² Elizabethtown Police Department, Ft. Mitchell Police Department, Jefferson County Sheriff's Office, and Kenton County Sheriff's Office had two HIV-related arrests each. Campbell County Police Department, Fayette County Sheriff's Office, Jefferson County Community Attorney, McCreary County Sheriff's Office, Paducah Police Department, Richmond Police Department, and the University of Louisville Police Department each had one HIV-related arrest.

Figure 3. HIV-related arrests by law enforcement agency



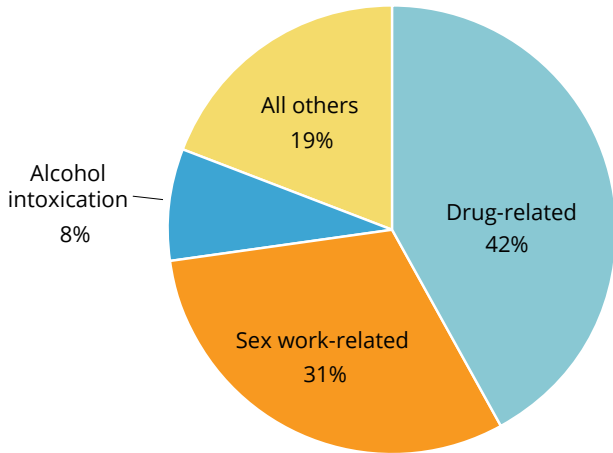
We have location data for 14 HIV-related arrests. Half occurred on a road, alley, or sidewalk. Another 14% occurred in a parking lot or garage. Only 36% of arrests for which the location is known happened inside an enclosed building such as a residence or hotel.

ARRESTEE DETAILS

None of the 32 HIV-related arrests in Kentucky were classified as attempted at arrest, however, four were charged as procuring prostitution, and one was charged as solicitation of prostitution. This suggests that over 15% of all HIV-related arrests were almost certainly for conduct that did not involve sex acts. Indeed arrests for allegations of sex work do not need to include actual sex acts.

In nearly half (44%) of all HIV-related arrests, the HIV-related offense was the only offense cited. There were no concurrent arrests. The remaining 18 arrests (56%) also included non-HIV-related offenses, the most common of which were drug- or alcohol-related (50%). In total there were 36 such non-HIV-related offenses.

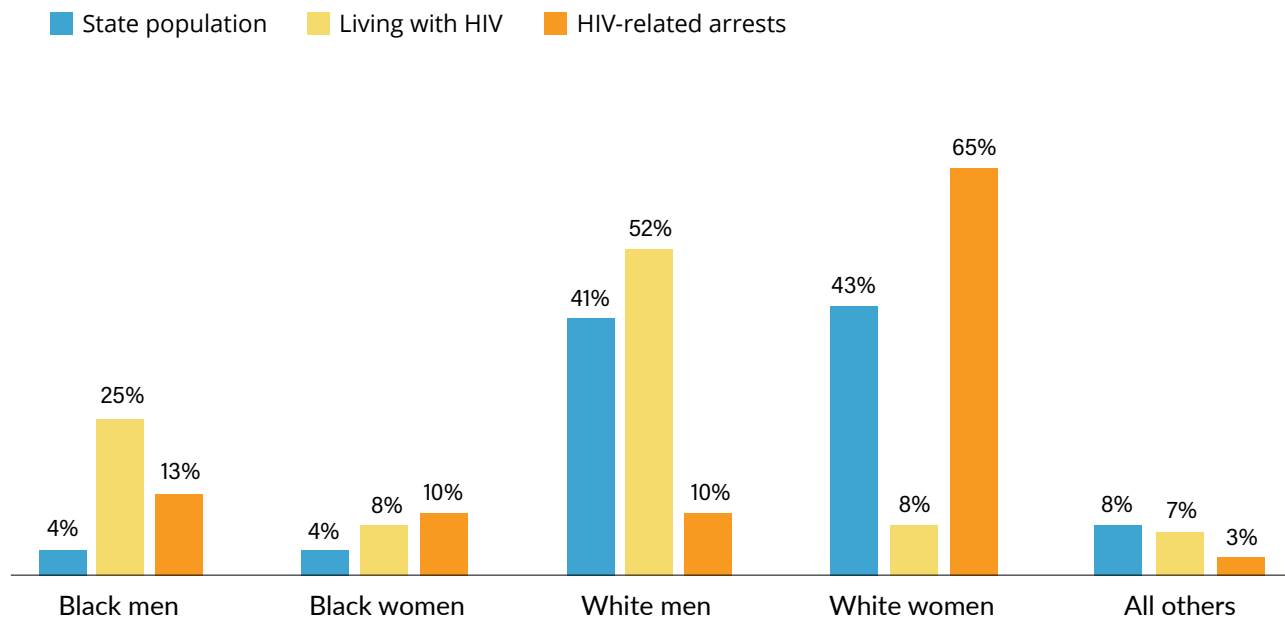
Figure 4. Non-HIV-related offenses cited at arrest in Kentucky



Demographics of People Arrested

We have demographic information for 31 of the 32 HIV-related arrests in Kentucky. Women, and especially white women, are dramatically over-represented in the state’s HIV-related arrests. Overall, women made up nearly two-thirds (62%) of all HIV-related arrests but were only one-sixth (17%) of the state’s population of people living with HIV. Disaggregating by race, white women were 43% of the state’s population in 2019, but only 8% of the state’s population of people living with HIV. In contrast, white women were 59% of all HIV-related arrests. All arrestees were identified as either Black or white; one arrestee was additionally identified as a Hispanic man. No other race/ethnicity categories were identified in the data.

Figure 5. Race/ethnicity and gender of Kentucky’s state population, population of people living with HIV, and people arrested for HIV-related offenses



Demographics of Victims

Victim information was included for about one-third (28%) of all HIV-related arrests in Kentucky. In all but one arrest, the victim was the Commonwealth of Kentucky. Only one arrest of the 32 arrests included victim information for a private citizen: a 37-year-old white man, suggesting that the sex workers may have been arrested without there being an actual client, or that the client was an undercover law enforcement officer.

AUTHORS

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ABOUT THE WILLIAMS INSTITUTE

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

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