

# HIV Data Privacy, Criminalization, and the Role of Health Departments

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# Presentation Outline

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- Overview of the legal landscape protecting health department HIV data from disclosure to courts, law enforcement, or prosecutors
- Key themes and findings from 53-jurisdiction review of HIV data privacy laws
  - Newly updated NASTAD resource: [HIV Data Protection Landscape](#)
- Collaboration between health departments and other partners to protect HIV data
  - Heather Anderson-Fintak, Esq. (Southern Nevada Health District)
  - Adrian Guzman, JD, MPH (NYC Department of Health and Mental Hygiene)

# National Landscape: Data Release for Law Enforcement is an Exception to Confidentiality

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HIV Confidentiality Statutes generally prohibit release of health department HIV data without consent

**EXCEPT**

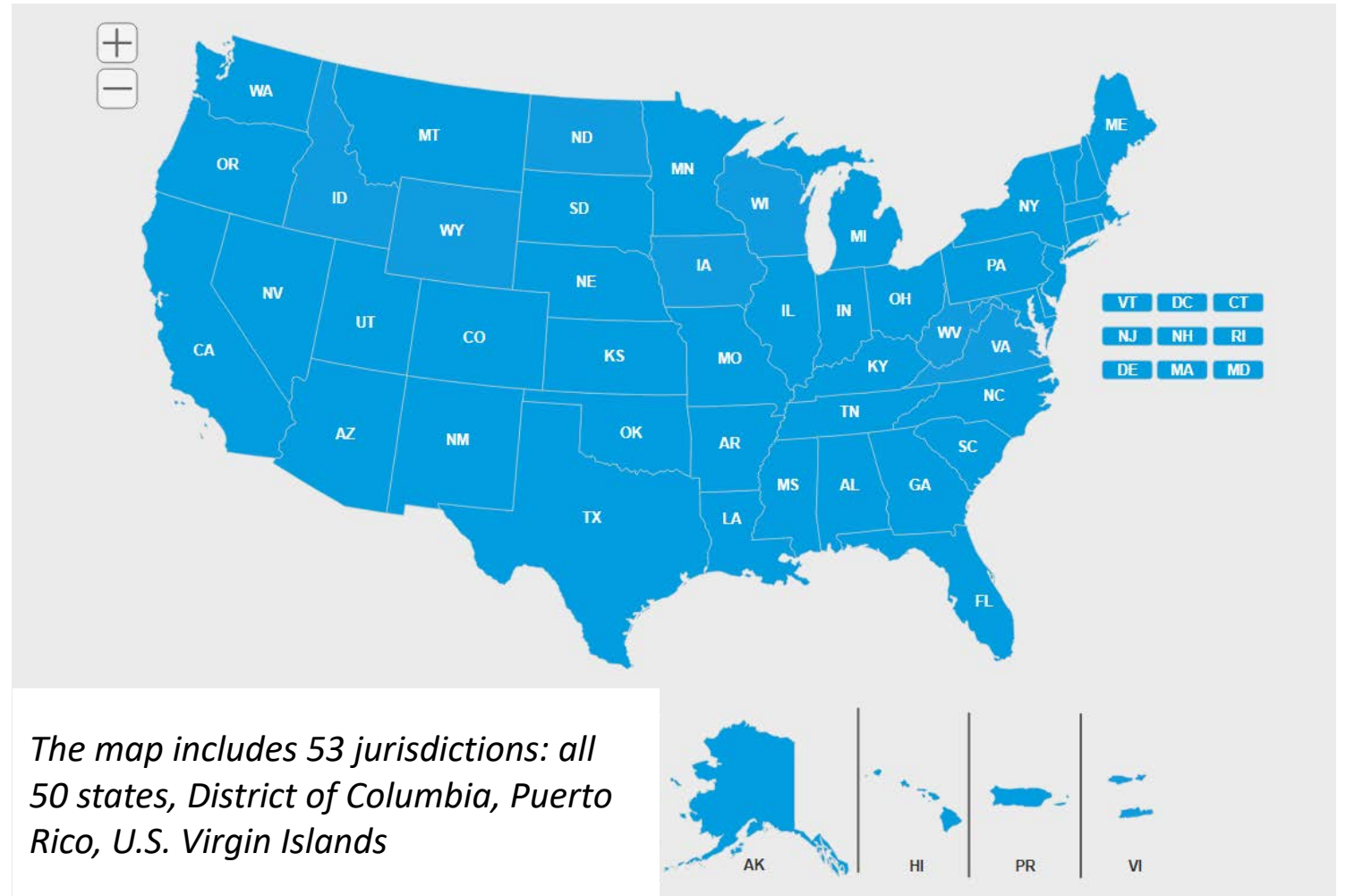
- For adjudication of criminal or civil matter
- In connection with specific criminal investigations or prosecutions
- To enforce public health laws
- In response to a court order or subpoena (broad authority)

*Some jurisdictions explicitly prohibit the release of any health department HIV data for law enforcement purposes, which is the most protective approach. However, in most jurisdictions, the law compels release for law enforcement purposes in some circumstances.*

# “HIV Data Protection Landscape”

## Can HD data be released for law enforcement/prosecution purposes?

- Is a court order required?
- What types of data can be released?
- Can data be released before charges are filed (e.g., for criminal investigations)?



<https://nastad.org/resources/hiv-data-protection-landscape>

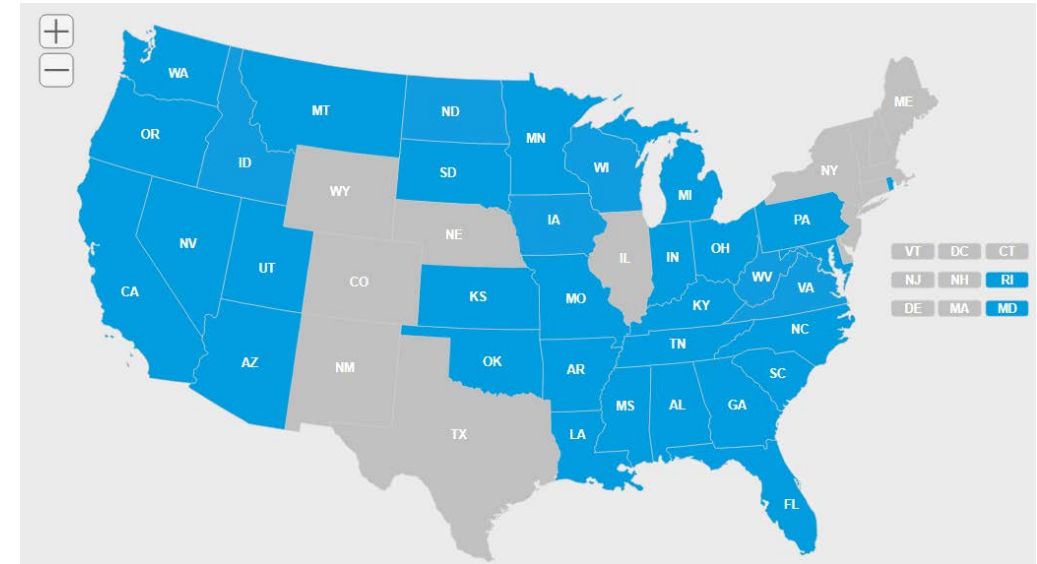
# Does the jurisdiction have a law criminalizing transmission of or exposure to HIV?

## Yes: 35 jurisdictions

- Laws criminalizing HIV transmission or exposure

## No: 18 jurisdictions

- HIV as a sentencing factor
- Exposure of law enforcement or corrections officers
- General criminal laws (e.g., assault)
- Sexual activity with minors
- Donations



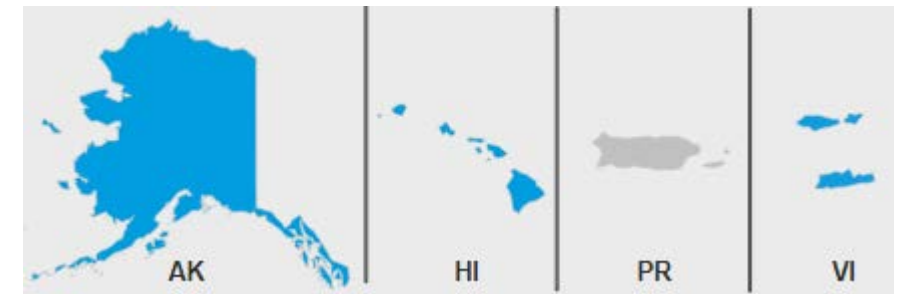
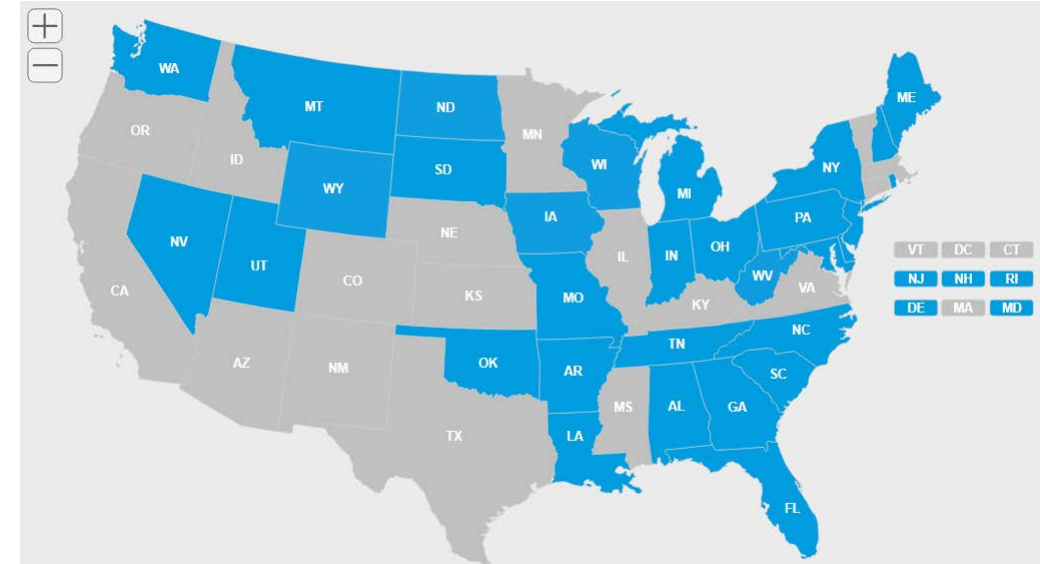
# Does the law explicitly permit release of health department HIV data for law enforcement and/or prosecution purposes?

## Yes: 34 jurisdictions

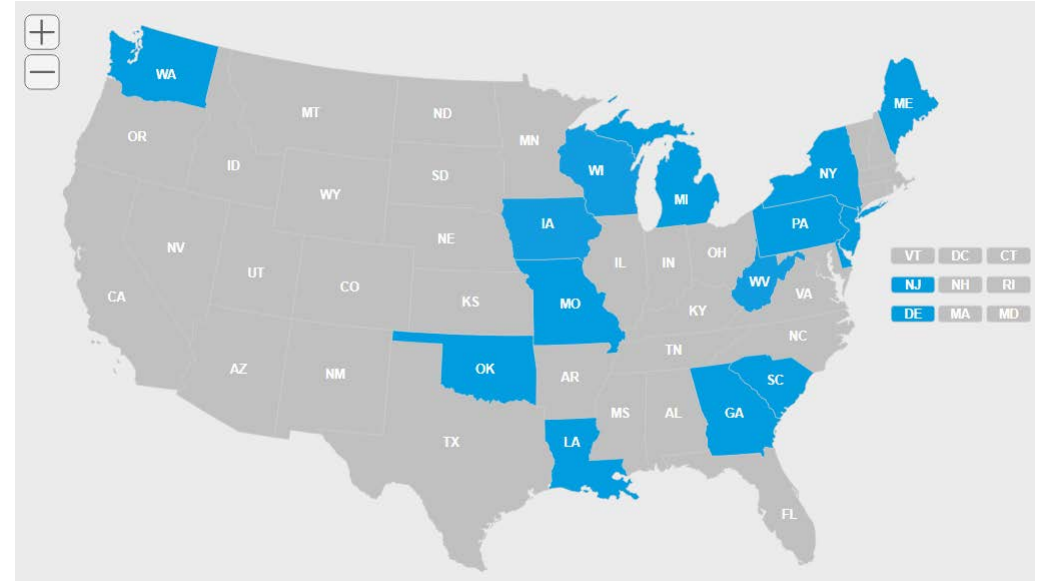
- Disclosure permitted to prosecutors or law enforcement agencies
- Disclosure permitted in connection with certain crimes/violations
- Disclosure generally permitted for criminal proceedings
- Disclosure generally permitted upon a finding of compelling need
- Disclosure is subject to procedural protections (e.g., in camera review)

## No: 19 jurisdictions

- Explicit prohibition on disclosure or admission into evidence
- The law is silent



Does the law explicitly require a court order for release of health department HIV data in response to requests from courts, law enforcement, or prosecutors in all circumstances?

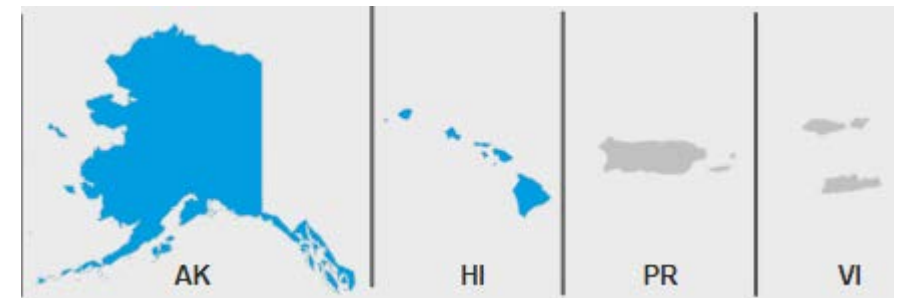


**Yes: 17 jurisdictions**

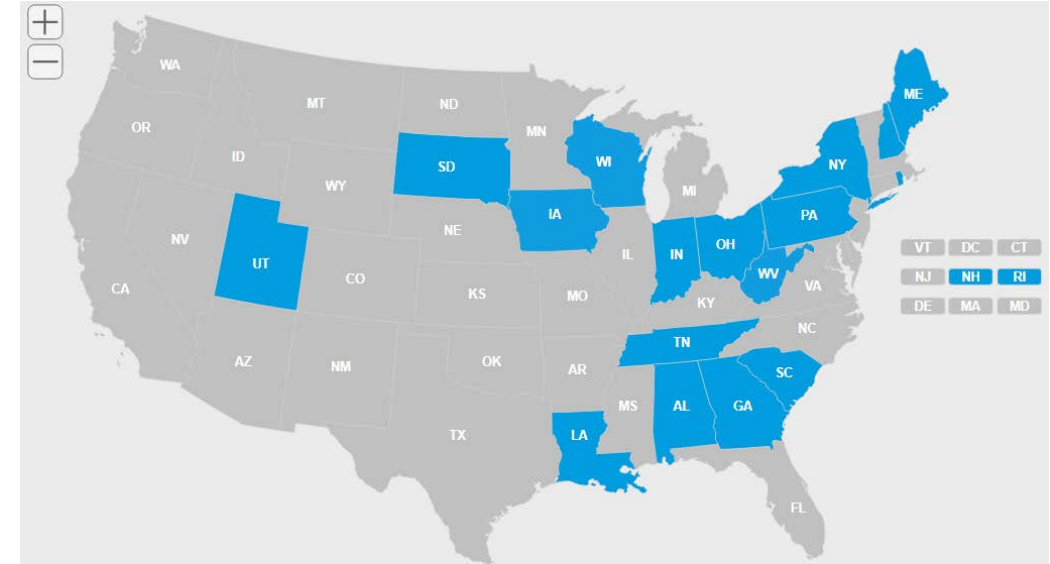
- Disclosure is permitted only pursuant to a court order (signed by a judge)

**No: 17 jurisdictions**

- Disclosure is permitted without a court order (e.g., prosecutor subpoena, law enforcement “request”)
- The law does not specify whether court order is required



Does the law limit the type of HIV data the health department may release to courts, law enforcement, or prosecutors?



**Yes: 17 jurisdictions**

- Disclosure is limited to certain types of data (e.g., HIV test results, “medical or epidemiological” information)

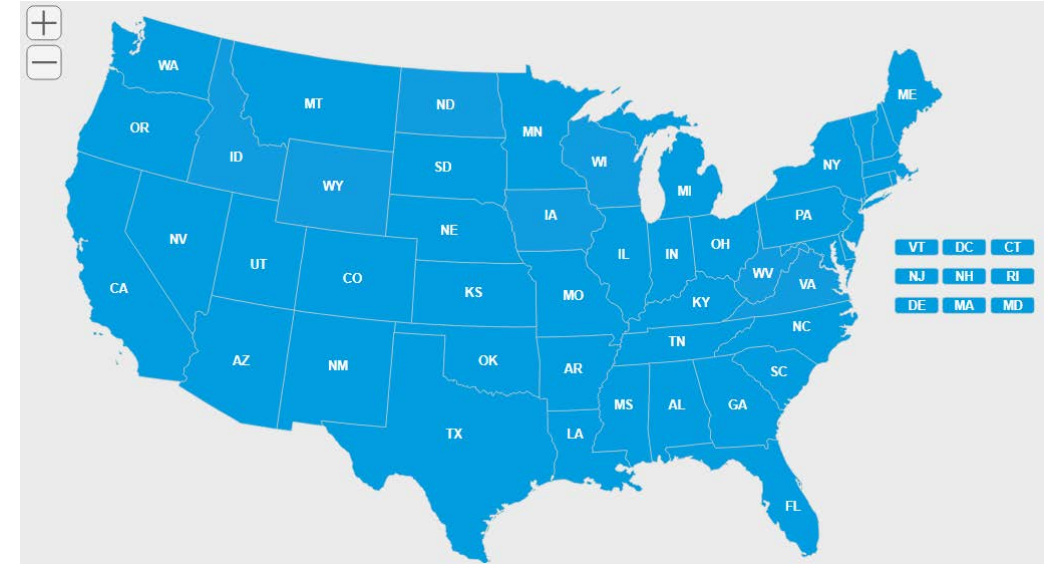
**No: 17 jurisdictions**

- The law does not limit the types of data that can be disclosed (e.g., “all information and records” collected or maintained by the health department may be disclosed)





Does the law explicitly require that a defendant be charged with a crime before health department HIV data may be released in connection with criminal matters?

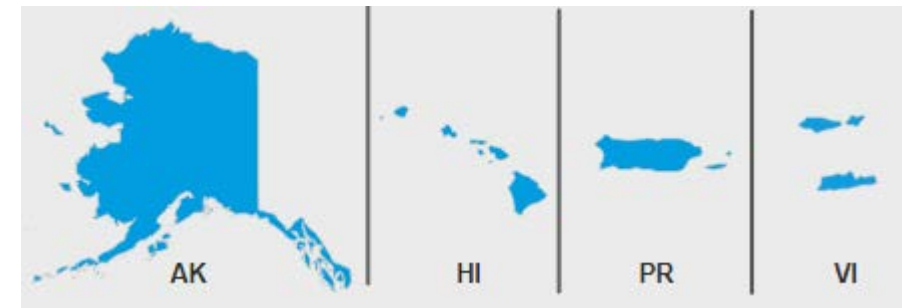


**Yes: 0 jurisdictions**

- Disclosure is permitted only after a defendant has been charged with a crime (e.g., during prosecution, for sentencing purposes)

**No: 34 jurisdictions**

- Disclosure is permitted for criminal investigations
- Disclosure is permitted during grand jury proceedings
- Disclosure is permitted upon a finding of probable cause
- The law does not specify whether disclosure is permitted before a defendant is charged with a crime



# Implications

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## Limiting Principles of Data Release

### Statutory

- Limits on types of data that can be disclosed in criminal matters, and under what circumstances
- Procedural protections, such as in camera review

### Legal Relevance

- Current limitations of molecular sequence data make it unhelpful for criminal exposure elements
- Health departments are not the only source of HIV data that may be of interest to law enforcement

### Policy and Procedural

- Data release can and should be structured in a limited way

# Engaging Criminal Justice Stakeholders in HIV Criminalization and Data Privacy Reform Efforts

NASTAD Meeting on Data Privacy, Criminalization, and the Role of Health Departments  
Friday, June 23, 2023, 2-3pm EST

Adrian Guzman, JD, MPH  
Director, Policy and External Affairs

Bureau of Hepatitis, HIV, and Sexually Transmitted Infections  
*Envisioning a New York City without transmission or illness related to viral hepatitis, HIV, and sexually transmitted infections.*

# Agenda

- HIV Criminalization and Data Privacy Reform Efforts: The Role of Health Departments
- Case Study: New York City Task Force on the Health and Safety of Sex Workers
- Case Study: HIV and Criminal Justice Projects by the New York City Department of Health and Mental Hygiene
- Discussion



# HIV Criminalization and Data Privacy Reform Efforts: The Role of Health Departments

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- **Centering evidence-based public health practice in HIV criminalization conversations**
- **Communicating that sexual health is the responsibility of both partners**
- **Partnering with criminal justice stakeholders**

# HIV Criminalization and Data Privacy Reform Efforts: The Role of Health Departments

- **Centering evidence-based public health practice in HIV criminalization conversations**
- **Communicating that sexual health is the responsibility of both partners**
- **Partnering with criminal justice stakeholders**

# Partnering with Criminal Justice Stakeholders

- **Identify criminal justice stakeholders essential to HIV criminalization conversations**
  - E.g., frontline law enforcement officers, including from vice squads or community policing units; law enforcement agencies' LGBTQ and other community liaisons; Mayoral advisors on criminal justice issues; prosecutors; public defenders; Bar Associations; court systems
- **Be strategic when convening criminal justice stakeholders**
- **Emphasize common goals**
  - E.g., protecting and promoting public health and safety; building community trust and cooperation; improving interagency communications and collaboration



# Partnering with Criminal Justice Stakeholders (cont.)

- **Frame the partnership as an opportunity to leverage each other's experiences and expertise**
  - Avoid characterizing partnership as a unilateral corrective intervention by the health department
- **Remind of past partnerships**
- **Remind of federal support for HIV criminalization reform**
  - *From National HIV/AIDS Strategy: 2022-2026: "HIV-specific criminal laws perpetuate HIV-related stigma, and discrimination can also deter individuals from getting tested. Some of these laws criminalize behavior that pose low or no risk for transmitting HIV and apply regardless of actual HIV transmission. These outdated laws do not reflect our current understanding of HIV and should be repealed or updated. . . . Such efforts must ensure that criminal laws and policies regarding HIV transmission are based on the latest scientific evidence and reflect effective public health strategies, and that legislators, prosecutors, and law enforcement officials have an accurate understanding of HIV transmission risks."*

# Partnering with Criminal Justice Stakeholders (cont.)

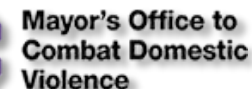
- **Take on role as convener of partnership to ensure momentum (and agenda-setting)**
- **Establish intended agenda and goals prior to convening stakeholders**



# Case Study: New York City Task Force on the Health and Safety of Sex Workers

# City Interagency Efforts Related to Sex Work/ers, 2017-2019

- Following FOSTA/SESTA, policy leads from various City agencies in New York City met to discuss agencies' efforts focused on sex workers and other jurisdictions' service delivery models.
- In July 2018, First Lady Chirlane McCray hosted a small group of sex workers and their advocates at Gracie Mansion to share their experiences and identify urgent needs.



# Task Force on the Health and Safety Needs of Sex Workers

- Policy leads continued meeting in 2018 and 2019 to discuss enhancing existing or establishing new policies and programming. Work groups focused on criminal justice, employment, and housing – three issues sex workers and their advocates had identified as most urgent.
- In June 2019, as part of the New York City Police Reform and Reinvention Plan, Mayor Bill de Blasio launched the **Task Force on the Health and Safety Needs of Sex Workers**, a coalition of City agencies and community stakeholders charged with developing recommendations centering the needs of sex workers and addressing sex and labor trafficking in New York City.

# Task Force on the Health and Safety Needs of Sex Workers (cont.)

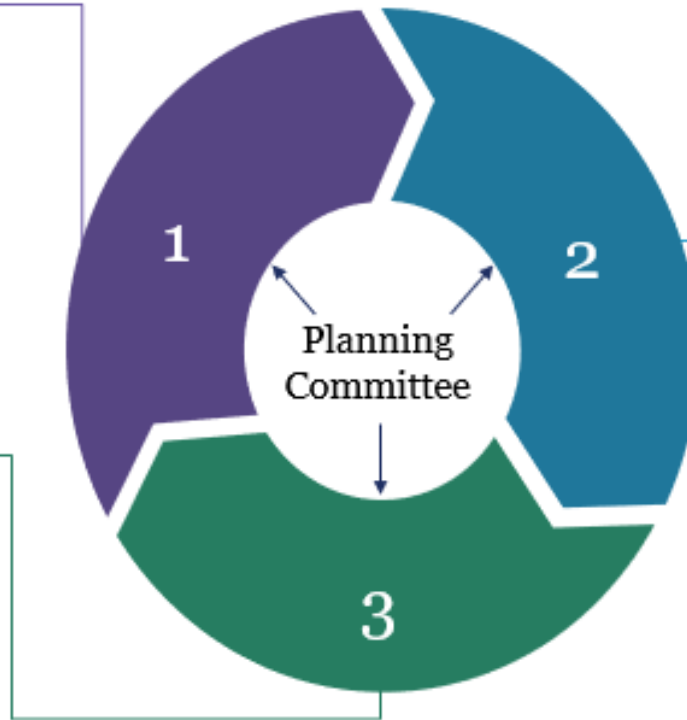
## Focus Areas

### Programs & Services

Develop programs and policies that address the health and safety needs of sex workers.

### Investigation and Prosecution of Trafficking

Identify strategies to enhance identification of and response to sex and labor trafficking within the criminal justice system.



### Shifting Police Policy & Practice

Reduce harms associated with criminalization of people in the sex trades.

# Task Force on the Health and Safety Needs of Sex Workers (cont.)

STRUCTURED  
INTERVIEWS



AGENCY TASK FORCE  
MEETINGS

POLICY REVIEW

FOCUS GROUPS

# Select New York City District Attorneys' Positions on Prosecuting Prostitution-Related Offenses

- Since 2021, the current Bronx, Brooklyn, Manhattan, and Queens District Attorneys announced their offices would dismiss hundreds of cases involving charges under N.Y. Penal Law § 230.00 (“Prostitution”) or § 240.37 (“Loitering for the Purpose of Engaging in a Prostitution Offense”) or both. All offices had declined to prosecute one or both charges for some time.
- In February 2021, Governor Kathy Hochul signed into law legislation repealing the Loitering for the Purpose of Engaging in a Prostitution Offense criminal statute.

*Sources:* Press Release, Office of Kings County District Attorney Eric Gonzalez, Brooklyn District Attorney Eric Gonzalez Dismisses All Outstanding Prostitution-Related Warrants (Jan. 29, 2021), available at <http://www.brooklynda.org/2021/01/29/brooklyn-district-attorney-eric-gonzalez-dismisses-all-outstanding-prostitution-related-warrants/>; Press Release, Office of Bronx County District Attorney Darcel D. Clark, Court Grants Motion by Bronx DA Darcel D. Clark to Dismiss Over 800 Loitering for Prostitution Cases (Mar. 8, 2021), available at <https://www.bronxda.nyc.gov/downloads/pdf/pr/2021/8-2021%20bronxda-announces-dismissal-loitering-prostitution.pdf>; OFFICE OF NEW YORK COUNTY DISTRICT ATTORNEY ALVIN BRAGG, MEMO ON ACHIEVING FAIRNESS AND SAFETY (Jan. 3, 2023), available at <https://assets1.cbsnewsstatic.com/i/cbslocal/wp-content/uploads/sites/14578484/2022/01/Day-One-Letter-Policies-1.03.2022.pdf>.





# Case Study: HIV and Criminal Justice Projects by the New York City Department of Health and Mental Hygiene

# HIV and Criminal Justice Project Proposals: Timeline

- In summer 2021, NYC DOHMH's Bureau of Hepatitis, HIV, and Sexually Transmitted Infections (BHHS) began actively exploring how to address the **intersection of HIV and criminal justice in New York City**, drawing from the New York City Prosecutors' Roundtable on the Criminal Justice Response to HIV and Infectious Diseases in July 2021 and from ongoing discussions with advocates.
- In spring 2022, the CDC approved BHHS's request to use CDC 18-1802 spenddown funding to support our HIV and criminal justice project proposals, and we began working on identifying agencies to carry out this work.
- In June 2022, BHHS joined the White House Convening on HIV Criminalization. Conversations with State and District Attorneys, health department representatives, and White House and CDC officials at the convening further informed our project proposals.

# HIV and Criminal Justice Project Proposals: Timeline (cont.)



- In January 2023, BHHS awarded funding to The Center for HIV Law and Policy to carry out two projects: the **New York City HIV Criminal Justice Stakeholders Project**, and **New York City HIV Criminalization and Data Privacy Project**.

# New York City HIV Criminal Justice Stakeholders Project

As part of the **New York City HIV Criminal Justice Stakeholders Project**, The Center for HIV Law and Policy will:

- Develop informational products (e.g., palm cards, fact sheets) for a diverse array of criminal justice stakeholders (e.g., NYPD officers, prosecutors, public defenders) on the basics of HIV and other infectious disease transmission and on state legislation, regulations, and policies on HIV and infectious disease discrimination and confidentiality; and
- Develop and implement HIV and infectious disease literacy programs for these criminal justice stakeholders.

# New York City HIV Criminalization and Data Privacy Project

As part of the **New York City HIV Criminalization and Data Privacy Project**, The Center for HIV Law and Policy will develop and implement a portfolio of projects related to HIV criminalization and data privacy in New York City and New York State, including but not limited to:

- Conducting analyses of relevant local and state legislation, regulations, and policies, and developing recommendations for improving outdated or stigmatizing content;
- Providing technical assistance to update NYC DOHMH and other City agencies' policies, as needed, for the protection of staff and of New Yorkers with HIV; and
- Promoting this work to other jurisdictions.

# Current Status of Projects

As The Center for HIV Law and Policy develops work plans and timelines for both projects, BHHS is engaging relevant stakeholders to broadly describe the projects and solicit enthusiasm and participation. These stakeholders include:

- Internal stakeholders, including BHHS HIV Epidemiology Program leadership, Division of Disease Control leadership, and Office of General Counsel; and
- External stakeholders, including NYPD, District Attorneys' offices, public defenders (e.g., Legal Aid Society, Legal Services NYC), Mayor's Office of Criminal Justice, among others.

# Contact Information

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Questions?



# Contact Information

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