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How the Conviction and Sentencing of "Tiger Mandingo" Modernized Missouri's HIV-Related Statutes in 2021

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How The Conviction and Sentencing of ‘Tiger Mandingo’ Modernized Missouri’s HIV-Related Statutes in 2021

RYAN JAY McELHOSE*

“I want every person living with HIV to celebrate their birthday, go to the movies, have great sex, and lay on the beach with a cold beverage. I want people living with HIV to live, and it’s on us to build a world where they can, without fear.”- Molly M. Pearson, MSW¹

* J.D. Candidate Class of 2023. I would like to thank my Wrongful Convictions professor, Professor Dwight Aarons, for his guidance; my beyond support partner, Jermal D. Brown, and Professor Rebecca Kite who encouraged me to push myself in the world of legal writing and research. This paper is dedicated to everyone who is working to end the HIV epidemic.

¹Molly M. Pearson, *Prevention is Good, but We Have Yet to Recognize the Humanity of People Living With HIV*, BODY (Aug. 3, 2021), <https://www.thebody.com/article/hiv-criminalization-law-updates-in-Missouri>.

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I. Introduction

With contradictory trial testimony, no genetic fingerprint testing, and little to no questioning of his sexual partners' credibility, Michael Johnson or "[T]iger Mandingo" as he referred to himself on social media, engaged in sexual acts with six different men, all of whom claimed that Michael lied about living with human immunodeficiency virus (HIV). As a result, the State of Missouri charged Michael with two counts of "[r]ecklessly infecting a partner with HIV and four counts of [exposing or attempting to expose] another with HIV."² The jury found Michael Johnson guilty of five felony counts which resulted in a 30-year prison sentence.

On December 20, 2016, the Missouri Court of Appeals overturned Michael Johnson's conviction, holding that "[t]he trial court [had] abused its discretion."³ The reversal of Michael's conviction was, ultimately, the function of a discovery violation; the court did not reach the question of whether Michael's 30-year sentence was cruel and unusual and thus constitutionally impermissible.⁴ However, Michael's conviction and sentencing sparked international attention towards how the United States continues to convict people living with HIV under archaic statutes that do not align with medical and scientific advancements or even moral standing. Today, HIV is a chronic

² Brigid Bone, Note, *Whose Responsibility is it to PrEP for Safe Sex? Archaic HIV Criminalization and Modern Medicine*, 53 WASH. U. J. L. & POL'Y 319 (2017).

³ Joseph F. Lawless, Article, *The Deceptive Fermata of HIV-Criminalization Law: Rereading the Case of "Tiger Mandingo" Through the Juridico-Affective*, 35.1 COLUM. J. GENDER & L. 117 (2017).

⁴ *Id.*

disease, like diabetes, yet exposure to HIV is still treated as if it is a ‘death sentence’ in both public opinion and American jurisprudence.⁵ These convictions and sentencing guidelines result in harsh sentences for punishments that do not match the “[c]rime,” misplaces responsibility when two consenting adults choose to have sex and raises the possibility of exposing people to wrongful convictions.

On August 28, 2021, the state of Missouri modernized its HIV statutes from the 1980s to lower the punishment for exposure to HIV and raised the level of intent prosecutors must prove to convict a person living with HIV of a felony. While modernization is a step in the right direction, the modernized law needs to be analyzed to determine whether the law is up to speed with the science and if people living with HIV are still vulnerable to harsh sentences and wrongful convictions.

In this expository, Section I gives background information on Michael Johnson, what is (and is not) HIV, HIV criminalization laws in the United States, a brief history of HIV criminalization laws in Missouri, and Michael Johnson’s trial, conviction, appeal, and release from prison. Section II highlights how Missouri updated its statute and expanded HIV prevention services, both in 2021. Section III analyzes how the modernized law has some legal considerations: whether the language of intent should be narrowed from

⁵ Bone, *supra* note 2, at 230.

knowingly to purposefully, whether the standard of punishment should be reduced from a felony to a misdemeanor, whether an undetectable viral load is the appropriate standard to protect people living with HIV from being charged with knowingly transmitting or exposing someone through an activity that creates a substantial risk of transmission, whether HIV prevention medicine such as PrEP and PEP helps place all sexually active consenting adults responsible for their sexual health in the eyes of the law, and how courts and lawmakers should respond when the accuser alleges that the accused did not disclose their status when the accused asserts that there was a disclosure of their HIV status.

II. Who is Tiger Mandingo?

Michael Lewis Thompson was born on December 11th, 1991, in Indianapolis, Indiana.⁶ He was the youngest of five sons to a single mother.⁷ Michael and his mother both believe that he has dyslexia which resulted in him enrolling in special education classes.⁸ None of his classes mentioned homosexuality – which he internalized to mean that it was wrong for him to be gay.⁹ By high school, Michael had a successful wrestling career which culminated by winning the Indiana State Wrestling Championship in 2010, during his senior year.¹⁰ Coupled with practiced

⁶ Michael Johnson, NAT'L BLACK JUST. COAL., <https://beenhere.org/2017/12/11/michael-johnson/> (last visited Nov. 19, 2021).

⁷ Steven Thrasher, *How College Wrestling Star “Tiger Mandingo” Became an HIV Scapegoat*, BUZZFEED (Jul. 7, 2014), [hereinafter Thrasher I], <https://www.buzzfeed.com/steventhrasher/how-college-wrestling-star-tiger-mandingo-became-an-hiv-scap>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

discipline, Michael would wear his “[l]ucky tiger shirt” to his wrestling matches, becoming “[T]iger” the wrestler.¹¹ Later on, Michael was also exploring his identity as someone both black and gay by walking in ballroom house balls, joining the House of Mizrahi.¹² The wrestling ring transformed Michael to Tiger and the ballroom scene transformed him from Tiger to Tiger Mandingo.¹³

After high school, Michael enrolled at Lincoln Junior College in Lincoln, Illinois, where he earned an associate’s degree in General Studies¹⁴ and won the National Junior Wrestling Championships in 2012.¹⁵ As a result, Lindenwood University, a private liberal arts university located in St. Charles, Missouri, recruited Michael to continue his education and also to wrestle.¹⁶ St. Charles has a 91 percent white population.¹⁷ At Lindenwood, Michael was generally accepted on-campus; however, a former teammate reported that at least one student athlete did not want to practice with him, and no one reportedly volunteered to wrestle with him either.¹⁸ At the same time, Michael introduced himself as Tiger Mandingo on social media platforms and dating profiles.¹⁹ While in college, on January 7th, 2013, Michael was diagnosed with human immunodeficiency virus (HIV), and signed a legal form²⁰ which acknowledged that he understood his diagnosis and that

¹¹ *Id.*

¹² NAT’L BLACK JUST. COAL., *supra* note 6.

¹³ *Id.*

¹⁴ *More on Michael*, FREE MICHAEL JOHNSON, <https://freemichaeljohnson.org/more-on-michael/> (last visited Nov. 22, 2021).

¹⁵ Thrasher I, *supra* note 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ NAT’L BLACK JUST. COAL., *supra* note 6.

¹⁹ Thrasher I, *supra* note 7.

²⁰ *Id.*

any time he had sex with someone without disclosing that he is living with HIV, he would be breaking the law, subject to a possible felony conviction.

III. What is (And is Not) HIV?

HIV is a virus that attacks cells in the body that fights infections, resulting in a person being more susceptible to other infections and diseases.²¹ HIV is transmitted by contact with certain bodily fluids of a person living with HIV, most commonly during condomless sex or through sharing injection drug equipment²². If left untreated, HIV can lead to *acquired immunodeficiency syndrome* (AIDS). In the United States, gay, bisexual, and other men who have sex with men are the population most affected by HIV.²³ According to Centers for Disease Control and Preventions (CDC), in 2018, gay and bisexual men accounted for 69 percent of new HIV diagnoses.²⁴ By race/ethnicity, “[B]lack/African Americans and Hispanics/Latinos are disproportionately affected by HIV compared to other racial and ethnic groups.”²⁵

²¹ *What Are HIV and AIDS?*, HIV.GOV, [hereinafter *What Are HIV and AIDS?*], <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids> (last visited Nov. 19, 2021).

²² *Id.*

²³ *Who Is at Risk for HIV?*, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/who-is-at-risk-for-hiv> (last updated May 27, 2020).

²⁴ *Diagnoses of HIV Infection in the United States and Dependent Areas, 2018: Gay, Bisexual, and Other Men Who Have Sex with Men*, CDC, <https://www.cdc.gov/hiv/library/reports/hiv-surveillance/vol-31/content/msm.html> (last visited Nov. 19, 2021).

²⁵ *HIV and African American People*, CDC, <https://www.cdc.gov/hiv/group/raciaethnic/africanamericans/index.html> (last reviewed Feb. 4, 2022); *HIV and Hispanic/Latino People*, CDC, <https://www.cdc.gov/hiv/group/raciaethnic/hispanic-latino/index.html> (last reviewed Feb. 4, 2022).

A person can only get HIV by coming into direct contact with certain body fluids from a person with HIV who has a detectable viral load.²⁶ These fluids include blood, breast milk, rectal fluids, semen and pre-seminal fluid, and vaginal fluids.²⁷ For transmission to occur, HIV in these fluids must get into the bloodstream of a person not living with HIV through a mucous membrane (found in the rectum, vagina, mouth, or tip of the penis); open cuts or sores; or by direct injection.²⁸ HIV is not spread by air or water; drinking fountains; engaging in closed-mouth or “[s]ocial” kissing with a person with HIV; mosquitoes, ticks, or other insects; saliva, tears, or sweat that is not mixed with the blood of a person with HIV; shaking hands, hugging, sharing toilets, sharing dishes, silverware, or drinking glasses; or other sexual activities that do not involve the exchange of body fluids (e.g. touching).²⁹

A positive HIV diagnosis should not be taken lightly; however, with HIV treatment and care, the diagnosis is no longer a “[d]eath sentence.”³⁰ Presently, although the human body cannot rid itself of HIV and no effective HIV cure exists, it is treatable by taking HIV medicine called antiretroviral therapy (ART).³¹ As a result of years of research which led to this groundbreaking medication, people living with HIV live long and healthy lives and prevent transmitting HIV to their

²⁶ *How Is HIV Transmitted?*, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/how-is-hiv-transmitted> (last updated June 24, 2019).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Marley Vogel, *No Longer a Death Sentence: The Evolution and Development of HIV in the U.S.*, WASH. U. ST. LOUIS INST. PUB. HEALTH (July 22, 2021), <https://publichealth.wustl.edu/no-longer-a-death-sentence-the-evolution-development-of-hiv-in-the-u-s/>.

³¹ *What Are HIV and AIDS?*, *supra* note 21.

sexual partners.³² In addition, there are effective methods to prevent HIV through sex or drug use, including pre-exposure prophylaxis (PrEP)³³ and post-exposure prophylaxis (PeP).³⁴

In addition, an overwhelming amount of clinical evidence firmly established the *Undetectable=Untransmittable* (U=U) campaign as scientifically sound.³⁵ U=U means that people living with HIV who achieve and maintain an undetectable viral load—the amount of HIV in the blood—by taking and adhering to ART as prescribed cannot sexually transmit HIV to others.³⁶ The U=U campaign was launched after three large studies³⁷ on sexual transmission of HIV were conducted with thousands of serodiscordant couples, meaning one partner living with HIV and another partner not living with HIV.³⁸ In these studies, not a single case of HIV was transmitted from someone who was virally suppressed to their partner that was not living with HIV.³⁹

³² *Id.*

³³ *Pre-Exposure Prophylaxis*, HIV.GOV, <https://www.hiv.gov/hiv-basics/hiv-prevention/using-hiv-medication-to-reduce-risk/pre-exposure-prophylaxis> (last updated Jan. 7, 2022).

³⁴ *Post-Exposure Prophylaxis*, HIV.GOV, <https://www.hiv.gov/hiv-basics/hiv-prevention/using-hiv-medication-to-reduce-risk/post-exposure-prophylaxis>, (last updated Apr. 28, 2021).

³⁵ Robert W. Eisinger et al., *The Science is Clear: With HIV, Undetectable Equals Untransmittable*, NIH (Jan. 10, 2019), <https://www.nih.gov/news-events/news-releases/science-clear-hiv-undetectable-equals-untransmittable>.

³⁶ *Id.*

³⁷ Rose McKeon Olson & Robert Goldstein, *U=U: Ending Stigma and Empowering People Living with HIV*, HARV. HEALTH PUBL'G: HARV. MED. SCH. (Apr. 22, 2020), <https://www.health.harvard.edu/blog/uu-ending-stigma-and-empowering-people-living-with-hiv-2020042219583>.

³⁸ *Id.*

³⁹ *Id.*

IV. HIV Statutes in the United States

According to 2020 data from the Center for HIV Law & Policy, thirty-two states have HIV-specific criminal laws and/or sentencing enhancement applicable to people living with HIV.⁴⁰ Twenty-five states have prosecuted people living with HIV under non-specific, general criminal laws.⁴¹ Eight states have sentencing enhancements applicable to people living with HIV who commit an underlying sexual assault crime.⁴² Six states may require registration as a sex offender as part of the punishment under HIV-specific laws.⁴³ Twenty-eight states have HIV-specific criminal laws including laws targeting sex/non-disclosure, exposure to bodily fluids, needle sharing, sex work, and blood/organ/semen donation; Missouri in particular has an expansive history of being one of those states.⁴⁴

The Missouri HIV statute (Mo. Rev. Stat. 191.677) was originally passed in 1988, at a time when living with HIV meant debilitating symptoms and rapid decline resulting in death for many people.⁴⁵ The statute has been revised in 1997 and 2002, becoming more severe for people living with HIV.⁴⁶ During the time Michael was enrolled at Lindenwood University, Missouri law allowed prosecutors

⁴⁰ CTR. FOR HIV L. & POL'Y, HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON THE STATE AND FEDERAL CRIMINAL LAW AND PRACTICE, <https://www.hivlawandpolicy.org/sourcebook> (last updated Feb. 2022).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Mayo Schreiber Jr., *An update on the prosecution, conviction, and appeal of Michael Johnson*, APA (Mar. 2017), <https://www.apa.org/pi/aids/resources/exchange/2017/03/michael-johnson>. *See generally*

Gene P. Schultz & Meg Reuter, *AIDS Legislation in Missouri: An Analysis and a Proposal*, 53 MO. L. REV., 1 (1988).

⁴⁶ Schreiber Jr., *supra* note 45.

to charge people living with HIV with a felony based on whether the person can prove if they disclosed their HIV status to their sexual partner.⁴⁷ If someone knew that they were living with HIV and did not disclose their status before engaging in sexual activities, Missouri law considered that action to be a reckless HIV exposure, even if the person that was living with HIV did not have transmittable HIV.⁴⁸ As a result, the state would charge the accused person with a Class A felony (punishable by 15-30 years in prison) if transmission occurred and a Class B felony (punishable by five – 15 years in prison), if no HIV transmission occurred.⁴⁹ Several Missouri laws punished people living with HIV based on their status. In fact, between 1990 and 2019, at least 593 people were arrested in Missouri for an “[H]IV/hepatitis crime,” including 318 people who were convicted for those crimes.⁵⁰ Data shows that Missouri had one arrest for an “[H]IV crime” for every 60 people living with HIV in Missouri.⁵¹

V. Michael Johnson is Arrested

One of the men that Michael had sex with during college was DKL, a white male college student, in Michael’s dorm room in late January 2013.⁵² Later that year, the same student and Michael had condomless sex noting that Michael is

⁴⁷ Thrasher I, *supra* note 7.

⁴⁸ *Lawmakers Pass Legislation to Update Missouri’s Outdated Missouri’s Outdated HIV Criminalization Laws*, EMPOWER MO. (May 14, 2021), <https://empowermissouri.org/lawmakers-pass-legislation-to-update-missouris-outdated-hiv-criminalization-laws/>.

⁴⁹ *Id.*

⁵⁰ *The Criminalization of HIV and Hepatitis B and C in Missouri*, UCLA SCH. L. WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/wp-content/uploads/MO-HIV-Criminalization-Fact-Sheet.pdf>.

⁵¹ *Id.*

⁵² Thrasher I, *supra* note 7.

“[h]uge,” “[o]nly my third [B]lack guy,” and alleged that Michael told him that he was “[c]lean.”⁵³ The student also disclosed that, between the period of the two sexual encounters with Michael, he had condomless sex with “[f]riends and ex-boyfriends,” and “[w]ith people [he] barely knew.”⁵⁴ In those cases, he said, “[I] knew they were clean,” sometimes just “[b]y looking at them.”⁵⁵ DKL was put in contact with an epidemiology specialist at the Missouri Department of Health, where the healthcare worker recommended DKL go to the police and provided him with two Missouri statutes as reference.⁵⁶ On October 10th, 2014, Michael was pulled out of class and the St. Charles police immediately placed handcuffs on him.⁵⁷ The prosecutor’s office charged Michael with two counts of “[r]ecklessly infecting another with HIV” and four counts of “[a]ttempting to recklessly infect another with HIV,” all which are felonies in the state of Missouri.⁵⁸

Steven Thrasher, Northwestern University Assistant Professor and Daniel H. Renberg Chair of the Medill School of Journalism, Media, Integrated Marketing Communications, noted that being Tiger Mandingo won Michael male admirers⁵⁹. He writes, “[W]ith social media, [Michael] experimented with sexually charged outlaw and slave motifs using his well-toned body. [Michael] was not the only person who enjoyed the role-playing — his persona had no shortage of willing

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Michael Johnson / Tiger Mandingo, Truer Crime with Celisia Stanton* (June 22, 2021) (downloaded using Spotify).

⁵⁷ Thrasher I, *supra* note 7.

⁵⁸ *Id.*

⁵⁹ *Id.*

white sex partners in St. Charles who wanted to be ‘[s]eeded’ by a strong black bull.”⁶⁰ Sad to be true; however, Michael was the only one facing any consequences because of it, and it was taken up with the law.

VI. Michael Johnson’s Race, Sexuality, and HIV Status on Trial

Months in solitary confinement did not encourage Michael Johnson to accept a plea deal because he asserted his innocence and had confidence in the U.S. legal system.⁶¹ However, in many facets, Michael’s race, sexuality, and HIV status were all on trial. His jury consisted of four white men, seven white women, and an African American retired nurse, all jurors were heterosexual and not living with HIV.⁶² Many of Michael’s sexual partners were white and all were consenting adults.⁶³ Michael’s first accuser (DKL) asserted that Michael transmitted HIV to him in the dorm room on Lindenwood campus in late January 2013.⁶⁴ Two weeks following their consensual encounter, DKL testified that he was hospitalized twice with severe stomach pains.⁶⁵ DKL was eventually diagnosed with gonorrhea and HIV.⁶⁶ Although the timing of DKL’s diagnoses formed the circumstantial basis of evidence tying DKL’s diagnoses to Michael’s, no scientific tests, such as genetic fingerprinting of the virus, were conducted to determine whether DKL’s strain of

⁶⁰ *Id.*

⁶¹ Steven Thrasher, *A Black Body on Trial: The Conviction of HIV Positive ‘Tiger Mandingo,’* BUZZFEED (November 30, 2015, 8:26 PM), [hereinafter Thrasher II], <https://www.buzzfeednews.com/article/steventhrasher/a-black-body-on-trial-the-conviction-of-hiv-positive-tiger-m>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

HIV was the same as Michael’s strain of HIV.⁶⁷ Also, the police reports indicated that DKL originally said that he “[h]ad been able to narrow [his sexual partners] down between two people.”⁶⁸ Furthermore, a friend of DKL’s believed that he had been dating a third person roughly 8.5 months prior to experiencing symptoms of contracting HIV.⁶⁹ The five other accusers on trial were discredited or occasionally made crucial contradictory statements from the police report during cross examination.⁷⁰

The medical professional who personally examined Michael did testify that Michael tested positive for HIV before he had sex with the six partners and that he had been treated for gonorrhea at least three times.⁷¹ Also, the doctor who treated DKL testified for the prosecution and characterized HIV as a terminal disease.⁷² However, two medical professionals testified that HIV is a manageable disease with current therapies (ART).⁷³ The defense’s medical witness, Dr. Rupa Patel, testified that when treated properly by taking as little as one pill a day, life expectancy should be normal.⁷⁴ The disconnect between the science and the law caused tension in the courtroom, to the point that the prosecution was loudly accusing the medical witness of being paid off by the public defender, which resulted in the public

⁶⁷ *Id.*

⁶⁸ Reporting Officer Narrative, St. Charles Police Department, Police Report - Dylan King Lemons (May 29, 2013), at 6, <https://www.documentcloud.org/documents/2580257-police-report-dylan-king-lemons.html#document/>.

⁶⁹ *Id.* at 7.

⁷⁰ Thrasher II, *supra* note 61.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

defender crying, running out of the courtroom – leaving Michael alone without his counsel.⁷⁵

VII. The Conviction of Michael Johnson

The jury found Michael not guilty on all charges involving *one* of the accusers but found him guilty of recklessly transmitting HIV to DKL and of exposing or attempting to expose four men with HIV.⁷⁶ At sentencing, for the transmission conviction alone, the minimum sentence was 10 years, while the maximum, according to the statute, was “[3]0 years to life.”⁷⁷ The mother of DKL testified that her son’s “[d]iagnosis is a life sentence without parole [...] So I ask each of you: Why does Michael Johnson deserve any less?”⁷⁸ As for the prosecution, Philip Groenweghe compared this case with the murder cases he had tried in his career. He argued that this case was worse than his murder cases because “[a] murder ended when a gun or knife killed someone, but the AIDS virus that passed through [Michael] could still be killing people for years.”⁷⁹ He charged that HIV has a “[m]indless agenda” and Michael Johnson was the “[p]erfect host.”⁸⁰ The presiding judge read that the jury condemned Johnson to 30 years in prison for HIV transmission and an additional 30.5 years of sentencing for three counts of exposure and one attempt to expose to HIV — meaning Johnson could have served 60.5 years

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

in prison if the judge ordered the sentences to be served consecutively.⁸¹ Ultimately, on July 13th 2015, the presiding judge ruled that Michael could serve his sentences concurrently and sentenced him to 30 years in prison.⁸²

This offense was Michael's first; yet, his sentence was longer than the average sentence for almost every other crime in the state of Missouri.⁸³ According to the Missouri Department of Corrections, Michael's sentence exceeds the average for physical assault (19.9 years), forcible rape with a weapon (28.2 years), and even second-degree murder (25.2 years).⁸⁴ In fact, to compare, Michael's sentencing was similar to class A felonies in Missouri, such as murder in the first degree, Mo. Rev. Stat. §565.020, and infanticide, §565.300.2.⁸⁵

After sentencing, Michael expressed that he had no regrets on not taking the deal because although he "...[c]ould have been home sooner with [his] family, and they'd have loved [him]... [to] come home, ...[he] was never going to take a plea" because "[i]t would have been morally wrong."⁸⁶ He added, "[I] wasn't raised to give up because something is hard."⁸⁷ He also expressed a belief that he would ultimately be found innocent on appeal. Michael believed, "[I] couldn't just let it be because I'm Black, and I'm in a place where being gay and HIV-positive is hard, that you shouldn't still believe that the system works."⁸⁸

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Schreiber Jr., *supra* note 45.

⁸⁶ Thrasher II, *supra* note 61.

⁸⁷ *Id.*

⁸⁸ *Id.*

VIII. The Appeal and Overturn of Michael Johnson's Conviction

Michael's appellant's brief in the Missouri Court of Appeals, Eastern District, was filed by his appellate counsel on April 21, 2016, raising three arguments, two procedural and one argument that he received a disproportionate sentence in violation of the Eighth Amendment.⁸⁹ Not only did Michael's trial garner international media attention, but also his conviction and appellate process. In response to the conviction, The Center for HIV Law and Policy, spearheaded the drafting and filing of an amicus brief to the court.⁹⁰

In an opinion filed on December 20, 2016, the Missouri Court of Appeals reversed the judgment of the trial court and remanded for a new trial.⁹¹ The Court found that the trial court abused its discretion on Michael's first point of appeal and did not reach the constitutional and federal disability arguments raised in Johnson's second point and in the amicus brief.⁹² The court based its decision on the finding that the state's disclosure of jailhouse telephone recordings on the first day of trial rendered his trial fundamentally unfair, as it was "[k]nowing and intentional and was part of a trial-by-ambush strategy."⁹³ Four months later, the ruling to throw out Michael's conviction was upheld by the Missouri Supreme Court.⁹⁴ Prosecutors

⁸⁹ Schreiber Jr., *supra* note 45.

⁹⁰ Brief for AIDS Law Project et al. as Amici Curiae in Support of Appellant, *State v. Johnson*, 513 S.W.3d 360 (Mo. Ct. App. 2016) (No. ED103217).

⁹¹ *State v. Johnson*, 513 S.W.3d 360 (Mo. Ct. App. 2016).

⁹² Schreiber Jr., *supra* note 45.

⁹³ *Id.*

⁹⁴ NAT'L BLACK JUST. COAL., *supra* note 6.

said they would retry Michael but instead agreed to a plea deal that Michael took in September 2017.⁹⁵ Michael pleaded no contest to one count of knowingly transmitting HIV to DKL and to the four counts of exposing four others to HIV.⁹⁶ He accepted a sentence of ten years with eligibility for parole within six to eighteen months.⁹⁷ In addition, because he pleaded to charges under a health statute, he was not required to register as a sex offender in Missouri, where he was incarcerated, or Indiana, his place of birth.⁹⁸

Is it possible that Michael Johnson was wrongfully convicted?

According to the National Institute of Justice, a conviction may be classified as wrongful for two reasons:

1. The person convicted is factually innocent of the charges.
2. There were procedural errors that violated the convicted person's rights.⁹⁹

In Michael's case, the state did not disclose the jailhouse telephone recordings until the first day of trial, which rendered the trial fundamentally unfair. Because Michael Johnson's Fifth Amendment due process rights were violated by the prosecutor's office, it is fair to conclude that the state wrongfully convicted Michael Johnson based on the procedural errors that violated his rights, meeting the second criteria of the National Institute of Justice's definition of a wrongful conviction. However, is it possible that Michael Johnson was also factually innocent of the charges?

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Wrongful Convictions*, NAT'L INST. JUST., <https://nij.ojp.gov/topics/justice-system-reform/wrongful-convictions> (last visited November 22, 2021).

When Michael Johnson was released from prison, he still asserted that he told all his partners his HIV status prior to engaging in condomless sex.¹⁰⁰ Six of his partners asserted that he either transmitted, exposed, or attempted to expose HIV to them. Out of the two people who accused Michael of transmitting HIV, the jury found Michael not guilty on all counts for one of the accusers. With the other sexual partner who accused him of transmission, he could not narrow his sexual partners to one person, yet the prosecutors did not conduct a genetic fingerprinting test to trace if DKL and Michael shared the same HIV strain. Also, the credibility of Michael's sexual partners was not on trial — not as to whether they may have exposed themselves to HIV through other sexual encounters, or if they were to be believed about what they were saying about Michael.¹⁰¹ Finally, none of the sexual partners were ever asked if they bore any responsibility for the sex they consented to with Michael.¹⁰² With all things considered, is it possible that Michael Johnson could be wrongfully convicted according to the first definition provided by the National Institute of Justice?

According to Larry Gostin, former director of US AIDS Litigation Project at Harvard University and current Linda D. and Timothy J. O'Neill Professor of Global Health Law at Georgetown University,¹⁰³ in the early 2000s there was 'a lot

¹⁰⁰ Graham Gremore, *College Wrestler Speaks Out After HIV Case: "I Was A Scary Big Black Gay Man Out to Cause Harm,"* QUEERTY (Jul. 17, 2019, 3:07 PM), <https://www.queerty.com/college-wrestler-speaks-hiv-case-scary-big-black-gay-man-cause-harm-20190717>.

¹⁰¹ Thrasher II, *supra* note 86

¹⁰² *Id.*

¹⁰³ *Lawrence O. Gostin*, GEO. U., <https://globalhealth.georgetown.edu/people/lawrence-o-gostin> (last visited November 22, 2021).

of interest' in the United States using genetic sequences from HIV in court cases between sexual partners.¹⁰⁴ Genetic fingerprinting for purposes of litigation has not only peaked interest in the United States but during criminal proceedings in Australia¹⁰⁵ and Sweden.¹⁰⁶ In fact, scientists in the United States and Great Britain have used viral genetic studies to show that a surgeon living with HIV in Baltimore did not transmit HIV to a woman he treated.¹⁰⁷ The woman asserted that she had no other factors that would put her at risk for exposure or transmission of HIV, but it was then uncovered that she had received a blood transfusion at the time of the operation.¹⁰⁸ The international scientists proved that the strains of HIV in the donated blood were much more closely related to the woman's strains than the strains of HIV in the surgeon.¹⁰⁹ International scientists also report that the use of vital genetic data for forensic science is much more complex than other techniques, such as DNA fingerprinting.¹¹⁰ Scientists would have to purify and clone samples of HIV from the parties involved to then compare the sequences of viral DNA.¹¹¹ In one case in Florida, sequences of DNA from five patients' strains were 'virtually

¹⁰⁴ Phyllida Brown, *Lawyers Look to Genetics to Prove HIV 'Guilt,'* NEW SCIENTIST (July 10, 1992), <https://www.newscientist.com/article/mg13518290-500-lawyers-look-to-genetics-to-prove-hiv-guilt/>.

¹⁰⁵ *Tracking HIV Transmission Through DNA*, POZ, (Apr. 30, 2007),

<https://www.poz.com/article/Tracking-HIV-Transmission-Through-DNA-11783-5006>.

¹⁰⁶ Liz Hunt, *HIV Data Used in Court to Link Rapist and Victim*, INDEPENDENT (Feb. 18, 1993, 12:02 AM), <https://www.independent.co.uk/news/uk/hiv-data-used-in-court-to-link-rapist-and-victim-1473601.html>.

¹⁰⁷ Brown, *supra* note 104.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

identical' to sequences of a dentist who was living with HIV and treated them as his patients.¹¹²

Relating to Michael's case, Michael did not deny that he had sex with DKL. In fact, he conceded to that fact. Michael said he disclosed his HIV status and the two continued to have condomless sex. DKL asserted that Michael told him during all sexual encounters that he was "[c]lean." The police reports also indicated that DKL had condomless sex with more people than just Michael and could tell if some of his partners were "[c]lean" just "[b]y looking at them." What is unclear is why the prosecutors did not test the strains of HIV to address the issue of tracing the strain. Could DKL's strains and Michael's strains be tested now? Likely not. At this point, according to international scientists, someone who has been living with HIV for more than four years "[w]ould be hard-pressed to point blame at any single individual because their strains would have diverged so much in that time."¹¹³ In fact, one scientist mentioned, "[F]or the courts to rely exclusively on such data would be a major mistake."¹¹⁴

Also, genetic fingerprinting is costly. Scientists posit that an uptick in lawsuits will arise because of genetic fingerprinting which will become a burden on research facilities. International scientists have agreed that cases where healthcare workers and patients are involved must be analyzed through genetic testing because of the important implications as it relates to public health.¹¹⁵ However, proving

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

transmission between consenting adults is more of an interest to lawyers, they confess.¹¹⁶ One of the scientists estimated the cost of the test to range from \$10,000 to \$100,000.¹¹⁷

Not only is genetic fingerprinting costly, but it is not a perfect system and could consequently end up perpetuating wrongful convictions. In the late 1990s, a Louisiana gastroenterologist was found guilty of “[a]ttempted murder” for deliberately transmitting HIV to a former lover after she threatened to break off their decade-long affair.¹¹⁸ This was in the first criminal case in the United States that used a DNA analysis of HIV strains.¹¹⁹ She alleged that he replaced her regular vitamin injections with blood with HIV, from his patients.¹²⁰ The prosecution arranged for an analysis of the HIV strains in the blood samples of the defendant’s patients to determine whether the gene sequences were closely related.¹²¹ The prosecution reported that the strains from the two samples were more closely related to each other than to a set of controls from other people living with HIV in the Lafayette, Louisiana, area.¹²²

Further, the prosecution presented evidence that seven men with whom the woman had sex with between 1984 and 1995 (including the defendant) had all tested negative for HIV.¹²³ On the other hand, the defense called a witness, Bette

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Gretchen Vogel, *DNA Strain Analysis Debuts in Murder Trial*, SCIENCE.ORG (Oct. 27, 1998), <https://www.science.org/content/article/dna-strain-analysis-debuts-murder-trial>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Korber, the then-head of the national HIV database at Los Alamos National Laboratory, who told the jury that the similarity between the strains “[c]ould have been mere chance.”¹²⁴ Following a search of a database of HIV strains in Louisiana, she reported that two pairs of different viral infections appeared to be more closely related than the patient’s and the victim’s strain, with no known or probable links to each other.¹²⁵

With all things considered, genetic fingerprinting could have determined whether DKL and Michael Johnson shared the same HIV strain. This science would have been helpful to give the prosecution office more than circumstantial and corroborating evidence. However, the Louisiana case shows that genetic fingerprinting is not a perfect tool which could lead to multiple similar strains, potentially leaving people exposed to wrongful convictions. Also, matching the strains of HIV does not help determine whether Michael told DKL that he is living with HIV and whether DKL consented to having condomless sex with him.

In a case of wrongful sentencing rather than conviction: Does research explain how a Black gay male who has committed his first offense can be given a 30-year sentence in prison?

Research shows a racial dynamic exists as to who is prosecuted and for “[e]xposing others to HIV” and how certain people are sentenced.¹²⁶ A study published in the *AIDS and Behavior* journal examined HIV “[c]riminal exposure”

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Thrasher I, *supra* note 7.

and prosecutions in Nashville, Tennessee, from 2000-2010.¹²⁷ The research found that “[P]ersons who were [B]lack were more likely to be convicted of criminal HIV exposure related to a sexual interaction than persons who were white,” and that “[i]ndividuals who were [B]lack received significantly longer sentences than those who were white.”¹²⁸

IX. Michael Johnson Is Released from Prison

In July 2019, Michael was released from custody.¹²⁹ In an interview with his local TV news station, Michael continued to assert his innocence. In the interview, he believed that he was painted out to be a villain by the media and prosecutors as a “[s]cary big [B]lack gay man wrestler that was out to cause harm.”¹³⁰ When asked if he was dishonest with his sexual partners about his HIV status, Michael responded, “[I] would never think of doing that to anyone [...]. I do not have anything to prove that the person was lying and that I was telling the truth. And it was a he-said, he-said situation.”¹³¹ When Michael was released from prison, he shared that he aspires to go back to school to finish his degree in the hopes of becoming a wrestling coach.¹³² He also wants to use his story to help get HIV transmission laws repealed not just in Missouri, but throughout the country.¹³³

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Gremore, *supra* note 100.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

X. HIV in Missouri in 2021

Six years following Michael's sentence, Missouri's Republican Governor, Mike Parson, signed *Senate Bill 53* (SB-53) that included provisions to reform the state's HIV crime laws.¹³⁴ Senator Holly Rehder (R-27) and Representative Phil Christofanelli (R-105) introduced the legislation with the aim to rewrite Missouri's HIV-specific criminal laws.¹³⁵ The law took effect on August 28, 2021.¹³⁶ Hereinafter, SB-53 will be referenced as the Serious Infectious or Communicable Disease Law and as the modernized law. This law is wide-ranging as it also bans chokeholds, requires jails and prisons to provide vaginal hygiene products at no cost and allows prosecutors to challenge wrongful convictions, among other provisions.¹³⁷ Four different versions of the bill were filed in four different legislative sessions before it was finally passed.¹³⁸ Here is a summary of the modernized law:

EXPOSING OTHERS TO SERIOUS INFECTIOUS OR
COMMUNICABLE DISEASES (Sections 191.677, 545.940,
575.155, & 575.157)¹³⁹

Under current law, it is illegal for a person knowingly infected with HIV to donate blood, organs, tissue, or sperm, unless for medical research, as well as illegal for such person to act recklessly in

¹³⁴ Trenton Straube, *Missouri Takes "A Really Strong Step" in Updating Its HIV Crime Laws*, POZ (July 16, 2021) <https://www.poz.com/article/missouri-takes-really-strong-step-updating-hiv-crime-laws>.

¹³⁵ EMPOWER MO., *supra* note 48.

¹³⁶ Straube, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ Sophie Hurwitz, *After 30 Years, Missouri Reforms HIV Transmission Criminalization Law*, MO. INDEP. (Aug. 5, 2021), <https://missouriindependent.com/2021/08/05/after-30-years-missouri-reforms-hiv-transmission-criminalization-law/>.

¹³⁹ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (bill summary by Mary Grace Bruntrager, Staff Attorney, Missouri Senate Research Office).

exposing another person to HIV without their knowledge and consent.

This act modifies those provisions to make it unlawful for a person knowingly infected with a serious infectious or communicable disease to: (1) donate blood, organs, tissue, or sperm, unless for medical research or as deemed medically appropriate by a licensed physician; (2) knowingly expose another person to the disease through an activity that creates a substantial risk of transmission; or (3) act in a reckless manner by exposing another person to the disease through an activity that creates a substantial risk of disease transmission. A “serious infectious or communicable disease” is defined as a non-airborne or non-respiratory disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management. The penalty for donation of blood, organs, tissue, or sperm while knowingly infected with the disease or knowingly exposing another person to the disease shall be a Class D felony, rather than the current Class B felony, and a Class C felony, rather than the current Class A felony, if the victim contracts the disease. The penalty for recklessly exposing another person is a Class A misdemeanor.

It shall be an affirmative defense to this offense if the person exposed to the disease knew that the infected person was infected with the disease at the time of the exposure and consented to the exposure.

This act specifies the actions to be taken during a judicial proceeding to protect the identifying information of the victim and the defendant from public release, except as otherwise specified. Additionally, this amendment changes similar provisions involving exposure of persons in correctional centers, jails, or certain mental health facilities to HIV or hepatitis B or C to exposure to a serious infectious or communicable disease when the nature of the exposure to the bodily fluid has been scientifically shown to be a means of transmission of the disease.

These provisions are identical to provisions in SCS/HB 530 & HCS/HB 292 (2021) and substantially similar to HCS/HB 755 (2021) and SCS/SB 65 (2021) and similar to HB 1691 (2020).

Missouri also joins Oregon and California to approve a bill to increase access to HIV risk prevention medication. State Sen. Greg Razer (D-25) and state Rep. Phil Christofanelli (R-105) backed the legislation with support from Empower Missouri and the Missouri HIV Justice Coalition to allow pharmacists to dispense

post-exposure prophylaxis (often referred to as PEP) without a doctor’s prescription to anyone who fears that they might have been exposed to HIV.¹⁴⁰ If taken within 72 hours after exposure, PEP reduces the risk of contracting HIV by more than 80 percent.¹⁴¹ By law, pharmacists must be authorized by a licensed doctor who determines the protocol to dispense the medication.¹⁴² This law has a similar protocol that is in place for pharmacists who are authorized to administer vaccines.¹⁴³ Mallory Rusch, the Executive Director of Empower Missouri, a Missouri-based HIV advocacy organization, notes, “[O]ne of the goals of the Missouri HIV Justice Coalition is to ensure that all Missourians will have unfettered access to HIV testing and treatment. [...] The passage of this legislation is a huge step towards this goal and will have a measurable impact in reducing the spread of HIV in our communities. We’re proud that Missouri is now a national leader in the movement to expand access to PEP.”¹⁴⁴

Analyzing The Serious Infectious or Communicable Disease Law

This analysis of the Serious Infectious or Communicable Disease law involves the implication of HIV exposure or transmission, from two consenting adults. This analysis does not include non-consensual sex between adults and sex between adults and children, which is also legally non-consensual. Adult survivors of sexual

¹⁴⁰ *Missouri Approves Bill to Increase Access to HIV Risk Prevention Drug*, ST. LOUIS AM., http://www.stlamerican.com/business/business_news/missouri-approves-bill-to-increase-access-to-hiv-risk-prevention-drug/article_b49023f2-b77d-11eb-bdd7-8329cc47244f.html (last visited November 23, 2021).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

assault do not have the opportunity to consent. In addition to the assault itself, survivors are subjected to the additional risk of exposure or transmission itself. Also, sex between an adult and children is criminalized in the United States to protect children who are not yet capable of making informed decisions to protect their interests. As a result, this analysis only focuses on the impact of the modernized law on consenting adults in Missouri.

The most apparent changes include the crime of “[r]eckless exposure” of someone to HIV has been downgraded from a Class B felony to a Class D felony.¹⁴⁵ The law lowers the punishment for exposure to HIV and raises the level of intent prosecutors must prove in order to convict a person living with HIV of a felony.¹⁴⁶ The standard was “[r]ecklessly” expose someone to HIV; now, prosecutors must prove the person with HIV “[k]nowingly” exposed their partner to HIV.¹⁴⁷ Further, if HIV is transmitted, the minimum sentence the person with HIV can now face is three years instead of 10 years. The law also states that if a person acts “[i]n a reckless manner by exposing” someone to an infectious or communicable disease, a person could be charged with a Class A misdemeanor and be jailed for up to one year.¹⁴⁸ The modernized law also eliminates the “[c]ondom use is not a defense” provision and allows both the accusers and the accused to maintain the privacy of

¹⁴⁵ Hurwitz, *supra* note 138.

¹⁴⁶ Straube, *supra* note 134.

¹⁴⁷ *Id.*

¹⁴⁸ *HIV Criminal Law Reform in Missouri Retains Felony Punishments for Exposure and Continues to Target Sex Workers and Incarcerated PLHIV*, CTR. FOR HIV L. & POL’Y, <https://www.hivlawandpolicy.org/news/hiv-criminal-law-reform-missouri-retains-felony-punishments-exposure-and-continues-target-sex> (last visited November 23, 2021).

their identity and their health status.¹⁴⁹ However, the modernized law also does not address Missouri’s penalty enhancement for sex workers living with HIV; leaves in place the felony-level punishment for needle sharing as well as organ, blood, and tissue donation by people living with HIV (with exception for medically appropriate blood and organ donation); and expands the list of diseases which can be criminalized for the offense of endangering a corrections or Department of Mental Health employee by people incarcerated.¹⁵⁰ Previously, the law only applied to exposure to HIV, Hepatitis B, or Hepatitis C.¹⁵¹

Should the language of intent for the accused be narrowed from knowingly to purposefully?

The first consideration is whether the *intent* of the accused should be narrower from “[k]nowingly” to “[p]urposefully.” Under the revised law, “[i]t is illegal for a person knowingly infected with HIV to donate blood, organs, tissue, or sperm, unless for medical research, as well as illegal for such person to act recklessly in exposing another person to HIV without their knowledge and consent.”¹⁵² According to the Model Penal Code, which is used in Missouri, “[k]nowingly” has the meaning specified in Section 2.02 and equivalent terms such as “[k]nowing” or “[w]ith knowledge” have the same meaning.¹⁵³ “[P]urposely” has the meaning specified in Section 2.02 and equivalent terms such as “[w]ith

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

¹⁵³ *Model Penal Code – Selected Provisions*, UMKC SCH. OF L., https://www1.law.umkc.edu/suni/crimlaw/mpc_provisions/model_penal_code_default_rules.htm (last visited November 23, 2021).

purpose,” “[d]esigned” or “[w]ith design” have the same meaning.¹⁵⁴ To compare, the “[p]urposefully” standard means that the prosecutor would have the burden of proof that someone living with HIV did “[i]ntend to bring about a result” of exposure and/or transmission to HIV to be prosecuted.¹⁵⁵ An example of a purposeful transmission of HIV in St. Charles, Missouri, is when the State of Missouri convicted Brian Stewart, a former blood worker in a hospital, for injecting his son with blood which contains HIV, in the hopes that his son died to avoid child support.¹⁵⁶ He was given a life sentence with eligibility for parole after 15 years; he was up for parole in 2021.¹⁵⁷ Whereas the “[k]nowingly” standard means that the prosecutor would have the burden of proof that someone living with HIV was “[p]ractically certain that the result will occur” of exposure and/or transmission of HIV.¹⁵⁸

On one hand, the modernized law has already narrowed the HIV transmission intent of the accused from “[r]ecklessly” to “[k]nowingly.” The law used to support that people living with HIV were acting “[r]ecklessly” if they had sex or allowed any other form of HIV “[e]xposure” without disclosing.¹⁵⁹ The law did not protect

¹⁵⁴ *Id.*

¹⁵⁵ *Criminal Intent*, LUMEN LEARNING, <https://courses.lumenlearning.com/suny-criminallaw/chapter/4-2-criminal-intent/> (last visited November 23, 2021).

¹⁵⁶ Justin Heckert, *A Positive Life: How a Son Survived Being Injected with HIV By His Father*, GQ (Apr. 28, 2016), <https://www.gq.com/story/son-survives-hiv-injected-by-father-brian-stewart>.

¹⁵⁷ Lucy Hancock, *Bryan Jackson: My Father Injected Me with HIV*, BBC NEWS (Oct. 19, 2016), <https://www.bbc.com/news/magazine-37696071>. According to the Missouri Department of Corrections, he is still incarcerated. *Offender Search*, MO. DEPT. CORR., <https://web.mo.gov/doc/offSearchWeb/offenderListAction.do?docId=1018559> (last visited May 28, 2022).

¹⁵⁸ LUMEN LEARNING, *supra* note 155.

¹⁵⁹ Devin Hursey, *Missouri’s Redo of its HIV Criminalization Law Is A Good Start – But It’s Not Enough*, BODY (July 23, 2021), <https://www.thebody.com/article/missouri-hiv-criminalization-law-reform>.

people using prevention methods (condoms) or a person living with HIV who had a suppressed viral load, which also prevents transmission.¹⁶⁰ The “[k]nowingly” standard protects accused people living with HIV from prosecution who are using effective prevention methods.¹⁶¹ Also, the specific word “[H]IV” is removed from the criminal code and is replaced with “[n]on airborne disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management.”¹⁶²

On the other hand, how many people who have been convicted of exposing someone to or transmitting HIV have intentionally wanted to transmit HIV? According to Stephen Frost, author of *HIV Criminalization Laws: A Poor Public Policy Choice In The New Era of PrEP*, criminalizing the transmission of HIV assumes that the majority of people living with HIV do so intentionally or purposefully to injure someone; common sense dictates that is not the case.¹⁶³ Beyond common sense, studies show that people who learn that they are living with HIV modify their behavior to reduce the risk of transmission.¹⁶⁴ By narrowing the language of intent from “[k]nowingly” to “[p]urposefully, Missouri will be ensuring that purposefully transmissions such as in the Brian Stewart case are handled by the law without prosecuting Missourians living with HIV that are not

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Stephen Frost, *HIV Criminalization Laws: A Poor Public Policy Choice in the Era of PrEP*, 6 WAKE FOREST J.L. & POL’Y 319 (2016).

¹⁶⁴ *Id.*

purposefully attempting to expose, expose, or transmit HIV to any of their sexual partners.

Whether a misdemeanor is appropriate instead of a felony conviction?

The next issue is whether a felony conviction is appropriate instead of a misdemeanor. According to the modernized law, “[t]he penalty for [. . .] knowingly exposing another person to [a serious infectious or communicable] disease shall be a Class D felony, rather than the current Class B felony, and a Class C felony, rather than the current Class A felony, if the victim contracts the disease. The penalty for recklessly exposing another person is a Class A misdemeanor.”¹⁶⁵

On one hand, there are already significant improvements with the modernized law. Missouri has been commonly referred to as a “[d]isclosure law” state – meaning that the onus was always on the person living with HIV to disclose their state before engaging in anything the law would consider an “[e]xposure.”¹⁶⁶ Missouri law would consider “[e]xposure” any sort of sexual contact and contact with bodily fluids – including spitting and biting¹⁶⁷, which are known not to transmit HIV.¹⁶⁸ The Serious Infectious or Communicable Disease law will now only punish behaviors which are considered to carry a “[s]ubstantial risk of HIV transmission.”¹⁶⁹ As a result, the Class A felony of transmission is reduced to a Class C felony and the Class B felony is reduced to a Class D felony.¹⁷⁰ The Class

¹⁶⁵ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

¹⁶⁶ Hursey, *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ *What Are HIV and AIDS?*, *supra* note 21.

¹⁶⁹ Hursey, *supra* note 159.

¹⁷⁰ *Id.*

A felony would get a person living with HIV 10-30 years, if the accuser received an HIV-positive diagnosis after the alleged exposure.¹⁷¹ This reduction to Class C felony will now only carry a sentence of three to 10 years.¹⁷² Under the old law, if transmission did not occur, even if the accused person could not prove that they disclosed their HIV status, the person could still be charged with a Class B felony, which is a five-to 15-year sentence.¹⁷³ This reduction is now to a Class D felony, which has no minimum sentence required and a maximum sentence of seven years.¹⁷⁴

On the other hand, even under the modernized law, there is a concern of whether the punishment fits the crime. According to Demario Richardson of the Missouri HIV Justice Coalition, “[I] feel like the update is a step towards modernization, but there are still areas for improvement. [. . .] For instance, the felony penalties should be removed and [the language of intent] narrowed to ‘purposely.’”¹⁷⁵ The Serious Infectious or Communicable Disease law classifies transmitting HIV as a Class C felony and “[e]xposing” someone to HIV as a Class D felony.¹⁷⁶ In Missouri, a Class C felony is punishable by three to ten years in prison.¹⁷⁷ The court can also impose a fine up to \$10,000.¹⁷⁸ Class C felonies in Missouri include: involuntary manslaughter in the first degree; child molestation in

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

¹⁷⁷ Kimberly Benjamin, *Felonies in Missouri*, MO. DWI CRIMINAL L. CTR. (Dec. 16, 2019), <https://www.dwicriminallawcenter.com/felony-missouri/>.

¹⁷⁸ *Id.*

the third degree, sexual abuse in the first degree, and drug trafficking in the second degree.¹⁷⁹ A Class D felony in Missouri is punishable by up to seven years in prison, or one year in the county jail.¹⁸⁰ The court also can impose a fine up to \$10,000.¹⁸¹ Courts may offer a chance for probation for most Class D felonies.¹⁸² Class D felonies in Missouri include: unlawful use of a weapon, rape in the second degree, first offense of possession of child pornography, terrorist threat in the first degree, and kidnapping in the second degree.¹⁸³ To compare, a Class A misdemeanor: up to one year in jail and/or a fine of up to \$2,000.¹⁸⁴ A Class B misdemeanor: up to six months in jail and/or a fine of up to \$1,000.¹⁸⁵ A Class C misdemeanor: up to 15 days in jail and/or a fine of up to \$700.¹⁸⁶ A Class D misdemeanor: a fine of up to \$500.¹⁸⁷ If someone is convicted of a Class C or D felony in Missouri, that person loses numerous rights by virtue of having a felony conviction.

However, some scholars and activists question whether criminal laws can achieve their prevention goals of deterring high-risk behaviors. Numerous studies have concluded that public health interventions can reduce high-risk behaviors and transmission of HIV and other sexually transmitted infections (STIs). However, there are no existing published studies which demonstrate the effectiveness of the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ E.A. Gjeten, *Missouri Misdemeanor Crimes by Class and Sentence*, CRIMINAL DEF. LAW. (last visited Mar. 4, 2022), <https://www.criminaldefenselawyer.com/resources/missouri-misdemeanor-crimes-class-and-sentences.htm>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

criminal prosecution approach to prevent the transmission of HIV.¹⁸⁸ Prosecution has placed too many people in jail. Moral standards typically define people's behaviors to which they should aspire; whereas criminal laws ideally reflect minimum standards of behavior to which society should conform. Many people do not disclose their STIs to their sexual partners, yet criminal HIV transmission statutes are still prevalent in the United States.¹⁸⁹ Although one survey has found that more than 95 percent of respondents agreed that there was a responsibility to discuss STIs with their partners, only one-third of respondents with STIs informed their partner about their STI before they had sex.¹⁹⁰

If Missouri removed all their HIV-related Class C and Class D felony crimes to misdemeanors, the state would be joining states who have already made that statutory change. In California, since January 1, 2018, it was no longer a felony to knowingly expose a sexual partner with the intent of transmit HIV.¹⁹¹ The then-Governor Jerry Brown signed legislation to lower the offense to a misdemeanor.¹⁹² The law previously punished people who “[i]ntentionally exposed or [transmitted]” HIV with up to eight years in prison; the new legislation lowered jail time to a maximum of six months.¹⁹³ Missouri has already joined California in modernized

¹⁸⁸ Leslie Wolf & Richard Vezina, *Crime and Punishment: Is There A Role for Criminal Law in HIV Prevention Policy?* 25 Whittier L. Rev. 821 (2004).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Ala Elassar, *California Lowers Penalty for Knowingly Exposing Partners to HIV*, CNN HEALTH (Oct. 10, 2017, 2:51 PM), <https://www.cnn.com/2017/10/07/health/california-hiv-bill-signed/index.html>.

¹⁹² *Id.*

¹⁹³ *Id.*

HIV-related statutes which allow pharmacists to dispense PEP without a doctor's prescription to anyone who fears that they might have been exposed to HIV.¹⁹⁴

Should an undetectable viral load be the standard to protect people living with HIV from being charged with knowingly transmitting or exposing someone through an activity that creates a substantial risk of transmission?

The next issue is whether an undetectable viral load should be the standard to protect people living with HIV from being charged with knowingly transmitting or exposing someone through an activity that creates a substantial risk of transmission. According to the modernized law, “[i]t [is] unlawful for a person knowingly infected with a serious infectious or communicable disease to [. . .] knowingly expose another person to the disease through an activity that creates a substantial risk of transmission.”¹⁹⁵ “[S]ubstantial risk” has been recognized that medication can suppress HIV so successfully that, according to the National Institute of Health (NIH) and the United Nations, a person cannot sexually transmit HIV.¹⁹⁶ This issue is important to address as courts have convicted Black men living with HIV who use preventative measures when having sex. Kerry Thomas, a Black man living in Idaho, has been incarcerated in an Idaho penitentiary after being convicted of violating Idaho Code Section 39-608¹⁹⁷ by “[t]ransferring or attempting to transfer any of his bodily fluid, to-wit: semen and/or saliva by genital to genital and/or oral to genital contact, without disclosing his infection of the human immunodeficiency

¹⁹⁴ ST. LOUIS AM., *supra* note 140.

¹⁹⁵ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

¹⁹⁶ Daniel Dale, *CNN Fact Check: Boebert Falsely Claims Liberals Have ‘Legalized’ Knowingly Spreading HIV*, CNN POLITICS (June 16, 2021 9:43AM), <https://www.cnn.com/2021/06/16/politics/fact-check-boebert-legalized-hiv-covid-restaurants/index.html>.

¹⁹⁷ IDAHO CODE § 39-608 (2022).

virus (HIV).” Kerry is serving a 30-year sentence for consensual sexual contact under circumstances where both parties agree that he always insisted on using condoms and during a period when his medical records reflect that he had an undetectable viral load.¹⁹⁸

On one hand, in addition to the NIH and the United Nations, courts in Iowa could not sustain a factual basis to support a defendant’s guilty plea of transmitting HIV when the defendant had an undetectable viral load and had sex with a condom.¹⁹⁹ The Iowa Supreme Court overturned the conviction of Nick Rhoades, a man living with HIV in Iowa, in 2014.²⁰⁰ Nick had an undetectable viral load for years.²⁰¹ He had sex with a man that he met online in 2008, and he used a condom.²⁰² Black Hawk County prosecuted and convicted Nick for not disclosing that he is living with HIV to his partner before they had sex.²⁰³ He was sentenced to 25 years in prison and a lifetime of the sex offender registration.²⁰⁴ By reversing Rhoades’s conviction, the Iowa Supreme Court became the first high court in the country to incorporate modern scientific knowledge of HIV transmission into HIV criminalization statute.²⁰⁵ If the courts in the United States exempted individuals

¹⁹⁸ State v. Thomas, 983 P.2d 245 (Idaho Ct. App. 1999); Bacilio Mendez II, *HIV is Not A Crime, There Should Be No Jail Time*, GOLDEN GATE L. REV. BLOG (June 15, 2020), <https://ggulawreview.com/2020/06/15/hiv-is-not-a-crime-there-should-be-no-jail-time/>.

¹⁹⁹ Rhoades v. State, 848 N.W.2d 22 (Iowa 2014).

²⁰⁰ *Id.*

²⁰¹ Mendez II, *supra* note 198.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Brian Cox, *Turning the Tide: The Future of HIV Criminalization After Rhoades v. State and Legislative Reform in Iowa*, 11 NW. J. L. & SOC. POL’Y 28 (2016).

with an undetectable viral load from the criminalization of HIV, that would reduce the number of individuals affected by 30 percent.²⁰⁶

On the other hand, who has barriers of access to ART medication matters. It is estimated that 13,000 people are living with HIV in Missouri.²⁰⁷ According to a Missouri Department of Health and Senior Services report in 2016, Black people in Missouri are living with HIV at a rate of 808.9 per 100,000, compared to 123.7 per 100,000 for white people.²⁰⁸ HIV criminalization laws that nod to current prevention methods as a mitigating factor are still unfair if Black people are not accessing those methods equally. In fact, Michael Johnson was one of those people in Missouri who had barriers to HIV prevention, treatment, and care. Michael shared, “[G]oing from state to state made it very difficult for access to care. [. . .] And I was a poor person or minority and just, you know, didn't have the funds needed to buy a car. What could've been almost a hundred dollars for just a taxi ride [to the clinic].”²⁰⁹

Some scholars and activists argue that there is a hyper-focus on HIV prevention which can be paralleled with a hyper-focus on reaching a suppressed viral load. According to Frost, the *Rhoades* case exemplifies a situation where there was no moral blameworthy conduct, since Rhoades’s potential to transmit HIV was so

²⁰⁶ *Id.*

²⁰⁷ ST. LOUIS AM., *supra* note 140.

²⁰⁸ Hursey, *supra* note 159.

²⁰⁹ PJ Randhawa & Erin Richey, *Former Lindenwood Wrestler Convicted of Transmitting HIV Speaks Out*, KSDK CHANNEL 5 (July 16, 2019), <https://www.ksdk.com/article/news/local/former-lindenwood-wrestler-convicted-of-transmitting-hiv-speaks-out/63-ca094a93-14f7-423a-93ad-9972d7b5fd4a>.

minimal.²¹⁰ However, it may be challenging to determine what conduct is or is not “moral[ly] blameworthy” when there is still an access issue to HIV treatment and care. Five days after Missouri’s Republican Governor Mike Parson signed The Serious Infectious or Communicable Disease law, the Biden administration announced that PrEP is to be completely free under most insurance plans, including clinic and lab fees.²¹¹ However, HIV medication was not mentioned, and people living with HIV who do not qualify for free HIV services under the Ryan White CARE Act will still face copays and lab fees.²¹² Molly M. Pearson, Human Behavior Adjunct Professor at the Brown School of Social Work, at Washington University, posits that “[t]he hyper-focus on prevention creates an environment where one’s failure to prevent others contracting HIV is punished both overtly, through criminalization, and covertly, through oppressive service provision.”²¹³

Should Missouri amend its statute so that HIV prevention medication can be an affirmative defense to the substantial risk of transmission?

The next issue to determine is whether Missouri should amend its statute so that HIV prevention medication (such as PrEP and PEP) can be an affirmative defense to the substantial risk of transmission. According to the modernized law, “[i]t [is] unlawful for a person knowingly infected with a serious infectious or communicable disease to [. . .] knowingly expose another person to the disease through an activity that creates a substantial risk of transmission.”²¹⁴ During the

²¹⁰ Frost, *supra* note 163.

²¹¹ Pearson, *supra* note 1.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

same year, the Missouri legislature passed a law which will allow pharmacists to dispense PEP without a doctor's prescription to anyone who fears that they might have been exposed to HIV.²¹⁵ If taken within 72 hours after exposure, PEP reduces the risk of contracting HIV by more than 80 percent.²¹⁶

HIV prevention medication (such as PrEP and PEP) are not affirmative defenses in many U.S. states, including Missouri.²¹⁷ In fact, Missouri just recognized condom use as a defense with the modernized law.²¹⁸ Only Minnesota and Nevada's HIV statutes are written broadly enough to allow an affirmative defense for PrEP, but not PEP.²¹⁹ The Minnesota statute provides that "[i]t is an affirmative defense . . . that [the person living with HIV] took practical means to prevent transmission as advised by a physician or other health professional"²²⁰ The Minnesota law could serve as a model nationwide because the law does not require that the preventative measure stop the exchange of bodily fluids.²²¹ Nor does the law provide an exhaustive list of acceptable methods of protection at a time when new methods continue to be scientifically uncovered. Scientists have established that PrEP is a "[p]ractical method" of "prevent[ing] transmission" within the plain language of the Minnesota statute.²²² Because PrEP requires a

²¹⁵ ST. LOUIS AM., *supra* note 140.

²¹⁶ *Id.*

²¹⁷ Graham White, *Pre-Exposure Prophylaxis (PrEP) and Criminal Liability Under State HIV Laws*, 126 YALE L. J. F. (2016), <https://www.yalelawjournal.org/forum/pre-exposure-prophylaxis-prep-and-criminal-liability-under-state-hiv-laws>.

²¹⁸ CTR. FOR HIV L. & POL'Y, *supra* note 148.

²¹⁹ White, *supra* note 217.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

prescription from a health care provider, an individual who uses PrEP is doing so “[a]s advised by a physician or other health professional.”

Nevada’s law is also a potential model for reform because the law imposes what is effectively a “[p]robability test” for transmission.²²³ While many other states criminalize behavior that could possibly lead to transmission, Nevada criminalizes “[k]nowingly or willfully engag[ing] in conduct in a manner that is intended to or likely to transmit the disease to another person”²²⁴ As scientists have concluded, transmission while taking PrEP is possible but highly unlikely.²²⁵ Thus, a probability test is broad enough to include PrEP, as well as other non-traditional preventative measures like antiretroviral therapy.²²⁶ Laws that involve HIV prevention medication as an affirmative defense can contribute towards fostering a culture where all sexually active consenting adults can be responsible for being active in conversation about their health and sex life. It is not uncommon that two people do not have conversations about contraceptives and sexually transmitted infections prior to every sexual encounter, as that excessive degree of formality takes away a part of dimension of life in which spontaneity is important.²²⁷ Laws in the United States impose the duty on people living with HIV to disclose their state to their partners; however, a felony conviction and a lengthy prison term, is draconian in cases where there is not a risk of transmission. PrEP will continue to

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Alexandra McCallum, *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, 2014 UTAH L. REV. 677, 697 (2014).

give rise to these situations; therefore, state legislatures must respond accordingly.²²⁸

How should courts respond when the accuser alleges that the accused did not disclose their status when the accused asserts that there was a disclosure of their HIV status?

The next issue is addressing how courts should respond when the accuser alleges that the accused did not disclose their status when the accused asserts that there was a disclosure of their HIV status. According to the Serious Infectious or Communicable Disease law, “[i]t is illegal for a person knowingly infected with HIV to donate blood, organs, tissue, or sperm, unless for medical research, as well as illegal for such person to act recklessly in exposing another person to HIV without their knowledge and consent.”²²⁹

On one hand, while case law is limited in this area, one Ohio court found that verbal disclosure sufficiently reveals one’s positive HIV status; that written, signed, and notarized disclosure is unnecessary; and that after the initial disclosure, an individual would not be guilty of any subsequent sexual encounters with that same partner.²³⁰ Even though a verbal mandate would be the most effective way to prevent misunderstandings concerning consent to HIV exposure, the practical considerations may not account for the surrounding question of how this approach could be incorporated into the legal system. If the legal system were to impose a verbal-permission rule every time someone living with HIV would engage in a

²²⁸ White, *supra* note 217.

²²⁹ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

²³⁰ McCallum, *supra* note 227, at 685.

sexual activity, scholars have posed concern that the law “[w]ould impose an excessive degree of formality and artificiality on a dimension of life in which spontaneity is important.”²³¹ As a result, courts in Missouri will have to consider if consent is not negotiated verbally, then how will the courts interpret consent and disclosure based on contextual cues, understandings about human behavior, and non-verbal forms of disclosure.

On the other hand, although a written, signed, and notarized disclosure has been found to be unnecessary in one Ohio court, it is unclear what happens in a “[h]e said/he said” dispute of whether there was disclosure of an HIV status. Just like Michael Johnson remains that he disclosed his HIV status to all his sexual partners, other Black gay men have faced legal consequences based on the “[h]e said/he said” dilemma. When a defendant and complainant are in a prolonged relationship, the disclosure element is particularly hard to prove. In Missouri, a man was arrested for allegedly not disclosing his serostatus to his female partner until ten months into their sexual relationship.²³² However, the couple continued to engage in sexual conduct for more than a month prior to the complainant filing with the police.²³³ The complainant never contracted HIV from the defendant, yet the defendant was sentenced to a year in jail.²³⁴

²³¹ *Id.* at 697

²³² Bone, *supra* note 2.

²³³ *Id.*

²³⁴ *Id.*

Another instance includes a Black gay man, Robert Suttle, who was diagnosed with HIV more than five years before his legal controversy.²³⁵ At the time, Robert was working at the Louisiana Second Circuit Court of Appeal as an assistant clerk.²³⁶ Following a bad breakup in 2008, Robert's former partner told law enforcement that Robert did not disclose his HIV status.²³⁷ Under Louisiana law, it is considered unlawful if a person knows that they are living with HIV and do not disclose their status prior to engaging in any type of sexual activity.²³⁸ Even though Robert says he disclosed his status to his partner, the State of Louisiana charged Robert with a felony, resulting in six months in prison and the requirement to register as a sex offender.²³⁹ In Louisiana, a person that is required to register as a sex offender must disclose their registration on their driver's license and with a photo of themselves in the newspaper.²⁴⁰ To this day, he is still on the sex offender registry.²⁴¹ Situations where one party alleges that the accused did not disclose their status when the accused asserts that there was a disclosure of their HIV status runs the risk of wrongfully convicting people who disclosed to their partner of their HIV status. Referring to the National Institute of Justice's definition of a wrongful conviction, a conviction may be classified as wrongful for two reasons: the person convicted is factually innocent of the charges or there were procedural errors that

²³⁵ *Robert Suttle Seeks to End HIV Criminalization*, GILEAD, (Mar. 2, 2021), <https://stories.gilead.com/articles/robert-suttle-seeks-to-end-hiv-criminalization>.

²³⁶ The Elizabeth Taylor Foundation, *True (Not) Crime Story, Robert Suttle, HIV is Not a Crime*, YOUTUBE (Dec. 15, 2020), <https://www.youtube.com/watch?v=sw-ZvH-aI9Y>.

²³⁷ GILEAD, *supra* note 235.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ The Elizabeth Taylor Foundation, *supra* note 236.

violated the convicted person's rights.²⁴² As a result, lawmakers and attorneys need to reassess how their HIV-related statutes around *consent* and *disclosure* are written and interpreted so that people are not wrongfully convicted.

Under The Serious Infectious or Communicable Disease Law, it is “[i]llegal for a person knowingly infected with HIV to donate blood, organs, tissue, or sperm, unless for medical research, as well as illegal for such person to act recklessly in exposing another person to HIV without their *knowledge* and *consent*.”²⁴³ Further, “[i]t shall be an affirmative defense to this offense if the person exposed to the disease knew that the infected person was infected with the disease at the time of the exposure and consented to the exposure.”²⁴⁴ This statute still targets consensual sexual behavior by not drawing a clear line between sex with disclosure and/or consent and sex without disclosure and/or consent.²⁴⁵ These ambiguities result in situations that may arise where the law extends into the bedroom criminalizing (and weaponizing) consensual private sexual activity.

According to Alexandra McCallum, author of *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, HIV-exposure statutes are drafted ambiguously which results in little to no guidance on what constitutes legally permissible consent and disclosure.²⁴⁶ Also, courts have yet to require a verbal mandate nor have courts determined whether consent and disclosure may be

²⁴² NAT'L INST. JUST., *supra* note 99.

²⁴³ S.B. 53, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

²⁴⁴ *Id.*

²⁴⁵ McCallum, *supra* note 230, at 702.

²⁴⁶ *Id.*

inferred from the circumstances surrounding their sexual encounter.²⁴⁷ The lack of clarity is on the internet where online dating sites (such as the ones where Michael Johnson and several other gay men frequent) facilitate nonverbal negotiation of disclosure and consent.²⁴⁸ With the growing popularity of online dating between people living with HIV as well as people not living with HIV, a greater necessity arises for these ambiguous statutes to be restructured with careful statutory construction.²⁴⁹ The structural changes can help rectify the flaws in the HIV transmission laws and narrow who is or ought to be convicted.²⁵⁰ In many jurisdictions, over two decades have passed since these statutes were first enacted.²⁵¹ Concurrently, the internet has dramatically transformed human behavior online and offline. As a result, the HIV-exposure statutes must be overhauled considering these changes.

XI. Conclusion

When Michael was released from prison, he hoped that his story would contribute towards the necessary change of HIV transmission laws not just in Missouri, but nationwide. In 2021, through Senate Bill-53, the law was, indeed, modernized. And while modernization is a step in the right direction, this expository concludes that the law can be even further modernized alongside other U.S. states so that people living with HIV are no longer vulnerable to harsh

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

sentences and the possibility of a wrongful conviction. The policy recommendations are:

1. The State of Missouri should consider narrowing the language of intent from knowingly to purposefully. The state would be an example to the rest of the country that someone should not be charged with transmission, exposure or attempting to expose HIV, unless prosecutors can prove that a person living with HIV “[w]ith purpose,” “[d]esigned” or “[w]ith design” transmitted, exposed, or attempted to expose someone to HIV. A purposeful standard would hold people like Brian Stewart accountable while also not charging people like Michael Johnson for felony crimes.
2. The State of Missouri should consider following states like Illinois and California that charge transmission, exposure, or attempting to expose someone with HIV with a misdemeanor, rather than a felony. In California, as of 2017, it is a misdemeanor punishable by up to six months in county jail (rather than the previous felony conviction followed by up to eight years in state prison) for a person to knowingly expose to HIV with the intent of transmission.²⁵² In Illinois, the state House and Senate have passed HB-1063 to repeal an existing law that makes it a felony for person living with HIV to have sex without a condom without first informing their partner of their HIV status.²⁵³ Although the bill has been widely described as a “[d]ecriminalization” bill, the bill would not mean that Illinois residents are immune from criminal prosecution if they deliberately transmit or expose someone to HIV.
3. Lawmakers and prosecutors’ offices in Missouri should clarify what constitutes a substantial risk of transmission. With the Biden administration announcing that PrEP is completely free under most insurance plans and PEP is available without a doctor’s prescription in Missouri, access to HIV prevention medication coupled with HIV treatment and care leading towards having a suppressed viral load contribute to reducing the risk of transmission below a substantial risk. However, a complete understanding of what does and what does not constitute a “substantial risk” does not yet exist.
4. Lawmakers in Missouri should consider amending the statute so that PrEP and PEP is an affirmative defense of a substantial risk of transmission. Currently, the only affirmative defenses are condoms and if a person exposed to a non-airborne disease knew that the person is living with a non-airborne disease at the time of the exposure and consented to the exposure.

²⁵² Dale, *supra* note 196.

²⁵³ *Id.*

$U=U$ means that an undetectable viral load renders HIV untransmittable, therefore proper administration of PrEP and PEP should likewise constitute an affirmative defense to a substantial risk of transmission.

5. Lawmakers in Missouri should determine whether the language and implications of consent and disclosure are ambiguously drafted, which may offer little to no guidance on what constitutes legally permissible consent and disclosure. Lawmakers need to determine if consent require a verbal mandate or if consent and disclosure can be inferred from the circumstances surrounding the sexual encounter, especially given the digital age where online dating profiles can facilitate non-verbal negotiations of disclosure and consent.²⁵⁴

²⁵⁴ McCallum, *supra* note 227, at 702.