

## THE DECEPTIVE FERMATA OF HIV-CRIMINALIZATION LAW: REREADING THE CASE OF “TIGER MANDINGO” THROUGH THE JURIDICO-AFFECTIVE

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### *Abstract*

*In July 2015, Michael Johnson, a twenty-three-year-old Black queer college student in Missouri, was sentenced to slightly over thirty years in prison on one count of reckless transmission of Human Immunodeficiency Virus (HIV) to another person and on four counts of reckless attempted transmission of HIV. Johnson’s conviction and exorbitant carceral sentence are not unique, however. State penal laws criminalizing the transmission of HIV have existed for well over twenty-five years and have remained nearly impervious to legal challenge throughout that time. This Article queries the continued vitality of HIV-criminalization laws and argues that their survival reflects their investment in appeals to the affective—the sensations of bodily impingement and intrusion that the terrifying spectacle of HIV is meant to conjure. The injection of the affective into the jurisprudential regime of HIV criminalization is shown to be at the core of Michael Johnson’s prosecution and conviction, animating Johnson’s unwitting transformation into HIV itself. Reflecting on this disturbing genealogy, the discussion concludes with both legal and critical prescriptions to combat the persistence of HIV stigma.*

### PRELUDE: THE CRIMINAL THEATER OF “TIGER MANDINGO”

In early October 2013, a queer white male student of Lindenwood University, located in St. Charles, a suburb of St. Louis, Missouri, had his second sexual experience with fellow Lindenwood student Michael Johnson.<sup>1</sup> The two had first met through a cellphone

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application often used by queer men to facilitate sexual encounters; Johnson, a twenty-three-year-old Black transfer student and member of the university's wrestling team, employed the username "Tiger Mandingo."<sup>2</sup> That evening, Johnson and his partner had condomless anal sex for the first time.<sup>3</sup> The choice to forego condom use during anal intercourse—a practice sometimes referred to as "bareback sex" among queer men—was allegedly made by Johnson's partner.<sup>4</sup> The student's interest in Johnson had been piqued because, in his words, Johnson was "only [his] third [B]lack [sexual partner]," had a "huge" penis, and had described himself as "clean," an unfortunately common euphemism for Human Immunodeficiency Virus (HIV) seronegativity.<sup>5</sup> On October 10, 2013, several days after their encounter, Johnson informed his partner that he had tested positive for "a disease" and that he did not know whether a cure for it existed.<sup>6</sup> As he would come to understand, Johnson had tested positive for HIV.

Later that same day, "Johnson was pulled out of class and led away in handcuffs by

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comments, and to the Editorial Board of the Columbia Journal of Gender and Law for their efforts. Finally, I thank Samuel Buffaloe, appellate counsel for Michael Johnson, and all those persons who have actively contested the injustice Johnson has been forced to bear; your work and Johnson's courage have forced a wedge into the blinding machine of HIV criminalization.

1 Steven Thrasher, *How College Wrestling Star "Tiger Mandingo" Became an HIV Scapegoat*, BUZZFEED (July 7, 2014, 9:00 PM), <https://www.buzzfeed.com/steventhrasher/how-college-wrestling-star-tiger-mandingo-became-an-hiv-scap> [<https://perma.cc/8F9M-6G2M>] [hereinafter Thrasher, *College Wrestling Star*].

2 *Id.* ("The student at Lindenwood University in the St. Louis suburb of St. Charles quickly recognized that in real life, Tiger Mandingo was also a student at his school: Michael Johnson, a recent transfer student on Lindenwood's wrestling team.").

3 *Id.* ("This time, they had anal sex without a condom.").

4 Although his purpose is to reflect the racialized and class-based inflections undergirding sexual linguistic economies, Marlon M. Bailey provides a definition of the term "raw sex" that, because of its (assumed) synonymy with the term "bareback sex," provides useful, if not somewhat reductive, clarity: "'[R]aw sex' is anal intercourse (insertive and receptive) without a condom and with or without anal receptive ejaculation and semen exchange." Marlon M. Bailey, *Black Gay (Raw) Sex*, in NO TEA, NO SHADE 239, 244 (E. Patrick Johnson ed., 2016). Bailey emphasizes the different connotative valences of the words "raw" and "bareback" to elucidate "the ways in which [B]lack gay men are confronted with regimes of racial, gender, and sexual normativity," but his definitional exegesis of raw sex offers a useful denotative heuristic for this discussion. *Id.* at 248.

5 Thrasher, *College Wrestling Star*, *supra* note 1 (internal quotation marks omitted); *see also id.* ("I let him come in me," the student said. He wanted bareback sex, he said, because Johnson was 'huge,' 'only my third black guy,' and—as he said Johnson told him yet again—'clean.'").

6 *Id.*

[police] . . . [and was] charged with [two counts] of ‘recklessly infecting another with HIV’ and four counts of ‘attempting to recklessly infect another with HIV,’” all felonies in the state of Missouri.<sup>7</sup> Johnson was immediately detained in a county jail, where he would spend the next eighteen months, primarily in solitary confinement, until his trial began on May 11, 2015.<sup>8</sup> The trial lasted for several days, and, after having left for some two hours to deliberate, the jury reached its verdict: Johnson was found guilty on one count of reckless transmission of HIV and on all four counts of reckless exposure of HIV.<sup>9</sup> The following morning, the jury convened to hear arguments about sentencing from both the prosecution and Johnson’s counsel; it took them an hour to sentence Johnson to a total of slightly more than sixty years in prison.<sup>10</sup> The trial judge scheduled a final sentencing hearing for July 13, 2015, during which he “ruled that Johnson could serve his sentences concurrently and sentenced him to [thirty] years in prison.”<sup>11</sup>

The conviction of Michael Johnson emblemizes the egregious jurisprudential system responsible for the ongoing criminalization of the HIV-positive sexual subject.<sup>12</sup> The legal history of HIV criminalization, now approaching three decades in age, has been thoroughly documented by scholars whose work spans multiple disciplines; accordingly, my purpose here will not be to supplement the incisive work detailing the HIV-criminalization

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7 *Id.*

8 Steven Thrasher, *A Black Body on Trial: The Conviction of HIV-Positive “Tiger Mandingo,”* BUZZFEED (Nov. 30, 2015, 8:26 PM), <https://www.buzzfeed.com/steventhrasher/a-black-body-on-trial-the-conviction-of-hiv-positive-tiger-m> [<https://perma.cc/TB3J-8LFZ>] [hereinafter Thrasher, *Black Body on Trial*] (noting that Johnson mentioned having “spent months in solitary confinement, not even allowed to go to church,” as he awaited the beginning of his trial).

9 *Id.* (“[The jury] found Johnson guilty of recklessly transmitting HIV to [one of the named victims] and of exposing or attempting to expose [four] other men to HIV”).

10 *Id.* (“It took the jury about an hour to return with a sentence. . . . [T]he jury [had] condemn[ed] 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.”).

11 *Id.*

12 See generally RASHIDA RICHARDSON, SHOSHANA GOLDEN & CATHERINE HANSENS, 1 ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES 269–91 (2d ed. 2015) [hereinafter RICHARDSON ET AL., ENDING & DEFENDING AGAINST HIV CRIMINALIZATION] (compiling a list of over two-hundred arrests and prosecutions in the United States for HIV exposure between 2008 and 2014 but noting that “the cases represented . . . do not constitute an exhaustive representation of all HIV-related prosecutions in the U.S., but are likely only a sampling of a much more widespread, but generally undocumented, use of criminal laws against people living with HIV”).

regime.<sup>13</sup> Instead, I offer a critical examination of the sustained normative force of HIV-related penal law through an unexplored lens—that of the affective, of affect. As I explain further below, my analysis is indebted to critical theorizations of affect as the infinitude of a body’s “*capacity* to affect and to be affected,”<sup>14</sup> as the potentiality of a body’s “ability to act and be acted upon, [thus] what it can do and what it can undergo.”<sup>15</sup> To effect an examination of law through the richness of the affective opens for us the possibility of understanding law as constitutively tied to “a physiological and biological phenomenon, [consequently] signaling why bodily matter matters, [why that which] escapes or remains outside of the discursively structured and thus commodity forms of emotion, of feeling” must be interrogated.<sup>16</sup>

Locating the criminal prosecution of Michael Johnson within a larger constellation of sexual governance, this discussion charts how the affective has produced and has been produced by the discourse of HIV criminalization. It therefore queries how notions such as viral contagion, bodily vulnerability, and sensorial impingement sustain the aggressive use of criminal law against HIV-positive sexual subjects. Consideration of these questions provides a backdrop for this argument’s central assertion: that the depiction of Michael Johnson as a predatory danger to the health and sexual propriety of his community achieved its perverse success through recourse to a language deeply rooted in affective allusion. Johnson’s prosecution illuminates how HIV becomes increasingly imagined as an all-consuming, homicidally appetitive contagion. No longer existing as a virus within the body, HIV is ultimately transformed through the law’s appeal to the affective into the psychic master of the body it inhabits, demonstrating a will to power all its own. In so doing, it destroys any agency once accessible to the subject.

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13 See, e.g., Kim Shayo Buchanan, *When is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1233–35 (2015) (noting that nondisclosure laws, in existence since the early 1990s, have consistently survived constitutional challenges and that, despite the federal government’s recent questioning of the utility of HIV criminalization, states have generally refused to repeal their HIV-criminalization laws); Joseph Allen Garmon, Comment, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 HOWARD L.J. 665, 669–78 (2014) (documenting the legislative response that followed the exponential rise in HIV infections and AIDS-related deaths in the late 1980s and early 1990s as well as examining the history of state statutes criminalizing nondisclosure).

14 Gregory J. Seigworth & Melissa Gregg, *An Inventory of Shimmers*, in *THE AFFECT THEORY READER* 1, 2 (Melissa Gregg & Gregory J. Seigworth eds., 2010) (emphasis in original).

15 John Protevi, *Ontology, Biology, and History of Affect*, in *THE SPECULATIVE TURN: CONTINENTAL MATERIALISM AND REALISM* 393, 394 (Levi Bryant, Nick Srnick, & Graham Harman eds., 2011).

16 JASBIR PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* 207 (2007).

My argument proceeds in four Parts. In Part I, I identify and develop the theoretical context for the arguments I present in Parts II, III, and IV. Part II brings this theoretical context to bear on the regime of HIV-criminalization law by tracing the presence of the affective in state criminal statutes and judicial opinions and the pernicious effects of that presence. My objective here is twofold. First, I suggest that HIV-related state penal codes regularly reconfigure the HIV-positive sexual subject as a container of fatal bodily fluid and disease. Through allusion to the affective dangers of HIV to heteronormative ideals of intimacy and kinship, these statutes feed a spectacular narrative of indiscriminate, purposeful HIV transmission. The second purpose moves my discussion toward state judiciaries' reviews of convictions based on HIV-criminalization law and the rhetorical excess seemingly definitive of these opinions. I demonstrate that this excess posits the HIV-positive sexual subject as the vessel within which HIV is psychically personified, thereby ensuring the proliferation of HIV as public predator and psychic seducer.

In Part III, I turn to the prosecution of Michael Johnson. Johnson's criminal trial underscores the role of the affective—and its mutually constitutive relation to violent racism—in the continued vitality of HIV-criminalization law. Despite advances in the scientific understanding and medical treatment of HIV, appeals to notions of contagious leakiness and the viral impingement were the weapons of the state prosecutor. I conclude Part III with brief commentary on the successful appeal of Johnson's conviction in December 2016, considering both the unique legal posture that allowed Johnson to prevail and the consequences of this victory on Johnson's retrial. Finally, in Part IV, I conclude with a meditation on the larger consequences of HIV criminalization for Black queer men and on potential modes of resistance to the criminalization of the HIV-positive sexual subject.

## **I. Composing The Normative Fugue: On the Juridico-Affective As Critical Lens**

### **A. Theories of the Affective: To Act and To Be Acted Upon**

Questions concerning the critical potential of affect theory have become increasingly paramount within social-theoretical paradigms, and this burgeoning interest has resulted in various conceptual visions of the affective. Though these diverse articulations are unlikely to be rendered reconcilable and may even undermine one another,<sup>17</sup> their veering between

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17 See Seigworth & Gregg, *supra* note 14, at 7 (“[We] can tentatively lay out . . . eight of the main orientations that undulate and sometimes overlap in their approaches to affect. Each of these regions of investigation . . . highlights a slightly different set of concerns, often reflected in their initiating premises, the endpoints of their aims, or both.”); Ruth Leys, *The Turn to Affect: A Critique*, 37 *CRITICAL INQUIRY* 434, 468 (2011) (critiquing the appropriation of neuroscience research by scholars who marshal its conclusions to “invariably privilege[] the

coexistence and discordance illuminates a characteristic I find vitally immanent to affect: a tireless imperative toward movement through which the passage of intensities among bodies and worlds is realized.<sup>18</sup> With this core theoretic tenet in mind, I would like to sketch the notional topography of the affective as used in the proceeding analysis.

At its most anthropomorphically envisioned and denotatively malleable, “affect” signifies the circuitry of force-relations generative of a body’s unquantifiable capacity to act and to be acted upon. Affect may thus be understood as the multiplicity and movement of force-relations—“an impingement or extrusion of a momentary or sometimes more sustained state of relation *as well as* the passage (and the duration of passage) of forces or intensities.”<sup>19</sup> It is within an intersubjective, dynamic field of rhythms, obstinacies, and vibrations that affect reiteratively places the body, and it is through this placement that affect reveals itself “as a gradient of bodily capacity—a supple incrementalism of ever-modulating force-relations—that rises and falls not only along various rhythms and modalities of encounter but also through the troughs and sieves of sensibility.”<sup>20</sup> Ann Pellegrini and Jasbir Puar think of affect as “precisely what allows the body to be an open system, always in concert with its virtuality, the potential of becoming.”<sup>21</sup> In concert with Puar and Pellegrini’s definition, I would argue that, insofar as it is bound to potentiality, affect is necessarily accretive, inscribing through its movement the uneven consequences of force-relations that cohere and corrode the embodied subject.

A particularly lucid, digestible synthesis of affect study’s dominant traditions can be found in Neel Ahuja’s *Bioinsecurities: Disease Interventions, Empire, and the Government of Species*. Eschewing accounts of affect that separate the mind from the body and the social from the biological, Ahuja advances an approach to the affective “that not only encompasses the forms of interface situated within the nervous system, but explicitly

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‘body’ and its affects over the ‘mind’ in straightforwardly dualist terms,” effectively reinscribing the Cartesian dualism such scholars purport to be deconstructing).

18 See GILLES DELEUZE, *SPINOZA: PRACTICAL PHILOSOPHY* 48–49 (Robert Hurley trans., 1988) (“These [affects] are necessarily active . . . [F]rom one state to another, from one image or idea to another, there are transitions, passages that . . . are not separable from the duration that attaches them to the preceding state and makes them tend toward the next state. These continual durations . . . are called ‘affects.’”). Deleuze’s reading of Spinoza interprets affect as that which is in constant metamorphosis; affect is accordingly not a particular state of being but instead an ongoing becoming between states.

19 Seigworth & Gregg, *supra* note 14, at 1 (emphasis in original).

20 *Id.* at 2.

21 Ann Pellegrini & Jasbir Puar, *Affect*, 27 *SOC. TEXT* 35, 37 (2009).

connects the materials of the nervous system”<sup>22</sup> with those “bodily sensations and public feelings . . . cultivated in media, in war, in technology, in formal political debate and organizing, and in the organization of social space.”<sup>23</sup> His intervention radically disregards the idea that affect exclusively concerns the passage of intensities within and across *human* bodies. The flow of affect is thus not limited to the envelope of the skin and identifiable cellular receptors; to this end, Ahuja considers affect in its totality to engage “the capacity of machines and bodies to affect and be affected, to sense, interact, connect, differentiate, move, and transition in a lifeworld.”<sup>24</sup>

Embedded within Ahuja’s theorization of affect are three additional conceptual coordinates that, if more expressly teased out, can further solidify the normative foundations of the below discussion. First, Ahuja frames affect in dynamic, processual terms.<sup>25</sup> Affect is always in flight, and although materializing within and through the subject it is never bound to the subject in her singularity. Second, in accord with Lone Bertelsen and Andrew Murphie’s engagement with the question of affect, Ahuja highlights the subtle yet transformative complexities of affective circulation, which effect a kind of “folding of broader affective intensities into the nervous system [that] eventually [become] recognizable as the register, eventually the representation, of the ongoing folding of self and world, as the person.”<sup>26</sup> This is the site at which the affective *qua* bodily sensation bears out its relation to emotion, with which it is not synonymous but to which it may be connected. Emotions often trigger bodily changes, but such physical transformations, however fleeting, are as likely to be caused by affective resonances as they are by emotions. Third, Ahuja emphasizes the Spinozist character of affect, suggesting that its very circulation may result in its reproduction, augmentation, and manipulation.<sup>27</sup> This third aspect represents

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22 NEEL AHUJA, *BIOINSECURITIES: DISEASE INTERVENTIONS, EMPIRE, AND THE GOVERNMENT OF SPECIES* 16 (2016).

23 *Id.*

24 *Id.* at 15.

25 *See id.* at 16–17 (“The transfer of affective potential from digestive and immune systems to mass-mediated publics (the mass national nervous system) and back may follow any number of different pathways, through the laboratory, media, environment, or the body itself.”).

26 Lone Bertelsen & Andrew Murphie, *An Ethics of Everyday Infinities and Powers: Félix Guattari on Affect and the Refrain*, in *THE AFFECT THEORY READER* 138, 140 (Melissa Gregg & Gregory J. Seigworth eds., 2010) (emphases removed).

27 *See AHUJA, supra* note 22, at 26 (“The energies of bodies and populations often spill beyond structures of containment, opening up unexpected effects elsewhere in biopolitical formations, demonstrating that material affects of intervention work to both incorporate and regenerate imperial form, often moving outside the confines of the direct goals or ideologies of intervention.”).

the fulcrum along which affect unendingly oscillates between the politically public, or the collective, and the politically private, or the subjective.

### **B. The Grid of Juridico-Affective Intelligibility: Bodily Surfaces, Legal Depths**

The theoretic cartography of affect I have just sketched is an obviously fragmentary one, as it privileges the enumeration of what I deem affect's fundamental attributes without a method for determining why those attributes have come to be fundamental—a question of the historical situatedness of affect and its intelligibility. By this, I mean to suggest that, within the context of this discussion, my development of the conceptual boundaries of “affect” must include an engagement with the sociohistorical production of those very boundaries; in effect, the index of this account's theoretical import should turn on whether it exhibits a sensitivity to the granular and historically specific particularities of law's exploitation of affect vis-à-vis HIV-criminalization jurisprudence. What I am describing is a reflexive obligation to assess the historicity of affect and its production, a tenet of the Foucauldian genealogical method.<sup>28</sup> One could offer a truncated summary of Foucauldian genealogy by turning to its animating inquiry: “How have domains of knowledge been formed on the basis of social practices?”<sup>29</sup>

The political stakes of genealogical inquiry, when taken at their most fundamental, concern the dangerous union forged between the disqualification of subjugated knowledges and the exercise of dominating social power such disqualification bulwarks.<sup>30</sup> Foucault

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28 See Michel Foucault, *Nietzsche, Genealogy, History*, in MICHEL FOUCAULT: AESTHETICS, METHOD, AND EPISTEMOLOGY 369, 370 (James D. Faubion ed., Robert Hurley et al. trans., 1998) (arguing that genealogy “rejects the metahistorical deployment of ideal significations and indefinite teleologies” and “opposes itself to the search for ‘origins’”); *id.* at 371–72 (“What is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity.”); Michel Foucault, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977*, at 78, 85 (Colin Gordon ed., Colin Gordon et al. trans., 1980) [hereinafter FOUCAULT, *Two Lectures*] (“By comparison, then, and in contrast to the various projects which aim to inscribe knowledges in the hierarchical order of power associated with science, a genealogy should be seen as a kind of attempt to emancipate historical knowledges from that subjection, that is, capable of opposition and of struggle.”).

29 Michel Foucault, *Truth and Juridical Forms*, in *Power: Essential Works of Foucault, 1954–1984*, at 1 (James D. Faubion ed., Robert Hurley et al. trans., 2000) [hereinafter FOUCAULT, *Truth*].

30 See FOUCAULT, *Two Lectures*, *supra* note 28, at 82 (“Subjugated knowledges are thus those blocs of historical knowledge which were present but disguised within the body of functionalist and systematizing theory and which criticism . . . has been able to reveal.”); *id.* (offering a second notion of subjugated knowledges as those “that have been disqualified as inadequate to their task or insufficiently elaborated . . . and which owe[]



contends that it is through the legitimation of particular schemas of knowledge, whose capricious instantiation a genealogical investigation documents, that manifold forms of social subordination crystallize and polymorphous techniques of subjugation materialize, all bearing the emblem of violent urgency.<sup>31</sup> Genealogical analysis leverages a nuanced exhumation of subjugated knowledges to expose the arbitrary process of transformation whereby certain knowledges become the absolute “truths” of a sociopolitical order.<sup>32</sup> By successfully repudiating the privileged hierarchy of knowledge creation, Foucault made space for the provocation that the success of a critical interrogation of “truth” required dismissing the transcendental character long ascribed to knowledge. The radical potential of genealogy was thus found at the juncture of truth’s proliferation and power’s application: “There can be no possible exercise of power without a certain economy of discourses of truth . . . . We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.”<sup>33</sup> The method underscores the inextricable and mutually constitutive relation of power and knowledge. Axiomatic to genealogy therefore is an orientation toward critique premised on the plenary eclipse of the social world by “techniques of knowledge and strategies of power;”<sup>34</sup> there can be no position of exteriority vis-à-vis power and knowledge, as the two operate in tandem to produce objects of investigation and investment.

The brief digression from the historicity of affect’s exploitation by law sought to

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[their] force only to the harshness with which [they are] opposed by everything surrounding [them]”); *id.* at 85 (characterizing the approach of genealogical inquiry as “based on a reactivation of [subjugated] knowledges . . . in opposition to the scientific hierarchisation of knowledges and the effects intrinsic to their power: this, then is the project of these disordered and fragmentary genealogies”).

31 See *id.* at 93 (“[T]here are manifold relations of power which permeate, characterise, and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse.”).

32 In the lecture series entitled *Truth and Juridical Forms*, Foucault remarks that the objective of his intervention will be to elucidate “how social practices may engender domains of knowledge that not only bring new objects, new concepts, and new techniques to light, but also give rise to totally new forms of subjects and subjects of knowledge.” FOUCAULT, *Truth*, *supra* note 29, at 2. He suggests that the question of history is one that can be employed to interrogate far more than the history of the subject; ultimately, his analysis seeks to demonstrate that “truth itself has a history.” Thus his crisp summation of the ensuing analysis: “What I intend to show in these lectures is how, in actual fact, the political and economic conditions of existence are not a veil . . . for the subject of knowledge but the means by which subjects . . . are formed, and hence are truth relations.” *Id.* at 15.

33 FOUCAULT, *Two Lectures*, *supra* note 28, at 93.

34 MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 98 (Robert Hurley trans., 1978).

identify a foundational point of departure from which this discussion could situate its own critical examination of HIV-criminalization jurisprudence's appeals to the affective. Despite the enormously varied manifestations of law and modes of its application, HIV-criminalization jurisprudence represents a distinctive nodule in the law's larger matrix. My analysis will take the HIV-criminal regime as its primary object, one that is constituted by internal rules that condition its materialization, and, insofar as I will argue that affect is one such condition of this materialization, HIV-criminalization law may be characterized as a specific discourse, the site where "power and knowledge are joined together."<sup>35</sup> This bond, which Foucault aptly names "power-knowledge," is not a site of stasis but rather one of transformation; as discourse proliferates, it undergoes endless metamorphosis, always being shaped in response to the episodic confrontations they encounter.<sup>36</sup> The continuity of HIV-criminalization law and the banality with which its discourse is met underscore that no singular form of "affect" can be identified; rather, affect's iterative multiplicity and infinite possibility for adaption permeate the discursive logics of HIV criminalization, working through multiple modalities while also nesting within the protective confines of the law. To provide a provisional account of affect's generative role in the maintenance of the HIV-criminalization regime, I offer the notion of the "juridico-affective" as a heuristic with which to trace the intermingling of HIV-criminalization law and the affective, as well as to chronicle the circuitry of subjectification and subordination precipitated as its consequence.

The substantive dimensions of the juridico-affective I offer here are intended to represent the contents of neither a methodology nor a theory of universal applicability. Instead, the juridico-affective offers an analytic mode through which to conceptualize the hazardous implications engendered by the appropriation of affect by HIV-criminalization discourse. Appeals to the juridico-affective in the discourse of HIV criminalization work to configure the sexually active HIV-positive subject as pathologically criminal and as a reservoir of viral contagion and deadly ecologies. The hyperbolic focus on viral bloom within the HIV-positive subject's body slowly transforms this persistent rhetoric of contagion into one of significant bodily danger to both the HIV-positive subject and those around him. Ultimately, the subtle ubiquity of the juridico-affective and its concomitant sensations of violation, infection, and impurity inaugurate the personification of HIV as agent. In so doing, the discourse of HIV criminalization denies the very humanity of the HIV-positive subject brought before the law, forcibly emptying the subject of his agency to

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35 *Id.* at 100.

36 *See id.* at 98–102 (advancing four cautionary prescriptions to inform an analysis of power, knowledge, and discourse, all of which emphasize the multiplicity, instability, and constant reproduction of discursive frames through the intermingling of knowledge and power).

align with the possession imagined at the hands of HIV.

Before moving into my discussion's substantive argument, I believe that a brief explanation on the semiotic configuration of "juridico-affective" is required, both to ensure the clarity of my theoretical interventions and to foreground the appalling implementation of HIV-criminalization law. My choice to attach via hyphen the term "juridical" (which is not to be read as either a synonym for law or its conceptual opposite) to the word "affective," which may appear redundant, is not a means to rhetorically double the claims I make. What must be recognized about the regime of HIV-criminalization regime is that, even within the typology of criminal law, HIV-related penal measures command a disturbing exceptionalism in the form punitive excess. The regime of HIV-criminalization conflates and fuses the myriad and presumptively disparate modes of law-based domination, thus melding transgression-based sanctions, the disciplinary regulation of the individual body, technologies of biopolitical governmentality, and the transformation of law into a conduit for the relay of subjects between various sites of governmentalized discipline and absolute control. While the idea that the law operates through a "juridical matrix" is certainly an anachronism, HIV-criminalization jurisprudence turns that antiquated model on its head by activating a vertiginous engagement with law as the snake-haired gorgon—that which employs modes of legal regulation and criminal prohibition that both exemplify the current moment and cannot be reconciled with that moment's ethos.

## **II. The Personifying Cantata of HIV Criminalization: Tracing the Effects of HIV-Criminalization Law Through the Juridico-Affective**

In the prior Part, I provided an overview of the methodological and theoretical architecture necessary to the development of this discussion's primary contentions. Building upon this foundation, I introduce in this Part the legal context of the HIV-criminalization regime, beginning with the federal legislation that mandated the passage of HIV-related penal law at the state level. I then review two such state criminal statutes, both of which typify the content of state penal statutes enacted to criminalize sexually active HIV-positive persons. These statutes depend upon the intelligibility of the juridico-affective to configure the HIV-positive sexual subject as a reservoir of viral contagion and gross promiscuity. Then, I turn to three juridical opinions all addressing appeals of successful convictions under HIV-criminalization laws. My purpose is to identify the juridico-affective maneuvers the opinions effect to reinforce the perception of the HIV-positive subject as always already pathologically criminal. Finally, I bring these jurisprudential coordinates together to document the role of juridico-affective discourse in the personification of HIV as homicidal monster.

### A. The Enactment of the Ryan White CARE Act and the Codification of HIV Criminality

In the early 1980s, Ryan White, a teenager living in Indiana, was accidentally infected with HIV during a blood transfusion, a routine treatment for White's hemophilia.<sup>37</sup> White's subsequent death due to the immuno-compromising effects of Acquired Immune Deficiency Syndrome (AIDS) reoriented the national dialogue around HIV/AIDS and incited a fervor for political action at the national level.<sup>38</sup> Mounting social pressure eventually led Congress to pass the Ryan White Comprehensive AIDS Resources Emergency Act,<sup>39</sup> known also as the CARE Act, in 1990, the purpose of which was "to provide emergency assistance to localities that are disproportionately affected by the [HIV] epidemic and to make financial assistance available to States" for the development and delivery of therapeutic care.<sup>40</sup>

As initially enacted, the CARE Act conditioned the receipt of federal funding on state codification of penal laws providing for the criminal prosecution of individuals believed to have intentionally transmitted HIV.<sup>41</sup> This provision of the CARE Act addressed what were considered to be, at the time of the Act's enactment, the three primary routes of HIV transmission: donation of "blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another [to] HIV;"<sup>42</sup> participation in sexual activity "if the individual [knew] that he or she [was] infected with HIV and *intends*, through such sexual activity, to expose another to HIV;"<sup>43</sup> or injecting oneself with a hypodermic needle and subsequently providing that needle to another for the

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37 See *Who Was Ryan White?*, RYAN WHITE & GLOBAL HIV/AIDS PROGRAMS: HEALTH RESOURCES & SERV. ADMIN., <https://hab.hrsa.gov/about-ryan-white-hiv-aids-program/who-was-ryan-white> [<https://perma.cc/UR29-WHU2>] (stating that White had contracted HIV "following a blood transfusion in December 1984").

38 See Garmon, *supra* note 13, at 670 (stating that White's "life and death began to change the American perception of HIV," almost immediately stimulating "a public conversation regarding education about the epidemic").

39 Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1990).

40 *Id.* § 2, 104 Stat. at 576.

41 See *id.* § 2647(a), 104 Stat. at 603 ("The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual . . . who [knowingly intends to infect another with HIV].").

42 *Id.* § 2647(a)(1), 104 Stat. at 603.

43 *Id.* § 2647(a)(2), 104 Stat. at 603 (emphasis added).

purposes of injection, “if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to [HIV].”<sup>44</sup> Congressional expectation after the passage of the CARE Act was that states would develop a statutory system sufficient to meritoriously prosecute the intentional transmission of HIV.

Within three years of the CARE Act’s passage, over twenty-five states had enacted HIV-criminalization laws in various forms, often significantly exceeding the federal mandate. The wide reach of state criminal statutes can be speculatively explained by the presence of an additional provision within § 2647 of the Act, which stated the following: “The State laws described in subsection (a) *need not apply* to circumstances under which . . . the individual who is subjected to the behavior involved knows that the other individual is infected and provides prior informed consent to the activity.”<sup>45</sup> Rather than flatly proscribing the application of states’ HIV-criminalization laws in situations of informed consent, the CARE Act merely allowed for an exception to the scope of HIV-criminalization laws’ application. The ambiguous character of this imperative enabled states to enact penal sanctions dangerously broad in scope. Unsurprisingly, the laws that states enacted reflected the unencumbered diversity of permissible penalization, criminalizing (non-)acts such as the failure to disclose HIV status to a sexual partner, the choice not to use a condom during penetrative sex when HIV positive, the choice not to follow daily medical regimens, and even consensual sex, which was often taken as indicative of a criminal “intent” to transmit HIV.

When the CARE Act was reauthorized in 2000, the provision mandating state enactment of HIV-criminalization laws was repealed.<sup>46</sup> Unfortunately, the repeal of this provision had a *de minimis* effect on the maintenance of HIV penal law;<sup>47</sup> for several years after

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44 *Id.* § 2647(a)(3), 104 Stat. at 603.

45 *Id.* § 2647(b), 104 Stat. at 603.

46 See *S.2311—Ryan White CARE Amendments of 2000*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/senate-bill/2311> [<https://perma.cc/9JHV-LCU7>] (providing summary of amendments to CARE Act, which included the repeal of provisions of 1990 legislation requiring enactment of state penal laws as condition for receipt of federal funding).

47 As of December 21, 2016, the Centers for Disease Control and Prevention explicitly state in response to the question of whether HIV may be transmitted by the bite or scratch of an HIV-positive that HIV is *not* “spread through saliva, and there is no risk of transmission from scratching because no body fluids are transferred between people.” *HIV Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 21, 2016), <https://www.cdc.gov/hiv/basics/transmission.html> [<https://perma.cc/V6EK-W834>]. Inexplicably, five states still maintain penal laws that criminalize the intentional transmission of saliva by an HIV-positive person to another individual. See GA. CODE ANN. § 16-5-60(c) (West 2016); IDAHO CODE ANN. § 39-608(1)

the 2000 amendments, at least “thirty-eight states maintained statutes that either directly criminalized the transmission of HIV or criminalized the transmission of any STD.”<sup>48</sup> As of January 2017, at least twenty-nine states criminally sanction the transmission of HIV.<sup>49</sup> This number does not include state sentencing laws prescribing that the presence of HIV within the body of an individual accused of a sexual crime must augment the period of incarceration;<sup>50</sup> it also does not include civil laws allowing states to confine an individual

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(West 2016); MISS. CODE ANN. § 97-27-14 (West 2016); MO. ANN. STAT. § 191.677 (West 2016); UTAH CODE ANN. § 76-5-102.6(2)(a)(iv) (West 2016). Knowledge that HIV could not be contracted through the exchange of saliva had reached non-scientific communities at least by 1987, three years before the CARE Act had even been enacted. Compare Lawrence K. Altman, *AIDS Studies Hint Saliva May Transmit Infection*, N.Y. TIMES, Oct. 9, 1984, <http://www.nytimes.com/1984/10/09/science/aids-studies-hint-saliva-may-transmit-infection.html> [<https://perma.cc/5QT3-CLF7>] (“New scientific evidence has raised the possibility that [AIDS] may be transmissible through saliva. The evidence, based on human and animal studies, is no more than suggestive in implicating saliva. But researchers said in interviews yesterday that they are convinced the studies raise real public health concerns.”), with Paula A. Triechler, *AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, 43 OCTOBER 31, 36 (1987) (noting that, despite scientific knowledge having established that casual contact between two persons, such as saliva transmission, cannot transmit HIV, the “ambiguity and uncertainty [that] are features of scientific inquiry” are poorly managed socially and linguistically).

48 Garmon, *supra* note 13, at 671.

49 See, e.g., ALA. CODE § 22-11A-21(c) (2016); ARK. CODE ANN. § 5-14-123(b) (West 2016); CAL. HEALTH & SAFETY CODE § 120291(a) (West 2016); FLA. STAT. ANN. § 384.24(2) (West 2016); GA. CODE ANN. § 16-5-60(c) (West 2016); IDAHO CODE ANN. § 39-608(1) (West 2016); 720 ILL. COMP. STAT. § 5/12-5.01 (West 2016); IND. CODE §§ 35-45-16-2(a)-(f) (West 2016); IOWA CODE § 709D.3 (West 2016); KAN. STAT. ANN. § 21-5424 (West 2016); KY. REV. STAT. ANN. § 311.990(24)(b) (West 2016); LA. STAT. ANN. § 14:43.5 (2016); MD. CODE ANN., HEALTH-GEN. § 18-601.1 (West 2016); MICH. COMP. LAWS ANN. § 333.5210 (West 2016); MINN. STAT. ANN. § 609.2241 (West 2016); MISS. CODE ANN. § 97-27-14 (West 2016); MO. ANN. STAT. § 191.677 (West 2016); MONT. CODE ANN. § 50-18-112 (West 2016); NEV. REV. STAT. ANN. § 201.205(1) (West 2016); N.J. STAT. ANN. § 2C:34-5(b) (West 2016); 10A N.C. ADMIN. CODE 41A.0202(1)(a)-(g) (2016); N.D. CENT. CODE ANN. § 12.1-20-17(2) (West 2016); OHIO REV. CODE ANN. § 2903.11(B) (West 2016); OKLA. STAT. ANN. tit. 21, § 1192.1 (West 2016); S.C. CODE ANN. § 44-29-145 (2016); S.D. CODIFIED LAWS § 22-18-31 (West 2016); TENN. CODE ANN. § 39-13-109(a) (West 2016); VA. CODE ANN. § 18.2-67.4:1 (West 2016); WASH. REV. CODE ANN. § 9A.36.011(1) (b) (West 2016). The statutes included in the above list are those that explicitly criminalize HIV; I did not include those general criminal law statutes that may be employed as an ancillary means of prosecution or those statutes that criminalized the transmission of communicable sexual diseases. Effectively, an explicit citation to HIV/AIDS was necessary to qualify for inclusion on this list.

50 See, e.g., ALA. STAT. ANN. § 12.55.155(c)(33) (West 2016) (allowing judges to increase the period of incarceration beyond the presumptive statutory maximum); CAL. PENAL CODE § 12022.85(a) (West 2016) (providing for a three-year enhancement in sentencing after the commission of certain violations); COLO. REV. STAT. ANN. § 18-3-415.5(5)(b) (West 2016) (requiring sentencing of three times the upper limit for a sexual crime if the putative offender has HIV/AIDS); FLA. STAT. ANN. §§ 775.0877(1)(a)-(n) (West 2016) (cataloging various criminal acts for which aggravated sentencing may apply); GA. CODE ANN. § 16-5-60(d) (West 2016) (elevating the criminality of an assault by a person with HIV/AIDS to that of a felony if that person assaults a

believed to demonstrate a dangerous interest in the wanton spread of HIV.<sup>51</sup> Despite the existence of statutes encouraging the use of condoms and allowing such use to serve as an affirmative defense to prosecution, there remain states where the failure to disclose one's HIV positivity is considered felonious regardless of condom use.<sup>52</sup>

To consider the role of the affective in sustaining the carceral logics that animate HIV criminalization, it is ultimately useful to examine HIV-criminalization statutes representative of the general statutory archetype. Discussed below are two state statutes whose contents reflect some of the most common linguistic codifications of HIV penal law.

### 1. Section 709C.1(1)(a) of the Iowa Code<sup>53</sup>

Iowa did not pass its first HIV-criminalization law until 1998, a relatively late point in the chronology of HIV jurisprudence. As written, the statute stated that a person committed the act of criminal transmission of HIV if, while aware of his or her positive status, such

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police officer or correctional officer); TENN. CODE ANN. § 40-35-114(21) (West 2016) (requiring an enhanced sentence if the transmission of HIV is at any point attempted during a crime); UTAH CODE ANN. § 76-10-1309 (West 2016) (increasing penalties for HIV positive criminal offenders regardless of whether such persons pose a significant risk of HIV transmission during the commission of the crime).

51 See, e.g., NEV. REV. STAT. § 441A.300 (West 2016) (“A person who is diagnosed as having acquired immunodeficiency syndrome who fails to comply with a written order of a health authority, or who engages in behavior through which the disease may be spread to others, is, in addition to any other penalty imposed pursuant to this chapter, subject to confinement by order of a court of competent jurisdiction.”); TENN. CODE ANN. § 39-13-108 (West 2016) (authorizing authorities to quarantine any individual who “clearly and convincingly demonstrates willful and knowing disregard for the health and safety of others” by posing a threat of wanton HIV transmission); WIS. STAT. ANN. § 973.017 (West 2016) (including HIV status as a potentially aggravating factor in the determination of incarceration period); Danny Hakim, *Man Who Spread H.I.V. May Be Held*, N.Y. TIMES, Apr. 13, 2010, <http://www.nytimes.com/2010/04/14/nyregion/14nushawn.html> [perma.cc/4UE2-MU45](recounting a New York case in which the Attorney General attempted to keep a putative criminal in indefinite civil confinement under the Sex Offender Management Treatment Act of 2007, a law “intended to keep the most dangerous sex offenders out of communities after prison”).

52 See, e.g., *State v. Wilson*, 256 S.W.3d 58, 64 (Mo. 2008) (concluding that the HIV-criminalization statute is unambiguous and requires prosecution whenever a failure to disclose the putative criminal's status is determined—even in those situations where prophylaxis is employed).

53 IOWA CODE ANN. § 709C.1(1)(a) (West 2003) (repealed 2014). It is important to note that Iowa significantly amended its HIV-criminalization statute in 2014 by reducing the maximum period of incarceration from twenty-five years to five years for exposure of an uninfected individual to HIV with reckless disregard as to whether the uninfected person contracts the virus.

individual “[e]ngages in *intimate* contact with another person.”<sup>54</sup> In turn, the statute defined “intimate contact” as “the intentional exposure of the *body* of one person to a *bodily fluid* of another person in a manner that could result in the transmission of [HIV].”<sup>55</sup> The statute was amended in 2014 to include a provision stating that the use of practical means of prevention to avoid the transmission of HIV between serodiscordant sexual partners would demonstrate that an HIV-positive individual did not act with the requisite *mens rea* to sustain a criminal prosecution.<sup>56</sup> Interestingly, the practical means provision effectively supplements a preexisting provision of the statute which provided for consent as an affirmative defense to prosecution,<sup>57</sup> the absence of which was a common, though by no means uniform, feature of other states’ criminalization laws.<sup>58</sup>

Here, the capacity of one body to affect another, to impinge upon it “criminally,” is contextualized by the statute’s language of “intimate conduct.” Sexual exchange and bodily intermingling are produced as sites of the private, the sensual, the knowingly erotic—and yet the profoundly dangerous.<sup>59</sup> The prohibited behaviors did not require the attribution of intimacy for the statute’s mandate to be cognizable. The incorporation of this affective

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54 *Id.* (repealed 2014) (emphasis added).

55 *Id.* § 709C.1(2)(b) (repealed in 2014) (emphasis added).

56 See IOWA CODE ANN. § 709D.3(7) (West 2016) (“A person does not act with the intent required [by the statute] if the person takes practical means to prevent transmission.”); see also IOWA CODE ANN. § 709D.2(3) (West 2016) (defining “practical means to prevent transmission” as “substantial good faith compliance with a treatment regimen prescribed by the person’s health care provider . . . [or use of] a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease”) (internal quotation marks omitted).

57 IOWA CODE ANN. § 709C.1(5) (West 2003) (repealed 2014) (“It is an affirmative defense that the person exposed . . . knew that the infected person had a positive . . . status at the time of the action of exposure, knew that the action . . . could result in transmission . . . and consented to the action of exposure with that knowledge.”).

58 Proof of consent to exposure is available in certain states as an affirmative defense to prosecution on the basis of criminal HIV transmission. Other states, however, do not consider consent to be a viable defense, affirmative or otherwise, to prosecution under HIV-criminalization laws, suggesting that an individual would likely remain criminally liable for transmission (regardless of its actual occurrence) even in situations of consensual sexual intercourse. See Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 392 (discussing the utility of the affirmative defense of consent in HIV-criminalization prosecutions).

59 The statute’s use of the phrase “intentional exposure” is particularly apposite to this point. The intentionality of transmission is built into the statute’s definition of “intimate contact,” thereby suggesting that to be intimate with a person who is HIV positive or as a person who is HIV positive necessarily invokes a sense of criminality and violation in the space regularly presumed to be defined by the absence of those affective sensations.



valence, however, operates to purposefully exacerbate the criminality of HIV transmission; it posits a scene of heterosexualized intimacy endangered by the confluence of intimacy and criminal intentionality vis-à-vis furtive, intentional HIV transmission. In its creation of a sexual imaginary that privileges a specific form of bodily sexual expression, the law exploits the familiarity of those affective resonances bound by a model of kinship that aggrandizes the stakes of putative betrayal and sexual contagion. Tellingly, the statute does not reference penetrative intercourse, and it avoids graphic viscerality in favor of hazy euphemism. The type of “contact” the statute envisions is qualified by its “intimate” character, and, though this rhetoric enables a sexual imaginary of benign sexuality, such a possibility dissipates once the statute’s definition of intimacy is articulated—one of leaking bodily fluids and vulnerable, compromised bodily surfaces.

Of obvious interest, then, is the statutory definition of “intimate contact,” which speaks of the *body* of one subject and the *bodily fluid* of another. Curiously, the durative predicate constituting “intimate conduct” has no *acting* subject. Definitive of the contact is not the action of an individual; it is the *passage* of fluid to body, the “exposure . . . that could result” in viral transmission. The statute does away with the notional agentic subject in favor of an affective reorganization of sexual temporality that agonizingly emphasizes the latent possibility of sexual criminality. In so doing, Iowa’s criminalization statute conjures a phantasmatic actor who is somehow able to facilitate the bodily exchange that the statute sanctions without ever taking corporeal, embodied form. A specter dwells within Iowa’s law, one that retroactively produces a fictive drama of intimacy to heighten the crime the HIV-positive body waits to commit.

## 2. Section 5-14-123 of the Arkansas Code<sup>60</sup>

Passed in 1989 and not having undergone any alterations since its enactment, Arkansas’ HIV-criminalization law remains disturbingly punitive, authorizing a maximum prison sentence of up to thirty years.<sup>61</sup> The statute’s semantic structure reads declaratively, with its first provision ostensibly *not* proscribing any specific criminal act but instead *categorically* asserting that a person living with AIDS or who is HIV positive “is infectious to another person through the exchange of a body fluid during sexual intercourse and through the parenteral transfer of blood or a blood product and *under these circumstances is a danger*

60 ARK. CODE. ANN. § 5-14-123 (West 2016).

61 See *id.* § 5-14-123(d) (“Exposing another person to human immunodeficiency virus is a Class A felony.”); ARK. CODE. ANN. § 5-4-401(a)(2) (West 2016) (stating that a defendant convicted of a Class A felony shall receive a sentence of “not less than six (6) years nor more than thirty (30) years”).

to the public.”<sup>62</sup> The next provision delineates the elements of the offense of criminal exposure, which is committed when an individual who is aware of his HIV-positive status “exposes another person to [HIV] infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another person without first having informed the other person of the presence of [HIV].”<sup>63</sup> The phrase “sexual penetration” is in turn defined as any form of sexual penetration “or any other intrusion, *however slight*, of any part of a person’s body or of any object into a genital or anal opening of another person’s body.”<sup>64</sup> The statute then states explicitly that “emission of semen is not required” for either prosecution or conviction.<sup>65</sup>

Arkansas’ criminalization statute bears the title “Knowingly transmitting AIDS, HIV.”<sup>66</sup> When juxtaposed against the statutory text, which properly differentiates the development of AIDS from the contraction of HIV, the statute’s title does significant normative work in the construction of the HIV-positive criminal. The title’s conflation of HIV and AIDS dissolves the possibility of a non-phobic stance toward HIV positivity through its densely concentrated ascription of criminal intention to the HIV-positive sexual actor. No *mens rea* standard is articulated within the statutory text, despite the suggestion borne by the statute’s title; what, then, might the titular language of knowledge be meant to signify? While no definitive answer can be provided, two aspects of the title merit attention: the conjugation of “transmit” in the durative predicate and the inverted viral temporality suggested by the ordering of “AIDS” before “HIV.” To describe a criminal act through the language of ongoing continuity, such as that suggested by “transmitting,” disrupts the linear temporality that organizes and divides past from present, present from future. These points of breakage cannot be identified when that which marks a subject’s action demarcates neither beginning nor end. This temporal disorientation is arguably heightened by the peculiar placement of “AIDS” before “HIV,” which both synonymizes the two (a form of metonymic slippage that heightens the spectacular precarity of the danger posed by the sexually active HIV-positive body) and signifies the primacy of that which results in death—the development of AIDS. It is the decomposition of bodily immunity that defines the onset of AIDS, still taken to symbolize a death no longer able to be deferred.

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62 *Id.* § 5-14-123(a) (emphasis added).

63 *Id.* § 5-14-123(b).

64 *Id.* § 5-14-123(c)(1).

65 *Id.* § 5-14-123(c)(2).

66 ARK. CODE. ANN. § 5-14-123 (West 2016).

In the criminal statute's first provision, a declaration is made regarding persons who are HIV positive: no matter the circumstances of their sexual or bodily interactions, HIV-positive persons are sites of public danger and therefore must be surveilled and controlled. The emphatic character of this danger is highlighted by the statute's definition of "sexual penetration," which holds that even the slightest impingement upon the body—not solely those bodily sites and orifices traditionally associated with sexual acts—constitutes a penetrative, and therefore virally infectious, act. That the statute does not condition the viability of prosecution on the emission of semen during a sexual encounter, though ostensibly curious merely by virtue of its express notation,<sup>67</sup> materializes as perfectly intelligible when contextualized by statute's emphasis on parenteral contact. In its commentary on Arkansas' HIV-criminalization law, the Center for HIV Law and Policy states that prosecution governed by a theory of parenteral exposure will argue that, "through a break in the skin or through a mucus membrane . . . any amount of HIV-positive blood [that] makes contact with another individual's non-intact skin, eyes, nose, mouth, or other area" justifies a conviction.<sup>68</sup> Intentionality is rendered purposefully absent, which incites the question of *who* exactly is deemed the acting criminal agent.

### B. Judicial Production of the Juridico-Affective Discourse of HIV

With the passage of state penal statutes came a deluge of criminal prosecutions, several of which resulted in the publication of judicial opinions by both intermediary courts and state courts of last resort. The legal texts these courts produced in their evaluations of HIV-criminalization statutes are the primary archival sites of this next discussion. I examine the below opinions with an assiduous scrutiny, the granular mode of which follows from courts' role as the "central institutional venue[s] for negotiating the role of sexuality [and race] in the public sphere."<sup>69</sup> The capacity to negotiate the meaning of public spaces is

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67 It is also worth noting that, by explicitly denying the necessity of seminal emission to the viability of criminal prosecution, Arkansas' statute centralizes the male body as the *sine qua non* of sexual aberrance and HIV-driven criminality. The likelihood of contracting HIV from a sexual encounter is driven by the quantity of virus present within an individual's body, known also as an individual's viral load. Vaginal secretions are among the bodily fluids that can contain (and therefore can transmit) HIV, but the possibility of transmission is determined by multiple other factors—including the consistent use of antiretroviral medication as prescribed by one's physician. By situating the penis as the locus of potential criminality and then dismissing the presence of seminal emissions as an evidentiary requirement, Arkansas's HIV-criminalization law doubly signifies the male body as the precarious site of HIV transmission and criminal sexuality.

68 RICHARDSON ET AL., ENDING & DEFENDING AGAINST HIV CRIMINALIZATION, *supra* note 12, at 16.

69 Nan Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1541 (2004).

undergirded by the relative autonomy the judiciary enjoys in fashioning the language it will use to vivify the law's dimensionality. Just as was the purpose of my review of Iowa's and Arkansas' HIV-criminalization laws, my objective here is to locate the juncture of bodily affect to the law that encourages the personification of HIV as a lethal, homicidal agent. Although I will present my discussion of these cases chronologically, this organizational choice is not meant to suggest that my analysis charts an *evolution* in the affectivity of HIV jurisprudence. Instead, I have chosen cases decided at various points in the history of the epidemic to more clearly demonstrate the embedded, ongoing character of the juridico-discursive in HIV-criminalization law.

### 1. *State v. Haines*<sup>70</sup>

In August 1987, police officers drove to the apartment of Donald Haines, located in Lafayette, Indiana.<sup>71</sup> Haines was found unconscious in a pool of blood, having attempted to commit suicide. When one of the responding officers successfully revived Haines, Haines "begin yelling and stated he wanted to f—[the officer] and 'give it to him,'" <sup>72</sup> understood by the officers to mean HIV because of clarifying information offered by Haines' sexual partner. Haines stated that he would use his wounds to splatter blood on the officers, and, upon the arrival of emergency medical technicians, Haines threatened to infect them with HIV by "spitting at them."<sup>73</sup> The court continued to detail the excesses of blood that doused officers' "eyes, mouth[s], and skin,"<sup>74</sup> stating that Haines "repeatedly told the medical staff not to touch him because he was diseased" and that Haines knew the staff "was 'afraid of his AIDS' because of the protective clothing they were wearing."<sup>75</sup> The responding officers subsequently arrested Haines, and the prosecuting attorney charged Haines with three counts of attempted murder, of which a jury found Haines guilty on each count.<sup>76</sup> Haines moved for a judgment on the evidence as to the three counts of attempted murder, which the trial court granted, vacating the verdict; Haines was subsequently charged with three

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70 *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989).

71 *Id.* at 835.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *State v. Haines*, 545 N.E.2d 834, 836 (Ind. Ct. App. 1989).

counts of battery, resulting in a six-year sentence.<sup>77</sup> The prosecuting attorney appealed the court's granting of a motion for judgment on the evidence.

The Court of Appeals of Indiana quoted extensively from the record of the lower court's transcript throughout its decision, and the language selected by the appellate court does significant normative work in the production of a juridico-affective discourse that subtends the criminalization of the HIV-positive body. In its evaluation of the common law of attempt, the trial court stated that, under normal circumstances, the mere act of spitting could not constitute "a step, substantial or otherwise," to satisfy the requisite burden of proof.<sup>78</sup> However, the case at hand was unique in that the conduct in question was linked to a disease "which by definition [was] inextricably based in science and medicine," and, for a jury to evaluate that conduct, it required the aid of expert assistance to better understand that science.<sup>79</sup> Per the trial court, the prosecution was incorrect to assume that the jury knew the truth—that AIDS was "as common a killer as a gun or a knife, which by their very nature are deadly weapons."<sup>80</sup> With this contention the appellate court disagreed, as the trial record demonstrated unequivocally that "Haines carried the AIDS virus, was aware of the infection, believed it to be fatal, and intended to inflict others with the disease by spitting, biting, scratching, and throwing blood."<sup>81</sup> The appellate court ultimately reversed the trial court's judgment, stating that Haines' "biological warfare with those attempting to help him [was] akin to a sinking ship firing on its rescuers."<sup>82</sup>

In its grotesque narration of Haines' detention by police and medical staff, the appellate court relentlessly emphasized the precarious portals of bodily entry that imperiled the responding officers. Bodily fluids such as blood and spit became the vectors through which disease could circulate among vulnerable organic tissues, where bodily sites such as eye sockets, mouths, and skin membranes were transformed into the lethal conduits of viral transmission. The linguistic presentation of *Haines*' curious facts takes root in the forbidden intermingling of a criminal body with the body of the state; the capacity of bodies to be vivisected by a lethal, unrepentant virus is captured most clearly in the court's emphasis on

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77 *Id.*

78 *Id.* (citations omitted).

79 *Id.* (citations omitted).

80 *Id.* at 837 (citations omitted).

81 *Id.* at 838.

82 *State v. Haines*, 545 N.E.2d 834, 838 (Ind. Ct. App. 1989).

the vulnerability associated with the touch of the contagion. Augmenting this suggestion of bodily vulnerability was the appellate court's unequivocal subjectification of HIV.<sup>83</sup> It is not the criminal subject who exploits his HIV-positive status to potentially harm the police officers seeking to thwart his suicide attempt. Instead, it is HIV that *becomes* the killer. The subject whose body bears the virus becomes psychically displaced by the virus itself, and what remains is a tool that will facilitate HIV's murderous will, having already taken its first victim at the moment of transmission—the HIV-positive subject now psychically dispossessed of his own body.

Perhaps most interesting is appellate court's description of Haines' actions as "biological warfare." In his extensive examination of American histories of bioinsecurity, Neel Ahuja suggests that the figurations espoused by contagion and microbial ecologies produce "intimate, even eroticized threats: the invisible weapon, the body poised to explode into violence, unthinkable knowledge, improper touch, unknown penetration, unpredictable shape-shifting."<sup>84</sup> Insofar as the affective is the political and the political the affective, the appellate court's invocation of warfare—a dramatized scaling whose hyperbole exacerbates the construction of the HIV-positive body as a vector of disease and danger—generates a nodal juncture at which national fears of interspecies contact could be inscribed onto the hyper-localized examination of Haines' criminality. That Haines spilled his own blood dissolved the putative boundary between the unmarked "outside" and the virally putrid "inside," and the violent eradication of this bodily dualism transformed Haines' body not only into a contact zone of virality but also into a leaky weapon of atmospheric saturation. HIV circulated beyond the physical limits of the body in which it was once contained,

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83 Because the appeal in *Haines* dealt with the legal propriety the trial court's granting of a motion for judgment on the evidence subsequent to the jury's verdict, the appellate court quoted extensively from the transcript of the proceedings at trial in its own opinion. At sentencing, the trial judge described the position taken by the prosecution in its selective submission of evidence: "[I]n this case, the State took the position that everyone has heard of AIDS; that everybody has read about the disease of AIDS; and that everyone knows that this disease can be lethal or that it is lethal; that AIDS, if you will, *is as common a killer as a gun or knife*, which by their nature are deadly weapons." *Id.* at 837 (citation omitted). The trial court rejected the viability of this assumption, which led the appellate court to reverse the trial court's displacement of the jury's verdict. In reaching its decision, the appellate court stated the following: "We can only conclude that Haines had knowledge of his disease and that he unrelentingly and unequivocally sought to kill the persons helping him by infecting them with AIDS, and that he took a substantial step towards killing them by his conduct believing that he could do so." *Id.* at 841. The intensity with which the appellate court describes Haines' desire to kill those "helping him" by "infecting them with AIDS" sounds almost otherworldly, and it is through the affectivity of this language that the HIV-positive body becomes something other than human—something viral, something murderous, and something unquestionably dangerous.

84 AHUJA, *supra* note 22, at 15.

fulfilling the murderous needs of a fictive will retroactively personified.

## 2. *State v. Hinkhouse*<sup>85</sup>

Timothy Hinkhouse was convicted of ten counts of attempted murder and ten counts of attempted assault on the basis of having unprotected sex with multiple partners despite knowing that he was HIV positive.<sup>86</sup> Hinkhouse appealed his conviction on the grounds that the evidence the prosecution presented was insufficient to establish intent to murder or cause serious injury to any of his sexual partners; the Court of Appeals of Oregon disagreed and affirmed the convictions.<sup>87</sup> In its recitation of the facts, the appellate court took pains to evince the quantity of Hinkhouse's sexual partners, often citing testimony from the record of the lower court's proceedings to demonstrate Hinkhouse's putative disregard for the lives of those whom he infected.<sup>88</sup>

In November 1990, two years prior to Hinkhouse's arrest and trial, Hinkhouse informed his probation officer that he had learned of his positive status. Hinkhouse's probation officer stated that, should Hinkhouse pass the virus to another person, he would "be killing someone,"<sup>89</sup> and the two regularly had conversations in which Hinkhouse was reminded of "the danger [he] posed by continuing to engage in sexual relationships."<sup>90</sup> When taken into custody for an unrelated probation violation several months later, Hinkhouse "signed a probation agreement that included a commitment not to engage in any unsupervised contact with women without express permission from his parole officer."<sup>91</sup> Despite having signed this agreement, Hinkhouse continued to solicit sex from various partners, and his use of condoms was rare and often purposefully disregarded. The court noted a particular occasion in which Hinkhouse refused to wear a condom and engaged "in intercourse so

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85 *State v. Hinkhouse*, 912 P.2d 921 (1996).

86 *Id.* at 922.

87 *Id.*

88 *Id.* ("When they met, defendant asked whether she had been tested [for HIV]. P.B. responded, '[W]ell, you should know my status because you gave it to me.' Defendant did not deny the accusation, but just 'brushed it off.'").

89 *Id.* at 923.

90 *Id.*

91 *State v. Hinkhouse*, 912 P.2d 921, 923 (1996).

vigorously” that his partner suffered vaginal bleeding.<sup>92</sup> The single exception Hinkhouse recited to his preference for condomless sex was with the woman whom he stated he intended to marry; Hinkhouse disclosed his HIV status to her and described having always worn condoms during sex.<sup>93</sup>

The appellate court’s characterization of Hinkhouse’s sexual proclivities effected a dramatized backdrop against which it summarized the commentary of various scientific experts. Such recapitulations often borrowed from the linguistic domain of security; for example, one expert is recounted as having stated that “more *violent* sex or anal sex increases the risk of transmission, because of the increased likelihood that tears in tissue [will] break down the body’s *barriers* to the virus.”<sup>94</sup> The language of securitization found its curious complement in the rhetoric of psychopathology, including evaluations from the state’s psychiatric expert which concluded that Hinkhouse suffered from both borderline personality disorder and antisociality.<sup>95</sup> The expert considered it significant that Hinkhouse “agreed to use, and in fact used, condoms when having intercourse with a woman for whom he expressed affection, but [did] not use condoms with the other women with whom he had sex.”<sup>96</sup>

Upon review of the evidence, the appellate court concluded that a rational trier of fact could find that Hinkhouse had intended to cause both physical injury and death to his victims. The court stated that Hinkhouse knew his “condition was terminal,”<sup>97</sup> and that “if he transmitted the virus to another person, that person would eventually die as well.”<sup>98</sup> Although Hinkhouse insisted that his sole purpose was his own sexual gratification, the court found the suggestion to lack credibility. Ultimately, the court concluded:

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92 *Id.*

93 *Id.*

94 *Id.* at 924 (emphasis added).

95 *Id.* Antisocial Personality Disorder is characterized by “poor social conformity, deceitfulness, impulsivity, criminality, and lack of remorse.” JON E. GRANT & DONALD W. BLACK, *DSM-5 GUIDEBOOK: THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 397 (5th ed. 2014). To be diagnosed with Antisocial Personality Disorder, an individual must “have little sense of responsibility, lack judgment, blame others [for socially inappropriate acts], and rationalize their behaviors.” *Id.* Many persons suffering from this disorder are caught within the crosshairs of the criminal justice system. *Id.*

96 *State v. Hinkhouse*, 912 P.2d 921, 924 (1996).

97 *Id.*

98 *Id.* at 924–25.



[Hinkhouse's conduct demonstrated] that his objective was more than mere sexual gratification. When he engaged in sexual intercourse with the woman he hoped to marry, he consistently wore condoms and made no attempt to conceal his HIV status. When he had sex with others, in contrast, he concealed or lied about his condition and refused any protection. Particularly in the light of the pattern of exploitation over a long period of time, a rational factfinder could conclude beyond a reasonable doubt that defendant did not act impulsively merely to satisfy his sexual desires.<sup>99</sup>

*Hinkhouse* underscores the mutually constitutive nexus of affect and securitization, whereby the reiterative performativity of the volatile HIV-positive body requires endless monitoring by supervisory juridical apparatuses. Foucault argues that freedom, as both an ideology and a technique of governance, “is nothing else but the correlative of the deployment of apparatuses of security . . . no longer [defined by] the exemptions and privileges attached to a person, but the possibility of movement, change of place, and *processes of circulation* of both people and things.”<sup>100</sup> Having been brought within the crosshairs of a disciplinary carceral system, Hinkhouse's sexual freedom was immediately recalibrated as a ratio correlative to the state's capacity to curtail that freedom. This figuration of security, the intelligibility of which is contingent upon identifying Hinkhouse as a vector of disease whose potential for violence takes on an especially acute form insofar as HIV has not yet “marked” his body, masquerades as an affective sense of bodily prophylaxis for the population of heterosexual women (as identified by the appellate court) who might otherwise fall victim to Hinkhouse's (or HIV's?) artifice.

The style of anticipatory governmentality Hinkhouse's “probation agreement” effectuates becomes for the court a juncture of temporal collapse, where Hinkhouse's prior and future misdeeds map onto a present whose boundaries undergo unexpected metamorphosis at the very moment when the state's biopolitical control manifests its putative apex. The probation agreement operates as a nodule of anticipatory juridical intervention. By requiring Hinkhouse to obtain express permission from his parole officer whenever he seeks to have contact with women, its purpose is not to mitigate the potential transmission of HIV or to reduce the state's purported fear of wanton viral exchange; instead, the agreement rests on the tacit presupposition that Hinkhouse *will inevitably seek contact* with women, *will inevitably seek to transmit the virus*, and thus conjures the very

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99 *Id.* at 925.

100 MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978 48–49 (Michel Senellart ed., Graham Burchell trans., 2009).

sense of affective invasion and bodily susceptibility it purports to mitigate.

Again appearing within a judicial opinion regarding HIV criminality is the leakiness and timidity of the body in its shedding of blood. Rhetorical emphasis was placed on Hinkhouse's interest in sexual intercourse so vigorous as to cause his partner to bleed vaginally, and this narrative depiction of sexual violence allowed the court to displace the human body from the register of organism to that of a fortress under siege. Discussion of bodily "barriers" broken down by Hinkhouse's aggressive style of sexual intercourse dispossess Hinkhouse of any psychic subjectivity so as to effect an allusion of his penis as a battering ram poised to release its viral napalm. Curiously, the appellate court includes citations from the trial record only when adding to the pernicious dimensionality of Hinkhouse's personality. Descriptions of roughness, rudeness, and reveling in opportunities to be "spiteful" are lifted from the testimony of Hinkhouse's prior partners, while testimonial language confirming the court's lurid descriptions of Hinkhouse's sexual inclinations stands as conspicuously absent.

Undergirding much of the appellate court's analysis is a heteronormative logic of monogamous kinship, which crystallizes throughout the testimony of the state's psychiatric expert in a paradoxical form. The court finds it of significance that Hinkhouse consistently used condoms during sexual intercourse with the woman whom he hoped to marry and that he had disclosed his positive status to this partner prior to the consummation of their sexual relations. Hinkhouse's interest in marriage, which might have been read as a willing submission to the disciplinary heteronormativity regulating sexual relations, is instead inverted and used as further evidence of his criminal intentions. Insofar as Hinkhouse demonstrated the kind of responsible, domesticated sexuality associated with heteronormativity with the woman he identified as a future wife, the wanton spread of HIV through reckless sexual abandon with multiple other partners further damned Hinkhouse as sexually *and* psychologically depraved. The import of the state's psychiatric expert's diagnosis of Hinkhouse with borderline personality disorder and antisocial personality disorder cannot be read merely as compounding evidence. These twin diagnoses evacuate Hinkhouse of the kind of normalized psychic subjectivity that is central to the modernist understanding of the agentic, rational subject; under a modernist, Cartesian reading that would divorce the body from the psyche, Hinkhouse's fractured psychic state left his body abandoned and without a psychic master. In the absence of a coherent psychic self, what remained operative within Hinkhouse's body? That the immediate answer to that question is HIV is not inconsequential.

### 3. *People v. Shawn*<sup>101</sup>

In 2001, Eric Shawn was arrested after an altercation with the assistant manager of a drug store, during which Shawn “allegedly made a threat by saying he was HIV positive.”<sup>102</sup> Shawn was arrested and subsequently charged with one count of misdemeanor theft and one count of felony menacing; a jury found him guilty on both counts, leading Shawn to file an appeal specifically contesting the sufficiency of the evidence supporting the conviction for felony menacing.<sup>103</sup> In the state of Colorado, a person commits the crime of menacing if, “by any threat or physical action, he or she knowingly places or attempts to place another person in *fear* of imminent serious bodily injury.”<sup>104</sup> Menacing, though normally a misdemeanor, is classified as a felony if “committed by ‘the use of a deadly weapon’ or by ‘the person representing verbally or otherwise that he or she is armed with a deadly weapon.’”<sup>105</sup> The appellate court noted that, in determining whether Shawn placed or attempted to place the putative victim in fear of imminent serious bodily injury, the proper focus should be placed “on the intent and conduct of the actor, not of the victim. The prosecution need only prove the defendant was aware that his or her conduct was practically certain to cause fear.”<sup>106</sup>

After rejecting Shawn’s contention that his actions were not intended to incite fear in the victim, the appellate court considered whether Shawn used a “deadly weapon” during the commission of the act of criminal menacing. The court noted that, in Colorado, a “deadly weapon” is defined as “any weapon, device, instrument, *material, or substance*, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.”<sup>107</sup> For HIV to qualify as a deadly weapon, the inquiry the court described emphasized not the extent to which the transmission of HIV was likely but rather whether an object or substance *could* cause transmission.<sup>108</sup> The

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101 *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004).

102 *Id.* at 1034.

103 *Id.*

104 COLO. REV. STAT. ANN. § 18-3-206 (West 2016) (emphasis added).

105 *Shawn*, 107 P.3d at 1034 (citing *People v. Hines*, 780 P.2d 556 (Colo. 1989)).

106 *Id.* at 1035.

107 *Id.* (emphasis added).

108 *Id.* at 1036 (“In Colorado, the controlling standing is whether the object or substance is ‘capable’ of causing, rather than ‘likely’ to cause serious bodily injury.”).

commission of felony menacing requires the incitement of fear in the victim and not actual use of the deadly weapon, as would be required in an allegation of assault. Ultimately, then, the propriety of Shawn's appeal turned on whether he in fact "used" HIV as a threatening, deadly weapon.

Prior decisional law in Colorado's highest court had held that the term "use" was "broad enough to include the act of holding the weapon in the presence of another in a manner that causes the other person to fear for his safety."<sup>109</sup> In the case the appellate court cited, *People v. Hines*, the defendant had held a gun at his side and "stated to the victim, 'You make one move . . . and I will put a hole in you.'"<sup>110</sup> The appellate court found *Hines* analogous to the instant appeal, stating that defendant's acts of pinching and scratching the victim as well as attempting to bite the victim were sufficient "to show [that Shawn] 'used' his purported HIV status in a manner that could cause the victim to fear for his safety."<sup>111</sup> Because Shawn had "attempted to break the victim's skin, [he] had [had] ready means of transmitting HIV and thus [had] used the infection to attempt to induce fear in the victim."<sup>112</sup>

The decision the appellate court reached in *Shawn* depended on a demonstration of the intersection of three juridico-affective axes: 1) Shawn's incitement of fear in the victim not merely as a psychic matter but as one intimately related to a sense of bodily violation and harm; 2) the affective lethality symbolically embedded within preexisting discourses of HIV circulation through the intermingling of "open" skin; and 3) the transmogrification of the HIV-positive body into a living, organic weapon, analogous to the gun-prosthesis described in *Hines*, capable of inciting fear of imminent bodily harm by an announcement of its presence and its proximity. Through its presentation of the factual record and its cleverly elastic reading of juridical precedent, the appellate court was able to generate each of these axes in the form of fundamentally axiomatic truths and then braid them together in the affirmation of Shawn's conviction.

That these valences are primarily affective and divorced from the per se emotional can be read within the court's interpretation of the juridical meaning of "fear." In its conclusion that Shawn's actions were certain to cause fear, the appellate court paradoxically states that

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109 *Id.* (citing *Hines*, 780 P.2d at 599).

110 *Id.* (citing *Hines*, 780 P.2d at 558).

111 *People v. Shawn*, 107 P.3d 1033, 1037 (Colo. App. 2004).

112 *Id.*

“the victim’s testimony that he *was not in imminent fear* of injury *does not* require another result.”<sup>113</sup> The court buttresses this conclusion by citing to prior case law holding that a victim’s “*actual* reaction” cannot be dispositive in determining whether defendant sought to incite fear.<sup>114</sup> More than simply ignoring its earlier dicta that what the victim saw or heard during the commission of the crime is relevant to the legal inquiry, the court dismisses the necessity of a cognitive registration of fear within the victim and instead depends upon proof of bodily excitation and stimulus. The objectivity purportedly undergirding the court’s analysis is merely a juridical trope that veils the court’s turn to the affective; indeed, there is a barely palpable undercurrent of psychoanalytic projection embedded within the court’s pronouncements, allowing it to displace the fear of the “victim” and supplant that space with its own paranoia.

Manifest once again is the anticipatory fear of the breakdown and intermingling of bodies and skin, where the viral ecology of Shawn’s body becomes a weapon as deadly as a gun. An examination of the economy of presuppositions allowing the court to claim that threatening to kill an individual with a gun and stating aloud that one is HIV positive share mimetic substance is also worthwhile. The use of a firearm to cause bodily injury to another person requires, in most instances, the conscious aiming of that firearm at the individual and the pulling of the firearm’s triggering mechanism. Of course, the firearm only becomes a bodily prosthetic during the period in which it is held; once it is removed from the body operating it, the gun’s status as dangerous prosthesis is nullified. That an individual can remove a gun from his hands presents a choice situated in starkly orthogonal juxtaposition to the “deadly weapon” of HIV positivity. Because an individual cannot excise HIV from his body, the court’s false equivalency of the firearm and the virus further sediments the criminalization not of an act but of *a body*. It is telling that the appellate court cited testimony from *Hines* in which the defendant spoke of putting “a hole” in the body of his potential victim; the capacity of a firearm to tear open a body in the form of a wound is the polarized dramaturgy of HIV’s work as a viral migrant, seeking its entry in the tiniest of vulnerabilities.

The appellate court thus divests Shawn’s body of the psychic subjectivity in order to reimagine that body as a weapon of viral warfare. Shawn need not have speech nor name, nor need he live as would any other human organism. What the court facilitates is the subjectification of HIV as agentic, as the true psychic entity devising its plans of reproductive bloom, as the master of a body whose speech takes the form of the curdling

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113 *Id.* at 1035 (emphasis added).

114 *Id.* (emphasis added).

blood-cry and the penetrating wound: destruction, alone and absolute.

### C. Psychic Dispossession and the Personification of HIV

The three cases discussed above are by no means exceptional in their rhetoric or in their holdings; my review of the juridical literature produced by courts within the field of HIV criminal jurisprudence suggests that they are, in fact, accurately emblematic of the body of decisional law construing HIV-criminalization statutes and prosecutions. Notably, in each of the above decisions, the court produced a legal analysis whose consequence reverberated not only in its amplification of the American carceral complex but also in its dependence on appeals to affect. This constant refrain to sites of bodily sensation subtends the proliferation of the juridico-affective discourse of HIV criminalization, wherein the intelligibility of punitive legal measures is indexed by the court's capacity to linguistically capture the myriad ways in which HIV impinges on the unsuspecting body.

Both intriguing and disturbing about this discourse is its forcible divestiture of an individual's psychic subjectivity from that individual's body to aggressively augment the sense of HIV's looming lethality. The consequence of this histrionic cultivation of fear is the dehumanization of the HIV-positive subject and the imputation of an agentic psyche to the virus reproducing within its host. As my readings of the above cases suggest, the efficacy of this perverse (re)inscription is intimately bound to the court's conjuring of bodily affect and the susceptibility of the body to HIV transmission. HIV becomes an actor within the dramaturgy of the crime, taking its role as the collective agent orchestrating its own transmission and reproduction across a nation completely unable to curtail its seepage. The anxiety that attends to the vulnerability of bodily porousness and the potential for the exploitation of that porousness infuse all three opinions with a unique kind of urgency—the micropolitical, affective battle waged within each opinion is almost understood to be tied to the macropolitical affective battle a wounded nation wages against HIV, an unremitting viral interloper.

Examples of this affective subjectification are multiple, but I find that the most illuminating involve the courts' ventriloquy of the HIV-positive persons standing before them. Citations of the HIV-positive criminal's speech—almost always reflective of the morbid and murderous—forge an aporia within which the subjectification of HIV as the puppeteer dominating the psyche of its bodily marionette may begin. One need only consider, for example, the appellant who bit a police officer during his arrest with the alleged intent to transfer HIV who then laughed when the officer asked if he was HIV-

positive,<sup>115</sup> or think about the HIV-positive man who “sought” to infect the police officers that revived him after an attempted suicide,<sup>116</sup> or remember the “criminal” who informed those around him that he had AIDS and that it was his intention to take as many with him in death as he could,<sup>117</sup> or acknowledge the sexual predator who sought to ensure that everyone would “die with [him]” from HIV.<sup>118</sup>

In each instance, behavior deemed sexually and physically violent to a domesticated, non-infectious social order is thrust into the rhetoricized present in the form of endless trauma. This forced exchange between past and present deconstructs the notion that the past is only a source of what *was*, producing a distinct repetition of the trauma of transmission in the present as what *is*, *was*, and *will be*, without distinction. In its violation of temporal norms, this deployment of past-as-present mirrors the sense of affective violation generated by the above judicial opinions that is meant to signify the corruption of bodily security. A process of psychologizing occurs at these junctures of memory, where the person living with HIV is signified as a site of psychic dispossession, investing HIV with the power of bodily control and the capacity to effectuate the virus’ homicidal will. This will, though difficult for the courts to articulate, is manifest in their invocations of affect, which litter the language, images, and narratives of their opinions.

### III. The Criminal Cadenza of Tiger Mandingo: Michael Johnson, HIV Criminalization, and the Juridico-Affective

The analysis presented in Part III sought to chart a (partial and inevitably fragmented) genealogy of the juridico-affective discourse of HIV criminalization. My purpose was to lay a foundation upon which to consider the following question: Is the juridico-affective economy of language subtending HIV criminalization coherently maintained and visible in the criminal prosecution of Michael Johnson? Problematically, no primary sources from

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115 *Scroggins v. State*, 198 Ga. App. 29, 29 (1990) (“Ultimately, Officer Crook got Greg Scroggins to the ground and straddled him. He heard Scroggins making noises with his mouth as if to bring up spittle; then Scroggins raised forward and bit Officer Crook on the forearm. The bite was strong enough to tear through the officer’s long-sleeved shirt, and left distinct, full-mouth bite wounds which took ten months to heal.”); *id.* at 30 (“Officer Crook went to Scroggins and said, ‘Dude, do you have AIDS?’ Scroggins just looked at him and laughed. He had just two months earlier been diagnosed as having the HIV virus.”).

116 *State v. Haines*, 545 N.E.2d 834, 835 (Ind. Ct. App. 1990).

117 *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. Ct. App. 1992).

118 *State v. Stark*, 66 Wash. App. 423, 433 (1992) (including testimony from Stark’s neighbor, accounting a statement in which Stark said, “I don’t care. If I am going to die, everyone is going to die.”).

Johnson's criminal trial are publically accessible; accordingly, my analysis of affect's normative role in the production of Johnson as an "HIV monster" will proceed through a close reading of major journalistic accounts of Johnson's life and the events of the trial. I will begin by situating this discussion within the larger narrative of Johnson's life that these sources present, and I will then engage accounts reporting on the trial. Finally, I will examine the tactical strategies that led to Johnson's successful appeal of his verdict in the Eastern District of the Missouri Court of Appeals.<sup>119</sup>

### A. Siting/Citing the Chrysalis of "Tiger Mandingo"

Of the biographical information contained within various journalistic accounts, a picture has been painted of a young Black man who understood well the poisonous lacing of queer male desire with racialized domination. Johnson, born in 1991 in Indianapolis, is the youngest of "his single mother's five sons," never having met or known his father.<sup>120</sup> Soon after beginning his elementary education, Johnson was diagnosed with dyslexia and was enrolled in special education programs to address other learning disabilities.<sup>121</sup> Steven Thrasher, author of two prominent articles chronicling Johnson's arrest and prosecution for HIV transmission, describes Johnson as having been aware "from a young age that his best shot for success was via his athletic body,"<sup>122</sup> and, though he considered participating in various sports, Johnson demonstrated a clear penchant for wrestling.<sup>123</sup> Johnson's enjoyment of wrestling was, unfortunately, dampened by the fear of homophobic reactions from teammates if he were to disclose his queerness.<sup>124</sup>

Johnson experienced much success as a member of the wrestling team of his high school, eventually leading him to adopt the nickname "Tiger," inspired by an animal-

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119 I am emphatically indebted to the kindness and generosity of Samuel Buffaloe, the Missouri State Public Defender who served as Johnson's counsel during the appellate proceedings, for sharing with me the briefs he submitted on Johnson's behalf. These documents were otherwise unavailable on legal databases, and this discussion would have certainly suffered in their absence.

120 See Thrasher, *College Wrestling Star*, *supra* note 1.

121 *Id.* ("Both Johnson and his mother said that he has dyslexia and was enrolled in special education.").

122 *Id.*

123 *Id.* ("While he flirted with other sports, he liked wrestling partially, he said, because unlike 'a team sport, you can't point the finger at another person . . . you can only point the Finger at yourself.'").

124 See *id.* (quoting Johnson as having acknowledged that he "wasn't sure whether [he] would be accepted in the wrestling community" if he disclosed that he was queer) (internal quotation marks omitted).



print shirt Johnson often wore to matches.<sup>125</sup> Despite his fears of homophobic reprisal by teammates and other members of the wrestling community, Johnson simultaneously began to publicly explore the dimensions of his queerness, “walking in ballroom drag house balls in Indianapolis . . . [in] a style known as BQ (‘Butch Queen’) Body.”<sup>126</sup> Thrasher notes that it “was in the ball era of [Johnson’s] life when ‘Tiger’ became ‘Tiger Mandingo,’”<sup>127</sup> an appellation given to Johnson by a friend in high school who “refused to tell him what it meant.”<sup>128</sup>

Noting that the etymology of “Mandingo,” an allusion to the motif of a “brave [B]lack slave fighter,”<sup>129</sup> appealed to him, Johnson expressed equal favor for the term’s additional meaning, which he knew to mean “a black man who is hung.”<sup>130</sup> Johnson’s presentation as “Tiger Mandingo” won him many sexual paramours, encouraging Johnson to experiment “with [the] sexually charged outlaw and slave motifs” intimately connected to the image of the “Mandingo” in his self-made photographs for dating websites.<sup>131</sup> Thrasher does not mince words on the former point: “Johnson was not the only person who enjoyed the role-playing—his persona had no shortage of willing white sex partners in St. Charles who wanted to be ‘seeded’ by a strong black bull.”<sup>132</sup> Johnson would end up in St. Charles

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125 *Id.* (“[A]s a teenager, Johnson presented as straight, becoming ‘Tiger’ the wrestler after he started wearing what he calls his ‘lucky tiger shirt’ to matches.”). For an image of the shirt that inspired Johnson’s name, see Tiger Mandingo, FACEBOOK (May 19, 2013), <https://www.facebook.com/photo.php?fbid=478204138918010> [<https://perma.cc/X43P-HLRH>].

126 Thrasher, *College Wrestling Star*, *supra* note 1.

127 *Id.*

128 *Id.*

129 *Id.* (citations omitted).

130 *Id.* (citations omitted).

131 *Id.* Johnson employed various iterations of “Tiger Mandingo” when creating social media accounts. On Twitter, Johnson used the name “Michael Mandingo” and the handle “@TigerMandingo.” Michael Mandingo (@TigerMandingo), TWITTER, <https://twitter.com/tigermandingo> [<https://perma.cc/25X5-PRXJ>]. On Facebook, Johnson did not use his first name or surname on his profile; instead, he registered himself as “Tiger Mandingo” and parenthetically referenced the House of Mizrahi, a famous drag house. Tiger Mandingo, FACEBOOK, <https://www.facebook.com/TigerSaidSo> [<https://perma.cc/JAK4-Z2EG>]. It would be on Instagram, a platform popularly used to upload images and photographs, where Johnson would most explicitly experiment with sexually racialized motifs. See @tigermandingo, INSTAGRAM (Sept. 24, 2013), <https://www.instagram.com/p/eocxhFpDxL/> [<https://perma.cc/5T2Z-FY33>]; @tigermandingo, INSTAGRAM (July 31, 2013), <https://www.instagram.com/p/cbfjwFJD-z/> [<https://perma.cc/C8CD-TDEE>].

132 Thrasher, *College Wrestling Star*, *supra* note 1.

following a series of state and national wrestling successes that led to a scholarship from Lindenwood University, a private educational institution that emphasizes Judeo-Christian values and its relationships with local churches.<sup>133</sup>

### **B. *State of Missouri v. Michael L. Johnson: The Criminal Trial***

Johnson's trial began on May 11, 2015, more than eighteen months after his arrest on the Lindenwood campus. Thrasher's account of the trial as a spectacle of sexualized racialization, as the inscription of American carceral dynamics onto the Black male body, resonates with chilling familiarity. The criminalization of Black male sexuality, symbolized with a cruel irony by Johnson's adoption of the appellation "Mandingo," undergirds the very structure of Johnson's prosecution. And, as matters unfolded at trial, Johnson's prospects became incredibly grim.

Heather Donovan, the public defender assigned as Johnson's attorney, suffered from an almost continuous loss of credibility throughout the trial. During the process of jury selection, for example, Donovan made the almost implausible error of stating to a pool of potential jurors that Johnson was "guilty until proven innocent."<sup>134</sup> Donovan's display of accidental confusion was, unfortunately, sustained throughout much of the trial; Donovan's apprehension ultimately crystallized in the form of complete silence as the prosecutor insidiously paraded a series of sexualized images of Johnson's body amidst a sea of white, petite, queer male witnesses, all of whom claimed to have been endangered by Johnson.<sup>135</sup> During the prosecution's direct examinations, Johnson seldom materialized in the familiar

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133 See *Lindenwood University—Tradition Like No Other*, LINDENWOOD: ABOUT LINDENWOOD, <http://www.lindenwood.edu/about/> [<https://perma.cc/EAK8-SWS3>] ("Lindenwood is an independent institution firmly rooted in Judeo-Christian values. Those values include belief in an ordered, purposeful universe, the dignity of work, the worth and integrity of the individual, the obligations and privileges of citizenship, and the primacy of truth.").

134 Thrasher, *Black Body on Trial*, *supra* note 8.

135 *Id.* Witnesses called by the prosecution included Dylan King-Lemons, "a lithe young blonde man," who testified that Johnson had definitively infected him with HIV (despite having stated to the police at a prior interview that Johnson had not been his only sexual partner); Andrew Tyron, described as a "tall, thin, blonde Lindenwood University cheerleader," who made statements on the witness stand that contradicted videos of his sexual encounters with Johnson that the two had mutually agreed to film; Charles Pfoutz, a "[w]iry and pale" man whose lies during the prosecutor's examination led to an aggressive inquisitorial parrying with Donovan; and Filip Cukovic, "a slim Serbian exchange student [who] testified that he found Johnson 'unusual because he was [B]lack,' [as] there were only white people in his home country." *Id.* Cukovic stated during direct examination that, after learning that Johnson was HIV positive, he became too "scared to even touch himself." *Id.* (citations omitted).

form of a living, breathing person. Instead, the “person” known as Michael Johnson was displaced by the dangerous Black body of Tiger Mandingo, an amalgamation of angles, contours, and sinew invidiously interpellated as a violently ejaculating, insatiably appetitive Black penis.<sup>136</sup> Wildly overwhelmed by the magnitude of the case and the escalating ire of prosecutor Philip Groenweghe, Donovan was eventually reduced to tears when she and Groenweghe were called to the judge’s bench; Donovan left the courtroom without explanation immediately thereafter, returning in about an hour’s time.<sup>137</sup> On the trial’s final day, Groenweghe urged the jurors to keep the public safe from Johnson, whom he described as “roam[ing] the world with a ‘calling card’ of ‘HIV with a tint of gonorrhea mixed in.’”<sup>138</sup> It took the jury two hours to find Johnson guilty of recklessly transmitting HIV to one of his partners and of “exposing or attempting to expose” four other men to HIV.<sup>139</sup>

The next day, the jury convened to hear evidence and arguments as to the appropriate sentence for Johnson.<sup>140</sup> Amidst the testimony of parents, fellow students, and the single person who spoke on Johnson’s behalf, it was Groenweghe’s closing argument that unequivocally struck the chord of the juridico-affective discourse of HIV criminalization.<sup>141</sup> Comparing Johnson’s case to the various murder cases he had prosecuted throughout his career, Groenweghe stated that this case was emphatically worse: Whereas a murder ended when a gun or knife killed someone, “the AIDS virus that passed through Johnson could still be killing people for years.”<sup>142</sup> From “the perspective of HIV and its ‘mindless agenda,’ [Groenweghe] said, Michael Johnson was the ‘perfect host,’ because he helped the virus spread by having sex with ‘one young man after another.’”<sup>143</sup> Groenweghe concluded with the observation that “HIV could wind up killing someone who had ‘never heard of Tiger Mandingo and who might not even be gay.’”<sup>144</sup> It took the jury about an hour to return

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136 See *id.* (“Characterized by his sexual partners as being ‘very large,’ ‘too tight’ for condoms, and too big to fit in a mouth ‘due to his large size,’ Johnson/Tiger’s penis was described in unusually graphic and at times almost absurd detail in police reports and later on the stand.”).

137 *Id.*

138 *Id.*

139 *Id.*

140 Thrasher, *Black Body on Trial*, *supra* note 8.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

with a sentence of sixty years in prison; at a final sentencing hearing two months later, the presiding judge allowed the sentence to be split and to run concurrently, resulting in a prison sentence of thirty years.<sup>145</sup>

Thrasher's account of Johnson's trial, as well as his episodic biographical account of Johnson's life prior to his arrest and incarceration, illuminates the affective saturation of HIV-criminalization jurisprudence; the threat of immunological failure, of bodily seepages and unexpected susceptibilities, and of an appetitive virus twisted together in the portrait of monstrosity presented to the jury. The fear of bodily intermingling and the dangerous opacity of a body's sexual history were reiteratively invoked throughout the trial, though the articulation of such paranoia had not begun in the courtroom. Prior to the trial, Thrasher was able to interview a member of Johnson's wrestling team at Lindenwood on the condition of anonymity, and though his teammate described Johnson as having "a good personality," he noted that Johnson "also never quite fit in."<sup>146</sup> When the wrestling team learned that Johnson was queer, no specific issues arose, but Johnson's teammate described an unwillingness on behalf of all Johnson's teammates to practice with him further. Johnson's teammate queried why "people around the poverty line . . . continually choose to infect one another [with HIV],"<sup>147</sup> ultimately concluding that the only viable answer was "because they get selfish pleasure in one aspect, they're selfish and greedy for that short pleasure that takes them to another place, because of all the pain they've had to deal with."<sup>148</sup> The wrestler described Johnson as likely having suffered from "a lot of demons," but he was adamant about the inexcusability of Johnson's behavior: "[Johnson could have] kept the HIV to himself. Instead, he decided to be selfish and to infect others."<sup>149</sup> This sentiment was echoed among students at Lindenwood, one of whom demonized Johnson as Hitler-esque and then described the anxiety Johnson's memory as a student had firmly implanted in his mind: "Now when I get with a girl, in the back of my head I have to worry, was she with him? Or was she with someone who was with him?"<sup>150</sup>

The emphasis the interviewed Lindenwood student placed on the paranoia that a *future*

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145 *Id.*

146 Thrasher, *College Wrestling Star*, *supra* note 1.

147 *Id.* (citations omitted).

148 *Id.* (citations omitted).

149 *Id.* (citations omitted).

150 *Id.* (citations omitted).

sexual partner *may* have had a male sexual partner who *may* have been intimate with Johnson underscores the capacity of the juridico-affective to corrosively disorient both time and space within the context of HIV criminalization. The presentation of affective paranoia often takes the syntactical form of the future anterior, where an event is posited as definitively occurring in a future that has not yet transpired. Affect's collapse of temporality reorganizes the economy of truth associated with the imminence of bodily sensation. In his superficial meditation on Johnson's reason for transmitting HIV to others, for example, Johnson's wrestling teammate simultaneously discusses the weight of past demons, the need of present pleasure, and the dangers of a future constituted by the viral mingling of that past and present.

The temporal disorientation achieved by the conjuring of affect frames the concluding arguments Groenweghe proffered during the sentencing phase of the trial. Groenweghe divested Johnson of his status as a psychically viable subject by naming him the "host" of HIV, which acted out its "mindless agenda" in the form of relentless transmission to other "host" bodies. An argument no doubt subtended by Johnson's intelligible cognitive disabilities, Groenweghe's statement demanded Johnson's incarceration because of the danger his body, now virally possessed, presented to a public that could not control it. The subjectification of HIV as the viral master of Johnson's body materialized in Groenweghe's subsequent comment, where he spoke of the looming chance that someone who had never heard of "Tiger Mandingo" or who was not even "gay" may contract the virus inhabiting Johnson's body. Notably, by specifically invoking both the racialized pseudonym Johnson used and Johnson's queerness, Groenweghe spoke to the fear that first propelled HIV-criminalization law—that HIV might manage to escape Black communities and queer communities and come to infect white heterosexual communities.

### C. The Body of "Tiger Mandingo" on Appeal

Approximately a week after Johnson was sentenced to thirty years in prison by the trial judge, Heather Donovan withdrew as counsel for Johnson, replaced by Missouri State Public Defender Samuel Buffaloe.<sup>151</sup> Through counsel, Johnson appealed his conviction in the Circuit Court of St. Charles County, Missouri, to the Eastern District of the Missouri Court of Appeals, filing a brief on April 19, 2016, which sought vacatur of his sentence and remand for a new trial.<sup>152</sup> Johnson argued three points on appeal: first, that the trial

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151 Entry of Appearance and Withdrawal of Counsel, *State v. Johnson*, 513 S.W.3d 360 (Mo. App. E.D. July 24, 2015) (No. ED103217).

152 Appellant's Brief, *State v. Johnson*, 513 S.W.3d 360 (Mo. App. E.D. Apr. 19, 2016) (No. ED103217).

court had erred in admitting into evidence excerpts of phone calls Johnson had made while in jail because “the State [had] failed to disclose the statements until the morning of the first day of trial,” thereby violating Rule 25.03 of Missouri Criminal Procedure;<sup>153</sup> second, that the trial court’s failure to issue a curative instruction after the prosecution introduced unsworn testimony for which “no evidence had been adduced at either the guilt phase or the sentencing phase of the trial,” in violation of Article I, Sections 10 and 18(a) of the Missouri Constitution;<sup>154</sup> and, third, that Johnson’s sentence violated his “right to be free from cruel and unusual punishment.”<sup>155</sup> After receipt and review of the state’s reply brief, Johnson waived the second of his three claims on appeal because of an unrealized error in reviewing the trial transcripts; he maintained his first and third arguments and awaited a decision from the appellate court.<sup>156</sup>

On December 20, 2016, the Missouri Court of Appeals issued its decision, holding that “the trial court [had] abused its discretion with respect to Johnson’s first point on appeal.”<sup>157</sup> All but dispositive in the court’s opinion was the glaring temporal chasm between Johnson’s service of a Rule 25.03 request on the prosecution and the prosecution’s eighteen-month delay in fulfilling that legal obligation.<sup>158</sup> Although a discovery request made under Missouri’s rules of criminal procedure must be answered within ten days after service, Missouri’s procedural law “establishes an ongoing duty requiring the State to supplement its [initial] response in the event it acquires or learns of additional responsive material.”<sup>159</sup> The prosecution asserted in its reply brief that there existed “no evidence” suggesting it possessed the recordings in question at any time before they were shared with

153 *Id.* at 23; *see also* Mo. SUP. CT. R. 25.03(A)(2) (mandating that “the state shall, upon request of defendant’s counsel, disclose to defendant’s counsel . . . [any] written or recorded statements and the substance of any oral statements made by the defendant”).

154 Appellant’s Brief, *supra* note 152, at 32.

155 *Id.* at 37.

156 Appellant’s Reply Brief at \*7, *State v. Johnson*, 513 S.W.3d 360 (Mo.App. E.D. Aug. 30, 2016) (No. ED103217), 2016 WL 4722619 (“After reading the pages in the transcript cited by the State, undersigned counsel agrees that he overlooked this testimony in writing Mr. Johnson’s initial brief. Undersigned counsel agrees that the State’s statement during closing argument was supported by the evidence. Undersigned counsel therefore waives this claim.”).

157 *State v. Johnson*, 513 S.W.3d 360, 363 (Mo. Ct. App. Dec. 20, 2016) (transfer denied Apr. 4, 2017).

158 *Id.* at 363 (observing that the state had disclosed its recordings of Johnson’s phone calls “approximately a year and a half after Johnson had on November 26, 2013, served on the State his Rule 25.03 discovery request”).

159 *Id.* at 364.

Johnson's counsel, thereby vitiating any affirmative duty to disclose the evidence prior to the date of trial.<sup>160</sup> However, when Johnson's counsel objected to the admission of the recordings at trial, the prosecution stated unequivocally that it had "intentionally withheld the recordings from the defense to gain a strategic advantage."<sup>161</sup> These recordings proved pivotal to the prosecution's successful conviction of Johnson at trial, as they were used "on cross-examination of Johnson to impeach his testimony that contrary to the victims' claims, he had not failed to disclose to them before engaging in sexual relations with them that he was HIV positive."<sup>162</sup> The court accordingly held that the prosecution's "blatant discovery violation is inexcusable" and denied Johnson his due process rights, requiring reversal of his conviction and remand for a new trial.<sup>163</sup>

### **CODA: BLACK MALE QUEERNESS AND THE PLEASURE-DANGER OF AFFECT**

The reversal of Johnson's conviction was, in the end, the function of a discovery violation; the court did not reach the question of whether Johnson's sentence was cruel and unusual and thus constitutionally impermissible. Missouri's law, now three decades without alteration, remains ossified within the state's penal codex. Framed by a long history of failed challenges to HIV criminalization,<sup>164</sup> the question of how to best resist a regime that criminalizes sexual personhood is painfully baffling. In my analysis of Johnson's trial and the decisional and statutory law preceding it, I sought to document how affect fortified the jurisprudential economy of HIV criminalization. Johnson's case underscores with particularity the confluence of institutional and social discourses—from the "benign" literature of public health to the racist, sensationalist media reporting on HIV-transmission prosecutions—that draw a reductive causal relationship between Black queer men's sexual behavior and the high rates of HIV prevalence among them. In conclusion, I would like to offer provisional thoughts both on the possibilities of legal resistance and on the necessity of challenging dominant conceptions of HIV and its racialization.

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160 *Id.* at 365.

161 *Id.*

162 *Id.* at 367.

163 *Id.* at 368.

164 *See* Buchanan, *supra* note 13, at 1233–35 (noting that nondisclosure laws, in existence since the early 1990s, have consistently survived constitutional challenges and that, despite the federal government's recent questioning of the utility of HIV criminalization, states have generally refused to repeal their HIV-criminalization laws).

Often, constitutional challenges to HIV-criminalization laws argue that such laws violate the rights guaranteed by the Free Speech Clause of the federal Constitution. Indeed, such an argument was made in a Missouri case at the very time that Johnson was appealing his conviction. In *State v. S.F.*, S.F., the defendant, appealed her conviction for recklessly exposing another person to HIV<sup>165</sup> (the same crime of which Johnson was convicted) on the theory that the Missouri law “infringe[d] on her constitutional rights to free speech and privacy by compelling her to disclose to potential sexual partners that she has HIV.”<sup>166</sup> The Supreme Court of Missouri rejected both constitutional arguments in its *en banc* decision. With regard to the defendant’s First Amendment claim, the court held that the Missouri’s HIV-disclosure law “regulates conduct, not speech,” and any speech incidentally compelled by the law cannot be deemed to violate the rights protected by the First Amendment.<sup>167</sup> With regard to the defendant’s claim that the statute violates her fundamental right to privacy, the court stated that the statute in question criminalized sexual conduct objectively understood to be harmful because of the potential transmission of HIV.<sup>168</sup> Any claim to privacy cannot be reconciled with conduct that jeopardizes the life of another individual.

HIV-criminalization laws have not, however, been thoroughly subjected to constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Under the Equal Protection Clause, state action “neither involving fundamental rights nor proceeding along suspect lines” is subject to rational-basis review.<sup>169</sup> Under the rational-basis standard, the state law under scrutiny will survive constitutional attack if the government can successfully demonstrate that the law “bear[s] some rational relationship to legitimate state purposes.”<sup>170</sup> While there is no doubt that a state may assert the reduction of HIV transmission as a legitimate interest, a penal law like that in effect in Missouri depends upon a fundamentally unreasonable and arbitrary method of HIV transmission. In an amicus brief filed by multiple HIV/AIDS advocacy organizations in support of Johnson’s appeal,

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165 See MO. ANN. STAT. § 191.667(1)(2) (West 2016) (criminalizing acting “in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV”).

166 *State v. S.F.*, 483 S.W.3d 385, 386 (Mo. 2016) (*en banc*).

167 *Id.* at 387.

168 *Id.* at 389 (“Unlike the statute struck down in *Lawrence*, section 191.677 does not criminalize *consensual, non-harmful* sexual conduct. Section 191.677 regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent to the conduct with knowledge of the risk of exposure.”) (emphases in original).

169 *Heller v. Doe*, 509 U.S. 312, 320 (1993).

170 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).



three reasons are offered in demonstration of the absence of any reasonable relationship between Missouri's HIV-criminalization law and the law's purported goal of reducing HIV transmission. First, HIV-criminalization legislation has been "empirically proven to have no effect on the rate of HIV infection."<sup>171</sup> Second, Missouri's law is "both overinclusive, criminalizing behavior that carries no risk of infection, and underinclusive, singling out HIV among all other communicable diseases," rendering it constitutionally defective.<sup>172</sup> Third, Missouri's law is ultimately counterproductive, "in that it provides powerful reasons for people living with HIV *not* to get tested and *not* to disclose their status to prospective sexual partners."<sup>173</sup> The confluence of these three factors suggests an essential arbitrariness to Missouri's HIV-related penal regime, and, under Supreme Court precedent, an effect argument could be made that the law violates the Fourteenth Amendment.

Recourse to the law, however, is often insufficient in situations of deeply embedded social stigma. HIV-criminalization law, particularly through its emphatic recital of heterosexuality's most affective valences—including senses of bodily security and the reversal of an ongoing sense of susceptibility and leakiness—represents one site of a larger normative project requiring the aggressive detangling of sexuality's latent contradictions, which include its relationship to processes of racialization and racialized subjectification. And, it is perhaps HIV's capacity to unequivocally precipitate those latent contradictions constitutive of both sexuality and race that has mired discourse surrounding HIV prevention, sexual pleasure in the age of an epidemic, and racialized subjectivity in theoretical paralysis.

How, then, to theorize the racialization of affect—and its profound impact on HIV-criminalization jurisprudence—without forfeiting affect's potentiality as a counter-hegemonic site of a politics of desire? Stephen Michael Best suggests that the racialized libidinal economies subtending Black male sexuality are those "of ('black male') sexual excess and ('black male') capitalist lack."<sup>174</sup> Black male sexuality is for Best the product of a generative paradox, and the interpellation of the Black male sexual subject occurs at the intersectional point of the excessive and the lacking. These concurring antipodes thrust the Black male subject into a state of precarious flux, where the spatiality of other bodies reorients the situatedness of the Black male subject in uncharted, unpredictable ways. As the

171 Brief for AIDS Law Project of Pennsylvania et al. as Amici Curiae Supporting Appellant at 18, *State v. Johnson*, 513 S.W.3d 360 (Mo. App. E.D. Apr. 14, 2016) (No. ED103217).

172 *Id.*

173 *Id.* (emphases in original).

174 Stephen Michael Best, "*Stand By Your Man*": *Richard Wright, Lynch Pedagogy, and Rethinking Black Male Agency*, in *REPRESENTING BLACK MEN* 111, 112 (Marcellus Blount & George P. Cunningham eds., 1996).

subject's body takes flight, the affective intensities constituting and subordinating him—sensations of excess and lack—stimulate the surfaces of other bodies. These stimulations, however, are not necessarily the result of the tactile interconnection of skin. Too often, the affective resonance of Black male sexuality has been constructed as the anticipation of an impingement, a fear that “overwhelms us and pushes us back with the force of its negation” without ever reaching the temporal present, which undergirds this excitation.<sup>175</sup> The Black male sexual subject is consigned to a space of multiple social disqualification, and the constraining impression this disqualification inscribes onto the body is only amplified by queerness.<sup>176</sup>

In a different register, Marlon M. Bailey offers a prefatory theorization in “Black Gay (Raw) Sex” of Black queer male desire that addresses the misattributions of life-destructive behaviors to Black gay men vis-à-vis their sexual practices.<sup>177</sup> Although Bailey does not sow his analysis with the language of affect, his normative analytic of “deep intimacy,” which provides an alternative narrative of how Black queer men address a need for “a closeness and a ‘being desired and wanted’ in a world in which [B]lack gay men are rarely desired and wanted,” usefully informs the foundation of an affective rereading of Black queer male subjectivity.<sup>178</sup> Bailey propounds the integral role that deep intimacy plays in the reconstruction of an epistemology of desire for Black male queer subjects, reorienting the destructive doubling of white supremacy away from its racialized oppression and toward an understanding of the absolute need for the “sensual and tactile pleasure of skin-to-skin sexual contact” for the sense of closeness and connection that Black queer men—and Black persons living in the diaspora of transcontinental slavery—find life-affirming.<sup>179</sup> If the theorization of Black queer male subjectivity embraces the productivity of paradox and contradiction in the interpellation of the subject, then the putative riskiness associated with condomless sex necessarily demands an alternative reading that “involves ‘flesh-to-flesh, mucous-membrane-to-mucous-membrane [pleasures],’ along with all the hardness,

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175 SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 65 (2004).

176 Although this is not the subject of my discussion here, I believe it is worthwhile to question whether Black heterosexuality is necessarily “heterosexual” as constituted and regulated by a racialized heteronormativity. That there may be something inevitably “queer” in the open defiance of constructions of Black sexuality as the abject space that defines the outer limits of white supremacist, heteronormative sexuality represents a site of political contestation that demands analysis.

177 See Bailey, *supra* note 4, at 239–61.

178 *Id.* at 253 (citations omitted).

179 *Id.*

softness, warmth, and wetness of sex.”<sup>180</sup>

Bailey advocates on behalf of the immensely transformative power of skin-to-skin connection, where the sense of bodily excitation and bodily intermingling effectuates a sense of tethering to a world acutely bent toward Black social death. The affective resonance of bodily impression, of bodily pressures concurrently impinged and extruded, is no longer read as the anticipatory danger of a Black male sexuality in need of discipline. Instead, the yearning for connection becomes the valence through which Black queer male sexuality can be understood to flourish. The question therefore remains: Must we pathologize those Black queer men who choose to have sex without a condom, or can we forge a space in which the condom can be understood, despite its potential for lifesaving, as a barrier to the pleasures and satisfaction of a kind of sex that may speak to the craving for deep intimacy that runs counter to Black queer men’s endless experiences of social disqualification, marginalization, alienation, and life-deprivation?

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180 *Id.* at 254 (citations omitted).