

COMMENT

HIV CRIMINALIZATION LAWS: A POOR PUBLIC POLICY CHOICE IN THE NEW ERA OF PREP

STEPHEN FROST†

“Beyond using condoms, there has been no effective means of preventing HIV, *until now*.”¹

—HBO’s VICE

“If there’s nobody to infect you, then the epidemic will be *over*.”²

—Dr. Howard Grossman, Former Director,
American Academy of HIV Medicine

No minority group has seen a more dramatic shift in legal status over the past decade than the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) community. Beyond the fight over marriage equality,³ LGBT rights have moved to the forefront of political⁴ and social⁵ culture throughout the United States. One

† Stephen Frost graduated from Wake Forest University School of Law in 2015. The author would like to thank the editorial board for the vast amount of time spent preparing this comment for publication.

1. *Stopping HIV? The Truvada Revolution—Part 1*, VICE MEDIA (June 26, 2015), <http://www.vice.com/video/stopping-hiv-with-the-truvada-revolution-part-1-111> (emphasis added) [hereinafter *Stopping HIV?*].

2. *Id.* (emphasis added).

3. For a general look at the fight over marriage equality, see *Marriage Center*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Nov. 9, 2015). For a historical look at the freedom to marry in the United States, see *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last visited Nov. 9, 2015).

4. The political acceptance of LGBT rights is evidenced by the increasing presence of LGBT political candidates in addition to expanded legal protections for LGBT people. See, e.g., Richard Goldstein, *Gay is Not Enough*, HUFFINGTON POST (Sept. 9, 2013, 4:05 PM), http://www.huffingtonpost.com/richard-goldstein/gay-is-not-enough_b_3895486.html (discussing the campaign of failed New York City mayoral candidate Christine Quinn and noting that “[i]f Quinn represents your political convictions, she’s your choice. If she doesn’t, then although she may represent your identity, she’s not the right woman for the

area that has not seen the same “shift” is public policy related to the human immunodeficiency virus (“HIV”). Largely considered an LGBT issue,⁶ transmission rates have been stable in recent years⁷ but have seen increases in some larger urban areas⁸ and amongst various social groups.⁹ Although people of any sexuality can contract HIV, policy surrounding HIV focuses on the LGBT

job.”); Emanuella Grinberg, *Wisconsin’s Tammy Baldwin is First Openly Gay Person Elected to Senate*, CNN (Nov. 7, 2012), <http://edition.cnn.com/2012/11/07/politics/wisconsin-tammy-baldwin-senate> (discussing the election of the first openly LGBT United States Senator); Jocelyn Kiley, *61% of Young Republicans Favor Same-Sex Marriage*, PEW RES. CTR. (Mar. 10, 2014), <http://www.pewresearch.org/fact-tank/2014/03/10/61-of-young-republicans-favor-same-sex-marriage> (discussing a shift in the views of young Republicans, which is the political party typically associated with disfavoring LGBT rights).

5. Culturally, the LGBT Rights Movement has moved forward at a staggering pace, seeing acceptance in various areas of pop culture arrive in the past five to ten years. *See, e.g., Gays and Lesbians More Popular than Evangelicals Among Voters, Poll*, HUFFINGTON POST (Mar. 28, 2014, 1:03 PM), http://www.huffingtonpost.com/2014/03/28/gays-more-popular-than-evangelicals_n_5049991.html (discussing polls showing an increase in popularity of gay people); Becky Hayes, *Mozilla’s Anti-Gay CEO Hastily Resigns Amid Controversy*, HUFFINGTON POST (Apr. 11, 2014, 2:48 PM), http://www.huffingtonpost.com/becky-hayes/mozillas-anti-gay-ceo-hast_b_5129335.html (describing the backlash resulting from Mozilla’s former CEO Brendan Eich’s anti-gay donations); Bruce Horowitz, *CEOs Express Anti-Gay Views at Their Peril*, USA TODAY (Apr. 7, 2014, 8:04 PM), <http://www.usatoday.com/story/money/business/2014/04/07/chick-fil-a-dan-cathy-mozilla-barilla/7434547> (discussing the high potential for backlash when CEOs make negative statements about the LGBT community).

6. *See HIV and the LGBT Community*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/hrc-issue-brief-hiv-aids-and-the-lgbt-community> (last visited Nov. 9, 2015).

7. *HIV in the United States: At a Glance*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/statistics/basics/ataglance.html> (last updated July 1, 2015) [hereinafter *HIV in the United States*]. Note that most data dealing with HIV incidence rates is from 2008–2011, as new data is not always readily available.

8. *See Mike DeBonis, City Officials: Fewer New HIV Cases in D.C. in 2012, but Infection Rate Still “Epidemic,”* WASH. POST (July 2, 2014), http://www.washingtonpost.com/local/dc-politics/city-officials-fewer-new-hiv-cases-in-dc-in-2012-but-infection-rate-still-epidemic/2014/07/02/cbce2be4-01f0-11e4-b8ff-89afd3fad6bd_story.html; Kim Geiger, *HIV Rates Rise Among Young Gay, Bisexual Men*, CHI. TRIB. (June 20, 2014), http://articles.chicagotribune.com/2014-06-20/news/ct-hiv-young-gay-men-met-20140620_1_new-hiv-hiv-rates-hiv-and-aids (noting increased incidence rates for men who have sex with men in Chicago); Bob LaMendola, *HIV/AIDS Still Rising in South Florida*, SUN SENTINEL, (Mar. 23, 2012), http://articles.sun-sentinel.com/2012-03-23/health/fl-hk-hiv-rising-20120323_1_new-hiv-infections-new-cases-aids-program-supervisor (noting increased incidence rates in and around Miami).

9. *See HIV in the United States, supra* note 7 (noting a 12% increase in incidence rates for gay, bisexual, and men who have sex with men and a disproportionate impact on African Americans and Hispanics).

community because LGBT individuals “remain the population most profoundly affected by HIV.”¹⁰

A potential rationale for the increase in HIV transmission rates is the continued prevalence of HIV criminalization laws.¹¹ While the reasoning behind HIV criminalization laws has always been questionable, these laws are particularly destructive today. The availability of HIV preventative medication Truvada, often referred to as “PrEP” (short for pre-exposure prophylaxis) when used to prevent HIV exposure,¹² increases the degree with which HIV criminalization laws represent poor public policy. In order to effectively combat HIV transmission in the United States, public policy must adapt. The first step in changing public policy is repealing HIV criminalization laws. Particularly in a world with PrEP, criminalizing HIV transmission no longer makes sense and is likely hindering the fight to combat HIV incidence. The next step is refocusing public policy around positive ways to fight HIV, like PrEP.

This comment will first look generally at HIV and the continued prevalence of HIV criminalization laws. Section II will explore PrEP and its potential to change the fight against HIV and reduce HIV incidence in the United States. Section III will examine the public policy surrounding HIV criminalization laws and describe how these laws have never made sense from a public policy standpoint. Finally, Section IV will discuss how the landscape has changed because of PrEP, making HIV criminalization laws virtually obsolete and ineffective. Section IV also analyzes recent developments in this area, including a look at very recent convictions and the early results from the use of PrEP.

10. *Id.*

11. See Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 514 (2007) (finding that the continued use of criminal statutes for HIV prevention stigmatizes and marginalizes those who are affected most and can lead to deferred testing).

12. See *Pre-Exposure Prophylaxis (PrEP)*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/prevention/research/prep/> (last updated Aug. 26, 2015) (explaining how proper use of Truvada was shown to reduce the risk of HIV infection by up to 92% in people who are at high risk of exposure). Truvada is also used in the treatment of HIV. See *Truvada for PrEP*, GILEAD SCI., INC., <http://www.truvada.com> (last visited Nov. 19, 2015). For the purposes of this comment, only Truvada when used as PrEP is being discussed.

I. BACKGROUND: HIV AND HIV CRIMINALIZATION LAWS

A. HIV

“This is an epidemic that is *out of control*.”

—Dr. Robert M. Grant, Gladstone Institute of
Virology and Immunology¹³

HIV, a virus, weakens a person’s immune system, causing the individual to suffer from illnesses that most people would not suffer from.¹⁴ At its most advanced stage, HIV is known as Acquired Immune Deficiency Syndrome (“AIDS”).¹⁵ Symptoms of HIV, which vary at different stages of the virus,¹⁶ can develop quickly or take up to ten years to manifest.¹⁷ There are a number of ways to contract HIV, most commonly through vaginal or anal intercourse, as well as through sharing needles.¹⁸ Currently, more than 1.2 million people in the United States are living with HIV, and one in eight are unaware they are infected.¹⁹

In the United States, we have 50,000 new HIV infections every single year, and that has not changed in the last twenty years. Men who have sex

13. *Stopping HIV?*, *supra* note 1 (emphasis added).

14. *HIV & AIDS*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-info/stds-hiv-safer-sex/hiv-aids> (last visited Oct. 17, 2015).

15. *Id.*

16. At the earliest stage of HIV, symptoms include: fever, swollen glands, sore throat, rash, fatigue, muscle and joint aches and pains, and headache. *Signs and Symptoms*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/hiv-aids-101/signs-and-symptoms/index.html> (last updated Dec. 19, 2013). After the earliest stage, infected persons move into a stage called “clinical latency” during which infected persons are often asymptomatic. *Id.* Anti-retroviral drugs are used to prolong this stage as long as possible. *Id.* If HIV progresses to its latest stage, AIDS, symptoms can include: rapid weight loss; recurring fever or profuse night sweats; extreme and unexplained tiredness; prolonged swelling of the lymph glands in the armpits, groin, or neck; diarrhea that lasts for more than a week; sores of the mouth, anus, or genitals; pneumonia; red, brown, pink, or purplish blotches on or under the skin or inside the mouth, nose, or eyelids; and memory loss, depression, and other neurological disorders. *Id.*

17. *Id.*

18. *How Do You Get HIV or AIDS?*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/index.html> (last updated Aug. 27, 2015).

19. *U.S. Statistics*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last updated Dec. 2, 2014).

with men are disproportionately impacted by HIV around the world, having a nineteen-fold higher prevalence of infection than the general population. This is an epidemic that is out of control, so finding new ways to prevent HIV is *critically important*.²⁰

While 50,000 new HIV infections each year seems low compared with the over 1.6 million new cancer cases each year in the United States,²¹ the more alarming element of HIV incidence is that infection rates have not been decreasing over time.

B. HIV Criminalization Laws

HIV criminalization laws are largely a result of the climate of hysteria surrounding the AIDS crisis of the 1980s and 1990s.²² One author summed up the beginning of the AIDS crisis: “In the early years, there [was] no name for this horror, no understanding of its origins, no medicine to cure it or arrest it, no precedent to compare it to, except perhaps the black plague, and little recognition of its existence by the larger, heterosexual community.”²³ A *New York Times* report in 1981 described HIV as a “Rare Cancer Seen in 41 Homosexual Men.”²⁴ Evidence that the disease was transmitted sexually did not become public knowledge until the publication of a 1982 United States Center for Disease Control and Prevention (“CDC”) report.²⁵ The Reagan administration did not support the CDC’s efforts to combat HIV throughout the 1980s, which greatly undermined preventative efforts.²⁶ President Reagan never actually used the term “AIDS” until 1986, years after the epidemic was underway.²⁷ Much of the

20. *Stopping HIV?*, *supra* note 1 (emphasis added); *see also HIV in the United States*, *supra* note 7 (reiterating that there are around 50,000 new HIV infections every year and that men who have sex with men bear the greatest infection rate).

21. AM. CANCER SOC’Y, CANCER FACTS & FIGURES 2015, at 1 (2015), <http://www.cancer.org/acs/groups/content/@editorial/documents/document/acspc-044552.pdf>.

22. *See generally* WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 61–62 (Rutgers Univ. Press 2014) (discussing the evolution of the AIDS crisis throughout the 1980s).

23. *Id.* at 62.

24. *Id.* at 61.

25. *Id.*

26. *Id.* at 62.

27. *Id.* at 64.

hysteria resulted from a lack of knowledge because no one fully understood how HIV developed or spread, which led to the circulation of misinformation.²⁸ This misinformation included the idea that HIV could lurk on toilet seats or that someone could contract HIV from kissing on the cheek.²⁹

Although it took many years, the government eventually acted to prevent the spread of HIV. In 1990, Congress enacted the Ryan White CARE Act (“the Act”),³⁰ which provided federal funding to combat HIV, but required states to enact criminalization laws in order to receive the funding.³¹ By the time the Act was passed, more than 120,000 Americans had died of AIDS.³² When reauthorizing the Act in 2000, Congress removed the criminalization law requirement, but many states had already codified criminalization laws.³³ The Obama administration’s 2010 report addressing the strategy to combat the HIV/AIDS crisis called on states to revisit their HIV criminalization laws.³⁴

Currently, at least thirty-seven states have a law criminalizing HIV for a variety of reasons, including: knowingly attempting to transmit HIV,³⁵ enhancing sentences when someone

28. John Tierney, *The Big City; In 80’s, Fear Spread Faster than AIDS*, N.Y. TIMES (June 15, 2001), <http://www.nytimes.com/2001/06/15/nyregion/the-big-city-in-80-s-fear-spread-faster-than-aids.html>.

29. *Id.*

30. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1994) (codified at 42 USC § 300ff) (“The Secretary may not make a grant under Section 300ff-41 of this title to a State unless . . . the criminal laws of the State are adequate to prosecute any HIV infected individual . . .”).

31. 42 U.S.C. § 300ff-47 (repealed 2000); Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1416 (2013) (“Under the CARE Act, however, states would only receive federal funding for HIV/AIDS prevention and relief after demonstrating that ‘the criminal laws of the State are adequate to prosecute [intentional HIV exposure].’”) (citation omitted).

32. FRANK, *supra* note 22, at 73.

33. Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1416 (2013) (“Congress repealed the criminalization mandate in 2000, after all states had met the requirement, but to this day, states have still kept their HIV-specific laws on the books.”).

34. WHITE HOUSE OFF. NAT’L AIDS POL’Y, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 37 (2010), http://www.whitehouse.gov/sites/default/files/uploads/NHA_S.pdf (citing “stigma and discrimination” as a rationale for reviewing HIV criminalization statutes) (“State legislatures should consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to preventing and treating HIV.”).

35. Twenty-six states impose laws criminalizing knowingly transmitting HIV. ALA. CODE § 22-11A-21(c) (1987); ARK. CODE ANN. § 5-14-123 (2012); CAL. HEALTH & SAFETY

commits a sex crime and is HIV positive,³⁶ prohibiting organ and blood donation for those who are HIV positive,³⁷ increasing penalties for HIV positive persons working in prostitution,³⁸ and a series of other miscellaneous laws.³⁹ For the purposes of this

CODE § 12091 (West 2012); FLA. STAT. § 384.24(2) (2015); GA. CODE ANN. § 16-5-60 (2010); IDAHO CODE § 39-608 (1988); 72 ILL. COMP. STAT. § 5/12-16.2 (2012); LA. STAT. ANN. § 14:43.5 (2010) (applying an enhanced sentence for conduct against police officers); MD. CODE ANN., HEALTH-GEN. § 18-601.1 (West 1989); MICH. COMP. LAWS § 333.5210 (1989); MINN. STAT. § 609.2241 (2015); MISS. CODE ANN. § 97-27-14 (2010) (creating an exposure crime if a prisoner causes a corrections employee, visitor to a correctional facility, or another prisoner to come into contact with bodily fluids); MONT. CODE ANN. § 50-18-112 (1989); NEV. REV. STAT. § 201.205 (1995); N.J. STAT. ANN. § 2C:34-5 (2013); N.C. GEN. STAT. § 130A-144 (2013); N.D. CENT. CODE § 12.1-20-17 (1989); OHIO REV. CODE ANN. § 2903.11 (West 2011); OKLA. STAT. tit. 21, § 1192.1 (2006); 28 R.I. GEN. LAWS § 23-11-1 (1986); S.C. CODE ANN. § 44-29-60 (2000) (prohibiting those diseases found in the South Carolina Department of Health & Environmental Control List of Reportable Diseases; currently, HIV is included in the list. *See* S.C. DEP'T OF HEALTH & ENVTL. CONTROL, SOUTH CAROLINA 2015 LIST OF REPORTABLE CONDITIONS (2015), <http://www.scdhec.gov/Library/CR-009025.pdf>); S.C. CODE ANN. § 44-29-145 (2000) (prohibiting prostitution); S.D. CODIFIED LAWS § 22-18-31 (2006) (prohibiting blood, organ, and other donation); TENN. CODE ANN. § 39-13-109 (2014); VA. CODE ANN. § 18.2-67.4:1 (2014); WASH. REV. CODE § 9A.36.011 (2014); W. VA. CODE § 16-4-20 (2011).

36. Seven states impose enhanced sentences when someone commits a sex crime and knows he or she is positive. ALASKA STAT. § 12.55.155(c)(33F) (2015); CAL. PENAL CODE § 12022.85 (West 2014); COLO. REV. STAT. § 18-3-415.5 (2015); FLA. STAT. § 775.0877 (2010) (imposing an enhanced sentence on those who commit a sexually related crime, become aware of their HIV status, and commit another sexually related crime); MASS. GEN. LAWS ch. 265, § 22b(f) (2008) (imposing enhanced sentence on those having sexual intercourse with a child under 16); TENN. CODE ANN. § 40-35-114(21) (2014); WIS. STAT. § 973.017 (2001).

37. Six states prohibit organ, blood, and other donation if someone is knowingly HIV positive. *See* CAL. HEALTH & SAFETY CODE § 1621.5 (West 2014); FLA. STAT. § 381.0041(11)(b) (2012); KY. REV. STAT. ANN. § 311.990 (24)(b) (West 2006); MO. REV. STAT. § 191.677 (1997); OHIO REV. CODE ANN. § 2927.13 (West 1996); VA. CODE ANN. § 32.1-289.2 (2011).

38. Eleven states have specific provisions dealing with prostitution. *See* CAL. PENAL CODE § 647f (West 2015); COLO. REV. STAT. § 18-7-205.7 (2015); COLO. REV. STAT. § 18-7-201.7 (2015); FLA. STAT. § 796.08(5) (2011); KY. REV. STAT. ANN. § 529.090 (West 2005); MO. REV. STAT. § 567.020 (2002); NEV. REV. STAT. § 201.358 (1995); OHIO REV. CODE ANN. § 2907.24-241 (West 2014); OKLA. STAT. tit. 21, § 1031 (2002); 18 PA. CONS. STAT. § 5902 (2002); TENN. CODE ANN. § 9-13-516 (1991); UTAH CODE ANN. § 76-10-1309 (West 2011).

39. Ten states have other statutes prohibiting conduct because of HIV. *See* ARK. CODE ANN. § 20-15-903 (2015) (requiring those who are HIV positive to report that status to doctors and dentists when receiving treatment); CAL. HEALTH & SAFETY CODE § 12090 (West 2015) (prohibiting willful exposure of HIV by an infected person); GA. CODE ANN. § 16-5-60(d) (2003) (prohibiting an attempted infection with use of saliva, urine, feces, or other bodily fluids against a peace or correctional officer); IND. CODE § 16-41-7-1 (1993) (creating a duty to warn past, present, and future sexual or needle-sharing partners of disease status and the need to seek medical care); IND. CODE § 16-41-14-17 (2014) (prohibiting the transfer of semen when infected with HIV for the purposes of artificial insemination); IND. CODE § 35-45-16-2 (2014) (prohibiting the placement of fluids in

article, only the first category of criminal laws—punishing those who knowingly attempt to transmit HIV—will be discussed. Different policy issues surround organ and blood donation and prostitution laws relating to HIV positive persons.

The case of Nick Rhoades exemplifies the issues with HIV criminalization laws.⁴⁰ Rhoades, who lives in Iowa, was diagnosed with HIV in 1998.⁴¹ He began treatment for the disease in 2005, and his doctor informed him that his HIV viral load was undetectable in 2008.⁴² Viral load is the HIV level in the blood.⁴³ Higher viral loads are associated with an inability to fight off infections and result in greater life changes from HIV.⁴⁴ Those with an undetectable viral load have low enough levels of HIV that the viral load cannot be accurately measured.⁴⁵ A few months after finding out he had an undetectable viral load, Rhoades had a sexual encounter with a man described as “A.P.”⁴⁶ The two engaged in consensual, unprotected oral sex and protected anal sex.⁴⁷ Rhoades never disclosed his HIV positive status, and upon learning that Rhoades was HIV positive, A.P. contacted the police.⁴⁸ The state charged Rhoades under an Iowa law that prohibits persons who know they are infected with HIV from

public with the intent that another person will come in contact with it); KAN. STAT. ANN. § 65.6005 (1999) (prohibiting dental care workers who are HIV positive from participating in certain procedures); MO. REV. STAT. § 565.085 (2005) (creating a felony for prisoners who attempting to cause corrections employees, visitor to correctional facilities, or another prisoner to come in contact with bodily fluids); NEV. REV. STAT. § 441A.180 (1989) (prohibiting exposing others to communicable disease or engaging in occupations where it is likely that a disease will be transmitted to others, only after a warning from a health authority); NEV. REV. STAT. § 441A.300 (2011) (allowing for the confinement of those who fail to comply with written orders of a health authority); OHIO REV. CODE ANN. § 2921.38 (West 2013) (prohibiting making another come into contact with bodily fluids); 18 PA. CONS. STAT. §§ 2703–2704 (2013) (prohibiting prisoners from causing others to come in contact with bodily fluids); UTAH CODE ANN. § 76-5-102.6 (West 2015) (prohibiting prisoners from propelling bodily fluids at a peace or correctional officer).

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

41. *Id.* at 25.

42. *Id.*

43. *Viral Load*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/understand-your-test-results/viral-load/> (last updated Sept. 9, 2015).

44. *Id.*

45. *Viral Load*, NAM PUBLICATIONS, <http://www.aidsmap.com/Viral-load/page/1327496/#item1327503> (last updated July 2012).

46. *Rhoades*, 848 N.W.2d at 25–26.

47. *Id.*

48. *Id.*

engaging in intimate conduct with another.⁴⁹ The law does not require actual transmission of the disease and provides an affirmative defense if the infected person informs a partner and the partner consents.⁵⁰ Rhoades pled guilty to one count of criminal transmission of HIV and was sentenced to a prison term of not more than twenty-five years.⁵¹

The Iowa Supreme Court reversed the judgment of the district court, finding that the facts could not sustain Rhoades's conviction.⁵² However, the reversal came nearly six years after Rhoades's initial conviction.⁵³ The court noted that there had to be at least the possibility that transmission of HIV could occur for a conviction⁵⁴ and that the possibility of transmission must be "reasonably possible" and not just theoretical.⁵⁵ The court further said that it was "unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person's viral load."⁵⁶

These facts demonstrate the issues with HIV criminalization laws. First, because Rhoades's viral load was undetectable, it was unclear if he could even transmit HIV.⁵⁷ A criminalization law cannot fulfill its limited purpose if the alleged perpetrator cannot even transmit the virus. Second, Rhoades used protection, which makes it unclear whether there was merely theoretical risk he could transmit HIV.⁵⁸ Third, transmission never

49. *Id.* at 26.

50. IOWA CODE § 709C.1(5) (repealed 2014).

51. *Rhoades*, 848 N.W.2d at 26.

52. *Id.* at 30.

53. *Id.* at 26.

54. *Id.* at 27–28.

55. *Id.* at 28.

56. *Id.* at 32.

57. *Id.* at 33.

58. The *Rhoades* Court made two important findings about the meaning of "theoretical risk." First, the Court noted that it was unable to conclude "an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person's viral load." *Id.* at 32. Second, it found that factually, the state could not establish that Rhoades could transmit HIV since "there is a question of whether it was medically true a person with a nondetectable viral load could transmit HIV through contact with the person's blood, semen or vaginal fluid or whether transmission was merely theoretical." *Id.* at 33. The focus of theoretical risk appears to focus on whether a prosecutor can prove that the risk of transmission was not theoretical, in that transmission is highly unlikely to occur, but that there actually was risk and the perpetrator knowingly subjected someone to that risk.

actually occurred.⁵⁹ While Rhoades's conduct may have qualified for conviction under each element of the statute, there appears to be no purpose in criminalizing his conduct when it was unlikely he would have actually transmitted the disease. At Rhoades's sentencing, the trial court judge noted that the "one thing that makes this case difficult is [that Rhoades does not] look like our usual criminals."⁶⁰ The judge's statement did not go far enough, as it is not readily apparent that Rhoades did anything criminal, and it is clear that his crime did not deserve a twenty-five year prison sentence.

II. HIV-PREVENTATIVE MEDICATION: PrEP

"When the FDA approved use of Truvada as PrEP, I naively thought that meant everyone was gonna learn about it, and was sadly disappointed when that wasn't true."

—Damon L. Jacobs, PrEP and Truvada Advocate⁶¹

PrEP is a "prescription medicine . . . used to help reduce the risk of getting HIV-1 infection."⁶² It is "for adults who are at a high risk of getting HIV-1 . . . includ[ing] HIV-negative men who have sex with men and who are at high risk of getting infected with HIV-1 through sex, and male-female sex partners when one partner has HIV-1 and the other does not."⁶³ Although the drug was approved in 2004 for use in combination with other drugs as an HIV treatment, it was only approved for use as a preventative medication in 2012.⁶⁴ Recent studies have shown that "the risk of getting HIV infection was lower—up to 92% lower—for participants who took the medicines consistently than for those

On remand, the prosecutor would have the opportunity to present facts that indicated the risk was not merely theoretical. *Id.*

59. Sergio Hernandez, *Sex, Lies and HIV: When What You Don't Tell Your Partner Is a Crime*, PROPUBLICA (Dec. 1, 2013, 10:58 PM), <http://www.propublica.org/article/hiv-criminal-transmission>.

60. *Id.*

61. See *Stopping HIV?*, *supra* note 1.

62. *How to Take Truvada for PrEP*, GILEAD SCI., INC., <https://start.truvada.com/individual/taking-truvadaprep#> (last visited Dec. 7, 2015).

63. *Id.*

64. CTR. FOR DISEASE CONTROL & PREVENTION, PRE-EXPOSURE PROPHYLAXIS (PrEP) FOR HIV PREVENTION 1 (2014), http://www.cdc.gov/hiv/pdf/PrEP_fact_sheet_final.pdf.

who did not take the medicines.”⁶⁵ One caveat to the potential impact that PrEP can make is that it must be taken every day.⁶⁶ As PrEP manufacturer Gilead Sciences, Inc. (“Gilead”) notes, taking PrEP every day at the same time and not missing doses is important as PrEP “cannot help you decrease the chance of getting HIV-1 if you do not take it as directed.”⁶⁷ A recent study also indicated that if taken immediately before sex, PrEP can reduce HIV transmission by as much as 80%.⁶⁸

Although PrEP appears to be effective,⁶⁹ two major issues have prevented it from gaining full acceptance within the LGBT community. First, many individuals are unaware of PrEP and its potential benefits.⁷⁰ Second, and perhaps more troubling, is the stigma associated with taking PrEP that has developed within the LGBT community and beyond.⁷¹ Although cost would appear to be an issue, most insurance programs cover the drug,⁷² and there are a number of payment reduction programs available, including one from the drug’s manufacturer, Gilead.⁷³ However, there is no generic version of the drug currently available,⁷⁴ and the cost is

65. *Id.*

66. *Id.*

67. *How to Take Truvada for PrEP*, *supra* note 62.

68. AGENCE AUTONOME DE L’INSERM, RISK OF HIV INFECTION REDUCED BY 86% IN ANRS IPERGAY TRIAL (2015), http://www.anrs.fr/content/download/6156/33460/file/CPIpergay_ENG_web.pdf.

69. CTR. FOR DISEASE CONTROL & PREVENTION, ARE YOU READY FOR PREP? (2015), http://www.cdc.gov/actagainstaids/pdf/campaigns/starttalking/stsh_prep-ig_englishbrochure_508.pdf (noting that “PrEP can provide a high level of protection against HIV”).

70. See Christopher Glazek, *Why is No One on the First Treatment to Prevent H.I.V.?*, NEW YORKER, (Sept. 30, 2013), <http://www.newyorker.com/tech/elements/why-is-no-one-on-the-first-treatment-to-prevent-h-i-v>; Tim Murphy, *Is This the New Condom?*, OUT MAG., Oct. 2013, at 70, 72, <http://www.out.com/news-opinion/2013/09/09/hiv-prevention-new-condom-truvada-pill-prep?page=full>.

71. Jim Burress of Wabe, “*Truvada Whore*” *Stigma Endures Among Doctors and LGBTs*, ADVOCATE (Aug. 11, 2014, 4:42 PM), <http://www.advocate.com/health/2014/08/11/truvada-whore-stigma-endures-among-doctors-and-lgbts>; Murphy, *supra* note 70; Ross Von Metzke, *Op-ed: PrEP, Shame and the Intentional Spread of HIV*, ADVOCATE (Sept. 3, 2014, 7:00 AM), <http://www.advocate.com/commentary/2014/09/03/op-ed-prep-shame-and-intentional-spread-hiv>; Scott Wiener, *Coming Out of the PrEP Closet*, HUFFINGTON POST (Nov. 17, 2014, 5:59 AM), http://www.huffingtonpost.com/scott-wiener/coming-out-of-the-prep-closet_b_5832370.html.

72. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 69.

73. *Id.*; *Truvada for PrEP Medication Assistance Program*, GILEAD SCI., INC., <http://www.gilead.com/responsibility/us-patient-access/truvada%20for%20prep%20medication%20assistance%20program> (last visited Nov. 9, 2015).

74. S.F. AIDS FOUND., PREP FACTS (2014), <http://men.prepfacts.org/the-questions>.

approximately \$1800 per month for those without insurance.⁷⁵ In addition to the cost of the medication, users will also be responsible for more frequent doctor visits and lab tests.⁷⁶ Observers have noted that due to the cost, using PrEP is a greater challenge for less affluent, minority, and non-English speaking communities.⁷⁷ While co-pay assistance programs may help reduce the out-of-pocket expense for the medication itself, these programs will not offset the additional medical expenses. For uninsured, at-risk individuals, using PrEP may present a significant burden, but that burden can be reduced if public policy shifts. There are also side effects of taking the drug for some users, both in the short-term and long-term.⁷⁸ However, these risks certainly do not outweigh the harmful effects of contracting HIV, which means that providing PrEP to at-risk groups is especially important. Public policy based around encouraging PrEP is essential to decrease HIV incidence, especially for the LGBT community.

III. HIV CRIMINALIZATION LAWS: A POOR PUBLIC POLICY CHOICE

HIV criminalization laws have always been a poor public policy choice. Before the creation and availability of PrEP, criminalization laws were an overreaction to the AIDS crisis of the 1980s.⁷⁹ These laws came only as a result of federal legislation requiring them to be passed.⁸⁰ Further, federal intervention to

75. *Id.*

76. *Id.*

77. *Stopping HIV? The Truvada Revolution—Part 2*, VICE MEDIA (June 26, 2015), <http://www.vice.com/video/stopping-hiv-with-the-truvada-revolution-part-2-222>. In addition to these criticisms, Michael Weinstein lodges a number of other criticisms. Weinstein, the president of the AIDS Healthcare Foundation, has actively lobbied against the adoption of PrEP while supporting other means of reducing HIV incidence. *Id.* Weinstein's criticism is based around skepticism of the drug's overall efficacy, as well as a likely reduction in the use of condoms. *Id.* While his opinions represent solid criticisms of the drug, Weinstein's objections are criticized by other individuals interviewed. *Id.*

78. *Important Safety Information*, GILEAD SCI., INC., <http://www.truvada.com/truvada-side-effects> (last visited Dec. 10, 2015) (noting side effects that include lactic acidosis, serious liver problems, worsening of Hepatitis B infection, and the possibility that if a PrEP user contracts HIV that it may be more difficult to treat HIV using Truvada).

79. See Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 252 (2002) (finding after a statistical study that "[m]ost likely, these laws were passed for symbolic rather than HIV-prevention reasons").

80. See Newman, *supra* note 33, at 1416.

stop the spread of HIV came after nearly a decade of a failure to act and came at a cost for the gay community.⁸¹ Essentially, federal legislation requiring the enactment of criminalization laws was a compromise the gay community needed to make in order to receive federal funding to combat the rapid spread of HIV. Because of this, criminalization laws never truly reflected sound public policy, but rather a compromise that appeased conservative politicians like Jesse Helms, who advocated requiring HIV testing for at-risk populations.⁸² Two particular failures demonstrate how HIV criminalization laws are poor public policy. First, the laws promote a stigma associated with being HIV positive that is counterintuitive to the best methods of stopping the disease. Most importantly, criminalization laws make the assumption that most HIV positive citizens are willfully attempting to infect others, but as the *Rhoades* case establishes, this is not always the case.

The most damaging result of HIV criminalization is the stigma associated with HIV. Stigma “refers to prejudice, negative attitudes, and abuse directed at people living with HIV and AIDS.”⁸³ There are many consequences of this stigma, but perhaps the most damaging as a result of HIV criminalization laws include “being shunned by family, peers and the wider community; poor treatment in healthcare and education settings; . . . and a negative effect on the success of HIV testing and treatment.”⁸⁴ “HIV-related stigma and discrimination was recognized early on in the AIDS epidemic as a key factor in fueling the spread of HIV.”⁸⁵ Even though HIV is no longer viewed as a disease solely affecting LGBT individuals, “the initial outbreak among men who have sex with men and injection drug users stoked prejudice and facilitated

81. FRANK, *supra* note 22, at 73–74 (noting that there was a cost associated for the gay community because it could not respond to attacks from the right wing as easily and removed the gay community from the forefront of the issue).

82. *Id.* at 74.

83. *HIV & AIDS Stigma and Discrimination*, AVERT, <http://www.avert.org/hiv-aids-stigma-and-discrimination.htm> (last updated Feb. 12, 2014).

84. *HIV/AIDS Stigma and the History of the Ryan White HIV/AIDS Program*, HRSA, http://hab.hrsa.gov/livinghistory/issues/stigma_2.htm#credit (last visited Nov. 9, 2015) (citation omitted).

85. Laura C. Nyblade, *Measuring HIV Stigma: Existing Knowledge and Gaps*, 11 PSYCHOL. HEALTH & MED. 335, 335 (2011).

early theories representing HIV as the consequence of certain lifestyles and choices.”⁸⁶

Stigma continues to impact the spread of HIV in two ways. First, it limits the desire and sometimes the ability to get tested for HIV regularly.⁸⁷ HIV criminalization statutes deter individuals from getting tested and knowing their status, since knowledge is a required element under most statutes.⁸⁸ Second, stigma is largely a result of many individuals’ lack of knowledge about HIV and how it is transmitted.⁸⁹ It is unfair to punish individuals for spreading a disease that many individuals do not understand.

Greater individual knowledge of one’s HIV positive status is an important step in stopping the spread of HIV.⁹⁰ Yet only about 54% of adults report receiving an HIV test and only 22% of that group report being tested in the past year.⁹¹ Determining how many people actually have HIV is difficult “because many individuals living with HIV have not been tested or reported [their status].”⁹² It is believed that one-fifth of the nearly 1.1 million individuals living with HIV in the United States remain undiagnosed.⁹³ There is a strong belief that undiagnosed individuals contribute disproportionately to the number of new infections.⁹⁴ Increased access to testing would likely help prevent the disease from spreading and increase the ability to track HIV infections.⁹⁵

86. Max D. Siegel, *Lessons from a Plague*, 4 WM. & MARY POL’Y REV. 292, 301 (2012) (citation omitted).

87. LAMBDA LEGAL, *HIV STIGMA AND DISCRIMINATION IN THE U.S.: AN EVIDENCE-BASED REPORT 1* (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf (reporting on a White House study that found that stigma and “fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing medical care”) (citation omitted).

88. See Hernandez, *supra* note 59.

89. LAMBDA LEGAL, *supra* note 87, at 1 (noting that “HIV stigma is largely fueled by ignorance about the basic modes of HIV transmission and unfounded fears” and that “[f]ar too many people still lack basic knowledge of how HIV is transmitted”) (citation omitted).

90. Siegel, *supra* note 86, at 300.

91. KAISER FAM. FOUND., *HIV TESTING IN THE UNITED STATES 2* (2014), <http://kaiserfamilyfoundation.files.wordpress.com/2014/05/609414-hiv-testing-in-the-united-states1.pdf>.

92. Siegel, *supra* note 86, at 300.

93. *Id.*

94. *Id.*

95. *Id.*

HIV criminalization laws directly counter the importance of being tested and knowing one's HIV status. In fact, one study found that "prosecution discourages HIV testing by raising the shadow price of knowing that one is HIV positive."⁹⁶ Because each law⁹⁷ contains a mens rea requirement of knowledge of one's HIV status, there is an incentive not to learn one's status.⁹⁸ For Nick Rhoades and others convicted of trying to intentionally spread HIV, they likely could not have been charged if they never bothered to get tested. It is significantly more blameworthy not to know one's HIV status than to have consensual, protected sex with knowledge that one is infected with the disease but has virtually no chance of infecting another. Even if one has knowledge of one's HIV status, criminalization laws promote the idea that being HIV positive should not be discussed or that it is an embarrassment. Individuals who can get past this negative stigma and be open about their HIV status without fear of repercussions are much more unlikely to divulge their status if they know it can lead to criminal prosecution. There is therefore an incentive—even if one knows his or her status as HIV positive—not to share that information with others because criminal prosecution cannot occur if no one has knowledge of another's status.

Stigma is also largely a result of the misinformation many individuals have about HIV.⁹⁹ "[L]arge segments of the public remain uneducated about HIV and how it is transmitted, which promotes fear and antipathy."¹⁰⁰ The idea that only gay and bisexual men contract HIV remains prevalent,¹⁰¹ even though it is patently incorrect. In fact, approximately one-third of new cases come from individuals other than men who have sex with men.¹⁰² Perhaps most startling is the perception of how HIV is spread. HIV cannot be passed with the passage of saliva, sweat, tears, toilet

96. Adeline Delavande et al., *Criminal Prosecution and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J.L. & ECON. 741, 778 (2010).

97. Although the various HIV criminalization laws in this comment are referred to collectively, each law is slightly different. However, each of the laws is generally similar in requiring knowledge and sometimes intent.

98. Newman, *supra* note 33, at 1415.

99. LAMBDA LEGAL, *supra* note 87, at 1.

100. *Id.*

101. *Id.* (noting that "levels of knowledge about HIV transmission have not improved since 1987").

102. See *HIV in the United States*, *supra* note 7, at 1.

seats, drinking fountains, or other forms of casual contact.¹⁰³ Yet approximately 34% of respondents in one study believed either that transmission could occur through sharing a drinking glass, touching a toilet seat, or using the same swimming pool as an HIV positive person.¹⁰⁴ Moreover, HIV only lives within humans and is not spread throughout the air.¹⁰⁵ Contracting HIV requires the passage of fluids like blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk.¹⁰⁶ Further, having an undetectable viral load “greatly lowers the chance that a person living with HIV can transmit the virus to a partner.”¹⁰⁷ Those with an undetectable viral load have less than a 5% chance of transmitting HIV, even without protection.¹⁰⁸ A new study, confirming another study from 2011, shows that when HIV is undetectable because of antiretroviral treatment, the disease is “unable to [be] transmit[ted] to a sexual partner.”¹⁰⁹ There also remains a prevailing thought that contracting HIV is a death sentence.¹¹⁰ However, “a quarter of a century of drug development means that for most people who contract the virus it has become manageable through medication.”¹¹¹ Those infected with HIV are living longer and healthier lives than in the past because of advanced treatments for the disease and greater awareness.¹¹²

103. *How Do You Get HIV or AIDS?*, *supra* note 18.

104. KAISER FAM. FOUND., 2009 SURVEY OF AMERICANS ON HIV/AIDS: SUMMARY OF FINDINGS ON THE DOMESTIC EPIDEMIC 4-5 (2009), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7889.pdf>.

105. *How Do You Get HIV or AIDS?*, *supra* note 18.

106. *Id.*

107. *Id.*

108. Gus Cairns, *No-One with an Undetectable Viral Load, Gay or Heterosexual, Transmits HIV in First Two Years of PARTNER Study*, NAM PUBLICATIONS (Mar. 4, 2014), <http://www.aidsmap.com/No-one-with-an-undetectable-viral-load-gay-or-heterosexual-transmits-HIV-in-first-two-years-of-PARTNER-study/page/2832748/>.

109. Katie Peoples, *STUDY: Zero HIV Transmissions When Undetectable on Treatment*, ADVOCATE (Aug. 18, 2015, 12:14 PM), <http://www.hivplusmag.com/treatment/2015/07/23/breakthrough-study-shows-zero-hiv-transmissions-when-undetectable>. One potential issue with becoming undetectable is that an individual must be receiving antiretroviral treatment and adhere to treatment to combat the virus. *Id.* Only 37% of those living with HIV receive antiretroviral treatment. *Id.*

110. *Debunking Common Myths About HIV*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/debunking-common-myths-about-hiv> (last visited Nov. 9, 2015).

111. James Gallagher, *Is HIV Still a Death Sentence in the West?*, BBC (Nov. 30, 2011), <http://www.bbc.com/news/health-15853743>.

112. *Id.*

HIV criminalization laws ignore many of these facts and were created at a time when HIV was not fully understood. For Nick Rhoades, who had an undetectable viral load and used a condom, the chance of transmitting HIV was extremely low, as the Iowa Supreme Court noted.¹¹³ Many criminalization laws do not allow for the possibility of being HIV positive and yet not having a realistic opportunity to transmit the disease. Further, criminalization laws promote the stigma associated with HIV because they criminalize conduct that may not result in HIV transmission. Divulging one's status to a potential partner may seem like a solution, and many criminalization laws list consent as an affirmative defense. This, however, would require an infected individual to deal with the stigma associated with being HIV positive and does not go far enough.

HIV criminalization laws also ignore the practical reality of having and spreading HIV. There are three categories of HIV transmission: intentional, reckless, and accidental.¹¹⁴ Knowledge of one's HIV status allows for prosecution for any of the three categories. However, accidental transmission and potentially reckless transmission are not always morally blameworthy. Moreover, HIV criminalization laws do not require actual transmission—only attempted transmission.¹¹⁵ The *Rhoades* case exemplifies a situation where there was no morally blameworthy conduct, since Rhoades's potential to transmit HIV was so minimal.¹¹⁶ While transmission that is intentional should be punished, reckless and accidental transmission should not be punished because they do not advance any societal purpose. There is already a lack of intent on the part of individuals transmitting the disease in the latter categories. Criminalizing the transmission of HIV assumes that the majority of infected persons who transmit HIV do so intentionally or purposefully to injure another. Common sense dictates that is not the case. But even beyond just common sense, "studies show that those who learn

113. *Rhoades v. State*, 848 N.W.2d 22, 25–26 (Iowa 2014).

114. *Criminal Transmission of HIV*, AVERT, <http://www.avert.org/criminal-transmission-hiv.htm> (last visited Nov. 9, 2015).

115. See *supra* note 35 and accompanying text.

116. See *supra* note 58 and accompanying text.

they are HIV positive modify their behavior to reduce the risk of HIV transmission.”¹¹⁷

IV. THE CHANGING LEGAL LANDSCAPE: PrEP AND THE OBSOLETE NATURE OF HIV CRIMINALIZATION LAWS

In a world where PrEP is an option to prevent the spread of HIV, criminalization laws make even less sense as a public policy choice. PrEP users must undergo an initial HIV test,¹¹⁸ as well as continuous medical treatment to monitor the medication.¹¹⁹ Knowledge of a negative status and use of PrEP will prevent the spread of HIV, but so will knowledge of a positive status.¹²⁰ Criminalization laws encourage members of high-risk communities not to learn their status,¹²¹ which prevents someone from being prescribed PrEP. Encouraging PrEP and eliminating the use of criminalization laws is a positive way to combat HIV. Further, it will allow state and local governments to redirect public funding to positive programs to encourage testing and awareness rather than prosecution.¹²² Beyond the economics, there are also social costs created by HIV criminalization laws. The continued use of HIV criminalization laws is a remaining vehicle to discriminate against the LGBT community. Currently, the LGBT community is gaining civil rights and greater acceptance throughout the United States,¹²³ but HIV remains a social, political, and legal hurdle that the LGBT community must overcome to achieve full equality. With PrEP available, energy can be poured into encouraging at-risk members of society into preventative treatment and can allow the LGBT community to gain empowerment and take charge of its health.

117. KAISER FAM. FOUND., *supra* note 91, at 1.

118. *Comprehensive Management*, GILEAD SCI., INC., <http://www.truvadapreprems.com/comprehensive-hiv-management> (last visited Dec. 10, 2015).

119. *Id.*

120. CTR. FOR DISEASE CONTROL & PREVENTION, *PROVEN HIV PREVENTION METHODS 1* (2015), <http://www.cdc.gov/nchhstp/ux-test-2015/newsroom/docs/factsheets/methods-508.pdf>.

121. *See supra* Section III.

122. *See infra* Section IV, B.

123. *See supra* notes 1–3 and accompanying text.

A. HIV Status

This paper has already addressed the importance of knowing one's HIV status and how HIV criminalization laws encourage individuals to delay finding out their status.¹²⁴ However, merely eliminating HIV criminalization laws will not solve other problems, such as ensuring that individuals obtain knowledge of their HIV status through regular screening. PrEP offers one potential solution to increase the number of individuals receiving regular testing and, in turn, reduce HIV incidence.¹²⁵

In order for a prescriber to start a patient on PrEP, the prescriber must first determine that an individual is in a high-risk category, which includes individuals with HIV positive partners or those engaged in a “high prevalence area of social network” with a noted inconsistency or non-use of condoms, diagnosis of STIs, exchange of sex for commodities, or use of illicit drugs or alcohol dependence.¹²⁶ Even individuals who do not qualify to take PrEP will gain the benefit of meeting with a doctor to discuss sexual habits, which can lead to safer sex practices.¹²⁷ But for those individuals who do qualify for PrEP, the next step is an initial screening, which includes an HIV test, HBV vaccination, and counseling on PrEP.¹²⁸ Just this initial screening process for PrEP may drastically assist in efforts to combat HIV for the most at-risk populations.¹²⁹

Once an individual goes through the initial screening process, there are three potential results. First, if the individual is discovered to be HIV positive, the disease will now have been diagnosed. Although PrEP use is only for those who are confirmed as HIV negative,¹³⁰ HIV positive persons will become aware of their status, which will help them avoid infecting others and allow them

124. See *supra* Section III.

125. CTR. FOR DISEASE CONTROL & PREVENTION, PREP: A NEW TOOL FOR HIV PREVENTION 1, 4 (2012), http://www.cdc.gov/hiv/pdf/prevention_prep_factsheet.pdf.

126. *About TRUVADA for PrEP Indication*, GILEAD SCI., INC., <http://www.truvadaprepregs.com/pre-exposure-prophylaxis> (last visited Dec. 10, 2015).

127. See U.S. PUB. HEALTH SERV., PREEXPOSURE PROPHYLAXIS FOR THE PREVENTION OF HIV INFECTION IN THE UNITED STATES—2014 CLINICAL PROVIDERS' SUPPLEMENT 27–28 (2014), <http://www.cdc.gov/hiv/pdf/preprovidersupplement2014.pdf>.

128. *Checklist for Prescribers*, GILEAD SCI., INC., <http://www.truvadaprepregs.com/truvadaprep-prescriber-checklist> (last visited Dec. 10, 2015).

129. See U.S. PUB. HEALTH SERV., *supra* note 127, at 27–28.

130. *Checklist for Prescribers*, *supra* note 128.

to begin treatment. As noted, nearly one-fifth of HIV infections remain undiagnosed¹³¹ and only 54% of adults have been tested for HIV with only 22% tested in the past year.¹³² Early diagnosis is an important step in improving the quality of life for infected individuals.¹³³ Second, if the individual is HIV-negative, the individual can begin treatment on PrEP. Treatment is effective in combatting HIV in two ways. Individuals on PrEP have a greatly reduced chance—up to 92%—of contracting HIV if they take the medication properly.¹³⁴ While on PrEP, individuals must have regular check-ins with doctors at least every three months.¹³⁵ But some individuals will contract HIV either because there remains a small chance of contracting HIV while on PrEP or because an individual fails to use PrEP properly.¹³⁶ Even for these individuals, PrEP is a positive step because the regular check-ins with a doctor will provide a means of obtaining a diagnosis. The other segment of individuals who use PrEP and do not contract HIV will be able to continue using PrEP as an effective means of reducing risk.¹³⁷

The third category of individuals who make it through the initial screening process are those who choose not to use PrEP. PrEP still serves an important purpose because even these individuals will have undergone HIV screening and been counseled on the importance of safer sex. There are a variety of reasons for deciding not to use PrEP. First, as with any medication, there are side effects.¹³⁸ Some individuals will decide that in their personal situation, the side effects and risks associated with the medication do not outweigh the potential benefits. Second, there remains a stigma associated with PrEP that remains a stumbling block for individuals.¹³⁹ As PrEP takes hold and becomes more

131. Siegel, *supra* note 86, at 300.

132. KAISER FAM. FOUND., *supra* note 91, at 2.

133. Siegel, *supra* note 86, at 300 (“Those who are undiagnosed are believed to disproportionately contribute to new infections, and this has led researchers to advocate that increased access to testing and care could service to prevent new cases . . .”).

134. *See supra* Section II.

135. *Checklist for Prescribers*, *supra* note 128.

136. *Pre-Exposure Prophylaxis (PrEP)*, AIDS.GOV (Mar. 23, 2014), <https://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis>.

137. *See* CTR. FOR DISEASE CONTROL & PREVENTION, *PREEXPOSURE PROPHYLAXIS FOR THE PREVENTION OF HIV INFECTION IN THE UNITED STATES—2014*, at 9 (2014), <http://www.cdc.gov/hiv/pdf/prepguidelines2014.pdf>.

138. *How to Take Truvada for PrEP*, *supra* note 62.

139. Hernandez, *supra* note 59.

widely used and accepted, it is likely that the stigma associated with using it will dissipate. Third, concerns remain about cost of both the medication and ongoing doctor visits.¹⁴⁰ Even though there are programs available to assist with the cost of the medication,¹⁴¹ ongoing visits and non-covered portions of the medication cost can be expensive.¹⁴² Less affluent individuals with potentially inferior health insurance may face difficulties paying for the medication.

What is clear is that regardless of whether someone actually begins using PrEP or not, there are benefits for individuals just from being initially screened for PrEP. Unlike HIV criminalization laws, which provide a reason for individuals not to know their HIV status, PrEP provides an incentive and requirement for individuals to get tested. It is one step towards turning the fight against HIV around.

B. Redirecting Funds from Ineffective Laws to Effective Treatment

The continued use of HIV criminalization laws is not just morally wrong, but ineffective as a means to fight HIV. One study reports that if prosecution is more likely, HIV positive persons become more afraid of being reported and are less likely to disclose their status.¹⁴³ The same study indicated that the prevalence of unsafe sex was not reduced if HIV criminalization laws became stricter.¹⁴⁴ But beyond the failure of prosecution and of HIV criminalization laws lies the cost factor. From 2008 to 2014, there were at least 210 prosecutions in various states for HIV related crimes,¹⁴⁵ and prior to that, there were at least 316 prosecutions between 1986 and 2001.¹⁴⁶ While slightly more than 500 prosecutions is not a huge number compared to crimes like rape and prostitution,¹⁴⁷ there is an immense social cost associated

140. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 69.

141. *Id.*

142. S.F. AIDS FOUND., *supra* note 74.

143. Delavande et al., *supra* note 96, at 743.

144. *Id.* at 756.

145. CTR. HIV L. & POL'Y, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008–2014 (June 30, 2015), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Chart%20of%20US%20Prosecutions%202008-2014.pdf>.

146. Delavande et al., *supra* note 96, at 750.

147. See Lazzarini et al., *supra* note 79, at 247.

with each prosecution.¹⁴⁸ While no direct study has been done on the cost of HIV criminalization, it is sorely needed.¹⁴⁹

Precise costs of prosecuting and incarcerating an individual for violating HIV criminalization laws remain unknown, but there is no doubt that a significant amount of resources go into each case.¹⁵⁰ For every person suspected of violating an HIV criminalization law, there is a police investigation, which drains time and resources. If authorities decide to charge an individual, more resources are poured into initial proceedings and holding the accused. If the case goes to trial, further resources are drained. The case may go the way of Nick Rhoades, who was convicted of violating Iowa's HIV criminalization law in 2009, but whose appeals were not exhausted until 2014.¹⁵¹ The Iowa Supreme Court remanded his case back to the trial court for further proceedings, thereby greatly increasing the cost associated with his prosecution.¹⁵² For those who are convicted, there is the additional cost of incarceration. This entire process combines for a much greater cost than a simple prosecution. Even though the number of individuals who are prosecuted remains somewhat minimal, it is important to note that "many of the statutes . . . make potential criminal defendants out of hundreds of thousands of people living with HIV who would not consider themselves (or be considered by their peers) to be doing anything criminal."¹⁵³ Any funds dedicated to prosecuting blameless individuals are wasted. There is also no evidence that incarcerating those who violate HIV criminalization laws reduces the number of people diagnosed with HIV, since there is no proof that those who are convicted would have infected anyone else or that there is any deterrent effect for others with HIV.¹⁵⁴

There is an additional cost, however, that cannot be assessed in "dollars and cents." Privacy rights of individuals being

148. See Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1352 (2013).

149. *Id.* at 1351 ("Research should assess the actual costs of enforcing HIV criminal laws. Ideally, measured costs would include costs of surveillance, arrest, pretrial detention, prosecution and defense (funded by the state), and incarceration for these crimes.")

150. *Id.*

151. Rhoades v. State, 848 N.W.2d 22, 26 (Iowa 2014).

152. *Id.* at 33.

153. Lazzarini et al., *supra* note 79, at 247.

154. *Id.* at 249.

prosecuted for HIV transmission are often compromised.¹⁵⁵ A key element of the crime that a prosecutor must prove is knowledge of one's HIV status, which is most easily obtained through medical records.¹⁵⁶ Privacy issues are particularly difficult in the context of HIV because of the stigma attached to being HIV positive. Public policy encourages regular testing, but lack of faith in the confidentiality of one's medical records would likely lead many to forego testing. For those aware of the potential for prosecution and the potential non-private nature of their medical records, HIV testing invites potential for eventual criminal penalties and public scorn. The attempt to criminalize HIV, therefore, also bears the social cost of reducing privacy of one's medical records, which runs counter to effective means of combatting HIV.

PrEP does exactly the opposite with regards to both economic and social cost when compared with HIV criminalization laws. The use of PrEP requires regular testing and prevents one from becoming infected with HIV.¹⁵⁷ An increase in the use of PrEP has the potential to decrease overall incidence of HIV and reduce the spread. Although PrEP can be expensive, money spent for PrEP for one person can potentially reduce the infection of many others, not to mention the decrease in medical bills for all involved. Further, while on PrEP, users are encouraged to employ safer sex practices and have a regular dialogue with their doctor about these practices.¹⁵⁸ Contrary to HIV criminalization laws, there is direct, scientific proof that correct use of PrEP reduces one's chances of contracting HIV by 92%.¹⁵⁹ There is also no social cost in the form of compromised patient privacy, as there is no compelling need to divulge one's health information because of PrEP. Diverting society's attention away from HIV criminalization laws and towards PrEP is a positive use of time and money and would be more effective in combatting HIV incidence.

155. *Id.* at 250–51.

156. *Id.* at 250.

157. *Checklist for Prescribers*, *supra* note 129.

158. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 69.

159. *Id.*

C. Morale and Perception of the LGBT Community

PrEP is not only a more effective option for reducing HIV incidence than HIV criminalization laws, but also is a means of hope for a fight that has been going in the wrong direction in recent years.¹⁶⁰ Even though there is much greater awareness of what causes HIV and how to prevent HIV transmission,¹⁶¹ criminal laws and public health initiatives continue to fail in reducing incidence of HIV.¹⁶² PrEP is a new, better way to reverse these trends. Unlike criminalization laws, which punish those already infected with HIV for committing crimes that are arguably not blameworthy, PrEP allows users to proactively combat HIV and has the potential to reverse the stigma associated with HIV because incidence will begin to decrease.¹⁶³ Further unlike the current state, LGBT individuals can be viewed as responsibly¹⁶⁴ dealing with the issue of HIV. Although there is not yet a cure for HIV, PrEP provides hope that the disease that has hampered the LGBT community for over thirty years can slowly be eradicated.

V. RECENT DEVELOPMENTS AND THE EARLY SUCCESS OF PREP

A. Recent Developments

Just like the *Rhoades* case, a number of more recent cases demonstrate that HIV criminalization laws are archaic and harmful. In Missouri, a former college wrestler named Michael L. Johnson was sentenced to thirty years in prison for infecting one individual and attempting to infect four others.¹⁶⁵ Johnson was

160. See *Stopping HIV?*, *supra* note 1 (noting that over the past decade, “the number of people living with HIV has increased, while the annual number of new HIV infections has remained relatively stable” but also noting that “the pace of new infections continues at far too high a level—particularly among certain groups”).

161. See *id.*

162. CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 50 (2014), http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Roadmap_For_Change_full_report.pdf.

163. See *Stopping HIV?*, *supra* note 1.

164. There is no assertion that LGBT individuals are not responsible in their sexual habits. The assertion here is that the community is viewed still as “promiscuous” and “deserving” of the disease. With PrEP that perception can be reversed because HIV will be less prevalent of an issue. See *id.*

165. Mark Schlinkmann, *Ex-College Wrestler Gets 30 Years in HIV Case in St. Charles County*, ST. LOUIS DISPATCH (July 13, 2015), <http://www.stltoday.com/news/local/crime->

convicted of five crimes and sentenced for what the judge called “very severe” crimes.¹⁶⁶ While Johnson’s acts are arguably immoral and warrant some penalty, thirty years as a penalty is akin to the penalty for murder.¹⁶⁷ Proscribing the same penalty for Johnson’s acts as for murder promotes stigma towards HIV positive individuals. HIV is not a death sentence, but treating it as one perpetuates negative attitudes towards HIV positive individuals in a way that greatly harms public health.¹⁶⁸

In another case, a man was sentenced to six months in prison for infecting an individual.¹⁶⁹ In sentencing the man to a misdemeanor under California law, the judge called it a “travesty” that the crime was “just a misdemeanor” and found it “a tremendous oversight in the law.”¹⁷⁰ Even though there was culpable conduct—the man joked in text messages about being HIV positive and willfully concealing the information¹⁷¹—the true issue is the stigma that continued criminalization presents. Further, there is little link between convicting culpable individuals and combating new HIV infections.¹⁷² Although one individual may “pay” for their actions, a conviction is merely a small step in solving the overall problem. These recent convictions also establish that although not often used, HIV criminalization laws are still prevalent today.

and-courts/ex-college-wrestler-gets-years-in-hiv-case-in-st/article_c3123243-b8d3-58c9-97df-e2c5a504902a.html.

166. *Id.*

167. Those convicted of Class A felonies are to receive “a term of years not less than ten years and not to exceed thirty years, or life imprisonment.” MO. REV. STAT. § 558.011.1(1) (2003). First and second-degree murder are Class A felonies. *See* MO. REV. STAT. § 565.020.2 (2012); MO. REV. STAT. § 565.021.2 (1991).

168. *See* HANSENS ET AL., *supra* note 162, at 48.

169. Nigel Campbell, *Man Who Knowingly Spread HIV Sentenced to Six Months, Says “I am Not a Monster,”* INSTINCT (May 5, 2015), <http://instinctmagazine.com/post/man-who-knowingly-spread-hiv-sentenced-six-months-says-i-am-not-monster>; Omari Fleming, *Ex: Man Accused of Knowingly Spreading HIV Still on Grindr*, NBC SAN DIEGO (Aug. 29, 2014), <http://www.nbcsandiego.com/news/local/HIV-Positive-Thomas-Miguel-Guerra-San-Diego-Grinder-273178761.html>.

170. *Id.*

171. *Id.*

172. HANSENS ET AL., *supra* note 162, at 49–50.

B. Early Success of PrEP

PrEP was only approved as a preventative medication in 2012.¹⁷³ While it has been slow to take hold,¹⁷⁴ there are some early indications that PrEP is an effective means of combatting HIV.¹⁷⁵ Official statistics on the number of new HIV infections for 2012 through 2015 will not be available for some time.¹⁷⁶ One early sign of success comes from San Francisco, where new HIV infections have declined 30% since 2012.¹⁷⁷ San Francisco has taken an aggressive approach to eliminating HIV, which includes the use of PrEP.¹⁷⁸ Washington, D.C., which has nearly twice the number of new infections as San Francisco and the highest AIDS diagnosis rate of any state in the United States,¹⁷⁹ has seen a nearly 60% decrease in new diagnoses since 2009.¹⁸⁰ PrEP is noted as a key element of further reducing transmission rates.¹⁸¹

Perhaps representing that PrEP has the potential to eradicate or at least greatly reduce HIV incidence, the Obama administration called for “full access to comprehensive PrEP services for those whom it is appropriate and desired, with support for medication adherence for those using PrEP” in its strategy for combatting HIV moving forward.¹⁸² The new strategy also provides information about specific state initiatives encouraging and supporting the use of PrEP.¹⁸³ While there is not an outright endorsement of PrEP, the inclusion of PrEP as an effective means

173. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 64, at 1.

174. *See Stopping HIV?*, *supra* note 1.

175. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 64, at 1.

176. As previously noted, the most recently available results are for 2011. Most importantly, due to PrEP’s slow adoption in the market, analyzing the years 2014, 2015, and beyond will provide the greatest insight.

177. Brenden Shucart, *Policy of Truth*, ADVOCATE, Oct./Nov. 2015, at 34, <http://www.advocate.com/print-issue/current-issue/2015/08/27/op-ed-how-san-francisco-beating-hiv>.

178. *Id.*

179. KAISER FAM. FOUND., *THE HIV/AIDS EPIDEMIC IN WASHINGTON, D.C.* 1 (2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8335.pdf>.

180. Colleen Curry, *How Washington DC Cut Its Epidemic-Level HIV Rate by 40 Percent*, VICE NEWS (July 10, 2015, 10:20 AM), <https://news.vice.com/article/how-washington-dc-cut-its-epidemic-level-hiv-rate-by-40-percent>.

181. *Id.*

182. OFF. OF NAT’L AIDS POL’Y, *NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES: UPDATED TO 2020*, at 3 (2015), <https://aids.gov/federal-resources/national-hiv-aids-strategy/nhas-update.pdf>.

183. *Id.* at 17, 22.

of preventing HIV signals acceptance among public health officials and marks an important step in PrEP gaining wider acceptance.

Unlike San Francisco's aggressive approach that is reducing new HIV infections, many rural and southern states have taken a more passive approach to their detriment. In Indiana, an outbreak of over 140 new HIV infections occurred in a relatively short time.¹⁸⁴ Comparatively, there were only 302 infections in San Francisco in 2014, a city with a much higher population and higher concentration of LGBT individuals.¹⁸⁵ The outbreak in Indiana occurred because of IV drug use, which had not produced many HIV cases in recent years.¹⁸⁶ To prevent reuse of needles that may help spread HIV and other diseases, many jurisdictions have created exchange programs so that used needles are replaced with new needles.¹⁸⁷ Indiana, however, did not have a needle exchange program until April 2015.¹⁸⁸ Although PrEP is unlikely to have affected the Indiana outbreak, the failure to adopt comprehensive reforms to combat HIV inhibits the ability to prevent future HIV outbreaks. The failure to move away from antiquated ideas such as the resistance to needle exchange programs and continued use of

184. Jen Christensen, *HIV Outbreak in Indiana Grows*, CNN (Apr. 24, 2015, 2:46 PM), <http://www.cnn.com/2015/04/24/health/hiv-indiana-spreads>.

185. Chris Roberts, *SF Records All-Time Low in HIV Infections, Deaths*, S.F. EXAM'R (July 6, 2015, 10:11 PM), <http://www.sfexaminer.com/sf-records-all-time-low-in-hiv-infections-deaths>.

186. See Christensen, *supra* note 184 (stating that the Indiana outbreak was linked to IV drug users although new HIV infections from IV drug users had declined 90% since the 1980s).

187. Only thirty-four states have needle exchange programs, and the states without programs are mostly concentrated in southern and other rural states. *Syringe Exchange Program Coverage in the United States 2012*, FOUND. AIDS RES., http://www.amfar.org/uploadedFiles/_amfarorg/On_the_Hill/3_29_12_Sep_Map_Final.pdf (last updated Dec. 15, 2015). Even though there is some criticism of need exchange programs, they have been shown to "substantially and cost effectively reduce the spread of HIV among IDUs and do so without evidence of exacerbating injecting drug use at either the individual or societal level." Alex Wodak & Annie Cooney, *Effectiveness of Sterile Needle and Syringe Programming in Reducing HIV/AIDS Among Injection Drug Users*, WORLD HEALTH ORG. 1, 30 (2004), <http://apps.who.int/iris/bitstream/10665/43107/1/9241591641.pdf> (last updated Dec. 15, 2015).

188. Jake Harper, *Indiana's HIV Outbreak Leads to Reversal on Needle Exchanges*, NPR (June 2, 2015, 4:15 PM), <http://www.npr.org/sections/health-shots/2015/06/02/411231157/indianas-hiv-outbreak-leads-to-reversal-on-needle-exchanges>; see also Wodak & Cooney, *supra* note 187 (Needle exchange programs have been shown to "substantially and cost effectively reduce the spread of HIV among IDUs and do so without evidence of exacerbating injecting drug use at either the individual or societal level.").

HIV criminalization laws, while simultaneously avoiding effective treatment options like PrEP, will only lead to failure in combatting HIV.

VI. CONCLUSION

PrEP has the potential to dramatically change the fight against HIV. While encouraging the use of PrEP represents sound public policy, it also should mark the end of HIV criminalization laws, which are preventing progress. HIV criminalization laws help create a stigma associated with HIV, which negatively impacts society's efforts to combat the disease. Moreover, HIV criminalization laws work against one of the primary ways to fight HIV: knowing one's HIV status by receiving regular HIV testing. PrEP does the complete opposite, as it requires HIV testing initially and throughout the course of treatment.

In addition to hindering efforts to increase HIV testing, HIV criminalization laws also cost money in the form of prosecuting individuals who have committed skeptical crimes. Nick Rhoades—an individual who had virtually no chance of transmitting HIV—was sentenced to twenty years in prison for “criminal transmission of HIV.”¹⁸⁹ Rhoades is one of many who have fallen victim to HIV criminalization laws.¹⁹⁰ Yet as state and local governments continue to pour money into prosecuting individuals under antiquated laws that do not achieve a reduction in HIV incidence, it is clear these funds would be better spent encouraging at-risk individuals to use PrEP and receive the course of regular testing that comes along with the medication. Without a shift away from HIV criminalization laws and towards PrEP and other positive forms of combating HIV, the LGBT community and those with HIV will continue to be stigmatized and discriminated against. Even though HIV is increasingly a societal problem and not just an LGBT issue, it remains most closely associated with the LGBT community. PrEP offers the LGBT community the

189. *Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (reversing Rhoades's conviction because “there is a question of whether it was medically true a person with a nondetectable viral load could transmit HIV . . . or whether transmission was merely theoretical”).

190. Lazzarini et al., *supra* note 79, at 245–46, 250 (reviewing 185 HIV-offense related convictions and determining the average duration of a less than life sentence was 14.3 years despite questionable deterrence value).

opportunity to take charge of its healthcare and fight against new transmission of HIV. Until there is a shift, the LGBT community will continue to experience discrimination, which will hinder efforts to combat HIV and bring equality to all factions of the LGBT community.

It remains to be seen to what effect PrEP will have in the long run on HIV incidence rates. The ability of PrEP to reach its full potential as a positive method for combatting HIV depends not only on society's buy-in to the new drug, but also the repeal of HIV criminalization laws, which only serve to injure and impede progress. Repeal is long overdue, and with the availability of PrEP, now is the time to take action in the fight against HIV.