

Spring 2016

## Turning the Tide: The Future of HIV Criminalization after *Rhoades v. State* and Legislative Reform in Iowa

Brian Cox

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### Recommended Citation

Brian Cox, *Turning the Tide: The Future of HIV Criminalization after Rhoades v. State and Legislative Reform in Iowa*, 11 Nw. J. L. & Soc. POL'Y. 28 (2016).  
<http://scholarlycommons.law.northwestern.edu/njlsp/vol11/iss1/2>

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# Turning the Tide: The Future of HIV Criminalization after *Rhoades v. State* and Legislative Reform in Iowa

Brian Cox

## I. INTRODUCTION

In the decades since it first appeared in the United States, HIV has gone from a mysterious and terrifying death sentence to a preventable, manageable chronic condition.<sup>1</sup> Law and public policy, however, have evolved much more slowly than scientific knowledge, or treatment and prevention options. The majority of states use criminal law as a misguided and ineffective tool to combat the spread of HIV.<sup>2</sup> Statutes that criminalize people living with HIV were passed when significantly less was known, from both a scientific and a policy perspective, about how to prevent or treat the virus.<sup>3</sup> As a result, most of those statutes criminalize behavior that poses an extremely low risk, or even no risk, of HIV transmission<sup>4</sup> and further contribute to misinformation, stigma, and skewed perceptions of sexual responsibility—ultimately fueling the spread of the virus rather than curbing it.<sup>5</sup>

Until 2014, Iowa’s HIV criminalization law was one of the most draconian in the country, carrying a maximum sentence of twenty-five years imprisonment and lifetime registration as a sex offender.<sup>6</sup> Moreover, it captured within its ambit activities that carry no more than a theoretical risk of HIV transmission.<sup>7</sup>

But in the summer of 2014, the Iowa Supreme Court made history by ruling in *Rhoades v. State* that Iowa’s HIV criminalization statute could not be used to prosecute

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<sup>1</sup> See Françoise Barré-Sinoussi et al., *Past, Present and Future: 30 Years of HIV research*, 11 NATURE REVIEWS MICROBIOLOGY 877, 877–80 (2013).

<sup>2</sup> Thirty-two states have HIV-specific criminal statutes. See *State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools*, CTR. FOR HIV L. & POL’Y 1–4, <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf> (last updated Oct. 21, 2013).

<sup>3</sup> Code citations for all state HIV-specific criminal statutes can be found in 1 POSITIVE JUSTICE PROJECT, THE CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS (2d ed. 2015), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf> [hereinafter ENDING & DEFENDING]. The majority of these statutes were passed in the 1980s or 1990s, while most of the key treatment and prevention advances discussed in this Note occurred in the 2000s and 2010s. See Barré-Sinoussi, *supra* note 1 (discussing recent advances).

<sup>4</sup> See discussion *infra* Section II.B.2.

<sup>5</sup> See, e.g., *15 Ways HIV Criminalization Laws Harm Us All*, LAMBDA LEGAL, <http://www.lambdalegal.org/sites/default/files/publications/downloads/15-ways-hiv-criminalization-laws-harm-us-all.pdf> (last visited Feb. 5, 2016) (submitting that HIV criminalization laws “[c]reate a disincentive to HIV testing” because “if you don’t know your status, you can’t be prosecuted”).

<sup>6</sup> See Section III.B.1 *infra*.

<sup>7</sup> See discussion *infra* Section III.B.1.

people living with HIV for consensual sex acts that pose no reasonable risk of transmitting HIV.<sup>8</sup> The court's decision was the end of a long journey for Nick Rhoades, who had been sentenced to twenty-five years in prison for performing oral sex without a condom and anal sex with a condom,<sup>9</sup> both of which pose little to no risk of transmitting HIV.<sup>10</sup> In addition, Rhoades had an undetectable viral load<sup>11</sup>, which means that the level of the virus in his bloodstream was extremely low<sup>12</sup>, further reducing or eliminating his possibility of transmitting HIV.<sup>11</sup> By reversing Rhoades's conviction,<sup>14</sup> the Iowa Supreme Court became the first high court in the country to incorporate modern scientific knowledge of HIV transmission into an HIV criminalization statute.<sup>15</sup>

At the same time that *Rhoades* was before the Iowa Supreme Court, the state legislature also repealed the law under which Rhoades had been convicted and replaced it with a much narrower, more nuanced alternative.<sup>12</sup> The new law provides for graded offenses, which depend in part on the defendant's specific intent.<sup>17</sup> This means that the most severe conviction under the statute is only available if the defendant specifically intended to transmit HIV, rather than merely intending to have sex. The severity of the offense is also dependent on whether transmission actually occurs, rather than merely a risk of transmission. Where the defendant does not intend to, and does not, transmit HIV, the defendant is only subject to a misdemeanor conviction.<sup>13</sup> Finally, the new statute imposes a higher "substantial risk" standard for transmission risk,<sup>14</sup> and creates an affirmative defense when the defendant takes practical measures to prevent transmission.<sup>15</sup> The combination of judicial and legislative changes in 2014 thus brought Iowa from being one of the most severe to one of the most enlightened jurisdictions in the United States on issues of HIV in criminal law.

This Note begins with an overview of the current scientific knowledge of HIV transmission and the historical background of HIV in American criminal law. Next, I discuss Iowa's old HIV criminalization law, the Iowa Supreme Court's opinion in *Rhoades*, and Iowa's concurrent legislative change. Finally, I discuss the future implications of *Rhoades* in Iowa and elsewhere. Though concurrent legislative reform in Iowa makes the court's decision less important as binding precedent, I argue that the

<sup>8</sup> See *Rhoades v. State*, 848 N.W.2d 22, 27–28 (Iowa 2014).

<sup>9</sup> *Id.* at 25–26. The district court suspended Rhoades's twenty-five-year sentence on his motion to reconsider and placed him on five years' probation. *Id.* at 26.

<sup>10</sup> See Section II.A *infra*.

<sup>11</sup> *Rhoades*, 848 N.W.2d at 33.

<sup>12</sup> See Section II.A *infra*.

<sup>13</sup> See Section II.A *infra*.

<sup>14</sup> *Rhoades*, 848 N.W.2d at 33.

<sup>15</sup> See *id.*

<sup>16</sup> See discussion *infra* Part III.

<sup>17</sup> See IOWA CODE § 706D.3(1) (2015).

<sup>13</sup> See *id.* § 709D.3(1)–(4).

<sup>14</sup> See *id.* § 709D.2(2).

<sup>15</sup> See *id.* § 709D.3(7). See generally *id.* § 709D.2(3) (defining the phrase "practical means to prevent transmission" as used in the statute to mean "substantial good-faith compliance with a treatment regimen prescribed by the person's health care provider, if applicable, and with behavioral recommendations of the person's health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease").

decision remains relevant in Iowa, and more importantly provides valuable persuasive precedent to guide reform efforts nationwide. The force of the decision as persuasive precedent varies significantly from state to state depending on each state's current approach to HIV criminalization. In all states, however, I argue that advocates can and should aggressively use the Iowa precedent to support attacks on HIV criminalization, whether at the trial, sentencing, appellate, parole, or post-conviction relief stages. Moreover, I argue that advocates should also draw upon the Iowa experience to advocate for legislative reform or, in the absence of legislative reform, to urge prosecutors to exercise their discretion not to pursue most HIV criminalization cases.

## II. BACKGROUND

### A. *HIV Treatment and Prevention*

HIV is the virus that can lead to AIDS if left untreated.<sup>16</sup> With current treatment options, however, an HIV diagnosis has relatively little impact on life expectancy.<sup>17</sup> Nonetheless, a large proportion of people living with HIV do not know their HIV status, and a significant proportion of those who know their status do not have access to adequate treatment.<sup>18</sup> This situation renders improved medical possibilities illusory under the social and economic realities of many people living with HIV.<sup>19</sup> Moreover, the considerable misinformation, fear, and stigma that continue to surround HIV<sup>20</sup> can have a greater impact on quality of life than the virus itself and can discourage testing and prevention efforts.<sup>21</sup>

The risk of HIV transmission begins when a bodily fluid carrying the virus (e.g., semen, pre-seminal fluid, blood, rectal fluid, vaginal fluid, or breast milk) is transmitted from a person living with HIV into the bloodstream of an HIV-negative individual.<sup>22</sup> The most common methods of transmission in the United States are sexual activity and shared

<sup>16</sup> See generally *What is HIV?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/whatishiv.html>.

<sup>17</sup> Barré-Sinoussi et al., *supra* note 1, at 879.

<sup>18</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *TODAY'S HIV/AIDS EPIDEMIC 2* (2015), <http://www.cdc.gov/nchhstp/newsroom/docs/hivfactsheets/todaysepidemic-508.pdf>.

<sup>19</sup> The CDC estimates that 18% of people living with HIV do not know their status, and that only 33% of people living with HIV are receiving treatment. CTRS. FOR DISEASE CONTROL & PREVENTION, *TODAY'S HIV/AIDS EPIDEMIC 2* (2015), <http://www.cdc.gov/nchhstp/newsroom/docs/hivfactsheets/todaysepidemic-508.pdf>.

<sup>20</sup> In a 2011 survey, many respondents believed that HIV could be transmitted by wholly impossible casual social contact such as sharing a glass of water, and a majority of respondents were uncomfortable with having a person living with HIV as a coworker, teacher, roommate, or cook. See THE HENRY J. KAISER FAMILY FOUND., *HIV/AIDS AT 30: A PUBLIC OPINION PERSPECTIVE 6-7* (2011), [http://kaiserfamilyfoundation.files.wordpress.com/2013/07/8186-hiv-survey-report\\_final.pdf](http://kaiserfamilyfoundation.files.wordpress.com/2013/07/8186-hiv-survey-report_final.pdf) [hereinafter *HIV/AIDS AT 30*].

<sup>21</sup> See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *BEST PRACTICES GUIDE TO REFORM HIV-SPECIFIC CRIMINAL LAWS TO ALIGN WITH SCIENTIFICALLY-SUPPORTED FACTORS 2* (2014), <http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf> [hereinafter *BEST PRACTICES GUIDE*] ("HIV stigma has been shown to be a barrier to HIV testing . . . stigma hampers prevention" (footnote omitted)).

<sup>22</sup> See *HIV Transmission*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/transmission.html> (last updated Dec. 14, 2015).

drug needles.<sup>23</sup> This Note focuses on transmission through sexual activity, which is also the primary focus of many criminal laws and prosecutions targeting people living with HIV. Some criminal laws also target spitting, biting, and similar acts of non-sexual aggression, which carry no risk or virtually no risk of transmission.<sup>24</sup> The criticisms outlined for sex-related laws and prosecutions apply similarly in non-sex-related cases.

If no mitigating factors are present, the highest risk sex act is receptive anal intercourse, meaning that the insertive partner is HIV positive and the receptive partner is HIV negative.<sup>25</sup> The risk of transmission in that scenario is approximately 138 in 10,000, or 1.38%.<sup>26</sup> The next highest-risk sex acts are insertive anal intercourse (0.11%), receptive vaginal intercourse (0.08%), and insertive vaginal intercourse (0.04%).<sup>27</sup> It remains a subject of debate whether receptive oral intercourse carries any risk at all, but if so, it is an extremely low risk; insertive oral intercourse carries no risk.<sup>28</sup>

Several factors can mitigate these risks. It has been well known since very early in the HIV epidemic that latex condoms dramatically reduce the risk of transmission.<sup>29</sup> Newer advances, known as biomedical prevention, have further revolutionized the landscape of HIV-prevention methods.<sup>30</sup> The most relevant form of biomedical prevention for purposes of this Note is treatment as prevention (TasP). TasP originated with the discovery that HIV treatment reduces the quantity of the virus in an individual's bloodstream (i.e., the individual's "viral load"), and that the lower an individual's viral load, the less likely it is for him or her to transmit HIV.<sup>31</sup> Thus, treatment not only improves the quality of life of the person living with HIV but also substantially inhibits his or her risk of transmitting HIV to others. The target viral load for an individual undergoing treatment is "undetectable," or so low that current technology cannot detect the virus's presence.<sup>32</sup> This goal is achievable for most people living with HIV if they have adequate access to treatment and are able to adhere to their treatment.<sup>33</sup> It is now

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<sup>23</sup> *Id.*

<sup>24</sup> See generally Mona Loutfy et al., *Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law*, 25 CAN. J. INFECTIOUS DISEASES & MED. MICROBIOLOGY 135 (2014); *State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools*, CTR. FOR HIV L. & POL'Y 1–4, <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf> (last updated Oct. 21, 2013).

<sup>25</sup> See *id.*

<sup>26</sup> *HIV Transmission Risk*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/risk.html> (last updated Nov. 16, 2015).

<sup>27</sup> See *id.*

<sup>28</sup> Mona Loutfy et al., *Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law*, 25 CAN. J. INFECTIOUS DISEASES & MED. MICROBIOLOGY 135, 137 (2014).

<sup>29</sup> See *id.* at 136.

<sup>30</sup> See Barré-Sinoussi et al., *supra* note 1, at 880.

<sup>31</sup> See *id.*

<sup>32</sup> See *HIV Transmission Risk*, *supra* note 31.

<sup>33</sup> See Loutfy et al., *supra* note 29, at 136–37.

well established that an undetectable viral load yields a dramatic reduction in transmission risk,<sup>34</sup> with one study suggesting that it completely eliminates all risk.<sup>35</sup> Other forms of biomedical prevention are post-exposure prophylaxis (PEP) and pre-exposure prophylaxis (PrEP). While TasP is a form of prevention practiced by the HIV-positive partner, PEP and PrEP are forms of prevention practiced by HIV-negative individuals at risk of exposure. PEP is a short-term treatment taken after a potential exposure.<sup>36</sup> PEP can have unpleasant but non-life-threatening side effects, but it substantially reduces the chances of becoming infected.<sup>37</sup>

PrEP is a long-term, daily treatment with minimal side effects that also substantially reduces the chances of becoming infected and is recommended to populations at high risk.<sup>38</sup> In April 2014, Washington State launched a drug assistance program to increase the availability of PrEP in high-risk communities,<sup>39</sup> and other states have considered similar programs.<sup>40</sup>

All of these medical advances mean that it is now easier than ever for a person living with HIV to avoid transmitting the virus, for a person without HIV to avoid contracting it, and for a person newly diagnosed to live a long and healthy life. Cumulatively, these changes suggest that investments in education, treatment, and prevention have the potential to finally bring the HIV epidemic under control and cast considerable doubt on the wisdom of targeting people living with HIV for harsh criminal sanctions.

### B. HIV Criminalization

The majority of states criminalize consensual sex acts for people living with HIV if they do not disclose their HIV status to their HIV-negative partner before having sex—

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<sup>34</sup> See, e.g., *id.* at 137; see also *Prevention Benefits of HIV Treatment*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/prevention/research/tap/> (last updated Apr. 15, 2013) (discussing a study showing a 96% reduction in transmission risk).

<sup>35</sup> See Alison Rodger, PARTNER Study Grp., Presentation at Conference on Retroviruses and Opportunistic Infections: HIV Transmission Risk Through Condomless Sex if the HIV Positive Partner Is on Suppressive ART (Mar. 4, 2014), [http://www.cphiv.dk/portals/0/files/CROI\\_2014\\_PARTNER\\_slides.pdf](http://www.cphiv.dk/portals/0/files/CROI_2014_PARTNER_slides.pdf). The PARTNER study found zero HIV transmissions in over 30,000 condomless sex acts between HIV-positive individuals with undetectable viral loads and their HIV-negative partners. See *id.*

<sup>36</sup> See *PEP*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/pep.html> (last updated Jan. 21, 2016).

<sup>37</sup> *Id.*

<sup>38</sup> See *PrEP*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prep.html> (last updated Dec. 14, 2015).

<sup>39</sup> See generally *Pre-Exposure Prophylaxis Drug Assistance Program (PrEP DAP)*, WASH. ST. DEP'T HEALTH, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/HIVAIDS/HIVCareClientServices/PrEPDAP> (last visited Oct. 29, 2014). See also Dave Kern, *Six Lessons for Health Departments Using Prep as an HIV Prevention Tool*, Dec. 10, 2014, <https://www.nastad.org/blog/six-lessons-health-departments-using-prep-hiv-prevention-tool>.

<sup>40</sup> The Illinois Department of Public Health announced a similar program, which was then halted shortly after Governor Bruce Rauner took office. See *Revolutionary PrEP Program in Illinois Halted by Governor Before Launch*, AIDS FOUND. CHI. (Apr. 10, 2015), <http://www.aidschicago.org/page/news/all-news/revolutionary-prep-program-in-illinois-halted-by-governor-before-launch>.

or, more accurately, if they cannot prove that they disclosed their status.<sup>41</sup> In this section, I broadly outline the varying forms that these laws take in jurisdictions across the country and the criticisms that have been raised against HIV criminalization generally. I then discuss in detail the Iowa HIV criminalization statute under which Nick Rhoades was convicted.

### 1. *HIV Criminalization in General*

Though most states criminalize HIV exposure in some manner, there is considerable variation among these laws. While it is difficult to categorize these statutes neatly, some of the key variations include the following:

- (a) Covered acts: Some statutes use general language about sex acts that pose a risk of transmitting HIV, at least theoretically allowing the fact-finder or the appellate courts to consider evidence of risk.<sup>42</sup> Many states' statutes, however, enumerate specific sex acts, often including no-risk or negligible-risk activities such as oral sex, which leaves less room for advocates to present evidence on the actual risk level of a given act.<sup>43</sup>
- (b) Significance of prophylactic measures: Under the plain language of the statutes, wearing a condom is a defense in only a small handful of states.<sup>44</sup> Newer forms of prevention, such as TasP, are not explicitly addressed by any statute but could be argued to be relevant or dispositive under the

<sup>41</sup> See *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5 (discussing difficulties with proving disclosure); see generally *State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools*, *supra* note 2, at 1 (listing criminal statutes of thirty-two states).

<sup>42</sup> See, e.g., IND. CODE § 16-41-7-1 (2015) (“[S]exual or needle sharing contact that has been demonstrated epidemiologically to transmit [HIV]”); IOWA CODE §§ 709D.2–.3 (2015) (providing that “[a] person commits a [crime] when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease . . .” and defining “exposes” as “engaging in conduct that poses a substantial risk of transmission”); MINN. STAT. § 609.2241 (2015) (“[B]ehavior that has been demonstrated epidemiologically to be a mode of direct transmission of [HIV]”); NEV. REV. STAT. § 201.205 (2014) (“[E]ngages in conduct in a manner that is intended or likely to transmit the disease to another person”); OKLA. STAT. tit. 21, § 1192.1 (2014) (“[E]ngage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another”); TENN. CODE ANN. § 39-13-109 (2015) (“[T]he exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV . . . transmission”).

<sup>43</sup> See, e.g., GA. CODE ANN. § 16-5-60(c)(1) (LEXIS through 2015 Reg. Sess.) (“[A]ny sexual act involving the sex organs of one person and the mouth or anus of another person”); MICH. COMP. LAWS. § 333.5210(2) (2015) (“[S]exual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required”); OHIO REV. CODE ANN. § 2907.01(A) (West 2006) (“[V]aginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex”).

<sup>44</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 120291 (Deering, LEXIS through 2015 Sess.) (“Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity . . .”); 720 ILL. COMP. STAT. ANN. 5/12-5.01(a)(1) (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.) (“A person commits criminal transmission of HIV when he or she . . . engages in sexual activity with another without the use of a condom . . .”); IOWA CODE § 709D.3(7) (2015); *id.* § 709D.2(3).

intent, risk, or mitigation prongs of some more nuanced statutes.<sup>45</sup> The majority of HIV criminalization statutes, however, do not explicitly account for any prophylactic measures taken by either partner.

- (c) Intent requirements: Many states' statutes have ambiguous intent language, which could require that the defendant have a specific intent to transmit HIV, but may only require that the sex act itself be intentional (i.e., that it was consensual on the part of the defendant).<sup>46</sup> These statutes have often been interpreted to require only that the sex act be intentional.<sup>47</sup> Two states, however, provide for a graded approach where specific intent to transmit HIV is required to secure the highest felony conviction, and otherwise only a misdemeanor or lower-level felony conviction is available.<sup>48</sup>
- (d) Penalties: Potential prison sentences under HIV criminalization laws vary dramatically. Illinois is on the low end, with a three- to seven-year sentence.<sup>49</sup> On the high end, Texas prosecutes people living with HIV under general criminal statutes rather than an HIV-specific one, and thus does not have an HIV-specific sentencing range.<sup>50</sup> An example of that state's approach in practice is a thirty-five-year prison sentence for spitting at a police officer—a zero-risk act.<sup>51</sup>

## 2. Criticisms of HIV Criminalization

There are many reasons to criticize HIV criminalization, from a public health perspective as well as from a criminal justice perspective.<sup>52</sup> The most obvious, and

<sup>45</sup> See, e.g., IOWA CODE § 709D.3 (2015) (risk: “[C]onduct that poses a substantial risk of transmission”); MINN. STAT. § 609.2241(3)(1) (2015) (mitigation: “[P]ractical means to prevent transmission as advised by a physician or other health professional”). To the extent that statutes require an intent to transmit HIV, see, e.g., CAL. HEALTH & SAFETY CODE §§ 120291; IOWA CODE § 709D.3(1), defendants should argue that by maintaining an undetectable viral load, they show that their intent is *not* to transmit HIV.

<sup>46</sup> For example, the Illinois statute requires “specific intent to commit the offense,” see 720 ILL. COMP. STAT. ANN. 5/12-5.01(a) (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.), and the Illinois Supreme Court has not yet decided whether that means intent to transmit HIV or merely intent to perform the acts enumerated in the statute.

<sup>47</sup> For example, in Louisiana, it is unlawful to “intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim.” LA. REV. STAT. § 14:43.5. However, Louisiana courts have held that intent to transmit HIV is not an element of the crime. See, e.g., *State v. Roberts*, 844 So. 2d 263, 271-72 (La. 2003).

<sup>48</sup> See CAL. HEALTH & SAFETY CODE §§ 120290–120291 (Deering, LEXIS through 2015 Sess.); IOWA CODE § 709D.3(1)–(4) (2015).

<sup>49</sup> See 720 ILL. COMP. STAT. ANN. 5/12-5.01(e) (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.); 730 ILL. COMP. STAT. ANN. 5/5-4.5-35 (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.).

<sup>50</sup> See generally ENDING & DEFENDING, *supra* note 3, at 226 (discussing case where man charged with aggravated assault for infecting women with HIV was sentenced to forty-five years’ imprisonment).

<sup>51</sup> See Gretel C. Kovach, *Prison for Man with H.I.V. Who Spit on a Police Officer*, N.Y. TIMES, May 16, 2008, <http://www.nytimes.com/2008/05/16/us/16spit.html>.

<sup>52</sup> See, e.g., Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517 (2012); Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN’S L.J. 363 (2013); Joseph Allen Garmon, Note, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of*

perhaps least controversial, criticism is that HIV criminalization laws are overbroad: the majority of HIV criminalization statutes punish conduct that poses no proven risk of HIV transmission, and these statutes do not distinguish between acts that pose very low or theoretical risks and acts that pose a demonstrated high risk.<sup>53</sup> Additionally, as the understanding of HIV transmission risks has evolved to include considerations such as viral load, it has become increasingly impractical to categorize sex acts by risk level, even where statutes purport to do so.<sup>54</sup>

Punishing harmless conduct is obviously unjust for the defendants in these cases, but it is also bad policy for another reason: it contributes to misinformation.<sup>55</sup> Despite scientific consensus on how HIV can and cannot be transmitted, misconceptions about transmission remain rampant in the general population.<sup>56</sup> It makes sense that when people see news stories about prison sentences for spitting at someone or for oral sex, they will falsely conclude that these acts must pose some risk of HIV transmission. The spread of such misinformation undermines attempts to educate people about real HIV transmission risks.<sup>57</sup>

Why is that misinformation harmful? After all, it does not make people believe their high-risk acts are low-risk; it only makes people believe no-risk or very low-risk acts may be risky. This type of misinformation *does* increase risks, however. When people believe that HIV can be more easily spread than it actually can, they are more likely to avoid people living with HIV, both socially and sexually.<sup>58</sup> This avoidance stigmatizes people living with HIV, and that stigma is a major barrier to HIV testing and other public health efforts.<sup>59</sup> Stigma associated with HIV also creates a culture of silence among HIV-negative people that interferes with open conversation about prevention and actually leads to more high-risk behaviors among those at risk.<sup>60</sup>

HIV criminalization interferes with prevention in other ways, too. Effective HIV prevention requires the engagement of people living with HIV, but also, more

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*HIV/AIDS*, 57 How. L.J. 665 (2014); James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707 (2009).

<sup>53</sup> See, e.g., GA. CODE ANN. § 16-5-60(c)(1) (LEXIS through 2015 Reg. Sess.) (criminalizing an HIV-infected person's engaging in "sexual intercourse or . . . any sexual act involving the sex organs of one person and the mouth or anus of another person," thus including with no distinction everything from high-risk unprotected receptive anal intercourse to no-risk insertive oral sex, with or without a condom); OHIO REV. CODE ANN. § 2907.01(A) (West 2006) ("[V]aginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex").

<sup>54</sup> See Kaplan, *supra* note 57, at 1540–43.

<sup>55</sup> Perone, *supra* note 57, at 383.

<sup>56</sup> See *HIV/AIDS* AT 30, *supra* note 25, at 6.

<sup>57</sup> See Perone, *supra* note 57, at 383–85.

<sup>58</sup> See generally *HIV/AIDS* AT 30, *supra* note 25, at 7 (finding a correlation between accurate responses to survey questions on HIV transmission and positive responses to survey questions on comfort with people living with HIV).

<sup>59</sup> See Perone, *supra* note 57, at 394; Ronald O. Valdiserri, *HIV/AIDS Stigma: An Impediment to Public Health*, 92 AM. J. PUB. HEALTH 341, 341–342 (2002).

<sup>60</sup> See MARIA EKSTRAND, CTR. FOR AIDS PREVENTION STUDIES, UNIV. OF CAL. AT S.F., HOW DOES STIGMA AFFECT HIV PREVENTION AND TREATMENT? 1 (2006), <http://caps.ucsf.edu/uploads/pubs/FS/pdf/stigmaFS.pdf>; *HIV Stigma, Treatment and Prevention*, HIV & AIDS TREATMENT PRAC. (NAM Aidsmap, London, U.K.), Oct. 13, 2005, at 2, 4, <http://www.aidsmap.com/pdf/HATIP-56-13th-October-2005/page/1037657/>.

importantly, the engagement of HIV-negative individuals.<sup>61</sup> Specifically, HIV-negative individuals at risk of contracting HIV must be encouraged to take responsibility for their own health, by any combination of considering PrEP or PEP, insisting on condom use, limiting sexual activity to low-risk or no-risk acts, and discussing HIV status and risks with sexual and needle-sharing partners.<sup>62</sup>

HIV criminalization suggests the opposite, though, by putting the onus entirely on people living with HIV.<sup>63</sup> This can create a false sense of security for the HIV-negative partner: if they understand that any HIV-positive sexual partner is legally obligated to proactively disclose his or her status, they may not raise the question themselves or take their own protective measures, since it is the HIV-positive partner's "job" to do so.<sup>64</sup> This line of thinking is dangerous and unrealistic for two reasons: many people with HIV do not know their status and thus cannot disclose it,<sup>65</sup> and those who do know their status may nonetheless not always disclose it.<sup>66</sup>

Additionally, though HIV criminalization laws mandate disclosure, their effects actually discourage disclosure,<sup>67</sup> for two reasons. First, HIV criminalization contributes to stigma.<sup>68</sup> By singling out people living with HIV as inherently dangerous or criminal, and necessitating criminal controls that other communicable diseases do not, these laws send a message of overt hostility to people living with HIV while fuelling irrational fear of HIV within the general population.<sup>69</sup> In particular, most HIV criminalization laws are not based on actual risk of HIV transmission: they therefore send the message that sex with a person living with HIV is harmful in and of itself, or that people living with HIV are unclean or undesirable people.<sup>70</sup>

Second, HIV criminalization laws discourage after-the-fact disclosure.<sup>71</sup> As soon as a person living with HIV has had sex with someone once without disclosing his or her status, he or she has a strong interest in continuing to conceal it for fear of prosecution.<sup>72</sup>

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<sup>61</sup> See, e.g., WORLD HEALTH ORG., GLOBAL HEALTH SECTOR STRATEGY ON HIV/AIDS 2011–2015, at 11–13 (2011), [http://whqlibdoc.who.int/publications/2011/9789241501651\\_eng.pdf?ua=1](http://whqlibdoc.who.int/publications/2011/9789241501651_eng.pdf?ua=1); Susan Kippax & Niamh Stephenson, *Beyond the Distinction Between Biomedical and Social Dimensions of HIV: Prevention Through the Lens of a Social Public Health*, 102 AM. J. PUB. HEALTH 789, 789 (2012); Stella R. Quah, *Ethnicity, HIV/AIDS Prevention and Public Health Education*, 18 INT'L J. SOC. & SOC. POL'Y, no. 7/8, 1998, at 1, 1–4. The underlying theme in all of these sources, and in most others dealing with HIV prevention, is that individuals and communities must be empowered to address and mitigate HIV risks, not that people living with HIV must simply stop spreading it.

<sup>62</sup> See generally *HIV Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/prevention.html> (last updated Dec. 6, 2015).

<sup>63</sup> See *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5.

<sup>64</sup> See *id.*

<sup>65</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 23, at 2.

<sup>66</sup> A 2012 study showed that awareness of an HIV criminalization statute has no effect on the likelihood of a person living with HIV disclosing his or her status to sexual partners. See Carol L. Galletly et al., *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living With HIV*, 102 AM. J. PUB. HEALTH 2135, 2135 (2012).

<sup>67</sup> See generally *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5.

<sup>68</sup> Kaplan, *supra* note 57, at 1535–36.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5.

<sup>72</sup> See *id.*

This is counterproductive, as after-the-fact disclosure would allow the HIV-negative partner to use PEP to mitigate the risk of becoming infected from the first encounter, and would also allow the HIV-negative partner to make an informed decision for future encounters. Instead, HIV criminalization makes later disclosures riskier, therefore incentivizing continued secrecy.

HIV criminalization also ignores the current reality of HIV treatment.<sup>73</sup> With proper treatment, an HIV diagnosis has relatively little impact on life expectancy or quality of life.<sup>74</sup> Treating HIV transmission as a “death sentence” or a form of aggravated physical assault simply does not make logical sense, given the advanced treatment options available today,<sup>75</sup> any more than it would make sense to attach harsh criminal penalties to acts that put an individual at risk for any other illness. For example, high blood pressure, heart disease, and diabetes all have a greater impact on life expectancy than HIV,<sup>76</sup> but criminal sanctions generally do not apply to conduct that puts people at risk for these conditions. Though HIV treatment carries a substantial financial cost, this is best addressed at the population level through prevention efforts and government assistance, much like the other expensive chronic health conditions just mentioned—not at the individual level through criminal sanctions.

Significantly, HIV criminalization statutes deviate substantially from the policy norms that underlie most areas of criminal law.<sup>77</sup> Under most criminal statutes, an actor’s conduct must actually cause harm, not just create a risk of harm.<sup>78</sup> For example, for a defendant to be guilty of criminal homicide under the Model Penal Code (MPC), the victim must actually die, and must die from the attack;<sup>79</sup> otherwise, the crime is only attempted criminal homicide.<sup>80</sup> Under all but one HIV criminalization statute, however, it makes no difference whether the victim actually contracts HIV;<sup>81</sup> indeed, in most HIV cases that have been prosecuted, the victim did not contract the virus.<sup>82</sup>

<sup>73</sup> See McArthur, *supra* note 57, at 731–32.

<sup>74</sup> See Barré-Sinoussi, *supra* note 1, at 879; Loutfy et al., *supra* note 29, at 138.

<sup>75</sup> See McArthur, *supra* note 57, at 731–33.

<sup>76</sup> See Barré-Sinoussi, *supra* note 1, at 879; Loutfy et al., *supra* note 29, at 138. See also Haomiao Jia et al., *The Effects of Diabetes, Hypertension, Asthma, Heart Disease, and Stroke on Quality-Adjusted Life Expectancy*, 16 VALUE HEALTH 140, 142 tbl. 1 (2013) (finding losses in life expectancy of 3.1 years for high blood pressure, 6.8 years for heart disease, and 9 years for diabetes before further adjustments for quality of life).

<sup>77</sup> See Kaplan, *supra* note 57, at 1520–21, 1539–46 (discussing the poor fit between HIV criminalization statutes and principles of mens rea and actus reus).

<sup>78</sup> See generally MODEL PENAL CODE §§ 2.02–.03 (AM. LAW INST. 1962).

<sup>79</sup> See *id.* § 210.1 (“A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.”).

<sup>80</sup> See generally *id.* § 5.01.

<sup>81</sup> Iowa’s new HIV criminalization statute, enacted in 2014, is the only one that makes a distinction based on whether transmission actually occurs. See IOWA CODE § 709D.3 (2015).

<sup>82</sup> There is no definitive way to track every HIV case that has ever been prosecuted. However, a survey of cases known by the Center for HIV Law and Policy shows that very few involve actual transmission. See *Prosecutions and Arrests for HIV Exposure in the United States, 2008–2015*, CTR. FOR HIV L. & POL’Y (June 30, 2015),

<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/ArrestsandProsecutionsforHIVExposureintheU.S.2008-2015revised6.30.15.pdf> [hereinafter *Prosecutions and Arrests*].

Similarly, intent is a crucial element of most criminal offenses. To be guilty of murder—the highest gradation of criminal homicide under the MPC—a defendant must cause the victim’s death purposely, knowingly, or “recklessly under circumstances manifesting extreme indifference to . . . human life.”<sup>83</sup> Lower levels of intent—ordinary recklessness or negligence—only support a conviction for manslaughter or negligent homicide,<sup>84</sup> which carry lighter sentences. But again, with only two exceptions (Iowa and California), HIV criminalization statutes do not differentiate based on different levels of intent.<sup>85</sup> Some statutes’ intent requirements are ambiguous, and the rule of lenity urges that they should be interpreted in defendants’ favor. Nonetheless, in many cases it suffices that the defendant had HIV and intended to have sex, whether or not he or she intended to transmit HIV.<sup>86</sup> Indeed, in many states, even affirmative acts to prevent transmission (e.g., condom use) do not affect the analysis, at least not under the plain language of the statute.<sup>87</sup> While homicide tends to have more intent-related gradations than other criminal offenses, the general principle that intent matters is reflected in most criminal laws: the MPC includes a presumption that a mens rea of recklessness is required for all crimes, unless a different requirement is specified.<sup>88</sup> Under most HIV criminalization laws, however, there is a mens rea requirement for the physical act that is committed (the sex act itself must be voluntary), but no mens rea requirement at all for the harm that these statutes purportedly seek to address: the risk of HIV transmission.

The current approach to HIV criminalization in most states is akin to a murder statute in which the defendant must intentionally pull the trigger or thrust the knife, but need not intend to cause death nor actually cause death: the person living with HIV must intentionally have sex, but need neither intend to, nor actually, transmit HIV. The “murder” weapon could be an unloaded gun, or a knife too dull to cause injury: the sex act could be no-risk, or the defendant could have an undetectable viral load. Finally, it is immaterial if the defendant acts to protect the victim by calling 9-1-1 or treating the wound: many HIV criminalization statutes do not have a defense for wearing a condom,

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<sup>83</sup> MODEL PENAL CODE § 210.2 (AM. LAW INST. 1962).

<sup>84</sup> *See id.* §§ 210.3–4.

<sup>85</sup> Iowa’s new law distinguishes between “intent” to transmit HIV and “reckless disregard” for a risk of transmitting HIV and does not criminalize any conduct that falls below the standard of reckless disregard. *See* IOWA CODE § 709D.3(1)–(4) (2015). California’s law requires “specific intent to infect the other person” for a felony conviction, *see* CAL. HEALTH & SAFETY CODE § 120291 (Deering, LEXIS through 2015 Sess.), and alternatively provides for a misdemeanor conviction for willful exposure, *see id.* § 120290.

<sup>86</sup> *See, e.g.*, GA. CODE ANN. § 16-5-60(c) (LEXIS through 2015 Reg. Sess.) (requiring the defendant to knowingly engage in various acts, but not requiring the defendant to knowingly or purposefully create a risk of HIV transmission). This language is typical of many HIV criminalization statutes in other states. *See, e.g.*, N.D. CENT. CODE § 12.1-20-17 (2015) (requiring the defendant to willfully engage in specified acts, but not requiring any mens rea for transmission risk); OHIO REV. CODE ANN. § 2903.11(B) (West 2006) (requiring the defendant to knowingly engage in various acts, but requiring no mens rea with regard to transmission risk).

<sup>87</sup> *See, e.g.*, ARK. CODE ANN. § 5-14-123 (LEXIS through 2015 Reg. Sess.); GA. CODE ANN. § 16-5-60(c) (LEXIS through 2015 Reg. Sess.); IDAHO CODE § 39-608 (2015); KAN. STAT. ANN. § 21-5424 (West 2012); MICH. COMP. LAWS § 333.5210 (2015); MO. REV. STAT. § 191.677(4) (2015); OHIO REV. CODE ANN. § 2903.11 (West 2006); S.C. CODE ANN. § 44-29-145 (2015); VA. CODE ANN. § 18.2-67.4:1 (West 2012).

<sup>88</sup> *See* MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1962).

and none have a defense for warning the other party to take PEP afterwards. Such departures from ordinary principles of criminal law lead to unjust prosecutions and convictions, and strongly suggest that HIV criminalization reflects animus toward people living with HIV and fear of the virus more than reasoned policymaking.

Finally, nearly half of new infections today originate with individuals who do not know their HIV status,<sup>89</sup> even though those individuals represent only 18% of the total population living with HIV.<sup>90</sup> Because those individuals are not receiving treatment, they will generally have higher viral loads and thus be more infectious; and because they do not know their HIV status, they cannot disclose it to their partners or encourage their partners to use protective measures. HIV criminalization laws do not apply to individuals who do not know their HIV status, and thus can have no deterrent effect on the highest-risk population or conduct. Therefore, if preventing HIV transmission is the goal, the focus should be on encouraging people who do not know their HIV status to be tested and to begin treatment. HIV criminalization likely hampers that goal, and at best, it certainly does not help.<sup>91</sup>

### III. IOWA CHANGES COURSE

#### A. *Iowa Law Before Rhoades*

Iowa’s old HIV criminalization law—the law at issue in *Rhoades*—was one of the most draconian in the country. It was passed in 1998,<sup>92</sup> and it criminalized “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 the human immunodeficiency virus.”<sup>93</sup> The only affirmative defense was if:

[T]he person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge.<sup>94</sup>

There was no affirmative defense for wearing condoms or for any other protective measure. Advocates argued that wearing condoms negated the “intent” component of

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<sup>89</sup> H. Irene Hall, et. al., *HIV transmission rates from persons living with HIV who are aware and unaware of their infection*, 26 AIDS 883, 883 (2012).

<sup>90</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 23, at 2.

<sup>91</sup> See BEST PRACTICES GUIDE, *supra* note 26, at 2; see also *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5.

<sup>92</sup> See Act of Apr. 13, 1998, ch. 1087, § 7, 1998 Iowa Acts 146, 149 (repealed 2014).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 149–50.

“intentional exposure,” but to no avail.<sup>95</sup> The offense was a class “B” felony, carrying a maximum sentence of twenty-five years.<sup>96</sup>

Until *Rhoades*, the Iowa courts gave the statute a particularly harsh construction, employing an “any risk” standard that allowed conviction for essentially any sex act, even if the risk was no more than theoretical.<sup>97</sup> Furthermore, the Iowa Supreme Court allowed convictions based on judicial notice, the principle that courts can find certain facts based on common knowledge rather than requiring the State to prove them beyond a reasonable doubt. In the case of the HIV statute, this meant that courts would assume that sexual conduct could transmit HIV, rather than requiring the State to prove on a case-specific basis that specific sex acts could transmit the virus in specific circumstances.<sup>98</sup> Thus, prosecutors were relieved of the burden of actually showing that a defendant’s conduct could have transmitted HIV, leaving defense counsel with very few options for effectively defending such cases.

## B. *Rhoades v. State*

### 1. *Background*

In 2008, against the legal backdrop described above, Nick Rhoades, an Iowa man living with HIV, had a one-time sexual encounter with Adam Plendl, who was HIV-negative.<sup>99</sup> Rhoades had an undetectable viral load at the time, rendering *any* sex act extremely low-risk or possibly even no-risk.<sup>100</sup> Rhoades performed oral sex without a condom on Plendl, which is a no-risk act, and performed anal sex with a condom, which is a very low-risk act (even without considering the further mitigating effect of Rhoades’s undetectable viral load).<sup>101</sup> When Plendl learned of Rhoades’s HIV status, he had Rhoades prosecuted.<sup>102</sup> Rhoades pled guilty on advice of counsel and received the maximum sentence of twenty-five years in prison and lifetime registration as a sex offender.<sup>103</sup>

In 2010, Rhoades filed a petition for post-conviction relief, which was denied by the district court.<sup>104</sup> Lambda Legal became involved and represented Rhoades in the Iowa

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<sup>95</sup> See *Rhoades v. State*, No. 12-0180, 2013 Iowa App. LEXIS 1048, at \*9–11 (Iowa Ct. App. Oct. 2, 2013), *vacated*, 848 N.W.2d 22 (Iowa 2014).

<sup>96</sup> § 7, 1998 Iowa Acts at 149 (designating the offense as a class “B” felony); see also IOWA CODE § 902.9(1)(b) (2015) (indicating maximum twenty-five year sentence for a class “B” felony).

<sup>97</sup> See, e.g., *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001) (“[I]t must simply be shown that transmission of the HIV from the infected person to the exposed person was *possible* considering the circumstances.”).

<sup>98</sup> See *id.* at 365–66.

<sup>99</sup> See *Rhoades v. State*, 848 N.W.2d 22, 25–26 (Iowa 2014).

<sup>100</sup> *Id.* at 25 (calling Rhoades’s HIV viral load “nondetectable”); see also discussion *supra* Section II.A (regarding risk levels).

<sup>101</sup> *Rhoades*, 848 N.W.2d at 25–26; see discussion *supra* Section II.A (regarding risk levels).

<sup>102</sup> See *Rhoades*, 848 N.W.2d at 26.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Court of Appeals,<sup>105</sup> where the district court’s decision was affirmed.<sup>106</sup> In late 2013, Rhoades and Lambda Legal chose to appeal the decision.<sup>107</sup> The Supreme Court of Iowa granted certiorari in January 2014, heard oral arguments in March 2014, and ruled in June 2014.<sup>108</sup>

*i. Supreme Court Decision*

The Supreme Court of Iowa vacated Rhoades’s conviction for two reasons: (i) that the language in the statute carried an implied reasonableness requirement precluding conviction on extremely low or theoretical risks,<sup>109</sup> and (ii) that current science precluded a finding by judicial notice that Rhoades’s and Plendl’s acts met the requisite risk level to transmit HIV.<sup>110</sup>

The court began its analysis with a statutory interpretation exercise focused on the words “could” and “possible.”<sup>111</sup> As discussed above, the statute required “intentional exposure . . . to a bodily fluid . . . in a manner that could result in the transmission of HIV.”<sup>112</sup> The Court noted that based on its prior case law, “could” meant “that transmission of . . . HIV . . . was *possible* considering the circumstances.”<sup>113</sup> The court then considered two competing definitions of “possible”: a broad definition that included the highly improbable and the merely theoretical, and a narrower definition that requires “an indicated potential by nature or circumstances” and carries a reasonableness requirement.<sup>114</sup> Though the court stated that it had not previously chosen between the two definitions,<sup>115</sup> as a practical matter it had historically followed the broad definition, which is effectively an “any risk” standard.<sup>116</sup>

After surveying a range of case law that used both definitions, the court decided that the narrower definition was more appropriate.<sup>117</sup> First, the court noted that medical experts testifying to HIV transmission risks “are not required to testify in absolutes.”<sup>118</sup>

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<sup>105</sup> *Rhoades v. Iowa*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/rhoades-v-iowa> (last visited Feb. 6, 2016).

<sup>106</sup> See *Rhoades v. State*, No. 12-0180, 2013 Iowa App. LEXIS 1048, at \*11 (Iowa Ct. App. Oct. 2, 2013), *vacated*, 848 N.W.2d 22 (Iowa 2014). With no exploration of scientific evidence on the actual risks of oral sex and no discussion of the significance of an undetectable viral load, the court held that “oral sex is a well recognized means of transmission of HIV.” *Id.* at \*7. The court also held that even though the statute requires that the defendant “intentionally expose” his bodily fluid, it was irrelevant whether or not he even ejaculated, as any unprotected oral sex demonstrates a per se intent to expose. See *id.* at \*11.

<sup>107</sup> See *Rhoades v. Iowa*, *supra* note 112.

<sup>108</sup> *Id.*

<sup>109</sup> See *Rhoades v. State*, 848 N.W.2d 22, 27–28 (Iowa 2014).

<sup>110</sup> *Id.* at 32–33.

<sup>111</sup> See *id.* at 27.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (quoting *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001)).

<sup>114</sup> *Id.*

<sup>115</sup> See *Rhoades*, 848 N.W.2d at 27.

<sup>116</sup> The “any risk” standard can be inferred from conviction under the virtually no-risk facts of *State v. Keene*, 629 N.W.2d 360, 362–63 (Iowa 2001), as well as from the appellate court’s ruling in *Rhoades v. State*, 840 N.W.2d 726 (Iowa Ct. App. 2013).

<sup>117</sup> See *Rhoades*, 848 N.W.2d at 27–28.

<sup>118</sup> *Id.* at 28.

This somewhat obtuse comment implicitly acknowledged a challenge HIV advocates have long faced under “any risk” standards: it is very difficult to have an expert testify that a specific act under specific circumstances poses absolutely no risk. In strict scientific terms, even the most attenuated, unlikely, and theoretical risks are not actually no-risk, meaning that even when conduct is no-risk for all practical purposes, it is exceedingly difficult to defend under an “any risk” standard. Second, the court noted that as a policy matter, it would be undesirable to allow convictions based on risks that are no more than theoretical.<sup>119</sup>

Having established that something more than a theoretical possibility of transmission is required to secure a conviction, the court turned to whether the record contained evidence to support the conviction under that standard. Because Rhoades had pled guilty, the analysis was framed by whether there was a sufficient factual basis to support his guilty plea.<sup>120</sup> The only factual basis in Rhoades’s guilty plea was his agreement that he had engaged in “intimate contact.”<sup>121</sup> The court determined that this simply meant that some form of sexual activity had occurred, and not that the conduct necessarily fit the statutory definition of “intimate contact” as sexual activity that “could transmit HIV.”<sup>122</sup>

The court next looked to minutes of testimony, including police reports containing Plendl’s statements.<sup>123</sup> The court noted that this testimony established that Rhoades performed oral and anal sex on Plendl, and that a condom was used during anal sex.<sup>124</sup> The testimony did not establish that bodily fluids had been exchanged or that Rhoades had “intentionally exposed” Plendl to any bodily fluids.<sup>125</sup>

Finally, and most importantly, the court turned to the doctrine of judicial notice.<sup>126</sup> A court may take judicial notice of an adjudicative fact if it is either “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>127</sup> The court noted that findings by judicial notice are case-specific, so previous cases where the possibility of HIV transmission was judicially noticed do not control future proceedings.<sup>128</sup>

Having established that judicial notice was the only way to find that Rhoades’s conduct could transmit HIV, and that previous judicial notice of similar facts in similar cases was not controlling, the court examined the current state of knowledge about HIV transmission.<sup>129</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *See id.* at 28–29.

<sup>121</sup> *See id.* at 29–30.

<sup>122</sup> *See id.* at 30.

<sup>123</sup> *Id.* at 30–31.

<sup>124</sup> *Id.* at 31.

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> *Id.* (quoting IOWA R. EVID. 5.201(b)).

<sup>128</sup> *See id.*

<sup>129</sup> *See id.* at 32.

The court began by acknowledging that science had progressed significantly since the court had last commented on the issue in 2003.<sup>130</sup> Discussing the specific acts of Rhoades and Plendl, the court held that it was “unable to take judicial notice that an infected individual can transmit HIV when [he] engages in protected anal sex . . . or unprotected oral sex, regardless of [his] viral load.”<sup>131</sup> Though that holding alone was dispositive, the court went further to note that “there is a question of whether . . . a person with a nondetectable viral load could transmit HIV . . . or whether transmission was merely theoretical.”<sup>132</sup>

ii. *Analysis of the Holding*

The court’s holding explicitly barred judicial notice of protected anal sex and unprotected oral sex as acts that could transmit HIV.<sup>133</sup> It also, independently, barred judicial notice of *any* act by a person with an undetectable viral load as an act that could transmit HIV.<sup>134</sup>

This signifies a major step forward in judicial recognition of modern science: never before has a state’s high court held that those sex acts are too low-risk to be criminalized, nor has a state’s high court ever before recognized the significance of an undetectable viral load. Historically, courts have tended to assume that all sex acts can transmit HIV, without seriously surveying scientific knowledge.<sup>135</sup> We now know, and the Iowa Supreme Court has now recognized, that many of the acts we once criminalized pose such a trivial risk that punishing them is inappropriate.

However, the court’s holding only bars a conviction *by judicial notice* for oral sex, protected anal sex, or individuals with an undetectable viral load, not *any* conviction under those circumstances. Thus, theoretically, the prosecution could introduce evidence to persuade the fact-finder that such acts pose a reasonable risk of transmitting HIV. Despite the weight of modern scientific evidence to the contrary, jury decisions are unpredictable, especially given the substantial stigma and misconceptions that continue to surround HIV.<sup>136</sup> However, Iowa has chosen not to re-prosecute Rhoades, and any future prosecutions will occur under a changed statutory landscape.

C. *Concurrent Legislative Reform in Iowa*

On May 30, 2014, just two weeks before *Rhoades* was decided, Governor Terry Branstad signed into law Senate File 2297, An Act Relating to the Criminal Transmission of a Contagious or Infectious Disease, Providing Penalties, and Including Effective Date

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<sup>130</sup> *See id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 33.

<sup>133</sup> *Id.* at 32.

<sup>134</sup> *Id.*

<sup>135</sup> For example, many of the cases listed in *Prosecutions and Arrests*, *supra* note 88, involve very low-risk or no-risk conduct, and very few of these cases include a rigorous scientific analysis of transmission risk.

<sup>136</sup> *See 15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5 (“Convictions may be strongly influenced . . . by jurors’ moral disapproval.”).

Provisions.<sup>137</sup> This Act repealed the old HIV criminalization law under which Rhoades had been convicted<sup>138</sup> and enacted a new scheme that was widely supported by HIV advocates.<sup>139</sup>

### 1. Key features of the new law

The new law applies not only to HIV but also to hepatitis and meningococcal disease.<sup>140</sup> This change represents an important recognition that based on treatment options that exist today, HIV no longer merits being singled out for harsher treatment than other contagious diseases.

The new law also allows for conviction only when conduct poses a “substantial risk” of transmitting an enumerated contagious disease.<sup>141</sup> The term “substantial risk” is not further defined, but based on the common usage meaning of the term, it is presumably a higher standard than the “reasonable risk” standard adopted by the court in *Rhoades*—or, at worst, is identical to that standard. As such, the new standard must at the very least exclude purely theoretical risks, such as those at play in *Rhoades*. By establishing this standard, the legislature recognized the same principle that the court did when it reinterpreted the old statute: that as a matter of criminal policy, it is undesirable to punish conduct that may not pose any genuine risk to others.<sup>142</sup>

The law provides for four gradations in the offense, with separate sentencing provisions, based on the intent of the actor and the result of the conduct.<sup>143</sup> This brings the new law more into line with general principles of criminal law. The harshest penalty, a maximum of twenty-five years in prison, is reserved for cases where the defendant specifically intended to transmit HIV (i.e., not just intended to engage in conduct that could result in transmission) and where transmission did in fact occur.<sup>144</sup> Conviction under this standard is very difficult: the majority of HIV criminalization cases involve

<sup>137</sup> Andrew D. Forsyth, *Iowa Modernizes HIV Criminalization Law*, AIDS.GOV: BLOGS.AIDS.GOV (June 2, 2014), <http://blog.aids.gov/2014/06/iowa-modernizes-hiv-criminalization-law.html>; *see also* Contagious or Infectious Disease Transmission Act, ch. 1119, 2014 Iowa Acts 352 (codified as amended at IOWA CODE § 709D (2015)).

<sup>138</sup> *See* § 9, 2014 Iowa Acts at 354.

<sup>139</sup> *See* Forsyth, *supra* note 144; *Breaking News: Historic HIV Bill Passes Iowa House Unanimously*, ONE IOWA (May 1, 2014), <http://oneiowa.org/2014/05/breaking-news-historic-hiv-bill-passes-iowa-house-unanimously/> (noting support for the bill by Iowa’s main LGBT and HIV advocacy organizations); *see also* Alison Gowans, *New HIV Transmission Law Makes Iowa Model for Nation*, GAZETTE (June 3, 2014), <http://thegazette.com/subject/news/new-hiv-transmission-law-makes-iowa-model-for-nation-20140529> (noting the broad coalition of groups supporting reform); Sergio Hernandez, *HIV Is Not a Crime: The Aftermath of HIV Criminalization Advocacy in Iowa*, POZ MAG., Oct.-Nov. 2014, at 44, 45–47, [http://www.poz.com/articles/HIV\\_Not\\_a\\_Crime\\_conference\\_2881\\_26228.shtml](http://www.poz.com/articles/HIV_Not_a_Crime_conference_2881_26228.shtml) (discussing the legislative process).

<sup>140</sup> *See* IOWA CODE § 709D.2(1) (2015).

<sup>141</sup> *See id.* § 709D.2(2) (defining the term “exposes” as “engaging in conduct that poses a substantial risk of transmission”).

<sup>142</sup> *See Rhoades v. State*, 848 N.W.2d 22, 28 (Iowa 2014) (“[W]e would not want to deprive a person of his or her liberty on the basis the defendant’s actions caused something that can only theoretically occur.”).

<sup>143</sup> *See* IOWA CODE § 709D.3 (2015).

<sup>144</sup> *See id.* § 709D.3(1) (designating actual transmission with specific intent a class “B” felony); *id.* § 902.9(1)(b) (prescribing twenty-five-year maximum sentence for class “B” felons).

*neither* actual transmission *nor* specific intent.<sup>145</sup> If, however, the defendant had the specific intent to transmit but actual transmission did not occur, the maximum sentence is five years.<sup>146</sup> Next, if the defendant acted with reckless disregard resulting in actual transmission, the maximum sentence is also five years.<sup>147</sup> Finally, if the defendant acts with reckless disregard and actual transmission does not occur (likely the most common scenario), the offense is only a misdemeanor carrying a maximum sentence of one year.<sup>148</sup>

In addition, a new affirmative defense was added for defendants who take “practical means to prevent transmission,”<sup>149</sup> which is defined as:

[S]ubstantial good-faith compliance with a treatment regimen prescribed by the person's health care provider, if applicable, and with behavioral recommendations of the person's health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease.<sup>150</sup>

This is a considerably more open-ended provision than the risk mitigation defenses that exist in most other jurisdictions, and has the potential to keep pace with evolving prevention methods and recommendations including TasP. In other jurisdictions, risk mitigation defenses are generally limited to condom use, if they exist at all.<sup>151</sup>

Although the legislature came to a conclusion similar to the court's in terms of prosecutable risk levels, it ultimately went much further than the court could have. Iowa made itself an example for reform nationwide by making the statute no longer HIV-specific, heightening the risk requirement, creating a new affirmative defense, and providing for graded offenses.<sup>152</sup> While the old approach to HIV criminalization was out of line with ordinary criminal law principles, this new approach is consistent with the MPC approach to other crimes such as homicide. As the MPC recommends for most other crimes, distinctions now exist based on the actor's intent to transmit HIV and on whether there was attempted or actual transmission.

<sup>145</sup> See BEST PRACTICES GUIDE, *supra* note 26, at 2 (“[I]ntentional HIV transmission is atypical and uncommon”); see also *Prosecutions and Arrests*, *supra* note 88 (listing known recent HIV prosecutions, very few of which involve actual transmission).

<sup>146</sup> See IOWA CODE § 709D.3(2) (2015) (designating specific intent without transmission a class “D” felony); *id.* § 902.9(1)(e) (prescribing five-year maximum sentence for class “D” felons).

<sup>147</sup> See *id.* § 709D.3(3) (2015) (designating transmission with reckless disregard a class “D” felony); *id.* § 902.9(1)(e) (prescribing five-year maximum sentence for class “D” felons).

<sup>148</sup> See *id.* § 709D.3(4) (2015) (designating reckless disregard but no transmission a “serious misdemeanor”); *id.* § 903.1(1)(b) (prescribing one-year maximum sentence for serious misdemeanors).

<sup>149</sup> See *id.* § 709D.3(7).

<sup>150</sup> *Id.* § 709D.2(3).

<sup>151</sup> Of other HIV criminalization statutes, only Minnesota's contains a similarly open-ended provision. See MINN. STAT. § 609.2241(3)(1) (2015). A few other statutes contain an affirmative defense for wearing a condom, or state condomless sex as an element of the crime. Under most other statutes, however, informed consent is the only affirmative defense.

<sup>152</sup> See Gowans, *supra* note 146.

## 2. *Role of the Rhoades case in bringing about reform*

Nick Rhoades's story was pivotal in bringing about legislative change in Iowa. The circumstances of *Rhoades*—the harsh penalty combined with the incredibly low risk of Rhoades's acts actually transmitting HIV—brought a national spotlight on the Iowa law, attracting the attention of national organizations like Lambda Legal and the Center for HIV Law and Policy.<sup>153</sup> Meanwhile, Rhoades's conviction, along with a similar case a year later, galvanized local HIV and LGBT activists in Iowa to focus their activism on criminal law reform.<sup>154</sup>

Those efforts ultimately resulted in the development of the new law, which was written with the input of national and local advocacy organizations and supported by the Iowa Department of Public Health.<sup>155</sup> Broad support for the new law helped it to pass unanimously in both houses of the Iowa legislature.<sup>156</sup>

## IV. IMPLICATIONS OF *RHOADES V. STATE*

If the most liberal reading of *Rhoades* (i.e., that oral sex, protected anal sex, and any act by an individual with an undetectable viral load are all too low-risk to prosecute) were applied as binding precedent in all states, the range of individuals and acts subject to criminalization would decrease dramatically nationwide. Exempting individuals with an undetectable viral load from HIV criminalization would reduce the number of individuals affected by 30%: the CDC estimates that 902,000 Americans know that they have HIV, of which 275,000 have an undetectable viral load.<sup>157</sup> Moreover, though there are no comprehensive statistics on what proportion of prosecutions relate to oral sex, protected anal sex, or even lower-risk activities such as spitting or biting, such prosecutions appear to be relatively commonplace compared to prosecutions for higher-risk acts.<sup>158</sup>

However, the picture is far more complex. Even in Iowa, legislative reform leaves some question as to how the holding will apply to future prosecutions. *Rhoades* is not binding outside Iowa, and its value as persuasive precedent is weaker in states whose statutes contain significantly different language.<sup>159</sup> On the other hand, the court's reasoning may have significant persuasive force on both legislatures and courts

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<sup>153</sup> See Hernandez, *supra* note 146, at 46 (stating that the Center for HIV Law and Policy and Lambda were involved in the legislative reform); see also Catherine Hanssens & Iván Espinoza-Madriral, *HIV Criminalization in Iowa: Rhoades v. Iowa*, CTR. FOR HIV L. & POL'Y: THE FINE PRINT BLOG (Oct. 4, 2013), <http://www.hivlawandpolicy.org/fine-print-blog/hiv-criminalization-iowa-rhoades-v-iowa> (stating that the Center for HIV Law and Policy filed an amicus brief in the case); *Rhoades v. Iowa*, *supra* note 105 (stating that Lambda represented Rhoades on appeal).

<sup>154</sup> See Hernandez, *supra* note 146, at 46.

<sup>155</sup> See *id.*

<sup>156</sup> See Gowans, *supra* note 146.

<sup>157</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 23.

<sup>158</sup> See generally *Prosecutions and Arrests*, *supra* note 88.

<sup>159</sup> While the old Iowa statute referred to conduct that "could transmit" HIV, many states' statutes simply list covered acts, without requiring a case-by-case factual determination of whether transmission was possible. See *supra* Section II.B.1; see also sources cited *supra* note 47 (providing examples of state statutes).

elsewhere, even in states where the statutory language does not lend itself to direct comparison.

Finally, while *Rhoades* places constraints on the prosecution of extremely low-risk activities, it suggests no such constraints on higher-risk activities, even though convincing arguments exist that criminal sanctions are not an effective tool for HIV prevention regardless of the risk level of the activities in question.

#### A. *Applicability of Rhoades to the New Iowa Law*

Because the new law requires a “substantial risk” of transmission,<sup>160</sup> whereas the old law required only conduct that “could . . . transmi[t]” HIV,<sup>161</sup> it is yet to be seen how, or if, the court’s precedent in *Rhoades* constrains courts implementing the new law. The *Rhoades* court reinterpreted “could transmit” as a reasonable risk standard;<sup>162</sup> the substantial risk standard may be tougher to meet, but at worst is equivalent. Thus, at the very least, the acts for which Nick Rhoades was prosecuted should not be prosecutable under the new law. Even without *Rhoades*, those acts—protected anal sex, unprotected oral sex, and any sex act with an undetectable viral load—should not be prosecutable under the plain language of the new law:

- (a) Sex acts with a condom are exempted under the “practical means” affirmative defense;<sup>163</sup>
- (b) Sex acts by a person with an undetectable viral load should be exempted under the “substantial risk” requirement<sup>164</sup> as well as under the “practical means” affirmative defense;<sup>165</sup> and
- (c) Any sex act other than anal or vaginal sex should be exempted under the “substantial risk” requirement, as there is no demonstrated risk level for oral sex or any non-insertive act.<sup>166</sup>

Even though as explained above, acts like those in *Rhoades* should be outside the scope of the new law regardless of the court’s precedent, *Rhoades* has the important practical effect of putting prosecutors, judges, defense attorneys, and people living with HIV on notice that those scenarios cannot be criminalized. As powerful as the “substantial risk” and “practical means” standards are, they are only as strong as the legal community’s knowledge of HIV transmission and prevention. Misconceptions about how

<sup>160</sup> See IOWA CODE § 709D.2(3) (2015).

<sup>161</sup> See Act of Apr. 13, 1998, ch. 1087, § 7, 1998 Iowa Acts 146, 149 (repealed 2014).

<sup>162</sup> See *Rhoades v. State*, 848 N.W.2d 22, 27–28 (Iowa 2014).

<sup>163</sup> See IOWA CODE § 709D.2(3) (2015) (“Practical means to prevent transmission . . . may include . . . the use of . . . a prophylactic device.”); *id.* § 709D.3(7).

<sup>164</sup> See *id.* § 709D.2(2); see generally Loutfy et al., *supra* note 29, at 137 (stating that risk in vaginal intercourse “approaches zero” with an undetectable viral load and noting significant risk reduction but further study needed for anal intercourse); Rodger, *supra* note 40 (reporting no transmissions in over at least 16,400 male-male exposures and 14,000 male-female exposures).

<sup>165</sup> See IOWA CODE § 709D.2(3) (2015) (“Practical means to prevent transmission means substantial good faith compliance with a treatment regimen . . . and with behavioral recommendations . . . to measurably limit the risk of transmission of the contagious or infectious disease.”); *id.* § 709D.3(7); see also sources cited *supra* note 171. The impact of an undetectable viral load can be framed passively as not meeting the risk threshold, or it can be framed actively as an affirmative step taken by the individual to prevent transmission.

<sup>166</sup> See generally Loutfy et al., *supra* note 29, at 137.

HIV can be transmitted remain rampant,<sup>167</sup> and there is no evidence that the legal community is any more knowledgeable than the general population on these matters. Indeed, the background to *Rhoades* suggests that the legal community is largely unfamiliar with HIV transmission risks: Iowa prosecutors pursued the case, Rhoades's original defense counsel advised him to plead guilty, and the trial judge accepted that plea, all despite the virtual non-existence of any transmission risk.<sup>168</sup> It took the involvement of a national impact organization, two more losses in court, and finally the intervention of the state's highest court to overturn the conviction—a process no defendant should have to experience again.

As a result, even if it is not necessarily legally determinative under the new law, *Rhoades* remains strategically significant. Hopefully, the court's precedent will prevent futile prosecutions of cases similar to *Rhoades* before they even happen. But if not, at least prosecutors and judges are aware that risk must be proven and cannot be assumed by the courts, at least not for extremely low-risk acts. Moreover, many people living with HIV in Iowa will now be aware of *Rhoades* and will be in a better position to defend themselves in court if needed. Given the financial and emotional cost of criminal proceedings and the stress of living under even the threat of prosecution, the clarity provided by *Rhoades* improves the quality of life of people living with HIV throughout Iowa.

### B. Impact outside Iowa

If harnessed effectively by advocates, the changes in Iowa, both judicial and legislative, could be the first domino to fall in a national movement to end HIV criminalization.<sup>169</sup> Advocates across the country are pushing for the repeal or substantial reform of HIV criminalization laws,<sup>170</sup> and the Centers for Disease Control and Prevention and the Department of Justice have recently joined the chorus calling for change.<sup>171</sup>

The role of *Rhoades* in that effort will vary significantly from state to state. Some states have HIV-specific statutes that explicitly incorporate a concept of risk or possibility,<sup>172</sup> as the old Iowa statute did, while others use general criminal laws that also carry some sort of risk requirement.<sup>173</sup> The application of *Rhoades* as persuasive precedent is most straightforward in these states. In states where statutes are worded in

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<sup>167</sup> See HIV/AIDS AT 30, *supra* note 25, at 6.

<sup>168</sup> See *Rhoades v. State*, 848 N.W.2d 22, 26 (Iowa 2014).

<sup>169</sup> See Hernandez, *supra* note 146, at 47.

<sup>170</sup> While advocates generally believe that people living with HIV should not be prosecuted for their HIV status, many argue that this is better achieved by the passage of narrowly tailored, less punitive statutes, such as the new Iowa law or the current California law, rather than by a simple repeal of existing laws. This is because, in the absence of a specific law, people living with HIV can be—and are—prosecuted aggressively through the HIV-specific application of general criminal statutes such as assault with a deadly weapon or even attempted murder, as currently happens in Texas and other states.

<sup>171</sup> See, e.g., J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997 (2014) (authored by CDC and DOJ representatives); see also BEST PRACTICES GUIDE, *supra* note 26, at 1–5.

<sup>172</sup> For example, the laws in Indiana, Minnesota, Nevada, Oklahoma, and Tennessee incorporate a risk requirement. See sources cited *supra* note 47.

<sup>173</sup> Several states, most notably Texas, prosecute people living with HIV in this manner. See *infra* note 184.

terms of enumerated acts rather than risk level, the precedent is less directly applicable but may still be helpful in sentencing proceedings or in efforts to reform legislation or to guide prosecutorial discretion. Finally, *Rhoades* may also be helpful in the small number of states where there is statutory language related to risk mitigation.

### 1. States Where Risk is an Element

A small number of states have HIV-specific criminal laws whose plain language explicitly requires that the act pose an objective risk of transmission.<sup>174</sup> A few other states have statutes that contain unclear or ambiguous wording, which could be interpreted to require objective risk.<sup>175</sup> Finally, a large number of states have prosecuted people living with HIV under general criminal statutes such as reckless endangerment, assault with a deadly weapon, and even attempted murder; these prosecutions are necessarily predicated on the finding (or the unquestioned assumption) that the conduct in question could transmit HIV.<sup>176</sup>

*Rhoades* can have the greatest impact as persuasive precedent in those states, where risk is an explicit consideration. As long as risk is part of the court's consideration, advocates have the opportunity to dispute the risk level of the conduct in the case. If that conduct was oral sex or protected anal sex, the holding of *Rhoades* is directly applicable. Protected vaginal sex is lower-risk than protected anal sex,<sup>177</sup> and is a clear enough logical analogy. Non-sexual acts that are sometimes prosecuted in these states, such as spitting and biting, are essentially no-risk and therefore relatively simple to consider and rule out under *Rhoades* as well.<sup>178</sup> Finally, the *Rhoades* court also cautioned against any prosecution of individuals with undetectable viral loads, regardless of their specific acts.<sup>179</sup>

Nonetheless, though *Rhoades* may be on point factually and legally for a range of cases in numerous states, courts in those states are entirely within their discretion not to follow Iowa's lead. Therefore, a more thorough explanation of the history of the case law in Iowa may help to make *Rhoades* more persuasive to other courts, particularly conservative courts. Specifically, it should be noted that Iowa previously adhered to an

<sup>174</sup> See sources cited *supra* note 47.

<sup>175</sup> See, e.g., LA. STAT. ANN. § 14:43.5 (2007); N.J. STAT. ANN. § 2C:34-5(b) (West, Westlaw through Pub. L. 2015, ch. 111); WASH. REV. CODE ANN. § 9A.36.011 (West).

<sup>176</sup> See, e.g., Brock v. State, 555 So.2d 285, 286–87 (Ala. Crim. App. 1989) (attempted murder and lesser included assault with a deadly weapon); People v. Dembry, 91 P.3d 431, 433 (Colo. App. 2003) (attempted manslaughter and lesser included reckless endangerment); State v. Haines, 545 N.E.2d 834, 835 (Ind. Ct. App. 1989) (attempted murder); Hancock v. Commonwealth, 998 S.W.2d 496, 497 (Ky. Ct. App. 1998) (wanton endangerment); State v. C.J., No. 01-S-726, 2002 WL 31059244, at \*1 (N.H. Super. Ct. May 23, 2002) (assault with a deadly weapon and reckless conduct); State v. Murphy, No. COA04-681, 2005 WL 892103, at \*1 (N.C. Ct. App. Apr. 19, 2005) (assault with a deadly weapon); Commonwealth v. Cordoba, 2006 PA Super 165, ¶ 3, 902 A.2d 1280, 1283 (reckless endangerment); Mathonican v. State, 194 S.W.3d 59, 61 (Tex. App. 2006) (sexual assault with a deadly weapon).

<sup>177</sup> Loutfy et al., *supra* note 29, at 137.

<sup>178</sup> See *id.* at 137–38.

<sup>179</sup> See *Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (“*Rhoades*’s viral count was nondetectable, and 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.”).

any-risk standard and allowed multiple convictions under that standard, which were affirmed by a relatively liberal bench. Years of seeing that standard in action, however, convinced the court to reconsider the evidence and reverse course, even after the court had become more conservative<sup>180</sup>. This history shows that the *Rhoades* decision was the product of considerable experience and deliberation, and these developments counter the alternative narrative that the decision was the “judicial activism” of a liberal bench.

## 2. States Where Risk is Not an Element

*Rhoades* is considerably less on point as persuasive precedent in the large number of states where risk is not an explicit element of the statute, but rather specific sex acts are enumerated (presumably on the implicit, incorrect assumption that they invariably carry a significant risk).<sup>181</sup> While these statutes vary, most include oral sex and do not differentiate based on whether the individual wears a condom.<sup>182</sup> Furthermore, none explicitly mention viral load.<sup>183</sup>

<sup>180</sup> In 2010, three justices of the Iowa Supreme Court lost their retention elections in reaction to their liberal decision in *Varnum v. Brien*, which legalized same-sex marriage in the state one year prior. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times, available at [http://www.nytimes.com/2010/11/04/us/politics/04judges.html?\\_r=0](http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0) (Nov. 30, 2010). Their replacements—Edward Mansfield, Bruce B. Zager, and Thomas Waterman—all received an ideological ranking of 1.03 from a Stanford University study, which was more conservative than the Iowa Supreme Court’s overall ranking of 0.21 (or moderately conservative). See *Iowa Supreme Court*, BallotPedia, [https://ballotpedia.org/Iowa\\_Supreme\\_Court](https://ballotpedia.org/Iowa_Supreme_Court); *Edward Mansfield*, BallotPedia, [https://ballotpedia.org/Edward\\_Mansfield](https://ballotpedia.org/Edward_Mansfield); *Bruce B. Zager*, BallotPedia, [https://ballotpedia.org/Bruce\\_B.\\_Zager](https://ballotpedia.org/Bruce_B._Zager); *Thomas Waterman*, BallotPedia, [https://ballotpedia.org/Thomas\\_Waterman](https://ballotpedia.org/Thomas_Waterman).

<sup>181</sup> See, e.g., ARK. CODE ANN. § 5-14-123(c)(1) (LEXIS through 2015 Reg. Sess. ); CAL. HEALTH & SAFETY CODE § 120291(a)–(b) (Deering, LEXIS through 2015 Sess.); GA. CODE ANN. § 16-5-60(c) (LEXIS through 2015 Reg. Sess.); IDAHO CODE § 39-608 (2015); 720 ILL. COMP. STAT. ANN. 5/12-5.01(b) (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.); IND. CODE. § 35-45-16-2(a)-(f) (2015) the Indiana statute criminalizes any exposure of bodily fluids of a person living with HIV, including bodily fluids that cannot transmit HIV, and regardless of whether or not the exposure is of a type that can transmit HIV); KAN. STAT. ANN. § 21-5424 (West 2012); MICH. COMP. LAWS § 333.5210(2) (2015); MINN. STAT. § 609.2241(1)(e) (2015) (citing sex acts listed in section 609.341(12)); MO. REV. STAT. § 191.677 (2015); N.D. CENT. CODE § 12.1-20-17(1)(b) (2015); OHIO REV. CODE ANN. § 2903.11(E)(4) (West 2006) (incorporating sex acts listed in section 2907.01); S.C. CODE ANN. § 44-29-145 (2015); VA. CODE ANN. § 18.2-67.4:1 (West 2012).

<sup>182</sup> Of the statutes cited *supra* note 190, only the California, Illinois, and Kansas statutes are explicitly limited to anal and vaginal sex, and only the California, Illinois, Minnesota, and North Dakota statutes explicitly differentiate based on whether a condom is worn (the North Dakota statute nonetheless requires disclosure even if a condom is worn; condomless sex is never legal for a North Dakotan living with HIV, even with disclosure).

<sup>183</sup> The Idaho statute provides a defense for individuals who have been told by a licensed physician that they are “noninfectious.” See IDAHO CODE § 39-608(3)(b) (2015). This provision is puzzling since it was enacted in 1988, two decades before there was any understanding of the significance of viral load or the possibility that a low viral load could render a person with HIV noninfectious. Barré-Sinoussi, *supra* note 1, at 880. None of the other statutes cited *supra* note 190 reference viral load or a similar concept, though some statutes contain risk mitigation language, for which I argue in the following sub-section that viral load is a relevant consideration. See discussion *infra* Section B.3.

Courts in those states are bound by those specific and restrictive laws, absent a constitutional challenge to their validity.<sup>184</sup> However, this does not mean that *Rhoades* is entirely irrelevant. In particular, the findings and reasoning of *Rhoades* may be invoked in sentencing, parole, and clemency proceedings to urge the greatest leniency available under the decision-maker's discretion. The same arguments can be made to prosecutors, encouraging them to exercise their discretion not to pursue these cases. Finally, the Iowa story—both *Rhoades* and the contemporaneous legislative reform—may be used to urge legislative reform in these states.<sup>185</sup>

### 3. Risk Mitigation and Intent Language

Minnesota is the only other state with an affirmative defense similar to the “practical means” defense in the new Iowa statute, exculpating any defendant who “took practical means to prevent transmission as advised by a physician or other health professional.”<sup>186</sup> Like the new Iowa law, the statute applies to diseases other than HIV,<sup>187</sup> which probably explains the more general language rather than a direct reference to condoms.

The Minnesota language begs the question of whether maintaining an undetectable viral load is a “practical means to prevent transmission.” Though the theory has not yet been tested in the Minnesota courts, the weight of scientific evidence and public health discourse increasingly indicates that such a theory should succeed.<sup>188</sup> As such, it is possible that an undetectable viral load could either negate the risk prong of a statute that explicitly references risk—because it lowers the risk below a legally cognizable level—or satisfy the risk mitigation prong where there is one—because it is a practical method that can be used by the defendant to prevent transmission—or both.

On its face, this argument helps only in the courts of Iowa and its northern neighbor, but it may also reverberate in other states. Specifically, it is possible that maintaining an undetectable viral load could also defeat the “intent” prong of some statutes, depending on how a court interprets the concept of intent (e.g., intent to have sex, intent to create a risk of HIV transmission, or intent to transmit HIV). Wherever possible, courts should be urged to abandon a reading of intent as only intent to have sex. Under either of the more demanding readings of intent, it is difficult to find intent to transmit HIV—or to create a risk of transmission—when a defendant's conduct poses an extremely low risk, and intent to transmit is clearly negated when a defendant takes practical means to prevent transmission.

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<sup>184</sup> Insofar as these laws reach demonstrably no-risk conduct, they may be unconstitutional status punishments under the Eighth Amendment pursuant to *Robinson v. California*, 370 U.S. 660 (1962), or under Equal Protection or Due Process theories. The viability of such challenges is beyond the scope of this Note.

<sup>185</sup> See generally Gowans, *supra* note 146.

<sup>186</sup> See MINN. STAT. § 609.2241(3)(1) (2015).

<sup>187</sup> See *id.* § 609.2241(1)(a).

<sup>188</sup> See generally Loutfy et al., *supra* note 29, at 137; Rodger, *supra* note 40.

Additionally, some states provide affirmative defenses for condom use—or require that sex be condomless as an element of the offense<sup>189</sup>—presumably because at the time those states passed their HIV laws, condom use was the only known reliable method of risk mitigation. Courts cannot rewrite unambiguous statutes to keep pace with scientific developments, but they can consider those developments in sentencing, parole, or clemency proceedings. Defense counsel in these proceedings can point to the fact that an affirmative defense exists for condom use as evidence of legislative intent to excuse defendants who take reasonable steps to mitigate or eliminate risk, and then argue that maintaining an undetectable viral load is such a step. Thus, through lenient sentencing or early parole, courts can give force to the underlying principle that defendants should not be punished when they take practical means to prevent transmission. Better still, the same reasoning can be employed to encourage prosecutors not to pursue these cases at all.

### C. *What about Higher-Risk Acts?*

This Note has focused on sex acts that carry a nonexistent, negligible, or only theoretical risk of transmitting HIV; the laws that criminalize those acts; and how to reform those laws. The question that lingers in the background is how any of this analysis affects sexual conduct that *does* pose a reasonable or substantial risk of transmitting HIV—namely anal and vaginal sex without a condom, and without an undetectable viral load. The direct, literal answer is that *Rhoades*—a decision centered on risk—has no impact on the prosecution of those acts, in Iowa or elsewhere.

It is the position of most HIV activists, and of the author, that even those higher-risk acts should not be criminalized, or should only be criminalized if the defendant acts with specific intent to transmit HIV.<sup>190</sup> Even so-called “high risk” acts pose an objectively low risk—1.38% for receptive anal intercourse and small fractions of 1% for any other act.<sup>191</sup> Moreover, criminalization has no demonstrated deterrent effect,<sup>192</sup> adds to HIV stigma and fear, does not target the highest-risk actors (i.e., those who do not know their HIV status), and contradicts other important public health priorities and messages.<sup>193</sup> However, those criticisms are explicitly policy-based positions that must be advanced in legislators’ and prosecutors’ offices, not in courts.

*Rhoades* is nonetheless an important step on the path to ending HIV criminalization. The majority of HIV prosecutions that take place nationwide are for the sorts of no-risk, negligible-risk, or theoretical-risk activities that can no longer be prosecuted in Iowa.<sup>194</sup> Ending those prosecutions nationwide would severely curtail the volume of HIV prosecutions and may ultimately push legislatures and prosecutors to reconsider the merits of HIV criminalization as a whole.

<sup>189</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 120291(a)–(b) (Deering, LEXIS through 2015 Sess.); 720 ILL. COMP. STAT. ANN. 5/12-5.01(a)(1) (LexisNexis, LEXIS through P.A. 99-500 of 2016 Reg. Legis. Sess.); MINN. STAT. § 609.2241(1)(e) (2015); N.D. CENT. CODE § 12.1-20-17(3) (2015).

<sup>190</sup> See generally POSITIVE JUSTICE PROJECT, CONSENSUS STATEMENT ON THE CRIMINALIZATION OF HIV IN THE UNITED STATES 1 (2012), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PJP%20Consensus%20Statement%20w%20Endorsers%2010-14.pdf>.

<sup>191</sup> See *supra* note 31.

<sup>192</sup> Galletly et al., *supra* note 71, at 2135; *15 Ways HIV Criminalization Laws Harm Us All*, *supra* note 5.

<sup>193</sup> Hall et al., *supra* note 96.

<sup>194</sup> See generally *Prosecutions and Arrests*, *supra* note 88.

## V. CONCLUSION

*Rhoades* was a watershed moment for HIV activists. For approximately thirty years, people living with HIV have been subject to targeting by the criminal law, to discrimination by health care providers, to segregation and abuse within the prison system, to workplace discrimination, and more. All too often, across all these areas of life and law, courts have upheld harsh and discriminatory practices by both state and private actors. Those courts have reasoned that an HIV diagnosis is such a grave consequence that the slightest risk justifies the most punitive measures—reasoning that no longer makes sense given the long and healthy life that a person can now live with HIV and the considerably more nuanced knowledge we now have of transmission risks. Courts have been slow to change course in the light of new treatment and prevention realities, especially in the area of criminal law. *Rhoades* represents the first high court to recognize that modern science should constrain HIV criminalization and the end of a painful six-year personal journey for Nick Rhoades.

Iowa dramatically reformed its law in 2014, establishing similar standards legislatively as the court established in *Rhoades*. While this means that the formal importance of *Rhoades* as controlling precedent is diminished, the case was also an important driver of that legislative change. More importantly, both the court's decision and the concurrent legislative change now stand as a blueprint for courts, activists, defense counsel, and legislatures from coast to coast as they confront their own states' outdated HIV criminalization regimes. It is now up to those stakeholders to learn from the Iowa experience and use it to end the criminalization of people living with HIV nationwide.