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ARTICLE

Preventive Medicine Stigma

Doron Dorfman

Seton Hall University School of Law, Newark, NJ, USA
Email: doron.dorfman@shu.edu

Abstract

The 2023 Texas federal district court decision *Braidwood Management, Inc. vs. Becerra* enjoined the enforcement of the Affordable Care Act's preventive care mandate, which requires "first-dollar" insurance coverage for a range of preventive measures, including pre-exposure prophylaxis (PrEP), an HIV prophylactic drug. Most scholars have analyzed the case with respect to the conflict between public health goals and the Religious Freedom Restoration Act (RFRA). This Article suggests another reading of the *Braidwood* decision in light of a broader socio-legal phenomenon I call *preventive health stigma.* Stereotypes attach to the underlying medical condition that a given measure is aimed at preventing, or to the actual preventive measure resulting in stigmatization. Preventive health stigma penetrated the *Braidwood* decision through the case's focus on PrEP users' signaled prurient behavior instead of the drug's proven health benefits. After offering a novel reading of the *Braidwood* decision, this Article also shows how preventive health stigma surfaces in the legal treatment of other preventive measures, such as abortion pills, masking, and vaccines. Understanding how stigma attaches to preventive medicine constitutes an important step in understanding how law and prejudice can undermine health reform.

Keywords: *Braidwood v. Becerra*; stereotypes; Affordable Care Act; PrEP; vaccines; masks

Introduction

Since July 2020, an Instagram user with the handle @gaysovercovid has documented gay men partying and allegedly breaking COVID-19 restrictions.[1] @gaysovercovid, who was never identified but is known to be based in Los Angeles, has been compared to a whistleblower who guards public health through public shaming.[2] No doubt, @gaysovercovid was an Instagram craze that caused a stir in the LGBTQ community. Yet there is more to this story. It indicates a trend of coloring health behaviors with moral judgments — a phenomenon that lies at the heart of the *Braidwood Management, Inc. v. Becerra* decision.

In August 2020, one post by @gaysovercovid exposed how stigma around using one type of preventive measure — pre-exposure prophylaxis (PrEP), a medication used to prevent HIV infection — was used to shame those who were *not* using another preventive measure, namely, masks to prevent COVID-19 infection. Reposting a video depicting gay men poolside at a resort in Mykonos, Greece, @gaysovercovid wrote: "Gonorrhea isn't the only thing these queens will be catching! They won't wear condoms, so why

[1]Mike Upton, *'They Won't Wear Condoms, So Why Would We Expect Them to Wear Masks?': Social Media, 'Circuit Queens' and the 'Gay Civil War' During COVID-19*, Sexualities, Oct. 22, 2023, at 11.

[2]*Id.* at 2; Alex Abad-Santos, *A Year into the Pandemic, Shame Still Doesn't Work*, Vox (Jan. 27, 2021, 8:30 AM), https://www.vox.com/22245094/gaysovercovid-pandemic-shaming [https://perma.cc/4MAM-ABTA]. For a discussion of mask shaming on account of wearing a mask and not wearing a mask, see *generally* Doron Dorfman, *Mask Shaming: On Private Enforcement and Disability Politics*, *in* Regulating the Body (Austin Sarat & Susanna Lee eds., forthcoming 2025).

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would we expect them to wear masks?"[3] Although the post only alludes to PrEP, without mentioning it directly, the context makes the reference clear. PrEP use, popular with gay and bisexual men, has been stigmatized because of its alleged association with promiscuous behavior, i.e., having condomless sex with multiple partners.[4] Because PrEP does not protect against other sexually transmitted infections (STIs), the caption implies that the gay men in the video would spread gonorrhea, given that they must be sleeping around with no condoms.[5] In reality, in order to keep the prescription for PrEP, a person is subject to STI testing every three months, so the probability that a PrEP user would have gonorrhea for a significant period of time is slim.[6] And yet, other Instagram users have also made the connection between the stigma around promiscuity associated with taking PrEP and the stigma around failing to wear masks to prevent the spread of COVID-19. Endorsing @gaysovercovid, some Instagram users commented on the video shaming the unmasked gay party goers with statements like "whores and sluts," "their PrEP ain't gonna help them here," or "$100 says they don't know their HIV status and BB [bareback] every other day."[7] There you have it: the stigma associated with one preventive measure (PrEP) is used to mock others for not using another preventive measure (masks).

Prevention is the mainstay of the public health field,[8] and endorsed and facilitated by Title IV of the Affordable Care Act (ACA).[9] Yet, as I have explored in prior work, the use of preventive health measures carries stigma.[10] Such stigmatization of preventive medicine permeates the law and affects legislation, policies, and even court decisions such as *Braidwood v. Becerra*, in which the stigma of promiscuity attached to PrEP played an important role in the reasoning.[11]

Stigma is an elusive and a complex process that takes on multiple forms.[12] According to renowned sociologist Erving Goffman, stigma is an act of disgracing produced through everyday social encounters, which also presumes a "special kind of relationship between attribute and stereotype."[13] Utilizing Goffman's idea about the special relationship between attribute and stereotype, I explore how stigma manifests itself with regard to preventive medicine. I suggest that the stigmatization of preventive medicine can come from two attributes: (1) the underlying health condition that the measure is aimed at preventing, and (2) the actual preventive measure taken. Stereotypes can attach to either one of these attributes and create a stigma around the use of the preventive health measures.

Conceptualizing preventive medicine stigma not only helps explain legal decision-making, but also assists in guiding normative interventions to protect public health. Indeed, over the last few years a number of state insurance commissioners and the Department of Labor (which oversees employer-based health plans, the most prominent type of health insurance in the United States) have issued guidance to

[3]Upton, *supra* note 1, at 11. For the original post, see gaysovercovid (@gaysovercovid), Instagram (Aug. 9, 2020), https://www.instagram.com/p/CDrfMHAp_1t/ [https://perma.cc/U8P2-7NYU?type=image].

[4]Doron Dorfman, *The PrEP Penalty*, 63 B.C. L. Rev. 813, 854 (2022) [hereinafter Dorfman, *PrEP Penalty*].

[5]Upton, *supra* note 1, at 11.

[6]CDC guidelines that were published in 2014 require PrEP users to get screened for HIV and STIs every three months to keep their prescription. This conditioning of screens serves as an effective way of dealing with undertesting. This professional guidance might not be binding but has been known to be followed by physicians who prescribe PrEP. *See* Dorfman, *PrEP Penalty*, *supra* note 4, at 856.

[7]Upton, *supra* note 1, at 11.

[8]Scott Burris et al., The New Public Health Law: A Transdisciplinary Approach to Practice and Advocacy 6 (2018) (stating that the aim of public health is to prevent rather than treat illness).

[9]Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 1(b), 124 Stat. 119, 124–25 (2010) (codified as amended at 42 U.S.C. § 18001).

[10]Doron Dorfman, *Penalizing Prevention: The Paradoxical Legal Treatment of Preventive Medicine*, 109 Cornell L. Rev. 311, 313–15 (2024) [hereinafter Dorfman, *Penalizing Prevention*].

[11]*Id.* at 314; *see* discussion *infra* Section II.

[12]Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 Ann. Rev. Socio. 363, 365 (2001); Betsy L. Fife & Eric R. Wright, *The Dimensionality of Stigma: A Comparison of Its Impact on the Self of Persons with HIV/AIDS and Cancer*, 41 J. Health & Soc. Behav. 50, 51 (2000).

[13]Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 4 (first touchstone ed., 1986).

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insurers prohibiting insurance discrimination based on the use of stigmatized preventive medicine.[14] However, people can be penalized for using preventive medicine outside of the realm of insurance. Therefore, issuing similar guidance in other areas should be the next step in fighting preventive medicine stigma.

This Article proceeds as follows. Part I introduces the concept of preventive medicine stigma and situates it within the literature on stigma and the public health scholarship. Part II showcases how preventive medicine manifests in *Braidwood v. Becerra.* Specifically, this Part shows how stigma attaches to preventive medicine through signaling. The discussion of PrEP in the *Braidwood* decision de-medicalizes the treatment by ignoring its health benefits and instead shifting the focus to the user's signaled morally condemned behavior. Part III discusses a second way in which preventive medicine stigma appears, the attachment of stereotypes to attributes. Preventive medicine has two attributes to which stereotypes attach: (1) the actual treatment or health measure, and (2) the underlying medical condition being targeted. This Part demonstrates this process of attachment of stereotypes to attributes through four case studies of preventive medicine: PrEP, abortion pills, masking, and the flu vaccine. The final Part offers concluding thoughts and considers future directions for normative interventions to ameliorate preventive medicine stigma.

I. Stigma and Preventive Medicine

In 1963, sociologist Erving Goffman published *Stigma: Notes on the Management of Spoiled Identity*, a book that inspired a body of social science research into the concept of stigma, its implication for intergroup dynamics, and its effects on the lives of those who are stigmatized.[15] Stigma, according to Goffman, is an act of disgracing others produced through social encounters in everyday life. It is a process that symbolically reduces a stigmatized individual from the status of a whole and usual person to one who is tainted, discounted, unfit, and unworthy of social acceptance.[16] Social rejection on account of stigma can create emotional distress and discomfort, leading to a self-view called "spoiled identity."[17] On a structural level, stigmatized individuals often stratify into groups that are in tension with other groups of people considered either "normal" or even more stigmatized, resulting in hostile intergroup dynamics.[18]

Put differently, stigma has been conceptualized as involving some attribute, a characteristic that stigmatized persons possess (or are perceived to possess), which conveys a social identity that is devalued.[19] Such definition underscores the "special kind of a relationship between attribute and stereotype" that Goffman originally observed.[20] This emphasis on the connection between attributes and stereotypes requires understanding what stereotypes are.

Social psychology literature defines stereotypes as "cognitive structures that comprise the perceived or assumed characteristics of social groups."[21] Stereotypes are generalized associations of traits with members of social groups. For example, while most do not see all Germans as efficient, most will associate efficiency with German people.[22] Debates over the factual validity of stereotypes, meaning

[14] *See, e.g.*, U.S. Dep't of Lab., FAQs About Affordable Care Act Implementation Part 47 (2021) (clarifying that cost-sharing may not be imposed on pre-exposure prophylaxis and its accompanying services); Mass. Off. of Consumer Affs. & Bus. Regul., Opinion Letter on HIV PrEP Preventive Health Service Coverage (Sept. 7, 2021); Cal. Dep't of Ins., Opinion Letter on Preventive Servs. Coverage for HIV Preexposure Prophylaxis with Provider-Administered Antiretroviral Drug Therapy (Dec. 29, 2021).

[15] Link & Phelan, *supra* note 12, at 363.

[16] Goffman, *supra* note 13, at 3.

[17] *Id.*

[18] *Id.* at 107.

[19] Link & Phelan, *supra* note 12, at 365.

[20] Goffman, *supra* note 13, at 4.

[21] Richard D. Ashmore & Frances K. Del Boca, *Conceptual Approaches to Stereotypes and Stereotyping*, *in* Cognitive Processes in Stereotyping and Intergroup Behavior 1, 16 (David L. Hamilton ed., 2nd ed. 2015).

[22] Roger Brown, Social Psychology: The Second Edition 595 (1986).

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whether stereotypes have a "kernel of truth" to them, date back to the 1930s.[23] Stereotypes usually do have some relationship with reality because they are generic statements about social groups.[24] To conclude, stereotypes can describe real, existing attributes of social groups and still be considered stereotypes.[25]

This Article explores how stigma intersects with preventive medicine, an area of public health. Preventive medicine, or prophylaxis, refers to a host of health measures, from hypertension medications to vaccines to mental health therapy. Preventive medicine uses health measures to preempt illnesses as opposed to treating them after they have manifested.[26] There are three kinds of preventive medicine. The first two categories, *primary prevention* and *secondary prevention*, were proposed by the Commission on Chronic Illness in 1952. Primary prevention refers to preventing the origination of illness and thus precluding it from occurring altogether. Examples of primary prevention measures include immunization, stress management, or health education. Secondary prevention applies after an illness has been diagnosed but before it causes symptoms like harm or suffering. The goal of secondary prevention is to prevent the progression of an illness. For instance, medication may be used to treat hypertension before it leads to heart disease.[27] The third category of preventive medicine, *tertiary prevention*, was developed over the years following the 1952 proposal.[28] Tertiary prevention applies after an illness has caused some harm with the goal of preventing further deterioration and suffering.[29] In that way, it resembles the concept of harm reduction. This three-part typology, which is based on the stage of the illness or disease, has served as the traditional conception of health promotion and disease prevention in public health literature.

Stigma can attach to preventive medicine in two ways: first, through signaling "high risk" for getting sick in the first place due to certain behavior or lifestyle traits, and second, through the attachment of stereotypes to attributes.

In my other work, I explore how using a preventive health measure can signal to others that something is wrong with the individual: that the individual has certain practices, that they maintain a certain lifestyle, or that they engage in behavior that is dangerous or even deviant.[30] Categorization of the individual as high risk also creates stigma around the individual taking the preventive measure. I have shown how stigma through signaling effect can, for example, attach to law students who underwent mental health treatment as secondary prevention later being rendered as unfit to practice law under state bar character and fitness evaluations.[31] In the next section, I will demonstrate how the *Braidwood* decision can also be analyzed through the frame of preventive medicine stigma based on signaling effects of those taking PrEP.

Another way in which preventive medicine can be stigmatized is through the complex relationship between stereotypes and attributes, as articulated by Goffman. Preventive medicine includes two attributes: the actual treatment or health measure, and the underlying medical condition that is being targeted. Stereotypes can thus attach to the preventive measure or the medical condition — or to both. In Part III, I will use case studies to demonstrate how this type of preventive medicine stigma manifests.

[23]The most famous first study on the topic was done by Katz and Braley in 1933. *See* Daniel Katz & K. Braley, *Racial Stereotypes of One Hundred College Students*, 28 J. Abnormal & Soc. Psych. 280, 282 (1933). This study was followed by others. *See* Penelope J. Oakes et al., Stereotyping and Social Reality 19 (1994); Charles M. Judd & Bernadette Park, *Definition and Assessment of Accuracy in Social Stereotypes*, 100 Psych. Rev. 109, 109 (1993); David J. Schneider, *Modern Stereotype Research: Unfinished Business*, *in* Stereotypes and Stereotyping 419, 420 (C. Neil Macrae et al. eds., 1996).

[24]Erin Beeghly, *What Is a Stereotype? What Is Stereotyping?*, 30 Hypatia 675, 677 (2015).

[25]Judd & Park, *supra* note 23, at 110–11.

[26]Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law: Power, Duty, Restraint 15 (3rd ed. 2016).

[27]Burris et al., *supra* note 8, at 6–7.

[28]Robert S. Gordon, *An Operational Classification of Disease Prevention*, 98 Pub. Health Reps. 107, 108 (1983).

[29]Burris et al., *supra* note 8, at 6–7.

[30]Dorfman, *Penalizing Prevention*, *supra* note 10, at 312–14.

[31]*Id.* at 342–46.

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II. Preventive Medicine Stigma Through Signaling in *Braidwood Management, Inc. v. Becerra*

In *Braidwood v. Becerra*, federal Judge Reed O'Connor for the Northern District of Texas, whose 2018 declaration that the ACA was unconstitutional was overturned by the Supreme Court,[32] awarded summary judgment to the plaintiffs, who included Christian-owned businesses and six individuals in Texas. The named plaintiff was an employer who wished to purchase insurance coverage for its employees that excluded coverage of preventive health measures including PrEP, contraception, the human papillomavirus (HPV) vaccine, and screenings and behavioral counseling for (STIs) and drug use. Other plaintiffs wished to purchase such health insurance for themselves. The plaintiffs' intentions directly conflicted with Section 2713 in Title IV of the ACA, which requires all insurers to provide preventive health measures that have been recommended by federal bodies,[33] such as the U.S. Preventive Services Task Force.[34]

Judge O'Connor granted the plaintiffs' summary judgment motion for two reasons. First, he held that federal bodies making recommendations for mandatory coverage of preventive measures in all insurance plans lack authority to do so based on the requirements of the Appointments Clause of the Constitution.[35] Second, even if the federal bodies had such authority, requiring the plaintiffs to offer PrEP and other health measures would impose an impermissible substantial burden on the employers' religious beliefs under the Religious Freedom Restoration Act of 1993 (RFRA).[36]

This judgment resembles that of the 2014 case *Burwell v. Hobby Lobby Stores*, in which the Supreme Court held that religious employers are not obligated to provide their employees insurance that covers contraceptives because requiring them to do so violates RFRA.[37] In a subsequent March 2023 decision regarding the remedy for the plaintiffs, Judge O'Connor enjoined the federal government "from implementing or enforcing the compulsory preventive care coverage mandate in the future" in any part of the country.[38] The government appealed the decision, which is currently pending before the Fifth Circuit Court of Appeals.

Scholars primarily read *Braidwood* as a religious freedom case that pits RFRA against public health. I offer a different reading of the case from a law and psychology perspective, one specifically informed by the interactions between law and stigma.

The *Braidwood* plaintiffs objected to multiple preventive measures with one thing in common: they all belong to a category I refer to as "sexually-charged preventive measures."[39] These are preventive measures that have a clear connection between health and engagement in sexual relations; examples

[32]Texas v. United States, 340 F. Supp. 3d 579, 619 (N.D. Tex. 2018). One legal scholar stated that after the 2018 Supreme Court decision, Judge O'Connor has been "blinded" by "his contempt of the ACA." Nicholas Bagley, Opinion, *The Latest ACA Ruling Is Raw Judicial Activism and Impossible to Defend*, Wash. Post (Dec. 15, 2018, 12:31 PM), https://www.washingtonpost.com/opinions/2018/12/15/latest-aca-ruling-is-raw-judicial-activism-impossible-defend [https://perma.cc/3HSE-PUBQ].

[33]The list of mandated preventive services to be covered by insurers derives from recommendations by one of four professional governmental or private, non-profit bodies: the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices, the Health Resources and Services Administration's Bright Futures Project, and the Institute of Medicine's Committee on Women's Clinical Preventive Services. *See* Affordable Care Act, 42 U.S.C. § 300gg-13; Comm. on Preventive Servs. for Women, Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps 1 (2011).

[34]The U.S. Preventive Services Task Force is an independent body "composed of individuals with appropriate expertise. Such Task Force shall review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations." 42 U.S.C. § 299b-4(a)(1).

[35]*See* Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 646 (N.D. Tex. 2023).

[36]*See id.* at 652. RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government shows that it has a "compelling governmental interest" and the policy "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b).

[37]573 U.S. 682, 690 (2014). For an important discussion of *Burwell v. Hobby Lobby Stores* and its impact, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453, 1496–1507 (2015).

[38]Braidwood Mgmt. v. Becerra, 666 F. Supp. 3d 613, 617 (N.D. Tex. 2023).

[39]Dorfman, *Penalizing Prevention*, *supra* note 10, at 329–30.

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include the Gardasil vaccine, which was designed to prevent HPV infection, contraceptive methods (i.e., birth control pills), condoms, STI screenings, and PrEP.[40] Risk compensation is the main motivator behind objections to insurance coverage of such preventive measures that makes them more publicly available. Risk compensation is the expectation that preventive interventions will affect individuals' decision-making processes and preferences with regard to taking risks, such that those using preventive measures will engage in more risky behaviors because they believe themselves to be protected.[41] Discussion of risk compensation was prominent when the policies of distributing condoms in schools and HPV vaccination were first rolled out in the 1990s and early 2000s,[42] and the phenomenon caused fear that those health policies would encourage teenagers to have more sex.[43] These attitudes toward sex are reminiscent of the Puritan tradition that believed the law should be used to control "social deviancy."[44] Nowadays, the same attitude involving concerns about risk compensation targets the newest sexually-charged preventive measure: PrEP. This was also Judge O'Connor's focus in *Braidwood*.

PrEP is an antiviral medication that effectively prevents HIV infection among HIV-negative people. It has been approved by the Food and Drug Administration (FDA) and has been endorsed by the Department of Health and Human Services (HHS) as part of a plan to eradicate HIV by the year 2030.[45] PrEP was originally distributed as a daily orally administered medication under the brand name Truvada and later Descovy, which is manufactured by Gilead. In 2020, the patent for Truvada expired, ensuring greater access to the treatment through generics.[46] In 2021, the FDA approved an injectable version of PrEP, taken every two months, under the brand name Apretude.[47] PrEP does not protect against STIs other than HIV, so users undergo STI and HIV testing every two or three months as a condition to keep their prescription to ensure their health.[48] PrEP has been popular among gay and bisexual men, although disparities exist with regard to uptake by Black and Latine persons and white persons.[49]

Ever since PrEP received FDA approval, discourse about sexual risk compensation among its users became prominent among some policymakers, physicians, and public health professionals.[50] They saw PrEP not as a health measure, but rather as a party drug or a license for promiscuity, allowing gay men to

[40]*Preventive Care Benefits for Adults*, HealthCare.gov, https://www.healthcare.gov/preventive-care-adults/ [https://perma.cc/7LXF-AH4E]; *Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., https://www.hrsa.gov/womens-guidelines/index.html [https://perma.cc/YL8N-HBKT] (last reviewed Mar. 2024).

[41]Kristen Underhill, *Risk-Taking and Rulemaking: Addressing Risk Compensation Behavior Through FDA Regulation of Prescription Drugs*, 30 Yale J. on Regul. 377, 379, 383–86 (2013); Julia L. Marcus et al., *Risk Compensation and Clinical Decision Making—The Case of HIV Preexposure Prophylaxis*, 380 New Eng. J. Med. 510, 510 (2019).

[42]Underhill, *supra* note 41, at 429–30.

[43]Douglas Kirby, *The Impact of Schools and School Programs upon Adolescent Sexual Behavior*, 39 J. Sex Rsch. 27, 31 (2002); Jonathan Thomas Fanburg et al., *Student Opinions of Condom Distribution at a Denver, Colorado, High School*, 65 J. Sch. Health 181, 182–83 (1995) (discussing fears surrounding condom distribution).

[44]Geoffrey R. Stone, Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century 74 (2017).

[45]Anthony S. Fauci et al., *Ending the HIV Epidemic: A Plan for the United States*, 321 JAMA 844, 844 (2019).

[46]Liz Highleyman, *First Generic Truvada Now Available in the United States*, POZ (Oct. 2, 2020), https://www.poz.com/article/first-generic-truvada-now-available-united-states [https://perma.cc/URD7-CPWK].

[47]Press Release, U.S. Food & Drug Admin., FDA Approves First Injectable Treatment for HIV Pre-Exposure Prevention (Dec. 20, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-injectable-treatment-hiv-pre-exposure-prevention [https://perma.cc/XS5S-8LVD].

[48]*See* U.S. Pub. Health Serv., Ctrs for Disease Control & Prevention, Preexposure Prophylaxis for the Prevention of HIV Infection in the United States – 2021 Update: A Clinical Practice Guideline 43 (2021), https://www.cdc.gov/hiv/pdf/risk/prep/cdc-hiv-prep-guidelines-2021.pdf [https://perma.cc/LH8S-A7CH] (recommending that certain patients receiving PrEP complete STI testing at least every three months).

[49]Dorfman, *PrEP Penalty*, *supra* note 4, at 826; *see also* Katherine G. Quinn et al., *Intersectional Discrimination and PrEP Use Among Young Black Sexual Minority Individuals: The Importance of Black LGBTQ Communities and Social Support*, 27 AIDS & Behav. 290, 291 (2023).

[50]Dorfman, *PrEP Penalty*, *supra* note 4, at 854.

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have condomless sex with a large number of partners.[51] And while the literature has not substantiated concerns about significant risk compensation, which, like all stereotypes, may be based on a kernel of truth yet not worthy of generalization, the stereotype about PrEP users being "Truvada whores" stuck and created stigma around PrEP.[52]

In other words, PrEP users signal to others something about their behavior, choices, and lifestyles. This signaling effect creates shame around taking PrEP, as exemplified by the @gaysovercovid scenario presented in the introduction.[53] Attributing the drug's use to an individual's sexually deviant behavior puts into motion a process that I call the "de-medicalization of PrEP" — stripping away the public health benefits of this medical treatment and shifting focus to the user's individual behavior.[54] The de-medicalization of PrEP began in the treatment's early days[55] and reached a new height in the *Braidwood* decision.

The stigmatization of PrEP through signaling promiscuity and deviant behavior comes across clearly in Judge O'Connor's opinion, particularly where he reiterates the plaintiff's beliefs about PrEP, including that:

> [P]roviding coverage of PrEP drugs "facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman," and. . . providing coverage of PrEP drugs in [his] self-insured plan would make him complicit in those behaviors.[56]

Reading *Braidwood* through the lens of preventive medicine stigma showcases how stigma trickles down from public and political discourse into court decisions. That Judge O'Connor sided with the plaintiffs demonstrates how moral judgment can influence decisions related to public health as a result of the de-medicalization of PrEP.

A stance consistent with the de-medicalization of PrEP asserts a difference between "us" (non-PrEP users) and "them" (PrEP users), while also undermining the bedrock of insurance: risk pooling. Although insurance enrollees all pay into one pool, some will inevitably receive more health care services than others.[57] Insurance is made possible through this collective funding mechanism, which emphasizes insurance's role as "a social contract of health care solidarity" in which sicker individuals and those who are currently well all have access to the care they need.[58] Analyzing *Braidwood* using the alternative frame of preventive medicine stigma thus also underscores the tenuous state of the U.S. health insurance system.

III. The Relationship Between Attribute and Stereotypes in Preventive Medicine Stigma

This section advances Goffman's conceptualization of stigma as a "special kind of a relationship between attribute and stereotype"[59] by using a typology I first introduced in previous work[60] to explore new examples of preventive medicine stigma. I suggest a 2x2 model that examines stigma around possible

[51] *Id.* at 854–56.

[52] *Id.* at 854, 860.

[53] *See supra* notes 1–7 and accompanying text.

[54] Dorfman, *PrEP Penalty*, *supra* note 4, at 853, 861–62.

[55] Craig Konnoth, *Drugs' Other Side Effects*, 105 Iowa L. Rev. 171, 186 (2019) (discussing how concerns about risk compensations dominated the FDA's advisory committee hearing prior to the approval of Truvada as PrEP in 2012).

[56] Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624, 652 (N.D. Tex. 2023).

[57] Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. Pa. L. Rev. 1577, 1610–11 (2011).

[58] *Id.* at 1579.

[59] Goffman, *supra* note 13, at 4.

[60] Dorfman, *Penalizing Prevention*, *supra* note 10, at 366.

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stereotypes attached to two attributes: (1) the underlying health condition that is meant to be prevented, and (2) the actual preventive measure used. The following table summarizes the model and the examples I offer to demonstrate the typology:

	Stigmatized Measure	Non–Stigmatized Measure
Stigmatized Health Condition	**Double Stigma of Prevention** Example: *PrEP*	**Singular Stigma of Prevention** Example: *Abortion Pills*
Non–Stigmatized Health Condition	**Singular Stigma of Prevention** Example: *Masking*	**No Stigma Associated with Measure or Health Condition** Example: *Flu Vaccine*

1. Double Stigma of Prevention: The Case of PrEP

Double stigma of prevention refers to situations where both an underlying health condition that is meant to be prevented as well as its corresponding preventive measure are stigmatized. PrEP is a prime example of this double stigma. HIV, the underlying health condition that PrEP prevents, has been described as "*the* stigmatizing condition of our time."[61] Using PrEP adds another layer of stigma associated with the preventive measure itself — by signaling promiscuity and immorality.[62] Despite being a preventive measure that HIV-negative individuals take to prevent HIV infection from occurring in the first place, PrEP is also stigmatized by its association with medications taken by HIV-positive individuals.[63] Some people mistakenly believe that PrEP is an antiretroviral medication, a different form of HIV prevention that HIV-positive individuals take to lower the level of the virus in their bodies so that it is undetectable, making it impossible for them to transmit HIV to others.[64] Societal association of PrEP with medications taken by HIV-positive individuals and misunderstanding of the nuance of who takes the preventive measure create a stigma that is imposed on HIV-negative individuals who use PrEP.

As I have shown in previous research, the stigmatization of PrEP has legal consequences for patients. PrEP users experience insurance discrimination[65] and exclusion from the civic practice of donating blood,[66] and evidence suggests that use of the drug by gay parents is weaponized against them in child custody cases.[67]

2. Singular Stigma of Prevention — Stigmatized Underlying Health Condition and Non-Stigmatized Measure: The Case of Abortion Pills

Early abortion care is considered a secondary preventive health measure aimed at preventing unintended pregnancy.[68] Federal agencies like the Centers for Disease and Prevention (CDC), the Agency

[61] Allyson Day, The Political Economy of Stigma: HIV, Memoir, Medicine and Crip Positionalities 3 (2021).
[62] Dorfman, *PrEP Penalty*, *supra* note 4, at 866–67, 875.
[63] Sarit A. Golub, *PrEP Stigma: Implicit and Explicit Drivers of Disparity*, 15 Current HIV/AIDS Reps. 190, 191 (2018).
[64] *HIV Treatment As Prevention*, HIV.Gov (Feb. 1, 2023), https://www.hiv.gov/tasp/ [https://perma.cc/5LJW-KUPM].
[65] Dorfman, *Penalizing Prevention*, *supra* note 10, at 332–35; Dorfman, *PrEP Penalty*, *supra* note 4, at 865–66.
[66] Dorfman, *Penalizing Prevention*, *supra* note 10, at 335–38; Dorfman, *PrEP Penalty*, *supra* note 4, at 832–33, 841.
[67] Dorfman, *Penalizing Prevention*, *supra* note 10, at 339–42; Dorfman, *PrEP Penalty*, *supra* note 4, at 870–71.
[68] Diana Taylor & Evelyn Angel James, *An Evidence-Based Guideline for Unintended Pregnancy Prevention*, 40 J. Obstetric, Gynecologic & Neonatal Nursing 782, 786 (2011); Versie Johnson-Mallard et al., *Unintended Pregnancy: A Framework for Prevention and Options for Midlife Women in the US*, Women's Midlife Health, Sept. 15, 2017, at 3 ("Secondary prevention services are focused on identification of unintended pregnancies early in order to improve reproductive health outcomes.

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for Toxic Substances and Disease Registry, and the U.S. Preventive Services Task Force have formally recognized the importance of promoting healthy pregnancy outcomes by preventing unintended conception.[69] Nevertheless, in part due to the politicization of abortion, the issue of unplanned pregnancy has received less attention in the health policy literature on prevention.[70] The Hyde Amendment, attached to federal appropriations bills that Congress has approved every year since 1977, prohibits the use of federal funds for abortion.[71] As a consequence, the ACA does not cover abortion services as part of Title IV.[72] Moreover, state law can prohibit abortion coverage by insurance plans offered on state health insurance exchanges, even when the pregnancy is life-threatening or results from rape or incest.[73]

Certain unintended pregnancies — specifically teenage or youth pregnancies, or those resulting from sexual violence, premarital sex, or adulterous relationships — carry stigma and shame.[74] The "stigma of illegitimacy" has been discussed to attach to children conceived through rape or outside of marriage.[75] Those stigmatized pregnancies constitute a stigmatized health condition.

Following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* — which changed the legal landscape of abortion by overturning *Roe v. Wade* and eliminating constitutional protection for abortion — medication abortion, commonly known by reference to abortion pills, has become "the next battleground in Post-*Roe* America."[76] The most common medication abortion regimen in the United States uses a combination of two drugs: mifepristone and misoprostol.[77] When used together, they can end a pregnancy through ten weeks' gestation.[78] The FDA first approved mifepristone in September 2000 for ending pregnancy through a seven-week gestational period and was approved for use through a ten-week gestational period in 2016.[79] The FDA approved the use of generic mifepristone in 2016.[80]

In examining the role of abortion pills in the post-*Dobbs* abortion debate, law professors David Cohen, Greer Donley, and Rachel Rebouché show that since *Dobbs*, the number of monthly "virtual

Secondary prevention services incorporate pregnancy diagnosis, pregnancy options counseling and management, referral and counseling for pregnancy care, adoption or early abortion referral and care.").

[69]Taylor & James, *supra* note 68, at 783.

[70]*Id.* at 782.

[71]Alina Salganicoff et al., *Coverage for Abortion Services and the ACA*, KFF (Sept. 14, 2014), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/ [https://perma.cc/4XA7-BWSA].

[72]*Id.*

[73]*Id.*

[74]*See, e.g.*, Constance M. Wiemann et al., *Are Pregnant Adolescents Stigmatized by Pregnancy?*, 36 J. Adolescent Health 352 (2005) (finding that two out of five adolescent women reported feeling stigmatized by their pregnancy and finding positive correlation with being unmarried or unengaged with baby's father); Tanya Lewis, *64,000 Pregnancies Caused by Rape Have Occurred in States with a Total Abortion Ban, New Study Estimates*, Sci. Am. (Jan. 25, 2024), https://www.scientificamerican.com/article/64-000-pregnancies-caused-by-rape-have-occurred-in-states-with-a-total-abortion-ban-new-study-estimates/ [https://perma.cc/D6UB-G6ZD].

[75]*See, e.g.*, Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345, 347 (2011); Karen M. Tani, *When a Wrong Creates a Life: Tort Responses to Children Born from Institutional Sexual Violence*, 73 DePaul L. Rev. 617, 620 (2024).

[76]Pam Belluck & Sheryl Gay Stolberg, *Abortion Pills Stand to Become the Next Battleground in Post-Roe America*, N.Y. Times (May 5, 2022), https://www.nytimes.com/2022/05/05/health/abortion-pills-roe-v-wade.html; *The Availability and Use of Medication Abortion*, KFF (Mar. 20, 2024), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/3F2V-JBL6].

[77]*The Availability and Use of Medication Abortion*, *supra* note 76.

[78]*Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. Food & Drug Admin. (Sept. 1, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

[79]*Id.*

[80]*Id.*

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abortions," pregnancy terminations completed through pills that clinics mail to patients, almost doubled.[81] The practice of virtually prescribing abortion pills such as mifepristone is legal in twenty-four states and Washington, DC.[82]

For the purpose of discussing preventive medicine stigma, I posit that abortion pills are considered as a not stigmatized — or at the very least, less stigmatized — preventive health measure for a highly stigmatized condition, an unintended pregnancy.[83]

Abortion procedures have been stigmatized for decades.[84] Anti-abortion advocates have often characterized later abortion procedures as "gruesome" and a form of dismemberment.[85] For example, law professor Carol Sanger has discussed how anti-abortion activists use images of fetal bodies to evoke profound emotions around abortion.[86] Medication abortion, which may appear as "less messy," could therefore reduce stigmatization.[87] Most medication abortions occur within the ten-week gestational period, when pregnancy tissue "is difficult to personify as a baby or even only as a developed fetus."[88] Additionally, abortion pills can separate the procedure from abortion clinics and abortion providers that anti-abortion advocates often stereotype as "abortion mills."[89] Instead, the procedure takes place in the privacy of one's home.[90] Indeed, Cohen, Donley, and Rebouché argue that "[h]istorically, the anti-abortion movement stigmatized abortion by stigmatizing abortion *procedures.* Abortion *pills*, however, will be harder to villainize."[91]

Nonetheless, access to mifepristone has been under attack, perhaps due to anti-abortion activists' fear that this new form of abortion is less stigmatized and thus easier to access. In June 2024, the Supreme Court dismissed a case challenging the FDA's regulatory process approving the use mifepristone due to lack of plaintiffs' standing.[92] Despite this victory for abortion rights, time will tell whether the Supreme Court will continue its interventions into the legal treatment of abortion in the future.

[81]David Cohen et al., *Abortion Pills*, 76 Stan. L. Rev. 317, 327 (2024); Claire Cain Miller & Margot Sanger-Katz, *Virtual Clinics Have Been a Fast-Growing Method of Abortion. That Could Change*, N.Y. Times (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/upshot/abortion-virtual-clinics.html.

[82]Cohen et al., *supra* note 81, at 327.

[83]*Id.* at 391.

[84]*See Historical Abortion Law Timeline: 1850 to Today*, Planned Parenthood Action Fund, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today [https://perma.cc/UDD8-P2M2] (stating doctors began an abortion criminalization campaign circa 1947); *see also* Carol Sanger, *Talking About Abortion*, 25 Soc. & Legal Studs. 651, 652 (2016); Carol Sanger, About Abortion: Terminating Pregnancy in Twenty-First-Century America 61 (2017) [hereinafter Sanger, About Abortion]; Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How – and Why It Matters in Law and Politics*, 93 Ind. L.J. 207, 226 (2018); Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. Rev. 1902, 1924 (2021).

[85]Cohen et al., *supra* note 81, at 391.

[86]Sanger, About Abortion, *supra* note 84, at 84.

[87]Cohen et al., *supra* note 81, at 391.

[88]*Id.* at 391–92.

[89]For an early articulation of the term 'abortion mill' as "[a] mill might be defined as an abortionist or several abortionists working steadily in a fairly permanent location and aborting a dozen or so women daily," see Jerome E. Bates, *The Abortion Mill: An Institutional Study*, 45 J. Crim. L., Criminology & Police Sci. 157, 157 (1954). The term later appeared in the 1973 decision *Roe v. Wade*, where the Supreme Court dismissed assertions by the state of Texas that banning abortion was crucial to protect women's health, observing that mortality rates during the first trimester of pregnancy "appear to be as low as or lower than the rates for normal childbirth" in contrast with the "prevalence of high mortality rates at illegal 'abortion mills.'" *See* Roe v. Wade, 410 U.S. 113, 149–50 (1973).

[90]Cohen et al., *supra* note 81, at 393.

[91]*Id.*

[92]Food & Drug Admin. v. Alliance for Hippocratic Medicine, No. 23–235 (U.S. June 13, 2024).

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3. Singular Stigma of Prevention — Stigmatized Measure and Non-Stigmatized Underlying Health Condition: The Case of Masking

When COVID-19 was still new and uncommon in the early days of the pandemic, falling sick with the disease was stigmatized. As time went on, the stigma associated with having COVID-19 largely faded. A 2023 study by the University Michigan School of Public Health has shown "a large decrease in perceived stigma and fear of COVID disclosure to friends or family and at work" compared to 2020.[93] Therefore, COVID-19 is assumed to constitute a non-stigmatized underlying condition. However, as I explain below, the preventive measure against the illness has been stigmatized.

Face masks are the visual representation of the COVID-19 pandemic.[94] On April 3, 2020, one month into the pandemic, the CDC advised every person over the age of two to wear face coverings in public.[95] President Joe Biden signed an executive order mandating masks on federal property and during interstate travel on his first day in office in January 2021.[96] Throughout the course of the pandemic, however, masking has become politicized.[97]

There is abundance of evidence showing that masks are an effective and cheap preventive measure to stop the spread of COVID-19 (as well as other airborne diseases, such as the flu or RSV).[98] Yet, through a process of de-legitimization, right-wing politicians instilled a view among many members of the public of masks as ineffective, unnecessary, and a government tool that restricts personal freedom and increases social control.[99] The de-legitimization of this pro-social preventive measure created stigma around wearing a mask.

As with PrEP stigma that intersects with existing prejudice around gay and bisexual men's hypersexuality,[100] gender bias and racial prejudice intersect with the stigma around masking.[101]

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[93] *COVID-19 Stigma and Mental Health: Who Hid Their Illness, Who Shared and Why It Still Matters*, Univ. of Mich.: News (Apr. 14, 2023), https://news.umich.edu/covid-19-stigma-and-mental-health-who-hid-their-illness-who-shared-and-why-it-still-matters/ [https://perma.cc/L8QH-XMPK] (citing Soomin Ryu et al., Univ. of Mich. Sch. of Pub. Health, Michigan COVID-19 Recovery Surveillance Study Data Report 6: COVID-19 Stigma and Mental Health in Michigan (2023), https://sph.umich.edu/mi-cress/pdf/MICReSS_Stigma_MentalHealth_Report_April2023.pdf [https://perma.cc/35BE-7594]).

[94] Doron Dorfman, *Pandemic "Disability Cons,"* 49 J.L. Med. & Ethics 401, 403–04 (2021) [hereinafter Dorfman, *Pandemic "Disability Cons"*].

[95] Shana Kushner Gadarian et al., Pandemic Politics: The Deadly Toll of Partisanship in the Age of COVID 100 (2022); Lindsay F. Wiley, *Democratizing the Laws of Social Distancing*, 19 Yale J. Health Pol'y L. & Ethics 63, 75 (2020); Dorfman, *Pandemic "Disability Cons," supra* note 94, at 403.

[96] Exec. Order No. 13991, 3 C.F.R. 434 (2022).

[97] Gadarian et al., *supra* note 95, at 100.

[98] *Id.* at 103. Some research doubted the efficiency of masks in combating infection air-borne viruses. Nevertheless, a 2024 study based on population-based SARS-CoV-2 infection data from Ontario, Canada that adjusted the analysis to include for the over-testing of older individuals and under-testing of younger individuals, reached the conclusion that masking is indeed an effective health measure. In the words of the researchers:

> While the physical properties of masks and respirators reduce both production of infectious aerosols containing SARS-CoV-2, and inhalation of infectious aerosols, the application of masks and respirators in indoor settings during the pandemic has been variable and controversial… Our findings likely identify an important source of bias towards the null in the available literature on community masking effects. We find that the effects of mask mandates are obscured by disproportionate testing of older individuals who are likely to present with more severe SARS-CoV-2 infection, and under-testing of younger individuals (children, teens, and young men) who are less likely to undergo testing, and more likely to experience minimally symptomatic infection… In summary, we find that adjustment for under-testing in younger age groups demonstrates that community mask mandates in Ontario, Canada were highly effective, and these effects were robust to different modeling approaches. Community masking mandates generated substantial health and economic benefits for the province. Such mandates should be considered a potent tool for the management of future respiratory virus emergences.

Amy Peng et al., *Impact of Community Mask Mandates on SARS-CoV-2 Transmission in Ontario After Adjustment for Differential Testing by Age and Sex*, PNAS Nexus, Feb. 2024, at 5–7.

[99] Gadarian et al., *supra* note 95, at 110.

[100] Dorfman, *PrEP Penalty*, *supra* note 4, at 858.

[101] Dorfman, *Mask Shaming*, *supra* note 2 (manuscript at 11).

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One study showed that men's conformity to masculine norms — like emotional control (e.g., showing no fear) and self-reliance — were associated with resistance to masking.[102] Distorted ideals about masculinity publicly manifested themselves when then-President Donald Trump avoided wearing a mask in public, and was later called out by President Biden as displaying "macho" and "falsely masculine" behavior.[103] Regarding racial prejudice, the massive Black Lives Matter (BLM) protests during the height of the pandemic raised concerns about spreading COVID-19.[104] These concerns quickly lead to questioning whether "protesters in the Black Lives Matter movement … get a free pass on not wearing [masks]"[105] and whether it is hypocritical not to raise public health concerns regarding BLM protests yet oppose right-wing anti-lockdown rallies.[106] Since then, research has shown that BLM protesters did not significantly spread COVID-19.[107] Anecdotal evidence also shows that many Black individuals were reluctant to cover their faces during the pandemic "because of their image and their desire to avoid unnecessary confrontations … a small hidden fear of 'being masked while black' and the possible negative outcome that can accompany it."[108] These concerns result from the societal fear of Black men and the deep-rooted stereotypical association of them with criminality.[109] As one commentator from North Carolina said, wearing a mask may trigger "racially-motivated suspicions": "I have two sons, and I've always had discussions with them about wearing hoodies and not putting their hoods up until they are in a safe environment…. Masks are really the new hoodie."[110]

As with much preventive medicine stigma, the stigma around masking penetrated law and policy. In March 2023, New York City Mayor Eric Adams enacted a new policy instructing delis and bodegas in the city to require customers take off their masks before entering the store to help prevent robberies and shoplifting. The new policy intended for security cameras to capture the face of potential criminals. According to Mayor Adams, "[w]hen you see these mask-wearing people, oftentimes it's not about being fearful of the pandemic, it's fearful of the police catching them for their deeds."[111]

By the fall of 2021, ten Republican-led states, including Arizona, Arkansas, Florida, Georgia, Iowa, South Carolina, Oklahoma, Texas, Utah, and Virginia, had enacted laws or issued executive orders

[102]James R. Mahalik et al., *Conformity to Masculine Norms and Men's Responses to the COVID-19 Pandemic*, 23 Psych. Men & Masculinities 445, 447 (2022).

[103]Daniel Victor, *Coronavirus Safety Runs into a Stubborn Barrier: Masculinity*, N.Y. Times (Oct. 10, 2020), https://www.nytimes.com/2020/10/10/us/politics/trump-biden-masks-masculinity.html; *see* Julia Marcus, *The Dudes Who Won't Wear Masks*, Atlantic (June 20, 2020), https://www.theatlantic.com/ideas/archive/2020/06/dudes-who-wont-wear-masks/613375/ [https://perma.cc/4GP3-ZF3A].

[104]Ashley Quigley et al., *Estimated Mask Use and Temporal Relationship to COVID-19 Epidemiology of Black Lives Matter Protests in 12 Cities*, 10 J. Racial & Ethnic Health Disparities 1213, 1213 (2023).

[105]Philip Galanes, *Shoppers Should Wear Masks. Shouldn't Protesters, Too?*, N.Y. Times (July 9, 2020), https://www.nytimes.com/2020/07/09/style/mask-wearing-in-public.html.

[106]Bjorg Thorsteinsdottir et al., *Are Physicians Hypocrites for Supporting Black Lives Matter Protests and Opposing Anti-Lockdown Protests? An Ethical Analysis*, Hastings Ctr. (Aug. 27, 2020), https://www.thehastingscenter.org/are-physicians-hypocrites-for-supporting-black-lives-matter-protests-and-opposing-anti-lockdown-protests-an-ethical-analysis/ [https://perma.cc/33VY-2TQ7].

[107]Quigley et al., *supra* note 104, at 1218; Leah Asmelash, *Black Lives Matter Protests Have Not Led to a Spike in Coronavirus Cases, Research Says*, CNN (June 24, 2020), https://www.cnn.com/2020/06/24/us/coronavirus-cases-protests-black-lives-matter-trnd/index.html [https://perma.cc/DSB6-3PND].

[108]Laurie Larsh, *Mask Shaming: America's New Favorite Pastime During COVID-19 — Including in Charlotte*, Charlotte Observer (May 19, 2020), https://www.charlotteobserver.com/charlottefive/c5-wellness/article242809766.html [https://perma.cc/K9HX-SPVS].

[109]Randall Kennedy, Race, Crime, and the Law 16 (1997); Claude M. Steele, Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us and What We Can Do 6–7 (2011); Paul Butler, Chokehold: Policing Black Men 17–21 (2017).

[110]Larsh, *supra* note 108.

[111]Bill Chappell, *NYC Mayor Eric Adams Is Telling Stores to Have Customers Remove Their Face Masks*, NPR (Mar. 7, 2023), https://www.npr.org/2023/03/07/1161623700/nyc-stores-masking-eric-adams-robberies-shoplifting-bodegas [https://perma.cc/4FL2-9FBC].

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prohibiting mask mandates in schools and universities.[112] These "mask bans" have a disparate impact on immunocompromised students, teachers, staff, and professors, who are still at a higher risk of contracting COVID-19 and experiencing health complications than the general population — even after being vaccinated.[113] Disability rights organizations turned to federal courts, urging schools and universities to require masking as an individualized reasonable disability accommodation for immunocompromised people.[114] These lawsuits resulted in a circuit split regarding whether the Americans with Disabilities Act requires masking as an accommodation.[115] The debate continues today, with COVID-19 infections on the rise several years after the pandemic started, especially in health care settings where providers do not wear masks when seeing immunocompromised patients.[116]

4. No Stigma of Prevention: The Case of the Flu Vaccine

Stigma is a complex and fluid social phenomenon that can evolve over time. As I have shown, stigma around preventive medicine exists in different forms, but there are also situations where neither the underlying health condition nor the measure are stigmatized. A good example of that is the flu vaccine. A 2023 study showed that partisan media (defined as right-leaning or left-leaning outlets) did not differ in their reporting of flu-related news coverage and did not exhibit bias when discussing the flu vaccine.[117] The lack of stigma around influenza is arguably because the flu is a common illness experienced by all members of society and society has not viewed the flu vaccine as problematic. By contrast, some have doubted the COVID-19 vaccination due to its FDA approval procedure as well as the spread of misinformation and conspiracy theories.[118]

The lack of stigma around the flu vaccine also contrasts with the stigma around other types of vaccinations, like the HPV vaccine, which is considered a "sexually-charged preventive measure."[119] "Vaccine passports," proofs of coronavirus vaccination required for participation in various work and social activities during the COVID-19 pandemic,[120] also raised the issue of stigma. That discussion, however, introduced concerns about stigmatizing individuals *not* taking the preventive measure, i.e., not getting vaccinated, and specifically members of racial and ethnic communities.[121]

[112]Stacey Decker, *Which States Banned Mask Mandates in Schools, and Which Required Masks*, Educ. Wk. (July 8, 2022), https://www.edweek.org/policy-politics/which-states-ban-mask-mandates-in-schools-and-which-require-masks/2021/08 [https://perma.cc/UUD9-JRWW]; *State-by-State School Mask Mandates*, Nat'l Ctr. for Disability, Equity, & Intersectionality (Apr. 6, 2022), https://thinkequitable.com/state-by-state-school-mask-mandates/ [perma.cc/B465-DR8A].

[113]Mical Raz & Doron Dorfman, *Bans on COVID-19 Mask Requirements vs Disability Accommodations: A New Conundrum*, JAMA Health F. (Aug. 6, 2020), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2782893 [https://perma.cc/S4GA-CMJR].

[114]This is as opposed to a universal masking mandate. *See* Doron Dorfman, *Third-Party Accommodations*, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 38), https://ssrn.com/abstract=4742287.

[115]*Id.* (manuscript at 38–46); Doron Dorfman et al., *Physicians' Refusal to Wear Masks to Protect Vulnerable Patients–An Ethical Dilemma for the Medical Profession*, JAMA Health F., Nov. 17, 2023, at 1-2, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2811897 [https://perma.cc/J9XG-X649].

[116]Dorfman et al., *supra* note 115; Katherine A. Macfarlane, *A Patient's Right to Masked Health Care Providers*, Harv. L. Petrie-Flom Ctr.: Bill of Health (July 20, 2023), https://blog.petrieflom.law.harvard.edu/2023/07/20/a-patients-right-to-masked-health-care-providers/ [https://perma.cc/J5CY-YW9F].

[117]Zhan Xu, *Partisan Bias in Flu News and Its Impacts on Flu Vaccination Uptake in the U.S.*, Journalism Prac. 7, 12–13 (May 11, 2023).

[118]Wendy E. Parmet, Constitutional Contagion: Covid, the Courts, and Public Health 11–12 (2023); Lev Facher, *Experts Warn Full COVID-19 Vaccine Approval Is No Quick Fix for Hesitancy*, STAT (July 12, 2021), https://www.statnews.com/2021/07/12/experts-warn-full-covid-19-vaccine-approval-is-no-quick-fix-for-hesitancy/ [https://perma.cc/S6TN-WES2].

[119]Dorfman, *Penalizing Prevention*, *supra* note 10, at 329–30.

[120]For the history of vaccine passports in the U.S., see Kevin Cope et al., *Vaccine Passports as a Constitutional Right*, 54 Ariz. St. L.J. 25, 32–34 (2022).

[121]Seema Mohapatra, *Passports of Privilege*, 70 Am. U. L. Rev. 1729, 1755–58 (2021).

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Final Thoughts and Normative Implications

This Article explored how stigma attaches to the use of preventive medicine. The creation of preventive medicine stigma occurs through two avenues: stigmatization of the underlying condition that is being prevented or stigmatization of the preventive measure in question. This Article also explored another way in which the process of stigmatization occurs: the use of a preventive measure signals that the user is engaging in a so-called deviant behavior or lifestyle that causes them to use the preventive measure in the first place. The decision in *Braidwood v. Becerra* exemplifies this phenomenon. Judge O'Connor's decision was guided by the notion that PrEP use acts as license for promiscuity, committing adultery, and using drugs, rather than as a public health tool to help eliminate HIV and AIDS. The decision is yet another example showcasing how PrEP has been de-medicalized in public discourse. Whether in discussions among decision-makers or publicized through the @gaysovercovid social media account, the treatment's health benefits are stripped away, and it is viewed instead as a party drug.

Preventive medicine stigma is dangerous and may deter people from using the health measures designed for individual wellness and public health.[122] The penetration of preventive health stigma into law and policy also contrasts with the goals of the ACA to incentivize and promote the use of preventive health measures. This Article is an important step in conceptualizing and highlighting how law can jeopardize public health reforms. Lastly, it highlights the need to pay close attention to the research on public attitudes and human behavior regarding health care consumption.

The law can combat preventive medicine stigma through state interventions. States like New York, New Jersey, and California prohibited insurance discrimination on the basis of PrEP use (and the stereotypes that arise from it) through legislation and statements directed at insurers.[123] New Jersey also enacted the Jake Honing Compassionate Use Medical Cannabis Act, also referred to as "Jake's Law" or the "Compassionate Use Act."[124] This statute creates employment protections for medical cannabis users. Medical cannabis is a stigmatized tertiary preventive measure used to prevent seizures and manage pain.[125] The Compassionate Use Act prohibits employers from taking an adverse employment action against an employee who holds a medical cannabis card, and allows an employee who tests positive for cannabis pursuant to an employer's drug testing policy the opportunity to present a medical reason for the positive test result.[126] The New Jersey courts have enforced the statute against discrimination based on stigma. In *Wild v. Carriage Funeral Holdings, Inc.*, the plaintiff was a cancer patient using medical cannabis who was fired for "being a drug addict."[127] In their employment discrimination lawsuit, the Supreme Court of New Jersey ultimately ruled in favor of the plaintiff based on the Compassionate Use Act.[128]

Nonetheless, reliance on state law interventions to fight preventive medicine stigma manifesting as discrimination is problematic because such interventions depend on a given state's political orientation. In the future, federal agencies like HHS and the Equal Employment Opportunity Commission (EEOC) should take steps to fight preventive medicine stigma and subsequent discrimination.

[122]Dorfman, *Penalizing Prevention*, *supra* note 10, at 326, 349–50, 361–63 (showing how preventive medicine stigma created a chilling effect around seeking preventive mental health treatment and around the public use of naloxone).

[123]*Id.* at 334, 376.

[124]N.J. Stat. Ann. §§ 24:6I-1 to -56 (West 2024).

[125]Dorfman, *Penalizing Prevention*, *supra* note 10, at 317, 370–71; *see also*, Linda J. Vorvick, *Medical Marijuana*, MedlinePlus (Oct. 13, 2023), https://medlineplus.gov/ency/patientinstructions/000899.htm [https://perma.cc/ENM9-8AR5].

[126]N.J. Stat. Ann. § 24:6I-6.1 (West 2024); *see also* Marijuana Pol'y Project, Jake Honig Compassionate Use Medical Cannabis Act 1–2, https://www.mpp.org/assets/pdf/states/new-jersey/jake-honig-compassionate-use-medical-cannabis-act.pdf [https://perma.cc/LT38-8QUE].

[127]205 A.3d 1144, 1150 (N.J. Super. Ct. App. Div. 2019).

[128]Wild v. Carriage Funeral Holdings, 227 A.3d 1206, 1208 (N.J. 2020).

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Doron Dorfman Professor of Law, Seton Hall Law School

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