A Separate Crime of Reckless Sex

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Abstract: This article attempts to make progress on both the problems of sexually transmitted disease and acquaintance rape by proposing a new crime of reckless sexual conduct. A defendant would be guilty of reckless sexual conduct if, in a first sexual encounter with another particular person, the defendant had sexual intercourse without using a condom. Consent to unprotected intercourse would be an affirmative defense, to be established by the defendant with a preponderance of the evidence. As an empirical matter, first-encounter unprotected sex greatly increases the epidemiological force of sexually transmitted disease and a substantial proportion of acquaintance rape occurs in unprotected first encounters. The new law, by increasing condom use and the quality of communication in first sexual encounters, can reduce the spread of sexually transmitted disease and decrease the incidence of acquaintance rape.

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Introduction

Imagine that we wake up one morning to learn that a 19-year-old woman has accused a married multi-million dollar basketball star ("Star") of raping her at a Colorado resort. Stories from Star's side circulate shortly thereafter claiming that the woman willingly entered Star's room and began consensual sexual contact, but that Star stopped short of intercourse, concerned that he wasn't wearing a condom.[1] The prosecution charges that Star kept going, indifferent to the protection that a condom would provide.[2]

If the case is prosecuted criminally as rape, the prosecution will have to prove much more than that Star failed to stop. In Colorado, which is typical of many states, the prosecution will need to prove, beyond a reasonable doubt, that Star used physical force, threat of physical force or some kind of intoxicant to cause the victim to submit to intercourse.[3] This is an extraordinarily difficult task. Rape can occur without any signs of physical force and the kind of bruising that might indicate physical force can accompany purely consensual endeavors. Without any other witnesses, all attempts to prove a threat of physical force or the presence of an intoxicant taken under coercion will inevitably devolve into a he said/she said contest. In the end, the jury will be asked whether it is plausible that a possibly star-struck 19-year old had sex with a multi-million dollar basketball hero. The jury will likely answer yes - because it is plausible. It may not

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[1] For a parallel story, *see* Allison Samuels, *Who is the Real Kobe*, NEWSWEEK, July 28, 2003 at 48.

[2] *Id*.

[3] CRSA § 18-3-402 (2003).

even be likely, but it is probably plausible.[4] If it was plausible that she consented, Star will be acquitted of rape charges.

If acquitted, Star will return to playing basketball, considered guilty of nothing other than adultery.[5] But even if factually innocent of rape, Star may well be responsible for exacerbating the epidemic risks of: HIV, pelvic inflammatory disease, various forms of genital cancers, nervous system damage, infertility, high blood pressure, thromboembolic disease, and something like post traumatic stress disorder.6 Currently, unless the prosecution can prove rape, these risks are routinely inflicted without any criminal sanction.

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[4] Juries in cases involving sexual conduct seem to take the burden of proof very seriously. A juror interviewed after a well-publicized sexual harassment trial of an army officer said "it's not that we did not believe the women. It's that we had reasonable doubt." Martha Raddatz, *All Things Considered* (NPR radio broadcast, Mar 19, 1998).

[5] Adultery is not a crime in most states and, with the exception of military prosecutions, is enforced virtually no where. *See* Martin Siegel, *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAM. L. 54, 54-57 n. 5 (1991/1992).

6 If Star did not know whether the 19 year old was infected with an STD, his choice to engage in unprotected sex increased the chance that both he and any other individuals with whom he would subsequently engage sexually (including his wife) would become infected. Indeed, the 19-year-old's accusation – even if false – may have reduced the risk that Star would spread a disease contracted in Colorado. The accusation may have prevented Star from engaging in unprotected sex subsequently with his wife (before being tested for STDs).

This article tries to fill that void in the criminal law by proposing a new crime of reckless sexual conduct, imposed for needlessly putting a sexual partner at such risk. The proposal is simple: A person would be guilty of reckless sexual conduct and subject to imprisonment of up to 6 months, if, in a first sexual encounter with another specific person, he or she had sexual intercourse without using a condom. Consent to *unprotected* intercourse would be an affirmative defense, to be established by the defendant with a preponderance of the evidence. The prosecution would have to prove beyond a reasonable doubt that this was the first time that the defendant had sexual intercourse with the accuser and that no condom was used.

Because the concept of "first encounter sex" is crucial to our analysis, let us pause to clearly define it. The term "first encounter sex" refers to the first time that two particular people have sex. It is distinguished from "subsequent encounter sex," which refers to any subsequent sex between the two people. The term is not limited to the first time that an individual has sex. An individual who has a total of N sexual partners over the course of her life therefore engages in N acts of first encounter sex.

Unprotected first encounter sex plays a crucial in exacerbating the prevalence of both STDs and acquaintance rape. While an increasing majority of people report and aspire to using condoms during casual sex,[7] the unprotected residual of first encounter sex may have a dramatic effect on the spread of infection.

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[7] "Casual sex" has a number of different definitions. Some researches define casual sex as a "one-night-stand." Others define it as intercourse on the first meeting. T. Edgar & M.A. Fitzpatrick, *Expectations for Sexual Interaction*, 4 HEALTH COMM. 239 (1993). Still others make the prior or later relationship between the two individuals irrelevant. J. A. Simpson & S.W. Gangestad, *Individual Differences in Sociosexuality* 60 J. PERSONALITY & SOC. PSYCHOL. 870 (1991).

Unprotected first-encounters are also correlated with coercion. The lions' share of acquaintance rape (that is, non-stranger, non-relative rape) occurs in unprotected first encounters. Men who rape in recklessness, by not finding the time or compassion to discern a partner's consent, rarely find time to use a condom.

Minimally regulating this small subset of sexuality can pay big dividends. Public policies designed at increasing condom use will make progress with regard to both STD epidemics and acquaintance rape. Increased condom use in first sexual encounters will dramatically reduce the effective number of "nodes" in the network of potential infection for the simple reason that many sexual pairings do not have subsequent sexual encounters. Increased condom use will likely also reduce the incidence of acquaintance rape. Giving men a new incentive to wear a condom in first-time sexual encounters should discourage the tragic lack of communication that often gives rise to the illusion of consent. The very act of stopping to put on a condom should increase deliberation and communication. The more deliberation and communication, the lesser the likelihood of acquaintance rape.

The crime of reckless sexual assault will also be a powerful prosecutorial tool for the thousands of acquaintance rape cases that are simply not winnable under current law. It represents a way to partially overcome the "he said/she said" dilemma. Reasonable doubts can remain whether an alleged acquaintance rapist raped, but there is often no question that he engaged in unprotected, first-encounter sex.

The message of our proposal is not necessarily to forego one-night stands, but rather to use a condom or communicate enough so that one can know one's partner is consenting. The new crime of reckless sex would not replace current rape laws and it would not immunize men who rape with condoms from prosecution under existing law. It would also not impose a punishment nearly as severe as rape. But, like DUI law, its very existence would send a clear message that society considers reckless sex both

physically and emotionally damaging.

Our discussion is divided into four parts. Part I explains the dangers, both physical and emotional, of unprotected sex – and the particular dangers when the first sexual encounter between two people is unprotected. Part II describes the current laws regulating first-time encounters and condom use. Part III then describes how the proposed statute would work and puts foreword the affirmative case for its enactment. Finally, Part IV responds to two potential constitutional objections to the statute – whether the law's affirmative defense would unconstitutionally force defendants to prove a necessary element of the crime and whether the law would unconstitutionally burden the rights of privacy and freedom of association.

I. Sex is Dangerous

Sex is dangerous both physically and emotionally. While sexuality can be a core attribute of human expression, it can also be the occasion for infection and coercion. This section details the dangers of disease and coerced sex and argues that a small subset of sexual activity – unprotected first sexual encounters between two people -- represents an unappreciated policy lever for addressing both STDs and acquaintance rape.

A. Physical Dangers of Unprotected Sex

The exact number of people carrying STDs is impossible to determine because many STDs have no symptoms, but one scholar has concluded that the number of undiagnosed cases of STDs probably exceeds the number of diagnosed cases,[8] and 15 million new cases are diagnosed each year.[9] One in six men aged

[8] J. Dennis Fortenberry, *Unveiling the Hidden Epidemic of Sexually Transmitted Diseases* 287

15-49 have genital herpes.[10] Five million new cases of genital warts are diagnosed each year[11] and four million new teenagers acquire an STD[12] each year. Some estimate that twenty-five percent of sexually active teenagers carry an STD.[13] A British study concluded that half of all women are likely to become infected with an STD during their first sexual encounter.[14] Whether symptomatic or not, whether diagnosed or not, all carriers of STDs can spread disease unless they use condoms during intercourse. Virtually all STDs can be prevented by effective condom use.[15]

There are six major sexually transmitted diseases in the United States, three are bacterial, chlamydia, gonorrhea, and syphilis and three are viral, HSV (genital herpes), HPV (genital warts) and HIV

J. AM. MED. ASSOC. 768, 768-69 (2002).

[9] MEG MEEKER, EPIDEMIC: HOW SEX IS KILLING OUR KIDS 11 (2002).

[10] THE ALAN GUTTMACHER INSTITUTE, IN THEIR OWN RIGHT: ADDRESSING THE SEXUAL AND REPRODUCTIVE HEALTH NEEDS OF AMERICAN MEN 53 (2002).

[11] *Id*.

[12] THE ALAN GUTTMACHER INSTITUTE, FAMILY PLANNING CLINICS AND STD SERVICES (2002).

[13] Meeker, *supra* note 8, at 11.

[14] Stuart Collins et. al., High Incidence of Cervical Human Papillomavirus Infection in Women During Their First Sexual Relationship, 109 BRITISH J. OF OBST. & GYN. 96 (2002).

[15] Guttmacher Institute, *supra* note 9, at 56 (consistent condom use is 99% effective in preventing HIV transmission).

(which can lead to AIDS).[16] Bacterial diseases are treatable with antibiotics, but if left untreated ca cause sterility,[17] destroy the nervous system[18] and lead to spontaneous abortions, premature delivery and birth defects.[19] Viral diseases cannot be cured at all.

1. Gender Effects

The physical dangers of STDs are visited disproportionately on women. In any given episode of unprotected heterosexual intercourse with an infected partner, a woman is significantly more likely than a man to get an STD. In one single act of unprotected sex, a teenage girl has a one percent chance of getting HIV, a thirty percent chance of getting HSV (genital herpes) and a fifty percent chance of getting gonorrhea.[20] Male to female transmission of HIV during vaginal intercourse is twenty percent more likely than female to male transmission.[21] A recent study found that the annual risk of genital herpes transmission

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[16] *Id*. at 52-53.

[17] Chlamydia can cause sterility in men, infertility in women and lead to ectopic pregnancy and chronic pelvic pain in women. *Id*. at 54.

[18] Untreated syphilis destroys the nervous system. *Id*.

[19] These pregnancy-related problems are often symptoms of gonorrhea. *Id*.

[20] The Alan Guttmacher Institute, *Teen Sex and Pregnancy*, FACTS IN BRIEF (Sept. 1999), http://www.agi-usa.org/pubs/fb_teen_sex.html.

[21] KING K. HOLMES, P. FREDERICK SPARLING ET. AL., SEXUALLY TRANSMITTED DISEASES 121 (3rd ed. 1998).

was nineteen percent from men to women but only five percent from women to men.[22] Women's increased susceptibility to some STDs is likely due to the fact that infected semen remains inside the female body for some time after intercourse, whereas the male is exposed to an infected female only during coitus.[23] Moreover, it is worth noting that *unwanted* sex probably carries with it a greater risk of becoming infected with an STD. This is true not only because of the lower probability of condom use during unwanted sex.[24] Unwanted sex also carries a greater risk of infection both because cervical mucus (which is not likely to be produced in a nonconsensual encounter) acts as a barrier to transmission and because the absence of mucus (not to mention potential force) is likely to lead to greater tearing and therefore greater chances for infection.[25]

If infected, women are more likely than men to develop serious medical complications. AIDS affects both sexes equally, but most other STDs do not. Ten to forty-five percent of women infected with gonorrhea and ten to thirty percent of women infected with chlamydia develop pelvic inflammatory disease, an upper genital tract infection.[26] Men are not nearly as susceptible to this kind of infection.[27] Of women with pelvic inflammatory disease, one in five will become infertile; one in ten will have an ectopic pregnancy

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[22] *Id*.

[23] *Id*. at 119, 121.

[24] *See infra* at 5.

[25] Holmes, Sparling et al., *supra* note 21, at 120.

[26] *Id*. at 123.

[27] *Id*. at 121.

(in which the fetus implants outside the womb), which is the leading cause of first-trimester deaths among American women in the United States.[28] Certain kinds of genital warts are linked to the development of genital cancers in both sexes, but the genital cancers that women get, cervical, vulvar, vaginal and anal, are fairly common, whereas penal cancer, the only cancer linked to genital warts in heterosexual men, is rare.[29]

Furthermore, women infected with an STD are particularly vulnerable to serious pregnancy complications, including spontaneous abortions, stillbirths, premature rupture of membranes and preterm delivery. The fetuses these women carry are susceptible to central nervous system damage, eye infections (which can lead to blindness) and pneumonia (which can lead to chronic lung disease).[30] Thus, unprotected sex leaves women at greater risk for contracting an STD and if a woman contracts an STD she incurs a substantial risk of physical injuries that men simply do not encounter.

2. Epidemiological Effects

Unprotected sex with an STD carrier is dangerous business. One's likelihood of contracting or

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[28] *Id*. at 123.

[29] *Id*. However, gay and bi-sexual men are also susceptible to heightened rates of anal cancer caused by genital warts. *See* Public Health Seattle & King County, *Anal Cancer Among the Gay and Bisexual Men*, (Jan. 12, 2004), *available at* www.metrokc.gov/health/glbt/analcancer.htm ("Statistics show that the rate for anal cancer in gay and bisexual men (without HIV) is about the same as the rates of cervical cancer in women before pap smears became routine.").

[30] Holmes, Sparling et. al., *supra* note 21, at 123.

giving a STD is linked to one's number of sexual partners,[31] but a few individuals with two or more simultaneous partners who engage in unprotected sex "can play a central role in spread[ing] infection."[32] First-time sexual encounters are particularly important to the epidemiological force of an STD. The *average* person in the United States has sex with six or seven partners over the course of their lives,[33] but the number of sexual partners that people have varies greatly. It is immediately intuitive that an STD is more likely to spread when the average person in a population has a larger number of sexual partners, but the *variance* in number of sexual partners in a population is positively related to the expected replication rate of an STD also. Epidemiologists have modeled the force of an epidemic's "infectivity" in populations with heterogeneous sexual frequency to equal:

$$R_0 = r_0\left(1 + \frac{s^2}{m}\right)$$

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[31] *Id*. at 28.

[32] *Id*. at 32. Of those people infected with an STD, a higher proportion of women than men are only "receivers," that is, they acquired an STD only because of the risky behavior of their partner *Id*. at 59. Unlike many of the gendered effects of STDs, see *infra* text accompanying notes 19-29, this medical conclusion may stem more from social facts regarding sexual behavior than from physiology or biology. Nonetheless, it suggests that not only are women more vulnerable to acquiring and suffering from STDs, they are less culpable in transmitting them.

[33] Tom W. Smith, *Adult Sexual Behavior in 1989: Number of Partners, Frequency of Sex and Risk of AIDS*, 23 FAM. PLANNING PERSP. 102, 103 table 1 (1991).

where $?_0$ is the average number of infections produced by an infected person in an uninfected population, s^2 is the variance of the number of contacts, and μ is the mean number of contacts in the population.[34] R_0 measures the "infector number" (sometimes referred to as "reproductive rate" or "threshold parameter"), the average number of secondary infections produced by a single index case in a population of susceptible persons.[35] The disease rate is stable (or "endemic") when the infector number (R_0) equals one; epidemic when greater than one; and eventually 0 (the disease will die out over time) when less than one.[36]

From the foregoing equation, it is clear that (for a fixed average number of partners) the larger the variance, the larger the epidemiological force of the disease. This means that populations with a larger variance in the number of partners will produce self sustaining epidemics with less infectious STDs. The intuition for the positive impact of variance is that populations with low means but high variances in the

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[34] ROY M. ANDERSON & ROBERT M. MAY, INFECTIOUS DISEASES OF HUMANS: DYNAMICS AND CONTROL (1992).

[35] James C. Thomas & Myra J. Tucker, *The Development and Use of the Concept of a Sexually Transmitted Disease Core*, 176 J. INFECTIOUS DISEASES 134 (Supp. 1996).

[36] This formula assumes a uniform probability that a sexual encounter between an infected and an uninfected person will lead to the uninfected person becoming infected. Thus, the formula remains accurate as long as every pair decides to use a condom with a particular probability. Although this degree of complete uniformity is not likely, and there might be variations within subpopulations, there is little reason to believe that different rates of condom usage make the model wholly inaccurate.

number of sexual partners are likely to exhibit large connected networks of sexual nodes. The few members of the population with many sexual partners are likely to form connections with members of the population who have few other sexual partners. Randomly infecting a node in a high variance network is therefore likely to yield a large epidemic.[37]

The importance of variance to the epidemiological force of infection matters because human sexuality often exhibits extremely high variance in the number of sexual partners. Indeed, as an empirical matter, the distribution of the number of sexual partners is highly skewed to the right. The great majority of people have only one or zero sexual partners in the last year (and only a handful during the course of their lives) but a few people report dozens or even hundreds of partners. The tremendous skew has, through analogy to a variety of physical systems, led some people to suggest the possibility that human sexuality might be an example of a "scale free" network with an infinite variance.[38] If human sexuality is a scale-free

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[37] Robert M. May & Alun L. Lloyd, *Infection Dynamics on Scale-free Networks*, 64 PHYSICAL REV. E 066112 (Nov. 2001).

[38] A scale free network is one where the distribution of connectivity is extremely uneven. In networks where the degree of connectivity follows a power law, the probability P(k) that a node in the network connects with k other nodes is proportional to k^V (where V is between 2 and 3). Albert-Laszlo Barabasi & Albert Reka, *Emergence of Scaling in Random Networks*, 286 SCIENCE 509 (Oct. 15, 1999) *available at* http://www.nd.edu/~networks/Papers/science.pdf. Scale free distributions exhibit infinite variance because the tails of the distribution are sufficiently fat that squaring the deviations from the mean is exponentially greater than the decline in probability mass.

network, policies aimed at reducing the number of unprotected encounters are likely to be highly effective means of reducing infection:

> Another property of scale-free networks is that despite their high susceptibility they are very sensitive to strategic removal of nodes. This turns out to be of importance for the prevention of the spread of STIs because *if only a few very active persons are removed (or change their behavior), the network very soon falls apart in separated components, thus preventing the emergence of epidemics*.[39]

Even if the distribution of sexual partners is not infinite, what is important for policy is that the extreme right skew of the distribution makes the variance so large that the reproductive number for many STDs will exceed the crucial threshold number of one – causing the size of the infection to increase over time – almost regardless of the mean number of sexual partners or the degree of disease infectiousness.

The *average* sexual behavior of most populations is not sufficient to sustain either an epidemic or an endemic STD infection.[40] For example, if everyone had exactly 7 sexual partners during the course of his or her lifetime (so that the variance in the number of partners was zero) most STDs would cease to exist. Rather, "the driving factor of most STDs is clearly the tail of the distribution."41 This minority of people

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[39] Fredrik Liljeros, Christofer R. Edling & Luis A. Nunes Amaral, *Sexual networks: Implications for the Transmission of Sexually Transmitted Infections*, 5 MICROBES AND INFECTION 189 (Feb. 2003).

[40] James Holland Jones and Mark S. Handcock, An assessment of preferential attachment as a mechanism for human sexual network formation, PROC.: BIOLOGICAL SCI. 1123 (2003).

41 H. Stigum, W. Falck, P. Magnus, The Core Group Revisited: The Effect of Partner Mixing and Migration on the Spread of Gonorrhea, Chlamydia and HIV, 120 MATHEMATICAL BIOSCI.1 (1994).

who have many sexual partners – sometimes referred to as "the core" -- crucially determines the force of the infection.[42]

The tremendous skew underscores the importance of first-time sexual encounters to the reproduction of STD infections. While a great deal still needs to be learned about casual sex, it is almost certainly true that the further one goes into the right hand tail of the numerosity distribution, the larger the probability of one-night stands. An individual who has ten or twenty sexual partners in a year is more likely to be having one night stands than a person who has only a single sexual partner in a year. Thus, while one-night stands may represent only a small proportion of all sexual intercourse, they represent a substantial proportion of the force of the infection because they represent a substantial proportion of the nodes of contact. Promoting condom use just on first-time encounters will have a dramatic effect on the rate of STD infection because a substantial proportion of first-time encounters are not followed up by subsequent sexual encounters – and this is particularly true of those few individuals who have a large number of partners. Put differently, promoting condom use for one night stands can reduce the effective size of the right hand tail of the distribution and it is this tail which is so crucial to reproductive force of the infections.

What proportion of sexual relationships are just one-night stands? Unfortunately, we don't know for sure. A national survey of one thousand Americans between the ages of 18 and 65 found that nine percent of respondents reported having had at least 11 "one-night stands" (another twenty-six percent

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[42] Id.

reported having between 2 and 10).[43] A 1991 survey of Texas college students found that twenty-four percent of those sampled reported having two or more one night stands in just the last year.[44] The proportion of sexual relationships that are one night stands is important because reducing infections in one-night stands might represent a dramatic way to reduce the epidemiological power of STD infections. If it turns out that the magnitude is thirty percent or higher, it one night stands could be a "but-for" cause of most STD epidemics. If people used condoms in first sexual encounters we would dramatically disarm this but-for cause.

The idea of intervening to promote condom use in casual sexual encounters has been the corner stone behind Thailand's recent one hundred percent condom use policy, pursuant to which the state has provided free condoms in brothels.[45] It is also the basis of the "ABC" approach -- abstinence, be faithful, condom use – to AIDS prevention.[46] The "be faithful" component is often shorthand for a strategy of

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[43] Adam Marcus, *One-night Stands Are Not That Rare, Survey Says*, HEALTH SCOUT REP. (2003) *available at* http://adutopia.subportal.com/health/Love_Sex_Relationships/Sex/110905.html.

[44] K. G. Hursey et. al., *Effects of AIDS Education on Knowledge, Attitudes, and Behavior*. Presentation: American Psychological Association, San Francisco, CA, (1991) *available at* http://dataguru.org/love/sexstd/index.asp.

[45] Nicholas Ford & Suporn Koetsawang, A Pragmatic Intervention to Promote Condom Use by Female Sex Workers in Thailand, 77 Bull. World Health Org., 888 (1999).

[46] John D. Shelton, Daniel T. Halperin, Vinand Nantulya, Malcolm Potts, Helene D. Gayle, King K. Holmes, *Partner Reduction is Crucial for Balanced "ABC" Approach to HIV Prevention*, 328 BRIT.

partnership reduction which will reduce the right-hand tail of the distribution.[47] Enhanced condom use in casual or short-term sexual relationships can have the same effect without reducing the actual number of partners. Because effective condom use largely eliminates the probability of infection for many types of STDs, it is as if many of these one-time encounters did not exist. Changing behavior in just the first encounter is accordingly the kind of target policy that might pay huge dividends in disintegrating the network of infection.

B. Emotional Dangers of Nonconsensual Sex

The dangers of sex are not limited to disease. Sex is emotionally dangerous as well, because in addition to their physical qualities, most sexual acts have enormous emotional content.[48] Some scholars and probably most people simply accept that there is emotional vulnerability in sex.[49] Others, though, have tried to minimize the emotional content of sex, either for pedagogical or policy reasons.[50] There are advantages

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MED. J. 891 (2004).

[47] *Id*. at 891 ("Behavior change programs to prevent HIV have mainly promoted condom use or abstinence, while partner reduction remains the neglected component of ABC.").

[48] The physical dangers of STDs bring their own emotional harm, but here we focus on the emotional dangers of non-consensual sex.

[49] STEVEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 100, 117 (1999).

[50] *See* RICHARD POSNER, SEX AND REASON (1992) (Posner seeks to have his readers see sex as a rational act as understood pursuant to his "bio-economic theory"); Donald Dripps, *Beyond Rape: An*

to minimizing the emotional content of sex because if sex is not experienced or idealized as a deeply emotional encounter, then one stands to lose less emotionally if the encounter does not go well. Forced, coerced and simply unwanted sex would likely be less injurious if what was being forced, coerced and taken was not seen or experienced as anything more than a physical act.

Critiques of the attempts to minimize the emotional content of sex suggest, however, that to take the emotional content out of sex is to rob sex, and indeed humanity, of critical, self-constitutive meaning. As Martha Nussbaum points out, at times, the excruciating toll that the emotional content of sexual desire takes on peoples' souls is a core literary tradition.[51] This tradition teaches that risking emotional loss is necessary if we are to "expose [ourselves] to real joy."[52] Robin West suggests that when we think of our sexual experiences as physical exchanges, experiences that do not necessarily involve one's soul or one's self "we justifiably think of ourselves as being in some way deadened in the process."[53] "Ideally - and it may be an

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Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780 (1992) (Dripps endorses a co-modified view of sex so that the crime of rape involves the theft of that commodity); LINDA HIRSHMAN & JANE LARSON, HARD BARGAINS: THE POLITICS OF SEX (1998) (Hirshman and Larson endorse a "bargaining approach to sexual regulation," so that women who bargain in sexual exchanges can be protected by laws that govern the marketplace and labor markets, instead of being abandoned because of the law's resistance to adjudicate emotional, personal issues.)

[51] Martha Nussbaum, *Only Grey Matter?* , 59 U. CHI. L. REV 1689, 1724-26 (1992)

[52] *Id*. at 1721

[53] Robin West, *Legitimating the Illegitimate,* 93 COLUM L. REV. 1442, 1451 (1993).

ideal worth holding on to - the 'self' is given with the giving of sex."[54] Sex is emotionally dangerous because if one experiences it as an emotional act, one runs the risk of profound loss and rejection.

The emotional injury associated with sex is not limited to feelings of loss and rejection, however. The harm done by nonconsensual sex is often described as closer to fatal. When one is raped, sex is taken, not given. Rape in a world in which the emotional content of sex is minimized is a violent physical act.[55] Rape in a world in which the emotional content of sex is idealized is a violent emotional act as well. One's ability to make oneself vulnerable in a manner that enables the self-constitutive, joyful giving of self in sex becomes compromised after rape because sex has been experienced not only as physically violent, but as devoid of compassion and self. It is an experience not of being rejected, but of being invaded and overcome. That is why the literary tradition teaches us that rape is akin to spiritual murder.[56] Once one has

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[54] *Id*.

[55] Even if there is no struggle, "unwanted sexual penetration involves unwanted force, and unwanted force is violent "it is physically painful, sometimes resulting in internal tearing and leaving scars." *Id*. at 1448.

[56] Consider these two passages describing the feelings of women being raped:

> The screams tried to break through her corneas out into the air, but the tough rubbery flesh sent them vibrating back into her brain, first shaking lifeless the cells that nurtured her memory. Then those went that constrained her powers of taste and smell. The last that were screamed to death were those that supplied her with the ability to love - or hate.

GLORIA NAYLOR, THE WOMEN OF BREWSTER PLACE 170 (1982);

> Charlotte felt Charlotte pass from her, she felt herself pass over into the noise . . . not a person, not a girl, not even a body rigid with terror but noise, shouts, blows. . . . Pain or spasms of pleasure, what did these matter? . . . Love, hate, pleasure, pain: they were identical, descending into the firmest most stubborn layer of life, a vegetative neutrality.

been raped, it becomes very difficult to make love.[57]

1. Reckless Disregard for Consent

The traumas associated with rape would not necessarily make sex dangerous if the line between sex and rape were clear. If sex was sex and rape was rape, then sex would bring with it the emotional risk of rejection, but not annihilation. The line between sex and rape is far from clear though, either for the participants or for society at large.[58] Men who acknowledge using force to get sex are often confused about whether they actually raped because not all women resist in the same way; some men simply assume consent if there is little resistance.[59] Women are confused about their own role in expressing consent and often feel responsible for any failure to communicate non-consent.[60] One prominent researcher has

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JOYCE CAROL OATES, "The Assault," THE GODDESS AND OTHER WOMEN, 438, 460 (1974).

[57] SUSAN BRISON, AFTERMATH 11 (2002) .

[58] Consider the comments of both Richard Posner and Catharine MacKinnon. "[R]ape appears to be primarily a substitute for consensual sexual intercourse. . . . " Posner, *supra* note 52, at 384 (footnotes omitted). "[T]he wrong of rape has proved so difficult to define became the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989) (footnote omitted).

[59] Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 102 (1984)

[60] Ronald Berger et al., *Sexual Assault in a College Community*, 19 SOC. FOCUS 1, 16 (1986).

concluded that when rape happens early in a relationship, misperception is likely the primary cause.[61] In one of the most comprehensive studies on sexual practices in the United States, University of Chicago researchers found that twenty-two percent of women reported having been forced to do something sexual, while only three percent of men admitted to having used force.[62] To quote the authors, "there seems to be not just a gender gap, but a gender chasm in perceptions about when sex was forced."[63]

What this means is that one person's sex can be another person's rape. That is why casual sex is so emotionally dangerous; it might actually feel like rape to one of the participants. And, like most of the physical dangers associated with sex, these emotional dangers are visited disproportionately upon women. This is true both because women, on average, seem to view sex as more emotionally laden than do men,[64] and because in those cases in which one person's sex is another person's rape, it is almost uniformly women who experience the act as rape.[65]

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[61] R. Lance Shotland, *A Theory of Courtship Rape: Part 2*, 48 J. SOC. ISSUES 127, 129-130 (1992).

[62] Michael et. al., *supra* note 40, at 223.

[63] *Id*. At 227.

[64] For a discussion, *see* Katharine K. Baker, *Unwanted Supply, Unwanted Demand*, 3 GREEN BAG 103, 108-09 (1999) (reviewing STEPHEN SCHULHOFER, UNWANTED SEX (1999)).

[65] All of the previously referenced studies of acquaintance rape, *see supra* notes 58-64, involved men raping women.

2. Acquaintance Rape and Unprotected First Encounters

The miscommunication, or lack of communication, that characterizes many acquaintance rapes can often be traced to recklessness. Recklessness can lead a man to complete the sexual act heedless of the consequences. From this perspective, it should not be surprising that acquaintance rapists rarely use condoms. Our interviews with both college rape counselors and with prosecutors underscore this basic correlation. Seasoned rape crisis counselors tend to report that condoms were "very rarely used" during acquaintance rape.[66] Prosecutors report that few legal complaints of acquaintance rape concern protected sex.[67] A review of recent Westlaw cases found that less than one percent (52 out of 5898) of reported rape decisions in 2003 mention the use of a condom.[68] Whether acquaintances or strangers, rapists tend not to

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[66] Research assistants called dozens of rape crisis centers seeking information on the prevalence of condom use in acquaintance rape. A majority of the respondents were reluctant because of confidentiality concerns to share even the most general impressions about condom use. Others claimed that they had no impressions. But of six rape crisis centers that did respond, two reported that condoms were "very rarely used;" one reported that "hardly ever used;" one reported that condoms were used in sixteen to twenty-five percent of the time but emphasized that this was merely a general impression; one reported "not often;" and one reported "more often than not." Only two of the respondents (one "very rarely used" and one "hardly ever used") were reported as being particularly confident in their assessment.

[67] We confidentially contacted a handful of prosecutors.

[68] The 5898 rape decisions were found in a Westlaw search of all state and federal cases containing the word "rape!". The 52 cases mentioning condom use were found by first searching the same data set for

use condoms.[69]

Rapists also tend to rape in first time sexual encounters. In 2002, National Crime Victimization Survey found that eighty-four percent of non-stranger, non-incest rapes were committed by "friends/acquaintances" as opposed to "intimates."[70] Similarly, a national study of college rape victims found that more than sixty percent of acquaintance rapes occurred in the context of "non-romantic" or "casual dating" (as opposed to "steady" relationship).[71] Nine percent of women age 15-24 say their very first sexual experience was forced.[72] Rape does occur in subsequent sexual encounters. Researchers sometimes refer to this as "intimate partner rape" or "rape within sexually active couples,"[73] but the data suggests that a

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"rape! &condom" and then reading the individual cases to verify whether the case referenced the defendant's use of a condom.

[69] Prosecutors did mention contexts in which condoms were more likely to be used– for example, in cases where the rapist drugged the victim.

[70] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 199994 *National Crime Victimization Survey*: *Criminal Victimization, 2002* (August 2003).

[71] Mary P. Koss, Thomas E. Dinero, Cynthia Serbel & Susan Cox, *Stranger and Acquaintance Rape: Are there Differences in the Victim's Experiences?*, 12 PSYCHOL. WOMEN Q. 121 (1988).

[72] Mary Rogers Gillmore et. al., *Heterosexually Active Men's Beliefs About Methods for Preventing STDs*, 35 PERS. SEXUAL & REPROD. HEALTH 121 (2003).

[73] Researchers distinguish between acquaintance rape that takes place between couples who have "not yet engaged in sexual intercourse" and those who have. R. Lance Shotland, *A Theory of the Causes*

majority of non-incest, acquaintance rapes are unprotected first sexual encounters.

* * *

Stepping back we can now see that there are deep parallels between the physical and emotional harms of reckless sex, and unprotected first-encounter sex plays a crucial role in the incidence of both. To be sure there are many instances of unprotected first-encounter sex that do not result in the spread of infection or in non-consensual sex. (There are also many instances of driving while intoxicated that do not result in an automobile accident.) Still, unprotected first encounter sex is dominantly responsible for the right tail in the distribution of sexual contacts,[74] and it is this right tail that gives such power to STD epidemics. Unprotected first encounter sex is also the occasion for a substantial proportion of acquaintance

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of Courtship Rape: Part 2, 48 J. SOC. ISSUES 127. The distinction is important because intimate partner rape tends be more violent than first-encounter acquaintance rape. Koss et. al., *supra* note 71. Moreover, the problem of rapists' misperception and miscommunication that loom large with regard to first-encounter acquaintance rape are less like to be present with regard to intimate partner acquaintance rape. Our efforts here are directed to the former category.

[74] There are indications that public health organizations are beginning to stress the importance of unprotected first-encounter sex in determining the power of STD epidemics. For example, cross country U.N. databases are beginning to collect information such information, including "reported condom use with a non-regular sex partner. OFFICE OF SUSTAINABLE DEVELOPMENT, *Health and Family Planning Indicators: A Tool for Results Frameworks, Volume I, available at* http://sara.aed.org/publications/cross_cutting/indicators/html/indicators1.htm.

rapes. Moreover, both of these harms are visited disproportionately on women.

II. The Current Legal Landscape

The last section showed that *when combined* two attributes of sex –sex that is a first encounter between two particular people, and sex that is unprotected – are strongly linked to both STDs and acquaintance rape. In light of these findings, we argue that the law should punish unprotected first time sexual encounters. Although this proposal, as a whole, is novel, several of its constituent parts are not. In a variety of different ways, the law already addresses the difference between first time and subsequent sexual encounters, the meaning of protected versus unprotected sex, and the physical endangerment that sex can create. The following sections explore each of these areas of the law.

A. First Encounters and Consent

At first blush, it might seem that the law does not explicitly distinguish between first and subsequent sexual encounters in the regulation of sexual assault. After all, rape is rape. But it has always been more difficult to prosecute rape in a case involving two people who have had a previous sexual relationship. The most prominent historical example of this was the de jure immunity of spouses to certain forms of rape prosecution. Many aspects of the marital immunity have been repealed, but remnants of it are still retained in several states.[75]

[75] Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1472 (2003) ("[T]wenty states grant marital immunity for sex with a wife who is incapacitated or unconscious and cannot consent. Fifteen

Indeed, the narrowing of the spousal immunity has been accompanied by a broadening of the scope of relationships entitled to distinctive treatment. The expansion of covered relationships began in 1962 when the Model Penal Code extended its marital rape immunity to include any "persons living as man and wife, regardless of the legal status of their relationship."[76] The expressly disparate treatment of first- and subsequent encounter sex can be found in today's Model Penal Code which downgrades first-degree rape to second degree if the victim "previously permitted [the assailant] sexual liberties."[77] Professor Anderson explains that several states followed suit, "Delaware, Hawaii, Maine, North Dakota, and West Virginia enacted statutes that gave partial immunity to men who sexually assaulted women who had previously permitted them sexual contact. If a man had previous consensual sex with a woman, he could not be convicted of raping her.'[78]

The disparate regulation of first- and subsequent encounter sex is also seen in the scope of rape shield laws. In recent years, forty-eight states and the District of Columbia passed some form of rape shield law.[79] While these laws generally exclude evidence of a victim's prior sexual history, nearly all jurisdictions,

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states grant marital immunity for sexual offenses unless requirements such as prompt complaint, extra force, separation, or divorce are met.).

[76] MODEL PENAL CODE § 213.6(2) (2001).

[77] MODEL PENAL CODE § 213.1(1)(d) (2001).

[78] Anderson, *supra* note 75, at 1521.

[79] Michelle J. Anderson, From Chastity Requirements to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51 (2002).

by statute or judicial decree, contain an exception: prior sexual behavior between the complainant and the defendant himself will not be excluded.[80]

The admission of evidence of prior sexual behavior, like the expanded immunity for subsequent sexual encounters, has everything to do with presumptions about victim consent. As Professors Bryden and Lengnick see it:

> Although previous consensual sex is obviously not conclusive evidence of consent on the occasion in question, nearly all commentators regard it as relevant, including thinkers as diverse as Susan Brownmiller, Herbert Wechsler, Susan Estrich, and Menachim Amir. At least superficially, this sort of evidence seems superior to evidence of intercourse with other men.[81]

Outside of formal legal rules, these disparate presumptions about consent may also impact police, prosecutor and jury behavior. Professor Anderson reports, "[p]olice frequently have been unresponsive or hostile to women who report having been raped by their intimate partners. Some women have had to lie to police to get them to respond to rapes by intimates."[82] Police are also more likely to find a complaint of subsequent encounter rape to be unfounded.[83] Moreover, "rape scholars report that, if the defendant and his accuser had previously been lovers, juries are extremely reluctant to convict him."[84]

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[80] Anderson, *supra* note 75, at 1524.

[81] David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1283 (1997).

[82] Anderson, *supra* note 75, at 1525-26.

[83] Anderson, *supra* note 75, at 1525 to 1526.

[84] Bryden & Lengnick, *supra* note 81, at 1201.

As a matter of raw statistics, the empiricism of the last section suggests that a much larger proportion of first sexual encounters than subsequent sexual encounters are non-consensual.[85] Instead of reflecting this difference through the scope of first degree rape, rape shields or police investigation policies, our proposal creates a less punitive but broader crime that focuses in part on the serious problem of non-consensual first encounter sex.[86]

B. Condoms and Consent

Prior sexual activity with the defendant is just one of many factors the law considers when evaluating rape. Another, even more controversial factor, is the presence of a condom. Most of the controversy of the relevance of condoms started with a single, well-publicized incident in Travis County, Texas. On September 17, 1992, Joel Rene Valdez, a 27-year-old house painter, entered into the victim's house with a

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[85] Excluding incest, the statistics suggest there are more first-encounter acquaintance rapes than subsequent encounter acquaintance rapes while there are far fewer acts of first-encounter sex than subsequent encounter sex. *See* CALLIE M. RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 1998 (1999).

[86] We reject the idea of immunizing intimates from the possibility of first-degree rape prosecution. "Intimate or not, rape is rape." Still, in the next section we will embrace the idea of immunizing intimates from the separate crime of reckless sexual conduct. Indeed, by giving countenance to the heightened probability of non-consensual sex with regard to first encounter sex, we might free criminal law to narrow the immunities for subsequent encounter sex with regard to the more traditional crimes of sexual assault.

knife, held the knife to her, and began assaulting her. The victim then requested that Valdez use a condom, which he did. Later, the county prosecutor brought the evidence to a grand jury, which refused to indict. While the grand jury proceedings were secret, one grand juror "later told an Austin television station that some jurors believed that the woman's act of self-protection [by requesting a condom] might have implied her consent."[87] Valdez's defense lawyer was reported to say: "Consent is the only issue in a rape case, and my client feels that the use of a condom implied consent."[88] The idea that a grand jury would refuse to indict because the victim of a stranger rape requested a condom sparked immediate public outrage. Prosecutors brought the case before a new grand jury one week later and the new grand jury promptly indicted Valdez, who was eventually sentenced to 40 years in prison.[89]

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[87] Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at 18; *see also Nobill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman's Request*, HOUSTON CHRON., Oct. 10, 1992, at 30.

[88] Milloy, *supra* note 87.

[89] Christy Hope, *Rapist Gets 40 Years: Consent Defense in Condom Case Unsuccessful*, DALLAS MORNING NEWS, May 15, 1993, at A33; *see also Condom Plea Not Consent Court*, HERALD SUN, May 14, 1993 (saying that the conviction "[drew] cheers in the courtroom"). Prior to his conviction, Valdez had argued that the request for a condom meant consent on both *Donahue* and in a tape-recorded statement played during the trial. Roy Bragg, *Woman Tells of AIDS Fear in Rape Case; Defendant Claims Condoms She Gave Him Implied Consent*, HOUSTON CHRON., May 12, 1993, at A1. However, the Travis County district attorney David Counts obvserved:

In response to the Texas case, California and Florida passed statutes regulating evidence of condom use to prove the issue of consent. Although the wording of the statues is slightly different,[90] both have been interpreted narrowly,[91] allowing condom use to come in as relevant to the issue of consent, but not allowing the condom use to be the exclusive evidence of consent. Court decisions in other jurisdictions have also eschewed any *per se* rule infering consent from either a victim's request or defendant's use of a condom,[92]

[T[he jury in the Valdez case was so clearly offended by the condom defense that the defense attorney did not mention it in closing arguments. [It] just doesn't fly. Jurors have common sense. This is not the 1930s, where people think premarital sex hardly exists. The condom defense represents a backwoods attitude.

Cindy Loose & Patrice Gaines, *Condom Doesn't Mean Consent, Jury Says*, WASH. POST, July 14, 1993, at C3.

[90] *See* CAL. PENAL CODE § 261.7; *see also* FLA. STAT. § 794.022(5) (Rules of evidence for Sexual Battery).

[91] A California court held, "the jury . . . could consider the alleged victim's request that a condom be used – or in this case, the alleged victim's purchase of condoms – but that it could not determine that she had consented based solely on that evidence. People v. Mokres, 2003 WL 22475856 (Cal. Ct. App. 2003). A Florida court held, "[u]nder the statute, condom use is a factor which can be argued and considered, but is not dispositive standing alone . . ." Strong v. State, 853 S.2d 1095 (Fla. Dist. Ct. App. 2003).

[92] *See* United States v. Robinson, 2003 WL 21786065 (N.M.Ct. Crim. App. 2003)

but courts do tend to admit evidence of a request to use a condom as evidence bearing on the issue of consent.[93]

What is most important for this article, however, is that courts in limited circumstances have taken the non-use of a condom as evidence of non-consent. For example, in *State v. Ferguson*,[94] a Washington court upheld a second-degree assault conviction of a defendant who intentionally exposed a woman to HIV. The defendant argued that the woman's consent to sex was a defense to the charge. The court found that the woman in question "clearly consented to sex with a condom," but found that consent to protected sex with an HIV infected man could not be construed as consent to the unprotected sex that actually occurred.[95]

Similarly, in *Tyson v. State*,[96] an Indiana appellate court found evidence of a request for condom use to be evidence that the woman was not consenting to unprotected sex. In this case, the victim, D.W., had said to the defendant, "Please put a condom on," and, "I don't need a baby." On appeal, the defendant argued that the jury should have been instructed that from this evidence the defendant might reasonably have believed the victim had consented. In rejecting this argument, the court reasoned:

> [The victim's request], by itself, does not reasonably support the inference that D.W. consented to sexual intercourse. However, D.W.'s request, along with Tyson's response, that he would prefer to 'ejaculate [ ] on her stomach and leg,' and Tyson's after-intercourse statements—'I told you I wouldn't come in you. Don't you love me now?'—suggest only the inference that Tyson was aware

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[93] *In re* J.J., 2000 WL 210440 (Iowa Ct. App. 2000).

[94] 1999 WL 1004992 (Wash. Ct. App. 1999), *aff'd in part and rev'd in part for other reasons*, 15 P.3d 1271 (Wash. 2001).

[95] Ferguson, 15 P. 3d at 638 n. 32.

[96] 619 N.E.2d 276 (Ind. Ct. App. 1993).

that D.W. did not consent to unprotected sexual intercourse.[97]

The victim's request that her assailant use a condom did not constitute consent to sexual intercourse, but rather (in consideration with other evidence) expressed *non-consent* to unprotected sexual intercourse that actually occurred**.**

What should be clear is that the law already finds the use of condoms relevant, though not necessarily determinative. Our statute elevates the legal importance of condom use both because we agree with the courts that have already found that in particularized settings, non-condom use can be indicative of non-consent, [98] and because of the separate epidemiological harm of unprotected sex.

C. Condoms and Reckless Physical Endangerment

Finally, before proceeding with our proposed statute, it is important to recognize that there is currently some legal protection against reckless physical endangerment caused by sexual activity. Under the Model Penal Code, a person who, knowing he was infected with an STD, had unprotected intercourse without informing his partner of his condition might well be guilty of reckless physical endangerment.[99] Some states have enacted more particularized crimes of sexual endangerment. For example, California Health &

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[97] *Id.* at 295 n.24.

[98] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 782 (W.D. Va. 1996), *rev'd,* 132 F.3d 949 (4th Cir. 1997), *reh'g granted en banc and opinion vacated,* 169 F.3d 820 (4th Cir. 1999) (emphasizing that defendants did not use condoms). *See also U.S. Appeals Court to Hear Case Alleging Rape*, WASH. POST, Feb. 8, 1998, at B3.

[99] MODEL PENAL CODE § 211 (2001).

Safety Code § 12029 provides:

> "(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years.

The phrase "unprotected sexual activity" is expressly defined in the statute to mean "sexual activity without the use of a condom."[100] For people who know themselves to be infected, California's statute imposes a requirement to either disclose this information to their partners or use a condom. Missouri also has an HIV prevention statute. It puts an unconditional duty of disclosure on infected persons who engage in sexual activity regardless of whether or not they use condoms.[101]

At first, Missouri's unconditional duty seems attractive. Condoms sometimes break and uninfected people might reasonably want to know that they are assuming the risks associated with breakage in choosing to have sex with an infected person. But the Missouri statute may provide weaker incentives for

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[100] *Id.* § 12029(b)(2).

[101] Prohibited Acts, Criminal Penalties, MO. ANN. STAT. § 191.677 (West 2002):

> It shall be unlawful for any individual knowingly infected with HIV to . . . (2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV, in one of the following manners: (a) Through contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal sexual intercourse . . . . 4. The use of condoms is not a defense to a violation of paragraph (a) of subdivision (2) of subsection 1 of this section.

See also Prostitution, *Id.* § 567.020 (West 2002) ("Prostitution is a class B misdemeanor unless the person knew prior to performing the act of prostitution that he or she was infected with HIV, in which case prostitution is a class B felony. The use of condoms is not a defense to this crime.").

condom usage. In Missouri, an infected person who uses a condom still runs a risk that his or her partner will claim that he or she was never told of the infection. Condom use won't give an infected person any legal advantage, so he may well not use one at all. This could lead to more infections. In the next section, our proposal for a new crime of reckless sexual conduct will cleave closer to the California structure. Like California's statute, we will ask men to either use a condom or communicate more thoroughly with their partners. And like California's statute, condom use will provide a safe harbor from liability.

Currently, notwithstanding the California and Missouri statutes, the legal regulation of physical sexual endangerment is incomplete and sporadic and the legal regulation of emotional sexual endangerment is nonexistent. Cases alleging acts of physical endangerment based on unprotected sex have been brought and won against people infected with HIV,[102] but we have found only one (very old) case involving another STD.[103] There simply is no crime of reckless emotional endangerment. The failure of the law to address emotional injuries associated with nonconsensual sex is a serious problem because, as mentioned, physical injury is often not the gravamen of the harm in rape. If the essential harm of rape can be an emotional harm, it would make sense to penalize its reckless infliction. Our proposed criminalization of reckless sexual

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[102] *See, e.g.*, People v. Dembry, 91 P.3d 431 (Colo. App. 2003); Smallwood v. State**,** 680 A.2d 512 (Md.1996).

[103] *See* Alan Stephens, *Transmission or Risk of Transmission of Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS) as Basis for Prosecution or Sentencing in Criminal or Military Discipline Case*, 13 A.L.R.5th 628 (1993). *But see* State v. Lankford, 29 Del. (6 Boyce) 594, 102 A. 63 (Del. 1917) (assault and battery conviction for syphilis).

conduct is tailored to do just that.

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The last section showed that two dimensions of sexuality (first encounters and the lack of protection) are statistically related to two societal harms (STDs and non-consent). These four permutations are depicted in Figure 1.

		Type of Societal Harm	
		STD	Non-Consent
Type of Sexuality	First Encounter		Marital/ Relationship Exceptions
	Unprotected	Reckless Infliction; Public Health Codes	Valdez and Its Progeny

The big picture is that the law sporadically and in very limited ways has already taken notice of three of these four causal permutations -- the connection between first-encounter sex and consent, the connection between unprotected sex and consent and the connection between unprotected sex and the spread of STDs. The missing fourth category, which we can now see is conspicuous by its absence,[104] is legal rules

[104] Guido Calabresi and Doug Melamed famously noticed a missing fourth category in a two-by-two box. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

reflecting the causal connection between first-encounter sex and the spread of STDs.[105] In the next section we will try to fill this gap by proposing a law that is sensitive in a more systematic way to both first-encounter *and* unprotected sex.

III. The Affirmative Case for Criminalizing Reckless Sex

This section lays out our affirmative case for a new crime of reckless sexual conduct. To put it simply, our goal is to promote condoms and communication for first-encounter sex. The first section showed that promoting condom use for this small subset of human sexuality could make progress on the problems of both sexually transmitted disease and acquaintance rape. Because condoms contain the viruses and bacteria that can be transmitted during intercourse, they prevent the spread of virtually all STDs. Because condom use requires deliberation and some patience, expanded condom use is also likely to decrease those instances of intercourse in which one party fails to understand that the other party does not wish to engage in intercourse. Though not as explicit in its communication-forcing as those rules that require

[105] One might see the targeted regulation of bath houses as indirectly growing out of just this concern. See RANDY SHILTS, AND THE BAND PLAYED ON (1988) (discussing the controversy surrounding the decision of the San Francisco Public Health Director to close public bath houses in 1980 to help prevent the spread of AIDS and other STDs). *See also* Thomas Farley, *Cruise Control*, WASH. MONTHLY, (Feb. 2001) http://www.washingtonmonthly.com/features/2001/0211.farley.html.

verbal consent before initiating a move to a higher level of sexual intimacy,[106] a default requirement of condom use would likely have comparable information-forcing effects.[107] The application of a condom usually requires some interruption, a break from being carried away by the passion of the moment. It is that interruption - that pause - which is likely to give both parties the opportunity to ascertain and correct the kinds of misperception that can lead to rape. It gives all parties a required chance to re-assess the situation and make sure the sexual intimacy should continue.

In what follows, we will show how, from three alternative analytic perspectives, the criminalization of reckless sex is likely to increase condom use. From an individualistic, rational-actor perspective, the law promotes condom use by raising the cost of unprotected sex. From a behaviorist perspective, the law appropriately offsets and harnesses cognitive biases. And from a social norms perspective, the law expresses a gentle nudge towards the use of condoms. The next sub-section presents a model statute of our proposed law. We then attempt to show from rational actor, behavioral, and norm perspectives, that the predictable consequences of criminalizing reckless sexual conduct will decrease the rate of both STDs and acquaintance rape.

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[106] Antioch College adopted such a policy in 1993. *See* Phil McCombs, *Taking a Look at Love*, WASH. POST, Feb 16, 1996, at F5.

[107] For more on the value of information-forcing default rules, *see* Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 127-130 (1989).

A. A Model Statute

To be precise about the contours of our proposal, we present here a model statute and in the margin briefly discuss a few drafting choices:

> **Reckless Sexual Conduct**
>
> (1). A person is guilty of reckless sexual conduct when the person intentionally engages in unprotected sexual activity with another person who is not his or her spouse and these two people had not on an occasion previous to the occasion of the crime engaged in sexual activity.
>
> (2). Affirmative Defense: Notwithstanding Subsection (1), it shall be an affirmative defense to any action brought under this article that the person, with whom the defendant had unprotected sex, expressly asked to engage in unprotected sexual activity or otherwise gave unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected.[108]

[108] A woman's past consent to unprotected sex should not be admissible to show that she likely consented this time. We reach this result in accordance with both the policies underlying rape shield laws, *see e.g.*, FED. R. EVID. 412, and the policies underlying the much older and time-tested statutory and common law prohibition against using prior acts to show action in conformity therewith. *See e.g.*, FED. R. EVID. 404. But as with current rape shield laws there would likely be some exceptions. For example if Kobe Bryant were prosecuted under our statute and if the prosecution intended to introduce evidence of

(3). Definitions:

(a) "Sexual activity" means vaginal or anal penetration accomplished with a male or female.[109]

(b) "Unprotected sexual activity" means sexual activity without the use of a condom.[110]

(c) "Occasion of the crime" includes the 12 hour period after the two people engage in sexual activity for the first time.[111]

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vaginal injury to rebut a defense of consent, we would allow the defendant to introduce evidence of other recent sexual partners as a potential cause of the injury.

[109] While included as a definition of "sexual activity," it is our intent that a prosecutor should prove beyond a reasonable doubt that the defendant and the person with whom he or she had unprotected sex are not married. The number of non-consensual first encounters among people who are married is ravishingly small. The statute allows those few couples who do wait until their wedding night to forego a condom when they do so. For those who find any marriage immunity to be an anathema, the words "who is not the spouse of the perpetrator" could be deleted.

[110] This definition is intended to include both the male and the female condom. It would immunize defendants from prosecution even if they used a non-latex condom. An alternative version of the statute might insert the word "latex" before "condom" in this definition.

[111] The purpose of this section is to create a 12 hour window of scrutiny surrounding the first-sexual encounter of a particular pair. Under this section, a defendant could not avoid liability by arguing that he

(4) Sanctions:

(a) Sentence: The crime of reckless sexual conduct is punishable by imprisonment in the state prison for three months, or a fine.

(b) Sexual Offender Status: The court shall not register a person as a sexual offender because the person was found guilty of reckless sexual conduct.

B. A Rational Actor Analysis of the Statute

This statute, only 200 words long, would increase the use of condoms. Because condom use is a safe-harbor, which makes first-encounter sex fall outside the scope of the statute – couples (and, as we will argue below, particularly men) will have an incentive to use condoms to avoid the risks involved in having to establish the affirmative defense (that the other person solicited or unequivocally indicated consent to unprotected sex).

1. Decreases in Both Unprotected and Non-Consensual Sex

This general shift toward protected sex can be decomposed into different components. Figure 2 divides the landscape of sexuality into a stylized 2-by-2 box. One dimension distinguishes between sex that is protected and unprotected; and the other dimension distinguishes between situations where a potential defendant does and does not have sufficient indications of consent. Acquaintance rape would live in the

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and the other person used a condom for their first sexual encounter and then later within the 12 hour period engaged in unprotected sex. To fall outside the scope of section (1), all sexual activity within the first 12 hours of the first sexual activity (i.e. the first penetration) would need to be protected.

"insufficient" consent row.

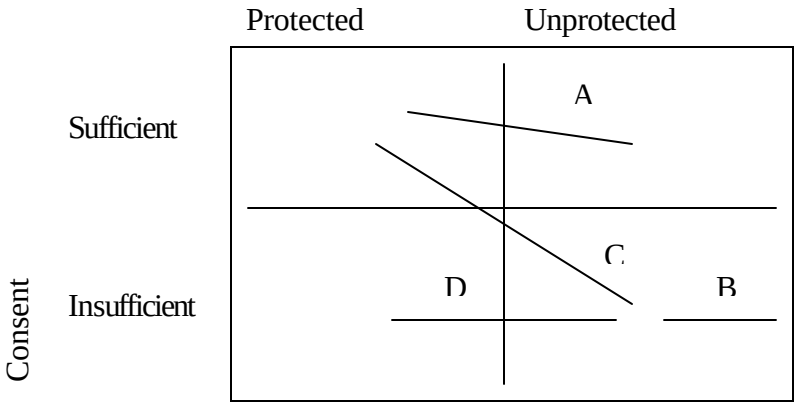

Figure 2: Three Predicted Shifts in Sexual Activity Caused By Criminalization

Some couples who would engage in unprotected consensual sex will shift to protected consensual sex. Because the lack of protection will be consensual, they would not need to avoid the statute, but in order to eliminate any strategic or spiteful use of the statue by a partner later, they will use protection. This shift is depicted by arrow A. This movement is clear progress in the fight against STDs.

For other couples, the act of attempting to put on a condom will present an opportunity for the parties (primarily women) to better express whether or not they truly consent. The result of this improved communication will be to more explicitly inform men that sex (either protected or unprotected) is not wanted. Studies suggest that at least some acquaintance rapists will not proceed if they truly learn the woman is not consenting.[112] This reduction in the amount of unprotected, unconsensual sex is depicted by arrow B and would be clear progress in the fight against acquaintance rape. It would also reduce the rate of

[112] *See supra*, notes 58-65 and accompanying text (discussing the relationship between many acquaintance rapes and confusion regarding whether both parties had consented to the sexual intercourse).

STD transmission.

At other times, the opportunity for clearer communication will lead to better evidence of genuine consent. This condom-induced opportunity for communication is an opportunity for a conversation about sex that may make both parties feel more in control of their decisions. Thus some of the unprotected, ambiguously consensual sex in the shadow of the new crime will become protected, consensual sex. This transformation is depicted by arrow C – and it represents progress in the fights against both STDs and acquaintance rape.

Finally, some men who had been engaging in unprotected, nonconsensual sex will opportunistically substitute toward protected, nonconsensual sex in order to fall inside the protection of the statute. This shift is depicted by the arrow D. Movements along the insufficient consent row do not reduce the amount of acquaintance rape. Nevertheless, the movement toward condom use still has a beneficial effect with regard to the spread of STDs. Protected acquaintance rape, though still rape, produces lower risks of infection (and pregnancy) than unprotected acquaintance rape. Protected acquaintance rape will not extinguish the emotional harm of acquaintance rape, but it will reduce the physical harm. This is one of the reasons that some rape victims ask that their assailant use a condom.

Thus, hyper-rational actors are likely to substitute toward condom use and/or conversation in the shadow of a law that requires that a man either use a condom or stand ready to prove, by a preponderance of the evidence, that his partner gave unequivocal indications of consent. On several margins, we would expect to see a reduction in unprotected, first encounter sex (represented by arrows A, C and D). And on one margin, we would expect to see not just a shift in the type of sexuality but an absolute reduction in the level of sexuality (arrow B). Because of increased communication (and because nonconsensual sex is

harder to accomplish with a condom) we expect that, in the shadow of the new law, some men who previously would have engaged in acts of unprotected, non-consensual sex acts will stop having sex.[113]

2. Decreases in Justice System Error

In addition to these four margins of benefit, the criminalization of reckless sexual conduct is likely to decrease the overall "errors" in the criminal justice system. At present we are stuck in an equilibrium where it is widely acknowledged that a large percentage of all acquaintance rapists go unpunished. After reviewing data from several jurisdictions, the Senate Judiciary Committee concluded that ninty-eight percent of rape victims "never see their attacker caught, tried and imprisoned."[114] The cause of this massive attrition is multifold – including failures to report rapes to the authorities, failures to arrest and failures to convict. For example, crime-victim survey data from the mid-1990s suggest that each year an estimated 500,000 women are victims of some form of rape or sexual assault.[115] In 1994, only 102,096 rapes were reported to

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[113] It is also possible that some men and women who would have engaged in unprotected, consensual sex acts will be so put off by the idea of using condoms that instead of switching to protected consensual sex (arrow A), they will choose not to have sex. This result would have been depicted by an arrow paralleling arrow B but starting in the upper right quadrant.

[114] STAFF OF SEN. COMM. ON THE JUDICIARY, 103D CONG, THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE III (Comm. Print 1993).

[115] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995). *See also* Bryden & Lengnick, *supra* note 83, at 1211.

authorities, and "ultimately there were only an estimated 36,610 arrests for forcible rape."[116] And an arrest does not assure conviction. One scholar found that "the likelihood of a rape complaint actually ending in conviction is generally estimated at two – five percent.[117]

The criminalization of reckless sexual conduct is likely to help ameliorate this problem. For many instances of acquaintance rape, the new law creates the first practicable means of obtaining a conviction – albeit for a crime with a modest sanction. A central goal of rape law reforms "has been to facilitate prosecution of acquaintance rape cases,"[118] but several studies suggest that the reforms have been largely unsuccessful at increasing the rate of acquaintance rate conviction.[119] At the end of the day, it is often extremely difficult for prosecutors to prove beyond a reasonable doubt that the victim did not consent.[120]

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[116] *Id*. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE U.S., *1994 Uniform Crime Rep.* 376 (1995).

[117] Joan McGregor, *Introduction to Symposium on Philosophical Issues in Rape Law*, 11 LAW & PHIL. 1, 2 (1992).

[118] Bryden & Lengnick, *supra* note 81, at 1283. *See also* JEANNE C. MARSH ET. AL., RAPE AND THE LIMITS OF LAW REFORM 22-23 (1982); Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25 (1987); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

[119] Bryden & Lengnick, *supra* note 81, at 1253.

[120] "Unlike stranger rapes, date rape trials are nothing but credibility contests. There is no fruit of

In contrast, it will be fairly easy to prove beyond a reasonable doubt that the sex was unprotected and that it was the first sexual encounter. The presence of the defendant's ejaculate found in a timely examination can, along with other circumstantial evidence (concerning the exigencies of the intercourse), provide powerful evidence that the sex was unprotected. Often the short duration of any acquaintance between the defendant and the victim strongly indicates that the sex was a first encounter. To some it is controversial whether William Kennedy Smith, Mike Tyson or Kobe Bryant engaged in non-consensual sex – but it is fairly clear that each engaged in unprotected, first-encounter sex.[121] Therefore, the criminalization of reckless sexual conduct is likely to reduce the problem of acquaintance rapists who go completely unpunished.

The criminalization of reckless sex might also help deter statutory rape. Prosecutors are often very reluctant to prosecute as rape a crime in which the victim willingly consented.[122] Our statute could help in two ways. First, its widespread enforcement should help elevate people's awareness that teenage girls

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the crime to be produced, no weapon to be traced and no mistaken identity. Everyone concedes that both parties were there . . . and that intercourse did take place . . . Given how easily the sexual acts could be consensual in these cases, it is very hard for the prosecution to remove all reasonable doubt that they were not. Katharine K. Baker, *Sex Rape and Shame*, 79 B.U. L. REV. 663, 690 (1999).

[121] *See* Susan R. Estrich, *Rape*, 95 YALE L. J. 1087 (1986).

[122] *See* Michelle Oberman, *Turning Girls Into Women: Re-evaluating Modern Statutory Rape Law*, 85 CRIM. & CRIMINOLOGY 15, 23 (1994) (quoting a Los Angeles District Attorney as saying "it is the policy of this office not to file criminal charges where there is consensual sex...").

engaging in unprotected first time sexual encounters are put at risk for grave, lifelong injuries. The more people realize how dangerous sex can be, the more they may be willing to prosecute those who use their age to extort it. Second, as with acquaintance rape, even if a prosecutor is not willing to prosecute someone for statutory rape, he or she may be willing to prosecute or accept a plea for the lesser crime of reckless sexual conduct. Again, those who now escape punishment altogether will at least be subject to some criminal sanction.

There are, however, two types of justice errors: failing to punish the guilty, and punishing the innocent (sometimes referred to as Type I and Type II errors respectively). By subjecting acquaintance rapists and statutory rapists to at least some punishment, the crime of reckless sexual conduct is likely to reduce Type I errors, but, by shifting the burden on the issue of consent from the prosecutor to the defendant and making it easier for prosecutors to convict, it might increase Type II errors. Some defendants who were in fact engaging in unprotected sex in which the other person had given "unequivocal indications of consenting to unprotected sexual activity" may be unable to establish this fact by a preponderance of the evidence. These men would be wrongfully convicted.

The size of this Type II error will crucially turn on the extent to which the defendants' sexual partners are willing to bring false claims of non-consensual, unprotected first-encounter sex. Current research suggests that the propensity of women to make false reports of acquaintance rape is extremely low. As Professor Lengnick summarizes, "The conventional wisdom now is that the proportion of false reports is negligible, perhaps as low as two percent, a figure said to be comparable to that for most other

major crimes."[123] Thus, while the new law will make it easier for prosecutors to convict, the problem of Type II errors is likely to be limited by general reluctance of "victims" to bring false claims. Moreover, given that the current equilibrium is so skewed toward Type I errors, the net number of judicial errors will almost certainly decrease – even if we abide by the social tradeoff that it is better to let 20 guilty go free rather than to convict even one who is innocent.

The risk of Type II errors is also one that potential defendants can easily avoid. As long as courts are accurate in determining what is protected first-encounter sex, potential defendants can avoid prosecution merely be choosing to use a condom. From an ex ante perspective, they hold the keys to their own jail house. In contrast, potential victims of acquaintance rape under current law have no easy means of reducing the risk of Type I error. Switching from a regime with very large and unavoidable Type I errors to one with small but avoidable Type II errors is a trade-off that society should embrace.

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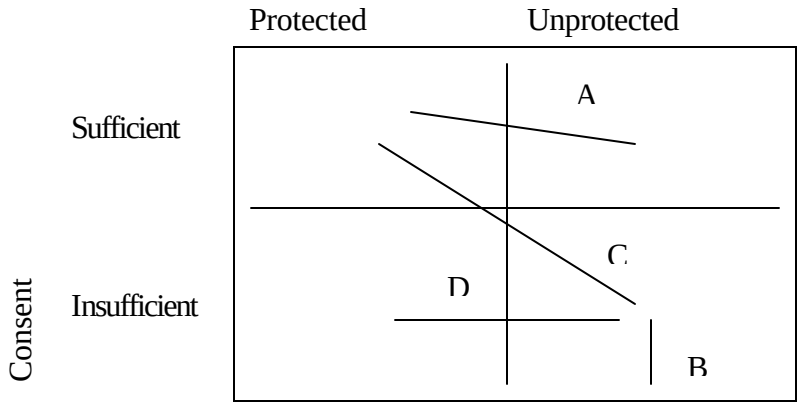
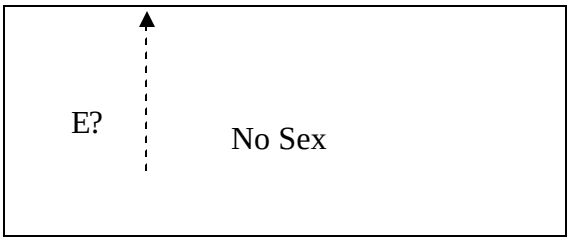
[123] *See, e.g.*, JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, RAPE: THE MISUNDERSTOOD CRIME 205 (1993); SUSAN BROWNMILLER, AGAINST OUR WILL: A VICTIM OF SOCIETY AND THE LAW 386-87 (1976); SEDELLE KATZ & MARY ANN MAZUR, M.D., UNDERSTANDING THE RAPE VICTIM 209 (1979) (citing unpublished study by Carolyn Hursch & James Selkin); Harry J. O'Reilly, *Crisis Intervention with Victims of Forcible Rape: A Police Perspective, in* PERSPECTIVES ON RAPE AND SEXUAL ASSAULT 89, 96-97 (June Hopkins ed., 1984); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U. C. DAVIS L. REV. 1013, 1028 (1991) (asserting that rape complaints are as likely to be true as reports of any other crime).

3. Could Criminalization Induce More Acquaintance Rape?

Figure 2 emphasized predictable shifts in the manner of pre-existing levels of sexuality – which in the shadow of the new law became more protected and more consensual. It is also important to consider whether the law would change not just the types of sex but the levels of sex. We already suggested one such effect when we argued that the law would deter some unprotected, non-consensual sex. This was represented by arrow B. We should pause to consider whether the law would cause some rapes to occur that otherwise would not have taken place.

For example, might it be possible that potential perpetrators might, because of the new crime, feel immunized to rape as long as they use a condom. If so, this might not just cause a shift from existing unprotected rape (as depicted by arrow D) but also create an absolute increase in the total amount of non-consensual sex – which is depicted by the additional arrow E in Figure 3, as instances of no sex become instances of protected, non-consensual sex.





Initially, we should be skeptical of this argument. While the use of a condom immunizes a first-encounter rapist from prosecution under the reckless sexual conduct statute, it does not immunize the rapist from prosecution under any of the pre-existing sexual assault laws. Our proposal is to enact an additional, complementary crime, not a substitute form of liability. Accordingly, we should not expect to see any reduction in current levels of deterrence for acquaintance or stranger rape.

However, a more subtle form of the argument is that jurors deciding cases involving preexisting claims of sexual assault will stop convicting if there is a condom and thus raise the bar for proving traditional rape. The idea here is that jurors will come to think (notwithstanding the formal law) that non-condom use is a prerequisite for finding non-consent – and thus as a practical matter will read into the rape statutes a de facto requirement that the sex was unprotected. Potential rapists who had been deterred under the earlier law will respond to this change by beginning to rape (or raping more) with condoms.

The possibility that our law might actually increase the amount of non-consensual sex is an important challenge to our proposal, but for several reasons, we think it is highly unlikely that this additional crime will reduce deterrence. First, the first grand jury in the *Valdez* case in Texas notwithstanding, jurors evaluating stranger rape cases are not likely to be significantly effected by evidence of condom use. Mr. Valdez went to jail for 40 years. It is increasingly implausible that jurors would acquit an alleged acquaintance rapist just

because he wore a condom.[124] Moreover, if legislators are worried about this, they can simply draft the kind of statutes that California and Florida did, making clear that condom use is not proof of consent. Second, we are skeptical that jurors would frame the elements of reckless sex as illuminating the elements of rape. As emphasized below, these crimes have radically different sanctions (with regard to prison time, stigma and potential labeling of a convict as a "sex offender"). Failing to wear a condom in first sexual encounters is more likely to come to be seen as reckless (just as driving while intoxicated is reckless) rather than as strong evidence that the victim failed to consent.

Third, we should be skeptical of the claim of reduced deterrence because as a statistical matter, it would be hard to imagine a regime with a lower probability of punishments. Estimates are that less than two percent of acquaintance rapists are criminally punished. This probability cannot fall below zero. It is implausible that reductions in the probability of conviction would induce an influx of additional non-consensual sex. Put more conservatively, it is unlikely that any increases in rape caused by reduced probability of punishment (arrow E) would not be more than offset by the benefits of increased communication and protection, and the benefits of reduced judicial error, described above.

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[124] Loose & Gaines, *supra* note 89 (jury acquits man accused of acquaintance rape but makes clear that "condom use was a non-issue."); *but see* Kevin Cullen, *Woman Alleges Rape Wasn't Prosecuted; Contends Police Left Case Because She Asked Men to Wear Condoms*, BOSTON GLOBE, Nov. 17, 1994.

4. Defending the De Facto Unequal Treatment of Reckless Women

Perhaps the strongest objection to our statute pertains to its gender effects. While facially neutral with regard to sex, as a practical matter women will be largely beyond prosecution. Men may not be able to prove by a preponderance of the evidence that a woman consented to unprotected sex, but a woman defendant will normally be able to prove that the man "gave unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected." The man's choice to place his unsheathed penis inside the woman in most cases would provide an unequivocal indication. Thus, if we put aside the truly aberrational case of a woman who puts a gun to the man's head and coerces unprotected sex, we should expect that women would rarely, if ever, be prosecuted under such a statute.[125]

This de facto immunity initially seems unfair, because women can be reckless too in instigating, precipitating or just willingly consenting to unprotected first-encounter sex. Why is it fair that the man who consents to unprotected sex must run the risk of prosecution, when the woman who consents to unprotected sex does not? Put differently, why should a male who engages unprotected sex bear the burden of establishing an affirmative defense, when the very act of unprotected sex establishes the defense for the reckless female?

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[125] While this subsection speaks of de facto immunity for women, a more general characterization would be to say that the statute would produce de facto immunity for a person who was penetrated. Thus, with regard to first-encounter unprotected sex between two men, the man who was penetrated would be de facto immune from prosecution, while the man who penetrated would not. We will return to specific concerns raised by applying the statute to same-sex couples, *infra* page 66.

One way to amend our model statute to remove this asymmetry would be to eliminate the affirmative defense thereby transforming the crime into a strict liability offense – making both men and women criminally liable for intentionally engaging in unprotected first encounter sex. Women would lose their de facto absolute immunity, and men would lose the limited immunity offered by the affirmative defense. To explain our preference for our proposed statute instead of the strict liability alternative, we must explain both why we prefer a limited consent defense for men, and secondly, why we prefer a much broader de facto immunity for women.

Our preference for a limited consent defense for men grows out of particular notion of culpability. Even if unprotected first-encounter sex is socially reckless, it is reasonable to consider a male defendant to be less culpable if his partner actively solicited his participation.[126] Active solicitation or unequivocal indications of consent are extenuating or mitigating factors that, as we will discuss below, track the contours of traditional affirmative defenses. Just as entrapment can be an affirmative defense for defendants who are egged on by government officials,[127] the broad contours of our affirmative defense (with a purposeful degree of drafting lenity due to difficulties of proof) afford immunity to male defendants who were likely to have been encouraged (or seduced) to behave recklessly with regard to the spread of STDs.

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[126] From the perspective of acquaintance rape, it is obviously relevant to a defendant's culpability whether or not the woman consented. But, as argued below, the affirmative defense only is constitutional if it does not represent an essential element of the crime. Accordingly, we explicitly want to ground the defense as a way of mitigating the culpability of acting recklessly with regard to the social risk of STDs.

[127] MODEL PENAL CODE § 2.13 (1985).

With regard to the de facto immunity for women, one must keep in mind that the law is not likely asymmetric in practice. When a woman is reckless too, her male partner is more likely to be able to establish the affirmative defense. So when the woman is reckless, both the man and the woman are likely to be immune from prosecution. The real asymmetry would arise with regard to a woman who was in fact an active and willing participant in the unprotected sex but who then falsely accused the man of forcing non-consensual sex. This theoretical concern is again undermined by the social science research indicating that few women make false claims.[128]

Moreover, our preference for a limited consent defense for men grows out of our twin concerns for both acquaintance rape and STDs. The de facto gender asymmetry of the statute mirrors the de facto gender asymmetry of acquaintance rape and the de facto gender-based injury asymmetry of STDs. The vast majority of acquaintance rapists are male.[129] From the perspective of making progress on acquaintance rape it is almost completely unproblematic to have a larger de facto immunity for women. As discussed, women are also much more likely to be infected with, and if infected, seriously injured by, STD transmission. [130] This law protects those who are most likely to get hurt.

Most important, making women de facto immune preserves their freedom to come forward and

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[128] *See supra* text accompanying note 126.

[129] *See, e.g.,* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf. *See, e.g.,* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NJC 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf.

[130] *See supra* notes 19-29 and accompanying text.

report instances of reckless sex when they did not give unequivocal indications of consent. A strict liability alternative to our statute would massively chill women's incentives for reporting rape. Indeed, it is likely that such a statute would aggravate the current under-reporting of acquaintance rape. A woman who was in fact raped by an acquaintance in a first sexual encounter without a condom would have to worry that in reporting the rape she would expose herself to potential prosecution for the crime of reckless sexual conduct. Strict liability versions of the reckless sex statute – even those that nominally immunized rape victims from prosecution – are intolerable because they are likely to exacerbate the under-reporting of acquaintance rape.[131] The last section rejected the possibility that the model statute might perversely lead to more

[131] Indeed, while we began this discussion by asking whether we should narrow the asymmetry in immunity for men and women, the importance of preserving reporting incentives for victims of acquaintance rape caused us to consider whether we should instead broaden the asymmetry by giving women a per se defense against prosecution. We ultimately rejected this possibility. First, the explicit sexual discrimination of such a statute would trigger heightened scrutiny under the Equal Protection Clause, though this would not necessarily kill the statute. A de jure immunity for the penetrated person in unprotected, first encounter sex would likely be constitutional both because it does not expressly discriminate on the basis of sex and because it furthers the important government interest of increasing the frequency of victim reporting, as discussed above. (It also gives the immunity to the person much more likely to be infected.) Our deeper concerns are prudential. We worry that social meaning of this de jure disparate treatment against men might undermine the effectiveness of the statute. Because women can indeed be instigators of reckless sex, it is unfair to expressly immunize them from any possibility of prosecution. The appearance of unfairness is

acquaintance rape, but making both men and women strictly liable for engaging in unprotected, first-encounter sex might do just this.

Granting defendants an affirmative defense in these settings perversely increases the likelihood of their conviction. There are likely to be more convictions of men under our model statute, then would occur under an identical statute that removed the affirmative defense. In a world without the defense, women are less likely to report non-consensual reckless sex. So even though the affirmative defense gives men more of a chance of defending against an accusation, it on net exposes acquaintance rapists to a higher risk of prosecution. Our statute might represent the rare instance in which granting defendants an affirmative defense makes it easier for prosecutors to convict.

C. A Cognitive and Norms Analysis of the Statute

The rational actor analysis of the preceding section will be unpersuasive (and may even be offensive) to certain readers who view evaluations of marginal carrots and sticks as poor predictors of human behavior. We are particularly agnostic about the extent to which rationality and rational response to incentives are a well-spring of human sexual behavior. The arrows of the prior section suggest the theoretical directions of movements in sexuality, but not the size of the effects.

Ultimately, however, we believe that an even stronger case for the criminalization of reckless sexual conduct can be made by taking into account both the cognitive biases that affect individuals and the ways that social norms affect groups. The normative "consilience" of these three approaches – that rational actor,

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important. And as discussed above, one can imagine pathological circumstances (gun-to-the-head scenarios) in which a woman would in fact be prosecutable.

cognitive bias, and norms analysis all are shown to support the model statute – enhances our confidence in the proposal.[132]

This section will first suggest that taking into account the ways that individual decision making tends to diverge from rationality strengthen the case for criminalization. We then suggest how a new crime of reckless sexual conduct could play an important role in a broader campaign to strengthen the current norm of using a condom in first sexual encounter.

1. Cognitive Departures from Rational Decision-Making

The increase of condom use in the shadow of the initial publicity about AIDS is good news for rational actor theorists.[133] It suggests that the rationality assumption can still aid in predicting behavior. The fact that condom usage rose is a strong indication that behavior does respond to incentives. The idea that people just will not stop "in the heat of the moment" is belied by the increased condom usage in response to AIDS fears.

But the gains that were made in condom use during the AIDS scare now show signs of ebbing.[134] As the threat of AIDS becomes more remote (or as the disease appears to be more treatable) in developed

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[132] *See* EDWARD WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE (1999); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

[133] Holmes, Sparling, et. al., *supra* note 21, at 59.

[134] C. Rietmeijer, J. Patnaik, F. Judson, J. Douglas, *Increases in Gonorrhea and Sexual Risk Behaviors Among Men Who Have Sex With Men: A 12-year Trend in Analysis at the Denver Metro Health Clinic*, 30 SEXUALLY TRANSMITTED DISEASES 562 (2003).

countries, people seem to be less likely to use a condom.[135] It may be that the scare did not last long enough for people, particularly heterosexuals, to internalize the risk of contracting HIV.

More importantly, there is scant evidence that people have ever internalized the comprehensive risks of unprotected sex.[136] Behavioral psychologists have identified a variety of cognitive biases that can cause men to systematically underestimate the risks of unprotected sex.[137] The low salience of STDs and acquaintance rate – especially with respect to first encounters -- may bias the risk downward. Availability bias[138] and optimism or self-serving bias[139] can lead people to underappreciate the risks of both acquaintance rape and STDs. The tendency of many men to treat acquaintance rape as something other

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[135] *Id*.

[136] *Id*.

[137] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (2003); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998); Jeffrey J. Rachlinki, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. R. 1165 (2003); Russell Korobkin, & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. R. 1051 (2000).

[138] Availability bias refers to people's tendency to appreciate and internalize only those risks that are obvious – or readily cognitively available to them.

[139] Self-serving bias refers to peoples' tendency to discount the likelihood that they themselves could be hurt.

than "real rape" may cause them to under-appreciate both its danger to the victim and the likelihood that they would engage in it.[140] Because successful prosecutions are so rare, many men may not have cognitively available examples that could provide cues for their own action.

Prosecutions under the proposed law would increase the cognitive salience of acquaintance rape, thus increasing the likelihood that men would fear it. Indeed, in an interesting way our law "economizes on misogyny" to promote condom use. The kind of man who does not particularly care about the quality of a woman's consent may be the same kind of man who will find the risk of this new crime to be most salient. This is because men who hold women in low esteem are likely to overestimate be risk of being falsely accused. This "irrational" fear of false rape accusations is well established in the literature.[141] The statute harnesses this misogynous bias to offset the various other factors that make risk of STDs and non-consensual sex low salience.

Lack of public awareness likely also leads to an under-appreciation of the risks of infecting another with an STD. The STD victims of reckless sex are seldom publicized. Magic Johnson's series of unprotected dalliances might have caused the death of dozens of other people, but these causal connections are rarely, if ever, discussed. Even when we hear about people who died from AIDS, the death is not connected to the sexual source; nor is risky sexual behavior linked to the infection. The more people that are prosecuted under the statute, the more cognitively available those causal connections will become.

Optimism and self-serving biases are also likely to contribute to individuals' tendency to downplay

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[140] SUSAN ESTRICH, REAL RAPE (1988).

[141] *See, e.g.*, Bryden & Lengnick, *supra* note 81, at n. 81.

their likelihood of being infected. Importantly, the risk of infection stands in a very different place cognitively than assessment of the risk of pregnancy (which might also be under-assessed because optimism and self-serving bias).[142] One does not need to think badly about one's choice of partner to worry that unprotected sexual intercourse may lead to pregnancy. The same is not true about assessing the risk of STD infection. To worry about being infected by one's partner is to focus on that person's sexual history and to worry about how and why he or she has been infected. Particularly at the moment of deciding to engage in intercourse, some people may want to reduce the salience of their partner's prior sexual relationships. This disassociation bias could lead to an irrationally low level of condom use.

Appreciating that men and women may underestimate the true risks of unprotected first encounters strengthens the rationales for government intervention. Thus, our crime can be justified now not only by the traditional "externalities" argument – men and women don't take into account the harms to other people when they engage in reckless sex. It can also be justified as a form of cognitive "paternalism" aimed at

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[142] Surveys consistently show that women (and to a lesser degree men) find the risk of pregnancy to be more salient in their decision to use condoms than the risk of contracting an STD. As women have gained more control over contraception (and abortion), the salience of the pregnancy risk has decreased. This may well have lead to an increase in unprotected sex. *See* Cynthia Rosengard, Nancy E. Adler, Susan G. Millstein, Jill E. Gurvey & Jonathan M. Ellen, *Perceived STD Risk, Relationship and Health Values in Adolescents' Delaying Sexual Intercourse with New Partners*, 80 SEXUALLY TRANSMITTED DISEASES 130 (2004) (noting that young women delay sex due to the importance of intimacy in relationships, perceived risk of STDs, and health values but making no explicit reference to pregnancy).

increasing the perceived risk of engaging in unprotected, first encounters.[143] If the risk of acquaintance rape and STD infection is currently low salience, then a new statute crime – which expressly defines and criminalizes reckless sex – can increase the legal risk of engaging in unprotected first-encounter sex. This is an example of "debiasing through law."[144]

2. Reinforcing Existing Norms

Both the rational actor and cognitive analyses focused on the individual actor as the unit of analysis. It is also useful to consider, at a more aggregate level, what impact a crime of reckless sex might have on the social meaning of unprotected first encounter sex. This section argues that criminalization can play a useful role in a larger strategy of reinforcing an emerging social norm to use condoms in first encounter sex.

a. The Message

To begin a discussion on changing social norms, it is important to emphasize that most people already use condoms in first time encounters. According to a recent national study more than sixty percent of adults report using condoms in casual relationships.[145] For older readers who may be apt to extrapolate

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[143] Cass R. Sunstein & Richard H. Thaler, Libertarian Paternalism is Not an Oxymoron (2003) (forthcoming paper, on file with The University of Chicago Law School, *available at* http://ssrn.com/abstract=405940).

[144] Christine Jolls & Cass R. Sunstein, Debiasing Through Law (2004) (on file with author).

[145] *See* Koray Tanfer, William R. Grady, Daniel H. Klepinger & John O. G. Billy , *Condom Use Among U.S. Men, 1991*, 25 FAM. PLANNING PERSP. 61, 64 table 3 (1993) (61.6% of men who reported a one night stand in last four weeks reported using a condom). *See also* Patricia O'Campo et al.,

from their own historical experiences, this may come as a surprise.[146] But in this age of AIDS (and herpes and chlamydia), things have changed. The great majority of people report that they aspire to condom use in casual sexual encounters.[147]

Contraceptive and Sexual Practices Among Single Women with an Unplanned Pregnancy: Partner Influences, 25 FAM. PLANNING PERSP. 215, 218 table 5 ("Women with multiple sexual partners in the last 12 month are 3.2 times more likely to report condom use."); Elizabeth L. Paul, Brian McManus & Allison Hayes, *"Hookups": Characteristics andd Correlates of College Students' Spontaneous and Anonymous Sexual Experiences*, 37 J. SEX RES. 76 (2000) (In 1997, 63% of teenager males who reported having sex during the previous 3 months said that they used a condom.); Laura Kann, et. al., *Youth Risk Behavior Surveillance – United States, 1997*, 47 MORBIDITY & MORTALITY WKLY. REP. 1 (1998) *available at* http://www.cdc.gov/mmwr/PDF/SS/SS4703.pdf.

[146] *See* Posner, *supra* note 52 (judges often mistakenly extrapolate from their own sexual history).

[147] In a study of a family practice center's patients, 92% reported that they insist on condom use, and 88% reported that they would refuse sex without a condom. D. L. Stewart, B. R. DeForge, P. Hartmann, M. Kaminski, E. Pecukonis, Attitudes Toward Condom Use and AIDS Among Patients from an Urban Family Practice Center, 83 J. NAT'L MED. ASSOC. 772 (1991). *See also* Susan M. Kegeles, Nancy E. Adler, & Charles E. Erwin, *Adolescents and Condoms: Associations of Beliefs with Intentions to Use*, 143 AM. J. DISEASES CHILD., 911 (1989); Francoise Caron, Gaston Godin, Joanne Otis, Leo-Daniel Lambert, Psychosocial Predictors of Intention and of Condom Use Among Adolescents Attending High School, Presentation at the 12th Annual Canadian Conference on HIV/AIDS Research (April 2003).

Promoting condom use in first-time sexual encounters is thus not an attempt to instill a radically new social norm. It is instead an attempt to reinforce a pre-existing norm and aspiration of most people in society. Accordingly, the criminalization of reckless sex is not a "just say no" strategy. "Just say no" campaigns run the risk of ambiguous signals. The listeners may think that they are being asked to play by the rules when no one else is. Playing by the rules in such a situation if very unlikely to be seen as "cool." [148] Society's message to the sexually reckless is not "Just say no to unprotected sex;" rather it is "Just be like everybody else!"[149]

The statute might also promote a new social norm by changing the social meaning attatched to using a condom. As Cass Sunstein notes: "[S]ocial norms can also be an artifact of social meaning. Suppose that the social meaning of condom use is a confession [or] an accusation. . . . If so, there will be a social norm discouraging condom use."[150] In a separate article, Sunstein describes a *New York Times* article:

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[148] Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349 (1997).

[149] This is an application of "Social Norms Marketing":

Back in 1990, Professor Perkins at Hobart and William Smith College discovered that most students thought that they were drinking less than the average—and, thus, increased their consumption to be more like others. When the true drinking data were publicized, and students discovered that few of their peers had more than five drinks at a party, peer pressure to drink more than five was greatly reduced. The results were so successful in reducing heavy drinking that this approach has been employed throughout the California State University System and beyond. As the *New York Times* reports: "Rather than telling students to 'Just say no!' They are saying, in effect, 'Just be like everybody else.'"
BARRY J. NALEBUFF & IAN AYRES, WHY NOT? HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL, 102 (2003).

[150] *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

> in which some teenage boys said that they don't use condoms even though they really would like to . . . and the reason is that use of a condom is an accusation or a confession, and neither is very romantic. That is, the social meaning of condom use is to say, you probably have AIDS, or I might have AIDS, and neither of those assumptions is very desirable to make in the relevant situation.[151]

Criminalizing unprotected first-encounter sex can give men an independent rationale for using a condom. In the shadow of our statute, reaching for a condom would not imply that the man was infected or that he worried about the woman's being infected, it might merely be an attempt to comply with both the law and the more general social norm to wear a condom while engaging in all first-encounter sex.

Because the average person has fewer than 10 sexual partners in a lifetime, the new law regulates a small handful of events in the lives of most Americans. Because most Americans already use condoms in first encounter sex, it is a law that asks most of us to change our behavior in fewer than 5 events in our lives. The only people significantly affected by this law are those people whose current behavior is the most risky – the small minority of citizens who are frequently engaging in unprotected first encounter sex.

Our statute is accordingly an example of what behavioral economists have recently termed

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[151] Cass R. Sunstein, Should Government Change Social Norms?, Speech for the AEI Bradley Lecture Series (Nov. 12, 1996) (transcript available at http://www.aei.org/news/newsID.18910/news_detail.asp). *See also* Jennifer Steinhauer, *At a Clinic, Young Men Talk of Sex*, N.Y. TIMES, Sept. 6, 1995 at C7. Condom use can also be a source of embarrassment for men. *See infra* note .

"asymmetric" interventions.[152] The idea here is that, when possible, government should prefer interventions that tend to constrain the behavior of the most cognitively biased individuals, while leaving relatively unaffected those people whose choices are relatively unbiased.[153] The statute is structured to do just this. It asks the most of the right-hand tale of population – people who have dozens or hundreds of sexual partners – but asks little if anything of the majority of people who already use condoms for initial sexual encounters.

All encompassing campaigns for "safe sex" or "100% condom use" are, if taken literally, unreasonable. If all couples used condoms all the time, the human race would cease to exist.[154] There is no

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[152] Colin Camerer, Samuel Issacharoff, George Lowenstein, Ted Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 PENN. L. REV. 1211 (2003). This article focuses on asymmetric interventions to correct biased choices of individuals that hurt themselves, but the same idea can be applied to interventions to correct biased choices of individuals that disproportionately hurt others as well. We might term this latter intervention as an example of "asymmetric internalization" of externalities. Our statute's asymmetric quality is supported by both rationales – as the most reckless individuals may both underestimate the risk to themselves and the risks to others created by their actions.

[153] The government's ban on cotton infant pajamas is a clear counterexample of asymmetric intervention. The non-smoking majority had to forego the pleasures of cotton because a few smokers would tend to incinerate their children.

[154] Of course, condoms sometimes break or are otherwise ineffective in stopping pregnancy. But if condoms were used 100% of the time, the human population would likely not be able to sustain itself and

valid policy reason for making monogamous long-term sexual partners use condoms. Programs advocating 100% condom use for sex workers, on the other hand, are quite laudable,[155] but insufficient. Condom advocates have yet to offer precise advice as to where to draw the line between these two poles. We draw the line at first encounter sex.[156] While this standard for condom usage is under-inclusive of optimal "safe sex" practices, criminal statutes are often structured to target the most egregious anti-social behavior.

Another possibility would be to require that condoms be used 100% of the time when partners are not married, but not necessarily at all if the partners are married. If universally accepted this rule would likely

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thus within some number of generations under this pathological hypothetical become an endangered species.

[155] Nicole Rajani, *Fighting for Their Health, India's Sex Workers Mobilize*, TREATMENT INSIDER E-NEWS *at* http://www.amfar.org; *Who Promotes 100% Condom Use Among Sex Workers in Asia*, AIDS WEEKLY, Sept. 8, 2003 *at* http://www.walnet.org/csis/news/world_2003/aidsweekly-030908.html.

[156] Many people now distinguish between casual and non-casual sex as the dividing line for mandatory condom use. A problem with the casual/non-casual frame is that it is more susceptible to a kind of self-delusion bias ("I really thought he/she was one.") – in ways that undermines the effectiveness of the norm. In contrast, there is no internal ambiguity in how to apply the norm that condoms should always be used the first time you have sex with someone else.

end STD epidemics.[157] Thus, a bright line marriage rule could be an effective public health measure, but it would seriously infringe on the sexual expression rights of unmarried people. Same-sex couples in many states would never have the option of non-condom use and neither would faithful unmarried straight couples. Faithful couples who begin a relationship without infection should, regardless of their marital status, retain the ability to engage in unprotected sex – even for non-procreative purposes – if they so desire.[158] Our model statute aims at reinforcing a much less demanding (and therefore more sustainable) norm. Unlike the impracticable demands of 100% condom use no matter what, or 100% condom use for all non-marital sex, the statute requires 100% condom use for all first-encounter sex.[159]

b. The Punishment

We have intentionally drafted the model statute to have a mild sanction – of only three months. We

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[157] This prediction assumes neither that spouses are faithful nor that they begin marriage unprotected. As long as all spouses used condoms during extra-marital intercourse there would be very little communication of STDs into or outside of the marriage unit and the communication of STDs within married couples that would be countenanced by this rule would not be sufficient to sustain an ongoing STD epidemic.

[158] We should not forget that non-condom use for marital sex is a religious requirement for observant Catholics and Orthodox Jews. Elaine Jarvick, *Birth Control is a Complex Issue*, DESERET NEWS, Mar. 8, 2003.

[159] But even here, the statute accommodates the desires for unprotected first encounter sex of those who communicate sufficiently.

have done this because if the criminal sanction is too strong, there is not likely to be widespread enforcement. Widespread enforcement will be critical to the statute's efficacy. As Dan Kahan has argued, attempts to change a norm by severely punishing that which has previously been unaddressed or under-enforced are often unsuccessful.[160] One reason for this is that decision-makers enforcing the laws (police officers, prosecutors, judges) often balk at imposing strict penalties for offenses that many people do not view as extremely offensive. Unprotected sex would almost certainly fall into this category. Prosecutors and jurors will not work to seriously condemn someone whose only proven offense is not wearing a condom in a first time sexual encounter. In all probability, those decision makers do not view the behavior as all that bad.

Those same decision makers might be willing to punish the behavior a little though, particularly as they learn more about the dangers associated with the behavior. The more the behavior gets punished somewhat, the easier it will become to punish in general and the more people will be punished. The more people are punished, the more certain punishment will be, the more people will become aware of the dangers and the less likely people will be to engage in the behavior.[161] The less people engage in the behavior, the easier it will be to ratchet up the punishment in order to proportionally reflect the degree of

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[160] Among Kahan's examples are date rape, domestic violence and prohibition. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U.CHI. L. REV. 607 (2000).

[161] This is another way of describing how to reverse availability bias.

harm involved.[162]

Increased punishment should also help change the norm of indifference with regard to whether one's partner is consenting to sex. Changing this norm should lead to much more effective prosecution of acquaintance rape. The crime of reckless sexual conduct creates a category of sexual offense that is not rape or sexual assault, but is still criminal. Reckless sexual conduct should not be presented as a substitute for rape. It is not to be prosecuted, punished or perceived as such. It is instead a crime that tries to control behavior that can lead to rape, just as drunk driving laws try to control behavior that can lead to manslaughter. If most people do not conflate a DUI conviction with a manslaughter conviction, people need not conflate a conviction for reckless sex with a rape conviction.

The recent history of rape enforcement shows all too clearly how resistant juries and prosecutors are to punishing offenders who have not raped in the traditional sense.[163] There are embedded images of who a rapist is[164] and who a rapist is not.[165] When the alleged rapist and the facts of the crime alleged fail to

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[162] This entire cycle is described by Kahan, *supra* note 162.

[163] *See generally*, Schulhoffer, *supra* note 51, ch. 2.

[164] In passing amendments to the Federal Rules of Evidence that allow prior acts of rape to be admitted in rape trials, the proponents of the legislation referred to rapists as a "small class of depraved criminals." *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI-KENT L. REV 15, 19-26 (1994), notwithstanding the evidence establishing that rape appears to be much more a function of social norms than individual psychology. Many men across many classes commit rape. *See* Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy*

conform to the embedded cultural definition of rape, the crimes do not get prosecuted, or if prosecuted, do not result in convictions.[166] The simple fact is that the public at large often refuses to see the "non-traditional" rapist as a rapist at all and therefore refuses to either mark him or punish him as such. After an acquittal in a well-publicized college gang rape, one juror explained that the jury's "main concern . . . [was not] want[ing] to ruin the boys' lives."[167] Decision makers may be willing to ruin the life of a "real rapist," but they will not impose comparable punishment for what they see as a less severe crime. The crime of reckless sexual conduct will make it easier to punish callous sexual behavior precisely because the punishment will not ruin the defendants' lives.

Many reformers have worked very hard to get jurors, judges, police and prosecutors to see that women acquaintances can be sexually assaulted in ways that are equally as devastating as stranger rape, if not more so.[168] This work is important and their claims are valid, but the attempt to illuminate the realness of

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in Rape Law, 110 HARV. L. REV. 565, 576-78 (1997).

[165] Consider the comments of one man who observed a gang rape trial of seven college students in Michigan, "I don't believe she was raped . . . I believe they ran a train on her." Chris O'Sullivan, *Acquaintance Gang Rape on Campus*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 140 (Andrea Parrot & Laurie Bechhofer eds. 1991).

[166] *See* Baker, *supra* note 166, at 589.

[167] Joseph Fried, *St. John's Juror Tells of Doubts in Assault Case: He Says He Went Along with Vote to Acquit*, N.Y. TIMES, Sept. 14, 1991, at 24.

[168] Acquaintance rape can be more devastating in part because it is more of a betrayal of trust. *See*

some acquaintance rape has obscured the moral wrong of other behavior that may not constitute or could never be proved to be rape.[169] In emphasizing that acquaintance rapists are "real rapists," the movement has had the effect of erasing the moral category of reckless sexual conduct. Under their approach, a man is either a "rapist" or legally not culpable. Our statute imposes a less severe punishment precisely because what we are attacking directly is recklessness, not the result of recklessness.

We also intentionally choose to exempt convicted defendants from registering on a state's list of sexual offenders. Jurors deciding these cases should not be determining whether the defendant is rapist or the kind of serious sexual offender whose whereabouts need to be tracked on an ongoing basis. Indeed, a signal that our statute was working would be if the public developed a pejorative noun, other than "rapist," to refer to a person who engaged in culpably reckless sexual behavior – something akin to a "drunk driver."[170]

c. The Program

Ideally, the new crime of reckless sexual conduct should be a part of larger private and public effort

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JEAN O'GORMAN HUGHES & BERNICE R. SANDLER, "FRIENDS" RAPING FRIENDS: COULD IT HAPPEN TO YOU? 6 (1987).

[169] As discussed, rape is only rape if there is no consent and proving non consent beyond a reasonable doubt can be extraordinarily difficult. *See* Baker, *supra* note 166.

[170] No such term currently exists. The terms "Reprobate," "Rounder," "Dissolute," connote a morally unrestrained person. The more colloquial "Louse" has a faint connotation of infection.

to eliminate unprotected first-encounter sex. While some may view social norms as beyond the reach of policy engineering, we are heartened by the dramatic impact of Mothers Against Drunk Drivers (MADD). MADD became a political force in the early 80s.[171] In just a few years, MADD had successfully lobbied in state after state for tougher drunk driving laws. In 1984, Congress responded by requiring all states to raise the drinking age to 21 as a condition of receiving highway money.[172] MADD, as a grassroots organization, realized that its power came from public awareness. It was MADD that popularized the concept of "designated drivers" and the first red ribbon campaign (asking people to "tie one on" for safe driving).[173] MADD's slogan is "the Voice of the Victim," but they succeed in large part because they dramatically put a face on the victims of recidivist drunk drivers.[174]

Inspired by MADD's example, it would be useful for public and private groups to put a face on the victims of reckless sex. There already is a Mothers Against Sexual Abuse,[175] but it would be useful to

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[171] Janice Lord, *Really MADD: Looking Back at 20 Years*, DRIVEN MAG., Spring 2000 *available at* http://www.madd.org/aboutus/0,1056,1686,00.html.

[172] Faye A. Silas, *Drinking Curb: Highway Money at Stake,* 70 A.B.A.J. 35 (1984).

[173] Kyle Ward, *MADD's Telemarketing: Successes and Cautions*, 23 FUND RAISING MGMT. 26 (1992).

[174] Frank J. Weed, *Grass-Roots Activism and the Drunk Driving Issue: A Survey of MADD Chapters*, 9 LAW & POL'Y 259, 263 (1987).

[175] Claire Reeves was the founder. Mothers Against Sexual Abuse, http://www.againstsexualabuse.org/default2.asp.

develop a group that showed the STD victims of reckless sex. The idea is to show the people who are injured by reckless sex and the people who did the injuring. Who killed Rock Hudson? And who did Rock Hudson kill? This effort would be part of a larger campaign to valorize protected, first-encounter sex.[176]

We would see the passage of the reckless sex statute as part of an incremental process of reinforcing norms of condoms and communication for first sexual encounters. Starting with more lenient punishment will make it easier to generate more convictions. More convictions will make the risk of unprotected, first-encounter sex more salient. Once the current norm starts to shift even more strongly toward condom use so that it is truly abnormal to not take the time to put on a condom, it will become easier to punish, and punish more severely those transgressors. Just as with drunk driving laws, it may well become possible to have stronger second-generation punishments.[177] "We just got carried away"[178] will not

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[176] As mentioned above, a "just be like everyone else" can be powerfully persuasive. It might also be useful to change the social meaning of condom use. Instead of (or in addition to) the message that men who don't where condoms in first-encounters are "jerks," it might be useful to send the message that men who do use condoms are cool or virile. Celebrities (appropriately picked to target different populations) could endorse condom use as a way to "be like me."

[177] *See* Robyn Meadows, *County DUI Deaths Increase*, THE REPUBLICAN, July 29, 2004.

[178] *See* Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994). In this notorious acquaintance rape case, both parties agreed that after intercourse the defendant commented "we got carried away." The alleged victim responded, "no, you got carried away." The Supreme Court of Pennsylvania overturned the

be a defense to the crime of reckless sexual conduct. Once people accept the illegitimacy of that defense for a crime of recklessness, it will become increasingly illegitimate as a defense to rape as well.

IV. Responding to Constitutional Objections

The last section showed from a triumvirate of perspectives why criminalizing reckless sex is likely to make progress on the social problems of both STDs and acquaintance rape. There remains, however, the issue of whether our proposed statute is constitutional. In this section, we take on questions of whether our affirmative defense violates the Due Process Clause and whether the statute's more general regulation of sexuality unconstitutionally burdens the rights of privacy and freedom of association.

A. Constitutionality of Affirmative Defense

The affirmative defense afforded defendants is amply supported as a matter of public policy. First, as discussed above, this defense gives women who are the victims of non-consensual sex more freedom to come forward and report the crime to police.[179] Second, the difficulty of proving non-consent beyond a reasonable doubt makes the re-allocation of the burden more appropriate.[180] Indeed, the state of

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conviction because there was insufficient evidence to prove beyond a reasonable doubt that she did not consent.

[179] *See infra* page 55.

[180] When the information necessary to prove an element is particularly difficult of the prosecution to obtain, it may be appropriate to shift the burden to the defendant. *See* WAYNE R. LEFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8 (2003). For instance, the Model Penal Code allocates the burden of proving due

Washington already allocates the burden of presenting and proving the issue of consent to the defendant in (far more serious) rape cases.[181] Third, putting the burden of proving non-consent on the prosecution in cases involving unprotected first encounter sex would encode in the law a presumption that women willingly put their physical and emotional health at extreme risk. It would assume that women act recklessly unless the prosecution can prove otherwise. It makes far more sense to assume that no one acts recklessly, unless the prosecution can prove beyond a reasonable doubt that unprotected sex happened. At that point, instead of assuming that the person most likely to be hurt by the reckless behavior was reckless, the law should require the person with the least to lose[182] and the most to gain[183] from the reckless behavior to show

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diligence to defendant corporations, instead of forcing the prosecution to prove the lack of due diligence beyond a reasonable doubt. *See* MODEL PENAL CODE § 2.07(5) (1985).

[181] *See* Washington v. Camara, 113 Wash.2d 631, 781 P.2d 483 (1989) (prosecution has the burden of proving "forcible compulsion" beyond reasonable doubt, but defendant has the burden of proving consent by a preponderance of evidence).

[182] As discussed above, men are much less at risk of STD transmission and rape and not at all at risk for pregnancy.

[183] See THE ALAN GUTTMACHER INSTITUTE, HETEROSEXUALLY ACTIVE MEN'S BELIEFS ABOUT METHODS FOR PREVENTING STDS (2003) ("men held several negative beliefs about condom use even with casual partners"); Guttamacher, *supra* note 10, at 55 (men embarrassed about condom usage). Men also consider sexual experience an attribute. It gives young men a greater sense of control over their lives. Importantly, it has the opposite effect on women. Daniel Whitaker, Kim Miller and Leslie Clark,

that his partner willingly consented to the risk.

Regardless of the policy arguments in favor of an affirmative defense, however, it is important to separately address whether the defense accords with the demands of the Constitution. The Due Process Clause demands that a prosecution prove "beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged."[184]

As many scholars have recognized, this constitutional command is ripe for legislative manipulation. Because the prosecution must only prove beyond a reasonable doubt those facts that are "necessary to constitute a crime," legislatures can reallocate any element of a crime as an affirmative defense so long as it engages in "arid formalism."[185] Statutes can come to define smaller and smaller subsets of elements as being necessary for conviction. In *Patterson v. New York*,[186] the Court recognized this problem, commenting that the Constitution "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their statutes."[187] In famous dicta, the Court responded: "there are obviously constitutional limits beyond which the States may not go in this

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Reconceptualizing Adolescent Sexual Behavior: Beyond Did They or Didn't They? 32 FAM. PLANNING PERSP. 111-117 (2000).

[184] *In re* Winship, 397 U.S. 358, 364 (1970).

[185] Charles R. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1577 (1981). I'll provide a full list of articles at the end.

[186] 432 U.S. 197 (1977).

[187] *Id.* at 210.

regard."[188]

The question for us is whether the proposed statute can shift the burden of proving consent to the defendant and still stay within those constitutional limits. We think there little doubt that it can, for one simple reason: Our statute does not criminalize what rape statutes criminalize. Our statute criminalizes unprotected sex. Rape statutes criminalize nonconsensual sex. We have not found one rape statute that even mentions unprotected sex. The crime of reckless sexual conduct therefore could not be a lesser included offense to the crime of rape. It would be perfectly possible to be guilty of rape, but not guilty under our statute. Our statute also imposes a significantly less severe punishment than does rape – and for a good reason: the crime of reckless sexual assault is not about punishing nonconsensual sex, it is about punishing the less egregious acts involved in first time unprotected sex.

As we noted previously, a strict liability offense, which would remove consent from the analysis completely, could readily be justified as necessary for public health reasons. If the analysis of Part I is correct, merely inducing condom use in first sexual encounters can effectively destroy the transmission networks of many STDs and consequently put an end to epidemics. Independent of any concern with consent, there is a strong policy rationale for criminalizing all first encounter sex that is unprotected.

From this perspective, the affirmative defense is nothing like an essential element of the crime. It is instead merely a factor that mitigates or extenuates the defendant's culpability. While a man who

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[188] *Id.* The Court also unhelpfully cites *Speiser v. Randall*, 357 U.S. 513 (1958), for the principle that a state's statutory definition of a crime cannot "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 523.

participates in unprotected first-encounter sex is criminally reckless, he is less culpable if his partner actively solicited the unprotected sex.[189] Thus, our affirmative defense parallels the affirmative defenses of entrapment, and irresistible impulse – defenses that qualify society's condemnation of the defendant's state of mind.

We have included a defense of consent both because, somewhat counterintuitively, it makes it more likely that acquaintance rape will be prosecuted, and because consent qualifies the perceived egregiousness of the defendant's behavior. A consent defense also encourages conversation and protects the sexual freedom of those couples who want to engage in unprotected sex. By encouraging communication our statute guards against acquaintance rape, but nonconsensual sex is not the target of our statute.[190]

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[189] The scope of the affirmative defense in the proposed statute goes beyond solicitation to cover defendants who can show that their partner "gave unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected." But the enlargement of solicitations to include unequivocal indications is consistent both with the notion of lenity and with the idea that not all solicitations are verbal.

[190] To the extent our statute regulates unprotected sex that could not pose a public health threat (between two people who knew they were not STD carriers) our statute imposes an unnecessary health regulation. It is only for this small group of cases that the statute might be seen as regulating the same thing as rape statutes because the only reason to require such couples to use protection is to protect against nonconsensual sex. This class of cases is so minute and the cost of compliance is so small (get consent or use a condom) that we think it extraordinarily unlikely that it could be seen to violate Constitutional

B. Burdening Privacy and Association Freedom

Finally, we assess whether the statute unduly burdens the constitutional rights of privacy and associational freedom. We do not contest that our statute regulates sexual expression in novel ways. Indeed, where once the state used criminal statutes to impede the distribution of birth-control,[191] we are now using criminal law to mandate it. However, our restrictions do not infringe on the constitutional rights of sexual expression as they have emerged to date.

First, it is important to keep in mind that sexual expression, like all forms of expression, can be subject to reasonable time, place and manner restrictions. Our statute regulates the manner in which people are able to participate in a first time sexual encounter. All we require is that the couple actually discuss (or otherwise communicate about) the issue of protection so that they can be clear that if the expression is to be unprotected, both parties agree to it. There are virtually no long term consequences that flow from this restriction and it is hard to see how this could be considered unreasonable in any circumstances.[192]

Second, it bears repeating that this is a one-time-per relationship health regulation. It does not impose any kind of regulation on an on-going intimate relationship. We readily accept that sexual relations can be an important means of enriching and nurturing a relationship. The Supreme Court has

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guarantees of due process. Over inclusive criminal statutes are not forbidden by the Constitution.

[191] Tileston v. Ullman, 129 Conn. 84 (1942).

[192] This is particularly true given the extensive historical support for criminally regulating many more aspects of sexual expression, including, who one could have sex with (adultery), how one could have sex (sodomy statutes), and where one could have sex (fornication statutes).

now endorsed this view unequivocally, but when it has protected sexual expression, the Supreme Court has done so as a way of protecting and fostering the relationship in which it is being expressed, rather than the expression itself.[193] The parties' relationship is not unduly burdened when the parties are free either to agree to unprotected sex or to engage in unprotected sex after just one encounter. The sexual liberties that are constitutionally protected from state interference,[194] "the realm of personal liberty which the government may not enter,"[195] are simply not implicated by a statute that only affects first time sexual encounters.

Third, the behavior regulated here can cause significant harm, in part despite and in part because of its intimate nature. In striking down the Texas sodomy statute in *Lawrence v. Texas*, Justice Kennedy was careful to point out that a general sodomy statute does not target "persons who might be injured or coerced

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[193] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as nay involved in our prior decisions."); Bowers v. Hardwick, 478 U.S. 186, 205 (1985) (Blackmun, J. , dissenting) (we protect relationships because "[they] contribute[] so powerfully to the happiness of individuals")

[194] *See* Lawrence v. Texas, 539 U.S. 588 (2003) (the right to engage in homosexual sodomy); Eisenstadt v. Baird 405 U.S. 438 (1971) (the right to use birth control in order to engage in nonprocreative sex); Griswold v. Connecticut, 381 U.S. 479 (1965) (the right of married people to use birth control).

[195] Planned Parenthood v. Casey, 510 U.S. 1309 (1994).

or who are situated in relationships where consent might not be easily refused."[196] First time unprotected sexual encounters involve precisely all of those dangers. The proposed statute is a minimally intrusive means of guarding against those dangers.

Nonetheless, there may be certain populations that are particularly affected by this regulation. Those who routinely engage in casual sexual encounters, and particularly those who embrace the importance of casual sexual encounters to their sexual identity, will be more burdened than others by this regulation. We recognize that portions of the gay male population are likely to be disproportionately burdened. In a recent survey of sexual behavior in a well-known gay Chicago neighborhood, researchers found fourty-three percent of men saying that they had had more than 60 sexual partners. Another eighteen percent had between 31 and 60 partners and another twenty-seven percent had between 16 and 30 partners.[197] This means that eighty-three percent of this urban gay male population has well over the average number of lifetime sexual partners.[198] Obviously these men will have more than the average number of first time encounters. Moreover, the same researchers noted that *most* "men-seeking-men" personal advertisements in the neighborhood "identify casual sex rather than long-term relationships as their goal." This means that the proposed statute will necessarily restrict the lives of gay men much more than the norm both because

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[196] *Lawrence* 539 U.S. at 561.

[197] EDWARD O. LAUMANN, THE SEXUAL ORGANIZATION OF THE CITY (2004).

[198] 86% of the gay male population lives in metropolitan areas, so these figures may be fairly representative of gay men generally. TAVIA SIMMONS & MARTIN O'CONNELL, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003) *at* www.census.gov/prod/2003pubs/censr-5.pdf.

gay men tend to have more sexual partners than is the norm and because gay men tend to prefer casual encounters more than is the norm. Moreover, this preference for casual sex may well be a preference that gays classify as an important part of their sexual identity.[199]

As discussed, and notwithstanding the advent of queer theory, it is unlikely that one could read even the most expansive Supreme Court case on sexual expression[200] as protecting the importance of casual sexual encounters to one's sexual identity. Certain groups valuing a practice does not give that practice constitutional protection. More important, our statute does not regulate casual sex, per se. We remain agnostic on the question of whether casual sex is good and an important part of some people's sexual identity. We do not remain agnostic on whether unprotected casual sex is good. Unprotected first-encounter casual sex is incredibly dangerous, not only for the participants but for anyone who will come into unprotected sexual contact with those participants.[201] Neither privacy nor associational rights will be

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[199] *See* Michael Warner, The Trouble With Normal 25- 37 (1999) (identifying casual sex with shame and arguing that queer culture is valuable precisely because "at its best [it]has always been rooted in a queer ethic of dignity in shame.").

[200] *See Lawrence*, *supra* note 197.

[201] Surveys of straight men in certain communities show that certain groups are remarkably likely to be having sex with more than one partner. 20% of straight men in one community reported having sex with two partners and 48% of that community's men reported have multiple partners in the last 12 months (22% of women reported having multiple partners in the last 12 months.) *See* Laumann, *supra* note 199.

"unduly burdened" by its reasonable regulation.[202]

Conclusion

Let us return to the Introduction's discussion of Star. If prosecuted for rape, Star may well be acquitted. If not prosecuted at all, perhaps because the alleged victim's sexual history renders her such a problematic witness, both Star and the alleged victim go home and the world will be left to believe that what happened in that resort was "just" a one night stand. So it may have been, but even if it was "only that," it was a reckless, dangerous encounter and it was abnormal. Most people now use condoms for one-night stands. Those who do not use condoms run the risk of seriously endangering their partners, both physically and emotionally.

Currently, the law's regulation of reckless sexual conduct is sporadic at best. While there is some prosecution of people who recklessly infect others with HIV, there is almost no regulation of the reckless infliction of other STDs and, save rape, there is no regulation of the reckless infliction of the emotional harm that can flow from careless sexual behavior. Comparably, while there is some indirect legal acknowledgement that condoms or the lack thereof may speak to the issue of consent and while there is de facto recognition that first time sexual encounters are more easily regulated than subsequent sexual encounters, the law has yet to regulate unprotected first time sexual encounters in any kind of comprehensive way. This deficiency in the law exists despite the fact that unprotected first time sexual

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[202] The "undue burden" test was developed in another constitutional privacy case, *see Planned Parenthood* 505 U.S. at 877 (1992).

encounters are likely the locus of the lion's share of both STD transmission and acquaintance rape.

Our statute fills that gaping hole. Giving men a new incentive to wear a condom in first-time sexual encounters should significantly reduce both the risk of sexually transmitted infections and the tragic lack of communication that often gives rise to the illusion of consent. Because so many first-time encounters are not followed by subsequent encounters and because just a few people with many unprotected encounters can be so powerful in spreading STDs, a law that requires protection in first time encounters will be very effective at reducing the spread of STDs. Because so many acquaintance rapes are first-time encounters and because so many of those rapes are primarily caused by a lack of communication, a law that fosters communication in first time encounters will likely be very effective at reducing the incidence of acquaintance rape. Our proposal is such a law.

We have argued that three different analytical approaches, rational actor, cognitive bias and norms analysis, support our claim that the proposed statute should reduce the risk of both STD transmission and acquaintance rape. This "consilience" should give public health specialists and rape reformers added confidence in the statute.

We are all hurt by a world in which sex is reduced to a base, non-communicative physical act. We are all hurt by a world in which the number of people infected with STDs reaches epidemic proportions. People on the right and left side of the political spectrum can agree that unprotected casual sex does little good for anyone and has the potential to do much harm. A crime of reckless sex, by encouraging people to protect themselves and their sexual partners, can encourage deliberation and communication in ways that promote public health and greatly reduce unnecessary and damaging sexual violence.