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# A Reckless Response to Rape: A Reply to Ayres and Baker

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*In a recent article in the University of Chicago Law Review, Professors Ian Ayres and Katharine Baker propose the crime of “reckless sexual conduct,” criminalizing unprotected first-encounter sexual intercourse. The goals of this proposal are to combat the epidemic of sexually transmitted diseases by requiring condom use and to reduce acquaintance rape by “forcing” communication. While the goals are admirable, the proposal is deeply flawed. As public health legislation, it is overinclusive, thereby punishing the morally innocent, and its conception of consent as an affirmative defense fundamentally misunderstands criminal responsibility. As rape reform, which is arguably the true aim of the statute, the proposal is morally and constitutionally impermissible: it punishes the innocent and improperly allocates the burden of proving consent to the defendant. The proposed statute also distracts from rape reform by attempting to circumvent the critical normative questions about consent and offering a second-best solution in consent’s place. Finally, the compromise verdicts that the authors seek, offered as a solution to the “sticky norms” problem, may ultimately undermine the seriousness of the very rapes the authors hope to prevent.*

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## INTRODUCTION

The rich and famous sometimes get away with murder. And they also sometimes get away with rape. Rape remains one of the most challenging areas of criminal law. Defining what constitutes consent and ascertaining under what conditions consent is competent, knowing, and unforced present difficult normative questions. And even when a rape, however defined, occurs, it still remains to be proven. Through the cracks of doctrinal and evidentiary rules, many rapes go unpunished. Arguably, Kobe Bryant's might have been such a case.

There is often an outcry against perceived injustice, and legislation may be introduced in response.<sup>1</sup> In a recent article in the *University of Chicago Law Review*, Professors Ian Ayres and Katharine Baker suggest a new crime to capture Kobe. They propose the crime of reckless sexual conduct.<sup>2</sup>

"Reckless sexual conduct" is, quite simply, unprotected first-encounter intercourse.<sup>3</sup> As Ayres and Baker summarize:

The proposal is simple: a person would be guilty of reckless sexual conduct and subject to imprisonment up to three months, if, in a first-time 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 by 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.<sup>4</sup>

This proposed statute aims to decrease acquaintance rape by creating a "default rule" of condom usage that will have "information-forcing effects."<sup>5</sup> The authors contend that the time lapse created by a man

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<sup>1</sup> For instance, the acquittal of John Hinckley resulted in significant changes to many jurisdictions' definitions of insanity. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 959-60 (1999).

<sup>2</sup> Ian Ayres & Katharine Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 599 (2005). The article's introduction features a hypothetical wherein "Star," "a married multimillionaire basketball star" is charged with raping a nineteen-year-old in a Colorado resort. *Id.* at 599-601.

<sup>3</sup> "The term 'first-time sexual encounter' refers to the first time that two particular people have sexual intercourse. . . . The term is not limited to the first time that an individual has sex." *Id.* at 601.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 631.

putting on a condom, or getting consent not to do so, presents an opportunity for the woman to express whether she actually desires intercourse.<sup>6</sup> With more deliberation and communication, the likelihood of acquaintance rape will be reduced.<sup>7</sup> Moreover, in those instances in which an acquaintance rape still occurs, the separate crime of reckless sex is intended to offer a new tool for prosecutors: "Reasonable doubts can remain whether an alleged acquaintance rapist raped, but there is often no question that he engaged in an unprotected first-time sexual encounter."<sup>8</sup>

The authors also aim at a second evil: the spread of sexually transmitted diseases ("STDs").<sup>9</sup> STDs can cause significant harm to those infected and also present a public health problem.<sup>10</sup> Condoms, of course, prevent the spread of these diseases.<sup>11</sup>

This proposal is intended to encompass the conduct of the authors' caricature of Kobe Bryant, whom they refer to as "Star."<sup>12</sup> Star, a married, "multimillionaire basketball star," is accused of raping a nineteen-year-old at a Colorado resort.<sup>13</sup> Star claims that the two had vaginal intercourse, but he stopped prior to ejaculation at the woman's request.<sup>14</sup>

Ayers and Baker contend that, although it will be difficult to prosecute Star for rape, he is still guilty of other wrongs: "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 posttraumatic stress disorder."<sup>15</sup> "[T]hese risks are routinely inflicted without any criminal

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<sup>6</sup> *Id.* at 636 ("[T]he break in the action caused by the attempt to put on a condom will present an opportunity for the parties (primarily women) to better express whether or not they truly consent.").

<sup>7</sup> *Id.*; see also *id.* at 619-20.

<sup>8</sup> *Id.* at 603.

<sup>9</sup> The category of "STDs" encompasses chlamydia, gonorrhea, syphilis, genital herpes, genital warts, and HIV. *Id.* at 604-05.

<sup>10</sup> *Id.* at 604-06.

<sup>11</sup> *Id.* at 630-31; see also Centers for Disease Control and Prevention, Male Latex Condoms and Sexually Transmitted Diseases, <http://www.cdc.gov/nchstp/od/latex.htm> (last visited Sept. 27, 2005) (stating that condoms prevent spread of STDs).

<sup>12</sup> Ayers & Baker, *supra* note 2, at 599.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 599, 600 n.3.

<sup>15</sup> *Id.* at 601.

sanction.”<sup>16</sup> The authors intend the crime of “reckless sexual conduct” to fill that gap.<sup>17</sup>

The goals of this proposal are admirable. Given the current risks of contracting an STD, it is simply foolish to have a one-night stand without a condom. It is also undoubtedly true that at least some acquaintance rapes are the result of miscommunication and that most acquaintance rapists currently escape the reach of the law.<sup>18</sup>

The proposal, however, is deeply flawed. As a public health regulation, this proposed statute is highly problematic. It is overinclusive, thereby punishing the morally innocent. Moreover, its conception of consent as an affirmative defense fundamentally misunderstands criminal responsibility.

The overinclusiveness of the proposed statute and the inclusion of a consent defense are completely intelligible, however, when we focus on the true aim of the proposal. As the introduction focusing on Star evinces,<sup>19</sup> the authors are actually rape reformers. Their approach is novel — they apply Ayres’s theory of information-forcing default rules to the criminal law. The authors seek to prevent rape by fostering communication.

However, as rape legislation, this proposal is morally objectionable and constitutionally impermissible: it punishes the innocent and improperly allocates the burden of proving consent to the defendant. This proposed statute also distracts from true rape reform by offering a second-best solution. Finally, the compromise verdict the authors seek is too much of a compromise — the authors offer a lesser alternative to rape reform, an alternative that may ultimately undermine the seriousness of the very rapes they seek to prevent.

#### I. THE PROBLEMS AND THE PROPOSAL

In their article, Ayres and Baker set forth a formidable argument as to the evils of STDs and acquaintance rape. They begin with the claim that sex is dangerous.<sup>20</sup> The first danger is STDs, and the statistics they cite

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Ayers and Baker cite a Senate Judiciary Committee finding that 98% of rapists are not caught, tried, and imprisoned. *Id.* at 637 & n.151.

<sup>19</sup> *Id.* at 599-601.

<sup>20</sup> *Id.* at 603.

are staggering. The authors tell us, inter alia, that fifteen million new cases of STDs are diagnosed each year, that one in six men aged 15 to 49 has genital herpes, and that 25% of sexually active teenagers have an STD.<sup>21</sup> Women are more susceptible to these diseases, and, with the exception of HIV, the effects on women are more serious than the effects on men.<sup>22</sup>

We also learn that a small proportion of the population is responsible for the spread of STDs. While the average individual has seven to nine partners, a minority of individuals has sex with a significantly greater number of people.<sup>23</sup> It is this latter group that perpetuates STD infections.<sup>24</sup> It also stands to reason that it is this group that partakes in most one-night stands.<sup>25</sup> Hence, Ayres and Baker maintain that enforcing condom usage in first (and likely only) encounters should have a significant effect on the spread of disease.<sup>26</sup>

According to the authors, sex is also dangerous because of its emotional content.<sup>27</sup> Sex is often emotionally laden, but there is even greater emotional destruction associated with rape.<sup>28</sup> Ayres and Baker claim that the line between rape and sex is all but clear, and they cite one researcher who contends that misperception is the likely cause of many acquaintance rapes.<sup>29</sup> Acquaintance rapes typically occur in first sexual encounters, and during acquaintance rapes, condoms are rarely used.<sup>30</sup>

The authors conclude that “two attributes of sex — sex that is a first-time encounter between two particular people, and sex that is unprotected — *when combined* are strongly linked to both STDs and acquaintance rape.”<sup>31</sup> Ayres and Baker aver that both evils may be prevented through the following statute:

#### **Reckless Sexual Conduct**

(1) A person is guilty of reckless sexual conduct when the person

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<sup>21</sup> *Id.* at 604.

<sup>22</sup> *Id.* at 605-06.

<sup>23</sup> *Id.* at 607.

<sup>24</sup> *Id.* at 611 (“For example, if everyone had exactly eight sexual partners during the course of his or her lifetime . . . most STDs would cease to exist.”).

<sup>25</sup> *Id.* at 612.

<sup>26</sup> *Id.* at 617.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 618.

<sup>29</sup> *Id.* at 619.

<sup>30</sup> *Id.* at 620.

<sup>31</sup> *Id.* at 622.

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.

(3) Definitions:

(a) "Sexual activity" means penile penetration of a vagina or anus accomplished by a male or female.

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

(c) "Occasion of the crime" includes the twelve-hour period after the two people engage in sexual activity for the first time.

(4) Sanctions:

(a) Sentence: The crime of reckless sexual conduct is punishable 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.<sup>32</sup>

The authors explain that this proposal, although innovative, is consistent with existing law. First-encounter sex is currently treated with greater suspicion than later encounters, as evidenced by rape spousal immunity provisions and by the admission of prior sexual behavior between the victim and the accused.<sup>33</sup> Additionally, statutes and case law already address the relevance of condom use to the presence or absence of consent.<sup>34</sup>

Ayres and Baker also note that the legal landscape already contains

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<sup>32</sup> *Id.* at 632-34.

<sup>33</sup> *Id.* at 622-24.

<sup>34</sup> *Id.* at 626-27 (citing cases finding that request to use condom is insufficient to prove consent to intercourse, but is sufficient to prove lack of consent to unprotected intercourse).

complementary statutes. The Model Penal Code bars reckless endangerment.<sup>35</sup> California criminalizes unprotected sexual activity where the individual knows he has HIV, fails to disclose it, and acts with the specific intent to infect his partner.<sup>36</sup> Missouri, on the other hand, requires the actor to disclose his HIV status regardless of whether he uses a condom.<sup>37</sup>

However, the authors contend the legal landscape is incomplete. For example, in Missouri, an infected individual is not immunized by using a condom, and thus, the state's statute provides no incentive for condom use.<sup>38</sup> Moreover, endangerment prosecutions have focused almost exclusively on HIV.<sup>39</sup> Finally, the authors argue that no statute exists to protect victims from the emotional havoc created by nonconsensual sex.<sup>40</sup>

In the third part of their paper, Ayres and Baker contend their proposed statute would abate these evils. They employ three different frameworks — the rational-actor, behaviorist, and social norms approaches — to demonstrate how their proposed statute would work. Rational actors would use condoms not only because they fear false complaints but also as the result of the communication that a default condom rule would engender.<sup>41</sup> From a behaviorist perspective, the proposed law would fight against availability bias and optimism, both of which may cause individuals to underestimate the risks of STDs and acquaintance rape.<sup>42</sup> Finally, because most people already use condoms in first-time encounters,<sup>43</sup> the proposed statute would reinforce the existing social norm while giving men an independent reason to reach for a condom without this action being perceived as an admission of infection.<sup>44</sup>

Ayres and Baker also claim that justice would be served more often under their statute. Currently, most acquaintance rapists go

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<sup>35</sup> *Id.* at 627-28; see MODEL PENAL CODE § 211 (1962).

<sup>36</sup> Ayers & Baker, *supra* note 2, at 628; see CAL. HEALTH & SAFETY CODE § 120290 (West 2005).

<sup>37</sup> Ayers & Baker, *supra* note 2, at 628; see MO. ANN. STAT. § 191.677 (West 2002).

<sup>38</sup> Ayers & Baker, *supra* note 2, at 628-29.

<sup>39</sup> *Id.* at 629.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 635-37.

<sup>42</sup> *Id.* at 647-50. "Availability bias refers to people's tendency to appreciate and internalize only those risks that are obvious — or readily cognitively available." *Id.* at 648 n.182.

<sup>43</sup> *Id.* at 650-51.

<sup>44</sup> *Id.* at 651-52.

unpunished.<sup>45</sup> Ayres and Baker argue that if their statute were enacted, acquaintance rapists might very well be convicted, as it would be easy for prosecutors to establish that the act was a first encounter and that it was unprotected.<sup>46</sup> Moreover, Ayres and Baker believe that jurors would be willing to convict those whom they do not believe are “real rapists” because the punishment is not severe.<sup>47</sup> Shifting the burden of proving consent to the defendant would also increase convictions, and although it would also increase the risk of punishing the innocent, Ayres and Baker dismiss this concern because “[c]urrent research suggests that the propensity of women to make false reports of acquaintance rape is extremely low.”<sup>48</sup> Men, they argue, can escape punishment simply by wearing a condom.<sup>49</sup>

In the fourth part of their paper, Ayres and Baker address the constitutionality of their proposed statute. First, they argue that public policy supports placing the burden of proving consent on the defendant. Favorable aspects of their proposal from a public policy perspective include increasing the likelihood of crime reporting, offsetting the difficulty of proving nonconsent, and coinciding with the common sense view that no woman would willingly and recklessly put her health at risk.<sup>50</sup> Second, the authors contend the allocation passes constitutional muster.<sup>51</sup> Ayres and Baker argue that their proposed statute addresses a crime different from rape because their goal, unlike that of rape statutes, is to criminalize *unprotected sex*.<sup>52</sup> Indeed, the authors assert that the affirmative defense could be altogether abolished and the proposed statute would remain justified “for public health reasons.”<sup>53</sup> At one point, they go so far as to argue that “nonconsensual sex is not the target

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<sup>45</sup> *Id.* at 637.

<sup>46</sup> *Id.* at 638.

<sup>47</sup> *Id.* at 656; see also SUSAN ESTRICH, REAL RAPE 3-4 (1987) (noting often made, but inappropriate, distinction between acquaintance rape (“simple rape”) and stranger rape (“real rape”)).

<sup>48</sup> Ayers & Baker, *supra* note 2, at 639.

<sup>49</sup> *Id.* at 640 (“From an ex ante perspective, they hold the keys to their own jail house.”). The authors also address the possibility that their proposal immunizes rapists so long as they wear a condom. However, they dismiss this possibility not only because it is unlikely in stranger rape cases but also because “it would be hard to imagine a regime with a lower probability of punishments” for current acquaintance rapes. *Id.* at 640-42.

<sup>50</sup> *Id.* at 658-59.

<sup>51</sup> They also argue that the statute does not unduly burden privacy and freedom of association. *Id.* at 661-64.

<sup>52</sup> *Id.* at 660.

<sup>53</sup> *Id.*

of our statute.”<sup>54</sup> Ultimately, the authors claim that the rationale for the affirmative defense is the mitigation of the defendant’s culpability because his partner “actively solicited” the unprotected sex, thus

“parallel[ing] the affirmative defenses of entrapment and irresistible impulse.”<sup>55</sup>

Thus, Ayres and Baker present a seemingly comprehensive argument in support of the separate crime of reckless sex. Requiring men to wear a condom (or to get consent not to do so) can reduce the evils of STDS and acquaintance rape.<sup>56</sup>

## II. THE PERILS OF THE PROPOSAL

Despite the legitimacy of its aims, this proposal should never become law. As STD legislation, it is morally illegitimate and its consent defense is conceptually confused. It is only when we view the proposal through the prism of rape reform that we can begin to understand the contours of this proposed statute. Yet, even as rape reform, the proposal threatens to punish the innocent and to undermine the seriousness of acquaintance rape.

### A. *The STD Rationale*

The first goal of the proposal is to minimize STDs. I argue in this section that, with regard to this rationale, the statute is problematic in

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<sup>54</sup> *Id.* at 661.

<sup>55</sup> *Id.* at 660-61.

<sup>56</sup> The authors’ discussion primarily depicts male defendants and female victims. I follow their usage. Under the authors’ proposed statute, women will be largely immune from prosecution when a man does not use a condom because, as the authors state, the “man’s choice to place his unsheathed penis inside the woman in most cases would provide an unequivocal indication [of his consent].” *Id.* at 642. The authors claim this de facto asymmetry is justified because the vast majority of acquaintance rapists are male, women are more likely to be injured by STD transmission, and the authors want to encourage rape reporting. *Id.* at 644.

One analytical gap is worth mentioning here. The authors’ statistics reveal that homosexual men engage in the most one-night stands. *Id.* at 614. Indeed, the authors draw the reader’s attention to this fact and then discuss the constitutionality of the disproportionate burden their legislation will have on gay men. *Id.* at 615, 663. One thus may question whether the proposed statute aims at the same set of relationships — the authors believe that gay men will be affected by the STD aspect of the legislation and that heterosexual men will be affected by the acquaintance rape aspect of the legislation. Thus, the male perpetrator/female victim dichotomy does not depict the true state of affairs, at least with respect to the STD rationale.

two respects. First, it is overinclusive, thereby threatening to punish the morally innocent. Second, the statute is underinclusive in a manner that undermines criminal responsibility — it offers a conceptually confused theory of excuse.

1. This Proposal Is Overinclusive and Punishes Morally Innocent Conduct

The proposed statute is overinclusive. As Ayers and Baker note, statutes already exist that criminalize an infected individual's failure to disclose that he has an STD.<sup>57</sup> There is, however, a critical distinction between statutes such as Missouri's and California's and that of the authors. In the former statutes, the defendant (1) actually has the STD and (2) culpably risks transmitting the disease. In contrast, under the authors' proposal, even a defendant who knows that he does not have an STD can be guilty of reckless sexual conduct. This, of course, is a significant difference.

Indeed, it is only in a footnote that the authors address their statute's overinclusive nature:

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 . . . . 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 guarantees of due process. Overinclusive criminal statutes are not forbidden by the Constitution.<sup>58</sup>

The authors are correct in their contention that “[o]verinclusive criminal statutes are not forbidden by the Constitution.”<sup>59</sup> The Supreme Court has had little to say about substantive criminal law.<sup>60</sup> Criminal statutes, unless burdening a fundamental right, are subject only to rational basis review.<sup>61</sup> Thus, as one commentator has noted, a state

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<sup>57</sup> *Id.* at 627-28.

<sup>58</sup> *Id.* at 661 n.235.

<sup>59</sup> *Id.*

<sup>60</sup> Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509 (2004) (“It has become a commonplace that there are no meaningful constitutional constraints on substantive criminal law.”).

<sup>61</sup> Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 LAW & PHIL. 437, 465-66 (2004).

could constitutionally criminalize eating sausage to prevent obesity.<sup>62</sup>

Academics have long argued that the Supreme Court's rational basis standard is an inadequate standard of review for criminal statutes. The state should have a good reason to coerce citizens into acting or not acting in a specific manner.<sup>63</sup> Criminal legislation that is overinclusive is morally illegitimate in that it criminalizes conduct that is not wrongful and thus is not appropriately the subject of regulation.<sup>64</sup> In such cases, the state threatens to punish an individual for conduct that she should be at liberty to engage in. When the individual breaks such a law, despite engaging in morally innocent behavior, that person is incarcerated — a significant deprivation of liberty.<sup>65</sup>

As Professor Sherry Colb has argued, "liberty from confinement cannot be relegated to the status of unprotected aspects of daily life, subject to any regulation that is not utterly irrational."<sup>66</sup> In illustrating what would be objectionable overinclusive legislation, Colb imagines "a statute that provides for the incarceration of those engaging in premarital sex to further the compelling interest in public health by shielding citizens from deadly diseases."<sup>67</sup> There is little difference between Colb's hypothetical law and that proposed by Ayres and Baker. Colb's law might punish *more* innocent people, but it, too, meets rational basis review, the only standard that Ayres and Baker believe to be relevant.

Here, Ayres and Baker's proposal threatens to take away an individual's liberty when he actually presents no risk of the harms the proposed statute seeks to prevent. Their criminal net encompasses

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<sup>62</sup> *Id.* at 467; see also William J. Stunz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("It has long been a source of academic complaint; indeed, it has long been the starting point for virtually all the scholarship in this field, which . . . consistently argues that existing criminal liability rules are too broad and ought to be narrowed.").

<sup>63</sup> JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 9 (1984) ("Liberty should be the norm; coercion always needs some special justification.").

<sup>64</sup> See also Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 605 (1998) ("[T]he sentiment that underlies the presumption of innocence seems applicable to a defendant whose act-token violates an overinclusive statute, even though it is reasonable and thus should not have been criminalized in the first place.").

<sup>65</sup> See Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 821 (1994).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 828.

everyone from eighteen-year-old virgins to promiscuous twenty-seven-year-olds, from those who see doctors to those who do not. However, if neither individual has an STD, they simply present no risk of contributing to STD epidemics. In such cases, the state does not have any good reason to restrict their behavior in any manner, no matter how slight the coercion is.

In addition, to the extent that the authors might justify punishing this morally innocent behavior for deterrence reasons (e.g., to encourage condom use by others), this rationale is particularly troublesome. Empirical data indicate that changes in criminal law rules have little deterrent effect.<sup>68</sup> Thus, the innocent are essentially sacrificed for no purpose whatsoever. Moreover, the criminal justice system operates best when it reflects the community's views of desert, and deviations from desert — punishing innocent people — can ultimately undermine the moral force of the criminal law.<sup>69</sup>

The proposed statute should be restructured to eliminate this injustice. Three different types of situations may be legitimately criminalized. First, if an actor acts purposefully, knowingly, or recklessly as to transmitting the disease, is an STD carrier, and actually infects another person, his conduct should be criminalized. Second, if an actor acts purposefully, knowingly, or recklessly as to transmitting the disease, is an STD carrier, but does not infect his partner, his conduct, too, could be covered. This type of conduct would be analogous to an attempt. Finally, the proposed statute could cover the situation wherein the defendant does not have the disease but still culpably risks infecting others. To illustrate, an individual who has had fifty unprotected encounters may have been fortunate enough to avoid an STD, but he may still be quite cognizant of the risk that he is a carrier. If he fails to

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<sup>68</sup> Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 204 (2004) (“[T]he standard practice of formulating criminal law liability and punishment rules to optimize deterrent effect is indefensible given the rarity with which such rule formulation is likely to have the intended effect on crime decisions.”). I thank Doug Husak for this point.

<sup>69</sup> Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 497-98 (1997) (“Most importantly, it is clear that a utilitarian calculus in determining the rules for the distribution of criminal liability and punishment must take account of real-world costs that come from deviating from the community's principles of deserved punishment. The costs and benefits of moral credibility may be more difficult to measure than those of the factors typically taken into account by utilitarian calculations in the past, but if they are more powerful in their effect than the other factors, to ignore them risks rendering the calculation meaningless.”).

confirm his noninfected status and willingly puts his future partners at risk, the proposed statute should cover his conduct. While punishing those who present no real risk of infection might be controversial, this approach would still be narrower than the authors' proposal, as it would not encompass morally innocent behavior.

In each of the situations presented above, there is a reason to criminalize the actor's behavior. Each individual acts culpably because he has expressed his willingness to harm another. Hence, the state may legitimately criminalize such behavior.

2. Ayres and Baker's Proposal Inappropriately Contains a Consent Defense, Thus Offering a Conceptually Confused Theory of Excuse

The proposed statute thus revised still needs significant work, however, because it is also underinclusive, and it is underinclusive in a particularly problematic way. The authors seek to legitimize placing the burden of proving consent on the defendant by arguing that the statute is a public health regulation.<sup>70</sup> According to Ayres and Baker, the consent defense is analogous to the defenses of entrapment or irresistible impulse.<sup>71</sup> They claim that men are less culpable when they are encouraged or seduced to "behave recklessly with regard to the spread of STDs."<sup>72</sup> This excuse theory of consent offers an inappropriate defense to the guilty and presents a conceptually confused view of criminal responsibility.

Consent cannot operate as an excuse. If this proposed statute aims at the public welfare, then the defendant's culpability is in no way mitigated simply because he acts on a desire to have unprotected intercourse and his partner is a willing, and perhaps encouraging, participant. Many, many factors influence people to commit crimes. They are often seduced or enticed. This does not *excuse* the actors,

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<sup>70</sup> Ayers & Baker, *supra* note 2, at 643 n.166 ("From the perspective of acquaintance rape, it is obviously relevant to a defendant's culpability whether or not the woman consented. But, . . . the affirmative defense is constitutional only 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.").

<sup>71</sup> *Id.* at 643-44; *id.* at 661 ("[O]ur affirmative defense parallels the affirmative defenses of entrapment and irresistible impulse — defenses that qualify society's condemnation of the defendant's state of mind.").

<sup>72</sup> *Id.* at 643-44.

however. "Causation is not compulsion";<sup>73</sup> otherwise, responsibility would vanish.<sup>74</sup> It is only when the defendant lacks the capacity or the fair opportunity to refrain from criminal conduct that we are willing to excuse him from criminal responsibility.<sup>75</sup>

Accordingly, the two defenses to which the authors seek to analogize their consent defense, irresistible impulse and entrapment, are simply inapposite. Irresistible impulse is an insanity test, wherein the defendant lacks volitional control.<sup>76</sup> That is not the case here. No matter how desirable his partner is, the man retains control over his participation in intercourse and the use of a condom. Encouragement and enticement do not compel him to commit the criminal act.

Entrapment, in turn, is best viewed as a nonexculpatory defense,<sup>77</sup> resting on the public policy rationale that "the judicial process ought not to be sullied by the use of improper police misconduct to procure convictions."<sup>78</sup> Entrapment cannot be understood to reflect the view that encouragement itself excuses, because the defense does not apply generally, but only to conduct by police officers.<sup>79</sup> Thus, neither of these defenses provides any support for the claim that encouragement excuses. Indeed, criminal law tells us just the opposite: the woman's encouragement establishes her complicity — it does not excuse the man.<sup>80</sup>

<sup>73</sup> MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 526 (1997).

<sup>74</sup> *Id.* at 522-47 (arguing that causation does not excuse); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 *CRIME & JUST.* 329, 350 (1998) (defining "the 'fundamental psycholegal error': Causation is neither an excuse per se nor the equivalent of compulsion, which is an excusing condition.>").

<sup>75</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 17.03[E] (3d ed. 2001) (discussing personhood theory, which requires that we "excuse people whose ability to reason practically is grossly disturbed or underdeveloped (e.g., insane people and infants) . . . [and] those whose opportunity to reason practically is seriously undermined on an individual occasion (e.g., due to passion or coercion)"); PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 83 (1997) ("[T]he actor can point to abnormal circumstances or abnormal characteristics that make it too difficult for the actor to appreciate the criminality or wrongfulness of his or her conduct or too difficult to conform his or her conduct to the requirements of law.>").

<sup>76</sup> DRESSLER, *supra* note 75, § 25.04[C][2].

<sup>77</sup> 2 PAUL ROBINSON, *CRIMINAL LAW DEFENSES* § 209(b), at 513-16 (1984).

<sup>78</sup> *Id.* § 209(b), at 513; *see also* Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 *J. CRIM. L. & CRIMINOLOGY* 827, 845-57 (2004) (explaining why individual's culpability is not diminished when he is entrapped).

<sup>79</sup> ROBINSON, *supra* note 77, at 515.

<sup>80</sup> *See* MODEL PENAL CODE § 2.06(3)(a)(i) (1962) (solicitation establishes accomplice liability); *id.* § 5.02(1) (defining solicitation as, among other things, "encouragement"). *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of*

Moreover, from the standpoint of the public health rationale, there is simply no reason to excuse the defendant simply because the victim consented to the unprotected intercourse.<sup>81</sup> If this statute were designed to protect the woman, consent would be relevant because it would negate the wrongfulness of the action.<sup>82</sup> However, as a public health regulation, the harm extends beyond the two participants. In such cases, the consent of the woman is insufficient to address the evil sought to be prevented.<sup>83</sup>

Indeed, consider the authors' claim that Star's conduct increased the risk of harms to multiple persons because he "did not know whether the nineteen-year-old was infected with a sexually transmitted disease," thus increasing "the chance that both he and any other individuals with whom he would subsequently engage sexually (including his wife)

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*Doctrine*, 73 CAL. L. REV. 323, 333 (1985) (explaining that rationale behind complicity doctrine is that accomplice cannot be said to "cause" principal's actions). Kadish states:

That same view of human action that entails freedom to choose obviously applies to the actions of one who is responding to the actions of another. In the same sense and for the same reasons that a person's genes, upbringing, and social surroundings are not seen as the cause of his actions, neither are the actions of another seen as the cause of his actions. We regard a person's acts as the products of his choice, not as an inevitable, natural result of a chain of events. Therefore, antecedent events do not cause a person to act in the same way that they cause things to happen, and neither do the antecedent acts of others. To treat the acts of others as causing a person's actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.

*Id.*

<sup>81</sup> Eliminating the affirmative defense of consent would not "thereby transform[] the crime into a strict liability offense," as the authors claim it would. Ayers & Baker, *supra* note 2, at 643; see also *id.* at 660 ("[A] strict liability offense, which would remove consent from the analysis completely, could readily be justified as necessary for public health reasons.").

Ayers and Baker's proposed statute might itself be viewed as imposing some type of formal or substantive strict liability: the defendant must intend intercourse, but no mens rea is required as to whether the defendant is infected, and the defendant need not even be infected. This has nothing to do with consent. Consent is not relevant to (1) the defendant's mental state regarding whether he is infected or (2) whether the defendant actually is infected. Thus, while allowing consent as a defense will undoubtedly reduce the number of people who fall within the proposed statute's proscriptions, the defense achieves this goal by relying on an arbitrary and irrelevant fact. The authors might as well allow "being a brunette" to be an affirmative defense — such a defense would be equally (un)intelligible.

<sup>82</sup> In such a case, however, it would be unconstitutional to allocate the burden of proving consent to the defendant. See *infra* text accompanying notes 107-15.

<sup>83</sup> PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 114-19 (2004) (explaining why consent does not apply to offenses that cause harm to people beyond participants).

would become infected.”<sup>84</sup> Nothing in the authors’ proposed statute would solve this problem. Infected risk-takers who choose to engage in reckless sex with consenting partners are immune from prosecution for the reckless act, despite the fact that they increase the risk to third parties (including their wives). And these actors are immune from liability in subsequent encounters with their wives because those acts would not be first encounters. Thus, consent as an affirmative defense undermines the proposed statute’s effectiveness.

To the extent that the proposal aims at reducing the spread of STDs, it misses the mark. While the goal is admirable, Ayers and Baker risk punishing the innocent. The authors also disregard the effect that their affirmative defense of consent would have — it would free the guilty. The proposed statute must be restructured so as to eliminate these effects.

### *B. As Rape Reform*

The problems with Ayers and Baker’s proposed statute as STD legislation may ultimately be beside the point. The true target of this proposal is acquaintance rape. Understood from this perspective, the proposed statute need not be limited to infected individuals and the defense of consent is relevant.<sup>85</sup> Through the prism of rape reform, the pieces of this proposal come together.

Unfortunately, even as rape legislation, the proposal is unsound. In this section, I explain how the proposal seeks to establish penalty defaults so as to “force” individuals to communicate about consent.<sup>86</sup> Next, I claim that the authors’ default rule punishes the innocent. I further argue that this statute is unconstitutional and morally objectionable because it places the burden of proving consent on the defendant. Finally, I turn to the practical problems with this proposal. First, I argue that it amounts to a second-best proxy for consent that avoids the true debates we must have about rape law. Second, I argue that the compromise verdicts sought by the authors could reinforce existing views that acquaintance rape is not “real rape.”

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<sup>84</sup> Ayers & Baker, *supra* note 2, at 601 n.8.

<sup>85</sup> *See Id.* at 661 n.235 (noting that when two individuals are not STD carriers in “this small group of people . . . 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”).

<sup>86</sup> *Id.* at 631.

1. The Authors Apply Information-Forcing Default Rules to the Criminal Law

In a 1989 article, Professor Ayres and his co-author Professor Robert Gertner famously introduced the concept of “penalty defaults” to contract law.<sup>87</sup> At that time, when faced with an incomplete contract, commentators urged courts to set default rules according to what the parties would have wanted.<sup>88</sup> Ayres and Gertner, however, argued for penalty defaults that are set “at what the parties would not want — in order to encourage the parties to reveal information to each other or to third parties.”<sup>89</sup> “Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.”<sup>90</sup>

Ayres and Baker expand the usage of these default rules to the law of rape.<sup>91</sup> The authors create an incentive for the man to ask the right questions. If a man needs to reach for a condom, there will be a pause in the sexual activity that will give both parties an opportunity to communicate about consent. If the man asks the woman for permission to forego using a condom, there will likewise be an opportunity for communication. But if the man simply proceeds with intercourse without stopping for a condom or obtaining articulated consent, the penalty default kicks in. He has forgone the opportunity for communication and is guilty of reckless sexual conduct. Thus, the proposed statute, “though not as explicit in its communication forcing as those rules that require verbal consent before initiating a move to a higher level of sexual intimacy, would likely have comparable information-forcing effects.”<sup>92</sup>

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<sup>87</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

<sup>88</sup> *Id.* at 89.

<sup>89</sup> *Id.* at 91.

<sup>90</sup> *Id.*

<sup>91</sup> Ayers & Baker, *supra* note 2, at 631; cf. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 374-75 (2004) (offering thought experiment of information-forcing adultery statute, but ultimately concluding it was inappropriate to employ such default rules in criminal law context).

<sup>92</sup> Ayers & Baker, *supra* note 2, at 631.

2. These Information-Forcing Default Rules Are Overinclusive and Punish Morally Innocent Behavior

With the structure of this legal rule articulated, the inquiry turns to whether the proposed penalty default can be justified. In order to make this evaluation, it is important to clearly articulate the harm or evil that the proposed statute seeks to prevent. The authors claim that Star and other actors have engaged in behavior that falls within “the moral category of reckless sexual conduct.”<sup>93</sup> However, once we unpack this category, it is evident that the proposed statute does not punish a different harm, a different culpability level, or a different moral category than do those statutes that punish acquaintance rape.<sup>94</sup>

First, there is no additional harm at issue besides the harm presented by rape. The authors seem to believe that rape laws fail to criminalize the emotional impact of rape:

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 conduct is tailored to do just that.<sup>95</sup>

At another point they argue that, “save rape, there is no regulation of the reckless infliction of the emotional harm that can flow from careless sexual behavior.”<sup>96</sup>

While it may be difficult to articulate the exact harm of rape,<sup>97</sup> there is no doubt that the current rape laws address the harms listed above. Rape is both a physical and emotional injury,<sup>98</sup> and it is exactly these

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<sup>93</sup> *Id.* at 656.

<sup>94</sup> Despite forsaking the rape rationale at one point, the authors clearly target acquaintance rape. *E.g.*, *id.* at 636 (predicting that their statute would make “clear progress in the fight against acquaintance rape”); *id.* at 638 (“[T]he criminalization of reckless sexual conduct is likely to reduce the problem of acquaintance rapists going completely unpunished.”); *id.* at 665 (“Because so many acquaintance rapes are first-time sexual encounters, and because so many of those rapes are primarily caused by a lack of communication, a law that fosters communication in first time sexual encounters will likely be very effective at reducing the incidence of acquaintance rape. Our proposal is such a law.”).

<sup>95</sup> *Id.* at 629.

<sup>96</sup> *Id.* at 664.

<sup>97</sup> For an excellent discussion, see ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 89-118 (2003).

<sup>98</sup> See ESTRICH, *supra* note 47, at 103-04 (“Whether one adheres to the ‘rape as sex’

harms that rape laws deter and punish.<sup>99</sup>

Second, the authors are not getting at a different type of culpability. They aim at recklessness:

In emphasizing that acquaintance rapists are “real rapists,” the [rape reform] 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.<sup>100</sup>

According to Ayres and Baker, an actor is reckless when he does not take the time to inquire as to whether the woman is actually consenting.<sup>101</sup> That is, Ayres and Baker’s complaint is that a man either consciously disregards the substantial and unjustifiable risk that the woman may not be consenting or he is unreasonably unaware of that risk. These formulations, of course, are the very definitions of recklessness and negligence,<sup>102</sup> and these culpability levels already exist in rape statutes. Many states convict the man when he is simply negligent as to the victim’s lack of consent, and some states arguably have strict liability as to this provision.<sup>103</sup> Thus, there is no doubt that the law currently punishes the reckless actor. Indeed, in instances in which the woman consents but the man believes he is raping her, the man is *still* within the reach of the criminal law through attempt provisions.<sup>104</sup>

Admittedly, recklessness as to consent is not always sufficient for

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school or the ‘rape as violence’ school, the fact remains that what makes rape, whether ‘simple’ or ‘aggravated,’ different from other crimes is that rape is a sexual violation — a violation of the most personal, most intimate, and most offensive kind.”).

<sup>99</sup> To the extent that the authors might reply that acquaintance rape without a condom is a greater harm, minor reforms of rape laws would address this problem. The situation is analogous to killing someone with one shot versus a machete. The use of a machete is not its own crime, but aggravates the murder. Once again, the authors are not truly addressing a new harm.

<sup>100</sup> Ayers & Baker, *supra* note 2, at 656.

<sup>101</sup> *Id.* at 602 (“Men who rape recklessly, by not finding the time or compassion to discern a partner’s consent, rarely find time to use a condom.”); *id.* at 620 (“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.”).

<sup>102</sup> See MODEL PENAL CODE § 2.02(2) (1962).

<sup>103</sup> DRESSLER, *supra* note 75, § 33.05 (noting that in several jurisdictions, honest and reasonable mistake as to consent is not defense). *But cf.* WESTEN, *supra* note 83, at 143-44 (arguing commentators rely on dicta when claiming strict liability is imposed).

<sup>104</sup> WESTEN, *supra* note 83, at 148-52 (when victim consents but defendant believes she does not, defendant has attempted rape).

liability because many rape laws require the element of force.<sup>105</sup> My argument is not that recklessness is sufficient to convict under current law, but that the authors' target is the wrong of rape and the culpability of acquaintance rapists. Thus, this proposed statute stands or falls on an acquaintance rape rationale — there is no separate moral category here and no separate wrong or culpability level at issue.

In other words, the separate crime of reckless sexual conduct is justified only to the extent that it covers the recklessness of acquaintance rapists or targets the harm inherent in rape. There is no other justification. Unfortunately, the statute fails to meet this burden because the failure to wear a condom is not coextensive with the crime of acquaintance rape. A man can act recklessly as to the woman's consent but still wear a condom, and a man may not be reckless as to consent, even if he does not wear a condom. In the latter instance, this proposed statute would punish morally innocent behavior.

Once again, the purpose of this proposed statute is to prevent the harm of rape. The culpability at issue is the recklessness of a man in failing to ascertain whether the woman is consenting. Thus, there is simply no justification for subjecting a man to even one day in jail simply because he did not wear a condom while having consensual sexual intercourse. Certainly, the man may be profoundly foolish for not wearing a condom, but this law is not designed to protect the man from himself — it is designed to protect the woman from rape.

While this statute will create an incentive to communicate, creating incentives is not the purpose of the criminal law. In the criminal law, a "penalty" default requires a justification for that "penalty." Failing to communicate about the use of a condom is not coextensive with being an acquaintance rapist, and Ayers and Baker offer no other justification for punishing the failure to communicate. Retributivists will find punishing the innocent to be wholly unjustified, and even utilitarians should fear that deviations from desert undermine the moral force of the criminal

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<sup>105</sup> *E.g.*, *People v. Warren*, 446 N.E.2d 591, 593 (Ill. App. Ct. 1983) (holding that because defendant did not use weapon or otherwise directly threaten to harm victim, there was no rape); *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164-65 (Pa. 1994) (reading Pennsylvania rape statute as requiring force, not just nonconsensual sex). *See generally* ESTRICH, *supra* note 47, at 58-71 (describing how rape reform legislation shifted focus from nonconsent to force in effort to draw focus toward man's behavior and away from woman's lack of resistance and how this reform has ultimately failed); WESTEN, *supra* note 83, at 208 (describing how "force"/"consent" formulation debate rests on false conceptual premises because both concepts are capable of incorporating same type of wrongful pressures). I thank Professors Ayres and Baker for prompting me to clarify this point.

law.<sup>106</sup>

3. The Authors' Allocation of the Burden of Proving Consent to the Defendant Is Morally and Constitutionally Objectionable

This proposed statute suffers from a second fatal flaw: the allocation of the burden of proving consent to the defendant is morally and constitutionally objectionable.<sup>107</sup> The authors concede that allocating the burden of proving consent to the defendant would be unconstitutional if the aim of their statute was to decrease acquaintance rapes.<sup>108</sup> Indeed, the constitutional impediment is the reason why the authors seek to legitimize the allocation under the public health rationale:

From the perspective of acquaintance rape, it is obviously relevant to a defendant's culpability whether or not the woman consented. But, as argued in Part IV.A, the affirmative defense is constitutional only 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.<sup>109</sup>

As discussed previously in Part II.A.2, the attempt to tie the consent defense to STDs fails because there is no reason to provide a consent defense for a public health regulation. Indeed, the theory behind a "consent as excuse" defense is so conceptually confused that the only legitimate explanation for the consent defense is that it applies to the rape rationale.

Once consent is properly understood as applying to the rape rationale, it is constitutionally and morally impermissible to allocate the burden to the defendant. Consent possesses "moral magic":<sup>110</sup> it "turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial

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<sup>106</sup> See *supra* text accompanying notes 68-69.

<sup>107</sup> Ayres and Baker claim that the state of Washington allocates the burden of proving "forcible compulsion" to the prosecution, but allocates the burden of proving consent to the defendant. Ayers & Baker, *supra* note 2, at 659 n.226. This is also true of the District of Columbia. See *Russell v. United States*, 698 A.2d 1007, 1116 n.12 (D.C. 1997). However, because "force" negates legal consent, the result is that juries are given contradictory instructions. WESTEN, *supra* note 83, at 129 n.1.

<sup>108</sup> Ayers & Baker, *supra* note 2, at 643 n.166.

<sup>109</sup> *Id.*

<sup>110</sup> Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121 (1996).

appropriation of name and likeness into a biography."<sup>111</sup> Consent can thus "make an action right when it would otherwise be wrong."<sup>112</sup> When a "victim" consents, there is no wrong and, thus, it is morally illegitimate to place the burden of proving consent on the defendant. The prosecution must prove there was a rape, or an act of reckless sex, and if the victim consented, there simply was no such act.

Ayers and Baker's proposal also violates the Due Process Clause. Dating back to *In re Winship*,<sup>113</sup> it has been clear that the prosecution bears the burden of proving beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged."<sup>114</sup> When there is sex with consent, there is no rape and, thus, no crime. Consent renders the conduct completely permissible. Because lack of consent is the very circumstance that renders the conduct

criminal, the burden of proving this element must lie with the prosecution.<sup>115</sup>

While the authors concede that under the rape rationale, placing the burden of proving consent on the defendant would run afoul of the Constitution, it is worth exploring the implications of their inappropriate allocation.<sup>116</sup> Consider two claims Ayers and Baker make. First, they state that their proposed statute will reduce acquaintance rapes because "it will be fairly easy to prove beyond a reasonable doubt that the sex was unprotected and that it was a first-time sexual encounter. . . . Therefore the criminalization of reckless sexual conduct is likely to

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<sup>111</sup> *Id.* at 123.

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

<sup>113</sup> 397 U.S. 358 (1970).

<sup>114</sup> *Id.* at 364.

<sup>115</sup> It is true that the Supreme Court's formalism in this area is problematic, as the question of what constitutes an essential element depends upon the legislature's formulation of the crime. See *Patterson v. New York*, 432 U.S. 197, 223 (1977) (Powell, J., dissenting) ("The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime."); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 341 (2000) ("Something peculiar is at work, however, when the extent of a constitutional guarantee that ought to limit the reach of the criminal sanction is determined by the legislation establishing the sanction itself."). Still, academics have a luxury that legislators do not have. Legislators must respond to political pressures, pressures that may sometimes yield less than optimal criminal statutes. There is simply no reason, however, why thoughtful academics cannot draft proposed statutes that present a coherent view of the harm sought to be prevented and properly allocate the burden of proof on those issues.

<sup>116</sup> Ayers & Baker, *supra* note 2, at 643 n.166.

reduce the problem of acquaintance rapists going completely unpunished."<sup>117</sup> Of course it will. The primary problem with acquaintance rape prosecutions, as evidenced by the Star hypothetical with which the authors begin, is the question of consent. Consent is crucial because it tells us whether the act is rape or sex. Certainly, if we eliminate the pivotal element of rape from the prosecutor's burden of proof, we will get more rape convictions. The problem is that some of those convicted might be factually innocent of the crime.

The authors are not all that concerned with punishing the innocent. Their second claim is that the conventional wisdom reveals that in only 2% of cases do women falsely accuse men.<sup>118</sup> This proportion is comparable to that of other major crimes.<sup>119</sup> Thus, the authors tell us false convictions will not be likely even when the burden of proving consent is allocated to the defendant — the risk of error is the same as with any other crime. There is a critical distinction, however. With other major crimes, the prosecution bears the burden of proving every essential element. Hence, even if a defendant is falsely accused, *Winship* protects him from being falsely convicted. Here, if the proposal allows the prosecution to avoid proving the key element of acquaintance rape, there will certainly be significant instances of punishing the innocent. *Winship* provides a key protection against the punishment of the innocent, and it is that protection the authors seek to circumvent.

Additionally, the authors cannot defend their allocation of the burden of proving consent by reconceptualizing the problem and claiming that their proposal punishes recklessness, not the result of recklessness.<sup>120</sup> Admittedly, the defendant may still be culpable in those instances in which the victim consents but the defendant is unaware of this fact. In such cases, although the wrong of rape has not occurred, the defendant has consciously disregarded the risk that the victim is not consenting. He is still culpable. In such cases, the defendant has *attempted* rape.<sup>121</sup>

Importantly, in such instances, where the defendant proceeds in conscious disregard of the possibility that the victim does not consent,

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<sup>117</sup> *Id.* at 638.

<sup>118</sup> *Id.* at 639.

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

<sup>120</sup> See *id.* at 656; E-mail from Katharine Baker, Professor of Law and Associate Dean, Chicago-Kent College of Law, to author (Feb. 1, 2005, 16:49:26 CST) (on file with author).

<sup>121</sup> See generally MODEL PENAL CODE § 5.01(1)(a) (1962) (stating that person is guilty of attempt when he "purposefully engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be").

consent is necessarily unavailable as a defense. Indeed, it is the very presence of consent that prevents the behavior from constituting rape itself (as opposed to attempted rape). Thus, no consent defense should be available at all, and to offer a defense in such a case would fundamentally misunderstand the workings of the offense.<sup>122</sup>

Ultimately, the relevance of the consent defense turns on the rationale for the proposed statute. If the proposed statute is a public health regulation, then, as mentioned previously, a consent defense is inappropriate. If the proposed statute seeks to punish the actor's recklessness, irrespective of the victim's consent, then the consent defense is likewise inappropriate. Only if the proposed statute aims at the wrong of rape is consent relevant, and in that instance, because consent negates the wrongfulness of the action, the burden of proof properly rests on the prosecution.

#### 4. This Proposal May Not Advance, and May Ultimately Hinder, Rape Reform Efforts

Finally, even if the authors could restructure their proposed statute to avoid these constitutional and moral impediments, we must consider whether any separate crime of "reckless sexual conduct" will actually advance rape reform. There are reasons to doubt whether this law would be efficacious, and more troubling yet, there is reason to believe that this statute might undermine rape laws.

First, Ayres and Baker obscure the real questions in rape law. They seek to offer a proxy for consent. Under their proposal, we need not inquire into consent for acquaintance rape — we force the information by requiring the use of a condom. But this evades the critical question: when may a man permissibly have intercourse with a woman? Does "no" mean no? Or does only "yes" mean yes? These are the debates that we need to have. "Do I need a condom?" is not the question. Nor will it give us the right answers. In 1991, a Ponomia College male sophomore asked a female freshman: "Should I get a condom?"<sup>123</sup> She said: "no." The man understood her to be saying "no" to the condom, and the

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<sup>122</sup> An instance of nonconsent by the victim and recklessness on the part of the defendant would obtain if the man attempted to rape the woman. Reckless sexual conduct cannot be understood as this type of attempt. By definition, reckless sexual conduct requires the sexual act and an unprotected one at that.

<sup>123</sup> WESTEN, *supra* note 83, at 81; see Susan Estrich, *This Case Demeans Real Date Rape Victims*, USA TODAY, May 26, 1994, at A15 (stating that man said "I should get a condom" and that woman "'motioned' no, by saying uh-uh and shaking her head").

woman meant “no” to the sex. “Should I get a condom?” does not solve the consent problem; it simply creates another layer of confusion.

The crime of reckless sexual conduct does not even offer a full proxy for consent because the statute likewise allows a consent defense. The authors define consent as “expressly ask[ing] to engage in unprotected sexual activity or otherwise [giving] unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected.”<sup>124</sup> If the defendant has an STD and does not reveal this when he solicits his partner’s consent to unprotected intercourse, is her consent valid? The same questions regarding the knowledge requirements for valid consent reappear.<sup>125</sup>

In other respects, however, this proposed statute does what rape laws do not always do: it defines what actions are necessary for consent. While many jurisdictions define consent with reference to the victim’s state of mind, this proposal’s requirement of an affirmative act may minimize mistakes.<sup>126</sup> The irony here is two-fold. First, if states were to adopt this definition of consent for their rape statutes, then the separate crime of reckless sex would be unnecessary. Second, to the extent that states do not define consent in this manner for rape laws, there is no reason for them to adopt a different definition of consent for this crime. Thus, this proposed statute only works if states employ two conflicting conceptions of consent while seeking to prevent the very same harm.

The final efficacy problem is, simply put, alcohol. Drunk people are not rational actors, they have a very specific cognitive impairment, and they often flout social norms. One of the most difficult practical problems with acquaintance rape is the presence of alcohol and its effects on communication and perception. Nowhere in the authors’ proposal do they come to terms with the diminished effect that their proposal will have on the behavior of those under the influence.<sup>127</sup>

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<sup>124</sup> Ayers & Baker, *supra* note 2, at 632.

<sup>125</sup> Cf. *Regina v. Cuerrier*, [1998] 2 S.C.R. 371 (“Without disclosure of HIV status there can be no true consent. The consent cannot be simply to have sexual intercourse. Rather, it must be to have intercourse with a partner who is HIV-positive.”).

<sup>126</sup> Defining consent as an expressive act is not without its problems, however. “Indeed, th[e] practice of defining consent in rape cases as a mental state on a subject’s part while requiring *mens rea* on the actor’s part is, if anything, a more precise measure of an actor’s guilty mind . . . .” WESTEN, *supra* note 83, at 145. Notably, the authors’ proposal does not have a *mens rea* requirement. While the Model Penal Code’s default *mens rea* would be recklessness, one suspects that the authors would rather impose negligence or even strict liability. See MODEL PENAL CODE § 2.02(3) (1962) (setting forth default *mens rea* of recklessness).

<sup>127</sup> Of course, one can make a broader attack on the rational-actor model. Unprotected

Thus, this legislation distracts from rape reform. It avoids the questions we should be asking and instead settles for a second-best solution. The authors offer us another layer of complexity — another layer of consent — without resolving the current problems. We still do not know what the victim must know or what she must say or what in the world we are to do about intoxicated consent. The authors' second-best solution thus distracts from rape reform while presenting us with the very same unanswered questions.

The efficacy problem does not end here, however. This proposed statute may not just distract from rape reform. It may undermine it.

The authors claim that juries will convict actors such as Star, because even if the jurors do not perceive Star to be a "real rapist," they will be willing to find him guilty of reckless sex.<sup>128</sup> "Reasonable doubts can remain whether an alleged acquaintance rapist raped, but there is often no question that he engaged in unprotected, first-encounter sex."<sup>129</sup> They believe that "the criminalization of reckless sexual conduct is likely to decrease the overall 'errors' in the criminal justice system."<sup>130</sup> This crime "creates the first practicable means of obtaining a conviction — albeit for a crime with a modest sanction."<sup>131</sup>

Introducing this "crime with a modest sanction" is offered as a solution to the "sticky norms" problem.<sup>132</sup> Professor Dan Kahan argues that the sticky norms problem "occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to

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sex currently carries the risk of HIV, genital warts, genital herpes, gonorrhea, chlamydia, and syphilis, not to mention the risk of creating another human life. Yet people still have unprotected sex. If, in the movie *Alfie*, the title character — a paradigmatic disease "node" — does not care that having sex with his best friend's girlfriend/fiancée can give him a disease, impregnate her, and ruin his friendship, why would Alfie fear a three-month jail term? *ALFIE* (Paramount Pictures 2004).

<sup>128</sup> Ayers & Baker, *supra* note 2, at 603 ("The crime of reckless sexual conduct 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. A prosecutor who does not have enough objective evidence to go forward with a rape case could easily have enough objective evidence to prove reckless sexual conduct."); *id.* at 656 ("Decisionmakers 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.").

<sup>129</sup> *Id.* at 603.

<sup>130</sup> *Id.* at 637.

<sup>131</sup> *Id.* at 638.

<sup>132</sup> *See id.* at 654-58.

change that norm.”<sup>133</sup> When legislation overreaches by punishing severely (“hard shoves”), prosecutors are less likely to prosecute and juries are less likely to convict, thus potentially causing the contested norm to grow in strength.<sup>134</sup> Kahan argues that “gentle nudges,” crimes with modest sanctions, may be more effective at changing the contested norm.<sup>135</sup> Ayres and Baker intend their proposed statute to be just such a gentle nudge.<sup>136</sup>

When defendants are charged with both acquaintance rape and reckless sexual conduct, the authors may very well get the compromise verdicts they seek. Behavioral psychology reveals that jurors may seek this third alternative. The “compromise effect” predicts that when jurors are offered a middle alternative, they will choose it.<sup>137</sup> Ayres and Baker would call this result a success because more rapists will be convicted of *something*, and any innocents caught in the web will only go to jail for a short period of time and only because they foolishly failed to wear a condom.<sup>138</sup>

The obvious problem with the proposed statute is its potential to punish the innocent. This concern warrants repeating. Ayres and Baker brush this fear aside by claiming that the defendant “hold[s] the keys to [his] own jailhouse” by determining whether to wear a condom.<sup>139</sup> Yet, what the statute effectively does is to restrict the liberty of an individual despite the fact that he presents no risk of harm. We all hold the key to our own jail cells. We can prevent false accusations against ourselves by staying home, never driving a car, and never speaking to other human beings. But our liberty interests consist not only in liberties *from* but also

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<sup>133</sup> Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

<sup>134</sup> *Id.* at 609 (“If the law condemns too severely — if it tries to break the grip of the contested norm (and the will of its supporters) with a ‘hard shove’ — it will likely prove a dead letter and could even backfire.”).

<sup>135</sup> *Id.* at 610-11 (“If the lawmaker selects a sufficiently mild degree of severity . . . then a majority of decisionmakers will enforce the law at the outset. This condition, too, will reinforce itself. As members of society are exposed to consistent and conspicuous instances of enforcement, they will revise upward their judgment of the degree of condemnation warranted by the conduct in question. Accordingly, over time, the percentage of decisionmakers willing to enforce the existing law will grow . . .”).

<sup>136</sup> *Id.* at 654-58.

<sup>137</sup> See generally Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211 (1972).

<sup>138</sup> Ayers & Baker, *supra* note 2, at 640 (“Switching from a regime with very large and unavoidable Type I errors [failing to punish the guilty] to one with small but avoidable Type II errors [punishing the innocent] is a tradeoff that society should embrace.”).

<sup>139</sup> *Id.*

in liberties *to*, and it is this latter liberty that the state must have a good reason to restrict.<sup>140</sup> A man who has consensual sex and does not have an STD should not have his liberty restricted under this proposed statute. Moreover, if falsely accused, he certainly should not have to fear a compromise, or more aptly, a *compromised*, verdict.

An equally destructive problem, however, is the punishment of the guilty. Is *any* amount of justice better than *no* justice? Maybe not. We simply should not be satisfied that a rapist is sentenced to three months in jail for reckless sex when he deserves many years for rape. While appeasing the victim should not be the goal of the criminal law, the problem with this proposed statute can be revealed by one simple question: will any victim feel that her rapist was caught, tried, and convicted for the tremendous evil that was done to her if the rapist gets three months in jail for reckless sex? Will not the convictions for this crime undermine the very seriousness of acquaintance rapes? In Kahan's terminology, we must be wary that this legislation is not a gentle nudge, but rather a "sly wink" that reinforces the existing norm.<sup>141</sup>

The authors deny this possibility. They claim that their statute is a supplement to, and not a substitute for, acquaintance rape statutes.<sup>142</sup> They seek to analogize their statute to a DUI law, reasoning that "[i]f 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."<sup>143</sup> The analogy fails. Lawmakers did not enact DUI laws because prosecutors were failing to pursue manslaughter cases or because juries were not convicting. Rather, DUI laws criminalize an inchoate act — by driving intoxicated, one takes the risk that one might kill another person. In contrast, reckless sexual conduct cannot be an inchoate form of acquaintance rape because both crimes require the very

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<sup>140</sup> See FEINBERG, *supra* note 63, at 7-10 (discussing idea of "liberty-limiting principle").

<sup>141</sup> Kahan, *supra* note 133, at 624 ("[I]t is also possible that 'indecent assault' statutes, too, will end up reinforcing the 'no sometimes means yes' norm. Critics argue that these statutes, precisely because they grade nonforcible, nonconsensual sex so much less severely than rape, are likely to corroborate the conviction that such behavior is not really worthy of criminal punishment at all. This anxiety points up a general implementation problem for the 'gentle nudges' strategy. That strategy implies that lawmakers should favor less condemnatory policies over more condemnatory ones in order to avoid triggering the 'hard shove' dynamic. But policies that are only weakly condemnatory can be seen as signaling that the underlying conduct isn't genuinely worthy of condemnation, an inference that is likely to reinforce itself insofar as moral appraisals are shaped by social influence.").

<sup>142</sup> Ayers & Baker, *supra* note 2, at 655 ("Reckless sexual conduct should not be presented as a substitute for rape.").

<sup>143</sup> *Id.*

same sexual act.

The authors want to eat their cake and have it too. They want to claim that this statute is necessary to convict acquaintance rapists and still claim that it punishes a “separate” crime of reckless sex.<sup>144</sup> But this separate crime is not separate at all. Its aim is to offer a lesser alternative to a rape conviction in the hopes that the jury will convict.

Ultimately, what effect convictions for reckless sexual conduct will have on our perception of acquaintance rape is an empirical question. The problem is that we cannot afford a failed experiment. Date rape has entered the public consciousness. It is the subject of everything from freshman dorm meetings to afternoon soap operas. While criminalizing “reckless sexual conduct” might unstick the norm, it could have the opposite effect, an effect that could undermine this progress.

#### CONCLUSION

In their conclusion, Ayers and Baker note that some readers may believe they have created a “thaumatrope,” “which by blending these two policy objectives somehow tricks the reader into seeing a whole that is greater than its parts.”<sup>145</sup> I believe that the authors have missed the force of the objection. It is not simply the case that Ayres and Baker have created a spinning toy that, through an optical illusion, combines a picture of a bird and a picture of a cage into a single image — a bird in a cage. The optical illusion here is far more troubling: they seek to combine two incomplete images and pretend they have a coherent whole, when what they actually have is just two images with a lot of holes. They seek to show us a picture of a bird without wings, spin the toy and show us wings, and pretend their image can fly. It cannot.

The most incoherent aspect of the authors’ proposal is their view of consent. The authors offer it as an affirmative defense, and they place the burden of proving consent on the defendant. Of course, as described above, such an action will have a significant impact on acquaintance rape. Because the contested issue in acquaintance rape prosecutions is consent, placing the burden on the defendant will ensure a greater number of convictions. But, as seen above, and as the authors note, there is a significant problem with such an allocation — it is unconstitutional.

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<sup>144</sup> Compare *id.* at 638 (“[T]he criminalization of reckless sexual conduct is likely to reduce the problem of acquaintance rapists going completely unpunished.”), with *id.* at 660 (“The crime of reckless sexual conduct is not about punishing nonconsensual sex . . .”).

<sup>145</sup> *Id.* at 665.

To fill this gap, the authors offer their second rationale: public health. If consent is a defense to the public health rationale, then the authors claim that they can justify allocating the burden to the defendant. The problem, however, is that with regard to this rationale, they cannot justify having a consent defense at all. If a woman consents to the risk of being infected, she increases the risk that others will become infected in the future. Her consent is utterly irrelevant to the health of the public. In fact, she increases the chance of potential harm.

The woman's consent also does not in any way diminish the man's culpability. One may not risk hurting other people for consensual sex. Here, if consent is a defense to the public health rationale under an entrapment or irresistible impulse analogy, the offer of consensual unprotected sex is an excuse to the risking harm of harm to others. The criminal law has never recognized such a defense nor should it.

In summary, consent has no place in this proposal if the aim is to protect the public health. Consent is properly part of a rape statute (or any other proposal aimed at protecting the woman), but the burden there must lie with the prosecution. The middle ground struck by the authors — offering consent as an affirmative defense that the defendant must prove — does not resolve either problem. It is both conceptually confused and constitutionally unsound. This bird cannot fly.

With the best of intentions, Ayres and Baker propose the crime of reckless sexual conduct to address the ills of STDs and acquaintance rape. Both goals, however, cannot be achieved with this one proposed statute, and with respect to both aims, the proposal requires significant reform. The STD legislation is overbroad and thus criminalizes morally innocent behavior, a result that is not only contrary to the presumption of liberty in a free society but also may undermine the moral force of the criminal law. Additionally, by offering a defense when conduct is consensual, the proposal excuses the morally guilty and legislates a view of excuse that runs contrary to our bedrock assumptions about criminal responsibility. Punishing the innocent and excusing the guilty are socially destructive actions, and the authors proceed with too little caution.

The authors' attempt at rape reform is also problematic. Once again, the proposed statute criminalizes innocent behavior, and worse still, it unconstitutionally places the burden of proving an essential element on the defendant. Moreover, even the punishment of the guilty is problematic under this proposed statute. The proposal offers a poor

proxy to real rape reform and ignores the fact that those culpable individuals who truly are acquaintance rapists deserve significant punishment, not a mere three months in jail. Slight punishments may gradually affect the norm so that our society becomes more willing to punish acquaintance rape, but such punishments may also reinforce the view that acquaintance rapes are not *real* rapes. Thus, with no empirical data suggesting that the chance of the former effect outweighs the danger of the latter, it is simply imprudent to proceed. This is the time for rape reform. But we should not be reckless about it.