

TOWARD A MORE BALANCED TREATMENT OF THE NEGLIGENT TRANSMISSION OF SEXUALLY TRANSMITTED DISEASES AND AIDS

INTRODUCTION

It hardly needs repeating that infection rates for sexually transmitted diseases (“STDs”) have reached epidemic proportions.¹ In response, courts have been increasingly willing to extend liability in tort for disease transmission in an effort to decrease the spread of STDs.² Virtually every commentator has supported the courts’ willingness to extend liability, even to the point of advocating a judicial policy denying the primarily male defendants the use of traditional affirmative defenses, namely contributory negligence and assumption of the risk.³ Several courts have accepted a broad interpretation of the defendant’s “reason to know” that he may be infected. Despite a lack of supporting evidence, justification for such a policy stems

¹ Centers for Disease Control & Prevention, *Tracking the Hidden Epidemics: Trends in STDs in the United States 2000*, at http://www.cdc.gov/nchstp/dstd/Stats_Trends/Trends2000.pdf. Without including HIV/AIDS, approximately 65 million Americans have an incurable sexually transmitted disease. *Id.* at 1. Another 15 million Americans will become infected each year, with half of them being infected with lifelong diseases. *Id.* Centers for Disease Control and Prevention is hereinafter known as CDC.

² Recent additions to the list of states that permit recovery in tort for STD liability include Alabama and Minnesota. *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989); *M.M.D. v. B.L.G.*, 467 N.W.2d 645 (Minn. App. 1991); *see also Deuschle v. Jobe*, 30 S.W.3d 215 (Mo. Ct. App. 2000) (liability exists to decrease the spread of disease). Given that courts are increasingly willing to find liability for transmission of STDs, it is not surprising that defendants who engage in the tortious intercourse in their respective homes are filing claims for reimbursement with their homeowners’ insurance policy. *See Roderick D. Blanchard & Jeffrey M. Thompson, Insurance Coverage for the Sexual Transmission of Disease*, 13 *HAMLIN L. REV.* 37 (1990); Daniel C. Eidsmore & Pamela K. Edwards, *Sex, Lies, and Insurance Coverage? Insurance Carrier Coverage Defenses for Sexually Transmitted Disease Claims*, 34 *TORT & INS. L.J.* 921 (1999).

³ *See, e.g., Louis A. Alexander, Note, Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 *CORNELL L. REV.* 101 (1984); Deane Kenworthy Corliss, Comment, *AIDS-Liability for Negligent Sexual Transmission*, 18 *CUMB. L. REV.* 691, 710-711 (1988) (high-risk persons are on constructive notice and have an affirmative duty to be tested); Bonnie E. Elber, Note, *Negligence as a Cause of Action for Sexual Transmission of AIDS*, 19 *U. TOL. L. REV.* 923 (1988) (advocating enacting statutes that create a duty to warn and a duty to get tested); Celia M. Fitzwater, Comment, *Tort Liability for Sexual Transmission of Disease: A Legal Attempt to Cure “Bad” Behavior*, 25 *WILLAMETTE L. REV.* 807 (1989) (liability will deter the spread of disease); Jeanmarie Papelian, Note, *Assessing Liability for Negligent Sexual Transmission of AIDS*, 24 *SUFFOLK U. L. REV.* 649 (1990) (liability will deter the spread of disease). *But see William Sundbeck, Note, It Takes Two to Tango: Rethinking Negligence Liability for the Sexual Transmission of AIDS*, 5 *HEALTH MATRIX* 397 (1995) (arguing in favor of affirmative defenses for the transmission of AIDS, but not necessarily other STDs).

from either using tort liability to deter harmful behavior⁴ or from the defendant's position as "least-cost avoider."⁵ Either way, the law is now placing the entire burden of responsibility on the defendant, which rejects basic notions of personal responsibility and may even increase the spread of sexual disease.

This paper argues that the tort should be treated like any other tort, thus making traditional affirmative defenses available. In doing so, the policy would increase personal responsibility and may even decrease the spread of disease. In many cases the availability of affirmative defenses are likely to overwhelm the tort and preclude liability against the defendant. Part I provides background studies regarding views towards sex and responsibility, as well as specific medical information concerning many sexually transmitted diseases, including HIV/AIDS.⁶ Part II introduces the elements of a negligent tort and evaluates different theories of duty that have been suggested by courts and commentators. Specifically, this comment will analyze a sex partner's duty under state statutes, duty when the defendant actually knows she is infected with an STD, duty when the defendant is said to be on constructive notice of his infection, and duty to be tested. Part III will consider the difficulties in proving causation in cases where the plaintiff is a virgin and in cases where the plaintiff has had previous sexual encounters. It will also suggest litigation strategies for proving, or disproving, causation. The role of physicians in proving causation to a legal or medical certainty is also discussed. Part IV considers why the plaintiff's own conduct might be a bar, or at least a partial bar, to recovery. Contributory negligence, comparative negligence, and assumption of risk are reviewed independently. Finally, Part V discusses three policy issues and legal doctrines that should affect recovery. In particular, the comment considers how an individual and a couple have a privacy interest that might preclude governmental intrusion into the bedroom, why the doctrine of interspousal tort immunity would apply, and why the doctrine of *in pari delicto*, or the unclean hands doctrine, precludes recovery in tort for criminal acts. Ultimately, this paper's conclusion is simple: Judicial decisions designed to curb the spread of these terrible diseases are made with the best

⁴ JEAN R. STERNLIGHT, AIDS AND THE LAW 349 (David W. Webber ed., 3d ed. 1997) (noting that the "likelihood of being sued may not play a very important role in most individuals' decision making about that behavior").

⁵ The phrase "least-cost avoider" means the defendant is in a position to more cheaply avoid transmitting the STD to the plaintiff than the other way around.

⁶ Nothing in this paper is meant to provide medical advice regarding sexually transmitted diseases. More detailed information regarding STDs is available in numerous other sources, including the Centers for Disease Control and Prevention website, available at <http://www.cdc.gov>.

intentions of public health advocates, but it is naïve to suggest the judiciary can create efficient and appropriate public health policies.⁷

I. SCOPE OF THE PROBLEM

Millions of Americans suffer from Chlamydia,⁸ Gonorrhea,⁹ Syphilis,¹⁰ Herpes¹¹ and Human Papillomavirus (HPV).¹² Nearly another million

⁷ The judiciary can serve an important role in adjudicating and enforcing statutes enacted by the legislature, with insight from public health specialists, to curb the spread of disease.

⁸ Chlamydia is a common STD transmitted during vaginal, anal, or oral sex. CDC, *STD Prevention: Chlamydia Factsheet*, (May 2004), at <http://www.cdc.gov/std/Chlamydia/STDFact-Chlamydia.htm>. Only one-fourth of infected women experience any symptoms. *Id.* The symptoms that might appear include abnormal vaginal discharge or a burning sensation when urinating. *Id.* Less common symptoms include lower abdominal pain, low back pain, nausea, fever, pain during intercourse, and bleeding between menstrual periods. *Id.* Only half of all infected men are symptomatic. *Id.* Those symptoms might include a discharge from the penis, a burning sensation when urinating, a burning and itching around the opening of the penis and pain or swelling in the testicles. *Id.* Chlamydia is easily treated and cured with antibiotics. *Id.* Proper condom usage can protect against Chlamydia. *Id.*

⁹ Gonorrhea is a common STD most often seen in persons aged 15 to 29 and, in 77% of the time, in African-Americans. CDC, *STD Prevention: Gonorrhea Factsheet*, (May 2004), at <http://www.cdc.gov/std/Gonorrhea/STDFact-gonorrhea.htm>. Gonorrhea is spread via vaginal, anal, or oral sex. *Id.* The infection can be spread to non-sexual body parts, such as the eyes or toes. *Id.* Symptoms in men include a burning sensation when urinating, a yellowish white discharge from the penis, and painful or swollen testicles. *Id.* Women may have no symptoms in the early stages of the infection, but symptoms will eventually include a painful or burning sensation when urinating or a yellow or bloody vaginal discharge. *Id.* Infected men can be asymptomatic for as long as 30 days after contact. *Id.* Gonorrhea can be cured with antibiotics, but antibiotic treatment will not vaccinate against a future transmission. *Id.* Proper condom usage can protect against Gonorrhea. *Id.*

¹⁰ Syphilis is a potentially fatal bacterial infection spread through direct contact with a syphilis sore during vaginal, anal, or oral sex. CDC, *STD Prevention: Syphilis Factsheet*, (May 2004), at <http://www.cdc.gov/std/Syphilis/STDFact-Syphilis.htm>. Symptoms may not appear for up to 90 days after infection. *Id.* Symptoms include a firm, round, small, and painless chancre at the site of infection. *Id.* Other symptoms, indicative of advanced syphilis, include a rash on the palms of the hands and the bottoms of the feet, fever, swollen lymph glands, sore throat, patchy hair loss, headaches, weight loss, muscle aches, and tiredness. *Id.* Many of the symptoms resemble other diseases which it makes it likely the person infected either does not know he is infected or believes he is infected with a more common disease. *Id.* Syphilis is easily treated and cured with antibiotics. *Id.* Antibiotic treatment does not vaccinate against future infections. *Id.* Proper condom usage can protect against transmission, but condoms will not provide any protection if the syphilis sore is not covered by the condom. *Id.* Syphilis sores can be hidden in the vagina, rectum, or mouth, making it possible that a partner has no indication that they are infected and can transmit the disease to others. *Id.*

¹¹ Herpes is a common STD that comes in two primary forms, herpes simplex virus type 1 (HSV1) and herpes simplex virus type 2 (HSV2). CDC, *STD Prevention: Herpes Factsheet*, (May 2004), at <http://www.cdc.gov/std/Herpes/STDFact-Herpes.htm>. HSV1 causes infections of the mouth and lips while HSV2 causes genital sores. *Id.* Most individuals have no or only minimal signs or symptoms from infection. *Id.* When symptoms of HSV2 do appear, they do so in the form of recurrent painful genital sores. *Id.* Most people infected with genital herpes are not aware of their infection. *Id.* Many

are HIV positive.¹³ STD infection rates remain high even though the public is apparently well-informed about STD transmission, prevention, and risk. For example, 94% of adults age eighteen to forty-four know that “some people with STDs may not show symptoms for months or years.”¹⁴ Surprisingly, 91% of teenagers age fifteen to seventeen also know STDs can be asymptomatic.¹⁵ Ninety-three percent of adults and 90% of teenagers know that “a person with an STD can spread it even if he/she has no symptoms.”¹⁶ The fear of contracting an STD from an asymptomatic sexual partner has seemingly little deterrent value; adults and teenagers seem willing to take their chances. The most unsuspecting statistic concerning STD awareness is that even though only 29% of *teenagers* “see STDs in largely moral terms,” 74% of *teenagers* “agree that if people had higher moral standards the country wouldn’t have such a problem with STDs today.”¹⁷ A statistic suggesting morality plays a strong role in STD prevention lends itself to this paper’s conclusion that personal responsibility, and not tort liability, is the only appropriate and feasible method for the judiciary to assist in reducing STD infection rates.¹⁸

people mistake the few symptoms that might appear as an insect bite or a rash. *Id.* Genital herpes is difficult to diagnose because in the cases when symptoms do appear those symptoms can vary greatly. *Id.* Even a blood test may not positively diagnose herpes. *Id.* Herpes has no cure and the infection can be life-long. *Id.* Antiviral medications can shorten and prevent outbreaks but these medications do not protect against transmission either during or between episodes. *Id.* During an outbreak, abstinence is the only effective preventive measure. *Id.* Between outbreaks, proper condom usage may protect against transmission if the genital sore is covered by the condom. *Id.*

¹² Genital human papillomavirus (HPV) is a collection of 30 sexually transmitted viruses that infect the genital area, including the skin of the penis, vulva, labia, or anus, or the tissues covering the vagina and cervix. CDC, *STD Prevention: HPV Factsheet*, (May 2004), at <http://www.cdc.gov/std/HPV/STDFact-HPV.htm>. Most HPV infections have no signs or symptoms. *Id.* Most infected persons are completely unaware they are infected, yet they can transmit the virus to a sex partner. *Id.* Some people get visible genital warts that appear as soft, moist, pink, or red swellings that often form a cauliflower-like shape. *Id.* Warts can appear weeks or months after infection. *Id.* There is no cure for HPV but the infection usually goes away without any treatment. *Id.* Warts can be removed by a physician. *Id.* Proper condom usage can reduce, but not eliminate, the risk of transmission. *Id.*

¹³ CDC, *HIV and its Transmission*, (Sept. 2003), at <http://www.cdc.gov/hiv/pubs/facts/transmission.htm>. HIV is spread by sexual contact with an infected person, by sharing needles or syringes with someone who is infected, or less commonly through blood transfusions. *Id.* Proper condom usage can prevent transmission. *Id.*

¹⁴ Kaiser Family Foundation et al., *What Teens Know and Don’t (But Should) About Sexually Transmitted Diseases* 10 (March 8, 1999), available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14696> [hereinafter “*What Teens Know*”].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 16.

¹⁸ In the least, this statistic suggests that carefree, sexually active, American teenagers are giving a

II. POSSIBLE DUTIES A DEFENDANT OWES TO HER SEXUAL PARTNER

Liability for a negligent tort rests on proving four elements.¹⁹ The plaintiff must prove, by a preponderance of the evidence,²⁰ that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the breached duty proximately caused the plaintiff's injury,²¹ and that the plaintiff suffered damages.²² Regarding duty more specifically, the plaintiff must prove first that the defendant owed a legal duty to the plaintiff and second, that the defendant somehow breached that duty.²³ In other words, the plaintiff must prove that the defendant failed to "conform to a certain standard of conduct, for the protection of others against unreasonable risks."²⁴ Failing to exercise ordinary care or failing to conform to some moral standard is by itself not actionable.²⁵ The defendant must have failed to conform when he was under a legal obligation to conform.²⁶ While determining whether a legal duty existed is a question of law only for the court to determine,²⁷ determining whether the defendant breached that duty is a question of fact for the fact-finder (usually the jury) to determine.²⁸

In an action for the negligent transmission of a venereal disease, two distinct fact patterns are likely to emerge. In the first scenario, the defendant is actually aware he is infected with a contagious disease.²⁹ Actually aware means the defendant has been diagnosed, by a physician, with a sexually transmitted disease. A defendant that has consulted a physician or

nod to personal responsibility when it comes to sexual choices. Perhaps this is grounds for optimism.

¹⁹ See RESTATEMENT (SECOND) OF TORTS § 328A (1965).

²⁰ See RESTATEMENT (SECOND) OF TORTS § 328A cmt. a (1965).

²¹ Causation is considered *infra* Part III.

²² Damages are not independently considered in this comment. I safely assume that the plaintiff's infection with an STD or HIV constitutes damage, and that the plaintiff's infection is sufficient proof of damages. Damages become a questionable element only in cases where the plaintiff is suing for *exposure* to HIV or a fear of developing HIV in the future. See generally STERNLIGHT, *supra* note 4, at § 8.

²³ W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 5.30 (5th. ed. 1984) [hereinafter "PROSSER"].

²⁴ *Id.*

²⁵ See *U.S. Fire Ins. V. Paramount Fair Serv. Inc.*, 156 N.E.2d 121 (Ohio 1959).

²⁶ *Id.*

²⁷ PROSSER, *supra* note 23, at 236; RESTATEMENT (SECOND) OF TORTS § 328(b)(6) (1965); *Wheeling & L.E.R. Co. v. Harvey*, 83 N.E. 66 (Ohio 1907); *Meany v. Meany*, 639 So. 2d 229, 233 (La. 1994); *M.M.D. v. B.L.G.*, 467 N.W.2d 645 (Minn. Ct. App. 1991).

²⁸ PROSSER, *supra* note 23, at 236-38. See also *Meany*, 639 So. 2d at 233-34.

²⁹ I am purposefully avoiding the potential liability of sexual partners for "false negatives," and I even more purposefully avoiding the potential liability of physicians to third-parties for "false negatives."

has taken it upon himself to be tested is not actually aware of his infection unless a diagnosis is made. In the second scenario, the defendant is not actually aware he is infected, but myriad facts may exist that suggest to the defendant that he has a sexually transmitted disease. This latter scenario is often termed the “defendant *has reason to know*” standard or constructive knowledge.³⁰ Whether a defendant actually knows, or has reason to know, of her infection “is a question of fact to be decided by the trier of fact.”³¹

Several theories of duty may exist for the negligent transmission of venereal disease—a duty by statute, a duty when you actually know you are infected, a duty when you have constructive knowledge of infection, a duty to be tested for disease. Each theory will be considered independently.

A. *The Duty by Statute—Negligence Per Se and Prima Facie Evidence of Negligence*

When a defendant breaches a duty by failing to conform to some standard of care created by legislative statute, as opposed to judicial doctrine, the defendant is often said to be negligent per se.³² The statute proscribing the standard of conduct need not actually provide for civil liability. Normally, negligence per se applies to a person who violates a criminal or traffic offense designed to promote public safety.³³ The plaintiff must also be a member of the class that the statute was created to protect.³⁴ In other words, an adult cannot sue on a statute designed to protect children.³⁵

Criminal statutes designed to protect the general public at large are not cognizable as negligence per se.³⁶ As Professor Morris suggests, courts should be reluctant to allow recovery under negligence per se for myriad reasons:

Administration of the criminal law often tempers responsibility in ways unparalleled in civil courts. Enactment of statutes may be unpublicized and adequate warning of impending drastic change of the law of negligence may not be given. Criminal statutes may be unwisely se-

³⁰ See *Mussivand v. David*, 544 N.E.2d 265 (Ohio 1989).

³¹ *Id.* at 273.

³² PROSSER, *supra* note 23, at 220.

³³ See *King v. Eccles*, 167 S.E.2d 349 (Va. 1969) (noting defendant violated a right-of-way statute).

³⁴ See *Hamilton v. Glemming*, 114 S.E.2d 438 (Va. 1948) (stating duty created by the statute must have been for the benefit of the person injured by the violation).

³⁵ This is not to say they cannot sue, they merely cannot sue under the specific statute.

³⁶ See *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621 (Va. 1986) (stating statute forbidding a bar to serve intoxicated persons does not create a duty to a third-party injured in an accident with the bar's intoxicated patron).

vere. And, most important, potentially ruinous civil liability is often inappropriate for minor infraction of petty criminal regulations.³⁷

While such a position may seem unduly harsh on an innocent plaintiff, it is worth remembering that some STDs are easily treated and costs for doctor visits and medication are likely covered by the plaintiff's insurance policy.

Several states have statutes that, to varying degrees, require that an infected defendant either abstain from intercourse or disclose to her partner that she is infected with a sexually transmitted disease. In Florida, for example, it is a first degree misdemeanor for any person who knows he has and can transmit genital herpes, Chlamydia, gonorrhea, syphilis, or HIV, among other named diseases, to other persons without informing his sexual partner of his infection prior to intercourse.³⁸ In *Gabriel v. Tripp*, the court, in a case of first impression, correctly applied Florida's statute to serve as prima facie evidence of negligence, but not negligence per se.³⁹ Florida's intent behind the statute was to benefit the public by curbing the incidence of sexually transmitted diseases and not to create a cause of action or provide for civil liability.⁴⁰ Other states extend the duty to persons who are on constructive notice of their infection or include a different set of diseases, but the general legislative intent is similar.⁴¹

Many statutes enacted to curb the spread of venereal disease are riddled with semantic problems. California's statute, for example, reads, any person "who exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of the condition and who marries or has sexual intercourse, is guilty of a misdemeanor."⁴² Notice that the first clause creates liability for exposure without actual transmission. A plaintiff who does not develop herpes and thus suffers no injury is still permitted to recovery under the statute. The second clause is even more troublesome. California requires

³⁷ Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 23 (1949). Morris argues that while the difference between negligence per se and a statutory violation as prima facie evidence of negligence is slight, the courts should adopt the latter rule so that the defendant may at least attempt to persuade the jury that his "criminal" act does not warrant civil liability. *Id.* at 34.

³⁸ FLA. STAT. ANN. §§ 29.384.24 & 384.34 (West 2002). The statute is not limited to named diseases but may include other unspecified sexually transmitted diseases. *See id.* at § 384.23.

³⁹ 576 So. 2d 404, 405 (Fla. Dist. Ct. App. 1991); *see also* Hall v. Warren, 632 P.2d 848 (Utah 1981) (noting violation of building code only prima facie evidence of negligence); Zeni v. Anderson, 243 N.W.2d 270 (Mich. 1976) (stating not walking on the sidewalk, in violation of a statute, is merely evidence of negligence and not conclusive).

⁴⁰ *Gabriel v. Tripp*, 576 So. 2d 404, 405 (Fla. 1991).

⁴¹ *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-519 (West 2002).

⁴² CAL. HEALTH & SAFETY CODE § 120600 (West 2002).

the defendant to both know he has herpes and to know his is currently capable of transmitting the disease to others. This is reasonable considering that some diseases, such as genital herpes, are unlikely to be transmitted in their “dormant” state.⁴³ Notice however that the duty created by the statute is not to disclose the disease, but rather to remain abstinent and unmarried. Under the statute, it is no defense that the infected partner fully informed the plaintiff about his condition and that the plaintiff then made a conscious decision to engage in sexual intercourse notwithstanding the infection. Since the statute’s adoption in 1995, no California court has ruled on this statute in either a criminal or civil setting.

Louisiana, like California, makes it “unlawful for any person to inoculate or infect another person in any manner with a venereal disease or to do any which will expose another to . . . a venereal disease.”⁴⁴ Though the statute seems to require abstinence, and not merely disclosure, the Louisiana Supreme Court rejected the statute as too broad for negligence per se and created a common law duty of abstinence or disclosure for infected persons.⁴⁵

Oklahoma has two statutes that intend to limit the spread of STDs. First, it is “unlawful and a felony” for any infected person to either “marry any other person, or to expose any other person by the act of copulation or sexual intercourse to such venereal disease.”⁴⁶ In *Lockhart v. Loosen*, the Oklahoma Supreme Court interpreted this statute to create an action under negligence per se because of the specific acts and specific plaintiffs prohibited in the statute.⁴⁷ The statute does not set a standard of conduct but, rather, it prohibits intercourse and marriage to protect infected persons’ sexual partners whether they consent or not.⁴⁸ Disclosure is no defense.⁴⁹ Notably, the court held that the statute does not protect third-party plaintiffs but still allowed the plaintiff to recover under common law rules.⁵⁰ Second, anyone who “with intent to or recklessly be responsible for the spread of” syphilis or gonorrhea is a felon subject to a mandatory minimum of two years in the penitentiary.⁵¹ This statute was recently modified to include

⁴³ Herpes, for example is more often spread when the disease is active. CDC, *supra* note 11.

⁴⁴ LA. REV. STAT. ANN. § 40:1062 (West 2002).

⁴⁵ *Meany v. Meany*, 639 So. 2d 229 (La. 1994).

⁴⁶ OKLA. STAT. ANN. tit. 63, § 1-519 (West 2002).

⁴⁷ *Lockhart v. Loosen*, 943 P.2d 1074, 1077-79 (Okla. 1997) (noting defendant gave herpes to plaintiff’s husband during an extramarital affair and husband then transmitted herpes to his plaintiff-wife).

⁴⁸ *Id.* at 1077-79.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1081 (noting that the clear legislative intent of the statute is to curb the spread of disease).

⁵¹ OKLA. STAT. ANN. tit. 21, § 1192 (West 2002).

HIV/AIDS.⁵² Though no court has considered the statute, negligence per se is unlikely to be available because the statute tends to set a standard of conduct rather than prohibit a specific act.

The Ohio Supreme Court adopted an even broader approach pursuant to a very liberal statute.⁵³ In Ohio, “no person, knowing or having reasonable cause to believe that he is suffering from a dangerous, contagious disease, shall knowingly fail to take reasonable measures to prevent exposing himself to other persons.”⁵⁴ Here, the statute applies to all dangerous and contagious diseases. It is not limited to sexually transmitted diseases. It would not apply *carte blanche* to all STDs because one could argue, successfully, that certain diseases are not dangerous. Intuitively, herpes (lifelong and incurable) and HIV (fatal) are more dangerous than Chlamydia and gonorrhea, both of which are easily cured.⁵⁵ The statute might also apply to more common diseases, such as influenza, which can be deadly to the elderly.⁵⁶ It is absurd to think that Ohio intended to create liability for spreading the winter flu. The issue of “dangerousness” was considered in *Smith v. Speligene*, where the court refused to rule that as a matter of law, herpes I, the less dangerous fever-blister type, is not a dangerous disease.⁵⁷

The Ohio court correctly rejected the state statute as providing a theory of negligence per se because the statute only provided a “rule of conduct” and not a “specific act.”⁵⁸ Notwithstanding the courts rejection of negligence per se, the court still created a common-law duty to either abstain or disclose if you know, or should know, that you are infected with a venereal disease.⁵⁹ Ohio’s duty is less draconian than California’s because full disclosure will avoid liability. However, the court seemingly went beyond the intent of the legislature because it applied a duty for all STDs, whereas the legislature would have applied to duty to only *dangerous* STDs.

Though it might seem that a negligence action modeled on a criminal statute is a slam dunk for the plaintiff’s bar, the defense has several options

⁵² *Id.*

⁵³ *Mussivand v. David*, 544 N.E.2d 265 (Ohio 1989) (unspecified venereal disease).

⁵⁴ OHIO REV. CODE ANN. § 3701.81(A) (Anderson 2002). Violating this statute is a second degree misdemeanor. *Id.* at § 3701.99(D).

⁵⁵ *Supra* notes 8-13.

⁵⁶ Each year 20,000 people die from influenza in the United States. CDC, *Prevention and Control of Influenza, Recommendations of the Advisory Committee on Immunization Practices*, 51 MORBIDITY & MORTALITY WKLY. REP. 1 (Apr. 12, 2002), at <http://www.cdc.gov/mmwr/PDF/RR/RR5103.pdf>. The elderly and those people with a serious pre-existing medical condition are more likely to die. *Id.*

⁵⁷ 990 P.2d 312 (Okla. Civ. App. 1999) (remanding for consideration of whether herpes I is a dangerous disease warranting liability for its transmission).

⁵⁸ *Mussivand v. David*, 544 N.E.2d 265, 271 (Ohio 1989).

⁵⁹ *Id.* at 270.

available to combat the statutory offensive. First, the defense can argue that the legislative intent of the statute was to provide criminal sanctions, and by default, not civil liability. Given that the legislature sufficiently considered the matter to create a criminal penalty, they could have easily, had they wanted to, create civil liability by statute. Second, one could argue the plaintiff's injuries exceeded the scope of the protections the statute sought to create. In other words, if the statute criminalizes the transmission of herpes II (the genital type), then a plaintiff could not recover for herpes I (fever blisters). Third, the plaintiff may not be a member of the protected class. If no protected class is mentioned in the statute, the statute does not allow for negligence per se. Finally, if the common law did allow recovery prior to the adoption of the statute, the criminal statute alone should not be sufficient to create civil liability where none previously existed.⁶⁰ Because of the difficulties understanding the statutes, courts should remain recalcitrant to permit liability for negligence per se without more.

B. *The Duty to Disclose—Actual Knowledge*

Every court that has considered the issue has held that a defendant who has actual knowledge of their infection with a sexually transmitted disease has a duty to disclose her infection to potential sexual partners.⁶¹ Practically every commentator supports a duty of disclosure.⁶² One commentator noted that the duty is satisfied merely by saying, "I have herpes."⁶³ Society seems to agree with the majority of commentators. Ninety-seven percent of adults and 86% of teenagers believe an infected person owes a "great deal" of responsibility to disclose her infection with sexual partners.⁶⁴ Only 1% of adults and 4% of teenagers believe there is either very little or no responsibility to disclose an infection to sexual partners.⁶⁵

⁶⁰ *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621 (Va. 1986) (stating that the statute sets the standard for conduct, it does not create the initial duty).

⁶¹ See, e.g., *Hogan v. Tavzel*, 660 So. 2d 350, 353 (Fla. Dist. Ct. App. 1995) (noting this as the "well established, majority view"); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988) (actual knowledge of herpes).

⁶² See, e.g., Sharlene A. McEvoy, *When You Have No Right to Remain Silent: Tort Liability for Sexually Transmitted Diseases*, 23 BRIEF 14 (1994). See also *supra* note 3.

⁶³ Williams S. Donnell, Comment, *You Wouldn't Give me Anything, Would You? Tort Liability for Genital Herpes*, 20 CAL. W.L. REV. 60, 68, n.72 (1983). This standard was cited favorably in *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988).

⁶⁴ *What Teens Know*, *supra* note 14, at 8. It should be noted that the survey respondents were not first asked if they were had an STD and were ever forced to decide whether to disclose or not. In other words, arguably, many of these respondents might change their minds, or at least reevaluate their moral positions, if they had to actually decide whether to disclose or not.

⁶⁵ *Id.*

Support for disclosure noticeably drops when, under the mistaken belief that an infected person can only spread venereal disease while symptomatic, the infected person chooses to have intercourse only while symptom-free. While asymptomatic, 83% of adults and 67% of teenagers owe a "great deal" of responsibility to inform their partners.⁶⁶ Because the great majority of Americans feel a moral responsibility to disclose, actions for the negligent transmission of sexual disease will likely, and fortunately, remain rare.⁶⁷ Notwithstanding their rare appearance, recovery based on the defendant's actual knowledge was allowed in *R.A.P. v. B.J.P.*⁶⁸ (herpes), *Doe v. Roe*⁶⁹ (herpes), *Hogan v. Tavzel*⁷⁰ (genital warts), *Long v. Adams*⁷¹ (herpes), and *B.N. v. K.K.*⁷² (herpes).

Many cases permitting recovery for nondisclosure have fact patterns more appropriate for fraud actions. In *Doe v. Roe*, for example, after the plaintiff told the defendant she was disease free and wanted to stay that way, the defendant, who had been diagnosed with herpes years earlier, replied, "I don't blame you, I wouldn't want one either."⁷³ Without expressly saying so, these words effectively reassured the plaintiff that the defendant was free of venereal disease.⁷⁴

An affirmative statement that you are free from venereal disease, when in fact you know you are infected with a venereal disease, is properly actionable as fraud.⁷⁵ Though the two are not mutually exclusive, an action in fraud, rather than negligence, avoids issues of contributory and comparative negligence or assumption of the risk.⁷⁶ It is hard to argue with the position that an infected defendant, one conclusively diagnosed by a physician, should have to inform his sexual partners of his infection. Though beyond the scope of this comment, such a fact pattern is likely sufficient to bring an action in battery⁷⁷ or to even permit criminal prosecution.⁷⁸ The argument

⁶⁶ *Id.*

⁶⁷ The record (almost exclusively appellate record) suggests only a few dozen STD transmission cases over the last hundred years.

⁶⁸ 438 N.W.2d 103 (Minn. Ct. App. 1988).

⁶⁹ 267 Cal. Rptr. 564 (Cal. Ct. App. 1990).

⁷⁰ 660 So. 2d 350 (Fla. Dist. Ct. App. 1995).

⁷¹ 333 S.E.2d 852 (Ga. Ct. App. 1985).

⁷² 538 A.2d 1175 (Md. 1988).

⁷³ 267 Cal. Rptr. 564, 565 (Cal. Ct. App. 1990).

⁷⁴ *Id.*

⁷⁵ *See, e.g., Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. Ct. App. 1984) (plaintiff has sex with defendant only after his deliberate misrepresentations of being free of venereal disease).

⁷⁶ *See, e.g., Pelkey v. Norton*, 99 A.2d 918, 920 (Me. 1953) ("one cannot escape liability for intentional misrepresentation on the ground that the plaintiff negligently relied thereon"); *Gaurke v. Rozga*, 332 N.W.2d 804 (Wis. 1983) (under a strict liability theory of fraud, the plaintiff's negligence is not a bar to recovery).

⁷⁷ *See, e.g., Hogan v. Tavzel*, 660 So. 2d 350 (Fla. Dist. Ct. App. 1995). *See also* RESTATEMENT

favoring full disclosure is at its strongest when the defendant is actually aware of his infection, but strategically, a plaintiff is more likely to recover under a fraud or battery theory in tort. The negligent tort is most appropriate when the defendant is, arguably, on constructive notice that she has a sexual disease.

C. *The Duty to Disclose—Constructive Notice or When the Defendant Should Know*

Courts should be hesitant to permit recovery against a defendant when he is on constructive notice of his infection. The classic constructive notice case is when a defendant experiences several symptoms of a disease and identifies the disease as one transmitted sexually. Such constructive notice is unworkable in myriad situations because many sexual diseases can be present without any outward signs or symptoms.⁷⁹ Asymptomatic diseases present no reason to suspect the presence, and therefore ability to transmit, an STD. Symptoms of an STD may easily be mistaken for symptoms of other, less stigmatic and dangerous diseases, such as the common cold or a urinary tract infection.⁸⁰

As a general rule, an individual will not be held liable for risks which are not known, not apparent, or not foreseeable.⁸¹ Applied to transmission of sexual disease without a medical diagnosis, the courts should err on the side of caution and against liability. In response to the well-documented epidemic of sexual disease, courts have been willing to allow recovery when the defendant is on constructive notice of their condition, even to the point of lowering the threshold for constructive notice. Not surprisingly, one commentator even lauds the lowered threshold as “a slippery slope to justice.”⁸² Such pro-plaintiff rhetoric is discouraging.

(SECOND) OF TORTS § 892B, illustration 5 (1979).

⁷⁸ See, e.g., *Smallwood v. State*, 661 A.2d 747 (Md. 1995) (affirming that an HIV-positive rapist could be found guilty of attempted murder); *Weeks v. State*, 834 S.W.2d 559 (Tex. App. 1992) (affirming the attempted murder conviction of an HIV-positive inmate who spat in the face of a prison guard). Notably, in both cases the HIV-positive criminal defendant was aware of the presence and danger of his disease.

⁷⁹ HPV for example presents no observable symptoms. See *supra* note 12.

⁸⁰ *Id.*

⁸¹ See, e.g., *Doe v. Johnson*, 817 F. Supp. 1382, 1394 (W.D. Mich. 1993); *Stedman v. O’Neil*, 72 A. 923 (Conn. 1909).

⁸² John A. Turcotte, Note, *When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV*, 52 ME. L. REV. 261, 293 (2000).

The range of constructive knowledge goes from having multiple symptoms and a suspicion of a specific venereal disease to being in a high-risk group without any symptoms whatsoever. In *M.M.D. v. B.L.G.*, the defendant sought treatment from his physician for repeated genital sores that both the defendant and his doctor suspected was genital herpes.⁸³ The court reasonably rejected the defendant's claim that he had no legal duty to disclose his "body acne" because he did not actually know he was infected with herpes.⁸⁴ In recognizing a legal duty, the court concluded, "Knowledge of facts giving rise to a duty may be imputed [from the defendant's] perception and experience."⁸⁵ In *Meany v. Meany*, the Louisiana Supreme Court said that, as an example, a person with "open, oozing genital sores" is on constructive notice of a serious problem, notwithstanding the lack of a medical diagnosis.⁸⁶ Here, the court enigmatically permitted recovery because the defendant should have known he had a disease, even though the defendant's only potential symptom was that he had "a drippage at one time."⁸⁷ In both *M.M.D.* and *Meany* the respective defendants experienced unusual activity in their genital area, but intuitively, the defendant in *M.M.D.*, who suspected he was infected with herpes and was even in the process of being treated by a physician, is more morally blameworthy than the defendant in *Meany*, who, as far as the record suggests, never actually suspected a venereal disease.

In *Doe v. Johnson*, the district court refused to recognize a person's past sexual history, even when the defendant engaged in high-risk activity, as constructive notice of the potential for transmitting an STD.⁸⁸ Applying Michigan law, the court correctly said that the allegation that basketball legend "Magic" Johnson had an extensive sexual past does not mean he has a legal duty to warn future sexual partners.⁸⁹ Unfortunately, the court also said that "knowledge that a prior sexual partner is infected with the virus may be notice of HIV exposure equivalent to symptoms."⁹⁰ This statement only requires courts to evaluate constructive knowledge as it applies to third-parties, i.e. past sexual partners. Is a defendant on constructive notice

⁸³ 467 N.W.2d 645, 646 (Minn. Ct. App. 1991).

⁸⁴ *Id.* at 647. The plaintiff's apparent failure to notice the defendant's "body acne" might support a defense of comparative negligence or assumption of the risk.

⁸⁵ *Id.*

⁸⁶ 639 So. 2d 229, 243 (La. 1994).

⁸⁷ *Id.* at 232. The court rejected the appellate court's determination that a drippage is not a symptom of herpes and therefore (according to the intermediate appellate court) the defendant was not on notice. *Id.* at 233.

⁸⁸ 817 F. Supp. 1382, 1393 (W.D. Mich. 1993).

⁸⁹ *Id.* This is not to suggest that he does not have a moral duty to warn future sexual partners or even a moral duty to not engage in such high-risk activity.

⁹⁰ *Id.* at 1390.

if he suspects a past sexual partner experiences a “dripping,” or is the defendant on constructive notice only when he actually knows that a past sexual partner is actually infected with HIV? This is not a slippery slope to justice; it is a slippery slope to nihilism.⁹¹

Determining whether a defendant was on constructive notice is fraught with difficulty at best and purely speculative at worst. Three important decisions refused to permit liability when the respective defendant was both unaware of his disease and had no reason to constructively know of his infection. In an early AIDS case, the defendant was granted summary judgment because, in the mid-1980s, little was known about the transmission and risks of the disease.⁹² Media coverage regarding AIDS was insufficient to put a person, suffering from symptoms later determined to be consistent with AIDS, on constructive notice of infection.⁹³ Awareness of AIDS has increased tremendously since the 1980s and the same outcome might not be reached today under similar facts. However, this older case suggests that media coverage on a disease can play a significant role in determining constructive notice.

The second case, *Delay v. Delay*, barred recovery because the defendant had recently tested negative for AIDS and other STDs.⁹⁴ The defendant tested positive only after being tested again under court order following his conviction for engaging in lewd and lascivious conduct in public.⁹⁵ The court concluded, after evaluating medical evidence, that the defendant was likely infected when he initially tested negative, but the defendant still had no reason to know of his infection and risk of transmission because of the negative test.⁹⁶

Finally, *McPherson v. McPherson* presents us with a recent case where a married defendant contracted HPV through an extra-marital affair and then transmitted the disease to his plaintiff-wife.⁹⁷ The defendant was never tested for HPV and never experienced any symptoms of an HPV infection.⁹⁸ The court correctly concluded that an asymptomatic defendant cannot be on constructive notice.⁹⁹ These last three cases suggest that con-

⁹¹ It is also a slippery slope to plaintiff-attorney heaven.

⁹² *C.A.U. v. R.L.*, 438 N.W.2d 441, 443 (Minn. Ct. App. 1989).

⁹³ *Id.*

⁹⁴ 707 So. 2d 400 (Fla. Dist. Ct. App. 1998). Here, plaintiff-wife sued for *exposure* to AIDS and never actually tested positive herself. *Id.* at 401.

⁹⁵ *Id.* at 401.

⁹⁶ *Id.* at 402. This is different than a false negative where the test itself is flawed and the testing agency is open to liability. Though the record is scant, the defendant's own infection was likely too recent to show up on the tests available in the late 1980s.

⁹⁷ 712 A.2d 1043, 1044 (Me. 1998).

⁹⁸ *Id.* Assuming the defendant was actually infected, his infection was completely asymptomatic.

⁹⁹ *Id.* at 1046. Apparently sometimes an itch is just an itch.

structive notice is based in part on the defendant's apparent symptoms and in part on his ability to link suspicious symptoms with his general knowledge of STDs. Courts should err against liability in these situations where proof of constructive knowledge is tenuous at best.

D. *The Duty to Be Tested*

Courts should not require people to be tested for sexually transmitted diseases because imposing such a requirement would be an affirmative duty unheard of in tort. As a general rule, people are not liable for nonfeasance, or inaction.¹⁰⁰ Though the rule has been roundly criticized by myriad commentators,¹⁰¹ the courts have created very few exceptions. Defendants have a duty to act when their own actions created a dangerous situation,¹⁰² or where they have harmed the plaintiff,¹⁰³ or when they have begun a rescue.¹⁰⁴ An exception also exists when there is a special relationship between the parties,¹⁰⁵ when the defendant is the owner or occupier of land,¹⁰⁶ or when the defendant undertakes activity gratuitously.¹⁰⁷ A common-law

¹⁰⁰ See, e.g., *Louisville & Nashville R. Co. v. Scruggs*, 49 So. 399 (Ala. 1909) (no duty for a freight train to move and allow a fire engine to rush to the scene of a house fire).

¹⁰¹ See, e.g., James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1909) ("one who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death"); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1909); Robert L. Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196 (1946).

¹⁰² See *Newton v. Ellis*, 119 Eng. Rep. 424 (K.B. 1855) (the defendant dug a hole and left it uncovered and without any warning of its existence).

¹⁰³ See, e.g., *Summers v. Dominguez*, 84 P.2d 237 (Cal. Ct. App. 1938) (driver who hit plaintiff on highway had a duty to aid and assist the plaintiff). See also RESTATEMENT (SECOND) OF TORTS § 322 (1965).

¹⁰⁴ See, e.g., *Black v. New York, N.H. & H. R.R.*, 79 N.E. 797 (Mass. 1907) (helpless plaintiff who was carried and left half-way up the stairs and who then stood up and fell back down the stairs was owed a duty); see also RESTATEMENT (SECOND) OF TORTS § 324 (1965).

¹⁰⁵ See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (university psychologist owed a duty to the victim of one of his clients because of the special nature of the relationship); *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (landlord owes a duty to tenants to protect them from foreseeable criminal acts committed by third parties). For a thorough comparison between *Tarasoff* and actions for the transmission of HIV see Janet Hollins, *An Imminent, Unidentified Victim: Does HIV Require a Duty to Warn?*, 62 DEF. COUNS. J. 214 (1997). Ms. Hollins does not conclude that HIV transmission is entirely analogous, either in factual circumstances or legal theory, to liability under *Tarasoff*.

¹⁰⁶ See *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (stating owners and occupiers have a duty to others, regardless of the underlying intent of the plaintiff).

¹⁰⁷ See *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703) (Holt, C.J., concurring) ("trusting [the

duty to be tested for STDs would fall into none of the existing exceptions to the general rule against affirmative duties and the spread of STDs does not justify creating any new exceptions.

The argument supporting a duty to be tested fares no better if one limits the requirement to potential defendants that engage in high-risk behavior or are members of a high-risk group.¹⁰⁸ For example, one could argue that gay men should be required to be tested for HIV/AIDS or people that lead a lewd and lascivious lifestyle should be required to be tested for herpes and Chlamydia, etc.¹⁰⁹ Aside from the self-evident problem of defining high-risk behavior, the rule, and its cousin rule requiring testing of *all* persons, would require people to take steps to inquire into their health and potential dangerousness. One would hope that people who consider themselves to be at high-risk for a disease, any disease, would seek testing to prevent and treat the disease, but this moral obligation to oneself and others does not necessarily translate into a legal duty. As morally problematic as this position seems to be, Professor Epstein rightly concluded that once “an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.”¹¹⁰

Because some states require an infected person to abstain from all sexual intercourse, even sex consented to after full disclosure, a duty to get tested would reinforce abstinence. Who would voluntarily be tested for a disease that would require them to remain abstinent? As it stands, only 24% of teenagers and 21% of adults admit to being tested for STDs (other than HIV) within a previous 12 month period.¹¹¹ Testing for HIV over the previous 12 month period fares the same—20% for teenagers, 31% for adults.¹¹² Encouraging more testing by threatening both an obligation to abstain and significant personal tort liability will probably fail and possibly result in decreased testing. A draconian approach such as this would likely decrease the number of persons getting tested and thus increase the spread of STDs.

defendant] with goods is a sufficient consideration to oblige him to a careful management”).

¹⁰⁸ At least one court has rejected a duty on defendants in “high-risk” groups. *Doe v. Johnson*, 817 F. Supp. 1382, 1393-96 (W.D. Mich. 1993) (defendant, “Magic” Johnson, had a long and distinguished sexual history).

¹⁰⁹ HIV/AIDS is still most prevalent among gay men. CDC, *Cumulative AIDS Cases—Basic Statistics*, available at <http://www.cdc.gov/hiv/stats.htm#cumajds>.

¹¹⁰ Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 192 (1973) (arguing that strict liability avoids this problem because *duty* is irrelevant).

¹¹¹ *What Teens Know*, *supra* note 14, at 27.

¹¹² *Id.*

III. CAUSATION

A. *The Virgin Plaintiff*

The defendant's breach of duty must have been the proximate cause of the plaintiff's injury in order for the plaintiff to recover.¹¹³ It is the factfinder's role to determine causation,¹¹⁴ unless reasonable minds could not disagree.¹¹⁵ In the case of the "virgin plaintiff,"¹¹⁶ causation is relatively easy to prove in light of circumstantial evidence.¹¹⁷ In *White v. Nellis*, the plaintiff's alleged-virgin daughter engaged in intercourse with three men over the course of a few days.¹¹⁸ Causation was inferred because, after having sex with the defendant, "symptoms of the disease were manifested before she had the connection with the other persons."¹¹⁹ In *Berner v. Caldwell*, causation was inferred because the plaintiff alleged, for purposes of summary judgment, that she never had sex with anyone except the defendant.¹²⁰ Notably, the "virgin plaintiff" is distinct from situations where the plaintiff tested negative for the disease prior to sexual contact with an infected defendant because latent symptoms or a prolonged incubation period do not foreclose the possibility of exposure and transmission prior to testing negative.¹²¹ This situation arose in *Hamblen v. Davidson*, where the plain-

¹¹³ *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); *Ryan v. N.Y. Cent. R.R.*, 35 N.Y. 210 (1866). I am making the assumption that if the defendant physically transmitted the disease to the plaintiff during and as a result of intercourse, then the defendant's failure to notify the plaintiff of his condition is the legal cause of the plaintiff's infection.

¹¹⁴ *See Atkinson v. Scheer*, 508 S.E.2d 68 (Va. 1998).

¹¹⁵ *See Roe v. Catholic Diocese of Memphis, Inc.*, 950 S.W.2d 27, 31 (Tenn. Ct. App. 1996) ("all reasonable persons must agree on the proper outcome"); *Huffman v. Sorenson*, 76 S.E.2d 182 (Va. 1953) ("when the facts are not in dispute and are susceptible of but one inference, the question becomes one of law for the court").

¹¹⁶ Virgin plaintiff means just that: the plaintiff's only sexual partner was the defendant.

¹¹⁷ But not all sexually transmitted diseases are transmitted *exclusively* through sex. HIV/AIDS can be transmitted by sharing needles or by receiving a tainted blood transfusion. *See CDC, supra* note 13. In these situations, the plaintiff may not even need to produce scientific evidence of the disease transmission because causation is essentially a matter of common knowledge; *cf. Mitchell v. Coca Cola Bottling Co.*, 200 N.Y.S.2d 478 (N.Y. App. Div. 1960) (under common knowledge, a child's illness was caused by drinking a soda with an insect in it).

¹¹⁸ 31 N.Y. 405 (N.Y. 1865).

¹¹⁹ *Id.* Here the plaintiff had multiple sex partners but the sequence of events was sufficient to infer causation.

¹²⁰ 542 So. 2d 686, 688 (Ala. 1989).

¹²¹ While still acknowledging latency problems, some commentators have inappropriately treated these plaintiffs as virgin plaintiffs as long as the plaintiff had no other sexual contact *after* contact with the defendant. *See, e.g., Elber, supra* note 3, at 939 (calling these plaintiffs the "ideal plaintiff"); Regina

tiff's only sexual partner other than the infected defendant was a man she had sex with about twenty-five years earlier and prior to her marriage to the defendant.¹²² There, the court permitted the jury to infer causation because of the long duration between the plaintiff's first sexual encounter and the emergence of her symptoms following her husband's extra-marital affair, notwithstanding the fact that her original sexual partner actually had herpes.¹²³ Even in virgin plaintiff scenarios, the defense is, of course, permitted to show that either the plaintiff was actually not a virgin or that the plaintiff was infected via non-sexual transmission such as a blood transfusion.

B. *The Promiscuous Plaintiff*

Proving causation becomes quite difficult when the plaintiff has had multiple partners. Other commentators tend to simplify, or completely ignore, the problems with proving causation.¹²⁴ Because of the potentially long duration between the date of infection and the emergence of symptoms, it is entirely possible that the plaintiff had other partners during this latency period. There is also the possibility that, following the plaintiff's discovery of her infection, she learns that multiple former partners were themselves infected. How does one prove that *A*, and not *B*, is the liable defendant?

Two approaches to proving causation may assist the sexually active plaintiff in recovering. Both approaches, however, are indicative of a sexually promiscuous plaintiff and may bias the jury against her. First, the relatively recent doctrine of "alternative liability" may permit the plaintiff to prove that one of several negligent defendants is obviously the liable defendant. In *Summers v. Tice*, the California Supreme Court permitted recovery against two separate, negligent tortfeasors without a finding that

DelaRosa, Comment, *Viability of Negligence Actions for Sexual Transmission of the Acquired Immune Deficiency Virus*, 17 CAP. U. L. REV. 101, 112 ("demonstrating good health for an extended time" could assist proving causation); Papelian, *supra* note 3, at 674 ("proximate cause is not likely to be of great importance in cases in which one plaintiff is suing one defendant"); Richard C. Schoenstein, Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 HOFSTRA L. REV. 37, 56 ("it will probably be sufficient to show that a duty had been established and breached").

¹²² 50 S.W.3d 433, 435-36 (Tenn. Ct. App. 2000).

¹²³ *Id.* at 440.

¹²⁴ See DelaRosa, *supra* note 121, at 112 (plaintiff need only show "the defendant's infection and sexual contact with the plaintiff"). Proving merely that the defendant had an infection and that parties engaged in sexual intercourse cannot be sufficient. Such a strategy suggests causation only through conjecture and speculation.

either one actually shot the plaintiff.¹²⁵ In other words, a plaintiff could recover against *A and B* where *either A or B* is causally responsible.¹²⁶ Because the shot came from “one or the other only” the court shifted the burden to the individual defendants to prove that either they were innocent or that the other defendant was the shooter.¹²⁷ While not every state has adopted this theory of alternative liability,¹²⁸ a plaintiff bringing suit in a state that permits alternative liability would merely have to name every past sexual partner who was negligent as a defendant.¹²⁹ Unless any individual defendant could prove otherwise, all defendants would be held jointly liable for any damage award. This approach is unlikely to become commonplace because of the inherent difficulty in proving which past sexual partners were negligent. If you are aware that only one was negligent, you can limit your action to that one defendant.

Second, the plaintiff who lacks proof of causation could bring an action against all possible defendants, namely, all past sexual partners, regardless of negligence. In *Sindell v. Abbott Laboratories*,¹³⁰ the California Supreme Court extended the rationale of *Summers* to situations where the defendants in a products liability suit were in a position to supply the product that harmed the plaintiff even when they never produced the dangerous product in the first place. The court shifted the burden to the defendants to show that they did not manufacture a synthetic estrogen.¹³¹ Because “the fundamental premise of the market share theory is that the plaintiff lacks sufficient identification information to make out a cause of action under traditional standards of tort liability,” the market share theory of causation is applicable when the plaintiff has had numerous sexual partners and is unable to determine which of several infected partners transmitted the disease. In other words, sue every past sexual partner because at least one

¹²⁵ 199 P.2d 1 (Cal. 1948). Prior to *Summers*, a plaintiff could recover against two tortfeasors only when both *A* and *B* are causally responsible. See *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927). *Summers* has since been adopted by the American Law Institute. RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

¹²⁶ 199 P.2d at 1-2.

¹²⁷ *Id.* at 3. In another case involving multiple defendants but without actual proof of causation the court held that, once the plaintiff could prove that one of the defendants likely caused the injury, the burden shifted to the individual defendants to disprove causation. See *Hall v. E.I. du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

¹²⁸ See *Leuer v. Johnson*, 450 N.W.2d 363 (Minn. Ct. App. 1990) (saying expressly that Minnesota does not follow the rule in *Summers*).

¹²⁹ *Summers* permits recovery against multiple defendants provided *each* defendant was negligent. 199 P.2d at 3. It is not enough to just name all past sexual partners. *Id.*

¹³⁰ 607 P.2d 924 (Cal. 1980). *Sindell* is a products liability case based on strict liability rather than negligence. Under *Sindell's* market share liability doctrine, one brings an action against every defendant that could be liable and make the defendants prove their own innocence.

¹³¹ *Id.* at 930.

transmitted the disease. At least one court rejected the market share liability approach in a products liability case but permitted recovery on an alternative liability theory because every possible defendant was named.¹³² The record is void of any plaintiff using this theory to prove causation in a venereal disease case, but considering that this tort is still in its early stages, plaintiff's attorneys have not yet been forced to try such schemes. Under *Sindell's* rationale, a defendant would have to provide a blood test, or similar evidence, that shows he is not infected with whatever disease he is being accused of transmitting.¹³³ The important distinction here is that the plaintiff need not prove causation or negligence.

C. *Litigation Strategy*

From the plaintiff's perspective, the broader *Sindell* approach is superior given that she need only show she is infected with a sexually transmitted disease. This very convenience is likely to backfire and prevent or limit the plaintiff's recovery. A plaintiff using an alternative liability approach to prove causation is effectively telling the jury that she has had numerous sexual partners, likely engaged in intercourse outside of a serious relationship or marriage where she would be inclined to inquire into the defendant's sexual history, and probably had a pattern of not taking even basic precautions like using a condom. These plaintiffs will have to defend themselves against affirmative defenses like contributory negligence and assumption of the risk.

From the defendant's perspective, the broader *Sindell* approach is likely to be rejected by the court because, so far, it applies only to products liability cases where liability is strict.¹³⁴ The obvious defense argument against alternative liability, i.e. the *Summers v. Tice* approach, is the plaintiff is required to sue *every* negligent defendant. A plaintiff who has had ten sexual partners but who sues only three must actually show that the remaining seven partners were not infected. It is not sufficient to argue that it is more likely than not that one of the defendants transmitted the disease. Under *Summers*, the court must be certain that one of the several defendants did in fact transmit the disease, even if it cannot be determined which par-

¹³² *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351 (N.D. Ill. 1988). In *Poole*, the court permitted a hemophiliac who died of AIDS to recover on alternative liability when he named the "complete market of manufacturers, processors, marketers and distributors from which Poole purchased factor VIII over his lifetime." *Id.* at 352.

¹³³ Under *Summers*, a defendant could also escape liability by proving he is not infected, but the burden stays with the plaintiff to prove negligence.

¹³⁴ Strict liability is a theory of recovery in tort commonly referred to as "liability without fault." PROSSER, *supra* note 23, at 534.

ticular defendant. If the plaintiff were to concede that it is at least possible that another unknown partner not named as a defendant was the source of her disease, alternative liability must be rejected as a means of proving causation. Ruling out all other past sexual partners is a significant obstacle for a sexually active plaintiff to overcome and is likely a bar to recovery.

D. *The Role of the Doctors*

Expert medical testimony is both required and not required in proving causation. At a minimum, the plaintiff has to show that he is actually infected with the disease he is claiming to be infected with.¹³⁵ Exposure, without more, is not actionable because in negligence suits the plaintiff must be actually harmed.¹³⁶ Courts have allowed recovery for exposure to HIV/AIDS under the tort of negligent infliction of emotional distress, a tort not considered in this Comment.¹³⁷ No cases in the record allow recovery for mere exposure to other STDs.

At the same time however, the courts have ruled that the plaintiff need not provide medical testimony to prove that *A* was infected by *B*.¹³⁸ While expert medical testimony is helpful in proving causation in personal injury cases, lack of such testimony is not fatal to the plaintiff's case.¹³⁹ Lay testimony from the plaintiff is sufficient to survive a motion to dismiss because such a ruling is in effect a "ruling on the weight of the evidence and the credibility of witnesses, matters that are left to the jury to resolve."¹⁴⁰ Expert testimony is only required when the case "involves obscure and

¹³⁵ *In re Louie*, 213 B.R. 754, 758 (N.D. Cal. 1997) (stating a plaintiff cannot just suspect he has a disease or have been exposed to a disease).

¹³⁶ *See, e.g.* *Kerins v. Hartley*, 27 Cal. App. 4th 1062 (Cal. App. 1994) (fear of contracting AIDS not sufficient); *Barrett v. Danbury Hosp.*, 654 A.2d 748 (Conn. 1995) (no recovery for AIDS phobia). *But see* *Herbert v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986) (recovery allowed for fear of developing cancer from exposure to asbestos); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982) (same for exposure to contaminated drinking water).

¹³⁷ *See, e.g.* *Johnson v. W. Va. Univ. Hosps.*, 413 S.E.2d 889 (W. Va. 1991). The plaintiff must still show the defendant actually exposed the plaintiff to HIV because a possibility of an exposure is not sufficient. *See, e.g.* *Rothschild v. Tower Air, Inc.*, 1995 WL 71053 (E.D. Pa. 1995) (refusing recovery for fear of HIV because the plaintiff failed to show that the needle she was accidentally pricked by was contaminated with HIV); *R.E.G. v. L.M.G.*, 571 N.E.2d 298 (Ind. Ct. App. 1991) (wife cannot recover against homosexual husband merely because he was at a high risk for HIV).

¹³⁸ *M.M.D. v. B.L.G.*, 467 N.W.2d 645, 647 (Minn. Ct. App. 1991).

¹³⁹ *Todt v. Shaw*, 286 S.E.2d 211, 213 (Va. 1982) (allowing plaintiff's testimony that her back pain prevented her from working); *see also* *Stahlberg v. Moe*, 166 N.W.2d 340 (Minn. 1969); *Quaker Oats Co. v. Davis*, 232 S.W.2d 282, 294 (Tenn. Ct. App. 1949) (an inference can be drawn from circumstantial evidence or expert testimony, or both).

¹⁴⁰ *Sumner v. Smith*, 257 S.E.2d 825, 827 (Va. 1979) (allowing the jury to hear and evaluate conflicting testimony between the plaintiff and a physician).

abstruse medical factors such that the ordinary layman cannot reasonably possess well-founded knowledge of the matter and could only indulge in speculation in making a finding.”¹⁴¹

In *M.M.D. v. B.L.G.*, the court held that the “causation of herpes is not beyond the average person’s knowledge, [thus] expert testimony was not necessary”¹⁴² Prior to their sexual contact, the plaintiff experienced no signs or symptoms of herpes, but the defendant had a *suspicion* that he was infected.¹⁴³ The plaintiff’s first outbreak of genital sores occurred after the parties were intimate and this first outbreak was medically consistent with the first outbreak of sores following transmission.¹⁴⁴ Given the timing of the sexual contact and the parties’ respective outbreak of sores, the court reasonably concluded that the defendant gave the plaintiff herpes.¹⁴⁵ Here, while admitting that expert medical testimony was not required, the court conveniently relied heavily on such testimony.

In *Hamblen v. Davidson*, the court again rejected the requirement of expert medical testimony, relying in large part on *M.M.D. v. B.L.G.*, but like the court in *M.M.D.*, the plaintiff had her treating physician testify regarding her infection and likelihood of transmission from the defendant.¹⁴⁶ The plaintiff in *Hamblen* had, for over twenty years, sexual relations exclusively with the defendant, her husband.¹⁴⁷ The court inferred causation because the plaintiff’s symptoms of herpes II first appeared a year after her husband began an extramarital affair.¹⁴⁸ Notably here, the plaintiff had sexual relations, prior to her marriage, with a man who tested positive for herpes I.¹⁴⁹ The plaintiff’s expert witness testified that herpes I could not be transmitted to the plaintiff’s genital area unless a person infected with herpes I performed oral sex on the plaintiff.¹⁵⁰ The court inferred that, even though she engaged in intercourse with an infected man, the plaintiff’s testimony that she never engaged in oral sex with the man precluded him from being the source of her herpes II infection.¹⁵¹

¹⁴¹ Bernloehr v. Cent. Livestock Order Buying Co., 208 N.W.2d 753, 755 (Minn. 1973).

¹⁴² 467 N.W.2d 645, 647 (Minn. Ct. App. 1991). Nothing in the case indicates the extent, if at all, of the plaintiff’s sexual past.

¹⁴³ *Id.* at 646.

¹⁴⁴ *Id.* at 648. The plaintiff’s treating physician testified that the first outbreak of sores is a more severely painful experience than subsequent outbreaks and that the severity of the plaintiff’s initial outbreak suggested a recent transmission. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 50 S.W.3d 433, 440 (Tenn. Ct. App. 2000).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 435-36.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Because of the inherent complexity of disease and disease transmission, courts should require plaintiffs to provide expert testimony, even if it is just the plaintiff's attending physician, to show causation. Proof of causation to a medical certainty is not required in personal injury cases,¹⁵² but to allow proof of disease transmission, without any scientific or medical basis for such a conclusion, forces, albeit subtly, juries to speculate on causation. Courts must prevent juries from speculating and should prevent juries from inferring causation even when a reasonable person might speculate or infer.¹⁵³ It is not unreasonable to require plaintiffs to actually prove causation.

IV. PLAINTIFF'S CONDUCT

Engaging in high-risk behavior, especially behavior that could foreseeably lead to being infected with a dangerous, and even deadly, disease requires a certain level of care. This seems intuitive enough because, as Professor Weinrib succinctly notes, "law is in the first instance an exhibition of intelligence rather than a set of observed regularities or a display of monopolized power."¹⁵⁴ Rock climbing is dangerous, but with proper education and the use of easy and reliable safety measures, its dangerousness is markedly diminished. A rock climber's partner or trainer might be responsible for an accident, but no one would suggest automatically barring affirmative defenses such as contributory negligence. Nothing about the risks involved with sex warrant an exception to the availability of affirmative defenses such as contributory negligence, comparative negligence, and assumption of the risk.

A. *Contributory Negligence*

An injured plaintiff, whose own conduct falls below the standard to which he is required to conform for his own protection, will be denied recovery notwithstanding the defendant's negligence.¹⁵⁵ The rule exists be-

¹⁵² See *Thompson v. Zwiren*, 561 S.E.2d 493, 494 (Ga. Ct. App. 2002) (rejecting a jury instruction that required the plaintiff to prove causation to a reasonable degree of medical certainty).

¹⁵³ See *Kramer Serv. v. Wilkins*, 186 So. 625 (Miss. 1939) (requiring expert medical testimony regarding cancer because the possibility of causation is not sufficient); *Wintersteen v. Semler*, 255 P.2d 138, 144 (Or. 1953) (expert testimony on the "probability" of causation is still speculative and insufficient).

¹⁵⁴ ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 14 (1995). The law presumes self-preservation is the norm, not the exception.

¹⁵⁵ The contributory negligence rule remains law in only a few states. See, e.g. *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987) ("[A]ny negligence of a plaintiff which is a proximate cause of the accident will bar recovery.").

cause, at a basic level, all individuals are ultimately responsible for their own well-being.¹⁵⁶ Determining what conduct constitutes negligence on the part of the plaintiff is ultimately up to the factfinder. Perhaps the plaintiff suggested the parties not use a condom. Perhaps the plaintiff pressured the defendant into having sex even though the defendant's reluctance was caused by the embarrassment of having an STD. Perhaps the plaintiff simply went out drinking with friends and, because of his intoxication, was unable to adequately assess his situation and risks. If a reasonable person would not have made the same choices as the plaintiff, then the plaintiff's decision was negligent.

The parties should share responsibilities and either party may benefit from the actions of the other; but to deny contributory negligence is to support a judicial rule that the plaintiff is entirely faultless, or entirely morally blameless, and that the defendant was entirely responsible and, thus, she alone should bear the entire loss. Such a rule could not be more counter-intuitive and more dangerous than as it applies to actions for the negligent transmission of sexual disease because you have to protect yourself before you can be trusted to protect others.

B. *Comparative Negligence*

Unlike contributory negligence, the plaintiff's own negligence is not a complete bar to recovery under a comparative negligence scheme.¹⁵⁷ Under a comparative negligence scheme, the fact-finder allocates fault between and among the parties.¹⁵⁸ In certain jurisdictions, the plaintiff is permitted to recover even if the plaintiff is 99% liable for his own injuries.¹⁵⁹ In other jurisdictions, the plaintiff is permitted to recover only if the plaintiff is less than 50% liable for his own injuries.¹⁶⁰ Whether by a change in the com-

¹⁵⁶ PROSSER, *supra* note 23, at 452.

¹⁵⁷ See *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973) (distinguishing the legal effect of a comparative fault scheme with a contributory negligence scheme); *Wysocki v. Kivi*, 638 N.W.2d 572 (Mich. Ct. App. 2001) (no recovery only because plaintiff was more than 50% at fault for his injuries).

¹⁵⁸ No one knows how exactly juries allocate fault between the plaintiff and defendant or among several defendants. See Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 ALA. L. REV. 13 (1989) (suggesting that proper jury instructions might assist jurors in allocating fault).

¹⁵⁹ See, e.g., LA. CIV. CODE ANN. art. 2323 (West 2003) (adopting pure comparative negligence by statute); N.Y. C.P.L.R. 1411 (McKinney 2003) (same); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (adopting a "pure" comparative negligence scheme); *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973) (explaining that if a defendant was 20% at fault, he should pay 20% of the plaintiff's costs).

¹⁶⁰ The modified comparative negligence scheme comes in several slightly different forms. See, e.g., IDAHO CODE § 6-801 (Michie 2002) (the plaintiff may recover so long as the plaintiff is less than 50% liable); WIS. STAT. ANN. § 895.045 (West 2002) (the plaintiff may recover so long as the plaintiff

mon law or by statute, almost all jurisdictions have adopted a comparative fault scheme. A comparative fault scheme provides a more just and equitable compensation method than both a contributory negligence rule and a rule barring all affirmative defenses. The judicial rationale behind moving from contributory negligence to comparative negligence was to protect plaintiffs from the harsh consequences of contributory negligence. Likewise, the courts would be justified to hold steadfast against the mounting pressure to deny defendants the affirmative defense of comparative negligence to protect defendants from the burden of total liability. As a matter of simple fairness, if the plaintiff is at least partially responsible for contracting an STD, then the defendant's liability should be reduced by an amount commensurate with the plaintiff's own negligence.¹⁶¹

C. *Assumption of Risk*

A plaintiff who engages in high-risk activity that he knows could expose himself to a dangerous, or deadly, disease is not morally blameless. A person who engages in sex with a partner who he knows to be infected with HIV is clearly and consciously choosing to confront the risk of contracting AIDS, and therefore liability is precluded. But the more problematic question remains; what exactly is a person consenting to when an infected partner fails to disclose his infection? Put another way, is a consenting sexual partner accepting *any risk* that he or she may become infected with an STD, even when the other partner makes no affirmations concerning his or her sexual health?

The affirmative defense of assumption of the risk is more likely an issue when the parties are effectively strangers, where no previous relationship, sexual or not, exists, and therefore, the parties are in far less of a position of trust than if they were dating or were married.¹⁶² A simple hypothetical may clarify my query and my distinction between strangers and spouses. Vanessa meets Caleb in a bar packed with other young profession-

is 50% liable or less); WYO. STAT. ANN. § 1-1-109 (Michie 2001) (the plaintiff may recover so long as the plaintiff is 50% liable or less); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979) (holding the plaintiff may recover so long as he is less at fault than the defendant or defendants combined).

¹⁶¹ See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 725 (1978) ("to negate altogether a plaintiff's lawsuit against a negligent defendant would be to allow the fairness idea associated with the contributory negligence defense to extinguish the moral idea that predicates negligence liability").

¹⁶² See, e.g., *Duke v. Housen*, 589 P.2d 334, 338 (Wyo. 1979) (parties had sex on the night they first met and then had a two-week sexual affair resulting in the plaintiff's gonorrhea infection).

als. Vanessa and Caleb, having known each other for only a couple of hours, leave together and head for Caleb's nearby loft. Having consumed a good amount of alcohol, the parties quickly become engaged in intercourse, without either party making any statements about their respective sexual history or health. As it turns out, Vanessa has genital herpes and infects Caleb. Herpes can still be transmitted even with a proper condom usage, so this fact is irrelevant. Putting Vanessa's negligence issues aside, is Caleb an innocent plaintiff worthy of being compensated by Vanessa? Probably not. Certainly not compared to a situation where the parties were either sober or had a previous relationship, sexual or otherwise. The parties equally risked pregnancy, being emotionally hurt, and disease transmission. Caleb cannot sue for wrongful pregnancy or for negligent infliction of emotional distress on the grounds that their brief encounter did not lead to the long-term commitment Caleb was hoping for.

Generally, to succeed on an assumption of risk defense, a defendant must show that "the plaintiff must know that the risk is present, and he must further understand its nature, and second, his choice to incur it must be free and voluntary."¹⁶³ Assuming the sex was consensual, the key element is whether the plaintiff knew and appreciated the risk of being infected with an STD.

Empirically, courts have required a showing that the plaintiff actually knew of a specific risk and then freely confronted that risk.¹⁶⁴ This approach is overly restrictive as it applies to the transmission of STDs because it tends to reward plaintiffs who make unwise moral decisions. Coming back to the earlier hypothetical, Caleb clearly did not know and appreciate the risk of acquiring herpes from Vanessa. However, Caleb "took a chance" with Vanessa, and lost. This chance may appear vague and too unspecific to bar recovery, but the rule requiring a specific risk exists to protect plaintiffs from a defense argument that the harm occurred as a natural result of daily life. In other words, an automobile driver risks being injured or killed in a car accident, but she does not assume the risk of being harmed for the purposes of tort liability.¹⁶⁵ Caleb's actions were not exactly "innocent," at least not in the moral sense that provides the basis for tort liability.¹⁶⁶

Risking disease infection is similar to risking an unwanted or unplanned pregnancy. The law correctly allocates the financial burden of

¹⁶³ PROSSER, *supra* note 23, at 487.

¹⁶⁴ *Id.*

¹⁶⁵ *Cf.* Harlow v. Connelly, 548 S.W.2d 143 (Ky. Ct. App. 1977) (plaintiff was a passenger in a car driven by an obviously drunk driver).

¹⁶⁶ *Cf.* Duke v. Housen, 589 P.2d 334 (Wyo. 1979) (the parties had a two-week sexual affair that began on the occasion of their first meeting).

pregnancy on both the father and mother, regardless of the possibility that one party shoulders more of the blame for the accidental birth than the other party.¹⁶⁷ This allocation exists because the courts wisely put the interest of the child ahead of the interests of the parent. Arguably, if the mother suffered a miscarriage and incurred medical costs associated with the aborted pregnancy, the “father” would not be free of all financial obligations.¹⁶⁸ If the public health community is primarily concerned with stopping the spread of potentially fatal STDs, then it should allocate the financial and emotional burden on both involved parties to affirm the commitment to disease prevention, just like the courts affirm the primacy of the child’s interests over the interests of any one parent.¹⁶⁹ By promoting increased liability on defendants, the public health community is analogously arguing that the mother is solely responsible for getting pregnant and that the father was morally blameless.¹⁷⁰

While it sounds simple enough, sex is not risk-free, and while a partner who fails to disclose an infection is far more morally blameworthy than her unsuspecting partner, both parties are, as is the case with an unwanted pregnancy, partially responsible and blameworthy. To use a more draconian phrase, if you engage in high-risk sex, you risk, suffer, and pay for adverse consequences.

¹⁶⁷ See, e.g., *C.A.M. v. R.A.W.*, 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990) (no liability against a father who purposefully lied about having a vasectomy to fraudulently induce the plaintiff to engage in sex without any form of birth control; see also *Perry v. Atkinson*, 240 Cal. Rptr. 402 (Cal. Ct. App. 1987) (no liability against a man who convinced the plaintiff to undergo an abortion on the false promise that they would have a pregnancy the following year).

¹⁶⁸ See *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983) (defendant lied about his sterility, and the plaintiff almost died from an ectopic pregnancy).

¹⁶⁹ In a thoughtful, more comprehensive look at the role of assumption of risk in AIDS related tort suits, one commentator concluded that, “when the parties’ relative levels of knowledge as to the defendant’s HIV status are equivalent, the plaintiff should bear her own costs . . . [because] allowing the assumption of risk defense in the equivalent-knowledge case will ensure that both parties have some increased deterrence from engaging in risky sexual acts.” Katherine A. Kelly, *The Assumption of Risk Defense and the Sexual Transmission of AIDS: A Proposal for the Application of Comparative Knowledge*, 143 U. PA. L. REV. 1121, 1175 (1995). Kelly generally advocates a more liberal use of the assumption of risk defense when a party engages in risky behavior. *Id.* at 1167.

¹⁷⁰ One could easily argue that the entire blame rests on the father and that the mother is the morally blameless victim. The argument is merely that one person is held responsible for the actions of two people.

V. OTHER JUDICIAL DOCTRINES AND POLICY PERSPECTIVES

A. *Privacy—A Brief Comment*

Sex between two consenting adults requires a substantial amount of governmental deference.¹⁷¹ You cannot sue for “wrongful birth”¹⁷² but you can sue for disease transmission; this is so even though the underlying facts constituting the wrongful birth or disease transmission are often identical. For example, in California, a father cannot sue the mother of his unwanted child on the grounds that she lied when she claimed to be using birth control pills.¹⁷³ However, a man is liable if he negligently, or intentionally for that matter, fails to disclose he has genital herpes.¹⁷⁴ In both cases one partner lied to the other, apparently in an effort to “reassure” the partner that the sex would be “safe.”¹⁷⁵ Both plaintiff’s were harmed—an unwanted child, an unwanted disease.¹⁷⁶ Why the distinction?

Aside from the obvious state interest in protecting the child over the complaints of the parents, the court correctly affirmed the dismissal of the wrongful birth action because the lawsuit “is [doing] nothing more than asking the court to supervise the promises made between two consenting

¹⁷¹ Several commentators have lauded judicial opinions that seek to keep government out of the bedroom. *See, e.g.*, Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 670 (1995); *see also* Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL’Y 9 (1998) (suggesting that an individual’s privacy interest might outweigh the benefits of partner notification). *But see* Jane E. Larson, “Women Understand so Little, They Call my Good Nature ‘Deceit’”: *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993) (proposing a tort of sexual fraud for defendants who seduce innocent plaintiffs); Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779 (1986) (suggesting generally that promises made in the bedroom should be enforced with tort liability).

¹⁷² Successful wrongful birth cases tend to be against a doctor for negligently performing a vasectomy or tubal ligation, or against a condom manufacturer or drug maker. *See* PROSSER, *supra* note 23, at 371-72. This paper is concerned with litigation between parents, not against doctors.

¹⁷³ *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Cal. Ct. App. 1980).

¹⁷⁴ *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. Ct. App. 1984). This paper takes no position on actions for fraud, as when the defendant knows he has herpes, is asked about it, and then purposely lies about his condition to induce sex.

¹⁷⁵ The record is void that this was the actual intent of the respective defendants, but given the surrounding facts one could reasonably conclude this to be at least the partial intent of the parties.

¹⁷⁶ For the purposes of this argument, I am categorizing an unwanted child as satisfying the damage element. In reality, I would never treat a child, or any person, as “a harm” or as a means to satisfy a tort claim.

adults as to the circumstances of their private sexual conduct . . . to do so would encourage unwanted governmental intrusion into matters affecting the individual's right to privacy."¹⁷⁷ It then conclude that "as a matter of public policy the practice of birth control . . . is best left to the individuals involved free from *any* governmental interference."¹⁷⁸ Morally, the government's deference to birth control, but not to negligent disease transmission, is a distinction without a difference.¹⁷⁹ At best it is a distinction with only a slight difference. The distinction is so slight that some commentators advocate allowing recovering in both situations—wrongful birth and disease transmission.¹⁸⁰ In other words, the woman who lies about being on birth control is morally blameworthy for taking the reproductive choices of the couple, and especially the man, out of the control of the couple or the man and entirely within the control of the woman.¹⁸¹ Essentially, the injured parent could bring an action for deceit.¹⁸² This proposal further diminishes fundamental notions of privacy and, more importantly, begins to dehumanize the unwanted child into a costly commodity. The superior moral solution is to hold the parties equally at fault when the parties fail to take proper precautions, whether it is collectively or individually, or whether it is to abstain or to inquire.

An individual's privacy interest should remain intact when the facts underlying the alleged tort are between two consenting adults and the defendant neither fraudulently concealed his disease nor intentionally transmitted the infection. Looking again at the earlier hypothetical with Vanessa and Caleb, the court would not relieve either party of all blame if the consequence of their casual and alcohol-assisted sex was an unwanted child, nor should it if the consequence is an infection.

¹⁷⁷ Stephen K. v. Roni K., 164 Cal. Rptr. 618, 620-21 (Cal. Ct. App. 1980).

¹⁷⁸ *Id.* (emphasis added).

¹⁷⁹ In fact, the court concluded that a person's privacy interest does not protect a defendant who *fraudulently concealed* his disease. Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276-77 (Cal. Ct. App. 1984). Again, this paper takes no position on actions for fraud.

¹⁸⁰ See Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779 (1986) (comprehensively comparing unwanted pregnancy actions with disease transmission actions); see also Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and its Legal Regulation*, 3 TEX. J. WOMEN & L. 7 (1994) (suggesting that the sociological and biological differences between men and women justify a gender-based approach to tort liability for the transmission of sexual disease).

¹⁸¹ Murray, *supra* note 180, at 793-94.

¹⁸² *Id.* at 801.

B. *Married Couples, Privacy and Interspousal Immunity*

At common law, a wife could not maintain an action against her husband in tort.¹⁸³ A married woman's "legal identity merged with that of her husband."¹⁸⁴ Divorce was the only readily available remedy for an injured wife.¹⁸⁵ This "unity theory"¹⁸⁶ emerged in response to two policy concerns held by the court. First, the courts would be flooded with "fictitious and fraudulent" suits among spouses.¹⁸⁷ Second, torts between spouses would destroy the "peace and harmony of the home."¹⁸⁸

Today almost all states have abrogated interspousal tort immunity.¹⁸⁹ Even in states abrogating the doctrine, a respect for the institution of marriage (as distinct from a couple of strangers) remains a unique concern in tort actions.¹⁹⁰ It offends the time-honored tradition of marriage to treat

¹⁸³ *Thompson v. Thompson*, 218 U.S. 611 (1910) (intentional torts); *Bandfield v. Bandfield*, 75 N.W. 287 (Mich. 1898); *Newton v. Weber*, 196 N.Y.S. 113 (N.Y. Sup. Ct. 1922); *Schultz v. Christopher*, 118 P. 629 (Wash. 1911) (waiting for abrogation by statute); *Campbell v. Campbell*, 114 S.E.2d 406 (W. Va. 1960) (negligence actions). Interspousal tort immunity barred a husband's suit against his wife as well, but given her inability to maintain wealth, a suit by a husband against his wife would seem futile. PROSSER, *supra* note 23, at 902.

¹⁸⁴ *Abbott v. Abbott*, 67 Me. 304 (1877) ("[M]arriage acts as a perpetually operating discharge of all wrongs between man and wife"). The effect of a wife's lack of legal identity was not limited to her inability to sue her husband in tort, but included the inability to enter into contracts and inability to possess property. *See* PROSSER, *supra* note 23, at 901.

¹⁸⁵ *Abbott*, 67 Me. at 304. Short and not exclusive of divorce, a woman could seek redress in the criminal courts. *Id.*

¹⁸⁶ The merging of the wife's legal identity with her husband's is sometimes referred to as the "unity theory of husband and wife." *Lewis v. Lewis*, 351 N.E.2d 526, 528 (Mass. 1976) (abrogating interspousal immunity for actions arising from motor vehicle accidents).

¹⁸⁷ *Abbott*, 67 Me. at 304 (A surviving wife could sue her husband's estate which "would add a new method by which estates could be plundered"); *see also* *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 654 (Mo. 1986) (Welliver, J., dissenting) (abrogating the doctrine for negligence actions may permit collusive actions against an insurance company to go undiscovered); PROSSER, *supra* note 23, at 902.

¹⁸⁸ *Ritter v. Ritter*, 31 Pa. 396 (Penn. 1858) ("The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders"); PROSSER, *supra* note 23, at 902.

¹⁸⁹ *See, e.g.*, VA. CODE ANN. § 8.01-220.1 (Michie 2002) (abrogating the defense by statute); *Boblitz v. Boblitz*, 462 A.2d 506 (Md. 1983) (abrogating interspousal tort immunity in negligence actions in Maryland); *Imig v. March*, 279 N.W.2d 382 (Neb. 1979) (same for Nebraska); *Scotvold v. Scotvold*, 637 N.W.2d 377 (S.D. 1941) (same for South Dakota); *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983) (same for Tennessee); *see also* Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101 (1999) (concluding that the immunity is all but completely abrogated from all states' common law).

¹⁹⁰ *Lewis*, 351 N.E.2d at 532 ("Conduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship"); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 653 (Mo. 1986) ("It cannot be said it is beyond the capacity of our courts to

spouses as strangers, and in states that still apply the doctrine of interspousal tort immunity, the plaintiff should be barred from recovering. In the alternative, it is not unreasonable to require a tort action between spouses for the transmission of a sexual disease to be part of a divorce proceeding. One can only wonder why a wife would sue her husband for infecting her with HIV without also suing for divorce. The privacy interest of keeping government out of the bedroom is at its strongest when it applies to a married couple.

Causation becomes the tricky element regarding married couples. Must the transfer have occurred during the marriage? If the married couple engaged in intercourse prior to marriage, and the defendant had been faithful to his wife during the marriage, then the transmission (i.e. causation) would have occurred prior to the marriage. Under this scenario the tort took place prior to the marriage, making interspousal immunity a moot point. But note, under this scenario, the couple was engaging in pre-marital sex, which is illegal in many jurisdictions and therefore might bar recovery under the doctrine of *in pari delicto*.¹⁹¹ If the married couple did not engage in pre-marital intercourse, then causation presumably occurred during the marriage (assuming the plaintiff was actually infected by her spouse). In this scenario, the most plausible explanation for how a sexual disease was transmitted between spouses is adultery.¹⁹² In virtually every recorded case of a defendant infecting her spouse, the underlying cause was the defendant's extra marital affair.¹⁹³ And unlike random strangers, married couples share enhanced communication and tend to distribute responsibility to 'the team' rather than to one spouse. Even without the doctrine of interspousal immunity, the married plaintiff is in a far better position to protect herself, at least compared to a random plaintiff, and therefore, appears more likely to be negligent herself.

The law already provides an appropriate remedy for injured spouses. Adultery and transmission of an STD are, and should be, grounds for di-

examine and on a case-by-case basis define or adjust the duty of care required between married persons to accommodate the 'give-and-take' of married life"); *Rampel v. Wascher*, 845 S.W.2d 918, 924-25 (Tex. Ct. App. 1992) ("We agree that spouses . . . should exercise care toward each other, but it does not follow that they may sue each other for damages when they are dissatisfied with the care they receive . . . the law cannot govern all aspects of marital life, and it would exact a high cost in privacy invasion if it did").

¹⁹¹ See Section C *infra*.

¹⁹² Adultery is not the exclusive cause. Blood transfusions, drug use, and even a visit to the dentist can result in infection.

¹⁹³ See, e.g., *Meany v. Meany*, 639 So. 2d 229 (La. 1994) (the parties were separated but legally married); *McPherson v. McPherson*, 712 A.2d 1043 (Me. 1998); *G.L. v. M.L.*, 550 A.2d 525, 526 (N.J. Super. Ct. Ch. Div. 1988).

voce.¹⁹⁴ A spouse suing for divorce should also be able to sue in tort, either as part of the divorce or as a separate action, for the damages associated with the STD infection. The married-plaintiff may also have a cause of action against the defendant's extramarital paramour.¹⁹⁵

Tort actions between married spouses raise serious moral and legal problems unique to marriage. Because of the heightened privacy interest that exists for married couples, and because of society's interest in protecting and promoting marriage, the law should be especially cautious in allowing liability against a spouse and extraordinarily cautious if the tort action against the spouse is not accompanied by a divorce proceeding.

C. In Pari Delicto or Wrongful Conduct Rule

"No court will lend its aid to a man who finds his cause of action upon an immoral or an illegal act."¹⁹⁶ Under this "wrongful-conduct-rule,"¹⁹⁷ "a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act."¹⁹⁸ In order for the rule to apply the parties must be *in pari delicto*

¹⁹⁴ See, e.g., *Neal v. Neal*, 873 P.2d 871 (Idaho 1994) (holding that the only available and appropriate remedy for breach of duty between married spouses is divorce); *Maharam v. Maharam*, 510 N.Y.S.2d 104 (N.Y. App. Div.) (plaintiff-wife sued for divorce alleging adultery and negligent transmission of genital herpes); *Wilkinson v. Wilkinson*, 1999 WL 969698 (Tenn. Ct. App. 1999) (adultery and transmission of genital herpes sufficient grounds for divorce).

¹⁹⁵ At least one court has permitted a plaintiff to recover against a party who gave the plaintiff's spouse a disease, who then transmitted the disease to the plaintiff. *Mussivand v. David*, 544 N.E.2d 265, 271 (Ohio 1989) ("A reasonably prudent person would anticipate that a wife and husband will engage in sexual relationships").

¹⁹⁶ *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775). This equitable doctrine, known more archaically as *ex turpi causa non oritur actio*, originally served as a total bar to a plaintiff's recover but is, unfortunately, seldom used today. See Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 87-88 (1995); see also RESTATEMENT (SECOND) OF TORTS § 889 (1977).

¹⁹⁷ A denial of recovery when the parties, or plaintiff alone, engaged in illegal or immoral conduct forming the basis of the action is commonly and collectively referred to as the "wrongful-conduct-rule." *Fisher v. Data Consulting Group, Inc.*, 2001 WL 1699406 (Mich. App. 2001).

¹⁹⁸ *Miller v. Bennett*, 56 S.E.2d 217, 218 (Va. 1949) (wrongful death action against abortionist held barred when plaintiff's decedent consented to abortion in violation of an anti-abortion statute); see also *Hill v. Nicodemus*, 979 F.2d 987 (4th Cir. 1992) (an illegal suicide bars a claim for wrongful death under Virginia law); *Fisher*, 2001 WL 1699406 (plaintiff's consideration for a real estate transaction was sexual services, which violated the state's prostitution statute); *Barkery v. Kallash*, 468 N.E.2d 39 (N.Y. 1984) (no recovery in negligence for an injury sustained while building an illegal pipe bomb); *Panther v. McKnight*, 256 P. 916, 918 (Okla. 1927) (unlawful marriage); *Zysk v. Zysk*, 404 S.E.2d 721 (Va. 1990) (fornication); *Hart v. Geysel*, 294 P. 570 (Wash. 1930) (parties consented to an illegal prize-fight). *But see*, *Mallory S.S. Co. v. Druhan*, 84 So. 874, 877 (Ala. Ct. App. 1920) (even among equally wrong tortfeasors, "where an injury results from a violation of a duty which one owes to another, the

with each other, or in other words, the parties must be “in equal wrong.”¹⁹⁹ While most courts that have grappled with the doctrine did so in actions for indemnity or contribution among joint tortfeasors, the doctrine is not limited to such actions.²⁰⁰

Two criminal laws have the potential to bar recovery under the defense of *in pari delicto*. The consenting participants could be in violation of a state law criminalizing either fornication or adultery.²⁰¹ In *Zysk v. Zysk* the plaintiff, who engaged in intercourse with the defendant before they were married, was denied recovery for being “a participant in the unlawful act of fornication.”²⁰² Virginia law provides that, “Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.”²⁰³ A minority of other states have similar fornication statutes.²⁰⁴ Adultery statutes, where at least one of the participants in intercourse is married, are both more common and more utilized because of their role in divorce proceedings.²⁰⁵ Some states never had, or have since repealed, fornication and adultery statutes.²⁰⁶

parties are not in *pari delicto*”); *Hudson v. Craft*, 204 P.2d 1 (Cal. 1949) (allowing recover against a boxing promoter for an illegal prizefight because the statute was specifically designed to protect the plaintiff).

¹⁹⁹ *Panther*, 256 P. 916 at 918.

²⁰⁰ *See, e.g.*, *Coates v. CTB, Inc.*, 173 F. Supp. 2d 1200, 1203 (M.D. Ala. 2001) (applying the doctrine in a commercial fraud case).

²⁰¹ *See* RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* (1996) (providing a quick survey of which states have which sex laws).

²⁰² *Zysk*, 404 S.E.2d at 722. At least one commentator has noted that “Virginia has produced most of the recent court decisions applying a broad public policy approach to [the defense of *in pari delicto*], reflecting a strong commitment to the principal that a court should not aid a plaintiff who has acted illicitly.” Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 86 (1995).

²⁰³ VA. CODE ANN. § 18.2-344 (Michie 2001). Notice that only the criminal defendant need be unmarried. In other words, the only lawful sexual intercourse in Virginia is between a husband and wife.

²⁰⁴ *See, e.g.*, GA. CODE ANN. § 16-6-18 (2001); IDAHO CODE § 18-6603 (Michie 2002); 720 ILL. COMP. STAT. 5/11-8 (2000); MINN. STAT. § 609.34 (2003); MISS. CODE ANN. § 97-29-1 (2002); N.C. GEN. STAT. § 14-184 (1999); UTAH CODE ANN. § 76-7-104 (2002); W. VA. CODE §§ 61-8-3, 61-8-4 (Michie 2002).

²⁰⁵ *See, e.g.*, D.C. CODE ANN. §§ 22-301 & 16-904(b)(3) (2001) (adultery is a misdemeanor and grounds for divorce); MISS. CODE ANN. §§ 97-29-1 & 93-5-1 (2002) (same); N.H. REV. STAT. ANN. §§ 645:3 & 458:7 (2002) (same); *Joel v. Joel*, 559 A.2d 769 (D.C. 1989) (applying D.C.’s adultery statute in a divorce proceeding). *But see* ALASKA STAT. § 25.24.050(2) (Michie 2002) (adultery is grounds for divorce only); LA. CIV. CODE ANN. art. 103(2) (West 2003) (same); ME. REV. STAT. ANN. tit. 19 § 691 (West 2002) (same); *Garner v. Garner*, 512 P.2d 84 (N.M. 1973) (applying New Mexico’s adultery statute in a divorce proceeding).

²⁰⁶ States without fornication statutes include: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mis-

Criminal prosecutions for fornication and adultery are extremely rare.²⁰⁷ Unfortunately, these rarely used laws may bar recovery or otherwise affect the outcome of civil actions.²⁰⁸ While some commentators suggest that rarely used criminal laws should not be available as a bar to recovery, the doctrine of “wrongful-conduct” or “unclean hands” remains sound.²⁰⁹ The appropriate solution to the “wrongful-conduct” barrier seen in *Zysk* is repeal of the rarely used criminal laws, not the genesis of a new doctrine that permits recovery when a wrongdoer engaged in conduct that used to be wrong but now is *de facto* accepted.²¹⁰

Under the old common law, an unmarried plaintiff infected with a venereal disease was unlikely to recover against her paramour-defendant because the unmarried parties were violating either the state’s fornication statute or the state’s adultery statute. Although attitudes regarding premarital sex may have changed over the years, a state law criminalizing fornication or adultery is consistent with the state’s interest in promoting marriage and traditional family structures.²¹¹ If a state criminalizes conduct it considers wrongful, in this case premarital or extramarital sex, then it reasonably follows that the state does not want participants engaged in the criminal act, even minor infractions, from recovering in tort for injuries suffered as a result of the crime. Absent repeal through the democratic process, the doctrine of *in pari delicto* should continue to bar recovery in tort actions for the transmission of sexual disease.

souri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, Wisconsin, and Wyoming. States without adultery statutes include: California, Hawaii, Iowa, Montana, Nevada, Oregon, Pennsylvania, Washington, and Wyoming.

²⁰⁷ Prosecutions are rare, but still occasionally occur. *See, e.g.*, *State v. Mangon*, 603 So. 2d 1131 (Ala. Crim. App. 1992) (prosecution for adultery); *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983) (prosecution for adultery); *Commonwealth v. Papariella*, 439 A.2d 827 (Pa. Super. Ct. 1982) (prosecution for adultery, along with prostitution); *Commonwealth v. Sager*, 419 A.2d 1288 (Pa. Super. Ct. 1980) (prosecution for fornication and bastardy).

²⁰⁸ *See, e.g.*, *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979) (a parent won custody of their child on the grounds that the other parent was fornicating); *Cooper v. Finch*, 460 N.W.2d 2 (Minn. 1990) (landlord lawfully denied an apartment to unmarried, but engaged, couple because he would be facilitating fornication).

²⁰⁹ Some commentators want courts to create a new a doctrine that would limit the “wrongful-doctrine” rule to statutes regularly enforced. *See* Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL’Y REV. 169 (1997).

²¹⁰ A growing number of states have decriminalized fornication and adultery. *See supra* note 206.

²¹¹ *See Baker v. State*, 744 A.2d 864 (Vt. 1999) (accepting a state interest in promoting marriage but criticizing a statute that discriminated against homosexual marriages).

CONCLUSION

This paper considers judicial policies that would promote personal responsibility and deter blame-shifting regarding the transmission of sexual diseases. Public health advocates prefer a litigation solution that, though designed with the best intentions, might easily increase the spread and infection rates of dangerous STDs. Allowing the traditional affirmative defenses—contributory negligence, comparative negligence, assumption of the risk—effectively allocates the burden of liability and responsibility on both parties. Personal and moral responsibility, along with a justice system that rewards such responsibility, is the best legal offensive to halt the epidemic of these dangerous and often deadly diseases.

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