No Condoms as Evidence
A Critical Step to Protecting Public Health

A legislative analysis of New York State Senate Bill S01289
and Assembly Bill 03856

Columbia Law School
Sexuality & Gender Law Clinic
2010
Executive Summary

This report supports Senate Bill S01289 and Assembly Bill 03856, which prohibits prosecutors from introducing condoms as evidence of prostitution and six other prostitution-related offenses. Those related offenses are patronizing a prostitute, promoting prostitution, permitting prostitution, maintaining a premises for prostitution, lewdness or assignation, or maintaining a bawdy house.

In New York, prostitution-related charges account for thousands of arrests, and police and prosecutors routinely cite condoms as evidence of prostitution-related activities. This practice has raised significant and justified fear among not just sex workers, but also the general public, that carrying condoms can lead to criminal prosecution. The practice thus has had an effect of discouraging condom usage, an essential method of protecting New Yorkers’ health.

Bill S01289/A03856 would prohibit this practice and is a vital piece of legislation to address New York’s public health crises and enable the state’s public health laws and policies are to remain effective and consonant with one another. New York was and is the epicenter of the HIV/AIDS epidemic in the United States and reports over 100,000 new cases of STDs each year. Given this stark reality, New York cannot afford to stand by in the face of a practice that further threatens public health and eviscerates the effectiveness of policies designed to redress public health problems, such as state and city free condom distribution and mandatory HIV/AIDS reporting and partner notification.

Moreover, the practice of using condoms as evidence is not vital to law enforcement’s ability to enforce prostitution laws. All of New York’s statutes criminalizing prostitution focus on the exchange of sex for a fee; none of those statutes provide any basis upon which to conclude that possessions, condoms or otherwise, may establish or are probative on the issue of that exchange. In addition, the vast majority of prostitution arrests are made through undercover operations, resulting in allegations that the arrestee unequivocally intended to engage in a prostitution-related offense, regardless of condom possession. Accordingly, Bill S01289/A03856 will not impede the enforcement of New York’s prostitution and prostitution-related laws, and the Legislature should not hesitate to enact it.

Finally, the Legislature has before acted to regulate condoms in other contexts, and Bill S01289/A03856 is a logical extension of these existing laws into the courtroom. In making this logical extension, New York would join a number of other jurisdictions that have prohibited using condoms as evidence of prostitution, respond to the call of many non-governmental organizations in New York and beyond, and secure its position as a leader in sound, coherent public health law and policy.
Table of Contents

I. Introduction .............................................................................................................................................. 1

II. Sound public health policy demands an end to the practice of using condoms as evidence of prostitution. ................................................................................................................................. 2
   a. New York suffers from serious public health problems, in the face of which condom usage must not be discouraged in any context. .......................................................................................................................... 2
      i. The HIV/AIDS epidemic in New York. ............................................................................................ 3
      ii. Other sexually transmitted diseases (STDs) in New York. .............................................................. 4
      iii. Pregnancy and abortion in New York. .............................................................................................. 5
   b. Prohibiting the use of condoms as evidence is necessary to bring New York’s evidentiary law into closer conformity with its other public health laws and policies. ................................................... 6
      i. New York’s AIDS Reporting and Partner Notification Law ............................................................ 6
      ii. New York’s free condom distribution programs. .............................................................................. 7

III. Condoms are not necessary to policing prostitution and prostitution-related offenses, nor are they necessary to proving those offenses in court. ....................................................................................... 8

IV. New York regulates condoms in other contexts to protect public health, and Bill S01289/A03856 is a necessary and appropriate complement to those regulations. ........................................... 10

V. Other jurisdictions have recognized the importance of prohibiting the use of condoms as evidence of prostitution, and New York should be no different. ................................................................. 11

VI. Conclusion ............................................................................................................................................... 12
I. Introduction

New York State, and New York City in particular, was and is the epicenter of the HIV/AIDS epidemic in America.\(^1\) New York has acted vigilantly and innovatively in response to this unprecedented public health crisis, as well as to other sexual health problems such as sexually transmitted diseases (STDs) and unintended pregnancies. For instance, New York was the first jurisdiction to include partner notification as part of its mandatory HIV/AIDS reporting law.\(^2\) Similarly, New York City was a pioneer in the field of protecting public health via free condom distribution, beginning the practice in 1971 and becoming the first city in the nation to provide official city condoms in 2007.\(^3\)

Today, however, New York tolerates a practice that risks its citizens’ health and its own position as a leader in the field of public health protection. Under current law, police and prosecutors can and do use condoms as evidence of prostitution. The negative public health connotations of this policy are clear. In an age when New York reports over 100,000 new cases of STDs each year,\(^4\) the State cannot afford to disincentivize condom usage in any way.

In addition, it is unclear why law enforcement officials prove prostitution via condoms. None of the prostitution statutes underlying all prostitution-related offenses mention condoms usage, or indeed any other possession of the defendant.\(^5\) Instead, those statutes make clear that the essential element of a prostitution offense is the exchange of sex for money.\(^6\) Condoms are simply not probative on this issue. Further, the vast majority of prostitution arrests are made through undercover operations, resulting in allegations that the arrestee unequivocally intended to engage in a prostitution-related offense, regardless of condom possession. Using condoms as evidence of prostitution endangers public health and conflicts with New York’s other laws and policies that promote condom usage among sexually active adults.

Bill S01289/A03856 addresses these problems by amending New York’s civil practice and criminal procedure laws to prohibit the introduction of condoms as evidence of prostitution and prostitution-related offenses. In so doing, the Bill recognizes that police and prosecutors can

---


\(^5\) N.Y. Penal Law § 230.00 (prostitution); id. § 230.02 (patronizing a prostitute); id. 230.15 (promoting prostitution); id. § 240.37 (loitering for the purposes of committing a prostitution offense).

\(^6\) See, e.g., id. § 230.00 (“A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”).
ably enforce prostitution laws without the use of condoms as evidence, and rectifies the conflict in laws that results when a state that distributes millions of free condoms each year later uses those same condoms as evidence of prostitution.

This report explains why the Legislature must act now to pass Bill S01289/A03856. To contextualize the proposed bill, Section I analyzes New York’s persistent public health problems, including the laws and policies enacted to address those problems. In so doing, the Section demonstrates that Bill S01289/A03856 is a necessary move on the Legislature’s part, as it harmonizes sound public health policy with evidentiary law, a harmony that does not currently exist. Section II explains why this move will not impede law enforcement’s ability to police and prosecute prostitution-related offenses, by showing that condoms are simply irrelevant to the issue of whether an individual has agreed to exchange sex for money. Section III proves that there are precedents supporting the Legislature’s action in this area, by discussing other arenas in which the Legislature has already regulated condoms in order to protect public health. Finally, Section IV discusses other jurisdictions, both domestic and international, that have prohibited the use of condoms as evidence in prostitution, and asks New York to join this group.

II. Sound public health policy demands an end to the practice of using condoms as evidence of prostitution.

The practice of using condoms as evidence of prostitution exacerbates New York’s serious public health problems and eviscerates the effectiveness of the laws the State has enacted to address those problems. This section details these public health problems and laws, as well as the inherent conflict that the practice of using condoms as evidence of prostitution creates among them.

a. New York suffers from serious public health problems, in the face of which condom usage must not be discouraged in any context.

New York City’s public health problems caused by unsafe sex are entrenched, ongoing, and serious. As evidenced by the data detailed below, studies and surveys show that the persistent prevalence of sexually transmittable diseases (STDs), HIV/AIDS, and unintended pregnancies in New York has reached an alarming level despite decades-worth of statewide action to combat these problems. Given that condoms are one of the most effective ways to reduce the risk of STD transmission and unintended pregnancy,7 and given that sex workers “are far more likely than other people to use condoms and engage in safer sex practices that prevent the transmission of disease,”8 these figures are an urgent reminder that New York cannot afford

8 Sylvia A. Law, Commercial Sex: Beyond Decriminalization, 73 S. Cal. L. Rev. 523, 546, 550 (2000) (citing a Centers for Disease Control and Prevention study and medical journal articles as substantial evidence that sex workers are far more likely than other people to use condoms).
to discourage, let alone criminalize, condom usage. In an era when more than 80% of New Yorkers fail to use condoms each and every time they have sex—thus rendering themselves vulnerable to fatal health risks associated with unsafe sex—the Legislature would be simply irresponsible to sit idly by while the practice of using condoms as evidence of prostitution continues to threaten citizens’ health.

i. The HIV/AIDS epidemic in New York.

Over 100,000 people are presumed to living with HIV/AIDS in New York City, including nearly 64,000 living with AIDS. This amounts to approximately 1.3% of all New York City residents. In the first half of 2008 alone, there were 1,407 new diagnoses of (non-AIDS) HIV in New York City—a number that amounts to approximately 8 new diagnoses each day, every day. And this number does not even include the overwhelming number of cases that go undiagnosed. During the same six-month period, 721 people died from AIDS in New York City; AIDS killed 2,012 people in New York City during the previous year. The City’s HIV/AIDS epidemic “is concentrated . . . among males, among those over the age of 30, and among minorities.” In fact, New York City has more AIDS cases than Los Angeles, San Francisco, Miami and Washington, D.C. combined. One of every 25 men living in Manhattan is HIV-positive.

But HIV/AIDS is not a problem confined to the five boroughs of New York City. As the New York State Department of Health has acknowledged, “New York State has long been the center of the AIDS epidemic in the United States, continuing to lead the nation in the number of AIDS cases and second only to the District of Columbia in the rate of AIDS cases . . . .” New York reports nearly one-third of the country’s cases among Hispanics and one-quarter among

18 Chan NYT.
females.\textsuperscript{20} Outside New York City, Erie, Monroe, Nassau, Suffolk, and Westchester Counties are among the most stricken by the virus, as each is home to over 1,000 people living with HIV/AIDS.\textsuperscript{21}

One fact about HIV/AIDS data collection is especially relevant in the context of this bill. New York City’s public health statistics identify a “history of prostitution” as a factor relevant to risk of HIV/AIDS transmission.\textsuperscript{22} The implication is that not only sex workers themselves are exposed to a high risk of HIV/AIDS infection, but also that they can spread the disease to others. Given that state public health officials identify prostitution as highly relevant to risk of AIDS transmission, it is dangerously illogical that other public actors would discourage condoms usage among those that their counterparts identify as at risk of HIV/AIDS transmission.

\textbf{ii. Other sexually transmitted diseases (STDs) in New York.}

Unfortunately for New Yorkers, HIV/AIDS is far from the only STD that infects the states’ residents at an alarming rate. New York ranks 10\textsuperscript{th} in the nation for reported cases of Chlamydia, 23\textsuperscript{rd} for gonorrhea, and 7\textsuperscript{th} for primary and secondary syphilis, and 12\textsuperscript{th} for congenital syphilis.\textsuperscript{23} In the New York State Department of Health’s own words, “STDs are overwhelmingly the leading category of reported communicable diseases in the State.”\textsuperscript{24} New York reported over 90,000 STD cases in 2006 alone, which represented 72\% of all communicable diseases reported statewide.\textsuperscript{25} As is the case with HIV/AIDS statistics, these numbers represent only reported cases; the actual number of STD sufferers in the state, most of which go unreported or undiagnosed, likely dwarf the 90,000 cases reported annually.\textsuperscript{26}

As is the case with HIV/AIDS, other STDs have also spread beyond New York City to have disastrous statewide effects. The counties with the highest gonorrhea case rates in 2006 were Erie and Monroe, reporting 188 and 186 cases per 100,000 people, respectively. While Bronx, Kings, and New York Counties were the next highest, their numbers lagged far behind Erie’s and Monroe’s, ranging from 160 to 156.\textsuperscript{27} All of these numbers are jarring when

\textsuperscript{24} Bureau of STD Control, p i.
\textsuperscript{25} Bureau of STD Control, p i (“These data . . . represent only a proportion of the true burden of STDs in the state.”).
\textsuperscript{26} Bureau of STD Control, p ii.
compared to the National Healthy People target,\textsuperscript{28} which suggests that a rate of 19 per 100,000 is acceptable.\textsuperscript{29} In particular, gonorrhea disproportionately affects women in New York, as the rate of infection per 100,000 females was nearly twice the rate among males in 2006.\textsuperscript{30}

Chlamydia, New York’s most commonly reported communicable disease, is similarly widespread throughout the state.\textsuperscript{31} Not only is Chlamydia rampant in the state, but infection and morbidity rates have continued to rise in New York over the past decade.\textsuperscript{32} The 68,725 Chlamydia cases reported in 2006 represented a 5\% increase in New York City and an 8.6\% increase in Upstate New York over 2005 figures.\textsuperscript{33} In 2006, 8 of New York’s 62 counties exceeded the national rate of Chlamydia of 347.8 cases per 100,000 people.\textsuperscript{34}

Syphilis also afflicts New Yorkers at higher rates than their fellow Americans in other states. In 2006, 4 of New York City’s 5 boroughs and 29 of the 57 Upstate New York counties exceeded the National Healthy People target for primary and secondary syphilis rates.\textsuperscript{35} Though these numbers represented a 6\% decrease over the prior year’s rate in New York City, they simultaneously represented a 77\% increase across the rest of the state.\textsuperscript{36}

Two decades into the AIDS pandemic, in a state that reports 80,629 new cases of Chlamydia,\textsuperscript{37} 17,699 new cases of gonorrhea,\textsuperscript{38} and 4,988 new cases of syphilis each year,\textsuperscript{39} it is simply incoherent and irresponsible to penalize condom usage in any way. Condoms are one of the most effective and affordable ways to halt STD rates. The Legislature must act in the face of a policy that criminalizes condom usage, unnecessarily risking New Yorkers’ health and squandering taxpayers’ money directed to documenting and solving sexual health problems.

### iii. Pregnancy and abortion in New York.

Alarming rates of sexually transmitted disease are not the only consequence of public policy that discourages condoms usage: increased pregnancy and abortion rates also result. In 2005, New York City reported 88,891 abortions, the second highest number in the country.\textsuperscript{40}

\textsuperscript{28} National Health People is an initiative of the federal Centers for Disease Control and provides science-based, 10-year national objectives for promoting health and preventing disease. For more information, see http://www.cdc.gov/nchs/healthy_people.htm.
\textsuperscript{29} Bureau of STD Control, p ii.
\textsuperscript{30} Bureau of STD Control, p ii. 493 sufferers of Chlamydia were female, while 220 were male. \textit{Id.}
\textsuperscript{31} Bureau of STD Control, p ii.
\textsuperscript{32} Bureau of STD Control, p ii.
\textsuperscript{33} Bureau of STD Control, p ii.
\textsuperscript{34} Bureau of STD Control, p ii.
\textsuperscript{35} Bureau of STD Control, p i.
\textsuperscript{36} Bureau of STD Control, p i.
\textsuperscript{38} New York State Dep’t of Health, Reported Cases by Disease and County: Giardiasis - Laboratory Confirmed Influenza (2007), http://www.health.state.ny.us/statistics/diseases/communicable/2007/cases/2.htm.
This figure represents the nation’s highest ratio of abortions to live births, at 756 abortions per 1,000 live births.\textsuperscript{41} New York State is also home to the highest rate of occurrence of abortions among women aged 15-44 years, at 30 per 1,000.\textsuperscript{42}

A 2007 New York City poll showed a startling correlation between failure to use condoms and unintended pregnancy. Among mothers polled who reported that they were not trying to become pregnant, 61.3\% or 35,047 said that they were not using any contraceptive method at the time of conception.\textsuperscript{43} This included 60.1\% of respondents age 19 and under and 64.9\% of respondents between ages 20 and 24.\textsuperscript{44} Given that condoms are inexpensive, easy, accessible method of contraception, the Legislature must encourage their use among sexually active adults in order to rectify this trend.

The most recent data from the Centers for Disease Control and Prevention show that among all live births in New York, 27.3\% were “mistimed” and 7.9\% were “unwanted.”\textsuperscript{45} Together, these figures mean that over one-third of all births in New York result from unintended pregnancies. New York’s children, parents, and family services thus deserve a sound, coherent public health policy that recognizes condoms are too important an aspect of sexual health to criminalize.

\textbf{b. Prohibiting the use of condoms as evidence is necessary to bring New York’s evidentiary law into closer conformity with its other public health laws and policies.}

The use of condoms as evidence of prostitution directly conflicts with, and indeed eviscerates the effectiveness of, a number of New York’s long-codified laws and policies. Those laws and policies are detailed below.

\textbf{i. New York’s AIDS Reporting and Partner Notification Law.}

AIDS prevention is such a strong priority within New York State that doctors and other healthcare providers are required to report, by name, new HIV and AIDS diagnoses to state officials.\textsuperscript{46} Indeed, New York’s HIV Reporting and Partner Notification (HIVRPN) law was the first in the nation to integrate the partner notification requirement with reporting.\textsuperscript{47} This law

\begin{itemize}
  \item \textsuperscript{41} Gamble, Abortion.
  \item \textsuperscript{42} Gamble, Abortion.
  \item \textsuperscript{44} NYC PRAMS 2007.
  \item \textsuperscript{45} Cts. for Disease Control and Prevention, Pregnancy Risk Assessment Monitoring System (PRAMS), PRAMS and Unintended Pregnancy 2, \textit{available at} http://www.cdc.gov/PRAMS/PDFs/PRAMSUnintentPreg.pdf. In this context, “mistimed” means the woman wanted to become pregnant later, while “unwanted” means the woman did not want to become pregnant ever.
  \item \textsuperscript{46} N.Y. Pub. Health Law §§ 2130-39 (McKinney 2008).
  \item \textsuperscript{47} Heather Horton et al., \textit{The Dimensions of Public Health Law Research}, 30 J.L. Med. & Ethics 197, 1999 (2002).
\end{itemize}
positioned New York as a leader in protection of public health, a position that is now endangered by the practice of using condoms as evidence in prostitution offenses. New York law also contains a similar provision for STD testing, which requires facilities offering sexual health services to offer to test New York residents for STDs.\textsuperscript{48}

New York enacted the HIVRPN law over controversy surrounding the naming provision\textsuperscript{49} for the purpose of stopping the further spread of the HIV/AIDS epidemic. The Legislature should not be afraid to act boldly again to achieve the same public health goal by enacting Bill S01289/A03856. Mandatory HIV/AIDS reporting, alongside mandatory offering of STD testing, shows that stopping the spread of HIV/AIDS and other STDs is among New York’s top priorities.

Discouraging condom use by permitting the use of condoms as evidence of prostitution directly conflicts with this priority. Bill S01289/A03856 halts and remedies this irreconcilable conflict, by enhancing protections for public health under law.

\section*{ii. New York’s free condom distribution programs.}

Recognizing the key role that condoms play in the protection of public health, both New York City and State have instituted free condom programs. The programs are a critical aspect of public health protection in the state, given that one government survey found a mere 36\% of New York City residents used a condom the last time they had sex and only 26\% had been tested for HIV in the preceding 18 months.\textsuperscript{50}

To increase condom usage among sexually active adults, the City’s free condom program provides free condoms and lubricant to individuals and organizations.\textsuperscript{51} Here, too, New York is a leader in this field, as the City’s free condom program started in 1971, predating the AIDS pandemic by over a decade, and in 2007 the City became the first in the nation to provide official city condoms.\textsuperscript{52} Since New York City’s official condom was unveiled in 2007, more than 70 million of the condoms have been distributed,\textsuperscript{53} at a rate of more than 3 million per month.\textsuperscript{54}

\textsuperscript{53} Chan NYT.
Similarly, the New York State free condom program distributes condoms and lubricant to organizations, which then distribute the condoms to individuals in their communities.\textsuperscript{55}

And yet, under current law, police and prosecutors can do use those very same free condoms as evidence in prostitution proceedings. It is shockingly wasteful and illogical that the same government that distributes free condoms to individuals later confiscates those condoms and uses them as evidence against those individuals in court.\textsuperscript{56} This policy contravenes the requirement that “[t]he purpose and intent of the statutes to reduce . . . the spread of HIV/AIDS are to be given effect,” and the Legislature must pass Bill S01289/A03856 to prevent this absurd result.

III. Condoms are not necessary to policing prostitution and prostitution-related offenses, nor are they necessary to proving those offenses in court.

In addition to the clear public health rationale for prohibiting the use of condoms in court, the fact is that condoms are not a necessary element of policing or prosecuting prostitution offenses. Not one of New York’s prostitution-related laws mentions condoms or other like paraphernalia, and not one of those laws would be harder to prosecute if condoms were prohibited as evidence.

Condoms are not probative evidence of prostitution because the essential inquiry in a prostitution case is whether an individual agreed to exchange sex for money. New York’s two statutes defining and penalizing both parties to the prostitution transaction, which underlie all of the statutes that Bill S01289/A03856 would alter, are written in these terms.\textsuperscript{57}

Condom possession does not make it any more or less likely that an individual intended to engage in sexual conduct \textit{for a fee}. Indeed, many prostitution charges in New York are the result of one-on-one interactions between police and defendants, all of which center upon whether the incident included the exchange of, or agreement to exchange, a fee.\textsuperscript{58} While

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{55} New York State Dep’t of Health, New York State Condom (NYSCondom) Program, http://www.health.state.ny.us/diseases/aids/facts/condoms/nyscondom.htm (last visited Dec. 2009).
\item \textsuperscript{56} Cf. Roe v. City of New York, 232 F. Supp. 2d 240, 257 (S.D.N.Y. 2002) (“It would be bizarre to conclude that the Legislative intent was to permit the creation of needle exchange programs in order to remove dirty needles, while at the same time frustrating that goal by making the essential steps of participation criminal.”).
\item \textsuperscript{57} See N.Y. Penal Law § 230.00 (McKinney 2008) (“A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”); id. § 230.02(1) (“A person patronizes a prostitute when: (a) Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or (b) He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him; or (c) He solicits or requests another person to engage in sexual conduct with him in return for a fee.”).
\item \textsuperscript{58} A sampling of recent cases proves this point. See, e.g., People v. Benjamin, 860 N.Y.S.2d 899, 901 (N.Y. Crim. Ct. 2008) (charging that defendant engaged in prostitution where she and police officer exchanged emails wherein defendant agreed to engage in massage for a fee and, upon meeting the officer, agreed to perform sexual services for a fee and then disrobed); People v. Rodriguez, 866 N.Y.S.2d 94, at *2 (N.Y. Crim. Ct. 2008) (explaining in prostitution case that undercover officer was informed that, in exchange for a sum of money, he could have sex with one of three women, and that after the officer paid the sum, one woman led the defendant into a bedroom and encouraged the officer to disrobe); People v. Choi, 856 N.Y.S.2d 501, *1 (N.Y. Crim. Ct. 2008) (stating that
\end{itemize}
\end{footnotesize}
condoms may be incident to such interactions, they are simply not probative on the issue of the exchange of sex for money. Accordingly, prohibiting condoms as evidence of prostitution would have no effect on law enforcement’s ability to enforce New York’s prostitution laws, as, even with condom evidence, law enforcement officials must still prove the exchange of a fee.

In addition, condoms are even less probative on the issue of “loitering for the purposes of committing a prostitution offense,” one of New York City’s most frequently arraigned offenses and an offense for which condoms are frequently used as evidence. 59 “Loitering for the purposes of committing a prostitution offense” is defined as:

remain[ing] or wander[ing] about in a public place and repeatedly beckon[ning] to, or repeatedly stop[ping], or repeatedly attempt[ing] to stop, or repeatedly attempt[ing] to engage passers-by in conversation, or repeatedly stop[ping] or attempt[ing] to stop motor vehicles, or repeatedly interfere[ing] with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute . . . . 60

Like the prostitution and patronizing a prostitute statutes, this statute does not mention condoms or other like paraphernalia. Similarly, condom possession is equally irrelevant in loitering for the purposes of prostitution offenses, as there is simply no way that condoms can be probative as to whether an individual is “remain[ing] or wander[ing]” in a public place “repeatedly beckoning” or “repeatedly attempt[ing] to stop” passers-by. Wandering, beckoning, and stopping passers-by are actions, movements, and other physical manifestations, and convictions

defendant was arrested for prostitution after being paraded with other women in front of a police officer who had entered an apartment and been told he could have sexual intercourse with any of the women in return for a fee; People v. Alvarez, 808 N.Y.S.2d 919, *3 (N.Y. Crim. Ct. 2005) (“[I]t seems clear that in the context of patronizing a prostitute, the act of ‘engaging’ requires the proactive efforts of more than one person and especially an act to be performed by the prostitute.”). Rodriguez is especially instructive, as the issue in that case was whether the defendant could be convicted for prostitution after receiving payment from a third party. Though the defendant displayed a condom in the course of her interaction with the undercover police officer, the decision focuses solely on the payment, rather than the sexual conduct or use of the condom. The case thus illustrates that the exchange of money is the essential inquiry in a prostitution charge and that condoms are of no relevance to this inquiry. Similarly, several recent cases have sought, albeit unsuccessfully to challenge a charge by alleging that the prosecution had not proved the defendant “agreed” to engage in sexual conduct for a fee. See Choi, 856 N.Y.S.2d 501, at *1 (asserting that because the defendant was not guilty of prostitution because she was only paraded in front of the officer, and did not partake in the negotiations for a fee); People v. Jin Lee, 859 N.Y.S.2d 905, *1 (N.Y. Crim. Ct. 2008); People v. Corona, 859 N.Y.S.2d 897, *1-2 (N.Y. Crim. Ct. 2008). By challenging the agreement underlying the prostitution charge, these cases also illustrate that the key issue in a prostitution case is the exchange of sexual conduct for money, not the safe or unsafe nature of the underlying sexual conduct.

59 Loitering for the purposes of committing a prostitution offense has been among the top ten most arraigned offenses in Midtown Community Court for over a decade. Criminal Court of the City of New York, Annual Report 2008 64, available at http://www.courts.state.ny.us/courts/nyccriminal/AnnualReport2008.pdf. Via its own independent investigation, the Columbia Sexuality and Gender Law Clinic has uncovered countless instances in which condoms are used as evidence in § 240.37 arrests and prosecutions. In the past two years in one New York City borough alone, the Clinic found 39 cases where condoms were used as evidence of prostitution. Indeed, the supporting deposition form that New York City police officers fill out lists a fill-in-the-blank space for the number of condoms the officer found in an arrestee’s possession.

60 N.Y. Penal Law § 240.37(2) (McKinney 2008).
under the statute are based on these grounds.\textsuperscript{61} By contrast, having a condom on one’s person says nothing about their movement or their interactions with passers-by. Moreover, courts have laid out the factors that render a § 240.37 complaint factually sufficient, all of which concern physical movement and actions and the type of public place at which the arrest occurred; neither condoms nor any other possession is on that list.\textsuperscript{62} Prohibiting the use of condoms as evidence would therefore have no effect on law enforcement’s ability to enforce New York’s statute criminalizing loitering for the purposes of committing a prostitution.

In sum, condoms simply do not make it any easier or harder for police and prosecutors to enforce the prostitution statute, and there is thus no way that Bill S01289/A03856 will impede enforcement of New York’s prostitution statute. Given the public health risks that this practice exacerbates, as discussed above, the Legislature should have no qualms about enacting Bill S01289/A03856 into law.

IV. New York regulates condoms in other contexts to protect public health, and Bill S01289/A03856 is a necessary and appropriate complement to those regulations.

In addition to the free condom programs discussed above, New York also effects its public health goals by regulating condoms in prisons and schools. The courtroom should be no different.

New York Department of Correctional Services regulations provide that prisons must provide condoms as part of its family reunion program. The regulations place condoms alongside, “pillows, blankets, bed linens, towels, [and] soap” as “items of personal hygiene.”\textsuperscript{63} Similarly, New York Department of Education regulations provide guidelines for all school districts that elect to provide condoms, requiring that each pupil receive age-appropriate “accurate and complete personal health guidance” along with the condoms.\textsuperscript{64} High schools in New York City go even further, as they are required to provide a Health Resource Room that, inter alia, provides free condoms and health information.\textsuperscript{65} In addition, Department of Health regulations require entities that run needle-exchange programs to provide participants with HIV

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} See, e.g., People v. Natividad, 866 N.Y.S.2d 94, *1 (N.Y. Crim. Ct. 2008) (alleging that 240.37 defendant remained and wandered about the same public place for 20 minutes and engaged in conversations with three passers-by); People v. Ortiz, 862 N.Y.S.2d 810, *1 (N.Y. Crim. Ct. 2005) (alleging that 240.37 defendant remained and wandered about the same public place for 20 minutes and attempted to engage in conversation with 3 passers-by).
\item \textsuperscript{62} See People v. Patricia B., 815 N.Y.S.2d 495, *1 (N.Y. Crim. Ct. 2006) (stating that the factors that render a 240.37 summons factually sufficient include “1. The police officer observed the defendant remain or wander about in a public place; 2. The defendant was seen beckoning, stopping or repeatedly attempting to engage motorists or passers-by in conversation; 3. The defendant was observed wandering in a known prostitution location for a period of time; and 4. A description of the type of clothing worn by the individual engaging in such conduct”).
\item \textsuperscript{63} 7 N.Y. Comp. Codes R. & Regs. tit. 7 § 220.9(c) (2009).
\item \textsuperscript{64} 8 N.Y. Comp. Codes R. & Regs. tit. 8 § 135.3(c)(2)(ii)(c); id. § 136.3(j).
\item \textsuperscript{65} See New York City Corp. Counsel, Opinion No. 2-91 (1991), 1991 NYC Corp. Counsel LEXIS 33 (opining that the City Board of Education had the statutory power to adopt a plan including condoms availability provision); New York City Dep’t of Educ., Condom Availability Program, http://schools.nyc.gov/Offices/Health/OtherHealthForms/HealthResource.htm (last visited Dec. 2009) (describing the condom availability program).
\end{itemize}
\end{footnotesize}
prevention education that may include “use of condoms and distribution of bleach kits and condoms.”66

There is thus no question that state government has the power and ability to regulate condoms usage, and Bill S01289/A03856 is an appropriate extension of the state’s accepted police power in this area to court proceedings. The bill is critical to ensuring that New York’s policies on condoms are consistent with one another—and send a uniform message that condoms are crucial to protecting New Yorkers’ health.

V. Other jurisdictions have recognized the importance of prohibiting the use of condoms as evidence of prostitution, and New York should be no different.

Outside New York, California has recognize the importance of condoms and sought to soundly align public health policy with evidentiary law. California, as a state, has decreed that a request to use condoms or other contraceptive may not be used as evidence of consent in sexual assault cases.67 Within California, the San Francisco District Attorney in 1994 announced a policy prohibiting the use of condoms as evidence in prostitution-related offenses.68 The policy was enacted after public pressure, including a San Francisco Board of Supervisors’ Task Force on Prostitution resolution, arguing that confiscating and use of condoms as evidence was contrary to public health.69 The contradiction was especially clear in light of the fact that the San Francisco City Department of Health had distributed many of the condoms that were confiscated and introduced as evidence.70

Internationally, the City of Beijing, citing public health policy, recently implemented a policy that makes condoms more accessible in hotels, nightclubs and construction sites, and prohibits the use of those condoms as evidence of prostitution.71 Similarly, the Vietnamese government also created a law decriminalizing the sale of condoms in Vietnamese guest houses in an effort to stop HIV transmission.72 In addition, Human Rights Watch, in a 2004 report, strongly urged the government of Philippine to stop using condoms as evidence of prostitution.

67 Cal. Penal Code § 261.7 (West 2008).
70 Leigh at 70.
as the practice “radically increase[s] the likelihood of a rapid outbreak and spread of HIV/AIDS among populations at high risk.”

Myriad non-governmental organizations around the world have joined this call and urged their governments to prohibit the use of condoms as evidence of prostitution.

VI. Conclusion

In sum, as a New York State legislator, you have the ability to halt a practice that risks New Yorkers’ health, wastes taxpayers’ resources, and creates an incoherent conflict between the state’s public health and evidentiary law. Enacting Bill S01289/A03856 will not endanger police and prosecutors’ ability to enforce prostitution-related offenses; indeed, it will have no effect on their ability, as not a single one of the statutes mention condoms or any other item in the defendant’s possession. Instead, Bill S01289/A03856 will join a number of other New York laws that regulate condoms in prescribed circumstances, as well as a number of other progressive, public-health-minded governments and organizations that recognize the primacy of protect

As a state legislator, you have a duty to protect public health, and enacting Bill S01289/A03856 is in line with—indeed, will ensure you fulfill—this duty. Consider co-sponsoring the bill, convince your colleagues to support the bill, and call for a vote on the bill today. New Yorkers’ health depends on it.

---

75 N.Y. Const. art. XVII, § 3 (The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.”).