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## CONTRACEPTIVE SABOTAGE

LEAH A. PLUNKETT\*

### *Abstract*

*This Article responds to the alarm recently sounded by the American College of Obstetricians and Gynecologists over “birth control sabotage”—the “active interference [by one partner] with [the other] partner’s contraceptive methods in an attempt to promote pregnancy.” Currently, sabotage is not a crime, and existing categories of criminal offenses fail to capture the essence of the injury it does to victims. This Article argues that sabotage should be a separate crime—but only when perpetrated against those partners who can and do get pregnant as a result of having sabotaged sex. Using the principle of self-possession—understood as a person’s basic right to self-ownership—this Article argues that women have a self-possessory interest in maintaining their reproductive capacity in its non-pregnant state during and after having sex to the extent they seek to establish with the use or planned use of contraception. Sabotage by sexual partners—typically male—violates this interest and merits criminal punishment. This Article proposes statutory language to criminalize sabotage that should be added to the revision of the Model Penal Code currently underway. Not only would this addition likely survive any Equal Protection challenge, it would arguably serve to strengthen the existing constitutional right to non-procreative sex by setting meaningful limits on one partner’s ability to interfere unilaterally with the other partner’s contraceptive decisions.*

### INTRODUCTION

The American College of Obstetricians and Gynecologists (ACOG) recently sounded an alarm over a phenomenon called “birth control sabotage.”<sup>1</sup> Birth control sabotage does

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1 American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, Committee Opinion: Reproductive and Sexual Coercion (Feb. 2013), <http://www.acog.org/~media/>

not have a universally agreed-upon definition, but the ACOG defines it as “active interference with a partner’s contraceptive methods in an attempt to promote pregnancy” and recommends that medical professionals take measures to reduce the incidence of sabotage among their patient populations, such as screening patients for potential sabotage situations and recommending safety planning and counseling should such behavior be present.<sup>2</sup> In the ACOG’s understanding, it appears that only women can be victims of sabotage.<sup>3</sup> Promotion of pregnancy is essential to the act of sabotage, and only women can get pregnant. Thus if women promote their own pregnancies, they are free to do so; they cannot sabotage themselves.

The identification of birth control sabotage as a fairly widespread but widely ignored social problem raises critical questions for law as well as for medicine, including whether there should be criminal consequences for saboteurs.<sup>4</sup> Legal scholars are just beginning to grapple with this issue.<sup>5</sup> To date, it appears that only one detailed scholarly proposal has been made to criminalize sabotage.<sup>6</sup> This proposal defines sabotage as a form of intimate partner violence and would make it a freestanding crime.<sup>7</sup> The proposal is drafted such that

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Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co554.pdf [http://perma.cc/DS8G-376J] [hereinafter ACOG]. This Article uses “contraceptive sabotage” and “birth control sabotage” as synonyms.

2 *See id.*

3 *See id.*

4 *See generally* Elizabeth Miller et al., *Recent Reproductive Coercion and Unintended Pregnancy Among Female Family Planning Clients*, 89 *CONTRACEPTION* 122–28, 123 (2014) (“National data demonstrate that approximately 9% of (or 10.3 million) US women report ever-experiencing RC [reproductive coercion, which includes sabotage and pregnancy pressure].”).

5 Legal scholarship on the specific topic of sabotage is quite scarce, which is not surprising given its comparatively recent identification as a discrete societal problem. Some scholars have mentioned the existence of sabotage in the context of broader discussions about domestic violence. *See, e.g.*, Cheryl Hanna, *Behind the Castle Walls: Balancing Privacy and Security in Domestic Abuse Cases*, 32 *T.J. L. REV.* 65, 75–76 (2009). And a number of scholars have had much more to say about the broader questions of the duties of candor and fair dealing—if any—between sexual partners. *See, e.g.*, Jane E. Larson, *Women Understand So Little, They Call My Good Nature Deceit: A Feminist Rethinking of Seduction*, 93 *COLUM. L. REV.* 374 (1993). As will be demonstrated in Part II, *infra*, however, contraceptive sabotage is not best understood as a subset of a broader category of so-called “rape-by-deception” or other forms of sexual dishonesty. Rather, it is a violation of its victims’ fundamental right to retain full possession of their physical selves.

6 *See* Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 *CAL. L. REV.* 721 (June 2012) (Student Comment) (analyzing birth control sabotage as a type of domestic violence).

7 *Id.* at 755. Trawick would also impose tort liability. I have reserved an exploration of the normative

not just women but men could be victims of sabotage as well if their female partners “tamper[ed]” with birth control “against . . . [the men’s] will, with the specific intent of inducing pregnancy.”<sup>8</sup> That is, women who wished to become pregnant and acted unilaterally in pursuit of this goal—by secretly stopping use of their birth control pills, for example—would be guilty of a crime. Were this or a similar proposal to be adopted, the inclusion of men in the class of potential victims could well be a point of disconnect between the medical establishment’s understanding of the sabotage problem and the law’s response.

More problematic for the development of legal doctrine and principles, such inclusion would criminalize two experiences that effectively never provide a basis for criminal liability in theory or in practice: pregnancy (when wanted by the pregnant woman) and parenthood (whether wanted by either party or not). Pregnancy transforms women’s bodies in countless ways,<sup>9</sup> and criminal law recognizes in limited contexts that this transformation—when unwanted—may constitute harm to women justifying criminal punishment.<sup>10</sup> Men’s bodies, however, are not transformed in any way by their female partners’ becoming pregnant, thus the essence of the injury to men as a result of contraceptive sabotage is most reasonably construed as becoming parents against their will. Of course, men cannot become parents unless their female partners become pregnant and continue the pregnancy until birth (live or still) results. Because of this inextricable link between pregnancy (for women) and parenthood (for partners of both sexes), any inclusion of men in the category of sabotage victims would render women subject to criminal punishment not just for transforming their male partners into parents but for becoming pregnant and continuing the pregnancy. Criminalization of women’s decisions to become and remain pregnant would

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desirability of tort liability for future work but, as a matter of initial consideration, am inclined against it. Imposing damages awards against perpetrators seems unlikely to provide adequate deterrence because if a child is born as a result of sabotage—the very outcome arguably desired by the saboteurs—the saboteurs will be liable for paying child support to the victims anyway or maintaining the victims and children as part of their households (if the sabotage does not in fact end the relationship). Put another way, if saboteurs are already facing the prospect of paying money to the victims under one legal scheme (child support), then it is not clear that the prospect of paying more money would necessarily deter them from engaging in sabotage in the first place. And to the extent that the victims need or deserve financial compensation for the injuries to them—separate from child support—criminal sentencing could provide for restitution. Indeed, the criminal justice system is increasingly being used to impose a range of costs on defendants for their misconduct. *See generally* Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57 (Dec. 2013) (specifically discussing defendants’ being charged for jail time).

8 *See* Trawick, *supra* note 6, at 755.

9 *See* Part II, *infra*.

10 *See* Part II, *infra*.

run directly counter to the constitutional guarantee of “limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood . . . as well as bodily integrity”<sup>11</sup> because women could be arrested, convicted, and imprisoned for that “most basic decision” of using their reproductive capacity for pregnancy.

This Article argues that the revision of the Model Penal Code currently underway should add statutory language that would make contraceptive sabotage a crime—but only against victims who can and do get pregnant as a result of the saboteur’s acts. (Because those victims can only be women—defined here on the basis of their sex, not their gender<sup>12</sup>—the analysis that follows will refer to victims of sabotage as females and perpetrators as males<sup>13</sup>). Absent this limitation on the class of victims, a crime of sabotage would punish experiences—wanted pregnancy, wanted or unwanted parenthood—that are not and should not be understood as injurious.<sup>14</sup>

This Article proceeds in three parts to look at the questions of whether and how birth control sabotage is currently being addressed in criminal law, followed by whether, why, and how it should be. Part I offers an overview of the current landscape of birth control sabotage, including what data from public health studies reveal about its prevalence and how it is treated by existing criminal law. Part I describes how sabotage alone—absent other allegations of criminal misconduct, such as a sexual assault charge arising from the forcible removal of a woman’s IUD—is not typically the basis for prosecution, despite the recognition elsewhere in criminal law that unwanted pregnancy may be an injury that warrants punishment.<sup>15</sup> This non-response is consistent with the law’s general reluctance to criminalize situations understood as “rape by deception” or “rape by fraud”—those times when a partner consents to sexual activity based on the other partner’s misrepresentation as to a term of the encounter. Upon first glance, contraceptive sabotage might appear to be

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11 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992).

12 See generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 10 (1995) (“[S]ex’ refers to the anatomical and physiological distinctions between men and women; ‘gender,’ by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions.”).

13 To be clear, not all women can be victims of sabotage. And not only men can be perpetrators, although biology renders them the typical—although not necessarily exclusive—culprits. For example, a woman could perpetrate sabotage against her female lover if she were to destroy her birth control then artificially inseminate her with sperm during sex.

14 See Part II, *infra*.

15 See Part II, *infra*.

a “rape by deception” situation; however, the essence of the offense lies in dispossession rather than deception.

Part II turns to theoretical concerns implicated when criminal law regulates sexual encounters. This Article takes self-possession—a person’s right to exercise “basic” “physical” “possession of one’s own body”—as the normatively desirable animating theory in this area.<sup>16</sup> In other words, the dominant concern of the criminal law when it regulates sex should be to prevent one person from effectuating a “taking of [another’s] body.”<sup>17</sup> This Part theorizes that unwanted pregnancies serve to dispossess women of their full self-ownership because their reproductive capacities are occupied. Women thus have a self-possessory interest in maintaining their non-pregnant selves—even when they choose to have sex—to the extent that they have sought to establish through the use or planned use of contraception.<sup>18</sup> Part II then explains the lack of a corresponding self-possessory interest for men in maintaining women’s non-pregnant selves, as well as the absence of a self-possessory interest for both partners in retaining their non-parental selves or not being deceived by their sexual partners in the matter of contraception.

Part III applies the theory that women have a self-possessory interest in maintaining their reproductive capacities to make a normative argument about doctrine at the overlap of criminal and family law.<sup>19</sup> Specifically, it proposes statutory language to add to the revision of the Model Penal Code currently underway that would criminalize knowing, purposeful, or reckless sabotage of women’s contraceptive choices such that the women become pregnant. The Article concludes by arguing that this new statute would not only comport with the Constitution but would strengthen an existing constitutional right to engage in sex without becoming pregnant.<sup>20</sup> More broadly, it suggests that selective intervention by criminal law into intimate life might serve to protect rather than erode certain constitutional rights.

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16 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1425 (Apr. 2013).

17 *Id.* at 1426.

18 See Part II, *infra*.

19 See, e.g., Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 295-96 (2012) (describing how recently scholars “have begun to argue for importing the tools and insights of other legal fields into family law . . . by recognizing the constructions of the family by seemingly unrelated areas of law such as criminal law”); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1258 (2009) (“calling for greater [scholarly and other] attention to the relationship between criminal law and family law in organizing intimate life”).

20 See Part III, *infra*.

## I. Contraceptive Sabotage Today

This Part describes the current landscape of contraceptive sabotage, beginning with the data that exist on the practice of sabotage, followed by an overview of the legal avenues now available for prosecuting sabotage. Generally speaking, the practice is prevalent enough to have triggered the concern and response of the medical community, although existing data have many limitations. Criminal law offers neither a robust nor a comprehensive legal scheme for addressing the problem. It does, however, offer such a scheme in another context in which one partner increases the other partner's risk of unwanted physical transformation with profound—often life-long—consequences: HIV exposure statutes. This Part concludes by noting these laws to situate the current non-response to sabotage in a broader descriptive context.

### A. Birth Control: Use & Partner Abuse

Birth control is essential to the lives of most adolescent and adult Americans.<sup>21</sup> Although its use meets with objection from some parts of civil and religious society,<sup>22</sup> the practice of trying to prevent sex from causing pregnancy is firmly entrenched in this country. At some point during their childbearing years, almost all women use some form of contraception.<sup>23</sup> Indeed, reliable contraception has been heralded as among the most important scientific advances in the twentieth century.<sup>24</sup> Within a dozen years after the pill's release to the broad consumer market in 1960,<sup>25</sup> the Supreme Court held that states could not forbid women—whether married or not—from having and using contraception.<sup>26</sup> And the federal government has long made significant expenditures to facilitate access to the pill and other forms of contraception, promoting the “correct[] and consistent[]” use of birth control as

21 See generally Guttmacher Institute, Fact Sheet: Contraceptive Use in the United States, (Aug. 2013), [http://www.guttmacher.org/pubs/fb\\_contr\\_use.pdf](http://www.guttmacher.org/pubs/fb_contr_use.pdf) [<http://perma.cc/5HKM-J9G4>].

22 See, e.g., Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 918 (2013) (noting objection of Catholic Church to providing employees with health insurance that covers contraception).

23 See Guttmacher Institute, *supra* note 21.

24 See generally Chad Brooker, *Making Contraception Easier to Swallow*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 169 (2012) (“[M]any have called it [birth control] the most important invention for women in the last century.”).

25 See Alexandra Nikolchev, *A Brief History of the Birth Control Pill*, PBS, (May 7, 2010), <http://www.pbs.org/wnet/need-to-know/health/a-brief-history-of-the-birth-control-pill/480/> [<http://perma.cc/TXF4-5HLX>].

26 See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

“[t]he best way to reduce the risk of unintended pregnancy among women who are sexually active.”<sup>27</sup> Absent contraception, a fertile woman who has sex has a roughly 85% chance of becoming pregnant over the course of a year.<sup>28</sup> With “correct and consistent” use of contraception, however, those odds become exponentially lower.<sup>29</sup> Many women thus regard contraception as vital to their lives and are willing to go through great lengths to obtain it and to protect their ability to use it.<sup>30</sup>

In general, conflict around contraceptive access is understood to mean struggles between women and institutions—usually the government or health insurance companies—over women’s being legally and financially able to obtain birth control.<sup>31</sup> This notion of conflict is reflected in legal scholarship as well, with literature devoted to such issues as the scope of employers’ lawful ability to limit contraceptive coverage in the health insurance policies they provide to employees.<sup>32</sup> However, within the last few years, awareness of another form of contraceptive conflict has crystallized in the medical and public health communities: conflict between women and their partners over women’s use of contraception. Research on the prevalence of this conflict is still fairly limited, but studies of women who experience one or more forms of abusive, coercive, or violent behavior from intimate

27 *Contraception*, CTRES. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/Contraception.htm> [<http://perma.cc/RS6H-7EEL>] (last updated on Aug. 28, 2013).

28 See Guttmacher Institute, *supra* note 21.

29 OFFICE OF WOMEN’S HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVICES, BIRTH CONTROL METHODS FACT SHEET, <http://womenshealth.gov/publications/our-publications/fact-sheet/birth-control-methods.pdf> [<http://perma.cc/Y482-NH5S>] (last updated Nov. 21, 2011).

30 See, e.g., Maggie Fazili Fard, *Sandra Fluke, Georgetown Law Student Called A “Slut” by Rush Limbaugh, Speaks Out*, WASH. POST, Mar. 2, 2012, available at [http://www.washingtonpost.com/blogs/the-buzz/post/rush-limbaugh-calls-georgetown-student-sandra-fluke-a-slut-for-advocating-contraception/2012/03/02/gIQAvjfSmR\\_blog.html](http://www.washingtonpost.com/blogs/the-buzz/post/rush-limbaugh-calls-georgetown-student-sandra-fluke-a-slut-for-advocating-contraception/2012/03/02/gIQAvjfSmR_blog.html) [<http://perma.cc/4RSB-THR8>]; Elizabeth Flock, *Birth Control Pill Contributed to Increase in Women’s Wages, Study Says*, WASH. POST, Mar. 30, 2012, available at [http://www.washingtonpost.com/blogs/blogpost/post/birth-control-pill-access-contributed-to-womens-wage-increases-study-says/2012/03/30/gIQAb7qKIS\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/birth-control-pill-access-contributed-to-womens-wage-increases-study-says/2012/03/30/gIQAb7qKIS_blog.html) [<http://perma.cc/G293-ANSH>] (“New research has found that the early availability of the birth control pill is responsible for about a third of women’s wage increases relative to men since the 1960’s . . .”).

31 For example, the 2012 presidential election involved significant national discussion of the candidates’ divergent views on governmental funding for Planned Parenthood, a nationwide provider of birth control, and the proper role of contraception in society more broadly. See, e.g., *Barack Obama Says Mitt Romney Opposes Contraception Mandate and Would Cut Planned Parenthood Funding*, POLITIFACT, Aug. 4, 2012, available at <http://www.politifact.com/truth-o-meter/statements/2012/aug/08/barack-obama/obama-slams-romney-on-contraception-and-planned-pa/> [<http://perma.cc/Z783-9XFS>] (rating Obama’s statement “true”).

32 See, e.g., Brooker, *supra* note 24.



partners have found that sabotage is common among these behaviors.<sup>33</sup> The phenomenon does not appear to be isolated and, at least, is deserving of serious inquiry, empirical and otherwise.<sup>34</sup> To date, there does not appear to be a single agreed-upon definition of birth control sabotage either within or across fields;<sup>35</sup> the handful of definitions by legal scholars include “a tactic of domestic violence when an intimate partner ignores the reproductive preferences of his or her partner by tampering with contraception or using coercion to induce pregnancy,”<sup>36</sup> while the ACOG describes the phenomenon as “active interference with a partner’s contraceptive methods in an attempt to promote pregnancy”<sup>37</sup> and calls for medical providers to take measures to identify and protect vulnerable patients.<sup>38</sup> Interest-

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33 See, e.g., Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 *CONTRACEPTION* 316, 316 (2010) (“Nearly one in four women in the United States report experiencing violence by a current or former spouse or boyfriend at some point in her life . . . . Studies have highlighted the association between partner violence and unintended pregnancy. . . . One specific element of abusive men’s control that may, in part, explain the association of partner violence with unintended pregnancy is . . . direct interference with contraception.”); Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 *SOC. SCI. & MED.* 1737, 1737 (2010) (finding 74% of respondents—all known to be victims of domestic violence—experienced some form of “reproductive control” during the abuse, such as contraceptive sabotage); Heike Thiel de Bocanegra et al., *Birth Control Sabotage and Forced Sex: Experiences Reported by Women in Domestic Violence Shelters*, 16 *VIOLENCE AGAINST WOMEN* 601, 605 (2010) (surveying women living in domestic violence shelters and finding that they “reported high rates of birth control sabotage by their partner”). *But see* Trawick, *supra* note 6, at 733 (“The direct relationship between physical violence and reproductive coercion or birth control sabotage is not entirely known. Birth control sabotage is not strictly limited to relationships in which domestic violence occurs.”).

34 Trawick, *supra* note 6, at 723 (“It is important to note that birth control sabotage is not limited to women of a particular class. Rather, experiences of birth control sabotage impact an array of women along the economic and educational spectrum.”).

35 See, e.g., Moore et al., *supra* note 33, at 1738 (“The Center for Impact Research has defined birth control sabotage as verbal or behavioral sabotage of the woman’s use of birth control by her partner . . . . Other literature has shown that this sabotage can be direct [interfering with her contraceptive use] as well as indirect [causing the woman to fear violence if she does use contraception or even brings up the topic]”); Miller et al., *supra* note 33, at 316 (comparing “overt pregnancy coercion” with “direct interference with contraception” and defining the second as “birth control sabotage”).

36 Trawick, *supra* note 6, at 722.

37 ACOG, *supra* note 1.

38 See ACOG *supra* note 1. See also Moore et al., *supra* note 33, at 1742 (“Interventions crafted around mitigating reproductive control could take the form of targeted assessment and prevention strategies in clinical settings.”); Thiel de Bocanegra et al., *supra* note 33, at 609 (“Prior to including men in couple-oriented reproductive health counseling and decisions, health care providers should determine the male partner’s supportive, neutral, or controlling role in contraceptive use and pregnancy decisions.”).

ingly, the ACOG categorizes birth control sabotage as a subset of the larger category of “reproductive coercion”—which also includes “pregnancy pressure” and “pregnancy coercion”<sup>39</sup>—whereas at least one legal scholar has done the opposite, including what amounts to pregnancy coercion within the category of birth control sabotage.<sup>40</sup> For reasons that will be discussed further below,<sup>41</sup> the ACOG approach is preferable from the point of view of developing a principled, internally consistent legal response to the sabotage problem—and not just because adopting it incorporates the valuable perspective of medical providers and promotes consistency between professional and scholarly work in medicine and law.

Despite the subtle yet important differences between definitions of contraceptive sabotage, there is considerable consensus within and among fields over the behaviors that constitute sabotage. The core types of conduct include putting holes in condoms;<sup>42</sup> hiding or ruining birth control pills;<sup>43</sup> and taking contraception (such as a NuvaRing or IUD) out of women’s bodies<sup>44</sup>. Men’s refusal to stop having sex before ejaculation—the so-called “withdrawal method”—or removing condoms once sex has begun are also commonly categorized as sabotage,<sup>45</sup> although this Article only considers the second to be sabotage. (The first is of course sexual assault—men are remaining inside women once consent has been revoked—but withdrawal is not an FDA-approved contraceptive medication or device, thus there is no contraception present to sabotage.)<sup>46</sup> These scenarios all share a central dynamic: men are secretly or unilaterally interfering with the contraception women are

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39 ACOG *supra* note 1 (“Pregnancy pressure involves behavior intended to pressure a female partner to become pregnant when she does not wish to become pregnant. Pregnancy coercion involves coercive behavior such as threats or acts of violence if a partner does not comply with the perpetrator’s wishes regarding the decision to terminate or continue a pregnancy.”). See also Moore et al., *supra* note 33, at 1738 (“Reproductive control occurs when women’s partners demand or enforce their own reproductive intentions whether in direct conflict with or without interest in the woman’s intentions, through the use of intimidation, threats, and/or actual violence.”).

40 See Trawick, *supra* note 6, at 730.

41 See Part II, *infra* (setting forth and applying self-possession principles to determine when sabotage poses an injury warranting criminal punishment).

42 See ACOG, *supra* note 1; Trawick, *supra* note 6, at 730.

43 See ACOG, *supra* note 1; Trawick, *supra* note 6, at 730 (describing one way to ruin pills: replace them with placebos). See also Moore et al., *supra* note 33, at 1739, Table 1 (flushing pills down toilet).

44 See ACOG, *supra* note 1; Trawick, *supra* note 6, at 731; Moore et al., *supra* note 33, at 1741.

45 See ACOG, *supra* note 1; Trawick, *supra* note 6, at 730–31; Moore et al., *supra* note 33, at 1740.

46 See Part III, *infra*.

using or plan to use to limit the risk that they will become pregnant as the result of sex.<sup>47</sup> Typically, within this set of examples, women have sex—or at least start having sex—believing that their selected method of contraception is and will remain intact and in place throughout the whole encounter. However, their partners' actions—previously substituting placebos for active pills, stopping during sex to remove a condom, and the like—either have made or will make this a false belief, subjecting women to a higher likelihood of pregnancy than they wish to have and have taken measures to avoid.<sup>48</sup>

There is less convergence around how to categorize men's actions prior to sex that aim to avoid contraceptive use—thus promoting pregnancy—and that are neither secret nor entirely unilateral. Paradigmatic practices relying on this approach include men giving their partners inaccurate or misleading information about contraception so women will not use it;<sup>49</sup> men threatening or intimidating—verbally or violently—women into having unprotected sex to promote pregnancy;<sup>50</sup> or men refusing to pay for or otherwise facilitate access to contraception<sup>51</sup>. At least one legal scholar has called for these behaviors to be understood as birth control sabotage, whereas the medical and public health literature tends to refer to them as “pregnancy coercion,” situating them in the general category of reproductive control or coercion but not sabotage specifically.<sup>52</sup> For the most part, then, men rely on women's knowledge and fear of such behaviors to induce women's acquiescence or submission to men's goal of having unprotected sex with pregnancy resulting, thereby bonding the partners together in a way and to an extent that women did not want.<sup>53</sup> This mechanism stands in general contrast to the quintessential sabotage behaviors identified above, which tend to rely on stealth and/or unilateral activity on the part of men.

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47 See Trawick, *supra* note 6, at 730 (citing Moore et al., *supra* note 33, and noting different periods—pre, during, post-intercourse—in which reproductive coercion can occur).

48 See Moore et al., *supra* note 33, at 1740 (distinguishing between men trying to impregnate women through rape—unwanted sex—and trying to do so through sabotage in otherwise wanted sex).

49 See Moore et al., *supra* note 33, at 1740–41.

50 See ACOG, *supra* note 1; Moore et al., *supra* note 33, at 1739–40.

51 See Moore et al., *supra* note 33, at 1741.

52 Compare Trawick, *supra* note 6, at 730, with Miller et al., *supra* note 33, at 316–17.

53 See, e.g., Moore et al., *supra* note 33, at 1740 (“In a number of situations, the abusive partner was being sent to prison and his stated reason for wanting to make his partner pregnant was if she were pregnant, he saw less chance of her leaving him while he was imprisoned because she would be seen as less desirable by other men and invested in maintaining a relationship with the father of the child.”).

Practically speaking, it appears likely that men who perpetrate one form of reproductive coercion or control against their partners—whether within some sabotage subset of behaviors or not—will also commit others.<sup>54</sup> An illustrative example: one woman obtained emergency contraception after “her partner . . . remove[d] the condom just before ejaculation and insist[ed] that the condom had slipped or broken. . . . In response [to her getting the EC], her partner . . . accused her of being a whore, spat in her face, and attempted to hit her.”<sup>55</sup> Under the public health paradigm, the condom removal would be sabotage, whereas the reaction to the EC would be reproductive control or coercion more broadly. This Article adopts the division between sabotage and a broader category of reproductive control or coercion for both descriptive and normative purposes. From a descriptive standpoint, it seems most accurate to adopt the definitional framework of those professionals and researchers in the most contact with sabotage victims: medical providers and public health scholars.<sup>56</sup> This precise definition facilitates the Article’s normative analysis, which offers a separate statutory definition of a crime of birth control sabotage that does not include reproductive coercion or control more broadly.<sup>57</sup>

## B. Legal Landscape

Currently, there does not appear to be any specific crime of birth control sabotage on the books in any state.<sup>58</sup> There also does not appear to be or have been any widespread call on the part of legal scholars, lawmakers, or other stakeholders to create such a law.<sup>59</sup> Indeed, scholars who have advocated for more legal intervention to promote full disclosure and honesty during sexual encounters have tended to look more toward civil than criminal mechanisms<sup>60</sup>—with the exception of “rape by deception” situations, in which an individu-

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54 See, e.g., Moore et al., *supra* note 33, at 1742 (“[E]vents of reproductive control rarely occurred in isolation of other events of reproductive control. Furthermore, women related experiencing reproductive control within and across their relationships including in non-physically abusive relationships.”).

55 Trawick, *supra* note 6, at 724.

56 See ACOG, *supra* note 1 (sabotage involves “active interference with partner’s contraceptive methods”).

57 See Part III, *infra*.

58 See Trawick, *supra* note 6, at 746. (“Strikingly, the sabotage of birth control has made no appearance in state criminal codes or in recommendations under the Model Penal Code.”).

59 To date, the only other proposed statute seems to be from Trawick, *supra* note 6, at 755–56. *But cf.* Moore et al., *supra* note 33, at 1742 (“Recent legislative efforts have been introduced across the U.S. aimed at penalizing partners who coerce a woman to have an abortion.”).

60 See, e.g., Larson, *supra* note 5.

al has sex he or she would not have had if he or she had known all the relevant information at the time of the encounter.<sup>61</sup> Nor does there appear to be any large-scale attempts to address the conduct systemically under existing statutes, either sexual assault or otherwise.<sup>62</sup>

When considered with respect to criminal law doctrine and practice more broadly, this lack of response is not surprising. Many—but not all—instances of contraceptive sabotage could be understood, upon initial consideration, as falling into the larger category of “rape by fraud” or “rape by deception.”<sup>63</sup> In general, there is no criminal liability for so-called “rape by fraud” or “rape by deception”—having sex with a partner who was not aware of material terms of the encounter or of the other partner’s identity—outside of “sex falsely represented as a medical procedure, and impersonation of a woman’s husband.”<sup>64</sup> To be sure, situations involving birth control sabotage have been and could be prosecuted successfully as some type of rape or sexual assault in many if not all jurisdictions, provided that the sabotage occurs in the context of circumstances sufficient to constitute sexual assault even in the absence of any sabotage.<sup>65</sup> That at least one goal of the penetration is to remove contraception is generally irrelevant to the charges in and disposition of this type of case. For example, a man who forcibly pulls out his partner’s IUD without her consent has committed some type of sexual assault under the Model Penal Code and many state

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61 See Rubinfeld, *supra* note 16, at 1396–98.

62 See generally Trawick, *supra* note 6, at 746–47.

63 See, e.g., Trawick, *supra* note 6, at 723 (poking holes in condoms). Indeed, the Supreme Court of Canada recently reached such an understanding in *R v. Hutchinson*, 2014 SCC 19, upholding the sexual assault conviction of a man who surreptitiously put holes in the condoms he and his female partner were using because “sex with a sabotaged condom amounts to sexual assault because consent is vitiated by fraud.” Joshua Sealy-Harrington, *A Pricked Condom: Fraudulently Obtained Consent or No Consent in the First Place?*, ABLAWG.CA (Apr. 9, 2014), <http://ablawg.ca/2014/04/09/a-pricked-condom-fraudulently-obtained-consent-or-no-consent-in-the-first-place/> [<http://perma.cc/XXH3-K6KL>].

64 Rubinfeld, *supra* note 16, at 1396–98. (“These two exceptions . . . have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception . . . . In the United States, courts have long endorsed the medical exception, while the spousal-impersonation exception is the law of at least fourteen states, including California, and is recognized in the Model Penal Code.”). See also Margo Kaplan, *Rethinking HIV Exposure Crimes*, 87 IND. L.J. 1517, 1526–27 (2012); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 193 (2003). See, e.g., Cal. Penal Code § 261(4)(D) & (5) (misrepresentations include deceit as to spousal identity and medical procedure); Mich. Comp. Laws Ann. § 750.90 (sex under pretext of medical treatment).

65 See Trawick, *supra* note 6, at 750 (“Of those U.S. jurisdictions considering cases of birth control sabotage, the sabotage is often considered as just another supporting fact, and not an independently sufficient offense, in the grander crime of forceful sexual assault.”).

statutes.<sup>66</sup> That the unwanted touching had a specific purpose—extracting the IUD—is not likely to be the basis for any additional liability; indeed, in some states, such a purpose could militate against bringing charges for certain types of sexual assault if the touching was construed as being for a purpose other than “sexual arousal or gratification.”<sup>67</sup>

In such instances, however, more general assault provisions likely would be able to provide grounds for prosecution, although such prosecutions—especially for simple assault—do not carry a significant penalty.<sup>68</sup> Similarly, it is theoretically possible to use other general—that is, non-sex-specific—types of crimes as grounds for prosecuting contraceptive sabotage occurring absent any physical force. For instance, a man who secretly replaces his partner’s birth control pills with placebos has arguably engaged in theft.<sup>69</sup> However, there are significant limitations on the applicability of theft and related offenses to sabotage behavior,<sup>70</sup> notably the law’s general reluctance to impose criminal responsibility on a spouse for theft of household “property normally accessible to both spouses.”<sup>71</sup> Indeed, the opportunity for sabotage is essentially conditioned on the man’s easy access to the woman’s contraception, thus this factual predicate may well undermine the ability to use theft or similar offenses as vehicles to address non-forceful sabotage. Household commingling does not pose the same obstacle to the proposed contraceptive sabotage statute, however,

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66 See, e.g., MODEL PENAL CODE § 213.4 (1962); MICH. COMP. LAWS ANN. § 750.520b (force causing personal injury); TEX. PENAL CODE ANN. § 22.011 (West 2009) (without consent due to use of force); GA. CODE ANN. § 16-6-22.1 ((b) “A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.”); KY. REV. STAT. ANN. § 510.130 (West) (“(1) A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter’s consent.”); MINN. STAT. ANN. § 609.3451 (West) (“A person is guilty of criminal sexual conduct in the fifth degree: (1) if the person engages in nonconsensual sexual contact . . .”).

67 See, e.g., MICH. COMP. LAWS ANN. § 750.520g (assault with intent to commit criminal sexual conduct).

68 See, e.g., MICH. COMP. LAWS ANN. §§ 750.81 *et seq.* See generally MODEL PENAL CODE § 211.1 (1962) (defining simple assault to include “attempts to cause or purposely, knowingly or recklessly caus[ing] bodily injury to another” and aggravated assault as including “attempts to cause serious bodily injury to another, or caus[ing] such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life”). Simple assault is typically a misdemeanor. *Id.*

69 See, e.g., MODEL PENAL CODE § 223.2(1) (1962) (“A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.”).

70 For example, a man who pokes holes in his partner’s diaphragm—without her knowledge or consent—is arguably guilty of destroying her personal property. See, e.g., MASS. GEN. LAWS ch. 266, § 127 (1994).

71 MODEL PENAL CODE § 223.1(4) (1962) (explaining that theft of such property “is theft only if it occurs after the parties have ceased living together”).

as co-habitation or marital status does not legally entitle partners to access to each other's bodies the same way it does to household property.

Even absent any potential obstacles to successful prosecutions under general criminal statutes, these statutes fail to capture fully the extent or the nature of the harm to victims. While the *actus reus* of sabotage might appear similar—in certain circumstances—to that of larceny or other more general offenses, any such similarity is superficial only and disappears when the specific nature of the item stolen or otherwise interfered with is taken into account. A woman whose birth control pills have been taken out of their place in her toiletry kit, replaced with placebos, and returned to their original spot is differently situated than a woman whose eyeliner is removed from that same kit, replaced with garden-variety pencil, and returned to its place. The purpose of the pills is decreasing the risk of pregnancy, while that of the eyeliner is beautification. A woman who is deceived as to her level of protection against pregnancy faces far more serious potential bodily consequences than one who is mistaken as to the caliber of her cosmetic product. At most, the latter is likely to experience some minor skin irritation or discomfort, coupled with the loss of money expended on the product itself, whereas the former stands to see the very consequence—pregnancy—that she was seeking to avoid through the use of pills come to pass. In order to capture fully the effects of these two substitutions (pills and pencil), the proper consideration is not the dollar amount of the property that was stolen—which, with decent prescription co-pays could be roughly equal<sup>72</sup>—but the purpose of the stolen property. With this consideration in mind, the relevant *actus reus* for contraceptive sabotage comes into focus: the destruction or damage of contraceptive medication or a medically-approved contraceptive device. And that specific act is not currently understood as an *actus reus* for the purpose of imposing criminal liability.

### C. HIV Exposure Statutes

Although criminal law does not currently provide any meaningful basis for prosecuting birth control sabotage, it does impose liability in another set of circumstances in which one partner subjects the other to potential significant, long-term, adverse physical consequences as a result of sex: when a person with HIV has sex with a person without HIV, and the latter is not aware of the former's condition.<sup>73</sup> Currently, roughly half of all states impose

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72 See generally U.S. DEP'T OF HEALTH & HUMAN SERVICES, WOMEN'S PREVENTIVE SERVICES GUIDELINES, available at <http://www.hrsa.gov/womensguidelines/> [<http://perma.cc/6Y8N-4LMM>] (last visited on Oct. 16, 2013), (requiring coverage of contraception by insurance plans under the Affordable Care Act).

73 See Kaplan, *supra* note 64, at 1518.

criminal liability in such situations.<sup>74</sup> In most states, the crime is a felony.<sup>75</sup> While the terms of the statutes vary, they typically include:

- (1) a mens rea requirement that the defendant must know she is HIV positive; (2) an actus reus requirement that the defendant must be HIV positive and engage in certain prohibited conduct . . . and (3) a requirement that the defendant's sexual partner must not be aware that the defendant is HIV positive.<sup>76</sup>

The conduct prosecuted under these statutes does not necessarily need to expose the partner without HIV to any significant risk of contracting the virus to result in a successful conviction,<sup>77</sup> nor does the perpetrator necessarily need to have intended to transmit the virus<sup>78</sup>. If convicted, defendants typically face the prospect of much longer sentences than they would for conduct that fell under a general statute criminalizing “recklessly engaging in conduct that creates a substantial risk of serious injury or death to another.”<sup>79</sup> In essence, then, many of these statutes seem to require affirmative disclosure by the partner with HIV so as to avoid prosecution.<sup>80</sup> At least one scholar has argued that mandatory disclosure—as well as other common features of HIV-exposure laws—intrudes too far into individuals’

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74 *See id.*

75 *See id.* at 1536.

76 *Id.* at 1519.

77 *Id.* at 1531.

78 *Id.* at 1545.

79 *Id.* at 1536–37 (comparing reckless endangerment penalties of six-twelve months with HIV exposure penalties of an “average maximum prison sentence is over eleven years”).

80 Ostensibly, most HIV-exposure offenses are not rape or sexual assault offenses. *See Kaplan, supra* note 64, at 1526–27. HIV-exposure statutes that are not explicitly defined as sexual assault but have terms and penalties that make them look a lot like rape by deception offenses: FLA. STAT. ANN. § 384.24 (West [1997]); GA. CODE ANN. § 16-5-60 (2003); IDAHO CODE ANN. § 39-608; ILL. COMP. STAT. 720 5/12-16.2 (2012); MD CODE ANN., HEALTH-GEN. § 18-601.1 (West [2014]); MICH. COMP. LAWS ANN. 333.5210 (West 1989); MISS. CODE ANN. § 97-27-14; MO. ANN. STAT. § 191.677 (West [1997]); NEV. REV. STAT. § 201.205; N.J. STAT. ANN. § 2C:34-5; 10A N.C. ADMIN. CODE 41A.0202; OHIO REV. CODE ANN. § 2903.11 (West); OKLA. STAT. ANN. tit. 21, § 1192.1 (West [1999]); S.C. CODE ANN. § 44-29-145; S.D. CODIFIED LAWS § 22-18-31; TENN. CODE ANN. § 39-13-108. HIV exposure statutes that are explicitly defined as sexual assault in some form: ARK. CODE ANN. § 5-14-123 (1989), under chapter on sexual offenses; LA. REV. STAT. ANN. § 14:43.5, under rape/sexual battery; N.D. CENT. CODE § 12.1-20-17; VA CODE ANN. § 18.2-67.4:1—Infected Sexual Battery; WASH. REV. CODE ANN. § 9A.36.011.



sexual decision-making because it does not require actual transmission or any intent to transmit.<sup>81</sup> That is, these laws criminalize a failure of notice rather than any violation of self-possession. In order to avoid such an outcome with the proposed sabotage statute, this Article now turns to the principle that should be at the foundation of the criminal law's response to policing such intimate decision-making: self-possession.

## II. Self-Possession and Sabotage

As a descriptive matter, then, birth control sabotage is recognized as a problem by the medical community, yet the criminal law provides no systematic or coherent response. This Part begins the process of answering the normative question—should criminal law respond and, if so, how?—by exploring the nature of the injury, if any, done to sabotaged partners. It considers four potential categories of legal injuries: (1) pregnancy unwanted by the female partner but wanted by the male saboteur; (2) pregnancy wanted by the female saboteur but unwanted by male; (3) parenthood wanted by one partner but not the other; and (4) deception of one partner by the other.<sup>82</sup> Each category is evaluated to see the extent—if any—to which it violates self-possessory interests. This Part concludes that only the first category—pregnancy unwanted by the woman—violates these interests and hence warrants intervention by the criminal justice system.<sup>83</sup> This is not to say that only self-possession violations ever warrant criminal punishment; rather, in the realm of sexual encounters and their aftermath, it may quickly become difficult—if not impossible—to say that one partner's choice should outweigh the other's.<sup>84</sup>

### A. Self-Possession Paradigm

In this analysis, self-possession is understood to mean a person's moral and legal right to own her physical self and to be free from bodily “control, master[y], [or] possess[ion]

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81 See Kaplan, *supra* note 64.

82 See generally Khiara M. Bridges, *When Pregnancy Is An Injury*, 65 STAN. L. REV. 457, 474–75 (2013) (“[M]uch energy is spent, in practice and in academia, advocating for the recognition of certain phenomena as legal injuries . . . identifying legal injuries and providing remedies for them are primary functions of the law.”).

83 Cf. generally Murray, *supra* note 19, at 1312 (arguing that there may be value in preserving the “interstitial space between marriage and crime” where private lives are not regulated by one or both areas of law).

84 See Rubinfeld, *supra* note 16, at 1380.

by another.”<sup>85</sup> In legal scholarship, a general proposition of self-ownership has appeared as a part—to some extent or another—of distinct accounts of the principles that should animate legal understanding and regulation of sexual encounters.<sup>86</sup> This Article does not seek to reconcile these related yet disparate uses of self-possession as a concept, nor to intervene at the level of first principles to argue for the normative desirability of self-possession over all other commitments in all areas of law. Rather, it accepts this basic account of self-ownership as a desirable normative commitment when considering the appropriate intervention—if any—of criminal law into people’s sexual acts and the consequences of those encounters.<sup>87</sup> It then develops an argument about whether and how self-possessory interests may be implicated in and potentially injured as a result of contraceptive sabotage.

It should be noted, however, that self-possession is by no means the only principled commitment of scholars who work on questions surrounding the role of criminal or other areas of law in people’s sex lives. Indeed, it was recently argued that the principle of autonomy—that “[p]eople have a right to decide for themselves with whom and under what circumstances to have sex”—rather than self-possession is the normative commitment of most scholars in this area.<sup>88</sup> While it is certainly true that autonomy appears to be invoked

85 See Rubinfeld, *supra* note 16, at 1427. See also I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1155–56 (2008) (“The belief that an individual is sovereign over his body is, of course, an idea with old philosophical and jurisprudential roots, that stands behind a number of familiar legal doctrines . . .”).

86 See, e.g., Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 325–36 (2004) (identifying “self-possession” as a core principle of polyamory, serving in part to reject the “control of women’s reproductive and other labor” that has historically been a tenet of monogamy); Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West’s Caring for Justice*, 24 LAW & SOC. INQUIRY 477, 495–96 (1999) (unpacking Robin West’s argument that “assaultive sex” constitutes “invasive injury” such that the victim is left with “no sense of self-possession.”); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 837 (2010) (identifying masturbation as consistent with the “values” of self-possession by “individuals”); Rubinfeld, *supra* note 16, at 1425 (“Self-possession, as I will use the phrase, refers to the possession of one’s own body.”); Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 106 (2000) (quoting Robin West’s definition of “self-possessed individual[s]” as those who can say “we desire what pleases us, and we act on the basis of our desires.”).

87 See Rubinfeld, *supra* note 16, at 1380 (“The great principle of individual autonomy hits a kind of limit in sexuality, where the pursuit of bodily and psychological conjugation makes the goal of autonomy strangely chimerical, at odds with desire itself.”).

88 Rubinfeld, *supra* note 16, at 1379. See also Murray, *supra* note 19, at 1289 (identifying “personal autonomy” as one of the “familiar family law themes”). But see Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923, 924 (2008) (arguing that the “presumptions that underpin this [liberal] conventional understanding of

and debated more frequently than self-possession,<sup>89</sup> it risks painting with too broad a brush to characterize the two concepts—autonomy and self-possession—as being inherently in tension. After all, people cannot decide “with whom and under what circumstances to have sex”<sup>90</sup> if they are not permitted—whether literally, legally, or both—to make decisions about what to do with their bodies. Put another way, some idea of self-possession appears to be inherent—explicitly or implicitly—in most conceptions of autonomy.<sup>91</sup> Without this bedrock proposition of self-ownership, a construction of autonomy—of personal choice—would be rather unstable if not empty. Because this Article engages a relatively new topic in legal academic literature—contraceptive sabotage—it seems prudent and logically efficient to consider it initially in light of this foundational principle of self-ownership rather than eliding possessory considerations by applying a higher order autonomy construct at this time.

The end of the marital rape exception provides a notable example of the value of identifying and engaging the self-possessory aspects of a legal regime surrounding sexual acts. Historically, a married woman’s actual consent to sex with her husband was irrelevant in part because he essentially owned her, so he could not be guilty of raping her.<sup>92</sup> Going back to the nineteenth century, proponents of abolishing this exception “publicly demanded the right to sexual self-possession in marriage, [and] they pressed the issue constantly, at length, and in plain language.”<sup>93</sup> They were cognizant of the need to own themselves in order to make meaningful, legally protected sexual choices. Indeed, throughout history,

consent have come under increasing scrutiny.”).

89 See, e.g., Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805 (1999) (discussing the interaction of the “liberal norm of autonomy” and “contemporary feminist theory”). See generally Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) (“Autonomy . . . is a protean concept, which means different things to different people.”).

90 Rubinfeld, *supra* note 16, at 1379.

91 See, e.g., Cynthia Grant Bowman, *Feminism and the Uses of History: An Essay on the Legacy of Jane E. Larson*, 28 WIS. J.L. GENDER & SOC’Y 195, 205–06 (2013) (analyzing “Larson’s concept of sexual autonomy as consisting of three aspects: (1) bodily integrity, (2) sexual self-possession, or the interest in self-expression through acts with partners that satisfy one’s present desires and purposes, and (3) sexual self-governance, or the power to shape sexual expression in ways that support and advance one’s personality and life projects.”). Although the term “self-possession” here focuses on ownership of specific sexual acts rather than general ownership of one’s entire body, the first is impossible without the second.

92 See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 330 (5th ed. 2013) (citing *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984)).

93 Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1378–79 (2000).

the self-possessory interests implicated in sex have had unique significance for women, as pregnancy effectuates a physical transformation that lasts beyond the duration of sex itself and raises distinct self-ownership issues.

## B. Pregnancy Unwanted by the Female Partner

Pregnancy effects an all-encompassing transformation of the pregnant woman.<sup>94</sup> Whether this transformation is normatively desirable or not is properly assessed with reference to the pregnant woman's subjective perspective,<sup>95</sup> as she is the owner of the space—her uterus—in which the pregnancy occurs. On the most basic physical level, the woman's uterus is occupied—first by the fertilized egg, then by the developing embryo and fetus.<sup>96</sup> When this occupation of her reproductive capacity is wanted by the woman, it may constitute a positive sharing of self on the deepest, most complete of levels.<sup>97</sup> When it is unwanted, however, it may be experienced as a profound, harmful intrusion.<sup>98</sup>

### 1. Pregnancy from Sexual Assault

Indeed, criminal law does already recognize at least one category of pregnancies as uniformly harmful to pregnant women because they have their origins in an act that, by definition, is unwanted by the women themselves: rape. In many, if not most, jurisdictions, pregnancy that results from sexual assault is not an “injur[y] necessarily incidental to an act of rape and, consequently, [such pregnancy] can warrant an increased punishment [for the perpetrator].”<sup>99</sup> Jurisdictions' approaches vary, with some explicitly including pregnancy

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94 See, e.g., Bridges, *supra* note 82, at 471 (“[P]regnancy is a multifaceted event that affects a woman mentally, emotionally, and physically.”).

95 See Bridges, *supra* note 82, at 477 (“Because it is wantedness that determines the phenomenology of a pregnancy, wantedness determines, or ought to determine, the ontological status of a pregnancy.”).

96 See generally *Pregnancy Week by Week*, MAYO CLINIC (Apr. 5, 2014), <http://www.mayoclinic.com/health/pregnancy-week-by-week/MY00331> [<http://perma.cc/AB6R-PQK9>] [hereinafter *Pregnancy Week by Week*].

97 See generally McClain, *supra* note 86, at 492 (“Pregnancy is a unique form of connection.”); Bridges, *supra* note 82, at 461 (describing this “positive [cultural] construction of pregnancy” as “hegemonic” in law and society).

98 See Bridges, *supra* note 82, at 477 (“A woman bearing an unwanted pregnancy . . . frequently experiences it as an injury that is happening to/in/by her body.”).

99 Bridges, *supra* note 82, at 468–69.

as a form of “serious personal injury” in their statutes,<sup>100</sup> while others analogize between pregnancy and “great bodily harm” or “allow the factfinder to determine whether pregnancy is a substantial bodily injury on a case-by-case basis.”<sup>101</sup> Despite their differences, these approaches have a fundamental similarity: they recognize that pregnancy may inflict a legally cognizable injury distinct from the injury of experiencing sexual assault itself.<sup>102</sup>

Other provisions of sexual assault laws reflect a similar recognition; for instance, in at least one jurisdiction, the fact that a sexual assault victim requests that her assailant use a condom is not sufficient evidence—in and of itself—of her consent to the sexual activity.<sup>103</sup> This prohibition suggests that the law is separating the measures a woman takes—if any—to protect herself from the risk of pregnancy from the measures she takes—if any—to demonstrate either her consent or resistance to a sexual act. Put another way, the law is permitting a woman to try to prevent one type of injury (pregnancy), even if she is subjected to another (sexual assault). This legal permission is consistent with imposing a greater penalty on a perpetrator who impregnates the victim of his sexual assault: she has been subject to an injury beyond the assault itself, thus proportionate punishment requires that he be punished beyond what he would have been for the assault alone.<sup>104</sup>

The dimensions (physical, mental, emotional, and so on) across which pregnancy is understood doctrinally to create this injury vary among jurisdictions and may be unclear even within a single jurisdiction.<sup>105</sup> But it appears that most—if not all—such understandings of pregnancy as injury contemplate a core physical dimension, with mental, emotional, or other dimensions sometimes also encompassed by statutory or case law.<sup>106</sup> Indeed, this baseline of physicality has a solid biological basis: absent a woman’s bodily transformation from not having a fertilized egg in her uterus to having one, she is not pregnant.

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100 Bridges, *supra* note 82, at 470 (looking at Nebraska).

101 Bridges, *supra* note 82, at 470 (Wisconsin analogizes, some others allow case-by-case determinations).

102 See Bridges, *supra* note 82, at 483–84.

103 See, e.g., *People v. Smith*, 2013 WL 3043341, at \*8 (Cal. Ct. App. June 18, 2013) (“*Evidence that the woman requested that the defendant use a condom or other birth control device is not enough by itself to constitute consent.*”) (italics in original).

104 See Bridges, *supra* note 82, at 468–69.

105 See Bridges, *supra* note 82, at 471 (noting that “it is not entirely clear what type of injury is being constructed” in these various statutes but focusing her analysis on the physical construction of injury).

106 See Bridges, *supra* note 82, at 466–73 (not mentioning any statutes that could be interpreted as defining pregnancy entirely as non-physical injury).

No other dimensions of pregnancy may be experienced unless and until the physical aspect is.<sup>107</sup> Thus it seems correct to say that laws that recognize pregnancy resulting from sexual assault as an injury understand that injury to be physical, with the possibility that other experiential dimensions may be included as well.

This doctrinal construction of pregnancy resulting from sexual assault as a legal injury first and foremost—if not exclusively—to the women’s body resonates strongly with the self-possession paradigm. Self-possession is fundamentally about a woman’s right to keep her physical self under her sole ownership and to be free from dispossession by another person.<sup>108</sup> If a woman is dispossessed of herself by a person who sexually assaults her, then it seems to follow that she would be dispossessed further by that person’s actions if she underwent a physical transformation—literally at the core of her being—as the result of the assault that lasted beyond the duration of the assault itself and effectuated physical changes beyond her control and beyond those directly associated with the act of assault.<sup>109</sup>

This dispossession by pregnancy resulting from rape would seem to occur on two levels. First, the rapist leaves his biological material (sperm) living inside of the woman. He thus effectively does not return full possession of her body back to her following the assault, thereby continuing the dispossession of the assault itself for as long as she remains pregnant. Second, the material he leaves is dynamic, not static. He does not leave a fingernail clipping. He leaves the only type of biological material that is capable of combining with her biological material (egg) to occupy her uterus with a fertilized egg, developing embryo, then a fetus (depending on how long the pregnancy lasts).<sup>110</sup> While she is pregnant

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107 See generally *Pregnancy Week by Week*, *supra* note 96. Some scholars have raised legitimate theoretical issues about using physicality as the core component in constructing an understanding of pregnancy. See, e.g., Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329 (2010). But because the physical aspect of pregnancy is, biologically speaking, the “but for” dimension of the experience, I am comfortable asserting that—at minimum—pregnancy be understood as a physically distinct state that, in certain circumstances, is properly recognized as a legal injury to the body.

108 See Rubinfeld, *supra* note 16, at 1443.

109 Cf. Rubinfeld, *supra* note 16, at 1443 (linking “right to self-possession” to “the freedom not to be forced into sexual service,” which in turn “links rape law directly to Roe”). Rubinfeld’s analysis centers on how a state law banning abortion would “conscript[ ]” the woman, not on how an unwanted pregnancy itself—regardless of the accessibility of abortion—would be dispossessing. *Id.* at 1431.

110 See generally *Pregnancy Week by Week*, *supra* note 96. If and when during the course of a pregnancy a fetus might be legally recognized as a distinct human being worthy of legal protection by the state is a question beyond the scope of this Article. For purposes of this analysis, the relevant fact is that a pregnancy occupies a woman’s entire reproductive capacity.

as the result of one sexual encounter, the woman's reproductive capacity is fully occupied. She is unable to become pregnant from another encounter until that pregnancy is over. She has been dispossessed of her reproductive capacity as a result of the assault.<sup>111</sup>

During this post-assault pregnancy, then, the woman must share possession of her body—at least to some extent—with a part of her rapist's physical being, as well as with the organism developing inside of her that occupies her entire reproductive capacity for the duration of the gestation. In sum, she is not in sole possession of her physical self but at least partially dispossessed, both by his continued presence inside her and by her inability to possess her reproductive capacity because it is being used in the service of a pregnancy she does not want.<sup>112</sup>

## 2. Pregnancy from Contraceptive Sabotage

A woman's self-possessory interest in her reproductive capacity is also implicated when her male partner sabotages her contraception and pregnancy—unwanted by her—results. Of course, in this scenario—as opposed to pregnancy from rape—the woman has not been dispossessed by the sex itself. Thus the man's continued presence (through his sperm) in her body is not in and of itself a dispossession because his initial presence there was not one. Nonetheless, dispossession by pregnancy resulting from sabotage shares the other fundamental characteristic of the dispossession occasioned by pregnancy resulting from rape: the woman loses possession of her reproductive capacity as the result of another's purposeful actions directed against her body.<sup>113</sup> When a woman uses contraception to limit her risk of pregnancy, her goal is to have sex but to try (to some extent or another) to preserve her reproductive capacity—either in its potential state (non-pregnant) or to try to become pregnant as the result of a different sexual encounter (different time, different

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111 With thanks to Scott Shapiro for our discussion of illegitimate possession of a woman's eggs versus illegitimate possession of her entire reproductive capacity.

112 That a woman in this position could terminate the pregnancy does not mean that no self-possession violation has occurred. Rather, the availability of abortion bears only on the ways in which a woman might combat this dispossession, not on whether there was a loss of self-possession in the first place. *Cf.* Bridges, *supra* note 82, at 476 (abortion available to “heal” injury of pregnancy resulting from assault).

113 This Article does not take the position that the fetus itself somehow harms the woman, although other scholars have made arguments along these lines. *See, e.g.,* Eileen McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1060 (1999) (“If a woman does not consent to pregnancy, the fetus's effects on her body constitute serious harm impinging upon her bodily integrity and liberty. The quantity and quality of the fetus's harm to a woman when it imposes a nonconsensual pregnancy on her justifies the use of deadly force [abortion] to stop it.”).

partner, or other distinguishing features).<sup>114</sup> If she becomes pregnant due to sabotaged contraception, she no longer possesses her reproductive capacity. It has been taken from her by her partner's unilateral actions, which led to the formation of the fertilized egg, embryo, or fetus (depending on how long the pregnancy lasts) that she sought to prevent from coming into existence. This dispossession of her reproductive capacity thus constitutes an injury to her self-possessory interests.

This argument is supported by—although distinct from—the position that a number of scholars have articulated that it would be somehow tantamount to a state take-over of women's bodies if the state were to require women to continue unwanted pregnancies by denying them access to abortion.<sup>115</sup> In general, such an understanding does not lay blame with the fertilized egg, embryo, or fetus itself,<sup>116</sup> although at least one scholar has taken that perspective.<sup>117</sup> Rather, if the state required women to remain pregnant when they did

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114 Cf. Cohen, *supra* note 85, at 1152 (noting that “one can argue that the right recognized in these [United States Supreme Court contraception] cases is really a right to have sexual intercourse without the state conditioning that right on the individual having to risk becoming pregnant . . .”).

115 See, e.g., Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 799 (2012) (“[Justice Blackmun] expounded on this idea [state coercion] years later in *Planned Parenthood of Se. Pa. v. Casey*: ‘By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care.’ Many scholars and advocates have embraced a similar framing.”); Cohen, *supra* note 85, at 1155–56 (“Many normative arguments in favor of a right to non-interference with having an abortion . . . are likewise based on the idea that such interference would constitute an invasion of the bodily integrity [sovereignty over her own body] of the woman.”); McClain, *supra* note 86, at 492 (describing Robin West’s “anticompulsion principle: even if forced nurture makes a fetus’s life go better by allowing it to develop and become a child, such nurture imposes unique and serious bodily imposition and pain and suffering upon a woman”); JED RUBENFELD, *FREEDOM & TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 225–26 (2001) (“It is impossible to name a single prohibitory law in our legal system with greater affirmative, conscriptive, life-occupying effects than those imposed by a law forcing a woman to bear a child against her will.”).

116 See, e.g., LAWRENCE TRIBE, *ABORTION: CLASH OF ABSOLUTES* 210 (1992) (arguing that “compromise” solutions to abortion debate “that treat each woman as a stranger to her fetus and pit the two against one another, are lacking in human understanding and are not plausible moves toward a world in which people reach out to each other.”); Bridges, *supra* note 82, at 487–88 (rejecting understanding of fetus as injury, even for pregnancies resulting from rape).

117 See, e.g., EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 6 (1996) (explaining that a woman getting abortion “seeks to expel the coercive imposition of the one and only agent capable of making her pregnant: the fetus.”). *But cf.* Bridges, *supra* note 82, at 459 (“In decades past, advocates for the abortion right made their case in the language of injury: unwanted pregnancies were injuries to the women forced to bear them. Abortion figured as a healing modality, serving to heal a woman of her injury. This advocacy never quite made it into abortion jurisprudence.”).



not want to be, the state would be the wrongdoer.<sup>118</sup> It would be forcing women to use their reproductive capacity in a service they did not want to provide.<sup>119</sup>

Women's male partners are not equivalent to the state,<sup>120</sup> of course, and the decision to begin a pregnancy is not necessarily equivalent—along functional, legal, ethical, or other dimensions—to the decision to end one.<sup>121</sup> Nonetheless, the birth control sabotage scenario does raise the same general specter as the prospect of a state that denied meaningful access to abortion: an actor other than the woman herself gets to decide what she does with her reproductive capacity (becoming pregnant when she has taken explicit measures not to be or staying pregnant even if she does not want to be). In both contexts, then, the woman's body is not fully recognized as her own but as a site that another actor can somehow occupy on its own terms.

### C. Pregnancy Unwanted by Men

Men have no corresponding self-possessory interest implicated in pregnancy because they cannot become pregnant. Even when men have gotten their female partners pregnant, their own reproductive capacity is in no way altered. There is no physical limitation on a man's ability to impregnate one woman on Friday night, another on Saturday, and so on.<sup>122</sup> In contrast, each of these women—if she were to become pregnant—would not be able to go out and start a new pregnancy the following night. Her reproductive capacity would

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118 See, e.g., Rubinfeld, *supra* note 16, at 1431 (identifying a “right not to be forced into state-dictated service [pregnancy and motherhood] against one’s will” by being “denied an abortion”).

119 Some state statutes—such as those governing when a pregnant woman may be removed from life support—do attempt to effectuate such an end. Their legitimacy is questionable at best, however, as a recent high profile case in Texas illustrates. See, e.g., Caleb Hellerman et al., *Brain Dead Pregnant Woman Taken Off Life Support*, CNN (Jan. 27, 2014), <http://www.cnn.com/2014/01/26/health/texas-pregnant-brain-dead-woman/> [<http://perma.cc/A8FP-JADL>].

120 See generally Cohen, *supra* note 85, at 1196 (“[T]he interest protected [in the United States Supreme Court contraception cases] has always been stated in terms of governmental restrictions on the individual’s access to contraceptive devices. It involves the freedom to decide for oneself, without unreasonable governmental interference, whether to avoid procreation through the use of contraception. This aspect of the right of privacy has never been extended so far as to regulate the conduct of private actors as between themselves.”).

121 See generally Blocher, *supra* note 115, at 792 (identifying a distinction between the rights to continue and to end a pregnancy).

122 See, e.g., Matt Lakin, *Magistrate: He’s Prolific, but Knoxville Dad Doesn’t Really Have 30 Kids*, KNOX NEWS (May 31, 2012), <http://www.knoxnews.com/news/2012/may/31/magistrate-hes-prolific-but-knoxville-dad-doesnt/> [<http://perma.cc/Z5UF-2DXU>] (profiling father of twenty-four kids).

be occupied fully until the pregnancy ended through miscarriage, termination, or birth of a child (live or still).<sup>123</sup> Biology thus leaves men and women in opposing possessory positions following sex that results in pregnancy: men's bodies remain essentially unchanged, while women's do not.

Of course, sex that results in pregnancy does—by definition—mean that the man's body has undergone one note-worthy alteration: the sperm that fertilized the woman's egg (and others released during that sexual encounter) have left the man's body permanently.<sup>124</sup> Even this change, however, underscores the lack of a violation of any self-possessory interest on the part of the man. The sperm have left his body. Nothing has entered it. He remains in sole control of his entire being, including his reproductive capacity, except for those biological elements (sperm) with which he has voluntarily parted.<sup>125</sup> Pregnancy that results from the actions of a female saboteur—poking holes in condoms, secretly stopping her birth control pills, and so on—does nothing to disturb this analysis. Her male partner still remains in full physical self-possession, even if she is now pregnant when he did not want her to be and when he believed that she was using contraception to avoid that outcome.

There is, however, a counter-argument to be made: namely, that a man is dispossessed when he gives up sperm that the woman should not have had because she has become—and will potentially stay—pregnant. Indeed, this type of argument has been made to courts in the context of civil disputes that involve sabotage (child support and torts) and, in general, courts have not found it persuasive.<sup>126</sup> This line of argument is perhaps strongest not in the sabotage context but when the man either did not actually deposit his sperm in the woman's vagina or when it constituted a criminal act for the woman to have received the sperm

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123 See generally *Pregnancy Week by Week*, *supra* note 96.

124 See generally *Sperm: How Long Do They Live After Ejaculation?*, MAYO CLINIC (May 5, 2012), <http://www.mayoclinic.com/health/pregnancy/AN00281> [<http://perma.cc/NVJ2-CARH>] [hereinafter *Sperm: How Long Do They Live*].

125 See generally *Low Sperm Count*, MAYO CLINIC (Sept. 22, 2012), <http://www.mayoclinic.com/print/low-sperm-count/ds01049/method=print&dsection=all> [<http://perma.cc/ZGQ2-6QQL>] (“Normal sperm densities range from 15 million to greater than 200 million sperm per milliliter of semen.”).

126 See, e.g., *Hughes v. Hutt*, 455 A.2d 623, 624 (Pa. 1983) (affirming dismissal of father's counter-claim in paternity and child support suit that mother “had ceased taking birth control pills without telling him because she wished to become pregnant, and that, after becoming pregnant, she had refused his request that she have an abortion”); *Lasher v. Kleinberg*, 164 Cal. Rptr. 618, 619 (Cal. Ct. App. 1980) (answering in the negative the question of whether with “two consenting sexual partners, may one partner [here the male] hold the other [female] liable in tort for the birth of a child conceived in an act of intercourse where one partner relied on the other partner's false representation that contraceptive measures had been taken?”).

(in her vagina or elsewhere). In the first category are situations in which a man consents to a type of sexual activity other than vaginal intercourse, but the woman manages to impregnate herself with the sperm released through the other activity. Such scenarios are not purely the stuff of hypothetical: in one Illinois case, a woman allegedly “obtained sperm from the Plaintiff [male partner] via oral sex and had herself inseminated with the Plaintiffs [sic] sperm.”<sup>127</sup> It appears as if the plaintiff-father remained liable for child support.<sup>128</sup> In the second are incidents of statutory rape of males by females.<sup>129</sup> The male is typically required to pay child support, despite the fact that he could not legally consent to the sexual act that resulted in pregnancy and subsequent childbirth.<sup>130</sup>

To be sure, these outcomes reflect the state’s strong interest in having parents provide support for their biological children, which is distinct from any self-possessory interests of the parents.<sup>131</sup> But they are also consistent with self-possession principles—namely, that a pregnancy and any resulting delivery of a child take place entirely inside (or in close connection with, as delivery involves the newborn exiting its mother’s body) the woman’s physical self, not the man’s. When a man seeks to avoid child support based on the theory that his female partner should never have had his sperm, he is implicitly arguing that he should be able to maintain some measure of legal control over his sperm—even after the sperm leave his body. That is, he is arguing that the law should be applied to give him back his sperm to the greatest extent possible without actually removing it physically (in its converted form of a fertilized egg, embryo, or fetus) from the woman’s body. This argument folds in on itself once the relevant sperm (the one that fertilized the egg, resulting in pregnancy) has taken up residence inside the body of his female partner—even if that was not where the man intended his sperm to go.<sup>132</sup> The self-possessory interest the male partner had in his sperm when they were inside him—part of his body—has now essentially trans-

127 *Phillips v. Irons*, 2006 WL 4472185, at \*1 (Ill. Cir. Ct. Apr. 18, 2006).

128 *See Sperm: The ‘Gift’ That Keeps on Giving*, NBC (Feb. 24, 2005), [http://www.nbcnews.com/id/7024930/ns/health-sexual\\_health/t/sperm-gift-keeps-giving/](http://www.nbcnews.com/id/7024930/ns/health-sexual_health/t/sperm-gift-keeps-giving/) [<http://perma.cc/W8G3-3VUX>].

129 *See, e.g., L.M.E. v. A.R.S.*, 680 N.W.2d 902, 912–14 (Mich. Ct. App. 2004) (listing cases across country in which minor male victims of statutory rape were nonetheless required to pay child support and applying same rule to this case).

130 *See Myrisha S. Lewis, Making Sex the Same: Ending the Unfair Treatment of Males in Family Law*, 27 *Wis. J.L. GENDER & SOC’Y* 257, 269 (2012) (“[S]tatutory rapes [of males by females] serve as a predicate for civil liability in the form of child support payments.”).

131 Of course, the state’s goal of having parents support children to avoid children becoming wards of the state is also evident. *See generally* WEISBERG & APPLETON, *supra* note 92, at 614.

132 *See generally Sperm: How Long Do They Live, supra* note 124.

ferred to the woman.<sup>133</sup> Thus the ability for the man to somehow repossess his sperm—namely by disclaiming liability for any birth of a child it causes—would mean giving the man a degree of legal authority to assert some measure of control over the woman's body in which the sperm had come to reside. His preference for the impact his sperm should have on the woman (no pregnancy and childbirth result) essentially would receive legal sanction because the law would treat him as if the outcome he wanted had come to pass (relieving him of his child support obligation) even when it factually had not (pregnancy and childbirth did in fact result). Such legal primacy for the man's preference—even after the sperm were no longer in his body but in the woman's—would establish a means for a man to use the law essentially to override the woman's decision to keep his sperm in her body (in the form of a fertilized egg, embryo, or fetus) because the law would allow him not to recognize financially the resulting child. The woman's awareness of the potential for such legal override would likely shape her decision-making with respect to the sperm, perhaps taking a morning after pill or terminating a pregnancy rather than proceeding with it. That is, her ownership rights in her physical self and what happens within it would be constrained by the man's access to the court to assert his continued interest in the sperm (i.e., that it not result in pregnancy and childbirth). Courts tend to be unwilling to locate any ownership interests in a physical self in someone other than the person whose self it actually is.<sup>134</sup> Thus even when sperm winds up inside a woman as a result of some form of sexual activity not intended by the man to be procreative—be it sabotaged activity, non-vaginal intercourse activity, or even otherwise illegal activity—once it is inside her body, self-possession principles require that she—not her male partner—be its only owner. This is not to say that the woman's possession of the sperm should somehow relieve her of any already existing strands of criminal liability that might attach to the sexual act through which she obtained the sperm, namely statutory rape prohibitions. Statutory rape prohibitions establish an important self-possessory zone around minors that mandates that they remain in full and exclusive possession of their own physical selves.<sup>135</sup> Criminal consequences should be

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133 This analysis looks different when the sperm remain outside of anyone's body, such as preserved for potential use for further assisted reproductive efforts. *See generally* Cohen, *supra* note 85, at 1156–1157.

134 *See generally* Cohen, *supra* note 85, at 1155–56. *Cf.* Harris v. State, 356 So.2d 623, 624 (Ala. 1978) (holding that the abortion decision was the woman's to make, and hers alone, when father tried to avoid child support by saying he had wanted pregnancy terminated but mother refused). Moreover, in certain circumstances, women who exercise their unilateral decision-making authority to terminate pregnancies might be able to shift some or all of the costs of the termination to their male partners. *See, e.g.*, In re Alice D., 450 N.Y.S. 2d 350 (Civ. Ct. 1982) (granting woman reimbursement for abortion and related costs when she chose to terminate pregnancy that occurred in course of adulterous relationship with male partner who said he was sterile).

135 *But see* Rubinfeld, *supra* note 16 (arguing that self-possession principles would militate against criminalizing statutory rape).

available against the woman who violates this zone; however, these consequences should not extend to legal recognition of the man's ability to assert control over sperm that has left his body and remained inside the woman's.

#### D. Parenthood (Unwanted by Either Party)

Another possible source of the injury inflicted by sabotage would be unwanted parenthood. Whether parenthood is unwanted by the male or female partner, the analysis is the same. Parenthood is a status change that brings with it new personal roles, as well as legal obligations and legal rights.<sup>136</sup> As such, it may implicate many areas of life experience—psychological, financial, temporal, emotional, even physical (for instance, a parent might lose sleep with a fussy newborn or be unable to travel far away from that newborn, if she is breastfeeding).<sup>137</sup> But it does not enact a change to fundamental self-possession on the part of either parent.<sup>138</sup> Both parents still retain basic ownership of their physical selves, without any sort of occupying force present in their bodies.<sup>139</sup> To be sure, children may well constitute an occupying force of sorts in parents' minds, hearts, homes, and other spaces. Not only does this type of occupation does not reach the level of direct, concrete physical control of the parents by the children, but recognizing it as an injury to self-possession likely would harm children's self-possessory interests. That is, if the law were to relieve parents of this external level of occupation from their offspring, it would likely diminish

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136 See generally WEISBERG & APPLETON, *supra* note 92, at 819 (noting that models of parenthood include "property ownership" (parents' owning children) and parents as "stewards or fiduciaries"). Professor Glenn Cohen has argued convincingly that parenthood is actually comprised of several different potential status changes: gestational parenthood (pregnancy), genetic parenthood (providing sperm or eggs), and legal parenthood. See Cohen, *supra* note 85, at 1140. This Article's analysis uses "parent" and "parenthood" in the colloquial sense—except where otherwise indicated—which corresponds to Cohen's genetic and legal parenthood categories for children born as a result of sex rather than assisted reproduction. To put it another way, when sex leads to pregnancy and a child is eventually born, at the time of birth (live or still), both partners become parents. As Cohen himself has noted, in "natural reproduction," the multiple types of parenthood are often considered together. See *id.* at 1136, 1140.

137 Indeed, the standard for parental care today has been characterized as increasingly all-encompassing. See, e.g., Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 536 (2013) (defining "helicopter parents").

138 The only exception is under Cohen's taxonomy in which pregnancy itself is characterized as a type of parenthood (gestational). See Cohen, *supra* note 85, at 1139–40. Pregnancy does impact self-possession. See Part II.B., *supra*.

139 The strongest potential counter to this statement would be the breast-feeding mother. Nursing is an incredibly intimate act, however, it is ultimately up to the mother whether or not to do it, how long to do it, and so on. The nursing infant does not literally possess the mother's body.

children's fundamental self-possessory interest in maintaining their physical selves in an alive and safe state. Children are deeply, at times completely, dependent on their parents for support.<sup>140</sup> Because of their uniquely vulnerable status, then, children's self-possessory interests would be in serious jeopardy if parents could claim the basic facts of parenthood—even unwanted—as some type of injury. Unwanted parenthood thus is not an injury from sabotage that merits criminal punishment.

To be sure, some scholars and jurists have suggested that the status change from non-parent to parent—if forced on women by abortion bans—may run afoul of self-possessory principles.<sup>141</sup> When unpacked further, this suggestion is ultimately not persuasive. If a forced status change to becoming a parent were conscriptive in and of itself, absent a forced physical transformation, then the current legal system should be criticized for conscripting men all the time. Men may be forced to become parents against their will once they have had sex because only women can decide to terminate the pregnancy.<sup>142</sup> When women decide not to terminate pregnancies despite their male partners' wishes that they do so, the men nonetheless become parents.<sup>143</sup> Note that such a decision is fundamentally distinct from the unilateral action taken by saboteurs because men know—or should know—whenever they have sex with adult women that they do so against the backdrop of a firmly established legal regime giving women sole authority over the termination decisions.<sup>144</sup> While the forced status transformation of men from non-parents to parents if women do not agree with the men's preference around termination nonetheless may raise legitimate normative concerns,<sup>145</sup> these do not sound in self-possession properly understood. Even if forced to become parents, men retain full ownership of their physical selves.<sup>146</sup> And, to

140 See generally WEISBERG & APPLETON, *supra* note 92, at 614 (discussing ALI child support principles).

141 See, e.g., Blocher, *supra* note 115, at 798–99 (identifying Justice Blackmun's concern about state conscription as including forced "maternal care"); Rubinfeld, *supra* note 16, at 1431 (criticizing a statute that would outlaw abortion in part because it "forces a pregnant woman into motherhood against her will. It conscripts her for as much as nine months (and arguably much longer) into a particular, life-occupying role.").

142 See, e.g., Cohen, *supra* note 85, at 1162–63; Lewis, *supra* note 130, at 258 (describing several ways men can be "forced into parenthood (through contraceptive fraud, sexual assault, or statutory rape), in spite of Supreme Court decisions, which emphasize the values of privacy and autonomy in sexual relations and the decision whether to reproduce.").

143 See Part II.C., *supra*.

144 See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

145 See Lewis, *supra* note 130, at 258 (criticizing existing family law regime for violating male autonomy around reproductive choices).

146 See Part (II)(C), *supra*.

be precise, women do as well—once they have passed through the pregnancy stage to become actual parents.<sup>147</sup> Thus a forced change in status from non-parent to parent—standing alone—does not pose a self-possession problem for men or women.

### E. Deception (Against Either Party)

The final serious contender for the injury inflicted by sabotage is relevant when the sabotage involves one partner deceiving the other (either explicitly or by omission).<sup>148</sup> Deception may be said to cause injury by vitiating consent to sex itself because one partner is purposefully kept ignorant of a key term of the encounter (in this case, contraceptive use).<sup>149</sup> With respect to women specifically, deception by male partners about contraception could be said to vitiate whatever consent the women gave to the possibility of becoming pregnant because the risk of this outcome was greater than she had been led to believe.<sup>150</sup> (The same could not be said for men; they do not have the ability to consent—or not—to becoming pregnant themselves as the result of sex because of biological impossibility.) Deception may also be said to violate an ideal societal standard that sexual partners “deal

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147 One of Professor Cohen’s hypotheticals on assisted reproduction is helpful here to appreciate the distinction between a woman being forced to become pregnant and forced to become a parent (in the colloquial sense of the term): “A gestational surrogate is carrying the child of the husband and the wife. Prenatal testing indicates that the child has a significant genetic abnormality. The husband and the wife want the surrogate to have an abortion. She refuses to do so. If the husband and the wife argue that allowing her to continue with the pregnancy would violate their rights, their claim is really that it violates their right not to be genetic parents against their will . . . . It is neither necessary nor sufficient that they have a right to be or not to be gestational parents.” Cohen, *supra* note 85, at 1143. In this scenario, neither the husband nor the wife will suffer any self-possession injury if the pregnancy continues and leads to their becoming parents because neither of them is carrying the pregnancy.

148 See Part I, *supra* (listing examples such as poking holes in condoms or stopping the use of birth control pills without telling one’s partner). Deception is used here in its broadest sense to include fraud, lies, and other forms of interpersonal trickery.

149 See generally Larson, *supra* note 5, at 379–80 (arguing for a contemporary tort of “sexual fraud” because “sexual fraud leads to nonconsensual sex because it deprives the victim of control over her body and denies her meaningful sexual choice.”); Rubinfeld, *supra* note 16, at 1376 (explaining how an argument in favor of imposing criminal liability for all “rape by deception” would go, although rejecting such an outcome himself: “[S]ex-by-deception is sex without consent, because a consent obtained by deception, as courts have long and repeatedly held outside of rape law, is ‘no consent’ at all.”).

150 See generally Bridges, *supra* note 82, at 483 (arguing that “unless a woman intends to become pregnant through an act of intercourse, she cannot be said to have consented to becoming pregnant. At most, by consenting to sex, she has consented to exposing herself to the risk of becoming pregnant.”).

fairly and honestly” with one another.<sup>151</sup> To some extent, all of these views essentially would locate the injury in the lie itself because of its limitation on or elimination of the deceived party’s ability to make informed choices.

Contraceptive sabotage thus would be put on par with many if not most of the other forms of deceptive behavior in which sexual partners might engage.<sup>152</sup> Whether such behavior is normatively desirable or not,<sup>153</sup> deceiving a sexual partner does not in and of itself result in somehow dispossessing him or her of his or her body.<sup>154</sup> To the extent that it is normatively undesirable, mechanisms of social disapprobation such as personal stigma (having a bad reputation such that potential partners will lose interest) or rejection from a broader community (for norms violations) exist to correct it. But under the self-possession paradigm, criminal liability should not attach. At most, deceiving a partner dispossesses her or him of his unencumbered decision-making abilities, but not her or his actual physical self. Indeed, the literal separateness of the deceiver and the deceived is essential to perpetrating the deceit. As a general matter, it is difficult to deceive oneself. Deceit hinges on one person knowing a truth that the other person does not. The deceptive party does not take over or fuse with the deceived party in order to perpetuate the deceit but—at some remove (admittedly not much of one when the parties are sexually involved)—he or she manipulates the information given to her or him. If this deceit does in fact set in motion a chain of events that results in a dispossession,<sup>155</sup> then the actual dispossessing event (such as pregnancy unwanted by the woman) would be the violation, not the lie itself. Thus deception about contraception—standing alone—does not constitute an injury that merits criminal punishment. Of the four types of injuries considered in this Part—pregnancy unwanted by the woman, pregnancy unwanted by the man, parenthood unwanted by either party,

151 Larson, *supra* note 5, at 380.

152 See, e.g., Rubinfeld, *supra* note 16, at 1416 (“Few people know the whole truth about those with whom they have sex, at least at first . . . . If fully informed consent were the key to lawful sex, the first thing we should do is jail all the beautiful people.”).

153 Compare Rubinfeld, *supra* note 16, at 1416 (“Yes, we could have a legal regime of full disclosure prior to any sexual contact—a kind of Rule 10b-5 for sexual security. This would undoubtedly improve the rationality of sexual decisionmaking, but it doesn’t sound like fun. Rationality has no monopoly on sex. And love? A vast engine of deception.”) with Larson, *supra* note 5, at 380 (arguing in favor of “a model of mutuality and reciprocity”—in other words, disclosure—and arguing that such a model “will potentially increase the quality (and perhaps even the quantity) of sexual interaction”).

154 Rubinfeld, *supra* note 16, at 1380–81 (arguing that “sex-by-deception should not be broadly criminalized” because it does not constitute a self-possession violation).

155 Rubinfeld convincingly argues that the act of sex itself, even if facilitated by deceit, does not constitute dispossession because there is no physical take-over. See Rubinfeld, *supra* note 16, at 1380–81.



and deception by either party—only the first violates self-possessory interests and merits criminalization. The next Part lays out specifically how such a statute should be configured.

### III. Doctrinal Reform

Part II identified women's self-possessory interest in maintaining access to her reproductive capacity—in its non-pregnant state indefinitely or for the purpose of becoming pregnant through a future sexual encounter—through the use of contraception. It further identified contraceptive sabotage as an injury to that interest. This Part now considers the doctrinal implications of these identifications. Specifically, it argues that state criminal law should recognize a specific offense of contraceptive sabotage as a distinct type of sexual assault. To this end, it offers a proposed addition to the revision of the Model Penal Code currently underway, explores the elements of this new offense, and addresses likely arguments against such an addition.

#### A. Statutory Reform

##### 1. Framework: Proposed HIV Exposure Statutory Revision

To protect women's self-possessory interest in maintaining their reproductive capacity before, during, and after sex,<sup>156</sup> the law needs to protect explicitly their contraceptive decisions from unilateral interference by male partners. To achieve this goal, states should add new provisions to their criminal codes, as existing criminal laws do not tend to cover sabotage adequately.<sup>157</sup> A starting point for this statutory revision may be found in a recent proposal to revise HIV exposure laws to embody “standards rather than rules” surrounding sexual behavior.<sup>158</sup> Use of this framework is not meant to equate fully pregnancy and HIV as a theoretical or practical matter but to build on existing scholarly insights—at the level of statutory construction rather than underlying theory<sup>159</sup>—about how the criminal law

156 See Part II, *supra*.

157 See Part I, *supra*.

158 Kaplan, *supra* note 64, at 1521–22.

159 For example, Professor Kaplan's analysis turns significantly on the presence or absence of consent to specific sexual acts on the part of the HIV-negative partner. Kaplan, *supra* note 64, at 1548. This approach reflects more of a focus on autonomy than self-possession, although a commitment to the first tends—at least implicitly—to involve adherence to the second. See Part II, *supra*. Furthermore, pregnancy does not tend to carry the same deleterious, chronic physical consequences as being HIV positive, although it is of course possible to have complications from pregnancy that could result in long-term health issues. See, e.g., *Postpartum preeclampsia*, MAYO CLINIC (Apr. 26, 2012), <http://www.mayoclinic.org/diseases-conditions/>

could best allow the sexual partner at risk of long-term, significant, adverse physical changes to her body as a result of sex to remain in possession of all components of her body during and after sex to the degree she seeks to establish.<sup>160</sup> Standards are more appropriate than rules for such a task because they allow for the law's recognition of the "nuances" surrounding "sexual relationships" and the attendant physical risks, such as unwanted pregnancy or acquiring HIV.<sup>161</sup> They also allow the law to be responsive to new "scientific advancements," such as new contraceptive methods or new HIV treatment regimes.<sup>162</sup>

## 2. Proposed Addition to the Model Penal Code for Offense of Contraceptive Sabotage

The addition to the Model Penal Code for the offense of contraceptive sabotage thus should read as follows:<sup>163</sup>

"It is unlawful for an individual":<sup>164</sup>

(1) ["with the purpose" of inducing pregnancy in a sexual partner who he or she knows uses or plans to use a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse]<sup>165</sup>

postpartum-preeclampsia/basics/definition/con-20035395 [http://perma.cc/5GWW-3CWJ].

160 See Part II, *supra* (explaining how the unwantedness of pregnancies makes them self-possession violations).

161 See Kaplan, *supra* note 64, at 1569–70.

162 See Kaplan, *supra* note 64, at 1522.

163 The framework that follows comes from Kaplan, *supra* note 64, at 1551. Phrases that are used verbatim from Kaplan's proposal have been placed in quotation marks.

164 The statute allows for both sexes to be perpetrators. Of course, biology dictates that men are far more likely to be perpetrators, but it is not impossible for women to be as well. For instance, a woman married to a man could be having an affair with another woman. The married woman takes birth control pills. Her lover replaces the pills with placebos and inseminates her with sperm (acquired from another source) during sex. She gets pregnant. The lover is no less guilty of contraceptive sabotage than her husband would be if he had accomplished the same outcome using his own sperm.

165 The phrase "induce pregnancy" comes from Trawick, *supra* note 6, at 755–56. Regulations would define "contraceptive device or medication" as those approved by the FDA for purchase over the counter or by prescription at the time the offense was committed. See BIRTH CONTROL: MEDICINES TO HELP YOU, FDA, <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> [http://perma.cc/3GRG-HV2M] (last updated May 2013). It would not include methods of limiting the risk of pregnancy that do not in fact involve using a contraceptive device or medication such as (1) surgical operations that

(2) [with the knowledge that his or her actions are practically certain to induce pregnancy in a sexual partner who he or she knows uses or plans to use a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse]

(3) ["who is aware of and ignores a substantial and unjustifiable risk" that his or her actions will induce pregnancy in a sexual partner whose use or planned use of a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse he or she is aware of and ignores]

(4) ["who should have been aware of a substantial and unjustifiable risk that his or her actions" will induce pregnancy in a sexual partner whose use or planned use of a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse he or she should have been aware of ]

"to engage in conduct that creates a substantial and unjustifiable risk" of damaging, destroying, or otherwise rendering ineffective the contraceptive device or medication resulting in a sexual partner becoming pregnant from sexual intercourse with that individual.

"Creates" applies only to the degree of risk" that sexual intercourse would result in pregnancy in a sexual partner that the defendant "[knows/recklessly disregards a risk/should have known]" exceeds the degree the sexual partner established or planned to establish through use or planned use of contraception. That the sexual partner consented to the physical act of sexual intercourse itself is not a defense to the crime of contraceptive sab-

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sterilize either males or females, (2) rhythm or fertility planning methods, (3) withdrawal, or (4) any verbal representations made by an individual about her or his fertility or lack thereof. "Planned use" refers to a partner act or series of acts taken to have the relevant device or medication (such as a condom to use during sex or the Morning After Pill to use right after) available at such a time that its use according to its instructions would limit risk of pregnancy. "Planned use" would not cover a scenario in which planned use is entirely hypothetical; that is, intent to use contraception is stated verbally but no affirmative steps are made to have the medication or device available at the time necessary to use it to limit pregnancy risk. "Sexual intercourse" under the current Model Penal Code "includes intercourse per os or per anum, with some penetration however slight; emission is not required." MODEL PENAL CODE § 213.0 (1962). This definition would continue to work for the proposed contraceptive sabotage statute, as long as "penetration" was defined broadly enough to include the insertion of any body part or object capable of inducing pregnancy in the sexual partner, such as the lover in the above scenario using a turkey baster. *See supra* note 11.

otage.

a. *Mentes Reae*

This statute would permit jurisdictions to decide which mental states are necessary for a perpetrator to be criminally culpable for contraceptive sabotage.<sup>166</sup> Of this menu, it is consistent with women's self-possessory interest in preserving their reproductive capacity in its non-pregnant state to criminalize the *mentes reae* of purposely, knowingly, and recklessly but not negligently; thus this Article recommends that states adopt the first three mental states listed above but not the fourth. The first three mental states are those in which the defendant consciously intends to try to possess his partner's physical self (her reproductive capacity) during sex beyond the boundaries she has established or plans to establish—that is, he intends to have greater possession of her than she intends him to have. The last mental state—negligence, which could include the man who should have known his partner kept the condoms on the nightstand but thoughtlessly put his heat lamp on the stand, thus weakening the condoms—does not reflect an intent by the man to possess his partner beyond the degree she seeks to establish. And this intention to dispossess is essential to the transgression; without it, the woman's self-possessory interest has not been violated because the man has not somehow gotten control of any aspect of her physical being. Rather, the essence of his violation is that he was not in adequate control of the circumstances of the sexual encounter. To put it somewhat more concretely, the negligent saboteur does not seek to go where his partner does not want him to be (in possession of her reproductive capacity); in fact, he may well not want to be there either (think the man who did not realize the condoms had deteriorated). That both partners have found themselves in unwelcome terrain may turn out to be unfortunate on a number of levels if pregnancy re-

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166 Mental states are designated by brackets. Kaplan, *supra* note 64, at 1551. See also *id.* at 1544–45 (“The Model Penal Code defines four different types of *mentes reae* . . . : purposely, knowingly, recklessly, and negligently. In the context of HIV transmission, a *mens rea* of “purposely” would require that it is the defendant's object to cause another to contract HIV. . . . A *mens rea* of “knowingly” would require that the defendant is practically certain that her conduct will cause HIV transmission . . . Recklessness . . . would require an individual to be aware of, and consciously disregard, a substantial and unjustifiable risk that her conduct would result in HIV transmission. Negligence does not require awareness of this risk; it is sufficient that the individual should be aware of a substantial and unjustifiable risk her conduct will result in transmission.”). An *actus reus* is of course also necessary for a crime. See generally MODEL PENAL CODE § 2.01 (1962). The relevant conduct here is the damage or destruction to contraception, followed by having sexual intercourse that results in pregnancy in the sexual partner. Even though this article does not recommend that states criminalize negligent contraceptive sabotage, it includes language that would do so in the proposed addition to the Model Penal Code so that state legislatures have before them language for all the mental states used throughout the Code and can decide for themselves which one(s) to add to their books based on their normative commitments, policy goals, or other criteria.

sults—emotional, psychological, financial (either cost of abortion or child-rearing)<sup>167</sup>—but it is not the result of the man in any way asserting control over the woman. It is the result of human frailty and ineptitude asserting control over both of them.

### b. Sentencing

Once the necessary *mentes reae* for the offense have been established, states should set punishments calibrated to these states.<sup>168</sup> Sabotage committed purposely or knowingly should be treated more harshly than that committed recklessly.<sup>169</sup> In terms of situating the offense of sabotage with respect to other types of offense, the two most relevant categories of comparison are assault and sexual assault. Self-possession principles suggest that sentences for sabotage should fall in between these two bookends: greater than the range for assault, less than that for sexual assault. In sabotage, the perpetrator is dispossessing the woman of her reproductive capacity, a violation that in theory goes beyond hurting her then separating from her (assault), but not as deep as the complete dispossession that can result from sexual assault.<sup>170</sup> This is not to say that any and all instances of sabotage should result in penalties greater than those for any and all instances of assault. The man who pokes one hole in one condom one time yet impregnates his partner is arguably a less culpable offender than the man who commits serial physical assaults against his partner that render her paralyzed. At sentencing, however, judges have the discretion to make appropriate determinations in individual cases.<sup>171</sup> Thus the existence of these extreme scenarios do not fundamentally undermine the general organizing schema of putting the available range of punishments for sabotage between assault and sexual assault.

### c. Elements of Contraceptive Sabotage

The factual determinations necessary to establish the elements of this proposed crime should be familiar to system participants because similar determinations must be made for other offenses at the criminal-family law line. Thus it is reasonable to require system actors to handle the factual matters—at all phases, including investigatory, charging, and

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167 See Part II, *supra*.

168 See Kaplan, *supra* note 64, at 1546 (“Whatever mens rea a statute requires . . . the offense should punish HIV exposure only to the extent that the criminal code punishes similar risks with similar mentes reae.”).

169 See generally MODEL PENAL CODE § 1.02 (establishing goal of proportionate punishment).

170 See Rubinfeld, *supra* note 16, at 1427.

171 See generally SANFORD H. KADISH ET AL., CRIMINAL LAW & ITS PROCESSES ch. 2(C) (2007).

adjudication—necessary to resolve sabotage allegations.

**i. Knowledge or Intentionally Disregarded Awareness of Partner's Contraceptive Use or Planned Use**

This element requires that the saboteur actually know of or intentionally disregard awareness of his sexual partner's use or planned use of contraception. Given that contraception is often used in connection with sexual acts between two people, it is reasonable to expect that one partner would know—or be in a position to know—about the other partner's birth control practices or plans. For example, a woman might not tell her partner that she is taking birth control pills, but she might leave them on a nightstand or in a shared bathroom cabinet. The question then becomes whether her partner intentionally disregarded awareness of these pills.

Other legal schema require state officials to investigate the functionally equivalent issue: determining whether Person A, who is in a familial or otherwise intimate relationship with Person B, knew or intentionally disregarded awareness of B's use or intended use of medicine or medically approved devices. For example, in abuse and neglect cases—involving juveniles, elders, disabled adults, or otherwise vulnerable relatives or intimates—factual disputes about the care that should have been supplied versus the level of care that was—or was not—actually given by the caretaker are central to determining liability.<sup>172</sup> Access to medicine, related devices, and services may be foundational to this care, requiring fact-finders to answer such questions as whether the care-taking party made prescribed medication available to the party in his care. That it may be difficult to discern the inner workings of a household may present challenges for prosecutors and other actors in abuse and neglect cases, but this concern has not led to the removal of this crime from the statute books or to the cessation of prosecutions.<sup>173</sup> That the legal implications of an affirmative determination are distinct between the abuse and neglect and sabotage contexts—for example, a parent who knew an ill child was out of medication should have gotten more, whereas a man who knew his intimate partner was out of birth control pills typically would be under no obligation to procure it for her—does not bear on the institutional competence of the legal system to resolve the underlying factual dispute about the medication itself.

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172 See generally LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS ch. 9 (2006).

173 See generally PROSECUTING ELDER ABUSE CASES, NATIONAL CENTER FOR STATE COURTS, available at <http://www.eldersandcourts.org/Elder-Abuse/~media/Microsites/Files/cec/Prosecution%20Guide.ashx> [<http://perma.cc/8SQL-F5SS>] (last visited Oct. 13, 2013).

**ii. Purposeful, Knowing, or Reckless Conduct to Damage, Destroy, or Render Ineffective Contraception**

This element requires that the saboteur intentionally or recklessly engage in conduct that creates a substantial and unjustifiable risk of damaging or destroying his partner's contraceptive device or medication. Of course, the conduct that rises to this level will vary based on the type of contraception involved. For example, a man who removes his partner's diaphragm before having sex has rendered it ineffective, but a man who removes his partner's NuvaRing—but otherwise leaves it in tact—does not render it ineffective.<sup>174</sup>

Questions of intentional or reckless destruction of property of all types are foundational to criminal law in general,<sup>175</sup> and the criminal-family law intersection is no exception. For example, an abusive partner often will intentionally take, damage, or destroy property that belongs to his partner.<sup>176</sup> A variety of criminal charges may result, such as theft,<sup>177</sup> which call for fact-finding as to whether the defendant effectuated the taking, damage, or destruction and the nature of his intention.<sup>178</sup> Contraception is a specific sub-set of property: FDA-approved devices or medicine used to reduce the risk of pregnancy.<sup>179</sup> Moreover, it is a property subset with which all system actors should be quite familiar, given its widespread availability and use nationwide.<sup>180</sup> Thus actors are likely better positioned to make the necessary determinations than they might be in many other contexts that require more specialized knowledge; for instance, your average reasonable juror is likely to have more commonsense wisdom about the purpose of and practices around condom use than she or he would have around theft of intellectual property.<sup>181</sup>

174 See generally *Birth Control*, FDA, <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/WomensHealthTopics/ucm117971.htm> [<http://perma.cc/4AJX-RN95>] (last updated July 16, 2013).

175 See, e.g., MODEL PENAL CODE Art. 220 (1962) (listing offenses against property).

176 See, e.g., Leah A. Plunkett & Erika A. Sussman, *Consumer Rights Screening Tool for Domestic Violence Lawyers and Advocates*, 45 CLEARINGHOUSE REV. 448, 488–90 (2012).

177 See, e.g., MODEL PENAL CODE Art. 220 (1962).

178 See, e.g., MODEL PENAL CODE § 223.2(1).

179 See Part I, *supra*.

180 See Part I, *supra*.

181 See generally Michael McNerney & Emilian Papadopoulos, *Hacker's Delight: Law Firm Risk and Liability in the Cyber Age*, 62 AM. U. L. REV. 1243, 1245 (2013) (“Most recently, the Commission on the Theft of American Intellectual Property reported that intellectual property theft against the U.S. is costing the economy more than \$300 billion per year, nearly equal to the country's total exports to Asia.”).

### iii. Purposeful, Knowing, or Reckless Intent to Induce Pregnancy

This element requires that the saboteur purposely, knowingly, or recklessly intended to induce pregnancy as a result of his actions. At first glance, this element seems the most elusive, without obvious analogue. Pregnancy is a singular physical state, with origins in the most intimate of interactions. The law recognizes that pregnancy may constitute a legal injury, however, when the woman did not consent to the sex that made her pregnant.<sup>182</sup> And, as demonstrated above, pregnancy attendant in sabotage should be understood as an injury as well.<sup>183</sup> Thus constructed, this factual element allows for numerous comparisons to familiar, even garden variety, issues in criminal law: did the defendant act with the intent to injure the victim with his conduct?<sup>184</sup> That the harm to be inflicted here would necessarily involve an intimate sexual interaction may suggest that the intent to inflict it would be kept private as well. Especially in today's social media culture, however, this assumption is by no means always accurate. Highly visible displays of intimate information are increasingly the norm, thus there are many more easily accessible pathways into personal planning and decision-making than ever before.<sup>185</sup> Furthermore, actors in the justice system are already required to engage in complex and sensitive fact-finding with respect to other crimes between intimates, such as allegations of rape.<sup>186</sup> While actors' capacities here might not be flawless,<sup>187</sup> the need for some improvement is not sufficient to say that—as a structural matter—the criminal justice system is incapable of determining intimate facts such as whether one partner intended to impregnate the other.

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182 See Part II, *supra*.

183 See Part II, *supra*.

184 See generally MODEL PENAL CODE § 2.01 (1962) (including intent as a general requirement for criminal culpability).

185 See, e.g., Kelly Ann Bub, Note, *Privacy's Role in the Discovery of Social Networking Site Information*, 64 SMU L. REV. 1433, 1434 (2011) ("From pictures to wall posts to status updates, people feel a new comfort in sharing masses of intimate information within the confines of the sites-- [sic] information which often would not have been shared so readily or spread so easily before the explosion of the social networking medium.").

186 See generally KADISH ET AL., *supra* note 171, at ch. 4(G).

187 For example, the processing of many "rape kits"—containing potential evidence for prosecution—are delayed nationwide. See, e.g., *Eliminating the Rape Kit Backlog*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <http://www.nsvrc.org/projects/eliminating-rape-kit-backlog> (last visited Oct. 13, 2013).



#### iv. Pregnancy Resulting<sup>188</sup>

From a fact-finding perspective, this element is perhaps the most straightforward; over-the-counter and medical testing are readily available to determine whether a woman is pregnant. To be sure, complicated scenarios could well arise, such as who actually impregnated a woman who was having sex with multiple partners during the same period of time. However, the court system has long dealt with such fact patterns in the course of paternity and other determinations,<sup>189</sup> thus it should be competent to do so here as well. From a broader theoretical perspective, though, the element of pregnancy triggers a more complex argument against the entire statute: if women can choose to terminate pregnancies, should sabotage be a crime at all?

#### d. Impact of Abortion Access on Sabotage Statute

Women have a constitutional right to access a medical provider for the termination of pre-viability pregnancies, subject to many restrictions.<sup>190</sup> Indeed, this right may be seen as grounded in the same self-possession principles that animate the proposed sabotage statute.<sup>191</sup> Thus one counter-argument to the proposed sabotage statute would be: if constitutionally-protected access to abortion gives women a post-sex means of undoing the effects of sex (pregnancy), sabotage does not constitute an injury because the woman can effectively undo the injury.

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188 Prosecutors could elect to investigate and charge attempted sabotage—where no pregnancy results—in which case this element is of course not required. Given that the animating concern behind the sabotage statute is dispossession of women's reproductive capacity through the imposition of unwanted pregnancies, though, prosecuting attempted sabotage in and of itself does not seem like the most principled use of scarce prosecutorial resources and is not recommended by this Article. In the attempted sabotage context, prosecution of course remains possible—under existing statutes—for behavior that is often contemporaneous with sabotage, such as assault (forcefully removing an IUD), theft (throwing out birth control pills), or criminal threatening. *See* Part I, *supra*. These existing statutes should generally suffice to redress the wrongs attendant to attempted sabotage; no free-standing statute of the kind proposed below is necessary to reach the dispossession aspect because no dispossession in fact occurs.

189 *See generally* WEISBERG & APPLETON, *supra* note 92, at 424–29 (explaining function and process of paternity suits).

190 *See generally* *Planned Parenthood of Se. Pa. vs. Casey*, 505 U.S. 833 (1992). The contours of this right and the permissible restrictions continue to be the subject of much debate among courts, lawmakers, academics, advocates, members of the public, and other constituencies. *See, e.g.*, Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009).

191 *See* Part II, *supra*.

While perhaps superficially appealing, this argument is weak on multiple levels. First, criminal law does not tend to take a victim's ability to somehow heal herself as grounds for saying the action that caused the injury should not be criminal, although it might bear somewhat on the ultimate charge or level of sentencing. Second, and more significantly, courts have been resoundingly unsympathetic to attempts by male partners to argue that women whom they impregnated should have gotten or should get abortions.<sup>192</sup> Accepting the proposition that access to abortion justifies the non-criminalization of sabotage would run directly counter to this entrenched judicial position that the abortion decision belongs to pregnant women and them alone.<sup>193</sup> It would accept as proper a state expectation that women terminate certain pregnancies. Although the right for women to use their reproductive capacity to get pregnant is not necessarily one they could assert against other all parties, including the state, in all instances,<sup>194</sup> for the state to tell them—implicitly or explicitly—that they should terminate pregnancies that have already begun threatens physical dispossession. It would put state authority to the task of sending women to have medical instruments or medications inserted into their bodies for the purpose of emptying out some of that body's contents. Further, because the pregnancies that would be terminated are the result of male partners' sabotage, this use of state authority would render women doubly dispossessed: once by saboteurs, again by the state. The availability of abortion is not a convincing counter to the need to criminalize sabotage, but there is another potential counter-argument that upon initial consideration looks quite strong.

### B. Constitutionality of Statutory Reform

The proposed statute will no doubt raise Equal Protection concerns along two fronts: only women can be victims and essentially only men can be perpetrators.<sup>195</sup> On the surface, there may appear to be a strong argument that the statute is unconstitutional because it makes classifications on the basis of sex. However, the argument in favor of its constitutionality is far more compelling: it actually makes classifications based on pregnancy, which typically does not raise much judicial concern under the Equal Protection Clause.

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192 See, e.g., *Harris v. State*, 356 So.2d 623, 624 (Ala. 1978) (holding that the abortion decision was the woman's "to make, and hers alone," when father tried to avoid child support by saying he had wanted pregnancy terminated but mother refused).

193 See Part II, *supra*.

194 Cf. *Cohen*, *supra* note 85, at 1154 ("[T]he [Supreme Court's] abortion cases . . . imply the existence of a right to be a gestational parent.").

195 U.S. CONST. amend. XIV.

Especially given the pressing public health problem posed by sabotage,<sup>196</sup> the potential threat of litigation should not serve as a bar to including the statute in the current revision of the Model Penal Code. States can make their own decisions about whether or not to adopt this and other Code provisions based on their assessments of the risks of litigation and other factors. But overall, the risk of the statute in fact being struck down on any Equal Protection grounds seems minimal enough to justify proceeding with the Model Penal Code reform.

### 1. Victims

Under the proposed statute, intending to induce and in fact inducing pregnancy are required components of the sabotage offense; thus all victims of sabotage—by definition—must be women. Not all women, however, can be victims of sabotage. The class of victims is far narrower than all women. It is limited to those women who are able to become and in fact become pregnant.<sup>197</sup> Thus the sabotage statute does not intentionally classify on the basis of sex but on the basis of pregnancy. The population is classified into two groups: (1) people who cannot and do not become pregnant as the result of sabotage (including all males, infertile women, menopausal and post-menopausal women, and pre-pubescent females) and (2) people who can and do become pregnant as a result of sabotage (fertile women who are able to conceive in that particular instance of intercourse). In general, a statute that classifies people based on pregnancy (non-pregnant vs. pregnant) is subject only to rational basis review rather than to the intermediate scrutiny that would be required if it intentionally classified based on sex,<sup>198</sup> although at least one exception—workplace

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196 See Part I, *supra*.

197 See Part III, *supra*.

198 See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), *superseded in part by statute*, Pregnancy Discrimination Act, *as recognized in* *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 676 n.12 (1983) (“Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this [insurance regulation] on any reasonable basis, just as with respect to any other physical condition.”). See also Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 242–43 (2013) (describing *Geduldig*—before passage of the Pregnancy Discrimination Act—as standing broadly for the proposition “that pregnancy discrimination was constitutional under the Equal Protection Clause of the Fourteenth Amendment”).

discrimination based on pregnancy—does exist.<sup>199</sup>

Surviving rational basis review should not prove difficult:<sup>200</sup> it is certainly legitimate for the state to try to protect women from having unwanted pregnancies forced upon them and reasonable to think that criminalizing conduct that leads to forced pregnancies (sabotage) would protect women from experiencing them and potentially birthing unwanted children that could become wards of the state. It is important to note that there do not appear to have been any significant, let alone successful, Equal Protection challenges to the enhanced criminal sentences imposed by many state statutes on sexual assaults that result in pregnancy.<sup>201</sup> And in those schemes, as in the proposed contraceptive sabotage statute, biology dictates that the only victims will be those women who can and do get pregnant as a result of the assault. Thus the statute's pregnancy-based classification seems likely to withstand an Equal Protection challenge.

## 2. Perpetrators

The statute does not place any limit on the sex of perpetrators. As with victims, it classifies based on pregnancy, not sex—although here, both sexes are represented in each group (perpetrators and non-perpetrators). For perpetrators, the line is drawn between (1) people who can make someone else pregnant and do (many but not all men; women with access to sperm and the means to inseminate another women successfully with the sperm) and (2) people who cannot make someone else pregnant and in fact do not (infertile men, women without sperm access). A woman who sabotages her female partner's contraception with the intent to induce pregnancy and in fact impregnates the partner during a sexual encounter by inseminating her with sperm she had acquired elsewhere would fall into the first group, and be just as guilty under the statute as the man who did the same thing with his own sperm. While the former scenario is admittedly far less likely than the latter, it is

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199 See, e.g., Jennifer Brown, *A Troublesome Maternal-Fetal Conflict: Legal, Ethical, and Social Issues Surrounding Mandatory AZT Treatment of HIV-Positive Pregnant Women*, 18 *BUFF. PUB. INT. L.J.* 67, 86 (2000) (“[T]he Supreme Court has only recognized that discrimination based on pregnancy is prohibited under the Equal Protection Clause in the employment context.”).

200 See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 640 (18th ed. 2013) (explaining that “how much bite there is in that [rational basis] requirement has remained debatable” going back to the adoption of the 14th amendment).

201 See generally Bridges, *supra* note 82 (not mentioning any such statutes that have been struck down or even challenged on Equal Protection grounds).

by no means impossible.<sup>202</sup> Since there is no intentional sex-based classification of perpetrators, then, rational basis review rather than intermediate scrutiny would likely apply to any challenge to the proposed statute based on the typical perpetrator being male.<sup>203</sup> For the same reasons discussed above,<sup>204</sup> it should not prove difficult to pass rational basis scrutiny. And even if the statute did intentionally classify men as the sole potential perpetrators, it would not necessarily be doomed to failure under intermediate scrutiny.<sup>205</sup>

Thus it appears quite unlikely that the sabotage statute would fail on Equal Protection grounds due to either the sex of the typical perpetrator (male) or the sex of the only type of victim (female) because the classification is in fact based on pregnancy, not sex. To the extent there may be some risk of the statute's being overturned, this possibility should not serve as justification for failure to pursue statutory development and implementation. Sabotage poses serious public health problems that admit of no easy resolution;<sup>206</sup> however, involvement by the criminal justice system would offer a powerful additional resource in terms of developing a comprehensive and effective response to sabotage.<sup>207</sup> The factors militating toward adopting the statute are not just pragmatic but principled. Protecting the principle of self-possession in and of itself, as well as its robust and consistent application to legal schemes around sexual activities, has both expressive and structural value. That is, it sends a societal message about the law's commitment to self-ownership, as well as shapes societal institutions that function with this lodestar in mind. In light of the pressing public health problem posed by sabotage, then, as well as the self-possessory interest at play, the Model Penal Code should incorporate the proposed offense of contraceptive sab-

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202 Cf., e.g., *Phillips v. Irons*, 2006 WL 4472185 (Ill. Cir. Ct. Apr. 18, 2006).

203 See generally *U.S. v. Virginia*, 518 U.S. 515, 531–34 (1996) (articulating intermediate scrutiny standard of judicial review of state law that intentionally treats men and women differently due to their sex); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (confirming that intermediate scrutiny applies when laws discriminate against either women or men).

204 See Part III, *supra*.

205 See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding statutory rape law that made it a crime for males to have sex with females under 18 in part because of state's "strong interest" in preventing "illegitimate [teen] pregnancy").

206 See Part I, *supra*.

207 The state's essential monopoly on the lawful use of violence gives criminal law enforcement a unique and strong role to play in keeping people safe from violence or misconduct at the hands of intimate partners—although law enforcement has considerable discretion as to when and how they exercise this ability. See generally *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (permitting police discretion in making arrests for violations of restraining orders).

otage and encourage states to adopt it as well.

### C. Strengthening the Constitutional Right to Non-Procreative Sex

The proposed statute would in fact support the Constitution by strengthening a key constitutional right. The Supreme Court's contraception cases arguably establish "a right to have sexual intercourse without the state conditioning that right on the individual having to risk becoming pregnant . . . ."<sup>208</sup> Currently, the strength of this right is limited because it protects an individual against contraceptive interference by the state, not against such actions by the partner with whom she is having sex.<sup>209</sup> Given that the state is not literally in the bedroom—most of the time<sup>210</sup>—actually exercising the right to non-procreative sex involves the interaction between partners just as much as the interaction between the partners (individually or collectively) and the state. Under the existing legal regime, where contraceptive sabotage is not meaningfully or systematically outlawed,<sup>211</sup> one partner is essentially free to render the other partner's right to non-procreative sex meaningless by sabotaging her contraception. This is not to say that partners should be transformed into state actors for the purpose of regulating their sexual encounters. The Constitution should not provide a cause of action for one sexual partner against the other. Rather, criminal law—with its ability to reach into the bedroom<sup>212</sup>—should step in to establish a baseline level of protection for the right to non-procreative sex against violation by an individual's sexual partner.

## CONCLUSION

This Article demonstrates the need for an addition to the revision of the Model Penal Code currently underway to criminalize contraceptive sabotage. It identifies women's

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208 Cohen, *supra* note 85, at 1152–53. Note that men and infertile women possess this right without the need for contraception. Also, while the Court's cases tend to use the language of autonomy, the right identified here is justified based on self-possession principles as well: women should not be forced to condition sex—or any other activity—on being dispossessed of some aspect of their physical selves. See Part II, *supra*.

209 See Cohen, *supra* note 85, at 1196 n. 60.

210 The factual predicate leading to *Lawrence v. Texas*, 539 U.S. 588 (2003), offers one noteworthy exception.

211 See Part I, *supra*.

212 Cf. Murray, *supra* note 19, at 1263 ("The recent trend towards the criminalization of domestic violence and marital rape has not gone unnoticed . . . a number of legal scholars have acknowledged the unique dynamics that have resulted from the increased criminalization of the private sphere for purposes of domestic violence enforcement.").

self-possessory interest in maintaining their reproductive capacity in its non-pregnant state as offering a principled basis for such an addition. It proposes language for this statute, explores the statute's elements, and defends it against likely strands of criticism. Chief among these concerns is likely to be that only women could be victims under this statute, with men as the typical (but not exclusive) perpetrators. The proposed statute would likely survive constitutional scrutiny because it draws a line based on pregnancy, not sex; however, non-constitutional normative arguments may remain against a statute that results in this sort of breakdown between the sexes. As discussed above, these sources of opposition may include that the statute would fail to address ways in which men's interests could be harmed by their female partners' becoming pregnant as a result of sabotage (poking holes in condoms before men put them on, for instance).<sup>213</sup> They could also include a concern that the statute would reinforce stereotypical gender roles, with women occupying a weak or submissive position. Such concerns have merit; equitable treatment of the sexes is generally a normatively desirable legal outcome. In the realm of sex and pregnancy, however, biology renders men and women differently situated on a fundamental level. Somewhat counter-intuitively, then, the law must take this physical reality into account if it is going to parse out—in a consistent and principled manner—the complex interplay of rights and responsibilities that arise from an act of physical union.<sup>214</sup>

Also, rather counterintuitively, this Article suggests that criminal law may need to be present—selectively—in the bedroom in order to make certain constitutional rights surrounding sexual decision-making more fully meaningful. Of course, criminal law does have the power to undermine constitutionally protected decision-making.<sup>215</sup> But it does not do so in all instances. The Constitution puts boundaries on the state's ability to interfere in intimate relationships and decisions, but it cannot easily—if at all—insert any boundaries into what intimates do to each other. As far as the Constitution is concerned, interactions between partners essentially constitute “sex without law”—constitutional law, that is.<sup>216</sup> Criminal law thus may be necessary to bring some measure of law to these interactions, not to undermine constitutional guarantees (such as the right to privacy) but to strengthen at least some of them (notably the right to non-procreative sex). Vigilance is necessary,

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213 See Part II, *supra*.

214 See generally Rubinfeld, *supra* note 16, at 1421 (“Sexuality . . . desires nothing other than this boundary [of one's self] violation, both physically and psychologically.”).

215 See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 10–11 (2006) (explaining how the use of criminal protection orders create *de facto* divorce, thus undermining individuals' right to select intimate partners).

216 See Murray, *supra* note 19, at 1313.

however, to ensure that criminal law retains its proper place in the bedroom: as a baseline source of protection, not as a saboteur of intimacy, liberty, or personal expression.