Birth Control Sabotage as Domestic Violence: A Legal Response

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This Comment responds to a series of recent studies linking domestic violence to birth control sabotage—a phenomenon where male partners destroy or manipulate contraceptive devices to force pregnancy, attempting to hold their female partners captive in a violent relationship. Birth control sabotage can take many forms, including the destruction of birth control, the piercing of condoms, or the forceful removal of contraceptive vaginal rings or intrauterine devices. Its existence raises two questions: what legal remedies are available to victims of birth control sabotage, and what policy steps should be taken to limit its occurrence? The absence of legal scholarship resolving these questions is glaring, and virtually no legal scholarship addresses the intersection of birth control sabotage and domestic violence. This Comment contends, first, that the recent studies linking birth control sabotage and domestic violence provide a sufficient justification for labeling sabotage as an intentional, fraudulent misrepresentation tort claim. Second, this Comment normatively argues that state legislatures ought to act quickly to criminalize birth control sabotage. As sabotage can now be understood as an act of violence in continuing domestic violence, criminalization and incarceration are crucial in preventing further abuse. While legal remedies for birth control sabotage have been severely limited in the past, creative attorneys and motivated legislators should address this important issue to improve the lives of survivors and their families.

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INTRODUCTION

Birth control sabotage is 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. 1 Given the disturbing prevalence of birth control sabotage, I hope to use this Comment as a medium to discuss the legal remedies currently and potentially available to victims of birth control sabotage. An investigation of birth control sabotage is not just an exercise in intellectual excess. Birth control sabotage impacts the lives of women in myriad ways—ways that merit exploration and deserve our compassion. While the following narratives may not capture the full range of birth control sabotage experienced in relationships involving domestic violence, they do illustrate some of the emotional and physical distress a woman may suffer as a result of birth control sabotage.

The story of “Janey” involves multiple forms of reproductive coercion by an abusive male partner who hoped to prevent Janey from ever leaving the relationship. 2 Janey was nineteen when she began a relationship with a

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2. “Janey’s” Story, KNOWMORESAYMORE.ORG, http://www.knowmoresaymore.org/2008/10/janeys-story (last visited Mar. 2, 2012). The KnowMoreSayMore project is a campaign to bring the issue of reproductive coercion out of the shadows. As part of the campaign, the project has a website form for survivors of reproductive coercion and domestic violence to share their stories online. More stories are available at the website, accompanied by readers’ responses.
“romantic” man in his mid-twenties. She acknowledges that there was abuse very early on in the relationship; however, at first the abuse was not physical. Instead, her partner lied about practically everything, including his fidelity. When Janey confronted him about his lies, he forced himself upon her sexually, refused to use a condom, and considered her suggestion of condom usage as a personal attack. In time, Janey became pregnant with his baby—a baby she did not want in the first place—and ultimately decided to carry the baby to term. Unsurprisingly, she was diagnosed on several occasions with sexually transmitted infections (STIs), despite having only one sexual partner.

Eventually, Janey became pregnant a second time by the same abusive partner. He had promised he would “pull out,” but on multiple occasions, intentionally did not. Though the sabotage of Janey’s reproductive preferences often brought her to tears, her partner merely laughed at her devastation and called her “crazy.”3 Believing another baby would keep her in his life permanently, he refused to pay for an abortion, despite her inability to pay for one herself. Janey eventually obtained a protection order after her abuser broke into her home. Notwithstanding her abuse, Janey now leads a successful life.4

“Carollee” is another survivor of domestic abuse who was also subjected to birth control sabotage.5 At the age of nineteen, Carollee began a sexual relationship with a thirty-two-year-old man. When her birth control pills began to disappear, she confronted him, only to be told that he “knew she wanted to have his child.”6 Carollee also noticed that her partner had been piercing the condoms they were using, but she did not address it. When she became pregnant with his child, he became more controlling—demanding to know where she was at all times and inspecting her clothing when she went out. When she went to Planned Parenthood for an abortion, he quickly found her, dragged her home, and threatened to kill her if she went through with the procedure. Like Janey’s abuser, Carollee’s aggressor likely did not want her to terminate the one permanent tie he could force upon her. Since then, her partner has been in and out of prison multiple times and is currently serving a sentence for attempting to detonate a bomb in a crowded building.7

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. The story of “Sandi” provides an apt example.8 Sandi was a model Ph.D. student on

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3. Id.
4. Id.
6. Id. (internal quotation marks omitted).
7. Id.
scholarship at a prestigious university. The early part of Sandi’s relationship with her partner seemed perfect, but it all changed when they began having sex. Her partner would remove the condom just before ejaculation and insist that the condom had slipped or broken. When Sandi grew concerned about the possibility of an unplanned pregnancy, she obtained emergency contraception. In response, her partner “became absolutely livid.”9 He accused her of being a whore, spat in her face, and attempted to hit her. In fury, he forced Sandi into a car, drove her two hours from her dorm, and dropped her off without any form of return transportation.10

These stories exhibit the host of ways in which birth control sabotage can impact the lives of women. Importantly, they also suggest one uniform message: the sabotage of contraception is a form of domestic violence that is detrimental to female autonomy. The consequences of sabotage and violence not only impact the survivor’s dignity, but also deteriorate her mental and physical health, financial position, and long-term stability. Even further, they impact the lives of the people close to the survivor, including the children either miscarried, aborted, or born to women who did not want them.

This Comment is a vital step in devising legal remedies for women like Janey, Carolee, and Sandi. Recent scholarship has failed to recognize the important intersection of birth control sabotage and domestic violence even though birth control sabotage occurs at a significantly higher rate in violent intimate partner relationships than in other relationships.11 The increasingly apparent relationship between birth control sabotage and violence demonstrates the imminent need to reevaluate how sabotage may fit into existing family law and domestic violence civil liability schemes; this correlation also underscores the importance of criminalizing sabotage as a deterrent to other ongoing violence.

Part I of this Comment is a general discussion of the current contraception usage rates in the United States as well as a brief explanation of current national attitudes about contraceptives. Further, Part I presents a discussion of the birth control sabotage phenomenon—what it is, how it occurs, how often it happens, and why women are subjected to it.12 Part II discusses the remedies

9. Id.
10. Id.
12. Throughout this Comment, I refer to birth control sabotage victims using predominantly feminine pronouns and their abusers with predominantly masculine pronouns. This is because the vast majority of domestic violence victims are women. SHANNON CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 228356, SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENCE 5 tbl.2 (2009) (finding that 86 percent of all domestic violence victims in sixteen large countries are women). But see Jennifer Langhinrichsen-Rohling, Controversies Involving Gender and Intimate Partner Violence in the United States, 62 SEX ROLES 179 (2010) (finding that data collection methodologies on the gender asymmetry of domestic violence may skew the gendered occurrence rates of domestic violence). As I argue that birth control sabotage is a form of domestic violence, I have assumed a similar
potentially available to survivors of birth control sabotage under current tort and domestic violence law. Specifically, I question whether a woman who experiences an unwanted pregnancy through her partner’s sabotage of her contraceptive device or plan of withdrawal may claim damages from his fraudulent misrepresentation of “protected sex.” I argue that new studies bringing sabotage under the umbrella of domestic violence should be sufficient to permit a fraudulent misrepresentation claim with punitive damages awarded to a survivor in the form of pregnancy-related costs and increased child support awards.

Part III proposes the criminalization of birth control sabotage. In light of the recent studies showing the relationship between sabotage and violence, criminalizing birth control sabotage is an important step in preventing further violence to a survivor and her family. I examine a 2010 Canadian case holding that fraudulent destruction of a contraceptive device is an offense under modern Canadian sexual assault statutes. I query whether this model could be harmoniously integrated into U.S. law and conclude that a wiser solution would be independent legislation to make birth control sabotage a separate criminal offense.

Part IV considers counterarguments and concerns related to the evidentiary hurdles and potential for fraud raised by allowing civil and criminal liability for birth control sabotage. I reason that pre-existing police procedure in domestic violence and sexual assault cases coupled with recent trends regarding rules of evidence should help allay any concerns about evidentiary difficulty or fraud.

I. CONTRACEPTION AND THE BIRTH CONTROL SABOTAGE PHENOMENON

Birth control sabotage occurs amidst a complex array of social and historical forces, including varying perceptions about contraception, reproduction, and female autonomy. This Part begins with an examination of the history of contraceptive methods and usage in the United States, and proceeds with an examination of historical attitudes about contraceptive use. Finally, it introduces and defines the problem of birth control sabotage.

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A. Contraceptive Methods and Rates of Use in the United States

The history of contraceptive technologies is a lengthy evolution of differing methods and devices in various historical and geographical contexts.\(^{13}\) Interestingly, for centuries after the initial development of contraceptive methods, no significant technological advances in contraceptives occurred—barrier methods, condoms, douches, and abortion are all ancient forms of contraception.\(^{14}\) Not until the development of oral contraceptives in the early- and mid-twentieth century did women in the West have access to an effective, safe, female-controlled form of contraception.\(^{15}\) The last two decades of the twentieth century have resulted in the development of many other hormonal techniques for contraception including injectables, patches, vaginal rings, implanted rods, and hormonal intrauterine devices (IUDs).\(^{16}\) In the grand scheme of things, female control of contraception and pregnancy is a very recent development.

The rate at which women, specifically fertile, sexually active, heterosexual American women, use contraceptives has varied over time. During the 1980s and 1990s, the rate of contraceptive use by women increased across the country and has steadily decreased ever since.\(^ {17}\) Interestingly,

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13. See generally ROBERT JÜTTE, CONTRACEPTION: A HISTORY (2008). The book covers a host of different contraceptive methods while also reviewing the evolving attitudes around contraceptive usage and sexuality beginning with ancient societies and concluding with the future of contraceptive development.


15. See Sharon R. Edwards, The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications, 26 FAM. PLAN. PERSP. 77 (1994). Contrary to popular belief, plant-based, chemical contraception was a fairly common means of lowering the risk of pregnancy in the ancient world. Importantly, the effectiveness of “herbal remedies” was contingent on appropriate dosage, which could potentially be toxic, leading many modern historians to reject its viability as a common method of birth control. See ENCYCLOPEDIA OF BIRTH CONTROL 125 (Vern L. Bullough ed., 2001). But see John M. Riddle, Oral Contraceptives and Early-Term Abortifacients During Classical Antiquity and the Middle Ages, PAST & PRESENT, 1991, at 3 (rejecting scientific consensus on the absence of ancient, female-controlled birth control and contending that “traditional medical systems employed chemical means of birth-control and—although the evidence for this is less conclusive—that such chemical substances were substantially effective in controlling the birthrate”). In fact, while these technologies existed and may have been somewhat effective, their existence was largely unknown to significant segments of early modern Christian Europe. ROBIN D. TRIBHUWAN & BENAZIR D. PATIL, BODY IMAGE HUMAN REPRODUCTION AND BIRTH CONTROL: A TRIBAL PERSPECTIVE 17 (2009).


women today use contraceptives at rates similar to women in the late 1980s.\textsuperscript{18} Current data suggests that seven percent of women fail to utilize contraceptives before, during, or after sexual intercourse.\textsuperscript{19} Importantly, the vast majority of sexually active, fertile, American women do use contraception,\textsuperscript{20} though the diversity of methods ranges widely. Of the currently available contraceptive methods, 28 percent of American women rely on birth control pills, 16 percent on male condoms, 5 percent on intrauterine devices, 5 percent on withdrawal, 3 percent on quarterly injectables, and 2 percent on vaginal rings.\textsuperscript{21}

**B. Attitudes About Contraceptive Use**

In order to situate birth control sabotage within a domestic violence framework, it is crucial to understand the historical and cultural shifts regarding contraceptive use, including who bears responsibility for reproductive control. After all, cultural trends concerning reproductive control or self-control will determine who the victim is, who the perpetrator is, what forms sabotage may take, and what the appropriate remedies for birth control sabotage are.

Over the last two centuries, reproductive justice and the ability to make meaningful decisions about one’s reproduction have become central to American ideas about female autonomy.\textsuperscript{22} Because control over reproduction is

\begin{itemize}
\item \textsuperscript{18} Compare Piccinino & Mosher, \textit{supra} note 17, at 5 (finding that 60.3 percent of women used contraception in 1988), with \textsc{Guttmacher Inst.}, \textit{supra} note 17 (62 percent in 2006–2008).
\item \textsuperscript{19} \textsc{Guttmacher Inst.}, \textit{supra} note 17. This is because 62 percent of women currently use contraception and 31 percent of women do not need contraception since they “are infertile; are pregnant, postpartum or trying to become pregnant; have never had intercourse; or are not sexually active.” \textit{Id.} However, the data only reflect average usage by all American women, failing to account for wide variation in usage rates across age, race, and socio-economic status. See Christine Dehlendorf et al., \textit{Recommendations for Intrauterine Contraception: A Randomized Trial of the Effects of Patients’ Race/Ethnicity and Socioeconomic Status}, 205 \textsc{Am. J. Obstetrics & Gynecology} 319. For detailed discussion of the intersections of race, class, and contraceptive usage, see generally Hosanna Soler et al., \textit{Relationship Dynamics, Ethnicity and Condom Use Among Low-Income Women}, 32 \textsc{Fam. Plan. Persp.} 82 (2000). Some have attributed variations in contraceptive usage by persons of different races or socioeconomic status to clinicians’ biases about contraception or assumptions based upon a patient’s race or class.
\item \textsuperscript{20} \textsc{Guttmacher Inst.}, \textit{supra} note 17.
\item \textsuperscript{21} \textit{Id.} This Comment addresses only those forms of contraception that may be manipulated or destroyed by an abusive male partner. Other forms commonly used, but not discussed, are tubal sterilization (27.1 percent); vasectomy (9.9 percent); implants; monthly injectables and the patch (1.1 percent); periodic abstinence (1.1 percent); and diaphragms (figure below statistical reliability). \textit{Id.} Notably, diaphragm use may be small, but it falls in the category of methods that can be manipulated or destroyed by a partner, as diaphragms may be punctured with small, unnoticeable holes.
\item \textsuperscript{22} See Sylvia A. Law, \textit{Rethinking Sex and the Constitution}, 132 \textsc{U. Pa. L. Rev.} 955, 957–58 (1984); see also \textsc{Bell Hooks}, \textit{Feminism Is For Everybody: Passionate Politics} 29 (2000) (“As we seek to rekindle the flames of . . . feminist movement[,] reproductive rights will remain a central feminist agenda. If women do not have the right to choose what happens to our bodies we risk relinquishing rights in all other areas of our lives. In renewed feminist movement the overall issue of reproductive rights will take precedence over any single issue.”). Reproductive justice has been understood as a framework “envision[ing] the complete physical, mental, and spiritual well-being of women and girls. It stipulates that reproductive justice will be achieved when women and girls have
crucial to control over one’s life, the right to contraceptives, comprehensive sex education, and abortion is indispensable. American courts and legislatures only began to formally recognize these rights in the 1960s and 1970s. Some scholars have argued that positive attitudes about contraception and reproductive control at the beginning and middle of the twentieth century were largely driven by hopes that contraception could limit population growth, especially in “lower” classes and among “lesser” races. Fortunately, ideas about the role of contraception continued to change. The 1960s brought on a decade of changing attitudes about sexuality and a new focus on contraceptives as a means to female autonomy and liberation.

As a result, most of the literature on contraceptive use since the sexual revolution of the 1960s focuses on female responsibility for contraceptive use. Consumer marketing strategies serve as a strong indication of the emphasis on feminine duty: many modern advertising campaigns by contraceptive manufacturers emphasize the need for medical control over female bodies, while denying a similar need for medical control over male bodies. This development raises the question—why one and not the other? Both participants contribute to the sexual act and to the conception of a child. Scholars suggest that the female body has traditionally been understood as the singular locus of reproduction. Untied to the sexual act between a woman and a

the economic, social, and political power and resources to make healthy decisions about [their] bodies, sexuality, and reproduction...” Eveline Shen, Reproductive Justice: How Pro-Choice Activists Can Work to Build a Comprehensive Movement, MOTHER JONES (Jan. 24, 2006, 12:00 AM), http://motherjones.com/politics/2006/01/reproductive-justice.


25. See Mary L. Dudziak, Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut, 75 IOWA L. REV. 915, 919 (1990) (discussing a sharp departure by feminists, like Margaret Sanger, from the rhetoric in the 1910s and 1920s of radical feminist liberation to a more toned, scientific rationale of limiting family sizes); see also Gordon, supra note 14, at 149–50 (explicating the influences of the eugenics movement on the movement for increased access to birth control).


27. See Edwards, supra note 15, at 77.

man. Conceptualizing reproduction as occurring solely inside the female body, and not between female and male bodies, has focused much of the discourse and scientific development of contraceptives on the female duty to control reproduction. In other words, if reproduction occurs inside the female body, then it is the female who has the responsibility to prevent conception. Consequently, contraceptive use for the last half century has been, and continues to be, considered the responsibility of women.

Male control over reproduction, however, is not so easily relinquished. The belief in contraceptive use as the female domain is complicated by a line of feminist arguments that unsafe sex is part and parcel of a supreme, misogynist, masculine identity. Some feminists thus understand unsafe heterosex as an exercise in patriarchy that consists of the “cultural performance of the male sex drive.” According to this line of feminist thinking, the patriarchal, male sex drive is one that regards condom usage as unnatural and emasculating. These beliefs taken together may indicate that the presumed female responsibility for and desire to use contraception is precluded by male desire to exercise socialized notions of a sexual masculinity that demands unprotected and “natural” sex. Thus, an unfortunate irony emerges in which a woman is responsible for preventing reproduction, but is ill equipped to exercise her “responsibility.”

29. See Mary Jacobus et al., Introduction to BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE 1, 10 (Mary Jacobus et al. eds., 1990) (acknowledging social perception of the female body “as a site of reproduction”); see also Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 COLUM. L. REV. 181, 183, 208 (2001) (wrestling the female body away from repronormativity or motherhood in favor of promoting sex and female sexuality as a mode of pleasure).

30. See NELLY OUDSHOORN, THE MALE PILL: A BIOGRAPHY OF A TECHNOLOGY IN THE MAKING 8 (2003) (suggesting that the male reproductive body has traditionally been viewed as being naturally more resistant to reproductive intervention than the female reproductive body, which would require only monthly interventions with ovulation as opposed to daily interventions with sperm); Mac Edwards, Contraceptive Choice: Responsibility of Both Women and Men, SIECUS REP., Dec. 2002–Jan. 2003, at 2.

31. But see William R. Grady et al., Men’s Perceptions of Their Roles and Responsibilities Regarding Sex, Contraception and Childrearing, 28 FAM. PLAN. PERSP. 221 (1996) (finding that the view of male partners playing an equal role in contraceptive behavior is increasingly prevalent).

32. See PETER C. ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 4 (2011) (claiming that the condom, despite its ill-repute and association with prostitution, became the most popular form of contraception in the United States during the mid-twentieth century).

33. See Nicole Vitellone, Condoms and the Making of “Testosterone Man”: A Cultural Analysis of the Male Sex Drive in AIDS Research on Safer Heterosex, 3 MEN & MASCULINITIES 152, 154–55 (2000) (rebuiting the idea that condom usage is emasculating, and arguing instead that it can be incorporated into a “hydraulic,” masculine performance of sexuality).

34. Id. at 154.

35. Id. at 155–58.

36. I use the term “natural” here to highlight with skepticism traditionally conservative notions of sex as repronormative and procreative. See Franke, supra note 29, at 183.
C. Birth Control Sabotage Defined

Birth control sabotage occurs when a sexual partner destroys, or fails to use, a form of contraceptive or contraceptive method without notifying his partner, in hopes of deceptively coercing her to become pregnant with his child. It is a form of reproductive control where “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, [deception] and/or actual violence.”

Birth control sabotage, or reproductive coercion, takes many forms: piercing condoms or other barrier contraceptives, throwing away oral contraceptives or replacing them with placebos, and forcefully removing contraceptive vaginal rings or intrauterine devices (which is very dangerous and painful). Further, birth control sabotage may take the form of direct interference or may be acted out through indirect coercion by threatening to harm a victim if she utilizes contraception. Male perpetrators use the possibility of pregnancy as a means to control their female victims in hopes of dominating them and precluding them from partaking in any alternate romantic pursuits. Additionally, a woman’s lack of power to negotiate contraceptive use and her partner’s refusal to pay for contraception hinders her ability to avoid an unwanted pregnancy.

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40. See Roni Caryn Rabin, Report Details Sabotage of Birth Control, N.Y. TIMES, Feb. 15, 2011, at D6 (citing to a 2011 report from the National Domestic Violence Hotline finding that one in four women calling the hot line said they had been pressured to become pregnant, told not to use contraception, or coerced into unprotected sex); see also Cari Jo Clark et al., Intimate Partner Violence and Interference with Women’s Efforts to Avoid Pregnancy in Jordan, 39 STUD. FAM. PLAN. 123, 123 (2008) (documenting studies showing a link between fear of intimate partner violence and contraceptive use); Eunice Njovana & Charlotte Watts, Gender Violence in Zimbabwe: A Need for Collaborative Action, REPROD. HEALTH MATTERS, May 1996, at 46, 49–50 (describing how fear of violence can influence Zimbabwean women’s use of contraception).

41. See Moore et al., supra note 38, at 1739 (quoting a study participant recounting her male abuser saying, “I should just get you pregnant and have a baby with you so that I know you will be in my life forever”).

Women may experience reproductive coercion differently at different points in the sexual relationship. In her study, Ann Moore identifies three temporal periods during which women may experience reproductive coercion: preintercourse, during intercourse, and postintercourse. Preintercourse, a male partner may pressure or threaten his female partner with pregnancy. During intercourse, a male partner may destroy or replace contraception. Postintercourse, a male partner may attempt to pressure a woman to choose a particular pregnancy outcome like abortion or birth. This Comment focuses on a variety of instances of reproductive coercion that occur prior to and during intercourse—the destruction or manipulation of barrier and chemical contraceptives. According to the Moore study, the most common forms of contraceptive sabotage occurred either (1) when men failed to withdraw before ejaculating, even though withdrawal was the contraceptive method agreed upon, or (2) when men simply refused to use a condom. In instances when men did use condoms, many of the study participants reported male sabotage of the condoms.

Birth control sabotage must be understood not as a unique phenomenon, but as a complex problem arising frequently in violent intimate relationships. Indeed, it comes as no surprise that male partners act on their patriarchal sex drive through unprotected sex in a relationship involving domestic violence.

43. See Moore et al., supra note 38, at 1738.
44. Id. at 1739. Behaviors during this period may include flushing birth control pills, destroying birth control or emergency contraception, refusing to withdraw when withdrawal was agreed upon, refusing to help pay for birth control, or convincing a woman that birth control has dangerous side effects as to discourage her use. Id.
45. Id. Behaviors during this period may include rape, secretive condom removal, condom manipulation, refusal to use condoms, accusations of unfaithfulness if the woman requests the use of condoms, secretive intrauterine device removal, or refusal to withdraw when withdrawal was the agreed upon contraceptive method. Id.
46. Id. Behaviors during this period may include assaulting her, intentionally causing a miscarriage, or refusing to let her get an abortion. Id.
47. I focus on these specific types of reproductive coercion as they are the types that may more readily yield physical evidence to be adduced at trial. This is not to suggest that forms of reproductive coercion not mentioned, including coercion postintercourse, may not fit into the scheme of a birth control sabotage claim. Scholarly writing is, nonetheless, confronted with practical limitations. Scholars on the intersection of domestic violence and reproductive health would do well to consider this issue further.
48. Thus, this Comment will not consider the use of force or fear of force to coerce sterilization or abortion or the refusal to pay for contraception. Dealing with the manipulation or destruction of contraception may be a first step towards resolving the issue of reproductive coercion at different stages in the sexual relationship. Nonetheless, this Comment faces pragmatic limitations. Compelling a male partner’s financial contribution for purchase of contraceptives would be a much more invasive undertaking. Similarly, the use of force or fear of force for a particular pregnancy outcome would likely fall under preexisting domestic violence protections. Instead, this Comment is concerned with fraudulently misrepresenting the use of contraception. Where sexual partners are aware of one another’s “contraceptive status,” this Comment offers no solution.
49. Moore et al., supra note 38, at 1740.
50. Id.
resulting in long-term consequences. The definition and causes of domestic violence have been the subject of much debate, but this social ill has been commonly perceived as an act or acts of violence, intimidation, and coercion against a partner, grounded in several sources: individual pathology, learned behavior, and structural patriarchy. Birth control sabotage is a variation on this frequently practiced form of domination and control.

Of particular concern, forty years of published research has demonstrated that domestic violence often reduces a female’s control over her sexuality and also may result in an overall decrease in her use of contraceptives. The absence of female autonomy in reproductive decision making is a crucial mechanism underlying the elevated risk of unintended pregnancy in abusive relationships. As such, the impact of domestic violence on contraceptive use, in the aggregate, results in increased rates of STIs and unplanned pregnancies.

51. See, e.g., Donald G. Dutton, Limitations of Social Learning Models in Explaining Intimate Aggression, in VIOLENCE IN INTIMATE RELATIONSHIPS 73 (Ximena B. Arriaga & Stuart Oskamp eds., 1999).


54. It should be noted that destruction of contraceptive devices or deception in withdrawal is not the only form of reproductive coercion that women may experience in relationships of domestic violence. They may also experience coercion to undergo sterilization procedures. J.E. Hathaway et al., Impact of Partner Abuse on Women's Reproductive Lives, 60 J. AM. MED. WOMEN'S ASS'N 42 (2005). Furthermore, they may experience coercion to terminate a pregnancy. Margi Coggins & Linda F.C. Bullock, The Wavering Line in the Sand: The Effects of Domestic Violence and Sexual Coercion, 24 ISSUES MENTAL HEALTH NURSING 723, 731 (2003); see also Moore et al., supra note 38 (arguing that while pressure to terminate a pregnancy may occur in the reproductive coercion context, the risk of not being able to obtain an abortion may lead to greater risk for female victims of domestic violence). But see Lynn M. Paltrow, Concerned About Coerced Abortions? Try Saying No to Cesarean Surgery, HUFFINGTON POST (Apr. 24, 2009, 12:15 PM), http://www.huffingtonpost.com/lynn-m-paltrow/concerned-about-coerced-a_b_190237.html (suggesting that the new flood of bills in state legislatures claiming to ensure female consent in the abortion decision cannot truly be about preventing coercion because the bills ignore coercion faced by women who carry their pregnancies to term). The reproductive justice movement is geared toward addressing all of the aforementioned issues. See Fried & Yanow, supra note 23, at 25–26.

55. Ann L. Coker, Does Physical Intimate Partner Violence Affect Sexual Health? A Systematic Review, 8 TRAUMA, VIOLENCE, & ABUSE 149, 170 (2007). Coker’s review has been criticized for its failure to identify these reproductive consequences as “measurable dimensions of abusive behavior” instead of indirect consequences of domestic violence. See Moore et al., supra note 38, at 1738. More relevant to this Comment, Coker’s review failed to consider the consequence of birth control sabotage in relationships with domestic violence.


The direct relationship between physical violence and reproductive coercion or birth control sabotage is not entirely known.\(^{58}\) Birth control sabotage is not strictly limited to relationships in which domestic violence occurs.\(^{59}\) Nonetheless, birth control sabotage appears most frequently within violent intimate relationships.\(^{60}\) In a recent study by Margaret Miller surveying 1319 women, approximately a third of all participants experiencing domestic violence reported experiencing pregnancy coercion or birth control sabotage, whereas only 15 percent of women not experiencing domestic violence reported birth control sabotage in the relationship.\(^{61}\) Indeed, the correlation between domestic violence and birth control sabotage is strong. Importantly, the Miller study found that the risk of unintended pregnancy doubled for women in relationships involving both birth control sabotage and other forms of domestic violence.\(^{62}\) Given our knowledge that pregnancy may heighten the risk of domestic violence,\(^{63}\) we should be particularly concerned with the potential for sabotage not only for purposes of protecting female reproductive autonomy, but also to protect women, their children, and their families from more violence.\(^{64}\)

It is important to recognize the theft of female reproductive autonomy through reproductive coercion and birth control sabotage as an extension of the domestic violence perpetrated against women. Only by acknowledging that birth control sabotage is a continuation of masculine domination and subordination can advocates and lawmakers begin to address the interplay of domestic violence and birth control sabotage. Put simply, birth control sabotage must be viewed as a common and additional form of domestic violence—a

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58. Moore et al., supra note 38, at 1738.
59. Id. at 1737.
60. See Miller et al. supra note 11, at 320.
61. Id. at 319.
62. Id. at 320.
63. Tina Bloom et al., Intimate Partner Violence During Pregnancy, in FAMILY VIOLENCE AND NURSING PRACTICE 155 (Janice Humphreys & Jacquelyn C. Campbell, eds., 2d ed. 2011). Various reasons for heightened violence during pregnancy have been suggested, such as jealousy, attempts at prenatal child abuse, attempts to deny paternity, and substance abuse. Id. at 157–58.
64. Although women who experience domestic violence and birth control sabotage deserve society’s protection, they should not be viewed as having “learned helplessness” from their abuse. See EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS, 11–25 (1988) (recommending an alternative characterization of domestic violence such that women are not understood as passive victims but rather as individuals who make decisions to ensure the survival of themselves and their children). Rather, women subjected to domestic violence have a tendency to exhibit strength, to demonstrate resiliency, and to seek help. Id. at 18. Further, women experiencing birth control sabotage in relationships involving domestic violence also demonstrate resilience by using contraceptive methods that may make it easier for them to conceal usage from their abusive partners. See 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, 609 (2010). Alternative methods may include IUDs or injectables. Id. These women, while experiencing significant violence, may still find ways to guarantee their own survival and maintain their reproductive autonomy.
tortious and criminal act committed by one partner against another that can cause significant financial, physical, and emotional harm.

II.

A REMEDY IN TORT FOR BIRTH CONTROL SABOTAGE

Upon fertilization, a woman is burdened by a variety of tangible costs associated with her pregnancy, including prenatal care costs, delivery costs, postpartum care costs for herself and her baby, or the cost of an abortion should she elect to terminate the pregnancy. These expenditures often amount to thousands of dollars. If she is uninsured, the costs are even more burdensome. Beyond the cost of the pregnancy, a mother must cover eighteen years (or more) of child-rearing expenses and a lifetime of emotional investment.

Traditionally, the remedy available to separated mothers who choose to carry their pregnancy to term and maintain custody of the child is to seek child support from the biological father. Generally, legislatures design child support formulas to compel continued financial support based on the timeshare arrangements between the parents—the more time spent with the child, the less a noncustodial parent will pay in child support. Thus, if the child spends 50 percent of her time with the father, a neutral support order is common because it is assumed that both parents will cover expenses incurred while they have the child.


66. Id.

67. See id. Sonfield’s article addresses the concern that of the current number of uninsured Americans, over twelve million of them are women of reproductive age. Id. He further discusses the problems under current private and public sector insurance plans that fail to cover the full costs of pregnancy for many women who are enrolled. Id. And under the new health care reform legislation, many states are working to exclude abortion from private insurance plans. Sabrina Tavernise, *Abortion Opponents Use Health Law to Put Restrictions in Private Insurance*, N.Y. TIMES, Apr. 9, 2011, at A13.

68. See LAURA W. MORGAN, CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION § 1.03 (2010). The models for calculating child support vary from state to state. Three models tend to be followed throughout the country: (1) the Income Shares Model, which presumes that a child should receive support in the same proportion of a parent’s income as would have been received if the parents had not separated; (2) the Percentage of Income Model, which calculates strictly the noncustodial parent’s support obligation as a fixed or progressive percentage of his income; and (3) the Melson Formula Method, which emphasizes policy concerns of the provision for the parents’ basic needs, the provision for the basic poverty level of the children, and the sharing of additional incomes with their children to improve their standard of living. Id. § 1.03(b)–(d).


70. See MORGAN, supra note 68, § 1.02(d) (highlighting that recommendations for guideline support should consider financial support provided by parents in shared physical custody arrangements). Many fathers may petition for joint custody, cross the threshold of shared time for not being required to pay child support, and then actually spend less or no time with the children. Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form—The Shared Time Family*, 22 INT’L J. L., POL’Y & FAMILY 231, 255 (2008).
But, in the case of an unwanted pregnancy, where a mother endures the harm of giving birth \(^{71}\) and raising a child, it may be unfair that a mother bears an “equal” share of the cost. While some courts have been unwilling to describe a pregnancy and motherhood as a harm, seemingly operating under the assumption that labeling a child as a harm devalues human life, \(^{72}\) these two values are not mutually exclusive. It is possible to value life while also acknowledging the costs associated with parenthood and the harm these costs can inflict. The question becomes, then, if we understand unwanted pregnancy as a “harm” incurred by a victim of sexual assault or birth control sabotage, what sort of legal remedies should be made available?

The recent slew of studies bringing birth control sabotage into the realm of domestic violence law gives vitality to the possibility of tort claims for victims of birth control sabotage. \(^{73}\) Recognizing birth control sabotage in the context of a domestic violence relationship avoids the conventional barriers to successful pregnancy-related suits that would have traditionally precluded civil claims by a victim of birth control sabotage. This Part gives a brief overview of how courts have analyzed pregnancy as a harm in the context of analogous lawsuits against physicians in wrongful conception cases. The Part further explores how unwanted pregnancy has been treated in birth control sabotage cases. Finally, the Part argues that the sabotage of contraception is an intentional, fraudulent misrepresentation that merits the award of punitive damages for domestic violence survivors in the form of child-rearing costs or child support offsets.

### A. The Analogous Case: Pregnancy as Harm in Wrongful Conception Cases Against a Third-Party Physician

In order to recover in tort for birth control sabotage, a woman must demonstrate a legally cognizable harm. In this context, the harms suffered are consequences of the resulting pregnancy. An abundance of case law discusses whether a pregnancy should be considered a harm in the analogous situation of wrongful conception cases against physicians. \(^{74}\) The wrongful conception cases demonstrate the barriers traditionally faced by women bringing claims grounded in an unwanted pregnancy. These barriers are relevant as they signal

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72. See infra notes 79–88 and accompanying text.

73. See generally de Bocanegra, supra note 64; Miller et al., supra note 11.

the barriers that women bringing a claim of birth control sabotage are likely to face, too.

In a wrongful conception case, a claimant sues her physician for a failed sterilization procedure or a botched abortion that results in an unwanted pregnancy or child. In those jurisdictions that recognize the tort claim, a variety of damage awards may be available to the parents. The most common awards are either only pregnancy-related expenses (the most common award), child-rearing expenses, or child-rearing expenses less the benefits of having a child. In deciding whether the entire child-rearing expense should be awarded, courts confront the issue of whether a parent can claim any cognizable harm under the law. In those jurisdictions where damages are denied or severely curtailed to pregnancy-related expenses, courts often assert that the claimant has suffered no tangible harm—a child is a blessing and the mere fact that a child was brought into the world, even if accidentally, is something far short of a serious injury. For example, in a case rejecting an award of child-rearing expenses, the Wyoming Supreme Court held that

the benefits of the birth of a healthy, normal child outweigh the expense of rearing a child. The bond of affection between child and parent, the pride in a child’s achievement, and the comfort, counsel and society of a child are incalculable benefits, which should not be measured by some misplaced attempt to put a specific dollar value on a child’s life. . . . [A] child should not be viewed as a piece of property, with fact finders first assessing the expense and damage incurred because of a child’s life, then deducting the value of that child’s life.81

76. Vikingstad, supra note 74, at 1068.
77. See Girdley v. Coats, 825 S.W.2d 295, 298–99 (Mo. 1992) (en banc) (denying full recovery on the grounds that damages are too speculative and the issue of damage mitigation through abortion or adoption renders strict tort application unworkable); Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1378 (Ohio 1989) (finding full recovery and the strict rules of tort ill suited for wrongful pregnancy claims); see also Mogill, supra note 75, at 848. The pregnancy-related expenses awarded generally include pain and suffering from pregnancy and birth, cost of a subsequent sterilization, and the lost wages associated with pregnancy and birth. See Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 609 (N.M. 1991) (finding child-rearing expenses compensable, but acknowledging that at least these pregnancy-related damages should be recovered). Thirty-two U.S. jurisdictions permit only the recovery of pregnancy-related damages. Vikingstad, supra note 74, at 1070.
These jurisdictions seemingly refuse to accept the idea that having a child is accompanied by any emotional, physical, or financial downsides. There is no single reason for the judiciary’s general inflexibility on this issue. Rather, multiple rationales may underlie a court’s conclusion. For example, the nation’s ongoing debate over abortion and the increasing influence of the pro-life movement is undoubtedly one possible genesis for a court’s denial. In fact, courts often place a preference for life over nonexistence in the context of wrongful life claims. The argument follows that allowing the claim would suggest that a child could have an overall negative value where the financial and emotional costs of the child outweigh any benefits—a position contrary to the pro-life belief in the inherent value of human life. Additionally, some scholars have argued that the failure of courts to recognize wrongful conception or unwanted pregnancy as harms stems from a deeper systematic oppression of women. Tort law has readily protected those interests traditionally valued by men, but it has been more reluctant to intervene on behalf of women’s interests in cases involving, “for example . . . sexual harassment or sexual abuse.” Yet others contend that the failure of legal systems to adopt a pregnancy harm is rooted in the inability of courts to recognize female work as “worthy of . . . hire,” and thus the mother’s burden of raising the child is considered lacking in merit for compensation. No matter the source of a court’s refusal, the simple calculus fails to acknowledge the less tangible harms women suffer from an unwanted pregnancy, like the loss of reproductive autonomy.

82. Throughout this Comment, I use the term “pro-life” to refer to a belief that life begins at conception.
84. See Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697 (Ill. 1987) (stating “human life, no matter how burdened, is, as a matter of law, always preferable to nonlife”), overruled by Clark v. Children's Mem’l Hosp., 955 N.E.2d 1065 (Ill. 2011). A wrongful life suit involves a claim by or on behalf of a child alleging that the physician or other health-care provider: (1) failed to accurately perform genetic screening tests prior to conception or to correctly inform the prospective parents of the hereditary nature of certain genetic disorders; (2) failed to accurately advise, counsel, or test his parents during pregnancy concerning genetic or teratogenic risks associated with childbirth suggested by maternal age, physical condition, family medical history, or other circumstances particular to the parents; or (3) failed to perform a surgical procedure intended to prevent the birth of a congenitally or genetically defective child. Siemieniec, 512 N.E.2d at 695.
87. Id.
88. See SUSAN ATKINS & BRENDY HOEGGET, WOMEN AND THE LAW 90 (1984); see also Glazener, supra note 71.
89. See PRIAULX, supra note 80, at 10.
Standing in stark contrast to those courts that deny the harm on the “child is a blessing” theory, some courts have been more willing to recognize the long-term burden of child rearing from an unwanted pregnancy due to a physician’s negligence. In awarding full child-rearing expenses in a wrongful conception case, the Wisconsin Supreme Court denied the defendant-physician’s argument that finding a harm in childbirth would impair the sanctity of life. By contrast, the court found that awarding child-rearing costs would actually enhance the child’s well being, thus augmenting, and not deteriorating, the sanctity of life. Alternatively, the New Mexico Supreme Court in Lovelace Medical Center v. Mendez awarded full child-rearing expenses after recognizing that the reasonably foreseeable financial insecurity of the plaintiff’s family, and not the birth of an unwanted child, was the harm inflicted. While suits against third-party physicians for wrongful conception have yielded mixed results, the vast majority of jurisdictions have been willing to award some form of damages for pregnancy-related tort claims against physicians.

Analyzing the divergent perspectives of harm that stem from pregnancy in the wrongful conception context clarifies the damages that may occur as a result of unwanted pregnancy. While courts have demonstrated some reluctance to recognize pregnancy as a harm because of concerns for the sanctity of life, it is increasingly apparent that the real harm from an unwanted pregnancy is not the child itself. By contrast, the disruption of future financial security and the physical threats of a pregnancy are the real damages to parties with an unwanted pregnancy. Surprisingly, few jurisdictions have adopted this sensible perspective. Those courts that have failed to do so would be wise to adopt this framework in keeping with traditional tort law principles that recognize the disruption to financial security and the physical threat of pregnancy.

B. Birth Control Sabotage and Unwanted Pregnancy as a Fraudulent Misrepresentation Between Intimate Partners

Unlike suing a third-party physician in a wrongful conception case, female survivors in violent relationships would make a claim of birth control

91. Marciniak, 450 N.W.2d at 246.
92. Id.
93. Lovelace Med. Ctr., 805 P.2d at 609; see also Vikingstad, supra note 74, at 1103 (reaching the conclusion that courts have misapplied the benefits rule in wrongful conception cases because they have failed to identify the detriment to familial financial security as the harm, rather than the birth of a child).
94. Vikingstad, supra note 74.
95. See supra note 77; supra note 93 and accompanying text.
96. Vikingstad, supra note 74.
sabotage against their own sexual partners. While recent studies show that birth control sabotage occurs with frequency in domestic violence relationships, survivors are not yet advancing claims for birth control sabotage in federal and state courts. This deficiency may indicate that women do not make birth control sabotage claims because they have traditionally failed in tort suits with scenarios of unwanted pregnancies between partners not involving domestic violence. Fraudulent and negligent misrepresentation cases highlight the rationales underlying these failures and the barriers that survivors of sabotage may face. Nonetheless, the recent studies bringing birth control sabotage within the realm of domestic violence should overcome barriers evident in the nonviolent, misrepresentation cases. Recognizing sabotage as part of an ongoing pattern of violence requires that we reassess the way unwanted pregnancies are understood in modern tort law.

Similar to the wrongful conception cases, some courts have awarded damages in wrongful pregnancy suits on the basis of negligent misrepresentation as between sexual partners, though the positive results have been significantly more limited. In these instances, the claim is that a failure to disclose or an affirmative misrepresentation concerning the use of contraceptives resulted in an unwanted pregnancy. Where a man had misrepresented his sterility to his female partner, resulting in her pregnancy, the New York Appellate Division found that, although the claimant had failed to make a case for fraudulent misrepresentation, she adequately demonstrated a claim for negligent misrepresentation. The parties had discussed the use of contraception, but when the male partner told her of his sterility due to a medical condition (despite already having successfully fathered three children), she decided contraception would be unnecessary. In her claim, she argued that the defendant’s representation of sterility was a fraudulent one. The court, however, found that the claimant failed to demonstrate the presence of intent by the defendant—there was no reason to believe the
defendant’s claim of sterility was “spoken recklessly or with knowledge of its falsity.” 106

Instead, the claimant could adequately prove the lesser claim of negligent misrepresentation, as the defendant, though having an honest belief in his sterility, had failed to undertake reasonable care in ascertaining the truth. 107 The court likened the plaintiff’s claim to those of a physician’s negligence in wrongful conception cases. 108 Because the claimant had ultimately terminated the pregnancy, the court awarded her pregnancy-related damages only: reimbursement for the cost of an abortion, transportation to the facility, loss of wages from days missed due to morning sickness and the abortion procedure, and pain and suffering attributable to emotional distress from the pregnancy and the abortion. 109 The woman’s decision to terminate the pregnancy naturally foreclosed the potential for damages associated with childbirth or child rearing. 110 While I would argue that this court came out on the right side of the issue, its decision remains a jurisprudential anomaly.

In contrast to the wrongful conception cases, courts have been reluctant to award damages in unwanted pregnancy claims as between sexual partners on three grounds: (1) the “child as a blessing” justification; 111 (2) privacy concerns; 112 and (3) concern that an award may hinder the welfare of the child. 113 These justifications, however, are inapplicable in the context of birth control sabotage in relationships involving domestic violence.

106. Id.
   Liability in such cases arises only where there is a duty . . . to give the correct information . . . . There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured . . . . Finally, the relationship of the parties . . . must be such that in morals and good conscience the one has the right to rely upon the other for information and the other giving the information owes a duty to give it with care.
108. Id. at 355.
109. Id. at 356–57.
110. A woman’s duty to mitigate the costs of pregnancy and child rearing by obtaining an abortion is beyond the scope of this Comment. For more information on the issue, see Priaulex, supra note 80, at 86.
111. Jill E. Evans, In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility, 36 Loy. U. Chi. L.J. 1045, 1080 (2005) (“Many courts implicitly or explicitly adopted the presumption that has consistently threaded through wrongful birth cases—that the birth of a healthy child is not a cognizable injury. This presumption is premised on the theory that a child (and life) is a benefit and brings joy to the parents, outweighing any burdens that might result.”).
113. See Beard v. Skipper, 451 N.W.2d 614, 615 (1990) (interpreting the Michigan Paternity Act to impose “an obligation to support [one’s] children and [that] the circumstances of a child’s conception do not give rise to an exception to that rule.” The court reasoned that “the child [should not] suffer from one of the parents’ ‘fault’ regarding the conception.”). Typically, the issue of fraudulent representation of sterility or birth control usage arises between intimate partners as a
Recent studies confirming birth control sabotage as a method of domestic violence controvert the traditional rationales for denying damages in unwanted pregnancy cases. First, the assumption that a child is inherently a benefit to a pregnant mother is flawed for reasons in addition to those demonstrated by wrongful conception cases. Giving birth and raising a child within an abusive relationship demonstrates the subjectivity and limitations of the typical pro-life belief that any life has inherent positive value. This belief not only raises the question of whether the positive value of life has any relationship to a positive life experience, but also neatly masks and ignores the inevitable harms and burdens imposed upon unwilling mothers. The birth of a child, fraudulently conceived and brought into a relationship with domestic violence, may ultimately be harmful for the mother and her child. Specifically, children with a parent who abuses another parent are more likely to become victims of physical abuse themselves, and their exposure to violence is likely to cause greater behavioral problems—such as Posttraumatic Stress Disorder (PTSD)—and birth defects resulting from violence experienced during the pregnancy. Raising a child with physical disabilities or emotional problems, either from suffering abuse or from witnessing it, creates significant burdens for a custodial mother. Further, involving children in the relationship increases the likelihood that the mother will stay in the relationship, despite the high probability that she defense to child support obligations by a putative father, rather than as a tort claim for damages. See C.A.M. v. R.A.W., 568 A.2d 556, 558 (N.J. Super. Ct. App. Div. 1990) (“We recognize that in all three of these out-of-state cases the issue arose by way of a father’s counterclaim to a suit seeking to establish paternity and support for the child.”).

114. See supra notes 80–100 and accompanying text.


116. See PETER G. JAFFE ET AL., MAKING APPROPRIATE PARENTING ARRANGEMENTS IN FAMILY VIOLENCE CASES: APPLYING THE LITERATURE TO IDENTIFY PROMISING PRACTICES 4–9 (2006); see also PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 31 (Peter G. Jaffe et al. eds., 2004) [hereinafter PROTECTING CHILDREN] (citing a study that intimate partner violence results in four times the risk of low birth weight and higher incidences of birth defects).
and her children will suffer future abuse. As a result, a woman is effectively tied to her abusive partner. Having a child in a relationship with domestic violence is fundamentally different than having one in a relationship without violence. Courts must recognize this difference and abandon the naive belief that a child has inherent positive value for its parents and society more broadly, especially in cases of birth control sabotage, a form of domestic violence that directly implicates the coercive nature of the pregnancy and the possibility that such child was unwanted.

Second, the right to privacy has also become a significant barrier to relief in situations of contraceptive deception between sexual partners. Plaintiffs alleging birth control sabotage have been denied relief because of the courts’ concern with the privacy of sexual conduct. Once again, reevaluating birth control sabotage as a form of domestic violence gives rise to a policy-based reason for limiting the right to privacy. Courts justifying noninterference because of the right to privacy generally reach the conclusion that sexual conduct between two adults is outside the sphere of judicial oversight; a court, therefore, should not enforce any agreements or representations concerning contraception decisions between sexual partners. By contrast, courts more easily find liability in cases involving the transmission of STIs, despite the obvious right to privacy concerns. Indeed, though similar privacy concerns arise between two consenting adults in the context of STI transmission, courts have found the growing concern about infection sufficient to outweigh any privacy concerns. Clearly, the right to privacy is not an absolute right.

In at least one misrepresentation case between intimate partners, a court found that intentional tortious conduct curtailed the use of privacy as a shield to liability. In Barbara A. v. John G., a California Court of Appeal upheld a

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117. See PROTECTING CHILDREN, supra note 116, at 90.
118. See Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620–21 (Ct. App. 1980). But cf. Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 YALE L.J. 1394, 1409 (2009) (discussing Catharine MacKinnon’s argument that the use of a privacy rationale for constitutional protection of sexual relationships may have “the pernicious effect of further insulating the already overly privatized world of intimate relations from either moral critique or political struggle. Men subordinate women, to a large degree, in private.”).
121. Kathleen K., 198 Cal. Rptr. at 276; see also Murray & Winslett, supra note 120, at 783.
122. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 929 (1992) (“The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.”).
woman’s tort cause of action for an ectopic pregnancy resulting from her partner’s misrepresentation of sterility. The court accepted the woman’s list of harms, which included the pregnancy itself as well as the physical and emotional damage she incurred as a result. Though the court limited damages to pregnancy-related losses, the court overrode the privacy concern, claiming that it would not protect an individual “from all judicial inquiry into his or her sexual relations . . . [and] it should [not] insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other.” Importantly, the court identified the defendant’s intentional conduct as key to its legal conclusion.

Viewed in this light, tort claims of fraudulent misrepresentation based upon the intentional act of birth control sabotage within a broader domestic violence context should succeed. Again, acknowledging birth control sabotage as a form of domestic violence makes all the difference. Overriding health policy concerns, similar to those concerning STI transmission prevention, should govern in cases of domestic violence with birth control sabotage. The State’s interest in limiting domestic violence justifies an invasion into the private sphere, a place that courts are reluctant to tread. Further, the courts’ concern with intentional tortious conduct, as in Barbara A., serves as further justification for limiting the right to privacy in birth control sabotage cases. Recognizing that birth control sabotage is a form of domestic violence justifies the courts’ intrusion into the private sexual relationship as a compelling State interest.

The third justification for failing to recognize such torts is that modifying child support or awarding damages on the basis of a misrepresentation will deprive a child of necessary support obligations. This is seemingly the most reasonable justification. However, rather than working against survivors of domestic violence who become mothers as a result of birth control sabotage, this justification should work in their favor. The argument that recognition of a fraudulent misrepresentation cause of action in birth control sabotage will

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124. Id.
125. Id. at 430–31 (emphasis added).
126. See id.
127. See Town of Castle Rock v. Gonzales, 545 U.S. 748, 780 (2005) (reflecting on the adoption in many states of mandatory arrest statutes, aimed at limiting underenforcement caused by perceptions of police departments that domestic violence was a “private” matter). Indeed, the state has an interest in “vindicat[ing] . . . the criminal justice system, protect[ing] . . . the community at large from future acts of violence by the defendant, reduc[ing] . . . the economic costs of spousal abuse, and protecting individual . . . women.” Ruth Jones, Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser, 88 GEO. L.J. 605, 628 (2000).
129. Cf. Murray & Winslett, supra note 120, at 794–95 (“The state’s interest in preventing the use of fraud by one person to deprive the other of his freedom of choice [in the shape of forced childbearing] is justifiable as a compelling governmental interest.”).
deprive a child of financial support has arisen only in cases where a father alleges the misrepresentation by the mother as a defense to child support obligations. Courts, in interpreting their child support statutes, often hold that considerations such as fault or fraud are irrelevant factors and should not be allowed to deprive a child of financial support. Thus, a claim of fraudulent misrepresentation or birth control sabotage should not serve as a defense to child support obligations.

As one author has suggested, a putative father may be unable to mitigate his duty to support an unwanted child on grounds of a custodial mother’s fraudulent misrepresentation. But when it is the noncustodial father who has made such misrepresentations, it makes sense that he should be apportioned a greater support obligation on the grounds of his wrongdoing. In cases of birth control sabotage where a mother is awarded primary custody, a requirement that the father pay more child support because of his intentional fraudulent misrepresentation will not negatively impact a child’s support. Instead, a greater obligation based on the abusive, noncustodial father’s wrongdoing will only enhance the child’s well being. Undoubtedly, a male victim of sabotage who also is awarded primary custody should receive a similar award, less the more traditional pregnancy-related expenses that he has not incurred. Because of the presence of the partner’s bad intent, punitive damages may be appropriately awarded in the form of higher support obligations. In those instances where a victim of birth control sabotage is not awarded primary custody and has a child support obligation, the mother will likely face the same ruling as noncustodial fathers that raise the defense. Reducing the support obligation will be inappropriate. Nonetheless, a survivor of domestic violence and birth control sabotage should, in some instances, be awarded child-rearing expenses in the form of punitive damages in addition to the more commonly accepted awards of pain and suffering, lost wages, and medical costs.

130. In fact, a mother may make the representation that she is using a particular contraceptive device, or alternatively that she is sterile. See Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245 (App. Div. 1985) (holding that support obligations should be determined on the ability to pay and that fraud, under the New York child support statute, is not a relevant consideration); Hughes v. Hutt, 455 A.2d 623, 625 (Pa. 1983) (holding only “the needs of the child and the means of both parents” and noting that allowing a fraudulent misrepresentation defense “could result in the denial of support to innocent children” so “failure to use birth control [should] have absolutely no place in a proceeding to determine child support”).

131. Hughes, 455 A.2d at 625.


133. But see Hughes, 455 A.2d at 625 (finding that a mother’s misrepresentation about contraceptive use has no place in determining a father’s obligation to pay child support).

134. Cf O’Hara v. W. Seven Trees Corp., 142 Cal. Rptr. 487, 491–92 (Ct. App. 1977) (finding that a female tenant, who was raped in her apartment complex, had sufficiently alleged reliance on a landlord’s intentional, fraudulent representation as to the security of the complex to support a claim for punitive damages).
In sum, recognizing birth control sabotage as a tactic in an ongoing pattern of domestic violence demands a reevaluation of how we view pregnancy in modern tort law. Recognizing birth control sabotage as a form of domestic violence refutes the traditional rationales for denying unwanted pregnancy-related claims. Notably, current judicial approaches tend to follow a typical pro-life framework in their rationales, devalue female reproductive autonomy, and underestimate the value of female labor as mothers—both during pregnancy and afterward. Further, courts have distorted tort law based on justifications such as “the child as blessing” theory or understandings of privacy and child support obligations that do not comport with the context of domestic violence in which birth control sabotage often arises. A proper understanding of the harm from an unwanted pregnancy requires acknowledgment that future financial insecurity and risk of physical harm from the pregnancy and birth—and not the existence of the child itself—is the harm experienced by parents. Recognizing these distortions, the claim of fraudulent misrepresentation should permit a victim of birth control sabotage to recover damages related to her pregnancy and the child-rearing costs she will incur as a result of her abusive partner’s intentional deception—deception that should result in compensatory and punitive awards through heightened child support requirements. The recent studies acknowledging birth control sabotage as an act of ongoing domestic violence should bolster unwanted-pregnancy-related claims against abusers.

III. CRIMINALIZATION OF BIRTH CONTROL SABOTAGE

While modern tort law may provide important remedies for some survivors of birth control sabotage, alone it is insufficient to provide relief to those survivors who concurrently endure other forms of domestic violence or whose abusers do not have the resources to pay higher child support. Fraudulent misrepresentation claims of sabotage would also fail to cover survivors who do not get primary custody of the resulting child. Rather than only awarding monetary damages, utilizing the criminal law may serve purposes beyond the reach of modern tort law. An important aspect of the criminal law is that a criminal’s conviction may result in incarceration. The incapacitation of an abuser better secures the protection of a survivor, and society in general, from her abuser.135 The recent studies demonstrating that birth control sabotage is a form of domestic violence suggest an important role for the criminal law: criminalizing birth control sabotage will help protect the

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survivor from further violence. Without state criminal intervention, abusers will continue to function freely at the expense of their victims’ safety.

Criminalization of birth control sabotage also sends a crucial message that the deceptive destruction of contraception with the intent of causing pregnancy is morally reprehensible and intolerable. A central purpose of the criminal law is to regulate human behavior to reflect society’s condemnation of certain actions. Importantly, a given action in one context may be perfectly acceptable, whereas in the presence of other characteristics it may be considered criminal or tortious. Sexual assault or rape serves as a perfect example. Consensual intercourse is broadly considered a lawful, and often healthy, act; however, when forcefully perpetrated without consent, sexual contact is deemed criminal. Simply recognizing the importance of context demands legal regulation of sexual activity that discerns the intentions of the parties and acknowledges the positive and negative consequences of sexuality.

Context is especially important in the situation of birth control sabotage as well. Statutory protection against birth control sabotage would acknowledge what is already recognized in nonsexual contexts: the will of an individual may be overcome by means other than physical force (e.g., by fear or fraud). A woman may consent to sexual intercourse, but she may do so with the understanding that it is only protected intercourse for which she gives consent. If unprotected, she may have never given consent in the first place. It is the context that makes her perpetrator’s act morally culpable. Criminalizing birth control sabotage, given its context, is vital to communicate community disapproval of this violent and oppressive behavior.

Strikingly, the sabotage of birth control has made no appearance in state criminal codes or in recommendations under the Model Penal Code. While this absence is concerning, the criminal law is not wholly devoid of mentions of contraceptive usage. Some states have passed legislation guaranteeing that the

136. Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 592–93 (1996) (claiming that “[t]he public rejects [alternative sanctions to incarceration] not because they perceive that these punishments won’t work or aren’t severe enough, but because they fail to express condemnation as dramatically and unequivocally as imprisonment”).


138. While the legal term describing unlawful sexual intercourse may vary by state—"rape," “sexual assault,” “unlawful sexual behavior”—for the purposes of this Comment, I use rape and sexual assault interchangeably.

139. See Franke, supra note 29, at 199–200. Franke is concerned that feminist demands for strengthened legal sanctions against sexual violence actually risk supporting the proposition that human sexuality should be limited strictly to reproduction. Criminalization of birth control sabotage, instead, reinforces sex positivism by supporting disentanglement of sex and reproduction and emphasizing recreational, non-reproductive sex for female pleasure. Id.

140. Larson, supra note 137.

141. See id. at 418–20.
mere request by a sexual assault survivor that her aggressor use a contraceptive device is insufficient to show her consent to sexual intercourse.\(^{142}\) Importantly though, no statute suggests that a man’s failure to actually comply with his partner’s request would necessarily revoke any prior given consent. State statutes need to address this absence. Criminalizing birth control sabotage is crucial, if for no other reason than to create the possibility of incarceration and to curtail escalating violence.

This Part details a proposal to criminalize birth control sabotage. First, the Part discusses the outcome of a Canadian case holding that birth control sabotage is a form of aggravated assault. Second, the Part rejects the possibility of adopting a similar model incorporating sabotage into the vagaries of U.S. rape law and instead proposes adoption of an independent statute criminalizing birth control sabotage. Finally, the Part concludes with a brief discussion of feminist concerns with engaging the criminal law and attempts to alleviate those concerns.

A. The Canadian Case: Sabotage as Aggravated Sexual Assault

At least one country has criminalized the efforts of abusers to sabotage their victims’ reproductive wishes. In 2010, the Nova Scotia Court of Appeal recognized a survivor’s claim of birth control sabotage under Canada’s modern sexual assault laws.\(^{143}\) At trial, the defendant, Mr. Hutchinson, was accused of aggravated sexual assault.\(^{144}\) Ms. C. testified she had consented to intercourse with her sexual partner, Mr. Hutchinson, on multiple occasions and that they had used condoms consistently as contraception on each occasion, except during menstruation.\(^{145}\) She further testified that within a few months of their last act of intercourse, she discovered Mr. Hutchinson had pricked holes in the condoms prior to using them for intercourse.\(^{146}\) At trial, Ms. C. adduced text messages containing Mr. Hutchinson’s confession that he had “wanted a baby with [her] so bad [sic] [that he] sabotaged the condoms . . . .”\(^{147}\) In addition, an investigator confirmed that each of the condoms in Ms. C.’s possession had a hole in the center of it.\(^{148}\) The sabotage of Ms. C.’s condoms resulted in pregnancy and a subsequent abortion, which led to infection, extreme bleeding, and severe pain.\(^{149}\)

\(^{142}\) \textit{See, e.g.}, CAL. PENAL CODE § 261.7 (West 2012).
\(^{143}\) \textit{R. v. Hutchinson}, 2010 NSCA 3, para. 3 (Can.).
\(^{144}\) \textit{Id.} at para. 25.
\(^{145}\) \textit{Id.} at para. 7. Ms. C was under the impression that it was not possible for her to become pregnant during her menstrual period. \textit{Id.}
\(^{146}\) \textit{Id.} at para. 8.
\(^{147}\) \textit{Id.} at para. 9.
\(^{148}\) \textit{Id.} at paras. 11–12.
\(^{149}\) \textit{Id.} at paras. 8–9.
Despite the evidence of sabotage, the trial court granted defendant’s motion for a directed verdict of acquittal.\textsuperscript{150} The court acknowledged that Mr. Hutchinson had in fact impregnated Ms. C. by wearing a sabotaged condom and that there was sufficient evidence to show his specific intent to impregnate her.\textsuperscript{151} In reaching its conclusion, the court considered two alternative arguments made by Ms. C.: (1) if consent was found, it was necessarily vitiated by the fraud of Mr. Hutchinson; or (2) there could be no consent because Ms. C. had consented only to protected sex and not to unprotected sex.\textsuperscript{152} Ultimately, the court found both arguments unpersuasive.\textsuperscript{153}

In January 2010, the Nova Scotia Court of Appeal overturned the trial court’s ruling, holding that the facts presented, if believed by a reasonable jury, could justify Hutchinson’s conviction for aggravated sexual assault.\textsuperscript{154} In reaching its decision, the court outlined three necessary elements for the actus reus of sexual assault: (1) touching, (2) the sexual nature of the touching, and (3) the absence of consent.\textsuperscript{155} The court noted that absence of consent is evaluated by considering the victim’s subjective internal state of mind at the time of the touching.\textsuperscript{156} The only mens rea requirement for a sexual assault is that the perpetrator intended the sexual touching with knowledge, recklessness, or willful blindness to the absence of the victim’s consent.\textsuperscript{157}

The court then addressed two questions: (1) whether there was sufficient endangerment to convict for aggravated sexual assault\textsuperscript{158} and (2) whether there was an absence of consent such that Mr. Hutchinson could be convicted of aggravated sexual assault or any lesser degree of assault.\textsuperscript{159} In evaluating the question of consent, the court interpreted two key statutes, the first of which applied to assaults generally, and the second of which applied only to sexual assaults.\textsuperscript{160} As each section provided independent definitions of consent, the court found that the definition of consent in the sexual assault statute necessarily meant “something more than consent to the application of force” that appeared in the more general assault statute.\textsuperscript{161} Essentially, the court

\begin{itemize}
\item \textsuperscript{150} Id. at para. 16.
\item \textsuperscript{151} Id. at para. 13.
\item \textsuperscript{152} Id. at para. 12.
\item \textsuperscript{153} Id. at paras. 14–16.
\item \textsuperscript{154} Id. at paras. 38–40.
\item \textsuperscript{155} Id. at para. 21.
\item \textsuperscript{156} Id. at paras. 21–22.
\item \textsuperscript{157} Id. at para. 21.
\item \textsuperscript{158} For purposes of this Comment, I do not consider whether the crime of birth control sabotage should be considered an aggravated crime because of the serious threat to life that a pregnancy or subsequent abortion may pose. I am strictly concerned with the underlying offense, namely, whether the sabotage of contraception or barrier methods should be considered a sexual assault in the first place.
\item \textsuperscript{159} Id. at paras. 22–24.
\item \textsuperscript{160} Id. at paras. 23–25.
\item \textsuperscript{161} Id. at para. 25.
\end{itemize}
grounded its holding by stretching statutory interpretation: if nonconsent to force is an assault, then consent to a particular “sexual activity” must mean something greater than the limited force required for the sexual act. Based on this interpretation, the court found that a reasonable jury could conclude that there was consent to the application of force that governed assault cases generally; however, the same jury could simultaneously find that there was no consent to the actual sexual activity in question—unprotected sexual intercourse. As the court wisely noted:

[C]onsent implies a reasonably informed choice, freely exercised. . . . Ms. C was entitled to control over her own sexual integrity and to choose whether her sexual activity would include the risk of becoming pregnant through unprotected sex. . . . A choice to assume the risks associated with protected sex does not necessarily include the risks of unprotected sex.

Alternatively, the court concluded that even if consent were found, it was necessarily vitiated by the fraud of Mr. Hutchinson. According to the court, fraud vitiates consent where there is proof of dishonesty resulting in actual harm or a risk of harm. The court held that a reasonable jury could find the defendant guilty of aggravated assault since the pregnancy sufficiently endangered Ms. C.’s life.

The Nova Scotia Court of Appeal’s ruling in *R. v. Hutchinson* marks an important turning point for the treatment of women under the criminal law. An individual subjected to the sabotage of her contraceptive device may now have a persuasive legal claim within Canadian criminal law. This would apparently be the case even absent proof of other acts of domestic violence, just as there was an absence of domestic violence in *Hutchinson*. While domestic violence advocates may celebrate the decision as a major victory for survivors of birth control sabotage in Canada, how might the decision influence treatment of rape and sexual assault in the United States? Would judicial interpretation in the United States likely permit a finding of birth control sabotage as sexual assault?

**B. Why the Canadian Model Will Not Work in American Courts**

It is unlikely that survivors of birth control sabotage will have much success in conforming their claims to the requirements of American sexual assault statutes. Adaptation of the Canadian approach appears unworkable and

162. Id. at paras. 27–28.
163. Id. at paras. 27–28.
164. Id. at paras. 36–37.
165. Id. at para. 40.
166. Id. at para. 29.
167. Id. at paras. 38–40.
168. See id. at paras. 3–6.
at best unwise. First, the Canadian court’s decision relied almost entirely on an attenuated application of statutory construction that would not work in most American jurisdictions. Second, the myriad laws regarding mens rea for consent and the form that consent takes renders a Hutchinson-like approach improbable. Even if some jurisdictions found birth control sabotage to fit into modern sexual assault statutes, the statutory framework is convoluted and fails to distinguish between different types of sexual assault, so it makes little sense to add one more claim to the list. 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. Finally, and most importantly, the prevalence of “generalized consent” in American sexual assault law practically makes the question moot. Given this context, legislatures would be wise to create an independent criminal cause of action for birth control sabotage.

The Nova Scotia Court of Appeal’s construction of its assault statutes, in light of other statutes, will prove an unsuccessful venture for U.S. advocates of a criminal remedy for birth control sabotage. To be sure, the Canadian court succeeded in broadening its interpretation beyond traditional notions of consent applying strictly to sexual intercourse. The court interpreted its sexual assault statute by defining consent in light of the broader assault statute of consent and found that consent may apply beyond the actus reus of penetration and force to the “specific type” of intercourse. The existence of two separate statutes defining consent for different forms of assault made the court’s interpretation possible. Unfortunately, many U.S. jurisdictions do not even define consent in their statutes, and, more often still, they continue to rely on the idea that consent applies only to the application of force. Where this specific notion of consent is adopted and no secondary statute to define consent separately (and potentially differently) exists, a construction like Hutchinson simply is not possible.

Notably, not all members of the Hutchinson court actually subscribed to the majority’s interpretation. The dissenting opinion found that the plain meaning of the statute, in light of its legislative history, could not be read as a broadened consent bordering on the concept of “informed consent” found in

169. See In re Adoption of A.F.M., 15 P.3d 258, 263 (Alaska 2001) (holding that the defendant’s forceful entry into a room, forceful penetration of the victim without her consent, and sabotage of his condom were sufficient facts to support a finding that he had committed a third-degree rape).
171. See supra note 161 and accompanying text.
172. See infra note 193 and accompanying text.
tort law. Of concern, a U.S. court considering a birth control sabotage case could readily reach a similar conclusion based upon statutory construction.

The significant variation across jurisdictions of mens rea requirements for sexual assault makes U.S. adoption of the Hutchinson approach unlikely. In almost all states, each element of the sexual assault must be proved with a specifically defined mental state, rather than the more lenient “morally blameworthy” general intent standard at common law. Under the modern law, the mens rea of rape typically revolves around the mental state of the defendant concerning the nonconsent of the assault survivor. States fall along the entire spectrum of mens rea requirements for nonconsent—from recklessness or negligence to strict liability (with some jurisdictions having no specified mens rea requirement whatsoever). Thus, the mens rea requirement as to the survivor’s consent is treated disparately across jurisdictions.

Beyond variations in the mens rea requirement, many jurisdictions differ in the form that consent may take. Some jurisdictions require that the victim have communicated the absence of consent to her attacker verbally or physically (i.e., her saying no). Other jurisdictions find that nonconsent exists where the attacker failed to obtain his victim’s affirmative consent (i.e., her saying yes). The “yes” model is defended on two grounds: it emphasizes that silence alone does not necessarily mean “yes” and, further, that a woman

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176. At common law, the mens rea requirement was one of general intent. Id. at 1094. The State did not need to show the defendant’s specific state of mind, only that he committed the sexual act with a morally blameworthy state of mind. Id. The requirement of resistance effectively stood in the place of blameworthiness. Donald Dripps, After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?, 41 AKRON L. REV. 957, 961 (2008). Resistance demonstrated that the offender was aware of the victim’s nonconsent. Id. Effectively, these strict requirements limited the number of successful rape claims. See Aviva Orenstein, Special Issues Raised by Rape Trials, 76 FORDHAM L. REV. 1585, 1587–88 (2007) (discussing how successful common law rape claims effectively illustrated a virtuous woman attacked by “a creepy stranger,” but the further the deviation from this construction, the less likely a survivor is to report her rape or society is to believe her). One can imagine how birth control sabotage, where the act of penetration is consented to, would fall well short of the requirements of force under the common law.
178. Id. at 279–82. The Model Penal Code defines these in order, from greatest to least, of the mental state required: (1) knowingly—the actor engaged in conduct and was aware that his conduct would cause a certain result; (2) recklessly—the actor is aware that the attendant circumstances exist, but nevertheless engages in the conduct that a “law-abiding person” would have refrained from; and (3) negligently—the actor is unaware of the attendant circumstances and the consequences of his conduct, but a “reasonable person” would have been aware of such consequences. MODEL PENAL CODE § 2.02(b)–(d).
179. Duncan, supra note 175, at 1099.
180. Id at 1099–1100. See, e.g., CAL. PENAL CODE § 261.6 (West 2012) (defining consent as “positive cooperation in act or attitude pursuant to an exercise of free will”).
may express her assent through nonverbal behavior. Her engagement in sexual foreplay may suggest a nonverbal “yes” to actual intercourse.

A sort of generalized consent to sexual intercourse thus emerges and is often presumed when there is consent to limited sexual contact. This is not a formalized rule, but the presumption exists nonetheless. In fact, it is often the case that a victim’s consent to limited sexual intimacy is presumed to demonstrate her assumption of the risk (a tort principle) for her aggressor’s misinterpretation of limited consent for full consent. This approach incorrectly views sexual contact as an all-or-nothing endeavor. Certainly, a person may be willing to engage in one type of limited sexual contact (e.g., foreplay) with its corresponding risks without assenting to further contact or penetration and its attendant risks (e.g., STIs, HIV, pregnancy). Nonetheless, judicial actors may presume consent to heightened sexual activity if consent is given to other nonintercourse sexual activity within the same sexual transaction.

Generalized consent may also be erroneously presumed between different sexual transactions. The notion that consent to one nonintercourse sexual act may serve as consent to penetration highlights a similar problem underlying the common law’s rejection of marital rape claims—that prior acts (sexual acts or the act of marriage) may demonstrate consent to later sexual acts. Interestingly, although most courts or legislatures have abandoned the idea that rape cannot occur in a marriage, the idea of generalized consent is alive and well. Generalized consent is often presumed, informally, to exist where there has been consent to prior sexual intercourse within the same relationship. Rape shield laws are designed to bar evidence of a victim’s prior sexual history

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182. Id.
183. Acquaintance Rape, supra note 173, at 2346.
184. Id.
185. Id. at 2348.
186. Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CALIF. L. REV. 1373, 1397 (2000) (“But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”) (quoting MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736)).
188. See Acquaintance Rape, supra note 173, at 2342; see also Jennifer Gentile Long, Prosecuting Intimate Partner Sexual Assault, PROSECUTOR, Spring 2008, at 20, 21 (noting the widespread belief that “spouses or other intimate partners who have previously given consent to a partner are not able to withdraw it”).
189. Acquaintance Rape, supra note 173, at 2342–44 (discussing voluntary social companion statutes in Delaware, Hawaii, Maine, and West Virginia).
as evidence that she consented to intercourse on a particular occasion;\textsuperscript{190} nevertheless, an exception exists in most states if the prior sexual intercourse occurred between the victim and the defendant (rather than the victim and another person).\textsuperscript{191} In this case, previous consent is presumed relevant in determining whether there was present consent.\textsuperscript{192} Rape shield laws may protect an individual in stranger rape cases, but, where the survivor has consented to intercourse in the past with one individual, that past consent may be informally imputed to the current sexual act with the same individual.

Finally, while some jurisdictions are left to battle with the “yes” versus “no” models, other jurisdictions have been reluctant to address the issue of consent at all. Many state statutes fail to even outline the meaning of consent.\textsuperscript{193} The reluctance of many jurisdictions to address the issue of consent has left the area of rape law muddled.

A criminal claim for birth control sabotage does not fit well amid the diverse consent requirements for sexual assault and rape in U.S. jurisdictions. While the array of mens rea requirements would pose little concern, as birth control sabotage is an intentional or purposeful act with the specific intent of impregnating a victim, the problem of generalized consent is cause for concern. In those jurisdictions where consent to sexual foreplay is construed as consent to sexual intercourse, one may be concerned that consent to unprotected sexual foreplay (e.g., oral sex with an attendant risk of an STI) may be construed as consent to unprotected sexual intercourse. Of greater concern, generalized consent to unprotected sexual intercourse may be implied where the survivor of birth control sabotage consented to it with the defendant in the past. Avoidance of these concerns requires escape from the statutory framework of sexual assault in favor of clearer requirements for what constitutes the crime of birth control sabotage. Achievement of this goal demands a statute establishing that prior consent to unprotected sex, whether during the same sexual transaction or a prior sexual transaction, cannot take the place of simultaneous consent to current, unprotected sexual intercourse.

In addition to escaping the pitfalls of rape law, criminalizing birth control sabotage as an independent crime would enhance public awareness of criminal conduct and more effectively condemn an offense to women’s reproductive autonomy. Indeed, sexual assault has become such a catchall crime that it encompasses a wide range of behaviors.\textsuperscript{194} The expansion of sexual assault

\textsuperscript{190} Leah DaSilva, Note, The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on MySpace, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 220 (2008).
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Dripps, supra note 176, at 970.
\textsuperscript{194} Samuel H. Pillsbury, Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, 35 LOY. L.A. L. REV. 845, 911 (2002) (“In fact, the conduct encompassed within the legal definition of
laws has been important to the extent that it provides greater protection to potential victims and survivors, though this comes at the expense of diminishing the force of the term. One scholar has noted that “[m]odern rape law reforms may have resulted in statutes that are too broad because they criminalize widely varying sexual misconduct as forcible rape.” 195 Indeed, U.S. statutes and court interpretations of those statutes have conflated varying behaviors and have muddled the requirements necessary for a sexual assault conviction to ensue.196 The evolution of laws related to rape and sexual assault in U.S. jurisdictions has created a legal morass that seemingly will not accommodate the criminalization of birth control sabotage under the current framework. It does not stand to reason that a forcible rapist, who acts out violence in forcing his victim to have sex, should be categorically lumped in with perpetrators of nonforceful, consensual sex where the contraceptive is destroyed. There is an important distinction to be made between the two as to the extent of culpability and the social harm that occurs as a result.197

Further, generally criminalizing distinct acts communicates a socially valuable message. Criminalization of birth control sabotage, in particular, emphasizes that sabotage and violence are public and structural problems, rather than private, individual ones. 198 When a person is convicted of a crime, society is put on notice of the individual’s future dangerousness; this allows individuals, theoretically, to protect themselves from future transgressions.199 If birth control sabotage were merged into the category of sexual assault, then the symbolic value of the term “sexual assault” would in itself be diminished. An individual, aware of her neighbor’s conviction for sexual assault, may mistakenly believe that her neighbor may forcefully assault her (despite the underlying facts that the assault was in the form of birth control sabotage). Birth control sabotage must be treated differently, because it is different.200

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195. Duncan, supra note 175, at 1088.
196. See id.
197. See id. at 1114.
199. See Duncan, supra note 175, at 1123 (“[I]t is important that society be able to tell from one’s conviction whether one is a forcible rapist or another type of sexual offender, such as one who has engaged in nonconsensual sex. As the law currently is applied in too many jurisdictions, it is difficult (if not impossible) to distinguish between the two with reference to the offense of conviction. To alleviate this problem, it is important for jurisdictions to give each offense a distinct label . . . .”). Indeed, one’s criminal status provides signals to others. See generally Devah Pager, The Mark of a Criminal Record, 108 AM. J. SOC’Y 937 (2003) (finding that a criminal record may signal negative credentials and unemployability to potential employers, resulting in adverse employment consequences).
200. Notably, birth control sabotage does often occur simultaneously with sexual assault. See de Bocanegra, supra note 64. Naturally, prosecutors will want to bring both charges in these instances. Because of the heightened risk of an STI that would accompany sabotage of a barrier method, other
C. A Proposed Model Statute for Criminalization of Birth Control Sabotage

In light of these problems, I propose the following model statute for criminalizing birth control sabotage:

1. A person is guilty of the crime of reproductive coercion if he or she:
   a) knowingly or recklessly tampers with a chemical or barrier contraceptive device, against his or her sexual partner’s will, with the specific intent of inducing pregnancy; or,
   b) knowingly or recklessly fails to withdraw, or cooperate with withdrawal, before ejaculation with the specific intent of inducing pregnancy. Subsection (1)(b) shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and the female has agreed in advance to cooperate with withdrawal.

2. Consent to protected sexual intercourse shall not be construed as consent to unprotected sexual intercourse.

3. Past consent to unprotected sexual intercourse, unprotected anal intercourse, unprotected oral sex, or other unprotected sexual touching shall not constitute current consent to unprotected sexual intercourse.

4. Consent to unprotected anal intercourse, unprotected oral sex, or other unprotected sexual touching during the current or previous sexual transaction shall not constitute consent to unprotected sexual intercourse.

5. Attempted use of chemical contraceptives or a barrier method of birth control shall serve as evidence that the victim did not consent to unprotected sexual intercourse.

6. A court shall consider all relevant evidence, including evidence related to prior or simultaneous acts of domestic violence, in determining the occurrence of reproductive coercion.

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201. This term is used to clarify that sabotage may not always involve birth control.

202. “He or she” is used as the crime of reproductive coercion may be perpetrated against either sex. See, e.g., Palmatier, supra note 12.

203. The term “protected” is defined as sexual activity that requires a barrier contraceptive or a chemical contraceptive.

204. Obviously, this means that no evidentiary presumption exists where the agreed upon method is withdrawal. Since no physical evidence would demonstrate agreement to withdraw, any presumption would be in the form of presuming that the victim’s testimony of agreed withdrawal is truthful. Such a presumption would seemingly be unworkable because courts and juries must discern truthfulness from the facts and not from a presumption favoring the woman’s testimony.
The codification of birth control sabotage as a crime would serve several purposes. First and foremost, it would communicate condemnation of the offense. Additionally, the statute would be useful for those women whose birth control is sabotaged, even if the relationship is not otherwise abusive. However, given the high correlation between other forms of domestic violence and that of sabotage, the proposed statute will probably be most useful to survivors of domestic violence who will be protected from further violence where the penalty is incarceration. At the same time, this proposal avoids doctrinal pitfalls by not attempting to force the criminalization of birth control sabotage within the confines of otherwise incongruent crimes like rape and sexual assault.

Reliance on the criminal justice system does not necessarily suggest a foolproof solution to the problem of birth control sabotage. In fact, some scholars have suggested that the criminal justice system has failed to deter violence against women. Other scholars have pointed to the prevalence of gender bias in the courtroom as a problem in criminal prosecution. Further, many feminist scholars have criticized voluntary interaction with the criminal justice system because of its tendency to undermine female agency and sex positivism. While these metacritiques suggest that general reforms in the criminal law are greatly needed, they do not support the view that women should abstain from engaging the criminal law. Exercising police power and adversarial processes to vindicate women’s rights and to dismantle patriarchy is an acceptable endeavor. Feminist skepticism of the criminal justice system situates women outside of civil society and leaves them subjected to a system of justice in which they do not participate. Rather, the criminal justice system needs reform dedicated to advancing the specific interests of women. Criminalization of birth control sabotage is an important step in that direction.

IV.
FRAUD AND EVIDENTIARY PROBLEMS POSED BY CIVIL AND CRIMINAL LIABILITY

By criminalizing birth control sabotage, the criminal law implicitly recognizes sabotage as an act of domestic violence—a forceful crime committed by one partner against another in an intimate relationship.

205. Aurelio José Figueredo, Blame, Retribution and Deterrence Among Both Survivors and Perpetrators of Male Violence Against Women, 8 VA. J. SOC. POL’Y & L. 219, 245–50 (2000) (citing adversarial procedures as contributing to survivor self-blame and the difficulty of pressing charges as discouraging many survivors from accessing the legal system).
208. See id. at 617.
Unfortunately, with many acts of domestic violence, survivors often struggle to meet the high evidentiary burdens of the criminal justice system. In domestic violence cases, victims are often reluctant to testify, and once survivors testify, their claims are often viewed with skepticism by the judiciary. The criminal justice system, though, often recognizes domestic violence as a systemic social ill that must be addressed despite these evidentiary limitations. Hence, states have often given some latitude to survivors of domestic violence to use at trial otherwise inadmissible evidence of previous bad acts.

Admittedly, accusations of birth control sabotage face many of the same evidentiary obstacles as traditional domestic violence claims. After all, how does a plaintiff show the destruction of birth control pills, replacement with placebos, removal of IUDs and vaginal rings, or an abuser’s deceptive failure to withdraw before ejaculation? This Section makes two arguments. First, by categorizing birth control sabotage as a criminal offense falling under the umbrella of domestic violence, prosecutors and survivors could take advantage of the unique evidentiary exceptions carved out for domestic violence survivors. And second, police can ameliorate some of the evidentiary concerns surrounding birth control sabotage by taking basic, precautionary steps upon investigating a claim of birth control sabotage.

First, by categorizing birth control sabotage as a form of domestic violence, prosecutors can utilize unique evidentiary exceptions carved out to protect domestic violence survivors—specifically, prosecutors can potentially admit previous bad acts of domestic violence that may be probative of birth control sabotage. Generally, evidence should be admitted if it is relevant and not unduly prejudicial. The propensity rule, however, bars the introduction of prior bad acts to show that a defendant has a tendency of performing bad acts and thus likely committed the act in question. As domestic violence involves a series of abusive acts and a pattern of behavior, prior bad acts are


210. Aiken & Murphy, supra note 209, at 44–45.

211. See, e.g., People v. Johnson, 91 Cal. Rptr. 2d 596, 602 (Ct. App. 2000) (“The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked, if we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner.”).

212. Id.


particularly important in domestic violence cases.\footnote{Aiken & Murphy, supra note 209, at 56–57.} Similarly, birth control sabotage typically occurs as a single act within ongoing domestic violence. As such, past acts of domestic violence may lead to conclusions about the probability that sabotage actually occurred.

Victims of sabotage will need to rely on theories similar to those for admission of past-acts evidence in domestic violence cases. These theories may include arguing that the propensity rule does not apply, as past abuse is an element of the cause of action, especially where the statute directs a court to consider the history of abuse.\footnote{Id. at 57.} The proposed model legislation in this Comment specifically directs the court to consider other abuse. Alternatively, most rules of evidence permit admission of prior bad acts when relevant to noncharacter issues “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of a mistake, or lack of accident.”\footnote{See, e.g., FED. R. EVID. 404; see also Andrea M. Kovach, Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future, 2003 U. ILL. L. REV. 1115, 1116 (2003) (analyzing state adoption of statutes permitting propensity evidence in domestic violence cases).} Nonetheless, admission may still prove difficult. Admission of past acts on noncharacter theories often requires similarity between the prior acts and the act being charged, rather than considering those past acts as part of an overarching concept of attempts to control another person.\footnote{Kovach, supra note 217, at 1129–30; see e.g., People v. Abraham, 753 N.E.2d 1219, 1227 (Ill. App. Ct. 2001).} Birth control sabotage may not be considered “similar enough” to other forms of physical and verbal abuse to permit admission.

More ideally, state legislatures will follow the few other states that permit propensity evidence for domestic violence cases.\footnote{See Kovach, supra note 217, at 1152. The use of propensity evidence in domestic violence cases is not without its critics. Many argue that use of prior bad acts will distract or confuse a jury or that jurors may overvalue the persuasiveness of such character evidence. \textit{Id.} at 1124–25. Further, a jury may desire to punish a defendant based strictly upon the prior bad acts committed, and not the offense for which the individual is on trial. \textit{Id.} Despite the seeming validity of these concerns, where states have already decided to consider prior bad acts in domestic violence cases, there is no reason to exclude their consideration in claims of birth control sabotage. For those states not currently admitting prior bad acts in domestic violence cases, necessity favors their admission into evidence. \textit{Id.} at 1126–27; see also Aiken & Murphy, supra note 209 and accompanying text.} Indeed, California adopted a rule of evidence to specifically permit admission of propensity evidence in criminal domestic violence cases.\footnote{CAL. EVID. CODE § 1109(a) (West 2012).} Rules permitting evidence of past bad acts for domestic violence and birth control sabotage are justified by the “need[] to build a just and fair case against a defendant whose abuse typically is without witnesses or other evidence.”\footnote{Kovach, supra note 217, at 1131–32.} Practitioners may successfully argue to extend
this logic to civil cases. Allowing admission of propensity evidence in birth control sabotage cases, both civil and criminal, will aid survivors in overcoming evidentiary barriers while continuing to limit fraudulent claims where no other violence exists.

Second, police and medical personnel can address basic evidentiary concerns by taking uniform, precautionary measures to preserve evidence upon investigating a claim of birth control sabotage. Good evidence collection will be especially important in cases of sabotage where no prior acts of violence or abuse exist. In investigating, police will want to collect tampered or manipulated birth control pills, condoms, IUDs, vaginal rings, or other intentionally damaged contraceptives. Further, police and medical personnel can preemptively address potential evidentiary concerns by using rape kits each time a survivor makes a birth control sabotage claim. This would be particularly useful in avoiding fraudulent claims of sabotage, while also identifying actual evidence of previous domestic violence or birth control sabotage. Additionally, the admission of prior bad acts of violence (perhaps revealed by the rape kit and physical exam) may permit a victim to meet her evidentiary burden while also avoiding fraudulent claims. For example, a rape kit and physical exam may reveal forceful removal of an IUD or vaginal ring, in addition to any other force or violence perpetrated on the survivor. The rape kit’s revelation of force may be especially important in those cases of failure to withdraw. However, this will only be useful to the extent that the woman learns of her partner’s failure to withdraw or intent to not withdraw and then physically resists, leaving physical evidence discoverable by medical personnel administering the rape kit. As the vast majority of birth control sabotage incidents happen in relationships of violence, evidence collected showing violence or force may be probative on whether sabotage actually occurred. Of course, this concept is not entirely novel; police and medical personnel practices in collecting evidence, taking testimony, and maintaining records may generally prove an important source for overcoming any evidentiary burdens in other situations as well. Nonetheless, law enforcement can address evidentiary concerns through basic preemptive tactics.

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222. Aiken & Murphy, supra note 209, at 62.

223. The Police Investigation, CRISIS INTERVENTION CENTER (Feb. 28, 2009, 4:05 PM), http://crisisinterventioncenter.org/index.php?view=article&id=72. A rape kit is a sexual assault evidence collection kit administered by a Sexual Assault Nurse Examiner or a forensic examiner with specialized training. What Is a Rape Kit?, RAPE, ABUSE & INCEST NAT’L NETWORK, http://www.rainn.org/get-information/sexual-assault-recovery/rape-kit (last visited Mar. 2, 2012). The exam permits the examiner to obtain a complete medical history of the victim; collect blood, urine, hair, and other body secretion samples; compile photo documentation; collect the victim’s clothing (especially undergarments); and collect any possible physical evidence transferred onto the victim. Id.

224. Aiken & Murphy, supra note 209, at 52–53. It is also worth noting that police should be careful to record any “excited utterances” documented in the police report that may be probative of the birth control sabotage. Id. (internal quotation marks omitted).
Clearly, evidentiary exceptions and evidence collection tactics leave much to be desired. Women who experience sabotage but have not experienced prior abuse will have to rely on the collection of evidence showing the manipulation of a contraceptive, or, in the case of withdrawal, evidence of force demonstrating a woman’s non-consent to procreative sex. Where force was not used or where it cannot be proved, however, victims of sabotage will be left to rely on the weight of their own testimony. This may be especially true in instances where withdrawal is the agreed upon method of contraception. The law is not perfect in this regard. Nonetheless, the creation of a presumption of nonconsent where barrier or chemical contraceptives are used coupled with consideration of prior acts of domestic violence is an important step in closing the evidentiary gap.

CONCLUSION

The high rate of birth control sabotage, documented by recent studies, has elicited concern in the domestic violence and reproductive rights advocacy communities. Despite identification of the emerging problem, no scholarship has recommended tort or criminal remedies for women subjected to this form of reproductive abuse. This Comment takes that initiative. Adoption of compensatory and punitive tort damages for abusers who intentionally misrepresent contraceptive usage to induce a pregnancy is an important legal tool to put female survivors of violence in control of their reproductive lives. Recognizing birth control sabotage as a form of domestic violence puts the tort claim beyond traditional rationales for rejecting wrongful pregnancy claims. Additionally, criminalization of contraceptive sabotage as an independent crime is another important remedy that legislatures should consider in order to effectively address the growing problem of birth control sabotage and domestic violence. An independent crime of sabotage is essential in curtailing domestic violence. A thoughtful reconsideration of the civil and criminal approach to birth control sabotage can better protect survivors and move our country closer to eradicating domestic violence.