

## ARE YOU THERE, LAW? IT'S ME, SEMEN

ANITA BERNSTEIN\*

Joining a conversation about menstruation and the law, this Essay interprets “law” to mean regulation—a source of burden, constraint, and interference justified by reason. The object of my regulatory agenda is a substance perceived by Western thinkers at least since Aristotle as the superior counterpart to menstrual fluid.<sup>1</sup> Traditions that celebrate semen as vital or affirmative, while recoiling from and controlling the other gendered emission that hurts no one, get reality backward. Law as burden, constraint, and interference ought to regulate semen and leave menstrual fluid alone.

Contrast the two substances. One of them started out with the potentially useful function of building a uterine lining. That possibility concluded, menstrual fluid is benign. The other effluvium started out with the potentially useful function of launching a pregnancy. Pregnancy is a good thing when it is desired by the person who has to live with the bulk of pregnancy’s detriments. Along with its capacity to do an important job, semen causes quite the array of harms.

A statute on point for this purpose, the Federal Hazardous Substances Act, regulates material that “may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use.”<sup>2</sup> Because semen “has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface,” it also aligns with the definition of “toxic” in the statute.<sup>3</sup> Judges, policymakers, litigants, and ordinary people can all learn from well-established legal labels to understand semen as a stark example of an externality.

---

\* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. My thanks to Bridget Crawford and the *Columbia Journal of Gender and Law* for pioneering work in a new legal field. The whole of their Symposium is greater than the sum of its parts.

<sup>1</sup> ADRIEL M. TROTT, ARISTOTLE ON THE MATTER OF FORM: A FEMINIST METAPHYSICS OF GENERATION 143–44 (2019).

<sup>2</sup> 16 C.F.R. § 1500.3(4)(i)(A).

<sup>3</sup> *Id.* at § 1500.3(5).

Nothing in this statute impedes the characterization I propose: The FHSA lists substances that lie outside its purview,<sup>4</sup> and semen is not among them. Labeling, containment, and emergency protocols—splash protection, if you like—are the hazardous-substance safety impositions I would apply to semen.

## I. Semen Danger

### A. Spermatozoa in It

Led by the United States Supreme Court, law worsens the dangerous nature of semen by thwarting repair of one of the key harms it inflicts, the commencement of an unwanted pregnancy. Ideologues have worked diligently for decades to obstruct a termination right after the Court found it in the United States Constitution. Proceeding at an accelerated pace in 2011-2019, states enacted 483 abortion restrictions to join older post-*Roe* interferences.<sup>5</sup> With six Justices, including the most recently nominated youngish third of the nine, holding staunchly anti-abortion judicial records, the Court as currently comprised opposes the prerogative of an individual to undo an injury done to her by semen.

Law-based interference with the rectification of semen-caused harm apparently need not make sense for courts to uphold them. Judges ask whether the burden that an impediment imposes is “undue,”<sup>6</sup> an indeterminate adjective that in practice has enabled incoherent and severe burdens to flourish. States whose laws ascribe personhood to a fertilized egg also permit fertility clinics to throw it in the trash.<sup>7</sup> The Supreme Court has upheld legislation that forces formerly pregnant persons and abortion providers to treat a fetus-corpse as human “remains” and give it a dignified burial or cremation, no matter

---

<sup>4</sup> They include foods, drugs, tobacco, and fuels used for heating. *Id.* at § 1500.3(4)(ii).

<sup>5</sup> State Facts About Abortion: Louisiana, GUTTMACHER INST. (Jan. 2021), <https://www.guttmacher.org/factsheet/state-facts-about-abortion-louisiana> [<https://perma.cc/VU6M-8GSZ>].

<sup>6</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992).

<sup>7</sup> Margaret Newkirk, *Why Alabama's Abortion Law Includes an Exemption for Infertility*, BLOOMBERG (Mar. 29, 2019), <https://www.bloomberg.com/news/articles/2019-05-29/why-alabama-s-abortion-law-includes-an-exemption-for-infertility> [<https://perma.cc/7KUD-8S9E>]; Jerry Lambe, *Alabama Exempts IVF Embryos from Abortion Law*, LAW & CRIME (May 29, 2019), <https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/> [<https://perma.cc/SP9T-GG83>].

that this material warrants the label “medical waste.”<sup>8</sup> A federal statute tendentiously named the Partial-Birth Abortion Ban Act won approval in the Court even though “partial-birth abortion” originates in misogynous rhetoric and fever dreams rather than any health science.<sup>9</sup> Legal-institutional actors, in short, enable semen to wreak havoc by imposing indefensibly hard-to-terminate pregnancy on the unwilling.

Semen-associated havoc also ensues when pregnancy follows rape and the woman who was raped chooses to remain pregnant. Acceptance of a pregnancy and a baby seems patently different from acceptance of a durable shared-parenting relationship with an adult malefactor, but numerous states show indifference to the difference by requiring a criminal conviction of rape before a rapist-inseminator can be denied custody of the child he generated by his wrongful act.<sup>10</sup> “We do not require convictions for termination of parental rights for such reasons as child abuse, neglect and habitual drug offenses,” noted one lawyer-activist after fending off the custody initiative of an inseminator who had not been convicted of raping her.<sup>11</sup>

## B. Seminal Fluid

The liquid that houses spermatozoa delivers more risks than formation of an unwanted pregnancy. Contact with semen can infect a recipient with the STD bacterial Big Three of syphilis, gonorrhea, and chlamydia. Moving beyond bacteria, a 2017 article in *Science* reported that dozens of viruses have been found in semen;<sup>12</sup> experts believe

---

<sup>8</sup> Jan Maienschein, *Dead Fetuses Are Not “Remains”*, SLATE (May 31, 2019), <https://slate.com/technology/2019/05/dead-fetus-burial-laws-personhood-indiana-texas.html> [<https://perma.cc/7ACG-XJZR>].

<sup>9</sup> See *Gonzales v. Carhart*, 550 U.S. 124 (2007); Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 255 n.303 (2020) (noting a medically correct term for this procedure, “abortion[] accomplished by intact dilation and evacuation”).

<sup>10</sup> *Parental Rights and Sexual Assault*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 9, 2020), <https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx> [<https://perma.cc/W6ZP-CGVQ>].

<sup>11</sup> Analyn Megison, *Do Rapists Have Parental Rights? Unfortunately, It Varies by State*, USA TODAY (June 19, 2019), <https://www.usatoday.com/story/opinion/voices/2019/06/19/abortion-laws-bans-rape-parental-rights-column/1432450001/> [<https://perma.cc/E54F-GFBK>].

<sup>12</sup> Karl Gruber, *Human Semen Can Host Up to 27 Different Viruses*, SCI. MAG. (Sep. 20, 2017), <https://www.sciencemag.org/news/2017/09/human-semen-can-host-27-different-viruses> [<https://perma.cc/SUY2-G3QK>].

that more are present.<sup>13</sup> Of them, HIV, is especially significant: people still die from it. “Though not all 27 viruses are capable of person-to-person transmission,” the *Science* article continued, “they can have other serious consequences, like reducing fertility or increasing the risk of acquiring a sexually transmitted disease.”<sup>14</sup>

Citing a 2017 source on viruses during a 2021 pandemic feels quaint. Researchers have found Covid-19 in semen.<sup>15</sup> Other pathogens—Ebola, Zika, Lassa—also repose there.<sup>16</sup>

The gender-neutral phrase “sexually transmitted disease” obscures the non-neutral fact that intimate contact with semen is more likely to convey illness than intimate contact with fluids emitted by the vagina,<sup>17</sup> menstrual fluid included. Worse consequences too: Chlamydia, for example, can travel from a woman to a man, but on arrival it will do his body much less harm. A government fact sheet on human papillomavirus that does not explicitly focus on semen as a vector acknowledges that women experience more HPV-related cancers more than men.<sup>18</sup> “Men who receive anal sex are more likely to get anal HPV and develop anal cancer,”<sup>19</sup> it adds. Different afflicted populations, same culprit.

---

<sup>13</sup> Alex P. Salam & Peter W. Horby, *The Breadth of Viruses in Human Semen*, 23 EMERGING INFECTIOUS DISEASES 1922, 1923 (2017).

<sup>14</sup> Gruber, *supra* note 12.

<sup>15</sup> *Covid-19 Found in Semen of Infected Men, Say Chinese Doctors*, THE GUARDIAN (May 7, 2020), <https://www.theguardian.com/world/2020/may/07/covid-19-found-in-semen-of-infected-men-say-chinese-doctors> [<https://perma.cc/FW8Y-SVTW>].

<sup>16</sup> Heinz Feldmann, *Virus in Semen and the Risk of Sexual Transmission*, 378 N. ENG. J. MED. 1440 (2018).

<sup>17</sup> CDC FACT SHEET, 10 WAYS STDS IMPACT WOMEN DIFFERENTLY FROM MEN (2011); Nancy S. Padian et al., *Heterosexual Transmission of Human Immunodeficiency Virus in Northern California: Results from a Ten-Year Study*, 146 AM. J. EPIDEMIOLOGY 350 (1997); Alfredo Nicolosi et al., *The Efficiency of Male-to-Female and Female-to-Male Sexual Transmission of the Human Immunodeficiency Virus: A Study of 730 Stable Couples*, 5 EPIDEMIOLOGY 570 (1994).

<sup>18</sup> See *HPV and Men – Fact Sheet*, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm> [<https://perma.cc/R9EZ-2NGZ>].

<sup>19</sup> *Id.*

## II. Semen Safety: Lessons from the Federal Hazardous Substances Act and the Consumer Product Safety Commission

Any hazardous substance that must be lived with rather than commanded to go away aligns well with the Consumer Product Safety Commission approach to risk. Tasked with regulation of hazardous substances present in ordinary life, this agency rarely resorts to the banhammer. Its authority to forbid the sale of an item exists if “the public health and safety can be served **only** by keeping such articles out of interstate commerce,”<sup>20</sup> and its list of consumer products too dangerous to be lawfully sold is short.<sup>21</sup>

Both the Federal Hazardous Substance Act and the CPSC presume that encounters with dangerous materials can take place with reasonable safety. The FHSA mandates precautions that lay consumers can understand. Hazardous substances in this perspective are not too peculiar, exotic, scary, or remote to contemplate. People integrate them into daily routines.

The Commission addresses prospective contact with a hazardous substance by recommending an approach that can be read as three practical, conduct-focused questions that a consumer might ask.<sup>22</sup> The first, covered most directly by what the CPSC calls “precautionary labeling”: *To guide my decision about whether to engage with this substance, what information do I need?* The second question amounts to *When I interact*

---

<sup>20</sup> 16 C.F.R. § 1500.17(a) (emphasis added).

<sup>21</sup> *Id.* The list names familiar products—items like water repellants, drain cleaners, toys, and paint—whose danger exceeds spelled-out quantitative thresholds.

<sup>22</sup> *Federal Hazardous Substances Act (FHSA) Requirements*, CONSUMER PRODUCT SAFETY COMMISSION, <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/FHSA-Requirements> [<https://perma.cc/9V8H-93W5>] (“The Federal Hazardous Substances Act (FHSA) requires precautionary labeling on the immediate container of hazardous household products to help consumers safely store and use those products and to give them information about immediate first aid steps to take if an accident happens.” U.S. Consumer Product Safety Commission, *Federal Hazardous Substances Act (FHSA) Requirements*. As one can see from the URL, this summary is written to inform regulated businesses, but it has a consumer perspective in mind.)

with the substance, how can I contain it safely?<sup>23</sup> Third: In case of exposure, what can I do by way of first aid? These questions suggest a three-point approach to semen safety.<sup>24</sup>

### A. Labeling to Inform the Choice About Contact

“To the willing, there is no injury,” says a famous Latin maxim. Its short form, “volenti,” is etymologically related to the English words voluntary and volunteer. *Volenti non fit injuria* has several applications in the law: it fits most closely with assumption of risk, a negligence doctrine. Assumption of risk has another defining element besides willingness: The person who encountered the risk willingly must also have understood it. When both knowledge and volition are present in the dangerous encounter, the person who chose to accept a risk has gained what she wanted. She has not been wronged by the risk-imposer and so will not receive compensatory damages for what she experienced.

Semen as a hazardous substance implicates both the knowledge and the volition criteria for assumption of risk. Knowledge first: Most people, I suppose, know about an association between exposure to semen and two consequences that endanger human beings, pregnancy and sexually transmitted disease. But other significant risks are less well known.<sup>25</sup> Regarding volition, it appears uncontroversial that not every reception of semen into, or onto the surface of, a human body occurs *volenti* for persons whom the substance touches.

Courts that hear negligence claims do not presume that an injured person had knowledge or volition with respect to a risk that resulted in injury. Assumption of risk is an affirmative defense rather than a default stance. For acceptance to be an option at the receiving end of a risk, rejection of it must also be an option.

---

<sup>23</sup> The first and second questions overlap but are distinct. Cf. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) cmt. i (1998) (noting that warnings enable a consumer to “prevent harm” in two ways: “either by appropriate conduct during use or consumption or by choosing not to use or consume.”).

<sup>24</sup> Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” from the “Need to Know” About Consumer Product Hazards*, 11 YALE J. REG. 293, 300 (1994) (covering these three points by noting that the FHSA says that a “warning statement must identify the hazard . . . , include a description of appropriate precautionary and first-aid measures, and provide instructions for handling the product.”).

<sup>25</sup> Research that I did for this Essay yielded information new to me, and I am confident I did not start out exceptionally ignorant.

Hazardous substances accordingly give rise to an entitlement that the *Restatement of Torts: Products Liability* calls “choosing *not* to use or consume.”<sup>26</sup> Avoidance of the hazard must be possible. The Yes answer to “Are you there, law? It’s me, semen” starts by supporting an informed decision to avoid contact. Deciding to avoid another person’s semen needs no reason. Even caprice ought to be good enough to ward off contact with a hazardous substance.

Here the counterpart to “precautionary labeling” as mandated by the Federal Hazardous Substances Act is not warning in verbiage, which does a poor job of relaying information about danger,<sup>27</sup> but expansion of public awareness, a social change that criminal and civil penalties for wrongdoing involving the transmittal of semen can aid. To start with criminal liability: Awareness of semen as a hazardous substance expands rape in the eyes of the law.

Until semen is recognized as hazardous, the line between rape and mere “sex” is more emotional or attitudinal than reliably factual,<sup>28</sup> unless the aggressor happens to throw in another variation on assault or battery. Aversion, inclination, disinclination, rejection, assent... if semen is benign, then rape versus non-rape exists mainly in our heads. Exposing another person to hazardous matter, by contrast, is unambiguously dangerous and antisocial conduct. Codified federal law provides extensive criminal penalties for misuse of such substances.<sup>29</sup> As for civil liability, close parallels exist between unwanted sexual penetration and actionable incursion into the premises of another,<sup>30</sup> and trespass to land becomes a pricier tort when it delivers pollution or contamination.

Gentler communications than crime and tort being desirable sources of “precautionary labeling,” children and adolescents can and should receive instruction about the hazards of semen along with the official school curriculum that teaches them the related subject of environmentalism (and the tacit social curriculum that teaches them

---

<sup>26</sup> See *supra* note 23 (emphasis added).

<sup>27</sup> See Noah, *supra* note 24.

<sup>28</sup> Cf. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 211 (1989) (exploring rape versus “sex” with reference to pornography).

<sup>29</sup> See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136l (b); Toxic Substances Control Act, 15 U.S.C. § 2615(b)(2)(A); Federal Hazardous Material Transportation Law, 49 U.S.C. § 5124.

<sup>30</sup> Anita Bernstein, *Rape is Trespass*, 10 J. TORT L. 1 (2017).

to feel demeaned or repelled by menstrual fluid).<sup>31</sup> Un-gentle though they may be, criminal and civil consequences for wrongful acts that put semen into or onto the body of another person against the will of the recipient are part of the same precautionary-labeling project. Law as applied and enforced generates not just sanctions that land on individuals but instruction *pour encourager les autres*.

## B. Safe Containment

Orderly coexistence with hazardous substances requires safe separation between them and a human body. Contact with another person's penis need not necessarily mean contact with his semen any more than holding a jug of bleach necessarily puts this liquid on the holder's hands. Governments give away condoms; they ought to give away more. Law and policy routinely require containment;<sup>32</sup> they can also demand and support the containment of semen.

My suggestion that condoms ought to be cheap if not free echoes leadership by Bridget Crawford and other contributors to this Symposium on the importance of supplying menstruation-containment materials to people who use them.<sup>33</sup> Both menstrual discharge and semen must be containable for persons to flourish because each human body visibly emits one of these fluids without deference to the thoughts and wishes and plans that people pursue. Splashes of both liquids might or might not be welcome sights; containment keeps the substances accessible for benefits they offer while curbing their tendency to disrupt. Semen containment as a goal can learn from the example of menstrual-fluid containment. Wrappers, discreet-looking packaging, and opaque bins for discarded pads and tampons convey a pertinent command of *Unless everyone present wants to engage with it, put it away* that the other gendered effluvium also ought to receive.

---

<sup>31</sup> Instructors can relay this message in 'sex positive' terms. Awareness of semen as hazardous is entirely compatible with the pursuit of sexual pleasure gained by intimate contact with a male body. Pleasure might require the opportunity to ejaculate, but it doesn't require anyone to receive an injection of risk.

<sup>32</sup> Examples include fencing-in rules, Superfund cleanups, product recalls, and orders to abate a hazard like asbestos.

<sup>33</sup> Christopher A. Cotropia, *Law's Ability to Further the "Menstrual Movement"*, 41 COLUM. J. GENDER & L. 53 (2021); Amy Fettig, *Menstrual Equity, Organizing and the Struggle for Human Dignity and Gender Equality in Prison*, 41 COLUM. J. GENDER & L. 76 (2021); Valeria Gomez & Marcy Karin, *Menstrual Justice in Immigration Detention*, 41 COLUM. J. GENDER & L. 123 (2021).



Child support imposed on reluctant biological fathers offers an example of containment as well-established law and policy. Depositing semen into a vagina is an act whose risks can almost always be eliminated or reduced by the choices of a male participant. He can use a condom. He can abstain. When he could have avoided risky rendering of semen and did not, an ejaculator usually is—and ought to be—liable to pay for this consequence of non-containment.

### C. Safety After Exposure

Consistent with the view that individuals are entitled to “information about immediate first aid steps to take if an accident happens,”<sup>34</sup> the law ought to enhance safety for individuals with whose bodies this substance makes contact. The same no-questions entitlement to reject semen before it reaches oneself continues after it lands. Semen does little for most recipients unless they want its gametes, and so presuming rejection of this risky substance rather than acceptance is a good default. Post-intercourse contraceptives, prompt and easily reached treatment of sexually transmitted disease, and termination of unwanted pregnancy at the election of the pregnant person are “first aid steps” that government ought to make available when this hazardous substance jeopardizes human safety.

Access is only the beginning of first aid, however. Retaining the analogy approach to my thesis with which this Essay began, I mention naloxone, the opioid antagonist that American governments seem keen to distribute. “Be prepared. Get naloxone. Save a life,” touts the Surgeon General’s website.<sup>35</sup> Every state has in recent years enacted laws to increase public access to this medication.<sup>36</sup>

Taking pride in its choice to help persons endangered by their consumption of illegal drugs like heroin and synthetic fentanyl shows that law and policy can focus on the value of historically disesteemed human bodies, emphasizing rescue over punishment when

---

<sup>34</sup> See *supra* note 20.

<sup>35</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL, *U.S. Surgeon General’s Advisory on Naloxone Opioid Overdose* (Apr. 5, 2018), <https://www.hhs.gov/surgeongeneral/priorities/opioids-and-addiction/naloxone-advisory/index.html> [<https://perma.cc/H984-QK6M>].

<sup>36</sup> Edward M. DeSimone II, Jennifer A. Tilleman, Kelsey A. Kaku & Chace T. Erickson, *Expanding Access to Naloxone*, U.S. PHARMACIST (Mar. 16, 2018), <https://www.uspharmacist.com/article/expanding-access-to-naloxone> [<https://perma.cc/2QMQ-5JV7>].

vulnerable people fall in peril.<sup>37</sup> If having broken the criminal law is compatible with the receipt of taxpayer-funded kindness, then persons harmed or jeopardized by contact with semen—the large majority of whom did not do anything blameworthy enough to deserve what this hazardous substance can wreak on them—ought to enjoy similar first aid. Their entitlement to receive help and support, like the emergent entitlement to naloxone, ought to be blazoned.

---

<sup>37</sup> This evolution is especially heartening for us who remember how state actors have treated persons imperiled by their consumption of crack cocaine.