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Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage

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EDUCATION NOT HANDCUFFS: A RESPONSE TO PROPOSALS FOR THE CRIMINALIZATION OF BIRTH CONTROL SABOTAGE

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> "Just when I thought I broke away and I'm feelin' happy you try to trap me. Say you pregnant and guess who the daddy. Don't wanna fall for it, but in this case what could I do? So now I'm back to makin' promises to you, tryin' to keep it true. What if I'm wrong, a trick to keep me holdin' on."[1]

The tale of the deranged woman who pokes holes in her partner's condom or tells him that she is on the pill when she is not, in an attempt to get pregnant, is engrained in our society.[2] However, recent research in the medical community should dispel any stereotype that the perpetrators of this act, termed "reproductive coercion," are women.[3] Indeed, women – primarily those in abusive relationships – are more likely to have their contraceptive methods sabotaged by their male partners in order to promote pregnancy.[4]

The high prevalence of reproductive coercion among women who experience intimate partner violence raises the question of whether this "birth control sabotage," a form of reproductive coercion,

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[1] 2 PAC, DO FOR LOVE (Interscope Records 1998) (displaying the idea that women try to trap men by getting pregnant).

[2] Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L., 275, 289 n.93 (2015) (citing films, songs, and storylines that perpetuate this tale).

[3] *See generally* Elizabeth Miller, et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 316 (2010); Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737 (2010).

[4] *Id.*

should be criminalized.[5] But criminalization is not an appropriate legal response to the prevalence of birth control sabotage.[6] This Comment argues that the criminalization of birth control sabotage would be inappropriate because establishing the mental state of a perpetrator of birth control sabotage would be too difficult to enforce.[7] Further, analogizing the crime of birth control sabotage to current domestic violence crimes, the criminalization of birth control sabotage would foster the underreporting of birth control sabotage, which would ultimately mask enforcement measures; deter female victims from seeking prenatal care; and perpetuate the mass incarceration of minority men.[8]

Part I of this Comment discusses the association between reproductive coercion and intimate partner violence and the prevalence of reproductive coercion. Part II identifies the current proposals for the criminalization of birth control sabotage and the rationales behind them. Part III discusses potential ramifications of criminalizing birth control sabotage and reproductive coercion in general. Finally, Part IV proposes alternatives to criminalizing birth control sabotage and reproductive coercion.

I. INTIMATE PARTNER VIOLENCE AND REPRODUCTIVE COERCION

In a 2010 study, Dr. Elizabeth Miller quantified the association between intimate partner violence and reproductive coercion.[9] While "researchers are not clear which comes first – whether reproductive coercion is an early predictor that a relationship will become abusive or whether [reproductive coercion] emerges from an already abusive relationship – the correlation between the two is clear."[10] Miller's

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[5] *See* Leah A. Plunkett, *Contraceptive Sabotage*, 28 COLUM. J. GENDER & L. 97, 98 (2014) (noting that "[t]he identification of birth control sabotage as a fairly widespread but widely ignored social problem raises critical questions for law as well as for medicine, including whether there should be criminal consequences for saboteurs.").

[6] *See infra* Part III.

[7] *Id.*

[8] *Id.*

[9] *See* Miller, *supra* note 3, at 319.

[10] Erin Liotta, *Detecting Reproductive Coercion: Teen Pregnancy as a Red Flag*, 32 J. NAT'L CTR. FOR YOUTH L. (2013), *available at*

study found that women who experienced intimate partner violence were more likely to also experience reproductive coercion.[11] This part discusses intimate partner violence and the reproductive health outcomes of women who experience intimate partner violence. A discussion of reproductive coercion follows.

A. Intimate Partner Violence Defined

Intimate partner violence (IPV) is defined as "physical, sexual, and emotional abuse and controlling behaviors by an intimate partner."[12] Physical IPV includes slapping and hitting.[13] An example of sexual IPV includes forced sexual intercourse.[14] Emotional IPV may include insults, intimidation and threats.[15] Controlling behaviors include isolation from family and friends, stalking, and limiting access to money, education, and employment.[16] The term "IPV" is used interchangeably with "domestic violence," "violence against women" or "gender based violence." Because many victims do not disclose their experiences of abuse due to fear that reporting the abuse may lead to further abuse, the true prevalence of IPV is unknown.[17] Nonetheless, it is estimated that 1 in 4 women in the United States experience IPV.[18] IPV risk is highest among adolescents and young adults.[19]

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http://www.youthlaw.org/publications/yln/2013/jan_mar_2013/detecting_reproductive_coercion_teen_pregnancy_as_a_red_flag/.

[11] Miller, *supra* note 3, at 320 (Reproductive coercion was reported in the absence of physical or sexual partner violence in 7% of a sample of 1278 women, ". . . suggesting women's experiences of reproductive controlling behaviors by men who do not physically or sexually abuse them are less common than among women who have experienced partner violence").

[12] WORLD HEALTH ORGANIZATION & PAN AMERICAN HEALTH ORGANIZATION, UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN: INTIMATE PARTNER VIOLENCE (2012), *available at* apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *See* Camp, *supra* note 2, at 22–23. Other reasons women do not report IPV include fear that disclosing abuse to a medical provider will prompt the provider to report abuse to the police, fear of being judged or feelings of shame. *Id*. at 23.

[18] Miller, *supra* note 3, at 316.

[19] *Id*. Women ages 16 to 24 experience the highest rates of intimate partner violence. Camp, *supra* note 2, at 21, n.99.

B. Reproductive Health Consequences of IPV

Jay Silverman, a leading global researcher on gender-based violence, notes that IPV is a major contributor to poor reproductive health among women and girls.[20] IPV is linked to unintended and unwanted pregnancy, sexually transmitted infections including HIV, induced abortions, and repeated abortions.[21] Women who experience IPV are twice as likely to report unintended pregnancy, twice as likely to have an induced abortion, and three times more likely to have multiple abortions.[22]

The association between IPV and unintended pregnancy is particularly concerning because pregnancy in general may make a woman vulnerable to IPV.[23] Women who reported experiencing abuse also reported that the abuse began or increased during pregnancy.[24] However, violence during pregnancy is significantly greater when a woman's pregnancy is unintended.[25] Women whose pregnancy is unintended are three to four times more likely to experience abuse than their counterparts whose pregnancy is intended.[26] One possible explanation for the poor reproductive health, especially unintended

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[20] Jay G. Silverman & Anita Raj, *Intimate Partner Violence and Reproductive Coercion: Global Barriers to Women's Reproductive Control*, 11 PUB. LIBR. OF SCI. MED. 1 (Sept. 16, 2014) http://www.plosmedicine.org/article/fetchObject.action?uri=info:doi/10.1371/journal.pmed.1001723&representation=PDF.

[21] *See* WORLD HEALTH ORGANIZATION ET AL., *supra* note 12, at 6; *see also* Moore, *supra* note 3, at 1737.

[22] Silverman, *supra* note 20, at 1.

[23] Moore, *supra* note 3, at 1737.

[24] Camp, *supra* note 2, at 19. Some reasons cited for violence during pregnancy include a male partner's jealousy and resentment towards the unborn child and his heightened feelings of insecurity and possessiveness. *See* Moore, *supra* note 3, at 1737. Financial stress and a woman's unavailability both emotionally and physically for her partner during pregnancy may also contribute to violence during pregnancy. *See id*.

[25] Camp, *supra* note 2, at 19.

[26] *Id*. Abuse during pregnancy, which is often directed at a woman's abdomen, may result in a woman obtaining prenatal care late, a miscarriage, or premature labor and birth. Garcia-Moreno, *supra* note 12, at 6. Violence during pregnancy is also associated with low birth weight and fetal injury. *Id*.

pregnancy, among women in abusive relationships is reproductive coercion.[27]

C. Reproductive Coercion Defined

Miller defines reproductive coercion as "explicit male behaviors to promote pregnancy."[28] According to University of California, Berkeley, School of Law graduate Shane Trawick, reproductive coercion is, and should be recognized as, a form of domestic violence.[29] Essentially, domestic violence is a pattern of controlling and coercive behaviors used by an abuser to exert power and maintain control over an intimate partner.[30] Similarly, the motivation behind a male abuser's desire to coerce pregnancy is to obtain control over his female partner's reproductive autonomy and trap her in the relationship.[31] In her study, Miller identified two forms of reproductive coercion: pregnancy coercion and birth control sabotage.[32] This section first defines pregnancy coercion and birth control sabotage respectively. It then discusses the prevalence of reproductive coercion.

1. Pregnancy Coercion

Pregnancy coercion consists of male behaviors that pressure a female partner to comply with his wishes that she become pregnant.[33] This form of reproductive coercion includes the use of verbal threats and physical violence by males to pressure a female partner into a pregnancy.[34] Examples of verbal threats include, insisting that a

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[27] Silverman, *supra* note 20, at 2.
[28] Elizabeth Miller, et al., *Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 457 (2010).
[29] Shane M. Trawick, Comment, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L.REV. 721, 733–34 (2012).
[30] KATHLEEN ERIN CURRUL-DYKEMAN, DOMESTIC VIOLENCE CASE PROCESSING: A SERIOUS CRIME OR A WASTE OF PRECIOUS TIME? 1 (LFB Scholarly Publishing 2014).
[31] *See* Camp, *supra* note 2, at 15 ("when asked, some men explicitly stated that they coerce pregnancy to physically confine or 'trap' their partner in the relationship, to claim ownership over the woman, and to 'mark' a woman as 'mine'").
[32] *See* Miller, *supra* note 28, at 457.
[33] Silverman, *supra* note 20, at 2.
[34] *Id*.

woman not use contraception and threatening to leave her if she does not get pregnant.[35] Physical violence perpetrated by males to coerce pregnancy includes forcing a female partner to have unprotected sexual intercourse,[36] physically abusing her upon finding out that she is using contraception, or physically abusing her if she insists that a condom be used during intercourse.[37]

Men also use emotional manipulation to coerce pregnancy. This method of pregnancy coercion may involve assertions to a female partner that she would have his baby if she really loves him.[38] A man's accusations that a female partner insists on using birth control in order to be unfaithful, is also a method of emotional manipulation used to coerce pregnancy.[39] Finally, men can, at times, manipulate a female partner's use of contraception by providing false information on the potential side effects of the contraception in an attempt to instigate fear of using that particular contraception.[40]

2. Birth Control Sabotage

Birth control sabotage is defined as "active interference with a partner's contraceptive methods in an attempt to promote pregnancy."[41] Common methods of birth control sabotage include refusing to withdraw prior to ejaculation when withdrawal was the agreed upon method of contraception or refusing to use a condom.[42] Males' manipulation of condoms either by removing the condom during intercourse or intentionally breaking the condom (i.e. poking holes in the material) is also a common method of birth control

[35] Miller, *supra* note 28, at 457.
[36] Moore, *supra* note 3, at 1740.
[37] Camp, *supra* note 2, at 7.
[38] *Id*. at 8.
[39] *Id.*
[40] Moore, *supra* note 3, at 1740–41. Respondent 4 of Moore's study, a 24 year-old female, admitted that she stopped taking birth control pills after her boyfriend told her that she should not use the pill because it "messes up [your insides] so bad that you even can't have kids." *Id*.
[41] American College of Obstetricians and Gynecologists, Committee Opinion No. 554: Reproductive and Sexual Coercion (2013).
[42] Moore, *supra* note 3, at 1740.

sabotage.[43] Other forms of birth control sabotage include hiding, withholding or destroying oral contraception.[44] Men also sabotage birth control by removing contraceptive rings, intrauterine devices or contraceptive patches.[45]

3. Prevalence of Reproductive Coercion

Based on the Centers for Disease Control and Prevention 2010 National Intimate Partner and Sexual Violence Survey, approximately 9% of women and 10% of men in the United States reported experiencing reproductive coercion.[46] Although both men and women can be perpetrators of reproductive coercion, the consensus amongst academics is that only women can be victims of reproductive coercion.[47] Essentially, these scholars argue that reproductive coercion and the resulting harm – pregnancy – is unique to women.[48] That is, while a coerced pregnancy can cause physical, emotional and financial harms to women,[49] the only potential injury to the male is becoming a parent against his will.[50]

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[43] *Id*.
[44] *See* Camp, *supra* note 2, at 9–10. Flushing birth control pills down the toilet is a commonly reported method used by men to destroy oral contraceptive.
[45] *Id*. See *also* Camp, *supra* note 2, at 9–10.
[46] *See* MICHELE C. BLACK, CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 48 (2010).
[47] *See* Camp, *supra* note 2, at 17; *see also* Plunkett, *supra* note 5, at 99.
[48] Camp, *supra* note 2, at 17.
[49] *Id*.
[50] Plunkett, *supra* note 5, at 99. Admittedly, pregnancy in general can cause harms to females. Likewise, an unintended or unwanted pregnancy can increase these harms. However, besides making the male a father against his will, an unintended or unwanted pregnancy can also cause him financial harm. The obligation to pay child support for the unforeseen child is a potential financial harm to the male. Courts often hold that fraudulent misrepresentation by a mother that resulted in the conception of a child is not a defense to a father's obligation to support the child. *See*, *e.g.*, Hughes v Hutt, 455 A.2d 623, 625 (Pa. 1983) (concluding that a "mother's failure to use birth control have absolutely no place in a proceeding to determine child support"). Although an obligation to pay child support is not of the same magnitude as harms suffered by female victims of reproductive coercion, such an obligation is still an injury. Therefore, if deceived by his female partner with such deception leading to the conception of a child, then a man is a victim just as a woman who was deceived by her male partner would be a victim. Nonetheless, while both men and women should be recognized as victims of reproductive coercion, this

Adolescents are especially vulnerable to reproductive coercion.[51] According to Miller's 2010 study, among a sample population of women ages 16 to 29, 19% reported having experienced pregnancy coercion and 15% reported having experienced birth control sabotage.[52] "Among the youngest in the sample (ages 16-20 years), 18% reported having experienced pregnancy coercion and 12% reported having experienced birth control sabotage."[53] Rachel Camp, Visiting Associate Professor at Georgetown University Law Center, lists adolescents' limited financial resources as well as their limited access to comprehensive sex education or birth control as potential reasons for adolescents' vulnerability to reproductive coercion.[54]

Non-Hispanic Black women were more likely to report having experienced reproductive coercion.[55] Among a sample population of women ages 18 to 49 years, 60% of women that reported having experienced reproductive coercion were Black.[56] The reporting rate among Hispanic and White women was 11% and 26%, respectively.[57]

II. A CALL TO CRIMINALIZE BIRTH CONTROL SABOTAGE IN THE UNITED STATES

Reproductive coercion in general is not addressed in the law and to date, only Canadian Courts have considered birth control sabotage, a subset of reproductive coercion.[58] In 2010, the Nova Scotia Court of Appeal found Craig Jaret Hutchinson guilty of sexual assault for sabotaging the condoms that were provided by his partner during sexual intercourse.[59] Hopeful that his partner would stay with him if she became pregnant, Hutchinson poked holes in condoms used during

Comment refers to women as victims and men as perpetrators because the scope of this Comment is on female victims of IPV who also reported experiencing reproductive coercion.

[51] Liotta, *supra* note 10, at 2.
[52] Miller, *supra* note 3, at 318.
[53] *Id*.
[54] Camp, *supra* note 2, at 13.
[55] Miller, *supra* note 3, at 318.
[56] Moore, *supra* note 3, at 1740.
[57] *Id*.
[58] *See* Trawick, *supra* note 29, at 747.
[59] R v. Hutchinson, 2010 NSCA 3 (Can.).

intercourse in order to get her pregnant.[60] However, despite getting pregnant, Hutchinson's partner ended their relationship and subsequently terminated her pregnancy.[61] Concerned that his partner might be exposed to sexually transmitted infections if she used the condoms with another intimate partner, Hutchinson texted her confessing that he sabotaged her condoms and suggested that she throw them away.[62] Upon his partner's complaint to the police, Hutchinson was arrested and charged with aggravated sexual assault.[63]

The trial court upheld Hutchinson's motion for a directed verdict of acquittal.[64] The court ruled that although it was proven beyond a reasonable doubt that Hutchinson intentionally impregnated his partner by wearing a sabotaged condom, he could not be convicted because his partner consented to have sexual intercourse.[65] On appeal by the Crown, the Nova Scotia Court of Appeal held that the trial judge erred in upholding Hutchinson's motion for a directed verdict of acquittal and thus ordered a retrial.[66] The Court reasoned that a directed verdict of acquittal should be upheld when there is no evidence of the essential elements of the crime charged or any included crimes.[67] Accordingly, to justify Hutchinson's acquittal for aggravated sexual assault, the trial court needed to find that there was consent and the use of sabotaged condoms by Hutchinson did not endanger his partner's life.[68]

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[60] *Id*. at para. 6.
[61] *Id*. at paras. 4–8.
[62] *Id*. at para. 6.
[63] *Id*. at para. 1.
[64] *Hutchinson*, 2010 NSCA at para. 20.
[65] *Id*. at para.17. The Court noted, "that the agreement to have sexual intercourse contained other terms and conditions does not change the consent to the sexual intercourse itself." *Id*. at para. 19.
[66] *Id*. at para. 55. On remand, the trial court acquitted Hutchinson on charges of aggravated sexual assault but convicted him on charges of sexual assault. Thus, Hutchinson appealed to the Nova Scotia Court of Appeal. The Nova Scotia Court of Appeal dismissed the second appeal affirming the trial court's ruling. In March of 2014, the Supreme Court of Canada also dismissed Hutchinson's appeal to that Court; *see* Ryan Heighton, *Secretly Poking Holes in Condoms Vitiates Consent to Sexual Activity:* R v Hutchinson, THE COURT (Mar. 20, 2014), http://www.thecourt.ca.
[67] *Hutchinson*, NSCA 2010 at para. 24.
[68] *Id*. at para. 30.

In analyzing the issue of consent, the Nova Scotia Court of Appeal found that a jury could have concluded that Hutchinson's partner consented to sexual intercourse but did not consent to the sexual activity in question – unprotected sexual intercourse.[69] The Court of Appeal also concluded that where the trial court found consent, it was "vitiated" by fraud of Hutchinson.[70] Regarding the issue of endangerment, the Court of Appeal found that the pregnancy sufficiently endangered Hutchinson's partner's life.[71]

Hutchinson's conviction spurred discourse on whether birth control sabotage should be criminalized in the United States.[72] While some in the domestic violence community would like for birth control sabotage to be a crime in the United States,[73] Shane Trawick notes that charging perpetrators of birth control sabotage under sexual assault laws "appears unworkable and at best unwise" in the United States.[74]

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[69] *Id*. at para. 38. Essentially, the Court reasoned, "as a matter of both language and law, consent implies a reasonably informed choice, freely exercised." *Id*. at para. 36. "[Hutchinson's partner] 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." *Id*. at para. 37. Because the nature of the sexual intercourse between Hutchinson and his partner was altered when he sabotaged the condoms used, his partner's consent was not "reasonably informed and freely exercised." *Id*. at para. 37.

[70] *Hutchinson*, NSCA 2010, at para. 46.

[71] *Id*. at para. 53–55. The Court of Appeal reasoned that because the pregnancy was unwanted, Hutchinson's partner suffered emotional and psychological distress and she subsequently decided to have an abortion, which resulted in her getting an infection. *Id*. at para. 46. Alternatively, the Court of Appeal concluded that even if the trial court found the medical evidence to be insufficient to support the element of endangerment, the trial court should have considered whether there was evidence to support a lesser charge such as sexual assault or assault. *Id*. at para. 30.

[72] *See generally*, Keli Goff, *Should Birth Control Sabotage Be Considered a Crime?*, DAILY BEAST, Dec. 16, 2013, http://www.thedailybeast.com/witw/articles/2013/12/16/should-birth-control-sabotage-be-considered-a-crime.html. *See also*, Emily Shire, *Why sabotaging condoms should be illegal*, THE WEEK, Dec.18, 2013, http://www.theweek.com/article/index/254263/why-sabotaging-condoms-be-illegal.

[73] Goff, *supra* note 72, at 2.

[74] Trawick, *supra* note 29, at 749–50. Trawick argues that the primary difference as to why birth control sabotage can be criminalized under Canada's sexual assault laws and not U.S. sexual assault laws is the notion of consent within each

Leah Plunkett, Associate Professor at the University of New Hampshire School of Law, also acknowledges that currently, "criminal law offers neither a robust nor a comprehensive legal scheme for addressing [birth control sabotage]."[75] Nonetheless, adamant that birth control sabotage should be a crime, both Trawick and Plunkett proposed model statutes that would make birth control sabotage a separate crime in the United States.[76] These two proposed statutes are discussed below. Subsequently, Trawick and Plunkett's rationales for criminalizing birth control sabotage are explored.

A. Proposed Model Statutes for Criminalizing Birth Control Sabotage in the United States

Trawick proposes the following statute:

> A person is guilty of the crime of reproductive coercion if he or she:
>
> (a) knowingly or recklessly tampers with [birth control methods], 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. [This subsection] shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and

jurisdiction. Whereas in Canada two separate statutes define consent for different types of assault, sexual assault and rape laws in the United States do not have a comprehensive definition of consent. *Id.* at 750. The mens rea requirement as to consent "is treated disparately across [United States'] jurisdictions." *Id.* at 751. But more importantly, there is a "prevalence of generalized consent" within sexual assault and rape laws in some jurisdictions in the United States. *Id*. at 750. Generalized consent is the notion that consent to a specific sexual activity constitutes consent to all other activities within the same sexual transaction or consent during a prior sexual transaction constitutes consent during a later sexual transaction with the same partner. *Id*. at 752.

[75] Plunkett, *supra* note 5, at 102.

[76] Trawick, *supra* note 29, at 747; *see also* Plunkett, *supra* note 5, at 98–99.

> the female has agreed in advance to cooperate with withdrawal.[77]

Under Trawick's proposal, both men and women can be held criminally liable for birth control sabotage.[78] Plunkett, on the other hand, argues that the inclusion of men as victims is problematic because should such a statute be adopted, female perpetrators of birth control sabotage will be punished for becoming pregnant and continuing the pregnancy.[79] Such a statute, she states, would be a constitutional violation of a woman's fundamental right to make decisions concerning procreation.[80] Essentially, punishing a woman for choosing to become pregnant – although it occurred unilaterally – is contrary to years of judicial precedent that guaranteed "limits on a State's right to interfere with a person's most basic decision about family and parenthood."[81]

Thus in response, Plunkett proposes that an individual can be found guilty of birth control sabotage if he or she (1) knows of or intentionally disregards his or her sexual partner's use of contraceptive, (2) intentionally or recklessly engages in conduct that damages, destroys or renders ineffective said contraceptive, (3) intentionally or recklessly intends to induce pregnancy, and (4) pregnancy results.[82] The operative element that distinguishes Plunkett's proposed statute from Trawick's is the result of pregnancy; pregnancy must occur for a perpetrator to be convicted.[83]

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[77] Trawick, *supra* note 29, at 755.
[78] Plunkett, *supra* note 5, at 98–99. Essentially, under Trawick's statute, men can be victims of birth control sabotage. *Id*. at 99–100. Plunkett does not dispute that men can be victims of sabotage. Her argument is that because the harm for male and female victims of sabotage differs, women should not be prosecuted for inducing their own pregnancy.
[79] *Id*. at 99.
[80] *Id*. at 100.
[81] *Id*.
[82] Plunkett, *supra* note 5, at 133–36.
[83] *Id*. at 100.

B. Rationales for Criminalizing Birth Control Sabotage

Trawick and Plunkett put forward several rationales for criminalizing birth control sabotage. Trawick suggests that criminalization of birth control sabotage will protect the victim from further violence.[84] Under this rationale, it is believed that criminalization can prevent future incidents of abuse by incarcerating the abuser.[85] However, domestic violence literature shows that prosecution does little to prevent future violence.[86] First, prosecution does not always lead to incarceration. Frequently in lieu of sentences resulting in incarceration, batterers receive probation.[87] Second, prison terms for domestic violence are often minimal.[88] Many domestic violence cases are prosecuted as misdemeanors, which have very short prison terms, instead of felonies.[89] Finally, arrest and prosecution of batterers often increases the likelihood of future violence.[90] Batterers often retaliate against victims for cooperating with the legal system by threatening or physically harming them.[91] Therefore, the criminalization of birth control sabotage, a recognized form of domestic violence, will not protect victims from further violence.

Trawick also argues that criminalizing birth control sabotage affirms society's condemnation of birth control sabotage.[92] Essentially, Trawick and other proponents of this rationale believe that making birth control sabotage a crime will inform society that birth

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[84] Trawick, *supra* note 29, at 746.
[85] *Id*.
[86] *See* Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 35 (2004) (noting "battered women engage [the criminal justice system] because [it] offers the promise of safety . . . but too often, the promise is illusory"); *See also* CURRUL-DYKEMAN, *supra* note 30, at 12 (27% of batterers arrested for domestic violence re-battered prior to trial).
[87] Goodmark, *supra* note 86, at 34. Goodmark notes that probation, as a form of punishment for abusers, is problematic because abusers are rarely monitored while on probation and rarely refrain from contacting their victims.
[88] *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 87 (N.Y. Univ. Press 2012).
[89] *Id*. at 86.
[90] CURRUL-DYKEMAN, *supra* note 30, at 12.
[91] *Id*.
[92] Trawick, *supra* note 29, at 756.

control sabotage is wrong and should not be tolerated as a social norm. Nonetheless, despite years of laws criminalizing domestic violence, laws against domestic violence have not influenced societal perceptions of domestic violence. Sadly, many are silent when it comes to domestic violence and some still view domestic violence as a personal problem between two people instead of a public problem.[93]

Plunkett argues that criminalization is necessary to protect a victim's "self-possessory" interests in his or her reproductive capacity.[94] Self-possession is the notion of having ownership and control of oneself.[95] Thus, for Plunkett, birth control sabotage should be criminalized because it takes away one's ownership and control of his or her reproductive capacity.[96]

III. POTENTIAL RAMIFICATIONS OF THE CRIMINALIZATION OF BIRTH CONTROL SABOTAGE

Criminalization of birth control sabotage is an inappropriate response to the prevalence of reproductive coercion among IPV victims. First and foremost, establishing the mental state of a perpetrator of birth control sabotage would be difficult. Second, criminalization would foster the underreporting of birth control sabotage, which would ultimately mask enforcement measures. Third, the criminalization of birth control sabotage would deter female victims from seeking prenatal care. Finally criminalization would perpetuate the mass incarceration of minority men. These ramifications are discussed in further detail below.

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[93] *See generally*, Tanya Young Williams, *The Silence Surrounding Domestic Violence is Deafening*, HUFFINGTON POST, Nov. 7, 2013, http://www.huffingtonpost.com/tanya-young-williams/domestic-violence-awarene_1_b_4216629.html.
[94] Plunkett, *supra* note 5, at 101.
[95] *Id*.
[96] *Id*.

A. The Mens Rea[97] of Birth Control Sabotage Would be Difficult to Prove

In *R v. Hutchinson*, discussed above, Hutchinson sent a text message to his partner confessing to sabotaging condoms used during intercourse.[98] This text message was admitted as evidence to prove Hutchinson's intent to sabotage his partner's birth control.[99] However, assuming Hutchinson had not sent a text confessing to sabotaging his partner's condoms and subsequently denied that he intended to sabotage the condoms, would he have been found guilty? When a perpetrator does not confess intent, it must be proved by circumstantial evidence.[100] However, because circumstantial evidence is ambiguous and may be even more so where the perpetrator denies his intent, the definition of intent is important.[101] "An ill-fitting definition [of intent] can mean that intent becomes impossible to prove."[102]

Plunkett notes that the Model Penal Code *mens rea* of purpose, knowledge or recklessness is necessary to find a perpetrator guilty of birth control sabotage.[103] Accordingly, in order to prove that a perpetrator purposely sabotaged his or her partner's birth control, the prosecutor would have to establish that the perpetrator consciously desired to destroy his or her partner's contraception and induce pregnancy.[104] To prove that the perpetrator knowingly sabotaged his or her partner's birth control, the prosecutor would have to show that the

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[97] Mens rea is defined as the state of mind that the prosecution must prove that a defendant had when committing a crime in order to secure a conviction. *Black's Law Dictionary* (10th ed. 2014).
[98] *See supra* note 63 and accompanying text.
[99] *Hutchinson*, 2010 NSCA at para. 6.
[100] David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1072 (2010).
[101] *Id*.
[102] *Id*. at 1081.
[103] Plunkett, *supra* note 5, at 131. *But see* Trawick, *supra* note 29, at 753 (noting that birth control sabotage is "an intentional or purposeful act with the specific intent of impregnating a victim.)"
[104] *See* MODEL PENAL CODE § 2.02(2)(a) ("A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.").

perpetrator was certain that destroying his or her partner's birth control would induce pregnancy.[105] Finally, to prove that the perpetrator recklessly sabotaged his or her partner's birth control, the prosecutor would have to establish that the perpetrator consciously disregarded a substantial and unjustifiable risk that he or she could induce pregnancy by destroying his or her partner's contraception.[106]

David Crump, a law professor at the University of Houston Law Center, suggests that the *mens rea* of purpose "should be reserved for offenses involving [a] high likelihood of proof"[107] and "a lesser likelihood of definitive evidence should be a factor in preferring a [mens rea] of knowledge."[108] Because domestic violence cases typically lack documented physical evidence or witnesses,[109] it follows that birth control sabotage will also lack such evidence. Thus, because "definitive evidence" such as documented physical evidence or eyewitnesses is less likely to be available in birth control sabotage cases, the *mens rea* of purpose would be unfitting. Further, it is also foreseeable that some birth control sabotage cases will be "he said, she said" cases due to the absence of an eyewitness. Thus, even with a lesser *mens rea* of knowledge or recklessness, in cases where a perpetrator's account is very convincing, the prosecutor is likely to have difficulties meeting the burden of proof beyond a reasonable doubt, which in turn would make it less likely that a jury would convict a perpetrator of birth control sabotage.

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[105] *Id*. at § 2.02(2)(b) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

[106] *Id*. at § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

[107] Crump, *supra* note 101, at 1082.

[108] *Id.* at 1080.

[109] Andrea 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).

B. Criminalization Fosters Underreporting Which Ultimately Masks Enforcement Measures

While some victims of domestic abuse rely on the criminal justice system to address domestic violence, a significant number of victims are reluctant to do so.[110] The mandatory policies of the criminal justice system are one potential reason why women do not seek the assistance of the criminal justice system.[111] Many jurisdictions have mandatory arrest policies where police officers are required to make an arrest if there is probable cause of abuse regardless of the victim's preference.[112] Jurisdictions also have mandatory prosecution policies, which require prosecutors to move forward with a case even if the victim does not want to pursue charges against the abuser. [113]

Other reasons victims remain reluctant to involve the criminal justice system include: financial dependence on the abuser, immigration status, and emotional attachment to the abuser.[114] Additionally, some women and girls may not seek assistance from the criminal justice system or other domestic violence resources because they may not recognize their partners' behavior as abusive or coercive.[115] Fear of retaliation by their abuser also explains why some victims are reluctant to involve the criminal justice system.[116] Survivors are often threatened by their abusers not to contact the police or courts for help.[117] In cases when victims do seek assistance from the legal system, they are placed in grave danger.[118]

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[110] CURRUL-DYKEMAN, *supra* note 30, at 12.
[111] Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 N.Y.U. CLINICAL L. REV. 201, 221 (2014).
[112] *Id*. *See also* GOODMARK, *supra* note 89, at 107 (noting that "in a mandatory arrest regime, no party to the incident–abuser, officer, or victim–has the ability to preempt the involvement of the criminal system once the officer decides that he has probable cause to make an arrest.").
[113] Carey & Solomon, *supra* note 111, at 221.
[114] *See generally* Carey & Solomon, *supra* note 111, at 216–31.
[115] Miller, *supra* note 28, at 458.
[116] Carey & Solomon, *supra* note 111, at 227.
[117] Goodmark, *supra* note 87, at 23.
[118] *Id*.

Furthermore, when victims do seek the assistance from the criminal justice system, they often find that courts are lenient in the prosecution of batterers.[119] Kathleen Erin Currul-Dykeman, an Assistant Professor of Criminology at Stonehill College, attributes this leniency to court officials' attitudes toward domestic violence.[120] Some prosecutors are reported as having feelings ranging from "apathy to disdain" towards domestic violence case assignments.[121] While not proven yet by qualitative studies, it is possible that prosecutors' feelings might have an impact on how they prosecute domestic violence cases.

Similar to prosecutors, a judge's personal attitude towards domestic violence may influence decision-making.[122] Studies have shown that some "judges attempt to dissuade victims from pursuing charges."[123] Researchers theorize that some judges hold beliefs that domestic violence is a private family matter that should be resolved outside of court, and this bias influences blaming a survivor for her abuse.[124] Thus, court official's processing of domestic violence cases may deter victims from seeking assistance from the criminal justice system in the event they experience further incidents of abuse.

Due to victims' reluctance to seek assistance from the criminal justice system, an overwhelming number of incidents of abuse go unreported.[125] Foreseeably, victims of birth control sabotage will also be reluctant to involve the criminal justice system for the same reasons victims of other forms of domestic violence do not do so. Thus, the crime of birth control sabotage too would be grossly unreported. The underreporting of birth control sabotage would mask the prevalence of the problem in that incidents would be treated as private and isolated rather than a public issue of concern. Conversely, birth control sabotage would be better reported if it were not a crime.

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[119] CURRUL-DYKEMAN, *supra* note 30, at 4 (noting "prosecutors are still handling domestic violence cases leniently"). There are high dismissal rates among domestic violence cases and when batterers are prosecuted, sentences are often very short.
[120] CURRUL-DYKEMAN, *supra* note 30, at 14.
[121] *Id*.
[122] *Id*. at 15.
[123] *Id*.
[124] *Id*.
[125] Carey & Solomon, *supra* note 111, at 225.

C. Criminalization Will Prevent Women From Seeking Prenatal Care

In addition to mandatory arrests and prosecution policies, some jurisdictions established mandatory reporting policies where physicians and other health care providers are required to report cases of domestic violence to authorities.[126] Opponents to mandatory reporting laws argue that such policies "undermine the confidentiality and trust of the doctor-patient relationship" which ultimately deter IPV victims from disclosing incidents of abuse to their medical providers.[127] Opponents to mandatory reporting laws also argue that mandatory reporting may deter IPV victims from seeking medical care entirely due to fear of police involvement as a result of medical providers' reports.[128] Similarly, should birth control sabotage become a crime, health care providers in jurisdictions that require reporting of injuries that result from criminal acts will be forced to report incidents of birth control sabotage to authorities. Thus, victims that are reluctant to involve the criminal justice system may not seek prenatal care out of fear of police involvement. Moreover, a victim might not be candid with her medical provider about her partner's reproductive coercion, which might ultimately impede her care and potentially increase her vulnerability to the reproductive consequences of reproductive coercion.

D. Criminalization Will Perpetuate "Hyper-Incarceration"

In comparison to other industrialized nations, incarceration rates are six to ten times greater in the United States.[129] Unfortunately, inmates in U.S. prisons are disproportionately African-American

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[126] *See* Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 87 (2009) (mandatory reporting laws in Colorado and California require doctors to report injuries that result from "assaultive or abusive conduct or any other injury that the reporter has reason to believe [resulted from] a criminal act including domestic violence.").

[127] *Id*. at 94.

[128] *Id*.

[129] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7–8 (The New Press 2012).

men.[130] The criminalization of birth control sabotage will perpetuate this "hyper-incarceration."[131] Admittedly, intimate partner violence occurs among all racial, ethnic and socioeconomic groups.[132] However, African-Americans are arrested more often for domestic abuse than their White counterparts.[133] Researchers at the University of Minnesota's School of Social Work attribute "race, poverty, pro-arrest laws and a higher level of policing in urban communities as sources of the disparity in domestic abuse arrests."[134] African-Americans are also more likely to be charged, convicted and imprisoned after conviction.[135] Given criminalization's emphasis on incarceration, the criminalization of birth control sabotage will add yet another force that pushes African-American men into the criminal justice system.

IV. ALTERNATIVES TO THE CRIMINALIZATION OF BIRTH CONTROL SABOTAGE

Given the prevalence of birth control sabotage among women who experience intimate partner violence and concerns about the reproductive health consequences of birth control sabotage, it makes sense why some are calling for the use of the criminal justice system to curb birth control sabotage. Unfortunately, criminalization will not

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[130] *See id*. at 6–7 ("in Washington, D.C. . . . it is estimated that three out of four young black men (and nearly all those in the poorest neighborhoods) can expect to serve time in prison. Similar rates of incarceration can be found in black communities across America").

[131] *See* Donna Coker, *VAWA @ 20: Roll Back "Prison Nation,"* CUNY L. REV., *available at* http://www.cunylawreview.org/vawa-20-roll-back-prison-nation/ (noting the "term hyper-incarceration highlights that the tremendous growth in incarceration is concentrated in particular geographic locations (low income neighborhoods of color) and has concentrated effects felt disproportionately by African-Americans").

[132] Goodmark, *supra* note 87, at 35.

[133] *See Domestic Violence Awareness Month: Stand with Survivors, Question Criminalization*, PROJECT SAFE, http://www.projectsafephilly.org (last visited Oct. 18, 2014) (out of approximately 21,000 9-1-1 calls for domestic violence in Minneapolis, about 3,000 result in arrests. Fifty percent of those arrested are African-American men).

[134] *Id*.

[135] Molly A. Schiffer, Note, *Women of Color and Crime: A Critical Race Theory Perspective to Address Disparate Prosecution*, 56 ARIZ. L. REV. 1203, 1205 (2014).

solve the problem. Criminalization has been limited in addressing domestic violence[136] and is likely to be limited in addressing birth control sabotage, a recognized form of domestic violence. Accordingly the legal profession must develop alternative ways to address birth control sabotage.

A. Empower Victims to Take Control of Their Reproduction

According to Ann Moore, "women's lack of negotiating power to insist on contraceptive use, abusive partner's interference with use of contraception [and] partner's refusal to pay for contraception" all hinder women's ability to control their reproduction in an abusive relationship. [137] Accordingly, Moore and Dr. Elizabeth Miller recommend the use of "invisible"[138] contraception as a means to assist victims of birth control sabotage.[139] "Invisible" forms of birth control include hormonal implants, which are surgically placed under the skin of the upper arm, and intrauterine contraceptives.[140] Moore notes that "invisible" forms of birth control "have the potential of improving the reproductive health outcomes of women who are experiencing reproductive control."[141]

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[136] *See* Beth E. Richie, *Who Benefits and Who Loses in the Criminalization of IPV: Considering the Logic of Punishment and Impact of Legal Intervention as a Tertiary Prevention Strategy*, UNIVERSITY OF KENTUCKY COLLEGE OF ARTS & SCIENCES, https://soc.as.uky.edu/sites/default/files/NSF%20Criminalization%20Paper-%20Final.pdf (last visited May 14, 2014) ("Criminalization of IPV is not the prevention tool it is assumed to be and has not advanced our ultimate goal of ending violence against women").

[137] Moore, *supra* note 3, at 1737; *See also* Miller, *supra* note 3, at 316 ("abused women face compromised decision-making regarding, or limited ability to enact, contraceptive use and family planning, including fear of condom negotiation.").

[138] *See generally*, Miller *supra* note 3, at 321; *and* Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOCIAL SCIENCE & MEDICINE 1737 (2010) (These authors use the word "invisible" to define contraception partners cannot interfere with).

[139] Miller, *supra* note 3, at 321.

[140] *See id*.; *See also* Olivia B. Waxman, *Study: Free Birth Control Slashes Abortion Rates*, TIME, healthland.time.com/2012/10/05/study-free-birth-control-significantly-cuts-abortion-rates/ (last visited Oct. 5, 2012).

[141] Moore, *supra* note 3, at 1742.

Unfortunately, in comparison to condoms or birth control pills, implants and IUDs are the most expensive forms of birth control.[142] Thus, to more meaningfully address the issue of birth control sabotage, the legal profession should focus on implementing laws to ensure that low-income women and adolescent girls have access to "invisible" forms of birth control rather than laws to criminalize birth control sabotage. A study of low income and uninsured women in St. Louis found that rates of unintended pregnancy decreased among participants who were provided with free IUDs and hormone implants.[143] So, providing more women with the tools necessary to exercise control over their reproduction is one alternative to the criminalization of birth control sabotage.

B. Enact Laws Requiring Comprehensive Sex Education Curricula in All Public Schools

Leyla couldn't figure out why her birth control pills kept disappearing until she found them hidden in her then-boyfriend's drawer.[144] When she confronted him, he hit her.[145] Leyla's boyfriend also raped her and locked her in his bedroom while he went to work.[146] As a result of the missed pills she got pregnant twice.[147] Her first pregnancy ended in an abortion, but when she decided against aborting her second pregnancy, her boyfriend pushed her down a flight of stairs in an attempt to induce an abortion.[148] Seven years later, Leyla eventually left the relationship.[149] She acknowledged that it took her seven years to leave because "witnessing her father abuse her mother corrupted her sense of what counts as 'normal' in a relationship."[150]

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[142] *See* Waxman, *supra* note 142 (stating that the cost to implant an IUD ranges from $500 to $1,000).
[143] *Id*.
[144] Lynn Harris, *When Teen Pregnancy is No Accident*, THE NATION, http://www.thenation.com/article/when-teen-pregnancy-no-accident# (last visited May 5, 2010).
[145] *Id*.
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] Harris, *supra* note 146.
[150] *Id*.

As discussed earlier, similar to Leyla, many girls and even some women at times remain in such abusive relationships or do not seek assistance because they may not recognize their partners' reproductive coercion as abuse.[151] Thus, Miller calls for "comprehensive sexuality education curricula that integrate discussions of partner violence, reproductive coercion and the contrast with healthy relationships" as a means to assist victims of reproductive coercion[152] Miller suggests that discussions on reproductive coercion "may encourage a woman to recognize how an unhealthy relationship might be constraining her reproductive autonomy and affecting her health."[153] Unfortunately, despite the noted benefits of comprehensive sex education,[154] only twenty-two states and the District of Columbia require public schools to teach sex education.[155] Thus, in addition to enacting laws that ensure the availability of "invisible" contraception to women, another alternative to criminalizing birth control sabotage is legislative efforts that require all public schools to implement sex education curricula that emphasize healthy relationships in addition to pregnancy prevention and the prevention of sexually transmitted diseases.

C. Challenge Gender Norms and Roles

Finally, beyond the law, efforts that challenge men and boys' perception of gender norms and roles are needed to curb birth control sabotage. Essentially, societal narratives of masculinity and gender roles often justify men's capacity for violence and control over women.[156] One such narrative that potentially perpetuates birth control

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[151] *See supra* Section III. B.
[152] Miller, *supra* note 28, at 458.
[153] *Id*. at 457.
[154] Kelly E. Mannion, *Steubenville and Beyond: The Constitutional Case for Comprehensive Sex Education*, 20 CARDOZO J. L. & GENDER 307, 307 (2014) ("comprehensive sex education offer opportunities to promote responsible, healthy decision-making by young persons").
[155] *Id*. at 312.
[156] *See generally* Sharon Wofford Mihalic & Delbert Elliot, *A Social Learning Theory Model of Marital Violence*, 12 J. FAM. VIOLENCE 21, 27 (1997) ("[E]arly sex-role socialization teaches boys to be the dominant partner, the major wage earner, the head of the household, and to maintain power and control, if necessary by the use of force.").

sabotage is the notion that women with children are less attractive to other men.[157] In her study, which assessed male reproductive control among women seeking reproductive health services, Moore found that in some cases, when an abusive partner was being sent to prison, he was inclined to coerce pregnancy. These men believed that if their partner was pregnant, it was less likely that she would leave him while he was imprisoned because "she would be seen as less desirable by other men and invested in maintaining a relationship with the father of her child."[158] Other societal narratives that potentially perpetuate reproductive coercion include the notions that sex with condoms is emasculating,[159] and men are meant to spread their seeds. Thus, the implementation of programs that will allow men and boys to critically reflect on notions of masculinity and gender norms in an effort to shift their perceptions and ultimately change their behaviors are needed to curb reproductive coercion.

CONCLUSION

Birth control sabotage is a public health problem that must be addressed. Left unaddressed, many other public health problems such as the spread of sexual transmitted diseases and unintended pregnancy will continue to increase.[160] Although anti–domestic violence advocates' call to criminalize birth control sabotage is understandable, this Comment asserts that criminalization is not the appropriate measure to address birth control sabotage.[161] Not only will a perpetrators' mental state be difficult to prove, the crime of birth control sabotage will face similar ramifications as current domestic violence crimes.[162] Instead, education needs to be the alternative to handcuffs.

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[157] *See* Moore *supra* note 3, at 1740.
[158] *Id*.
[159] Trawick, *supra* note 29.
[160] *See supra* Part I.B.
[161] *See supra* Part III.
[162] *Id*.