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*DOBBS IN THE CONTEXT OF INTIMATE PARTNER
VIOLENCE: THE CASE FOR A VIRGINIA CONSTITUTIONAL
AMENDMENT PROTECTING REPRODUCTIVE CHOICE*

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ABSTRACT

Advocates for victims of sexual and domestic violence have long understood the critical role that reproductive freedom plays in ensuring victim safety in the aftermath of trauma. Lawmakers, on the other hand, have used victims of domestic and sexual violence as political footballs, oftentimes supporting “exceptions” to abortion bans, such as for rape and incest, as a means of distracting from the actual harms these restrictions cause. These exceptions fail to meet the needs of victims and are inadequate protections against the many forms of abuse, such as reproductive coercion and control, that victims in abusive relationships face. This article examines the dynamics of abusive relationships through the lens of the power and control model, highlighting examples of reproductive control and coercion experienced by victims of intimate partner violence in Virginia. It also explores previous policy attempts to address reproductive coercion and control that have fallen short. Ultimately, this article proposes a constitutional amendment to ensure unfettered access to reproductive healthcare as the only viable solution for victims, and all people in Virginia, going forward.

INTRODUCTION

All people, including and especially, victims of sexual and intimate partner violence (sometimes referred to as “domestic violence”) must be guaranteed full access to non-judgmental, safe, legal, affordable, and medically accurate sexual and reproductive health care.¹ Victims of sexual and intimate partner violence can and do become pregnant because of the violence they experience. Some victims choose abortion, some victims choose adoption, and some victims choose to parent. Allowing victims to make informed decisions regarding their bodies and their care in the aftermath of trauma is an empowering step toward recovery. As a result, it is critical that victim advocates support the choices that victims, and all pregnant people, make to control their bodies, lives, and futures. Moreover, any infringement on reproductive autonomy jeopardizes the safety of victims of sexual and intimate partner violence. Legislative “cures” for victims of sexual and intimate partner violence—such as exceptions for rape and incest—are insufficient and impractical, and further remove agency and control from the

¹ We would like to note that we recognize that women are not the only people who can become pregnant, and not all women can become pregnant. Reproductive health access impacts people of all genders. For the sake of simplicity, the term “women” will be used throughout the paper when referring to those impacted by abortion laws. Although we sometimes use gendered language when describing hypothetical victims and abusers, we also recognize that people of all genders can be both victims and abusers.

victim (who may be forced to report their assault in order to access these exceptions). Unfettered sexual and reproductive autonomy is a basic human right, not a special privilege applicable only to victims of violent crimes. Victims should not have to endure violence to be worthy of bodily autonomy.

The United States Supreme Court decision, *Dobbs v. Jackson Women's Health Organization*,² overturned two foundational cases that established and affirmed a constitutional right to obtain an abortion: *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). This decision paved the way for vicious prosecution of people seeking abortions or experiencing miscarriages. The particular danger *Dobbs* introduces to victims of sexual and intimate partner violence, however, is an emerging threat that must be addressed immediately.³ It is imperative that Virginia's legislators act now to protect reproductive freedom by enshrining abortion access in the state constitution. As reproductive freedom is inextricably linked to sexual and intimate partner violence, protecting abortion rights is crucial to ensuring the safety of victims of such violence.⁴

Part I of this article explores sexual and reproductive coercion as a means to control victims and demonstrates the reality of this threat to victims in Virginia. Part II discusses the danger the *Dobbs* decision poses more broadly, as well as to victims of sexual and reproductive coercion in particular. Part III discusses the need for a constitutional amendment in Virginia to ensure the right to abortion.

I. SEXUAL AND REPRODUCTIVE COERCION: TOOLS ABUSERS USE TO CONTROL VICTIMS OF INTIMATE PARTNER VIOLENCE IN VIRGINIA

Intimate partner violence ("IPV") is a significant public health concern impacting thousands of Virginians each year, accounting for approximately

² See 597 U.S. 2228, 2242 (2022); *Roe v. Wade*, 410 U.S. 113 (1973).

³ For more information on the Action Alliance's position statement, see Va. Sexual and Domestic Violence Action All., *Position Statement: Promoting Sexual & Reproductive Health* (Nov. 2018), <https://vsdvalliance.org/wp-content/uploads/2020/09/Promoting-Sexual-Reproductive-Health-Position-Statement.pdf>.

⁴ Although this article focuses on the specific danger faced by victims of DV/IPV/SV if reproductive justice is not ensured, the authors of this article firmly assert that all people, regardless of whether or not they are victims of IPV/DV, have a fundamental right to reproductive autonomy.

one-third of homicides in Virginia.⁵ IPV occurs in relationships where there is an imbalance of power and control, and one person insists on maintaining that power and control over the other person through a pattern of abusive behaviors, described in further detail below.⁶ Although domestic violence (“DV”) and sexual violence (“SV”) are distinct phenomenon, victims of DV can and often do experience SV within the context of an abusive relationship.⁷ Furthermore, although domestic violence can refer to abuse between people in multiple kinds of relationships, including non-romantic relationships such as siblings, the focus of this article will be on intimate partner violence, or abuse that occurs between romantic partners.⁸

In many abusive relationships, sexual and reproductive coercion are common and dangerous ways that abusers maintain power and control over their victims. Sexual coercion involves any behavior related to sexual activity or sexual health that is intended to maintain power and control in a relationship and can include a range of behaviors such as pressure, threats, sabotage, and/or manipulation to coerce a person to engage in sexual activities without using physical force.⁹ Reproductive coercion, meanwhile, involves behavior related to reproduction and sexual health that is intended to maintain power and control in a relationship and can also include a range of behaviors that may involve pressure, threats, sabotage, and/or manipulation.¹⁰ Both forms of coercion are perpetrated by someone who is, was, or wishes to become involved in an intimate or dating relationship with another person.¹¹ Such behaviors often include pregnancy pressure,

⁵ VA. OFF. OF THE CHIEF MEDICAL EXAMINER, FAMILY AND INTIMATE PARTNER HOMICIDE: A DESCRIPTIVE ANALYSIS OF THE CHARACTERISTICS AND CIRCUMSTANCES SURROUNDING FAMILY AND INTIMATE PARTNER HOMICIDE IN VIRGINIA 1 (2015), www.vdh.virginia.gov/medExam/fipvhs-reports-publications.htm More recent data has not been published by the Office of the Chief Medical Examiner.

⁶ *What is DV?*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/about-dv/what-is-dv/>, (last visited Feb. 15, 2023).

⁷ *What is Domestic Violence?*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/learn-more> (last visited Feb. 15, 2023).

⁸ Note that the terms “domestic violence” and “intimate partner violence” will be used interchangeably throughout this article. Virginia does not define “intimate partner violence” but, rather, defines “family abuse” against “family or household member[s]” in VA. CODE § 16.1-228 (2023), addressing a broad array of relationships. See also Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective*, 2 HEALTH PSYCH. RSCH. 62, 62 (2014).

⁹ VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL., REPRODUCTIVE AND SEXUAL COERCION: A TOOLKIT FOR SEXUAL & DOMESTIC VIOLENCE ADVOCATES A.1 (3rd ed. 2020); *The Facts on Reproductive Health and Partner Abuse*, FUTURES WITHOUT VIOLENCE, http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Reproductive.pdf; American Coll. of Obstetricians and Gynecologists, *Comm. Op. No. 554: Reproductive and Sexual Coercion*, 121 OBSTETRICS & GYNECOLOGY 411, 411 (2013).

¹⁰ VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL., *supra* note 9, at A.2.

¹¹ *Id.*

pregnancy coercion, and birth control sabotage, discussed in more detail below.

Both sexual coercion and reproductive coercion often occur in the context of abusive relationships. Conversations about abusive relationships must be grounded in a proper understanding of how such relationships function. Deeply rooted cultural myths surrounding domestic violence tend to hijack these discussions, reinforcing problematic and ineffective strategies and preventing policymakers from reaching evidence-based, practical solutions. Such myths include ideas around mutual violence, which suggests that parties in abusive relationships tend to engage in equal amounts of abusive behaviors and are, therefore, equally culpable.¹² Other misconceptions include gender parity myths that suggest men and women are statistically equally violent.¹³ Moreover, the timeless question “why doesn’t she just leave?” implicates a cultural myth that the door is wide open, and the “decision” to stay in an abusive relationship indicates some moral or psychological deficit in the victim herself, such as “learned helplessness,” “battered women’s syndrome,” or a “failure to protect” herself and her children.¹⁴

Moreover, when it comes to reproductive freedom, some legislators inaccurately assume that abortion bans are acceptable if they include enough

¹² Margaret Kertesz & Cathy Humphreys, *Women Who Use Force*, PURSUIT (Jan. 13, 2021) <https://pursuit.unimelb.edu.au/articles/women-who-use-force>. “Mutual abuse” is a myth. Abuse in intimate relationships occurs within the context of an imbalance of power and control, usually favoring one party over the other. Focusing on specific acts of violence without considering the larger context of the relationship fails to accurately capture the complexity of power imbalances within intimate relationships.

¹³ *Id.* Women in heterosexual relationships statistically are more likely to use force in self-defense, protection of children, retaliation, or stress, rather than as tools to exert power and control over their male partners. See also Suzanne Swan, et al., A Review of Research on Women’s Use of Violence With Male Intimate Partners, 23 VIOLENCE AND VICTIMS 301, 308-309 (2008); Murray Straus, et al., *The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data*, 13 J. OF FAM. ISSUES 283, 283, 285-86 (1996) (noting the revision of the Conflict Tactics Scale, or CTS, and acknowledging the limitations of a tool that merely measures individual acts of violence, noting that true symmetry in behavior is difficult to measure without broader context).

¹⁴ See *Why Doesn’t She* Just Leave?*, FAIRFAX CNTY. DEP’T. OF FAM. SERV., <https://www.fairfaxcounty.gov/familyservices/community-corner/2022-11-why-doesnt-she-just-leave> (last visited Feb. 12, 2023) (noting the complex barriers victims face when attempting to escape abusive relationships, and that victims are “70 times more likely to be killed in the weeks after leaving their abusive partner than at any other time during the relationship”).

exceptions for victims of sexual and domestic violence.¹⁵ These exceptions not only fail to meet the needs of victims of SV and DV, they further stigmatize abortion and create additional burdens to victims seeking healthcare.¹⁶ Therefore, exceptions for rape and incest do not cure any ban or limitation on abortion and fail to protect victims of sexual and intimate partner violence.

To enact effective reproductive legislation that protects all Virginians, but especially those Virginians who are victims of sexual and intimate partner violence, legislators must understand: (1) abusers maintain power and control over their victims; (2) sexual and reproductive coercion are a part of the spectrum of abuse; (3) what victims of such abuse in Virginia are experiencing; and (4) clear, unambiguous protection for abortion is needed to protect victims in Virginia. Each is discussed in turn below.

A. Abusive Relationships: An Imbalance of Power and Control

Domestic violence is “a pattern of coercive behaviors that may include, but [is] not limited to, physical assaults, threats, intimidation, sexual manipulation, and control over economic resources.”¹⁷ This pattern of behavior is used by one party in a family or relationship to maintain power and control over another person in the family or relationship. Sexual violence is “conduct of a sexual nature which is non-consensual, and is accomplished through force, threat, coercion, exploitation, deceit, physical or mental incapacitation, and/or power of authority.”¹⁸ Domestic and sexual violence

¹⁵ Such exceptions are not based on logic or sound scientific reasoning. *See e.g.*, Julie Rovner, *Romney and Abortion: Another Shift in the Works?*, NPR (Sept. 3, 2012), <https://www.npr.org/sections/health-shots/2012/09/03/160502626/romney-and-abortion-another-shift-in-the-works> (noting inconsistent and confusing statements made by United States Senator Mitt Romney, suggesting that he opposes abortion except in cases of rape, incest, or when the life or health of the mother is threatened). Political debates around abortion exceptions reveal breathtaking ignorance among policymakers on topics affecting women’s health and safety, including rape and basic knowledge about how uteruses work. *See e.g.*, John Eligon & Michael Schwartz, *Senate Candidate Provokes Ire With ‘Legitimate Rape’ Comment*, N.Y. TIMES (Aug. 19, 2012), <https://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html> (discussing United States Senator Todd Akin’s suggestion that victims’ bodies can somehow “block” an unwanted pregnancy in instances of rape.).

¹⁶ *See* Margot Schein, *Abortion Stigma: What About in Cases of Rape and Incest?*, PLANNED PARENTHOOD (Dec. 3, 2019), <https://www.plannedparenthoodaction.org/planned-parenthood-votes-south-atlantic/blog/abortion-stigma-what-about-in-cases-of-rape-and-incest> (noting that in states where rape exceptions exist for victims of sexual violence, the victim not only has to report the rape to the police, but the police also has to believe them—a statistical improbability given that for every 1,000 perpetrated sexual assaults, 995 perpetrators will walk free).

¹⁷ Ruth G. Micklem & Kristi VanAudenhoove, *Definition of Domestic Violence*, VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL, <https://vsdvalliance.org/wp-content/uploads/2020/09/Definitions-of-Sexual-Domestic-Violence.pdf> (last visited Feb. 26, 2023).

¹⁸ *Id.*

must be understood in the context of other forms of intersecting oppression that promote the devaluation of groups and individuals.¹⁹

Although physical violence is the kind of behavior most easily addressed by the law, other forms of abuse are critical to understanding the experience of victims in abusive relationships. Indeed, abusers maintain power and control over victims using a pattern of behaviors that are often not visible to others—nor are they explicitly illegal. The Power and Control Wheel, created in the 1980s by the Domestic Abuse Intervention Project,²⁰ serves as a powerful visual representation of the ways in which abusers maintain power and control over their victims.²¹ This model has been widely adopted and is currently used as a tool by advocates and others working with victims of intimate partner violence.²² “Power and Control” are at the center of the wheel, with various behaviors stemming out as “spokes,” demonstrating the various tools abusers use to maintain power and control throughout a relationship.²³ Physical and sexual violence are represented as the outermost ring of the wheel.²⁴ This ring represents crimes such as assault, battery,²⁵ and sexual assault. However, it is the myriad of behaviors in the middle of the wheel that frequently go unrecognized by the law and are often very difficult to prove. These subtler, often invisible behaviors, serve to support the power and control that an abuser maintains over their victim, and include using intimidation, coercion, threats, emotional and economic abuse; isolating the victim; using children; using male privilege; and minimizing, denying, and blaming the victim.²⁶ Physical and sexual violence are also used as tools to maintain this power and control, however, advocates working with victims always view the behavior within the larger context of the power and control model.

Gradually, the tactics used by abusers to maintain power and control over a victim can create a labyrinth from which escape not only poses a significant threat to the life of a victim, but can be nearly impossible. Attempts to leave

¹⁹ *Id.*

²⁰ *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> (last visited Feb. 26, 2023).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ In Virginia, assault and battery against a “family or household member” is considered a distinct crime. *See* VA. CODE § 18.2-57.2(A) (2023)

²⁶ *Why People Stay in an Abusive Relationship*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship> (last visited Feb. 26, 2023).

the relationship often increase the danger to the victim,²⁷ and abusers use an increasingly complex series of tools to keep the victim trapped. With time, abusive behaviors typically escalate, becoming more frequent and/or severe, and sometimes ending in homicide.²⁸ Several factors are associated with increased risk of fatality. In fact, several tools have been developed to determine the level of danger and likelihood that an abused victim will be killed by her intimate partner. Sexual coercion and control over daily activities are both statistically correlated with a higher risk of fatality.²⁹ Reproductive coercion, closely linked to both forms of abuse, is therefore related to behaviors that indicate a victim is at increased risk of homicide. Accordingly, such behavior should never be minimized or dismissed—indeed, it should be noted with the gravest concern. This severe abuse manifests in a myriad of behaviors, all intended to exert power and control over a victim.

B. Reproductive coercion impedes a victim's autonomy and jeopardizes her safety

Reproductive coercion is behavior used to pressure or coerce a person into becoming pregnant, or into continuing or ending a pregnancy against one's will. It is executed through manipulation, intimidation, threats, and/or actual acts of violence.³⁰ Such abuse violates a victim's basic "human right to maintain personal bodily autonomy, have children, not have children, and parent . . . children . . . in safe and sustainable communities."³¹ Reproductive coercion can be roughly broken down into three categories of behaviors:

Birth control sabotage includes interfering with a person's selected method of contraception. This category can encompass several behaviors, including when a person:

²⁷ *Escalation*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/escalation/> (last visited Feb. 26, 2023).

²⁸ *Id.*

²⁹ See *Danger Assessment Instrument*, JOHNS HOPKINS UNIV. SCH. OF NURSING (2019), <https://www.dangerassessment.org/DATools.aspx/>; see also *Virginia's Lethality Assessment Program*, OFF. OF THE ATT'Y GEN. OF VA. (2023), <https://oag.state.va.us/programs-initiatives/lethality-assessment-program>. This assessment is administered by the Office of the Attorney General. It provides law enforcement and other community-based professionals evidence-based tools to prevent domestic violence homicides by identifying which victims are at the highest risk of being killed or seriously injured by their intimate partners, and provides a protocol to immediately connect such victims to their local domestic violence program).

³⁰ Elizabeth Miller & Jay G. Silverman, *Reproductive Coercion and Partner Violence: Implications for Clinical Assessment of Unintended Pregnancy*, 5 EXPERT REV. OBSTETRICS & GYNECOLOGY 511 (2010). Note that women are not the only people who can get pregnant; people of all genders can become pregnant.

³¹ *Reproductive Justice*, SISTER SONG WOMEN OF COLOR REPRODUCTIVE JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice/> (last visited Feb. 26, 2023).

- hides, withholds, or destroys a sexual partner's birth control pills;
- replaces or tampers with a sexual partner's birth control pills without the partner's knowledge or consent;
- breaks or pokes holes in a condom on purpose;
- removes a condom during sex without telling his/her sexual partner (sometimes called "stealththing");
- refuses to withdraw during sex, even if s/he previously agreed to do so;
- pulls out a sexual partner's vaginal contraceptive ring; or
- tears off a sexual partner's contraceptive patch.³²

Pregnancy pressure includes pressuring a person to become pregnant when they do not wish to become pregnant. This includes pressuring a partner to:

- get pregnant when s/he doesn't want to be pregnant;
- continue a pregnancy when s/he wants an abortion; or
- end a pregnancy that s/he wants to continue.³³

Pregnancy coercion includes threats or acts of violence if a partner doesn't comply with wishes regarding the decision to terminate or continue a pregnancy.³⁴

Given the severity of this form of abuse, reproductive coercion is disturbingly common in IPV relationships. Approximately one in five women in the United States have experienced pregnancy coercion and one in seven have experienced active interference with contraception, a form of birth control sabotage.³⁵ The painful impact of reproductive coercion is disproportionately borne by women of color, as Non-Hispanic Black (52.9%) and multiracial women (42.9%) experience higher rates when compared to white women (20.6%).³⁶ As noted *supra*, a partner removing a condom without consent is a form of sexual violence, sometimes called "stealththing."³⁷ A 2019 study indicated that one in eight women in the study had experienced this form of sexual violence in their lifetime.³⁸ Additionally, women experiencing IPV are more likely to report they do not use birth control because their male partner

³² See VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL., *supra* note 9, at A.2.

³³ *Id.*

³⁴ *Id.*

³⁵ *The Facts on Reproductive Health and Partner Abuse*, FUTURES WITHOUT VIOLENCE http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Reproductive.pdf (last visited Feb. 26, 2023).

³⁶ Karen T. Grace, *Caring for Women Experiencing Reproductive Coercion*, 61 J. MIDWIFERY & WOMEN'S HEALTH 112, 112 (2016).

³⁷ VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL., *supra* note 9, at A.2; See also Gabrielle Kassel, *What is Stealthing? Everything You Should Know* (Aug. 11, 2022), <https://www.healthline.com/health/what-is-stealthing>.

³⁸ Kelly Cue Davis et al., *Young Women's Experiences with Coercive and Noncoercive Condom Use Resistance: Examination of an Understudied Sexual Risk Behavior*, 29-3 WOMEN'S HEALTH ISSUES 231, 234 (2019).

is unwilling to use it or wants them to become pregnant.³⁹ Irrespective of whether reproductive coercion results in pregnancy, it is nevertheless an alarmingly common occurrence within abusive relationships.

Unsurprisingly, however, reproductive coercion often *does* result in pregnancy. In fact, women with a history of intimate partner violence have significantly higher rates of unintended pregnancies.⁴⁰ Once a victim becomes pregnant, the danger to the victim is likely to increase, as pregnancy itself is a statistical indicator that violence by an intimate partner will be more frequent and severe.⁴¹

Reproductive coercion, therefore, is properly understood as behavior within the broader dynamic of power and control that severely impacts a victim's bodily autonomy and/or safety. This phenomenon is not merely hypothetical; rather, this is a common occurrence within the Commonwealth of Virginia.

C. Victims in Virginia routinely experience reproductive coercion

The stories collected from our experiences as advocates and lawyers working with victims in Virginia illustrate the reality and harm of reproductive coercion. These stories demonstrate what reproductive coercion looks like in real life circumstances and the profound harm that it causes. Some victims⁴² have related to us that their partners have destroyed or tampered with their birth control and that their partners have refused to wear condoms. Victims have reported feeling coerced into becoming pregnant and express fear that they will become pregnant when they do not wish to be.

The following victim composite story displays how reproductive coercion fits into a larger pattern of abuse and how it poses serious long-term risks. Victim is a woman whose partner exhibits very controlling behavior, including restricting whom she is permitted to speak with and how much money she is allowed to spend. He is demeaning and manipulative, constantly telling her that she is worthless and that no one else would be in a relationship with her. Additionally, he has been pressuring her to have a baby with him. Victim does not wish to have a baby with her partner. He tells her that he will leave

³⁹ Rebekah E. Gee et al., *Power Over Parity: Intimate Partner Violence and Issues of Fertility Control*, 201 AM. J. OF OBSTETRICS & GYNECOLOGY 148.e1, 148.e3 (2009).

⁴⁰ Christina C. Pallitto et al., *Intimate Partner Violence, Abortion, and Unintended Pregnancy: Results From the WHO Multi-Country Study on Women's Health and Domestic Violence*, 120 INT'L J. GYNECOLOGY & OBSTETRICS 3, 3-8 (2012).

⁴¹ Sandra L. Martin et al., *Changes in Intimate Partner Violence During Pregnancy*, 19 J. FAM. VIOLENCE 201, 208 (2004).

⁴² Anecdotes do not include victim names or identifying information, and "Victim" will be used as the sole identifier for each story herein.

her if she does not consent to sex without birth control. When she refuses, he berates her and, on multiple occasions, becomes physically violent with her. Eventually, she relents and becomes pregnant. The pregnancy seems to exacerbate his controlling and abusive behavior. Victim fears for her safety and for the safety of her baby. Eventually, she leaves. However, her now ex-partner continues to abuse and harass her during exchanges of their child. He also engages in a years-long campaign to harass her through the court and child protective services (CPS) systems. He files many unfounded CPS complaints and initiates countless frivolous legal suits attempting to modify the custody order. She fears that she will never truly be free of him, as co-parenting binds her to her abuser for the duration of her child's minority, if not even longer.

Pregnancy coercion, or controlling the outcome of pregnancy, is also commonly experienced by victims in Virginia who access our hotline services. The following two examples from our work further evidence this form of abuse.

The victim related that she became pregnant twice during a very abusive relationship. The first time that she became pregnant her boyfriend told her to get an abortion. When she refused to do so, he beat her so badly that she miscarried her baby. When she got pregnant for a second time, her boyfriend again told her to get an abortion. She refused. He told her he would kill her if she allowed the pregnancy to continue. Once, he even pointed a gun at her while issuing threats. She decided to leave the relationship. Several months later, she delivered a healthy baby. Almost immediately after giving birth, her now ex-boyfriend began filing motions in order to gain full custody. She lives in fear of losing her baby to her abusive ex-boyfriend.

Another victim disclosed that she discovered she was pregnant as a result of her then-boyfriend, who was volatile and occasionally violent, and this greatly concerned her. Several times, he had threatened her with a gun during arguments. She wanted to terminate her pregnancy. When she told her boyfriend of this intention, he became very angry. He struck her while screaming at her that this was his baby too and that he would not allow her to end the pregnancy. Afraid that he would retaliate violently against her if she sought abortion care, she decided to follow through with the pregnancy. After the baby was born, she continued to receive threats during custody exchanges with the father.

Unfortunately, stories of reproductive coercion are common. The authors of this article speak to victims in Virginia daily, who routinely report incidents of reproductive coercion in abusive relationships. Although this is

rarely reported to law enforcement or the courts, this severe form of abuse is happening every day to victims in Virginia, jeopardizing their safety and well-being. It is critical, therefore, that victims understand their legal rights and options when facing such abuse. Unfortunately, victims often face significant barriers in accessing clear legal information and advice—a problem that is likely to get worse in the wake of *Dobbs*.

D. Ambiguity in Virginia's legal system concerning reproductive freedom creates opportunities for abusers to further terrorize victims

A typical victim attempting to access the legal system in Virginia is likely to encounter many barriers. For instance, many abusers use the legal system as another spoke in the wheel of power and control by manipulating the victim's access to, and perception of, her legal rights. This is especially true if the abuser possesses a superior understanding of the legal system compared to their victims. Victims commonly report that during the relationship, they were prevented from leaving, in part, due to threats from the abuser about the legal repercussions of leaving. The authors of this article have worked with numerous victims who have reported fear of leaving a relationship due to an abuser threatening to use both Virginia's civil and criminal legal system against her. Such threats include that the abuser will: "get her for abandonment," "take out charges against her for abuse," take the children away from her, deport her, "get her for child support," or, alternatively, refuse to pay any child support by "denying" paternity. Frankly, it does not matter whether these threats have legal merit. What matters in the moment is whether or not these threats sound sufficiently valid to achieve the purpose for which the abuser intends—to trap his victim. If a victim is confused about her legal options, this creates a perfect opportunity for abusers to tighten their grip, and further maintain power and control over their victim.

These threats are not made in vain. Even when victims manage to escape these relationships, abusers often make good on their promises to use the legal system to punish a victim for leaving.⁴³ Especially for victims who share children in common with their abusers, the cycle of abuse continues long after the relationship has ended. Statistically, perpetrators of IPV are significantly more likely than non-batters to pursue custody of children,⁴⁴ and many

⁴³ For a practitioner's perspective on litigation abuse in Virginia custody and divorce cases, see, e.g., Katie Carter, *When Virginia Divorce and Custody Litigation Becomes Abusive*, HOFHEIMER FAM. L. FIRM (Mar. 4, 2019), <https://hoflaw.com/when-virginia-divorce-and-custody-litigation-becomes-abusive/>.

⁴⁴ AM. PSYCH. ASSOC., VIOLENCE AND THE FAMILY, PRESIDENTIAL TASK FORCE REP. ON VIOLENCE AND THE FAMILY 40 (1996); Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1055 (2011).

engage in years of emotionally and financially draining litigation harassment. The legal system, intended to shield and protect victims, often turns into a sword that is used against victims when abusers threaten civil or criminal action as a means of controlling their victims' decisions.⁴⁵

These threats are especially potent when they involve the threat of criminal punishment. For example, an abuser may call the police and say that they have been attacked, even when they have been the primary aggressor. Under Virginia law, police officers must arrest whom they believe to be the primary aggressor when they have sufficient reason to think that intimate partner violence has occurred.⁴⁶ As a result, if police arrive to the scene of an IPV incident and the abuser has marks from the victim defending herself, but the victim does not have visible marks, then the police will often arrest the victim. Many abusers are aware of this reality and will use it against victims. Several victim stories, detailed below, illustrate this terrifying reality.

Victim revealed that her husband had fits of rage that were so extreme that he had, on a number of occasions, attempted to strangle her. In fact, her husband had recently tried to strangle her while she was breastfeeding their baby. While fighting him off, she scratched him. He warned her that if she left a mark on him and he called the police, they would arrest her, as scratching usually leaves marks but strangling often does not. Believing him, she did not call the police for help. Unbeknownst to her, he summoned the police, claiming that she had attacked him. When the police arrived at their house, however, her husband had fled the scene and no arrest was made. Victim lived in fear that her husband would continue to attack her and that, if she defended herself, she would risk arrest and that her children would be taken from her, as her husband said that they would. As result, she described feeling as scared of criminal punishment as she was of her husband's terrifying physical abuse. She felt that she had no options to protect herself.

Victim was in a violent altercation with her boyfriend, who was also the father of her baby. During this fight, he threatened to hurt her and her baby. He rushed at her while she held their baby and she feared that he was going to hurt them. In a panic, she threw a

⁴⁵ Maleaha Brown, *De-Weaponizing the Courts; Attorney's Fees May Help Deter Litigation Abuse Against Domestic Violence Survivors*, AM. BAR ASSOC. DOMESTIC VIOLENCE COMM. (Oct. 29, 2019), https://www.americanbar.org/groups/family_law/committees/domestic-violence/litigation-abuse/#:~:text=Litigation%20abuse%20is%20a%20particularly%20manipulative%20method%20of,legal%20system%20will%20provide%20protection%20from%20their%20abusers.

⁴⁶ VA. CODE § 19.2-81.3(B) (2023). Arrest without a warrant is authorized in cases of assault and battery against a family or household member and stalking and for violations of protective orders.

cloth at him to stop him from moving toward her. At that point, her abuser called the police, saying that she had thrown a cloth at him and that she was the primary aggressor. When the police arrived, they arrested the victim, allowing the abuser to successfully manipulate the criminal system against his victim.

Victim is an undocumented immigrant. During an altercation, her partner severely beat her. He told her that if she called the police, he would tell them she attacked him and that she would get arrested. He also warned that, as she was undocumented, if the police arrived at the scene, they may report her to ICE. As a result of these threats, victim reported feeling too scared to call the police, despite the severity of his beating. This story typifies the reality that victims who are marginalized are often the most vulnerable. Indeed, because of this victim's status as an undocumented immigrant, and her lack of knowledge of the law given her recent arrival to this country, her abuser beat her viciously, knowing that there was little chance she would call for help.

Advocates working with victims of IPV understand how murky the legal system can appear from inside of an abusive relationship, especially when filtered through the lens of an abuser. A critical component of assisting victims is empowering them to understand and access their legal rights and remedies. When the legal system is inconsistent, in flux, or otherwise unreliable in protecting victims from abuse, the system can inadvertently re-traumatize the victim or compound the barriers she faces as she attempts to escape an abusive relationship. Unfortunately, *Dobbs* creates newfound uncertainty within our legal system, muddying the waters for victims even more.

II. CONSEQUENCES OF DOBBS: EMPOWERING ABUSERS AND JEOPARDIZING VICTIM SAFETY

If there is ambiguity in the law around the issue of abortion, or if the victim is unsure of what the law is, this will be a potent method of coercion. *Dobbs* and the threat of the eradication of abortion rights in Virginia will increase abusers' ability to victimize while simultaneously depriving victims of options to seek the care they need.

As the stories above demonstrate, abusers frequently use pregnancy to control their victims. Moreover, as the examples show, victims of violence do become pregnant because of this abuse. The *Dobbs* decision, which returns the issue of abortion to state legislatures and therefore leaves open the

possibility that abortion could become further restricted in Virginia, potentially limits abortion care as an option for victims to address the impacts of abuse. Indeed, such coercive laws intended to control reproduction reinforce and enhance the power and control dynamic used by perpetrators of IPV against their victims.

Additionally, if Virginia chooses to further criminalize pregnancy, victims could find themselves criminally punished for obtaining the care they require after abuse. Alternatively, victims may fear criminal repercussions for seeking an abortion and forego such care, leaving them vulnerable to more negative outcomes. Undoubtedly, the restriction of access to abortion and the resulting increase in the criminalization and surveillance of certain behavior of pregnant people will have a disproportionate impact on those from marginalized backgrounds.

A. State laws restricting abortion increasingly target pregnant people for criminal punishment

Victims have good cause to fear criminal punishment for seeking abortion care. Laws restricting abortion increasingly target pregnant people for criminal punishment. Anti-abortion laws are becoming more commonly weaponized against pregnant people themselves. This will undoubtedly accelerate in the post-*Dobbs* world. Even before *Dobbs*, pregnant people faced criminal liability for pregnancy related offenses.⁴⁷ Indeed, more than fifty women have been prosecuted for child neglect or manslaughter in the United States since 1999 as a result of testing positive for drug use after a miscarriage or a stillbirth.⁴⁸

Over the last twenty-three years, there have been at least twenty felony cases in Alabama, fourteen in South Carolina, ten in Oklahoma, as well as nine in other states, where prosecutors have employed the concept of “fetal personhood” to bring criminal charges after miscarriage or stillbirth.⁴⁹ This approach to drug addiction during pregnancy is harmful and counterproductive because it disincentivizes the pregnant person from seeking the medical care they need. Unfortunately, it is a strategy that is likely to become more common in the wake of *Dobbs*, as states can now pass laws that give fetuses and embryos the same rights as children or their mothers.⁵⁰

⁴⁷ Cary Aspinwall et. al., *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison.*, MARSHALL PROJ. (Sept. 1, 2022), <https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Moreover, those faced with pregnancy loss after drug use are often least able to effectively defend themselves against criminal charges. They frequently work low-paying jobs, are often victims of IPV, have little access to health care or drug treatment, and rely on court-appointed lawyers who commonly encourage them to plead guilty.⁵¹

The case of Ashely Traister illustrates this reality. When Traister met her husband, he was significantly older and already had record of arrests, including arrests for domestic violence offenses.⁵² Through her husband, she became addicted to methamphetamine, and he physically abused her.⁵³ While she did call the police, he was never charged with a domestic violence offense.⁵⁴ When she became pregnant in 2019, she did not discover the pregnancy until several months in.⁵⁵ Midway through the pregnancy, she started bleeding profusely. Soon after, she delivered a stillborn son at a local hospital.⁵⁶ When the hospital tested Traister's blood for drugs, they found the presence of methamphetamine.⁵⁷ A state autopsy classified the stillbirth's cause as undetermined, saying methamphetamine was not the cause of the baby's death was but most likely a contributing factor.⁵⁸ Based on this autopsy, police arrested Traister on charges of manslaughter and child neglect.⁵⁹

In addition to facing arrest for stillbirths and miscarriages, pregnant people have been punished for years for terminating pregnancies, and this trend appears to be on the rise.⁶⁰ Indeed, this shift has become so pronounced that organizations like the National Association of Pregnant Women ("NAPW") have emerged to provide legal defense for people who have been charged with pregnancy related offenses.⁶¹ In 2013, NAPW worked with Fordham University to gather data on the arrests and prosecutions of pregnancies.⁶² From 1973—the year that *Roe v. Wade* was decided—until 2005, they found over 400 cases where pregnancy, including pregnancy loss, was used

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Cat Zakrewski et al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, WASH. POST (July 3, 2022), <https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution/>.

⁶¹ Robert Baldwin III, *Losing a Pregnancy Could Land You In Jail in Post-Roe America*, NPR (July 3, 2022), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss>.

⁶² *Id.*

in a criminal investigation or prosecution.⁶³ Alarming, from 2006 through 2020, that number virtually quadrupled.⁶⁴

According to the National Conference of State Legislatures, at least thirty-eight states have current laws that make it a crime to harm a fetus.⁶⁵ While these laws were originally intended to stop violence against pregnant people, these “fetal harm” laws effectively increase penalties for actions by a pregnant person. Indeed, in practice, they have been used to investigate and prosecute different forms of pregnancy outcomes, including miscarriages, stillbirths and self-induced abortions.⁶⁶ Applying these laws in this manner, as is now occurring more frequently, criminalizes a pregnant person’s behavior during their pregnancy.⁶⁷ Without the protections of *Roe* and *Casey*, this will only become more common. Furthermore, pre-*Roe*, the landscape of American law enforcement was vastly different. The movement since then has been to increasingly push social problems onto the plate of police, potentially making it even more likely that pregnant people will be arrested, charged, and convicted for abortion related offenses than during the pre-*Roe* era.⁶⁸

Additionally, digital evidence has played an increasingly important role in the prosecution of pregnant people for abortion related offenses. The case of Indiana woman Purvi Patel typifies this trend. In 2015, she was the first woman in the United States to be charged, convicted, and sentenced for “feticide” in terminating her own pregnancy. The prosecutors in the case relied heavily on text messages in which she discussed her plans to take abortion pills.⁶⁹ Because of the accessibility and sheer volume of digital evidence, the trend of relying on such evidence could signal a sharp increase in investigations and prosecutions in abortion related offenses as compared to the pre-*Roe* era, when digital evidence was not available.

The story of Texas woman Lizelle Herrera foretells the future of post-*Dobbs* America and provides an illustrative example of what Virginia could look like if it does not protect abortion rights. In April 2022, Herrera was charged with murder for “intentionally and knowingly causing the death of an individual by self-induced abortion.” Though details are uncertain, it is

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Sandhya Dirks, *Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color*, NPR (Aug. 3, 2022), <https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of>.

⁶⁹ Zakrewski et al., *supra* note 60.

likely that medical professionals treating Herrera at a Texas hospital reported her to law enforcement.⁷⁰ Many of the states that have recently introduced strict anti-abortion laws, such as Texas, have stressed that they are not intending to punish those with the capacity for pregnancy. In practice, however, these laws are often leveraged against pregnant people, as Herrera's case clearly demonstrates. This is especially true for people of color and those with fewer resources.⁷¹ With abortion now banned in thirteen states, and more bans expected in the near future, people seeking abortions will be increasingly targeted for criminal punishment.

B. Virginia's Landscape: Prosecution of Pregnancy Termination and Legislative Attempts to Further Criminalize Abortion

Pregnant people in Virginia have also faced prosecution in the pre-*Dobbs* era. In 2017, a woman in Chesterfield, Virginia, was arrested and prosecuted on felony charges of "producing abortion or miscarriage."⁷² In a ruling on the woman's motion to dismiss, the circuit court judge determined that the statute did not exclude the pregnant woman herself from prosecution.⁷³ In 2005, a pregnant woman in Suffolk, Virginia, was prosecuted under the same law⁷⁴ for shooting herself in the abdomen on her due date. In this case, however, a circuit court judge dismissed the charge, saying the law⁷⁵ was not intended to punish the pregnant person.⁷⁶ As the different results of these two cases demonstrate, there is inconsistency in how courts interpret laws relating to abortion. This ambiguity could be exploited by prosecutors and by abusers against their pregnant victims. To protect victims of sexual and intimate partner violence, it is imperative that Virginia make clear the legality of abortion by codifying the right in its state constitution.

In Virginia, legislative attempts have been made to convey "personhood" onto a fetus through criminalization of the termination of a pregnancy resulting from injuries to the pregnant person caused by another person—

⁷⁰ Mary Ziegler, *Lizelle Herrera's Texas Arrest is a Warning*, NBC (Apr. 16, 2022) <https://www.nbcnews.com/think/opinion/lizelle-herrerass-texas-abortion-arrest-warning-rcna24639>.

⁷¹ *Id.*

⁷² DeNeen L. Brown, *'I Know What's Buried in the Backyard': A Woman Faces a Rare Charge of Self-induced Abortion*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/local/i-know-whats-buried-in-the-back-yard-a-woman-faces-a-rare-charge-of-self-induced-abortion/2017/04/20/6276452c-1fc1-11e7-a0a7-8b2a45e3dc84_story.html. The defendant was prosecuted under VA. CODE § 18.2-71 (1975).

⁷³ Commonwealth v. Roberts, 96 Va. Cir. 378, 384 (2017)

⁷⁴ See VA. CODE § 18.2-71 (1975).

⁷⁵ See *id.*

⁷⁶ Brown, *supra* note 72.

intentional or unintentional—during the commission of a crime.⁷⁷ “Personhood” bills, as they are called, seek to create and/or expand the criminal code to include the termination of a pregnancy by relying on the argument that the “killing of a fetus,” is a crime against a person and the state. In this way, these laws pave the way for the argument that the fetus deserves the same protection as the mother under the law. Establishing such personhood rights for a fetus further criminalizes abortion by making any person who “kills the fetus of another intentionally or accidentally guilty of voluntary manslaughter.”⁷⁸ In some states, these laws have been used to justify more expansive rights for fetuses that lead to outright bans on abortion.⁷⁹

On behalf of all Virginians—especially victims of sexual and domestic violence—our lawmakers have a duty to ensure that this does not happen. State laws should be crafted to acknowledge the rights of citizens for whom the state exists and is intended to serve. For example, code language like that in Va. Code Ann. 18.2-32.2 referring to the “killing of a fetus,” whether intentional or not, disregards the life and rights of the pregnant person carrying that fetus. Instead, Virginia should prioritize code language that clearly acknowledges the life of the pregnant person, such as “termination of a pregnancy” or “producing miscarriage or abortion.” Under this legal framework, willful or deliberate attempts to terminate another person’s pregnancy should be considered an injury inflicted on that person, not on the fetus. Virginia lawmakers should modify code language so that our laws clearly establish the rights of a pregnant person and consider those rights paramount to the “rights” of a fetus.

III. THE CASE FOR A VIRGINIA CONSTITUTIONAL AMENDMENT TO PROTECT REPRODUCTIVE FREEDOM

With the protections of *Roe* and *Casey* now overturned, Virginia lawmakers must act now to create clear and unambiguous protections for reproductive autonomy. Without a constitutional amendment, lawmakers may further restrict abortion access, thus increasingly criminalizing pregnancy and impeding the ability of sexual or intimate partner violence victims to access the healthcare they need in the aftermath of trauma. The movement towards

⁷⁷ H.D. 744, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

⁷⁸ *Id.*

⁷⁹ Jeff Amy, *EXPLAINER: What's the role of personhood in abortion debate?*, ASSOCIATED PRESS (July 30, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-constitutions-93c27f3132ecc78e913120fe4d6c0977>.

punishing the pregnant person and not just the provider has been on the rise for years and is likely to increase significantly in the wake of *Dobbs*. As such, the threat of criminal punishment for pregnancy is increasing—a reality that will expose victims of sexual and intimate partner violence to even greater risk. The possibility of criminal repercussions will also give abusers another avenue of control and manipulation, as they can use the twin approach of reproductive coercion and the threat of criminal punishment for terminating a pregnancy to coerce their victims and to dissuade them from seeking help.

Inaction on this issue will surely result in significant barriers, including increased danger and lethality, for sexual and intimate partner violence victims across Virginia. Confusion around the legality of abortion also leaves ample room for abusers to use the threat of criminal punishment to control their victims. For this reason, it is essential that Virginia protect the ability of victims to access abortion care and make clear its legality by enshrining abortion rights in the Virginia constitution.

However, the impetus to enshrine abortion rights in Virginia does not rest solely on the legislature. The process of making changes to Virginia's constitution requires two years of approval or passage by Virginia's House of Delegates and the Virginia Senate before a referendum can be sent to the voters for a final decision. Thankfully, public support for abortion access remains high in Virginia. Recent polling found that 79% of Virginians support safe and legal abortion.⁸⁰ That said, under the control of anti-abortion legislators, Virginia may attempt to ban abortion outright. Without the protections enshrined in *Roe* and *Casey*, Virginians' rights to bodily autonomy and freedom lay at the mercy of our General Assembly. Therefore, it is incumbent on the voting citizens of Virginia not only to elect representatives who believe that the state constitution should reflect the values of a majority of Virginians, but also to elect legislators who share the values of those they are meant to represent in the General Assembly.

Now more than ever, Virginia should look to its neighbors in Maryland and the District of Columbia for legal and policy blueprints to protect abortion access and expand reproductive freedom. For example, Maryland law includes express statutory protections for abortion.⁸¹ In 2022, Maryland enacted a law requiring public medical assistance programs to cover abortion services and private insurance plans that cover labor and delivery to also

⁸⁰ Katherine Patterson, *Majority of Virginians Believe Abortion Should Be Legal; Oppose Unnecessary Restrictions Targeting Abortion Providers*, PUB. POL'Y POLLING (Jan. 24, 2020), <https://virginia.prochoiceamericaaffiliates.org/wp-content/uploads/sites/12/2020/01/Majority-of-Virginians-Believe-Abortion-Should-Be-Legal-Oppose-Unnecessary-Restrictions-Targeting-Abortion-Providers.pdf>.

⁸¹ MD. CODE ANN., HEALTH-GEN § 20-209 (LexisNexis 2022)

cover abortion services, thus increasing access to life-saving healthcare services for victims statewide. Similarly, in 2020, the District of Columbia amended the District's Human Rights Act of 1977 to recognize the right to abortion among other fundamental human rights.⁸²

Following these blueprints, Virginia's lawmakers can take immediate action to expand prevention education and healthcare access statewide. Being accountable to the will and the values of the people requires our lawmakers to act to protect the right to abortion in Virginia's state constitution. This will not only protect fundamental human rights for all Virginians, but will also restore power and control for sexual and intimate partner violence victims for whom access and choice are critical both for safety and healing.

⁸² D.C. CODE § 2-1401.06 (2023)

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