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## The Current State of Abortion Law in Virginia Leaves Victims of Domestic and Sexual Violence Vulnerable to Abuse: Why Virginia Should Codify the Right to Abortion in the State Constitution†

Courtenay Schwartz

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THE CURRENT STATE OF ABORTION LAW IN  
VIRGINIA LEAVES VICTIMS OF DOMESTIC AND  
SEXUAL VIOLENCE VULNERABLE TO ABUSE: WHY  
VIRGINIA SHOULD CODIFY THE RIGHT TO ABORTION  
IN THE STATE CONSTITUTION†

*Courtenay Schwartz* \*

ABSTRACT

*All people must have access to safe and legal reproductive health care—especially victims of sexual and domestic violence who can and do become pregnant because of the violence they experience. This year, the United States Supreme Court overturned Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey in Dobbs v. Jackson Women’s Health Organization. In doing so, the Supreme Court held that the Constitution does not protect the right to an abortion. Though abortion access is currently protected in Virginia, this could change with each new General Assembly session. To guard against the danger that this poses to victims of sexual and domestic violence, Virginia can guarantee the ability of every citizen to access necessary healthcare by enshrining the right to abortion in the state constitution and by enacting strong statutory protections.*

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† This Article was derived in part from “Dobbs in the Context of Intimate Partner Violence: The Case for a Virginia Constitutional Amendment Protecting Reproductive Choice,” written by Caitlin Bradley, Courtenay Schwartz, and Jonathan Yglesias in the Richmond Public Interest Law Review, Vol. 26, Issue 3, 2023.

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## INTRODUCTION

All people, including and especially victims of sexual and domestic violence, must be guaranteed full access to non-judgmental, safe, legal, affordable, and medically accurate sexual and reproductive health care.<sup>1</sup> Victims of sexual and domestic violence can and do become pregnant because of the violence they experience. Allowing victims to make informed decisions regarding their bodies and their care in the aftermath of trauma is an empowering step toward recovery. Thus, it is critical that victims of sexual and domestic violence have control over their bodies, lives, and futures. Legislative exceptions for victims of sexual and domestic violence are inadequate protections against the many forms of abuse that victims face. They are also impractical and further remove agency and control from the victim, who may be forced to report their assault in order to access these exceptions. Moreover, restricting a victim's reproductive autonomy may jeopardize their safety and further trap them in abusive relationships. Finally, abortion restrictions, or even an environment where protections are precarious, create a culture which transmits the message that it is acceptable to assert dominion over others' bodies. This empowers abusers and reiterates to victims what their abusers often attempt to convince them of: that others control what happens to their bodies.<sup>2</sup>

The United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*<sup>3</sup> overturned *Roe v. Wade*<sup>4</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>5</sup> which established and affirmed the constitutional right to obtain an abortion. After *Dobbs*, states are now free to restrict or even ban abortion care.<sup>6</sup> As a result, most abortions are now banned in over

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1. I would like to note that I 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 often be used throughout the paper when referring to those impacted by abortion laws. Additionally, while I sometimes use gendered language when describing hypothetical victims and abusers, I also recognize that people of all genders can be both victims and abusers.

2. Although this Article focuses on the specific danger faced by victims of sexual and domestic violence if reproductive justice is not ensured, the author of this Article strongly asserts that all people, regardless of whether or not they are victims of sexual or domestic violence, have a fundamental right to reproductive autonomy.

3. 142 S. Ct. 2228, 2242 (2022).

4. 410 U.S. 113, 164 (1973).

5. 505 U.S. 833, 846 (1992).

6. *Dobbs*, 142 S.Ct. at 2306.

twenty states as laws restricting the procedure take effect.<sup>7</sup> For example, Georgia bans abortion at about six weeks of pregnancy—before many people know they are pregnant.<sup>8</sup> This decision has paved the way for the prosecution of pregnant people and has restricted the ability of all people to make choices about their reproductive futures. *Dobbs* introduces specific dangers to victims of sexual and domestic violence which must be addressed immediately.<sup>9</sup>

The *Dobbs* decision had no immediate impact on abortion law in Virginia; currently, abortion is permitted until the third trimester with limitations.<sup>10</sup> Specifically, state Medicaid coverage of abortion care is banned except in very limited circumstances; parental consent or notice is required for a minor's abortion; and qualified health care professionals—not solely physicians—can provide abortions.<sup>11</sup> Although abortion is presently protected in Virginia, this could change with each new General Assembly session, as attempts to restrict abortion access occur annually in the General Assembly.<sup>12</sup> Thus, the threat to abortion access, and the resulting danger to victims of sexual and domestic violence, is very real in Virginia.

As the last state in the South to maintain relatively open access to abortion post-*Dobbs*, it is imperative that Virginia protects the right to abortion access, as even more out-of-state patients will seek care in Virginia. Since Virginia is a purple state with a General Assembly that is vulnerable to both flipping and to having a House and Senate under the control of different parties,<sup>13</sup> the legality of abortion access will remain murky and precarious. Unless

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7. Allison McCann et al., *Tracking the States Where Abortion is Banned*, N.Y. TIMES (Aug. 2, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [http://perma.cc/Z4C6-5BTF].

8. *Id.*

9. See generally VA. SEXUAL & DOMESTIC VIOLENCE ACTION ALL., ACTION ALLIANCE POSITION STATEMENT: PROMOTING SEXUAL & REPRODUCTIVE HEALTH (2018), <https://vsdvalliance.org/wp-content/uploads/2020/09/Promoting-Sexual-Reproductive-Health-Position-Statement.pdf> [https://perma.cc/Y3EK-RLXD] (discussing the importance of access to reproductive health care for victims of sexual and intimate partner violence).

10. VA. CODE ANN. § 18.2-72 (Cum. Supp. 2023).

11. See §§ 18.2-72 to -74, 16.1-241 (2021 & Cum. Supp. 2023).

12. Ian Munro, *Proposed 15-Week Abortion Ban Introduced on 1st Day of General Assembly Session*, VIRGINIAN-PILOT (Jan. 11, 2023, 11:44 PM), <https://www.pilotonline.com/2023/01/11/proposed-15-week-abortion-ban-introduced-on-1st-day-of-general-assembly-session/> [https://perma.cc/U2U5-3BWA].

13. Alexandra DeSanctis, *Virginia is a Purple State After All*, NAT'L REV. (Nov. 5, 2021, 11:47 AM), <https://www.nationalreview.com/2021/11/virginia-is-a-purple-state-after-all/> [http://perma.cc/U6DE-5MCZ].

definitive action is taken, this will put survivors of violence at risk here in Virginia and throughout the South. Virginia can best ensure the safety of victims of sexual and domestic violence and the ability of every citizen to access all needed healthcare by enshrining the right to abortion in the state constitution in addition to having strong statutory protections.

Part I explores the link between sexual and reproductive coercion and access to reproductive care. Part II highlights how ambiguities in Virginia's legal landscape concerning abortion rights will endanger victims of sexual and domestic violence, and how this will not be resolved with the implementation of rape and incest exceptions. Part III addresses abortion at the 2023 Virginia General Assembly, discusses the need for a constitutional amendment to ensure the right to abortion, and explores abortion protections in other state constitutions that may serve as models for Virginia.

## I. THE LINK BETWEEN DOMESTIC VIOLENCE AND ABORTION RIGHTS

To appreciate the link between domestic violence and reproductive justice, it is imperative to understand how abusive relationships function. Domestic violence is the intentional "intimidation, physical assault, battery, sexual assault, and/or other abusive behavior" that is a part of a pattern of power and control carried out by one person in a family or relationship against another.<sup>14</sup> It can include "physical violence, sexual violence, psychological violence, and emotional abuse."<sup>15</sup> While the frequency and severity varies significantly, the one unifying characteristic of all abusive relationships is one partner's consistent efforts to maintain power and control over another person in the family or relationship.<sup>16</sup>

### A. *Sexual and Reproductive Coercion Are Dangerous and Common Tools of Abuse Which Often Result in Pregnancy*

Domestic violence is a significant public health concern impacting thousands of Virginians each year, accounting for approximate-

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14. *What Is Domestic Violence?*, NAT'L. DOMESTIC VIOLENCE HOTLINE, <https://ncadv.org/learn-more> [<https://perma.cc/95MG-X5S6>].

15. *Id.*

16. *Id.*

ly one-third of homicides in Virginia.<sup>17</sup> Domestic violence 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, which are described in further detail below.<sup>18</sup> Although domestic violence and sexual violence are distinct phenomena, victims of domestic violence can and often do experience sexual violence within the context of an abusive relationship.<sup>19</sup> Furthermore, although domestic violence can refer to abuse between people in multiple kinds of relationships, including non-romantic relationships, this Article will focus on intimate partner violence—abuse that occurs between romantic partners.<sup>20</sup>

In many abusive relationships, sexual and reproductive coercion are common and dangerous ways that abusers maintain power and control over their victims.<sup>21</sup> Sexual coercion “involves any behavior intended to maintain power and control in a relationship related to sexual activity or sexual health . . . . [It] includes 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.”<sup>22</sup>

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17. VA. OFF. OF THE CHIEF MEDICAL EXAM’R, VA. DEPT’ OF HEALTH, 2015 FAMILY AND INTIMATE PARTNER HOMICIDE: A DESCRIPTIVE ANALYSIS OF THE CHARACTERISTICS AND CIRCUMSTANCES SURROUNDING FAMILY AND INTIMATE PARTNER HOMICIDE IN VIRGINIA 1 (2018), <https://www.vdh.virginia.gov/content/uploads/sites/18/2018/02/2015-FIPS-Annual-Report.pdf> [<https://perma.cc/Z7J9-STE6>]. More recent data has not been published by the Office of the Chief Medical Examiner.

18. *What is Domestic Violence?*, *supra* note 14; *What is DV?*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/about-dv/what-is-dv/> [<https://perma.cc/8SED-TDTB>].

19. *Id.*

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

21. PLANNED PARENTHOOD FED’N OF AM., FACT SHEET: INTIMATE PARTNER VIOLENCE AND REPRODUCTIVE COERCION (2012), [https://www.plannedparenthood.org/files/3613/9611/7697/IPV\\_and\\_Reproductive\\_Coercion\\_Fact\\_Sheet\\_2012\\_FINAL.pdf](https://www.plannedparenthood.org/files/3613/9611/7697/IPV_and_Reproductive_Coercion_Fact_Sheet_2012_FINAL.pdf) [<https://perma.cc/GXF6-NM7T>].

22. VA. SEXUAL & DOMESTIC VIOLENCE ACTION ALL., REPRODUCTIVE AND SEXUAL COERCION: A TOOLKIT FOR SEXUAL & DOMESTIC VIOLENCE ADVOCATES A.1 (3d ed. 2020) [hereinafter TOOLKIT], [https://www.communitysolutionsva.org/files/2020\\_Reproductive\\_and\\_Sexual\\_Coercion\\_Toolkit\\_FINALv5.pdf](https://www.communitysolutionsva.org/files/2020_Reproductive_and_Sexual_Coercion_Toolkit_FINALv5.pdf) [<https://perma.cc/LQ3W-L6DA>]; FUTURES WITHOUT VIOLENCE, THE FACTS ON REPRODUCTIVE HEALTH AND PARTNER ABUSE, [https://www.futureswithoutviolence.org/userfiles/file/Children\\_and\\_Families/Reproductive.pdf](https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Reproductive.pdf) [<https://perma.cc/8SED-TDTB>].



Reproductive coercion involves behavior related to reproduction and sexual health that is “intended to maintain power and control in a relationship,” and it can include “a range of behaviors that may involve pressure, threats, sabotage, and/or manipulation.”<sup>23</sup> 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.”<sup>24</sup> Such behaviors often include pregnancy pressure, pregnancy coercion, and birth control sabotage, which are 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 the idea of mutual violence, which suggests that parties in abusive relationships tend to engage in equal amounts of abusive behaviors and are therefore equally culpable.<sup>25</sup> Another misconception is the gender parity myth, which suggests that men and women are statistically equally violent.<sup>26</sup> The timeless question, “why doesn’t she 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

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*c/56KZ-W72J*]; Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 554: Reproductive and Sexual Coercion*, 121 *OBSTETRICS & GYNECOLOGY* 411, 411 (2013).

23. TOOLKIT, *supra* note 22, at A.2.

24. *Id.* at A.1–A.2.

25. Margaret Kertesz & Cathy Humphreys, *Women Who Use Force*, PURSUIT: U. MELB. (Jan. 13, 2021), <https://pursuit.unimelb.edu.au/articles/women-who-use-force> [<https://perma.cc/RW8D-5KFG>]. “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. *Mutual Abuse: It’s Not Real*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/mutual-abuse-its-not-real/> [<https://perma.cc/JCZ8-3HDX>].

26. Kertesz & Humphreys, *supra* note 25. Women in heterosexual relationships are statistically more likely to use force in self-defense, protection of children, retaliation, or stress, rather than as a tool to exert power and control over their male partners. See Suzanne Swan et al., *A Review of Research on Women’s Use of Violence with Male Intimate Partners*, 23 *VIOLENCE & VICTIMS* 301, 308–09 (2008); Murray Straus et al., *The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data*, 17 *J. FAM. ISSUES* 283, 283–86 (1996) (acknowledging the revision of the Conflict Tactics Scale, or CTS, and 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).

herself, such as “learned helplessness,” “battered women’s syndrome,” or a “failure to protect” herself and her children.<sup>27</sup>

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

### B. *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.”<sup>28</sup> 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, force, physical or mental incapacitation, and/or power of authority.”<sup>29</sup> Domestic and sexual violence must be understood in the context of other forms of intersecting oppression that promote the devaluation of groups and individuals.<sup>30</sup>

Although physical violence is the behavior most easily addressed by the law, other forms of abuse are critical to understanding the experience of victims in abusive relationships. Abusers often maintain power and control over victims using a pattern of behaviors that are often not visible to others—nor are they explicitly illegal.

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27. See *Why Doesn't She Just Leave?*, FAIRFAX CNTY., VA. DEP'T OF FAM. SERVS. (2022), <https://www.fairfaxcounty.gov/familyservices/community-corner/2022-11-why-doesnt-she-just-leave> [<https://perma.cc/V23Z-BYMB>] (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”).

28. RUTH G. MICKLEM & KRISTI VANAUDENHOVE, VA. SEXUAL & DOMESTIC VIOLENCE ACTION ALL., DEFINITION OF DOMESTIC VIOLENCE (2020), <https://vsdvalliance.org/wp-content/uploads/2020/09/Definitions-of-Sexual-Domestic-Violence.pdf> [<https://perma.cc/YG9K-KHQ3>].

29. *Id.*

30. *Id.*

The Power and Control Wheel, created in the 1980s by the Domestic Abuse Intervention Project,<sup>31</sup> serves as a powerful visual representation of the ways in which abusers maintain power and control over their victims.<sup>32</sup> This model has been widely adopted and is currently used by advocates and others working with victims of intimate partner violence.<sup>33</sup> “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.<sup>34</sup> Physical and sexual violence are represented as the outermost ring of the wheel.<sup>35</sup> This ring represents crimes such as assault, battery,<sup>36</sup> 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 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.<sup>37</sup> Thus, as the Power and Control Wheel demonstrates, physical and sexual violence are used as tools to maintain power and control and must be viewed within the larger context of the abusive relationship.

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. Moreover, attempts to leave the relationship often increase the danger to the victim.<sup>38</sup> Seventy-seven percent of domestic violence-related homicides are committed during a separation, and there is a seventy-five percent increase in violence after

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31. *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> [https://perma.cc/9WGS-V7U3].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. In Virginia, assault and battery against a “family or household member” is considered a distinct crime. VA. CODE ANN. § 18.2-57.2(A) (2021).

37. *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> [https://perma.cc/VML8-VH67].

38. *Escalation, Warning Signs of Relationship Abuse*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/escalation/> [https://perma.cc/55FD-C42B].

separation for at least two years.<sup>39</sup> Abusers use an increasingly complex series of tools to keep the victim trapped, including physical violence and the threat of violence.

Abusive behaviors typically escalate over time, often becoming more frequent and/or severe and sometimes ending in homicide.<sup>40</sup> Many 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.<sup>41</sup> Sexual violence and coercive control are both strongly predictive of a higher frequency and severity of violence.<sup>42</sup> Accordingly, such behavior should never be minimized or dismissed—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.

### C. *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.<sup>43</sup> It is executed through manipulation, intimidation, threats, and/or actual acts of violence.<sup>44</sup> Such

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39. *Eighteen Months after Leaving is Still the Most Dangerous Time*, BATTERED WOMEN'S SUPPORT SERVS. (June 11, 2020), <https://www.bwss.org/eighteen-months-after-leaving-domestic-violence-is-still-the-most-dangerous-time/> [<https://perma.cc/RW7N-83EM>].

40. *See id.*

41. *See, e.g., Tools & Strategies for Assessing Danger or Risk of Lethality*, VAWNET, <https://vawnet.org/sc/tools-strategies-assessing-danger-or-risk-lethality> [<https://perma.cc/DM3B-DGRJ>]; *Virginia's Lethality Assessment Program*, VA. OFF. OF THE ATTY GEN., <https://oag.state.va.us/programs-outreach/lethality-assessment-program> [<https://perma.cc/R3DW-767N>]. This assessment is administered by the Office of the Attorney General. It provides "law enforcement and other community professionals" evidence-based tools to prevent domestic violence homicides by identifying which victims are at the "highest risk of being seriously injured or killed by their intimate partners," and provides a protocol to immediately connect such victims to their local domestic violence program. *Id.*

42. *See* NORTH METRO. HEALTH SERVS., GOV'T OF AUSTL., EXPLANATION OF HIGH RISK FACTORS IN FAMILY AND DOMESTIC VIOLENCE (2020), <https://www.kemh.health.wa.gov.au/Family-and-domestic-violence/~media/CE6FC07468334EF48F5FF92E1308E47F.ashx> [<https://perma.cc/J84N-UJ3T>]; *see also* JACQUELYN C. CAMPBELL, DANGER ASSESSMENT (2019), [https://www.dangerassessment.org/uploads/DA\\_NewScoring\\_2019.pdf](https://www.dangerassessment.org/uploads/DA_NewScoring_2019.pdf) [<https://perma.cc/4C89-3DVY>].

43. Amanda Kippert, *A Guide to Reproductive and Sexual Coercion*, DOMESTICSHELTERS.ORG (Jan. 4, 2023), <https://www.domesticshelters.org/articles/comprehensive-guides/a-guide-to-reproductive-and-sexual-coercion> [<https://perma.cc/TJ3V-CLZU>].

44. Elizabeth Miller & Jay G. Silverman, *Reproductive Coercion and Partner Violence: Implications for Clinical Assessment of Unintended Pregnancy*, 5 EXPERT REV. OBSTETRICS

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."<sup>45</sup> Reproductive coercion can be roughly broken down into three categories of behaviors: (1) birth control sabotage; (2) pregnancy pressure; and (3) pregnancy coercion.

Birth control sabotage includes interfering with a person's selected method of contraception.<sup>46</sup> This category can encompass several behaviors, including when a person 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 "stealthing"); refuses to withdraw during sex, even if they previously agreed to do so; pulls out a sexual partner's vaginal contraceptive ring; or tears off a sexual partner's contraceptive patch.<sup>47</sup>

Pregnancy pressure includes pressuring a person to become pregnant when they do not wish to become pregnant.<sup>48</sup> This includes pressuring a partner to get pregnant when they don't want to be pregnant; continue a pregnancy when they want an abortion; or end a pregnancy that they want to continue.<sup>49</sup> 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.<sup>50</sup>

Given the severity of this form of abuse, reproductive coercion is disturbingly common. 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.<sup>51</sup> As noted previously, a partner removing a condom without consent is a form of sexual violence that

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& GYNECOLOGY 511, 512 (2010). Note that women are not the only people who can get pregnant; people of all genders can become pregnant.

45. *Reproductive Justice*, SISTER SONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice/> [<https://perma.cc/L2VP-RGCB>].

46. See TOOLKIT, *supra* note 22, at A.2.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. FUTURES WITHOUT VIOLENCE, *supra* note 22.

is sometimes called “stealthling.”<sup>52</sup> A 2019 study indicated that approximately one in eight women had experienced this form of sexual violence in their lifetime.<sup>53</sup> Additionally, women experiencing domestic violence are more likely to report that they do not use birth control because their male partner is unwilling to use it or wants them to become pregnant.<sup>54</sup> Irrespective of whether reproductive coercion results in pregnancy, it is nevertheless an alarmingly common occurrence within abusive relationships.

Unsurprisingly, reproductive coercion often *does* result in pregnancy. In fact, women with a history of domestic violence have significantly higher rates of unintended pregnancies.<sup>55</sup> Additionally, according to the most recent National Intimate Partner and Sexual Violence Survey, 14.9% of rape victims became pregnant.<sup>56</sup> 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 more severe.<sup>57</sup> In a recent study, researchers found that more pregnant people in the United States die by homicide than they do by pregnancy-related complications,<sup>58</sup> and homicide “exceeded all the leading causes of maternal mortality by more than twofold.”<sup>59</sup> Pregnancy is especially lethal for young pregnant people and Black pregnant people, who are three times more likely to die by homicide than pregnant

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52. TOOLKIT, *supra* note 22, at A.2; see also Gabrielle Kassel, *What is Stealthing? Everything You Should Know*, HEALTHLINE (Aug. 11, 2022), <https://www.healthline.com/health/what-is-stealthling> [<https://perma.cc/N73X-47PX>].

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

54. Rebekah E. Gee et al., *Power Over Parity: Intimate Partner Violence and Issues of Fertility Control*, 201 AM. J. OBSTETRICS & GYNECOLOGY 148.E1, 148.E3 (2009).

55. 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).

56. CTRES. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 14 (2022), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonsexualviolence.pdf> [<https://perma.cc/FMV7-NRNM>].

57. Sandra L. Martin et al., *Changes in Intimate Partner Violence During Pregnancy*, 19 J. FAM. VIOLENCE 201, 202 (2004).

58. See Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019*, 138 OBSTETRIC GYNECOLOGY 762, 762 (2022) (“Homicide is a leading cause of death during pregnancy and the postpartum period in the United States. Pregnancy and the postpartum period are times of elevated risk for homicide among all females of reproductive age.”).

59. *Id.*

people who are white.<sup>60</sup> Therefore, access to methods of stealth contraception (such as implants, intrauterine devices, etc.) and access to safe and legal abortion are critical to a victim's safety, health, and freedom.

D. *Victims from Historically Oppressed Groups Are Disproportionately Harmed by Both Sexual and Domestic Violence and by Restriction of Access to Abortion Care*

Because of the intersection of violence and societal marginalization in which age, gender identity, race, ethnicity, and socioeconomic status often limit access to quality health information and services, victims from historically oppressed groups are disproportionately harmed by both sexual and domestic violence and by restriction of access to abortion care. Intersecting forms of oppression and discrimination result in power, privilege, and access to resources for the elite, and limited access to power and resources for those who are socially marginalized, including women, people of color, and those in poverty.<sup>61</sup> Sexual coercion, for example, has a disproportionate impact on women of color, as non-Hispanic Black and multiracial women experience higher rates when compared to white women.<sup>62</sup>

Moreover, Black, Hispanic, and Native American women experience poverty at higher rates than white women, earning less on average.<sup>63</sup> As a result, if they do become pregnant, they will face much greater difficulty overcoming the barriers to abortion care placed by newly enacted bans and restrictions.<sup>64</sup> Poor and vulnerable pregnant people cannot afford to seek abortion care within

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60. Caroline Orr Bueno, *How Abortion Access Can Save Women from Violence*, NEW REPUBLIC (Dec. 15, 2021), <https://newrepublic.com/article/164711/abortion-bans-violence-against-women> [https://perma.cc/4BK6-RL4C].

61. Amanda Manes, *Reproductive Justice & Violence Against Women: Understanding the Intersections*, VAWNET (Feb. 28, 2017), <https://vawnet.org/sc/reproductive-justice-violence-against-women-understanding-intersections> [https://perma.cc/AS5J-WEVJ].

62. 52.9% of non-Hispanic Black women and 42.9% of multiracial women experience sexual coercion, while only 20.6% of white women experience it. TOOLKIT, *supra* note 22, at A.3.

63. *Spotlight on Women of Color: Employment and Earnings Data*, STATUS OF WOMEN IN THE STATES (2013), <https://statusofwomensdata.org/women-of-color/> [https://perma.cc/9XZP-TKV4].

64. Liza Fuentes, *Inequality in US Abortion Rights and Access: The End of Roe is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), <https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides> [https://perma.cc/3US5-TD3J].

hospitals and private physicians' offices or to travel far away from home to the nearest abortion clinic. Additionally, they have the least access to safe and reliable contraception, so they are more likely to find themselves unexpectedly pregnant in the first place.<sup>65</sup> As pregnancy is associated with an increase in violence,<sup>66</sup> the lack of access to reproductive care places marginalized pregnant people in an especially dangerous position. A recent study found that a one-minute increase in the time required to access the closest abortion clinic is estimated to increase the number of reported cases of domestic violence per municipality by 0.16%.<sup>67</sup>

Furthermore, the birth of a child decreases the socioeconomic status of a pregnant person, which makes them more vulnerable and more likely to suffer abuse both within and outside of the household.<sup>68</sup> "Increased legal access to abortion . . . is associated with an increase in high school completion, employment rates, and labor force participation rates,"<sup>69</sup> while restricted access to abortion is related to an increase in the "likelihood of needing public assistance, living [below] the federal poverty line," and the inability to maintain full time employment.<sup>70</sup> This decrease in a pregnant person's economic status severely restricts their bargaining power in a relationship, making it more likely that they will experience violence and ensuring that it will be harder to leave when they do. A lower economic position also decreases a person's bargaining power in the public sphere, making them more vulnerable to abuse. For example, women with irregular, insecure, contingent employment environments are more susceptible to abuse in the workplace and less likely to report that abuse if they do experience it.<sup>71</sup>

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65. *See id.* (explaining that minority women are more likely to experience unintended pregnancy for multiple reasons, including lack of access to high-quality health care).

66. Wallace et al., *supra* note 58, at 767.

67. Caterina Muratori, *The Impact of Abortion Access on Violence Against Women 3* (Dep't. of Econ., Univ. Reading, Discussion Paper No. 2021-03, 2021).

68. *Id.* at 2, 8.

69. *Id.* at 8–9.

70. *Id.* at 9.

71. *Id.* at 9–10.



## II. AMBIGUITIES IN VIRGINIA'S LEGAL SYSTEM CONCERNING REPRODUCTIVE FREEDOM WILL ENDANGER VICTIMS OF SEXUAL AND DOMESTIC VIOLENCE AND CANNOT BE CURED BY RAPE AND INCEST EXCEPTIONS

Ambiguities in Virginia's legal system concerning reproductive freedom create opportunities for abusers to further terrorize victims. Many abusers use the legal system as a tool of control and abuse 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.<sup>72</sup> The author of this Article has 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 claim abandonment; press charges against her for abuse; take the children away from her; get her deported; come after her for child support; or refuse to pay any child support by denying paternity. Frankly, it does not matter whether these threats have legal merit. What matters is whether these threats sound valid enough to allow the abuser to trap their victim. If a victim is confused about their legal options, this creates a perfect opportunity for abusers to tighten their grip and further maintain power and control.

### A. *The Threat of Criminal Punishment Is Often a Powerful Tool of Control in an Abusive Relationship*

In the context of abortion, an abuser may threaten to report a victim who has sought reproductive care to the police. If abortion is criminalized or there is uncertainty in the legal landscape, a victim may feel that the risk of criminal punishment is too great and decide that leaving the abusive relationship is not a possibility if

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72. See *What to Do When You Get Sued by Your Abuser*, SURVIVOR'S GUILD (2021) (quoting *Domestic Violence Manual for Judges, Appendix H*, WASH. STATE ADMIN. OFF. OF THE CTS. (2015), <https://www.courts.wa.gov/content/manuals/domViol/appendixH.pdf> [<https://perma.cc/WR5M-2BWV>]), <https://survivorsguild.club/docs/what-to-do-when-you-get-sued-by-your-abuser.html> [<https://perma.cc/M43G-PHMZ>] ("Litigation is a way that abusers can attempt to reestablish and retain control over a survivor, particularly when other forms of contact with the survivor have been restricted.").

she has sought abortion care. This may become one more tool of power and control that an abuser could wield against a victim.

From the inside of an abusive relationship, the legal system can seem murky, confusing, and confoundingly complex. When the legal system is inconsistent or in flux, a victim may be uncertain of the legal risks involved in leaving, which is another barrier a victim faces in attempting to leave an abusive relationship. Unfortunately, *Dobbs* has created significant uncertainty and instability within our legal system, further muddying the water for victims of sexual and domestic violence.

If Virginia chooses to further restrict abortion, victims may be criminally punished for obtaining the care that they require after abuse. Alternatively, they may forgo such care altogether out of fear of criminal repercussions. Victims have good reason to fear criminal punishment for seeking abortion care, as laws throughout the United States that restrict abortion are increasingly targeting the pregnant person.<sup>73</sup>

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.”<sup>74</sup> In a ruling on the woman’s motion to dismiss, the Chesterfield County Circuit Court judge determined that the statute did not exclude the pregnant woman herself from prosecution.<sup>75</sup> In 2005, a pregnant woman in Suffolk, Virginia was prosecuted under the same law<sup>76</sup> for shooting herself in the abdomen on her due date. In this case, however, the judge dismissed the charge, finding that the law<sup>77</sup> was not intended to punish the pregnant person.<sup>78</sup> The differing results of these cases demonstrate the inconsistency

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73. Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-Roe America*, NAT’L PUB. RADIO (July 3, 2022, 5:27 AM), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss> [<https://perma.cc/TTV8-7LZ6>].

74. 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, 7:00 AM), [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](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) [<https://perma.cc/EK8S-XW6F>]. The defendant was prosecuted under section 18.2-71 of the Code of Virginia. VA. CODE ANN. § 18.2-71 (2021).

75. Commonwealth v. Roberts, 96 Va. Cir. 378, 380–85 (2017) (Chesterfield County).

76. § 18.2-71 (2021); Lillian Ruiz & Lara Setrakian, *Judge Dismisses Charges Against Woman Who Killed Her Unborn Child*, ABC NEWS (Oct. 19, 2006), <https://abcnews.go.com/US/LegalCenter/story?id=2585102&page=1> [<https://perma.cc/3LSU-S22D>].

77. § 18.2-71 (2021); Ruiz & Setrakian, *supra* note 76.

78. Brown, *supra* note 74; Ruiz & Setrakian, *supra* note 76.

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 domestic violence, it is imperative that Virginia make the legality of abortion clear by codifying the right in its state constitution.

B. *Rape and Incest Exceptions Are Insufficient to Protect Victims of Sexual and Domestic Violence*

Rape and incest exceptions are not sufficient to protect victims of sexual and domestic violence. These exceptions not only fail to meet the needs of victims of domestic and sexual violence, but also further stigmatize abortion by creating a hierarchy of “good” and “bad” abortions.<sup>79</sup>

Firstly, it is not clear what conditions a victim would have to meet to avail themselves of these exceptions. Furthermore, the multiple potential steps simply force victims to take actions that they do not want to take and may even endanger them. For example, it is uncertain whether the victim is required to report the abuse and whether the victim must participate in an investigation.<sup>80</sup> Forcing a victim to take either of these steps removes agency and control from the person harmed and could potentially put them at greater risk of danger, as abusers may react violently when they discover that a victim has sought assistance from the criminal justice system.

Additionally, rape and incest exceptions would likely not protect the victims of sexual and reproductive coercion who may become pregnant. Much of this behavior, while commonly found in abusive relationships, is often not itself a crime. As a practical matter, if abortions were banned except for victims of rape and incest, few abortion clinics would stay open to serve the small number of

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79. Margot Schein, *Abortion Stigma: What About in Cases of Rape and Incest?*, PLANNED PARENTHOOD VOTES! S. ATL. (Dec. 3, 2019, 4:14 PM), <https://www.plannedparenthoodaction.org/planned-parenthood-votes-south-atlantic/blog/abortion-stigma-what-about-in-cases-of-rape-and-incest> [<https://perma.cc/2H6W-XUS5>] (explaining that in states where rape exceptions exist for victims of sexual violence, the victim has to report the rape to the police and police have to believe them: a statistical improbability given that for every 1,000 perpetrated sexual assaults, 995 perpetrators will walk free).

80. Fabiola Cineas, *Rape and Incest Abortion Exceptions Don't Really Exist*, VOX (July 22, 2022, 4:20 PM), <https://www.vox.com/23271352/rape-and-incest-abortion-exception> [<https://perma.cc/3T57-G6PR>].

people who could take advantage of these allowances.<sup>81</sup> Thus, accessing abortion care would likely still be prohibitively difficult for those who qualify for it. Exceptions for rape and incest do not remedy any ban or limitation on abortion and fail to protect victims of sexual and intimate partner violence.

### III. VIRGINIA MUST PROTECT VICTIMS OF SEXUAL AND DOMESTIC VIOLENCE BY ENSHRINING THE RIGHT TO ABORTION IN THE STATE CONSTITUTION

With the protections of *Roe* and *Casey* now overturned, Virginia must protect abortion rights at the state level. Inaction will inevitably result in increased danger to victims of sexual and domestic violence, particularly victims from historically oppressed groups.

#### A. *Abortion During the 2023 General Assembly Session*

During the 2023 General Assembly, many bills were introduced in both the House and Senate which related to reproductive rights. Several bills proposed abortion restrictions, including a bill that would have banned abortion starting at fifteen weeks, a bill seeking to establish personhood rights for fetuses, and a bill that would have made it a Class 4 felony to perform an abortion.<sup>82</sup>

Several pieces of legislation protecting abortion access were also introduced, including Senate Joint Resolution 255, which put forward a constitutional amendment that would prohibit penalizing people for exercising their right to reproductive freedom, and Senate Bill 1112, which would have ensured health insurance coverage of contraceptives.<sup>83</sup> The joint resolution provides an effective example of legislation that would clarify the legality of abortion, thereby empowering and protecting survivors of sexual and domestic violence. It proposed a constitutional amendment which held that:

The Commonwealth shall not penalize, prosecute, or otherwise take adverse action against an individual on the basis of an actual, potential, perceived, or alleged outcome of such individual's pregnancy, nor

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81. Megan Messerly, *In States That Allow Abortion for Rape and Incest, Finding a Doctor May Prove Impossible*, POLITICO (June 27, 2022, 4:30 AM), <https://www.politico.com/news/2022/06/27/abortion-exceptions-doctor-shortage-00042373> [<https://perma.cc/6J3F-N6L2>].

82. S.B. No. 1284, Va. Gen. Assembly (Reg. Sess. 2023); H.B. No. 1395, Va. Gen. Assembly (Reg. Sess. 2023); H.B. No. 1795, Va. Gen. Assembly (Reg. Sess. 2023).

83. S.J. Res. 255, Va. Gen. Assembly (Reg. Sess. 2023); S.B. 1112, Va. Gen. Assembly (Reg. Sess. 2023).

shall the Commonwealth penalize, prosecute, or otherwise take adverse action against an individual who aids or assists another individual, with such individual's voluntary consent, in the exercise of such individual's right to reproductive freedom.<sup>84</sup>

Unfortunately, the joint resolution failed to pass.<sup>85</sup> Although most of the Senate was committed to protecting reproductive freedoms, the majority of the House was staunchly opposed.<sup>86</sup> This stalemate resulted in no action being taken on abortion.<sup>87</sup>

B. *A Constitutional Amendment Preserving Abortion Access Is Necessary to Clarify the Legality of the Procedure and Protect Victims of Sexual and Domestic Violence*

Without a constitutional amendment, lawmakers may further restrict abortion access, thus criminalizing pregnancy and impeding the ability of sexual and domestic violence victims to access the healthcare they need in the aftermath of trauma. As a purple state—a state with roughly even numbers of Democratic and Republican voters—the General Assembly is at risk of flipping with each election cycle and often has a House and Senate controlled by two different parties.<sup>88</sup> This could lead to confusion, ambiguity, and uncertainty on the issue of reproductive rights for years to come. Moreover, the movement towards 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*.<sup>89</sup> As such, the threat of criminal punishment for pregnancy is increasing—a reality that will expose victims of sexual and domestic violence to even greater risk. This threat will loom over all Virginians attempting to access abortion care until the right is clearly protected. Preserving the right to an abortion in the Constitution of Virginia will also ensure that the abortion laws currently in the Code of Virginia are

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84. S.J. Res. 255.

85. *Id.*

86. See Press Release, *Virginia House Subcommittee Fails to Advance Constitutional Amendment for Reproductive Freedom*, PLANNED PARENTHOOD ADVOCS. OF VA. (Feb. 17, 2023), <https://www.plannedparenthoodaction.org/planned-parenthood-advocates-virginia-inc/press-releases/virginia-house-subcommittee-fails-to-advance-constitutional-amendment-for-reproductive-freedom> [https://perma.cc/4H8R-5WNE].

87. See *id.*

88. Laura Gersony, *Virginia Legislative Primaries Could Shape Abortion Policy and More*, ABC NEWS (June 20, 2023, 5:05 AM), <https://abcnews.go.com/Politics/virginia-legislature-primaries-shape-abortion-policy/story?id=100211688> [https://perma.cc/6WLH-N6M6].

89. Baldwin III, *supra* note 73.

not interpreted differently by different courts. This creates inconsistency and confusion, as demonstrated by the Chesterfield and Suffolk cases.<sup>90</sup> The right to reproductive autonomy is fundamental and significant, both to victims of sexual and domestic violence and to all people who may become pregnant in Virginia. Thus, the right cannot perpetually remain one election away from falling, or be subject to interpretation by individual judges.

Virginia employs the “legislative referral” method to amend the state constitution,<sup>91</sup> which requires that an amendment must start as a resolution in the General Assembly.<sup>92</sup> Once the resolution is approved by both houses, it will be sent to the voters for approval.<sup>93</sup> More specifically, the resolution must be ratified by a majority vote in both the Senate and the House during the same session.<sup>94</sup> The resolution must then be introduced again and ratified by both houses in the session immediately after a House election.<sup>95</sup> Both houses then pass a bill that approves a referendum, which will be put on the ballot at the next general election.<sup>96</sup> If approved by a simple majority, it is adopted into the state’s constitution.<sup>97</sup>

The will of the voters plays an essential role in the process of amending the Constitution of Virginia. Fortunately, public support for abortion access remains high in Virginia, as recent polling suggests that the majority of Virginians support safe and legal abortion.<sup>98</sup> Moreover, protecting abortion access has proven to be a winning issue nationally at the ballot box in the wake of the *Dobbs* decision.<sup>99</sup> The 2022 midterm election, by many measures, should have been very successful for Republicans. However, Democrats—who generally support protecting abortion rights—were unexpect-

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90. See *supra* text accompanying notes 74–78.

91. *Virginia 2024 Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/Virginia\\_2024\\_ballot\\_measures](https://ballotpedia.org/Virginia_2024_ballot_measures) [<https://perma.cc/QZ2Z-53FJ>].

92. VA. CONST. art. XII.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See Control of the General Assembly Appears Up for Grabs; Voters Top Issues Include the Economy, Abortion, and K-12 Education*, THE WATSON CTR. (Oct. 17, 2023), <https://cnu.edu/wasoncenter/surveys/archive/2023-10-17.html> [<https://perma.cc/Q5XD-V7X8>].

99. Katie Reilly, *These Are the States That Voted to Protect Abortion Rights in the Midterms*, TIME (Nov. 9, 2022, 2:19 PM), <https://time.com/6231690/abortion-election-results-2022/> [<https://perma.cc/G2F4-6CCX>].

edly successful in places where abortion access was on the ballot, such as Michigan and Kentucky.<sup>100</sup>

C. *Constitutional Protections for Abortion in Vermont, California, and Michigan, and Pending Constitutional Protections in Maryland, Can Serve as Models for Virginia*

The Vermont, California, and Michigan constitutions, and pending constitutional protections in Maryland, all provide effective examples of explicit safeguards for abortion rights. Vermont's state constitution provides "[t]hat an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means."<sup>101</sup> Vermont's law supports this constitutional protection by prohibiting interfering with one's reproductive choice,<sup>102</sup> prohibiting punishing a person seeking an abortion,<sup>103</sup> and statutorily protecting abortion as a fundamental right.<sup>104</sup>

California's constitution also makes clear that abortion is a fundamental right. In 2022, it was amended to establish that "[t]he state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives."<sup>105</sup> California's Reproductive Privacy Act provides statutory protections for reproductive autonomy,<sup>106</sup> and "declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions."<sup>107</sup> This includes pregnancy, contraception, and abortion care.<sup>108</sup> Additionally, California law says that the state cannot interfere with a pregnant person's right to an abortion prior to fetal

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100. Rebecca Traister, *Abortion Wins Elections: The Fight to Make Reproductive Rights the Centerpiece of the Democratic Party's 2024 Agenda*, THE CUT: THE BODY POLITIC (Mar. 27, 2023), <https://www.thecut.com/article/abortion-democratic-party-2024-elections.html> [<https://perma.cc/9HTR-HVSW>].

101. VT. CONST. ch. I, art. XXII.

102. VT. STAT. ANN. tit. 18 § 9494(a) (2023).

103. § 9494(b).

104. § 9493.

105. CAL. CONST. art. I, § 1.1.

106. Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE §§ 123460–69 (2023).

107. HEALTH & SAFETY § 123462.

108. *Id.*

viability and/or when the abortion is necessary to protect the life or health of the pregnant person.<sup>109</sup>

Moreover, Michigan's constitution protects abortion, stating in relevant part:

Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.<sup>110</sup>

In addition to the strong and clear constitutional protections for abortion in Michigan, Governor Whitmer recently signed House Bill 4006 into law, which repealed the existing unenforced abortion ban.<sup>111</sup>

Although Maryland has not officially enshrined the right to an abortion in its constitution, Senate Bill 798—which proposed an amendment to the state constitution that would safeguard the right to an abortion—recently passed the Maryland House and Senate.<sup>112</sup> The measure will be sent to the voters for approval in November 2024.<sup>113</sup> This proposed amendment holds:

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue or end one's own pregnancy. The state may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling state interest achieved by the least restrictive means.<sup>114</sup>

Maryland also has strong statutory protections for abortion, including prohibiting interference with a woman's decision to seek

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109. HEALTH & SAFETY § 123466 (2023).

110. MICH. CONST., art. I, § 28(1).

111. H.B. 4006, 102d Leg., Reg. Sess. (Mich. 2023); *see also* Arpan Lobo, *Michigan House Repeals 1931 Abortion Ban Following Passage of Proposal 3*, DETROIT FREE PRESS (Mar. 2, 2023, 5:34 PM), <https://www.freep.com/story/news/politics/2023/03/02/house-repeals-abortion-ban-after-prop-3-passage/69962571007/> [<https://perma.cc/7ZHR-G99V>].

112. S.B. 798, 2023 Gen. Assembly, Reg. Sess. (Md. 2023); Colleen Grablick & Aja Drain, *Maryland Lawmakers Tee Up Referendum Abortion Protections for 2024 Ballot*, DCIST (Mar. 30, 2023, 5:17 PM), <https://dcist.com/story/23/03/30/maryland-abortion-referendum-2024-ballot/> [<https://perma.cc/5WAP-7TMF>].

113. *See* Grablick & Drain, *supra* note 112.

114. Md. S.B. 798.



an abortion before viability, if necessary to protect the life or health of the woman, or if the fetus is affected by a severe abnormality.<sup>115</sup> In 2022, Maryland enacted a law requiring public medical assistance programs to cover abortion services and mandating that private insurance plans that cover labor and delivery also cover abortion services, thus increasing access to life-saving healthcare services for victims statewide.<sup>116</sup>

Under the control of anti-abortion legislators, Virginia may attempt to ban abortion outright.<sup>117</sup> Without the protections enshrined in *Roe* and *Casey*, Virginians' rights to bodily autonomy and freedom are at the mercy of the General Assembly. Therefore, it is imperative that the voting citizens of Virginia elect representatives who believe that the state constitution, in addition to state statute, should protect bodily autonomy—a conviction held by a majority of Virginians. Now more than ever, Virginia should look to Vermont, California, Michigan, and Maryland for legal and policy blueprints to protect abortion access and expand reproductive freedom.

D. *A Call to Action: Virginia Is the Last State in the South That Can Maintain Abortion Rights for Domestic Abuse Victims and Other Women*

The importance of protecting abortion access has heightened, as Virginia is set to become the only state in the South to allow abortions after twelve weeks of pregnancy.<sup>118</sup> On May 16, 2023, the North Carolina legislature overrode the Governor's veto of a bill that bans most abortions after twelve weeks gestation.<sup>119</sup> In South Carolina, the legislature is attempting to ban all abortions after six weeks of pregnancy.<sup>120</sup> On April 14, the Governor of Florida

115. MD. CODE ANN., HEALTH-GEN. § 20-209 (2023).

116. Abortion Care Access Act, H.B. 937, 2022 Gen. Assembly, Reg. Sess. (Md. 2022).

117. See Jackie DeFusco, *Three Attempts to Restrict Abortion Shot Down in Virginia General Assembly*, WRIC (Jan. 26, 2023, 7:37 PM), <https://www.wric.com/news/politics/capitol-connection/three-attempts-to-restrict-abortion-shot-down-in-virginia-general-assembly/> [https://perma.cc/R7QB-YRQ3].

118. Sam Cabral, *The Last Stronghold of Abortion Access in the US South*, BBC NEWS (May 19, 2023), <https://www.bbc.com/news/world-us-canada-65638728/> [https://perma.cc/6T VF-YB2P].

119. House Roll Call Vote Transcript, Roll Call #380, 2023 Gen. Assembly, Reg. Sess. (N.C. 2023), <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2023/H/380> [https://perma.cc/R4BL-NFCY]; S.B. 20, 2023 Gen. Assembly, Reg. Sess. (N.C. 2023).

120. See Cabral, *supra* note 118.

signed a six-week abortion ban.<sup>121</sup> In the wake of these regional restrictions, pregnant people throughout the South—many of whom will undoubtedly be survivors of sexual and domestic violence—will seek abortion care in Virginia. Since every seat in the Virginia legislature is on the ballot this November, this is a precarious moment.<sup>122</sup> Domestic and sexual violence are inextricably linked to reproductive freedom. Thus, government restrictions on abortion serve to create and reproduce the dynamic of abusive relationships where one person asserts power and control over another. Hence, Virginia must codify the right to abortion care in the state constitution to ensure that it is unambiguously protected. This will not only protect a fundamental human right for all Virginians, but will also restore power and control for sexual and domestic violence victims, for whom access and choice are critical for safety and healing.

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121. Steve Contorno, *Florida Governor Signs 6-Week Abortion Ban*, CNN (Apr. 14, 2023, 8:25 AM), <https://www.cnn.com/2023/04/13/politics/florida-abortion-ban/index.html>/ [<https://perma.cc/7K92-5Y3Z>].

122. Cabral, *supra* note 118.