DOBBS, *BRUEN*, AND DOMESTIC VIOLENCE: FEWER ABORTIONS, MORE GUNS, AND THE EFFECTS OF BOTH ON SURVIVORS OF INTIMATE PARTNER VIOLENCE*

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The central focus of this Article is to posit that the approach of courts in invoking notions of privacy to largely ignore intimate partner violence throughout most of American history continues to eclipse the full ramifications of both reproductive rights and Second Amendment case law. Homicide is a leading cause of death for pregnant women, more prevalent than any medical condition, and a majority of pregnancy-related homicides are committed by an intimate partner of the deceased. Intimate partner violence has been a constant presence throughout American history, yet courts have routinely ignored or cast aside this violence, considering it part of the private sphere. In Dobbs v. Jackson Women's Health Organization *and* New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court held, respectively, that abortion is not a constitutional right, and that states cannot ask gun owners to show a need for their weapons to obtain a concealed carry license. Those decisions ignore how intimate partner violence interacts with reproductive rights and access to firearms, despite the reality that the decisions' combined effects are likely to be particularly acute for those vulnerable to intimate partner violence. Pregnancy is the risk factor most likely to lead to death for a victim of intimate partner violence, and fewer gun restrictions can enable abusers to wield an incredibly lethal weapon. The lack of consideration afforded to victims of intimate partner violence (estimated to include more than one in four Americans) in* Dobbs *and* Bruen *is particularly remarkable in light of the probable effect that decreased access to abortion and freer firearm possession will each have on this population, and especially given the long-term (and possibly lifelong) consequences and potential danger of child-rearing and co-parenting with an abusive partner or ex-partner.*

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This Article argues that the legal system's current acknowledgement of intimate partner violence as a problem that merits state intervention should change how case law approaches access to abortion and access to firearms. Part I examines the relationship between reproductive rights and intimate partner violence, and between firearms restrictions and such violence. Part II traces the history and evolution of case law surrounding intimate partner violence, reproductive rights, and firearms restrictions, analyzing the unique way in which courts treated intimate partner violence as a private phenomenon largely unworthy of state intervention until the latter half of the twentieth century, and examining how the Supreme Court has either ignored or highlighted intimate partner violence depending on which approach best serves its jurisprudential agenda in a given case. Part III discusses recent case law on reproductive rights and firearms—including Dobbs*,* Bruen*, and the Fifth Circuit's decision in* United States v. Rahimi*—and the likely impacts of those decisions on victims of violence. Part IV of this Article grounds case law in the realities of intimate partner violence and, in doing so, provides alternative reasoning by which to conceive of reproductive rights and Second Amendment jurisprudence.*

INTRODUCTION

In October 2021, Cavanna Smith, a twenty-five-year-old woman from Houston, Texas, learned that she was pregnant. She told her boyfriend about her pregnancy by writing him a card, stating, "Kwan, I know this isn't what we expected but WE ARE expecting!" and showed him her ultrasound.[1] The following day, she was shot in the face and killed.[2] Her boyfriend was later charged with her murder.[3] Investigators allege that Smith's boyfriend abducted her, and the morning she was murdered, she texted her sister with her location in case anything happened to her.[4] Shortly before Smith died, she and her boyfriend were seen arguing on a street; Smith attempted to flag down help and asked a passing driver to call 911.[5] Smith was one of 204 individuals who were victims of intimate partner homicide in 2021 in Texas alone.[6] At least eight of those victims, including Smith, were shot and killed while pregnant.[7] Writ

1. Chris Harris, *Pregnant Texas Woman Texted Sister Fearing for Her Life, Now Boyfriend Is Fugitive on Murder Charge*, PEOPLE (Nov. 15, 2021, 3:10 PM), https://people.com/crime/cavanna-smith-murdered-suspect-wanted-kwanmaine-travion-boyd/ [https://perma.cc/AX4P-XG35].

2. *Id.*

3. *3rd Update: Suspect Arrested in Fatal Shooting at 800 Reid Street*, CITY OF HOUS., https://cityofhouston.news/3rd-update-suspect-arrested-in-fatal-shooting-at-800-reid-street/ [https://perma.cc/PW53-3W4N] (last updated Nov. 22, 2021).

4. Harris, *supra* note 1.

5. Briana Zamora-Nipper, *Man Wanted in Shooting Death of Pregnant Girlfriend Arrested, HPD Says*, CLICK2HOUSTON, https://www.click2houston.com/news/local/2021/11/22/man-wanted-in-brazen-shooting-death-of-pregnant-girlfriend-arrested-hpd-says/ [https://perma.cc/SCX7-7X64] (last updated Nov. 22, 2021, 9:44 AM).

6. TEX. COUNCIL ON FAM. VIOLENCE, HONORING TEXAS VICTIMS: FAMILY VIOLENCE HOMICIDES IN 2021, at 14 (2021), https://tcfv.org/wp-content/uploads/tcfv_htv_rprt_2021.pdf [https://perma.cc/S7GM-MUSK].

7. *Id.* at 13.

large, abusers with firearms are five times more likely to kill their female victims compared with abusers who do not have firearms.[8]

Despite the obvious and overwhelming ramifications of *Dobbs v. Jackson Women's Health Organization*[9] and *New York State Rifle & Pistol Ass'n v. Bruen*[10] on intimate partner violence, both decisions ignore the prevalence and dangerousness of such violence. In *Dobbs*, the Supreme Court held that abortion is not a constitutional right, disregarding the relationship between bodily autonomy and the lethality of domestic violence.[11] In *Bruen*, the Court held that a firearms regulation is only constitutional if there is a tradition of the type of regulation at issue, never engaging with the potential consequences of freer firearms possession for intimate partner violence or the fact that this violence was largely ignored during the founding.[12] Currently, in *United States v. Rahimi*,[13] the Court is considering whether a statute violates the Second Amendment where it prohibits perpetrators of intimate partner violence from possessing firearms when they are subject to a restraining order following notice and an opportunity to be heard.[14]

Rates of firearms possession, reproductive rights, and intimate partner violence are intimately linked, yet *Dobbs* and *Bruen* entirely ignore the immense stakes of the rights at issue in each case for survivors of gender-based violence and intimate partner violence. Without access to abortion, people who become pregnant as a result of reproductive coercion or while in an abusive relationship lose autonomy to determine whether to carry a pregnancy to term and whether to remain permanently tied to a perpetrator through a child. Without firearm restrictions for perpetrators of intimate partner violence (at issue in *Rahimi*), survivors would likewise lose access to one of the few tools to stop such violence. By overlooking the implications of abortion restrictions and increased access to firearms for intimate partner violence, the legal system leaves survivors even more vulnerable to ever-increasing rates of violence and death.

8. *Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/ [https://perma.cc/T2S9-MLG7] (last updated Apr. 10, 2023) [hereinafter *Guns and Violence Against Women*] (citing Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003)).

9. 142 S. Ct. 2228 (2022).

10. 142 S. Ct. 2111 (2022).

11. *Dobbs*, 142 S. Ct. at 2234.

12. *Bruen*, 142 S. Ct. at 2126.

13. 143 S. Ct. 2688 (2023) (mem.), *granting cert. to* 61 F.4th 443 (5th Cir. 2023).

14. *Id.* at 2688–89; Transcript of Oral Argument at 4–5, *Rahimi*, No. 22-915 (U.S. Nov. 7, 2023); *see also* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (holding that a federal law which restricts those convicted of domestic abuse from owning firearms is unconstitutional).

Few scholars have examined the effects of reproductive rights restrictions on intimate partner violence, let alone that in tandem with the consequences of reduced firearms restrictions on intimate partner violence. This Article seeks to fill that gap in the literature by examining the consequences of restricted reproductive rights and looser firearms restrictions on intimate partner violence. This Article begins by providing an overview of the connection between reproductive autonomy and intimate partner violence, as well as the connection between access to guns and intimate partner violence. It then traces the American legal system's treatment of intimate partner violence, explaining that courts largely ignored or minimized this violence until the latter half of the twentieth century. This Article then discusses how case law regarding reproductive rights and firearms restrictions has dealt with—or ignored—the effects of intimate partner violence. It continues with an analysis of *Dobbs*, *Bruen*, and *Rahimi*, including the ramifications of the cases for individuals experiencing, or at risk for, intimate partner violence and homicide. This piece concludes by applying an intimate partner violence lens to reconceive reproductive rights and Second Amendment jurisprudence, analyzing the ways in which case law on abortion regulation and firearms regulation might change if grounded in the realities of intimate partner violence.

I. THE RELATIONSHIP BETWEEN INTIMATE PARTNER VIOLENCE, REPRODUCTIVE RIGHTS, AND ACCESS TO FIREARMS

Domestic violence or intimate partner violence[15] is a pattern of abusive behavior used by one partner to maintain power and control over another partner in an intimate relationship.[16] Intimate partner violence can include physical violence, sexual violence, emotional abuse, economic or financial abuse, stalking, psychological abuse, and technological abuse.[17] Intimate partner violence is common in the United States; more than one in three women and one in four men experience sexual violence, physical violence, and/or stalking

15. The terms "domestic violence" and "intimate partner violence" are often used interchangeably to refer to the cycle of abuse in a romantic relationship. Given that "domestic violence" may also refer to broader household violence (e.g., violence by a parent against a child), this Article will primarily use "intimate partner violence" or "IPV" to describe this cycle of abuse in intimate relationships. *See* Olivia Moorer, *Intimate Partner Violence vs. Domestic Violence*, YWCA SPOKANE (Jan. 5, 2021), https://ywcaspokane.org/what-is-intimate-partner-domestic-violence/ [https://perma.cc/L7US-HEW3].

16. *Understand Relationship Abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/identify-abuse/understand-relationship-abuse/ [https://perma.cc/F6V2-ZQRG].

17. Off. on Violence Against Women, *Domestic Violence*, U.S. DEP'T JUST., https://www.justice.gov/ovw/domestic-violence [https://perma.cc/Q5L9-DKKT] (last updated Oct. 4, 2023).

by an intimate partner during their lifetime.[18] Black people experience intimate partner violence at higher rates; approximately 45% of Black women experience physical violence, sexual violence, or stalking from an intimate partner.[19] And more than half of Indigenous women experience sexual violence, physical violence, or stalking by an intimate partner.[20] While research on intimate partner violence has historically focused on heterosexual relationships, largely ignoring the LGBTQIA+ community, LGBT people have a lifetime prevalence of intimate partner violence that is as high or higher than heterosexual people.[21] For instance, bisexual women are 1.8 times more likely to report ever having experienced intimate partner violence than heterosexual women.[22] Transgender and gender nonconforming individuals are more likely to experience intimate partner violence as compared with cisgender individuals,[23] and transgender victims are more likely to experience such violence in public as compared with cisgender victims.[24]

There are several causes of intimate partner violence, including past exposure to violence and low levels of women's access to paid employment. Broad inequality and norms regarding the acceptability of violence against women are root causes of gender-based violence.[25] Intimate partner violence has severe effects on survivors as well as on broader society. Physical, mental, and sexual reproductive health effects have been associated with intimate partner

18. MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf [https://perma.cc/DVD2-GQP6].

19. *Abuse in the Black Community*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/resources/abuse-in-the-black-community/ [https://perma.cc/W3P9-4VEV].

20. RUTH W. LEEMIS, NORAH FRIAR, SRIJANA KHATIWADA, MAY S. CHEN, MARCIE-JO KRESNOW, SHARON G. SMITH, SHARON CASLIN & KATHLEEN C. BASILE, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 7 (2022), https://www.cdc.gov/violenceprevention/pdf/nisvs/NISVSReportonIPV_2022.pdf [https://perma.cc/A3JP-88LM].

21. TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., UCLA SCH. OF L., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 2 (2015), https://williamsinstitute.law.ucla.edu/publications/ipv-sex-abuse-lgbt-people/ [https://perma.cc/C4GJ-RJAF].

22. *Id.*

23. Sarah E. Valentine, Sarah M. Peitzmeier, Dana S. King, Conall O'Cleirigh, Samantha M. Marquez, Cara Presley & Jennifer Potter, *Disparities in Exposure to Intimate Partner Violence Among Transgender/Gender Nonconforming and Sexual Minority Primary Care Patients*, 4 LGBT HEALTH 260, 263 (2017).

24. *Domestic Violence and the LGBTQ Community*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (June 6, 2018), https://ncadv.org/blog/posts/domestic-violence-and-the-lgbtq-community [https://perma.cc/9DA2-RF9F].

25. *Violence Against Women*, WORLD HEALTH ORG. (March 9, 2021), https://www.who.int/news-room/fact-sheets/detail/violence-against-women [https://perma.cc/8U6X-RJLW].

violence, including but not limited to acute injuries to the head and face, chronic headaches, chronic pelvic pain, recurrent vaginal infections, and post-traumatic stress disorder ("PTSD").[26] Intimate partner violence also causes homelessness and housing instability.[27] The total economic cost of intimate partner violence in the United States totals more than $8.3 billion each year, and survivors of intimate partner violence lose a total of 8 million days of paid work each year.[28] As explored below, this violence is intimately correlated with restrictions on reproductive freedom as well as with access to firearms.

A. *Pregnancy and Intimate Partner Violence*

Homicide is a leading cause of death for pregnant women[29] in the United States.[30] Pregnant women in the United States are more likely to die of homicide than of a pregnancy-related health issue,[31] even in light of the high rate of maternal mortality in the United States due to health and healthcare issues as compared with other countries.[32] According to a recent study, mortality

26. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. 518, INTIMATE PARTNER VIOLENCE 2 (reaffirmed 2022), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner-violence [https://perma.cc/2XYV-TT38].

27. Cris M. Sullivan, Cortney Simmons, Mayra Guerrero, Adam Farero, Gabriela López-Zerón, Oyesola Oluwafunmilayo Ayeni, Danielle Chiaramonte, Mackenzie Sprecher & Aileen I. Fernandez, *Domestic Violence Housing First Model and Association with Survivors' Housing Stability, Safety, and Well-Being over 2 Years*, 6 JAMA NETWORK OPEN art. no. e2320213, at 2 (2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2806371 [https://perma.cc/Y689-EYQS (staff-uploaded archive)] (click "Download PDF").

28. *Id.* at 9; *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/STATISTICS [https://perma.cc/KL6Z-89BW]; *see also* Emily F. Rothman, Jeanne Hathaway, Andrea Stidsen & Heather F. de Vries, *How Employment Helps Female Victims of Intimate Partner Violence: A Qualitative Study*, 12 J. OCCUPATIONAL HEALTH PSYCH. 136, 136 (2007).

29. This Article largely refers to "pregnant people," given that cisgender women, nonbinary people, transgender men, and others can become pregnant. At the same time, most research on pregnancy appears to focus on women; accordingly, the Article refers to "pregnant women" when citing studies that appear to be solely about women.

30. *Homicide Leading Cause of Death for Pregnant Women in U.S.*, HARV. T.H. CHAN SCH. PUB. HEALTH (Oct. 21, 2022), https://www.hsph.harvard.edu/news/hsph-in-the-news/homicide-leading-cause-of-death-for-pregnant-women-in-u-s/ [https://perma.cc/9FLZ-8YTT].

31. Rebecca B. Lawn & Karestan C. Koenen, Editorial, *Homicide Is a Leading Cause of Death for Pregnant Women in US*, 379 BRIT. MED. J. ONLINE art no. o2499, at 1 (2022), https://pubmed.ncbi.nlm.nih.gov/36261146/ [https://perma.cc/Y76W-HDBH (staff-uploaded, dark archive)].

32. Regine A. Douthard, Iman K. Martin, Theresa Chapple-McGruder, Ana Langer & Soju Chang, *U.S. Maternal Mortality Within a Global Context: Historical Trends, Current State, and Future Directions*, 30 J. WOMEN'S HEALTH 168, 169–70 (2021). Within the United States, mothers located in states that banned abortion following *Dobbs* were up to three times more likely to die during pregnancy, childbirth, or soon after giving birth, as compared with mothers in states that did not ban abortion. NATALIA VEGA VARELA, NANCY L. COHEN, NEISHA OPPER, MYRIAM SHIRAN & CLARE WEBER, GENDER EQUITY POL'Y INST., THE STATE OF REPRODUCTIVE HEALTH IN THE

during pregnancy and within the first forty-two days after the end of pregnancy due to homicide exceeds all other health-related leading causes of maternal mortality.[33] And there are significant racial disparities among pregnant women; Black women are three times more likely to be killed by an intimate partner while pregnant as compared with their white and Hispanic peers.[34]

Pregnancy and intimate partner violence often go hand in hand. For instance, one form of intimate partner violence is to induce pregnancy through rape, sexual assault, or reproductive coercion. In turn, being pregnant is a risk factor for serious injury or death due to ongoing or newly initiated intimate partner violence. Almost three million women in the United States have experienced rape-related pregnancy in their lifetime.[35] Approximately 8.6% of women in the United States report that an intimate partner tried to get them pregnant when they did not want to be pregnant or refused to use a condom.[36] Reproductive coercion can include pressuring a partner not to use contraception, birth control sabotage—when a sexual partner destroys, or fails to use, a form of contraceptive without notifying their partner—and pressure to choose a particular pregnancy outcome (i.e., abortion or birth).[37] Of women who were raped by an intimate partner, 30% experienced a form of reproductive coercion by the same partner.[38] And the current state of the law in many states presents barriers to survivors accessing safety following a rape-related pregnancy. As of 2020, one state lacks any specific laws restricting the parental rights of rapists, and twelve states and the District of Columbia restrict custody and visitation rights but do not terminate parental rights, leaving a survivor at risk of being tethered through child custody to the partner who raped them.[39]

Additionally, being pregnant increases the risk of serious injury or death due to ongoing or newly initiated intimate partner violence. Each year, an

UNITED STATES 3 (2023), https://thegepi.org/wp-content/uploads/2023/06/GEPI-State-of-Repro-Health-Report-US.pdf [https://perma.cc/D9BN-75RU].

33. Maeve Wallace, Veronica Gillispie-Bell, Kiara Cruz, Kelly Davis & Dovile Vilda, *Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019*, 138 OBSTETRICS & GYNECOLOGY 762, 762 (2021).

34. Aaron J. Kivisto, Samantha Mills & Lisa S. Elwood, *Racial Disparities in Pregnancy-Associated Intimate Partner Homicide*, 37 J. INTERPERSONAL VIOLENCE at NP10938, NP10951 (2022).

35. *Understanding Pregnancy Resulting from Rape in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html [https://perma.cc/5UK4-A74B] (last updated June 1, 2020) [hereinafter *Understanding Pregnancy*].

36. BLACK ET AL., *supra* note 18, at 48.

37. Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721, 730 (2012). For discussion of stealthing, see generally Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Response to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2017).

38. *Understanding Pregnancy*, *supra* note 35.

39. Victoria Brown, Gregory Haffner, Dana Holmstrand, Caroline Oakum, Elana Orbuch, Victoria Pavlock & Samantha Pepperl, *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 430–31 (2020).

estimated 324,000 pregnant people in the United States are physically abused by intimate partners.[40] The rate of homicide among pregnant and postpartum women is 16% higher than the rate of homicide among nonpregnant and nonpostpartum women of reproductive age, and a majority of pregnancy-related homicides occur in the home,[41] implicating the likelihood of intimate partner violence. The dangers of physical violence during pregnancy can include stillbirth, pelvic fracture, placental abruption, fetal injury, preterm delivery, and low birth weight.[42] And pregnant women who experience intimate partner violence may be about three times more likely to suffer perinatal death (i.e., death immediately before or after giving birth) compared with pregnant women who do not experience intimate partner violence.[43]

The effects of intimate partner violence on the mortality of pregnant women are even greater than the startling homicide data would suggest. "Pregnancy represents a particularly high-risk time for experiencing intimate partner violence,"[44] and pregnant survivors of intimate partner violence are at a 37% increased risk of developing obstetric complications.[45] In other words, being pregnant while in an abusive relationship increases the risk of death from not only the abuse itself but also from pregnancy-related medical complications.

B. *Reproductive Rights and Intimate Partner Violence*

Reproductive rights generally refers to the ability to decide whether and when to have children,[46] and the reproductive rights framework has historically

40. SHAINA GOODMAN, NAT'L P'SHIP FOR WOMEN & FAMS., MOMS & BABIES SERIES: INTIMATE PARTNER VIOLENCE ENDANGERS PREGNANT PEOPLE AND THEIR INFANTS 1 (2021), https://www.nationalpartnership.org/our-work/resources/health-care/intimate-partner-violence-endangers-pregnant-people-and-their-infants.pdf [https://perma.cc/6WNB-BYUM].

41. Wallace et al., *supra* note 33, at 762.

42. *FAQs: Intimate Partner Violence*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/womens-health/faqs/intimate-partner-violence [https://perma.cc/QUE9-7JVJ] (last updated Apr. 2023).

43. Guadalupe Pastor-Moreno, Isabel Ruiz-Pérez, Jesús Henares-Montiel & Dafina Petrova, *Intimate Partner Violence During Pregnancy and Risk of Fetal and Neonatal Death: A Meta-Analysis with Socioeconomic Context Indicators*, 222 AM. J. OBSTETRICS & GYNECOLOGY 123, 131 (2020).

44. Anna Yegiants, *Homicide Is Leading Cause of Death for Pregnant Women in US, Data Shows*, ABC NEWS (Oct. 28, 2022, 5:06 PM), https://abcnews.go.com/GMA/Wellness/homicide-leading-death-pregnant-women-us-study-finds/story?id=92294415 [https://perma.cc/5GSC-C22G]; *see also* Lawn & Koenen, *supra* note 31, at 1.

45. *Access to Abortion: A Lifeline for Survivors of Domestic Violence*, SANCTUARY FOR FAMS. (June 24, 2022), https://sanctuaryforfamilies.org/abortion-domestic-violence/ [https://perma.cc/LA98-LTJY] [hereinafter *Access to Abortion: A Lifeline*].

46. *Reproductive Rights*, STATUS OF WOMEN IN THE STATES, https://statusofwomendata.org/explore-the-data/reproductive-rights/ [https://perma.cc/3L2U-WF4U]; *see also* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE, at v n.2 (Robert C. Clark et al. eds., 2015) ("Generally speaking, reproductive rights . . . includ[e] but [are] not limited to sexuality education; prevention, testing, and treatment for sexually transmitted infections; maternity care;

focused on achieving freedom from restrictions to abortion and contraception through the legal system.[47] Reproductive justice refers to the human right to maintain personal bodily autonomy, including the right to have children, to not have children, and to parent children in safe and sustainable communities.[48] The reproductive justice framework has existed for decades,[49] but the term was coined in 1994 by a Black women's delegation at the International Conference on Population and Development.[50] Reproductive justice activists "situated reproductive rights within a social justice framework to capture the complex, interlocking forms of oppression that often keep their communities from fully enjoying reproductive autonomy, and to compel the elimination of these oppressions in a quest for comprehensive and inclusive justice."[51]

The choice to carry a pregnancy to term or to have an abortion is among one of the most salient reproductive freedoms. Approximately 59% of women in the world live in countries that broadly allow abortion.[52] While nearly sixty countries have liberalized their abortion laws over the last twenty-five years, the United States is one of just four countries that have increased abortion restrictions during the same period, along with Poland, El Salvador, and Nicaragua.[53]

birthing options; parental rights; public assistance; assisted reproductive technologies; and access to volitional use of abortion, contraception, and sterilization.").

47. Danielle M. Pacia, *Reproductive Rights vs. Reproductive Justice: Why the Difference Matters in Bioethics*, HARV. L. SCH: BILL OF HEALTH (Nov. 3, 2020), https://blog.petrieflom.law.harvard.edu/2020/11/03/reproductive-rights-justice-bioethics/ [https://perma.cc/NP6V-RD3G].

48. *Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice [https://perma.cc/QP76-6BRJ].

49. *Id.*

50. Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS, no. 4, 2006, at 14, 16.

51. MURRAY & LUKER, *supra* note 46, at v. While the reproductive rights movement historically prioritized the needs of affluent white women, the reproductive justice movement was founded by women of color and has emphasized the need for all people—particularly women of color, Indigenous women, and the LGBTQIA+ community—to have reproductive freedom and liberation. *See* Ross, *supra* note 50, at 16; Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. REV. L. & SOC. CHANGE 221, 221 (2018). For instance, reproductive justice advocates have exposed forced sterilization and other forms of reproductive coercion exerted on women of color, including but not limited to targeting Black women to utilize Norplant during the 1990s. *See, e.g.*, Elizabeth Jekanowski, *Fall 2018 Journal: Voluntarily, for the Good of Society: Norplant, Coercive Policy, and Reproductive Justice*, BERKELEY PUB. POL'Y J. (Aug. 23, 2018), https://bppj.berkeley.edu/2018/08/23/norplant-coercive-policy-and-reproductive-justice/ [https://perma.cc/8J42-NEX2]; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY 104–05 (Vintage Books 2017).

52. *The World's Abortion Laws*, CTR. REPROD. RTS. (June 9, 2023), https://reproductiverights.org/maps/worlds-abortion-laws/ [https://perma.cc/RR3H-7GNF].

53. Laurin-Whitney Gottbrath, *U.S. Joins Only 3 Other Countries That Have Rolled Back Abortion Rights Since 1994*, AXIOS, https://www.axios.com/2022/05/05/only-3-countries-have-rolled-back-abortion-rights-since-1994 [https://perma.cc/8RD7-E2QV (staff-uploaded archive)] (last updated June 24, 2022).

One alleged justification for the recent turn toward abortion restrictions in the United States is traceable to a fundamental mistake of fact. In *Gonzales v. Carhart*,[54] which upheld a ban on intact dilation and evacuation procedures (a form of abortion), Justice Kennedy wrote, "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[55] However, scientific study has shown just the opposite. In the Turnaway Study, the largest longitudinal study of women in the United States seeking abortions to date, scientists found that, during interviews occurring every six months in the five years following their abortion, 95% of women reported that having the abortion was the right decision for them.[56] There are myriad reasons for this widespread reporting of abortion as correct decisions; greater freedom from violence is one such reason.

Access to reproductive rights and freedom often affects outcomes for pregnant victims of intimate partner violence. Between 6% and 22% of women having abortions report recent violence from an intimate partner, and concern about violence is one reason that some pregnant women terminate their pregnancies.[57] In the Turnaway Study, almost a quarter (24%) of women who had later term abortions experienced domestic violence or other conflict with their male partner.[58] A lack of reproductive freedom tethers survivors to their abusers; for example, a survivor may decide to stay with an abusive partner if their partner is "the only means of financial support for the child."[59] In data from the Turnaway Study about heterosexual relationships where the male partner was the abuser, researchers concluded that "[t]erminating an unwanted pregnancy may allow women to avoid physical violence from the [male perpetrator], while having a baby from an unwanted pregnancy appears to result in sustained physical violence over time."[60] Moreover, women who are prevented from having abortions are slower to terminate relationships with an abuser compared with women who are able to have abortions, and women who are prevented from having abortions are more likely to have sustained contact with their perpetrator over time, putting them and their child or children at

54. 550 U.S. 124 (2007).

55. *Id.* at 159.

56. DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION 124 (2020).

57. Sarah C.M. Roberts, M. Antonia Biggs, Karuna S. Chibber, Heather Gould, Corinne H. Rocca & Diana Greene Foster, *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MED. art. no. 144, at 1 (2014).

58. FOSTER, *supra* note 56, at 84.

59. *Access to Abortion: A Lifeline*, *supra* note 45.

60. Roberts et al., *supra* note 57, at 5.

greater risk than if they had received an abortion.[61] And many people who would have had abortions locally without telling their partners may not be able to covertly travel to a state in which abortion is legal in order to receive a wanted abortion.[62] Accordingly, as early data is beginning to show, new abortion bans will lead to an increase in abuse during pregnancy. For instance, in the year after the Supreme Court overturned *Roe v. Wade*[63] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[64] the National Domestic Violence Hotline saw a dramatic increase in callers.[65]

Abortion restrictions also harm children and teenagers who become pregnant as a result of rape and other abuse. In a study of rape-related pregnancy, the majority of these pregnancies occurred among adolescents.[66] Other studies have shown high rates of reproductive coercion and birth control sabotage among adolescents experiencing intimate partner violence.[67] Before the overturning of *Roe v. Wade*, almost three-quarters of U.S. states required parents to be involved in a minor's decision to have an abortion;[68] the Supreme Court allowed these laws so long as they included judicial bypass procedures, a narrow exception forcing adolescents to seek the permission of a judge to have an abortion if they do not have the required parental consent.[69] Since the release

61. *Id.*; *Turnaway Study*, BIXBY CTR. FOR GLOB. REPROD. HEALTH, UNIV. OF CAL. S.F., https://bixbycenter.ucsf.edu/sites/bixbycenter.ucsf.edu/files/Turnaway_Study_summary_web.pdf [https://perma.cc/6Z4X-EZRW].

62. Marisa Iati, *Without Abortion, Advocates Worry That Abuse Victims Will Be Trapped*, WASH. POST (July 9, 2022, 8:00 AM), https://www.washingtonpost.com/nation/2022/07/09/abortion-domestic-violence-abuse/ [https://perma.cc/8RWX-JZAE (dark archive)].

63. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

64. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

65. Amna Nawaz, *The Link Between a Lack of Reproductive Rights and Domestic Violence*, PBS NEWS HOUR (July 14, 2023, 6:45 PM), https://www.pbs.org/newshour/show/the-link-between-a-lack-of-reproductive-rights-and-domestic-violence [https://perma.cc/74ZS-3RS2]; Carter Sherman, *Domestic Abusers Are Using Abortion Bans To Control Their Victims*, VICE NEWS (July 13, 2023, 7:00 AM), https://www.vice.com/en/article/dy3yny/abortion-bans-domestic-abusers [https://perma.cc/M7ZB-KYQV].

66. Melissa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 321, 324 (1996).

67. FAM. VIOLENCE PREVENTION FUND, THE FACTS ON ADOLESCENT PREGNANCY, REPRODUCTIVE RISK AND EXPOSURE TO DATING AND FAMILY VIOLENCE (2010), https://www.futureswithoutviolence.org/userfiles/file/HealthCare/adolescent_preg_facts.pdf [https://perma.cc/ZR9N-EZ8T].

68. FOSTER, *supra* note 56, at 86.

69. Abbey Marr, *Judicial Bypass Procedures: Undue Burdens for Young People Seeking Safe Abortion Care*, ADVOCS. FOR YOUTH (June 2015), https://www.advocatesforyouth.org/resources/policy-advocacy/judicial-bypass-procedures/ [https://perma.cc/PM8P-GNC9]; *see also* Lizzie Presser, *She Wanted an Abortion. A Judge Said She Wasn't Mature Enough To Decide.*, PROPUBLICA (Nov. 29, 2022, 5:00 AM), https://www.propublica.org/article/how-states-limit-teen-access-to-abortion [https://perma.cc/8UUJ-57QY].

of the *Dobbs* decision, this option has now disappeared in states where abortion is banned, leaving many adolescents without legal access to abortion.[70] For instance, in July 2022, a ten-year-old girl living in Ohio was forced to travel to Indiana to have an abortion after she was raped and became pregnant.[71] This is far from an isolated incident, and in fact, pregnant minors (as well as pregnant adults) often had to cross state lines to obtain abortion care even before the release of *Dobbs*.[72] Because minors—especially those who, pre-*Dobbs*, would have depended on judicial bypass—are even less likely than adults to be able to cross state lines to access abortion, abortion bans will have an even more drastic effect on this already-vulnerable population.

As of January 8, 2024, fourteen states have banned abortion in almost all circumstances; of those states, eleven have no exceptions for rape or incest.[73] As a result, twenty-five million American women do not have access to the ability to decide whether to carry a pregnancy to term. In addition, Georgia bans abortion after six weeks of pregnancy, and several other states have either banned abortion early during the first or second trimester, or have passed abortion restrictions that are currently blocked by court order.[74] Even for pregnant people with the means and ability to cross state lines to access abortion, that option is quickly becoming endangered; some states are now threatening to prosecute individuals who seek abortion care out of state.

Ongoing court battles may impose additional restrictions on reproductive rights post-*Dobbs*, further limiting autonomy for survivors of intimate partner violence in the process. In November 2022, a recently incorporated medical organization and several doctors sued the Federal Food and Drug

70. Megan Burbank, *Long Uncertain, Young People's Access to Abortion Is More Complicated Than Ever*, NPR (Aug. 13, 2022, 7:00 AM), https://www.npr.org/sections/health-shots/2022/08/13/1116775457/abortion-access-roe-vs-wade-dobbs-opinion [https://perma.cc/ZB6P-VRRK].

71. David Folkenflik & Sarah McCammon, *A Rape, an Abortion, and a One-Source Story: A Child's Ordeal Becomes National News*, NPR, https://www.npr.org/2022/07/13/1111285143/abortion-10-year-old-raped-ohio [https://perma.cc/LP6E-TVWG] (last updated July 13, 2022, 10:28 PM). The Ohio Attorney General pursued a disciplinary complaint against the girl's doctor, Dr. Caitlin Bernard, despite the fact that she reported the rape to authorities. Tom Davies & Arleigh Rodgers, *AG: Penalize Doctor Who Spoke of Ohio 10-Year-Old's Abortion*, AP NEWS (Nov. 30, 2022, 5:05 PM), https://apnews.com/article/abortion-biden-health-indianapolis-indiana-e73ecf4f60ed68f1ad1d11db7c223359 [https://perma.cc/MND5-ENBS].

72. Dana Goldstein & Ava Sasani, *What New Abortion Bans Mean for the Youngest Patients*, N.Y. TIMES, https://www.nytimes.com/2022/07/16/us/abortion-bans-children.html [https://perma.cc/5SSN-63MQ (staff-uploaded, dark archive)] (last updated July 25, 2022).

73. Allison McCann, Amy Schoenfeld Walker, Ava Sasani, Taylor Johnston, Larry Buchanan & Jon Huang, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/4W2K-YTH9 (staff-uploaded, dark archive)] (last updated Jan. 8, 2024, 9:30 AM); Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), https://www.nytimes.com/2022/06/09/health/abortion-bans-rape-incest.html [https://perma.cc/LU34-8S5L (staff-uploaded, dark archive)].

74. McCann et al., *supra* note 73.

Administration ("FDA") and Biden administration officials in the Northern District of Texas to challenge the FDA's approval of mifepristone, one prescription drug often used in medication abortions.[75] Typically in the United States, medication abortion involves taking two drugs: mifepristone and misoprostol.[76] Medication abortion accounts for more than one-third of all abortions in the United States,[77] and it is safer than other commonly used medications including over the counter pain relievers and Viagra.[78] Plaintiffs challenged the FDA's approval of mifepristone by alleging that adverse effects from mifepristone "can overwhelm the medical system"[79] despite the fact that mifepristone is one of the most carefully studied medications on the market and has a complication rate lower than that of over-the-counter acetaminophen.[80] In fact, taking misoprostol alone without mifepristone is associated with a greater likelihood of incomplete abortion as compared to taking both drugs.[81]

On April 7, 2023, Judge Matthew Kacsmaryk of the Northern District of Texas granted plaintiffs' motion for a preliminary injunction and issued an order suspending the FDA's approval of mifepristone, set to take effect seven days later.[82] On the same day, Judge Thomas O. Rice of the Eastern District of Washington partially granted an injunction to plaintiffs in a lawsuit filed by seventeen states, ordering the federal government not to make any changes to the FDA's mifepristone approval.[83] The government quickly appealed Judge Kacsmaryk's order to the Fifth Circuit, and the Fifth Circuit only partially blocked the order, reinstating the FDA's original approval of mifepristone in

75. JENNIFER A. STAMAN, CONG. RSCH. SERV., LSB10919, MEDICATION ABORTION: NEW LITIGATION MAY AFFECT ACCESS 2–3 (2023). Plaintiffs incorporated their organization in Amarillo, Texas, three months prior to filing the lawsuit to ensure that they appeared before Judge Matthew Kacsmaryk, a conservative judge and former Christian activist. Gabriella Borter & Brendan Pierson, *Judge Mulls Banning Abortion Pill in US, Questions Regulatory Approval*, REUTERS, https://www.reuters.com/legal/texas-judge-consider-banning-abortion-pill-us-2023-03-15/ [https://perma.cc/F588-5HJQ (staff-uploaded, dark archive)] (last updated Mar. 16, 2023, 11:00 AM).

76. *The Availability and Use of Medication Abortion*, KFF, https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/H8Y9-D66D] (last updated Sept. 28, 2023).

77. *Medication Abortion*, GUTTMACHER INST. (Feb. 1, 2021), https://www.guttmacher.org/evidence-you-can-use/medication-abortion [https://perma.cc/J3SL-XMVB (staff-uploaded archive)].

78. FOSTER, *supra* note 56, at 145.

79. Plaintiffs' Brief in Support of their Motion for Preliminary Injunction at 9, All. for Hippocratic Med. v. U.S. Food & Drug Admin., 668 F. Supp. 3d 507 (N.D. Tex. Nov. 18, 2022) (No. 22-CV-223-Z).

80. Honor MacNaughton, Melissa Nothnagl & Jessica Early, In Reply to Letter to Editor, *Risks of and Indications for Mifepristone for Medication Abortion*, 105 AM. FAM. PHYSICIAN 5, 6 (2022).

81. *The Availability and Use of Medication Abortion*, *supra* note 76.

82. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 688 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff'd in part*, *vacated in part*, 78 F.4th 210 (5th Cir. 2023).

83. Washington v. U.S. Food & Drug Admin., 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023), *opinion clarified*, 669 F. Supp. 3d 1057, 1061 (E.D. Wash. 2023).

2000 but also reinstating pre-2016 restrictions on the drug.[84] On April 21, 2023, the Supreme Court granted a stay of the district court's order.[85] The Fifth Circuit subsequently made a merits determination in this case, and in December 2023, the Supreme Court granted petitions for certiorari.[86]

In sum, intimate partner violence affects a large portion of the American population, and pregnancy is a risk factor for experiencing such violence. Unsurprisingly, restrictions on reproductive rights—which infringe on the bodily autonomy of people who can become pregnant—can exacerbate the risk of injury or death due to intimate partner violence, by preventing survivors from exercising reproductive freedom and potentially tying them to a perpetrator of abuse for the long term.

C. *Guns and Intimate Partner Violence*

Firearms also have a close relationship to intimate partner violence. Between half and two-thirds of all intimate partner homicides are committed with a gun.[87] Data suggest that the most accurate predictor of homicide with a firearm is a background of domestic violence.[88] An average of seventy women are shot and killed by an intimate partner every month,[89] and access to, or prior use of, a firearm by an abuser are the risk factors most associated with intimate partner violence-related homicide.[90] In fact, abusers with firearms are *five times more likely* to kill their female victims.[91] The intersection of firearms and intimate partner violence has a disproportionate impact on pregnant and postpartum women and on American Indian/Alaska Native, Black, and Latina women.[92]

Seven out of ten pregnancy-associated homicides involve a firearm, confirming that guns are the most common means of perpetuating pregnancy-associated homicide.[93] In 2020 alone, 80% of pregnancy-associated homicides

84. All. for Hippocratic Med. v. Food & Drug Admin., No. 23-10362, 2023 WL 2913725, at *21 (5th Cir. Apr. 12, 2023).

85. Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023).

86. Danco Lab'ys, LLC v. All. for Hippocratic Med., 144 S. Ct. 537, 537 (2023) (mem.) (granting cert.); Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 537, 537 (2023) (mem.) (granting cert.).

87. *Domestic Violence and Firearms*, EDUC. FUND TO STOP GUN VIOLENCE, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/ [https://perma.cc/MKT7-9RMW] (last updated July 2020); *Domestic Violence*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/issues/domestic-violence/ [https://perma.cc/VLZ3-YUWX].

88. *See* Tom Lininger, *An Ethical Duty To Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 177 (2015).

89. *Guns and Violence Against Women*, *supra* note 8.

90. Liza H. Gold, *Domestic Violence, Firearms, and Mass Shootings*, 48 J. AM. ACAD. PSYCHIATRY & L. 35, 36 (2020).

91. *Guns and Violence Against Women*, *supra* note 8.

92. *Id.*

93. Wallace et al., *supra* note 33, at 766.

involved firearms.[94] In numerous instances of intimate partner violence-related homicide, a man has murdered his female partner with a gun and then turned it on himself—a murder-suicide tragically ending a pattern of abuse[95]—or has shot a former or current intimate partner before proceeding to commit a mass shooting.[96] Intimate partner violence involving guns is only increasing; from 2011 to 2020, intimate partner homicides of women increased by 6% and homicides with guns increased by 15%.[97]

D. *Gun Laws and Intimate Partner Homicide*

At a broad level, states with more guns have elevated rates of homicide,[98] and fewer people die by gun violence in states with stronger gun safety laws.[99] States that have the highest rates of gun ownership have a gun homicide rate that is 114% higher than states that have the lowest rates of gun ownership.[100] Gun surrender laws are associated with lower rates of domestic violence homicide.[101] And by contrast, shall-issue laws for firearms are associated with an increase in firearm-involved homicides.[102]

Studies have found that there is a 16% increased risk of homicide for pregnant or postpartum women as compared with nonpregnant, nonpostpartum women.[103] Further, the majority of intimate partner homicides involve physical abuse prior to the murder,[104] indicating that laws that allow for removal of guns

94. Maeve E. Wallace, *Trends in Pregnancy-Associated Homicide, United States, 2020*, 112 AM. J. PUB. HEALTH 1333, 1333 (2022).

95. *See, e.g.*, ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 191–93 (2021).

96. *Guns and Violence Against Women*, *supra* note 8.

97. *Id.*

98. Matthew Miller, Deborah Azrael & David Hemenway, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 1988, 1991 (2002).

99. Emma Tucker & Priya Krishnakumar, *States with Weaker Gun Laws Have Higher Rates of Firearm Related Homicides and Suicides, Study Finds*, CNN, https://www.cnn.com/2022/01/20/us/everytown-weak-gun-laws-high-gun-deaths-study/index.html [https://perma.cc/8ZNT-Q42K] (last updated May 27, 2022, 10:09 AM); *Gun Safety Policies Save Lives: Which States Have the Ideal Laws To Prevent Gun Violence?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/ [https://perma.cc/DUS6-6QFU] (last updated January 12, 2023).

100. Amanda L. LeSavage, Comment, *American Gun Violence: An Information Asymmetry Problem*, 4 U. PA. J.L. & PUB. AFFS. 313, 322 (2019) (citing Matthew Miller, David Hemenway & Deborah Azrael, *State-Level Homicide Victimization Rates in the US in Relation To Survey Measures of Household Firearm Ownership, 2001–2003*, 64 SOC. SCI. & MED. 656, 659–60 (2007)).

101. Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 565–66 (2020).

102. *Effects of Concealed-Carry Laws on Violent Crime*, RAND, https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime.html [https://perma.cc/VH2Q-6LMZ] (last updated Jan. 10, 2023).

103. Wallace et al., *supra* note 33, at 762.

104. Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria

from abusers could decrease intimate partner violence-related homicide. Indeed, states with laws that ban firearm possession by individuals who are subject to intimate partner violence-related restraining orders are associated with lower rates of intimate partner homicide as compared to states without such laws,[105] suggesting that pregnancy-associated intimate partner homicide could also be reduced by such laws.[106]

In short, pregnancy increases the risk of intimate partner violence, and access to firearms increases the lethality of intimate partner violence. Accordingly, where abortion is restricted and guns are not, more people will die from intimate partner violence.

II. THE LEGAL SYSTEM'S HISTORICAL APPROACH TO (OR WILLFUL IGNORANCE OF) INTIMATE PARTNER VIOLENCE

Until the latter half of the twentieth century, courts largely treated intimate partner violence as permissible, invisible, or a private matter not deserving of state intervention. During the latter half of the twentieth century, the domestic violence movement organized to demand legal remedies, to mixed success. Still, while intimate partner violence is now recognized as a prevalent and serious issue, even relatively contemporary judicial treatment of intimate partner violence reflects either a willingness to ignore such violence or to manipulate its existence, depending on how intimate partner violence can be utilized (or not) to further other issues or agendas present in a particular opinion.

A. *History of Domestic Violence Law*

Prior to the American Revolution, women in the colonies could seek court intervention from abuse by their husbands, though violence by men against their wives rarely resulted in punishment beyond a small fine.[107] Following the Revolution, the "family became increasingly viewed as a private domain distinct from government," and as a result, abuse was less likely to be redressed through the legal system.[108]

Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089 (2003).

105. Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, Craig S. Ross, Bindu Kalesan, Kristin A. Goss & Michael Siegel, *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536, 541 (2017).

106. Wallace et al., *supra* note 33, at 766.

107. Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 EARLY AM. STUD. 223, 232–34 (2007).

108. *Id.* at 238–39.

By the nineteenth century, the judicial system's hostility to women seeking freedom from domestic violence had solidified. Courts "gave far more consideration to matters of family privacy" with respect to domestic violence, and judges chose to ignore "acts of violence they regarded as falling short of [an] extreme standard of permanent injury."[109] When a woman married, she became bound to obey her husband, and her legal identity merged with her husband's, such that she was "unable to file suit without his participation, whether to enforce contracts or to seek damages in tort."[110] Consistent with that concept, it was considered a husband's "prerogative" to engage in marital chastisement, that is, what was considered "moderate" physical abuse.[111]

State court litigation from this time reflects a general disregard for—or even disdain for—women abused by their husbands. For instance, in *Poor v. Poor*,[112] a New Hampshire court refused to grant a woman a divorce based on extreme cruelty.[113] The court acknowledged that the husband's conduct included beating the woman in the head, striking her with a horse whip, and imprisoning her in a cellar.[114] Yet the court noted that the woman had a "bold, masculine spirit" and found that she was not entitled to a divorce because the "ill treatment" inflicted by the man was "drawn upon her by her own misconduct," based, in part, on the contention that "no very serious injury was done to her person."[115] In a similar opinion by the Supreme Court of California, a court also found that the extreme cruelty necessary to grant a divorce to a woman was not apparent because the violence was not committed "to endanger life, limb, or health, or to cause a reasonable apprehension of future danger," despite the fact that the complaint alleged that the "defendant laid violent hands on the plaintiff, seized her by the throat, and choked and maltreated her in such a manner, as to leave on her person visible marks of his cruelty."[116]

Starting in the 1850s, the women's rights movement ushered in greater legal rights for women, including the right to file suit in court in their own name.[117] The movement also sought to address marital chastisement, and by the 1870s, the legal system largely ceased to recognize a "right" of men to physically abuse their wives.[118] At the same time, courts "routinely condoned violence in marriage," continuing to treat wife beating distinctly from other instances of

109. *Id.* at 241–42.

110. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996) [hereinafter Siegel, *"The Rule of Love"*].

111. *Id.* at 2123.

112. 8 N.H. 307 (1836).

113. *Id.* at 319–20.

114. *Id.* at 311–13.

115. *Id.* at 308, 316–18.

116. Morris v. Morris, 14 Cal. 76, 79 (1859).

117. Siegel, *"The Rule of Love," supra* note 110, at 2128.

118. *Id.* at 2129.

assault and battery throughout the nineteenth century and much of the twentieth century.[119] For instance, in *State v. Oliver*,[120] the court acknowledged that wife beating was no longer a legal right afforded to men, but held that when "no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[121]

Furthermore, courts that repudiated abuse were often more likely to do so if their perpetrator was a Black man, apparently "more interested in controlling African-American men than in protecting their wives."[122] Through decisions such as *Fulghan v. State*,[123] courts appeared to relish in punishing Black men for violence against women in their family while such violence was routinely ignored when perpetrated by white men.[124] In *Harris v. State*,[125] the Mississippi Supreme Court disparagingly referred to a "belief among the humbler class of our colored population of a fancied right in the husband to chastise the wife in moderation" even though white men were also beating their wives during the same period.[126] This blame of Black men is consistent with larger white supremacist violence during the era; throughout the nineteenth century and into the twentieth century, Black men were lynched by white mobs that invoked the specter of rape and other violence against white women, often when no such violence had occurred.[127]

By 1920, wife beating was illegal in all states,[128] but the legal system still largely viewed such violence as a private matter between spouses.[129] Rather than grant divorces in response to spousal abuse, courts encouraged "reconciliations" through the first half of the twentieth century, and often coerced women to

119. *Id.* at 2118, 2130.

120. 70 N.C. 60 (1874).

121. *Id.* at 61.

122. Siegel, "*The Rule of Love*," *supra* note 110, at 2136.

123. 46 Ala. 143 (1871).

124. *Id.* at 147–48; *cf.* Poor v. Poor, 8 N.H. 307, 308, 311–13, 318–20 (1836) (holding that the fact that a woman's husband beat her in the head, struck her with horse whip repeatedly, and imprisoned her in a cellar was not sufficient to grant her a divorce based on extreme cruelty).

125. 14 So. 266 (Miss. 1894).

126. *Id.* at 266.

127. For a more fulsome discussion of the racial and gender dynamics of violence against women and lynchings of Black men, see generally ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION (2013) (discussing the history of the specter of rape being utilized to lynch Black men, and later attempts by a regionally, racially, and politically varied group of reformers to redefine the legal understanding of rape).

128. Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1781 n.17 (2012) [hereinafter Bailey, *It's Complicated*] (citing Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996)).

129. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662 (2004) [hereinafter Sack, *Battered Women*].

withdraw complaints.[130] Likewise, police responses to domestic violence in this time period largely involved separating the parties temporarily, often advising an abusive male partner to "take a walk around the block."[131] Law enforcement almost never arrested the abuser when called to the scene, and even when an arrest was made, the case was usually either dismissed or never charged in the first place;[132] prosecutors generally viewed domestic violence cases as "low-prestige,"[133] and in some jurisdictions, victims had to pay a fee to prosecutors to pursue their cases.[134]

The domestic violence movement began to emerge in the 1960s, when a grassroots coalition of feminist activists, civil rights leaders, and other organizers coalesced.[135] Movement leaders challenged the idea that violence was a private matter, instead framing violence against women as a political issue stemming from subordination of women.[136] The movement initially organized outside of the legal system due to mistrust of that system, instead opting to create domestic violence shelters and other services on their own.[137]

During the 1970s and 1980s, however, the movement shifted from grassroots efforts to a focus on public policy, relying on lawyers, courts, and policy change to provide a legal regime for adjudicating domestic violence and distributing resources to victims.[138] Public awareness of domestic violence grew, and with it, so did the political capital to intervene.[139] Every state gradually enacted a civil protection order statute, providing survivors with a sometimes-effective legal mechanism for physical separation from their abusers.[140] States also enacted criminal statutes to punish offenders[141] and no-drop prosecution policies that forced prosecutors to proceed with domestic violence prosecutions

130. Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 994 (1989).

131. Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996); *see also* Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1259 (2010).

132. Kathryn Gillespie Wellman, Note, *Taking the Next Step in the Legal Response to Domestic Violence: The Need To Reexamine Specialized Domestic Violence Courts from a Victim Perspective*, 24 COLUM. J. GENDER & L. 444, 450 (2013).

133. Sack, *Battered Women*, *supra* note 129, at 1665.

134. Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 982 (2004).

135. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges To Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 500 (2003).

136. Bailey, *It's Complicated*, *supra* note 128, at 1782–83.

137. Wellman, *supra* note 132, at 450–51; Murphy, *supra* note 135, at 500–01.

138. Wellman, *supra* note 132, at 451; Murphy, *supra* note 135, at 499, 501.

139. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11 (1999).

140. *Id.*

141. Murphy, *supra* note 135, at 501.

where an evidentiary standard was met, regardless of the victim's buy-in.[142] Increased attention to these interventions at the federal level eventually resulted in the passage of the Violence Against Women Act of 1994 ("VAWA").[143] Among other initiatives, VAWA established new federal crimes for acts of domestic violence and conditioned federal funding to states on interstate enforcement of civil protection orders, as well as arrests for violations of protection orders.[144] Reforms to the criminal legal system primarily focused on arrest policies and no-drop prosecution policies.[145]

This embrace of the legal system had some negative consequences for survivors of intimate partner violence writ large, and especially for survivors of color. As one example, mandatory arrest policies and no-drop prosecutions deprive survivors of agency—something they are already robbed of by abusers—when they may not want to engage the criminal justice system as a solution.[146] Victims of intimate partner violence know their abusers, and are thus far more likely to understand whether involvement of the legal system will increase the lethality risk to themselves.[147] Additionally, women of color who are victims of intimate partner violence have often, paradoxically, faced civil or criminal penalties.[148] For instance, in jurisdictions with dual arrest policies, women of color are more likely to be arrested than white women, and when charged with a crime, they are charged with more serious crimes.[149] Immigrant victims can be disproportionately harmed by mandatory arrest and other domestic violence policies as well, either because the possible deportation of an abusive partner may have catastrophic economic consequences for their family, or because an immigrant victim may plead guilty of domestic violence if they do not have knowledgeable legal counsel.[150] Moreover, the court system's involvement in intimate partner violence can eventually result in involvement by the family policing system, which disproportionately separates women of color and immigrant women from their families.[151]

142. Wellman, *supra* note 132, at 452.

143. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.); Murphy, *supra* note 135, at 501.

144. Epstein, *supra* note 139, at 12; Murphy, *supra* note 135, at 501–02.

145. Wellman, *supra* note 132, at 452.

146. *Id.* at 454.

147. *Id.*

148. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 805–06 (2007) [hereinafter Gruber, *The Feminist War*].

149. Sack, *Battered Women*, *supra* note 129, at 1680–81.

150. Bailey, *It's Complicated*, *supra* note 128, at 1794–95; Sack, *Battered Women*, *supra* note 129, at 1679.

151. Gruber, *The Feminist War*, *supra* note 148, at 806; Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Colo*r, 33 U.C. DAVIS L. REV. 1009, 1031 (2000).

The last six decades or so has seen a shift in the legal system's treatment of intimate partner violence from a private issue to a public safety issue. Yet as noted in the next two sections, case law in other areas makes clear that, when confronting other legal issues that intersect with intimate partner violence, courts have either ignored the ubiquity of intimate partner violence, or used intimate partner violence as a justification for the legal remedy sought as to another issue.

B. *Reproductive Rights Law and Intimate Partner Violence*

Treatment of intimate partner violence in reproductive rights case law has been inconsistent throughout history, which makes sense given how differently courts view the concept of privacy against the backdrop of these two topics. Historically, courts utilized notions of privacy in the home or familial privacy to justify broad failure to provide relief to victims of intimate partner violence. And courts largely ignored intimate partner violence when adjudicating reproductive rights cases until *Planned Parenthood of Southeastern Pennsylvania v. Casey*, when the Supreme Court conceived of a right to privacy as a substantive due process right that encompassed decisions about pregnancy and abortion.[152] In doing so, the Court highlighted the theretofore "private" phenomenon of intimate partner violence as one reason that women should be free from a spousal notification requirement to obtain abortions.[153]

The Supreme Court first explored the concept of privacy as applied to reproductive rights in *Griswold v. Connecticut*.[154] In *Griswold*, the Court noted that the right to privacy is implied by several amendments to the Constitution, and held that marital privacy lies "within the zone of privacy created by several fundamental constitutional guarantees."[155] The Court then held that a state law criminalizing the use of contraception infringed on the right to privacy within a marriage, stating that the right of privacy in marriage is not only protected by the Bill of Rights, but is a right "older than our political parties" and protects "an association for as noble a purpose as any involved in our prior decisions."[156] In contrast to cases involving intimate partner violence—in which judges invoked marital privacy to ignore victims of violence seeking legal redress—in *Griswold*, the Supreme Court protected privacy sought by both married partners. In earlier domestic violence cases, women explicitly went to courts to

For more information, see generally DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (detailing the disparate effects of the family policing system on families of color).

152. 505 U.S. 833, 891 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

153. *Id.* at 893–94.

154. 381 U.S. 479 (1965).

155. *Id.* at 485.

156. *Id.* at 486.

make previously private violence by their husbands public in the hopes of seeking legal relief, but were denied by courts that chose to ignore the violence or view the husbands' actions as meriting concealment from public view. In *Griswold*, the Court determined that the government could not interfere in a private (and consensual) decision between married people, neither of whom wished to disclose the use of contraceptives to the State.[157] While *Griswold* has a different subject than early intimate partner violence cases, in both instances, courts treated the marital home as a "sacred precinct" and therefore deserving of privacy protections.[158]

Eisenstadt v. Baird[159] subsequently untethered the right to privacy from marriage.[160] In *Eisenstadt*, the Court held that a ban on contraceptives for single individuals also violated their right to privacy under the Equal Protection Clause of the Fourteenth Amendment because there was no rational basis to treat married and unmarried persons differently under the state law at issue.[161] *Eisenstadt* untethered privacy from heterosexual marriage, explaining that individuals should also be free from "unwarranted governmental intrusion."[162]

In *Roe v. Wade*, the Court greatly expanded the rights of people who become pregnant, holding that the Due Process Clause of the Fourteenth Amendment protects the right to privacy, including a pregnant woman's right to terminate a pregnancy.[163] The Court did not reference the Equal Protection Clause, though scholars later suggested that the right to bodily autonomy for women may have found stronger grounding in an equal protection argument.[164] *Roe v. Wade* also did not mention domestic violence, although the plaintiff, Norma McCorvey, had previously been a victim of abuse and intimate partner violence.[165]

Continuing along the lines of *Griswold* and *Eisenstadt*, the Court's opinion in *Roe* was based on the right to privacy. Rather than invoking privacy to eclipse familial violence as courts had done in the past, though, the Court in these cases

157. *Id.*

158. *Id.* at 485.

159. 405 U.S. 438 (1972).

160. *Id.* at 454–55.

161. *Id.* at 447.

162. *Id.* at 453.

163. Roe v. Wade, 410 U.S. 113, 153, 164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

164. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375 (1985); *see also* Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO STATE L.J. 1085, 1085–86 (2009); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 266 (1992).

165. *See* Joshua Prager, *The Accidental Activist*, VANITY FAIR (Jan. 18, 2013), https://www.vanityfair.com/news/politics/2013/02/norma-mccorvey-roe-v-wade-abortion [https://perma.cc/A6WV-9TRF (dark archive)].

explicitly found that women actually possess the right to privacy,[166] i.e., the right to make decisions about their own bodies. At the same time, *Roe* emphasized the relationship between a doctor and patient—referring to the physician with male pronouns—therefore framing the privacy right as one bound up in the medical judgment of a male medical professional.[167]

Planned Parenthood of Southeastern Pennsylvania v. Casey reframed the privacy right once again, but this time, the Court finally conceived of pregnant people, standing alone, as deserving of privacy.[168] And *Casey* not only grounded the right to an abortion in a pregnant person's autonomy rather than in the relationship between a woman and her doctor, but it also addressed intimate partner violence in the context of reproductive rights for the first time. Affirming *Roe*, the Court stated that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[169] The Court therefore held that a state may not place an undue burden on a woman's right to terminate a pre-viability pregnancy.[170] *Casey* invalidated a Pennsylvania state law that required a married woman seeking an abortion to sign a statement indicating that she had notified her husband that she planned to get an abortion[171] absent certain circumstances, such as if the woman signed a statement that the pregnancy was the result of spousal sexual assault that she had reported, or if she believed that notifying her husband would cause him or someone else to inflict bodily injury on her.[172]

Prior to *Casey*, the Court invalidated a Missouri law requiring spousal consent for an abortion in *Planned Parenthood of Central Missouri v. Danforth*,[173] though the Court did not discuss intimate partner violence as a reason motivating their decision.[174] Instead, *Danforth* mused that a marriage would not be successful if a husband and wife were "fundamentally divided" on abortion, but reluctantly concluded that, between the two partners, a pregnant woman is

166. *Roe*, 410 U.S. at 153 (holding that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

167. *See id.* at 165–66.

168. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

169. *Id.* at 856.

170. *Id.* at 877.

171. *Id.* at 898. The Court did not address or even acknowledge violence in LGBTQ+ relationships; at the time, same-sex marriage was not legal in any state. To the contrary, the Court upheld a Georgia law criminalizing sodomy and targeting homosexual sex. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

172. *Casey*, 505 U.S. at 887–88.

173. 428 U.S. 52 (1976).

174. *Id.* at 69.

"more directly and immediately affected by the pregnancy" and therefore should not need spousal consent to have an abortion.[175]

In *Casey*, the district court made a number of findings with respect to marital violence, in stark contrast to the willful ignorance of intimate partner violence by American courts throughout the nineteenth and much of the twentieth centuries. The district court noted that battering husbands often threaten that they will inflict further violence upon their wife or their children if their wife tells an outsider about the abuse, and that "[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."[176] The district court also discussed the many circumstances in which a pregnant woman would not be eligible to invoke the "bodily injury" exception to spousal notification, explaining, as follows, that a husband could employ a variety of tactics that would not constitute bodily injury but would still constitute abuse:

> The "bodily injury" exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children . . . .[177]

The Supreme Court went on to recount the high risk of physical violence to women by their male partners, noting that studies at the time suggested that up to one-third of women would be physically assaulted by a partner or ex-partner in their lifetimes.[178] In sum, the Court acknowledged the reality that "there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands."[179]

Ultimately, the Supreme Court held that the Pennsylvania law requiring spousal notification prior to abortion placed an undue burden on married women seeking abortions.[180] The Court emphasized that it is rational for a survivor of spousal abuse not to inform their husband of pregnancy for a variety of reasons, including the possibility that their husband would physically assault

175. *Id.* at 71.
176. *Casey*, 505 U.S. at 889.
177. *Id.* at 888.
178. *Id.* at 891–92.
179. *Id.* at 893.
180. *Id.* at 898.

them, assault their children, or engage in psychological abuse.[181] The Court also acknowledged that the law enforcement reporting requirement for a woman who has been sexually assaulted by her husband would, in turn, result in the husband learning that she had reported the assault and, therefore, victims of spousal rape could not realistically access abortion.[182]

Further, the Court engaged with bodily autonomy for pregnant people,[183] noting that state regulation of abortion will inherently have "greater impact" on a woman carrying a pregnancy than on her husband.[184] This may seem unremarkable, but as the Court stated and this Article has outlined, during the nineteenth century, it was widely understood that "a woman had no legal existence separate from her husband."[185] That the Court chose to make this finding explicit seemed to signal a new recognition that women and pregnant people are deserving of the same autonomy that had seemed automatic for men under the Constitution.

Of course, that was soon to fade in the twenty-first century. In *Whole Women's Health v. Hellerstedt*[186] and *June Medical Services L.L.C. v. Russo*,[187] the Supreme Court made only a passing mention to intimate partner violence, in each case merely noting *Casey*'s finding that a spousal notification requirement would pose an undue burden to an individual seeking an abortion.[188] And as explored below, *Roe* and *Casey* (as well as *Hellerstedt*, *June Medical*, and related cases) were overturned in 2022.

C. *Firearms, Gun Safety Laws, and Intimate Partner Violence*

In contrast to the majority of the Supreme Court's jurisprudence in reproductive rights cases—where the Court has largely ignored intimate partner violence—the Court has heard cases directly on the relationship between firearms restrictions and intimate partner violence, and it has largely upheld such restrictions. Until very recently, federal courts did not question whether firearms restrictions aimed at preventing domestic violence could withstand constitutional muster.

181. *Id.* at 888.

182. *Id.* at 893.

183. The Court appeared to only acknowledge cisgender women as people who could become pregnant, though nonbinary people, transgender men, and other people can also be pregnant. *See* Amber Leventry, *Here's What I Want People To Know About Trans and Nonbinary Pregnancies*, PARENTS, https://www.parents.com/pregnancy/my-body/pregnancy-health/trans-and-nonbinary-people-can-be-pregnant-too/ [https://perma.cc/53ZX-EZFJ] (last updated Oct. 16, 2023).

184. *Casey*, 505 U.S. at 896.

185. *Id.* at 896–97 (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).

186. 579 U.S. 582 (2016), *as revised* (June 27, 2016), and *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

187. 140 S. Ct. 2103 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228 (2022).

188. *See Hellerstedt*, 579 U.S. at 608; *June Med. Servs. L.L.C.*, 140 S. Ct. at 2137.

1. Intimate Partner Violence and Federal Firearms Regulations

As noted above, federal law largely did not address the relationship between firearms and domestic violence injuries and fatalities until the 1990s.[189] The two most salient federal laws involving domestic violence and firearms are 18 U.S.C. § 922(g)(8) and 18 U.S.C. § 922(g)(9).

Section 922(g)(8) prevents any individual who is subject to a restraining order for "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child"—subject to certain parameters, including actual notice and the ability to participate in a hearing—from possessing a firearm.[190] Congress enacted 18 U.S.C. § 922(g)(8) in 1994 with the aim of addressing the danger posed by perpetrators of domestic violence possessing firearms.[191] The legislative history also reveals that the sponsors of what would become Section 922(g)(8) wanted to disarm all persons against whom domestic violence restraining orders had

189. As a caveat to the next section, this Author does not advocate for a carceral approach to intimate partner violence. Carceral approaches to gender-based violence have often failed to reduce violence against women and, in fact, have reinforced subordination and structural racism against women of color. *See generally* Natalie Nanasi, *New Approaches to Disarming Domestic Abusers*, 67 VILL. L. REV. 561 (2022) [hereinafter Nanasi, *New Approaches*] (analyzing alternative approaches to dispossessing perpetrators of intimate partner violence of firearms other than the criminal justice system); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) (critiquing and exposing the failings of the use of criminal law in rape reform); Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801 (2021) (providing more information). Moreover, many survivors do not call on the legal system to seek protection from abuse, *see* Nanasi, *New Approaches*, *supra*, at 561, and many survivors (especially survivors of sexual violence) would prefer a restorative justice approach to violence, Judith L. Herman, *What True Justice Looks Like for Sexual Violence Survivors*, TIME (March 14, 2023, 7:00 AM), https://time.com/6262295/sexual-violence-survivors-justice/ [https://perma.cc/32UW-WA8G].

However, the two regulations outlined in this section are the only two federal regulations that directly address the lethality of firearms in the context of intimate partner violence; accordingly, this Article explains the history and current operation of those two laws. If instead the federal government had civil restrictions on the ability of perpetrators of domestic violence to possess firearms—for instance, regulations and a retailing licensing regime that prevented gun retailers from selling firearms to individuals against whom there is a domestic violence restraining order or conviction—this Article would analyze the efficacy of such laws. And arguably, those types of regulations might be more effective. But a licensing regime appears deeply unlikely to survive post-*Bruen* and, in any event, the purpose behind such a regime would track the purpose of Sections 922(g)(8) and 922(g)(9) as explained below. Accordingly, this section will explain the legislative history, purpose, and status of both regulations prior to *Bruen*. The following section will discuss the ramifications of *Bruen* on firearms restrictions aimed at preventing intimate partner violence and, in the course of doing such, will discuss the Fifth Circuit's 2023 decision in *Rahimi*.

190. 18 U.S.C. § 922(g)(8); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 110401(b), 108 Stat. 1796, 2014 (codified at 18 U.S.C. § 922(g)(8)).

191. United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012) (citing Tom Lininger, *A Better Way To Disarm Batterers*, 54 HASTINGS L.J. 525, 538–44 (2003)).

been enacted, and wanted to remove some discretion from judges with respect to enacting measures to protect domestic violence survivors.[192]

Section 922(g)(9) prevents any person who was "convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm.[193] While the rest of the prohibitions in Section 922(g) do not apply to military and law enforcement personnel, such personnel are subject to Section 922(g)(9).[194] This Section was enacted in 1996; Senator Lautenberg introduced this legislation to fulfill the original purpose of the bill that became Section 922(g)(8), which had initially included banning firearms for those convicted of misdemeanor offenses involving domestic violence.[195]

2. Courts Uphold Sections 922(g)(8) and 922(g)(9)

Sections 922(g)(8) and 922(g)(9) have been periodically tested—and, until *Rahimi*, always upheld—in courts of appeals. In 2008, *District of Columbia v. Heller*[196] held unconstitutional provisions of District of Columbia law that restricted registration of handguns and required owners of lawfully registered firearms to keep them unloaded or bound by a trigger lock absent certain circumstances.[197] When invalidating those District of Columbia restrictions, *Heller* explicitly stated that its reasoning should not cast doubt on "longstanding prohibitions on the possession of firearms by felons" and other historical restrictions.[198]

A proliferation of legal challenges to firearms restrictions soon followed *Heller*, including challenges to Sections 922(g)(8) and 922(g)(9). Post-*Heller*, courts of appeals generally adopted a two-part framework to analyze laws that could infringe on Second Amendment rights. First, courts asked whether the law at issue restricted conduct that fell under the Amendment's historical protections. Second, if the law did so, courts determined the appropriate level of scrutiny to apply to that law according to whether it burdened core Second Amendment protections or not. Under this framework, until 2023, courts of appeals found Section 922(g)(8) constitutional under the Second Amendment. And courts of appeals—as well as the Supreme Court—have consistently upheld Section 922(g)(9) on constitutional and statutory interpretation grounds.

192. Tom Lininger, *A Better Way To Disarm Batterers*, 54 HASTINGS L.J. 525, 542–43 (2003) [hereinafter Lininger, *A Better Way*].

193. 18 U.S.C. § 922(g)(9).

194. Lininger, *A Better Way*, *supra* note 192, at 550.

195. *Id.* at 551.

196. 554 U.S. 570 (2008).

197. *Id.* at 635–36.

198. *Id.* at 626.

a. Section 922(g)(8)

In *United States v. Bena*,[199] for instance, the Eighth Circuit upheld Section 922(g)(8).[200] The Eighth Circuit invoked *Heller*'s characterization of the Second Amendment as "guaranteeing 'the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home.'"[201] The Court then traced scholarship on historical treatment of firearms, demonstrating "historical support for a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible."[202] Accordingly, the Eighth Circuit found that "[a]t least some applications" of Section 922(g)(8) are consistent with common-law tradition surrounding firearms, and upheld the petitioner's conviction under the statute.[203] Similarly, the Third Circuit determined that Section 922(g)(8) covers a category of individuals who would have historically been restricted from firearms in *United States v. Boyd*.[204] The Third Circuit noted the "dangers of gun possession by domestic abusers," and explained that the defendant to whom Section 922(g)(8) applied "cannot distinguish himself from the class of presumptively dangerous persons who historically lack Second Amendment protections."[205] Both cases and others cited the fact that firearms and domestic violence can be a particularly lethal combination.[206]

Prior to *Rahimi*, the Fifth Circuit itself twice considered and upheld Section 922(g)(8) as constitutional under the Second Amendment. In *United States v. Emerson*,[207] a defendant challenged Section 922(g)(8)(c)(ii)'s lack of a requirement that the state court issuing the restraining order make an "explicit, express credible threat finding" for the prohibition to comport with the Second Amendment.[208] However, the Third Circuit noted that Section 922(g)(8)(A) requires an "actual hearing with . . . notice and an opportunity to participate" prior to issuance of a restraining order for that issuance to bar firearm possession under the statute.[209] The court further noted Congress's assumption that state law mandated restraining orders would not bar possession unless they "either

199. 664 F.3d 1180 (8th Cir. 2011).

200. *Id.* at 1183.

201. *Id.* (quoting *Heller*, 554 U.S. at 635).

202. *Id.*

203. *Id.* at 1184. The Eighth Circuit acknowledged that Section 922(g)(8) does not require a conviction, but that it focuses on a "threat presented by a specific category of presumptively dangerous individuals," and that the prohibition is time limited to "so long as a person is 'subject to' a qualifying court order." *Id.*

204. 999 F.3d 171, 186–88 (3d Cir. 2021).

205. *Id.* at 186, 188.

206. *See Bena*, 664 F.3d at 1184; *Boyd*, 999 F.3d at 186–88; *see also* United States v. Reese, 627 F.3d 792, 805 (10th Cir. 2010) (reversing dismissal of Section 922(g)(8) conviction).

207. 270 F.3d 203 (5th Cir. 2001), *abrogated by* United States v. Rahimi, 59 F.4th 163 (5th Cir. 2023).

208. *Id.* at 263.

209. *Id.* at 261.

were not contested or evidence credited by the court reflected a real threat or danger of injury to the protected party by the party enjoined."[210] The Fifth Circuit thus rejected the defendant's challenge.[211]

The Fifth Circuit again upheld the constitutionality of Section 922(g)(8) nineteen years later in *United States v. McGinnis*.[212] The defendant in that case brought a facial challenge against Section 922(g)(8), but the court held that the facial challenge failed.[213] At step two of the two-step inquiry courts employed to analyze firearms restrictions pre-*Bruen*, the Fifth Circuit held that intermediate scrutiny applies to Section 922(g)(8) because individuals affected by this regulation had been found by a state court to pose a real danger, and therefore, these "individuals subject to such judicial findings are not the 'responsible citizens' protected by the core of the Second Amendment."[214] Then applying intermediate scrutiny and citing *Emerson* for the principle that there is a sufficient "nexus" between the "threat of lawless violence" as traditionally understood and gun possession by perpetrators of intimate partner violence, the Fifth Circuit found that Section 922(g)(8) "passes constitutional muster."[215]

b. Section 922(g)(9)

The Supreme Court, and lower courts similarly, consistently affirmed Section 922(g)(9) prior to *Bruen*. For instance, upholding Section 922(g)(9), the Seventh Circuit in *United States v. Skoien*[216] explained that *Heller* invoked a precursor law to the Second Amendment, making clear that the right to bear arms did not extend to those who created danger of injury.[217] The Seventh Circuit also noted that the "first federal statute disqualifying felons from possessing firearms was not enacted until 1938";[218] given *Heller*'s explicit protection of statutes prohibiting felons from firearms possession, therefore, the Seventh Circuit concluded, "we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."[219] That is, the Seventh Circuit suggested that the fact that a firearms restriction was not imposed on perpetrators of domestic violence during the founding does not render such a restriction unconstitutional.

210. *Id.* at 262.
211. *Id.* at 263–64.
212. 956 F.3d 747 (5th Cir. 2020), *abrogated by Rahimi*, 59 F.4th 163.
213. *Id.* at 756.
214. *Id.* at 757 (quoting United States v. Chapman, 666 F.3d 220, 224 (4th Cir. 2012)).
215. *Id.* at 758–59.
216. 614 F.3d 638, 640 (7th Cir. 2010).
217. The Seventh Circuit also noted that "[d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists," and that "domestic abusers often commit acts that would be charged as felonies if the victim were a stranger." *Id.* at 643.
218. *Id.* at 640.
219. *Id.* at 641.

The Supreme Court has also explored and confirmed the validity of Section 922(g)(9). In *United States v. Hayes*,[220] the defendant was convicted in the district court under Section 922(g)(9) because he had a prior misdemeanor conviction for domestic violence against a prior partner (his then-wife).[221] The Supreme Court subsequently upheld that conviction.[222] And the Court again addressed the importance of Section 922(g)(9) just five years later in *United States v. Castleman*.[223] Castleman pleaded guilty to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, and several years later, was convicted under Section 922(g)(9) for selling firearms on the black market.[224] The district court held that the conviction under the statute did not qualify as a crime under Section 922(g)(9) because an individual could cause "bodily injury without violent contact."[225] The Sixth Circuit affirmed under different reasoning, holding that the degree of force required was equivalent to that required in a violent felony, and therefore concluding that Castleman's conviction did not qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9) because he could have been convicted of causing a "slight" physical injury through "conduct that cannot be described as violent."[226]

The Supreme Court reversed, finding that the lower courts' interpretation of Section 922(g)(9) was incorrect.[227] Given that domestic violence is typically prosecuted under generally applicable assault and battery laws, the Court held that Congress likely intended for Section 922(g)(9) to encompass the type of conduct involved in a "common-law battery conviction."[228] Accordingly, the Court concluded that Congress likely intended to incorporate the misdemeanor-specific definition of "force" when crafting the language of Section 922(g)(9).[229] Further, the Court held that "domestic violence" is a "term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[230] Distinguishing "domestic violence" from "violence,"

220. 555 U.S. 415 (2009).

221. *Id.* at 419–20.

222. *Id.* at 426. The Supreme Court reversed the Fourth Circuit's decision, which had vacated Hayes's conviction. *Id.* The Supreme Court found that, as a matter of statutory interpretation, Section 922(g)(9) did not require the predicate domestic violence to be with the same victim. *Id.* Moreover, the Court noted the "[p]ractical" matter that Congress enacted the statute with the purpose to "keep[] firearms out of the hands of domestic abusers." *Id.*

223. 572 U.S. 157 (2014).

224. *Id.* at 161.

225. *Id.* (internal citation omitted).

226. United States v. Castleman, 695 F.3d 582, 590 (6th Cir. 2012), *rev'd and remanded*, 572 U.S. 157 (2014).

227. *Castleman*, 572 U.S. at 173.

228. *Id.* at 164.

229. *Id.*

230. *Id.* at 165.

the latter of which the Court stated connotes "a substantial degree of force,"[231] the Court found that "[m]inor uses of force" could constitute domestic violence, and therefore such "minor" force that resulted in a conviction could constitute a "misdemeanor crime of domestic violence" that would result in firearms restrictions under Section 922(g)(9).[232] Highlighting the legislative history of the statute, the Court noted one senator's comment during debate that "'[a]ll too often . . . the only difference between a battered woman and a dead woman is the presence of a gun.'"[233] The majority also highlighted that the "impetus of [Section] 922(g)(9) was that even perpetrators of severe domestic violence are often convicted 'under generally applicable assault or battery laws.'"[234]

The Court again affirmed the purpose of Section 922(g)(9) two years later in *Voisine v. United States*,[235] holding that reckless domestic assault qualifies as a misdemeanor crime of domestic violence.[236] In *Voisine*, the Court again looked to the history of Section 922(g)(9), finding that the statute was intended to bar gun possession by domestic abusers "convicted of garden-variety assault or battery misdemeanors."[237] The petitioner had asked the Court to look at how the common law defined assault and battery crimes in an earlier age, arguing that common law required a greater mens rea than recklessness for those crimes.[238] Rejecting that view, the Court noted that Congress passed Section 922(g)(9) to remove guns from abusers convicted under laws "then in general use" and, when Section 922(g)(9) was passed in the 1990s, a "substantial majority of districts . . . had abandoned the common law's approach to mens rea in drafting and interpreting their assault and battery statutes."[239] Accordingly, the Court declined to look to a "common-law precursor that had largely expired," pointing out that Congress would have undermined its own aim "by tying the ban on firearms possession not to the laws under which abusers are prosecuted but instead to a legal anachronism."[240] The Court also examined the practical challenges to a common law approach, explaining that recklessness was not contemplated by the common law until the mid-to-late-1800s. Therefore,

231. *Id.* (quoting Johnson v. United States, 559 U.S. 133, 140 (2010)). In a concurrence, Justice Scalia disagreed, calling the majority's statement that "an act need not be violent to qualify as 'domestic violence'" an "absurdity." *Id.* at 179 (Scalia, J., concurring in part). For analysis of Justice Scalia's concurrence, see Emily J. Sack, United States v. Castleman*: The Meaning of Domestic Violence*, 20 ROGER WILLIAMS U. L. REV. 128, 143–49 (2015).

232. *Castleman*, 572 U.S. at 165–66.

233. *Id.* at 160 (quoting 142 CONG. REC. 22986 (1996) (statement of Sen. Wellstone)).

234. *Id.* at 172 (quoting United States v. Hayes, 555 U.S. 415, 427 (2019)).

235. 579 U.S. 686 (2016).

236. *Id.* at 692.

237. *Id.* at 695.

238. *Id.* at 696–97.

239. *Id.* at 697.

240. *Id.*

"[w]hether and where conduct that we would today describe as reckless fits into that obscure scheme is anyone's guess."[241]

At least as recently as 2016, then, the Court was far from hostile to firearms restrictions as applied to perpetrators of intimate partner violence. And, unlike in the realm of reproductive rights restrictions, courts regularly engaged with the consequences of their decisions for those experiencing intimate partner violence. That is not to say that these Section 922 cases should be championed as models for how courts should center intimate partner violence; in fact, they are part of a long line of cases that contribute to the mass incarceration of men of color and elevate carceral solutions to intimate partner violence over the expressed desires of survivors. Understood within the context of that broader legal project and contrasted with judicial treatment of intimate partner violence in reproductive rights cases, these cases instead reveal a legal approach to intimate partner violence that centers survivors selectively and only when doing so furthers other ideological goals. Part III explores a series of cases in which intimate partner violence was sidelined entirely.

III. *DOBBS*, *BRUEN*, AND INTIMATE PARTNER VIOLENCE

The 2021–2022 Supreme Court term fundamentally changed the interpretation of the Constitution in American law in several areas. Though neither *Dobbs* nor *Bruen* acknowledged the ramifications of the respective decisions for victims of intimate partner violence, both decisions—especially in combination—will likely increase lethality risks for victims. And with *United States v. Rahimi*, the Fifth Circuit has invalidated one of the few federal statutes designed to reduce the risk that a domestic abuser kills their partner with a firearm.

A. Dobbs *Ignores Intimate Partner Violence*

Dobbs v. Jackson Women's Health Organization held that the Constitution does not provide the right to an abortion, overruling *Roe v. Wade*, *Planned Parenthood v. Casey*, and all other cases embracing the framework announced by *Roe* and *Casey*.[242] As noted above, the Supreme Court established in *Casey* that an abortion restriction is invalid if it places an undue burden on the ability to have an abortion before a fetus is viable.[243]

In *Dobbs*, Jackson Women's Health Organization and one of its doctors brought a challenge to the Mississippi Gestational Age Act, which banned

241. *Id.* at 698.

242. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

243. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 877 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

abortion in the state after fifteen weeks of pregnancy (i.e., pre-viability).[244] The Supreme Court overruled *Roe* and *Casey* and found the Mississippi law valid.[245] The Court rejected respondents' argument that the right to abortion could be found in the Due Process Clause of the Fourteenth Amendment, stating that this provision does "guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[246] The Court then explained its holding that there was not a national right to abortion when the Fourteenth Amendment was passed in 1868.[247] The Court instead explained that "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion,"[248] oddly while citing historical sources from a wide range of time periods including the thirteenth century.[249]

Dobbs does not mention intimate partner violence at all. Despite *Casey*'s deep examination of spousal abuse,[250] *Dobbs* does not engage with that reasoning (or the underlying realities of intimate partner violence) when overruling *Casey*. Though the majority opinion in *Dobbs* mentions a wide range of topics from "safe haven" laws to adoption,[251] nowhere does it acknowledge intimate partner violence, a problem facing more than one in three women.[252] As explained previously, "[p]regnancy is associated with both the initiation of IPV [intimate partner violence] and an increase in IPV severity, making it a particularly dangerous time" for survivors.[253] By allowing states to prohibit or severely restrict abortion, *Dobbs* will undoubtedly expose more pregnant women to violence by involuntarily extending their pregnancies because pregnant people in abortion-ban states will either be forced to carry their pregnancies to term or will remain pregnant for longer while they attempt to travel to have an abortion. In allowing for abortion bans and severe restrictions, *Dobbs* leaves pregnant

244. Fetal viability typically occurs at approximately 24 weeks of pregnancy. G.H. Breborowicz, *Limits of Fetal Viability and Its Enhancement*, 5 EARLY PREGNANCY 49–50 (2001).

245. *Dobbs*, 142 S. Ct. at 2279.

246. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

247. *Id.* at 2279.

248. *Id.* at 2248.

249. *Id.* at 2249–50; *see also id.* at 2323–24 (Breyer, J., joined by Kagan & Sotomayor, JJ., dissenting). As the dissent noted, the "ratifiers" of the Fourteenth Amendment did not include women because women did not have the right to vote in 1868. *Id.* at 2324. The dissent highlights that, in confining interpretation of the Fourteenth Amendment to its ratifiers, the majority is basing its interpretation on that of individuals who "did not recognize women's rights" and, in so doing, "consigns women to second-class citizenship." *Id.* at 2325.

250. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 891–92 (1992), *overruled by Dobbs*, 142 S. Ct. 2228; *see supra* Part II.

251. *Dobbs*, 142 S. Ct. at 2259.

252. BLACK ET AL., *supra* note 18, at 2.

253. Elizabeth Tobin-Tyler, *A Grim New Reality—Intimate Partner Violence After* Dobbs *and* Bruen, 387 NEW ENG. J. MED. 1247, 1247 (2022).

people at risk of an increase in the severity of the violence they experience. For instance, in a pre-*Dobbs* longitudinal study, almost a quarter of women having abortions after the first trimester of pregnancy experience conflict with their male partner or domestic violence.[254]

For survivors of intimate partner violence in the fourteen states where abortion is banned in almost all circumstances as of January 2024,[255] *Dobbs* removed from them a means by which to protect themselves from continued violence. Removing access to abortion can cause a pregnant person to be "indefinitely tethered to her violent partner,"[256] not only because that person will become the father of her child; pregnant women not already employed may also struggle to find employment, and can therefore be dependent on that violent partner for economic support.[257] In one study of women who sought abortions, one in twenty women reported that the man involved in the pregnancy physically hurt them within the past six months.[258] In that study, there was a dramatic reduction in the incidence of violence experienced by women who received an abortion, while a reduction in violence was not experienced by women who were denied an abortion.[259] And two and a half years after the abortion or the denial of the abortion, women who were denied an abortion were still more likely to experience violence from the man involved in the pregnancy as compared to women who received an abortion.[260] Despite the Court's apparent choice to ignore intimate partner violence in *Dobbs*, the decision will undoubtedly affect survivors' safety.

B. *Post*-Dobbs *Abortion and Intimate Partner Violence*

As noted above, declining access to abortion will remove an opportunity for survivors to seek autonomy and freedom from further abuse, particularly given that the rate of lethality from domestic violence increases during pregnancy. In addition, in allowing for freewheeling restriction of abortion, *Dobbs* has provided perpetrators of abuse with yet another tool for maintaining power and control—the legal system.

For instance, Texas Senate Bill 8 ("S.B. 8") (a Texas statute enacted in 2021) prohibits abortions after about six weeks of pregnancy (most people do not realize that they are pregnant prior to the sixth week of pregnancy).[261]

254. FOSTER, *supra* note 56, at 84.
255. McCann et al., *supra* note 73.
256. FOSTER, *supra* note 56, at 168.
257. *See id.*
258. *Id.* at 231.
259. *Id.* at 232.
260. *Id.*
261. *See* S. 8, 87th Leg., Reg. Sess. (Tex. 2021); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., joined by Breyer, Sotomayor & Kagan JJ., concurring in part and dissenting in part).

Further, S.B. 8 allows any private citizen to enforce the statute and sue someone for performing or aiding or abetting an abortion, thereby attempting to insulate the State of Texas from any potential liability for enforcing the law.[262] The Supreme Court repeatedly declined to intervene after S.B. 8 was passed, even though *Roe v. Wade* remained good law, when doctors filed complaints seeking to challenge S.B. 8.[263] Following *Dobbs*, the regulations implementing S.B. 8 continued to be in effect, and they remain valid today.[264] Accordingly, individuals can bring suit in state courts against anyone who has helped someone get an abortion, and can even receive statutory damages for doing so.[265] In addition to providing an avenue for private individuals who are opposed to abortion to target people seeking abortions writ large, this statute provides perpetrators of abuse with an avenue to threaten a survivor from disclosing abuse and/or the desire to have an abortion to others, for fear that they could be sued and held liable.

Less than a year after *Dobbs*, at least one abuser has made national news while attempting to utilize state laws to exert power and control over their spouse. In March 2023, Marcus Silva filed a wrongful death lawsuit against his now-ex-wife's friends for allegedly assisting his ex-wife in having an abortion.[266] Silva's lawyer is Jonathan Mitchell, the architect of S.B. 8. In this complaint, Mitchell appears to lay the groundwork for criminal prosecution of the named defendants by citing the state murder statute.[267] Marcus Silva's complaint alleges that his then-wife, Brittni Silva, procured a medication abortion without his knowledge, but when forensic and legal experts reviewed the case, they noted that the text messages Marcus attached to his lawsuit suggest that he may have known his wife was planning to have an abortion.[268]

The answer and counterclaims by two of the three defendants in the lawsuit allege that Marcus Silva had been engaging in domestic violence against Brittni.[269] Marcus allegedly emotionally abused his ex-wife for years.[270] Brittni

262. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., joined by Breyer & Kagan JJ., dissenting); *see also* 2 TEX. ADMIN. CODE § 171.208 (2021).

263. *Whole Woman's Health*, 142 S. Ct. at 530; *In re* Whole Woman's Health, 142 S. Ct. 701, 701 (2022).

264. 2 TEX. ADMIN. CODE § 171.204 (2021).

265. *Id.*

266. Plaintiff's Original Petition at 1, Silva v. Noyola, No. 23-cv-0375 (Tex. Dist. Ct. Mar. 9, 2023).

267. Sarah McCammon, *A Texas Man Sues Ex-Wife's Friends for Allegedly Helping Her Get Abortion Pills*, NPR (Mar. 13, 2023, 5:06 AM), https://www.npr.org/2023/03/13/1163028308/a-texas-man-sues-ex-wifes-friends-for-allegedly-helping-her-get-abortion-pills [https://perma.cc/9SQE-8K2S].

268. Sarah McCammon, *Documents in Abortion Pill Lawsuit Raise Questions About Ex-Husband's Claims*, NPR (Apr. 10, 2023, 3:32 PM), https://www.npr.org/2023/04/10/1168951856/documents-in-abortion-pill-lawsuit-raise-questions-about-ex-husbands-claims [https://perma.cc/HQ3W-QTTT].

269. Original Answer and Counterclaims at 4–7, *Silva*, No. 23-cv-0375.

270. *Id.* at 8.

had allegedly called the police on him at least twice.[271] Brittni filed for divorce from Marcus in May 2022, but she and Marcus continued to live together, and he continued to try to control her.[272] In July 2022, as noted in the report filed after Marcus spoke to the police, Marcus accessed Brittni's phone, learned that she had been planning to purchase medication abortion with her friends to terminate her pregnancy and even found the medication, but did not speak with Brittni or dispose of the pill.[273] The counterclaims allege that Marcus later used his knowledge about Brittni's abortion to exert power and control over her, threatening to make sure she went to jail if she did not give him her "mind body and soul" until the end of their divorce;[274] Brittni also reported that Marcus sought custody of their children and threatened that he would press charges against her if she did not "act[] like his wife who loves him."[275] While Marcus Silva's case looks doubtful at best in light of the counterclaims, his actions expose the fact that abortion bans and restrictions are a mechanism for litigation abuse,[276] by which perpetrators can engage in, or threaten to engage in, a variety of tactics in connection with court proceedings to control, harass, and/or otherwise harm their partners or former partners.[277]

C. Bruen *Likewise Disregards Intimate Partner Violence*

New York State Rifle & Pistol Ass'n v. Bruen will likewise have ramifications for survivors of intimate partner violence.[278] In *Bruen*, individuals and an organization challenged a New York state law that required applicants to show "proper cause" to receive an unrestricted license to carry a handgun in public.[279] An applicant could show "proper cause" by demonstrating that they had a special need for self-protection.[280] The district court granted the state defendants' motion to dismiss and the Second Circuit affirmed, upholding the state law, but the Supreme Court reversed.[281]

The Court held that the two-step framework previously applied by courts of appeals to determine the constitutionality of firearms restrictions was "one

271. Moira Donegan & Mark Joseph Stern, *Not Every Man Will Be as Dumb as Marcus Silva*, SLATE (May 4, 2023, 1:27 PM), https://slate.com/news-and-politics/2023/05/texas-man-medication-abortion-lawsuit-backfired-explained.html [https://perma.cc/D4NG-A8EU].

272. Original Answer and Counterclaims, *supra* note 269, at 1.

273. *Id.* at 1–2.

274. *Id.* at 2.

275. *Id.*

276. Donegan & Stern, *supra* note 271.

277. David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. FOR SOC. JUST. 429, 432 (2015).

278. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2164–68 (2022) (Breyer, J., dissenting).

279. *Id.* at 2122–23 (majority opinion).

280. *Id.* at 2123.

281. *Id.* at 2164.

step too many," and instead, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[282] The Court then laid out a complicated—and somewhat internally contradictory—approach to analyzing the historical record with respect to regulations on firearms. The Court evaluated historical sources on firearm regulation, noting that "not all history is created equal" and historical evidence that "long predates" the adoption of the Second and Fourteenth Amendments may not "illuminate the scope of the right if linguistic or legal conventions changed in the intervening years."[283] As for post-ratification history, the Court stated that public understanding and interpretation can be a "'critical tool of constitutional interpretation,'"[284] but cautioned that "to the extent later history contradicts what the text says, the text controls."[285] Rather than provide clarity on parameters for evaluating the import of post-ratification history, the Court merely took note of the fact that there is debate about whether to look to understandings of the Constitution at the founding or during the 1860s (given that New York is "bound to respect" this right through the Fourteenth Amendment).[286]

Ultimately, the Court concluded that "respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement," and invalidated the New York law.[287] Throughout the opinion, the Court emphasized the rights of "law-abiding citizens,"[288] and made pronouncements about firearms protecting individuals *from* violence, without acknowledging the association between firearms and violence in the home. For instance, the Court cited its opinion in *Heller* to note that founding-era firearms laws "likely did not 'preven[t] a person in the founding era from using a gun to protect himself or his family from violence,'"[289] without any thought as to violence this hypothetical man might inflict with that gun *within* his family.

In discussing the severity of gun violence in the United States, the dissent in *Bruen* mentioned the fact that a woman is far more likely to be killed by an intimate partner if that partner has access to a gun.[290] And indeed, that statistic lends credence to firearms restrictions that prohibit possession by perpetrators of abuse, given historical regulations prohibiting firearms possession by those

282. *Id.* at 2127.
283. *Id.* at 2136.
284. *Id.* at 2128, 2136 (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)).
285. *Id.* at 2137.
286. *Id.* at 2137–38.
287. *Id.* at 2156.
288. *Id.* at 2133.
289. *Id.* at 2149 (quoting *Heller*, 554 U.S. at 633–34).
290. *Id.* at 2166 (Breyer, J., dissenting).

considered dangerous to the public.[291] But Justice Alito cast aside statistics about domestic disputes as irrelevant in this case,[292] and *Bruen* otherwise ignored the relationship between firearms regulations and intimate partner violence entirely.

D. Rahimi *Illuminates the Effects of* Bruen *on Intimate Partner Violence*

1. Background on *Rahimi* and the Fifth Circuit's Opinion

Perhaps no case better underscores the potential effects of *Bruen* on victims of intimate partner violence than *United States v. Rahimi*, a Fifth Circuit decision that utilized the language of *Bruen* to invalidate Section 922(g)(8) as unconstitutional under the Second Amendment.[293] In December 2019, Zackey Rahimi physically assaulted his girlfriend, C.M., and threatened to shoot her if she told anyone about the assault.[294] On February 5, 2020, after giving Rahimi notice and an opportunity for a hearing, a Texas state court granted a two-year restraining order to C.M. against Rahimi.[295] The order prohibited Rahimi from, among other things, committing family violence or going within 200 yards of C.M.'s residence or place of employment.[296] The order also suspended Rahimi's handgun license and informed him that possessing a firearm while the restraining order was in effect might be a federal felony.[297]

Rahimi subsequently violated the restraining order and was arrested for doing so in August 2020, and he also threatened another woman with a gun.[298] Rahimi then participated in five shootings between December 2020 and January 2021.[299] Police officers subsequently identified Rahimi as a suspect in those shootings, secured a search warrant, and searched his home.[300] In doing so, they found a copy of the state court restraining order.[301] A federal grand jury indicted Rahimi for violating Section 922(g)(8) and 922(a)(4), and Rahimi moved to dismiss the indictment, arguing that 922(g)(8) is facially unconstitutional.[302] The district court denied Rahimi's motion to dismiss and declined to set aside

291. *See* Kanter v. Barr, 919 F.3d 437, 451, 454 (7th Cir. 2019) (Barrett, J., dissenting) (emphasizing that legislatures have had the power to keep dangerous and violent individuals from possessing firearms since this country was founded).

292. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

293. United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).

294. *See* Petition for a Writ of Certiorari at 2, United States v. Rahimi, 143 S. Ct. 2688 (2023) (mem.) (No. 22-915) [hereinafter Petition for a Writ of Certiorari, *Rahimi*].

295. *Id.*; *Rahimi*, 61 F.4th at 449.

296. Petition for a Writ of Certiorari, *Rahimi*, *supra* note 294, at 2.

297. *Id.*

298. *Id.* at 3.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 3–4.

Rahimi's indictment.[303] The Fifth Circuit affirmed the district court's sentencing order and the order denying Rahimi's motion to dismiss, noting that a challenge to Section 922(g)(8) was foreclosed by precedent.[304]

On June 23, 2022, the Supreme Court issued its decision in *Bruen*.[305] Two weeks later, the Fifth Circuit withdrew its original opinion in *Rahimi*, set oral argument, and directed the parties to file supplemental briefing addressing the effect of *Bruen* on the case.[306]

The Fifth Circuit then reversed Rahimi's conviction under Section 922(g)(8),[307] holding that the regulation "fails to pass constitutional muster."[308] In reversing Rahimi's 922(g)(8) conviction, the panel explicitly found that the regulation is unconstitutional under *Bruen*. The panel stated that *Bruen* "fundamentally change[d]" the analysis for laws that implicate the Second Amendment, and ultimately held that being subject to a domestic violence restraining order "does not suffice to remove [Rahimi] from the political community within the [Second] [A]mendment's scope."[309] The Fifth Circuit concluded that Section 922(g)(8) is not "consistent with the Nation's historical tradition of firearm regulation,"[310] and invalidated the regulation accordingly.[311]

Rahimi illuminates the extent to which *Bruen*'s reasoning can be used to ignore the current realities of intimate partner violence, even when dealing with a statute that is explicitly focused on restraining orders against perpetrators of intimate partner violence. Second Amendment jurisprudence has continually acknowledged that people who were considered dangerous were prohibited from possessing firearms throughout history, including at the founding.[312] As now Justice Barrett explained in a Seventh Circuit dissent in *Kanter v. Barr*,[313] "History is consistent with common sense: it demonstrates that legislatures

303. Order at 1, 3, United States v. Rahimi, No. 21-cr-00083 (N.D. Tex. June 3, 2021).

304. United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 (5th Cir. June 8, 2022), *withdrawn*, No. 21-11001, 2022 WL 2552046 (5th Cir. July 7, 2022), *and superseded by*, 59 F.4th 163 (5th Cir. 2023), *and withdrawn and superseded by* 61 F.4th 443 (5th Cir. 2023).

305. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2111 (2022).

306. *Rahimi*, 2022 WL 2070392, at *1; *Rahimi*, 2022 WL 2552046, at *1.

307. *Rahimi*, 61 F.4th at 448.

308. *Id.*

309. *Id.* at 450, 452.

310. *Id.* at 453 (quoting *Bruen*, 142 S. Ct. at 2130).

311. *Id.* at 461.

312. *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (explaining that the notion that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . accords with the historical understanding of the scope of the right"); *see also* Kanter v. Barr, 919 F.3d 437, 451, 454 (7th Cir. 2019) (Barrett, J., dissenting) (emphasizing that legislatures have had the power to keep dangerous and violent individuals from possessing firearms since this country was founded).

313. 919 F.3d 437 (7th Cir. 2019).

have the power to prohibit dangerous people from possessing guns."[314] Yet in *Rahimi*, the Fifth Circuit construed *Heller* and *Bruen* to find that Rahimi did not fall into a group whose disarmament the Founders would have tolerated because the domestic violence restraining order against him was civil and he was not otherwise subject to a "'longstanding prohibition[] on the possession of firearms.'"[315] Rahimi participated in a series of five shootings following the issuance of the restraining order at issue, but the Fifth Circuit ignores that danger—to the partner for whom the restraining order was issued, as well as to the public at large—and crafts the definition of individuals who can receive Second Amendment protection to include him.

Rahimi rejects as historical analogues to Section 922(g)(8) founding-era colonial and state laws that disarmed people considered to be "dangerous," including "disloyal" people as well as enslaved individuals and Native Americans; in doing so, the court acknowledges that the purpose of these laws was to preserve the political or social order rather than to protect people from domestic abuse.[316] Here, the Fifth Circuit appeared to recognized the racism and political exclusion motivating early gun regulation, but then continued to state that current regulations must be sufficiently similar to early gun regulation.

Rahimi finds that the perpetrator of domestic violence at issue falls within the political community that has historically received Second Amendment protections.[317] Yet the court fails to acknowledge that victims of intimate

314. *Id.* at 451 (Barrett, J., dissenting). Barrett goes on to explain that this power "extends only to people who are *dangerous*," and expounds on why the status of being a felon is, in and of itself, not sufficient to allow for restricted Second Amendment rights. *Id.* Here, by contrast, individuals convicted under Section 922(g)(8) have explicitly been found to be dangerous. In an order granting a defendant's motion to dismiss a Section 922(g)(1) charge, Judge Carlton Reeves similarly acknowledged that history could support "disarmament of persons adjudicated to be dangerous." United States v. Bullock, No. 18-CR-165, 2023 WL 423309, at *2 (S.D. Miss. June 28, 2023) (order dismissing case). At the same time, Judge Reeves found the as-applied challenge to Section 922(g)(1) valid and dismissed the charge against the defendant. *Id.* at *34.

315. *Rahimi*, 61 F.4th at 452 (quoting *Heller*, 554 U.S. at 626).

316. *Id.* at 456–57.

317. Likewise, though *Bruen* details the importance of the right to bear and carry arms to free Black citizens after the Civil War, the Court fails to acknowledge that Black people in the United States were largely not permitted to have guns prior to the Civil War. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2150–53 (2022). The fact that Black people were largely not provided the right to bear arms before the Civil War—and that the Court suggests that the post-Civil War period might have less weight in the historical analysis of firearm restrictions as compared with the founding—necessarily means that "the people" originally restricted or entitled to Second Amendment protections is a different populace than the individuals we provide firearm access to today. Thus, neither *Rahimi* nor *Bruen* explain why Rahimi, as a domestic abuser, should be entitled to carry a gun simply because domestic abusers were able to do so at the founding. By contrast, as one district court has noted, "[t]he Second Amendment does not constrain courts to adhere to outdated or mistaken conceptions of who is presumptively nonviolent and who is violent or dangerous." United States v. Guthery, No. 22-CR-00173, 2023 WL 2696824, at *9 (E.D. Cal. Mar. 29, 2023).

partner violence *were* historically subject to political exclusion, and that animus toward women motivated the absence of laws to address such violence. Until the nineteenth and twentieth centuries, women who were subject to beatings by their husbands could not own property or get divorced without spousal consent, let alone vote or otherwise participate in political life; accordingly, the views of individuals disproportionately subjected to intimate partner violence were not captured by democratic participation during the founding. The populace that crafted historical firearms protections and restrictions, then, did not meaningfully include victims of intimate partner violence, and therefore the suggestion that historical firearms restrictions should inform current restrictions—based implicitly on the falsehood that historical laws were a reflection of democratic norms—appears to be smoke and mirrors. Domestic violence was largely legal during the founding; by using that fact to invalidate Section 922(g)(8), the Fifth Circuit endorses the idea that individuals engaging in now unlawful conduct should be protected under *Bruen* because that abusive conduct was lawful more than two hundred years ago.

On March 17, 2023, the United States petitioned for a writ of certiorari in *Rahimi*, and the Court granted the petition on the last day of the 2023 term.[318] At present, *Rahimi* is currently good law in the Fifth Circuit.

2. *Rahimi* Before the Supreme Court

On November 7, 2023, the Supreme Court heard oral argument in *Rahimi*.[319] Questions by the Justices at oral argument revealed that the Court may be inclined to reverse the Fifth Circuit while affirming its holding in *Bruen*, which would simultaneously ensure that Section 922(g)(8) remains in place and fail to reckon with the methodological problems with the Court's approach to history and tradition.

The overall tone of oral argument suggested that several Justices—including conservative Justices—appeared skeptical of Rahimi's argument and inclined to uphold the constitutionality of Section 922(g)(8). Justice Barrett noted that there is "little dispute" that "someone who poses a risk of domestic violence is dangerous," and highlighted the evidence of dangerousness presented in state court that gave rise to the restraining order in question.[320] Justice Elena Kagan even suggested that Rahimi's counsel was "running away" from his argument because the implications "are just so untenable" given that this line of reasoning would invalidate "obvious" firearms restrictions.[321] In fact, it seemed so clear that Section 922(g)(8) would be upheld that the Justices

318. Petition for a Writ of Certiorari, *Rahimi*, *supra* note 294, at 17 (stating the filing date for the petition); United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting cert.).

319. Transcript of Oral Argument, *supra* note 14, at 1.

320. *Id.* at 12–13, 64–65.

321. *Id.* at 88–89.

devoted a significant portion of the oral argument to asking Solicitor General Elizabeth Prelogar about the potential constitutionality of other firearms restrictions.[322]

At the same time, several of the Court's questions belied an ongoing failure to appreciate the insidiousness of intimate partner violence. For instance, Justice Alito implied that some restraining orders that would bar firearm possession under Section 922(g)(8)(c)(ii) could be issued without a finding of dangerousness, even though, as Solicitor General Prelogar responded, a court would have to find that dangerous conduct would be reasonably likely to occur in order to enjoin conduct under subsection (c)(ii).[323] Similarly, Justice Thomas questioned whether a proceeding in civil court could determine dangerousness,[324] despite the fact that qualifying civil protection orders are tied to a finding of violence or threat of violence.

And more broadly, neither the Solicitor General nor most of the Court examined whether *Bruen*'s history and tradition framework might be reconsidered in light of the framework's inconsistency and its failure to consider the exclusion of women and people of color from the political community at the founding. General Prelogar asked that the Court correct "three fundamental errors" that lower courts had been making post-*Bruen*, and then outlined those three topics, arguing that (1) courts can consider all historical sources that bear on original meaning, (2) courts need not discount current regulations if historical analogues have minute differences, and (3) courts need not consider the absence of an identical historical regulation as dispositive.[325] Yet General Prelogar did not question the reasoning of *Bruen* itself, which failed to consider that a sizable percentage of the current population—i.e. women and people of color—were not a part of the political community that created the bounds of the Second Amendment during the founding. Granted, Justice Jackson highlighted this issue, asking whether there is a problem with the *Bruen* methodology given that the history and tradition test only considers the history and tradition of "some of the people."[326] But General Prelogar sidestepped the question by arguing that it was not relevant to Section 922(g)(8), and the Court did not otherwise consider the ramifications of the fact that the history and tradition test only validates regulations that were made by a political populous that excluded women and people of color.[327]

322. *See id.* passim (frequent questioning about hypothetical instances of unlawful firearms possession unrelated to the facts of the case).

323. *Id.* at 20–21.

324. *Id.* at 32–33.

325. *Id.* at 38–40.

326. *Id.* at 54.

327. *See* Melissa Murray & Kate Shaw, Opinion, *The Conservative Supreme Court Vision That Means Inequality for Women*, N.Y. TIMES (Nov. 12, 2023), https://www.nytimes.com/2023/11/12/opinion/supreme-court-rahimi-women.html [https://perma.cc/ZBG4-MWTY (staff-uploaded, dark archive)].

IV. CENTERING INTIMATE PARTNER VIOLENCE IN REPRODUCTIVE RIGHTS AND SECOND AMENDMENT JURISPRUDENCE

As explored in Parts II and III, the Supreme Court has historically either ignored intimate partner violence, or utilized the prevalence and seriousness of intimate partner violence as it serves their reasoning for other purposes in a given case. The Court continues to do so today, as illuminated by a lack of any engagement with intimate partner violence in the majority opinions in *Dobbs* and *Bruen*. In contrast to the reasoning in *Dobbs* and *Bruen* (both of which employ the "ignore it" approach), this part will explore lines of argumentation that state and federal courts alike could employ regarding reproductive rights and firearms possession that meaningfully account for the existence—and pervasiveness—of intimate partner violence. If courts confronted the prevalence of intimate partner violence and its inevitable consequences, reproductive rights jurisprudence would be forced to reckon with a more accurate reflection of the harms at stake for pregnant people, or if nothing else, would be forced to reconceive health- and life-related exceptions to abortion bans. Likewise, Second Amendment jurisprudence could be challenged in light of its assumptions about safety in the home, and at a minimum, would be pushed to analyze historical restrictions on guns against the backdrop of current lethality risks for victims of intimate partner violence.

A. *Examining Abortion Restrictions in Light of Intimate Partner Violence*

If reproductive rights case law were to integrate an intimate partner violence-based lens, courts would be forced to reckon with the myriad ways in which deprivation of reproductive autonomy is linked to such violence. Looking first at *Dobbs*, the majority opinion's failure to acknowledge intimate partner violence enabled it to avoid engaging with pregnancy as a sometimes-involuntary state. The majority cites other cases involving substantive due process—including a case about the right to not undergo involuntary medical procedures—and then argues that abortion is not in line with those cases largely due to the contention that abortion involves the "potential life" of the fetus.[328] However, in doing so, *Dobbs* makes two errors.

First, the decision fails to consider the wide range of circumstances in which the predicate act for pregnancy—sex and/or sex without effective contraception—may be involuntary. As the dissent notes, a person can become pregnant by rape or sexual assault.[329] And further, an abusive partner can engage in reproductive coercion by sabotaging contraception or can use the threat of violence to force the victim to have sex. In those circumstances, far from at a

328. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259–60 (2022).

329. *Id.* at 2318 (Kagan, J., joined by Sotomayor & Breyer, JJ., dissenting).

"high level of generality,"[330] the right to abortion is very similar to the right to not undergo involuntary or forced bodily processes,[331] and removing the right to abortion forces pregnant people to involuntarily carry their pregnancies to term.

Second, the Court highlights the "potential life" of the fetus but fails to reckon with lethality risks to pregnant people of carrying a pregnancy to term, particularly the nonmedical lethality risks due to intimate partner violence. As noted at the top of this Article, homicide is a leading cause of death for pregnant and recently postpartum women.[332] In other words, women face a greater risk of death by murder than by any medical complication stemming from the medical condition of pregnancy. And most homicides of pregnant women are committed inside the home, thus implicating an intimate partner.[333] Yet *Dobbs*, and even other post-*Casey* decisions prior to *Dobbs*, ignore intimate partner violence as a consideration entirely. *Dobbs* repeatedly discusses "protecting fetal life" as a legitimate interest when considering abortion restrictions, so much so that the idea of fetal personhood is now animating concerns about the legality of *in vitro* fertilization and medical care for miscarriages.[334] By contrast, the decision only gives a passing mention to "the effects of pregnancy on women," and does not engage with the risks of pregnancy for pregnant people.[335] Considering the risk to the life of a pregnant person in light of the lethality of intimate partner violence would, at minimum, force courts to consider the pregnant person as more than just a vessel for potential fetal life, but also as an individual whose life is at risk due to the pregnancy. Courts considering the violence-based risks of pregnancy—in addition to the medical risks, which far outpace the medical risks of abortion—could be compelled to weigh an abortion ban's stated purpose against the risks that a pregnant person dies of a medical complication or of homicide. Against that backdrop, the autonomy to avoid a

330. *Id.* at 2258 (majority opinion).

331. The cases cited by the Court—*Winston v. Lee*, 470 U.S. 753 (1985), *Washington v. Harper*, 494 U.S. 210 (1990), and *Rochin v. California*, 342 U.S. 165 (1952)—all involve the State performing an involuntary act upon a citizen's body. *Dobbs*, 142 S. Ct. at 2257–58. But by forcing a pregnant person to carry a fetus for nine months and give birth—particularly for a pregnancy that exists due to involuntary sex and/or contraception sabotage—the State is arguably forcing that person's body to perform an involuntary act, albeit one that does not involve the State physically touching that person. This seems especially clear given that the forced act in question here, carrying a pregnancy to term and giving birth, can result in a lifelong commitment to parent a child, as opposed to a bodily effect that fades with time.

332. *See supra* notes 30–31 and accompanying text.

333. Wallace et al., *supra* note 33, at 766.

334. *See Dobbs*, 142 S. Ct. at 2261, 2284; Mary Ziegler, Opinion, *The Next Step in the Anti-Abortion Playbook Is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html [https://perma.cc/VFV3-JT3B (staff-uploaded, dark archive)].

335. *Dobbs*, 142 S. Ct. at 2261.

higher risk of death would seem to be one of the most important individual rights of all.

The integration of information about intimate partner violence into case law could also be particularly effective in bolstering an equal protection approach to abortion. In *Dobbs*, the majority rejected the idea that abortion is a constitutional right grounded in the Equal Protection Clause, stating that the Court's prior precedents establish that abortion regulation is not a sex-based classification, and therefore, such regulation is not subject to heightened scrutiny.[336] The majority cited *Geduldig v. Aiello*,[337] which held that pregnancy classifications were not sex-based classifications,[338] yet as scholars have explored in depth, *Geduldig* has since been superseded by case law making clear that pregnancy discrimination can violate the Equal Protection Clause.[339] As established above, intimate partner homicide is the leading cause of death for pregnant and recently postpartum women.[340] If abortion regulations were properly viewed as sex-based classifications, then, and in light of the fact that intimate partner violence increases the disparate impact of such regulations on pregnant women, courts could be compelled to weigh abortion restrictions in light of the indisputable lethality risks of pregnancy co-occurring with such violence.

Assuming *Dobbs* is not overturned, an intimate partner violence-based lens as applied to reproductive rights could still results in greater availability of abortion. For instance, abortion regulations that contain an exception for the life and health of the pregnant person would inevitably carry a different meaning for statutory interpretation purposes when considered alongside the lethality risk of intimate partner violence. A recent, post-*Dobbs* survey of abortion restrictions found that abortion ban exceptions generally fall into one of four categories: to prevent death of the pregnant person, to preserve the health of the pregnant person, to terminate a pregnancy when that pregnancy resulted from rape or incest, and to terminate a pregnancy when the fetus has lethal abnormalities incompatible with life.[341] However, healthcare providers have struggled to determine when exceptions to prevent death or preserve the

336. *Id.* at 2245–46.

337. 417 U.S. 484 (1974).

338. *Id.* at 492–97.

339. *See generally* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2022) (analyzing how *United States v. Virginia*, 518 U.S. 515 (1996), and *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003), supersede *Geduldig*).

340. Wallace et al., *supra* note 33, at 767; *Homicide Leading Cause of Death for Pregnant Women in U.S.*, *supra* note 30.

341. Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KFF (May 19, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/ [https://perma.cc/GQ6T-MUV8].

health of the pregnant person are triggered, complicating the ability of doctors to provide medically necessary care.[342] As a result, since *Dobbs*, doctors have often refused to treat pregnant women experiencing medical emergencies, in some cases severely compromising their health.[343] For instance, in *Zurawski v. Texas*,[344] several women and physicians sued the State of Texas because they were denied abortions under the state's restrictive medical emergencies exception, and faced several medical complications as a result.[345]

In this current landscape, abortion ban exceptions for the life and/or health of the pregnant person are largely interpreted to apply solely to a medical risk to health or a medical risk of death.[346] However, abortion ban exceptions generally do not define the scope of the risk to "health" or "life" that must arise to qualify for the exception at issue.[347] Under the ordinary meaning of either term—and considering the widely acknowledged fact that intimate partner violence risks the health and the life of the victim—such exceptions could be interpreted to apply to any pregnant person experiencing intimate partner violence or who is at risk for intimate partner violence. Accordingly, if courts considered abortion ban exceptions in light of intimate partner violence, a much larger proportion of pregnant people could seek abortion care because their health and/or life is at risk due to such violence.

Interpreting abortion-ban statutes that have health and life exceptions in light of intimate partner violence would, at minimum, open these exceptions to pregnant victims of intimate partner violence, and would better capture the stated purpose of these exceptions: to prevent substantial impairment and/or death of pregnant people. Particularly given that rape or incest exceptions require that the rape or incest be reported to law enforcement, a more accurate interpretation of exceptions for the life and health of the pregnant person could better serve survivors of violence seeking reproductive healthcare.

342. *Id.*; *see also* Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion Foes Push To Narrow 'Life of Mother' Exceptions*, WASH. POST, https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life/ [https://perma.cc/J2KM-NYUH (dark archive)] (last updated May 13, 2022, 7:08 PM) (discussing how narrowing the medical necessity exception "will complicate medical decisions for those who are pregnant, increasing the risk of death").

343. Selena Simmons-Duffin, *Doctors Who Want To Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky [https://perma.cc/C54M-6XQA].

344. No. D-1-GN-23-000968 (Tex. Dist. Ct. Aug. 4, 2023) (temporary injunction order).

345. *See id.* at 1–2; *Texas Abortion Ban Emergency Exceptions Case:* Zurawski v. State of Texas, CTR. FOR REPROD. RTS., https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas/ [https://perma.cc/C9PD-CL7M]; *see also Zurawski*, D-1-GN-23-000968, at 3 ("The Court finds that the Patient Plaintiffs each experienced emergent medical conditions during their pregnancies that risked the Patient Plaintiffs' lives and/or health . . . and required abortion care.").

346. *See* Felix et al., *supra* note 341 (discussing these two categories of exceptions as applying to medical conditions and/or risks).

347. *See id.*

An intimate partner violence lens on abortion restrictions could also implicate the ethical issues that hospitals face when a doctor is asked to perform lifesaving medical care to end a pregnancy in a state in which abortion is banned. As mentioned above, in the wake of *Dobbs*, hospitals have been reluctant to perform abortions even when medically necessary to protect the health or life of the pregnant person, and in some cases, have stated that they will not provide abortions at all.[348] Granted, as highlighted in *Zurawski*, compelling medical conditions have not, to date, convinced these hospitals to allow for life-saving pregnancy termination. But that might be, in part, due to the fact that there is limited data on the effects of medical denial of abortion post-*Dobbs*. By contrast, the relationship between pregnancy and intimate partner homicide has been closely studied for years. Combining the data on the danger of denying a pregnant person who is at high risk of intimate partner homicide an abortion—with increasingly available data on the danger of refusing an abortion to someone experiencing a medical complication—could strengthen the evidence at a hospital's disposal when determining whether, and in what circumstances, to offer abortion-related care.

B. *Considering the Dangers of Intimate Partner Violence When Evaluating the Constitutionality of Firearms Restrictions*

Likewise, centering survivors of intimate partner violence—especially those who are pregnant—in Second Amendment jurisprudence could alter conceptions of permissible firearms restrictions. While the home sphere was conceived of by (largely male) jurists as deserving of privacy for centuries, the realities of intimate partner violence expose that the legal system's willful blindness to such violence in the home sphere confers a benefit enjoyed only by perpetrators, not victims, of violence, and that state ignorance of what takes place in this space can have violent consequences. Firearms possession in the "privacy" of the home does *not* eliminate the potential danger of firearms use, and in fact, gun possession in a residence amplifies that risk for victims of intimate partner violence, who are trapped in a walled-off space with their perpetrator and a deadly weapon. Exposing the consequences of unfettered access to firearms for those with a history of perpetrating violence—and the sometimes-fatal consequences this approach can have for victims of intimate partner violence—might lead courts to reevaluate the normative frame they have typically utilized when discussing possession of firearms in the home.

348. *See* Jen Christensen, *Amid Contradictory Laws, Hospitals in One State Were Unable To Explain Policies on Emergency Abortion Care, Study Finds*, CNN (Apr. 25, 2023, 10:01 AM), https://www.cnn.com/2023/04/25/health/emergency-abortion-confusion-okahoma/index.html [https://perma.cc/38ZH-C8HH].

Bruen is grounded in *Heller* and *McDonald v. Chicago*,[349] so much so that the opening line of *Bruen* evokes both opinions as a baseline for access to firearms jurisprudence, noting they establish the right "to possess a handgun in the home for self-defense."[350] But *Heller* and *McDonald* assume that the primary or even sole purpose of a firearm in the home, in part, is premised on the need for "self-defense" from the outside world.[351] That ignores the reality that another, very common purpose for a firearm in the home is intimate partner violence, as underscored by the rate of firearms-related intimate partner homicides.[352] *Heller* cites centuries-old regulations and opinions about the rights of *men* to bear arms in the home,[353] telling phrasing. Intimate partner violence by husbands, largely referred to as wife beating, was lawful for much of American history, and firearms possession is one tool to enact such violence.[354]

Heller and *McDonald* ignore the reality that firearms possession in the home could be utilized for spousal abuse as much as for self-defense, for violence against the family rather than for a "man's right to bear arms for the defense of himself and family.'"[355] Neither opinion addresses the consequences of this (alleged) historical right for *men* to bear arms in the home on the women with whom they historically shared that home. Nor does either opinion grapple with women's subsequent inclusion in political life, and the corresponding, current consensus that intimate partner violence should be outlawed and condemned. And *Bruen* reinforces that initial disregard by tethering its analysis of firearms possession outside of the home to *Heller*/*McDonald*'s analysis of firearms possession at home, and by categorically rejecting efforts to introduce evidence of the history and tradition of firearms regulation from periods in which individuals other than white men have had political rights. An intimate partner violence-based lens on firearms restrictions, by contrast, would clearly unsettle *Heller* and its progeny's reification of firearms possession in the home and recognize the unique danger posed by firearms in the hands of perpetrators in precisely that space.

To be clear, centering intimate partner violence would permit restrictions on perpetrators' possession of firearms even under *Bruen*. An intimate partner violence-based lens on firearms restrictions, by contrast, would recognize the unique danger posed by firearms in the hands of perpetrators. More than half

349. 561 U.S. 742 (2010).

350. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) (citing District of Columbia v. Heller, 554 U.S. 570, 635 (2008); *McDonald*, 561 U.S. at 750).

351. *See Heller*, 554 U.S. at 635–36; *McDonald*, 561 U.S. at 791.

352. *See Heller*, 554 U.S. at 711–12 (Stevens, J., dissenting); *see* Gold, *supra* note 90, at 36.

353. *Heller*, 554 U.S. at 615–616.

354. *See* Elizabeth Tobin-Tyler, *Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises*, 51 J.L. Med. & Ethics 64, 65–66 (2023); Siegel, "*The Rule of Love*," *supra* note 110.

355. *Heller*, 554 U.S. at 616.

of female murder victims are killed by an intimate partner[356] and about eight in ten murders in the United States involve a firearm.[357] As many courts have acknowledged, for hundreds of years, individuals who were considered dangerous were prevented from possessing firearms.[358] These historical prohibitions on gun possession by dangerous individuals make clear that the legal system consistently considered the safety of the larger public, not only the interests of the person with the firearm, when conceiving of the scope of the right to possess firearms under the Second Amendment. Historical laws restricting firearms possession by those considered "dangerous" reveal that the legal system has historically valued firearms regulations that protect against danger or the risk of violence; that aim is, in fact, consistent with preventing firearms possession by individuals with a history of perpetrating intimate partner violence, particularly given that intimate partner violence can be a proxy for committing mass violence on a greater scale.[359] Accordingly, utilizing the Supreme Court's focus on historical tradition when analyzing the Second Amendment—while allowing for the fact that concepts of dangerousness have evolved—would lend support to the restrictions under Section 922(g)(8).

This is particularly true given that the Court in *Bruen* treats dangerousness as a concept that should be considered in a contemporary light. During discussion of dangerous and unusual weapons, the Court explains that, even if handguns were considered "dangerous and unusual" during colonial times, they are "quintessential" today, and therefore, colonial laws regarding carrying handguns do not provide justification for restricting public carry of "weapons that are unquestionably in common use today."[360] Likewise, intimate partner violence may not have been considered a danger during the founding, particularly given the fact that women and people of color did not have political power. But today, intimate partner violence is widely acknowledged as a danger, to individual victims and to the public at large.[361] Accordingly, using the

356. Camila Domonoske, *CDC: Half of All Female Homicide Victims Are Killed by Intimate Partners*, NPR (July 21, 2017, 2:22 PM), https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners [https://perma.cc/PD2Y-XPLQ].

357. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/N3KN-XYC7].

358. *See, e.g.*, United States v. Boyd, 999 F.3d 171, 186, 188 (3d Cir. 2021) (referencing historical restrictions prohibiting dangerous individuals from possessing firearms); United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (noting that *Heller* invoked a precursor of the Second Amendment making clear that the right to bear arms did not extend to those who created danger of injury).

359. *See* Gold, *supra* note 90, at 39–40.

360. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2119–20 (2022).

361. Several studies, for example, have shown a link between domestic violence and mass shootings. *See, e.g.*, Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 INJ. EPISTEMOLOGY art. no. 38, at 1, 5, https://injepijournal.biomedcentral.com/counter/pdf/10.1186/s40621-021-00330-0.pdf [https://perma.cc/3F7G-R6X9].

Supreme Court's approach by considering what is considered "dangerous" today would support upholding Section 922(g)(8).

Intimate partner violence inherently involves a perpetrator's exertion of power and control over a victim or survivor. Removing the ability for that victim to end a pregnancy, or to pursue a protection order—that, if granted, will result in the perpetrator being prohibited from possessing a weapon—enacts state power and control over an individual who has already been robbed of agency at the interpersonal level. In failing to account for the experiences of victims of intimate partner violence, the legal system is complicit in a perpetrator's work to remove a victim's agency over their body and their life.

CONCLUSION

Intimate partner homicide is the leading cause of death among pregnant and recently postpartum women in the United States,[362] and most homicides of pregnant and postpartum women are committed with firearms.[363] Access to abortion and other mechanisms of reproductive freedom are essential tools for survivors of intimate partner violence to protect themselves against further violence, as the Supreme Court recognized in *Casey*. Likewise, regulations that restrict access to firearms from individuals who have been convicted of domestic violence misdemeanors, or against whom there is a restraining order, are critical mechanisms by which to prevent intimate partner fatalities.

Courts largely ignored intimate partner violence throughout history, leaving victims to fend for themselves while trying to survive physical and psychological violence. From the founding until the latter half of the twentieth century, the legal system relegated such violence (which disproportionately affects women, people of color, and the LGBTQIA+ community) to the "privacy" of the home. In doing so, courts actively participated in secluding victims with their abusers in an isolated space, dismissing any physical or other signs of abuse by either ignoring them entirely, or deciding that they were not worthy of intervention, unlike other forms of assault, battery, and financial fraud, among comparable crimes thought to merit public attention.

Over the last six decades or so, the American legal system has begun to acknowledge the seriousness of intimate partner violence, at least at times. In fact, in *Casey*, the Supreme Court cited the prevalence and insidiousness of spousal abuse as a rationale for eliminating a state law requiring spousal notification to obtain an abortion. Lower courts have likewise recognized the risks to health and life present for victims of intimate partner violence in decisions regarding firearms restrictions. But with *Dobbs* and *Bruen*, the Court

362. *See Homicide Leading Cause of Death for Pregnant Women in U.S.*, *supra* note 30; Wallace et al., *supra* note 33, at 767.

363. Wallace et al., *supra* note 33, at 766.

significantly constricted avenues for survivors of intimate partner violence to escape that violence. The majority in both decisions ignores victims of intimate partner violence entirely, even though the effects of restricted access to abortion and fewer permissible gun regulations on intimate partner violence victims will likely be enormous. Post-*Dobbs*, fourteen states have virtually eliminated access to abortion, and as the *Dobbs* dissent warned,[364] ten states provide no exception for people who become pregnant after being sexually assaulted or raped.[365] As abortion restrictions balloon and women who cannot obtain an abortion remain pregnant, rates of domestic violence have likewise swelled dramatically.

And the legal ramifications of the Supreme Court's choice to ignore intimate partner violence during the 2021–2022 term have already become apparent. Relying on *Bruen*, the Fifth Circuit in *Rahimi* held Section 922(g)(8) unconstitutional and, in doing so, invalidated a regulation that prevented gun possession by perpetrators of domestic abuse against whom survivors have already received a protective order after notice and an opportunity for the perpetrator to be heard. *Rahimi* was heard by the Supreme Court during the 2023–2024 term. While the Court appeared poised to leave Section 922(g)(8) intact, oral argument also revealed that the Court is likely to continue to adhere to a history and tradition test that, in fact, ignores some critical history: exclusion of women from the political community, and the legal system's proclivity to invoke notions of privacy to ignore intimate partner violence.

As explored above, the Supreme Court's decisions in *Dobbs* and *Bruen* will have enormous ramifications for intimate partner violence throughout the United States. And if courts fail to consider the prevalence of intimate partner violence—and its intimate relationship to both abortion and guns—victims of such violence will face increased danger and fatality risks. By contrast, courts have an opportunity to rethink case law by considering the practical realities and legal significance of intimate partner violence for reproductive autonomy and Second Amendment jurisprudence. The effects of intimate partner violence on the health and life of pregnant people could reshape interpretation of abortion ban exceptions, forcing legislatures and courts to reconcile with the imminent risks that domestic violence poses to both health and life. Similarly, exposing the dangerousness of perpetrators of such violence—for their victims, as well as for the public at large—could compel courts to recognize that the populace historically protected by the Second Amendment does not, in fact, include these perpetrators. In sum, applying an intimate partner violence-based lens to the jurisprudence illuminates that access to abortion and firearms

364. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, J., joined by Sotomayor & Kagan, JJ. dissenting) (warning that the outcome of *Dobbs* would lead to states limiting access to abortions through "draconian restrictions").

365. McCann et al., *supra* note 73; Hoffman, *supra* note 73.

regulations is intimately bound up with the safety of a large population of the United States, and, ultimately, that access to abortion and firearms regulations for perpetrators of violence is essential to equal autonomy for victims of such violence.