BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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Dedication

The *Berkeley Journal of Gender, Law & Justice* dedicates this volume to the organizers and activists on the front lines of social, economic, and legal struggles, who advocate fearlessly for justice beyond the limits of the law. We aspire for this scholarship to empower those who seek a more caring and compassionate world in spite of seemingly insurmountable oppression at the hands of powerful institutional actors. Gender Journal is and will remain a space that fosters solidarity and coalition-building within and between marginalized communities.

From the Membership

The *Berkeley Journal of Gender, Law & Justice* is guided by an editorial policy that distinguishes us from other law reviews and feminist journals. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to race, class, sexual orientation, and disability. Therefore, discussions of "women's issues" that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their intersectional feminist analysis. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the *Berkeley Journal of Gender, Law & Justice.*

The majority of pieces submitted to this journal, however, do not fall within the mandate. There are far too few of us in legal education and practice committed to advocating for intersectional feminist justice, let alone focusing on those least served by the legal system. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the *Berkeley Journal of Gender, Law & Justice* as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at a conference that addresses the mandate of the *Berkeley Journal of Gender, Law & Justice,* refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in intersectional justice.

From the Editors

We are incredibly proud to present Volume 39 of the *Berkeley Journal of Gender, Law & Justice*. We extend a heartfelt thanks to our wonderful membership and Editorial Board. Their hard work and dedication come through in the work we publish. Even amid the stresses of law school and the world at large—where unimaginable violence against oppressed communities has become even more normalized— our members have continued to show up with empathy, grace, and a steadfast commitment to uncompromised justice. . We also thank those who have contributed to our online blog, *Under Deconstruction*, as it has remained a place where our members can respond to current developments in the law. We are especially grateful to our readers, who continue to support our journal; this work is fundamentally about coming together and building community, and our readers are a critical part of our efforts. Finally, we acknowledge the work of our predecessors as we continue to build on their remarkable contributions to our journal.

Volume 39 grapples with the challenges of an increasingly hostile legal landscape and offers a vision for how we may continue to fight for a more just world. It has long been apparent that the interests of lawmakers, judges, and administrators are not aligned with those relegated to the margins. This Volume represents our ongoing pursuit to amplify the struggles and voices of those most impacted by implicitly and explicitly gendered regressive laws and policies.

We begin Volume 39 with the powerful words of Rocío Madrigal, a community outreach coordinator in the Central Valley, in "*We have to hope that things will change*." Ms. Madrigal sheds light on the poverty, pesticides, medical injustice, and labor exploitation farmworkers in the Central Valley face everyday, while at the same time, highlighting necessary policy solutions and the resilience and joy present in her community. Professor Yxta Maya Murray interviewed Ms. Madrigal for this article to challenge the legal community's dispassionate understanding of the grave issues farmworkers face. Murray centers the organic, poignant, and knowledgeable voice of Ms. Madrigal to illustrate the benefits of following community legal thought.

Next, resoundingly beloved Berkeley Law Professors, Andrew Bradt and Mallika Kaur, combine their renowned expertise in civil procedure and domestic violence law, respectively, to champion domestic violence tort law as a non-carceral remedy for survivors of domestic abuse. In *A Surprising Ally: Harnessing the Power of Procedure in Domestic Violence Tort Cases*, Bradt and Kaur introduce domestic violence tort law as a relatively novel remedy, one of both promise

and peril. They then demonstrate the important role of civil procedure in domestic violence tort cases through a close look at a recent California Court of Appeals decision. Their article closes with a call to the California Legislature to clarify the jurisdictional reach of California's domestic violence statutes so as to bring greater opportunities for relief to survivors of domestic violence.

We then continue with a transformative reimagining of the recent *Dobbs* decision titled *Re-Righting History: A Critical Race Perspective of Dobbs v. Jackson Women's Health Organization* written by Sophie Brill, winner of the 2023 If/When/How Writing Prize for New Student Scholarship in Reproductive Rights and Justice. Inspired by the book *Critical Race Judgments*, a collection of landmark US court opinions rewritten from a critical race theory perspective, Brill re-envisions a Supreme Court that is fully conscious of the role that race plays when deciding the future of reproductive autonomy in the United States. Using critical race theory as her guide, Brill offers a thought-provoking alternative opinion that directly acknowledges the historical use of the US legal system to control the autonomy of Black women's bodies and ultimately holds that Mississippi's 15-week abortion ban violates the Reconstruction Amendments.

Afterwards, Jennifer Meleana Hee provides a deeply thoughtful and personal perspective on the fertility industry and assisted reproductive technology in *Our Bodies, Our Price: Accepting Commodification and Racial Categorization in Assisted Reproductive Technology.* Hee draws from her own experience as an Chinese-English egg donor to explore the intersections of race and the use of reproductive technologies in the United States. Throughout her article, Hee addresses the racial disparities in the modern use of reproductive technologies and critiques the fertility industry's perpetuation of racial selection and categorization. Hee ends her piece with an encouraging call to action for people with oocytes from historically marginalized groups to disrupt the whiteness of the fertility industry through informed and empowered participation.

We then present our 2023 Albiston Prize winner Jordan J. Al-Rawi and his piece titled *The Case for Relaxing Bruen's Historical Analogues Test: Rahimi, Domestic Violence Regulation, and Gun Ownership*. In this timely predictive analysis of the soon-to-be-decided US Supreme Court case *United States v. Rahimi* , Al-Rawi explores the possible limitations the Supreme Court will face if it applies *Bruen*'s "historical analogues" test to strike down § 922(g)(8). Through a deep dive into US's history of domestic violence regulation, Al-Rawi argues that the *Bruen* test is inapplicable to § 922(g)(8) since it would bind modern lawmakers to the antiquated societal norms around gender-based issues and domestic violence regulation prevalent at the time of colonial and post-enactment America. In an attempt to resolve this conundrum,

Al-Rawi makes several recommendations that would allow the Court to remain consistent with the *Bruen* regime while preserving the legislature's responsibility to balance modern interests involving gun ownership and domestic violence regulation.

Finally, we close with a compelling Student Note from recent Berkeley Law graduate Brooke D'Amore Bradley. *Sex Education After Dobbs: A Case for Comprehensive Sex Education* discusses the consequences of the Supreme Court's regretful Dobbs decision in sex education classrooms across the country. Bradley chronicles how a backlash to comprehensive sex education has followed hot on the heels of *Dobbs*. A maddening irony, Bradely highlights, considering the need for evidence-based and culturally responsive sex education has only increased since the decision. In this piece, Bradely aptly defends comprehensive sex education, especially amidst the ongoing attacks on people's reproductive freedoms.

▬ ▬ ▬

On behalf of our journal, thank you for your commitment to intersectional feminism in (and outside) the law. We hope this work inspires you to challenge the boundaries of traditional legal solutions and organize your own communities.

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Thank you so much to all our sponsors and friends for your generous and continuing support. We could not continue publishing intersectional feminist scholarship without you.

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BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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ARTICLES

"We have to have hope that things will change:" Interview with Rocío Madrigal

Yxta Maya Murray and Rocío Madrigal†

INTRODUCTION

On July 27, 2023, I traveled to Fresno to meet Rocío Madrigal, the community outreach coordinator for the Central California Environmental Justice Network. This organization works to empower our communities and secure our children's future by eliminating negative environmental impacts in low income and communities of color in the Central Valley. Ms. Madrigal is a former paralegal who is certified and licensed in social and behavioral research as well as public health.[1] She has spent the last four years helping the low-income and largely Latinx Central Valley community combat the dangers of pesticides.[2] She sat with me for several hours in Fresno's Di Ciccio Sunnyside restaurant and answered my questions about the ways immigration law, climate change, extreme heat, police harassment, and other factors maintain severe inequality among farmworkers in California's Central Valley.

This oral history is part of an ongoing project that seeks to understand "community legal thought."[3] My undertaking is inspired by the people who agree to speak to me, as well as legal scholars who do outreach,[4] study social

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† Rocío Madrigal is the Community Outreach Coordinator for the Central California Environmental Justice Network and Yxta Murray is the David P. Leonard Professor of Law at Loyola Law School. With thanks to Kevin Johnson, Tristin Green, and Anita Bernstein.

Home, Central California Environmental Justice Network, https://ccejn.org/ [https://perma.cc/L7DZ-6ZXY] (last visited Aug. 30, 2023).

1. Rocio Madrigal, *LinkedIn,* https://www.linkedin.com/in/rocio-madrigal-5940721a4/ (last visited Jan. 18, 2024).
2. *Staff*, Central California Environmental Justice Network, https://ccejn.org/about/staff/ (last visited Jan. 18, 2024).
3. *See, e.g.*, Yxta Maya Murray*, The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109 (2019); Yxta Maya Murray, *Blights Out and Property Rights in New Orleans Post-Katrina*, 68 BUFFALO L. REV. 1 (2020); Yxta Maya Murray, *"FEMA Has Been a Nightmare:" Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321 (2019).
4. *See* Veena Dubal, *The New Racial Wage Code*, 15, HARV. L. & POL'Y REV. 511 (2021); Sameer M. Ashar, Edelina M. Burciaga, Jennifer M. Chacón, Susan Bibler Coutin, Alma Garza & Stephen Lee, *Navigating Liminal Legalities Along Pathways To Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions*, No. 2016-05 UNIV. OF CAL. IRVINE SCH. OF L., LEGAL STUD. RSCH. PAPER SERIES 1, (2015); Jennifer M. Chacón, *Citizenship Matters:*

movements,[5] and document how non-lawyers build and change legal knowledge and structures.[6] Legal writers engage in such participant-led practices to achieve several aims: They work to introduce marginalized perspectives into jurisprudence; unearth facts about oppression and discrimination that have been overlooked by lawyers, law enforcement officers, and other social monitors; and reduce the hierarchy that can exist between legal actors and vulnerable communities by respecting community members as experts in legal rights and anti-subordination strategies. When working together, these scholars and participants embody the knowledge expressed by Dorothy E. Roberts, who has explained that "we, the people" possess the wherewithal to create alternative legal interpretations.[7] They also embrace the wisdom of Reva Siegel, who has noted in the 14th Amendment context that "the Constitution emanates from the people

Conceptualizing Belonging in an Era of Fragile Inclusions, 52 U.C. DAVIS L. REV. 1, 2 (2018) ("Using information gathered in original interviews conducted in Southern California over a four-year period ending in January 2018, this article describes how harsh and uncertain immigration laws, significant swings in executive policies toward immigrant communities, and blocked access to citizenship have generated new understandings of citizenship and belonging in those communities."); Camila Bustos, Bruni Pizarro & Tabitha Sookdeo, *Climate Migration and Displacement: A Case Study of Puerto Rican Women in Connecticut*, 55 CONN. L. REV. 781 (2023); Sara L. Friedman & Chao-ju Chen, *Same-Sex Marriage Legalization and the Stigmas of LGBT Co-Parenting in Taiwan*, 48 L. & SOC. INQUIRY 660, 664 (2023) ("In addition to reviewing existing laws, adoption evaluation policies, and court adoption decisions involving heterosexual and LGBT families, we derive our findings from participant observation and ethnographic interviews with LGBT parents, LGBT rights activists, social workers, and government officials."); Janine Prantl, *Community Sponsorships for Refugees and Other Forced Migrants: Learning from Outside and Inside the United States*, 37 GEO. IMMIGR. L.J. 401, 446 (2023) ("Two case studies were conducted with volunteers from Seattle to complement this Article with insights on how the Sponsor Circles initiative worked out in practice. They were based on qualitative interviews with open-ended questions. The interviews took place virtually between September and December 2022."); Thalia González & Rebecca Epstein, *Critical Race Feminism, Health, and Restorative Practices in Schools: Centering the Experiences of Black and Latina Girls*, 29 MICH. J. GENDER & L. 409, 426 (2022) ("To gather in-depth perceptions of RP, we conducted nine semi-structured focus groups across the country, representing a diverse array of demographics. Sixty-seven students between the ages of thirteen and eighteen years old participated in the study."); Kimberlé W. Crenshaw, Priscilla Ocen & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, COLUM. L. SCH. FACULTY SCHOLARSHIP 1 (2015).

5. *See* Dorothy E. Roberts, "*Foreword: Abolition Constitutionalism*," 133 HARV. L. REV. 1 (2019); Jack M. Balkin, "*Wrong the Day It Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005); Reva B. Siegel, *Memory Games: Dobbs's Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*," 101 TEX. L. REV. 1127 (2020); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943 (2011); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2014). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 156 (2004) (tracing the history of the "popular aspect of ordinary law"). For an excellent analysis of these and other scholarly efforts, *see* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 863 (2021).

6. *See, e.g.*, JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION (2023).

7. Roberts, *supra* note 5, at 54 ("Recent research has illuminated an alternative public meaning of the Constitution residing in 'largely forgotten books, pamphlets, articles, resolutions, and legal briefs,' rather than on the pages of Supreme Court decisions.").

themselves."[8] Participatory scholars[9] also share the values of Kimberlé W. Crenshaw, Priscilla Ocen, and Jyoti Nanda, who, when studying the school-to-prison pipeline, have assessed that "much of the existing research literature excludes [Black girls and other girls of color] from [its] analysis"[10] and call for the kind of "critical dialogue"[11] that emerges from outreach efforts. Jointly-engaged scholarship additionally builds on the work of social movement scholars such as Lani Guinier and Gerald Torres, who have sought to "better understand and recognize the important roles played by ordinary people who succeed in challenging unfair laws through the sounds and determination of their marching feet."[12]

Increasingly, I depend on face-to-face interviews to engage in this process: in order to best fathom how vulnerable populations experience domination on the ground, I interview community members with expertise in the state's use of mal-power[13] on communities of color. I ask them what is needed to affect social, statutory, and constitutional change. Through this work, my interviewees and I not only strive to communicate law's real-world effects on communities of color; we also seek to imagine additional or replacement readings of constitutional, statutory, and other laws that would protect and support those communities' flourishing, not to mention baseline human capability.[14]

Ms. Madrigal's answers to my questions offer invaluable insight into the variety of traumas afflicting the people of the California Central Valley and give a heady glimpse of the political and legal work that will be required to undo the damage which white supremacy, colonialism, and capitalism inflict on the region's farmworker populations. Her commentary suggests which federal and state constitutional rights must be recognized for farmworkers to obtain guarantees to their essential needs.[15] She also makes observations that strengthen the case for

8. Siegel, *supra* note 5, at 1203–04 ("But struggles to democratize constitutional memory are still worth waging as they begin the process of taking back the Constitution from the Court. Doing that requires us to begin to reconstruct and to relocate our own understanding of our history and traditions—to remember the many ways that the Constitution emanates from the people themselves.").
9. "Participatory legal scholarship" was coined by Rachel López, who has added immeasurably to this discipline. Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795 (2023).
10. Crenshaw, Ocen & Nanda, *supra* note 5, at 5.
11. *Id.*
12. Guinier, *supra* note 5, at 2743.
13. "Mal power" is power used toward oppressive and destructive ends. From the term mal (bad, undesirable, not good), derived from the Latin for "bad, badly, ill, poorly, wrong, wrongly." *See mal-*, THE ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=mal+ [https://perma.cc/X8WC-XSXV] (last visited Jan. 18, 2024). I did not invent this term, but I cannot find references to it in my research.
14. Amartya Sen identifies the quality of life with human capabilities that are states of "doing and being," and notes that these states require a certain level of "functioning"—that is, possessing the abilities to be well nourished, be in good health, take part in the community, be happy, have mobility, etc. Amartya Sen, *Capability and Well-Being, in* THE QUALITY OF LIFE 30, 31 (Martha C. Nussbaum & Amartya Sen eds., 1993).
15. *See, e.g.*, *infra* notes 25 and 29.

certain progressive bills[16] and could give rise to other fruitful state and federal legislation.[17] In addition, she relates how current state and federal statutes that should protect workers are not enforced[18] and the seizure of property and harassment in violation of undocumented workers' constitutional rights.[19] Last but not least, she reflects on farmworker resiliency and experiences of joy.[20] Ms. Madrigal's words connect not only with legal doctrine but also legal theory.[21] In the footnotes, I set forth these resonances and make notes on the legal vacuums that Ms. Madrigal identifies in the hopes they will spark legal reform. This interview has been edited for clarity.

INTERVIEW

There's such a joy in the morning. If you're not familiar with farm workers you'd think, "Why are they happy? They have a terrible day ahead of them. Awful work, with terrible working conditions." But with farmworkers, they say, "I need to rise. I need to do what I can today."

They are a great inspiration for me. Their resiliency. The whole San Joaquin Valley is agriculture.[22] We have billions of pesticides here.[23] The poverty and the medical hardships the farmworkers endure with miscarriages, with birth defects, with learning disabilities, it is terrible.[24] Still, they are resilient. They don't take

16. *See, e.g.*, *infra* note 28.
17. *See, e.g.*, *infra* note 74 (making a suggestion that could give rise to a prohibition on irrigating agriculture with oil field wastewater).
18. *See infra* notes 66-67.
19. *See infra* note 78.
20. She begins and ends with an emphasis on joy.
21. *See infra* note 68.
22. Alvar Escriva-Bou, Ellen Hanak, Spencer Cole, Josué Medellín-Azuara, POLICY BRIEF: THE FUTURE OF AGRICULTURE IN THE SAN JOAQUIN VALLEY, PPIC (Feb. 2022), https://www.ppic.org/publication/policy-brief-the-future-of-agriculture-in-the-san-joaquin-valley/ [https://perma.cc/27MQ-BSWR] ("The San Joaquin Valley produces more than half of the state's agricultural output, and it is an important contributor to the nation's food supply. In terms of revenues, Fresno, Kern, and Tulare Counties are the nation's top three agricultural counties.").
23. Jane Sellen, *Pesticide Use in California Remains at Record High, New Data Show*, INSTITUTE FOR PESTICIDE REFORM (Jan. 21, 2021), https://www.pesticidereform.org/pesticide-use-in-california-remains-at-record-high-new-data-show/#:~:text=The%20greatest%20burden%20continues%20to,every%20person%20in%20those%20counties [https://perma.cc/DH7L-Z4YW] ("The greatest burden continues to be borne by the San Joaquin Valley, with well over half (108 million pounds) used in just five counties – Fresno, Kern, Tulare, San Joaquin and Madera. That equates to 33 pounds of pesticides for every person in those counties.").
24. Mona A. H. El-Baz, Ahmet F. Amin & Khalik M. Mohany, *Exposure to Pesticide Components Cause Recurrent Pregnancy Loss by Increasing Placental Oxidative Stress and Apoptosis: a Case-Control Study*, 13 SCI. REPORTS 9147 (2023);; *New Scientific Paper: Broad Class of Pesticides Puts Children at Risk for Reduced IQ, Learning Disabilities*, NRDC (Oct. 24, 2018), https://www.nrdc.org/press-releases/new-scientific-paper-broad-class-pesticides-puts-children-risk-reduced-iq-learning#:~:text=The%20authors%20found%20that%20exposure,increased%20risk%20of%20learning%20disabilities [https://perma.cc/P7ZJ-YLKB]; Yonit A. Addissie, Paul Kruszka, Angela Troia, Zoe C. Wong, Joshua L. Everson, Beth A. Kozel, Robert J. Lipinski, Kristen M.

on the attitude of "poor me."

I believe in justice. In my soul and heart, I know that this can change, that this can be better.

In response to a question about the meaning of justice in the Central Valley

What would that look like? Access to livable housing. Access to the great food that the farmworkers toil for, food that they could feed their own families. Access to good education for their children. Access to good food prices in the rural communities that we work.[25]

During COVID, the prices were so high for meat and milk.[26] Also, there was all of the price gouging that you can imagine, even for masks. It happened all over our state, but certainly it happened in our counties.[27] And that was sad to see. When you think of farmworkers, they receive abuse and injustice, and they live in unlivable housing. Not in a mobile home. Not in a trailer park. They live in camping trailers that are made for you to stay for two days, five days. And you have whole families living out there permanently and paying nine hundred dollars a month for unpaved roads, for polluted water. One big trash can for thirty families. You have children running and playing in dirt, in rocks. Not a beautiful park, which is what anyone would want for their children.[28]

C. Malecki & Maximilian Muenke, *Prenatal Exposure to Pesticides and Risk for Holoprosencephaly: a Case-Control Study*, ENVIRON. HEALTH 19, 65 (2020).

25. There is no federal constitutional right to food, healthy or otherwise; currently, only the state of Maine recognizes such a fundamental right via a recent amendment to its constitution. Alice Bannon, *The Constitutional Right to Food,* THE BRENNAN Center (Aug. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/constitutional-right-food [https://perma.cc/ALA2-NRCQ] ("In 2021, Maine voters enshrined a right to food in their state constitution.").

26. Dave Mead, Karen Ransom, Stephen B. Reed, Scott Sager*, The Impact of the COVID-19 Pandemic on Food Price Indexes and Data Collection,* BUREAU OF LAB. STAT. (Aug. 2020), https://www.bls.gov/opub/mlr/2020/article/the-impact-of-the-covid-19-pandemic-on-food-price-indexes-and-data-collection.htm#:~:text=Demand%20shocks%20and%20problems%20with,brought%20on%20by%20the%20pandemic ("Demand shocks and problems with supply chains contributed to increased volatility in import, export, producer, and consumer prices in the months following the onset of the COVID-19 pandemic in the United States. Meat, fish, dairy, and eggs were especially affected by the shifting economy brought on by the pandemic.").

27. Stockton Police Department, *Information on Price Gouging*, FACEBOOK.COM (Mar. 19, 2020), https://www.facebook.com/stocktonpolicedepartment/posts/information-on-price-gouginganyone-who-suspects-price-gouging-is-occurring-in-ou/2768611826568057/ ("In general, price gouging occurs when prices increase more than 10% than the price charged before the emergency declaration. These goods and services can include a wide variety of essentials, from hand sanitizer, masks, water, food, gasoline, to infant formula, diapers, batteries . . . anything on which residents of San Joaquin County would need to depend in the event of a prolonged emergency.").

28. *See, e.g.*, Anna Kaplan, *Illegal Farm Workers to Get Limited Help*, RECORDNET.COM (May 30, 2006), https://www.recordnet.com/story/entertainment/human-interest/2006/05/31/illegal-farm-workers-to-get/53024321007/ [https://perma.cc/LYH8-8AVQ] ("San Joaquin County agencies rushed to help Roberts Island farm workers who were uprooted from their illegal trailer park last week, but the workers will be eligible for only limited public assistance, since most of them are in the country illegally. More than 70 people were left homeless Thursday after the county Environmental Health Department visited

All of this affects their health. Their mental health, their physical health. During COVID, people were living in these small trailers. Twelve people in a small two-bedroom apartment with one restroom. Three generations in one place.[29] Even without COVID, it was bad, but with COVID, their income was all of a sudden fifty percent of what it used to be.[30] The mom now had to stay home for the children because of Zoom. People got depressed—more depressed.[31] There was more domestic violence.[32]

In reply to a question about the welfare of local youth

Yes, the children are getting educated. They go to the local public school system. It's gotten better over the last thirty-one years. Schools were so bad, one of the superintendents was stealing so much money that the state had to take it over.[33]

Abbate Farms to follow up on a complaint about mobile homes and trailers being used as permanent housing for farm-worker families.").

For the U.S. law on federal constitutional housing rights, *see* Lindsey v. Normet, 405 U.S. 56, 74 (1972); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 411–12 (2022) (considering "the holding for which the *Lindsey* case is most frequently cited—that the Constitution does not provide a fundamental right to decent housing."). In June of 2023, a proposed California constitutional amendment that would declare a fundamental right to housing "passed its first vote 6-2 in the state Assembly Housing Committee on June 7." Seth Sandronsky, *Assembly Committee Okays Amending State Constitution to Add Housing as a Right*, THE CENTER SQUARE (June 8, 2023), https://www.thecentersquare.com/california/article_3d998d74-0631-11ee-8041-b3c9267bbb70.html [https://perma.cc/P96E-V3RR]("California Gov. Gavin Newsom vetoed AB 2405 (Autumn Burke D-LA) in 2020. The bill would have established a policy that all Californians have a right to safe, decent, and affordable housing across the state, the most populous in the U.S., home to about 12% of all Americans."). This amendment would appear to cover undocumented immigrants. *See* ACA, Fundamental Right to Housing (June 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240ACA10 [https://perma.cc/R9WB-7N4X].

29. David Bacon, *In Rural California, Farmworkers Fend for Themselves for Health Care: 'We Have a Right to Survive,'* VISALIA TIMES DELTA (Dec. 8, 2022), https://www.visaliatimesdelta.com/story/news/local/california/2022/12/08/rural-california-san-joaquin-valley-central-valley-farmworkers-fend-for-themselves-health-care/69713358007/ [https://perma.cc/4FC7-EE3A] ("When the pandemic started, several residents died. 'Often three generations live in small houses or trailers where there's no space to quarantine . . .."") (internal citation omitted).
30. *Id.* ("Our harvest season used to last nine months, and now, with growers bringing in more H-2A workers, people living here get only four months of work. Local farmworkers feared not having enough work to feed their families, so they went to work even when they were sick.") (internal quotation marks and citation omitted).
31. *I'm Worried About my or my Loved One's Mental Health*, STOCKTON STRONG, https://www.stocktonstrong.org/mental-health/ (last visited Jan. 18, 2024) ("COVID-19 is having an effect on our community's mental well-being. With physical distancing, job, housing, and food insecurity, illness, and losses in our community, it is common to have feelings of anxiety and depression.").
32. Carmen George, *Fresno Domestic Violence Rises with Coronavirus,* FRESNO BEE (Mar. 26, 2020), https://www.fresnobee.com/news/coronavirus/article241472571.html [https://perma.cc/T9N8-QM8N].
33. *Former Parlier Unified Superintendent Arrested for Embezzlement,* GVWIRE (Jan. 4, 2019), https://gvwire.com/2019/01/04/former-parlier-unified-superintendent-arrested-for-embezzlement/ [https://perma.cc/TE6S-2Y7U].

I mean, I have an education. I have a car, I have a resume, and with that I could find a better job. My last job wasn't so great. I guess I had courage to move out of that place.

What I've learned in this job is that people's wells go dry.[34] Last week, I did three referrals. The people said, "We need help, our well is dry, we haven't had water for a week." We try to help, send outreach. But people don't know where to go. They see us as an organization that helps when we can. Or we can send them to someone.[35]

Last Wednesday, someone came to us for help—not for a well going dry, but for the pesticides that were making her sick. On Friday, we sent her to a workshop at U.C. Davis, where she learned to make a Rosenthal box fan. It has four filters, and it works like a purifier. It purifies the room, and it's only fifty dollars. It's better than a swamp cooler, which allows the pesticides inside the home.[36]

The studies about pesticides? The studies only assume that farmworkers are getting exposed eight hours a day. They're not! They get exposed at work, and then they go home and are exposed for ten more hours. Maybe the whole twenty-four hours of the day? At 10 pm, the sprayers spread half a mile this way, and at 3 am, they spray another way. It's all the time. It's constantly. The studies don't show what's really happening to the people.[37]

We battled chlorpyrifos, the pesticide that causes brain damage.[38] That got

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34. Alastair Bland, *State Rejects Local Plans for Protecting San Joaquin Valley Groundwater*, CALMATTERS (Mar. 3, 2023), https://calmatters.org/environment/2023/03/california-groundwater-valley-wells/#:~:text=Even%20in%20February%2C%20after%20record,reported%20dry%20in%20the%20region [https://perma.cc/EQQ2-5QKK] ("Even in February, after record rain and flooding, state water officials received reports of 19 wells running dry in the San Joaquin Valley, ground zero of California's groundwater crisis. In the past year, about 400 wells were reported dry in the region.").

35. In its constitution, California codifies the inalienable right to safety. CAL. CONST. art. I, §. 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."). The state also provides a statutory right to safe and clean water. CAL. WATER CODE § 106.3(a) (West 2013). Yet these guarantees appear meaningless for the people of the Central Valley. *See* Salvador Segura, *Exploring an Unenumerated California Constitutional Right to Safe and Clean Water Through A Hypothetical Decision*, 23 VT. J. ENVTL. L. 209, 209–10 (2022) ("Throughout the state, one million Californians lack such access. Many of these Californians are Hispanic farmworkers residing in disadvantaged unincorporated communities (DUCs) throughout the Central and Salinas Valleys. These communities must rely on contaminated aquifers.").

36. Richard L. Corsi, *Science in Action: How to Build a Corsi-Rosenthal Box*, UC DAVIS COLL. OF ENG'G (Apr. 14, 2022), https://engineering.ucdavis.edu/news/science-action-how-build-corsi-rosenthal-box [https://perma.cc/S9FC-RR82] ("The device was created to provide significant reduction in the amount of virus-laden, aerosol particles that are in the air.").

37. *See, e.g.*, *Paradichlorobenzene Fact Sheet*, NATIONAL PESTICIDE INFORMATION CENTER, http://npic.orst.edu/factsheets/archive/PDBtech.html (last visited Jan. 18, 2024) ("Male and female rabbits, rats, and guinea pigs were exposed to 798 ppm paradichlorobenzene vapor for eight hours a day, five days a week for up to 69 days of exposure.").

38. Erin Fitzgerald, *EPA Ignores Evidence Chlorpyrifos Causes Permanent Damage To Children's Brains*, EARTHJUSTICE (Sept. 22, 2020), https://earthjustice.org/press/2020/epa-ignores-evidence-chlorpyrifos-causes-permanent-damage-to-childrens-

banned in 2019,[39] though a study last year showed that the chlorpyrifos levels were higher than they should be.[40] But that isn't our only problem. There are still dangerous chemicals that are being used. Have you heard of Telone? It's a fumigant—it's banned in thirty-four countries.[41] It's also called 1,3-D. It gets injected in the earth and kills everything—the good and the bad. It causes cancer.[42] It was flagged here as a cancer-causer from 1990 to 1995, but then Dow Chemical did enough lobbying and filling pockets and playing games with the name of the chemical that the risk assessment got downgraded.[43] Some of the highest levels of Telone are in Arvin and a town called Parlier.[44]

It's incredible, because these farmers, who own the groves, they do live on

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brains#:~:text=Chlorpyrifos%20is%20just%20one%20of,regulatory%20limits%20%E2%80%94%20harms%20babies%20permanently [https://perma.cc/JB7N-KML6].

39. *Chlorpyrifos Cancellation*, CAL. DEP'T OF PESTICIDE REG., https://www.cdpr.ca.gov/docs/chlorpyrifos/index.htm [https://perma.cc/2VK3-S642] (last visited Jan. 18, 2024) (decision made in 2019, enforced in 2020).

40. Kimberly Hazard, Abbey Alkon, Robert B. Gunier, Rosemary Castorina, David Camann, Shraddha Quarderer & Asa Bradman, *Predictors of Pesticide Levels in Carpet Dust Collected from Child Care Centers in Northern California, USA,* J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY Jan. 2023 ("SwRI measured concentrations and loadings of 14 pesticides in the dust: bifenthrin, chlorfenapyr, chlorpyrifos, cyfluthrin, cypermethrin, dacthal, deltamethrin, diazinon, esfenvalerate, fipronil, lambda-cyhalothrin, permethrin (cis- and trans-), and piperonyl butoxide.")

41. Registered in California as a fungicide, herbicide, insecticide, and nematicide, Telone is a restricted material, that is, a material deemed dangerous to "public health, farm workers, domestic animals, honeybees, the environment, wildlife, or other crops compared to other pesticides"; it can nevertheless be used under the guidance of certified commercial or private applicators under a permit issued by the County Agricultural Commissioner. *See Active Ingredient: 1,3-Dichloropropene (Telone) Human Health Risk Assessment and Mitigation Documents and Activities*, CAL. DEP'T OF PESTICIDE REG., , https://www.cdpr.ca.gov/docs/whs/active ingredient/1 3-d.htm [https://perma.cc/X587-RTAJ] (last visited Jan. 18, 2024); *see also Restricted Materials Use Requirements*, CAL. DEP'T OF PESTICIDE REG., https://www.cdpr.ca.gov/docs/enforce/permitting.htm [https://perma.cc/FG5Y-AE27] (last visited Jan. 18, 2024); *see also California Must Ban or Severely Restrict Cancer-Causing 1,3-Dichloropropene (Telone)*, CALIFORNIANS FOR PESTICIDE REFORM, https://www.pesticidereform.org/safe/ [https://perma.cc/9PLK-DSGL] (hereinafter *California Must Ban*) (last visited Jan. 18, 2024) ("It is banned in 34 countries, but in California is the third most heavily used pesticide in agriculture – an astonishing 12 million pounds in 2019.").

42. *See California Must Ban*, *supra* note 41.

43. Sharon Lerner, *Environmental Group Charges EPA with Ignoring Evidence of Cancer,* THE INTERCEPT (Feb. 25, 2021), https://theintercept.com/2021/02/25/epa-cancer-pesticide-telone/ [https://perma.cc/KFL2-G4X9] (explaining that "the recent draft assessment characterized Telone as less dangerous. Although the number of studies linking the pesticide to cancer has grown during the intervening years, this time the agency deemed the chemical as having only 'suggestive evidence of carcinogenic potential.' According to the [Public Employees for Environmental Responsibility] complaint, the EPA reached this conclusion in part because it omitted the full name of the chemical from a search of the medical literature"); Union of Concerned Scientists, *EPA Downgrades Severity of Cancer-Causing Pesticide,* USCUSA (Feb. 15, 2022), https://www.ucsusa.org/resources/attacks-on-science/epa-downgrades-severity-pesticide [https://perma.cc/X3QW-X67L].

44. *See, e.g.*, John Cox, *State Considers New Restrictions on Use of Toxic Pesticide Widely Used in Kern,* THE BAKERSFIELD CALIFORNIAN (Oct. 16, 2019), https://www.bakersfield.com/news/state-considers-new-restrictions-on-use-of-toxic-pesticide-widely-used-in-kern/article_0c0f669a-f053-11e9-99a4-7b10879c5467.html [https://perma.cc/HP8A-T3BM] (mentioning the towns of Shafter and Parlier).

their land. They don't breathe in a bubble. They breathe the same contaminated pesticide-filled air that we do. But there's no will to change what's happening. I went to the Fresno fair and saw this chart that they have with the names of all the crops and the billions of dollars earned by each crop in Fresno County.[45] And that's the only answer. That's why people don't matter, why children don't matter, why long-term health effects don't matter. Just the bottom line.

I know one person who moved here from San Jose. She used to let her son play outside, and he loved to watch the helicopters fly over and spray the crops. It can be a beautiful sight. But later the mom found out what the airplane was spraying. All of a sudden, this woman's bunnies and cats died because of the air drift. The pesticides had gone into the dog and rabbit food. If the animals eat it, they die.[46] But at least the animals die immediately, and you can see what is happening. But us humans? Our bodies are so resilient that it happens slowly, and it's almost worse. If we all died like flies, maybe somebody would do something.[47]

When workers grow older, they finally get sick, they're no longer strong. They can't do the work anymore. They're undocumented and they don't have social security,[48] no income, no medical.[49] They have to live with somebody from

45. *See, e.g.*, Todd Fitchette, *Oranges are Tulare County's New Billion-Dollar Crop*, FARM PROGRESS (Oct. 5, 2021), https://www.farmprogress.com/fruit/oranges-are-tulare-county-s-new-billion-dollar-crop [https://perma.cc/DPY5-2EYE].).

46. *See, e.g.*, *Pests and Pesticides: Keeping Our Companions Safe*, BEYOND PESTICIDES, https://www.beyondpesticides.org/resources/pets#:~:text=In%20addition%20to%20having%20immediate,cause%20of%20death%20for%20pets [https://perma.cc/2CM3-6LCP] (last visited Jan. 18, 2024) ("In addition to having immediate poisoning risks, many toxic pesticides are linked to cancer, which is a leading cause of death for pets.").

47. There is no right to live in an environment free of deadly pesticides. When the EPA considers whether to register a pesticide, it must determine that the chemical will "not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D) (1988). "Unreasonable adverse effects on the environment" means unreasonably adverse effects on *either* human beings *or* the environment, "taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb) (1988). This is a cost-benefit analysis. *See* Arlene Yang, *Standards and Uncertainty in Risk Assessment*, 3 N.Y.U. ENVTL. L.J. 523, 531 (1995). Regarding Ms. Madrigal's observation that maybe something would happen if farmworkers died more rapidly, *see* Stephen Lee, *Family Separation As Slow Death*, 119 COLUM. L. REV. 2319, 2327 (2019) ("The paradigm of slow death or violence captures the kinds of harms that happen slowly and over time, which can often go overlooked or unnoticed.").

48. *See, e.g.*, Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 48 (2006) ("Notably, workers who are authorized to work in the United States will probably qualify for Social Security retirement benefits, but undocumented workers will never qualify for any benefits with respect to the contributions they make to the Social Security retirement system.").

49. No U.S. constitutional or federal statutory right to medical care exists, though California extended its Medi-Cal program to low-income undocumented people in 2024. Kendra Simpson, *The Racial Tension Between Underprescription and Overprescription of Pain Medication Amid the Opioid Epidemic*, 45 N.Y.U. REV. L. & SOC. CHANGE 129, 149 (2021) ("The Supreme Court has generally refused to find a fundamental right to medical care."); Vinita Andrapalliyal, *"Healthcare for All"? The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 UCLA L. REV. DISCOURSE 58, 63-64 (2013) ("One aspect of our healthcare system the ACA does not change was the noncitizen eligibility requirements for the Medicaid program. . .While recently arrived LPRs [Legal Permanent Residents], nonimmigrants, and undocumented immigrants may avail themselves of the federal emergency Medicaid program for immediate and severe medical emergencies, they are unable to access

their family, if they have one. They don't have money for medicines. I hope they don't become homeless, but we do have a growing problem that's alarming.[50]

But it's not just pesticides poisoning the workers. We have leaking oil wells. No one checks them, not PG&E, not the agencies. If we can't trust the agencies, who can we trust? There was a pregnant woman I knew, and she got so sick from the fumes.[51]

Also, we have two Amazon warehouse locations in Fresno. So hundreds of trucks drive back and forth from them. We have an Alta distribution center. Those are just the massive ones. We have a FedEx center. And all the big semis that transport the food. The trucks spread pollution through the valley.[52]

Then there are the recycling centers. The recycling centers that are supposed to make everything cleaner. Well, they're a dump site. It smells, the trash affects the small community. And the recycling trucks come here, too, along with all the other trucks. They recycle batteries that drain into the dirt, drain into the water, and then pollute everything.[53]

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preventative and nonemergency care under this program."); Shirin Ali, *California Will Offer Health Insurance to all Undocumented Immigrants,* THE HILL (June 29, 2022), https://thehill.com/changing-america/well-being/prevention-cures/3541196-california-will-offer-health-insurance-to-all-undocumented-immigrants/ [https://perma.cc/GWS7-YHCJ] ("California will become the first state to offer all undocumented immigrants, regardless of age, state-subsidized health insurance. It's expected to take effect in 2024 and it will make California the first state to achieve universal access to health coverage."); Miranda Dietz, Laurel Lucia, Krikanth Kadiyala, Tynan Channelor, Annie Rak, Yupeng Chen, Menebere Haile, Dylan H. Roby & Gerald F. Kominski, *California's Uninsured in 2024: Medi-Cal Expands to all Low-Income Adults, but Half a Million Undocumented Californians Lack Affordable Coverage Options*, UC BERKELEY LAB. CENTER (Mar. 22, 2023), https://laborcenter.berkeley.edu/californias-uninsured-in-2024/ [https://perma.cc/W7QQ-TBUJ] ("[U]ndocumented Californians will continue to be categorically excluded from Covered California under federal policy.").

50. Dennis Wyatt, *Homeless: $130M Burden on SJ County Economy,* MANTECA/RIPON BULLETIN (Apr. 15, 2023), https://www.mantecabulletin.com/news/local-news/homeless-130m-burden-sj-county-economy/ [https://perma.cc/RET6-TEYD] (finding that there are "2,319 homeless [people] living throughout San Joaquin County, as identified in a 2022 point-in-time count"); *Study: Fresno Has Worst Homelessness Problem in the Nation,* FOX 26 NEWS, Dec. 27, 2023, https://kmph.com/news/local/study-fresno-has-worst-homeless-problem-in-nation ("The personal finance company Wallet Hub says Fresno has the highest homeless rate in the nation.")

51. *See, e.g.*, John Cox, *Refinery Near Bakersfield Agrees to Pay $500,000 to Settle Alleged Environmental Violations,* THE BAKERSFIELD CALIFORNIAN (Dec. 10, 2019), https://www.bakersfield.com/news/refinery-near-bakersfield-agrees-to-pay-500-000-to-settle-alleged-environmental-violations/article_4ceb9858-1b84-11ea-8fae-0f8d5ce441dd.html [https://perma.cc/TAE9-KA7T] ("A refinery in the Lamont area has agreed to pay half a million dollars to settle federal allegations it failed to properly monitor sulfur dioxide emissions from its main flare and neglected to report toxic chemicals leaking from its valves and other equipment.").

52. *Cf.* Sam Levin, *Amazon's Warehouse Boom Linked to Health Hazards in America's Most Polluted Region*, THE GUARDIAN (Apr. 15, 2021), https://www.theguardian.com/technology/2021/apr/15/amazon-warehouse-boom-inland-empire-pollution [https://perma.cc/BH3G-4QHT] (analyzing effects of Amazon pollution on the Inland Empire).

53. *See cf.*, "*It's as if they're Poisoning Us": The Health Impacts of Plastic Recycling in Turkey,* HUMAN RIGHTS WATCH (Sept. 21, 2022), https://www.hrw.org/report/2022/09/21/its-if-theyre-poisoning-us/health-impacts-plastic-recycling-turkey [https://perma.cc/6YZV-T5HC] ("Scientific studies have found that localized air pollution and the release of toxins during

The pesticides and pollution go down but they have to come up again. We grow our food in this soil.

There's a town not far from here, called Mendota. Fifty miles west. Chevron wanted to build a plant there to do carbon capture and sequestration. It's supposed to help with climate change. It's where they take waste and make it liquid, and then they pour it through a pipeline and send it to someone else. People buy it, it's an energy source.[54] There's a huge subsidy for it.[55] But carbon capture has been shown to increase pollution locally.[56] Sequestration has unknown dangers.[57] The

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plastic shredding and melting pose risks to human health. These include exposure to fine particles, dioxins, volatile organic compounds, and other harmful chemical additives in plastics, and have been linked to asthma, respiratory illnesses, cancer, and reproductive system harms.").

Under federal law, Title VI prohibits federally-funded programs from discriminating on the basis of race, national origin, or color. This suggests that People of Color in the Central Valley could pursue an action to challenge their unequal exposure to pollutants if nearby warehouses and recycling facilities receive federal assistance. However, no private cause of action exists to enforce the prohibition on programs with discriminatory impacts. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding no private cause of action to enforce for disparate-impact regulations exists); *but see id.* at 294 (Stevens, J., dissenting) ("Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations."). This creates a significant obstacle to dismantling environmental racism as it is now experienced in the Central Valley. *See generally* Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI Through Heightened Judicial Review*, 90 U. COLO. L. REV. 867, 882 (2019) (discussing challenges in which disparate environmental impacts could not be litigated directly); Matthew Snyder, *Environmental Justice and Public Company Disclosures: Mandatory Reporting for Polluting Facilities Located in Minority and Low-Income Communities*, 100 U. DET. MERCY L. REV. 373, 385 (2023) (discussing challenges associated with environmental claims under Title VII).

54. *See Understanding carbon capture and storage*, BRITISH GEOLOGICAL SURVEY, https://www.bgs.ac.uk/discovering-geology/climate-change/carbon-capture-and-storage [https://perma.cc/J99A-FRQV] (hereinafter *British Geological Survey*) ("There are 5800 km of CO2 pipelines in the United States transporting CO2 to oil production fields, where the CO2 is injected to help produce more oil. This process is called enhanced oil recovery or EOR").

55. *Carbon Capture and Storage in the United* States, CONGRESSIONAL BUDGET OFFICE (Dec. 2023), https://www.cbo.gov/publication/59832 [https://perma.cc/G42N-K9MU] ("The federal government mainly subsidizes carbon capture and storage through funding for the Department of Energy (DOE) and tax credits available to companies using CCS technology. Both the amount of funding for CCS programs and the size of the tax credits have increased in recent years"); *British Geological Survey* ("There are 5800 km of CO2 pipelines in the United States transporting CO2 to oil production fields, where the CO2 is injected to help produce more oil. This process is called enhanced oil recovery or EOR."); *Carbon Capture and Storage in the United States*, CONGRESSIONAL BUDGET OFFICE, Dec. 2023, https://www.cbo.gov/publication/59832 ("The federal government mainly subsidizes carbon capture and storage through funding for the Department of Energy (DOE) and tax credits available to companies using CCS technology. Both the amount of funding for CCS programs and the size of the tax credits have increased in recent years.").

56. *See* Taylor Kubota, *Stanford Study Casts Doubt on Carbon,* STANFORD (Oct. 25, 2019), https://news.stanford.edu/2019/10/25/study-casts-doubt-carbon-capture/ [https://perma.cc/RZS9-C75F] (reporting that carbon capture can increase air pollution).

57. Jacob D. McDonald, Dean Kracko, Melanie Doyle-Eisele, C Edwin Garner, Chris Wegerski, Al Senft, Eladio Knipping, Stephanie Shaw & Annette Rohr, *Carbon Capture and Sequestration: an Exploratory Inhalation Toxicity Assessment of Amine-Trapping Solvents and their Degradation Products*, 48 ENV'T SCI. & TECH., 10821, 10821 (2014) ("Amine

Mendota city council approved the plant, but no one in town knew about it—not lay people, not pastors. Not people who handled local food distribution. When I asked one of their city council people, who was a very bright person, "Why do you approve this? Why are you on board?" he said, "We have a bad rap of our town being one of the worst cities in the nation, and so we should be the best at doing something new." But we (the Central California Environmental Justice Network) and our allies fought it. There had been no community input. And now the project's been withdrawn.[58]

The problem with the sequestration wasn't just toxins. Because, do you know what that plant would cost? Mendota only has one ambulance, and the hospital is a long drive away.[59] The money is better spent getting medical care for the local people.

But the workers don't call for help when they're injured or sick, anyway. It can cost them their jobs. And they don't have insurance, or they don't have the necessary information. If someone has, say, a severe tooth ache, they just bear it. Some of them don't even know that in California, undocumented people over fifty years old have been given the ability to apply for medical insurance.[60] Even if they know, they don't feel like they can trust it. People who do not have legal status, like permanent residency, they fear that if they get anything from the government, even insurance or food stamps, then they won't get immigration status when it's reviewed. So they go without food. They go without medical attention. Some of them have injuries and are not even provided workers 'compensation information from their bosses. I know one man, he had an injured eye, and he lost sight in that eye. We told him that he qualified for insurance. Now he's gotten surgery on that one eye and he's going to get surgery on the other eye. He has a wife and a daughter and he's the breadwinner.[61]

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scrubbing . . . is the most well-developed of technologies for CO2 capture and sequestration (CCS); however, it has not yet been applied at full scale to coal-fired power plant flue gases . . . Amine scrubbing has been employed in a number of industrial applications, but the environmental releases of the amines and potential degradation products are not generally well-characterized").

58. Liz Hampton & Sabrina Valle, *Chevron, Schlumberger Withdraw Request for California Carbon-Capture Permit*, REUTERS (May 18, 2022), https://www.reuters.com/article/chevron-schlumberger-carboncapture-idAFL2N2XA27V [https://perma.cc/672K-XZLR]) ("Top U.S. energy companies Chevron and Schlumberger have withdrawn an application to capture carbon dioxide emissions and store them deep underground in central California, spokespeople said on Wednesday, putting the clean-energy project on hold after U.S. environmental regulators questioned it.").

59. *Hospitals Near Mendota, CA,* HEALTHGRADES, https://www.healthgrades.com/hospital-directory/ca-california/mendota [https://perma.cc/TQQ9-PHBT] (last visited Jan. 18, 2024) (showing that the closest hospital to Mendota is in Fresno, 33 miles away).

60. *Older Adult Expansion*, CAL. DEP'T OF HEALTH CARE SERVICES (2022), https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/OlderAdultExpansion.aspx [https://perma.cc/57DZ-BLQ6] ("Beginning May 1, 2022, a new law in California will give full scope Medi-Cal to adults 50 years of age or older and immigration status does not matter.").

61. *See* Cal. Lab. Code § 1171.5 (West 2018); Farmer Bros. Coffee v. Workers' Comp. Appeals Bd., 133 Cal. App. 4th 533, 541 (2005) (stating that in enacting § 1171.5, the California legislature "provid[ed] that an employee's immigration status was irrelevant to his or her workers 'compensation claim, as provided under existing law, except with regard to the issue

The workers, they get abused. We say in Spanish that the contractors and growers 'gain on their ribs.' *Acostillas de otros*.

Who abuses them? The grower owns the farm. The contractor runs it. The contractor decides how many farmworkers to hire and how much to pay them. The farmworkers are contracted to the contractor.

Farmworker salaries just don't go up.[62] Plus, in recent years, we've also seen a lot of ghost-worker contractors. The farm will do a contract with a bid saying that they'll get the job done with fifty-nine farmworkers, say, in three weeks. But then they only have thirty-four workers, so the salaries that were supposed to go to the workers go into the bosses 'pockets. These are known as 'ghost workers, ' because they don't exist, they're ghosts.[63]

There's a law that says there's supposed to be water for each worker.[64] But the contractor just fills bottles up from the hose, and they don't keep it cool. I just read something on Facebook about a worker who died last week in Arizona from heat exposure and dehydration.[65] And there's a right to clean restrooms, but the restrooms aren't clean.[66] Once, a lady worker became so upset that she started a petition about the restrooms, but then her car was vandalized. The people who broke into her car took the signature pages, and they took her phone. Retaliation is against the law, but the law—the workers are not protected.[67]

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of reinstatement, since the employer would be committing a federal crime by reinstating the undocumented employee."); see also John A. Castro, *Second-Class Citizens: The Schism Between Immigration Policy and Children's Health Care*, 37 HASTINGS CONST. L.Q. 199, 214 (2009) ("Undocumented immigrants experience an underlying fear that they will be reported to authorities if they utilize institutionalized services such as hospitals.").

62. *See, e.g.*, Douglas S. Massey & Julia Gelatt, *What Happened to the Wages of Mexican Immigrants? Trends and Interpretations*, 8 LAT STUD. 328 (2010) (stating that for those born in Mexico, earnings did not simply stagnate, they deteriorated. "[T]he wages earned by native whites fell between 1970 and 1980 and then slowly rose back toward their 1970 level between 1980 and 1990. The wages of Mexican American natives managed to increase during both decades, probably owing to expanded civil rights enforcement, though at a much slower rate than before. In contrast, the wages earned by Mexican immigrants fell steadily from 1970 to 1990.).

63. The term "ghost worker" has been given a variety of meanings in legal literature. For example, it has been used to identify undocumented workers generally, or those who work under a different name. Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 738–39, 748 (2003).

64. CAL. CODE REGS. tit. 8, § 3457(c)(1)(A) (2020), ("Potable water shall be provided during working hours and placed in locations readily accessible to all employees. Access to such drinking water shall be permitted at all times.").

65. David Gonzalez, *Yuma Farmworker and Father of 2 Dies Amid Record Heat Wave*, AZ CENTRAL (July 24, 2023), https://www.azcentral.com/story/news/local/arizona/c/07/24/yuma-farmworker-dies-arizona-heat-wave/70457694007/ [https://perma.cc/XPX6-ZRB4]. The problem has recently visited Ms. Madrigal's own county: In August of 2023, a 59-year old Fresno farmworker named Elidio Hernández Gomez died while working in extreme heat. *See* Melissa Montalvo, *Farmworker Who Labored in Extreme California Heat Died. Family, Advocates, Seeking Answers,* THE FRESNO BEE (Nov. 8, 2023), https://www.fresnobee.com/news/local/article278374474.html [https://perma.cc/GDU8-KVW7].

66. *See supra* note 64, at § 3457(c)(2)(B)(1) ("Toilet facilities shall be appropriately screened to keep flies and other vermin away from the excreta.").

67. 29 U.S.C. § 1855(a) ("No person shall intimidate, threaten, restrain, coerce, blacklist,

It's like the laws don't exist.[68] If there's no enforcement, the laws aren't worth the paper they're printed on. We've regressed.

The contractors are supposed to teach the farmworkers about heat and illness, and how to prevent heat sickness.[69] There's a lot of symptoms that if you did the training well, you would know that instead of working harder you should stop and rest. Because you could lose your life. It is clear that above eighty-five degrees they're supposed to have a break every two hours.[70] It gets so hot, it breaks my heart.

These people have families, mothers, and, when they die, now they're gone for all the people who love them. And because of why? Because of greed. Because the contractor does not care to remind the workers to check on their co-workers, to look for signs of heat exhaustion in each other. It's not that hard. It's not rocket science. It's very simple. If someone is dizzy, stop. Call 911, and don't wait until the organs start shutting down. It's serious, because we have extreme heat here. Extreme, extreme heat. Maximum heat of 111, 113 [*This is up to 45 in degrees Celsius*], it's almost inhuman what we expect these farmworkers to do.[71] They are pushed to the limit. And they're verbally harassed to do more work. "Don't work like a girl," the contractor says. The older people will lose their jobs to sixteen- and seventeen-year-olds, who become their rivals.

Even if you don't die, it can impair you forever. People become sick and dizzy, and then afterwards are fragile. They can no longer work in farm labor. And for some of them it's the only thing they can do, and their life becomes a greater hardship.

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discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter.").

68. Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD. L. REV. 1241, 1250 (1991) ("attempts to respond to certain problems can be ineffective when the intersectional location of women of color is not considered in fashioning the remedy."). I cite Crenshaw here because her landmark article, *Mapping the Margins*, addressed how Congressional attempts to fashion legal relief and remedies for battered immigrant women did not address those women's needs because the lawmakers failed to understand the lived experience of this population, who experienced language, monetary, and cultural barriers that prevented them from taking advantage of legal rights. Crenshaw's article, published in 1991, has been a crucial addition to legal scholarship because it describes laws that exist on paper but that are useless for vulnerable populations. In that way, it's as if the laws "don't exist."

69. 5 CAL. CODE REGS. tit. 8 § 3395(h) (2020).

70. *Staying safe in the heat and humidity*, HENNEPIN COUNTY CLIMATE ACTION, https://www.hennepin.us/climate-action/what-we-can-do/staying-safe-heat-humidity [https://perma.cc/SZK7-RGA7] ("During moderate values between 83 and 85 degrees F, limit duration of outdoor activities to two hours or less and take a 30-minute break in the shade after each hour of work or exercise outdoors.") Reader, note that this source comes from Hennepin County, Minnesota and that this source does not deal with California's particular climate issues, which are even more severe.

71. *Central and South San Joaquin Valley Climate Graphs*, NATIONAL WEATHER SERVICE, https://www.weather.gov/hnx/Cliplot [https://perma.cc/Y6LM-KEBD] (reporting highs of 107 in 2021 and 112 in 2017).

I met a woman at a market selling perfumes, like Mary Kay stuff, and she shared with us that she'd had a heatstroke and cannot physically do the work anymore. And she's a single mom.[72]

Then there's the asthma. Kids have a fifty percent higher chance of having asthma since birth if they live here. Even if you weren't born with it, if you live here long enough you can get it.[73] My daughter has it. She's had severe incidents. She was at school and she collapsed. The teachers can't let the kids run around with this air quality. She was having trouble breathing. Later, the principal said I'd threatened the teacher.

I don't know, the pollution, the toxins, they're everywhere. It's in the water. You know those sweet little fruits, like the oranges called Cuties and the pomegranates? They're irrigated with water from Chevron. The muggy oil-filtered water is reused on the crops.[74]

The problems here are so huge. We have a lot of drug use and abuse[75] and domestic violence.[76] I think that it's a way that people start coping—with their depression, with the temperatures. Alcohol and drinks and drugs. Whenever there's poverty, and this feeling like you can't get out, if there's despair, there's more chance of youths or adults going to crime or substance abuse and then everything goes downhill.

The kids get into gangs. In the town of Mendota, a gang from El Salvador called Mara Salvatrucha showed up. Before you knew it, there were over twenty

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72. Aryn Baker, *How Heat Waves Could Have Long-Term Impacts on Your Health,* TIME (July 13, 2022), https://time.com/6196564/climate-change-obesity-long-term-health-impacts/ [https://perma.cc/3TDD-DP29].

73. California Asthma Dashboard, California Department of Public Health, https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/EHIB/CPE/Pages/CaliforniaBreathingCountyAsthmaProfiles.aspx [https://perma.cc/27KJ-PXPN] (noting asthma prevalence in California). See also cf. Ying-Ying Meng, Rudolph P. Rull, Michelle Wilhelm, Christina Lombardi, John Balmes & Beate Ritz, *Outdoor Air Pollution and Uncontrolled Asthma in the San Joaquin Valley, California*, 64 J. EPIDEMIOLOGY & CMTY. HEALTH, 142 (2010).

74. Liza Gross, *A California Water Board Assures the Public that Oil Wastewater is Safe for Irrigation, But Experts Say the Evidence is Scant*, INSIDE CLIMATE NEWS (Feb. 6, 2022), https://insideclimatenews.org/news/06022022/a-california-water-board-assures-the-public-that-oil-wastewater-is-safe-for-irrigation-but-experts-say-the-evidence-is-scant/ [https://perma.cc/W6FP-ZQJW].

75. *San Joaquin County 2016 Community Health Needs Assessment*, SAN JOAQUIN COUNCIL OF GOVERNMENTS, https://www.healthiersanjoaquin.org/pdfs/2016/substance%20use.pdf [https://perma.cc/JY5V-EWF7] (last visited Jan. 18, 2024) ("San Joaquin County's rate of drug-induced deaths is 56% higher than average rate across California.") (hereinafter *Community Health Needs Assessment*).

76. Kay Recede, *Reported Domestic Violence Abuse Cases in San Joaquin County Decreased in 2020,* KCRA (Feb. 26, 2021), https://www.kcra.com/article/domestic-violence-abuse-cases-san-joaquin-county-2020/35654391# [https://perma.cc/X8BZ-KJUA] ("The district attorney's office shared with KCRA 3 that 5,034 domestic violence cases and 977 child abuse/sexual assault cases were reviewed in 2020, compared to a review of 5,717 domestic violence cases in 2019, and 909 child abuse/sexual assault cases."); *Nearly Half of Domestic Violence Goes Unreported*, THE CRIME REPORT (May 3, 2017), https://thecrimereport.org/2017/05/03/report-nearly-half-of-domestic-violence-goes-unreported/ [https://perma.cc/KWD4-3P85].; *Community Health Needs Assessment,* (. . . "The number of domestic violence calls is 37% higher in San Joaquin County than in California as a whole.").

members of that gang recruited and bodies started coming up beheaded. Finally, after there were enough missing people and decapitations, the FBI came and cleaned up house.[77]

But law enforcement is no real help. There's police harassment here. In Parlier, which is a town about an hour away from Mendota, county sheriffs like to show up at a certain part of a big avenue, which is right off the fields. They arrive there when they know it's time for farmworkers to go home. In Parlier, there's one big avenue, and you have to go down it to get to other parts of town. One night, the sheriffs were waiting, kind of targeting the farmworkers 'cars, which are used, small, dirty, because they've been in the fields. The sheriffs took the farmworkers 'vehicles if they didn't have a license or insurance. They take the vehicles for thirty days, and then the farmworkers have to struggle to keep them. Usually, the county keeps the cars and auctions them.[78]

In response to a question about self-care

How do we keep up our strength? How do we resist? Most women, if they know they're pregnant, they stop working. Or they learn to mitigate, like taking off their clothes before coming into the house. They bathe themselves or have their partners bathe them, to clean off the toxins.[79]

And otherwise, I don't know. I know this all sounds dark.

What I do is, I work with like-minded people. I find joy. Anytime I go to a college or high school graduation, I remember that generations are thriving, they are learning. The hope is that they'll come back and make a difference in the community.

We have to have hope that things will change. Last week, I went as a chaperone in a program that exposes young teens to camping. I've lived in this area for so long and I've never been camping. And when you're out in nature, you realize that the universe, the earth, the local problems, it's bigger than that. We are one people, one earth. And it can change. It's going to take a lot of change, and I think to myself, if I give up, who is going to do the work? If people like me give up, who is going to do what it takes to create that change?

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77. *U.S. Attorney: MS-13 Gang Terrorized Central California Farm Town*, CBS NEWS (Aug. 31, 2018), https://www.cbsnews.com/sacramento/news/ms-13-mendota-terrorized/ [https://perma.cc/7K3C-B4ZV] (this source does not mention decapitations).

78. For a discussion of the thirty-day impound and whether it violates the Fourth Amendment, *see* Brewster v. Beck, 859 F.3d 1194, 1197 (9th Cir. 2017) ("A seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification. Appellees have provided no justification here."). *See also* Byrhonda Lyons, *CHP Sidesteps Feds to Continue 30-Day Tows*, CAL MATTERS (Sept. 16, 2021), https://calmatters.org/justice/2021/09/chp-car-impounds-unlicensed-drivers/ [https://perma.cc/6USA-R43V] (reporting that thirty-date impounds are still happening despite *Brewster* decision).

79. Cf. George Lipsitz, "*In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1770 (2012) ("women generally play important roles in local networks of social control and self-help.").

My hope was, when we took the young people camping, that we were giving a new generation a new insight. We have to wake up their awareness of the natural beauty of Earth. You go up there to Yosemite, it takes your breath away. That is the natural earth. We need to inspire these children to preserve this. We need them to ask, "How did it turn into this?" In my program, we went to the sequoias for a while and then we went back home. As our van was coming down from the mountains, we passed beautiful green trees, and then we went down further and saw a little bit of logging. We keep going further, more logging. It started to look like the desert. As we continued, the trees were changing color, becoming brown, and so did the color of the sky. When we got closer to Fresno County, the air was gray from pollution. And there were no more trees, just highways and buildings.

But in my organization, one of our projects is to plant trees. We take dozens of trees to different communities—a high school, an elementary school, just different areas. Some people may think, "What's one tree?" It's a lot. When I plant a tree we are undoing a little bit of the bad stuff that we're doing to our environment.[80]

And it's a joy. In those hours when you feel that joy, that's when you can dream of a different way of life.[81]

POSTSCRIPT

After my meeting with Ms. Madrigal, we continued talking and decided to work together on a project about farmworkers. As of this writing, January of 2024, we have brought the artist and filmmaker Paulina Sierra into our discussions, with the object of shooting a short documentary in the Fresno area in March of 2024. We are now in our preproduction phase and are talking to undocumented farmworkers from Parlier, Mendota, and Fresno. Ms. Madrigal has been responsible for bringing these interviewees into the project. During one of these conversations, which took place on January 16, 2024 on Zoom, a farmworker named Adela told us "Life here is sad. We are essential for this country. I would like people in the U.S. to recognize us. I live with the fear that they are going to catch me one day and deport me. People don't know about the sacrifices that we make for the fruit and vegetables that they eat. Farmworkers work with depression. Sometimes they are sad because they have to harvest when someone is sick and you can't see them, or when someone has died and you can't go to their funeral. There are tears on the fruits and vegetables that arrive on Americans 'tables."

80. *1,700 New Trees Coming to South Central Fresno under New Clean Air Program*, SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DIST. (Mar. 31, 2023), https://ww2.valleyair.org/news-outreach-and-education/news/1-700-new-trees-coming-to-south-central-fresno-under-new-clean-air-program [https://perma.cc/YY3M-X4FK] (describing the "Adopt-A-Tree program, led by Central California Environmental Justice Network (CCEJN)," which will provide 1,200 trees to residents and business owners in Fresno).

81. *See, e.g.*, Alexis Yeboah-Kodie, *Meditations on Joy Full Leadership and Black Liberation*, 37 HARV. BLACKLETTER L. J. 65, 116 (2021) ("[L]et me get into the activism that cultivates joy because Black people deserve to be joyous.").

When Adela began to cry, the group went quiet. The silence was broken by Ms. Madrigal's gentle voice. "Adela, I want to thank you so much," she said. "Thank you for sharing your stories."

A Surprising Ally: Harnessing the Power of Procedure in Domestic Violence Tort Cases

Andrew Bradt & Mallika Kaur†

ABSTRACT

Tort remedies for domestic violence, while not new, are not widely used. Many states do not explicitly provide for them, and those that do may find their goals stymied by procedural obstacles that legislatures did not consider. This paper highlights a recent case that the California legislature, leading the country with its specific Domestic Violence tort, likely intended its statutes to cover, thereby providing compensation to the plaintiff. But the case nearly foundered on an objection to personal jurisdiction and required an appellate opinion to reverse the trial court and get the case out of the starting gate. This delay—and the risk to the plaintiff's recovery— was unnecessary and easily avoidable. Legislators and judges following California's lead in actualizing domestic violence tort remedies should clarify their statutes' jurisdictional reach and the choice-of-law effects in the text of their bills. States have always had a great amount of leeway and vary greatly in their treatment of Domestic Violence torts. In 2024, as some states seek to provide specifically for this remedy for domestic violence survivors, they can preempt procedural challenges—that are especially foreseeable given everything known about tactics employed in Domestic Violence litigation—to truly make DV torts less illusory.

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INTRODUCTION

> "…[Defendant]'s actions easily satisfy the minimum contacts requirement. If a negligent car accident or dog bite suffices, surely an assault [by an abusive husband] does, too."[1]
>
> –CA Appellate Judgment, October 20, 2021.

Few practicing lawyers will remember their mandatory torts courses including domestic violence (DV) torts cases: civil suits for damages by those escaping and surviving domestic violence.[2] All legal remedies for domestic violence survivors[3] have become more attainable in recent decades, but of the various criminal and civil options, tort remedies remain underutilized. Recognizing the inadequacy of common law tort claims in providing sufficient remedy due to the unique dynamics of domestic violence, some states have now developed specific torts and statutes to support victims filing for damages against their abusers. Other states rely on case law that has sought to free the application of common law tort claims (such as assault and battery) from vestiges of discriminatory legal principles and cultural attitudes that disadvantage the

1. Doe v. Damron, 70 Cal. App. 5th 684, 692 (2021).
2. Understood by experts as any tactic/s used to exert power and control over an intimate partner or other family member, including but not limited to, physical, sexual, emotional, financial, technological abuse. Definitions in criminal and civil codes vary, and are often much more limited as well as historically centered on physical violence (one possible tactic of abuse). Data from Centers for Disease Control's National Intimate Partner and Sexual Violence Survey (NISVS) show that DV affects millions of people in the U.S. each year. Fast Facts: Preventing Intimate Partner Violence, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html [https://perma.cc/5RLW-8UMG].
3. Various terms are used for those who are subjected to the power and control dynamics of domestic violence. This paper largely uses the term "survivor," employed and preferred by many who do not see their identity as a "victim." We acknowledge the reality that many victims of DV do not survive and that others who do survive wish to reclaim and remove shame from the word "victim." There should perhaps be no one default term; to return agency to someone who has been victimized, the individual should determine how they prefer to be to identified.

plaintiff-survivor. Survivors of domestic violence usually do not consider bringing DV tort actions for various reasons (such as lack of awareness about DV tort remedies, overwhelming fear of retaliation by the abusive party/defendant, preoccupation with attaining a safe distance from the abusive partner/defendant, and internalized biases about victims of gendered violence seeking monetary restitution). Even if the survivor has an attorney (typically in the area of family law), they too usually do not consider a tort remedy or inform the client of this option.[4] The illegality of suing for interspousal torts for much of U.S. legal history further contributes to the lack of legal clarity and activity; DV torts are usually not litigated in U.S. courtrooms.

Meanwhile, the legal system as a whole regularly interacts with the ubiquitous[5] societal problem of domestic violence. Domestic Violence remains the single largest category of police calls in many states.[6] The interaction of victim-survivors with the criminal legal system—where they are a "witness" for the prosecution of a crime rather than the driving agents in the case about their most intimate experiences—remains considerable, even if fraught.[7] In the civil system, the restraining order framework (that includes possibility of no-contact and stay-away orders) is regularly employed by many survivors. This most sought-after legal remedy for DV survivors[8] was the result of activists seeking non-criminal alternatives for survivors. Even before that, the criminalization of domestic violence was itself the result of sustained activism by anti-violence feminist activists. Now, through racial justice protests across the United States, as connections and tensions between decarceration, defunding the police, and domestic violence have been brought into sharper focus,[9] additional remedies

4. Some commentators assert that this failure may amount to malpractice. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 7 (2005).

5. *See, e.g.,* NAT'L CTR. FOR INJ. PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2015 DATA BRIEF – UPDATED RELEASE (2018), (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf ("about 1 in 4 women and 1 in 10 men experienced contact sexual violence, physical violence, and/or stalking by an intimate partner and reported an IPV-related impact during their lifetime.") [https://perma.cc/T9JY-AN8K].

6. U.S. DEP'T OF JUST., NAT'L INST. OF JUST., PRAC. IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENF'T, PROSECUTORS, AND JUDGES (2009), https://www.ojp.gov/pdffiles1/nij/225722.pdf. [https://perma.cc/56LV-LH4P].

7. *See, e.g.,* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases,* 37 FLA. ST. U. L. REV. 1 (2009), https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1077&context=lr.

8. As of 2014, protection orders have reportedly been the most widely used legal remedy against domestic violence above both the tort system and criminal justice system. *See* Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015 at 1019 (2014).

9. *See* Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, THE APPEAL (Jul. 28, 2020), https://www.typeinvestigations.org/investigation/2020/07/28/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence [https://perma.cc/PV2T-XJQR] ("She pointed to studies that show survivors of domestic violence are less likely to report abuse

independent of the criminal system are of renewed interest.

Might victim-survivors of domestic violence employ the civil legal system and sue for damages to recoup losses and avoid (or even correct) the various complications and disempowerment they feel in the criminal system?

State laws vary greatly in their approach to domestic violence civil suits. Despite the variance in state laws around DV torts, in 2023, the reality of interstate connectedness cannot be overlooked: people travel for work, for pleasure, for transit, and are coerced or trafficked across state lines. Given the pervasiveness of domestic violence, some are in abusive relationships and may be abused by their partner while both are in another state. If this non-home state seeks to provide a civil remedy for DV survivors, it should also account for and preempt procedural challenges (especially foreseeable given everything known about tactics employed in DV cases)[10] that may further dissuade survivors from employing this relatively novel remedy. A recent California case highlighted in this paper illustrates the danger of lack of jurisdictional specificity vis-à-vis civil remedies for DV survivors who may be non-state residents. As the employment of tort remedies for domestic violence gradually increases, we suggest states further clarify their jurisdictional reach and intentionally make DV tort remedies less illusory.

First, this paper briefly describes the evolutionary arc of civil remedies for DV survivors in the U.S. and lays out the context for DV tort remedies. Next, it describes a recent appellate case where a survivor sought to apply California's specific DV tort statute but had to first endure the arduous process of an appeal on procedural grounds. Third, it describes the grounds for the appellate win by the survivor, in which black letter civil procedure provided the winning argument. The fundamental procedural hook on which this case won illustrates how seemingly obvious procedural law still may not prevail over a trial judge overseeing a DV tort case, given the dynamics and prevailing myths of domestic violence and the relative novelty of DV tort suits.

The final section of the paper zooms out from this specific case to the more general lesson we can draw from it: to achieve their intended purpose, legislatures seeking to provide specific tort remedies for DV victims should be explicit about procedure and choice of law. Defendants will naturally seek to avoid liability on procedural grounds—indeed, that is their right. And the present reality is that when it comes to tort cases, those with multistate connections face even greater procedural hurdles than they did just a decade ago. Moreover, in multistate cases

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when they think that will lead to an arrest and research showing that police are often unsympathetic to victims. Other studies have found that police themselves are often the perpetrators of domestic and sexual violence, rendering them undesirable as a source of help, particularly for women of color who experience much greater rates of violence, including sexual violence, from police. Interactions with the police can also exacerbate existing conditions, like economic instability or trauma.").

10. *See, e.g.,* David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429, 430 (2015) ("Domestic violence survivors and their advocates have long known that abusers often use the legal system to continue to exert power and control over survivors years after a relationship has ended, particularly through litigation in family court").

—which are inevitable and perhaps increasingly common—matters of jurisdiction and choice of law are challenging. Legislatures, however, have significant constitutional leeway in these areas. By making clear the intended jurisdictional and territorial scope of the statutes, legislators can better ensure effectiveness and make litigation more efficient by heading off expensive and delay-producing procedural objections.

To conclude, the paper thus illustrates that validation by the law of procedure need not be exceptional. Instead, states may further guarantee a meaningful DV tort remedy by explicitly stating their jurisdictional intent.

It is unlikely and unusual for a practicing lawyer to remember domestic violence law discussed in their civil procedure class. Indeed, this paper calls on advocates for statutory reform and proceduralists to be in dialogue at the statutory drafting phase and to facilitate these statutes' effectiveness. That is, if procedural hurdles are considered from the start, they need not be obstacles at all. To the contrary, procedure can, and should, be an ally to justice. Recognizing the power of procedure in DV tort cases will be another corrective step to bring these cases up to par with other civil cases, to signal a viable expansion of legal options for survivors, and to send a wider societal message that domestic violence is no longer overlooked by any law, in letter or spirit.

I. FROM COVERTURE AND "RULE OF THUMB" TO RIGHT TO SUE AN ABUSIVE PARTNER

A long cultural history dissuades women from suing their intimate partners; for too long they were legally prohibited from doing so in the U.S. Inherited English common law rendered married women property (chattel) of their husbands. Husbands were the sole legal identity of the married unit before any court of law (doctrine of coverture) and could admonish and punish their wives (doctrine of chastisement). The late eighteenth-century "rule of thumb" only limited the girth of the rod a husband could use to beat his wife.[11] In this subordinate status, wives suing husbands was rendered culturally unthinkable; for those who still dared, the law upheld the State's interest in 'protecting the sanctity of marriage' (doctrine of non-interference) and gravely disadvantaged women.[12]

As the decades turned slowly, slowest of all for those trapped in marriages marred by abuse, and women's rights were gradually recognized, the vestiges of common law retained their hold. Marital rape was not illegalized by all U.S. states until 1993.[13] It is then unsurprising that suing a spouse for damages remained

11. *See* State v. Rhodes, 61 N.C. 453, 454 (1868) ("A man may whip his wife with a switch as large as his finger, but not larger than his thumb, without being guilty of an assault."); Bradley v. State, 1 Miss. 156, 157 (1824) (discussing and recognizing a doctrine in which it is proper for a husband "to use a whip or rattan, no bigger than [their] thumb, in order to inforce[sic] the salutary restraints of domestic discipline.").
12. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122-41 (1996).
13. Jennifer A. Bennice and Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 TRAUMA, VIOLENCE, & ABUSE 3, 228, 231 (2003).

discouraged, in letter and practice. Interspousal tort immunity, which prohibits one spouse from suing the other during the marriage,[14] is facially neutral but creates irrefutably disparate impacts given the gendered nature of domestic abuse. By blocking abused partners from suing those abusing them, it effectively prohibits wives from suing husbands. Today, some states still have not entirely abolished interspousal tort immunity and allow for partial immunity.[15] Women seeking civil remedies against intimate partners remain disadvantaged in bringing and sustaining litigation, an already fraught course of action for those seeking to escape abuse.

In the twentieth century, advocates challenged societal and cultural attitudes and insisted on the right to be free from abuse in intimate relationships and sought reforms from the legal system. Advocates urged police and the criminal legal system to recognize domestic violence as a crime rather than a 'private problem.' Thus 1994's Violence Against Women Act (VAWA) was a significant shift and has long been seen as a major achievement: it provided considerable funding for criminal arrests and prosecutions of domestic violence as a crime against the public and not an impenetrable private action.[16] The original VAWA, part of the Violent Crime Control and Law Enforcement Act of 1994,[17] led to an earlier unexpected collaboration between feminists and law enforcement,[18] which would only deepen over the years. Overreliance on the criminal system responses to domestic violence has come under increased criticism, heightened during the recent Black Lives Matter protests and dialogues.[19] But the original VAWA also contained an important non-criminal federal remedy.

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14. *See generally* Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational, and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251 (2002).
15. Relevantly, Georgia is one of these states. Barnett v. Farmer, 308 Ga.App. 358, 362 (Ct. App. 2011) (note 15). *See generally* WILLIAM L. PROSSER, LAW OF TORTS, § 122 at 863 (4th ed. 1971); Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 454-457 (2013); Douglas D. Scherer, *Tort Remedies For Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 562 (1992).
16. The proportion of Violence Against Women Act funds allocated to non-criminal options or social services for survivors shrunk over next two decades. *See, e.g.*, Jill Messing, Allison Ward-Lasher, Jonel Thaller, & Meredith E. Bagwell-Gray, *The State of Intimate Partner Violence Intervention: Progress and Continuing Challenges*. J. SOC. WORK (2015), https://doi.org/10.1093/sw/swv027 ("[I]n 1994, VAWA appropriated approximately 62 percent of funds for criminal justice and 38 percent for social services. Whereas VAWA authorizations have nearly doubled to $3.1 billion in 2013, the proportion of funding for social services has decreased to approximately 15 percent of the total, resulting in a smaller dollar amount appropriated for social services in 2013 than in 1994.").
17. Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 2014, 2015 (1994).
18. *See e.g.,* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (Univ. of Cal. Press2020); *see also* Mimi E. Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization*, 1973-1986, 24 ISSI GRADUATE FELLOWS WORKING PAPER SERIES No. 2013-2014.70 (2015).
19. *See e.g.,* Am. Bar Ass'n, Section of C.R. and Soc. Just., "Restorative Justice and Gender Based Violence," YOUTUBE, https://www.youtube.com/watch?v=JVy-5u17M08.

The VAWA of 1994 created a federal civil cause of action for gender-motivated violence, including domestic violence.[20] This "civil right for women," as described by VAWA, was struck down by the Supreme Court in 2000, in *United States v. Morrison*, holding that Congress had overstepped its authority (and that neither the Commerce Clause nor the Fourteenth Amendment allowed Congress to enact such private causes of action).[21]

The extinguishment of VAWA's DV-specific civil remedy at the federal level was a setback that some states took it upon themselves to immediately correct. A minority of states[22] have developed their own specific torts, modeled after the now defunct federal tort. The remedy is not always statutory. In some cases (notably New Jersey and Washington), case law has clearly interpreted and recognized the DV tort.[23]

In more states, monetary recovery is allowed in varying amounts through the much more prevalent civil legal system governing domestic violence: the civil restraining order (e.g., in New Mexico).[24] Long before the recent cycle of debates around the criminalization of domestic violence, anti-violence advocates also sought non-criminal responses to domestic violence. At its best, the DV movement has championed the central principle of returning choice and autonomy to those victimized by domestic violence. The option of filing a civil restraining order was an important advancement of the 1970s to 1990s feminist movement in the United States. Within restraining orders, survivors can obtain some financial recuperation.[25] While more limited than a possible tort recovery, it is some states' concerted attempt at filling the void of lack of a specific DV tort statute.

California recognized the unique tort of domestic violence in Civil Code section 1708.6, which took effect in 2003.[26] "Because California already had statutory torts providing the sort of civil remedies referred to in *Morrison* [the U.S. Supreme Court case invalidating the federal civil remedy] in the areas of sexual battery (which includes rape) and stalking, Civil Code section 1708.6 focused

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20. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13981 (108 Stat. 2014, 2015) (1994).
21. United States v. Morrison, 529 U.S. 598 (2000).
22. Five states and one municipality have recognized a domestic violence tort: California (Cal. Civ. Code § 1708.6); Illinois (740 Ill. Comp. Stat. Ann. 82/1-20); Florida (Fla. Stat. Ann. § 768.35), NJ (N.J. Rev. Stat. § 2C:25-29(13)(b)(4) (2017)); Washington (recognizes tort of Battered Woman Syndrome under Jewett v. Jewett, No. 93-2-01846-5 (Wash. Super. Ct. 1993)); and New York City (§ 7:16. Victims of Gender-Motivated Violence Protection Act (NYC Administrative Code §§ 8-901 through 8-907); *see also* Camille Carey*, Domestic Violence Torts: Righting A Civil Wrong* at 709.
23. Washington: Jewett v. Jewett, No. 93-2-01846-5 (Wash. Super. Ct. 1993); New Jersey: Cusseaux v. Pickett, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1995).
24. *See* New Mexico Family Violence Protection Act, ch. 286, § 1; 1999, ch. 142, § 1, §40-13-5(A)(5), (providing that "[a]s a part of any order of protection, the court may . . . order the restrained party to reimburse the protected party or any other household member for expenses reasonably related to the occurrence of domestic abuse, including medical expenses, counseling expenses, the expense of seeking temporary shelter, expenses for the replacement or repair of damaged property or the expense of lost wages.")
25. *See, e.g., id*.
26. Cal. Civ. Code §1708.6 (West 2003).

solely on domestic violence."[27] The legislature clearly stated its intent to create this specific tort "modeled after provisions in the federal Violence Against Women Act that created a cause of action for gender motivated violence, which were struck down by the Supreme Court as lying beyond the powers of Congress. AB 1933 [the bill introducing this tort] has been amended to address specifically the issue of domestic violence, thus offering a more readily useable tool to the victims of domestic violence, who may not, in some cases, be able to show that the violence was gender motivated."[28] California thus explicitly sought to fulfill the promise of more complete remedies[29] for those victimized by an intimate partner, recognizing the special dynamics involved that require a special tort remedy.

A. Promise and Perils of DV Tort Remedies

Tort remedies may be relevant to DV survivors for various reasons; the primary financial recovery is a non-trivial part of the tort remedy promise. Domestic violence causes economic losses, including medical expenses, legal expenses, and property damage expenses, among others.[30] The economic harm is not only the result of the abuse: it may in fact also be the means of abuse; economic abuse against intimate partners has been documented to include: loss of savings, loss of credit, or bad credit.[31] Survivors often lose work days, or may even lose their jobs altogether. Recouping monetary losses is only partially satisfied through other legal remedies (including civil restraining order systems, mentioned below) available to survivors. Further, monetary recovery for pain and suffering is not available through criminal law or family law remedies.

Tort remedies carry important non-financial promise for survivors as well. They may create an avenue for survivors to take charge of their own legal case—unlike a criminal case, where the prosecutor is in charge—and obtain a sense of closure. They may provide a day in court and possible vindication. Even filing a civil lawsuit and placing the abuse on record may be important for some survivors who have no other avenue for publicly holding their abuser accountable—

27. Pugliese v. Superior Ct., 146 Cal. App. 4th 1444, 1455 (2007).
28. Cal. Legislature, Cal. Assembly Comm. on Judiciary, Cal. Bill Analysis A.B. 1933, (Apr. 09, 2002), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml. [https://perma.cc/36FH-CUGZ]. There are two California statutes, one requiring proof of gender motivation and one not requiring this. *See* Cal. Civ. Code § 52.4 (providing a civil cause of action for damages for someone subjected to gender violence).
29. Cal. Legislature, Concurrence in Senate Amendments, Cal. Bill Analysis A.B. 1933, (Jun. 28, 2002), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB1933 [https://perma.cc/KG5J-HDXS]. ("This bill strengthens and clarifies the relief available to victims of domestic violence in two ways. First, this bill offers a clear statement of the state's policy that victims of domestic violence be able to bring suit against their abusers and recover damages. By creating a specific tort of domestic violence, this bill gives victims and the courts a clear statement of the rights and remedies of victims in these cases. Second, this bill allows an award of attorney's fees in a case based on domestic violence, a remedy not available under existing law.").
30. For example, also moving expenses, security system expenses and therapy expenses.
31. Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 991 (2012).

including in cases where the abuse did not result in a criminal charge, or where the survivor chose not to involve the criminal system. Survivors may believe a monetary loss will have a more lasting deterrent effect on an abusive partner, or even on other abusive people in society at large. Tort cases bring increased public attention to domestic violence; this may be important to a survivor's sense of contributing to the safety of other potential victims, from their individual abuser or from other abusive people employing similar tactics.

Despite possible options for recovery (financial and non-financial), tort remedies are not attractive to many survivors. As an initial matter, their relevance is diminished for survivors who suffered abuse at the hands of someone who has no assets. Further, survivor healing does not have a statute of limitations but tort claims do: by the time a survivor fulfills their primary safety priorities and is ready to emotionally engage with the abuser in a court, it may be too late to file the civil action. Also, most who complete the difficult and dangerous task of leaving want to limit engagement with their abuser, not extend it through lengthy court dates that allow for the other party to further their abusive tactics, including public denial, gaslighting, avoidance, and casting the survivor as at-fault, or unreasonable or worse as conniving and lying about the abuse to pursue other ends (for example, in the case highlighted below, for a nonimmigrant visa, a topic entirely unrelated to the lawsuit). Many survivors may be weary of returning to court given prior experiences.[32] Finally, insurance carriers do not cover torts against family members—perpetuating their own form of interspousal immunity—and this may further diminish survivors' chances of possible recovery should they successfully face the other obstacles.[33] The calculus for survivors of the trauma of domestic violence is considerable: they are acutely aware of the myths perpetuated about domestic violence and are not usually seeking an open forum where they may be subjected to prodding, disbelief, and victim-blaming.

Societal and related legal exceptionalism still attaches to claims of damages that result from gendered violence. Legal historian Professor Reva B. Siegel notes that "for a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery."[34] The civil remedy created by the 1994 VAWA sought to alleviate this by creating a specific tort remedy for survivors of gendered violence, including domestic violence.[35] The repudiation of this remedy leaves survivors in most states with only the option to pursue monetary damages against an intimate

32. *See, e.g., supra* note 12. *See also In re Marriage of Kuhlmeyer*, No. 82828-2-I (Wash. Ct. App. Nov. 7, 2022) (unpublished) [https://perma.cc/V3R9-G5D8] (affirming a trial court decision dismissing appellant's lawsuit against his ex-wife as abusive litigation under Washington's Abusive Litigation Act (ALA) Ch. 26.51 RCW).

33. Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002).

34. Siegel, *supra* note 12, at 2118.

35. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40302(c), 108 Stat. 1796, 1941 (codified as 34 U.S.C. § 12361(c),(d). This remedy was struck down six years later by the Supreme Court, *supra* note 21.

partner through general assault and battery claims, provided interspousal tort immunities can be overcome. Restrictive statutes of limitations for these general common law torts are one barrier. Their subjective elements are another barrier: given the sustained societal myths about domestic violence dynamics, elements such as whether the survivor acted "reasonably" foreseeably pose higher hurdles in cases involving intimate partner violence. For example, would a jury that still largely subscribes to the societal bias 'if it were so bad she/survivor could have just left,' believe the account of a survivor who stayed in the same household with their abuser despite no evidence of physical barriers to leaving the house?[36]

Even in the few states with specific DV tort remedies, there has not been a resultant avalanche of cases precisely because of the difficult dynamics of domestic violence and related emotional and safety considerations. Specific DV tort cases also do not overcome the financial reality that such remedies are irrelevant to individual survivors who were abused by partners without money, and from whom there is nothing to recover. They are by default less available to survivors without access to money: finding a lawyer, paying for costs and fees (even when a lawyer takes the case on a contingency), and having time to pursue these cases over possible years-long timelines is not an option for the majority of the country's DV survivors. Despite individual barriers, the existence of specific DV tort remedies forwards an essential function of signaling a clear and long overdue advancement in the law surrounding intimate partners.

II. CASE: NO VACATION FROM VIOLENCE

A recent case in California considered a Plaintiff's right to bring a DV tort suit as a non-resident subjected to domestic violence by a non-resident Defendant while they were on vacation in California.

The Plaintiff (henceforth "Ms. Doe"), according to her petition,[37] was a survivor of complex traumas outside[38] and within California when she filed the tort action against her ex-husband, Mr. Damron.

In December 2016, Mr. Damron traveled with Ms. Doe, his then-wife, from their home state of Georgia to Riverside, California. While on this vacation, Mr. Damron committed various acts of domestic violence against Ms. Doe, including

36. *See* Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. KAN. L. REV. 695, 725 (2014) (citing, among other cases, Chen v. Fischer, 843 N.E.2d 723, 725 n.2 (N.Y. 2005) (holding that New York does not recognize intentional infliction of emotional distress claims by one spouse against another); Artache v. Goldin, 519 N.Y.S.2d 702, 706 (N.Y. App. Div. 1987) "(dismissing an intentional infliction of emotional distress claim when parties lived together for fourteen years and had four children together)"; Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (holding that spouse's perpetration of domestic violence throughout a marriage was not sufficiently outrageous to sustain a tort claim for intentional infliction of emotional distress).

37. Doe v. Damron, 70 Cal. App. 5th 684, 688 (2021), *as modified* (Nov. 9, 2021).

38. "During marital dissolution proceedings in Georgia, Doe alleged that Damron abused her, and she filed claims against him for battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. Doe later dismissed these claims without prejudice. The Georgia court granted the couple a divorce, finding that the marriage was irretrievably broken." *Id.* at 688.

groping her violently and attempting to force her to perform oral sex on the street and later repeatedly raping and strangling her in their hotel room.[39] The next day, Mr. Damron was arrested in California, including for felony domestic violence[40] and Ms. Doe was interviewed and photographed by the police and transported to a hospital where she also underwent a sexual assault exam.[41]

In February 2017, Mr. Damron, who had been charged with a felony violation of Penal Code Section 273.5 for infliction of corporal injury resulting in a traumatic condition on a spouse or former spouse, took a plea deal and pled guilty to a misdemeanor violation of Penal Code Section 273.5. (A year later, his petition to have his California criminal conviction expunged was accepted. Mr. Damron allegedly perjured himself in furthering his expungement request.)[42]

Traumatized by the California assault, Ms. Doe had filed and obtained a no-contact restraining order against Mr. Damron in Georgia. Mr. Damron actively sought to reconcile with her, and under pressure, she eventually relented. They entered a period of reconciliation that is characteristic of abusive relationships.[43] The abuse continued into their next trip to California, just a few months later.[44]

In June 2017, Mr. Damron again traveled to California with Ms. Doe. Over the course of this trip, through various California counties, Ms. Doe alleged her husband verbally abused her calling her racial and sexist epithets, physically assaulted her, prevented her from calling the police, threatened to kill her, and strangled her.[45]

On returning to Georgia, Ms. Doe separated from Mr. Damron and they were

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39. Recent research recognizes strangulation as an indicator of high lethality danger and is now even recognized specifically in Cal. S.B. 40 (2007), codified as Cal. Penal Code §273.5 (2007). *See, e.g.,* JT Messing JT, JC Campbell, C. Snider, *Validation and adaptation of the danger assessment-5: A brief intimate partner violence risk assessment*, J. ADV. NURS. (2017). *See, generally,* https://www.strangulationtraininginstitute.com.

40. Opening Brief for Appellant at 12, Doe v. Damron, 70 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078). ("Scott was arrested for violation of felony Penal code section 288a(C)(2), "oral copulation by use of force or injury," Penal Code Section 262(A)(1), "rape spouse by force/fear/etc."; felony Penal Code Section 262(A)(3), "rape: spouse unconscious of nature of act"; and felony Penal Code Section 27[3].5(A) "inflicting corporal injury on a spouse," all based upon his violence against Jane. (CT 558:28 to 559:1-4.) An Emergency Protective Order issued protecting Jane from Scott. (CT 560:10-12; CT 580.)")

41. Opening Brief at 12. Ms. Doe would eventually receive $40,000 from the California Victims' Compensation Fund as reimbursement and/or coverage for bills and expenses resulting from Mr. Damron's violence against her. Opening Brief at 14.

42. Appellant's Opening Brief at 13, Doe v. Damron, 588 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078). ("In April 2018, Scott submitted a Petition for Dismissal (otherwise known as an "expungement" of his California criminal conviction, pursuant to Penal Code Section 1203.4. (CT 594-95.) In making his request, Scott falsely declared under penalty of perjury that he had "lived an honest and upright life since pronouncement of judgment and conformed to and obeyed the laws of the land." Scott omitted any mention of an August 29, 2017 Georgia court finding of willful contempt for violations of a protective order and violence toward Jane throughout 2017. (CT 559:6-18; CT 570; CT 594-595.)")

43. *See generally* National Domestic Violence Hotline, "50 Obstacles to Leaving," https://www.thehotline.org/resources/get-help-50-obstacles-to-leaving/#:~:text=Leaving%20is%20not%20easy.,regain%20control%20over%20their%20victim [https://perma.cc/H3J3-RHW7].

44. *See Damron*, 70 Cal. App. 5th at 688.

45. Appellant's Opening Brief at 12, Doe v. Damron (Cal. App. 1 Dist. 2021) (No. A161078).

eventually divorced in Georgia. "Prior to the final disposition of the dissolution, Jane withdrew her counterclaims concerning civil torts for battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. No final judgment on those issues was made. A final judgment issued on the parties' dissolution of their marriage only."[46]

In November 2019, just short of three years since the first vacation violence in California, Ms. Doe filed a Complaint for Damages in the Superior Court of Napa County for the torts of domestic violence (Civ. Code § 1708.6), Sexual Battery (Civ. Code, § 1708.5), and Gender Violence (Civ. Code, § 52.4). The complaint alleged the history of the violence in Georgia[47]—a state with no specific tort of DV—as well as the specific events that took place in various counties in California.

Mr. Damron, properly served by mail,[48] responded with a Motion to Quash Summons for Lack of Personal Jurisdiction and a Motion to Dismiss on Ground of Inconvenient Forum. Despite California twice being his chosen vacation destination where he assaulted his wife, was arrested and pled guilty for this violence on one occasion, and where he expunged his criminal record, Mr. Damron argued his alleged lack of connections to California made it unreasonable to subject him to California's jurisdiction.[49] In addition to claiming to have over two dozen witnesses, mostly in his home state of Georgia, Mr. Damron also focused on the fact that that the couple had been in legal proceedings in Georgia earlier and that the majority of the alleged violence occurred in Georgia, not California. Additionally, the defense raised/insinuated common questions employed against survivors: Why would she even travel with him if she was a victim of his violence? What ulterior motives did she have to pursue a civil case

46. Opening brief at 16; CT 562:14-17; Doe v. Damron, 70 Cal. App. 5th at 688.

47. In Georgia, the Plaintiff's only option for civil remedy would have been general assault, battery, and emotional distress claims. The limitations of pursuing these common law tort claims aside (explained in section II *infra*), the statutes of limitation for both had run as explained in detail in Ms. Doe's Opening Brief to the Appellate Court: "Plaintiff's potential causes of action stemming from Defendant's act of domestic violence against her in Georgia may include battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. There are no separate domestic violence or sexual battery torts in Georgia. The statute of limitations for all three torts in Georgia is two years. (Ga. Code Ann. §9-3-33; *see* Gowen v. Carpenter, 376 S.E.2d 384, 386 (1988) (applying the statute to battery); *see* Mears v. Gulfstream Aerospace Corp., 484 S.E.2d 659, 663 (1997) (applying the statute to intentional infliction of emotional distress).) All the acts that took place in California, including the most egregious acts of sexual battery (Riverside County) and strangulation (Napa County), took place over 2 years ago— in 2017. The strangulation took place in June 2017. The sexual battery took place in December 2017. The statute of limitations has now run on those claims for battery. While there is a Georgia statute that tolls the statute of limitations by 6 months after dismissal (*see* GA. CODE. ANN. §9-2-61), that additional 6-month period has also passed. As to any previous acts of battery that took place before December 3, 2017 — and there are many — the statute of limitations has also passed in Georgia. In short, Georgia is not an available forum for Plaintiff to litigate any of the physical violence in Georgia that occurred prior to February 28, 2018 (two years from the date of the motion at bar.) The intentional infliction of distress and emotional infliction of distress causes of action are similarly most likely barred by the [Georgia] statutes of limitations of 2 years." Opening brief at 15.

48. Pursuant to Cal. Code Civ. Proc. § 415.40.

49. *Damron*, 70 Cal. App. 5th at 688.

against him? Ms. Doe's status as an immigrant and non-U.S. citizen was also brought into focus.[50]

To further illustrate how California's exercise of personal jurisdiction would be reasonable in the totality of circumstances, Doe listed 10 witnesses located in California who could testify as to DV injuries immediately following the assault, the investigation of the Riverside sexual assault, Doe's state of mind immediately after the sexual assault, and California Victim's Compensation funds expended in the aftermath of the assault.[51]

After a hearing in the Napa, California trial court on July 15, 2020, the trial judge issued her order granting Mr. Damron's Motion. The judge found California's exercise of personal jurisdiction unreasonable in this case:

> "Both Doe and Damron are now, and were, at all times relevant to the allegations of the Complaint, residents of Georgia. Of the approximately 14 specific acts of violence alleged in the Complaint, only three are alleged to have happened in California. Doe alleges that each of these three occurred while the parties were travelling in the State.
>
> Doe does not allege any other connection between the State of California and either Damron or herself. Doe admits that no one (other than Doe and Damron) witnessed any of the assaults alleged to have occurred in California. Finally, both parties submit evidence that Doe has brought claims in the Superior Court of Cobb County, State of Georgia, against Damron based on the same facts alleged here.
>
> Damron presents evidence that appearing in California to defend this action would place considerable burdens on him. Among these, Damron specifically identifies 20 individuals, including Doe, who reside in Georgia and who Damron maintains are or may be witnesses to the events alleged in the Complaint.
>
> In light of the foregoing, the Court finds that asserting personal jurisdiction over Defendant in this matter would not comport with either fair play or substantial justice."[52]

Ms. Doe appealed. Though many of the financial barriers to civil recovery (discussed in section II) existed in her case, she was in the unique situation of being represented by a victim's rights and family law firm, ADZ Law, that continued representing her pro bono, and took charge of the appellate work in her case.

Nowhere does the California legislature state, in the statute or its history, that the DV tort statute seeks to provide protection only to those with established

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50. Respondent's Answer to Amicus Brief Filed by Family Violence Appellate Project, Doe v. Damron, 70 Cal. App. 5th 684 (Cal. App. 1 Dist. 2021) (No. A161078).
51. *See id*.
52. Opening Brief at 18-19. CT 692: 6-24. Citations to record have been omitted.

residency in California. The words "California" do not appear in the text nor its clearly stated intent:

> "The Legislature finds and declares the following:
> (a) Acts of violence occurring in a domestic context are increasingly widespread.
> (b) These acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners.
> (c) It is the purpose of this act to enhance the civil remedies available to victims of domestic violence in order to underscore society's condemnation of these acts, to ensure complete recovery to victims, and to impose significant financial consequences upon perpetrators."[53]

Appellate case law interpreting the DV tort statute had similarly not contended with a situation where both plaintiff and defendant were non-residents. Ms. Doe's attorneys concluded from their research: "We are very likely in new territory."[54]

III. CALIFORNIA APPEALS COURT CLARIFIES AND CLOSES A LOOPHOLE

> "…Damron's actions easily satisfy the minimum contacts requirement. If a negligent car accident or dog bite suffices, surely an assault [by an abusive husband] does, too." [55]
>
> –Appellate Judgment, October 20, 2021.

Ms. Doe's family law attorneys, who were also DV experts, were now contending with briefing questions of specific jurisdiction for the Appellate Court, from which they sought relief from the trial court's order. California's jurisdiction seemed all too obvious to her legal team. Although the Supreme Court's specific-jurisdiction jurisprudence is maddeningly complex at the margins, the touchstone is that there is jurisdiction over cases against out-of-state defendants when the plaintiff's claim arises out of or relates to the defendant's purposeful contacts with the forum state.[56] After all, the Defendant had chosen to travel to California with his then-partner, had committed acts of violence including strangulation and rape against her in California, and, unlike most cases of intimate partner violence, had even pled guilty in California. But Mr. Damron was, at least in the trial court, able

53. Cal. Legis. Serv. Ch. 193, § 1(a)-(c) (A.B. 1933, eff. Jan. 1, 2003). https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200120020AB1933 [https://perma.cc/VJ25-QX78].
54. 2020 Memorandum and personal correspondence with Ms. Doe's attorneys regarding internal process and strategy (on file with author).
55. *Damron*, 70 Cal. App. 5th at 692.
56. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021).

to emphasize a dearth of direct case law as well as the relative novelty of the DV tort statute. So, while to Ms. Doe's lawyers, personal jurisdiction seemed clear, they would need to explain their position to an appellate court that might feel reluctant to interpret California's general long-arm statute to cover these facts, as the trial court had been.

Co-author Kaur, as Of Counsel with ADZ Law and a nationally recognized expert on intimate-partner and sexual violence,[57] solicited an amicus brief from a civil procedure expert who could elucidate the personal jurisdiction jurisprudence and course-correct the trial court's hasty analysis. Kaur contacted co-author Bradt, a professor of civil procedure at UC Berkeley School of Law, where Kaur also teaches courses on domestic violence. While the two had never collaborated before, and neither had worked at the intersection of their respective fields, the immediate importance of working on this case was apparent to both. Recognized nationally as an expert on civil procedure, and the author of textbooks on the subject,[58] Bradt immediately recognized the opportunity to not only correct a serious error, but also to develop appellate precedent regarding personal jurisdiction in DV tort cases and more generally. He began to work on an amicus brief. It must be noted that such collaboration with a professional proceduralist is not the kind of resource a typical plaintiff would have. And, although this sort of joint effort is a credit to the culture of Berkeley Law, it is exceptional in most cases. Most plaintiffs do not have an eager proceduralist on call, and most proceduralists cannot draw on an expert in the substantive law. The importance of corrective appellate caselaw on the procedure of DV torts was thus all the more apparent to the co-authors in their support of the lawyers at ADZ Law championing Ms. Doe's case. Indeed, one goal of this paper is to encourage such collaborations in the future—but also to make them less necessary by encouraging legislators to anticipate procedural issues in advance.

In this case, Bradt's amicus brief expounded both on how the almost eight decades of jurisprudence around the *International Shoe* test undoubtedly established required contacts between the Defendant and California, and why the trial court's perfunctory analysis did not "pass muster under the U.S. Supreme Court's reasonableness jurisprudence."[59]

Another detailed amicus brief supporting a finding of jurisdiction in cases where the DV is committed in CA, even though both parties are non-residents, was filed by Family Violence Appellate Project, a California and Washington state non-profit legal organization focused on appellate representation of survivors. It

57. Professor Kaur has worked with victim-survivors of gendered violence for two decades, including as an emergency room crisis counselor, expert witness on domestic violence and sexual violence, researcher, and attorney. *See https://www.law.berkeley.edu/our-faculty/faculty-profiles/mallika-kaur/#tab_profile*.

58. Professor Bradt has taught Civil Procedure at Berkeley Law for over a decade and is a co-author on two leading casebooks in the field. *See https://www.law.berkeley.edu/our-faculty/faculty-profiles/andrew-bradt/#tab_profile.*

59. Brief for Andrew Bradt as Amicus Curiae Supporting Petitioner, Doe v. Damron, 70 Cal. App. 5th 684 (No. A161078).

was signed by twenty other state and national organizations and DV experts.[60] The case had an undeniable precedential value.

The California Court of Appeals for the First District made its decision in October 2021, nearly two years after the case had been filed.[61] It reversed the trial court's finding and held that "absent compelling circumstances that would make the suit unreasonable, a court may exercise jurisdiction over a non-resident who commits a tort while present in the state."[62]

The court summarized the "minimum contacts" doctrine and concerned itself with determining whether Mr. Damron's contacts with the state were sufficient to constitute "specific jurisdiction."[63] For his part, the court noted, Mr. Damron had vigorously argued: "He had never lived, owned property, paid taxes, registered to vote, opened a bank account, or held a driver's license in California. His only contacts arose from his two trips to California with Doe."[64] During one of these trips, Mr. Damron admitted to assaulting Doe and thus pleading guilty to "willfully inflicting corporal injury on her." This travel to the state and injury to the plaintiff while in the state were found sufficient to meet the two *Ford* factors to support specific jurisdiction: "(1) the defendant's own actions must connect him or her to the forum state, and (2) the litigation must arise from or relate to the defendant's actions." [internal citations omitted].[65]

The opinion noted how these factors establish specific jurisdiction even in cases where the tort action occurred during a sole and brief visit, giving the example of a car accident caused by an out-of-state visitor.[66] Further, it noted that California's Supreme Court has found jurisdiction over an out-of-state dog owner in a dog bite tort action, finding it fair for the Defendant, "whose voluntary acts have given rise to a cause of action in a state to litigate his responsibility for that conduct at the place where it occurred."[67]

The appellate decision rejected Mr. Damron's claims of unreasonableness and clearly refocused on California's state interest in regulating abusive behavior. First, the court stated the indisputable interest in regulating tortious conduct in California (weeding out the red herrings in Mr. Damron's reasonableness

60. Brief for Family Violence Appellate Project as Amicus Curiae Supporting Petitioner, Doe v. Damron, 70 Cal. App. 5th 684 (No. A161078). ("We are joined in this request by the following state and national non-profit organizations and individuals: Alliance for Hope International; Battered Women's Justice Project; California Protective Parents Association; California Women's Law Center; Center for a Non-Violent Community; Community Legal Aid SoCal; Domestic Abuse Center; Doves of Big Bear Valley, Inc.; FreeFrom; Law Foundation of Silicon Valley; Legal Voice; Los Angeles County Bar Association Counsel for Justice Domestic Violence Project; Project Sanctuary; Public Interest Law Project; Sanctuary for Families; San Diego Volunteer Lawyer Program, Inc.; Christine M. Scartz; Stopping Domestic Violence; Walnut Avenue Family &Women's Center; and D. Kelly Weisberg.")
61. *Damron*, 70 Cal. App. 5th at 684.
62. *Id.* at 687.
63. *Id.* at 689.
64. *Id.* at 688.
65. *Id.* at 692.
66. *Id*.
67. *Damron*, 70 Cal. App. 5th at 692.

argument, such as the duration of the domestic relationship in Georgia). Second, the court unambiguously stated how California's interest extends to non-resident victims.

> "California law protects people from domestic violence, holds abusers to account, and provides a remedy for victims of spousal abuse that occurs in the state— without regard for whether the abusers or victims reside here. (See, e.g., Civ. Code, § 1708.6 [providing for liability for the tort of domestic violence]; Pen. Code, § 273.5; Hogue v. Hogue (2017) 16 Cal.App.5th 833, 839.) If a defendant has minimum contacts with a forum state, there is no additional requirement that the plaintiff be a resident of that state. (Keeton, supra, 465 U.S. at p. 780; Epic Communications, Inc. v. Richwave Technology, Inc. (2009) 179 Cal.App.4th 314, 336.) Constitutional limits on jurisdiction do not grant a free pass to tourists and business travelers—millions of whom visit California each year—to abuse their spouses or assault other visitors without fear of civil liability in the state." [68]

Finally, the Court was unpersuaded by Damron's argument that he would be unduly inconvenienced; it noted lack of specificity in the evidence Damron claimed was in Georgia, noting also that the Plaintiff listed nine specific witnesses in California.

With this reversal, Ms. Doe and her pro bono attorneys were able to proceed once again in trial court, now in Riverside County (after a stipulated change of venue).

Almost four years after filing the Complaint in November 2019, jury selection began in October 2023 and the trial took place over the span of six weeks.

Doe's intersecting vulnerabilities, including her immigration status and single motherhood, were brought into issue by Damron again in an effort to have the jury question her motivations to file a tort suit. Ms. Doe's lead trial attorney Jessica Dayton from ADZ Law recounts:

> "On cross examination, defense counsel tried to imply that Ms. Doe, a native Spanish speaker, was using an interpreter for manipulative reasons. They made false connections regarding the timing of marrying Mr. Damron, as well as regarding the timing of the filing the civil lawsuit. Their strategy was to paint Ms. Doe as manipulative, motivated by money and immigration gain. They implied negative inferences about her ability to work or spend time with her children after suffering abuse at the hands of Mr. Damron, rather than recognizing Ms. Doe could be a survivor doing her best to move on with her life."[69]

Eventually the jury returned a verdict for Ms. Doe. The award was however

68. *Damron*, 70 Cal. App. 5th at 9.
69. Email correspondence with Jessica Dayton (Feb. 6, 2023) (on file with authors).

limited; 10 out of 12 jurors found Mr. Damron liable for domestic violence against Ms. Doe. They awarded her full request for past and future economic damages in the amount of $188,000. They did not, however, award any general damages, finding contradictorily that Ms. Doe had experienced no pain and suffering.

IV. LEGISLATURES SHOULD HEAD OFF PROCEDURAL HURDLES WITH CAREFUL DRAFTING

State legislatures wishing to ensure that their DV statutes are maximally effective must take what one might call 'lawyer's law' into account.[70] Without fully addressing issues like personal jurisdiction and choice of law in the statutory language, legislators risk leaving the interpretation of their statute to judges who may feel compelled to limit its scope, as the trial court in *Damron* did.[71] And while the trial court decision in *Damron* was ultimately reversed on appeal, that result was far from certain, even though the Plaintiff's legal team believed that the law was clear. The reality is that domestic-violence-specific statutes are so new that there is little precedent that is on all fours. Moreover, procedural law is always in flux, as the Supreme Court's decade of personal-jurisdiction cases demonstrate.[72] And even though the right result was eventually reached in *Damron*, it was not without delay and uncertainty. The failure to address procedural issues in the text of the statute very much could have spelled doom for this case had the court of appeals not felt compelled to reverse.

If personal jurisdiction over the defendant had proved to be an insuperable obstacle in *Damron*, the effectiveness of California's statute would have been in serious doubt in all cases other than those where both parties were domiciled in California and all the tortious acts occurred in California. Such is the power of procedure.[73] No longer may any sophisticated lawyer refer to the law of procedure (or analog fields like conflict of laws or remedies) as "adjective law," acting only as the "handmaid" to the substantive law.[74] Setting aside that there is no meaningful way to divide the world between substantive and procedural law, what should be clear is that the procedural law is equally important to the substantive law—and that when procedure is mismatched to legislative intent, that intent may be thwarted.[75]

But procedure need not be an enemy. When thought through *ex ante* by legislators, specificity in procedure can go a long way toward ensuring that a

70. *See generally* Robert H. Jackson, *Full Faith and Credit—The Lawyers' Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).
71. Doe v. Damron, Napa County Superior Court, Docket No. 19CV001762 (Sept. 4, 2020).
72. *See* Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 457 (2022).
73. *See* Stephen B. Burbank*, Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706 (2004).
74. *Id.*; *cf.* Charles Alan Wright & Harry M. Reasoner, *Procedure—The Handmaid of Justice, Essays in Honor of Charles E. Clark* (1965).
75. *See* Karl N. Llewellyn, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930).

statute accomplishes its goals. Personal jurisdiction is a prime example. As noted above, California's DV tort statute contained no specific jurisdictional provision. This is not uncommon in California or other states that also have adopted a "pure long-arm statute," that is, a personal-jurisdiction statute that extends to the outer limit of what the Fourteenth Amendment allows.[76] In other words, states with pure long-arm statutes allow their courts to exercise as much jurisdiction as the Supreme Court permits. But what *Damron* illustrates is that even these maximal statutes can have holes. That is especially true during a period of constitutional flux like the one we are in now. The meaning of California's long-arm statute varies according to the Supreme Court's current jurisprudence, so what might have been acceptable in 1949, 1979, or 2009, might not be so today. In this case, the Court of Appeals corrected the confusion, but not without significant uncertainty and elbow grease.

One way that legislators can preempt these questions is by being specific in the statutory text about the intended jurisdictional scope of the statute. In the end, we were affirmed that our central argument—that California may assert jurisdiction over an out-of-state defendant who commits an intentional tort within California's borders—was uncontroversial. The legislature, however, could have made clear its intention to cover torts committed by visitors while in California by simply saying so in the statute. That is, statutory drafters should make clear in the statutory text the jurisdiction it intends to grant to state (and by extension federal) courts. For instance, drafters could canvas the current law of personal jurisdiction and make clear that some predictable scenarios are intended to be covered—for example, a tort committed by one Californian against another while outside the state, or torts committed by non-Californians while present within the state's borders. Of course, there are risks in specificity.[77] To the extent there is any uncertainty, legislators can include a savings clause such that any scenario not included may be adjudicated by the state's courts if allowed by the general long-arm statute. Conversely, legislators who want to limit their statute's scope more carefully can do so, as well.

It is of course true that any more specific statute will be subject to challenge by a defendant on constitutional grounds. For instance, even if the California statute specified that its courts would have jurisdiction over torts committed in the state by a non-resident, Mr. Damron could have asserted that the statute was unconstitutional. Still, the legislative intent would be clear. To the extent that a judge's espying "forum shopping" in a particular case—as the Supreme Court seemed concerned with in *Bristol-Myers* and *Ford*[78]—a specific jurisdictional

76. *See, e.g.,* CAL. CODE CIV. PROC. § 410.10 (West 1970) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). *See also* Zachary D. Clopton, *Long Arm "Statutes"*, 23 GREEN BAG 2d 89 (2020).

77. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 670 (1992).

78. *See Ford*, 141 S. Ct. at 1031 (distinguishing Bristol-Myers Squibb on the basis that there, the "plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State"); Gardner et al., *supra* note 72, at 468-69.

provision would make clear that California welcomes and encourages these cases and does not consider survivors filing in California to be kind of manipulation. Moreover, legislators could make life easier on lawyers and judges by providing accompanying notes and analysis explaining the reasons it concluded that jurisdiction over the denominated cases is appropriate. In this way, procedure can be a powerful ally. By making clear that the statute's jurisdictional scope has a strong constitutional foundation, specific procedural text can ensure the statute fulfills legislators' aims.

Personal jurisdiction, of course, is only one way that statutory drafters can be clearer about the intended scope of a statute. Much state procedural law resides in codes or rules, which typically track to at least some degree the Federal Rules of Civil Procedure.[79] To the extent these statutes demand specific provisions for pleading, joinder, discovery, and the right to a jury trial, legislators can again leave less to chance by being more specific in the text. Beyond code or rule-based procedure is, of course, procedural common law, within which, for purposes of this paper, we include choice of law, remedies, and preclusion.[80] Each of these areas are less likely to be defined by statute, and they each have constitutional dimension, whether as a matter of due process or federalism.[81] Like personal jurisdiction, being specific about statutory intent will better define the statute's ambit. To illustrate this, this paper focuses on choice of law.

Choice of law is a subject that terrifies many lawyers. Renowned former Berkeley Law Dean Prosser did the field no favors when he famously described it as a "dismal swamp,"[82] a label that has stuck over the intervening decades.[83] The reality of choice of law may, however, be easier than it seems if a legislator keeps it in mind. The natural presumption, if a statute is silent as to choice of law, is that legislators did not intend their statute to protect non-residents or apply to events occurring outside the state's territory.[84] But this is a presumption that attaches only to legislative silence. Legislators should be aware that the Constitution imposes only minimal limits on a state's power to apply its own law to a case.[85] So long as the forum state has "significant contacts" with the case at bar, the forum state may apply its own law.[86] Despite many opportunities, the Supreme Court has declined

79. John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1369 (1986) (noting the "pervasive influence of the Federal Rules on at least some part of every state's civil procedure"); *see also* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2019).

80. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 823 (2008).

81. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001).

82. William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

83. *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

84. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

85. Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 279 (1996); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 442 (1982).

86. *Compare* Allstate Ins. Co. v. Hague, 449 U.S. 302, 333 (1981) (holding that neither the due process clause nor the full faith and credit clause were violated by application of Minnesota

to make this standard stricter or to regularly police state choice of law.[87] States are therefore typically left to their own devices when it comes to their rules and methods for choosing law.

The result has been a cacophony—U.S. states follow at least six different "approaches" to choosing law, some of which are more complicated and nuanced than others.[88] Most prominently, some states adhere to more traditional territorially based rules, such as "apply the law of the state where the injury occurred," while others take more modern approaches that balance many factors, such as the parties' domiciles and governmental interest, to determine the most appropriate law.[89] Most statutory causes of action do not contain explicit choice-of-law provisions, so in cases with multistate elements, the choice of law is left (with maximal leeway) to the trial court judge. So, for instance, in a state that follows the old "lex loci delicti" rule that selects the law of the state where the alleged injury occurred, that state's DV statute would not likely apply to a tort committed outside the state, even if legislators intended it to.[90] The general choice-of-law rule would trump.

California, for its part, follows a "governmental interest" approach to choice of law.[91] Much has been written explaining California's methodology.[92] For our purposes, one can boil it down, with apologies for oversimplification. California will apply its own law if doing so will advance its statutory policy. It will defer to the law of another state only when California has no such interest, or another state's interest will be impaired significantly by applying California law.[93] Consider how this method might have thwarted the plaintiff's efforts in *Damron*: a California court might conclude that despite there being personal jurisdiction over the defendant, Georgia's tort law should apply because that was, at the relevant time, the parties' common domicile. If Georgia's tort law is less plaintiff-friendly than California's, the plaintiff might find herself worse off even in California's courts.[94] The legislature could, however, preempt this risk altogether by mandating in the statute that California law will apply in all cases where either one party is a California citizen, or the tort occurred within California. Such a choice-of-law rule, even if imposed by statute, is entirely consistent with the constitutional architecture. Defendants might challenge application of California law, but such a challenge would be futile since in all such cases California will

law), *with* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-23 (1985) (holding that application of Kansas law to members of a nationwide class with no connection to Kansas was unconstitutional).

87. Weinberg, *supra* note 85, at 442.

88. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 63 (2006).

89. *Id*.

90. *See id.* at 66.

91. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 578 (1980).

92. *See, e.g., id*.

93. McCann v. Foster Wheeler LLC, 225 P.3d 516 (2010).

94. *See id.*; *see also* Kearney v. Solomon Smith Barney, Inc., 137 P.3d 914, 936 (2006).

have the requisite "significant contact" with the litigation. Ultimately, then, legislatures can head off these problems with appropriate procedural foresight.

CONCLUSION

> "Constitutional limits on jurisdiction do not grant a free pass to tourists and business travelers—millions of whom visit California each year—to abuse their spouses or assault other visitors without fear of civil liability in the state." [95]
>
> –Appellate Judgement, October 20, 2021.

Even after survivors and their attorneys become well-versed in DV tort claims as a possible remedy, lack of textual clarity may render the DV tort remedy a non-starter for most plaintiffs. Among the inherent limitations of civil DV tort remedies, financial status is already a limiting factor (as discussed in section II). If a survivor must also appeal a case even before it begins, they are likely to not only incur more fees but are also more likely to lose their trial lawyer who is already working on a contingency basis and in an area of law that remains uncommon. In the California case described here, black letter civil procedure provided the winning argument and allowed the case to proceed.

This ameliorative appellate case, which may well have never proceeded in the absence of a very persistent and brave plaintiff and the availability of committed pro bono legal assistance (including the expert amicus brief), is a meaningful win for California's DV tort statutes as well as a cautionary tale for other state statutes seeking to effect civil remedies for gender-based violence. Statutes must be drafted with procedure as a prominent element, and not an afterthought. And the jurisdictional language of existing statutes must be amended to account for procedural issues instead of relying on appellate clarifications if and when a petitioner and their advocate are able to pursue an appeal. However, even short of action by legislatures, courts should recognize that they must consider state procedural law as an ally to facilitate the litigation. DV advocates may thus need to bring more cases to appeal to actualize DV tort remedies through spread of positive case law.

Finally, this case and the successful collaborations it engendered for creating positive appellate case law in California illustrates that the ubiquitous nature of domestic violence also requires remedial legal actions across silos—"family lawyer," "DV expert," "personal injury lawyer," "civil procedure expert"— and beyond the courtrooms where DV cases have traditionally been litigated.

95. *Damron*, 70 Cal. App. 5th at 9.

Re-Righting History: A Critical Race Perspective of *Dobbs v. Jackson Women's Health Organization*

Sophie Brill†

INTRODUCTION

In 1973, the Supreme Court held in *Roe v. Wade* that the Fourteenth Amendment of the U.S. Constitution protects the right to an abortion. Nearly fifty years later, the Court reversed itself with *Dobbs v. Jackson Women's Health Organization*, overruling *Roe* and its progeny and returning the issue of abortion to the states. In addition to overturning a rule that had been affirmed and re-affirmed many times over, the *Dobbs* decision effectively withdrew a right that had been understood as "fundamental" for nearly half a century. In truth, however,

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Roe stood on the shoulders of a long line of cases interpreting the Reconstruction Amendments—particularly the Fourteenth Amendment—in a way that willfully undermined the reach of those Amendments and prevented them from having the broad, affirmative powers they were meant to have.

Inspired by *Critical Race Judgments*, a collection of U.S. court opinions re-written a Critical Race perspective, this opinion re-writes the *Dobbs* majority decision as if it were written by a Supreme Court that acknowledges its flawed history and addresses it head-on.[1] The opinion re-frames the issue presented and uses historical context to show that reproductive autonomy is an issue of race as well as gender, and that the inability to control one's body is precisely the kind of harm the Reconstruction Amendments were meant to guard against. It then finds that Mississippi's 15-week abortion ban and the fetal personhood theory supporting it are nothing less than a continuation of the relentless state regulation and control that Black women have experienced since they first arrived on this continent. In holding that such policies violate the Reconstruction Amendments as they were meant to be interpreted, the opinion acknowledges the fact that the United States' practices have long conflicted with its founding promises, and demonstrates that only when that acknowledgement is incorporated into our legal framework can the two be brought into alignment.

SYLLABUS

Respondents challenge a Mississippi law that prohibits abortion care after the fifteenth week of pregnancy, several weeks before the point of viability. We decline to overturn a half century of legal precedent. Rather, we take this opportunity to review our past precedents and expand our previous holdings in *Roe v. Wade* and *Planned Parenthood v. Casey* regarding the Constitution's protection of reproductive autonomy. We find that the Mississippi law violates principles expressed in our founding documents and definitively embraced in the Reconstruction Amendments to the Constitution. Reproductive autonomy is a fundamental "liberty" interest and is entitled to equal protection under the law pursuant to the Fourteenth Amendment. Additionally, restrictions on reproductive autonomy violate the Thirteenth Amendment's prohibition of involuntary servitude and "badges and incidents" of slavery.

OPINION

Justice BRILL delivered the opinion of the Court.

I. ISSUE AT HAND

For more than fifty years, American law has recognized a constitutionally protected right to reproductive autonomy and privacy with respect to personal

1. *See generally*, Bennett Capers, et. al. Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law (2022).

decision-making and one's reproductive capabilities.[2] Since the Court's *Roe v. Wade* decision in 1973, this right has included a woman's[3] right to terminate her pregnancy before the point of fetal viability[4] without undue state interference.[5] This right is widely recognized as fundamental to a woman's ability to "participate equally in the economic and social life of the Nation," and has been repeatedly affirmed by this Court—most recently just two years ago.[6]

The law at issue here, Mississippi's Gestational Age Act ("HB 1510"), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." § 4(b).

Respondents, the only remaining abortion clinic in Mississippi, quickly challenged HB 1510, and a District Court found the law unconstitutional as a clear violation of long-standing precedent prohibiting abortion bans before the point of viability.[7] Mississippi does not dispute the fact that a fetus cannot be viable before at least 23-24 weeks of pregnancy.[8] The Fifth Circuit unanimously affirmed, observing that beginning with *Roe v. Wade*, Supreme Court precedent has established ("and affirmed, and reaffirmed") that the Constitution protects the

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2. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that parents have a right to control their children's upbringing and education); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to use contraception); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing procreation as one of the "basic civil rights of man"); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a right to have consensual sexual relations with the person of one's choosing); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting prohibitions on interracial marriage); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).
3. Although the Court will use the terms "woman" and "women" throughout this opinion, the Court hereby takes judicial notice that "individuals of all gender expressions may also become pregnant" and seek abortion and reproductive health services. *See* Brief for the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae Supporting Respondents at 2 n.5, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief for Howard University"]. This opinion applies equally to all individuals with the capacity to become pregnant and reproduce.
4. *See* Brief for Respondents at 5, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief for Respondents"]. Fetal viability is the point at which a fetus could conceivably survive outside the pregnant person's body, and today generally falls around the 23-24th week of pregnancy. *Id.*; *see also* Roe v. Wade, 410 U.S. 113, 163 (1973); *see also infra* notes 67-73 and accompanying text.
5. *Roe*, 410 U.S. at 153; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846, 874 (1992) (reaffirming *Roe*'s "essential holding" and establishing that before the point of viability states may regulate abortion but may not impose an "undue burden" on a woman's right to choose).
6. *Casey*, 505 U.S. at 856; *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); *see also* June Medical Services v. Russo, 140 S.Ct. 2103, 2112-13 (2020) (where the Louisiana statute being challenged was "almost word-for-word identical" to the Texas law that was struck down in *Whole Woman's Health*, thereby resulting in findings of fact that "mirror[ed] those made in *Whole Woman's Health* in every relevant respect and require[d] the same result," namely, that the law imposing undue burdens on abortion access was unconstitutional).
7. Brief for Respondents, *supra* note 4, at 7-8.
8. *Id.* at 8.

right to terminate a pregnancy before the point of viability.[9]

II. THE CONSTITUTIONAL QUESTION

Before the Court is the question of whether to overrule *Roe* and its progeny, which would require a finding that the Constitution does not protect the right to terminate one's pregnancy after fifteen weeks. In other words, we are being asked to overturn nearly fifty years of precedent. In defending HB 1510, the State of Mississippi boldly asserts that we should reconsider and overrule *Roe* and *Casey* and once again allow the States to regulate abortion as their citizens wish[10]—or, at the very least, to do away with the viability line. On the other hand, Respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*; they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after fifteen weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely."[11] They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*.[12]

We must first acknowledge that *stare decisis* alone is an insufficient reason to adhere to prior precedents. The doctrine of *stare decisis* is based on the idea that the rule of law underlying our Constitution "requires such continuity over time that a respect for precedent is, by definition, indispensable."[13] On the other hand, *stare decisis* recognizes that some rulings may come to be viewed "so clearly as error" that they must be re-examined and possibly overruled.[14] We would lack all

9. *Id.* (internal quotes omitted).

10. *See* Brief for Petitioners at 14-18, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392). Though Mississippi argues that overturning *Roe* and *Casey* would allow the States to regulate abortion as their citizens wish, polling indicates that the states that are currently working to restrict or ultimately ban abortion are doing so against the wishes of a majority of their citizens. *See, e.g.*, Alison Durkee, *More Americans Support 15-Week Abortion Ban—But Don't Want Stricter Restrictions—Poll Finds*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/alisondurkee/2022/04/01/more-americans-support-15-week-abortion-ban-but-dont-want-stricter-restrictions-poll-finds/?sh=71b35cbcbf5b [https://perma.cc/5EQK-5KBD] (discussing a *Wall Street Journal* poll finding that 55% of Americans believe abortion should be legal "in all or most cases"); *see, e.g.*, Sarah McCammon, *Poll: One year after SB 8, Texans express strong support for abortion rights*, NPR (Sept. 1, 2022), https://www.npr.org/2022/09/01/1120472842/poll-one-year-after-sb-8-texans-express-strong-support-for-abortion-rights [https://perma.cc/NZP4-M29P] (noting that one year after Texas's S.B. 8, which allows for civil lawsuits to enforce a prohibition on most abortions after about six weeks, six in ten Texas voters support abortion being "available in all or most cases."). Though the Court does not base its decision on public opinion, it is important to note that Mississippi's claim that HB 1510 is in line with the wishes of its voters is insincere and not supported by any reliable data.

11. Brief for Respondents, *supra* note 4, at 43.

12. *Id.* at 50.

13. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

14. *Id.* In order to maintain respect for precedent while ensuring that we are able to correct our past missteps, the doctrine of *stare decisis* provides several factors for the Court to weigh when determining whether to affirm or overrule a prior decision. *Id.* Those factors include (i) whether a prior holding has become unworkable; (ii) whether overruling a prior decision would result in societal instability or serious inequity to those who have relied upon it; (iii) the strength of the prior decision's reasoning and whether the rule of law has developed to the point where the prior ruling has been "discounted by society"; and (iv) whether the factual bases for a prior decision have changed so as to render the prior ruling irrelevant or an

credibility if we failed to recognize that the law has been used to create and perpetuate systems of oppression in ways that are wholly inconsistent with human rights principles and the promises of our founding documents.[15] Indeed, this Court has been instrumental in upholding and enforcing such laws, having taken as true—and enshrined into law—racist and prejudicial ideas about certain marginalized groups.[16]

In addition to perpetuating explicit discrimination, this Court has a long history of implicitly—or, in many cases, complicitly—creating and preserving discrimination in the law.[17] The Court's interpretation of the Reconstruction Amendments is a perfect example of these complicit biases at work. Since they were first ratified, this Court has, in many ways, failed to give the Reconstruction Amendments the sweeping, affirmative powers they may have—and indeed were intended to have—had. For example, in *Slaughter-House Cases*, the first time we interpreted these Amendments, we expressed doubt that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever…come within the purview of th[e Equal Protection Clause]," thereby restricting the Clause's reach to only a small subset of discriminatory actions.[18] The Court did this knowing full well that discrimination comes in many forms—not just explicit state-sanctioned racism. By contrast, one prominent

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unjustifiable method for dealing with the issue it addressed. *Id.* at 855.

Applying these factors to the central holdings of *Roe* and *Casey*, we find that *stare decisis* requires that they be upheld. First, there is nothing unworkable about the "undue burden" standard we set out in *Casey*. It sets forth a predictable yet flexible standard that allows for the balancing of interests and can be applied on a case-by-case basis. *See* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2335 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting). Second, *Roe* and *Casey* have created "overwhelming" reliance interests. *See id.* at 2343-2344 (noting that "all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe's* and *Casey's* protections."). Overruling them would therefore create profound disruption and inequities. Furthermore, as we will discuss in more detail in this opinion, we stand by the strength of *Roe* and *Casey*'s reasoning; if anything, developments in the legal and factual bases for those decisions have further reinforced their holdings. Far from supporting their overturning, *stare decisis* therefore requires that we uphold these decisions.

15. *See, e.g.*, Peggy Cooper Davis, *Loving v. Virginia*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 444–45 (Bennett Capers, et. al., eds., 2022); Francisco Valdes, *The Slaughter-House Cases*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 124 (Bennett Capers et. al., eds., 2022).
16. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) (justifying colonizers' "absolute title" to the land by characterizing Native Americans as "fierce savages . . . whose subsistence was drawn chiefly from the forest"); *Dred Scott v. Sandford*, 60 U.S. 383, 417 (1857) ("it is not a power to raise to the rank of a citizen any one born in the United States, who . . . belongs to an inferior and subordinate class"); *Ping v. U.S.*, 130 U.S. 581, 608 (1889) (favorably comparing the exclusion of Chinese immigrants to the exclusion of "paupers, criminals, and persons afflicted with incurable diseases").
17. *See* Michele Goodwin, *Complicit Bias and the Supreme* Court, 137 HARV. L. REV. F. 119, 127–28 (arguing that the Supreme Court acts with "complicit bias" where the Court (1) is "aware of a past, present, or future harm and does not intercede, with apparent knowledge that the impact will prejudice another"; (2) "shows an inclination to protect an individual or group based on relationship, affinity, or group characteristics"; and (3) "furthers the harm through silence and inaction."
18. Slaughter-House Cases, 83 U.S. 36, 81 (1872).

constitutional scholar concluded that the Equal Protection Clause was meant to have the dual effect of "impos[ing] on state and federal governments an absolute prohibition on the *denial* of equal protection to any person subject to their laws and jurisdiction," and "additionally impos[ing] on the same authorities a positive duty of *protection* against unlawfulness, whether private or public, which the states and federal governments now owe, equally, to all persons under their jurisdiction."[19] The result is that this Court's jurisprudence, particularly under the Reconstruction Amendments, has become "inhospitable" to claims arising out of laws or policies that, while not explicitly prejudicial, are the result of decades of systemic oppression.[20]

We must be mindful of the effects of the Court's biases, both on our past jurisprudence and this Court's reasoning in the case at hand.[21] For these reasons, any decision to uphold past precedent, regardless of how many times it has been reaffirmed, cannot be based solely on the principle of *stare decisis*. We therefore accept this invitation to revisit *Roe* and *Casey*, and take this opportunity to reconsider and expand on the jurisprudence on which they stand.[22]

This case requires us to consider the specific question of whether the Constitution, properly understood, confers a right to obtain an abortion. Though abortion is not explicitly mentioned, that does not end our analysis. It is well established that the Constitution, particularly with the addition of the Reconstruction Amendments, protects rights that are implicit in its meaning, even if those rights are not explicitly enumerated.[23]

Fundamental rights derive from the founding claims to the "natural law of liberty" embedded in the Declaration of Independence.[24] The identification and protection of fundamental rights "is an enduring part of the judicial duty to

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19. *See* Valdes, *supra* note 15, at 140 (emphasis in original).
20. Khiara M. Bridges, *Elision and Erasure: Race, Class and Gender in Harris v. McRae*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 117, 124 (Melissa Murray, et al., eds., 2019) (using as an example *Harris v. McRae*, where the plaintiffs, challenging a law prohibiting federal funds from paying for abortions, chose not to argue that the law in question constitutes discrimination on the basis of race or poverty in part because the Court's jurisprudence on race and class had become "inhospitable" to such claims).
21. Biases, while to some extent unavoidable, are disfavored in the law "because they introduce errors in judgment." Goodwin, *supra* note 17, at 140. Informed in no small part by such biases, this Court has, far too many times, struck down or undermined laws intended to protect vulnerable groups. *Id.* at 142.
22. *Contra* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2301 (2022) (Thomas, J., concurring) (inviting the Court to "reconsider all of this Court's substantive due process precedents").
23. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that parents have a right to control their children's upbringing and education); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to use contraception); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing procreation as one of the "basic civil rights of man"); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a right to have consensual sexual relations with the person of one's choosing); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting prohibitions on interracial marriage); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).
24. *See* Cheryl Harris, *Dred Scott v. Sanford, in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 305, 319 (Bennett Capers, et. al., eds., 2022).

interpret the Constitution."[25] This duty is not effectuated using any strict "formula," but rather by the exercise of "reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[26] One justification for this method of reasoning is that, as we have explained, "[t]he nature of injustice is that we may not always see it in our own times."[27] Indeed, the Founders and those who wrote and ratified the Reconstruction Amendments recognized this reality, and so they built into our Constitution the flexibility to "protect[] the right of all persons to enjoy liberty," even as we continue to learn its meaning.[28] Accordingly, our analysis must be guided by history and tradition only insofar as we must respect our history and learn from it.[29] However, we must be careful to avoid upholding laws simply because they reflect the way things have been done in the past, for, as we know, "if rights were defined by those who exercised them in the past, then received practice could serve as their own continued justification and new groups could not invoke rights once denied."[30]

We must be particularly mindful of our history when interpreting the Reconstruction Amendments, for their objectives were directly informed by the context in which they were drafted. The Reconstruction Amendments were ratified in response to the institution of chattel slavery and the Civil War.[31] They reflected an acknowledgement that our country's practices were in direct conflict with its founding promises, and took an affirmative step toward bringing the two in alignment.[32] Taken together, these Amendments—the Thirteenth Amendment, which prohibited slavery and any "badges and incidents" of the institution; the Fourteenth Amendment, which created a national citizenship vested with new rights of due process and equal protection upon which States could not infringe; and the Fifteenth Amendment, which granted freed men the right to vote—were not designed only to end the institution of slavery. These amendments prevent the law from being used to establish any "caste system" in the future, reinforce the original text of the Constitution, and expand protections of freedom and liberty for *all* people.[33]

Guided by these principles, we conclude that any law that imposes a

25. *Obergefell*, 576 U.S. at 663.
26. *Id.* at 664.
27. *Id.*
28. *Id.*
29. *Id*.
30. *Id.* at 671.
31. *See* Harris, *supra* note 24, at 319; *see also* Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution,* N.Y. TIMES, June 26, 2022, at A23, https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html?smid=url-share.
32. Harris, *supra* note 24, at 319; Goodwin, *supra* note 31, at A23.
33. *See* Slaughter-House Cases, 83 U.S. at 71–72 (observing the "pervading purpose" of the Reconstruction Amendments was the "freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."); Valdes, *supra* note 15, at 124–25.

condition of involuntary servitude or any other burden on a group that was similarly imposed on enslaved people pursuant to the institution of chattel slavery violates the Thirteenth Amendment. Additionally, any law that denies a fundamental liberty or imposes a burden on a particular group in a way that functions to oppress or subordinate that group violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Finally, when assessing the effects of the law at issue, we must consider the context and history of the law itself, including its proffered and actual effects.[34] Bearing in mind that there may be overlapping systems of oppression at work, we must evaluate the effects of the law from the perspective of those for whom the law is *most* burdensome.[35]

III. SLAVERY, SUBORDINATION, AND REPRODUCTIVE AUTONOMY

There is no question that the denial of reproductive autonomy was a key feature of the institution of chattel slavery, and that while the methods and goals may have changed, Black women's reproductive freedoms in particular have continued to be the subject of relentless state regulation and control.[36] Slavery's defining feature was its denial of Black people's humanity. Indeed, in order to relegate Black people to the status of property, the institution of slavery depended on the destruction of "any notion of Black personhood."[37] Denying enslaved people autonomy over their intimate lives was a key feature of these efforts.[38] For example, enslaved people were prohibited from entering into contracts, including marriage contracts.[39] Those who defied these rules and formed familial relationships received no protections, and many suffered forced separation when one partner was sold or loaned to other plantations.[40] Children were likewise regarded as the property of the enslaver rather than as a dependent of their parents and were frequently forcibly separated from their families.[41]

34. *See* Valdes, *supra* note 15, at 135–36.

35. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). Though white women have historically experienced state-sponsored efforts to control their reproductive lives, such regulations are most insidious and burdensome for Black women. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 154 (observing that feminist theory purporting to reflect *women's* experiences tends to center the experience of *white* women, thereby ignoring the fact that Black women suffer oppression not just as a function of their sex but also their perceived race. This allows white feminists to ignore not only the way their own race mitigates their experience of sexism, but also "often privileges them over and contributes to the domination of other women.").

36. *See* Brief for Howard University, *supra* note 3, at 3.

37. *Id.* at 4; Civil Rights Cases, 109 U.S. 3, 36 (1883) (Harlan, J., dissenting) (noting that the institution of slavery "rested wholly upon the inferiority, as a race, of those held in bondage").

38. *See* Melissa Murray, *Roe v. Wade*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 523, 527 (Bennett Capers et. al., eds., 2022); Davis, *supra* note 15, at 445.

39. *See* Murray, *supra* note 38, at 527; Davis, *supra* note 15, at 445.

40. Murray, *supra* note 38, at 527–28.

41. *See* Brief for Howard University, *supra* note 3, at 7.

After the importation of enslaved people was outlawed in 1808, the United States could no longer rely on the international slave trade for its supply of slave labor, and so the institution became dependent on the reproductive capabilities of enslaved women.[42] Enslaved women's value was therefore measured by their ability to reproduce, and their masters acted accordingly: enslaved women's sexual partners were controlled (and often forced on them, either in the form of rape by their enslavers or by being forced to "breed" with other enslaved people); pregnancy was rewarded; and failure to bear children was punished.[43] Enslavers received support from the newly professionalized medical field, which supported efforts to limit women's ability to control their fertility by launching a campaign to criminalize contraception and abortion nation-wide.[44] All of this was sanctioned and enabled by American law.[45]

Enslaved women resisted efforts to control their fertility, going to great lengths to avoid or end pregnancy using homemade contraceptives and abortifacients.[46] Given that the institution of slavery depended on their ability to reproduce, these efforts to control their fertility were a key method of resisting their enslavement and undermining the institution itself.[47] In short, state-sanctioned denial of reproductive autonomy was a critical tool of white supremacy and there can be no question that it constitutes a "badge and incident" of slavery.[48]

Even after they were freed from literal bondage, Black women continued to face sexual coercion, violence, and attempts to control their reproductive lives as part of the backlash to Reconstruction and the end of slavery.[49] Meanwhile, efforts to maintain white supremacy gave rise to negative eugenics policies, or the "weeding out of undesirable social elements by discouraging or preventing the birth of children with 'bad' genetic profiles."[50] Fueled by racist stereotypes about

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42. *Id.* at 5–6; Murray, *supra* note 38, at 529–30.
43. Brief for Howard University, *supra* note 3, at 5–6 (quoting Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 41 (1997)).
44. *See* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 24 (2017).
45. *See, e.g.*, State v. Mann, 13 N.C. 263 (1829) (holding that it is "the imperative duty of the Judges to recognize the full dominion of the owner over the slave," on the ground that "this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility greatly dependent upon their subordination," as well as for the "general protection and comfort of the slaves themselves"); Ross & Solinger, *supra* note 44, at 18 (explaining that enslaved women "did not have any of the sexual, relational, or maternal rights that white females could generally claim"); Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 34 (1997) (discussing one of America's first laws, which provided that children who were born to enslaved mothers and fathered by white men inherited the slave status of their mother).
46. *See* Murray, *supra* note 38, at 530.
47. *Id.*
48. *Id.* at 530–31; *See* Civil Rights Cases, 109 U.S. at 20 (noting that "the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery").
49. *See* Brief for Howard University, *supra* note 3, at 8–9.
50. *See id.* at 11 (quoting Harriet A. Washington, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE

the inferiority of Black people and Black women's unfitness for motherhood, thousands of Black women were forcibly sterilized between the late 1800s and late 1900s.[51] Forced sterilization was in fact so common in the state of Mississippi that it earned the nickname "the Mississippi appendectomy."[52] Again, these efforts were sanctioned and enabled by American law.[53]

Though restrictions on Black women's fertility are subtler and less overtly racist now than in the past, Black women continue to face a combination of systemic barriers and restrictions on access to care and resources. This effectively denies them the ability to control their reproductive lives. The advent of birth control in the early twentieth century represented a critical step for Black women trying to claim control over their own bodies.[54] Birth control and the ability to safely terminate a pregnancy presented Black women not only with the ability to resist white supremacist efforts to control their bodies, but also to protect themselves against high maternal mortality rates and decide for themselves how and when to become parents.[55] As we acknowledged in *Casey*, "[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."[56] This is especially true of Black women. It follows that the effect of denying access to these critical tools is to deny women of such control.

In Mississippi in particular, the State's restrictions on access to care and resources have impaired Black women's ability to control their reproductive lives, often with deadly consequences. For example, Mississippi's maternal and infant mortality rates are shockingly high, with Black women and infants facing significantly higher mortality rates than their white counterparts.[57] Yet far from

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PRESENT 66 (2006)).

51. *See* Brief for Howard University*, supra* note 3, at 11–12; *see also*, Ross & Solinger, *supra* note 44, at 51–52 (observing that while Black women were being forcibly sterilized, white women faced barriers to voluntary sterilization as part of a broader social effort to *encourage* them to reproduce, with the implication that more *white* children were good for society).
52. *See* Brief for Howard University, *supra* note 3, at 11.
53. *See*, *e.g.*, *id.* at 12 (quoting President Theodore Roosevelt's comment that "race purity must be maintained"); *see also* Buck v. Bell, 274 U.S. 200, 207 (1927) (rejecting a constitutional challenge to the forced sterilization of an institutionalized rape victim, reasoning that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.").
54. *See* Ross & Solinger, *supra* note 44, at 33 (showing that birth control represented a tool of empowerment even as it was weaponized to reduce Black fertility in service of the "public good").
55. Brief for Howard University, *supra* note 3, at 3.
56. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 856 (1992).
57. *See* MISS. STATE DEPT. OF HEALTH, MISS. MATERNAL MORTALITY REPORT 10, 12, 16 (April 2019), https://www.mspqc.org/wp-content/uploads/2020/10/Mississippi-Maternal-Mortality-Report-2013-2016.pdf) (showing that between 2013 and 2016, the Mississippi pregnancy-related maternal mortality rate was 22.1 deaths per 100,000 live births, and Black women suffered a maternal mortality rate nearly three times that of white women, in addition to accounting for "nearly 80 percent of pregnancy related cardiac deaths" in the state); MISS. STATE DEPT. OF HEALTH, 2019 & 2020 INFANT MORTALITY REPORT 10, 13 (2020) https://www.supremecourt.gov/opinions/URLs_Cited/OT2021/19-1392/19-1392-19.pdf, (showing that between 2018 and 2020, Mississippi had an average infant mortality rate of 8.43

expanding access to healthcare, Mississippi has taken steps to deny such access by imposing strict requirements for Medicaid and refusing to expand the program under the Affordable Care Act.[58] In fact, though 86 percent of pregnancy-related deaths in Mississippi occur postpartum, Mississippi *rejected* federal funding that would have provided a year's worth of Medicaid coverage to mothers after giving birth.[59] Many women who choose to terminate their pregnancies are low-income mothers who are concerned about the cost of providing for another child.[60] Given the high cost of childcare, a predictable effect of being denied an abortion is an increased likelihood of remaining in or falling into poverty.[61] However, far from reaching out a helping hand in its efforts to encourage women to continue their pregnancies, Mississippi actually *penalizes* families for having too many children by imposing a cap on the number of children in calculating increases in public assistance benefits.[62] Due to the effects of systemic racism, policies denying access to public assistance disproportionately burden people of color.[63]

IV. HB 1510 AND THE RECONSTRUCTION AMENDMENTS

Beginning when they were first brought to this country in 1619 and continuing until this day, Black women have consistently and systematically been deprived of all control over their reproductive lives at the hands of the State. They have been denied the ability to choose not to have children, the ability to voluntarily have children, and the ability to have and raise their children safely and with dignity. Regardless of states' justifications for these various policies, the effect of these denials has invariably been to subordinate Black women. HB 1510, which restricts women's ability to control their fertility, is simply a continuation of this method of oppression.

We hereby expand our past holdings in *Roe* and *Casey* and conclude that the Constitution protects the right to reproductive autonomy, or the ability to freely exercise control over one's reproductive health and capabilities, without undue State interference. Our precedents firmly establish that the Constitution's Due Process Clause protects a right to privacy and autonomy with respect to personal

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infant deaths per 1,000 live births, but when broken down by race, Black infants faced a mortality rate of 11.7 deaths per 1,000 live births—nearly twice as high as the mortality rate of white infants (6.2 deaths per 1,000 live births)).

58. *Id.*; *see also* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2339 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

59. *Dobbs*, 142 S.Ct. at 2340 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

60. *See* Brief of Equal Protection Constitutional Law Scholars as Amicus Curiae at 26, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief of Equal Protection Scholars"].

61. *See* Jennifer Ludden, *Women who are denied abortions risk falling deeper into poverty. So do their kids*, NPR (May 26, 2022), https://www.npr.org/2022/05/26/1100587366/banning-abortion-roe-economic-consequences [https://perma.cc/R7P2-29FZ].

62. Brief of Equal Protection Scholars, *supra* note 60, at 26.

63. *See* Suzanne Wikle et al., *States Can Reduce Medicaid's Administrative Burdens to Advance Health and Racial Equity*, CENTER ON BUDGET AND POLICY PRIORITIES (July 19, 2022), https://www.cbpp.org/research/health/states-can-reduce-medicaids-administrative-burdens-to-advance-health-and-racial.

decision-making.[64] The exercise of reproductive autonomy involves making "the most intimate and personal choices a person can make in a lifetime," choices we have recognized as "central to personal dignity and autonomy" and accordingly "central to the liberty protected by the Fourteenth Amendment."[65]

Additionally, in light of our analysis of the purpose and function of the Reconstruction Amendments, and taking into account our historical findings, reasoned judgment leads us to conclude that there is additional protection for reproductive autonomy in the Constitution beyond what our precedents have previously recognized. We hold that because HB 1510 restricts women's ability to control their fertility, echoing the ways in which Black women's ability to control their fertility was restricted in furtherance of the institution of slavery, it is a "badge and incident" of slavery and accordingly violates the Thirteenth Amendment. Additionally, because it effectively denies women their right to reproductive autonomy in a way that has historically been used to subordinate women, especially Black women, based on both their sex and their race,[66] HB 1510 violates the Equal Protection Clause of the Fourteenth Amendment. Finally, just as we held in *Roe* and *Casey*, HB 1510 denies women a fundamental liberty, their right to an abortion, in direct contravention to the Fourteenth Amendment's Due Process Clause.

Respondent's argument that HB 1510 is justified by the State's legitimate interest in protecting "unborn human life" does not withstand scrutiny. *Roe* and *Casey* recognized that there are important and potentially conflicting interests at stake in the question of whether to protect the ability to terminate one's pregnancy, and so they struck a balance, as courts often do.[67] The Court acknowledged that pregnancy is a unique condition whereby, over the course of approximately nine months, a fertilized egg develops into what is, at birth, unquestionably a "person" in every sense of the word.[68] As pregnancy progresses, the fetus's "interest[s]" become "significantly involved" to the point where, under some circumstances, those interests have the potential to directly conflict with the interests of the pregnant person.[69] However, until the point of viability, the fetus is entirely

64. *See supra* note 2 and accompanying text.

65. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 851 (1992).

66. *See generally* Crenshaw, *supra* note 35 (discussing the impact of overlapping identities of gender and race in the context of discrimination).

67. *See* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2321-2323 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

68. *See* Roe v. Wade, 410 U.S. 113, 159 (1973).

69. *Id.* An extreme example of these interests conflicting is when a pregnant person with cancer depends on chemotherapy to save her life, but that chemotherapy would compromise her pregnancy. *See* NATIONAL ADVOCATES FOR PREGNANT WOMEN, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 22 (2022), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/08/Fetal-Personhood-Issue-8.17.22.pdf [hereinafter "National Advocates"]; *see also* Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion foes push to narrow 'life of mother' exceptions*, WASHINGTON POST, May 13, 2022, https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life/ [https://perma.cc/Q98H-RC3K].

dependent on the pregnant person's body for its existence and survival. As such, any legal "interests" of the fetus are entirely hypothetical, as they are conditioned on a series of events that must take place for the pregnancy to successfully continue to term but are by no means certain—just one of which is the pregnant person choosing not to terminate.

That is why in *Roe* we drew the line at which states may regulate the practice of ordinary abortions[70] at the point of viability: because that is when the fetus is conceivably capable of independent existence outside the mother's body.[71] In other words, that is when the fetus's "interests" can plausibly be protected without subordinating the rights of the pregnant person. We recognize that the viability line is dependent on a number of factors, and we note here that those factors will vary from pregnancy to pregnancy and change with the development and availability of medical technology.[72] Crucially, we noted in *Roe* that viability requires the possibility of "meaningful life," not fleeting survival.[73] Accordingly, we must emphasize that the determination of whether a pregnancy is "viable" must be made on a case-by-case basis by the medical professionals attending to the pregnant person at hand.

With these considerations in mind, we hold that before the point of viability, any restrictions on the ability to access abortion care that place the fetus's hypothetical interests before the very real interests of the pregnant person pose an "undue burden" and are accordingly invalid.[74] States wishing to protect fetal life may regulate ordinary abortions only *after* the point of viability.[75] However, under

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70. We use the term "ordinary" abortion to describe those for which there is no medical necessity, given that this category includes the vast majority of abortions and avoids the moral connotations of the term "elective" abortion. *See, e.g.*, Katie Watson, *Why We Should Stop Using the Term "Elective Abortion,"* AM. MED. ASSOC. J. OF ETHICS 2018, https://journalofethics.ama-assn.org/article/why-we-should-stop-using-term-elective-abortion/2018-12#:~:text=The%20term%20elective%20abortion%20or,2 [https://perma.cc/6NHA-CUCM].

71. *Roe*, 410 U.S. at 163.

72. *Id.* at 160; *see also Abortions Later in Pregnancy*, KAISER FAMILY FOUNDATION (Dec. 5, 2019), https://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/ [https://perma.cc/U8H7-XKB3] [hereinafter "Abortions Later in Pregnancy"] (noting that "[v]iability depends on many factors, including gestational age, fetal weight and sex, and medical interventions available"). Viability can also depend on the hospital at which the infant is delivered. *See id.* (showing that according to a study of 24 academic hospitals, treatments for infants born at 22 weeks ranged from 0 to 100 percent depending on the hospital, which shows that "the criteria used to determine viability at one hospital may not be the same as another").

73. *Roe*, 410 U.S. at 163.

74. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 846, 874 (1992).

75. We recognize that some people seek ordinary abortions later in their pregnancy due to a variety of systemic barriers to obtaining abortion earlier in pregnancy, and that bright-line legislative restrictions run the risk of disregarding the unique patient needs and variables that inevitably present themselves during pregnancy. *See, e.g., Abortions Later in Pregnancy*, *supra* note 72; *Facts Are Important: Understanding and Navigating Viability*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (last accessed June 4, 2024), https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability [https://perma.cc/S2MT-Z5SK]. In our efforts to balance the interests of the pregnant person with those of the viable fetal life, our holding that *any* restriction on abortion access before the

no circumstances may states restrict or prohibit abortion care that relevant medical professionals deem necessary, or otherwise use the viability line to limit access to "evidence-based care."[76]

Furthermore, we reject the State's characterization of a pre-viability fetus as an "unborn human being" and hold that policies based on this idea of "fetal personhood,"[77] to the extent they afford legal rights to a nonviable fetus, are unconstitutional under the Thirteenth and Fourteenth Amendments. Fetal personhood policies inherently function to subordinate the pregnant person's liberty by allowing states to police a pregnant person's body and otherwise legal activity for the purposes of protecting the fetus's hypothetical interests—sometimes with devastating consequences.[78] Such arbitrary subordination constitutes a deprivation of liberty (and, in extreme cases, life) without due process of law, and so it violates the Fourteenth Amendment. Furthermore, such a policy reflects the State's judgment that the pregnant person is worthy of protection only insofar as they can support the life of the fetus. This is analogous to the way slave states used to police Black women's bodies based on the State's judgment that Black women were only valuable insofar as they could reproduce. Accordingly, such a policy also violates the Thirteenth Amendment.

V. HOLDING

We hold that the central holdings of *Roe* and *Casey* are not just affirmed but expanded. The fundamental right to reproductive autonomy includes the right to choose not to have a child, the right to have a child at the time of one's choosing, and the right to do so safely and with dignity. Denial of reproductive autonomy was an essential tool used in the perpetuation of chattel slavery and is accordingly inconsistent with the Reconstruction Amendments' effort to abolish slavery and its badges and incidents. HB 1510 impermissibly infringes on the inalienable

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point of viability, as well as our emphasis that viability and the necessity of post-viability abortions must be determined by medical professionals on a case-by-case basis, aim to remove some of those barriers.

76. *Id.*; *see also Casey*, 505 U.S. at 879 (noting an exception to the viability line "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother") (quoting *Roe v. Wade*, 410 U.S. at 164-65). This includes situations where abortion is deemed necessary to preserve the life or health of the pregnant person; cases in which there are serious fetal anomalies, and any other situation in which a medical professional concludes abortion care is indicated. We emphasize that these determinations must be made not by the States but by qualified medical professionals in consultation with their patients.

77. *See,* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L. J. 13, 62 (2012) (arguing that legal personhood should begin at conception because there is "no ontological transformation that occurs at the point of birth, or at some mid-point in pregnancy . . . or at any other point subsequent to conception.").

78. *See e.g.,* National Advocates for Pregnant Women, *supra* note 69, at 14 (discussing a Wisconsin law that defines "unborn child" as a "human being from the time of fertilization to the time of birth" and allows the state to detain a pregnant person "on the suspicion that a person is pregnant and has consumed or *may* consume alcohol or a controlled substance during their pregnancy."); *and* 2 n.1 (describing a situation in which a pregnant woman was arrested for attempted feticide after falling down the stairs. She was reported to the police by medical staff after she confided that she had considered getting an abortion earlier in her pregnancy.).

freedoms protected by these Amendments and is accordingly unconstitutional.

Our Bodies, Our Price: Accepting Commodification and Racial Categorization in Assisted Reproductive Technology

Jennifer Meleana Hee†

I. INTRODUCTION

I am a forty-four-year-old childfree woman. During my late twenties and early thirties, I donated my eggs seven times. Two were for the same couple, whom I met prior to donating when my egg broker set us up for drinks in San Francisco. It was like a first date with two men, where procreation was the explicit reason we were meeting, and it was fine to ask about my family history of mental disorders. What was their conversation like on the drive home, evaluating my appearance, my not-quite-quirky awkwardness, the fact that I was a Harvard graduate making $11 an hour cooking in a commercial kitchen? *Is this how we*

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want our children to turn out?

I imagine one of the most decisive factors was my mixed ethnicity. One man was Chinese, his husband, English; my father is Chinese, and my mother is English. Any mixture of my genes with either might create children that appear mixed—double eyelids above almond eyes, and dark, wavy hair against light brown skin.

One's journey as an egg donor does not always begin with talk of depression over drinks, but immediate preparation for egg retrieval is fairly uniform.[1] First, donors inject a synthetic hormone to suppress normal ovarian function.[2] Next, donors begin hormone injections that hyperstimulate follicles to rapidly mature.[3] During this period, I remember frequent blood draws and ultrasounds, as reproductive endocrinologists carefully monitored my follicles, counting and measuring over twenty enlarging dark blobs crowding my ovaries.[4] After eight to fourteen days, a shot of human chorionic gonadotropin (hCG) induces the final stage of egg maturation.[5] Approximately thirty six hours after this injection, egg donors are placed under light anesthesia while doctors retrieve mature follicles via transvaginal ultrasound aspiration.[6] Suitable eggs are then fertilized in a laboratory.[7] Once fertilized, the embryo is implanted in the recipient, either an intended parent[8] or a gestational surrogate.[9] Except for the couple I met and one other family, I have no idea how many lives my donations created, whether follicles containing my DNA remain cryopreserved, able to create humans even if I die.[10]

I knew minor side effects of the initial round of fertility drugs could include:

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1. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 4-6 (2018), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/art-booklet2.pdf [https://perma.cc/4TLL-Q7BY].
2. *Egg Donation Process for Donors*, UCSF HEALTH, https://www.ucsfhealth.org/education/egg-donation-process-for-donors [https://perma.cc/8ATD-DFRH] (last visited Feb. 10, 2024).
3. I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 490-91 (2010); Pamela Foohey, *Paying Women for Their Eggs for Use in Stem Cell Research*, 30 PACE L. REV. 900, 906 (2010).
4. *See* Egg Donation Process for Donors, *supra* note 2.
5. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 6.
6. *Id.* at 6, 7.
7. *Id.* at 8.
8. AM. SOC'Y FOR REPROD. MED., GAMETE (EGGS AND SPERM) AND EMBRYO DONATION (2014), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/gamete_eggs_and_sperm_and_embryo_donation_factsheet.pdf [https://perma.cc/7FK5-ARWK] (noting that "intended parent" is the person who will raise the child; in this context, an intended parent is a biological woman able to carry the embryo in her uterus).
9. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15.
10. Chantel Cross, *Freezing Eggs: Preserving Fertility for the Future*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/wellness-and-prevention/freezing-eggs-preserving-fertility-for-the-future [https://perma.cc/3RBQ-XN5R] (last visited Jan. 28, 2024).

> [H]ot flashes, difficulty with short-term memory, and insomnia . . . vaginal dryness, hypertension, formation of blood clots, intestinal bleeding, fluid accumulation in the limbs, swelling of the limbs, numbness of the limbs, fatigue, depression, mood swings, chest pain, bone pain, joint pain, muscle pain, migraines, vision problems, dizziness and blackouts, nausea, vomiting, diarrhea, anemia, and thyroid enlargement.[11]

These did not dissuade me any more than taking any prescription medication. I was afraid of the injections, but I barely felt the miniscule needles, even though my belly was covered in small bruises. I signed consent forms acknowledging the serious risks: ovarian hyperstimulation syndrome (OHSS),[12] ovarian torsion,[13] cancer.[14] For long-term psychological harms, I had to proceed on best guesses. Would I deeply regret bringing humans into this world? Should I meet my genetic offspring one day, would I become attached to them? I was worried about the unknown long-term risks of shutting down my ovaries and then cranking them into overdrive,[15] but these distant physical and psychological concerns just pooled with the many amorphous anxieties for future me.[16] I did not get to sign a waiver

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11. Foohey, *supra* note 3, at 906 (citations and internal quotation marks omitted).
12. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15-16 (explaining approximately 30% of women may experience a "mild case" of ovarian hyperstimulation, which includes symptoms such as bloating and nausea that will resolve themselves). *See also* Diane M. Tober, Kevin Richter, Dougie Zubizarreta & Said Daneshmand, *Egg Donor Self-Reports of Ovarian Hyperstimulation Syndrome: Severity by Trigger Type, Oocytes Retrieved, and Prior History*, 40 J. ASSISTED REPROD. & GENETICS 1291, 1292-93 (2023) (citations omitted) (noting that approximately 1% to 10% of women experience severe OHSS requiring hospitalization. Symptoms of severe OHSS include rapid weight gain, bloating requiring removal of fluid from the abdomen, difficulty breathing, and kidney distress).
13. INST. MED. & NAT'L RSCH. COUNCIL, ASSESSING THE MEDICAL RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH: WORKSHOP REPORT 3 (Linda Giudice, Eileen Santa & Robert Pool, eds., 2007), https://nap.nationalacademies.org/catalog/11832/assessing-the-medical-risks-of-human-oocyte-donation-for-stem-cell-research (available for download) (stating that ovarian torsion occurs when an ovary "twists around its supporting ligament and cuts off its blood supply").
14. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 16 (stating, without more, that "numerous recent studies support the conclusion that fertility drugs are not linked to ovarian cancer. Nevertheless, there is still uncertainty whether a risk exists, and research continues to address this question."). *See also* Foohey, *supra* note 3, at 908 (noting certain "small, limited studies" suggest a link between fertility drugs and breast, ovarian, and uterine cancer but "[t]he long-term health risks of shutting-down a woman's ovaries and then hyperstimulating them to produce numerous eggs remain unknown and generally unstudied.").
15. *See* Foohey, *supra* note 3, at 908.
16. Ethics Comm. Am. Soc'y for Reprod. Med., *Interests, Obligations and Rights in Gamete and Embryo Donation: An Ethics Committee Opinion*, 111 FERTILITY & STERILITY 664, 667 (2019) https://www.asrm.org/globalassets/_asrm/practice-guidance/ethics-opinions/pdf/interests_obligations_and_rights_in_gamete_and_embryo_donation.pdf [https://perma.cc/V5TC-8Q35] (noting "Donors . . . should be aware that data are lacking about the long-term emotional and psychological impact of participating in gamete donation"); Jennifer K. Blakemore, Paxton Voigt, Mindy R. Schiffman, Shelley Lee, Andria G. Besser & M. Elizabeth Fino, *Experiences and Psychological Outcomes of the Oocyte Donor: A Survey*

for the myriad hazards of existing; at least here I could consent to something more concrete and potentially quantifiable.[17]

I am risk-averse in so many ways—I drive cautiously, do not drink, wear a flashing light vest when I walk my dogs in the dark. Yet I was a donor willing to go beyond the American Society for Reproductive Medicine's (ASRM) recommendation of six cycles, as it is these donors that are most likely to experience severe OHSS, which can lead to kidney failure and even death.[18] Twenty-nine-year-old me likely cognized the possibility of death the same way I do today, as arms-length away from the banal.[19] Egg donation was risky, but so was getting in my car every day. I would not have accepted the risks of donation without compensation, but I recognized them as statistically slim, well worth the relief of paying off my credit cards and traveling to India.[20] After retrievals, I would cramp and bloat, but this discomfort was de minimis, as the cash made living slightly more bearable.

After a few years of traveling from Hawai'i to San Francisco, Los Angeles, Shady Grove, and San Diego for donations, I was done injecting my abdomen with hormones, done with the blood draws and ultrasounds, done going under anesthesia for the retrieval. I had my fallopian tubes plugged with metal coils, an act both symbolic and pragmatic. I had health insurance that would cover the procedure, but it was reassuring to know that I would never become pregnant. I have always been disgusted by the thought of having a fetus growing inside my

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of Donors Post-Donation from One Center, 36 J. ASSISTED REPROD. & GENETICS 1999, 2004 (2019) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6823395/pdf/10815_2019_Article_1527.pdf [https://perma.cc/BZ3X-DAZP] (urging researchers to study long-term psychological impacts on donors because the majority of respondents in a limited, single fertility center study of mostly white individuals reported psychiatric symptoms of mental disorders such as depression and anxiety). *See also* Jane E. Brody, *Do Egg Donors Face Long-Term Risks?*, N.Y. TIMES (July 10, 2017), https://www.nytimes.com/2017/07/10/well/live/are-there-long-term-risks-to-egg-donors.html (discussing the lack of—and need for—a registry tracking the long-term health impacts on egg donors).

17. *See, e.g.*, Tober et al., *supra* note 12, at 1292 (describing a study of oocyte donors in which "researchers found a 1.5% risk of severe OHSS and a 33.5% risk of moderate OHSS among 149 donors over 400 egg retrieval cycles. Another clinical study of 587 oocyte donors at a single IVF center found 9% of cycles had to be cancelled due to OHSS, out of caution for donor health. Another retrospective survey study of 246 . . . noted that 13.4% of donors in their study reported OHSS, among other complications, but the severity of OHSS is not discussed." (citations omitted)); Sarah B. Angel, *The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research*, 22 BERKELEY J. GENDER L. & JUST. 183, 204-05 (2007) (noting the rarity of severe cases and that measures can be taken to reduce risk).

18. Tober et al., *supra* note 12, at 1301-02. *See also* Prac. Comm. of the Am. Soc'y for Reprod. Med. & Prac. Comm. of the Soc'y for Assisted Reprod. Tech., *Repetitive Oocyte Donation: A Committee Opinion*, 113 FERTILITY & STERILITY 1150, 1151 (recommending six cycles as the limit because of the lack of studies on the long-term health effects and concerns regarding cumulative risk).

19. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 16 (discussing potentially serious risks of oocyte donation, including death).

20. *See* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 221 (2009) [hereinafter Krawiec, *Altruism and Intermediation*] (explaining that the "more serious risks are quite rare, and egg donation is normally little more than a time-consuming and physically uncomfortable inconvenience.").

body, feeding off me. Forcing it into a nonconsensual existence as my child would traumatize us both. I imagined scar tissue weaving around the coils, building miniscule barricades, protecting my body in the way that mattered most.

A. Assisted Reproductive Technologies

One would imagine the language of creating human embryos outside of human bodies to mirror the miracle. Instead, the language of reproductive technology is scientific, disconnecting, overtly sterile.[21] A person who donates their eggs is an "oocyte donor."[22] Couples or individuals who purchase these oocytes are "intended parents."[23] The person whom an intended parent might compensate to carry an embryo is the "gestational carrier."[24] These actors together engage in the most significant act of the "genetic offspring's" life—the offspring's creation—yet the connection between donors and intended parents, and between donors and gestational carriers, remains depersonalized by contractual labels. An act of ineffable profundity becomes obscured by legal and medical jargon.[25]

Assisted Reproductive Technology (ART) makes "collaborative reproduction" possible.[26] Any fertility treatment that involves eggs or embryos falls under the umbrella of ART,[27] an ever-advancing industry.[28] The law, meanwhile, lags behind not only because of rapid scientific developments[29] but

21. *See, e.g.*, AM. SOC'Y FOR REPROD. MED., THIRD-PARTY REPRODUCTION: A GUIDE FOR PATIENTS (2018), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/third-party_reproduction_booklet_web.pdf [https://perma.cc/JKV4-A2LV] Prac. Comm. Am. Soc'y for Reprod. Med. & Practice Comm. For Soc'y for Assisted Reprod. Tech., *Guidance Regarding Gamete and Embryo Donation*, 115 FERTILITY & STERILITY 1395, 1395-96 (2021), https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/recs_for_gamete_and_embryo_donation.pdf [https://perma.cc/P4X2-37D4] (using language such as "quarantine," "gamete source," and "'ineligible' tissue").
22. Tober et al., *supra* note 12, at 1291.
23. AM. SOC'Y FOR REPROD. MED., THIRD-PARTY REPRODUCTION, *supra* note 21, at 3.
24. *Id.* at 18.
25. For example, the "names" on one of my contracts were "Intended Father #5510A" and "Intended Father #5510B." I was "Donor #5510." Egg Donation Agreement (Apr. 11, 2011) (on file with author).
26. Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 683 (2004).
27. *What is Assisted Reproductive Technology?*, CDC, https://www.cdc.gov/art/whatis.html [https://perma.cc/UZ6N-PJ9E] (last visited April 23, 2023). The medical model of "assisted" reproduction is distinguished from "unassisted" reproduction, which is "traditional conception" where a biological man impregnates a biological woman who is ovulating via vaginal penetration. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 3-4.
28. *See* Manning, *supra* note 26, at 679 (citations omitted); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: Arts, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1, 6 (2003) (noting that "our judicial system has trailed woefully behind the complex bioethical dilemmas that accompany the rapid advances in biotechnology, biomedicine, and assisted reproductive technologies.").
29. *See, e.g.*, Naomi Cahn, *Accidental Incest: Drawing the Line – Or the Curtain? – For Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 76 (2009) ("The lack of market oversight has repeatedly been traced to the comparatively limited use of the technology until the 1980s") (citations omitted); Bender, *supra* note 28, at 13 ("Legislation that does get enacted

also because of the complex ethical issues implicated by ART, ranging from the commodification of human tissue[30] to eugenics[31] to procreative rights.[32]

The American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) emerged to self-police the industry, determining the policy for collaborative reproduction in the United States via nonbinding guidelines.[33] On one hand, the nonexistent federal and limited state statutes that govern reproductive technology[34] seem preferable—why should families requiring assisted reproduction by no fault of their own be burdened with regulations,[35] when those not requiring assistance are essentially free to procreate? On the other hand, assisted reproduction involves third parties and donor-conceived children, whose health and interests may require protection.[36] Between 2016 and 2017, there were 49,193 donor egg retrievals in the United States.[37]

The lack of regulation has led to considerable scholarly debate on the many aspects and market participants involved in ART.[38] Some scholars have suggested

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often fails to anticipate the newest ARTs and their unique twists.").

30. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1855-56 (1987) (describing a commodification as the decision that something is "suitable for trade in a laissez-faire market" and citing examples of human tissues that are and can be commodified); Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1762 (2010) [hereinafter Krawiec, *A Woman's Worth*] (suggesting that the industry endeavors to demonstrate effective self-regulation because "perceiving a market run amok with the potential to commodify women and children and coerce and exploit egg donors, the natural impulse would be top-down state or federal regulation of the entire industry.").
31. *See, e.g.*, CAMISHA A. RUSSELL, THE ASSISTED REPRODUCTION OF RACE 70 (2018).
32. *See, e.g.*, AM. SOC'Y FOR REPROD. MED., STATE ABORTION LAWS: POTENTIAL IMPLICATIONS FOR REPRODUCTIVE MEDICINE (Oct. 10, 2022), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/dobbs/state_abortion_laws_p2_oct_22.pdf [https://perma.cc/LLS7-QDKJ]; Cahn, *supra* note 29, at 76 ("The lack of market oversight has repeatedly been traced to . . . the contested nature of the technology's relationship to parenthood and other social issues." (citations omitted)).
33. *See, e.g.*, Wynter K. Miller, *Assumption of What? Building Better Market Architecture for Egg Donation*, 86 TENN. L. REV. 33, 50 (2018); Cahn, *supra* note 29, at 76, 81.
34. *See, e.g.*, Saylor S. Soinski, *Paid Donation: Reconciling Altruism and Compensation in Oocyte Transfer*, 20 YALE J. HEALTH POL'Y, L. & ETHICS 513, 515 (2021) (citations omitted); Miller, *supra* note 33, at 49 (citations omitted) ("[G]eorgia, Louisiana, and Oklahoma have passed blanket prohibitions on compensation for egg donation. Florida and Virginia broadly permit 'reasonable' egg donor compensation but have neglected to define 'reasonable.'"); Michael Ollove, *States Not Eager to Regulate Fertility Industry*, STATELINE (Mar. 18, 2015), https://stateline.org/2015/3/18/states-not-eager-to-regulate-fertility-industry/ [https://perma.cc/X2RU-LQGT].
35. *See* Susan Frelich Appleton & Robert A. Pollak, Exploring the Connections Between Adoption and IVF: Twibling Analyses, 95 MINN. L. REV. HEADNOTES 60, 68 (2011) (characterizing IVF as "self-regarding and expensive but free from burdensome regulation").
36. *See, e.g.*, Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 621 (2012).
37. Jennifer F. Kawwass, Patrick Ten Eyck, Patrick Sieber, Heather S. Hipp & Brad Van Voorhis, *More Than the Oocyte Source, Egg Donors as Patients: A National Picture of United States Egg Donors*, 38 J. ASSISTED REPROD. & GENETICS 1171, 1172 (2021).
38. *See, e.g.*, Krawiec, *A Woman's Worth*, *supra* note 30, at 1741-42; Janelle E. Thompson, *The Eggsploitation of the United States' Organ and Egg Donation Systems*, 48 VAL. U. L. REV. 469, 512-14 (2013) [hereinafter Thompson, *Eggsploitation*]; Lynn M. Squillace, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMEDICAL L. 135, 146-50 (2005).

regulating egg donation in the same way organ donation is regulated,[39] but in such a scenario there would be increased oversight without compensation.[40] The fertility industry, its pockets likely only deepening as technology advances, will likely resist regulation akin to organ procurement.[41] While human aversion to organ selling is a long-held sentiment,[42] ART is a modern development that has advanced into a booming industry despite any existential "yuck" factor.[43] Other avenues for regulation include scholar Dov Fox's suggestion the government impose a commercial ban on sperm bank "race-attentive and race-exclusive" advertising;[44] Michele Goodwin's proposal that ART be regulated via tort law;[45] and Douglas NeJaime's urgent recommendation that state legislatures and judicial

39. Thompson, *Eggsploitation*, *supra* note 38, at 512-14 (recommending Congress amend the National Organ Transplant Act to include "ovum" in its definition of "human organ" and thus adopt a supervised market approach for egg donation).

40. 42 U.S.C. § 274e ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation.").

41. *See* MarketResearch.biz, *Fertility Clinics Market Rising Steadily at 11.2% CAGR; Aiming for US$ 92.9 Bn by 2032*, GLOBENEWSWIRE (July 17, 2023) (explaining that "rising technological advancements in fertility treatments and the increasing availability of healthcare facilities are the significant factors that drive market growth."); Brenda Reddix-Smalls, *Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs But Not Our Livers?*, 10 VAND. J. ENT. & TECH. L. 643, 681, 685-87 (arguing that the dominant market forces such as fertility clinics, pharmaceutical companies, and egg brokers have "captured" regulating agency oversight).

42. *See* Misia Landau, *The Organ Trade: Right or Wrong?*, HARVARD MED. SCH. (Mar. 7, 2008), https://hms.harvard.edu/news/organ-trade-right-or-wrong [https://perma.cc/ZV39-P89C].

43. *See* Joan O'C. Hamilton, *What Are the Costs?*, STAN. MAG., Nov./Dec. 2000, https://stanfordmag.org/contents/what-are-the-costs [https://perma.cc/WD9X-S5H7]. While the development (or lack thereof) of legal regulations for ART is beyond the scope of this paper, some history is useful. Social mores prior to the mid-twentieth century considered sperm "donation" immoral and adulterous. Noa Ben-Asher*, The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1888-90 (2009). Beginning in the 1950s, sperm donation became legitimized as a medical treatment for infertility, *id.* at 1891-92, garnering additional support because of its "promise of eugenics." *Id.* at 1895. The new medical paradigm that treated sperm donation as a "cure" ultimately led to a market where "lack of regulation and a relatively low price for the gametes mean that it is both an open market in which a large number of people can participate, and a free market that flourishes because of its comparative freedom from regulation." *Id.* at 1897 (quoting Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 15-16 (2003)). The first egg donation resulting in a birth was in 1984, JUDITH DAAR, I. GLENN COHEN, SEEMA MOHAPATRA & SONIA M. SUTER, REPRODUCTIVE TECHNOLOGIES AND THE LAW 242 (3d ed. 2006), and egg donation did not meet "legal, medical and feminist resistance" since it was considered a legitimate medical treatment. Ben-Asher*, supra*, at 1912. The problem with this medical paradigm is that it is gendered; has the effect of oppressing those who cannot "naturally" have children as requiring a "cure;" and limits access for groups such as single men, same-sex couples, and lower-income families. *Id.* at 1922-24. *See also* Lisa Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1033 (1996) (noting how reproductive technology has been characterized as treatment for infertility—as if childlessness is a condition requiring medical intervention—now that such technology available).

44. Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1897-98 (2009) (noting such a ban would raise First Amendment issues).

45. Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039, 1043 (2010) (focusing on the "negligent application of ART").

decisions reform parentage law to resolve the persistent inequalities in legal treatment of queer parents, many of whom are nonbiological parents to their ART-created children.[46] These proposals are not mutually exclusive, and only demonstrate the complexity of regulating an industry that generates human life. As reproductive rights are increasingly curtailed, perhaps it is preferable "to allow non-legal institutions such as 'science' or 'medicine' to be the primary forum for policy debate and resolution."[47]

This paper explores current issues at the intersection of race and reproductive technology in the United States. First, I introduce the broad social justice issues implicated by the fertility industry. Next, I explain the industry's problematic donor compensation structure. Third, I review racial disparities in the use of reproductive technologies. Next, I explain how fertility clinics employ racial selection and categorization. Lastly, I argue that people with oocytes[48] from historically marginalized groups must affirmatively disrupt the whiteness of the fertility industry by pushing back against the donation framework, becoming savvy sellers of their valuable genetic material.[49]

II. SOCIAL JUSTICE ISSUES IN THE FERTILITY INDUSTRY

Because intended parents who need assisted forms of reproduction explicitly choose the traits they desire, ART implicates many social justice issues, spotlighting inequalities on the stage of procreation.[50] ART could be considered an "aggravating factor in an existing inequality of power" for every historically marginalized population.[51] This is because the affluent white population has the primary ability to access ART, revealing "preferred" traits.[52] While trait-based selection for procreative purposes occurs when it comes to choosing a partner, such as height and intelligence, once traits become selectable in the same way as one might select options for an inanimate online purchase,[53] these choices take eugenic form.[54]

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46. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2331-33 (2017).
47. Larry I. Palmer, *Private Commissions, Assisted Reproduction, and Lawyering*, 38 JURIMETRICS 223, 234-35 (1998) (book review).
48. While I chose the phrase "people with oocytes" to be inclusive of the capacity of nonbinary and trans individuals to donate reproductive material and participate in pregnancy, I frequently use "woman/women" if the study or example is connected to a gendered stereotype.
49. *See* Marissa Steinberg Weiss & Erica E. Marsh, *Navigating Unequal Paths: Racial Disparities in the Infertility Journey*, 142 OBSTETRICS & GYNECOLOGY 940, 942 (2023).
50. *See generally* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 246-93 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY].
51. Nanette R. Elster, *ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies*, 9 DEPAUL J. HEALTH CARE L. 719, 721 (2005).
52. *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 939 (1996) [hereinafter Roberts, *Race and the New Reproduction*].
53. *See id.* at 945.
54. RUSSELL, *supra* note 31, at 70 ("Today's genetics proceeds under the shadow of eugenics. Nowhere is this shadow more obvious than in the case of reproductive and reprogenetic technologies.").

One example of this potential is the frequent use of Pre-implantation Genetic Diagnosis (PGD), where early-stage embryos are analyzed for genetic abnormalities.[55] This implicates issues of ableism and eugenics, as families may choose not to begin a pregnancy if certain "disfavored" traits are detected[56] thus devaluing individuals who possess these traits.[57]

Another social justice issue involves LGBTQIA rights. Dysfertile[58] queer families who desire genetically related children may not be able to access ART services because of the costs, which can be up to $200,000.[59] This financial barrier likely denies many dysfertile families the option to procreate and experience the same personal satisfaction of having genetic children that fertile heterosexual families experience.[60]

This paper focuses on the social justice issue of race in the fertility industry. Historically, only white individuals have had access to reproductive services.[61] The modern fertility industry reinforces the biological myth of race[62] and stereotypes about race[63] because clinics openly racially categorize donors.[64] Donor eggs are racially marked, enabling families searching donor databases to

55. *Pre-Implantation Genetic Diagnosis*, UCSF HEALTH, https://www.ucsfhealth.org/treatments/pre-implantation-genetic-diagnosis [https://perma.cc/LFL4-PN9G] (last visited Feb. 9, 2024).

56. Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 792 (2009) [hereinafter Roberts, *Race, Gender*].

57. *Id.* at 794.

58. Ikemoto, *supra* note 43, at 1008-09, 1053 (introducing the term "dysfertile" because "infertile" has traditionally only encompassed women, and to make visible the distinct procreative challenges of lesbians and gay men, long ignored by the fertility industry). Ikemoto chose "dysfertile" because the industry had viewed procreation outside of the heterosexual framework as "dysfunction," and scholars such as Harvard Law School professor I. Glenn Cohen continue to use the term. I. Glenn Cohen, *Borrowed Wombs: On Uterus Transplants and the "Right to Experience Pregnancy"*, 2022 U. CHI. LEGAL F. 127, 137 (2022) (expanding the category of "dysfertile" in his scholarship to include "all individuals who have no medical limitation to their fertility but instead face an obstacle towards their reproduction" and noting similar use of the term "socially infertile.").

59. *See The Cost of Surrogacy, Egg Donation, & Third-Party IVF Explained,* HATCH FERTILITY (Feb. 24, 2021), https://www.hatch.us/blog/surrogate-and-egg-donor-costs [https://perma.cc/4AUZ-QX32].

60. *See* Dov Fox, *Reproducing Race in an Era of Reckoning*, 105 MINN. L. REV. HEADNOTES 233, 242 (2021) [hereinafter Fox, *Reproducing Race*].

61. *See* Elster, *supra* note 51, at 721 ("Racial inequality in reproductive services has existed long before the advent of ARTs and may, according to some, be perpetuated by the increasing use and access to ARTs by some groups and not by others.").

62. *E.g.*, Roberts, *Race, Gender, supra* note 56, at 789, 799.

63. *See, e.g.*, Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTINGS CTR. REP. 13, 13 (2001) ("Race-based gamete selection raises two major, linked ethical issues. One is the harm that racial stereotypical causes to individuals, and the second is the public awareness that racial stereotyping is an accepted feature of this largely unregulated market.").

64. Charis Thompson, *Skin Tone and the Persistence of Biological Race in Egg Donation for Assisted Reproduction*, *in* SHADES OF DIFFERENCE 131, 134-35 (Evelyn Nakano Glenn ed., 2009) [hereinafter Thompson, *Skin Tone*] (explaining the belief held by donors, intended parents, and medical practitioners that there are ethnoracial attributes that can be genetically passed on from donor to child).

select genes based on race.[65] This is problematic because race is not biological, yet racial categorization demonstrates that intended parents may believe that racial traits can be genetically transmitted.[66] As one legal scholar explained:

> Biological racism maintains that racial groups are physically distinct species, with specific characteristics or capabilities attributable to group members' similar genes and biology. The racism part of biological racism separates or divides human beings into hierarchically ranked groups with more or less power and privileges; the biological part of biological racism makes those divisions seem scientifically supportable and natural, as if they were based on true physical distinctions between races.[67]

Additionally, dysfertile families may not be able to access ART services due to the exorbitant costs.[68] As such, this also makes it nearly impossible for families with lower socioeconomic status, the majority of whom are Black or Hispanic, to access ART.[69] The industry thus perpetuates unequal access because of its astronomical costs.[70]

III. DONOR COMPENSATION STRUCTURE

Before exploring how racial inequities in the fertility industry may be mitigated by increasing the supply and demand of gametes from historically marginalized people, it is important to understand how donors are currently compensated.[71] The Ethics Committee of ASRM has deemed compensation for egg donors ethically justified mainly because of the time, inconvenience, and physical discomfort involved.[72] In 2007, this Committee issued a report that used

65. *See* Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom, and the Quest for the Perfect Child*, 104 MINN. L. REV. 2375, 2403-06 (2020).

66. *See* Thompson, *Skin Tone*, *supra* note 64, at 131.

67. Bender, *supra* note 28, at 54.

68. *See* Fox, *Reproducing Race*, *supra* note 60, at 242.

69. Rich, *supra* note 65, at 2401; John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html [https://perma.cc/D6R6-8ZQJ] (showing that Black and Hispanic Americans have poverty rates of 18.8% and 15.7%, respectively, while Asians and Non-Hispanic whites have a poverty rate of 7.3%).

70. *See* Rich, *supra* note 65, at 2401; Elster, *supra* note 51, at 721-22.

71. The compensation of gestational surrogates, while beyond the scope of this paper, is also controversial for many of the same reasons as egg donor compensation. *See, e.g.*, Krawiec, *Altruism and Intermediation*, *supra* note 20, at 246 ("As in the case of the egg market, formal attempts to cap surrogate compensation and the persistent dialogue of altruistic donation in the surrogacy market may further complicate the ability of surrogates to fully reap the value of their services."). One distinguishing factor is that intended parents do not need to consider the race of the gestational surrogate. *Id.* at 225.

72. Ethics Comm. Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 307 (2007); Ethics Comm. Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 319, 321 (2021).

an hourly rate to calculate compensation for egg donation based on sperm donation, determining that "the average payment to sperm donors was $60–$75, which . . . would justify a payment of $3,360–$4,200 to oocyte donors."[73] In 2021, this same Committee removed this compensation range, stating only the "compensation to women providing oocytes should be fair and not used as an undue enticement that will lead prospective donors to discount risks."[74]

Thus, the amount of compensation is neither legally limited nor specifically narrowed by the ASRM Ethics Committee, yet egg brokers and fertility clinics use the rhetoric of altruism to emphasize that donors should donate their eggs to compassionately help another woman by giving the gift of life,[75] a gift "beyond measure."[76] ART is a multibillion-dollar industry where fertility clinics profit immensely,[77] yet these clinics, as well as egg donor agencies, use language that

73. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).

74. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 322 (2021).

75. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 319-21 (2021); Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242; *see, e.g.*, *Egg Donor Compensation*, PAC. FERTILITY CLINIC, https://www.pfcdonoragency.com/become-a-donor/egg-donor-compensation [https://perma.cc/CW68-64PE] (last visited Feb. 19, 2024) ("For many egg donors, the act of helping others fulfil their dreams of building a family can be more rewarding than monetary compensation."); *Become an Egg Donor*, FERTILITY INSTIT. HAW., https://www.ivfcenterhawaii.com/3rd-party/become-an-egg-donor/ [https://perma.cc/G7BC-G8DG] (last visited Feb. 19, 2024) ("[G]ive the gift of motherhood. . . . The generosity of egg donors like you continues to make this possible."); *Your Journey to Parenthood Starts Here!*, CONCEPTIONS CTR. FOR OVUM DONATION, https://www.conceptionscenter.com/ [https://perma.cc/N7VJ-W3FT] (last visited Feb. 19, 2024) (matching "warm and compassionate egg donors to couples and individuals worldwide who need help building a family"); *Donor Information*, A PERFECT MATCH, https://www.aperfectmatch.com/Egg-Donation-Program/For-Donors/donor-information.html [https://perma.cc/B4VJ-VBSM] (last visited Feb. 19, 2024) ("[O]ur donors say their greatest reward comes from knowing they made a difference in someone's life by giving of themselves in such a personal way." "[The Agency], however, strongly encourages its donors to request compensation that realistically reflects the time and effort required of the donor to do an egg donation—*and that includes a level of altruism*." (emphasis added)).

76. *Donor Information*, *supra* note 75.

77. *See The Fertility Business is Booming,* ECONOMIST (Aug. 8, 2019), https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming ("Data Bridge, a research firm, predicts that by 2026 the global fertility industry could rake in $41bn in sales, from $25bn today. . . . Add high operating margins—of around 30% in America for a $20,000 round of IVF—plus the recession-proof nature of the desire for offspring, and investors are understandably excited."); *Assisted Reproductive Technology Market is Expected to Reach USD 56.18 Billion By 2028 with a CAGR of 9.94% Over the Forecast Period Due to Demand in Healthcare Industry*, MEDGADGET (Oct. 7, 2022), https://www.medgadget.com/2022/10/assisted-reproductive-technology-market-is-expected-to-reach-usd-56-18-billion-by-2028-with-a-cagr-of-9-94-over-the-forecast-period-due-to-demand-in-healthcare-industry.html [https://perma.cc/QY4D-SFE8]; Arizton Advisory & Intelligence, *U.S. Assisted Reproductive Technology (ART) Market to Hit $4.5 Billion by 2027*, GLOBAL NEWSWIRE (Mar. 24, 2022), https://www.globenewswire.com/news-release/2022/03/24/2409807/0/en/U-S-Assisted-Reproductive-Technology-ART-Market-to-Hit-4-5-Billion-by-2027.html [https://perma.cc/GF56-3BGT]; Rebecca Torrence, *The Fertility Business is Booming as Startups Go After Big Profits in a $54 Billion Market, Even as Other Healthcare Companies Slump*, BUS. INSIDER (Jun. 13, 2023), https://www.businessinsider.com/fertility-startups-booming-despite-market-downturn-2023-6 [https://perma.cc/2NLT-UQJR] (Because health insurance does not cover many ART procedures, *see infra* Section IV, fertility clinics are profitable because patients pay them out of pocket. "Clinics get that cash directly, rather than seeking reimbursement from health plans,

pressures individuals to "donate" their eggs rather than seek financial gain.[78] Egg brokers may reject prospective donors who assert a primary interest in earning money from their donations,[79] will coach donors to downplay financial motivations,[80] and express discomfort advocating for donors' desired compensation.[81]

Despite all the rhetoric of altruism, where intended parents supposedly "compensate" donors for their eggs, intended parents are in fact providing payment to people with oocytes for their oocytes, a product of their bodies.[82] This rhetoric poorly disguises a traditional market exchange as a gift,[83] with the fertility industry effectively treating eggs as commodities on the marketplace.[84] If eggs were truly inalienable, for example, there would be no opportunity for negotiation between intended parents (buyers) and donors (sellers).[85] Organs, which society also considers inalienable, are banned from the transplant marketplace under federal law.[86] So too is bone marrow,[87] which arguably should be less inalienable than ova because bone marrow can save lives that already exist.

Meanwhile, "compensation" for eggs varies between four thousand to over one hundred thousand dollars,[88] a sign to any prospective donor that their compensation deserves closer scrutiny, as an exchange with such variability suggest it is not actually a donation. Clinics and egg brokers use the rhetoric of altruism without pushback because the ART industry has long-standing moral sentiments on its side.[89] Society considers bodily products too sacred to treat as

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which tend to negotiate down the costs of services. That model can yield hefty profits for fertility players. . .").

78. *See, e.g.*, Rene Almeling*, Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOCIO. REV. 319, 319 (2007); Miller, *supra* note 33, at 38 ("[M]arket rhetoric and industry nomenclature are carefully designed to ensure alignment with the appropriate narrative.").
79. Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 GEO. J.L. & PUB. POL'Y 349, 355 (2015) [hereinafter Krawiec, *Markets, Morals*] ("Potential egg donors who claim monetary compensation as their overriding motivation, for example, are often eliminated as undesirable."); Miller, *supra* note 33, at 38.
80. Almeling, *supra* note 78, at 327, 329-30.
81. *Id.* at 333 ("[S]taff do not appreciate 'girls that really ask you to negotiate' a higher fee. [Egg Agency's] director expresses 'disappointment' in these women, saying, 'I really don't like that. It's really uncomfortable, and couples don't like it.'").
82. Krawiec, *Markets, Morals*, *supra* note 79, at 354.
83. *See* Stephanie Karol, *The Market for Egg Donation*, 27 DUKE J. ECON., Aug. 10, 2016, at 1 (describing donated oocytes as "straddle[ing] the line between 'tradeable good' and 'gift'").
84. *Id.* ("[T]he institutions . . . facilitate an exchange of money for an end product, which has all the traditional trappings of a market mechanism.").
85. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354 (describing aspects of oocyte donation, including payment from buyer to seller, that indicate commodification).
86. 42 U.S.C. § 274e.
87. *Id.*
88. *Become an Egg Donor*, *supra* note 75 (offering $4,000 to $6,000 for a single donation cycle); *Egg Donor Compensation*, PAC. FERTILITY CLINIC, *supra* note 75 (advertising that an egg donor's "cumulative earning potential can be up to $111,000" depending on the number of cycles, "donor location, prior donation, ethnicity, and other factors").
89. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354-55 (giving examples of altruistic rhetoric in egg donation).

marketplace commodities in order to avoid exploitation of vulnerable individuals and existential harms that may result from treating body parts as salable goods.[90] These theoretical harms are largely philosophical and are centered on commodification's alleged injury to personhood due to objectification,[91] which will "do[] violence to our conception of human flourishing."[92] Therefore, society purportedly benefits from this play acting because it allegedly preserves human dignity, even though an egg donation functions like a traditional market exchange where good is transferred for value.[93] Kimberly Krawiec explains that this anti-commodification argument fails because the fertility industry is a massive capitalist enterprise: "Arguments against commodification, then, are simply claims that the supplier/egg donor should be excluded from the full profits generated by ARTs that employ donated eggs, while fertility clinics enjoy the surplus created by the ability to procure their inputs at below-market prices."[94]

The anti-commodification argument offers flimsy support for the paternalistic justification that low compensation protects women.[95] I argue that

90. *See, e.g.*, Jody Lyneé Madeira, *Conceiving of Products and the Products of Conception: Reflections on Commodification, Consumption, ART, and Abortion*, 43 J.L. MED. & ETHICS 293, 296 (2015) ("Addressing egg donation, surrogacy, prenatal testing and preimplantation genetic diagnosis (PGD), scholars argue that women's bodies and reproductive capacities, embryos, fetuses, and children should not be commodified, and warn that ART can coerce and exploit patients. They argue that it is impossible or unwise to monetarily value certain goods, that monetary valuation does not capture these goods' significance, that valuation and exchange can warp those goods, and that transactions exchanging these goods for money are involuntary or accessed unequally."); Nicolette Young, *Altruism or Commercialism? Evaluating the Federal Ban on Compensation for Bone Marrow Donors*, 84 S. CAL. L. REV. 1205, 1206 ("[M]oral concerns include the commodification of the human body, the exploitation of poor and ethnic minority populations, and the general repugnance that some feel toward the idea of selling one's body.") *But see* Squillace, *supra* note 38, at 144 ("Concerns that exist over the fact that the marketplace is driven by efficiency rather than morality, and is contradictory with human existence, are undermined by the fact that many aspects of human life are already commodified. People with intelligence, physical beauty, athletic prowess, and even willingness to submit to scientific experimentation are paid for such traits and skills. Genes and genetic sequences are patented and serve as the basis for multi-billion-dollar industries. Standardized charts that place values on body parts serve as the guidelines for damages in personal injury cases.") (citations omitted).

91. Radin*, supra* note 30, at 1881 ("Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.").

92. *Id.* at 1885 ("In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable 'objects.' This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.").

93. *See id.* at 1885-86 ("[W]e must reject universal commodification, because to see the rhetoric of the market . . . as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing.").

94. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 241.

95. I choose the gendered term "paternalistic" because only people with oocytes can donate oocytes, and limitations on the parameters of donation implies that these individuals are incapable of making informed decisions over their bodily autonomy and are vulnerable to

egg donors do not benefit from forced altruism and feigned "donation" because they create an exploitative devaluation of donors' inner and market worth.[96] This is because the fertility industry uses societal unease with the commodification of bodily materials to its advantage to coerce women into being commercially compliant while doctors, for example, profit immensely.[97] Donors requesting higher compensation, after all, will reduce what is available for the other actors involved.[98] Yes, there are harms to selling body parts, but consider the greater harm of denying people with oocytes the right to participate in the ART market while they are well aware of how greatly others profit.[99] This policy materially devalues a donor, unlike potential philosophic disquietude.

Reading legal scholarship on egg donation over a decade after my own has clarified sentiments I felt but for which I had no conceptual foundation. Saylor Soinski explains, "Parties to oocyte transfer . . . frame the oocyte as a gift and avoid the *discomfort* of openly commodifying human parts."[100] I would have

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coercion, thus requiring protection—whether it is by fertility clinics or ethic committees. *See* Stephen J. Ware, *Paternalism or Gender-Neutrality?* 52 CONN. L. REV. 537, 554-58 (2020) (providing examples where use of the word "paternalism" is appropriate, including in discussions of surrogacy contracts and reproductive health). *But see* Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 85 (2002) (arguing that "the epitome of patriarchy and paternalism" is "[m]ostly male physicians encouraging healthy, fertile women to undergo procedures that will help infertile women, at a cost and risk unknown to the donor.") I find Karsjens's counterargument less persuasive, because it is more paternalistic to treat people with oocytes as unable to push back against this narrative—especially when these individuals desire to help others, desire to earn a substantial amount, and are aware that certain risks are currently unknown.

96. *See* Krawiec, *Markets, Morals*, *supra* note 79, at 354-55 (describing conflicting altruism and commodification in the egg market).

97. *See* Lawrence Zelenak, *The Body in Question: The Income Tax and Human Body Materials*, 80 L. & CONTEMP. PROBS. 37, 70 (2017) ("By artificially depressing the compensation paid to the donors, the assisted reproduction industry increases its own profits."); Krawiec, *Markets, Morals*, *supra* note 79, at 350 ("Societal unease with the literal egg market is mediated through the cultural understanding of egg donation as at least partly a nonmarket gift exchange."); Krawiec, *A Woman's Worth*, *supra* note 30, at 1764 (noting that assisted reproduction is "a multi-million dollar, highly commercial industry"). Many consumers of ART in fact expect fertility clinics to provide near-luxury accommodations, yet do not extend this concept of value and worth to donors. Madeira, *supra* note 90, at 298 ("Most care-seekers expect to pay high prices (which may perversely increase ART's mystique), expect good doctors to be well-paid, and anticipate that clinics will be not merely comfortable, clean, and sanitary but lavish and fashionable.").

98. Anna Curtis, *Giving 'Til It Hurts: Egg Donation and the Costs of Altruism*, FEMINIST FORMATIONS, Summer 2010, at 88 ("[T]he more compensation an egg donor receives, the less money recipients will be willing to pay for clinics' and agencies' recruitment services.").

99. *See* Squillace, *supra* note 38, at 144 ("Drawing the line at egg donation inflicts a direct harm on those who desire to participate in such a system while allowing [other] commodification practices to continue."). Even through my compensation was never restricted by black letter regulation or law, not being able to sell my oocytes on my terms felt like just another form of reproductive oppression. *See also* Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 33 (2015) ("The term reproductive oppression refers to the myriad ways in which pregnancy, childbearing, and mothering (as distinct from simply parenting or from being a father) can deny women access to a full range of human experiences. Being born with a womb or living in a body presumed to contain a womb has traditionally required that women, far more frequently than men, take account of their reproductive capacity and deal with the ways in which others frame that capacity.").

100. Soinski, *supra* note 34, at 525 (emphasis added) (citing Karol, *supra* note 83, at 2).

preferred a little metaphysical discomfort over the actual disturbance I felt from being manipulated by a system that guaranteed massive profits to others.[101] Being able to decide the monetary "worth" of my unique Chinese-Caucasian oocytes would have been empowering.[102] If I had earned $700,000 (at $100,000 per donation), rather than the approximate $83,000 I actually earned, this amount would have significantly supplemented the low wages I earned as a cook, enabling me to travel, write, and thrive. I completely disagree with the notion that a restraint on alienability when it comes to the oocyte market truly protects some amorphous conception of "human flourishing."[103] I have found great consonance in scholars such as Kimberly Krawiec, who writes:

> [T]he commodification objection seems an especially implausible vehicle through which to raise concerns about societal degradation or the economic and social well-being of women. In an economic exchange that requires an oocyte for completion, does limiting the monetary benefit of only a single actor—the egg donor herself—significantly reduce any degrading effects of what remains a highly profitable and expensive economic transaction?[104]

The burden should not be on individual donors to risk their health *and* take the financial hit; highly philosophical justifications provide no comfort to donors who are not contemplating contested commodification or inalienability while splayed on an operating room table.

One aspect of the exploitation argument of commodification is that egg donors cannot give genuine informed consent to the medical procedure because of the unknown long-term harms, such as cancer. I understood in signing consent forms that not every risk may be listed, and I was accepting certain unknowns. There is much scholarly concern with egg donor risks,[105] while women having

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101. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1764. ("[A]nticommodification objections are a poor fit in the face of a multi-million dollar, highly commercial industry."); Arizton Advisory & Intelligence, *supra* note 77 (highlighting projected expansion in market valuation for the assisted reproductive technology sector partly due to increased investments, expanded access to clinics, and growing infertility).

102. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 307 (2007); Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 321 (2021) (noting that clinics and donor agencies, not oocyte donors, are setting prices for donations).

103. *See* Radin, *supra* note 30, at 1885 (presenting an argument against commodification).

104. Krawiec, *A Woman's Worth*, *supra* note 30, at 1764.

105. *See, e.g.,* Karsjens, *supra* note 95, at 83-85 (questioning egg donors' ability to give informed consent to the risks of egg donation); H. Deniz Kocas, Tonya Pavlenko, Ellen Yom & Lisa R. Rubin, *The Long-Term Medical Risks of Egg Donation: Contributions Through Psychology*, 7 TRANSLATIONAL ISSUES IN PSYCH. SCI. 80, 83-85 (using psychological theory to analyze the communication of long-term medical risks to egg donors). *But see* Angel, *supra* note 17, at 210-12 (arguing that egg donors should be able to give informed consent under the same rationale that participants can give informed consent for Phase I clinical trials. "Despite this deficiency of information about risks in humans, there is general consensus that it is acceptable to allow individuals to participate in these trials, and to make their own decisions as to whether the potential benefits to themselves or society in general outweigh the possible, unknown risks. The trials are allowed to proceed because society believes that the informed consent process sufficiently protects volunteers from exploitation.").

eggs retrieved for their own use—whether for freezing or IVF—are not chased by scholars waving red flags and yelling, "exploitation!" So long as prospective donors are informed that consent may not encompass all known risks, this consent should be sufficient. A federal registry of egg donor data could aggregate statistical information about OHSS, for example.

Kimberly Krawiec argues that the scholarly emphasis against egg donors receiving higher compensation may reveal gender and class bias:

> There are many dangerous jobs regularly performed for compensation, often by employees with lower socio-economic status and education levels than egg donors (who are often valued for their academic credentials, among other characteristics). Those jobs are also performed primarily, if not exclusively, by men. For example, fishing, logging, aircraft pilot, and construction top the list of the most dangerous jobs, and more than ninety-two percent of all workplace fatalities are men. Yet, wage capping of these occupations is not suggested as an appropriate response to the jobs' inherent dangers. Nor are industry collusion or government regulation to limit worker compensation invoked as necessary mechanisms to "protect" these employees from financial coercion.[106]

The concern with coercion and exploitation is not invalid, but the physical and psychological risks of egg donation should cut in favor of donors being able to decide for themselves what these risks are worth. As bioethicist Elizabeth Yuko similarly states, "There are a lot of things people are allowed to do with their bodies for money that are risky: pro sports for example, being a firefighter…We're fine with people using their bodies in those ways to make money. Why shouldn't women have the option to donate their eggs?"[107] Additionally, coercion happens when there is financial need: egg donor donation limitations apply to all potential donors, and thus do not directly implicate actual instances of coercion.[108]

When I began donating my eggs in 2008, an ASRM Ethics Committee had just released an opinion stating that "sums of $5,000 or more require justification and sums above $10,000 are not appropriate."[109] ASRM emphasized that egg donors undergo far more discomfort and risk than sperm donors, but even though there was "no consensus on the precise payment," the accepted compensation of $5,000 aligned with the amount most SART member clinics provided.[110]

Throughout my seven donations, I questioned how an ethical boundary of $10,000 was able to prevent the commodification of human tissue.[111] This

106. Krawiec, *A Woman's Worth*, *supra* note 30, at 1764-65 (citations omitted, parentheses in original).
107. Donna De La Cruz, *Should Young Women Sell Their Eggs?*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/20/well/family/young-women-egg-donors.html.
108. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1765.
109. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).
110. *Id.*
111. *See* Krawiec, *A Woman's Worth*, *supra* note 30, at 1764; Ethics Comm. Am. Soc'y for Reprod.

boundary resulted in having to engage in behavior that felt unethical only as a result of this cap. My egg broker instructed me to lie (if asked) to the fertility clinics regarding my compensation, which varied between $12,000 and $18,000. My broker told me fertility clinics would not work with donors whose compensation exceeded ASRM's ethical cap. The fact that my legally valid fifteen-page Egg Donor Agreements openly stated my compensation amount felt at odds with ASRM's ethical boundary.[112] I was living a moral reasoning hypothetical—if a medical committee set an ethical cap, but egg brokers do not abide by this cap and instruct donors to lie so that donors can receive slightly higher amounts, yet the donors still do not receive the compensation they ask for and are made to feel guilty—how is this ethical?

I also felt indignant that a medical committee could decide the value of my bodily tissue[113] when I was the one enduring a risky medical process.[114] My feelings were confounded by the fact that I sincerely wanted to help other families who could not conceive without ART. Still, because my desired compensation was $40,000, it felt offensive when intended parents offered $12,000, knowing full well that they were not negotiating with the reproductive endocrinologist or attorney. Even if intended parents can afford to pay donors higher amounts, they generally prefer donors who have an altruistic nature, perhaps believing this too is somehow inheritable.[115] Because my broker already made me feel as though my compensation was in excess of the ethical cap, further negotiation was tacitly inappropriate.[116] As a woman in her twenties with no business acumen, I was profoundly unqualified to negotiate.[117] The protection I needed was not from commodification in a commercial industry[118] but from an advocate who would affirm that it was acceptable for me to desire and demand the price I had set. I chose $40,000 because it was a reasonable discount on the advertisements I had seen offering at least $50,000.[119] I was empathetic to the families knowing very

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Med., *supra* note 72, at 308 (2007).

112. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 72, at 308 (2007).

113. *Id.* at 308-09 (illustrating that fifteen men and women on the Ethics Committee determined that sums exceeding $10,000 were "not appropriate").

114. *See* AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 1, at 15-16 (2018); Tober et al., *supra* note 12, at 1292 (citations omitted); INST. MED. & NAT'L RSCH. COUNCIL, *supra* note 13, at 3.

115. *See* Curtis, *supra* note 98, at 88.

116. *See, e.g.*, Almeling, *supra* note 78, at 329-30 (explaining that donation agencies may coach donors to downplay financial motivations instead of negotiating for a higher price); Soinski, *supra* note 34, at 528 ("[T]he industry continues to be dominated by the idea that financial, motivations, to some extent, preclude the existence of altruistic motivations." (citations omitted)).

117. "Though little is known about the *actual* demographics of these donors, the ideal donor profile is clear: she is young, intelligent, highly educated, and has yet to realize her earning potential." Miller, *supra* note 33, at 43. Business negotiation is not in the skillset of the average donor and certainly was not in my skillset at the time of my donations.

118. *See* Krawiec, *Altruism and Intermediation*, *supra* note 20, at 241 ("[O]bjections to the egg market (or any other baby market sector) cannot persuasively rest on concerns over commodification and commercialization, as the market was commodified and commercialized long ago.").

119. *See, e.g.*, O'C. Hamilton, *supra* note 43 (giving the example of a full-page ad placed in the

well there was no empathy in fertility clinics' calculations. Asking for $40,000 felt excessive, but it somehow still made me feel less than.

Moreover, imagine my surprise having to pay income tax on my "donation."[120] I am not the only donor whose broker failed to inform her of tax liability on "donations,"[121] as one donor writes:

> One of the worst parts is that egg "donations" are classified at the end of the year as "Miscellaneous" income on par with lottery winnings and hobby income. It is taxed at the highest amount possible. Even though the sale of body parts is a federal offense and ILLEGAL in the U.S., the agency and IRS will classify your "service" as taxable income. None of this was explained to me at the time of my egg donation.[122]

In 2016, a federal court ordered ASRM and SART to remove language that specified an ethical cap from its guidelines and clinic requirements.[123] Nonetheless, the perception of egg donation as a means to a windfall remains pervasive.[124] Current examples of compensation egg donors receive if they donate directly to a clinic includes $10,000 to $20,000,[125] $4,000 to $6,000,[126] and $7,000.[127] Examples of compensation amounts for donors who choose to use an

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Sanford Daily and in student newspapers at Harvard, Yale, UCLA [sic] and other schools last spring that read, 'Give the Gift of Life & Love.' It promised $100,000 to a Caucasian woman under age 30 with 'proven college-level athletic ability' willing to donate eggs. Numerous other ads have offered between $10,000 and $80,000.").

120. *See* Bridget J. Crawford, *Tax Talk and Reproductive Technology*, 99 B.U. L. REV. 1757, 1761-63 (2019) (discussing a 2015 court opinion finding that remuneration received for egg donation was taxable income and must be reported).

121. *Id.* at 1796 ("It is difficult to understand the persistence of the altruism narrative as applied to compensated egg transferors until one understands that the continued vitality of that narrative depends in part on the suppression of tax talk."). Some agencies, however, are now upfront about egg donation being taxable income. *See, e.g.*, *Egg Donor Compensation: How Much Does Egg Donation Pay?*, CONCEIVEABILITIES, https://www.conceiveabilities.com/egg-donors/egg-donor-pay/ [https://perma.cc/U86Z-7LLY] (last visited Feb. 22, 2024) (telling potential donors they will be issued a 1099-S because egg donation compensation is taxable income).

122. M, *What I Wish I Knew Before I Donated My Eggs*, WE ARE EGG DONORS (Nov. 13, 2015), https://www.weareeggdonors.com/blog/2015/11/13/what-i-wish-i-knew-before-i-donated-my-eggs [https://perma.cc/7LYV-AK6M].

123. Kamakahi v. Am. Soc'y Reprod. Med., No. 3:11-CV-1781 JCS, 2016 WL 7740288, at *2 (N.D. Cal. Aug. 26, 2016).

124. *See, e.g., Egg Donor Compensation*, FAM. SOL. INT'L, https://thedonorsolution.com/egg-donation/egg-donation-compensation/ [https://perma.cc/HM9B-35Y6] ("Some people have the impression that a woman who chooses to donate eggs for money can make $100,000 or more. In reality, compensation for egg donors very rarely exceeds $10,000, even in areas where starting compensation is higher.") (last visited April 23, 2023).

125. *Egg Donor Compensation*, PAC. FERTILITY CLINIC, *supra* note 75 ("Compensation amount is determined by donor's location, prior donations, ethnicity, and other factors.").

126. *Become an Egg Donor*, *supra* note 75.

127. *How Will I be Compensated for Egg Donation?*, SHADY GROVE FERTILITY (Aug. 10, 2017), https://www.shadygrovefertility.com/article/egg-donor-compensation/ [https://perma.cc/SSY9-MMG8].

egg agency includes $5,000 to $10,000[128]; $10,000 to $12,000 "or more"[129]; and compensation that begins at $10,000 without an explicit limit.[130] The fertility industry benefits from the claims that donor participation is non-commercial and that this protects women from commodification, because clinics are then exempt from price-fixing regulations.[131]

Even though there is no longer an explicit cap, and some donors do receive over $10,000, the typical donor payment appears to still be less than $10,000, meaning the industry continues to implicitly set the same standard as over a decade ago.[132]

IV. CURRENT LANDSCAPE OF RACE AND ART

Infertility, which is defined by the Center for Disease Control as an inability "to get pregnant (conceive) after one year (or longer) of unprotected sex,"[133] is a disease.[134] In the United States, about 8% of married and cohabitating women of reproductive age struggle with infertility,[135] and about 12% have received infertility services.[136] There is mixed data on whether infertility affects white individuals more than Black, Asian, or Hispanic individuals,[137] yet white

128. *Prospective Donors*, EGG BANK AM., EGG DONOR AM., https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation [https://perma.cc/M9YS-D58L] (last visited April 23, 2023).

129. *Being an Egg Donor is Rewarding in More Ways Than One*, GROWING GENERATIONS, https://www.growinggenerations.com/egg-donation/for-egg-donors/pay/ [https://perma.cc/5HCG-9SEP] (last visited Feb. 22, 2024).

130. *Egg Donor Compensation and Benefits*, HATCH FERTILITY, https://www.hatch.us/egg-donor-compensation (offering compensation starting at $10,000 "with room for growth according to your achievements, education, and prior cycles.") (last visited Feb. 22, 2024);

131. *See* Krawiec, *Altruism and Intermediation*, *supra* note 20, at 239 ("Formal and informal agreements to depress the price of eggs pervade the fertility industry…[T]hese attempts by the fertility industry to control egg prices amount to the same type of horizontal price fixing agreement long deemed *per se* illegal by the Supreme Court. Yet these agreements to depress egg prices thus far have failed to elicit regulatory notice, public criticism, or legal consequence. Although several factors may contribute to this lapse, the persistent dialogue of altruism and donation that shrouds the egg business and distracts from the commercial nature of the industry is surely a contributing factor." (citations omitted)).

132. *See, e.g.*, Egg Donor Compensation, PAC. FERTILITY CLINIC, *supra* note 75; Become an Egg Donor, *supra* note 75; Prospective Donors, *supra* note 128; Egg Donor Compensation, FAM. SOL. INT'L, *supra* note 124.

133. Infertility FAQs, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm/ [https://perma.cc/YN2K-2MGG] (last visited April 30, 2023).

134. *Infertility*, WHO, https://www.who.int/news-room/fact-sheets/detail/infertility [https://perma.cc/T3E9-23H9] (last visited April 30, 2023).

135. Morgan Snow, Tyler M. Vranich, Jamie Perin & Maria Trent, *Estimates of Infertility in the United States: 1995-2019*, 118 FERTILITY & STERILITY 560, 563 tbl.2.

136. CDC, *2020 Assisted Reproductive Technology Fertility Clinic and National Summary Report* 2 (2022), https://www.cdc.gov/art/reports/2020/pdf/Report-ART-Fertility-Clinic-National-Summary-H.pdf [https://perma.cc/8HTS-EMKR].

137. Angela S. Kelley, Yongmei Qin, Erica E. Marsh & James M. Dupree, *Disparities in Accessing Infertility Care in the United States: Results from the National Health and Nutrition Examination Survey, 2013-16*, 112 FERTILITY & STERILITY 562, 565-66 (2019) (analyzing National Health and Nutrition Examination Survey (NHANES) cycles from 2013 to 2016 and finding no significant differences in the prevalence of infertility by race or socioeconomic

individuals seek out ART services at a disproportionately higher rate than Black, Asian, and Hispanic individuals.[138] This reduced use of ART services by Black, Asian, and Hispanic individuals perpetuates the flawed idea that white people with oocytes ought to procreate in abundance.[139] Consider also the structural racism embedded in an industry that provides infertile white families with multiple ART-created offspring, while welfare laws limit the amount of children a Black person with oocytes may have.[140]

Where do the roots of this reproductive inequity begin?[141] In order to systematically analyze the multiple racial disparities in everything from IVF outcomes[142] to live birth rates,[143] Doctors Marissa Weiss and Erica Marsh created a pyramid-shaped infertility model, including stages such as "Diagnosed with infertility," "Referred to a specialist," "Gets appointment with specialist," "Engages in fertility treatment," and "Engages in IVF (if needed)."[144]

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background). *But see* Snow et al., *supra* note 135, at 563 (indicating that Non-Hispanic Black women are in fact significantly more likely to experience infertility than Non-Hispanic white women).

138. *See, e.g.*, Deepa Dongarwar, Vicki Mercado-Evans, Sylvia Adu-Gyamfi, Mei-Li Laracuente & Hamisu M. Salihu, *Racial/Ethnic Disparities in Infertility Treatment Utilization in the US, 2011-2019*, 68 SYS. BIOLOGY REPROD. MED. 180, 185 (finding that Hispanic and Non-Hispanic Black women were 70% less likely to use infertility treatment, but acknowledging the limitations of the study's "inability to account for important sociodemographic factors such as income and insurance coverage for ART" and noting other studies that have controlled for these factors and still demonstrated racial disparities in ART utilization between Non-Hispanic-Black and white women, and Hispanic and Non-Hispanic women); David B. Seifer, Linda M. Frazier & David A. Grainger, *Disparity in Assisted Reproductive Technologies Outcomes in Black Women Compared with White Women*, 90 FERTILITY & STERILITY 1701, 1701, 1707 (2008) ("Black, white, and other race/ethnicity women underwent 3666 (4.6%), 68,607 (83.5%), and 8036 (11.9%) IVF cycles, respectively."); Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy*, 20 *AMA J. ETHICS*, E1152, E1154 (2018) ("There is evidence that African American, Chinese, and Hispanic patients are much less likely to seek care than white patients."); Kelley et al., *supra* note 137, at 566 (finding data consistent with previous studies demonstrating "black and Hispanic women with infertility may seek infertility care less often than non-Hispanic whites, Asians, and women of multiracial backgrounds"). *But see* Saswati Sunderam, Dmitry M. Kissin, Yujia Zhang, Amy Jewett, Sheree L. Boulet, Lee Warner, Charlan D. Kroelinger & Wanda D. Barfield, *Assisted Reproductive Technology Surveillance—United States, 2018*, MORBIDITY & MORTALITY WEEKLY REP. SURVEILLANCE SUMMARIES, Feb. 2022, at 11 (stating data indicated that "ART use was highest among Asians or Pacific Islanders, followed by non-Hispanic White women, whereas non-Hispanic Black, Hispanic, and non-Hispanic American Indian or Alaska Native women had substantially lower levels of ART use").

139. Roberts, *Race, Gender, supra* note 56, at 785 (describing how the use of race in reproductive technology has perpetuated the casting of "white women as the only consumers of reproductive technologies and women of color only as victims of population control policies").

140. *Id.* at 784-85.

141. Reviewing current scientific literature is notably problematic. First, research employs heteronormative and cisnormative bias by, for instance, excluding many individuals from studies that examine demand for ART, for example. Second, racial groups that are not white are underrepresented in this research. Weiss & Marsh, *supra* note 49, at 941.

142. *Id.* at 942 (stating that IVF utilization is higher among white women "[e]ven after adjusting for relevant factors such as age, marital status, education, and payment method.").

143. *Id.* at 944 (noting a contributing factor to racial disparities in live-birth rates is that Black women have a higher incidence of miscarriages following ART treatments).

144. *Id.* at 941 fig.1.

Weiss and Marsh found "inequities at every stage of the path to parenthood."[145] At the outset, Black women are half as likely as white women to be evaluated for infertility.[146] Other disparities include: Black and Hispanic women wait longer to see infertility specialists;[147] Black women have lower odds of getting pregnant using IVF;[148] and, particularly relevant to this Article, Black recipients of donor eggs are not only less likely to get pregnant than white recipients, but have the "lowest probability of pregnancy regardless of the race of the oocyte donor."[149] This probing is significant because one of the core values of SisterSong Women of Color Reproductive Justice Collective's[150] reproductive justice framework is the right to have a child.[151] It is disconcerting that maternal race can predict both ART utilization and outcome.[152] Action must be taken to prevent this reproductive injustice.

Even though the number of ART cycles has doubled since 2009,[153] "the majority of individuals undergoing fertility treatment are still white, highly educated, and financially privileged."[154] One reason Black and Hispanic women use ART services less than white women is the expected financial barriers that emerge from the intersection of race and class.[155] ART services requiring donor

145. *Id.* at 944.

146. *Id.* at 941. The reasons for this require further examination by researchers, but Doctors Weiss and Marsh surmise that "factors such as limited fertility knowledge, misconceptions, and mistrust of the health care system among Black women, compounded by physician bias based on longstanding stereotypes" play a role. *Id.* (citations omitted). Black and Hispanic women may choose to delay infertility evaluations an average of twenty months longer than white women. *Id.* (citations omitted).

147. *Id.* at 942 (noting results from a 2021 study showing no racial difference in getting a fertility appointment or the potential obstacle of taking time off from work).

148. *Id.* at 943.

149. *Id.*

150. SISTERSONG, https://www.sistersong.net/about-x2 [https://perma.cc/W45B-53XS] (last visited Jan. 21, 2024). SisterSong is "a Southern based, national membership organization; [whose] purpose is to build an effective network of individuals and organizations to improve institutional policies and systems that impact the reproductive lives of marginalized communities").

151. *Visioning New Futures for Reproductive Justice*, SISTERSONG, https://www.sistersong.net/visioningnewfuturesforrj [https://perma.cc/X5KW-973Y] (last visited Feb. 16, 2024).

152. Dandison Nat Ebeh & Shayesteh Jahanfar, *Association Between Maternal Race and the Use of Assisted Reproductive Technology in the USA*, 3 SN COMPREHEN. CLIN. MED. 1106, 1107, 1112 (citing research suggesting racial differences in ART utilization and concluding that racial differences in ART procedure success "persist even when adjusting for disease (infertility) severity, age, insurance coverage, marital status, income, and educational status" (citations omitted)).

153. *See* CDC, *supra* note 136, at 12.

154. Weiss & Marsh, *supra* note 49, at 942. *See also* Kelley et al., *supra* note 137, at 565 (explaining that "despite equivalent rates of infertility, women who accessed infertility care the least have lower income, have less education, are non-U.S. citizens, are uninsured, and use the emergency department as their primary source of health care").

155. *See* Elster, *supra* note 51, at 726 (citing Tarun Jain & Mark Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 223 (2005)) ("With regard to infertility patients, potential barriers to access to care may include lack of appropriate information, racial discrimination, lack of referrals from primary care physicians, lack of adequate insurance coverage among lower socioeconomic

eggs and a gestational surrogate can cost up to $200,000.[156] This is a financial barrier because in many states, there is no mandated insurance coverage for ART services.[157] Without insurance coverage, the gap in access widens between individuals from historically marginalized groups who cannot afford ART and affluent white families who can.[158]

Public and federal insurance rarely covers infertility treatments,[159] and there is mixed data on whether state insurance mandates regulating private insurance coverage reduce the racial disparity in ART usage.[160]

Among Black women, other barriers to ART usage are sociodemographic factors such as cultural norms and acceptance,[161] religious beliefs,[162] and stigma.[163] For example, stereotypes about Black women being highly fertile may cause them to feel embarrassed about seeking medical intervention to conceive.[164]

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groups, and cultural bias against infertility treatment.").

156. *See The Cost of Surrogacy, Egg Donation, & Third-Party IVF Explained*, *supra* note 59.

157. *See Insurance Coverage by State*, RESOLVE: THE NAT'L INFERTILITY ASS'N. https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/ [https://perma.cc/3TFQ-MEMV] (last visited Feb. 16, 2024) (noting that as of September 2023, only twenty-one states and the District of Columbia have fertility insurance coverage laws), *See also* Kelley et al., *supra* note 137, at 565 (stating "health insurance is a proxy for improved medical access," but "health insurance alone is insufficient to guarantee access to care and/or that cultural factors may influence an individual's decision to pursue medical care for infertility").

158. Kelley et al., *supra* note 137, at 565.

159. Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, *Coverage and Use of Fertility Services in the U.S.*, KAISER FAM. FOUND. (Sept. 15, 2020) https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/ [https://perma.cc/7FQ4-LBK8] (noting that as of January 2020, Medicaid covers fertility treatments in only one state (New York), but "no state Medicaid program currently covers artificial insemination (IUI), IVF, or cryopreservation").

160. *See* Sunderam et al., *supra* note 138, at 1 (finding white women use ART more than Black and Hispanic women even when insurance coverage is the same); Ada C. Dieke, Yujia Zhang, Dmitry M. Kissin, Wanda D. Barfield & Sheree L. Boulet, *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, 26 J. WOMEN'S HEALTH 606, 606 (2017) ("Although our results suggest that ART utilization was higher in states with IVF (insurance) mandates regardless of race/ethnicity, in states with a mandate, utilization rates for black non-Hispanic and Hispanic women were still lower than the overall utilization rates for those states."). *But see* Insogna & Ginsburg, *supra* note 138, at E1154 (citations omitted) (finding studies demonstrating that when partial insurance equalizes coverage, Black individuals utilize ART four times more than when insurance is an issue).

161. Roberts, *Race and the New Reproduction*, *supra* note 52, at 940; Ebeh & Jahanfar, *supra* note 152, at 1112.

162. Angela Hatem, *Sperm Donors are Almost Always White, and it's Pushing Black Parents Using IVF to Start Families that Don't Look Like Them*, INSIDER (Sept. 17, 2020), https://www.insider.com/egg-sperm-donor-diversity-lacking-race-2020-9 [https://perma.cc/EVF5-4S7W] ("A survey conducted by Fertility IQ found that Black women were roughly three times more likely than Caucasian women to believe their ability to conceive relied upon 'religious faith' or 'God's will.' They were also less likely to view fertility as something dependent on a medical provider.").

163. Ben Carter, *'Why Can't I Find an Afro-Caribbean Egg Donor?',* BBC (Jan. 12, 2020), https://www.bbc.com/news/stories-51065910 [https://perma.cc/MWH4-VSUL] (describing infertility as a "taboo" subject in the Black community).

164. Elster, *supra* note 51, at 728-29 (citing Ziba Kashef, *Miracle Babies: One in Ten Black Women Will Face the Anguish of Being Unable to Conceive, but Today's Fertility Treatments are*

One Black woman who struggled with infertility expressed that "[b]eing African-American, I felt that we're a fruitful people and it was shameful to have this problem."[165]

Additionally, women of color may not seek ART services with the same frequency as whites because of the racist history of medical institutions.[166] This is particularly true considering the involuntary sterilization of women of color, a disturbing historical practice that has continued through present day to women detained at the U.S. Immigration and Customs Enforcement's Irwin County Detention Center.[167] In order to increase usage of ART by historically marginalized groups, individuals need to feel they can trust medical providers. Yet without more usage, there are no statistics or even anecdotal stories to improve this trust.[168]

As will be discussed in section VI, there is also an insufficient supply of donor eggs.[169] Limited access to ART combined with limited supply of donor eggs is particularly fraught because if white eggs are practically the only gametes available, then this could implicate societally acceptable racial design at the pre-existence stage.[170]

Improving the Odds, ESSENCE, Jan. 1998 ("[I]n a culture that often portrays Black women as stoic earth mamas and baby-making welfare queens, this myth may be especially potent among African-Americans.")); Weiss & Marsh, *supra* note 49, at 941.

165. ROBERTS, KILLING THE BLACK BODY, *supra* note 50, at 259 (citing Martha Southgate, *Coping with Infertility*, ESSENCE, Sept. 1994, at 28).

166. Elster, *supra* note 51, at 730 ("This distrust has historical antecedents rooted in the abuses of the Tuskegee syphilis study, the misunderstanding surrounding sickle cell carrier testing in the 1970's that led to the firing or grounding of black pilots if they were carriers of the sickle cell trait and publications such as the Bell Curve, which suggested a genetic link between race and intelligence.").

167. *See, e.g.*, Natasha Lennard, *The Long, Disgraceful History of American Attacks on Brown and Black Women's Reproductive Systems*, THE INTERCEPT (Sept. 17 2020), https://theintercept.com/2020/09/17/forced-sterilization-ice-us-history/ [https://perma.cc/2SGS-VR9Q]; *see also* Roberts, *Race and the New Reproduction*, *supra* note 52, at 944 ("What does it mean that we live in a country in which white women disproportionately use expensive technologies to enable them to bear children, while Black women disproportionately undergo surgery that prevents them from being able to bear any?").

168. Elster, *supra* note 51, at 732 (speaking to distrust of medical providers, and speculating, "Trust will grow if ARTs do not seem to be yet another social control measure over the reproductive choices of minorities. Increasing access is one way to accomplish this goal illustrating the very circuitous nature of this dilemma").

169. *E.g.*, Hatem, *supra* note 162 (emphasizing the "short supply of African-American, Asian, and Middle Eastern donors"); Amber Ferguson, *America has a Black Sperm Donor Shortage. Black Women are Paying the Price*, WASH. POST (Oct. 20, 2022), https://www.washingtonpost.com/business/2022/10/20/black-sperm-donors/; Annabel Rackham, *Lack of Ethnic Diversity Among Egg and Sperm Donors*, BBC (Nov. 30, 2022), https://www.bbc.com/news/health-63796862 [https://perma.cc/6NZZ-LXJL].

170. *E.g.*, Karsjens, *supra* note 95, at 79 ("[T]he entire premise of boutique egg donation is to perpetuate certain characteristics that are deemed salient by a select few. Wealthy couples, who utilize egg brokers or high-profile advertisements, do not seek general traits. These couples are seeking a 'perfect gene pool' for their commodity. . .").Rapper Da Brat and her wife, who are Black, explained that they chose a white sperm donor because there was only one Black donor in a pool of 300. A high-profile Black couple with substantial resources struggling to find a Black donor is just one example that demonstrates the scarcity of Black gametes. Barnaby Lane, *Rapper Da Brat Says She and Her Wife Chose a White Sperm Donor Because the Only Black Donor Presented to Them 'Looked Like Jiminy Cricket*,' INSIDER

V. RACIAL SELECTION IN ART

I remember advertisements seeking egg donors when I attended Harvard University in the late 1990s. They were always seeking the same sort of egg donor: Caucasian, taller than 5′6″, blue-eyed, with the highest percentile of SAT scores.[171] I am half Chinese, 5′4″, brown-eyed, and did not have the highest percentile SAT scores. Was I valued less than the preferred choice, or just not a genetically similar-enough match?[172] Why did these specific traits matter so much for the people who put out these advertisements? My mother did not go to college, and I still ended up at an Ivy League university. I may not be tall, but my sister certainly is. These ads' explicit preferences for Caucasian donors are not unusual, as racial categorization is one of the fertility industry's defining features.[173]

ART allows intended parents to be very selective of traits that may never manifest in the resulting child because they are simply not inheritable traits.[174] Families who do not require ART do not articulate a racial choice when reproducing. Once race becomes attached to an exorbitantly priced process, the explicit racial choice becomes conspicuous.[175] But is this analysis being too critical of the motivations behind racial selection? Is eugenics really implicated if intended parents happen to be white and want a child with stereotypically white characteristics? Perhaps they simply want what those who can reproduce "naturally" already have—children that look like them.[176] As an egg donor, it felt deeply unfair that certain families must go through the tremendous challenges of ART, relying on an entire cast of strangers to have a family, while others just…have sex. When reading such harsh scholarly critique of ART, I wonder if participants deserve to be the subject of such scrutiny when we do not subject those who are able to reproduce "unassisted" to the same scrutiny.

Notwithstanding intended parents' motivation, racial categorization by the fertility industry harms individuals and society because by racially categorizing donor gametes, the fertility industry reinforces the idea that race is not socially constructed, but inheritable.[177] Donor race is the top one or two characteristics

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(May 3, 2023), https://www.insider.com/da-brat-wife-white-sperm-donor-black-donor-jiminy-cricket-2023-5 [https://perma.cc/Z4V9-Y66Q]. In the UK, where there is a shortage of Asian egg donors, couples also have to consider using white eggs. *Asians Could Use Caucasian Donor Eggs*, BBC (Oct. 6, 2015), https://www.bbc.com/news/av/health-34455016 [https://perma.cc/5TWG-DDHZ].

171. *See, e.g.*, *Egg Donor Needed*, BROWN DAILY HERALD, https://bpb-us-w2.wpmucdn.com/blogs.cofc.edu/dist/5/554/files/2013/02/563418_10152529250955391_2118584874_n.jpg [https://perma.cc/2HGM-T7VD] (an example of an ad that could be found in college papers).

172. *See* Rich, *supra* note 65, at 2398-99 ("[S]ales of eggs show that race plays a key role in pricing. A blonde, highly educated egg donor can fetch as much as $100,000 for her eggs. More recently eggs from Asian donors, particularly 'pure-blood Chinese eggs' have commanded a high price.").

173. *See, e.g.*, Thompson, *Skin Tone*, *supra* note 64, at 134-35.

174. *See id.* at 146.

175. Fogg-Davis, *supra note* 63, at 14.

176. Roberts, *Race and the New Reproduction*, *supra* note 52, at 945.

177. *See, e.g.*, Roberts, *Race, Gender, supra* note 56, at 789-90, 799; Fogg-Davis, *supra note* 63, at 13-14; Amrita Pande, *"Mix or Match?": Transnational Fertility Industry and White*

intended parents use in choosing donor eggs,[178] yet the industry's packaging of race has no discernable standards and reinforces antiquated, artificial conceptions of race.[179] A donor may self-identify as one ethnicity or race, yet the clinic may decide the donor should be categorized as "Black" if the donor has one Black grandparent, adhering to a modern "one drop" rule.[180] My sister and I are far fairer than our 100 percent Chinese father.[181] We would likely be categorized as "Asian" by fertility clinics, and definitely not "white," despite being equally both. Rosa Yadira Ortiz, struggling to find a sperm donor, stated, "My wife wanted to carry [our child], and it was really important to her to carry on her genes. . . I realized that I really wanted Mexican sperm. It's stupid. What is Mexican sperm?"[182]

The industry's oversimplification is demonstrated by gamete banks that color-code labels—black labels for Black gametes, yellow labels for Asian gametes, white labels for white gametes.[183] Is a Jewish person considered white by this classification system?[184] Racial category is clinics' primary selection feature of clinics, yet these categories are overly broad and fail to take into account the contours of ethnic variation.[185] Clinics and agencies may screen out mixed-race donors from the "white" category, believing that by doing so there is a greater likelihood that the children will not exhibit certain phenotypic characteristics.[186]

Adding to the problematic nature of the industry's reinforcement of racial categories is that intended parents will purchase a donor's genetic material believing it possesses certain qualities, yet race is not genetically transmittable.[187] Intended parents may hope a certain skin tone or facial feature will make the children resulting from donated gametes appear more like them, when in fact variation is likely.[188]

Currently, U.S. policies allow anonymous egg and sperm donation, enabling heteronormative families to "hide" the use of assisted reproduction.[189] This is one

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Desirability, 40 MED. ANTHRO. 335, 336 (2021) [hereinafter Pande, *"Mix or Match?"*] ("[S]cholars have demonstrated a fundamental irony of race in assisted reproduction – while social scientists continue to argue that race is a social construct, these technologies reinforce the concept of race as a biological category, and shared race as shared kinship.")

178. Rich, *supra* note 65, at 2391-92.

179. *See id.*

180. *Id.* at 2402.

181. *See generally* Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105, 1113-15, 1120 (2013) (explaining that skin color does matter within some Asian communities to indicate both class and beauty, with lighter skin higher in the skin tone hierarchy).

182. Miriam Zoila Pérez, *Where Are All the Sperm Donors of Color?*, REWIRE NEWS GROUP (Nov. 28, 2018), https://rewirenewsgroup.com/2018/11/28/where-are-all-the-sperm-donors-of-color/ [https://perma.cc/43K9-Q4R8].

183. Rich, *supra* note 65, at 2404-05.

184. *See id.* at 2408-09.

185. *See, e.g.*, Thompson, *Skin Tone*, *supra* note 64, at 134-35; Rich, *supra* note 65, at 2407-08.

186. *See* Rich, *supra* note 65, at 2409.

187. *Id.*

188. Thompson, *Skin Tone*, *supra* note 64, at 139, 146.

189. Proponents of donor non-disclosure policies argue it advances the privacy and autonomy of intended parents by:

rationale to attempt racial matching.[190] Anonymity as the worldwide industry default has become extremely controversial,[191] and may become less meaningful with the wide availability of consumer DNA tests such as 23andMe and Ancestry.com.[192] Those who oppose donor anonymity argue that it harms donor-conceived children.[193] Donor anonymity policies are connected to compensation because in the case of sperm donors, a recent study has suggested that legally-mandated identity disclosure could lead to a sperm shortage, as some donors would refuse to donate[194] and some would require at least a 29% increase in compensation.[195] Donations from historically marginalized groups, already in short supply, would likely be most impacted.[196] Mandatory disclosure could further deplete scarce gamete options, such as eggs from Black and Asian donors.[197]

I first became interested in race and reproductive technology when a professor posed the following question to our class: "Do you think a white woman should be able to choose an egg from a Black donor?" My immediate intuition was no. I tried to sort why I felt it was fine for a white person to choose a Black partner to "naturally" have children with, but also why this type of selection via ART felt problematic. What if this white person was not infertile? Would this be

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> ensuring that, firstly, the nongenetic parent feels connected to the child; secondly, the child develops a strong bond with the one genetic parent; thirdly, the appearance of a 'normal' family is maintained; fourthly, there is as little disruption of the child's stability as possible; and finally, *the genetic parent's infertility (a condition that may still carry a negative stigma in some societies) is able to remain undisclosed*.
>
> Clark, *supra* note 36, at 639 (emphasis added). The only intended parents who connected with me were gay male couples—one prior to my donation (non-anonymous), and one after an anonymous donation.

190. *Id.*

191. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 292-93. Internationally, prohibitions on anonymous donations are increasing, although the U.S. has yet to adopt such prohibitions. *Id.*

192. Meghana Keshavan & STAT, *Consumer DNA Tests Negate Sperm-Bank-Donor Anonymity*, SCI. AM. (Sept. 12, 2019), https://www.scientificamerican.com/article/consumer-dna-tests-negate-sperm-bank-donor-anonymity/ [https://perma.cc/C6HZ-GYFZ]; *see* Clark, *supra* note 36, at 658.

193. Courtney Megan Cahill, *Universalizing Anonymity Anxiety*, 3 J.L. & BIOSCIENCES 647, 654 (2016) ("[T]he potential universality of the purported harms associated with donor anonymity might give regulators and mandatory disclosure proponents pause before eliminating anonymity."); Clark, *supra* note 36, at 621 (stating research "supports the argument that knowledge of one's genetic background is crucial to the development of a sense of identity or self"), 650 (explaining donor-conceived children should be able to learn about their genetic history for medical reasons); Meghana Keshavan & STAT, *supra* note 191 (mentioning psychological harms that stem from children not knowing their biological origins).

194. Glenn Cohen, Travis Coan, Michelle Ottey & Christina Boyd, *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIENCES 468, 485, 487-88 (2016).

195. *Id.* at 485.

196. *See id.* at 486.

197. *See* Bernstein, *supra* note 190, at 304-06 (cautioning against open identity systems because they may result in gamete shortages).

cultural appropriation at the most fundamental level? What if a person chooses eggs from a Native Hawaiian donor because they want to connect to Native Hawaiian customs and traditions by proxy of their child? Should an individual's procreative rights encompass the right to select the race and ethnicity of that individual's child?[198]

Generally, fertility clinics and agencies encourage racial matching.[199] In 2014, a Canadian fertility clinic restricted intended parents from using donor gametes that were not an ethnic match.[200] Doctors from the clinic explained that a child should have a "cultural connection" with their parents and to be able to "identify with their ethnic roots."[201] Another fertility clinic rejected a New Age Buddhist German (white) couple specifically seeking a South Asian donor.[202] While not a racial match, this couple felt a South Asian donor was a religious and cultural match.[203] The fertility clinic decided this was not in the best interest of the child because the couple's reasons were superficial, and the couple seemingly desired a child of color to legitimize their own Buddhism.[204]

How much should clinics and agencies get to decide that the racial motivations of the intended parents matter? As one woman expressed:

> I am an American woman, of Ashkenazi Jewish ancestry, and I strive to live my life as an active agent against racism and white supremacy. . . If I choose a donor of color, am I condemning my child to be born into a system designed not to serve them? Or can I use my white privilege to help them fight that system? Would my future child of color feel separated from their heritage with me as their mother? If I choose a white donor, am I succumbing to racist ideas of what traits are "desirable," or taking the "easy road" in knowing my child will look more like me?[205]

This woman acknowledged the reality that it is easier to be a white woman in our current society. Choosing white eggs thus feels like a problematic doubling down on the desirability of whiteness. But what if a Black family chooses white gametes[206] because they too worry about "*condemning [their] child to be born*

198. *See* Thompson, *Skin Tone*, *supra* note 64, at 143 (giving an example of a fertility clinic rejecting a couple's request to choose an egg donor who did not match their race and ethnicity).
199. *See generally* Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 FORDHAM L. REV. 2801 (2018).
200. Jessica Barrett, *No 'Rainbow Families': Ethnic Donor Stipulation at Fertility Centre 'Floors' Local Woman,* CALGARY HERALD (July 25, 2014), https://calgaryherald.com/news/local-news/no-rainbow-families-ethnic-donor-stipulation-at-fertility-centre-floors-local-woman [https://perma.cc/F3HT-X4V6].
201. *Id.*
202. Thompson, *Skin Tone*, *supra* note 64, at 143.
203. *Id.*
204. *Id.* at 143-44.
205. Kwame Anthony Appiah, *How Should I Think About Race When Considering a Sperm Donor?*, N.Y. TIMES, (June 16, 2020), https://www.nytimes.com/2020/06/16/magazine/how-should-i-think-about-race-when-considering-a-sperm-donor.html.
206. *See* Ikemoto, *supra* note 43, at 1014-15.

into a system designed not to serve them"?[207] Black women have in fact desired to use white gametes because of the advantages of being a non-marginalized race.[208] One Black woman stated, "A white person knows they have a level of comfort. You know when there is a physical aspect about you that gives you an edge. I knew being African-American was going to be hard for my kids."[209] Black women choosing white gametes does seem problematic for affirming the desirability of whiteness,[210] but at the same time it is true that Black children in our society face profound, mortal challenges that white children do not face.[211] Does this make the choice of white oocytes by Black families more morally acceptable?

Racial classification and colorism also act as a social hierarchy within cultures, demonstrated by certain Asian parents desiring babies with a pale skin tone.[212] Light skin tone is connected to higher class and a more valuable aesthetic in Asian cultures, where use of skin whitening creams is prevalent and many seek surgery for stereotypically "white" features, such as double eyelids and less "flat" noses.[213] If Asian families choose white donors, is yet another historically marginalized group choosing whiteness? In her fieldwork on the transnational fertility industry, Amrita Pande interviewed a doctor in Cambodia who said the following regarding same-sex Asian male clients:

> Many of our Asian married patients (intended parents) choose from our Asian database. . . But yes, every third patient asks for white eggs. Everyone wants a beautiful face for the next generation. . .We let the patients make the choice, we don't question. And many don't ask for our advice. . .They (the IP) hear from word of mouth that that is a possibility

207. Appiah, *supra* note 204.
208. Ikemoto, *supra* note 43, at 1014 n.25.
209. Hatem, *supra* note 162.
210. Karsjens, *supra* note 95, at 79-80.
211. *See, e.g.*, John Gramlich, *Gun Deaths Among U.S. Children and Teens Rose 50% in Two Years*, PEW RESEARCH CENTER (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years/ [https://perma.cc/YT6K-8GKR] ("In 2021, 46% of all gun deaths among children and teens involved Black victims, even though only 14% of the U.S. under-18 population that year was Black."); Giulia Heyward & João Costa, *Black Children Are 6 Times More Likely to be Shot to Death by Police, Study Finds,* CNN (Dec. 17, 2020), https://www.cnn.com/2020/12/17/us/black-children-police-brutality-trnd/index.html [https://perma.cc/P89Z-F8TJ]; Ilena Peng, *Covid Death Rate Among Black Children Nearly Three Times Higher Than White Kids*, BLOOMBERG (Mar.14, 2023), https://www.bloomberg.com/news/articles/2023-03-14/covid-killed-black-children-three-times-more-often-than-white-children; Christina Caron, *Why Are More Black Kids Suicidal? A Search for Answers*, N.Y. TIMES (Nov. 18, 2021, updated June 22, 2023), https://www.nytimes.com/2021/11/18/well/mind/suicide-black-kids.html.
212. Amrita Pande, *Want Your Eggs Black or White?*, MAIL & GUARDIAN (Feb. 1, 2019), https://mg.co.za/article/2019-02-01-00-want-your-eggs-black-or-white/ [https://perma.cc/8FFL-3R4K].
213. Jones, *supra* note 181, at 111; Anthony Youn, *Asia's Ideal Beauty: Looking Caucasian*, CNN (June 26, 2013), https://www.cnn.com/2013/06/25/health/asian-beauty/index.html [https://perma.cc/9PN5-8E7B].

> here—that you can get white egg donor. And they see these pictures of couples with lovely mixed-race babies and they say 'why not'? And we say 'why not'?[214]

On one hand, racial matching is problematic in an industry dominated by white intended parents, and should be discouraged.[215] On the other hand, pushing against racial matching may only increase whiteness if Black or Asian individuals, for example, demonstrate a marked preference for white gametes.[216] Perhaps one intended parent articulated this complex desire when he said, "I am looking for a white, Asian-looking girl."[217]

VI. DIVERSIFYING THE EGG MARKET

As explained in Part III, the fertility industry exploits people with oocytes using the rhetoric of altruism. Yet in order for more Black, Hispanic, Indigenous, and Asian individuals to access ART services, there needs to be an increased supply of gametes from these groups. Scholars have argued that including more people of color with oocytes in the fertility industry may not reduce the racial stratification in the industry and would simply reinforce the idea of race as inheritable, a profoundly dangerous idea that supports the disenfranchisement of historically marginalized groups.[218] I believe that no more damage is possible given the peak whiteness of the industry and people with oocytes who are not white ought to disrupt the fertility industry by opting in.[219] Dorothy E. Roberts wrote, "Increasing access to an unjust market doesn't solve the problem of systemic devaluation."[220] Yet if prospective egg donors utilize the fertility industry's reliance on racial categorization to make themselves marketable, this process may attach value to historically marginalized groups,[221] provide donors with financial gain, and make reproductive injustice visible.[222]

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214. Pande, *"Mix or Match?"*, *supra* note 177, at 342.
215. *See, e.g.*, *id.*, Karsjens, *supra* note 95, at 79-80.
216. *See, e.g.*, Christina Weis, *Changing Fertility Landscapes: Exploring the Reproductive Routes and Choices of Fertility Patients from China for Assisted Reproduction in Russia*, 13 ASIAN BIOETHICS REV. 7, 9-10, 16-17 (2021) (describing studies which reveal an international demand for white eggs, even among families from China traveling to Russia to create children that would be lighter skinned).
217. Pande, *"Mix or Match?"*, *supra* note 177, at 342.
218. *E.g.*, Roberts, *Race, Gender, supra* note 56*, at 7*99.
219. *See* Weiss & Marsh, *supra* note 49, at 942.
220. Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 UC IRVINE L. REV. 611, 614 (2017).
221. Fogg-Davis, *supra* note 63, at 15 (explaining that race is "prominent in private advertisements soliciting egg and sperm donors" and is "the first category on the donor lists of most fertility clinics"). Perhaps minority-race donors could be proactively anti-eugenic by providing photos in their online profiles of family members, displaying the range of skin tones and features, and thus lessening the harms of racial selection. *See also* RUSSELL, *supra* note 31, at 144-45.
222. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and The Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2054 (2021) (explaining that reproductive justice "goes beyond contraception and abortion—the traditional subject matter of reproductive rights—to consider a broad range of issues that impact reproductive freedom, including sterilization, assisted reproductive technology, access to childcare, pregnancy discrimination,

To resolve moral concerns with encouraging people with oocytes who are not white to participate in the multi-billion-dollar fertility industry, donors need to empower themselves. Empowerment comes through understanding the dysfunctionality of the industry, including how clinics and brokers use the rhetoric of altruism to make donors feel guilty for asking for "too high" a price.[223] The industry's suppression of egg donor compensation harms women by first depriving them of an adequate fee and then conveying that it is unacceptable to be motivated by money when it comes to the labor of egg donation, which is easier than many physically demanding professions.[224] For me, the periods when I travelled to donate my eggs were welcome vacations from twelve-hour days in a commercial kitchen. I do not recall the sentimentalized story I told my egg broker, but "[M]any egg donors report in surveys that helping infertile couples achieve parenthood was one of the primary concerns motivating their decision. Donors often are more forthcoming in informal interviews, however, explicitly discussing the motivating force of money in the decision to become an egg donor."[225] Donors should not feel they have to mask their motivations, even if that motivation is a desire for a six-figure payout.[226]

Fertility for Colored Girls[227] and The Broken Brown Egg[228] are examples of volunteer-run organizations that provide egg donors with valuable support, testimonies, information and even grants for infertility treatment, but donors need additional parties to advocate for their interests throughout the donation journey: brokers who do not also represent the intended parents, independent legal representation and reproductive endocrinologists. This is a costly proposition. National nonprofits should be established to provide such services at minimal cost to the donor. Additionally, there needs to be comprehensive studies of the physical and psychological impacts on past donors, and a federal registry to track donor

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community safety, food and housing insecurity, the criminalization of pregnancy, and access to reproductive health care") (internal quotation marks and citations omitted).

223. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242 ("Even those ads offering donor compensation well above the average nearly always include an appeal to altruistic impulses, frequently exhorting young women to 'give the gift of life,' or requesting the help of a 'sunny Samaritan.'").

224. *See id. See also* ASIAN CMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005) https://forwardtogether.org/tools/a-new-vision (available for download). ("[T]he regulation of reproduction and exploitation of women's bodies and labor is both a tool and a result of systems of oppression based on race, class, gender, sexuality, ability, age and immigration status.").

225. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242.

226. *See id.* (noting that "donors whose primary motivation is financial will be disqualified" by fertility clinics); Prac. Comm. Am. Soc'y for Reprod. Med. & Practice Comm. For Soc'y for Assisted Reprod. Tech., *supra* note 16, at 1400 ("Payment to donors varies from area to area but should not be such that monetary incentive is the primary motivation for gamete donation.").

227. FERTILITY FOR COLORED GIRLS, https://www.fertilityforcoloredgirls.org/ [https://perma.cc/SQ9M-MG2J] (last visited Jan. 29, 2024).

228. THE BROKEN BROWN EGG, https://thebrokenbrownegg.org/ [https://perma.cc/B69M-HULP] (last visited Jan. 29, 2024).

data moving forward.[229] Former donors should be transparent about their compensation and advise first-time donors through the negotiation process.[230] Better advocacy will hopefully lessen the likelihood of exploitation and reduce broader moral concerns with harm to donor personhood. Research and data collection on the long-term physical and psychological impacts on donors will enable them to have actual knowledge of the risks they are accepting.

Kari Karsjens articulates the difficulty in reconciling the feminist position of allowing women to do what they choose with their bodies and how it is also "disheartening and troubling to think that a legal theory, committed to de-emphasizing gender inequality and subordination, supports a practice that essentially places young women in positions of extreme commodification through human tissue exploitation."[231] I was that woman, and disempowerment came from not being able to say: this is from my body, it is for sale, and this is what I want for it.

Egg donation literature—medical, legal, and philosophical—focuses primarily on the physical impacts, coercive potential,[232] and harm to personhood. On the other side of egg donation is the substantial financial assistance, ineffable meaning, and ego gratification of a family choosing you to help create their family.[233] Discussing the financial gain, one donor wrote, "I would consider doing this again. I do worry about how it would impact my body, but the impact on my life would be so significant. I don't know if I could deny that."[234] For every

229. Jacob Radecki, *The Scramble to Promote Egg Donation Through a More Protective Regulatory Regime*, 90 CHI-KENT L. REV., 729, 753-56 (2015) (suggesting Congress adopt federal reporting requirements to track long-term effects of donation); Brody, *supra* note 19 (noting that "The Centers for Disease Control and Prevention collects information on in vitro fertilization, but not on those who donate their eggs either anonymously or to family members or friends unable to get pregnant with their own eggs" and discussing the need for an egg donor registry to "keep[] track of the medical or psychological fate of egg donors"). The FDA requires ample medical testing and record-keeping to determine whether a donor is eligible at the screening stage, but does not require collection of follow-up health impacts. *See* 21 C.F.R. §§ 1271.45-1271.90 (2004).

230. For example, as part of the negotiation process, experienced donors can advise prospective donors that the fertility clinic provide insurance coverage. *See* Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 16, at 667 (2019) (explaining that "Programs have an ethical obligation to ensure that there is a reasonable mechanism in place to cover the costs of treatment for adverse outcomes. . . For example, some programs purchase insurance to cover donors for health-related expenses incurred specifically through participation in the program.").

231. Karsjens, *supra* note 95, at 81.

232. Krawiec, *A Woman's Worth*, *supra* note 30, at 1768 ("The coercion defense fares no better. Far from saving the poorest and most vulnerable from tragic choices, the restrictions on taboo markets explored here impede earnings or market entry, increase risk, or raise social stigma, making the market less attractive. Yet underlying economic and social disparities ensure that, for those with few other viable income opportunities, sex, eggs, and surrogacy services will continue to be sold.").

233. *See* Mutcherson, *supra* note 99, at 64 ("Those who sell gametes or reproductive labor may also have a desire to experience a sense of purpose or power that comes from providing something precious to one who needs or wants it. They can be viewed as seeking the kind of karmic wellness that comes from donating blood or an organ, but doing so with much better remuneration.").

234. Ellie Houghtaling, *I Sold My Eggs for an Ivy League Education—But was it Worth it?*, THE

potential risk, prospective donors should contemplate the deep impact of helping in such a rare way. As Yasmin Sharman expressed, "I never fully grasped the level of joy giving to somebody else in this way could bring me. You may think it would be nice to help someone have a family, but actually doing it and then embracing the knowledge that a baby has been born [with your help] is a different kind of gratitude."[235] It has taken me over a decade to understand this kind of gratitude, bearing witness from afar to the families I helped create.

Women of color becoming egg donors adds an additional layer of significance because their participation is a type of activism, fighting against reproductive injustice.[236] Egg donors are notably absent from reproductive injustice dialogues.[237] Yet reproductive justice is concerned with the very nexus an egg donor inhabits:

> Women's ability to exercise self-determination—including in their reproductive lives—is impacted by power inequities inherent in our society's institutions, environment, economics, and culture. The analysis of the problems, strategies and envisioned solutions must be comprehensive and focus on a host of interconnecting social justice and human rights issues that affect women's bodies, sexuality, and reproduction.[238]

The fertility industry plays to power inequities by suppressing donor compensation to the industry's benefit.[239] ART is primarily accessible only to the white and wealthy for whom using such services is culturally acceptable. The egg donor thus has a unique role in possessing the power to alleviate one aspect of reproductive injustice, which donors of color have identified.

For example, a Chinese woman named Elaine Chong explained that when she learned there was a shortage of eggs from women of color, she thought about how her Chinese background could help other Chinese people who struggled to

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GUARDIAN (Nov. 7, 2021), https://www.theguardian.com/lifeandstyle/2021/nov/07/i-sold-my-eggs-for-an-ivy-league-education-but-was-it-worth-it [https://perma.cc/Z4WY-MGHQ].

235. Edikan Umoh, *The Immeasurable Joy of Becoming a Black Egg Donor*, REFINERY29 (Apr. 11, 2023), https://www.refinery29.com/en-us/2023/04/11355383/ivf-fertility-black-egg-donors [https://perma.cc/R3P8-ZA8V].

236. *See* Murray, *supra* note 221, at 2054 (noting that "[t]he reproductive justice framework 'highlights the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction,' and therefore considers "a broad range of issues that impact reproductive freedom, including. . . assisted reproductive technology. . ."') (citations omitted). *See also* ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223 at 1-2. Asian Communities for Reproductive Justice (ACRJ) helped found the SisterSong Women of Color Reproductive Health Collective, demonstrating the work of women of color across racial division to address reproductive injustice. *Id.* at 1.

237. *See, e.g.*, ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223 (lacking discussion of reproductive technology or egg donors); *Visioning New Futures for Reproductive Justice*, *supra* note 151 (writing that reproductive justice is for people who've had abortions, for parents, for people who have sex for pleasure, for queer and transgender people, for people of faith, for undocumented people, for people of any age, for healthcare providers, for disabled people, etc.—without mentioning reproductive technology or egg donors).

238. ASIAN CMTYS. FOR REPROD. JUST., *supra* note 223, at 2.

239. Krawiec, *Altruism and Intermediation*, *supra* note 20, at 242.

have a family.[240] Black donor Journee Clayton stated, "[T]his way I can help and be a face for women looking to donate but don't know that donating is an option for them."[241] Writing about Yasmin Sharman, Edikan Umoh explained "the nurses at her egg donation facility said they could count on one hand the number of Black women that have donated eggs [at their facility], and she felt empathetic to the Black women and couples going through the stress of the IVF treatment without the option of having a baby that looks like them."[242] Lyne Mugema researched egg donation and articulated her reasons for donating:

> In 2015/2016 when this whole topic was welling in my head, social media was full of violence against Black bodies and my instinct every single time was that I wanted to go out and have a mess of dark skin, nappy-headed children as a 'fuck you!' to the world. It was a way for me to do that without having to be a slave to that rebellion while giving a Black life, hopefully a dark skin, gap-tooth, nappy-headed, wide-nose one at that, [a chance], and to empower a woman and relieve the sense of tension over something that I don't necessarily want, but have just been conditioned to go after.[243]

Additionally, to dilute the whiteness of the fertility industry, clinics, brokers, and the media should increase public awareness regarding the color blindness of infertility, addressing the fact that Black and Hispanic families may feel a stronger stigma around assisted reproduction.[244] As donor Journee Clayton, who is mixed race, explains, "It is okay to talk about infertility. There's a huge stigma around it—that we should keep it to ourselves because it's not other people's business, but I learnt that it's something that is okay to talk about."[245] A Black woman named Natasha struggled to find an Afro-Caribbean donor in the United Kingdom.[246] She attended a race, religion, and reproduction session at Fertility Fest in London, and explained that "The taboo, the stigma, not talking about it in communities, that all came out . . . There was a room full of people of colour all talking about it. People are finding their voice now."[247] Promisingly, fertility clinics no longer only market to potential white clients, and include people of color in their marketing materials.[248] Coverage of these issues must also include the dysfertile—

240. Elaine Chong, *Why I Chose to Donate My Eggs*, BBC (Nov. 15, 2017), https://www.bbc.com/news/stories-41936041 [https://perma.cc/SGQ3-6NYW].
241. Umoh, *supra* note 233.
242. *Id.*
243. Lauren Porter, *At 28, I Knew I Never Want to Be a Mom, So I Donated My Eggs Instead*, ESSENCE (Oct. 24, 2020), https://www.essence.com/lifestyle/black-women-donate-eggs-20s-what-to-know/ [https://perma.cc/9KSC-J3DQ].
244. Carter, *supra* note 163.
245. Umoh, *supra* note 235.
246. Carter, *supra* note 163.
247. *Id.*
248. Roberts, *Race, Gender, supra* note 56, at 786 ("Women of color are now part of the market and cultural imaginary of the new reprogenetics."); *see, e.g.*, SHADY GROVE FERTILITY, https://www.shadygrovefertility.com/ [https://perma.cc/7JM8-KZU7] (last visited Feb. 19, 2024) (displaying photos of diverse users of ART services); *Donors by Ethnicity*, DONOR

single parents, non-nuclear combinations and queer families.[249]

As Dorothy E. Roberts has explained, "it is precisely the connection between reproduction and human dignity that makes a system of procreative liberty that privileges the wealthy and powerful particularly disturbing,"[250] Even if the supply of donors increases, low-income families will not be able to access ART due to myriad other costs that are unlikely to be covered by insurance.[251] Prospective donors who are financially stable can act as genuine "donors" and help families that cannot access ART services due to financial limitations. However, women should not have to volunteer their bodies to achieve societal goals of reproductive justice,[252] and policy makers must develop solutions. Faster than scholars can theorize on societal impacts, technology hurls forward. On the commercial horizon: artificial wombs;[253] the ability to create a child from two women or two men;[254] and the use of CRISPR-Cas9 to modify genes and actually create "designer babies."[255]

I would not encourage people with oocytes who have no interest in egg donation or who have profound concerns about the health risks to become donors. Those that are willing and informed should not accept anything less than the price they decide they are worth.

VI. CONCLUSION

Despite scholarly speculation and concern with white women choosing to use ART and Black women choosing not to, Dorothy E. Roberts wrote that "[e]vidence is hard to come by."[256] The lack of information is shocking. Women have been undergoing egg donations and IVF for forty years now, yet there remains a lack of longitudinal information on the impacts of hyperstimulating hormones. There are no studies comparing "mixed-race children born of assisted reproduction to black parents as opposed to white ones"[257] that could dissuade those who argue same-race gamete selection results in better social or psychological adjustment for donor-conceived children. There is as scarce

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CONCIERGE, https://www.donorconcierge.com/egg-donor-search/ethnicities/armenian-greek-egg-donors [https://perma.cc/7JM8-KZU7] (last visited July 7, 2023).

249. *See* Fox, *Reproducing Race*, *supra* note 60, at 242.

250. Roberts, *Race and the New Reproduction*, *supra* note 52, at 946.

251. *E.g.*, Kelley et al., *supra* note 137, at 565; Mutcherson, *supra* note 99, at 73 ("[I]n order to achieve equality of access, the government likely needs to affirmatively create opportunities for financial assistance to those seeking access to assisted reproduction, which could be done in part through public and private insurance programs.").

252. *See* Murray, *supra* note 221, at 2054.

253. Yehezkel Margalit, Orrie Levy & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Parenthood*, 37 HARV. J.L. & GENDER 107, 126-27 (2014) (citations omitted).

254. *Id.* at 116-17.

255. Naomi Cahn & Sonia M. Suter, *The Art of Regulating ART*, 96 CHI-KENT L. REV. 29, 35-37 (2021).

256. Roberts*, Race and the New Reproduction*, *supra* note 52, at 949.

257. Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection,* 104 CORNELL L. REV. ONLINE 114, 129-30.

information on Indigenous people and ART as there are Indigenous donors.

Once we are aware of the inequities in reproductive justice, "we must shift our focus from identifying disparities to dismantling them."[258] One path to this dismantling is for people with oocytes openly embrace commodification and leverage the power they possess as market scarcities in an industry dominated by whiteness. While this places an onus on individuals to provide an avenue for social change, these individuals can aptly cognize the potential physical and psychological harms of donation and determine a price for assuming such risks.[259]

In writing this piece, I re-read a magazine article I wrote at thirty-two, as I finished my final donation.[260] Over a decade later, cancer and COVID-19 have taken the lives of friends who never explicitly chose a medical procedure for cash. It is hard for me to engage with the risks of my oocyte donations because they seem far more remote compared to the "risks" I see family and friends knowingly engaging in daily: smoking cigarettes[261] or eating red meat and highly processed foods.[262] In the balancing test of life, bodily autonomy means determining our own self-care calculus.

In 2012, I wrote:

> I am an egg donor, and my role in the lives of the couples I donate to ends the moment my last ova hits the aspirator. What I go through medically and psychologically is not easy, but, at the end, we exchange dreams: the Intended Parents get families, I get freedom. The freedom to work a little less so I can do what I love a lot more: garden, rock climb, create, cook for

258. Weiss & Marsh, *supra* note 49, at 944.

259. *See* Squillace, *supra* note 38, at 143 (citing Radin, *supra* note 30, at 1849) ("The problems involved in a human egg market should be for the women participating in such a market to weigh through their own moral deliberation and choice."); Joel Schwarz, *Most Women Report Satisfaction with Egg Donation; Some Claim Problems*, UNIV. WASH. NEWS (Dec. 17, 2008), https://www.washington.edu/news/2008/12/17/most-women-report-satisfaction-with-egg-donation-some-claim-problems/ [https://perma.cc/FZY2-X3M3] ("73 percent [of donors]—reported being aware of some of psychological risks associated with egg donation prior to donating. These included the chance they might develop concern for or attachment to their eggs or to a potential or resulting offspring, concern that the donor or resulting child might want a future relationship with them, the possibility of having a genetic child in the world or the stress resulting from the donation process.").

260. Jennifer Meleana Hee, *Egg Donations: A Honolulu Woman's Story*, HONOLULU MAG. (Apr. 10, 2012), https://www.honolulumagazine.com/egg-donations-a-honolulu-womans-story. [https://perma.cc/W5DE-X8KU].

261. *See Health Effects of Cigarette Smoking*, CDC https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/JUD3-AC5V] (last reviewed Oct. 29, 2021) (Smoking is the main cause of preventable death in the U.S.).

262. *See What's the Beef with Red Meat?*, HARV. HEALTH PUBL'G (Feb. 1, 2020), https://www.health.harvard.edu/staying-healthy/whats-the-beef-with-red-meat [https://perma.cc/D9PJ-XUEQ] (Red and processed meats increase health risks and can lead to higher rates of heart disease, diabetes, cancer and premature death); Maria Godoy, *What We Know About the Health Risks of Ultra-Processed Foods*, NPR (May 25, 2023), https://www.npr.org/sections/health-shots/2023/05/25/1178163270/ultra-processed-foods-health-risk-weight-gain [https://perma.cc/3K7B-7Z4K] (Overconsumption of processed foods is linked to poor health outcomes including obesity, type 2 diabetes, heart disease, and cancer.)

> loved ones, write and travel. . . I will never be a mother, but I worry for what becomes of my eggs, for all the unborn and the Pandora's box of agonies that life unbounds for them, but, eventually, out of ovary, out of mind.[263]

Instead of being out of mind, they have entered existence, entered mine. Much like society's apprehension over the commodification of body parts, when I was an egg donor, my anxieties were abstract: my genetic offspring would suffer by being, and I was complicit. Harms are still possible: commodification may injure personhood; fertility hormones may cause my cells to become cancerous; the heaviest of griefs may make the lives of my gametes feel less worth living. But the tethered truth is that I did not spend enough time imagining the rewards. Now I have met the people formerly known as Intended Fathers #5510A and #5510B. My genetic offspring are their children. Clichés abound: I gave them eggs, but gay men gave my life meaning. We are all indebted, and I am forever grateful.

263. Hee, *supra* note 258.

The Case for Relaxing Bruen's Historical Analogues Test: Rahimi, Domestic Violence Regulation, and Gun Ownership

Jordan J. Al-Rawi †

ABSTRACT

The Supreme Court's grant of certiorari to review United States v. Rahimi presents the Court with an important opportunity to clarify its 2022 ruling in New York State Rifle & Pistol Association v. Bruen.

In Rahimi, the Fifth Circuit expanded Bruen's historical approach to the Second Amendment when it struck down a 1994 federal law, 18 U.S.C. § 922(g)(8), which allowed a court to disarm a person subject to a domestic violence civil protective order. This essay argues that Rahimi offers insight into one of Bruen's potential flaws, and suggests an alternative analysis of Rahimi that helps to remedy this problem more broadly without undermining Bruen itself. Bruen accepted and perpetuated the results of cost-benefit analyses of the Second Amendment performed by ancient legislatures, leaving no opportunity for interest-balancing by modern lawmakers.

In deciding Rahimi pursuant to Bruen, the Fifth Circuit focused its inquiry on what eighteenth century legislatures had done with regard to perpetrators of domestic violence, and found no analogue sufficient to support § 922(g)(8). At the time of ratification, no calculation had been made to suggest that the societal interests in curbing domestic violence outweighed the interest of gun ownership. This is largely because lawmakers, and society in general, did not recognize domestic violence or the rights of women as categories of social interest, much less as targets of ameliorative legislative or judicial action. It would be nonsensical, therefore, to go backwards in history and rely upon cost-benefit calculations done by a legislature incapable of fully appreciating the challenges faced or values held by modern society. And yet Bruen, as read by the Rahimi court, would bind modern society to that perspective.

To resolve the conundrum, this essay suggests three approaches to

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† Thank you to Professor Rebecca Brown, whose course inspired this paper.

addressing the Rahimi issue while still remaining consistent with the Bruen regime. The most specific solution in Rahimi would be to clarify that persons who have perpetrated domestic violence and are subject to a qualifying civil protective order, even before being convicted of a crime, fall outside the community of "law-abiding citizens" whose gun rights are protected. A broader solution to the analytical problem would be for the Court to adjust the relevant historical period to which it looks for analogues whenever a societal failure of the founding period–such as deeply rooted discrimination and exclusion–rendered early legislatures incapable of striking a meaningful balance between the competing interests at issue. Or, relatedly, the Court could permit explicit means-end scrutiny, in the form of intermediate or strict scrutiny, to be applied to modern regulations that are designed to further a societal interest that was grossly undervalued in the ratification era, particularly due to entrenched systems of discrimination or exclusion. These adjustments to the historical approach advanced by Bruen would preserve the legislature's responsibility of meaningfully considering and balancing gun rights with competing social interests.

INTRODUCTION

The Supreme Court established a rigid framework for judicial review of

challenged laws regulating the Second Amendment right to bear arms in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* struck down a New York state law requiring that individuals show a special need for self-protection in order to obtain an open carry license for a firearm, replacing means-end scrutiny with a form of historical review temporally limited to the eighteenth century. The *Bruen* test requires the government to justify a challenged gun regulation by pointing to analogous regulations in the historical record that demonstrate a pattern and practice of restricting Second Amendment rights in a similar fashion.

Shortly after the Court's decision in *Bruen*, the Fifth Circuit struck down 18 U.S.C.§ 922(g)(8) in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023). Passed in 1994, § 922(g)(8) restricted the Second Amendment rights of individuals subject to qualifying civil protective orders that were issued in response to complaints of domestic abuse. The Fifth Circuit concluded that because no analogous regulations to § 922(g)(8) existed in colonial and post-enactment America,[1] the statute was unconstitutional under the *Bruen* test. Though a small number of regulations criminalizing domestic violence existed in colonial and post-enactment America, these regulations either went unenforced or were enforced extrajudicially. As a result, the legislative and judicial record remains underdeveloped and unreliable on the topic of domestic violence.

Domestic violence is a societal issue that is undeniably rooted in gender, which can explain why eighteenth and nineteenth-century lawmakers paid little to no attention to it. During this time, violence within the home was largely unregulated and not formally punished; in some jurisdictions, corporal discipline of women and children was tolerated or outright permitted.[2] Civil protective orders did not exist, women had no political or economic rights, and their protection was left largely to their male guardians. Domestic violence in early America was not recognized as a category of social interest at all, much less an interest powerful enough to outweigh that in gun ownership.[3]

In rebuking the circuit courts' application of means-end scrutiny[4] to

1. This paper uses "post-ratification America" or "early America" or "post-enactment America" to refer to the period following the enactment of the Second Amendment until the Civil War.
2. Because the vast majority of survivors of domestic abuse are women and domestic violence laws in colonial America typically addressed the issue of domestic violence by referring to the perpetrator as the husband and the survivor as the wife, this paper both explicitly and implicitly refers to domestic abuse survivors as women and to persons who have perpetrated acts of domestic violence as men. While not the focus of this paper, it is important to acknowledge that domestic violence is not limited to heterosexual relationships. Indeed, non-heterosexual persons are much more likely to experience domestic violence than are heterosexual persons. *See* Jennifer L. Truman & Rachel E. Morgan, *Violent Victimization by Sexual Orientation and Gender Identity, 2017-2020*, BUREAU OF JUSTICE STATISTICS (Oct. 04, 2023) https://bjs.ojp.gov/library/publications/violent-victimization-sexual-orientation-and-gender-identity-2017-2020 [https://perma.cc/A3HR-GRJ4].
3. *See infra*, Part III.
4. Means-end scrutiny refers to the analytical process of evaluating the constitutionality of government action, such as the adoption of a regulation that burdens or limits a constitutional right. In general terms, a court applying means-end scrutiny to a challenged government

challenged gun regulations and replacing it with a historical test, the *Bruen* Court creates an unworkable dichotomy: early American legislatures' conclusions that protecting a particular social interest justified restricting gun rights are treated as presumptively reasonable, yet modern legislatures are prohibited from engaging in the same cost-benefit calculations. Rather, modern legislatures are bound by the cost-benefit calculations made by colonial and post-enactment legislatures, despite the reality that these early legislatures were incapable of fully appreciating the challenges or values of modern society. This dichotomy is at its worst when the legislative or judicial history being analyzed to determine the constitutionality of a challenged gun regulation is underdeveloped due to a significant failure of early society, such as deeply rooted racism or sexism.

Part I of this paper provides an overview of the Supreme Court's decision in *Bruen*. Part II discusses § 922(g)(8) and the Fifth Circuit's decision in *Rahimi*. Part III analyzes our nation's history of regulating domestic violence from colonial America until the mid-1990s. In Parts IV and V, this paper argues that the *Bruen* test is inapplicable to § 922(g)(8) because the historical record is unreliable on the topic of domestic violence regulation. The Court should carve out reasonable exceptions to the *Bruen* test, and can do so without undermining the principles upon which *Bruen* is based, if it views gender-based issues, such as the lack of domestic violence regulation in colonial and post-enactment America, as a hole in our nation's legislative history. Because colonial and post-enactment societies undervalued the benefit of holding those who have perpetrated acts of domestic violence accountable while protecting survivors[5] from further harm, a proper cost-benefit calculation that weighs this benefit against the cost of disarming persons perpetrating domestic violence would likely result in a different outcome today. Lastly, in Part VI, this paper suggests that the Court may avoid carving out an exception to *Bruen* by holding that person who perpetrate acts of domestic violence and are subject to qualifying civil protective orders are not law-abiding citizens, and thus lack the privilege to exercise Second Amendment rights.

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action evaluates whether the *means* (the measures and methods chosen to effectuate the government's policy goals) justify the *ends* (the purpose of the government's action and the effect that the government intends its action to produce). The three types of means-end scrutiny are: rational basis review, intermediate scrutiny, and strict scrutiny. Prior to the Supreme Court's decision in *Bruen*, the constitutionality of laws that burdened or limited Second Amendment rights were evaluated under intermediate or strict scrutiny. *See infra* Part I.

5. The word survivor has been used in place of "victim" wherever possible. Feminist and intimate partner violence scholars advocate against "defining women who experience violence at the hands of their intimate partners as 'battered women,'" because this terminology confines survivors identities to that of "powerless and passive objects of another's violence, helpless to free themselves from the constraints imposed" by the person who has perpetrated acts of violence. *See* A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (And Utility?) of Shame*, 98 B.U.L. REV. 1677, 1724-25 (2018). Said another way, defining a person by the harm they have suffered takes away their autonomy and confines their identity to this harm. Similarly, this article will strive to refer "persons who have perpetrated acts of domestic violence" rather than "batterers" or "abusers." The use of terms such as "batterer" or "abuser" assumes that persons who have perpetrated acts of domestic violence "lack the willingness or capacity to change." *Id.*, at 1725.

PART I: THE *BRUEN* DECISION

In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court struck down New York State's proper cause requirement, which required individuals who sought to carry a firearm outside of their home for self-defense purposes to "demonstrate a special need for self-protection distinguishable from that of the general community."[6] The Court also enshrined the Second Amendment as the strongest right in the Constitution by rejecting means-end scrutiny,[7] a judicial tool that permitted states to offer compelling interests, such as the protection of public health and safety, as the justification for a challenged gun control law.[8] The application of means-end scrutiny to challenged gun regulations enabled legislatures to engage in contemporary cost-benefit analyses. After the passage of a gun regulation by a legislature, means-end scrutiny empowered courts to weigh the strength of the government's asserted interest in support of the regulation against the burden that the regulation imposed on an individual's Second Amendment rights. Despite nearly all appellate courts adopting means-end scrutiny in the Second Amendment context,[9] *Bruen* holds that "when[ever] the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" unless the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[10] As such, the framework set out in *Bruen* cabins judicial review to the historical record, meaning that a challenged gun regulation is only constitutional if there is a pattern and practice of restricting or limiting gun rights, in a similar manner and for similar reasons, that dates back to the enactment of the Second Amendment.

I. *The Old Test*

Following the Supreme Court's landmark decisions in *McDonald v. Chicago*, 561 U.S. 742 (2010) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), almost every Court of Appeals adopted a two-step framework to determine whether a challenged regulation impermissibly restricted conduct protected under the Second Amendment. Indeed, "every Court of Appeals to have addressed the question ha[d] agreed on a two-step framework for evaluating whether a firearm regulation [was] consistent with the Second Amendment" including the "First,

6. *Bruen*, 142 S. Ct. at 2123 (quoting *In re Klenosky*, 75 App. Div. 2d 793, 428 N.Y.S. 2d 256, 257).
7. Erwin Chemerinsky, *Chemerinsky: Supreme Court Gun Ruling Puts Countless Firearm eRegulations in Jeopardy*, A.B.A. J. (Jun. 29, 2022), https://www.abajournal.com/columns/article/chemerinsky-supreme-court-gun-ruling-puts-countless-firearms-regulations-in-jeopardy [https://perma.cc/2YP2-NGPN] ("*Bruen* is, by far, the most expansive reading of the Second Amendment in American history. . . The court's approach… provides more protection for gun rights than virtually any other in the Constitution.").
8. *See Bruen,* 142 S. Ct. at 2127.
9. *See id.* at 2174 (Breyer, J. dissenting) (internal citation omitted).
10. *Id.* at 2126, 2130.

Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits."[11]

The first step required courts to use "text and history to determine 'whether the regulated activity [fell] within the scope of the Second Amendment.'"[12] If a court determined that the first step was satisfied, the second step required courts to "consider 'the strength of the government's justification for restricting or regulating' the Second Amendment right."[13] Courts would then need to apply one of two forms of means-end scrutiny: strict scrutiny and intermediate scrutiny. If a challenged law or regulation burdened the "core Second Amendment right [of]… self-defense *in the home*," which the Supreme Court recognized in *Heller* as the heart of the individual right to gun ownership, courts applied strict scrutiny and asked whether the challenged law or regulation was "'narrowly tailored to achieve a compelling government interest.'"[14] If a challenged law or regulation did not burden this core Second Amendment right, meaning that the law or regulation restricted, limited, or conditioned an aspect of gun ownership unrelated to self-defense *inside of the home*, courts applied intermediate scrutiny by "consider[ing] whether the Government c[ould] show that the regulation [was] 'substantially related to the achievement of an important governmental interest.'"[15]

In the wake of *Heller*, lower courts exercised means-end scrutiny by upholding some laws and striking others. A federal district court upheld the Lautenberg Amendment,[16] which provided for the disarmament of individuals convicted of a misdemeanor crime of domestic violence, holding that the statute was properly tailored to the substantial government interest of "protect[ing] the victims of domestic violence and…keep[ing] guns from the hands of the people who perpetrate such acts [of domestic violence]."[17] Similarly, multiple circuits upheld § 922(g)(8), which provided for the disarmament of individuals subject to domestic-violence-related civil protective orders but who had not yet been convicted of a felony or misdemeanor charge of domestic violence, holding that it was properly tailored to the substantial government interest of protecting survivors of domestic abuse from further violence.[18] However, in *Ezell*, the Seventh Circuit held unconstitutional a series of zoning restrictions that limited the location of firing ranges in Chicago on the basis that these restrictions "severely limit[ed] Chicagoans' Second Amendment right[s]" in exchange for "only speculative claims of harm to public health and safety… [which were] not nearly enough to survive [] heightened scrutiny."[19] Each circuit that addressed means-end scrutiny

11. *Id.* at 2174 (Breyer, J. dissenting) (internal citation omitted).
12. *Id.* (quoting *Ezell v. Chicago*, 846 F.3d 888, 892 (7th Cir. 2017)).
13. *Id.*
14. *Id.* at 2126 (citing *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017).
15. *Id*. (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2nd Cir. 2012)).
16. 18 U.S.C. § 922(g)(9).
17. *United States v. Booker*, 570 F.Supp. 2d 161, 164 (D. Me. 2008).
18. *See, e.g.*, *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012); *see also United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011).
19. *Ezell*, 846 F.3d at 890.

embraced its application to Second Amendment regulations because the test enabled circuits to strike a delicate balance between preserving Second Amendment rights and protecting significant interests of the community which warranted the limitation of such rights.

II. *The New Test*

Even though appellate courts agreed upon using means-end scrutiny as an element of the test to determine whether a challenged gun regulation violates the Second Amendment, [20] Justice Thomas concluded in *Bruen* that neither *Heller* nor *McDonald* "support applying means-end scrutiny in the Second Amendment context."[21]

Instead, *Bruen* holds that:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its [challenged] regulation…the government must demonstrate that the [challenged] regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside of the Second Amendment's 'unqualified command.'[22]

The test prescribed by *Bruen*, which this paper refers to as "historical analysis," results in extensive Second Amendment protections. Unlike the old test which applied means-end scrutiny at step two of the inquiry, the new test looks solely at historical tradition. Anytime a "challenged regulation addresses a general societal problem that has persisted since the 18th century," such as domestic violence, the regulation is likely unconstitutional if any of the following fact-patterns apply: (1) there is a "lack of [] distinctly similar historical regulation addressing that problem," (2) "earlier generations addressed the societal problem, but did so through materially different means" or (3) "some jurisdictions [] attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds."[23] As a practical matter, this means that the government must produce comparable legislation or judicial opinions from the historical record demonstrating that a cost-benefit analysis was done during the relevant historical period and concluding that the limitation of Second Amendment rights was justified in order to control a presently identified societal problem. For instance, as *Bruen* recognizes, many jurisdictions enacted prohibitions against the concealed carry of pistols and other smaller weapons during the mid-nineteenth century, which presumptively justifies modern

20. *Bruen*, 142 S. Ct., at 2127, n.4.
21. *Bruen*, 142 S. Ct., at 2127.
22. *Id.* at 2126 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).
23. *Id.* at 2131.

concealed carry restrictions.[24]

Justice Thomas instructs lower courts conducting historical analysis to weigh most heavily "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th Century.'"[25] Later history, particularly to the extent that it "contradicts what the text says," should be given minimal deference.[26]

However, the Court does not contend that Second Amendment rights are limitless: "All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense…"[27] As the Court acknowledged in *Heller*, certain "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful."[28]

III. *Where does this leave us?*

This paper will address an important gap in *Bruen*: is it proper to cabin the court's constitutional analysis of a challenged gun regulation to the historical record when a general societal problem existed in early America but was (1) not recognized as a problem because post-enactment society did not recognize or hold the same values as does modern society, or (2) left unregulated due not to a failure to recognize the problem altogether but rather a failure to recognize the importance of the problem?

As discussed below in Part III, domestic violence was recognized as a societal problem as early as the establishment of Puritan colonies' criminal codes; however, it was sparsely regulated, and perpetrators of abuse rarely faced punishment for their crimes. The *Bruen* framework imposes a rigid form of historical analysis that fails to consider the possibility that a problem was recognized as *factually* existent in early America but was not *legally* addressed until a later date. Significantly, *Bruen* does not hold that a legislature can never make a cost-benefit calculation regarding whether the existence of a societal problem justifies the limitation of the Second Amendment to control that problem. Rather, *Bruen* binds modern legislatures to the cost- benefit calculations which were made in colonial and post-enactment America, at least to the extent that these calculations were made concerning a general societal problem in existence during this time period.

Although domestic violence existed and was recognized as a social problem in colonial and post-enactment America, legislatures and courts failed to address

24. *Id.* at 2120.
25. *See id*. at 2136 (quoting *Heller*, 554 U.S. at 605) (explaining that evidence from this period is weighed the most heavily while underscoring the primacy of text in constitutional analysis).
26. *Id.* at 2137.
27. *Id.* at 2159 (Alito, J. concurring) (emphasis added).
28. *Id.* at 2162 (Kavanaugh, J. concurring) (quoting Heller, 554 U.S. at 627, n.26).

the problem due to a defect in social values.[29] *Bruen*, as applied by the Fifth Circuit in *Rahimi*, expands the Second Amendment to untenable lengths; in the case of Zackey Rahimi, *Bruen* prevents modern legislatures from depriving a man suspected of domestic violence and found by a court to be an imminent threat to another person of his right to possess a firearm.[30]

Rahimi's strict application of *Bruen*'s history and traditions approach is the result of the Court's failure to provide guidance to lower courts concerning the correct application of this test. The history and tradition approach assumes that, with respect to a societal problem, colonial and post-enactment history is most relevant to resolving the Constitutional question of whether the benefits of addressing the societal problem outweigh the burden (cost) placed on Second Amendment rights.[31] But when a defect in social values affects the cost-benefit analysis performed by colonial and post-enactment legislatures and courts, modern courts should be permitted to extend their analysis of the historical record to a later date when a cost-benefit analysis concerning the societal problem was performed in a meaningful way. Permitting modern courts to expand their analysis of the historical record to a later date at which the legislature performed a cost-benefit analysis which properly balanced the problem of domestic violence with society's interest in gun ownership is consistent with *Bruen* because it allows a cost-benefit calculation to be performed. In other words, the failure of the American legal system to meaningfully address domestic violence immediately following the forming of the Union should not prohibit the legislature from addressing the problem altogether. Where, as in the case of preventing domestic violence, there is widespread consensus that the Founding generation did not properly assess the value of a societal interest, *Bruen* does not preclude, but rather urges modern legislatures to strike the proper balance between burdening Second Amendment rights and protecting the societal interest at stake.

Bruen's historical analysis framework applies to § 922(g)(8) as follows:

(1) Domestic violence is a general societal problem that existed at the time of the passage of the Second Amendment.

(2) There is no evidence in the historical record supporting a finding that courts issued civil protective orders which, by way of any statute, resulted in the deprivation of the Second Amendment rights of a person who perpetrated, but was not convicted of perpetrating, acts of domestic violence.

(3) Because there is a *lack of distinctly similar historical regulations addressing the problem*, § 922(g)(8) is unconstitutional.

However, *Bruen* provides no clarity as to how courts should consider the

29. In the case of domestic violence, the defect in values is self-evident.
30. *See infra* Part II.
31. *Bruen*, 142 S. Ct. at 2137.

historical record when that history reveals anachronistic values that are unanimously rebuked by all fifty states at a future point.[32] Domestic abuse in post-ratification America, when it was reported, either went unpunished or was punished only extrajudicially.[33] In the exceptional circumstance that a domestic abuse case was actually brought, courts typically dealt with it on an informal and impromptu basis.[34] The combination of extrajudicial punishments, informal judicial proceedings, and the lack of a fully developed criminal justice system or victim support network for domestic abuse survivors resulted in an underdeveloped legislative and judicial history of domestic abuse regulation in post-ratification America. Furthermore, and perhaps most significantly, civil protective orders were not available to women who were subjected to abuse until at least the 1970s and were not available to all women in America until 1994.

This paper argues that the rare and insignificant instances of domestic abuse regulation in post-enactment America demonstrate that a cost-benefit calculation was never made during this period regarding whether the societal problem of domestic abuse justified disarming persons who perpetrated acts of domestic abuse. Because the legislature did not actually engage in this cost-benefit calculation until the 1990s, and *Bruen* only permits post-enactment cost-benefit analyses to place limitations on Second Amendment rights, the rigid framework prescribed by *Bruen* yields a nonsensical answer to the question of whether the historical record supports disarming such persons. Thus, any relevant historical analysis of the Second Amendment's application to domestic violence-based gun restrictions must extend at least until the 1990s.

PART II: § 922(G)(8) AND *UNITED STATES V. RAHIMI*

Pursuant to 18 U.S.C. § 922(g)(8),[35]

> It shall be unlawful for any person . . . who is subject to a court order that[:] (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from 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; and (C) [either] (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force

32. *See infra* Part III (discussing the adoption of civil protection order legislation in all fifty states by the 1990s).
33. *Infra*, Part III.
34. *Id.*; It is worth noting that the criteria for determining the criminality of certain conduct was much narrower in post-enactment America than in the modern era. *See infra* Part III. Additionally, some acts of domestic abuse that are now criminalized were once seen to be outside the domain of the courts. For example, the spousal rape exception was not abolished entirely within the United States until approximately 1993.
35. § 922(g)(8) was added to the Federal Firearms Act in 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c), 108 Stat. 2014, 2015 (1994).

> against such intimate partner or child that would reasonably be expected to cause bodily injury . . .to . . . possess in or affecting commerce, any firearm or ammunition . . . .

Recently, the Fifth Circuit held in *United States v. Rahimi* that 18 U.S.C. § 922(g)(8) is unconstitutional under the historical analysis test established in *Bruen*.[36] Zackey Rahimi was indicted by a federal grand jury on charges of possessing a firearm[37] while subject to a domestic violence restraining order in violation of § 922(g)(8).[38] Prior to the Supreme Court's decision in *Bruen*, a pair of Fifth Circuit cases[39] foreclosed any challenges to the constitutionality of § 922(g)(8). However, the Fifth Circuit stated that *Bruen* "'fundamentally change[d]' [its] analysis of laws that implicate the Second Amendment" and "render[ed its] prior precedent obsolete."[40]

For § 922(g)(8) to be upheld as a constitutionally permissible restriction on the right to bear arms, the government bore the burden of "proffering *relevantly similar* historical regulations [to § 922(g)(8)] that imposed *a comparable burden*" on Second Amendment rights and were "*comparably justified*."[41] In applying this test, the Fifth Circuit held that none of the historical analogues offered by the Government justified § 922(g)(8)'s ability to fully deprive a person of their Second Amendment rights through a civil proceeding. Although the court acknowledged that § 922(g)(8) "embodie[d] salutary policy goals meant to protect vulnerable people in our society," the disposal of means-end scrutiny led the Fifth Circuit to strike it down based solely on the conclusion that "our ancestors would never have accepted" § 922(g)(8).[42]

The Fifth Circuit held that persons subject to civil protective orders do not automatically fall outside the community of law-abiding citizens, and thus are not presumptively outside the scope of the Second Amendment. In so holding, the Fifth Circuit interpreted the law-abiding citizen requirement of the Second Amendment to "exclude [only] . . . [those] that have historically been stripped of their Second Amendment rights" such that the Founders would have "'presumptively' tolerated" their disarmament.[43] The court identified only two groups — persons convicted of felonies and individuals with mental illnesses —

36. *United States v. Rahimi*, 61 F.4th 443 (7th Cir. 2023).
37. While subject to a civil protective order that expressly prohibited him from possessing a firearm, Rahimi was involved in five shootings in less than two months. *Rahimi*, 61 F.4th at 448–49.
38. *Id*. at 449.
39. *See United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020); *see also United States v. Emerson*, 270 F.3d 203 (2001) (holding that 18 U.S.C. § 922(g)(8)(C)(ii) is not unconstitutional).
40. *Rahimi*, 61 F.4th at 450–51 (citing *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021)).
41. *Id.* at 455 (citing *Bruen*, 142 S. Ct. at 2132-33) (internal quotation marks omitted, emphasis added).
42. *Id.* at 461.
43. *Id.* at 452 (citing *Heller*, 554 U.S. at 627, n.26).

whose disarmament would be presumptively tolerated.[44] As such, the court concluded that domestic violence restraining orders issued in a civil proceeding do not "remove [abusers] from the political community within the amendment's scope" because such orders can be issued without a felony conviction.[45]

PART III: HISTORY OF PROTECTIVE ORDERS AND DOMESTIC VIOLENCE

I. *Protective Orders*

Under § 922(g)(8), a person subject to a civil protective order ("CPO") automatically forfeits their Second Amendment rights in two instances: first, when there is a finding that the person subject to the CPO is a credible threat to the physical safety of an intimate partner or child, and second, when the CPO by its own terms explicitly prohibits the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.[46]

Judges issue CPOs, typically following a two-step process: first, a survivor of domestic violence files an application for a temporary restraining order ("TRO") in which they describe the harm suffered.[47] After issuing a TRO, courts require an evidentiary hearing to be held promptly and will issue a permanent or longer-term CPO only after notice and a hearing at which both parties are present to offer testimony.[48] In some states, other emergency remedies such as an Emergency Protective Order can be obtained, which requires only that a survivor of domestic violence "demonstrate reasonable grounds for a judicial officer to believe that [they] or [their] children are in immediate and present danger of domestic violence."[49]

Protective orders have only become widely available to domestic abuse survivors in the past three decades. In fact, prior to 1976, "only two states had protective order (PO) legislation specifically for battered women" and it was not until 1994 that "some form of protective order legislation had been adopted by all 50 states."[50]

II. *English and Colonial Regulation of Domestic Violence*

English and Colonial laws against domestic violence date back to at least the sixteenth century. In sixteenth-century England, persons who perpetrated acts of domestic violence could be charged with a "breach of the peace," resulting in a

44. *Id.*
45. *Id.*
46. *See supra* Part II.
47. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 365 (2002).
48. *Id.*
49. *Id.* at 366.
50. Matthew J. Carlson, Susan D. Harris & George W. Holden, *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 205-06 (1999).

requirement that the person "[post] bond or stake pledges from his associates to guarantee his good behavior."[51] Because domestic abuse was charged as a breach of the peace, domestic violence was a crime against the community rather than a crime against an individual.[52]

New England Puritans enacted the first laws in colonial America against family violence.[53] For example, the Plymouth Colony codified a law against spousal abuse in 1672 which provided that wife beating would be punished by a five-pound fine or a whipping.[54] The *Body of Laws and Liberties* adopted by the Massachusetts Bay Colony provided that "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault."[55]

However, these colonial laws against domestic violence were seldom used. Only "nineteen cases of wife beating" or other family abuse cases were recorded in Plymouth Colony between 1633 and 1802.[56] Moreover, "[t]he few domestic assaults that were prosecuted were punished by a fine."[57] By the second half of the eighteenth century, "there were at most two complaints [of domestic violence] per decade."[58]

III. *Post-Revolution Regulation of Domestic Violence*

Following the American Revolution, American law began to recognize a "new, institutional right to familial privacy that accorded fewer legal protections to household dependents like abused wives."[59] The revolutionary values of individual liberty and privacy resulted in a general reluctance among the judiciary to punish abusive conduct.[60] Still, courts set the standard for "what kind of violence qualified as assault and battery… much higher for battered wives" than for other victims of abuse."[61] Indeed, in *State v. Hussey*, 44 N.C. 123 (1852), the North Carolina Supreme Court explained that:

> We know that a slap on the cheek, let it be as light as it may, indeed any touching of the person of another in a rude or angry manner—is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery,

51. Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy,* 5 EARLY AM.STUD. 223, 233-34 (2007).
52. *See id.* at 234.
53. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 CRIME AND JUST. 19, 22 (1989).
54. *Id*.
55. *Id.* (internal quotation marks omitted).
56. *Id.* at 25.
57. *Id.*
58. *Id.* at 27.
59. Bloch, *supra* note 51, at 250.
60. *See id.* at 238.
61. *Id.* at 239.

contention and strife, where peace and concord ought to reign.[62]

Though the position articulated by the North Carolina Supreme Court was not an absolute one — women could bring suit for assault or battery when a person, including their husband, inflicted permanent injuries upon them — it demonstrates the exceedingly high standard required for survivors of domestic abuse to prevail in these cases.

IV. *Practical Limitations on Domestic Violence Regulation in Early America*

Women in colonial America faced strong disincentives against reporting persons subjecting them to domestic violence. First, unless the woman suffered permanently incapacitating injuries or died, "there were few sentences imposed on violent husbands that went beyond a small fine."[63] If a woman who was abused by her husband sought help from the police or the judiciary, she was unlikely to obtain any assurance that her husband would not assault her again. Indeed, reporting the abuse would likely put a woman at greater risk of further abuse by her husband. In some instances, repeat offenders were asked to post a bond of surety, but persons who perpetrated acts of abuse rarely faced any stronger deterrents against continued assaults.[64]

Second, "subjection to violence never constituted a sufficient reason for legally dissolving a marriage" in colonial America.[65] Following the Revolution, many states passed laws allowing divorce proceedings and criminal charges to be filed on the basis of wife beating, but only when a husband threatened death or permanent physical injury on his wife.[66] Even if an abused wife sought a divorce from her husband, she risked facing social stigma, considerable expenses, and the loss of her husband's financial support.[67] A wife who obtained a divorce from her husband could "los[e] all property, financial support, and [her] children."[68] Because the law strongly disincentivized wives from divorcing or prosecuting persons who perpetrated acts of abuse against them, when their husbands were prosecuted for abuse, women "routine[ly] ple[d] for leniency and non-custodial sentences for their assailants."[69]

Few, if any, resources were available to victims of domestic violence who wanted to leave their abusers. In the nineteenth century, there existed "only one society to protect wives from cruelty."[70] The combination of "police and prosecutorial fail[ures]" to control domestic violence with the "lack of deterrent

62. State v. Hussey, 44 N.C. 123, 126 (1852).
63. Bloch, *supra* note 51, at 234.
64. Pleck, *supra* note 53, at 25.
65. Bloch, *supra* note 51, at 237.
66. *Id.* at 238-240.
67. Carolyn B. Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batterers*, 13 CAL. L.R. ONLINE 45, 53 (2022).
68. Bloch, *supra* note 51, at 237.
69. Ramsey, *Against Domestic Violence*, *supra* note 67, at 53-54.
70. Pleck, *supra* note 53, at 19, 39.

policies or socioeconomic support for abuse victims placed such victims in an untenable position."[71] Until a network for victim support developed in the 1970s, many economically disadvantaged women experiencing domestic abuse were trapped in dangerous situations for fear of losing financial support or facing further violence.

V. *Courts, Prosecutors, and Informal Punishments*

Beginning in approximately 1875, there was a "revival of interest in criminal sanctions against domestic violence." This led to twelve states and the District of Columbia introducing legislation that proposed to punish perpetrators of domestic violence with the whipping post.[72] Three states actually passed this legislation,[73] yet there is little evidence suggesting that abusive husbands were ever punished with the whipping post, and no evidence suggesting that an abusive husband who was punished in this manner faced any further penalties for his abusive behavior.

Domestic violence historians have catalogued well-established trends demonstrating that persons who perpetrated acts of domestic violence were punished using extrajudicial methods in the post-Civil War period rather than with criminal prosecutions. For example, in the nineteenth and twentieth centuries, very few non-lethal intimate assault cases were brought in New York, "indicating that such matters were processed at a lower level, either by the discretionary decisions of police magistrates or by the patrolmen themselves."[74] One police captain in New York stated that arresting a drunken, violent husband would do no more than put the family's wage-earner in jail and leave the wife and children starving; as a result, he addressed instances of domestic violence by beating the perpetrator himself.[75] This suggests that courts in the post-Civil War period were likely under-involved in punishing persons who perpetrated acts of domestic violence and providing remedies to those harmed by abuse.

The few laws that criminalized domestic violence in early and post-Civil War America were rarely and selectively enforced. Prosecutors in early America routinely refused to prosecute cases involving family abuse.[76] Likewise, police officers frequently allowed for "extra-legal station-house releases" of persons who perpetrated acts of domestic violence without charging them with any crimes.[77] When a domestic violence case did make it to court, "justices and magistrates dealt individually and informally" with the perpetrators as long as their violence had not been fatal, resulting in a limited legal record from the early American period.[78]

Furthermore, despite the existence of legislation in at least twenty states by

71. Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control*, *1880-1920*, 77 U. COLO. L. REV. 101, 106-07 (2006).
72. Pleck, *supra* note 53, at 35, 40.
73. *Id.* at 40.
74. Ramsey, *Intimate Homicide*, *supra* note 71, at 168.
75. Pleck, *supra* note 53, at 31.
76. *Id.*
77. Ramsey, *Intimate Homicide*, *supra* note 71, at 168.
78. Bloch, *supra* note 51, at 233.

the end of the nineteenth century which permitted wives to bring civil suits against their abusive husbands, such suits were limited by the judiciary out of fear "that such torts would sow the seeds of discord and clog the courts."[79] Some courts and legislatures, believing that domestic violence was caused by the consumption of alcohol, required a wife who had been abused to "notify the saloonkeeper in advance not to serve her husband alcohol" in order to be awarded damages against her husband.[80] As a practical manner, damages suits were rarely brought against abusive husbands because their wives typically could not afford to hire a lawyer.

VI. *Legal Reform and Modern Domestic Abuse Regulation*

The Violence Against Women Act ("VAWA"), passed in 1994, was a substantial leap forward in America's domestic violence regulation.[81] VAWA provided grants for domestic violence hotlines, shelters, and other victim resources, established pro-arrest policies to encourage police intervention in domestic violence, and created education and training programs to help identify and prevent domestic violence. [82] The passage of VAWA was preceded by and coincided with the enactment of many state domestic violence laws, such as the New York State Family Protection and Domestic Violence Intervention Act of 1994.[83] Many state laws, including New York's, addressed head-on the deficiencies of domestic violence regulation by establishing no-drop prosecution[84]

79. Pleck, *supra* note 53, at 42.

80. *Id.*

81. Though not the focus of this paper, it would be inappropriate to discuss VAWA without mentioning its setbacks and shortcomings. Chiefly among those was the Supreme Court's decision in *United States v. Morrison*, in which the Court held unconstitutional a provision of VAWA that provided a civil cause of action to survivors of domestic violence against persons who abused them. 529 U.S. 598, 606-09 (2000). In *Morrison*, the Court found that Congress had exceeded its Commerce Clause powers by providing this cause of action to survivors. *Id.* VAWA has also been criticized for its *one-size-fits-all* approach to domestic violence prosecution, particularly in cases in which survivors of domestic abuse do not wish to participate in prosecution due to their immigration status, economic hardship, or religious beliefs. Additionally, though the passage of VAWA was laudable, domestic violence regulation has suffered recent setbacks – particularly in the wake of the Supreme Court's 2022 *Dobbs* decision. For example, the Iowa Attorney General's Office announced in April 2023 that it would "pause its practice of paying for emergency contraception… for victims of sexual assault." *Iowa Won't Pay for Rape Victims 'Abortions or Contraceptives*, ASSOCIATED PRESS (Apr. 9th, 2023) https://apnews.com/article/iowa-rape-victims-contraception-funding-41ad066f0831961eeec57a676b4a67d6 [https://perma.cc/K6MQ-76CW].

82. Hyunkag Cho & Dina J. Wilke, *How Has the Violence Against Women Act Affected the Response of the Criminal Justice System to Domestic Violence*, 32 J. SOCIO. AND SOC. WELFARE 125, 26 (2005).

83. The Family Protection and Domestic Violence Intervention Act of 1994. 1994 N.Y. ALS 222.

84. A no-drop policy strictly limits the ability of both the victim and the prosecutor to drop filed domestic violence charges. No-drop policies can prevent the voluntary withdrawal of a domestic violence complaint by the victim and can prevent a prosecutor from dropping domestic violence charges because of a victim or witness who refuses to cooperate. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to State Action or Dangerous Solution*, 63 FORDHAM L. REV. 853, 56 (1994).

and mandatory arrest provisions.[85]

VAWA was a significant piece of legal reform and the first comprehensive piece of legislation to address domestic violence at the national level.[86] Yet, *Bruen* instructs courts reviewing modern gun restrictions that touch or concern domestic violence to focus their analysis on pre- and post-enactment history — centuries before domestic violence was meaningfully addressed. Part IV will argue that the history of domestic violence regulation during the pre- and post-enactment period is unreliable since women were undervalued as a population during this period. The undervaluing of women creates tension with the *Bruen* historical review framework, which requires courts reviewing modern gun regulations to preserve the cost-benefit calculations made by post-enactment legislatures that balanced social interests with Second Amendment rights. Because the legislature grossly undervalued women during the relevant historical period, it is unreasonable to rely upon any calculations made by these legislatures balancing Second Amendment rights with the social interest of protecting women subjected to domestic abuse.

To remedy the incongruencies between the *Bruen* test and our nation's history of domestic violence regulation, courts should be permitted to expand their review of the historical record up to and including the point in history at which domestic violence regulation developed meaningfully in America. Though domestic violence regulation is in its infancy and will continue to evolve over the next several decades, VAWA should be a focal point for future courts that apply the *Bruen* test to challenged gun regulations that implicate the issue of domestic violence. Because VAWA is the first comprehensive legal reform to address domestic violence at the national level, permitting courts reviewing modern gun regulations to uphold the cost-benefit calculations made by the legislature when it passed VAWA ensures that the social interest of protecting survivors of domestic abuse is properly valued against the social interest of protecting Second Amendment rights. Accordingly, permitting courts to consider VAWA's cost-benefit analysis is consistent with *Bruen* because this approach allows modern legislatures to strike a balance between these social interests.

A strict application of *Bruen*'s historical analogues test – meaning an application that limits modern courts' consideration of the historical record to the colonial and Founding era – is improper because it prohibits courts from considering the evolution in social values which has resulted in legislation, like VAWA, protecting survivors of domestic violence from the perpetration of further violence. Whenever, as is true concerning domestic violence regulation, Founding-era history is polluted by social values which have been unanimously rejected by modern society, the Court must permit modern courts to expand their review of the historical record such that courts may decide the constitutionality of modern gun restrictions by comparing these modern restrictions to historical

85. Jennifer Sarkees, *Phase Three of New York State Domestic Violence Law: The Financial Aftermath*, 14 BUFF. WOMEN'S L.J. 95, 98 (2005).

86. Sally Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 64 (2002).

analogues developed by a legislature that properly valued the social interest at stake. To this end, Part V argues that the judiciary should apply means-end scrutiny to any challenged portion of VAWA that limits Second Amendment rights to determine whether the statute does so in a manner narrowly tailored to the achievement of the government's goals. This is the only way to preserve the legislature's role in striking the delicate balance between Second Amendment rights and competing social interests.

PART IV. *BRUEN*'S LIMITED FORM OF HISTORICAL REVIEW FAILS TO ACCOUNT FOR THE UNRECOGNIZED SOCIAL VALUES AFFECTING THIS HISTORY.

The Fifth Circuit's review of the historical record yielded no evidence of analogous regulations in post-enactment society that would justify disarming persons who are subject to a qualifying civil protective order under 18 U.S.C. § 922(g)(8). As discussed in Part III, civil protective orders were not an available remedy to women subjected to domestic abuse in early America. Even if a similar remedy had been available, law enforcement and judicial officers would likely have refused to enforce the remedy against perpetrators. Because domestic abuse was punished infrequently and informally in early America, the historical record remains largely underdeveloped on domestic abuse regulations. *Rahimi* formalistically adheres to the temporally limited form of historical review set forth in *Bruen*, and in so doing ignores significant developments in women's rights movements.[87]

While the Supreme Court struck down means-end scrutiny in *Bruen*, it did not outright prohibit the legislature from engaging in cost-benefit analyses to determine whether the existence of a societal problem warranted a corresponding limitation of Second Amendment rights.[88] *Bruen* claims to take a strictly textualist view of the Second Amendment. However, the test it established instructs modern courts reviewing challenged gun regulation to look to the methods earlier generations used.[89] In the words of the Court, "[a]nalogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances."[90]

By enshrining into Second Amendment judicial review the regulatory schemes that existed before or immediately followed ratification, the Court accepts and perpetuates the results of cost-benefit analyses performed by pre- and post-enactment legislatures.[91] In effect, this means that modern or future

87. A large amount of scholarship is devoted to the underreporting of domestic violence. This paper does not suggest that there are no longer barriers to reporting domestic violence. Rather, this paper argues that the political and economic barriers that impacted women are less significant today than they were during the post-enactment period.

88. *See Bruen*, 142 S. Ct. at 2133 (requiring judges applying analogical reasoning to perpetuate the balances struck by the founding generation to modern circumstances).

89. *Id*.

90. *Id.*

91. *Id*.

limitations on the Second Amendment are permissible so long as they comply with the bounds drawn by the legislature during the ratification period.[92] The Court justifies its position by explaining that the Second "Amendment codified a preexisting right [which]… was regarded at the time of [its] adoption as rooted in the natural right of resistance and self-preservation."[93] While this explanation seems to justify the relevance of the English common law and post-enactment history, the Court does not adequately explain why modern legislatures are prohibited from redrawing the bounds of the Second Amendment.[94]

In finding § 922(g)(8) unconstitutional, the Fifth Circuit held that the government had failed to sustain its burden of identifying regulations that imposed a relevantly similar burden on Second Amendment rights in the post-Revolutionary period, and which were comparably justified.[95] *Bruen*'s historical analysis is a catch-22 as it applies to § 922(g)(8). The government bears the burden of producing a historical analogue of regulations justifying the disarmament of a person who is subject to a qualifying civil protective order. However, it cannot possibly do so because *Bruen* limits the relevant historical period to a period during which (a) domestic violence was largely unregulated or not formally punished, (b) civil protective orders did not exist, and (c) married women were disenfranchised and economically dependent on their husbands, which would have removed any incentive to seek a comparable remedy to a CPO, had one existed.[96]

Section 922(g)(8) represents a cost-benefit calculation by the legislature: the benefit of disarming persons subject to a qualifying civil protective order issued in response to domestic violence outweighs the cost of restricting their Second Amendment privileges. Indeed, prior to its decision in *Rahimi*, the Fifth Circuit upheld §922(g)(8) through the application of means-end scrutiny and found that the statute was narrowly tailored to the laudable state goal of disarming persons who perpetrated acts of domestic abuse. But under *Bruen*, § 922(g)(8) is unconstitutional because domestic violence, despite its existence during colonial and post-enactment periods, was never addressed with a corresponding limitation of Second Amendment rights.[97] The Fifth Circuit ends the inquiry here without considering whether the legislature's failure to limit Second Amendment rights was the type of cost-benefit calculation that *Bruen* sought to protect.[98] During the

92. *See id* at 2132-2133 (requiring future courts analyzing a challenged gun regulation to uphold the regulation unless the government identifies a "well-established and representative historical analogue" to the modern regulation – even if the modern regulation contemplates circumstances "that were unimaginable at the founding").
93. *Id.* at. 2157 (Alito, J. concurring) (quoting *Heller*, 554 U.S. at 594) (internal quotation marks omitted).
94. *See generally id.*at 2132-34.
95. *See Rahimi*, 61 F.4th 443 at 460 (citing *Bruen*, 142 S. Ct. at 2133).
96. It is worth noting that even had a CPO or comparable remedy existed and a married woman been willing to seek such a remedy, the married woman would likely have been met with additional barriers to obtaining any remedy, such as fear, hostile power dynamics, and severe stigma. *See supra* Part III.
97. This analysis is complicated by the fact that civil remedies were unavailable in America during the colonial and post-enactment periods.
98. *See Rahimi,* 61 F.4th at 460-61.

post-enactment period, the legislature saw no need to protect those harmed by domestic abuse—primarily women and children—by restricting Second Amendment rights because women and children were not recognized as a category of social interest.[99] *Rahimi* highlights an important and unanswered question arising out of *Bruen*: is a historically contingent cost-benefit calculation that balances Second Amendment rights (the cost) with the protection of a competing social interest (the benefit) reliable if American society grossly undervalued the 'benefit' in the post-enactment era?[100]

As discussed in Part III, domestic violence was sparsely regulated in the colonial and post-enactment eras, and the regulations that did exist either went unenforced or were enforced extrajudicially. Women lacked the right to vote, own property, or work for wages during the period that *Bruen* holds relevant to a court's historical analysis. The economic and political disempowerment of women during this period shows that colonial and post-enactment American society significantly undervalued women. These observations yield two possible conclusions relevant to the application of the *Bruen* framework. First, because society grossly undervalued women during this time, any cost-benefit calculation made regarding the balancing of Second Amendment rights with the social value of protecting women from domestic violence is inherently unreliable and cannot be the basis for striking a modern gun restriction that makes the opposite calculation. The alternative conclusion is that society never made a cost-benefit calculation that balanced Second Amendment rights with its interest in addressing domestic violence and, therefore, courts should expand their review of the historical record to the point in time at which the legislature first made such a calculation. The rigid framework of *Bruen* should be relaxed whenever newly appreciated values are realized by modern society.

PART V. PROPOSED SOLUTIONS: ABSTRACTION OR A RETURN OF MEANS-END SCRUTINY

This paper suggests two solutions to *Bruen*'s shortcomings: (1) the Court could adjust the relevant historical period and allow the Government to introduce

99. *See, e.g.*, Pleck, *supra* note 53, at 26 (stating that a child abuse case was never prosecuted in Plymouth courts); 35 (explaining that family privacy values dominated antebellum courtrooms for most of the eighteenth century, resulting in a general unwillingness by the judiciary to intervene in instances of physical abuse). Note that this paper does not intend to argue that post-enactment society placed no value on the lives of women or children. Rather, familial privacy and personal autonomy dominated competing interests, such as protecting women and children from physical abuse.

100. Cost and benefit could be used interchangeably here. This paper refers to the protection of survivors of domestic abuse and the prevention of persons with a history of domestic violence from committing further abuses as the 'benefit 'to society, and the disarmament of persons who perpetrate domestic abuse as the 'cost 'to society. Other courts to have considered and upheld the constitutionality of § 922(g)(8) under means-end scrutiny have cited reducing domestic violence, upholding public safety, keeping firearms out of the hands of persons who constitute a threat to their intimate partner, and reducing domestic gun abuse as important or compelling government interests. *See, e.g., McGinnis*, 956 F.3d at 758; *Chapman*, 666 F.3d at 226-27.

evidence of analogous regulations up to and including the period during which the societal failure in question was corrected (the Abstraction approach), or, relatedly, (2) the Court could permit means-end scrutiny to be exercised in these situations.

Bruen takes the position that the English common law and post-enactment history are of particular importance to judicial review of modern gun regulations because the Second Amendment codified a preexisting right. *Bruen* purports to preserve the delicate balance struck by the Founders between gun rights and competing social interests but does not instruct modern courts on how to consider social interests that were not afforded appropriate weight in the ratification period. The Abstraction approach proposes that societal failures, such as deeply rooted discrimination and exclusion, should be viewed as holes in history that are filled once they are meaningfully addressed.[101] Said another way, a court should decline to credit the historical record whenever a social interest materializes after the close of the *Bruen* historical review period. The Court can preserve *Bruen*'s weight on ratification history by explaining these holes in history in one of two ways: either society conducted an inherently unreliable cost-benefit calculation when it weighed its interest in addressing domestic violence against its interest in protecting gun rights, or society never made any such calculation because it never saw fit to do so. Regardless of the Court's answer, courts reviewing modern gun laws cannot use Second Amendment interpretations from the ratification period as the basis for striking down a challenged domestic violence gun regulation when an undervalued or nonexistent social interest is the subject of review.

At its core, the Abstraction approach to Second Amendment analysis proffered throughout this piece urges the Court to permit instances of evolution in social values. This approach rests on the assertion that it would be impossible or unfair to rely upon the historical record when that record is deficient due to a pervasive social problem, such as racism or sexism. Though *Bruen* purports to permit only those limitations on Second Amendment rights that our Founders would have presumptively tolerated, courts must consider whether the *but-for cause* of the Founders' failure to restrict gun rights in response to an emergency complaint of domestic violence is the Founders' failure to properly value women as a social class. If curing the defect in social values likely would have resulted in a corresponding restriction of Second Amendment rights, then a modern regulation that similarly limits Second Amendment rights should be constitutional.

According to the Abstraction model, the Court should permit the period of history relevant to its historical analysis to be expanded up to and including the period during which the defect in social values was corrected. However, the first laws correcting a social defect would still be subject to means-end scrutiny

101. This paper does not take a position on which certain years of history may be relevant to assessing the constitutionality of a gun regulation that regulates the Second Amendment rights of a person who has perpetrated an act of domestic abuse. As is explained in Part III, domestic violence was not meaningfully regulated until at least the 1990s. Many scholars will argue that domestic violence still is not meaningfully regulated or that extraneous factors contribute to ineffective or insufficient regulation. The purpose of this paper is to encourage courts to consider history beyond the period preceding and immediately following the enactment of the Second Amendment.

whenever they burden a Second Amendment right.[102] If the Court determined that the first laws addressing the defect were constitutional, these laws would be available to governments in the future who sought to justify a challenged gun regulation using historical analogues. As it applies to § 922(g)(8), the Court would apply means-end scrutiny to determine whether the statute is constitutional. If § 922(g)(8) is constitutional, it would be available to a future government seeking to defend an identical or similar gun regulation under the *Bruen* test. Means-end scrutiny must be applied to any modern law that may be used as an example of constitutional gun regulation in the future because the Supreme Court applied means-end scrutiny broadly to all post-enactment regulations which were not outliers in *Bruen*.

The second approach that this paper suggests would permit the application of means-end scrutiny to all regulations of Second Amendment rights of persons perpetrating domestic violence. *Bruen* holds that the cost-benefit calculations made by the legislature which drew the bounds of the Second Amendment during the post-enactment period are presumptively constitutional.[103] However, because the post-enactment legislature undervalued women and did not view domestic violence as a social problem of sufficient importance to justify regulation, that legislature made no cost-benefit analysis on regulations of this type in drafting the Second Amendment. The modern legislature's restriction of the right to bear arms of persons who have perpetrated acts of domestic violence is the first cost-benefit calculation made that interprets how the Second Amendment applies to such persons.[104] By allowing lower courts to apply means-end scrutiny to laws that cannot be justified using historical analogues due to a defect in historical social values, the Court would do no more than allow a cost-benefit calculation balancing Second Amendment rights with its interest in protecting domestic abuse survivors to be made rather than forewent.

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102. Although *Bruen* rejected means-end scrutiny, the Court did not completely do away with cost-benefit analyses as a tool to determine whether a limitation on the Second Amendment is justified by the interest sought to be protected. Rather, *Bruen* binds modern generations to the cost-benefit analyses performed by the Founding generation. *See supra* Part I (arguing that the *Bruen* historical analysis framework assumes that all Founding-era cost-benefit analyses concerning limitations on the Second Amendment are presumptively constitutional). Were the Court to permit the period of history relevant to historical analysis to be expanded up to and included the point at which a particular defect in social values is corrected, as is suggested by the Abstraction approach, the Court would still be left with the question of whether a modern limitation on Second Amendment rights is properly tailored to the furthering of the social interest. The Abstraction approach is most consistent with the *Bruen* framework when the Court applies means-end scrutiny to Second Amendment limitations enacted to cure a Founding-era social defect. Doing so ensures that the Abstraction approach does not rubber-stamp *any* Second Amendment regulation enacted in response to a social defect. If regulations implemented to cure a social defect from the Founding era survive means-end scrutiny, then these laws can be used as historical analogues by legislatures seeking to justify future Second Amendment regulations.

103. *See Bruen*, 142 S. Ct. at 2150 (holding that the historical record supports certain "reasonable regulation[s]" on the "*manner* of public carry" including common law restrictions against carrying "deadly weapons in a manner likely to terrorize others" or regulations eliminating concealed carry) (emphasis in original).

104. Goldfarb, *supra* note 86, at 64.

Of the two solutions proposed by this paper, the second is likely more workable for lower courts. A significant body of case law has developed around when and how to apply strict and intermediate scrutiny to challenged gun regulations. With respect to the Abstraction model, it may be difficult or impossible for lower courts to agree upon when the historical record is deficient and, if it is, which periods of history should be relevant to the court's analysis. Accordingly, the second proposal should prevail. Lower courts should be permitted to apply means-end scrutiny to gun regulations that implicate societal issues which, on their face, have an underdeveloped or flawed legislative and judicial history. While not an exhaustive list, this paper proposes that means-end scrutiny, not the *Bruen* test, should apply to gun regulations that require the Court to examine a historical record that is undeniably rooted in race, gender, or other identity-based inequality.

Viewed in this light, *Rahimi*'s application of the *Bruen* test is fundamentally flawed — not because the test was applied incorrectly, but because the test can not apply to § 922(g)(8). Part III argued that domestic violence is a societal problem that has existed since at least the enactment of the Second Amendment, but due to violent gender norms and inequalities was not meaningfully addressed until approximately the 1990s. Thus, the judiciary and the legislature's failure to regulate domestic violence in colonial and post-enactment America is not, as *Bruen* holds, "evidence" that any subsequent gun regulation addressing domestic violence "is inconsistent with the Second Amendment."[105] Because the historical record on this subject cannot be relied upon, the Fifth Circuit erred in applying *Bruen* to § 922(g)(8).

PART VI. PERSONS WHO HAVE PERPETRATED ACTS OF DOMESTIC VIOLENCE FALL OUTSIDE THE CATEGORY OF "LAW-ABIDING CITIZENS" WHOSE GUN RIGHTS ARE PROTECTED

Despite the clear holes in *Bruen*, it is likely that this Supreme Court will be uncomfortable with expanding the historical period relevant to Second Amendment judicial review beyond the bounds that it has prescribed. As such, the Court may avoid this question altogether by holding, quite logically, that the Fifth Circuit erred in concluding that persons who are subject to qualifying civil protective orders are law-abiding citizens.[106] The disarmament of certain populations, including felons and those with mental illnesses, is presumptively lawful under the Second Amendment.[107] *Bruen* reiterated *Heller*'s holding that the Second Amendment protects the rights of law-abiding persons to keep and bear

105. 142 S. Ct. at 2131.

106. *See Rahimi*, 61 F.4th, at 451 (rejecting the Government's argument that "Rahim is neither responsible nor law-abiding, as evidenced by his conduct and by the domestic violence restraining order issued against him" and should therefore "fall…outside the ambit of the Second Amendment.").

107. 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27).

arms.[108] Persons who are subject to qualifying civil protective orders[109] are not part of the community of law-abiding persons. There are historical regulations that justify disarming violent or dangerous persons who have not been convicted of felonies. Further, the legislature evinced clear intent when it passed § 922(g)(8) that persons subject to such protective orders on the basis of domestic violence be immediately disarmed.[110]

Many historical regulations that limited Second Amendment rights applied to groups other than convicted felons and the mentally ill. For example, "[v]iolent and other dangerous persons… [including] distrusted groups of people… have historically been banned from keeping arms."[111] For instance, in early and post-Civil War America, certain groups of persons, including impoverished immigrants, British loyalists, and free Black citizens, were deprived of their right to bear arms regardless of whether they had been convicted of a felony.[112] Several states, including New Hampshire, Vermont, Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa fully or partially limited the rights of "tramps," "typically defined as males begging for charity outside of their home country," to possess and carry arms.[113] The Ohio Supreme Court explained that prohibitions on this population's Second Amendment rights were constitutional because tramps were "vicious persons."[114] During the revolutionary period, several states passed laws that "provid[ed] for the confiscation of weapons owned by persons refusing to swear an oath of allegiance to the state or the United States."[115] Prior to the passage of the Fourteenth Amendment, some states maintained "race-based exclusions [which] disarmed slaves and… free [B]lack [people]."[116] These regulations demonstrate that limitations on a person's right to bear arms has not been so limited to felons or the mentally ill as *Bruen* suggests, but rather to persons that society distrusted or deemed dangerous.[117]

It is worth noting that these regulations are predicated on xenophobic and racially prejudiced assumptions. They are useful, however, to understand the scope of our nation's history and tradition of enacting class-based restrictions on the right to bear arms. Following the passage of the Fourteenth Amendment, many class-based restrictions would not pass constitutional muster.[118] But the

108. *Id*. at 2122.
109. This paper's discussion of civil protective orders is limited to only those which result in the disarmament of the person perpetrating acts of abuse under § 922(g)(8).
110. *See generally*, Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 110401(c), 108 Stat. 2014, 2015 (1994).
111. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L.R. 249, 285 (2020).
112. *See id.* at 285; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506 (2004).
113. Greenlee, *supra* note 111, at 270.
114. *Id.* (quoting *State v. Hogan*, 63 Ohio St. 202, 218-19 (1900)).
115. Cornell & DeDino, *supra* note 112, at 506.
116. *Id.* at 505.
117. *Bruen*, 142 S. Ct. at 2162..
118. *See, e.g., Heller*, 554 U.S., at 583 n.7 (discussing, in relevant part, the right of newly freed slaves to bear arms).

unconstitutionality of some class-based restrictions does not necessarily mean that all class-based restrictions are inconsistent with the Second Amendment.[119] Rather, these regulations demonstrate that the scope of classes whose Second Amendment rights may be restricted extends beyond just felons and the mentally ill. This paper argues that the legislature should be permitted to make cost-benefit calculations regarding which populations are violent and must be disarmed.

The "law-abiding citizen" requirement in the Second Amendment is a fine line: this requirement is intended to disarm violent or otherwise dangerous persons, but not those who are unvirtuous.[120] Disarming persons subject to civil protection orders ("CPO") is consistent with the historical record, which demonstrates that conviction of a felony was not *per se* a precondition to disarmament. The disarmament provision of § 922(g)(8) is triggered only when the following three conditions are met: first, the alleged perpetrator of domestic violence must be given notice of a hearing and have the opportunity to have their side of the story told; second, following the hearing, the court must issue an order restraining the person from harassing, stalking, or threatening an intimate partner or that intimate partner's child, or otherwise in engaging in conduct which would place the intimate partner in reasonable fear of bodily injury to themselves or their child; and third, the restraining order must either (i) explicitly find that the person represents a credible threat to the physical safety of their intimate partner or child, or (ii) explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.[121] Therefore, a person subject to a civil protective order based on an allegation of domestic violence loses their Second Amendment rights under the statute only once a judge determines, following a hearing, that the person presents a threat to the complainant that is sufficient to justify a restraining order and either that the person is a credible threat to the complainant or that the restraining order should explicitly prohibit the person from threatening violence against the complainant.[122] § 922(g)(8) by its terms deprives a person of their right to possess and bear arms only if that person, based upon a history of extralegal conduct, presents a threat of committing further abusive or violent conduct.[123]

The case for disarming persons subject to qualifying CPOs is stronger than the class-based restrictions that existed in the pre– and post–Revolutionary period. Many prohibitions and limitations on the right of "tramps," British loyalists, and free Black Americans to bear arms swept broadly, capturing all members of these classes regardless of the individual risk posed by each individual.[124] In contrast, §

119. *See, e.g.*, *Bruen*, 142 S. Ct., at 2162 ("'longstanding prohibitions on the possession of firearms by felons and the mentally ill'" are constitutional) (quoting *Heller*, 554 U.S. at 626-27).

120. *See* Greenlee, *supra* note 111, at 275 (arguing that unvirtuous citizens-–-a class of persons including nonviolent felons or nonviolent misdemeanants-–-cannot be deprived of their right to bear arms even though they have engaged in conduct that is unlawful).

121. 18 U.S.C. § 922(g)(8).

122. *See id.*

123. *Id*.

124. *See, e.g.*, Greenlee, *supra* note 111, at 265 ("revolutionary and founding-era gun regulations… targeted… Loyalists [even though they] were neither criminals nor traitors… [because]

922(g)(8) deprives a person of their right to possess and bear arms only after an impartial judge deems that such remedy is commensurate to the threat posed by the person.[125] Moreover, § 922(g)(8) does not disarm persons based on racist or xenophobic generalizations, but rather based on an individualized determination of the disarmed person's risk of committing future acts of violence. As such, § 922(g)(8) is not only justifiable on a historical basis– it is also sufficiently narrowly tailored so as not to deprive a non-violent person of their right to bear arms. Accordingly, the Court should find that persons subject to CPOs that qualify under § 922(g)(8) fall outside the community of law-abiding citizens.

CONCLUSION

The rigid historical analysis adopted by the Supreme Court in *Bruen* solidified the Second Amendment as our strongest constitutional right.[126] *Bruen*'s demand that the government defend challenged gun restrictions by pointing to historical analogues that establish a pattern and practice of restricting Second Amendment rights in a similar manner to the challenged restriction is itself a form of means-end scrutiny. By upholding modern gun laws that are sufficiently similar to colonial and post-enactment restrictions, the Supreme Court allows cost-benefit calculations to be made as to whether a restriction sufficiently serves a government interest so as to justify the limitation of Second Amendment rights. *Bruen*'s historical analogues test does no more than change the yardstick against which modern gun restrictions are measured: modern legislatures are permitted to limit the exercise of Second Amendment rights to protect any social interest so long as someone else thought to protect that interest in the past.

This paper seeks to ask and answer a deeper question raised by the Court's ruling in *Bruen*: how do lower courts consider a modern restriction which places limits on the exercise of Second Amendment rights in furtherance of a pervasive social issue that existed in colonial and post- enactment America, but was not properly addressed due to some other social failure present at that time (such as racism or sexism)? As applied to 18 U.S.C. § 922(g)(8): should courts be permitted to look beyond colonial and post-enactment history to consider how our nation has balanced Second Amendment rights with the protection of survivors of domestic violence given that America failed to meaningfully regulate domestic violence until at least the 1990s, even though the historical record includes some regulations dating back to the Puritan colonies?

Bruen's fatal flaw is its rigidity; the Court's focus on near-enactment history and neglect of outlier regulations presupposes omniscience and perfection on

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legislators had determined that permitting these people to keep and bear arms posed a potential danger.") (quoting *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012); 281 (historically, 'Indians and black slaves… were barred from owning firearms'") (citing *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012)); 270 (discussing New Hampshire's 1878 law which provided for the imprisonment of any tramp "found carrying any fire-arm or other dangerous weapon).

125. § 922(g)(8)(A).

126. Chemerinsky, *supra* note 7.

behalf of Founding legislatures, leaving no room for an evolution of social values. This paper argues that *Bruen* permits courts to look beyond the historical period described in *Bruen* because the gender inequality in early American society implies that either: (1) a cost-benefit calculation as to whether persons who have perpetrated acts of domestic violence could be deprived of their Second Amendment rights was never made given that legislatures were not concerned with protecting survivors of domestic violence, or (2) any cost-benefit calculation that was made during the relevant historical period is inherently unreliable, also because the society making the calculation undervalued the survivors of domestic violence—largely women—due to the pervasive social failure of the patriarchy.

Social failures, such as deeply rooted discrimination and exclusion based on gender or race, should be viewed as holes in the historical record. Adopting this view would permit courts to look beyond colonial and post-enactment historical records for analogues that support a challenged modern gun restriction. The Supreme Court could carve out a narrow exception to *Bruen* that would apply whenever the historical record cannot be relied upon because of racism, sexism, or a similar failure of early American society. When the exception applies, lower courts should be permitted to either apply means-end scrutiny to a challenged modern gun law or to look beyond *Bruen*'s historical period until and including the period of time during which the societal failure in question was corrected to find analogues that support the challenged restriction. As applied to § 922(g)(8), the court would either permit the application of means-end scrutiny to the statute or would allow the Government to introduce evidence of historical analogues supporting the statute up to and including the point at which domestic violence became meaningfully regulated by the Government. According to the latter method, because § 922(g)(8) represents the first point in time at which the legislature made a cost-benefit calculation that appropriately weighed the social interest of protecting survivors from abuse against the interest in those with CPOs issued against them in retaining their Second Amendment rights, the court would be required to apply means-end scrutiny to the statute to determine whether future domestic violence gun restrictions could be justified upon the basis of § 922(g)(8).

This paper recognizes that the modern Supreme Court may be hostile to carving out exceptions to *Bruen*. The Court may avoid adopting any exception to *Bruen* by explaining who the law-abiding citizen is who is entitled to exercise Second Amendment rights. Throughout our nation's history, several politically unpopular groups without criminal histories or mental illnesses have been deprived entirely of their Second Amendment rights because society deemed these groups to be dangerous. The law-abiding citizen requirement exists to disarm dangerous groups of people. § 922(g)(8) deprives those with CPOs of their right to bear arms only after a judge has issued a qualifying civil protective order against the perpetrator of domestic abuse. The issuance of a qualifying civil protective order itself represents a finding by a judge that the person against whom the CPO is issued is dangerous. The law-abiding citizen requirement articulated by the Supreme Court should be used to disarm these dangerous members of society.

The Supreme Court recently granted certiorari in *Rahimi*. The Court has the

opportunity to carve out a sensible exception to *Bruen*'s rigid historical analysis test and protect a vulnerable population in doing so.

Sex Education After *Dobbs*: A Case for Comprehensive Sex Education

Brooke D'Amore Bradley†

ABSTRACT

Abstinence-only sex education, a curriculum that teaches abstinence is the most effective form of birth control, is the dominant and most funded sex education in the United States. This is despite research that shows it is not effective, leaves students uninformed, and negatively reinforces gender stereotypes. In comparison, research suggests that comprehensive sex education, especially when evidence-based and culturally responsive, does encourage safe sex and has the potential to decrease the number of unwanted pregnancies and sexually transmitted infections.

The decision in Dobbs v. Jackson Women's Health Organization *overturned* Roe v. Wade *and the federal right to abortion. By leaving abortion regulation up to the states,* Dobbs *harms students with unwanted pregnancies. However,* Dobbs *is also predicted to harm students in another way: as a signal of incoming threats to the little comprehensive sex education that does exist in schools. In 2022, since* Dobbs*, there are already calls from Republican lawmakers at the state level to weaken or ban sex education.*

In response, this note argues that implementing comprehensive sex education at the school district level is one way to address the harms caused by Dobbs*. Especially inspired by the outpouring of student calls for comprehensive sex education after* Dobbs*, school district leaders can implement comprehensive sex education programs and, if done correctly, can defend these programs against legal challenge.*

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INTRODUCTION

The debate over sex education in public schools is storied and illuminates sharp religious, moral, and political divisions. Debates in the early 1980s over sex education were described as "touch[ing] upon the deepest religious and philosophical rifts in post-World War II America."[1] The battle is over two main forms of sex education – abstinence-only and comprehensive. Abstinence-only sex education teaches that abstinence is the "only completely effective method of birth control."[2] This education is preferred by conservatives.[3] In comparison, comprehensive sex education is intended to be "age-appropriate, medically-accurate, evidence-based, and culturally responsive."[4] A more liberal view, the comprehensive model includes discussions of "birth control, healthy relationships, consent, and sexual orientation."[5] As of August 2023, only twenty-nine states and the District of Columbia require sex education curricula, sixteen of which have

1. JONATHAN ZIMMERMAN, WHOSE AMERICA? CULTURE WARS IN THE PUBLIC Schools 172 (Univ. of Chi. Press 2nd ed. 2022) (2002).
2. Patrick Malone & Monica Rodriguez, *Comprehensive Sex Education vs. Abstinence-Only-Until-Marriage Programs*, A.B.A. (Apr. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/comprehensive_sex_education_vs_abstinence_only_until_marriage_programs/.
3. Leslie Kantor, Nicole Levitz & Amelia Holstrom, *Support for sex education and teenage pregnancy prevention programmes in the USA: results from a national survey of likely voters*, 20 SEX EDUC. 239, 239 (2019).
4. *Sex Ed State Law and Policy Chart,* SEICUS (2022), https://siecus.org/wp-content/uploads/2021/09/2022-Sex-Ed-State-Law-and-Policy-Chart.pdf [https://perma.cc/J7TR-6P7A] [hereinafter *SIECUS Chart*].
5. Kantor et al., *supra* note 3, at 239.

strict abstinence-only programs and five of which require comprehensive sex education.[6] The remaining states do not have formal sex education requirements.[7]

Like the debate about sex education, the abortion debate demonstrates deep religious, moral, and political divisions.[8] Those who believe abortion should be illegal tend to identify as conservative and religious.[9] Those who identify as Democrats are comparatively more likely to agree that "abortion should be legal in all or most cases."[10]

In 1973, the Supreme Court recognized the right to abortion,[11] but in 2022 the Supreme Court eliminated this federal right in Dobbs v. Jackson Women's Health Organization. As of February 2024, twenty-one states either significantly limit or prohibit abortion.[12] and half of these states are states without sex education mandates in public schools.[13] In sex education about abortion, seven states either prohibit discussion of abortion or require a discussion that negatively frames abortion.[14]

Of course, these divisions are not only limited to sex education and abortion. Recent presidential elections and a pandemic[15] demonstrate that these political and moral divisions are not merely theoretical policy debates but are consequential to our mental, and to some extent physical, health.[16] As demonstrated above, these

6. *The SIECUS State Profiles*, SEXUALITY INFO. & EDUC. COUNCIL U.S. [SIECUS] 3 (2023), https://siecus.org/state- profiles/ [https://perma.cc/CJX4-6CVH].
7. *Id.*
8. *See* Dahlia Lithwick, *Foreword:* Roe v. Wade *at Forty*, 74 OHIO STATE L.J. 5, 5–6 (2013) (discussing the significance and controversiality of *Roe*).
9. Michael Lipka, *A closer look at Republicans who favor legal abortion and Democrats who oppose it*, PEW RSCH. CTR. (June 17, 2022), https://www.pewresearch.org/short-reads/2022/06/17/a-closer-look-at-republicans-who-favor-legal-abortion-and-democrats-who-oppose-it/ [https://perma.cc/WJ98-D992].
10. Hannah Hartig, *About six-in-ten Americans say abortion should be legal in all or most cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion- should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/8BS9-SL3T].
11. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (overruled by Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2284 (2022)).
12. *Tracking Abortion Bans Across the* Country, N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html#:~:text=Twenty%2Done%20states%20ban%20abortion,overturned%20the%20decision%20last%20year [https://perma.cc/AR9H-CPW6]; *see also After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (2022), https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/P6BX-LRCW].
13. Riley Farrell, *As states ban abortion, a new spotlight on an old battle over sex education*, RELIGION NEWS SERV. (July 14, 2022), https://religionnews.com/2022/07/14/as-states-ban-abortion-christian-leaders-assess-abstinence-sex-education/ [https://perma.cc/53D6-VZAG].
14. *Sex Ed State Law and Policy Chart*, *supra* note 4, at 17-18.
15. Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/short-reads/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ [https://perma.cc/EMS6-GTJ9].
16. Sameera S. Nayak, Timothy Fraser, Costas Panagopoulous, Daniel P. Aldrich & Daniel Kim, *Is divisive politics making Americans sick? Associations of perceived partisan polarization with physical and mental health outcomes among adults in the United States*, 284 SOC. SCI. & MED. 113976, 113980 (2021).

consequential debates are also reflected and replicated in the American education system. Within the greater American "culture wars," public school classrooms are on the front lines.[17] This is not new,[18] but within the modern context means that school board decisions about public school curriculums are regularly in the news, including debates over critical race theory,[19] gender identity,[20] and of course, sex education.[21]

Sex education curriculum debates at their core are battles to control how younger generations learn and subsequently develop their own opinions about sex and reproductive rights. Control over this development is controversial in part because sex is "so intricately connected to American assumptions about gender, race, and class."[22] In 2022, the battle over sex education parallels the cultural battle to police sex in the United States' public schools.

This note argues that Dobbs harms youth by limiting reproductive rights and signaling a threat to what little comprehensive sex education exists. In response, this note argues that implementing comprehensive sex education at the school district level is one way to help mitigate some of these harms.

Part I presents a brief history of sex education and abortion in the United States and argues that 1) they are connected within the greater American regulation of sex and 2) support for anti-abortion policies and abstinence-only education tend to coincide. Part II presents research about the efficacy of sex education and explains why abstinence-only education is still dominant in the United States even though research shows comprehensive sex education is more effective at changing youth behavior. Part III explains how *Dobbs* threatens the little comprehensive sex education that does exist, citing to academic scholars who share this prediction and providing examples of what states and school districts have done following *Dobbs*. Lastly, Part IV synthesizes these parts to argue how *Dobbs* harms students, how comprehensive sex education can address these harms, and provides examples of how these programs can withstand legal

17. *See generally* ZIMMERMAN, *supra* note 1 (describing how culture wars in America show up in classrooms, including discussions of social studies curriculum, religious education, and sex education). Zimmerman's book was updated in 2022 to include discussions of critical race theory, the 1619 project, mask mandates, and the impact of the Trump administration.

18. *See id*. at 2–3 (describing twentieth century culture wars in education).

19. *See, e.g.*, Roxana Kopetman, *CRT, sex-ed among hot topics in Yorba Linda-Placentia school board races*, ORANGE COUNTY REG. (Oct. 29, 2022), https://www.ocregister.com/2022/10/29/crt-sex-ed-among-hot-topics-in-yorba-linda-placentia-school-board-races/ (describing a school board election debate over a critical race theory ban).

20. *See, e.g.*, Laurel Wamsley, *What's in the so-called Don't Say Gay bill that could impact the whole country*, NPR (Oct. 21, 2022), https://www.npr.org/2022/10/21/1130297123/national-dont-say-gay-stop-children-sexualization-bill [https://perma.cc/6EP8-4LP2] (describing a bill in Florida than bans instruction on gender identity and sexual orientation). This note recognizes that the debates over gender identity and sex education curriculum are often intertwined. However, in order to focus this note on abortion and sex education, this note attempts to look at sex education curriculums about reproductive health, contraceptives, and STIs separate from gender identity educations.

21. *See, e.g.*, Kopetman, *supra* note 19.

22. COURTNEY Q. SHAH, SEX ED, SEGREGATED: THE QUEST FOR SEXUAL KNOWLEDGE IN PROGRESSIVE-ERA AMERICA 146 (2015).

challenge.

In making these arguments, this note recognizes that sex education can only do so much. Comprehensive sex education cannot replace access to abortion – "[w]e can offer better sex education, access to contraception, availability of Plan B, resources for adoption, and support for mothers and their children after birth and it will never eliminate circumstances where abortions become necessary."[23] Despite these limitations, comprehensive sex education is one tool that schools can use to arm youth with medically accurate information. With this information, youth can make informed decisions about their bodies, especially recognizing that in some states, youth have little to no reproductive autonomy after *Dobbs*.

I. THE SEX EDUCATION & ABORTION DEBATE

The goal of Part I is to illuminate how the sex education and abortion debates are related, supporting the claim presented in Part IV that *Dobbs* harms students. Part I.A1 describes how sex education ended up in public school curriculums, and Part I.A2 describes the debate over what type of sex education should be taught in schools. Part I.B gives a brief history of abortion. Part I.C connects the two histories and argues that support for anti-abortion policies tends to coincide with support for abstinence-only education.

A. Brief History of Sex Education

1. Should sex education be taught in schools?

Before the debate about what *type* of sex education should be taught in schools came the debate over *whether* sex education should be taught in schools.

In the early twentieth century, in response to declining birth rates among White Anglo- Saxon families and increasing divorce rates,[24] calls for "social hygiene" and "moral purity" guided sexuality education to the public.[25] The explicit goals were to "prevent sexually transmitted infections [STIs], stamp out masturbation and prostitution, and limit sexual expression to marriage."[26] Beneath the surface, however, the "social hygiene" movement was born from and tied to eugenics movement – "[t]hose who originally pushed the importance of educating

23. Robert Gehrke, *Goodbye* Roe v. Wade. *Hello, minority rule*, writes Robert Gehrke, SALT LAKE TRIB. (June 25, 2022). https://www.sltrib.com/opinion/2022/06/25/goodbye-roe-v-wade-hello/ [https://perma.cc/VX64-6MZW].

24. *History of Sex Education*, SIECUS 9 (2021), https://siecus.org/wp-content/uploads/2021/03/2021-SIECUS- History-of-Sex-Ed_Final.pdf [perma.cc/H7N3-ZWDF].

25. *History of Sex Education in the U.S.*, PLANNED PARENTHOOD 1 (Nov. 2016), https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf [https://perma.cc/5JDA-5952]; John P. Elia, *School-Based Sexuality Education: A Century of Sexual and Social Control*, *in* 1 SEXUALITY EDUCATION: PAST PRESENT AND FUTURE, 33–57 (Elizabeth Schroder & Judy Kuriansky eds., 2009).

26. *History of Sex Education in the U.S.*, PLANNED PARENTHOOD, *supra* note 25, at 1.

the public about sexuality did so out of a fear that their comfortable, white, middle-class way of living was being threatened by the loosening of sexual morals."[27]

In 1913, Chicago public schools were the first to implement formal sex education in schools with "personal purity" talks.[28] However, by the next year, the school board ended the program after facing backlash from community members, including Catholic leaders.[29] Efforts pivoted to focus on education in community groups, including the YMCA and Boy Scouts, and were primarily focused on educating boys and young men.[30]

Shortly thereafter, the federal government passed the Chamberlain-Khan Act. Partially in response to rising STI rates during World War I, the Act "provided $4 million dollars during the 1919-20 school year to train teachers about STIs, so they could then train high school students."[31] The first federal funding of sex education was therefore not part of a movement to educate students about their bodies but was instead a response to what was seen as a public health crisis.[32]

Mirroring the social changes that occurred between the 1920s and 1960s, greater efforts were made to implement sex education in public schools.[33] "Schools were increasingly seen as arenas for social activism."[34] In the 1930s, the Department of Education began to publish sex education materials and train educators.[35] In 1964, Dr. Mary Calderone, the medical director for Planned Parenthood Federation of America, founded the Sexuality Information and Education Council of the United States (SIECUS).[36] Although Dr. Calderone's focus was not only sex education in schools, SIECUS was eventually "inundated with requests from schools for help with their sex education."[37]

By the 1980s, the popular consensus was that sex education should be taught in schools.[38] New Jersey became the first state to require sex education, as

27. *History of Sex Education*, SIECUS, *supra* note 24, at 6. *See also* SHAH, *supra* note 23, at 3. The eugenics movement was based on a white supremacist "political ideology designed to sculpt societies through biological methods of population control" and aimed to reduce the number of "undesirable" people, particularly through forced sterilization. Adam Rutherford, *A cautionary history of eugenics*, 37 SCIENCE 1419, 1419 (2021).
28. *History of Sex Education*, SIECUS, *supra* note 24, at 14.
29. *Id.*
30. *Id.*
31. *Id.* at 18. The Chamberlain-Khan Act also created the Division of Venereal Diseases in the Public Health Service.
32. See Valerie J. Huber & Michael W. Firmin, *A History of Sex Education in the United States since 1900*, 23 INT'L J. EDUC. REFORM 25, 29–30 (2014), for a discussion of "Government Involvement in Social Issues."
33. Huber & Firmin, *supra* note 32, at 32-36.
34. *Id.* at 30.
35. Johannah Cornblatt, *A Brief History of Sex Ed in America*, NEWSWEEK (Oct. 27, 2009), https://www.newsweek.com/brief-history-sex-ed-america-81001 [https://perma.cc/A7LQ-QANW].
36. *History of Sex Education in the U.S.,* PLANNED PARENTHOOD, *supra* note 25, at 2.
37. *History of Sex Education*, SIECUS, *supra* note 24, at 27. SIECUS and Dr. Calderone reached out to education leaders during the early years of SIECUS. *Id.* at 26.
38. Leslie M. Kantor, John S. Santelli, Julian Teitler & Randall Balmer, *Abstinence-Only Policies and Programs: An Overview*, 5 SEXUALITY RSCH. & SOC. POL'Y 7 (2008).

opposed to just health education, in public schools,[39] followed by Kentucky, Maryland, and the District of Columbia.[40] The AIDS epidemic contributed, in part, to this shift.[41] In 1986, after receiving no response from the Reagan administration, the Congressional Select Committee on Children, Youth, and Families declared that "education is the only tool we have to prevent the spread of this deadly disease."[42] The Committee also recognized that "issuing advice on moral behavior by [itself is] painfully inadequate."[43] Just as in the 1920s, a public health crisis, rather than the interests of students, prompted major change in attitudes towards sex education. Following these changes in the 1980s, the debate shifted to what type of sex education should be taught in schools.

2. What type of sex education should be taught in schools?

During debates in the 1980s, proponents of sex education "emphasized the overwhelming support for 'preventative' sex education among teens themselves."[44] At this point, a growing number of schools included discussion of masturbation, homosexuality, contraception, and abortion in their sexual education curriculum.[45] But social conservatives pushed back against curriculum that exemplified "liberal social attitudes."[46] Specifically, Jerry Falwell's Moral Majority, a component of the New Christian Right, challenged this type of sex education.[47] The Moral Majority argued that sex education was part of a new type of religion, secular humanism, that "supplanted God's word with 'godless ethics.'"[48] Viewing this liberal sex education as promotion of humanism, opponents argued that Christianity should get equal time in schools.[49]

However, the Moral Majority eventually abandoned its attempt to provide both secular humanist and Christian sex education to students in public schools. One opponent of sex education wrote, "Let's stick to the things we do know about: reading, writing, arithmetic, the basics"[50] – or in other words, nuanced discussions of secular and Christian sex education should be avoided altogether. To this end, abstinence-only sex education movement would limit sex education to only

39. ZIMMERMAN, *supra* note 1, at 206.
40. Susan Walton, *N.J.'s Sex-Education Requirement Sustained by High Court*, EDUC. WEEK (June 2, 1982), https://www.edweek.org/education/n-j-s-sex-education-requirement-sustained-by-high-court/1982/06 [https://perma.cc/5UST-9483].
41. *History of Sex Education*, SIECUS, *supra* note 24, at 37.
42. *Id.* at 38.
43. JEFFREY P. MORAN, TEACHING SEX: THE SHAPING OF ADOLESCENCE IN THE 20TH CENTURY 207 (2000).
44. ZIMMERMAN, *supra* note 1, at 189.
45. *See id*.
46. Kantor et al., *supra* note 38, at 7.
47. *See* ZIMMERMAN, *supra* note 1, at 189-190.
48. *Id.* at 191.
49. *Id.* at 192 ("If we are to educate the whole child, practice democracy, stimulate critical thinking, then both sides of an issue must be presented.").
50. *Id.* at 192.

discussions of abstinence.

As Republicans gained political control in the 1980s, they pushed to fund abstinence-only sex education at the federal level.[51] In 1981, Congress passed the Adolescent Family Life Act (AFLA) under Title XX of the Public Health Services Act.[52] Under AFLA, a "$7 million appropriation was designated for promoting premarital abstinence . . . discouraging abortion and promoting adoption as an option for pregnant teens."[53] Two other federal programs formed in 1996 and 2000 provided more funding.[54] The 1996 program also provided the following eight-point definition of abstinence-only sex education, which schools were required to follow to qualify for funding under Title V, Section 510 of the Social Security Act: [55]

> For the purposes of this section, the term "abstinence education" means an educational or motivational program which:
>
> A. has as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
> B. teaches abstinence from sexual activity outside marriage as the expected standard for all school-age children;
> C. teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
> D. teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of sexual activity;
> E. teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
> F. teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;
> G. teaches young people how to reject sexual advances and how alcohol and drug use increase vulnerability to sexual advances; and
> H.teaches the importance of attaining self-sufficiency before engaging in sexual activity. [56]

A 2006 guideline for an Administration for Children and Families program made it clear, "sex education programs that promote the use of contraceptives are not eligible for funding."[57] Not all states applied for funding for abstinence-only programs; for example, California never accepted funding.[58] And by 2009, nearly

51. *See id.*
52. Kantor et al., *supra* note 38, at 7.
53. *Id.*
54. *Id.* at 7–8.
55. *Id.* at 7.
56. Social Security Act, § 510(b), Pub. L. No. 104–193, § 510b (1996). As of 2022, the definition has been updated. *See* 42 U.S.C. § 710.
57. Kantor et al., *supra* note 38, at 8.
58. Marissa Raymond, Lylyana Bogdanovich, Dalia Brahmi, Laura Jane Cardinal, Gulielma

half of the states chose not to take federal support.[59]

The development of comprehensive sex education stood in opposition to the development of abstinence-only education. In 1990, SIECUS drafted the first Guidelines for Comprehensive Sexuality Education K-12 (Guidelines).[60] SIECUS published the Guidelines to support educators designing curriculum, and the most recent version suggests including the topics of "abstinence, sexually transmitted diseases (STDs), HIV/AIDS, contraception, and disease prevention methods."[61] Advocates for comprehensive sex education envision evidence-based curriculum that "equip[s] young people with the knowledge, skills, attitudes and values they need to determine and enjoy their sexuality—physically and emotionally, individually and in relationships."[62] One vocal advocate, Dr. M. Jocelyn Elders, a pediatrician and the first Black U.S. Surgeon General, supported a message to "Get real."[63] In response to the question, "Why do we remain silent on public health issues relating to sex?" Dr. Elders responded: "People realize that we all support the moral view, but we know that an awful lot of our children are not being abstinent . . . Since we can't legislate morals, we have to teach them how to take care of themselves."[64]

By 2009, under the Obama administration, federal funding emphasis shifted away from abstinence-only to comprehensive "evidence-based" education.[65] After a waning of the controversy over sex education,[66] by 2016, the pendulum swung. In his presidential campaign, former President Trump ran on an abstinence-only sex education platform.[67] During his administration, comprehensive sex education programs were defunded,[68] and abstinence-only

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Leonard Fager, LeighAnn C. Frattarelli, Gabrielle Hecker, Elizabeth Ann Jarpe, Adam Viera, Leslie M. Kantor & John S. Santelli, *State Refusal of Federal Funding for Abstinence-Only Programs*, 5 SEXUALITY RSCH. & SOC. POL'Y 44, 45 (2008).

59. *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. ADOLESCENT HEALTH 400, 401 (2017) [hereinafter *Position Paper*]. The source does not state the exact number of states that chose not to take federal support.

60. *History of Sex Education*, SIECUS, *supra* note 24, at 39.

61. *Guidelines for Comprehensive Sexual Education, 3rd ed.*, SIECUS 11 (2004).

62. *A Definition of Comprehensive Sexuality Education*, GUTTMACHER INST., https://www.guttmacher.org/sites/default/files/report_downloads/demystifying-data-handouts_0.pdf [https://perma.cc/4DM5-MTYW].

63. *History of Sex Education*, SIECUS, *supra* note 24, at 40 (citing Claudia Dreifus, *Jocelyn Elders*, N.Y. TIMES (Jan. 30, 1994), https://www.nytimes.com/1994/01/30/magazine/joycelyn-elders.html).

64. Dreifus, *supra* note 63.

65. Brenda Wilson, *Proven Sex-Ed Programs Get a Boost from Obama,* NPR (June 6, 2010), https://www.npr.org/templates/story/story.php?storyId=127514185 [https://perma.cc/Q4E6-9ZF7].

66. *See* ZIMMERMAN, *supra* note 1, at 237 (2022) (suggesting that as some members of the New Christian Right opted out of public schools, the debate over sex education in public schools lessened).

67. Melody Alemansour, Austin Coe, Austin Donohue, Laura Shellum & Sophie Thackray, *Sex Education in Schools*, 20 GEO. L.J. 467, 499 (2019).

68. *Position Paper, supra* note 59, at 401. *See also* Cristina Leos & David Wiley, *"It falls on all*

funding increased by $10 million.[69]

B. Abortion

A parallel battle over abortion was simultaneous with struggles over sex education. Support for abstinence-only education coincided with anti-abortion policies.[70]

In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court held there was a right to abortion and grounded this right in the 14th Amendment's "liberty doctrine . . . to make fundamental decisions about personal autonomy and bodily integrity."[71] This liberty doctrine is built on case law beginning with the right to establish a home and bring up children and followed by the rights to marital privacy, contraceptives, and interracial marriage.[72] The liberty doctrine was also extended after *Roe* and *Casey* to the right to engage in consensual sexual acts, including same-sex intercourse, and eventually same-sex marriage.[73]

There was some initial opposition to *Roe* in 1973,[74] but it was the Reagan election campaigns in the 1980s that energized "the strongest anti-abortion

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our shoulders": Overcoming Barriers to Delivering Sex Education in West Texas Schools, 10 J. APPLIED RSCH. ON CHILD. 1,1 (2019) (noting that teen prevention programs lost $200 million nationwide).

69. Meghan Boone, *Perverse & Irrational*, 16 HARV. L. & POL'Y REV 393, 432 (2022); *see also* Keli Goff, *Op-Ed: Better sex education in schools can help young people affected by abortion bans*, L.A. TIMES (Aug. 12, 2022), https://www.latimes.com/opinion/story/2022-08-12/sex-education-abortion-bans [https://perma.cc/W2CG-24LX] (Kelli Goff won two Emmy Awards for her documentary, REVERSING ROE).

70. This note does not offer a full history of abortion in America but aims to illuminate how sex education and abortion are related. For more complete histories of abortion, maternal health, and reproductive rights in America, see generally MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT (2020) (discussing the post-*Roe* backlash); KHIARA BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011) (discussing race in the medical setting, especially looking at women of color's access to prenatal care and safe childbirth); Paul Benjamin Linton, Roe v. Wade *and the History of Abortion Regulation*, XV AM. J. LAW & MED. 227 (1989) (discussing the common-law and pre-*Roe* regulation of abortion).

71. *A Post*-Roe *America: The Legal Consequences of the* Dobbs *Decision, Before the S. Comm. on Judiciary*, 117th Cong. 2–3 (2022) (statement of Khiara M. Bridges, Professor of Law, U.C. Berkeley Sch. L.) [hereinafter Bridges] (referencing Roe v. Wade, 410 U.S. 113, 164–65 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (both overruled by Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2284 (2022))).

72. The referenced liberty doctrine is a result of case law including Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right to "establish a home and bring up children"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (the right to marital privacy and contraceptives for married people); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (the right to contraceptives for unmarried people); and Loving v. Virginia, 388 U.S. 1, 12 (1967) (the right to interracial marriage).

73. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003) (the freedom of adults to engage in consensual private sexual conduct); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (the right to same-sex marriage).

74. Ron Elving, *The leaked abortion decision blew up overnight. In 1973, Roe had a longer fuse*, NPR (May 8, 2022), https://www.npr.org/2022/05/08/1097118409/the-leaked-abortion-decision-blew-up-overnight-in-1973-roe-had-a- longer-fuse [https://perma.cc/J3ZV-X9HY] (suggesting that the *Roe* decision was overshadowed in the media by other political news, such as the Vietnam War and former President Lyndon Johnson's death).

plank."[75] This opposition grew along with the backlash against sex education in the 1980s. Following the similar shifts seen in the sex education debate, by and during the Obama administration, there were not serious calls at the federal level to end abortion. However, during this time, states vehemently fought to restrict access to abortion with medication abortion restrictions, religious refusal laws, and targeted regulation of abortion providers.[76]

Along with his abstinence-only platform,[77] it was former President Trump who reinvigorated federal anti-abortion politics, running on the promise that he would appoint Supreme Court justices who would overturn *Roe*.[78] Fulfilling his promise, *Roe* was not seriously threatened until the conservative majority was solidified on the Supreme Court in 2020,[79] and on June 24, 2022, the end of *Roe* and the end of the federal right to abortion solidified with the official publication of the *Dobbs* decision.[80] Unlike the initially muted response to *Roe*, the *Dobbs* decision sparked significant public protest,[81] and public support for the Supreme Court hit record lows.[82]

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75. *Id*.
76. *Center Report: More State Abortion Restrictions Passed in 2021 Than in Any Year Since* Roe v. Wade, CTR. FOR REPROD. RTS. (Jan. 4, 2022), https://reproductiverights.org/2021-state-legislative-wrap-up/#:~:text=In%202021%2C%20states%20across%20the,right%20to%20abortion%20in%201973 [https://perma.cc/DHU7-VB3P].
77. Alemansour et al., *supra* note 67, at 499.
78. Elving, *supra* note 74.
79. *See* Nina Totenberg, *The Supreme Court is the most conservative in 90 years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/A6RZ-5FJX].
80. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2284 (2022). Before the official publication, on May 2, 2022, in an unprecedented moment, a draft *Dobbs* majority opinion by Justice Samuel Alito was leaked. *See Read Justice Alito's initial draft abortion opinion which would overturn* Roe v. Wade, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf- 00029504 [https://perma.cc/SDY8-ACHD]; Elving, *supra* note 74. The draft opinion dominated the news cycles. Chief Justice John Roberts described the leak as a "betrayal of the confidences of the court . . . intended to undermine the integrity of our operations." *Chief Justice Roberts calls Roe v. Wade leak a betrayal*, NPR (May 3, 2022), https://www.npr.org/2022/05/03/1096123185/supreme-court-john-roberts-roe-wade [https://perma.cc/FCW2-VN52].
81. Natasha Ishak, *In 48 hours of protest, thousands of Americans cry out for abortion rights*, VOX (June 26, 2022), https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overturned-protests [https://perma.cc/NLD8-PE4T].
82. Chris Cillizza, *Trust in the Supreme Court is at a record low*, CNN (Sept. 29, 2022), https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/index.html [https://perma.cc/8UR9-F5RV]. Although the political support for abortion has varied by president, public opinion on abortion has been less variable over time. Two years after *Roe*, in 1975, a Gallup poll found that 54% of U.S. adults supported abortion under certain circumstances. Laura Santhanam, *How has public opinion about abortion changed since Roe v. Wade?*, PBS (July 20, 2018), https://www.pbs.org/newshour/health/how-has-public-opinion-about-abortion-changed-since-roe-v-wade [https://perma.cc/K6H9-ZWHG]. For a visual presentation of statistics on abortion support over time, see *Abortion*, GALLUP https://news.gallup.com/poll/1576/abortion.aspx. As of 2022, 61% of U.S. adults think abortion should be legal in all or most cases. Hartig, *supra* note 10. The support for and

C. How Are the Sex Education & Abortion Debates Related?

The abortion debate is, at its core, a debate over the regulation of sex in the United States, specifically aimed at regulating the bodies and behavior of people with the capacity for pregnancy. With abortion bans, states purposefully take away one option from pregnant people to, in theory, end the practice of abortion. But unsurprisingly, abortion bans do not end the practice of abortion. They make abortion less safe and disproportionally harms poor people of color,[83] specifically Black people.[84]

The debate about the appropriate type of sex education is an example of the sex regulation "culture war" manifesting in public schools. Sex education is an attempt to regulate sex in the United States, specifically aimed at regulating youth's bodies and choices. With well- funded abstinence-only education, states and districts purposefully deemphasize safe sex practices in theory to stop teenage sex. But, again unsurprisingly, this does not stop teens from having sex. It makes sex less safe[85] and youth of color are disproportionately affected.[86]

These coinciding histories and debates are increasingly relevant now because of *Dobbs*. If this history repeats itself, *Dobbs* signals that the little comprehensive sex education that does exist is at risk. This likely simultaneous banning of abortion and limiting of sex education work together to the detriment of youth. Part IV explains these harms to youth in more detail, but for one example, for youth that do have sex and become pregnant, *Dobbs* limits the available options. This makes the need for comprehensive sex education even more urgent. In Part II, this note emphasizes this need by presenting evidence about the efficacy of abstinence-only and comprehensive sex educations.

II. SEX EDUCATION EFFICACY

Significant research explores the efficacy of sex education programs. Common criteria in assessing these programs include unintended pregnancy

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opposition to abortion can be broken down by race, age, religion, and party affiliation. To highlight a few of these categories, the large majority of those who are religiously unaffiliated, 84%, tend to support the legality of abortion in all or most cases. In comparison, a majority of White evangelicals, 74%, think abortion should be illegal in all or most cases. *Id*. Most supporters of abortion are under the age of 50 and tend to have higher levels of education. Lipka, *supra* note 9; Lydia Saad, *Education Trumps Gender in Predicting Support for Abortion*, GALLUP (Apr. 28, 2010), https://news.gallup.com/poll/127559/education- trumps-gender-predicting-support-abortion.aspx [https://perma.cc/5SPQ-PE7J].

83. Michelle Oberman, *What will and won't happen when abortion is banned*, 9 J. L. & BIOSCIENCES 1, 1 (2022).

84. Bridges, *supra* note 71, at 6.

85. *See infra* notes 93–102.

86. *See* Laura D. Lindberg & Leslie M. Kantor, *Adolescents' Receipt of Sex Education in a Nationally Representative Sample, 2011–2019*, 70 J. ADOLESCENT HEALTH 290, 295 (2022) (finding racial and ethnic disparities in rates of unplanned pregnancies and sexually transmitted diseases).

rates;[87] knowledge about and rates of HIV and STI identification;[88] knowledge about and use of contraception, including condoms and birth control pills;[89] incidence and frequency of intercourse;[90] and number of sexual partners.[91] The research on abstinence-only programs suggests they are unsuccessful in their purported goal to encourage abstinence. In comparison, comprehensive sex education research suggests it can change young people's behavior and improve health outcomes, as elaborated in part II.B.

A. Abstinence-Only Sex Education

Peer reviewed, evidence-based research suggests abstinence-only education does not increase rates of abstinence and can leave youth ill-equipped with the necessary knowledge to practice safe sex.[92] Trial results suggest "abstinence only program[s] do not effectively encourage abstinent behavior."[93] "At present, there does not exist any strong evidence that any abstinence program delays the initiation of sex, hastens the return to abstinence, or reduces the number of sexual partners."[94] A 2007 study mandated by Congress evaluated four Title V, Section 510 abstinence-only education programs.[95] Summarizing the main goal of Section 510 abstinence programs as "to teach abstinence from sexual activity outside of marriage," the report found that the sex education programs studied "show[ed] no

87. *See* Kristen Underhill, Don Operario & Paul Montgomery, *Abstinence-only programs for HIV infection prevention in high-income countries*, 335 Brit. Med. J. 248, 249 (2007); Douglas Kirby, *Emerging Answers 2007: Research Findings on Programs to Reduce Teen Pregnancy and Sexually Transmitted Diseases*, NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY 14 (Nov. 2007), https://powertodecide.org/sites/default/files/resources/primary-download/emerging-answers.pdf [https://perma.cc/X9WF-XKXJ] (showing criteria for evaluating effectiveness of pregnancy and sexually transmitted disease-prevention programs); Kathrin F. Stanger- Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE 1, 4 (Oct. 2011) (showing teenage pregnancy rates in relation to abstinence education programs).

88. *See* Underhill et al., *supra* note 87, at 249-50; Kirby, *supra* note 87, at 14; Christopher Trenholm, Barbara Devaney, Ken Fortson, Lisa Quay, Justin Wheeler & Melissa Clark, *Impacts of Four Title V, Section 510 Abstinence Education Programs Final Report*, MATHEMATICA POL'Y RSCH., INC. xx (Apr. 2007) (a contractual report submitted to the U.S. Dep't Health & Human Services); *see also* Virginia A. Fonner, Kevin S. Armstrong, Caitlin E. Kennedy, Kevin R. O'Reilly & Michael D. Sweat, *School Based Sex Education and HIV Prevention in Low- and Middle- Income Countries: A Systematic Review and Meta-Analysis*, PLOS ONE (2014) (finding students who received school-based sex education knew more about HIV).

89. Underhill et al., *supra* note 87, at 250; Kirby, *supra* note 87, at 14; Trenholm et al., *supra* note 88, at xxi–xxii. *See also* Fonner et al., *supra* note 88 at 1.

90. Underhill et al., *supra* note 87, at 250; Kirby, *supra* note 89, at 14.

91. Underhill et al., *supra* note 87, at 250; Trenholm et al., *supra* note 88, at xviii; *see also* Fonner et al., *supra* note 88, at 1.

92. *See Position Paper*, *supra* note 59, at 400; Kirby, *supra* note 87, at 15; Underhill et al., *supra* note 87, at 248; Trenholm et al., *supra* note 88, at 59; Stanger-Hall & Hall, *supra* note 87, at 1. For summaries of this research see *History of Sex Education*, SIECUS, *supra* note 24, at 50 (all summaries of research on results of abstinence education programs).

93. Underhill et al., *supra* note 87, at 251.

94. Kirby, *supra* note 87, at 15.

95. Trenholm et al., *supra* note 88, at xiii.

impacts on the rates of sexual abstinence."[96] The report also found that although the programs taught youth about the risk of pregnancy and STIs, "47 percent of sexually active youth had unprotected sex" within a year of the report.[97] Some studies found moderate change of sexual behavior, although critics feel that these studies are less rigorous than others.[98]

Regardless, "studies of abstinence programs have not produced sufficient evidence to justify their wide-spread dissemination"[99] backed by federal funding amounting to $2 billion spent on these programs between 1982 and 2017.[100] Some recent studies suggest abstinence-only education may be correlated with an increase of teen pregnancy and STIs, making this funding especially exorbitant.[101]

Further, research suggests abstinence-only education reinforces gender stereotypes. For example, "[a]bstinence-only curricula implicitly and explicitly perpetuate the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire."[102] In a country with a disturbing prevalence of intimate partner and gendered violence,[103] it is concerning that the dominant form of sex education contributes to the cultural perpetuation of this violence by reinforcing gender stereotypes.[104]

B. Comprehensive Sex Education

In light of the failure of abstinence-only education, social science and public health research has tried to determine which sex education programs *are* effective and how success should be measured. Joan Helmich, a sexuality educator, explains what research tells us about youth:

> [W]e know that youth are exposed to lots of sexual information, sexualizing and titillating media, and pornography. They've received a

96. *Id.* at 59.
97. *Id.* at 60.
98. Kirby, *supra* note 87, at 15.
99. *Id.*
100. *Abstinence-Only Education Is a Failure,* COLUMBIA MAILMAN SCH. PUB. HEALTH (Aug. 22, 2017) https://www.publichealth.columbia.edu/news/abstinence-only-education-failure [https://perma.cc/8W4F-3DJC].
101. Boone, *supra* note 69, at 434 (citing Jillian B. Carr & Analisa Packham, *The Effect of State-Mandate Abstinence- Based Sex Education on Teen Health Outcomes*, 26 HEALTH ECON. 403 (2017); M. Hogben, H. Chesson & S. O. Aral, *Sexuality education policies and sexually transmitted disease rates in the United States of America*, 21 INT'L J. STD & AIDS 293 (2010)).
102. Cornelia T. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 953 (2007).
103. *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/STATISTICS. [https://perma.cc/2VEM-CXJE].
104. For more information about gender stereotyping and its harms, *see Gender stereotyping*, UN HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/women/gender-stereotyping [https://perma.cc/SU6C-S4J8]. *See also* Kristin L. Anderson & Debra Umberson, *Gendering Violence: Masculinity and Power in Men's Accounts of Domestic Violence*, 15 GENDER AND SOCIETY 358 (2001). Of course, intimate partner and gendered violence are not singularly a result of gender roles. To learn more about the causes and effects of this violence and abuse, *see* Nancy Lemon, DOMESTIC VIOLENCE LAW 37-106 (5th ed. 2018).

> myriad of mixed, conflicting and unclear messages about sexuality. And they talk about sex among themselves and with older peers, and the information they get from each other may not be very accurate, reasonable, or responsible. We know that youth have lots of questions and concerns. We know that they typically do not get very good information from parents, nor do they engage in reasonable discourse about sexuality with other responsible adults in their lives.[105]

Helmich argues that sex education should aim to be long-term, client-centered, skills-based, values-based, research-based, theory-based, broad, integrated, collaborative, and positive.[106]

Only comprehensive sex education programs can achieve these goals, and achieving these goals is more important when youth have fewer reproductive health options and less access to abortion. A review of three decades of sex education studies found "strong support for comprehensive sex education across a range of topics and grade levels [and] evidence for the effectiveness of approaches that address a broad definition of sexual health and take positive, affirming, inclusive approaches to human sexuality."[107]

Similar to Helmich's definition of successful comprehensive sex education, the review found that "attention to the full range of sexual health topics, scaffolded across grades, embedded in supportive school environments and across subject areas, has the potential to improve sexual, social, and emotional health, and academic outcomes for young people."[108] Instruction "scaffolded across grades" is not a one-time lecture in high school, but is a regular curriculum built into education across subjects at every grade level.[109] For example, "some of the most effective sex education outcomes . . . were achieved not just in traditional health or sex education classrooms, but in English, social studies, physical education, music and art classes."[110] Specifically, to engage Black, Latine, LGTBQ, and immigrant youth, "youth participatory action research" suggests sexual education programs should include art-based methods such as digital storytelling, body mapping, story circles, and poetry.[111] A review of twenty-three studies of sex education programs found that effective comprehensive sex education programs "did delay the initiation of intercourse, reduce the frequency of intercourse, reduce

105. Joan Helmich, *What is Comprehensive Sexuality Education? Going WAAAAAY Beyond Abstinence and Condoms*, 4 AM. J. SEXUALITY EDUC. 10, 11-12 (2009).

106. *Id.* at 11–15.

107. Eva S. Goldfarb & Lisa D. Lieberman, *Three Decades of Research: The Case for Comprehensive Sex Education*, 68 J. ADOLESCENT HEALTH 13, 13 (2021)

108. *Id*.

109. *Id*.

110. Eva Goldfarb & Lisa Lieberman, *After* Roe, *Sex Ed Is Even More Vital*, N.Y. TIMES (July 20, 2022) https://www.nytimes.com/2022/07/20/opinion/after-roe-sex-ed-is-even-more-vital.html?searchResultPosition=2 [https://perma.cc/E2LY-EUMW].

111. Isabella Caruso, Elizabeth Salerno Valdez, Camille Collins Lovell, Jazmine Chan, Elizabeth Beatriz & Aline Gubrium, *The Need for Community-Responsive and Flexible Sex Ed for Historically Marginalized Youth*, 20 SEXUALITY RSCH. & SOC. POL'Y 1, 11 (2022).

the number of sexual partners, or increase the use of condoms or other contraceptives . . . [and have the] potential to reduce exposure to unintended pregnancy and sexually transmitted disease."[112]

Medical experts also advocate for comprehensive sex education programs. The American Academy of Pediatrics and the American College of Obstetricians and Gynecologists advocate for comprehensive sex education programs in part to help prevent and reduce the risks of adolescent pregnancy and STIs.[113] Further, the American Medical Association, American Public Health Association, National Education Association, and National School Boards Association all endorse comprehensive sex education and oppose abstinence-only education.[114]

C. Current Sex Education Laws

Despite the evidence that comprehensive sex education improves youth behavior more effectively than abstinence-only education, abstinence-only education is still more prevalent in the United States. The SIECUS Sex Education Law & Policy Chart reports the sex education policies in each state and groups similar state policies to allow for numerical counts of how many states have certain types of sex education.[115] As of July 2022, twenty-nine states and the District of Columbia require sex education.[116] Thirty-seven states and the District of Columbia require education about abstinence,[117] sixteen of which provide abstinence-only sex education.[118] Only eleven states mandate sex education to be "medically accurate."[119] Five states have laws requiring comprehensive sex education, two of which only require that sex education be comprehensive if it is provided.[120]

Linda Lindberg, a public health professor and sex education researcher, believes what little sex education does happen in schools is "too little too late."[121] Her research found that fewer than half of adolescents received education about where to get birth control before the first time they had sex and that students

112. Douglas Kirby, Lynn Short, Janet Collins, Deborah Rugg, Lloyd Kolbe, Marion Howard, Brent Miller, Freya Sonenstein & Laurie S. Zabin, *School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness*, 109 PUB. HEALTH REP. 339, 339 (1994).

113. Cora C. Breuner & Gerri Mattson, *Sexuality Education for Children and Adolescents*, 138 PEDIATRICS e1, e1 (2016); Comm. on Adolescent Health Care, *Committee Opinion No. 678*, 128 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS e227, e227 (2016).

114. Katia Santiago-Taylor, *Comprehensive Sexuality Education Should be a Public Health Priority*, XVI J. HEALTH & BIOMEDICAL LAW 173, 178 (2020).

115. *See SIECUS Chart*, *supra* note 4.

116. *See The SIECUS State Profiles*, *supra* note 6.

117. *Sex and HIV Education*, GUTTMACHER INST. (Dec. 1, 2022), https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education [https://perma.cc/SYT4-8796].

118. *See The SIECUS State Profiles*, *supra* note 6.

119. Goldfarb & Lieberman, *After* Roe, *Sex Ed Is Even More Vital*, *supra* note 110.

120. *See The SIECUS State Profiles*, *supra* note 6.

121. Hannah Natanson, *After Roe, teens are teaching themselves sex ed, because the adults won't*, WASH. POST (Aug. 23, 2022) https://www.washingtonpost.com/education/2022/08/23/teen-sex-education-roe/ [https://perma.cc/9UVS-S8ZC].

learned less about sexual health in the 2010s than they did in 1995.[122] Delivery of this education is also inequitable. There are "widespread racial disparities in the receipt and timing of formal sex education," meaning that young students of color are less likely to receive instruction than white peers.[123] Further, despite a decline since 1991, the United States teen birth rate is still "substantially higher than in other western industrialized nations."[124]

The prevalence of abstinence-only education is illogical considering the research on the positive impact of comprehensive sex education. However, as explained in Part I, sex education tied with reproductive rights is a controversial and politicized issue. Decisions about what type of sex education should be taught and funded are not made based on scientific research and consensus. America's "way[] of thinking about sex education [has] signified not an inevitable progression toward objective truth but a series of historically contingent response[s] to social change."[125] If the history of coinciding anti-abortion and abstinence-only education support described in Part I continues, on the coattails of *Dobbs*, support for abstinence-only education is likely to grow despite its documented failures. As explained in Part III, researchers predict history will repeat itself with *Dobbs* threatening what little comprehensive sex education does exist.[126]

III. THE PREDICTED & ACTUAL IMPACT OF *DOBBS* ON SEX EDUCATION

The aim of Part III is to highlight why legal scholars predict that sex education is at risk because of the *Dobbs* decision and to determine if these predictions are proving true. Part III.A explains in more detail why scholars have made this prediction. Part III.B then presents examples of lawmaker responses to the *Dobbs* decision. If lawmakers are emboldened by *Dobbs* and the prediction that sex education is at risk is true, this strengthens the argument presented in Part IV regarding the urgency to implement comprehensive sex education.

A. Predicted Impact of *Dobbs*

The *Dobbs* majority found that "*Roe* erred when it interpreted the [14th]

122. Lindberg & Kantor, *supra* note 86, at 294 (2022). See also the figures presented in *US Adolescents' Receipt of Formal Sex Education,* GUTTMACHER INST. (Feb. 2022), https://www.guttmacher.org/fact-sheet/adolescents-teens-receipt-sex-education-united-states [https://perma.cc/AHL7-BH4W].

123. Lindberg & Kantor, *supra* note 86, at 295.

124. *About Teen Pregnancy*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 15, 2021), https://www.cdc.gov/teenpregnancy/about/index.htm [https://perma.cc/H2YZ-BEVL].

125. MORAN, *supra* note 43, at 230.

126. *See The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States*, *Before the H. Comm. on Oversight & Reform*, 117th Cong. (2022) (statement of Prof. Michele Bratcher Goodwin) [hereinafter Goodwin]; Alemansour et al., *supra* note 67, at 499; Radio Atlantic, *Predictions for a Post*-Roe *America*, THE ATLANTIC (May 10, 2022), https://www.theatlantic.com/politics/archive/2022/05/the-future-of- roe/629802/ [https://perma.cc/J5VV-FEQK].

Amendment's Due Process Clause to protect a right to terminate a pre-viability pregnancy insofar as that clause only protects rights that are 'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.'"[127] In July 2022, Professor Khiara Bridges argued in her testimony before the Senate Judiciary Committee that by "privileg[ing]" America's history and tradition from the 1860s, the majority "attempt[ed] to divine the meaning of the Constitution" by looking at "an era characterized by the formal exclusion of people with the capacity for pregnancy."[128] Professor Mary Ziegler summarized how this reasoning is related to sex education:

> [The *Dobbs* reasoning] is that in the 19th century—at the time of the ratification of the 14th Amendment—there was no recognition of an abortion right. And abortion was being criminalized. I mean, of course, there was no recognition of a right to same-sex marriage. Of course, there was no sense that interracial couples could constitutionally demand to get married. Birth control was being criminalized at the state as well as federal level. Sex-education materials were being criminalized at the state as well as federal level.[129]

Of course, unlike abortion, same-sex marriage, and contraception, there never was a constitutional right to sex education. There is not even a constitutional right to education.[130] The threat to sex education is not an impending Supreme Court opinion about sex education, but the potential for coinciding support and momentum for anti-abortion policies and abstinence-only education as a result of the opinion. For example, Professor Michele Bracher Goodwin testified to Congress about the impact of the *Dobbs* decision arguing that "[o]verturning *Roe v. Wade* foreshadows . . . bans on sex education in schools."[131] This is not a surprise. Despite the "fundamental paradigm shift" in the United States as awareness of the benefits of comprehensive sex education spread, the opposite "distinctive paradigm shift" on the judicial level grew and gained momentum with the confirmation of Justice Brett Kavanaugh to the Supreme Court[132] and was solidified with *Dobbs.* Further as explained in Part I, "[r]eligious-right political groups that have spent decades dismantling abortion rights . . . have been gunning for sex education for just as long."[133] These groups have also been successful in pushing and funding abstinence-only education despite the evidence presented in

127. Bridges, *supra* note 71, at 2 (quoting Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242 (2022)).
128. *Id.* at 2-3.
129. Radio Atlantic, *supra* note 126.
130. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
131. *The Impact of the Supreme Court's* Dobbs *Decision on Abortion Rights and Access Across the United States*, *Before the H. Comm. on Oversight & Reform*, 117th Cong. 6 (2022) (statement of Prof. Michele Bracher Goodwin) [hereinafter Goodwin].
132. *See* Alemansour et al., *supra* note 67, at 499.
133. Goldfarb & Lieberman, *After* Roe, *Sex Ed Is Even More Vital*, *supra* note 110.

Part II that it has failed at encouraging abstinence. After *Dobbs*, "[i]f a state is looking toward banning abortion or has already banned abortion, then it's incredibly likely that their sex education policy is either abstinence-only or, at the very least, abstinence-focused."[134] Part III.B discusses whether these predictions are proving true in 2022.

B. Actual Impact of *Dobbs* – District & State Responses

Following *Dobbs*, some school boards passed comprehensive sex-education for the 2022–23 school years. For example, in Tampa, Florida, the Hillsborough School Board approved a sex education curriculum in September 2022 that included discussions of gender identity and "detailed descriptions of the human body."[135] In August 2022 near Milwaukee, Wisconsin, Wauwatosa School District passed a comprehensive sex education initiative.[136] The curriculum includes discussions of gender identities, sexual orientation, and sexual activities by eighth grade and discussions about abusive relationships and safe sex in high school.[137] Both school districts allow parents to opt out of the programs, meaning that parents can decide to not have their child participate.[138]

Although there have been some post-*Dobbs* comprehensive sex education successes, there are, as predicted, impending threats to sex education. Specifically, Republican state legislators call to ban or weaken sex education. In Texas in summer 2022, in the state with the second largest school system in the United States,[139] the Republican Party voted in favor of two new party platforms – "barring the teaching of sex and sexuality in schools while simultaneously calling on Texas schools to teach the 'dignity of the preborn human' and that life begins at fertilization."[140] Although these are aspirational party platforms and not yet proposed legislation, it is impossible to disentangle these platforms from the

134. Fionna M. D. Samuels, *Graphic: Many States That Restrict or Ban Abortion Don't Teach Kids About Sex and Pregnancy*, SCI. AM. (July 26, 2022), https://www.scientificamerican.com/article/graphic-many-states-that-restrict- or-ban-abortion-dont-teach-kids-about-sex-and-pregnancy/ [https://perma.cc/ET7U-EVMG].

135. Marlene Sokol, *Hillsborough School Board Oks sex education lessons after objections*, TAMPA BAY TIMES (Sept. 21, 2022) https://www.tampabay.com/news/education/2022/09/21/hillsborough-school-board-oks-sex-education- lessons-after-objections/ [https://perma.cc/9949-Y58N].

136. Beck Andrew Salgado, *Wauwatosa schools change their sex education curriculum amid protests, will start teachings as early as kindergarten this year*, MILWAUKEE J. SENTINEL (Aug. 23, 2022), https://www.jsonline.com/story/communities/west/news/wauwatosa/2022/08/23/wauwatosa-school-board-approves- new-sex-education-curriculum/7873012001/ [https://perma.cc/643T-QJ5G].

137. *Id.*

138. *Id.*; Sokol, *supra* note 135.

139. Leos & Wiley, *supra* note 68, at 2.

140. Kate McGee, *Texas GOP platform calls for ban on teaching "sexual matters," while requiring students to learn about "dignity of the preborn human,"* TEX. TRIB. (June 18, 2022), https://www.texastribune.org/2022/06/18/texas-gop-platform-gender-sexuality-preborn/ [https://perma.cc/4G5Q-83Y7].

ongoing abortion debate in Texas. In 2021, a Republican representative proposed legislation that would have "define[d] personhood at fertilization and . . . provide[d] due process to a fetus."[141] The bill died in committee.[142] Of course, after *Dobbs*, abortion is illegal in Texas at all stages of pregnancy except in a life-threatening medical emergency.[143] This sex education party platform, alongside the post-*Dobbs* abortion ban, is an attempt by Texan legislators to control sex education to teach youth that life begins at fertilization and build support in younger generations for abortion bans.

Republican lawmakers are also active in Oklahoma and New Jersey. In Oklahoma in October 2022, lawmakers held an interim study to discuss "how far is too far for sex education in schools."[144] One senator emphasized that sex education should be up to parents and suggested a new policy that parents should have to "opt in" to sex education programs rather than "opt out."[145] Another representative said that "he'd like to do away with sex education in K–12 schools entirely."[146] In New Jersey in August 2022, state senators expressed support in a hearing for a "Repeal, Replace, Restore" platform as a way to attack New Jersey's new sex education curriculum.[147] In response, state education officials made clear that "school districts that refuse to implement [the] new sex education standards can be disciplined."[148]

Less than two years since the opinion was published, , it is too early to tell what the full impact of *Dobbs* will be on sex education and public schools. Future notes should assess what sex education legislation states are able to pass in the future legislative sessions. The named examples of calls from Republican legislators to weaken or eliminate current sex education programs are likely just the beginning. Nevertheless, because *Dobbs* limited reproductive rights and access to abortion and because *Dobbs* further threatens the little sex education that does exist, *Dobbs* harms students. Part IV illuminates these harms, suggests how these harms can be mitigated with comprehensive sex education, and explores how comprehensive sex education programs can withstand legal challenges.

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141. *Id.*
142. *Id.*
143. *Abortion in Texas*, ACLU TEX. (Aug. 29, 2022), https://www.aclutx.org/en/know-your-rights/abortion-texas#:~:text=Texas%20bans%20abortions%20at%20all,that%20involve%20rape%20or%20incest [https://perma.cc/WW7W-BV4H].
144. Nuria Martinez-Keel & Dana Branham, *Republican legislators find next target: Sex education - Oklahoma had one of the nation's highest teen birth rates before abortion ban*, OKLAHOMAN (internal quotations omitted).
145. *Id.*
146. *Id.*
147. Eric Kiefer, *4 Republican NJ Senators Hold Hearing on Sex Education in Schools*, PATCH (Aug. 30, 2022), https://patch.com/new-jersey/montclair/4-republican-nj-senators-hold-hearing-sex-education-schools [https://perma.cc/BT98-Z49F].
148. Mary Ann Koruth, *School districts that don't teach new sex ed standards will be disciplined, state says*, NORTHJERSEY.COM (Sept. 20, 2022), https://www.northjersey.com/story/news/education/2022/09/20/nj-sex- education-standards-discipline-schools/69497535007/ [https://perma.cc/327E-4SWV].

IV. HOW *DOBBS* HARMS YOUTH & MOVING FORWARD

Given the histories of sex education and abortion, the research on the efficacy of sex education programs, and the predicted and actual impact of *Dobbs*, the goal of Part IV is to explicitly identify how *Dobbs* harms students and look ahead to solutions. First, Part IV.A explains how *Dobbs* harms youth and why comprehensive sex education can help address these harms. Next, Part IV.B captures what current students in the United States are doing about sex education in response to *Dobbs*. Finally, Part IV.C suggests how school district leaders, inspired by their students, can implement comprehensive sex education programs and defend them against legal challenge, even in a post-*Dobbs* United States.

A. Why Comprehensive Sex Education & Why Now

The research from Part II.A shows that despite well-funded, abstinence-only education, teenagers still have sex. Even if the only goal of sex education is to stop teenagers from having sex, abstinence-only education has failed. As explained in Part I.A, actual public health goals are broader than preventing sex, and a common historical goal is to minimize STI risk. Research in Part II.B shows that it is comprehensive sex education, not abstinence-only education, that can actually change a student's behavior and minimize STI transmission.

Dobbs puts another sex education goal on the table – ending abortion. Even if you do not agree with the goal, *if it is the goal*, one way to decrease the number of abortions is to decrease the number of unwanted pregnancies.[149] The question is then how to decrease unwanted pregnancies, recognizing that youth will still have sex. Again, research in Part II.B shows that comprehensive-sex education, not abstinence-only education, has the potential to minimize unwanted pregnancies with knowledge about contraception, safer sex, and healthy relationships.

When judges limit reproductive rights by taking options off the table for pregnant people who do not want to be pregnant and political actors simultaneously limit access to comprehensive sex education, they place the "health and safety of young people" at risk.[150] *Dobbs* harms youth. And

149. This note recognizes that this is an oversimplification and that unwanted pregnancies are not the only reason pregnant people get abortions. Sometimes, the pregnancy is wanted but having a child is not an option for that person because of finances, relationships, and other factors. *See* Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 110 (2005). Despite misinformation campaigns that say otherwise, abortions can also be medically necessary, including to save a pregnant person's life. *See* Reuters Fact Check, *Fact Check-Termination of pregnancy can be necessary to save a woman's life, experts say*, REUTERS (Dec. 27. 2021), https://www.reuters.com/article/factcheck- abortion-false/fact-check-termination-of-pregnancy-can-be-necessary-to-save-a-womans-life-experts-say- idUSL1N2TC0VD [https://perma.cc/3K7T-ELD2].

150. Goldfarb & Lieberman, *After* Roe, *Sex Ed Is Even More Vital*, *supra* note 110.

unsurprisingly, given the disproportionate delivery of sex education,[151] all of these harms to young people will be racially and socioeconomically disproportionate. Many amicus briefs submitted in *Dobbs* by reproductive justice, LGBTQ, and disability rights organizations and Indigenous communities warned that the end of *Roe* would only "exacerbate societal inequalities and disproportionately harm people of color."[152] Even before *Dobbs*, Black people who gave birth had a higher maternal mortality rate compared to other races.[153] And now, because of *Dobbs*, Black women will be especially affected.[154] Socioeconomically, "[w]ith abortion access now significantly diminished, and inconsistent and incomplete sex education available to help young people prevent unwanted pregnancies, poor women" will be disproportionately harmed.[155]

Namely, the first of these harms is that youth in states with abortion bans because of *Dobbs* cannot access abortion in their state. Although the "vast majority of abortions" in the United States are "sought by women over the age of 20," that is not an excuse to ignore the fact that teenagers do get pregnant and seek abortions.[156] Further, even if teenagers are not the majority of those seeking abortions, adolescent pregnancy (ages thirteen to nineteen) is associated with an increased risk of complications to the pregnant person and the fetus.[157] In 2020 in Texas, about 550 youth fifteen and younger and 4,400 teenagers between ages sixteen and nineteen had abortions[158] and this is likely an undercount.[159] In 2021,

151. *See generally* Lindberg & Kantor, *supra* note 86. "Differences in the receipt of sex education, by gender, race/ethnicity, and the location of instruction, leave many adolescents without critical information." *Id.*

152. For a summary of the amicus briefs, see *The Disproportionate Harm of Abortion Bans: Spotlight on* Dobbs v. Jackson Women's Health, CTR. FOR REPROD. RTS. (Nov. 29, 2021), https://reproductiverights.org/supreme-court- case-mississippi-abortion-ban-disproportionate-harm/ [https://perma.cc/738M-92KK].

153. *See* Dána-Ain Davis, *Reproducing while Black: the crisis of Black maternal health, obstetric racism and assisted reproductive technology*, 11 REPRODUCTIVE BIOMEDICINE & SOC. ONLINE 56, 56–64 (2020). This note uses the term Black "people" instead of Black "women" to acknowledge that not all people who give birth identify as women.

154. Christine M. Slaughter & Chelsea N. Jones, *How Black women will be especially affected by the loss of* Roe, WASH. POST (June 25, 2022), https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/ [https://perma.cc/WXS9-H72A].

155. Goff, *supra* note 69.

156. *See* Naomi Schaefer Riley, *Perspective: The return of the sex-ex crusaders*, DESERET NEWS (Aug. 9, 2022), https://www.deseret.com/2022/8/9/23290428/perspective-the-return-of-the-sex-ed-crusaders-dobbs-roe-v-wade-abortion-birth-control-sex-education [https://perma.cc/5N4E-6TBA].

157. Michael K. Magill & Ryan Wilcox, *Adolescent Pregnancy and Associated Risks: Not Just a Result of Maternal Age*, 75 AM. FAM. PHYSICIAN 1310, 1310 (2007).

158. *2020 Induced Terminations of Pregnancy for Texas Residents*, TEX. HEALTH & HUMAN SERVS. (2020), https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/records-statistics/research-statistics/itop/2020/2020-itop-narrative-tx-residents.pdf [https://perma.cc/ZJN6-LE7R].

159. *See* Mandi Cai, *Before* Roe v. Wade *was overturned, at least 50,000 Texans received abortion in the state each year. Here's a look behind the numbers.*, TEX. TRIB. (May 9, 2022), https://www.texastribune.org/2022/05/09/texas- abortions-by-the-numbers/ [https://perma.cc/LT5N-9JDP]. This is likely an undercount because the study did not include medication abortions or nonresidents seeking abortions in Texas.

21 youth under age fourteen and 367 teenagers aged fifteen to nineteen had abortions in Oklahoma.[160] Because Oklahoma bans abortion, similarly situated youth now either have to give birth, travel to Kansas, New Mexico, or Colorado to access an abortion, or risk having an illegal abortion in Oklahoma through other means.[161] A youth with an unwanted pregnancy facing these circumstances will not benefit from a teacher admonishing them for not having been abstinent. These youth need medically accurate information, resources, and options. Comprehensive sex education is the only sex education curriculum that can provide this information.

Second, to avoid forcing youth with unwanted pregnancies to make these decisions on their own, efforts must be made to teach young people what options exist to avoid unwanted pregnancy. If youth are not taught about options for safer sex, students will still seek out this information, likely from their peers and the internet.[162] In an age of misinformation, especially via social media,[163] and bad actors preying on vulnerable people with fake contraception[164] and abortion pills,[165] that is a frightening proposition. Only comprehensive sex education ensures what youth learn about contraception is medically accurate and provides a safe space for students' questions. After learning this curriculum in school, students can assess the information they do learn from the internet and peers with a critical eye. Abstinence-only education leaves students uninformed and ignores the reality that they will still seek out information about sex.

Third, *Dobbs* not only took options off the table for pregnant youth with unwanted pregnancies; the illegality of abortions means that the risk to students is more than just lack of abortion access. The risks are criminal and carceral[166] and disproportionately harm Black youth.[167] The criminalization of abortion is beyond the scope of this note but if youth could potentially be incarcerated for their reproductive decisions, then at the very least, sex education needs to address the criminal risks of abortion and pregnancy decisions. Abstinence-only education might try to address these risks with scare tactics, but research shows that

160. Martinez-Keel & Branham, *supra* note 144.

161. *See After* Roe *Fell, supra* note 12.

162. *See* Helmich, *supra* note 105, at 12.

163. *See* Jahnvai Sunkara, *Sexual Health Misinformation and Potential Interventions Among Youth on Social Media*, THE CARDINAL EDGE, 2021, at 1 (discussing negative impacts of the spread of sexual health misinformation via social media on youths).

164. *See* Suzy Katz, *Desperate People Are Turning to Illegal Online Pharmacies for Birth Control*, VICE (Aug. 29, 2022), https://www.vice.com/en/article/88q85a/illegal-online-pharmacies-counterfeit-birth-control [https://perma.cc/3Z7W-XKPM].

165. *See* Ruth Reader, *The web is home to an illegal bazaar for abortion pills. The FDA is ill-equipped to stop it.*, POLITICO (Aug. 1, 2022), https://www.politico.com/news/2022/08/01/the-web-is-home-to-an-illegal-bazaar-for- abortion-pills-the-fda-is-ill-equipped-to-stop-it-00048802 [https://perma.cc/5AZJ-VLA9].

166. *See* Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUS. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis- opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes [https://perma.cc/F59S-D48D].

167. *See* Bridges, *supra* note 71, at 6–12.

abstinence-only education does not increase rates of abstinence. Comprehensive sex education is better suited to inform students of these risks.

Fourth and finally, *Dobbs* harms youth dignity. Stephanie J. Hull, President and CEO of Girls Inc.,[168] and a signer of an amicus brief in *Dobbs*, argues that people's "bodily autonomy is critical to their dignity as human beings and their right to be safe in the world."[169] Comprehensive sex education is "a pre-condition for exercising full bodily autonomy," since bodily autonomy requires not only meaningful access to information about the choices youth can make about their bodies and reproduction but also meaningful access to exercise those choices.[170] When implemented across grades and subjects and culturally responsive, comprehensive sex education can empower students to learn about their bodies while also respecting their peers' bodies and decisions.

B. Student Response to *Dobbs*

Middle and high school students are in tune with the impacts and harms of *Dobbs* and what is happening in their states and school districts. In Tennessee, where abortion became illegal in August 2022 after *Dobbs*, students formed Teens for Reproductive Rights, a youth-led community organization that aims to amplify teens' voices and support reproductive healthcare education and organizations.[171] A 2012 law in Tennessee prohibited instruction on what the legislation deemed "gateway sexual activity" that would encourage "non-abstinent behavior."[172] Knowing they would not learn about abortion or other contraceptives in school, "the teens . . . decided, this lack of education was no longer acceptable."[173] These students are not alone. In Utah, "high-schoolers rallied outside a courthouse in May [2022] to call for accurate education on sex and abortion."[174] In summer

168. Girls Inc. is a network of nonprofit organizations the serves girls ages five to eighteen with evidence-based sex education programming at more than 1,500 sites across the United States and Canada. *What We Do*, GIRLS INC. (2022), https://girlsinc.org/what-we-do/ [https://perma.cc/62C9-5QWC].

169. *Banning Abortion Will Have Devastating Consequences for Young Women, Especially Young Women of Color, Argues YWCA USA, Girls Inc., Supermajority Education Fund, and United State of Women in Amicus Brief*, YWCA (Sept. 20, 2021), https://www.ywca.org/blog/2021/09/20/banning-abortion-will-have-devastating-consequences-for- young-women-especially-young-women-of-color-argues-ywca-usa-girls-inc-supermajority-education-fund-and- united-state-of-women-in-amicus-bri/ [https://perma.cc/V3J5-6PDR].

170. *See Comprehensive sexuality education*, U.N. POPULATION FUND, https://www.unfpa.org/comprehensive- sexuality-education [https://perma.cc/NPL8-W7UB]; *see also My Body, My Life, My World Operational Guidance*, U.N. POPULATION FUND (Dec. 2022), https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA-MBMLMW_OperationalGuidance-EN.pdf [https://perma.cc/A8V4-DM5Z] (summarizing purpose and format of the UNFPA's My Body, My Life, My World guidance modules, as well as explaining its overarching goal to ensure rights and choices for all youth).

171. Natanson, *supra* note 121; TEENS FOR REPRODUCTIVE RIGHTS, https://teensforreproductiverights.godaddysites.com/ [https://perma.cc/8KUV-WCCB].

172. *Tennessee State Profile*, SIECUS (May 16, 2022), https://siecus.org/state_profile/tennessee-state-profile-22/ [https://perma.cc/UHT4-S459].

173. Natanson, *supra* note 121.

174. *Id.*

2022, a group of students from Texas (the same group that previously held a virtual protest on Minecraft to demand a more comprehensive sex education in 2020)[175] created an Instagram account to share sex education lessons with their peers.[176] A student in Virginia, in response to *Dobbs*, organized demonstrations outside of school board meetings to demand "information about reproductive health clinics, more detailed lessons on contraceptive methods other than abstinence . . . and access to contraception."[177] One student from Oklahoma said that "learning about safe sex is even more critical . . . now that most abortions are banned in Oklahoma."[178] There has also been activism from college students and recent graduates.[179] The outpouring of student responses demonstrates how the abortion debate is not insulated from public education and that students turn to sexual education to educate themselves, whether that education is delivered formally in a school setting or informally on social media and among peers. District leaders inspired by these students calling for comprehensive sex education can implement these curricula at a local level and successfully defend them against legal challenges.

C. Legal Challenges to Sex Education

Self-implementing comprehensive sex education programs at the district level allows local district leaders to move forward without getting caught in state level politics and the legislative process. This would not be successful in a school district in a state with a statewide ban on comprehensive sex education. However, if a school district in a state without statewide sex education regulation wants to implement comprehensive sexual education, one starting point is to ensure the program would survive a legal challenge by a parent who opposes comprehensive sex education. This final section presents examples of how comprehensive sex education can survive legal challenges despite *Dobbs* and briefly mentions emerging legal theories about how a parent could potentially challenge abstinence-only education.

The debate between abstinence-only and comprehensive sex education in

175. *Teens Use Minecraft to Demand Comprehensive Sex-Ed in Texas,* JANE'S DUE PROCESS (Nov. 14, 2020), https://janesdueprocess.org/blog/teens-use-minecraft-to-demand-comprehensive-sex-ed-in-texas/ [https://perma.cc/7JQM-ERLE].

176. Fort Bend S.U.R.F. (@fortbendsurf), INSTAGRAM, https://www.instagram.com/fortbendsurf/?hl=en [https://perma.cc/DR5K-DG6M].

177. Natanson, *supra* note 121. *See also* Hannah Natanson, *Fairfax students call for sex ed reform after fall of* Roe v. Wade, WASH. POST (July 14, 2022), https://www.washingtonpost.com/education/2022/07/14/fairfax- students-sex-ed-reform-roe/ [https://perma.cc/CB2Q-4TV2] (describing students' efforts in Fairfax County, Virginia to add more information about contraception to their sex-education curriculum following the *Dobbs* ruling).

178. Martinez-Keel & Branham, *supra* note 144.

179. *See* Sofia Andrade, *What Young People Face Without* Roe, THE NATION (June 30, 2022), https://www.thenation.com/article/politics/roe-dobbs-college-organizing/ [https://perma.cc/YP55-H36S].

public schools animates the delicate balancing of parental rights and control over what their children learn in school with ensuring that children have medically accurate information about their own bodies and decisions. The American Academy of Pediatrics recognizes that schools are not the only provider of this important education:

> Developmentally appropriate and evidence-based education about human sexuality and sexual reproduction over time provided by pediatricians, schools, other professionals, and parents is important to help children and adolescents make informed, positive, and safe choices about healthy relationships, responsible sexual activity, and their reproductive health.[180]

And in the school setting, parents have argued that their views "must take precedence over 'expert' pronouncements."[181]

The spectrum of arguments made by parents challenging sex education is wide. This is in part because, as discussed in Part I, sex education in public schools is not regulated at the federal level though a program might face certain requirements as conditions of receipt of federal funds.[182] What sex education looks like in practice varies state by state, district by district, and teacher by teacher.[183] As a result of this localism, parents have challenged sex education programs on multiple constitutional grounds depending on the individual content of that district's program. The main constitutional arguments include "religious freedom, the right to privacy, and parental control of . . . education."[184]

Many of these challenges fail. Despite the Supreme Court's recognition that "liberty" protected by the 14th Amendment Due Process Clause includes the right to "direct the education and upbringing of one's children,"[185] challenges to sexual education programs have failed before reaching the merits because parents lacked standing.[186] On the merits, these challenges fail when objections were based solely on a parent's personal morals[187] or when parents had adequate opt-out options.[188]

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180. Breuner & Mattason, *supra* note 113, at e1 (emphasis added).

181. ZIMMERMAN, *supra* note 1, at 171.

182. *Sex Education Laws and State Attacks*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks [https://perma.cc/A6T2-V3YY]; *see also* Kantor et al., *supra* note 39, at 8.

183. *Id.*; Natanson, *supra* note 121.

184. Alemansour et al., *supra* note 67, at 483–84 (citing Smith v. Ricci, 446 A.2d 501, 503 (N.J. 1982); Fields v. Palmdale School Dist. 427 F.3d 1197, 1199 (9th Cir. 2005); Meyer v. Nebraska, 262 U.S. 390, 392 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

185. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing *Meyer*, 262 U.S. at 390; *Pierce*, 268 U.S. at 510).

186. *See, e.g.*, *Bergstrand v. Rock Island Bd. of Educ.*, 514 N.E.2d 256, 258-59 (Ill. App. Ct. 1987) (holding that a father without full custody of his daughter could not opt-out of the school's sex education program and noting that the mother did not want to opt-out). For a more complete discussion of sex education and standing cases see Tommy Ou, *Sex Education in Schools*, 9 GEO. L.J. 795, 807 (2022).

187. Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995).

188. *Smith*, 446 A.2d at 523.

The federal circuit courts define and limit parental rights differently, including the First and Ninth Circuits holding a narrower view than the Third Circuit. This can impact the outcome of a parental legal challenge.[189]

Specifically, courts have pointed to the adequate opt-out provisions as the reason programs can survive legal challenge.[190] In *Smith v. Ricci*, a parental challenge to a family-life education program on religious grounds, the Supreme Court of New Jersey found that "because the program included a provision allowing parents to remove their children from parts they felt violated their beliefs, there was no infringement upon their religious freedom."[191] The opt-out provisions also likely do not have to allow opt-out for the full sex education program. In *Leebaert v. Harrington*, a parent challenged a sex education program that allowed opt-out for up to six days of the sexual health unit, but not the entire 45-day health and hygiene education.[192] The Second Circuit held that the parent did not have a fundamental right to remove the student for the entire program and that the required sex education class survived rational basis review.[193]

On the other side, as of now, there have not been any successful challenges to abstinence-only education laws.[194] However, there are emerging legal theories for how parents might go about challenging abstinence-only education programs. A recent Harvard Law and Policy Review article suggests a path for parents that support more comprehensive sex education to legally challenge abstinence-only education as "irrationally perverse."[195] Considering the sex education efficacy research that has found that abstinence-only education programs are not only ineffective, but also may "result in outcomes that are opposite of legislative intent," the author suggests that abstinence-only education programs could be challenged at the state and federal level:[196]

> [T]he moment may be ripe to bring a claim that state and local laws that require abstinence-only education – and the federal laws that fund them – are irrational because they employ methods that are likely to

189. Emily J. Brown, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109, 116 (2009). For a discussion of parental rights to educate children outside of the United States, *see* JONATHAN ZIMMERMAN, TOO HOT TO HANDLE: A GLOBAL HISTORY OF SEX EDUCATION 94–98 (2015).

190. For a more in-depth analysis of what types of opt-out provisions have survived legal challenge, *see* Alemansour et al., *supra* note 67, at 483–88.

191. *Id.* at 484 (citing *Smith*, 446 A.2d at 520).

192. Leebaert v. Harrington, 332 F.3d 134, 136–37 (2d Cir. 2003).

193. *Id.* at 135, 142.

194. *But see Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608, 2015 WL 2298565 (Cal. Super., April 28, 2015) (ruling against a school district for non-compliance with California's comprehensive sex education requirement).; *see also Campaigns to Undermine Sexuality Education in the Public Schools*, ACLU, https://www.aclu.org/documents/campaigns-undermine-sexuality-education-public-schools [https://perma.cc/573K-PPES] (discussing legal challenges to abstinence-only education that were partially successful or resulted in settlement).

195. Boone, *supra* note 69, at 431–436.

196. *Id.* at 436.

have perverse outcomes from the stated legislative intent.[197]

Judge Pillard, a former Georgetown professor and current circuit judge, suggests that because abstinence-only education is based on gendered stereotypes, "[p]ublic school teaching of gender stereotypes violates the constitutional bar against sex stereotyping and is vulnerable to equal protection challenge."[198] Finally, Leslie M. Kantor, a public health researcher at Rutgers School of Public Health, also suggests that abstinence-only education should be attacked as an international human rights violation – "[t]he articulation of human rights concerns alongside health arguments could bring additional advocates to [the] issue and illuminate further reasons why [abstinence-only] policies and programs are harmful and misguided."[199]

CONCLUSION

Given the coinciding history of support for abstinence-only education and anti-abortion policies, it is not surprising that *Dobbs*, an anti-abortion opinion, signals a threat to the little comprehensive sex education that exists. Because of this threat and the fact that *Dobbs* limited reproductive rights, including youth reproductive rights, *Dobbs* harms youth. When looking at these harms and reviewing the sex education efficacy research, comprehensive sex education is one way to mitigate these harms, especially when compared to abstinence-only education. Although it is too early to understand the full impact of *Dobbs* on sex education and youth, the calls from Republican lawmakers to further weaken or ban sex education creates an urgency to implement comprehensive sex education at the district level. Inspired by student responses to *Dobbs*, districts that want to implement comprehensive sex education can and should act, ensuring to model their programs after other sex education programs that have withstood legal challenges.

As the current generation of students becomes the next generation of educational, political, and legal leaders, hopefully comprehensive sex education programs will become the dominant form of sex education in the United States. In the meantime, especially in the immediate fallout of *Dobbs*, the onus is on current leaders to ensure that the harms of *Dobbs* to youth are mitigated through comprehensive sex education.

197. *Id.*

198. Pillard, *supra* note 102, at 948.

199. Leslie M. Kantor, *Abstinence-Only Education: Violating Students' Rights to Health Information*, A.B.A. (July 1, 2008), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_summer2008/hr_summer08_kantor/.