

# Firearms in the Family

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*This Article considers firearms prohibitions for domestic violence offenders, in light of recent Supreme Court decisions and the larger, national debate about gun control. Unlike other scholarship in the area, it confronts the costs of ratcheting up the scope and enforcement of such firearms bans and argues that the politicization of safety has come at the expense of a sound approach to gun control in the context of intimate-partner abuse. In doing so, it expands scholarly arguments against mandatory, one-size-fits-all criminal justice responses to domestic violence in a direction that other critics have been reluctant to go, perhaps because of a reflexive, cultural distaste for firearms.*

*Both sides in the gun-control debate rely on starkly contrasting, gendered images: the helpless female victim in need of state protection, including strictly enforced gun laws, and the self-defending woman of the National Rifle Association's "Refuse to be a Victim" campaign. Neither of these images accurately describes the position of many domestic violence victims whose partners have guns, and neither image responds effectively to the heterogeneity of conduct leading to a protection order or a misdemeanor domestic violence conviction that triggers federal and state firearms bans. The emphasis the National Rifle Association and other pro-gun organizations place on a woman's right to carry a firearm in self-defense ignores the most common homicide risks women face, as well as structural inequalities that contribute to gender violence. Yet, significant problems afflict an uncritically anti-gun approach, too. First, gun-control advocates tend to ignore the reality of intimate-partner abuse—a reality in which some women fight back; some family livelihoods depend on jobs for which firearms are required; not all misdemeanants become murderers; and victims have valid reasons for wanting to keep their partners out of prison. Second, to the extent that proponents of strict gun regulation also exhibit distaste for racialized crime-control policies, they fail to acknowledge that zealously enforced gun laws aimed at preventing*

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*domestic violence would put more people—including more men and women from vulnerable communities of color—behind bars.*

*The current framing of the argument for tougher firearms laws for abusers is derived from public health research on domestic violence that makes a reduction in intimate homicide rates its chief goal. Yet, since hundreds of thousands of domestic violence misdemeanants are thought to possess illegal guns, reformers should also consider the potential costs to victims and their families of a move to sweeping and rigorous enforcement. Changes in gun laws and their implementation in the context of intimate-partner abuse ought to cure over- and under-breadth problems; provide greater autonomy to abuse victims and protections for those who resist their batterers; reconsider the lack of an exemption to the misdemeanor ban for firearms required on-duty; and include a better mechanism for restoring gun rights to misdemeanants who have shown the capacity to avoid reoffending.*

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## I. INTRODUCTION

The competing images of women deployed in the gun-control debate juxtapose the gun-wielding, female survivor of an attack against the vulnerable victim who ostensibly needs the state to confiscate her homicidal abuser's weapons. However, the real relationship of America's firearms culture to the problem of gender violence lies somewhere between these feverish extremes. Gun-control in the context of domestic abuse ought to respond to a variety of concerns, not solely the aim of reducing homicide rates. According to some researchers, battered women are five times more likely to be killed by an abusive intimate partner if the abuser possesses a firearm.<sup>1</sup> However, despite the Supreme Court's willingness to endorse a broad definition of domestic violence<sup>2</sup> and federal appellate courts' near unanimity in rejecting Second Amendment challenges to domestic violence gun laws,<sup>3</sup> strict prohibitions on paper do not guarantee women's safety. Even if governmental actors aggressively enforced 18 U.S.C. § 922(g)(8) and § 922(g)(9) and corresponding state laws, which they

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<sup>1</sup>See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

<sup>2</sup>See *Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016) (holding that petitioners' possession of guns following conviction under a Maine misdemeanor assault statute that encompassed reckless conduct violated 18 U.S.C. § 922(g)(9)).

<sup>3</sup>See *infra* Part III.B.1. At least a half-dozen circuits have concluded that § 922(g)(9) does not violate the Second Amendment. See *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *In re United States*, 578 F.3d 1195 (10th Cir. 2009) (unpublished order appended to published dissent) (granting petition for writ of mandamus directing district court not to instruct jury that § 922(g)(9) is inapplicable to persons who do not pose a risk of violence).

remain reluctant to do,<sup>4</sup> stripping all domestic violence offenders of their guns for conduct that includes merely reckless infliction of injury<sup>5</sup> might have a variety of negative outcomes. It might chill the reporting of abuse; exacerbate recidivism; lead to unemployment, a known contributor to intimate femicide,<sup>6</sup> for abusers whose jobs require them to carry a gun; and leave victims without weapons for self-defense. But a simplistic, politically-motivated call for women to arm themselves is not the answer either.

For many Americans, the gun debate is not really about guns at all, but a culture war between two competing visions of self and nation: a masculine, individualistic, self-reliant, arms-bearing America and an urbane society grounded in civic solidarity and abhorrence of violence, sexism, and racism.<sup>7</sup> The gun-control facet of domestic violence policy has roots in the second social model, but it also displays a tough-on-crime orientation. Intimate-partner abuse victims, for whom guns are tangible and often life-threatening, have gotten caught in the crossfire. This Article favors reasonable gun control.<sup>8</sup> It critiques the rhetorical use of gender by gun-rights advocates, as well as gun manufacturers and sellers. Yet, significant problems afflict an uncritically anti-gun approach, too.

First, such an approach tends to ignore the reality of intimate-partner abuse—a reality in which some women fight back; some family livelihoods depend on jobs for which guns are required; not all misdemeanants become murderers; and victims have valid reasons for wanting to keep their partners out of prison. Second, to the extent that the anti-gun vision of America also exhibits distaste for punitive, racialized crime-control policies, it fails to acknowledge that zealously enforced gun laws aimed at preventing domestic violence would

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<sup>4</sup> See *infra* notes 29–36, 461–63, 467–75, 496–500 and accompanying text (discussing under-enforcement and relatively light punishments for violations of § 922(g)(8) and § 922(g)(9)); see also *infra* Parts IV.A–B (describing problems of enforcement at the federal and state levels).

<sup>5</sup> See *Voisine*, 136 S. Ct. at 2282.

<sup>6</sup> See Campbell et al., *supra* note 1, at 1092; see also *infra* notes 489–91, 502–07 and accompanying text (discussing how rigorous enforcement of § 922(g)(9) might put victims at risk of retaliatory violence because it would cause batterers who needed guns for work to lose their jobs).

<sup>7</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 452–59 (1999) (describing “the social meaning” of guns). *But cf.* JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* 19–24, 66–69, 95–100, 177 (2015) (documenting gun owners’ view that carrying a gun is part of their civic duty to protect their home, family, and community in an age of inadequate policing, economic stress, and crime).

<sup>8</sup> Some courts have upheld the federal law prohibiting domestic violence misdemeanants from possessing firearms, on the ground that there is a “reasonable fit” between the restriction and its asserted objective. See, e.g., *Chovan*, 735 F.3d at 1139. This Article does not challenge the constitutionality of domestic violence gun-control laws. It nonetheless critiques the scope and enforcement of 18 U.S.C. § 922(g)(9) and other firearms restrictions in the context of intimate-partner abuse and questions the soundness of proposals for a more punitive and less discretionary approach.

put more people—including more men and women from vulnerable communities of color—behind bars. This Article seeks to expose the blind spots and manipulation of stereotypes characteristic of the controversy over firearms in the family to facilitate a conversation about gun control that takes into account other goals besides reducing intimate-partner homicide rates and other costs besides the loss of gun rights. In doing so, it expands scholarly arguments against mandatory, one-size-fits-all criminal justice responses to domestic violence<sup>9</sup> in a direction that other critics have been reluctant to go, perhaps because of a reflexive, cultural distaste for firearms.<sup>10</sup>

Female self-defense concerns play a supporting role in gun-rights advocacy; gun-carrying women soften the public face of America's masculine firearms culture. Second Amendment activists frequently deploy images of women wielding firearms to protect themselves from armed robbers at home, mass shooters in our nation's schools, and rapists lurking in shadowy parking lots. Thus, pro-gun rhetoric aimed at female consumers and voters elides the problem of domestic violence by constructing the dangers women face as "stranger dangers."<sup>11</sup> Guns are touted as the great equalizer between the sexes in violent conflict,<sup>12</sup> although the myth of guns as an equalizer is supported by neither history nor recent social-scientific evidence.<sup>13</sup> Furthermore, the emphasis the National Rifle Association (NRA) and other pro-gun organizations place on a woman's right to carry a firearm in self-defense ignores the most common homicide risks women face,<sup>14</sup> as well as structural inequalities that contribute to gender violence.<sup>15</sup> Singing the praises of concealed-carry does little to protect women from violent attacks by their intimates at home.<sup>16</sup>

However, gun-control rhetoric can also be charged with manipulating stereotypes for ideological and political purposes. According to advocates of

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<sup>9</sup> See Leigh Goodmark, *Should Domestic Violence be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 58–59 & nn.20–25 (2017) (summarizing such arguments); see also Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN. ST. L. REV. 337, 379 (2015) (exposing "the ineffectiveness of [domestic violence] laws and policies rooted in offender stereotypes" and contending that "[t]he need to adopt [new batterer intervention] protocols that reduce resentment and increase long-term change is also closely connected to the goal of avoiding reliance on incarceration for less serious domestic violence crimes").

<sup>10</sup> See *infra* note 172 and accompanying text (describing how gun laws like the Lautenberg Amendment add a layer of complexity to the crime-control framing of intimate-partner abuse by inverting typical left/progressive and conservative positions regarding crime and punishment).

<sup>11</sup> See *infra* Part II.C.1. But for a description of how gun-rights activists use female self-defense against domestic violence to promote guns to women, see *infra* notes 52, 55–56, 60–66, 68 and accompanying text.

<sup>12</sup> A description of the "great equalizer" claim can be found in Part II.A.

<sup>13</sup> See *infra* Part II.C.2.

<sup>14</sup> See *infra* Part II.C.1.

<sup>15</sup> See *infra* Part II.C.2.b.

<sup>16</sup> See *infra* Part II.C.1.

broad restrictions on firearms, including outright bans for any person convicted of a domestic violence misdemeanor, the vulnerability of women to gun homicide cries out for state protection. In this staging of the controversy, the powerless victims are always female, the homicidal shooters inevitably male.<sup>17</sup> Two key federal statutes were adopted in response to this iconic framing of domestic violence. First, 18 U.S.C. § 922(g)(8), enacted in 1994, bars a person subject to a domestic violence restraining order (DVRO) from possessing or receiving a firearm, if the order meets certain requirements, including actual notice to the respondent and an opportunity to participate in the hearing that leads to the order's issuance.<sup>18</sup> A second provision, enacted in 1996 and commonly known as the Lautenberg Amendment to the Gun Control Act,<sup>19</sup> prohibits the receipt or possession of a firearm that has traveled in interstate commerce by anyone who has been convicted of or pled guilty to a misdemeanor crime of domestic violence.<sup>20</sup> It is the only *federal* law that prohibits gun possession by misdemeanants.<sup>21</sup> About half of the states also have statutes barring domestic violence misdemeanants from purchasing and possessing

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<sup>17</sup> See *infra* Parts III.A–B.

<sup>18</sup> 18 U.S.C. § 922(g)(8) (2012). A qualifying restraining order meets four requirements. First, the defendant/respondent must have actual notice and an opportunity to participate in the hearing that led to the issuance of the order. *Id.* § 922(g)(8)(A). Second, the petitioner must be an “intimate partner” of the defendant/respondent. *Id.* § 922(g)(8)(B). To satisfy this requirement, the parties must be spouses, ex-spouses, parents of a common child, or present or former cohabitants. *Id.* § 921(a)(32). Third, the protection order must restrain the defendant/respondent from either: a) harassing, stalking, or threatening the intimate partner, child of the defendant/respondent, or child of the defendant/respondent’s intimate partner; or b) “engaging in other conduct that would place [the] intimate partner in reasonable fear of bodily injury to the partner or child.” *Id.* § 922(g)(8)(B). Finally, the order must include a finding that the defendant/respondent poses a “credible threat to the physical safety of [the] intimate partner or child,” or expressly prohibit the “use, attempted use, or threatened use of physical force against [the] intimate partner or child that would reasonably be expected to cause bodily injury.” *Id.* § 922(g)(8)(C)(i)–(ii). As discussed *infra* notes 340, 353–57, 416–31 and accompanying text, § 922(g)(8) does not apply to *ex parte* temporary restraining orders, which some states allow. In this Article, the acronym “DVRO” is used to refer to these synonymous terms: “domestic violence restraining order,” “domestic violence protection order,” and “domestic violence protective order.”

<sup>19</sup> See Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL’Y 173, 177–82 (2015) (describing the passage of the Lautenberg Amendment).

<sup>20</sup> 18 U.S.C. § 922(g)(9). See *infra* Part III.B.2 for the Supreme Court’s interpretation of conduct that constitutes a qualifying misdemeanor crime of domestic violence. Section 922(g)(9) also prohibits a person who has been convicted of a misdemeanor crime of domestic violence from shipping a firearm in interstate commerce. Another provision makes it unlawful for a person to transfer a firearm to a domestic violence misdemeanant. *Id.* § 922(d)(9).

<sup>21</sup> Laura Lee Gildengorin, Note, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807, 813 & n.41 (2016).

guns, and a substantial number of these have extended the ban beyond § 922(g)(9) to convictions involving a wider class of victims.<sup>22</sup>

Unlike the DVRO provision from which police, military, and others who need firearms for their government jobs are exempted,<sup>23</sup> § 922(g)(9) contains no exemption for official government use.<sup>24</sup> Moreover, while § 922(g)(8)'s gun prohibition lasts only as long as the restraining order remains in place, the federal ban on possession of a firearm by a domestic violence misdemeanor is essentially permanent.<sup>25</sup> Legislatures have also enacted gun restrictions at the state level for persons subject to a qualifying restraining order. Some of these laws expand the types of intimate relationships covered and/or extend gun restrictions to ex parte orders.<sup>26</sup> Thirty-five states and the District of Columbia authorize or require courts to bar individuals subject to qualifying DVROs from purchasing or possessing firearms, but “[m]any of these laws have significant loopholes.”<sup>27</sup> Twenty-seven states have “removal” or “surrender” statutes that help ensure that DVRO respondents relinquish their guns.<sup>28</sup>

Despite their “tough-on-abusers” veneer, these gun prohibitions are poorly conceived and haphazardly enforced. To date, scholars who have criticized § 922(g)(8) and § 922(g)(9) have focused on the fact that violators are prosecuted infrequently and, even if they are convicted, they do not receive punishment as severe as that of felons in possession of a firearm.<sup>29</sup> Other

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<sup>22</sup> See *Domestic Violence and Firearms*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> [<https://perma.cc/82CC-9A2K>].

<sup>23</sup> 18 U.S.C. § 925(a)(1) (2012).

<sup>24</sup> See *id.* However, even § 922(g)(8) makes it possible to order the surrender of firearms by private-sector employees, such as security guards, who are required to carry guns on the job.

<sup>25</sup> See *infra* Part IV.B.3; see also Gildengorin, *supra* note 21, at 812, 814.

<sup>26</sup> See April M. Zeoli, *Domestic Violence and Firearms: Research on Statutory Interventions*, NAT'L DOMESTIC VIOLENCE & FIREARMS RES. CTR. 3, <http://www.preventdvgunviolence.org/assets/documents/relevant-research/domestic-violence-and-firearms-research-on-statutory-interventions.pdf> [<https://perma.cc/6PRC-78QW>]. Some states allow victims of dating violence to apply for protection orders that include gun restrictions. See *Domestic Violence and Firearms*, *supra* note 22. California, Illinois, Massachusetts, Texas, and West Virginia have extended gun prohibitions to ex parte orders. See *id.*

<sup>27</sup> See *Domestic Violence and Firearms*, *supra* note 22.

<sup>28</sup> See *id.*

<sup>29</sup> See Lininger, *supra* note 19, at 174 (“[T]he federal government has rarely enforced [§ 922(g)(9)], prosecuting approximately thirty to seventy each year among hundreds of thousands of potentially eligible defendants.”). Between 1996 and 2001, cases filed under § 922(g)(8) slowly increased from three to sixty-eight, while § 922(g)(9) cases grew from one in 1996 to 125 in 2001. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 531–32 (2003) [hereinafter Lininger, *A Better Way to Disarm Batterers*]. By 2005, there had been an uptick with domestic violence weapons offense referrals to U.S. Attorneys’ Offices almost doubling since 2002. Myrna S. Raeder, *Domestic Violence in Federal Court: Abused Women as Victims, Survivors, and Offenders*, 19 FED. SENT’G REP. 91, 93 (2006). Section 922(g)(9) violations constituted about 70% of these firearms charges. See *id.* Despite potential sentences of up to ten years in prison, most defendants convicted of

researchers charge lawmakers with failing to enact state-level prohibitions and enforcement legislation to support the domestic violence provisions in the federal Gun Control Act.<sup>30</sup> Many of these criticisms have validity. However, in contrast to most extant critiques, this Article contends that reform must involve something besides broader and more aggressively enforced prohibitions. The current framing of the argument for stricter firearms laws is decidedly oriented toward crime control and derived from public health research on domestic violence that makes a reduction in fatal shootings its chief objective.<sup>31</sup> Yet, if “hundreds of thousands of convicted domestic violence misdemeanants possess firearms,” as some scholars and judges estimate,<sup>32</sup> reformers should also consider the potential costs of a move to sweeping and rigorous enforcement. Changes in gun laws and their implementation in the context of intimate-partner abuse ought to cure over- and under-breadth problems; provide greater autonomy to abuse victims and protections for those who resist their batterers; reconsider the lack of an “official use” exemption to the misdemeanor ban for firearms required on-duty; and include a better mechanism for restoring gun rights to misdemeanants who have shown the capacity to avoid reoffending.

At least on paper, the punitive approach to misdemeanor domestic violence reflected in § 922(g)(9) and its state counterparts subordinates a victim’s choices, especially if she is reluctant to take action that will permanently deprive her partner of his firearms. Broad gun prohibitions for domestic violence misdemeanants also detrimentally affect women who use force to protect themselves, yet who do not have viable defenses at criminal law. Indeed, another problem with uncritical reliance on gun-control measures to reduce domestic violence is that they entrench a stereotype of women as helpless and passive. This framing of the necessity of disarming batterers leaves non-traditional victims—that is, survivors who physically resist abuse—with neither a gun nor

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domestic violence gun charges received terms of fewer than two years. Lininger, *A Better Way to Disarm Batterers*, *supra*, at 596–98; Raeder, *supra*, at 91, 93.

<sup>30</sup> See Gildengorin, *supra* note 21, at 824–28, 831, 838–39; see also Aaron M. Jolly, *Patchwork of Protection: American Regulation of Domestic Gun Violence*, 53 CRIM. L. BULL. 674, 706–07 (2017) (noting the trend toward a more proactive approach to preventing domestic gun violence at the state level but urging “states with deregulated firearms schemes” to enact new laws); Claire McNamara, *Finally, Actually Saying “No”: A Call for Reform of Gun Rights Legislation and Policies to Protect Domestic Violence Survivors*, 13 SEATTLE J. FOR SOC. JUST. 649, 671, 675 (2014).

<sup>31</sup> Research by Dr. Jacquelyn Campbell and her colleagues has been influential in associating batterers’ access to firearms with intimate-partner homicide. In 1985, Campbell developed a Danger Assessment tool “for public health workers to predict the risk of homicide for women subjected to abuse.” Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 524 (2010). When she developed the tool—which courts now use for many determinations, including “sentencing, probation, parole, bail, bond and alternative treatment decisions,” as well as the issuance of civil protection orders, *id.* at 540—“Dr. Campbell identified the decrease of homicide as her only goal.” *Id.* at 525.

<sup>32</sup> Lininger, *supra* note 19, at 176.



a good argument in court. Reforms aimed at making domestic violence firearms laws work better ought to take such victim-centered concerns into account.

The gun-control camp also tends to depict domestic violence misdemeanants as men predisposed to commit a fatal homicide if their firearms are not confiscated.<sup>33</sup> This stereotype fits uncomfortably with the complex reality of intimate-partner abuse, including that perpetrated by women,<sup>34</sup> and could result in the harsh enforcement of perpetual gun prohibitions on low-level offenders. By some estimates, a quarter of violent offenders in local jails committed domestic violence crimes.<sup>35</sup> Given such statistics, care must be taken to ensure that increasing the prosecution of weapons offenses does not inflate incarceration without lessening recidivism or accomplishing other important goals. Violation of federal gun laws can subject the offender to as many as ten years in prison and a \$250,000 fine, for one § 922(g)(8) or § 922(g)(9) count alone, though few offenders currently receive the maximum punishment.<sup>36</sup>

This Article examines the relationship between guns and domestic violence from legal, historical, social-scientific, and cultural perspectives. Part II shows that the image of female gun users that gun-rights activists deploy is misleading and harmful. Having a firearm in her home or on her person may not, in fact, make a woman safer, especially not if her abusive intimate partner has access to it.<sup>37</sup> Moreover, when appealing to women, gun-rights advocates ignore historical tensions between arms-bearing, the socio-legal status of women (and, especially, women of color), and the question of their full citizenship in the nation. In doing so, the gun-rights camp discounts the structural inequalities that contribute to gender violence.

Part III turns to the strong gun-control position, the arguments its proponents make about firearms prohibitions for domestic abusers, and the images of women the gun-control camp propagates. With regard to deficiencies in current laws, this side wants *more*: more punitive charging and prosecution

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<sup>33</sup> Other aspects of the criminal justice response also stereotype batterers. For example, batterer intervention programs often fail to acknowledge contributors to intimate-partner violence, including unemployment and substance abuse; varying risk levels posed by different types of offenders; and the fact that “individuals who resort to domestic violence are not uniformly powerful and controlling, nor are they all straight men.” Ramsey, *supra* note 9, at 371, 378–84.

<sup>34</sup> See *id.* at 395–405.

<sup>35</sup> RANA SAMPSON, U.S. DEP’T OF JUST., OFFICE OF CMTY. ORIENTED POLICING SERVS., PROBLEM-ORIENTED GUIDES FOR POLICE NO. 45, DOMESTIC VIOLENCE 13 (2013), <https://ric-zai-inc.com/Publications/cops-p123-pub.pdf> [<https://perma.cc/2235-S9ED>].

<sup>36</sup> See 18 U.S.C. § 924(a)(2) (2012). However, there is no mandatory minimum sentence. In the 1990s, Lininger found that most violators of § 922(g)(8) or § 922(g)(9) got prison terms of two years or less and that such sentences were far below the average sentence for federal weapons offenses. See Lininger, *A Better Way to Disarm Batterers*, *supra* note 29, at 536–37, 550–51; see also Raeder, *supra* note 29, at 93 (updating Lininger’s data but finding no change).

<sup>37</sup> See *infra* note 94 and accompanying text.

of intimate-partner abuse,<sup>38</sup> more comprehensive and rigorously enforced gun bans,<sup>39</sup> more search and seizure authority to enable firearms confiscation,<sup>40</sup> and the protection of a broader category of victims.<sup>41</sup> Some scholars have also argued for fewer procedural protections for defendants. Their proposed changes would include extending guns bans to ex parte restraining orders; eliminating the requirement for a valid waiver of the right to defense counsel and a jury trial for the predicate offense;<sup>42</sup> and expanding felony weapons laws to defendants who were only arrested, but not convicted, of domestic violence misdemeanors.<sup>43</sup>

Part IV rejects these polarized positions in favor of a more cautious, nuanced approach that asks what is working, what has proven ineffective, and what could be done instead. Part IV focuses on the shortcomings and potential costs of gun prohibitions related to domestic violence. It describes the different types of laws in this area and pairs this categorization with empirical evidence showing the varying levels of success of these approaches to disarming batterers. Ultimately, Part IV suggests that the Lautenberg Amendment and related state laws constitute a largely ineffective bandage on a thorny, multi-faceted problem. America's hyper-masculine gun culture contributes to the global scourge of abuse in families and intimate relationships. Yet, a zealously-enforced, potentially lifelong ban on gun possession by domestic violence misdemeanants, even those who did not intend to inflict bodily injury, sounds better in the halls of Congress and the Supreme Court than it does in the gritty, complicated landscape of intimacy.

This Article offers a critique, not a watertight solution. It extends unease with mandatory domestic violence laws and policies, which are often rooted in victim and offender stereotypes, to include serious concerns about the criminalization and carceral punishment of gun possession by domestic violence misdemeanants and DVRO respondents. However, it does not completely reject either gun control or criminal justice interventions in nonfatal domestic violence. Instead, it sketches the outlines of a more sophisticated understanding

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<sup>38</sup> See Lininger, *supra* note 19, at 204.

<sup>39</sup> See, e.g., Gildengorin, *supra* note 21, at 841–46 (advocating such measures as providing federal funds for states to implement gun relinquishment laws, promulgating guidelines to facilitate relinquishment, allowing officers to confiscate weapons at the scene of a domestic violence incident, and improving background check laws so they do not offer loopholes for abusers to purchase weapons); Jolly, *supra* note 30, at 706 (making similar proposals).

<sup>40</sup> See McNamara, *supra* note 30, at 653 (advocating the passage of state laws allowing officers to confiscate firearms at the scene of a domestic violence offense). About eighteen states have such laws. See *Domestic Violence and Firearms*, *supra* note 22; see also *infra* notes 445–51 and accompanying text.

<sup>41</sup> See Gildengorin, *supra* note 21, at 812; Lininger, *A Better Way to Disarm Batterers*, *supra* note 29, at 599.

<sup>42</sup> See Lininger, *A Better Way to Disarm Batterers*, *supra* note 29, at 600.

<sup>43</sup> See *id.*

of women's relationship to firearms than the rhetoric that either the gun-rights or gun-control camps offers.

Parts IV and V conclude that, from this new perspective, it might be possible to design an approach to firearms and domestic violence that recognizes abused women's capacity to choose a path that best serves their interests, supported (but not infantilized) by the state. Whatever the precise outlines of re-drafted gun restrictions in the context of abuse, they should be narrowly tailored to target the most dangerous offenders; imposed at the victim's initiative, or at least with her support; and adjustable in duration to differentiate recidivists from offenders who learn to avoid using violence against intimates and family members. The last of these suggestions aims to treat domestic violence offenders as a heterogeneous and possibly redeemable group of individuals and to exclude such offenders from the right to possess guns only as long as their behavior warrants it. Such changes have the potential to make domestic violence gun control more reasonable, enforceable, and sensitive to victims' priorities and concerns.

## II. THE SELF-DEFENDING WOMAN IN GUN-RIGHTS RHETORIC AND GUN MARKETING

During the 2016 presidential election, the NRA released a video entitled *Don't Let Hillary Leave You Defenseless*.<sup>44</sup> This video not only claimed that Supreme Court justices appointed by candidate Hillary Clinton would undermine women's Second Amendment right to possess a gun in self-defense;<sup>45</sup> it also disparaged women's reliance on the government to protect them from violent crime. On average, it claimed, police officers take eleven minutes to respond to a 9-1-1 call, which is "too late."<sup>46</sup> Consequently, depriving the female protagonist of the handgun she kept locked in her bedroom safe would place her in imminent, lethal danger from a male intruder.<sup>47</sup> The video thus brought together two themes that have animated gun-rights rhetoric for several decades: (1) the purported role of firearms as the great equalizer in women's struggle against gender-based violence and (2) the incompetence and

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<sup>44</sup>Nat'l Rifle Ass'n, *Don't Let Hillary Leave You Defenseless*, YOUTUBE (Sept. 20, 2016), [https://www.youtube.com/watch?v=hPM8e\\_DauUw](https://www.youtube.com/watch?v=hPM8e_DauUw) [<https://perma.cc/B3VH-GZ3A>].

<sup>45</sup>*Id.* As a candidate, President Trump made statements widely interpreted to (at least jokingly) encourage Second Amendment advocates to use violence against Hillary Clinton if she were elected: "Hillary wants to abolish—essentially abolish the Second Amendment. By the way, if she gets to pick, if she gets to pick her judges, nothing you can do, folks. Although the Second Amendment people, maybe there is, I don't know." Jeremy Diamond & Stephen Collinson, *Donald Trump: 'Second Amendment' Gun Advocates Could Deal with Hillary Clinton*, CNN POLITICS (Aug. 10, 2016), <http://www.cnn.com/2016/08/09/politics/donald-trump-hillary-clinton-second-amendment/index.html> [<https://perma.cc/5W62-23E4>].

<sup>46</sup>*Don't Let Hillary Leave You Defenseless*, *supra* note 44.

<sup>47</sup>*Id.*

even malevolence of big government, which seeks to strip Americans of their guns.

By casting Hillary Clinton as the arch-villain, the NRA video went beyond an attack on the evils of paternalistic government to charge liberal, female politicians with endangering women via gun control. The campaign to recruit women as firearms purchasers and gun-rights activists gives America's gun culture a claim to gender inclusivity. However, its rhetorical insistence on the power of guns to neutralize violent crime, including domestic abuse, is dangerously overstated. This Article will emphasize that violence, especially criminal homicide, is a social event. Because killing stems from hierarchy and inequality, as well as from norms for dealing with conflict, it is naïve (or perhaps more accurately, disingenuous) to propose gun possession as a simple solution to the complex problem of domestic violence. However, as Parts III and IV will show, one-size-fits-all gun prohibitions for domestic violence offenders that are poorly conceived, and even more sloppily enforced, provide no magic bullet either.

### *A. Guns as an Equalizer in Gender Violence*

Gun-rights spokeswomen cite the need for firearms to defend against male strangers who attack with intent to rape, rob, or murder. For example, a prominent profile on the NRA Women website tells the story of Amanda Collins, who was brutally raped in a parking garage when she returned to her vehicle after an evening class at the University of Nevada-Reno.<sup>48</sup> Collins was not carrying a gun, even though she owned one, because concealed-carry was illegal on her university's campus, but she believes she could have prevented the rape if she had been armed.<sup>49</sup> Alluding to female survivor stories, NRA President Wayne LaPierre told the audience at the Conservative Political Action Conference in 2013 that “[t]he one thing a violent rapist deserves to face is a good woman with a gun.”<sup>50</sup> LaPierre juxtaposed the image of an armed, female survivor of a rape attempt against his fiery criticism of politicians, including Senator Dianne Feinstein, who favor an assault weapons ban and other restrictions on gun ownership to curb lethal shootings and other violent crime.<sup>51</sup>

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<sup>48</sup> *Amanda Collins: A Survivor's Story*, NRA WOMEN, <http://www.nrawomen.tv/refuse-to-be-a-victim/video/amanda-collins-a-survivor-s-story/list/refuse-to-be-a-victim-feature> [<https://perma.cc/HER6-WNCN>].

<sup>49</sup> *See id.*

<sup>50</sup> Aaron Blake, *NRA Head: A “Violent Rapist Deserves to Face . . . a Good Woman with a Gun,”* WASH. POST (Mar. 15, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/15/nra-head-a-violent-rapist-deserves-to-face-a-good-woman-with-a-gun/> [<https://perma.cc/5BXE-7XZ3>].

<sup>51</sup> *See id.*

Such pro-gun narratives depict the violence women face as being similar to the dangers men confront.<sup>52</sup> In doing so, they construct women's need for self-defense as part of a universal imperative of personal protection against criminals that the government ostensibly will not, or cannot, restrain. As one scholar puts it, "although gun carriers may actively promote guns for women, they assume a particular understanding of crime that reproduces masculine privilege by emphasizing fast, warlike violence perpetrated by strangers—the kinds of crime men, as opposed to women, are more likely to face."<sup>53</sup> The discursive deployment of firearms as "equalizers" is not limited to confrontations between men and women. In the rhetoric of strong gun-rights proponents, law-abiding citizens need to equalize the threat from criminals: men must neutralize the advantage that younger, stronger male attackers have, and because criminality has racial connotations in the popular mind, white gun owners envision the imperative of defending themselves against black and Hispanic "thugs" and "gangbangers."<sup>54</sup>

Domestic violence plays a relatively minor role in the drive by the NRA and other entities to convince women to embrace guns, rather than gun restrictions, for their personal safety. However, some Second Amendment activists have added intimate-partner abuse to the list of dangers against which women, in particular, must empower themselves. For example, in an NRA Women TV video, conservative talk show host Dana Loesch warns "every rapist, *domestic abuser*, [and] violent criminal thug" that millions of women are "flocking to gun stores and gun ranges" to exercise their "right to choose" their own lives over the lives of the "despicable cowards" who prey on female victims.<sup>55</sup> Loesch's inclusion of domestic abusers in an umbrella category of bad guys largely comprised of male strangers who brutalize women constructs intimate-partner violence as "a clear-cut crime [involving] a fast, bloody act" that can easily be

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<sup>52</sup> See, e.g., Clayton E. Cramer, *Cramer: On the Right Side of the Bullet*, WASH. TIMES (Feb. 9, 2012), <http://www.washingtontimes.com/news/2012/feb/9/on-the-right-side-of-the-bullet/> [<https://perma.cc/6DXC-Y8P7>] (describing how eighteen-year-old Sarah McKinley fatally shot a robber who entered her home, while she was home alone with her three-month-old baby).

<sup>53</sup> Jennifer Carlson, *The Equalizer? Crime, Vulnerability, and Gender in Pro-Gun Discourse*, 9 FEMINIST CRIMINOLOGY 59, 61 (2014).

<sup>54</sup> *Id.* at 72–74. In her recent book on American gun culture, Jennifer Carlson observes:

The broad appeal of guns to men of diverse backgrounds suggests that this may be an inclusive moment in gun politics, but guns are inherently exclusionary objects in the sense that they are about aggressively policing others—. . . (suspected) criminals who are always imagined as hyperaggressive men and often (but not always) imagined as economically precarious people of color involved in drug dealing or gangs.

CARLSON, *supra* note 7, at 15.

<sup>55</sup> NRA, *Freedom's Safest Place: Real Empowerment*, YOUTUBE (July 11, 2016), <https://www.youtube.com/watch?v=cjuNe5fXfQ> [<https://perma.cc/P6AM-RXCN>] (emphasis added).

repelled with the use of a firearm in self-defense.<sup>56</sup> It also associates batterers with irresponsible, dangerous classes of people, including criminals and the mentally ill, that moderate gun owners are happy to regulate.

Loesch touts her Second Amendment activism broadly to “moms, grandmothers, and professional women.”<sup>57</sup> Regardless of age and socioeconomic profile,<sup>58</sup> the gun-carrying woman transforms herself from victim to heroine, capable of defending herself and her family against male predators. Her possession of a firearm and the ability to shoot it empowers her against threats to her safety.<sup>59</sup>

Ordinary women who own guns tend to embrace the “equalizer” narrative enthusiastically. For instance, a white, female secretary from Detroit says she believes that the possession of a gun levels any disparity in size, strength, age, or gender: “You know, a grandma can pull the trigger. It has nothing to do with [the gender of] who’s carrying it. [My husband is] no more dangerous than I am. We can both pull the trigger. It’s just that simple.”<sup>60</sup> A recent news article about a young woman stabbed nearly to death by a jealous ex-boyfriend describes how she endured a painful recovery, married the man of her dreams, and obtained a concealed-carry permit.<sup>61</sup>

Stories like these imply that a woman abused by her male intimate-partner need not depend on mandatory arrest laws, no-drop prosecution policies, or the imposition of gun prohibitions on domestic violence offenders. She can defend herself if she has a firearm and knows how to shoot it accurately. By contrast, a woman who refuses to take action, relies on the state for help, or succumbs to her abuser’s requests for reconciliation stays a vulnerable victim.<sup>62</sup>

Such overtly gendered messaging is not confined to the NRA; it is a pervasive theme in a variety of pro-gun media, mainstream news, and conservative or libertarian scholarship advocating strong Second Amendment guarantees. The National Association for Guns Rights, for example, has an advertisement featuring a woman aiming a handgun with the caption, “Mama

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<sup>56</sup> Carlson, *supra* note 53, at 75.

<sup>57</sup> *Freedom’s Safest Place: Real Empowerment*, *supra* note 55.

<sup>58</sup> The profiles of female gun owners on sites like NRA Women are relatively homogenous. They tend to highlight white women as hunters and target shooters with recreational, as well as self-defense, interests in gun ownership and shooting skills. See *Armed & Fabulous*, NRA WOMEN, <http://www.nrawomen.tv/armed-and-fabulous> [<https://perma.cc/ELQ8-6NAW>]; *New Energy*, NRA WOMEN, <http://www.nrawomen.tv/new-energy> [<https://perma.cc/ZH22-GUGR>].

<sup>59</sup> See CARLSON, *supra* note 7, at 100–03. Some gun owners and gun-rights activists may actually place a higher value on women’s maternal defense of their children. See *id.* at 103.

<sup>60</sup> Carlson *supra* note 53, at 70.

<sup>61</sup> Melissa Dohme, *Marrying the Man Who Saved My Life*, BBC NEWS MAGA. (Jan. 17, 2017), <http://www.bbc.com/news/magazine-38302839> [<https://perma.cc/65JB-DUYQ>].

<sup>62</sup> See Carlson, *supra* note 53, at 75.

didn't raise a victim."<sup>63</sup> Arming Women Against Rape for Endangerment (AWARE), a nonprofit organization promoting female self-defense, similarly encourages gun ownership, among other strategies, to protect women against violent crime.<sup>64</sup> Like Dana Loesch, AWARE stresses that domestic violence victims number among the especially vulnerable women for whom having a gun for self-defense is potentially life-saving. The AWARE website provides anecdotes about victims like Betsy McCandless Murray and Janice LaCava, whose murder at the hands of their estranged intimate partners might have been prevented if they had learned to use guns self-defensively.<sup>65</sup>

The tragic stories of these domestic homicide victims (murdered despite obtaining restraining orders and, in Murray's case, filing criminal charges)<sup>66</sup> underscore a prevalent refrain in gun-rights rhetoric: The state will not protect you; it will only tax you and confiscate your firearms.<sup>67</sup> Female gun owners who disparage traditional means of protection, such as calling 9-1-1, as inadequate to defend against criminal violence espouse comparable messages. Finally, academic supporters and other advocates of law-abiding citizens' right to bear arms also emphasize the ineffectiveness, and even unwillingness, of the police to protect domestic violence victims from crime.<sup>68</sup>

### B. Efforts to Increase the Appeal of Guns to Women

The efforts of gun-rights proponents and gun sellers to appeal to female voters and consumers did not begin in this century. Rather, the move to promote guns and gun rights among women dates back at least as far as the 1980s and 1990s. During these decades, the Second Amendment Foundation debuted the *Women and Guns Magazine*—"The Worlds [sic] First Firearm Publication for Women"—largely focused on the issue of self-defense.<sup>69</sup> The NRA launched its "Refuse to be a Victim" campaign primarily, but not exclusively, for women in 1993.<sup>70</sup> At the same time, it unsuccessfully opposed the Violence Against

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<sup>63</sup> See Advertisement, *Mama Didn't Raise a Victim*, NAT'L ASSOC. FOR GUN RIGHTS, <http://ww2.hdnux.com/photos/17/72/37/4171721/3/1024x1024.jpg> [<https://perma.cc/7N7V-J6HQ>].

<sup>64</sup> *Self Defense Is Important*, ARMING WOMEN AGAINST RAPE ENDANGERMENT (Feb. 20, 2017), <http://www.aware.org/self-defense/is-important> [<https://perma.cc/QZ63-PN6W>].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., Blake, *supra* note 50 (reporting that, in 2013, NRA President Wayne LaPierre asserted, "In the end, there are only two reasons for federal government to create [a] federal registry of gun owners—to tax them, or to take them").

<sup>68</sup> See, e.g., Don B. Kates & Alice Marie Beard, Response, *Murder, Self-Defense, and the Right to Arms*, 45 CONN. L. REV. 1685, 1691–93 (2013) (arguing that domestic violence victims cannot depend on the police to protect them).

<sup>69</sup> See WOMEN & GUNS, <http://www.womenandguns.com/> [<https://perma.cc/58X9-VTZS>].

<sup>70</sup> See Ruthann Sprague, *Refuse To Be a Victim Celebrates 20 Years*, AM. RIFLEMAN, Jan. 2013, at 89, 89.

Women Act (VAWA).<sup>71</sup> The Refuse to be a Victim self-defense program, which continues to exist today, is advertised on the NRA Women website along with videos about carrying and using a firearm that feature female instructors' advice to presumptively female viewers.<sup>72</sup> NRA Women describes the self-defense program as "more than just a class: it's a mindset."<sup>73</sup>

Today, female consumers can find pastel-colored, bejeweled, and zebra-print guns for sale.<sup>74</sup> Accessories, including high-end handbags to conceal firearms, also cater to female purchasers. The retail site *Armed in Heels* offers everything from feminine holsters to guns in colors designed to appeal to women.<sup>75</sup> A similar retailer, *Concealed Carrie*, advertises purses and other gear that allow women to tote concealed weapons and still be fashionable.<sup>76</sup> Yet, despite the advertising of feminine accessories for everything from handguns to assault weapons, such gender-specific marketing tends to be paired with an obvious appeal to women's assertiveness in exercising their "right" to self-defense.

Some manufacturers even eschew soft advertising gimmicks with a direct claim that their weapons make women as formidable as men in violent confrontations. For example, Glock, Inc., the American subsidiary of a popular gun manufacturer, features eight categories of gun ownership on its product site and asks, "Which Glock are you?"<sup>77</sup> The seventh category of Glock owners are women,<sup>78</sup> and here, the sales pitch reminds female consumers that "[y]ou have every right to defend yourself."<sup>79</sup> The advertising of guns on the site both explicitly and implicitly sends the message that the proper equipment and the ability to shoot will level the playing field in a lethal struggle between an innocent woman and her male attacker. Under the Glock Women tab on the product site, the manufacturer promises: "[Y]ou won't find a 'Woman's' model here. If someone crosses that line, you require equal stopping power."<sup>80</sup>

Research indicates that concern about personal safety constitutes the driving force behind female gun ownership,<sup>81</sup> even though rates of lethal violence in the

<sup>71</sup> Carlson, *supra* note 53, at 60.

<sup>72</sup> See *Refuse To Be a Victim*, NRA WOMEN (Dec. 30, 2016), <http://www.nrawomen.tv/refuse-to-be-a-victim> [<https://perma.cc/3FHJ-9MDX>].

<sup>73</sup> *Id.*

<sup>74</sup> April M. Zeoli & Amy Bonomi, Commentary, *Pretty in Pink? Firearm Hazards for Domestic Violence Victims*, 25 WOMEN'S HEALTH ISSUES 3, 4 (2015).

<sup>75</sup> See *ARMED IN HEELS*, <http://www.armedinheels.com> [<https://perma.cc/B4FB-8EBQ>].

<sup>76</sup> See *CONCEALED CARRIE*, <http://www.concealedcarrie.com> [<https://perma.cc/XYP7-QJH6>].

<sup>77</sup> See *Which Glock Are You?*, GLOCK, <https://us.glock.com/products> [<https://perma.cc/5CQY-VUC2>].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see also *Glock Women*, GLOCK, <https://us.glock.com/products/sector/women> [<https://perma.cc/TD45-RZYC>].

<sup>80</sup> *Glock Women*, *supra* note 79.

<sup>81</sup> See Lois Beckett, *Domestic Violence and Guns: The Hidden American Crisis Ending Women's Lives*, *GUARDIAN* (Apr. 11, 2017), <https://www.theguardian.com/us-news/2017/apr/>



United States have decreased from a peak in the 1990s.<sup>82</sup> In response to women's fears, gun manufacturers, gun sellers, and publications for gun enthusiasts emphasize that female firearms possession reduces victimization. The effect of this aggressive marketing on women's attitudes toward guns remains unclear. Studies conducted in the 1990s, when the gun industry began to focus on female consumers, indicate that advertisements for guns and gun-related products are not likely to make a woman significantly more pro-gun.<sup>83</sup> Indeed, only a relatively small percentage of women own guns today—15% to almost 25%, compared to about 45% of men<sup>84</sup>—despite the proliferation of gender-based marketing. Advertising, combined with self-defense courses and other firearms-related education, likely has a greater influence on the creation of a loyal, female customer base than the stand-alone marketing of guns.<sup>85</sup>

### C. Criticizing the Use of Gender in Pro-Gun Rhetoric

Female empowerment is a worthy goal, but the rhetorical deployment of gender by pro-gun entities raises myriad concerns. Violence and homicide arise from social forces and pressures, including inequality, hierarchy, and masculine norms for dealing with conflict. Hence, it is simplistic to think of guns as a straightforward, unilateral solution to a problem like domestic violence. Although this Article does not aim primarily to refute the gun-rights view that

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11/domestic-violence-shooting-deaths-women-husbands-boyfriends [https://perma.cc/5U4E-D89Z]; see also M. Elizabeth Blair & Eva M. Hyatt, *The Marketing of Guns to Women: Factors Influencing Gun-Related Attitudes and Gun Ownership by Women*, 14 J. PUB. POL'Y & MARKETING 117, 124 (1995) (“[F]ifty 50% of those who possess firearms solely for the purpose of self-protection are women.”); Garen J. Wintemute et al., *Correspondence: Increased Risk of Intimate Partner Homicide Among California Women Who Purchased Handguns*, 41 ANNALS EMERGENCY MED. 281, 282 (2003) [hereinafter Wintemute et al., *Increased Risk of Intimate Partner Homicide*] (stating that two-thirds of female gun owners purchased their weapons to protect against crime).

<sup>82</sup> See PEW RESEARCH CTR., GUN HOMICIDE RATE DOWN 49% SINCE 1993 PEAK; PUBLIC UNAWARE 1–2, 4 (May 2013), [http://www.pewsocialtrends.org/files/2013/05/firearms\\_final\\_05-2013.pdf](http://www.pewsocialtrends.org/files/2013/05/firearms_final_05-2013.pdf) [https://perma.cc/LXZ6-T6RQ].

<sup>83</sup> Blair & Hyatt, *supra* note 81, at 124.

<sup>84</sup> Jeffrey M. Jones, *Men, Married, Southerners Most Likely To Be Gun Owners*, GALLUP (Feb. 1, 2013), <http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx> [https://perma.cc/EE74-NR52]. A Gallup poll in 2011 revealed a slightly different, though still significant gender gap, with 46% of men, compared to 23% of women, reporting that they owned guns. Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest Since 1993*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150353/self-reported-gun-ownership-highest-1993.aspx> [https://perma.cc/MT6N-CSK5].

<sup>85</sup> See Lisa Parsons-Wraith, *Strategies for Success in the Women's Market*, SHOOTING INDUSTRY, Jan. 2015, at 40.

women need to possess a firearm for personal protection,<sup>86</sup> several criticisms reveal the liabilities of the self-defending woman image.

### 1. *Guns and Intimate-Partner Violence*

First, the tendency of gun enthusiasts and activists to depict threats to law-abiding women as exterior to the home largely elides the problem of domestic violence. Homicides committed with firearms *in the home* by family members and acquaintances are more prevalent than stranger killings in public. According to a recent study of data from the National Violent Death Reporting System (NVDRS) and other sources, “nearly half of all incidents of firearms-related homicide take place in the home,”<sup>87</sup> as do almost 80% of nonfatal acts of intimate-partner violence.<sup>88</sup> One-third of female homicide victims are killed by their intimate partners, and about two-thirds of intimate-partner homicide victims are killed with a gun, usually a handgun.<sup>89</sup> Social-scientific data further

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<sup>86</sup> See *infra* notes 187–207, 213–17 and accompanying text (discussing women’s use of force, as well as abuse survivors’ perception that women trained to use a gun should be able to possess one to defend against battering).

<sup>87</sup> Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 156, 165 (2015) [hereinafter Fan, *Disarming the Dangerous*]. 48% of the homicides reported by NVDRS in 2011 occurred in the home (including apartments, single-family houses, and the curtilage, as well as the residential structure itself). *Id.* at 165 tbl.2. In 2011–2014, firearms violence at home occupied an even greater proportion of the NVDRS total—50%. Mary Fan, *Preventing Ordinary and Extraordinary Violence*, in THE POLITICIZATION OF SAFETY (Jane Stoeber ed., forthcoming 2018) (manuscript at 18–19 & tbl.2) (on file with the author) [hereinafter Fan, *Preventing*]. National data produced slightly higher numbers: 55% of homicides and more than 60% of assaults occurred within a home or residence in both 2012 and 2014. *Id.* (citing 2014 National Incident-Based Reporting System: Crimes Against Persons Offenses, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, [https://ucr.fbi.gov/nibrs/2014/tables/by-location/crimes\\_against\\_persons\\_offenses\\_offense\\_category\\_by\\_location\\_2014\\_final.pdf](https://ucr.fbi.gov/nibrs/2014/tables/by-location/crimes_against_persons_offenses_offense_category_by_location_2014_final.pdf) [<https://perma.cc/AL2K-TDX8>]); Fan, *Disarming the Dangerous*, *supra*, at 165–66 (presenting statistics for 2012). NVDRS data from seventeen states shows that, for 2011–2014, 45% of the counted homicides were killings of family or intimates. Fan, *Preventing*, *supra*, at 17–18 tbl.1. Less than 20% of the killings were perpetrated by strangers. *Id.*

<sup>88</sup> See JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 2444697, SPECIAL REPORT: NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 1 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [<https://perma.cc/E5Z6-CRFJ>].

<sup>89</sup> Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (stating that about 60% of intimate-partner homicides are committed with a firearm); Garen J. Wintemute et al., *Firearms and the Incidence of Arrest Among Respondents to Domestic Violence Restraining Orders*, Article in *Injury Epidemiology*, SPRINGERLINK 1, 2 (Dec. 2015), <https://link.springer.com/content/pdf/10.1186%2Fs40621-015-0047-2.pdf> [<https://perma.cc/3M3R-HTGN>] [hereinafter Wintemute et al., *Firearms and the Incidence of Arrest*] (“In 2008, firearms were used in 53.0% of female and 41.9% of male intimate partner homicides.”). For the types of guns used to kill intimate

indicates that a domestic violence perpetrator's access to a gun increases his victim's risk of being killed by him at least fivefold.<sup>90</sup> According to case-controlled research by Jacqueline Campbell and her coauthors, firearm access is one of several risk factors—including the abuser's unemployment, the couple's estrangement, and prior physical violence or threats to kill—that increase the risk of intimate-partner homicide.<sup>91</sup>

Admittedly, such statistics indicate only that extremely violent abusers tend to own and use guns, and that guns are more lethal than other weapons, *not* that the availability of guns *causes* femicide. Moreover, as pro-gun scholars note, homicide statistics likely underestimate the number of justifiable shootings, including women's use of guns to defend themselves or their children against a current or estranged partner.<sup>92</sup> Part III of this Article will consider how conflating correlation with causation and ignoring women's use of guns in self-defense has led to overbroad firearms prohibitions in the context of domestic violence. That said, guns exacerbate the dangers an abuse victim faces: the perpetrator's use of a firearm increases her risk of death due to the lethality of shooting, compared to beating, stabbing, and other methods of inflicting injury.<sup>93</sup>

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partners, see Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, Article in *Trauma, Violence, & Abuse*, SAGE JOURNALS 1, 2 (Sept. 14, 2016), <http://journals.sagepub.com/doi/pdf/10.1177/1524838016668589> [<https://perma.cc/F8DX-ABKH>] (“[A] substantial majority of the guns used in intimate partner homicides are handguns.”), and Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1413 tbl.1 (2004) (stating that women in shelters who self-reported victimization with a gun reported it was a handgun twice as often as a long gun).

<sup>90</sup> Campbell et al., *supra* note 1, at 1092.

<sup>91</sup> See *id.* at 1090–92.

<sup>92</sup> See, e.g., Clayton E. Cramer, Essay, *Why the FBI's Justifiable Homicide Statistics Are a Misleading Measure of Defensive Gun Use*, 27 U. FLA. J.L. & PUB. POL'Y 505, 505, 507 (2016) (stating that FBI justifiable homicides do not include excusable homicides committed during “sudden combat”; homicides charged as murder that later lead to dismissal, acquittal, or dropped charges; or any self-defensive killing that did not involve a reported crime taking place when the homicide was committed); see also *infra* note 205.

<sup>93</sup> In the 2003 study by Campbell et al., abusers' use of a gun (versus another weapon, including physical assault) was associated with a marked increase in women's homicide and “[t]he substantial increase in lethality associated with using a firearm was consistent with the findings of other research assessing weapon lethality.” Campbell et al., *supra* note 1, at 1091–92. Older research on family and intimate assaults in Atlanta found that many abusers who kill their victims with a gun “would be unable or unwilling to exert the greater physical or psychological effort required to kill with another, typically available weapon.” Lininger, *A Better Way to Disarm Batterers*, *supra* note 29, at 528–29 (citing Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3045–46 (1992)). Because not all intimate homicides are premeditated or even intentional, guns may increase lethality beyond the outcome the perpetrator contemplated and desired. Franklin Zimring reached a similar conclusion about homicides in general in a pair of studies in the late 1960s. See Frank Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721, 722–24, 728, 735 (1968) [hereinafter Zimring, *Is Gun*

Second, while gun-rights activists like Dana Loesch claim to support women's empowerment against domestic abuse, single-minded reliance on self-defense with a firearm is misguided. The available evidence suggests that buying a gun might actually put a female abuse victim at greater risk, especially if she resides with her batterer. According to one study, for example, women in California who purchased handguns to protect themselves doubled their domestic murder risk, though the researchers could not determine whether buying a gun actually increased the danger or was simply "an imperfect protective measure taken by women who [were] at high risk of intimate partner homicide for other reasons."<sup>94</sup> This Article cautions against uncritical reliance on the stereotype of the innocent woman who is too helpless and passive to defend herself with a firearm.<sup>95</sup> Notwithstanding this warning, I favor better tailoring gun restrictions for perpetrators of abuse and improving support services for their partners, rather than enacting laws that make it easier and faster for victims to get guns.<sup>96</sup>

Some female domestic violence survivors question the value of owning a firearm for self-defense. Unlike stranger violence, intimate-partner abuse often unfolds cyclically; it is seldom characterized by a single, life-or-death incident of the type depicted in the imagery of gun organizations and pro-gun media. Moreover, unlike stranger violence, domestic violence involves a tangle of personal relationships and interdependencies. In a 2004 study, the majority (66.9%) of interview subjects drawn from California emergency shelters said they felt less safe because their partner had a gun, and an even larger number (79.2%) felt less safe when there was a gun in the home.<sup>97</sup> Similarly, in a sample of forty-two abuse survivors in the southern United States, many thought having a gun in the house would create greater danger and lead to their death at the hands of their abuser or to their imprisonment for killing him.<sup>98</sup> One woman

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*Control Likely to Reduce Violent Killings?*]; see also Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J.L. MED. & ETHICS 34, 35 (2004) [hereinafter Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*] ("[T]he capacity of a weapon to inflict life-threatening injury [including a firearm's caliber] would have an important influence on the death rate from assault.").

<sup>94</sup>Wintemute et al., *Increased Risk of Intimate Partner Homicide*, *supra* note 81, at 282.

<sup>95</sup>See *infra* Part III.A.1 and notes 200–02, 207, 215–17, 296–311 and accompanying text.

<sup>96</sup>In Kentucky, for example, a court issuing an emergency restraining order can automatically issue a concealed-carry permit to the person whom the order protects. See Sorenson & Schut, *supra* note 89, at 3.

<sup>97</sup>Sorenson & Wiebe, *supra* note 89, at 1414. Their fear may have stemmed in part from unsafe storage practices. Almost 50% lived in a residence "where a gun was kept unlocked and loaded or unlocked and with ammunition." See *id.*

<sup>98</sup>Kellie R. Lynch & T.K. Logan, "You Better Say Your Prayers and Get Ready": *Guns Within the Context of Partner Abuse*, Article in *J. Interpersonal Violence*, SAGE JOURNALS 1, 9, 11–12 (Nov. 15, 2015), <http://journals.sagepub.com/doi/pdf/10.1177/0886260515613344> [<https://perma.cc/8E9Y-YRPG>].

decided to get rid of her gun because she felt that it simply armed her batterer with a lethal weapon.<sup>99</sup>

There was an even stronger “sentiment that participants would not have wanted to seriously harm or kill their abuser and that a gun would increase the risk of that happening.”<sup>100</sup> Participants worried that they might misjudge the threat and shoot when doing so would not constitute self-defense under the criminal law and/or when it was not necessary in either a moral or practical sense.<sup>101</sup> They also “commonly expressed concern for the safety of children with regard to having guns around for protection.”<sup>102</sup>

As Part III.A explains, participants in this study did not display implacable hostility toward firearms, nor did they have positive experiences with the enforcement of gun prohibitions on domestic violence offenders. But, collectively, their comments to interviewers revealed a more complex understanding of the risks of bringing a firearm into an abusive relationship than gun-rights imagery and rhetoric acknowledges.

## 2. *The Myth of Guns as the Great Equalizer*

The gun-rights camp’s gendered rhetoric purveys another myth, that of firearms as the “great equalizer” between men and women in a violent confrontation. The term “equalizer” is misleading in several respects.

### a. *Gender Disparities in the Perpetration of Intimate-Partner Gun Violence*

Some studies indicate that women are more likely to use a gun against an intimate partner than men are, in an effort to counter imbalances in physical strength.<sup>103</sup> However, in the aggregate, guns have not balanced gender disparities in the commission of homicide, either historically or today. For

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<sup>99</sup> *Id.* at 9 (“In my case I got rid of the gun that I had because basically I was just arming him . . .”).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 10–12.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *See* Poco Kernsmith & Sarah W. Craun, *Predictors of Weapon Use in Domestic Violence Incidents Reported to Law Enforcement*, 23 J. FAM. VIOLENCE 589, 593–94 (2008) (finding that, in a study of 393 domestic violence cases reported to the San Diego County Sheriff’s Department, women were three times more likely to use a weapon against a man than vice versa “to compensate for their generally smaller physical size relative to their male partner”). Marianne Hester’s data on domestic violence perpetration in Northumbria, England, from 2001–2007 indicates that, although men were more likely to engage in physical violence and threats, “women were much more likely to use a weapon although this was at times in order to stop further violence from their partners.” MARIANNE HESTER, N. ROCK FOUND., WHO DOES WHAT TO WHOM? GENDER AND DOMESTIC VIOLENCE PERPETRATORS 8 (June 2009), <http://www.nr-foundation.org.uk/downloads/Who-Does-What-to-Whom.pdf> [<https://perma.cc/P76L-UDHR>].

example, urban historian Eric Monkkonen said of the rise of guns as consumer objects and their use in the commission of murder:

Men, not women, engineered the turn to guns [in New York]: only about 5 percent of murderesses used guns throughout the whole time period [i.e. 1797–1994], a stable proportion. Women did not seek guns, even though they have often been called “equalizers,” in the sense that strength may not determine the outcome of a fight. These gender differences suggest that weapons should be considered culturally chosen tools.<sup>104</sup>

As gun usage by both male and female perpetrators increased in New York, “women were still less likely than men to use guns [to kill].”<sup>105</sup> Monkkonen’s data was city-specific and may not support broad generalizations.<sup>106</sup> Historian Randolph Roth found that, in the United States more generally, women often used guns if they sought to defend themselves against abusive spouses.<sup>107</sup> However, “[o]nly a few women tried to murder husbands who left them, and those who did were far less likely than men to use a firearm . . . .”<sup>108</sup>

Today, men overwhelmingly commit more intimate-partner homicides than women do.<sup>109</sup> Firearms constitute the most frequently used weapon in such killings. More than two-thirds of men and women killed by spouses or ex-spouses between 1980 and 2008 were killed with guns.<sup>110</sup> Some social-scientific studies have found that the few women who kill their spouses or non-marital

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<sup>104</sup>ERIC H. MONKKONEN, MURDER IN NEW YORK CITY 38–39 & fig.2.1 (2001).

<sup>105</sup>*Id.* at 43.

<sup>106</sup>By contrast, according to historian Jeffrey Adler, more than three-quarters of Chicago husband killers in the late 1800s and early 1900s used guns, often aiming for the head and firing multiple shots to make sure their abusive spouse died. See JEFFREY S. ADLER, FIRST IN VIOLENCE, DEEPEST IN DIRT: HOMICIDE IN CHICAGO, 1875–1920, at 104–05 (2006).

<sup>107</sup>See RANDOLPH ROTH, AMERICAN HOMICIDE 268 (2009) (stating that, in the nineteenth century, 65% of self-defensive homicides of abusive husbands by their wives were perpetrated with guns).

<sup>108</sup>*Id.* at 266.

<sup>109</sup>In 2014, about 49% of female homicide victims, compared to just 6% of male homicide victims, were killed by intimate partners, in cases with known perpetrators. Zeoli, *Domestic Violence and Firearms*, *supra* note 26, at 1 (citing U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2010: EXPANDED HOMICIDE DATA TABLE 10 (Sept. 2011), <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl10.xls> [<https://perma.cc/9MBL-PCH8?type=image>]). Two hundred forty-one males and 1095 females were murdered by an intimate partner in 2010. *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> [<https://perma.cc/68S5-VLXZ>] (citing U.S. DEP’T OF JUSTICE, *supra*).

<sup>110</sup>ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 19–20 & figs.29a, 29b, & tbl.11 (Nov. 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf> [<https://perma.cc/6D2T-QL7Z>]. However, the proportion of both male and female intimate homicide victims who are fatally shot, as opposed to being killed with other weapons, has actually decreased since 1980. *Id.* at 19–20.

intimate partners are more likely to use guns than male domestic killers are.<sup>111</sup> But the death of men at the hands of their partners has declined, perhaps due to the opening of battered women's shelters, the greater availability of protection orders, and the creation of an improved (though still incomplete) social safety net.<sup>112</sup>

Nonfatal gun use has been studied less than intimate homicide, and the relevant research reflects greater methodological disparities, including the lack of an agreed-upon definition of "gun use."<sup>113</sup> Researchers have not reached a consensus about the frequency of nonfatal gun violence or the gender breakdown of its perpetrators.<sup>114</sup> Nevertheless, the predominant understanding seems to be that men more often inflict nonfatal injuries on their intimate partners with firearms than women do. The rate of violent but nonfatal victimization of women by their intimate partners was 6.2 per 1,000 persons aged twelve or older, between 2003 and 2012, compared to just 1.4 per 1,000 for men.<sup>115</sup> According to a 2003 study of shooting victims who visited hospital emergency rooms, "a higher percentage of women than men were hospitalized for having been shot or pistol whipped by a current or former spouse."<sup>116</sup>

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<sup>111</sup> See Philip J. Cook, *The Effect of Gun Availability on Violent Crime Patterns*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 66 (1981); Kernsmith & Craun, *supra* note 103, at 594. For similar findings by historians about gender and gun use in intimate-partner homicides in nineteenth- and early twentieth-century America, see ADLER, *supra* note 106, at 104–05, and ROTH, *supra* note 107, at 268.

<sup>112</sup> Of all homicides between 1980 and 2008 for which the victim-offender relationship is known, the percentage of men killed by an intimate partner dropped 53% from 10.4% in 1980 to 4.9% in 2008. COOPER & SMITH, *supra* note 110, at 18. During the same period, the percentage of women killed by their intimate partners increased by 5%. *Id.* For the purposes of this data, the term "intimate" included spouses, ex-spouses, boyfriends, girlfriends, and same-sex relationships. *Id.*

<sup>113</sup> Sorenson & Schut, *supra* note 89, at 5, 7. Many studies count being pistol-whipped, shot at, or shot, but not being threatened with a gun, as nonfatal gun use. The available data is limited because studies derived from the Conflict Tactics Scale conflate guns and knives, and the most regularly kept statistics relate to homicides, rather than nonfatal assaults. See *id.*; Vigdor & Mercy, *supra* note 89, at 323.

<sup>114</sup> Many researchers believe that gun use in intimate-partner violence is relatively rare. See Kernsmith & Craun, *supra* note 103, at 595 ("[T]he data, from this and other studies, indicates that common household objects, such as telephones are the most commonly used weapons . . ."). Fists, feet, and other types of weapons are used more frequently than guns to inflict physical injury in intimate-partner abuse. See Vigdor & Mercy, *supra* note 89, at 323; Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely To Be Issued When Applications Mention Firearms?*, 30 EVALUATION REV. 266, 273 (2006); see also *infra* note 212 and accompanying text. But see Sorenson & Wiebe, *supra* note 89, at 1414 ("Nearly two-thirds (64.5%) [of the women interviewed in domestic violence shelters] responded that the partner had used one of the guns to scare, threaten, or harm her.").

<sup>115</sup> TRUMAN & MORGAN, *supra* note 88, at 11 & tbl.11.

<sup>116</sup> Sorenson & Schut, *supra* note 89, at 5 (citing Douglas J. Wiebe, *Sex Differences in the Perpetrator-Victim Relationship Among Emergency Department Patients Presenting with Nonfatal Firearm-Related Injuries*, 42 ANNALS EMERGENCY MED. 405, 405 (2003)).

If reports of menacing and intimidation get factored into the analysis, women in the general population are more likely to have been threatened by an intimate partner with a gun than a knife.<sup>117</sup> Indeed, threats may constitute the most common type of gun use in domestic violence situations,<sup>118</sup> and men may be more likely to make threats to kill than women.<sup>119</sup> If this is so, then data on nonfatal injuries probably underplays both the role of firearms in domestic abuse and the prevalence of threats. Since victims may be more likely to acquiesce when a gun, instead of a less deadly weapon, is used against them, a gun-wielding perpetrator who seeks control might not need to inflict physical harm.<sup>120</sup> “[S]imply knowing that an abusive partner has *access* to a gun can signal a credible risk that instills fear regardless of whether the partner has been physically violent.”<sup>121</sup> Firearm access by batterers can thus impose emotional and psychological injuries on women, even if they do not become shooting victims.

### b. *Structural Inequalities*

In a structural sense, the “equalizer” label also distorts the role of gun violence in the larger arena of contestation over economic resources, social status, power, and authority in the family and society—an arena in which women and people of color occupy an unequal place. Historically, women have had an ambivalent relationship to guns and the Second Amendment. Linda Kerber explains that, “[i]n the eighteenth-century context, arms-bearing was both a personal right (‘the natural right of resistance and self-preservation’) and a personal duty (to assist ‘in the execution of the laws and the preservation of the public peace’).”<sup>122</sup> Because women did not shoulder the burden of militia service or pursue criminals when a hue and cry was raised, their status with regard to arms-bearing remained unclear. James Burgh, an English political writer familiar to the American Revolutionaries, claimed: “He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms.”<sup>123</sup>

This type of thinking about the right to possess guns may have supported the exclusion of women, children, and slaves from Second Amendment

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<sup>117</sup> Sorenson & Schut, *supra* note 89, at 5.

<sup>118</sup> *See id.* at 2.

<sup>119</sup> *See* HESTER, *supra* note 103, at 8, 10 (finding men more often made threats and used violence to establish fear and control than women and, unlike women, men were arrested for threatening to kill their partners).

<sup>120</sup> *See id.*

<sup>121</sup> Sorenson & Schut, *supra* note 89, at 1 (emphasis added).

<sup>122</sup> LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 240 (1998).

<sup>123</sup> *Id.* at 238.



guarantees.<sup>124</sup> Colonial and state legislation from the eighteenth century through Reconstruction clearly aimed to prevent blacks from bearing arms.<sup>125</sup> However, there is little or no evidence that *any* laws actually barred *women* (as a class) from having access to guns. Whether women had affirmative gun rights is a more clouded question. Women may have been understood to uphold the reciprocal obligations associated with arms-bearing rights through their patriotism,<sup>126</sup> their ownership of guns for use by their militia-aged sons and servants,<sup>127</sup> or their nurturance of a new generation of young boys who would provide military service in the future. Upholding the constitutionality of a concealed weapons prohibition in 1846, for example, the Supreme Court of Georgia stated in dicta:

The right of the whole people, old and young, men, *women* and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.<sup>128</sup>

The ambiguity of this passage with regard to women's right to bear arms lay in the tension between the court's claim that the right belonged to the individual, on the one hand, and the rationale the court offered for the existence of the right, on the other: "*rearing up* and qualifying a well-regulated militia . . ."<sup>129</sup> Were women included in the court's definition of "the whole people" because the judges literally expected women to carry guns, or simply because they were responsible for "rearing up" future militiamen?

Since colonial times, American women had practical access to guns to hunt and defend their families against wild animals and human attackers, especially when their husbands were absent.<sup>130</sup> Moreover, despite feminist concerns about

<sup>124</sup> However, state legislatures in the United States did not actually impose some of these restrictions—the prohibition on firearms purchases by minors, for example—until the late nineteenth century. See ROGER LANE, *MURDER IN AMERICA: A HISTORY* 344–45 (1997).

<sup>125</sup> See *infra* notes 143–47 and accompanying text.

<sup>126</sup> As late as 1928, the Supreme Court held that a fifty-year-old woman's refusal to agree to bear arms in the national defense (an obligation she actually could not have fulfilled) provided sufficient grounds for deeming her unfit to become a naturalized citizen. See KERBER, *supra* note 122, at 246–48.

<sup>127</sup> See CLAYTON E. CRAMER, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* 4, 7 (2006).

<sup>128</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis on "women" added). *But see* Lucilius A. Emery, *The Constitutional Right To Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) ("Only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty. Women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits, may be prohibited from carrying weapons.").

<sup>129</sup> *Nunn*, 1 Ga. at 251 (emphasis added).

<sup>130</sup> CRAMER, *supra* note 127, at 4, 7, 80, 236 (noting that female household heads were required to own guns in parts of colonial America). When the Royalists confiscated arms

the male focus of self-defense doctrine at criminal law,<sup>131</sup> women in the past successfully made self-defense—and even defense of honor—arguments when charged with fatally shooting their husbands or lovers.<sup>132</sup> These cases were decided under substantive criminal law, not provisions guaranteeing a constitutional right to bear arms for personal self-defense, such as the Supreme Court relatively recently has interpreted the Second Amendment to provide.<sup>133</sup> But the acquittal of women charged with domestic murders in the past tends to indicate that courts and juries believed female victims of gender violence could use a gun justifiably to protect themselves.

Even so, female access to guns, including for self-defense, must be placed in the larger context of other legal disabilities that constrained women's lives. Under the system of coverture, a wife's legal self was subsumed by that of her husband: She could not enter contracts, except as her husband's agent; hold any property that she did not inherit; or sue in her own name without her husband's concurrence and participation in the lawsuit.<sup>134</sup> Divorces were difficult to

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from colonial households, women complained, "What should they do if the Indians come upon them, being thus strip'd of men and Arms to defend them." *Id.* at 80. Cramer also quotes an account of frontier life in Indiana during the War of 1812: "Some of [the women] could handle the rifle with great skill, and bring down the game in the absence of their husbands . . ." *Id.* at 208 (quoting WILLIAM C. SMITH, INDIANA MISCELLANY 78 (Cincinnati, Poe & Hitchcock 1867)). A travel narrative Cramer consulted revealed that Ozark women in the 1810s used guns to hunt. *Id.* at 212 (citing HENRY ROE SCHOOLCRAFT, RUDE PURSUIITS AND RUGGED PEAKS: SCHOOLCRAFT'S OZARK JOURNAL, 1818–1819, at 55 (1996)).

<sup>131</sup> See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 114 (2000) ("With respect to battered women who kill, gender bias pervades the entire criminal process. It permeates perceptions of appropriate self-defense and the legal standard of self-defense, the broader problem of choice of defense, and the need for expert testimony on battering, all of which are interrelated.").

<sup>132</sup> See Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860–1930*, 86 IND. L.J. 185, 236–44, 249–55 (2011) [hereinafter Ramsey, *Domestic Violence and State Intervention*]. See generally Carolyn B. Ramsey, *A Diva Defends Herself: Gender and Domestic Violence in an Early Twentieth-Century Headline Trial*, 55 ST. LOUIS U. L. REV. 1347 (2011) (analyzing the 1910 trial of opera singer Mae Talbot, who was prosecuted and acquitted of fatally shooting her husband in Reno, Nevada).

<sup>133</sup> *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) ("[The Second Amendment] protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.").

<sup>134</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 430–32 (University of Chicago Press 1979) (explaining the law of coverture); Elizabeth Cady Stanton, *Mrs. Stanton's Address to the Legislature of the State of New York (1854)*, in 1 HISTORY OF WOMAN SUFFRAGE 1848–1861, at 598–99 (Elizabeth Cady Stanton et al. eds., reprint ed. 1985) (describing marriage in nineteenth-century America as "instant civil death" for the wife, due to her legal disabilities); see also HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 115 (2000) (explaining the meaning of coverture). Hartog argues that law and social conventions were manipulated to avoid "the plain meaning of the Blackstonian text," but he concedes that "to play on the legal field of domestic relations required litigants—and their lawyers—to accept

obtain, and nationwide female suffrage awaited the ratification of the Nineteenth Amendment in 1920.<sup>135</sup> These disabilities collectively made it difficult for women to escape abusive marriages or to have a voice in civic life.<sup>136</sup> Thus, invoking the Second Amendment and comparable state guarantees as a panacea for gender violence ignores long-standing structural inequalities that perpetuate women's victimization. The use by activists and gun manufacturers of terms like "choice" and "empowerment" to muster female support for expansive Second Amendment rights displays an "unwillingness to consider, let alone problematize or scrutinize, patriarchal power."<sup>137</sup>

The gun-rights movement has made efforts to accord women and minorities at least a token presence in Second Amendment advocacy. For example, the named plaintiffs in the *District of Columbia v. Heller* litigation initially included an elderly black woman, Shelly Parker, who battled to reclaim her Capitol Hill neighborhood from drug dealers and who wanted a gun for self-protection against their retaliatory violence; and a gay man, Tom Palmer, who used a firearm to defend himself against homophobic assailants.<sup>138</sup> Ultimately, all but Dick Heller, the white security guard who unsuccessfully applied to register one of his personal handguns in the District, were dismissed from the suit for lack of standing.<sup>139</sup> Besides these strategically chosen individuals, marginalized groups sometimes employ a self-defense narrative to promote gun ownership. For example, the nonpartisan organization, Pink Pistols, advocates concealed-carry,<sup>140</sup> claiming that "[a]rmed queers don't get bashed."<sup>141</sup> Similarly, a recent study analyzing the viewpoints of gun-carrying African-Americans, among

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that starting premise of coverture: that by marriage a wife became a feme covert, a woman whose political and legal identity was covered by her husband, who became responsible for her care." *Id.* at 121–22.

<sup>135</sup> See Stanton, *supra* note 134, at 595–96 (describing women's exclusion from voting rights in nineteenth-century America); see also HARTOG, *supra* note 134, at 63–64 ("Throughout the United States [in the eighteenth and nineteenth centuries], the law was dedicated to discouraging separations and divorces and to punishing those responsible.").

<sup>136</sup> See Ramsey, *Domestic Violence and State Intervention*, *supra* note 132, at 196 (stating that women could only vote in a few states prior to 1920); *id.* at 215–16 (describing the legal and social impediments to escaping a bad marriage).

<sup>137</sup> Mary D. Vavrus & August Leinbach, *Postfeminism at the Shooting Range: Vulnerability and Fire-Empowerment in the Gun Women Network*, in DANGEROUS DISCOURSES: FEMINISM, GUN VIOLENCE, & CIVIC LIFE 179, 184 (Catherine R. Squires ed., 2016).

<sup>138</sup> See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 43, 60, 91 (2011). The case was originally filed as *Shelly Parker v. District of Columbia*. See *id.* at 60. Otis McDonald, who raised a landmark constitutional challenge to a municipal gun law in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), was also black. See NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 295–96 (2014).

<sup>139</sup> See WINKLER, *supra* note 138, at 42, 91–92.

<sup>140</sup> See *About the Pink Pistols*, PINK PISTOLS, <http://www.pinkpistols.org/about-the-pink-pistols/> [<https://perma.cc/TE3S-U7JK>].

<sup>141</sup> *Id.*

others, in the rust belt describes how a group of black Detroit men “organized to ‘take back’ their communities from criminals while also contesting a police force they saw as simultaneously inadequate and abusive.”<sup>142</sup>

However, particularly with regard to race, the token inclusivity of pro-gun activism obscures a complicated relationship between the right to bear arms and minority communities torn by gun violence. Because the impact of gun control on vulnerable populations is a factor that proponents of rigorously enforced domestic violence firearms bans ought to consider, it is worth briefly exploring this fraught relationship. Laws prohibiting blacks and Indians from arming themselves, with certain exceptions for free householders, dated back to the early eighteenth century in some colonies.<sup>143</sup> After the American Revolution, a handful of state constitutions in the 1700s and 1800s expressly extended gun rights to white men only,<sup>144</sup> and the United States Supreme Court in *Dred Scott v. Sandford* infamously opined that it could not recognize the citizenship of blacks because doing so “would give to persons of the negro race . . . the right to . . . keep and carry arms wherever they went.”<sup>145</sup> Before the Civil War, Southern slave patrols seized guns and ammunition from free and enslaved blacks,<sup>146</sup> and even after the Civil War, state legislation barred African-Americans from buying or using guns or serving in state militias.<sup>147</sup> White posses, including the Ku Klux Klan, used murderous violence in an effort to enforce this race-based disarmament.

African-Americans have defiantly wielded firearms to resist white men’s public and private violence for much of American history<sup>148</sup>—from the seizure

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<sup>142</sup> CARLSON, *supra* note 7, at 122–23.

<sup>143</sup> See Verna L. Williams, *Guns, Sex, and Race: The Second Amendment Through a Feminist Lens*, 83 TENN. L. REV. 983, 995–99 (2016).

<sup>144</sup> See, e.g., ARK. CONST. of 1864, art. II, § 21 (“That the free white men of this State shall have a right to keep and to bear arms for their common defense.”). For similar constitutional provisions in other states, see FLA. CONST. of 1838, art. I, § 21; TENN. CONST. of 1834, art. I, § 26; and TENN. CONST. of 1796, art. XI, § 26. It is perhaps notable that state constitutions extending guns rights only to white men in the eighteenth and nineteenth centuries often tended to describe the purpose of arms-bearing as “the common defense,” whereas state constitutions that spoke more generally of “citizens” or “people” included other purposes, such as self-defense and protection of home and property. See, e.g., COLO. CONST. art. II, § 13 (“The right of no person to keep and bear arms in defense of his home, person, and property, or in aid of the civil power when thereto legally summoned, shall be called in question . . . .”); PA. CONST. art. I, § 21 (“The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”). For a compilation of state constitutional provisions from the Framing Era to the present, see generally Eugene Volokh, Reference Materials, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

<sup>145</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857).

<sup>146</sup> See WINKLER, *supra* note 138, at 133.

<sup>147</sup> See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 168–69 (2006).

<sup>148</sup> Ida Wells—a female African-American leader who defied lynching, segregated seating on trains, and other manifestations of the Jim Crow regime—famously said: “The

of the courthouse in Colfax, Louisiana, in 1873 by black militia men opposing a fraudulent election that involved the intimidation of black voters,<sup>149</sup> to the ideology of Huey Newton and Bobby Seale, who asserted, “[t]he gun is the only thing that will free us . . . .”<sup>150</sup> The conspicuous arms-bearing of the Black Panther Party for Self-Defense and other “black nationalist” groups in the 1960s provoked a backlash that led to the passage of the Gun Control Act of 1968 and its state law counterparts.<sup>151</sup> Citing such examples, writers of varied perspectives have implied that strict firearms laws constitute tools of white supremacy and social control.<sup>152</sup>

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Winchester rifle deserves a place of honor in every Black home.” JOHNSON, *supra* note 138, at 105–06. Yet, as this Article will briefly discuss, *infra* notes 153–64 and accompanying text, the relationship between firearms and black resistance to oppression and violent crime is more complex (and has involved more internal debate among African-Americans) than gun-rights advocacy tends to acknowledge.

<sup>149</sup>In 1873, the black militia from Grant Parish was burned out of the courthouse and killed by armed whites during the so-called “Colfax Massacre,” which led to a Supreme Court ruling that the federal government lacked authority to prosecute the white perpetrators. *United States v. Cruikshank*, 92 U.S. 542, 556–60 (1875).

For further discussion of the Colfax Massacre and the Supreme Court’s *Cruikshank* decision, see CORNELL, *supra* note 147, at 190–97. For a detailed discussion of white violence against black militias, including the Colfax Massacre, and the connection between firearms and racial oppression in the post-bellum South, see JOHNSON, *supra* note 138, at 100–03 (suggesting that, for blacks in the post-bellum South, armed resistance “doomed to failure might actually have been the best among the dreary options”); WINKLER, *supra* note 138, at 143–44; and Williams, *supra* note 143, at 1001–21 (analyzing events like the Hamburg Massacre of 1876, which was precipitated by a black militia’s Independence Day parade through the streets of a predominantly African-American town in South Carolina).

These narratives of conflict over blacks’ self-armament during the Reconstruction seek, at least indirectly, to substantiate differing views of twenty-first century judicial decisions about gun rights. For example, Williams argues:

[T]he hostilities sparked by Reconstruction illustrate that the right to keep and bear arms was integral to white hegemonic masculinity . . . . The Court’s historical narrative [in *Heller* and *McDonald*] turned a blind eye to this part of the [Second] Amendment’s story. In doing so, the Court protected white patriarchal norms, and as a consequence, reinforced longstanding racialized and gendered subordination connected to gun ownership and use, as illustrated by Stand Your Ground legislation.

Williams, *supra* note 143, at 1021. In contrast, Johnson embraces the black tradition of arms and sees potential in the Second Amendment to protect the individual choice to possess a gun for self-defense. See JOHNSON, *supra* note 138, at 29, 299–300, 303, 318.

<sup>150</sup>WINKLER, *supra* note 138, at 234.

<sup>151</sup>See *id.* at 230–53. Other black leaders, including H. Rap Brown of the Student Nonviolent Coordinating Committee (SNCC), urged blacks to arm themselves and be prepared to use violence. *Id.* at 250. Even Dr. Martin Luther King, Jr., renowned for his peaceful approach to achieving civil rights, unsuccessfully sought a concealed-carry permit in 1956 after his home was fire-bombed. *Id.* at 235.

<sup>152</sup>To cast doubt on gun-control measures, some proponents of strong Second Amendment rights describe the sordid history of racist firearms restrictions and whites’ use of violence to disarm and subordinate blacks. See, e.g., Clayton E. Cramer, *The Racist Roots*

Yet, the racist associations of gun control do not tell the whole story. Indeed, the gun-control issue has divided the black community *internally* in the twentieth and twenty-first centuries.<sup>153</sup> As African-Americans obtained greater sociopolitical influence, including positions in local government, some adopted a stringent gun-control stance.<sup>154</sup> For example, African-American leaders in the District of Columbia who passed the handgun law challenged in *Heller* argued that restricting guns was a necessary first step to end the plague of black-on-black shootings.<sup>155</sup> Black gun-rights proponents and crime victims, especially women, retorted that stripping D.C. residents of their handguns would put women at the mercy, not only of rapists and robbers, but also of their “nasty tempered husbands.”<sup>156</sup> According to James Forman, the turn to gun control by African-American leaders and ordinary blacks who felt victimized by intra-racial crime constituted “a civil rights triumph” because it arose from the sense

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*of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 23 (1995); Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 370 (1994). In a different vein, progressive law professor Maxine Burkett exhorts scholars and others to recognize and attend to “the race-based implications of the gun debate.” Maxine Burkett, *Much Ado About . . . Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. GENDER RACE & JUST. 57, 104–05 (2008). She argues that “[f]or the predominantly black District of Columbia . . . the choice to limit gun ownership, even with the understanding of gun control’s history of racial oppression, deserved significant judicial respect.” *Id.* at 104. However, a few black scholars support a strong, individual right to bear arms for self-defense. Nicholas Johnson argues, for example:

Empirically it is far from obvious that the Parker/McDonald class [i.e. law-abiding black citizens] is better off disarmed. So it seems fair to give them the option. But choice also resonates beyond cold empirical assessment. As a matter of long practice and policy, the black tradition of arms respected, indeed, exalted, the self-defense interest of individual black people.

JOHNSON, *supra* note 138, at 318.

<sup>153</sup> James Forman shows how the struggle for gun control in the District of Columbia divided black residents and black civic leaders in the 1970s. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 47–77 (2017). He also describes the support of black judges, municipal officials, police officers, and prosecutors for incarceration and mandatory minimum sentencing for firearms offenses. See *id.* at 3–6, 60–61, 114, 206–07. According to Forman, “many of these voices would propel, not constrain, an emerging tough-on-crime movement” that contributed to the mass incarceration of African-Americans. *Id.* at 115. Besides Forman’s nuanced discussion of conflict within the black community over gun control, other African-American academics cited in this Article espouse heterogeneous perspectives on America’s firearms conundrum. See *supra* notes 149, 152 (presenting the views of Verna Williams, Maxine Burkett, and Nicholas Johnson).

<sup>154</sup> See FORMAN, *supra* note 153, at 56 (describing black City Councilman John Wilson’s successful campaign for strict gun control in the District of Columbia).

<sup>155</sup> See *id.* at 63.

<sup>156</sup> *Id.* at 72.

that black-on-black street violence now posed a greater threat than white racist attacks.<sup>157</sup>

However, women of color’s need to defend themselves against intimate-partner violence complicates this picture. Black and Native American women historically were, and still are, vulnerable to being shot to death by their husbands or lovers. In the nineteenth century, spousal murder rates for blacks surpassed those for whites, as the experience of poverty and racial discrimination fueled marital tensions.<sup>158</sup> This trend continued between the World Wars.<sup>159</sup> The tendency of African-American women to use force in self-defense probably escalated marital violence and increased the intimate homicide rate for the black population.<sup>160</sup> Domestic homicide rates for Native Americans were also high in both the eighteenth and nineteenth centuries.<sup>161</sup> In more recent times, data from 2003 to 2012 showed higher nonfatal domestic violence rates for blacks than any other racial group.<sup>162</sup>

The NRA has never fully embraced women (or men) of color.<sup>163</sup> Despite the instrumentality to gun-rights advocates of the connection between gun control and race-based oppression, the implicit and explicit cultural association of African-Americans with criminality gives the NRA’s personal self-defense

<sup>157</sup> *Id.* at 72–73.

<sup>158</sup> See ROTH, *supra* note 107, at 271–72.

<sup>159</sup> See LANE, *supra* note 124, at 230, 233 (noting that blacks carried firearms for protection against whites, but those guns were “turned too often against family and friends”).

<sup>160</sup> See *id.* at 233; ROTH, *supra* note 107, at 272. See *supra* note 92 and accompanying text (discussing how homicide statistics often obscure whether the killing was done in self-defense); *infra* note 205 and accompanying text (addressing the same issue).

<sup>161</sup> See ROTH, *supra* note 107, at 108, 128, 276.

<sup>162</sup> TRUMAN & MORGAN, *supra* note 88, at 11 & tbl.11 (“In 2003–12, non-Hispanic blacks (4.7 per 1,000) and non-Hispanic persons of two or more races (16.5 per 1,000) had the highest rates of intimate partner violence compared, to non-Hispanic whites (3.9 per 1,000) . . .”). According to evidence from the FBI’s Supplementary Homicide Reports, the proportion of black females killed by an intimate is more comparable to that for white women. In 2008, the domestic murder of black females constituted 43% of all homicides of black women for which the victim-offender relationships was known. The intimate homicide of white women averaged 43% of killings of white women from 1980 to 2008. COOPER & SMITH, *supra* note 110, at 18.

<sup>163</sup> For example, the NRA sparked fury with its “near silence” about the fatal shooting of black motorist Philando Castile, who informed police officers during a traffic stop that he had a firearm (for which he had a valid permit) in his car. See Avi Selk, *Guns Owners Are Outraged by the Philando Castile Case. The NRA Is Silent.*, WASH. POST (June 21, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/06/18/some-gun-owners-are-disturbed-by-the-philando-castile-verdict-the-nra-is-silent/?utm\\_term=.80ffed9d0a2c](https://www.washingtonpost.com/news/post-nation/wp/2017/06/18/some-gun-owners-are-disturbed-by-the-philando-castile-verdict-the-nra-is-silent/?utm_term=.80ffed9d0a2c) [<https://perma.cc/8RK2-ZDA5>].

“We don’t want the NRA to be just for old white guys,” a member of the gun group wrote . . . on Hot Air—one of several right-leaning outlets upset with the organization’s failure to speak out on Castile. “[The NRA] needs to represent everyone who supports and defends the Second Amendment and stays on the right side of the law.”

platform a racially-loaded character. The NRA Women website and other pro-gun media outlets contain few, if any, profiles of blacks or other minority women among their “armed and fabulous” female gun owners.<sup>164</sup> In American society in general, racial stereotypes continue to stigmatize black females (and males) as blameworthy and prone to violence.<sup>165</sup>

This does not mean that gun control is the obvious answer to curb either violent street crime or domestic abuse. As Part IV.C will explain, gun-control measures passed in service of punishing and preventing intimate-partner homicide likely have a disproportionate impact on black and Hispanic communities. This effect would be exacerbated if broader laws and stricter enforcement became the norm. Unfortunately, neither racial minorities, nor women in general, nor women of color especially, can always count on the government for protection. Any safety the state offers seems to come at a cost to autonomy. Like other mandatory criminal justice approaches to domestic violence, gun control does not offer an easy, unproblematic solution. Before turning to the costs to abuse victims, families, and vulnerable communities that would accompany a more rigorous system of disarming domestic violence offenders, Part III will unpack some of the paradigms on which the gun-control position relies.

### III. THE PARADIGM OF THE BATTERER IN ARGUMENTS FOR DOMESTIC VIOLENCE GUN CONTROL

When Senator Frank Lautenberg proposed an amendment to the federal Gun Control Act to prohibit persons convicted of a misdemeanor crime of domestic violence from possessing a firearm, as well as the sale or transfer of a firearm to such persons,<sup>166</sup> he asserted that “the difference between a murdered wife and a battered wife is often the presence of a gun.”<sup>167</sup> Quantitative research tends to confirm that gun access is a significant risk factor for intimate-partner homicide.<sup>168</sup> But the image of the helpless battered woman, doomed to become a fatal shooting victim without government measures to keep firearms away from her abuser, comes with dangers and disadvantages, as well as presumably good intentions.

The internal critique of domestic violence law and policy within feminist scholarship is, by now, well-known.<sup>169</sup> Concern about the construction of a

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<sup>164</sup> See *supra* note 58 (describing the homogeneity of the female profiles on the NRA Women website); see also Vavrus & Leinbach, *supra* note 137, at 191–92, 203.

<sup>165</sup> See HILLARY POTTER, *BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE* 136 (2008) (“Black women are raised in the United States with the stereotype of being strong, angry, and more masculine than White women . . .”).

<sup>166</sup> The final version was codified as 18 U.S.C. § 922(d)(9) and § 922(g)(9).

<sup>167</sup> Lininger, *supra* note 19, at 178 (quoting Senator Lautenberg).

<sup>168</sup> See *supra* notes 90–91 and accompanying text.

<sup>169</sup> One of the leading critics of mandatory interventions, Leigh Goodmark, argues that “[m]andatory policies are disempowering because they deprive women who have been



paradigmatic battered woman—weak, passive, and traumatized to the point of incapacity to make rational decisions—constitutes a key component of this pushback against mandatory responses to intimate-partner abuse.<sup>170</sup> Gun prohibitions for domestic violence offenders add another dimension to the problem. If the batterer is arrested, prosecuted, and convicted of a domestic violence misdemeanor, federal law makes it a crime for him to possess a firearm, even if he needs one for his job, and regardless of whether the victim wanted that consequence to be imposed upon him.<sup>171</sup> Laws like the Lautenberg Amendment thus add a layer of complexity to the crime-control framing of intimate-partner abuse that developed in the late twentieth century.<sup>172</sup>

Indeed, broadly speaking, criminal weapons laws are a topic that “complicates and subverts” expectations about the positions of left and right in scholarship and advocacy.<sup>173</sup> Support for strong gun rights is a central feature of the Republican Party platform,<sup>174</sup> part of the appeal of newly-elected President Trump to some right-wing voters,<sup>175</sup> and a driving force in

battered of the ability to control their use of tools like arrest, prosecution, and mediation.” Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 41 (2009); *see id.* at 13–14 (criticizing hard no-drop prosecution policies for prioritizing “safety over all other aims, including fostering the agency of the woman who has been battered”). Goodmark and Aya Gruber both challenge aspects of second-wave feminism, especially the “dominance feminist theory” pioneered by Catharine MacKinnon, which they believe led domestic violence reformers to advocate punitive, mandatory laws and policies. *See id.* at 43–44; Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1371 (2013).

<sup>170</sup> *See* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 76 (2008); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 797 (2007); Gruber, *supra* note 169, at 1366–68, 1380; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 241 (2005); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 584 (1999).

<sup>171</sup> 18 U.S.C. § 925(a)(1) (2012) (stating that the government use exemption does not apply to § 922(g)(9)).

<sup>172</sup> Several scholars have expressed concern about the conservative, crime-control approach with which some feminists have allied. *See* Gruber, *supra* note 169, at 1330–31; Miccio, *supra* note 170, at 322. *See generally* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) (extending her “neofeminist” argument to rape law reform).

<sup>173</sup> *See* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2193 (2016) (calling attention to the racial dimension of criminal gun possession laws, which have harsh implications for blacks).

<sup>174</sup> *See id.* at 2191–92; *see also* FORMAN, *supra* note 153, at 51.

<sup>175</sup> During the election, President Trump presented himself as a gun-rights champion, and he received the NRA’s endorsement. *See* Reena Flores, *Where Donald Trump Stands on Gun Control*, CBS NEWS (Sept. 19, 2016), <http://www.cbsnews.com/news/where-donald-trump-stands-on-gun-control/> [https://perma.cc/5A75-EF8T]. The details of his position on gun laws are hard to identify, as he has changed his arguments several times. However, broadly speaking, he seems to favor strong Second Amendment rights, including national

congressional politics, where the NRA has the power to defeat gun legislation, even after the slaughter of twenty schoolchildren and six teachers in Newtown, Connecticut.<sup>176</sup> In contrast, “[s]upport for stringent gun control has become deeply embedded in the contemporary liberal/progressive worldview and enjoys an important place in the package of views generally shared by the U.S. Left.”<sup>177</sup> Some gun-rights advocates, notably Don Kates, claim that Second Amendment protection of an individual right to bear arms does not extend to criminals or other non-virtuous persons.<sup>178</sup> But gun-rights champions and feminist advocates for battered women make an uneasy alliance. From another angle, Ben Levin has argued that liberals and progressives ignore the impact of gun-possession laws on vulnerable, marginalized communities at peril to their commitment to racial equality.<sup>179</sup>

Such tensions make firearms prohibitions for domestic violence offenders a thorny issue. Perhaps for this reason, law professors and other experts writing about intimate-partner abuse have been wary of criticizing the Lautenberg Amendment, except to note problems arising from prosecutorial discretion, poor legislative drafting, and other failures of enforcement.<sup>180</sup> A real danger exists, however, that the politics of gun control will overwhelm and distort the search for a sound approach to intimate-partner violence.

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concealed-carry permits, for people he deems to be law-abiding gun owners, as well as policies designed to get law-breakers and the mentally ill off the streets and to prevent individuals on terror watch lists from buying firearms. *See id.*; Chris Sanchez, *This Is Where Donald Trump Stands on Gun Control*, BUS. INSIDER (Oct. 8, 2016), <http://www.businessinsider.com/this-is-where-donald-trump-stands-on-gun-control-2016-10> [<https://perma.cc/3BBZ-QSKL>]. Although aggressive use of stop-and-frisk procedures in high-crime areas (which Trump supports) likely would have a disproportionate impact on racial minorities, neither Trump nor gun-rights advocates, with the exception of groups like Black Guns Matter and the National African-American Gun Association, have commented on this issue. *See* Igor Bobic & Elise Foley, *Gun Rights Advocates Go Silent When Trump Wants to Frisk Black People*, HUFFPOST (Sept. 22, 2016), [http://www.huffingtonpost.com/entry/donald-trump-gun-rights\\_us\\_57e42e32e4b0e28b2b52e4f2](http://www.huffingtonpost.com/entry/donald-trump-gun-rights_us_57e42e32e4b0e28b2b52e4f2) [<https://perma.cc/VBY3-DCPT>].

<sup>176</sup> *See, e.g.*, Sarah Childress, *How the Gun Rights Lobby Won After Newtown*, FRONTLINE (Dec. 10, 2013), <http://www.pbs.org/wgbh/frontline/article/how-the-gun-rights-lobby-won-after-newtown/> [<https://perma.cc/J4W8-86WS>].

<sup>177</sup> Levin, *supra* note 173, at 2215–16.

<sup>178</sup> *See, e.g.*, Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1341, 1343, 1360 (2009).

<sup>179</sup> *See* Levin, *supra* note 173, at 2194 (arguing “people of color bear the brunt of enforcement” of weapons possession laws); *id.* at 2177–78, 2194, 2196–97, 2206, 2213 (contending the war on guns, like the war on drugs, contributes to mass incarceration, employs pretextual police procedures, and has detrimental social and economic impacts).

<sup>180</sup> *See* Gildengorin, *supra* note 21, at 810; Jolly, *supra* note 30, at 706; Lininger, *supra* note 19, at 175; *see also infra* Part III.B.2 (discussing the Supreme Court’s subsequent interpretation of the physical force requirement). *See generally* Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505 (2008) (highlighting ambiguity in the meaning of the physical force and domestic relationship requirements under § 922(g)(9), prior to the Supreme Court’s rulings on these issues).

Although this Article advocates reasonable gun control, it exposes the way gun-control arguments in the context of domestic violence employ problematic stereotypes and gendered images. Gun-control rhetoric creates a sense of urgency, even panic, despite the fact that fatal shootings, including domestic killings, have declined from a late twentieth-century peak.<sup>181</sup> The moral panic over guns arguably has led to the passage of laws that do little to protect abuse victims, or realize their preferences, yet have the potential to result in the incarceration of people who might never commit a fatal shooting, based solely on their possession of illegal weapons. Laws like § 922(g)(9) generate cultural backlash that inhibits their enforcement and results in retaliation against victims without clearly producing big reductions in intimate-partner gun violence.<sup>182</sup>

Furthermore, such laws assume a binary: a passive female victim who is always on the receiving end of force and a male offender who will inevitably use a firearm to kill her, if he isn't prevented from possessing guns. By entrenching traditional associations of women with nonviolence and victimhood, the current approach underestimates the extent to which women are convicted of domestic violence offenses and thus subjected to firearms prohibitions. Gun-control rhetoric renders women who use force invisible; the potential impact of gun restrictions on them is ignored.<sup>183</sup> Finally, the gun bans erroneously assume that all defendants convicted of domestic violence misdemeanors are heterosexual, white men, despite the more heterogeneous reality of those subject to mandatory arrest and no-drop prosecution policies.<sup>184</sup>

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<sup>181</sup> COOPER & SMITH, *supra* note 110, at 17 (“[T]he percentage of homicides committed by intimate partners that involved a gun declined from 69% of all intimate homicides in 1980 to 51% in 2008 . . . .”); ERICA L. SMITH & ALEXIA COOPER, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 243035, HOMICIDE TRENDS IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011, at 1 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/hus11.pdf> [<https://perma.cc/S9AH-NQHE>] (showing the rate of gun homicides in general decreased by half from 1992 to 2011); *see also* SHANNAN CATALANO, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 243300, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993–2011, at 1 (Nov. 2013), <https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf> [<https://perma.cc/S9B6-78GE>] (“From 1994 to 2011, the rate of serious intimate partner violence declined 72% for females and 64% for males.”). Even a recent FBI report, which shows an increase in violent crime in 2016 over rates in 2012 and 2015, actually documents a *decline* from the higher violent crime rates of the early 2000s and the 1990s. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2016: TABLE 1 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-1> [<https://perma.cc/GN55-YEVL>].

<sup>182</sup> *See infra* notes 218–19, 229, 519 and accompanying text; *see also infra* Parts III.B.1 and III.B.2.

<sup>183</sup> *See infra* Part III.A.1; *see also infra* notes 215–17 and accompanying text.

<sup>184</sup> Ramsey, *supra* note 9, at 358, 373–74 (discussing the dramatic increase in female arrests, including women in same-sex relationships, after the advent of mandatory arrest laws, despite the paradigm of the batterer as a white, heterosexual male); *see also* Gruber, *supra* note 169, at 797–98, 798 n.243 (suggesting black and Hispanic men are disproportionately incarcerated for domestic violence offenses, despite the common assumption that most batterers are white).

In fact, such laws can be used to target low-income and minority communities—a facet of the problem that should trouble anyone who cares about racial equity and the stabilization of poor, violence-torn neighborhoods.<sup>185</sup>

To summarize: Although existing prohibitions on gun possession by domestic abusers are grounded in a well-meaning concern to prevent intimate-partner homicide, they rely on multiple stereotypes that threaten to undermine their legitimacy and feasibility. In the subsections that follow, Part III explores how the paradigms of victim and offender prevalent in gun-control rhetoric shape firearms prohibitions related to domestic violence and undercut their effectiveness.

### A. *The Vulnerable, Unarmed Female Victim*

#### 1. *The Myth that Women Don't Fight Back*

Domestic violence gun laws rely on the paradigm of the passive female victim: a battered woman who neither risks arrest by fighting back, nor has priorities that conflict with the state's goal of confiscating her batterer's firearms. Feminist theorists have been reluctant either to confront or to embrace women's use of physical force.<sup>186</sup> Yet, in both the United States and England, arrests of female perpetrators of intimate-partner violence have increased.<sup>187</sup> Indeed, women may be disproportionately likely to be taken into police custody, despite the fact that men commit more acts of abuse, including physical violence, threats, harassment, and damage to their partner's property.<sup>188</sup> While women are the chief victims of intimate-partner violence,<sup>189</sup> they have the capacity to use force, and in one Gallup poll, almost a quarter of female survey participants reported possessing a gun.<sup>190</sup> Moreover, when women engage in physical resistance to battering,<sup>191</sup> they may retaliate or use preemption in ways that fail to satisfy self-defense doctrine.<sup>192</sup> Their aggressive acts may also arise from mixed motives and emotions. Female arrestees report using force “to make an intimate partner listen or refrain from leaving during an argument, to regain self-respect . . . as a strategy in child custody battles,” and even to express anger

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<sup>185</sup> See *infra* Part IV.C.

<sup>186</sup> See Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 27 YALE J.L. & FEMINISM 287, 293 (2016).

<sup>187</sup> See HESTER, *supra* note 103, at 10; Ramsey, *supra* note 9, at 374, 395.

<sup>188</sup> See HESTER, *supra* note 103, at 9.

<sup>189</sup> See *Intimate Partner Violence: Consequences*, *supra* note 109 (“Nearly 1 in 4 women (22.3%) and 1 in 7 men (14.0%) aged 18 and older in the United States have been the victim of severe physical violence by an intimate partner in their lifetime.”).

<sup>190</sup> See Saad, *supra* note 84.

<sup>191</sup> See POTTER, *supra* note 165, at 9–10, 115–37.

<sup>192</sup> See Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 949–54 (2016); Ramsey, *supra* note 9, at 397.

about physical or emotional traumas inflicted in the past by a completely different person.<sup>193</sup>

Advocates of toughening firearms prohibitions in the context of abuse and forcing prosecutors to charge batterers with qualifying predicate offenses often paint a sensational picture of a helpless woman slaughtered by her gun-toting husband, boyfriend, or former partner.<sup>194</sup> Federal gun laws and scholarship about them thus risk entrenching harmful stereotypes about innocent women's lack of skill and determination to use firearms in self-defense<sup>195</sup> and converse assumptions about monstrous females who shoot or otherwise fight their attackers.<sup>196</sup>

For example, when Congress made § 922(g)(9) applicable to public employees, including police officers, who need a gun for official government use, it seemed to assume that any employee stripped of his gun would be a batterer, not a victim (and probably a man, not a woman). But some police officers are abused by their partners, and they face a stark choice when they suffer domestic violence. One female officer, Suzanne Walton, who later conducted research on the effects of the federal gun ban, recalled her experiences when her husband hit her:

I encountered the greatest frustration when I sought advice from my mentors and supervisors in the police department. After explaining the situation, I would ask the question, "Could I have fought back?" Some of the answers I received demonstrated my supervisors' confusion: "I don't know." "It would be best if you didn't." I was advised, "Whatever he does, don't fight back or

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<sup>193</sup> Ramsey, *supra* note 9, at 403–04 (citing Lisa Young Larance, *Serving Women Who Use Force in Their Intimate Heterosexual Relationships: An Extended View*, 12 VIOLENCE AGAINST WOMEN 622, 628, 631 (2006)).

<sup>194</sup> See, e.g., Lininger, *supra* note 19, at 173–74 (describing Ronald Lee Haskell's fatal shooting of his ex-wife and her relatives after his abusive marriage to her ended in divorce); McNamara, *supra* note 30, at 649–50 (recounting the tragic story of Melissa Batten, whose estranged husband killed her with a weapon he purchased at a gun show after he relinquished his other guns pursuant to a temporary restraining order).

<sup>195</sup> See, e.g., *supra* note 94 and accompanying text (discussing a California study claiming that women who purchased guns put themselves at more risk of being killed by their abusive partners).

<sup>196</sup> Cultural stereotypes influence the evaluation of violent acts. See Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right To Bear Arms?*, 11 YALE L. & POL'Y REV. 509, 553 (1993). In one study, for example, "women who competently shot a burglar were blamed more than women who wielded the gun incompetently and made a lucky hit." *Id.* A leading scholar on domestic violence, Elizabeth Schneider, frames the failure of women's self-defense arguments as an equal rights problem and argues "[t]he equal-rights problem for battered women who kill has many sources: [including] widespread views of women who act violently, particularly against intimates, as 'monsters.'" SCHNEIDER, *supra* note 131, at 113.

you'll lose your gun." This shocked me. They essentially told me, a victim of domestic violence, that I could not defend myself or I would lose my job.<sup>197</sup>

Walton's study, which was based on self-reporting, showed a 25% rate of claimed victimization among police officers.<sup>198</sup> It also indicated that the federal gun ban was more likely to influence the behavior of *victimized* officers, who were afraid to act in self-defense, than of abusive officers.<sup>199</sup>

Negative reactions to the scenario of a police officer acting in self-defense when her husband hits her find parallels in prevalent attitudes toward civilian victims. For example, grant funding through VAWA and other sources has rarely extended to self-defense instruction, in part because physical resistance is still perceived as "highly threatening, for what it implies about women's autonomy and the prevalence and degree of violence in our society."<sup>200</sup> We lack sufficient data on how often women use weapons, and whether such uses occur in self-defense, to know how detrimental the impact of rigorously-enforced domestic violence gun bans on self-defending women might be. One study established that, although a group of shelter women (most of whom were racial minorities) rarely self-reported using guns against their intimate partners, about one-third had considered it.<sup>201</sup> Other researchers have actually found a higher likelihood that a woman will use a gun against a male partner than vice versa.<sup>202</sup>

Such conclusions are necessarily tentative. Studies of female-perpetrated violence based on police reports may be distorted by the possibility that "male victims [are] more reticent to involve law enforcement than females, but are more likely to call the police when their female perpetrator uses a weapon."<sup>203</sup> Abusers also manipulate mandatory arrest laws by summoning law enforcers as a strategy to harass and intimidate resisting victims.<sup>204</sup> Another complicating

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<sup>197</sup> Suzanne Walton & Mark Zelig, "Whatever He Does, Don't Fight Back or You'll Lose Your Gun": *Strategies Police Officer Victims Use to Cope with Spousal Abuse*, in DOMESTIC VIOLENCE BY POLICE OFFICERS 365, 366 (Donald C. Sheehan ed., 2000).

<sup>198</sup> *Id.* at 367.

<sup>199</sup> *See id.*

<sup>200</sup> Lisa R. Hasday, *What the Violence Against Women Act Forgot: A Call for Women's Self-Defense*, 13 YALE J.L. & FEMINISM 175, 178, 189 (2001).

<sup>201</sup> Sorenson & Wiebe, *supra* note 89, at 1415 (stating that the main reasons for thinking about gun use included self-defense (20.8%), to kill (18.2%), to threaten or intimidate (6.5%), and to injure but not kill the batterer (5.2%)). Another 18% kept guns to defend themselves against stranger intruders. *Id.*

<sup>202</sup> *See* Kernsmith & Craun, *supra* note 103, at 594; *see also* Cook, *supra* note 111, at 66, 71.

<sup>203</sup> *See* Kernsmith & Craun, *supra* note 103, at 594.

<sup>204</sup> *See* POTTER, *supra* note 165, at 131–32 (quoting an African-American woman's story about how her physically abusive boyfriend called the police when she responded to being hit and thrown into a rosebush by beating him with wooden-soled sandals); Ramsey, *supra* note 9, at 409 (noting that mandatory arrest, dual arrest, and primary aggressor policies often backfire in cases of lesbian partner violence). An abuser can also exploit a battered immigrant woman's fear of deportation to coerce and control her. *See* Mariela Olivares,

factor is that statistics on gun homicides often fail to break down the numbers in a way that reveals the sex of the perpetrator or whether the shooting occurred in self-defense.<sup>205</sup> Studies focused solely on gun homicide also fail to capture victims' nonfatal use of guns to deter a severe assault.<sup>206</sup>

In short, a stringent regime of domestic violence law enforcement, featuring stricter and broader gun bans, might have a punitive impact on women who resort to force, even to a minimal degree, as a means of self-help or who act aggressively for other sympathetic reasons. It would require such abuse survivors to relinquish their firearms and rely solely on government institutions (i.e. police, prosecutors, and courts) and non-profit service providers to protect and advocate for them. This is a strategy that some abused women, especially women of color, might want to avoid.<sup>207</sup> Although proponents of sweeping gun control for domestic violence offenders are perhaps willing to gamble that abused women will not lose their firearms and suffer other punitive consequences, discussions in this area would benefit from a candid acknowledgement that women, as well as men, use force, get served with restraining orders, and are convicted of qualifying misdemeanors. We shall delve deeper into this issue in Part II.B.

## 2. *The Role of Victim Preferences*

Many, but not all, abused women want the government to take away their partner's guns. For example, in a study of seventeen women who obtained temporary restraining orders for domestic abuse in a pilot program in San Mateo County, California, eleven cases involved an express request for gun confiscation or surrender. However, five of the women did not make this request, which they explained by reference to fear (two of the women),

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*Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 238 (2014).

<sup>205</sup> A couple of student researchers perceptively noted this deficiency in the 1990s. See Blodgett-Ford, *supra* note 196, at 534–38; Inge Anna Larish, Note, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 507 (1996). Justifiable homicides arguably continue to be undercounted today, whether the crime defended against is intimate-partner violence or some other kind of threat. See Cramer, *supra* note 92, at 507–08. A focus on justifiable homicide may also underestimate the defensive use of guns because such use can thwart crime without resulting in a homicide. See *id.* at 511–13.

<sup>206</sup> Blodgett-Ford, *supra* note 196, at 534–36. From a gun-rights perspective, Cramer suggests that a better measure of defensive gun use would be “crimes prevented,” rather than “dead criminals.” Cramer, *supra* note 92, at 512.

<sup>207</sup> Potter states, “[T]here has been an increase in arrests of women victims of intimate partner abuse, and, as demonstrated by the stories of the women in my study, stereotypical images (such as that of the ‘angry Black woman’) reinforce this practice.” POTTER, *supra* note 165, at 6; see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1041–50 (2000) (explaining how, “[f]or some poor women of color, the risks of arrest encouraging policies may outweigh the potential benefits”).

uncertainty about whether the abuser actually had a gun (one woman), and “wanting the restrained person to be able to keep his job as an armed security guard” (one woman); the fifth woman did not provide a reason for not wanting her partner’s guns removed.<sup>208</sup> Six women in the study chose not to seek a more permanent protection order.<sup>209</sup> Their reasons included reconciliation with their partner and “not wanting to further disrupt the restrained person’s life.”<sup>210</sup> About one-third of the petitioners seemed to desire only temporary state intervention, which suggests that permanent weapons removal was *not* one of their primary goals.<sup>211</sup> Furthermore, just a small minority (three) of the seventeen women reported being attacked or threatened with a gun in the six months preceding the issuance of the restraining order.<sup>212</sup>

The previous subsection emphasized that battered women sometimes respond to abuse with force, including the use of a firearm.<sup>213</sup> Qualitative studies indicate that female victims also believe that women *ought* to be able to possess guns to protect themselves in violent relationships and after separation, even if they personally would not want a gun in the house. For example, the study by Kelly Lynch and T.K. Logan discussed in Part II indicates that many battered women fear an abuser might turn a firearm against them or their children.<sup>214</sup> But Lynch and Logan’s results also reflect a strong belief on the part of the interview subjects in a constitutional right to bear arms or “a woman’s right to protect herself.”<sup>215</sup> Some participants affirmatively stated that women ought to learn how to use a firearm for self-defense and receive proper instruction on shooting and gun safety.<sup>216</sup> Several of the female interview subjects even complained that being barred from gun possession due to convictions or pending criminal charges hindered them from protecting themselves.<sup>217</sup>

Furthermore, while many participants in the Lynch and Logan study believed that guns in the hands of their abusers might result in murder, they also feared that government confiscation of firearms would lead to retaliatory violence. Both the victim’s own effort to remove guns from the home and a call

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<sup>208</sup> Katherine A. Vittes et al., *Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California*, 19 VIOLENCE AGAINST WOMEN 602, 609 (2013).

<sup>209</sup> *Id.* at 610–11.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 612.

<sup>212</sup> *See id.* at 608. The most common type of physical abuse the women experienced in the six months prior to obtaining a temporary order was not inflicted with a gun but, rather, involved pushing, shoving, and grabbing. *See id.*

<sup>213</sup> *See supra* Part III.A.1. Potter’s qualitative sociological findings based on interviews with forty battered black women indicated that black women often engage in physical resistance, *see* POTTER, *supra* note 165, at 115–37, or at least perceive themselves as the type of strong woman who would fight back. *See id.* at 27–55.

<sup>214</sup> *See supra* note 98 and accompanying text.

<sup>215</sup> Lynch & Logan, *supra* note 98, at 12.

<sup>216</sup> *See id.* at 13.

<sup>217</sup> *See id.* at 12.



to the police to get them confiscated posed the frightening scenario of lethal payback.<sup>218</sup> Some women also worried that they would face negative social consequences in communities in which many residents were gun collectors.<sup>219</sup> Thus, although the majority of the women in the study thought that male batterers should lose their gun rights,<sup>220</sup> several participants denied that the government was entitled to remove all firearms from the home over a female abuse victim's objection.<sup>221</sup> Indeed, several opined that gun removal should not be mandatory when a woman seeks a protection order.<sup>222</sup>

Finally, Lynch and Logan's study of restraining order cases fails to capture an additional set of concerns—those raised by § 922(g)(9). First, unlike a civil restraining order, for which an abuse victim applies, a misdemeanor conviction or a guilty plea to a qualifying predicate offense automatically triggers a long-term federal gun prohibition, regardless of whether the victim desired it. For example, in *United States v. Carter*,<sup>223</sup> the defendant had been convicted under Maine's general assault statute for shoving and spitting at his live-in girlfriend, even though his girlfriend "said that she was not hurt, did not want Carter arrested, and did not want to press charges; she only wanted him removed from the house."<sup>224</sup> Carter was subsequently charged with a § 922(g)(9) offense when he tried to buy back a pawned rifle.<sup>225</sup> After entering a conditional guilty plea, he was sentenced to one year and one day in prison—a relatively lenient punishment that resulted from the judge's departure below the bottom of the guidelines range.<sup>226</sup> In short, even though Carter's prison term was short, neither

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<sup>218</sup> See *id.* at 15 (reporting some interviewees' fear that government confiscation of the gun might "make an abuser much angrier and put a woman's life in danger"). Study participants also tended to believe that any action the abuse victim took to hide her abuser's firearms and bullets herself would likely result in physical harm or even death. See *id.* at 11 ("[T]hey're going to come back and say, 'where's my gun?', and beat the crap out of you because you got rid of the gun."). Several women in the study commented on the possible futility of mandated gun restrictions in protection orders. For example, one interviewee said, "I think these men that never honored a DVO or EPO, why would they honor the gun part?" *Id.* at 15. Another argued more forcefully that trying to confiscate the abuser's guns under a protection order "would be the time he would kill her." *Id.*

<sup>219</sup> See *id.* at 16.

<sup>220</sup> See *id.* at 14.

<sup>221</sup> Lynch & Logan, *supra* note 98, at 15–16.

<sup>222</sup> See *id.*

<sup>223</sup> *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014), *rev'd*, 860 F.3d 39 (1st Cir. 2017) (holding that conviction was proper but remanding for reconsideration of sentencing issue).

<sup>224</sup> *Id.* at 10–11.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 11–12. Nevertheless, the case went "around the barn and back" while the Supreme Court decided *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Voisine v. United States*, 136 S. Ct. 2272 (2016). *Carter*, 860 F.3d at 42–43. Carter continued to challenge his sentence even after he had served his prison term on the grounds that he should have qualified for "a substantially lower guidelines sentencing range based on . . . the "sporting purposes or collection" exception." *Id.* at 43.

his sentence nor his prior assault conviction was a result that his girlfriend sought.

A second key difference between a gun disability arising from a DVRO and the potentially perpetual ban for domestic violence misdemeanants under federal law is that the latter contains no exemption for guns required for government jobs, such as police and military.<sup>227</sup> The misdemeanor gun prohibition might have a serious financial impact on affected families, as we shall see.<sup>228</sup> Knowing that her partner could be stripped of the gun he needs for his job, the abused spouse or girlfriend of a police officer often decides not to call the police;<sup>229</sup> at the very least, it is a consequence she *should* consider, since unemployment and poverty both constitute risk factors for domestic violence.<sup>230</sup>

## B. *Gun Possession and the Stereotype of the Inevitably Homicidal, Male Abuser*

In addition to stereotyping and infantilizing abuse victims, the extant firearms restrictions pigeonhole domestic violence offenders and obfuscate the complex relationship between gun access and intimate-partner violence. The federal courts' uncritical adoption of the paradigm of the inevitably homicidal male abuser and his helpless victim has affirmed ineffective laws that ought to be reformed. Several areas of concern are the scope of the prohibitions and their potential to reduce the risk of harm. Federal court holdings arguably stem from stereotypes about who poses a risk of lethal domestic gun violence; whether the exclusion of people in this category from gun rights can be analogized to bans with historical roots; and how long excluded persons should be barred from possessing and purchasing firearms.

### 1. *The Batterer Paradigm in Constitutional Analysis*

All of the federal circuits that have heard Second Amendment challenges to § 922(g)(8) and § 922(g)(9) have upheld these federal gun prohibitions. A few federal circuit courts have concluded, with little or no reliance on history or

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<sup>227</sup> See 18 U.S.C. § 925(a)(1) (2012) (stating that the government use exemption does not apply to § 922(g)(9)).

<sup>228</sup> See *infra* Part IV.B.2.

<sup>229</sup> See Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1204 (2015). Goodmark calls § 922(g)(9) "a powerful disincentive to report abuse." *Id.* at 1204; see also *infra* Part IV.B.2.

<sup>230</sup> See Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 686 (1992) (finding that arrest correlated to a 53.5% increase in recidivist violence among unmarried and unemployed batterers, in contrast to a reduction in repeat offending by married and employed batterers); see also SAMPSON, *supra* note 35, at 14 (noting that being low-income and a resident of rental housing are factors associated with high rates of domestic violence victimization); *infra* Part IV.B.2 (discussing employment-related impacts of domestic violence gun laws).

social scientific evidence, that § 922(g)(9) fits under *Heller*'s non-exhaustive list of presumptively lawful, "longstanding prohibitions on the possession of firearms" by certain categories of irresponsible individuals, including felons.<sup>231</sup> They simply employed the logic that the Lautenberg Amendment sought to close a loophole created by widespread reluctance to charge batterers with felonies.<sup>232</sup> Hence, those who commit misdemeanor crimes of domestic violence can be analogized to felons for the purposes of Second Amendment analysis.

In contrast, most federal circuit courts to address the constitutionality of § 922(g)(9) have applied intermediate scrutiny,<sup>233</sup> using a two-step inquiry.<sup>234</sup> First, the court asks whether the restriction implicates the Second Amendment right to keep and bear arms for self-defense.<sup>235</sup> Because the gun laws at issue burden Second Amendment rights, the court next evaluates the restriction under some form of means-ends review.<sup>236</sup> Domestic violence misdemeanants are not "law-abiding, responsible citizens," so their claims are not within the core of Second Amendment protection; hence, courts have applied intermediate (rather than strict) scrutiny.<sup>237</sup> Section 922(g)(9) imposes a "substantial" burden on the right to bear arms, although courts have been skeptical that it really is a total "lifetime ban."<sup>238</sup> However, analyzing this law under the middle tier of scrutiny, federal appellate courts have concluded that reducing domestic gun violence constitutes an important governmental objective to which the firearms disability bears a substantial relation.<sup>239</sup>

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<sup>231</sup> See, e.g., *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009); see also *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . .").

<sup>232</sup> See, e.g., *White*, 593 F.3d at 1205 (quoting *United States v. Hayes*, 555 U.S. 415, 426 (2009)); see also 142 CONG. REC. 22,985 (1996) (statement of Sen. Lautenberg).

<sup>233</sup> See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); see also *United States v. Carter*, 752 F.3d 8, 13 (1st Cir. 2014); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Donovan*, 410 F. App'x 979, 981 (7th Cir. 2011).

<sup>234</sup> See *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016) (stating the majority of circuits use a two-step inquiry in Second Amendment cases).

<sup>235</sup> *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013) (citing *United States v. Chester (Chester II)*, 628 F.3d 673, 681–82 (4th Cir. 2010)).

<sup>236</sup> *Chovan*, 736 F.3d at 1136–37; *Chester II*, 628 F.3d at 680.

<sup>237</sup> *Chester II*, 628 F.3d at 683; see also *Chovan*, 735 F.3d at 1137–38 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). The Supreme Court did not specify the appropriate tier of scrutiny in *Heller* but indicated that rational basis was not the appropriate standard. See *Heller*, 554 U.S. at 628 n.27. Multiple circuits, including the Ninth Circuit in *Chovan*, have held that § 922(g)(9) does not violate the Second Amendment, applying intermediate scrutiny. See *Chovan*, 735 F.3d at 1136 (following the First, Fourth, and Seventh circuits).

<sup>238</sup> See *infra* Part IV.B.3 (discussing whether § 922(g)(9) should be considered a permanent ban).

<sup>239</sup> See *Chovan*, 735 F.3d at 1139; *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

Decisions that uphold the constitutionality of the DVRO gun prohibition, § 922(g)(8), have taken a similar approach.<sup>240</sup> Despite asserting that the Second Amendment guarantees an individual right to bear arms, the Fifth Circuit, in its pre-*Heller* decision *United States v. Emerson*,<sup>241</sup> held that Emerson fell into a class of irresponsible people, including felons and the mentally ill, who could be barred from possessing guns, because he “posed a credible threat to the physical safety of his wife.”<sup>242</sup> According to the Fifth Circuit, “[t]he nexus between firearm possession by [Emerson] and the threat of lawless violence, is sufficient, though likely barely so, to support the deprivation, while the order remains in effect, of the enjoined party’s Second Amendment right to keep and bear arms.”<sup>243</sup>

Significantly, many federal circuit courts have relied on a particular paradigm of the domestic violence offender to find a substantial relation between § 922(g)(8) and § 922(g)(9) and the objective of preventing “armed mayhem.”<sup>244</sup> For example, after analogizing domestic violence misdemeanants to felons, the Seventh Circuit stated in *United States v. Skoien* that “firearms are deadly in domestic strife,” and “persons convicted of domestic violence are likely to offend again.”<sup>245</sup> The court thus linked a couple of disparate sets of statistics (the lethality of guns and the likelihood of domestic violence recidivism) to depict all domestic violence misdemeanants as men with a high likelihood of committing a fatal shooting.<sup>246</sup> Several other circuits have relied on *Skoien* and the types of data that the government and the *Skoien* court cited.<sup>247</sup> If one accepts that intermediate scrutiny is the correct tier of review, such social scientific evidence is probably enough to show a substantial relation between both § 922(g)(8) and § 922(g)(9) and the objective of preventing fatal shootings in intimate and family relationships.

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<sup>240</sup> Compare *United States v. Chapman*, 666 F.3d 220, 225–26, 231 (4th Cir. 2012) (using a two-part test and intermediate scrutiny to uphold § 922(g)(8) against an as-applied Second Amendment challenge), and *United States v. Reese*, 627 F.3d 792, 800–05 (10th Cir. 2010) (holding that, as applied to Reese, § 922(g)(8) passed constitutional muster under intermediate scrutiny using a two-step analysis), *rev’d*, 559 F. App’x 777 (10th Cir. 2014) (overturning Reese’s conviction on other grounds), with *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (analogizing § 922(g)(8) to gun-control regulations that the *Heller* Court found presumptively lawful and finding § 922(g)(8) consistent with “a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible”).

<sup>241</sup> *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001).

<sup>242</sup> *See id.* at 226 n.21, 260–61, 264.

<sup>243</sup> *Id.* at 264.

<sup>244</sup> *Skoien*, 614 F.3d at 642; *see also Chapman*, 666 F.3d at 228–31.

<sup>245</sup> *Skoien*, 614 F.3d at 643.

<sup>246</sup> *See id.* at 643–44.

<sup>247</sup> *See, e.g., United States v. Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154, 163–68 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011); *United States v. Reese*, 627 F.3d 792, 801–04 (10th Cir. 2010), *rev’d*, 559 F. App’x 777 (11th Cir. 2014) (overturned on other grounds); *see also Chapman*, 666 F.3d at 228–31 (upholding § 922(g)(8) on the basis of similar social-scientific data).

But in their eagerness to secure the constitutionality of these gun prohibitions, lawyers and domestic violence experts have swept from view the cases that do not fit the paradigm. And by adopting the binary of the homicidal male offender and the passive victim at the level of constitutional jurisprudence, courts have given their imprimatur to that erasure. Indeed, the majority opinion in *Skoien* also employed the stereotype of the helpless, beaten woman to underscore the need for state intervention to prohibit batterers from possessing guns. At one point in its analysis, for example, the Seventh Circuit stated that abused women are often “willing to forgive the aggressors” or are “so terrified that they doubt the ability of the police to protect their safety.”<sup>248</sup> The reluctance of victims to cooperate with police and prosecutors means that “many aggressors end up with no conviction, or a misdemeanor conviction, when similar violence against a stranger would produce a felony conviction.”<sup>249</sup> Hence, courts and police have authority to take the abuser’s guns, even if the woman, who has lost any agency of her own, tries to object.

Historical support for the exclusion of domestic violence offenders from Second Amendment protection appears rather thin. Though spousal violence was illegal in Puritan New England and nineteenth-century America, typical colonial punishments included whipping and the stocks; wife beaters in the 1800s and early 1900s often served short jail terms, paid substantial fines, or both.<sup>250</sup> Judges in this time period were more likely to confiscate a wife beater’s liquor than his guns.<sup>251</sup> However, circuit courts have reasoned by analogy to the dicta in *Heller* about the “longstanding” exclusion of felons from Second Amendment protection—a development that seems to date from the early- to mid-twentieth century, not from the eighteenth or even the nineteenth.<sup>252</sup> In short, neither the *Heller* majority nor federal appellate judges subsequently

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<sup>248</sup> *Skoien*, 614 F.3d at 643.

<sup>249</sup> *Id.*

<sup>250</sup> See Ramsey, *Domestic Violence and State Intervention*, *supra* note 132, at 199–204, 206–08, 216–20; Ramsey, *supra* note 9, at 346–47.

<sup>251</sup> See Ramsey, *supra* note 9, at 352–53.

<sup>252</sup> According to one researcher who has traced this history:

The federal “felon” disability . . . is less than fifty years old. A disability from all such persons’ receiving any firearm in interstate commerce dates to a 1961 amendment of the Federal Firearms Act of 1938 (“FFA”). Congress in 1968, using the same standard, banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce.

C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698 (2009). The original FFA of the 1930s (supported by NRA President Karl T. Frederick) only covered offenders who had been convicted of a crime of violence, defined as “murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, and certain forms of aggravated assault.” *Id.* at 699, 707. Derived from the Uniform Firearms Act, which eleven jurisdictions adopted in 1930, the FFA applied to all types of firearms and sought to “eliminate the gun from the crooks’ hands, while interfering as little as possible with the law-abiding citizen.” *Id.* at 699; see also *id.* at 700, 705. The rise in violent crime during Prohibition probably spurred this development. See *id.* at 701.

upholding § 922(g)(8) and § 922(g)(9) have insisted on much historical evidence to support carving out certain categories of individuals for exclusion from core Second Amendment protection. Instead, circuit courts have focused on the danger of harm that gun possession by batterers creates.<sup>253</sup> Some sympathetic defendants whose past offenses suggest little risk of future lethality and/or who have remained nonviolent for many years after committing a domestic violence misdemeanor might have grounds for as-applied challenges. Yet such claims have not gained traction.<sup>254</sup>

Although multiple circuits have upheld the constitutionality of § 922(g)(9), the scope and potential duration of the ban it imposes should raise concerns about its soundness as a matter of domestic violence law and policy. Courts and commentators have not given adequate consideration to the costs that zealous enforcement of this prohibition might have on defendants, abuse victims and their families, and vulnerable, minority communities. In questioning the highly punitive approach to § 922(g)(9) and complementary state laws that other scholars recommend,<sup>255</sup> I stop short of arguing that these gun bans violate the Second Amendment. I favor reforming, not abolishing, firearms restrictions for domestic abusers. Yet, unfortunately, circuit courts upholding § 922(g)(8) and § 922(g)(9) have used reasoning that further cements victim/offender stereotypes, which reduce the positive impact of the gun laws and exacerbate backlash.

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<sup>253</sup> See Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1487–98 (2009) (discussing the “scope” and “danger reduction” justifications that legislatures and appellate courts use to deny or burden the Second Amendment rights of untrustworthy people).

<sup>254</sup> See *United States v. Chovan*, 735 F.3d 1127, 1141–42 (9th Cir. 2013) (denying appellant’s “as applied” challenge to § 922(g)(9) when his qualifying misdemeanor occurred fifteen years before and he had no subsequent domestic violence convictions); *United States v. Tooley*, 717 F. Supp. 2d 580, 581–83, 597–98 (S.D.W. Va. 2010) (denying an “as applied” challenge to § 922(g)(9) by a male defendant with three prior domestic violence convictions, none involving the use of a firearm, who tried to become the registered owner of a shotgun that his girlfriend had given him for Christmas), *aff’d*, 468 F. App’x 357, 359 (4th Cir. 2012). The Ninth Circuit also recently upheld a California state law that imposed a ten-year gun ban on domestic violence misdemeanants against facial and “as applied” Second Amendment challenges by a private security guard. See *Fortson v. L.A. City Attorney’s Office*, 852 F.3d 1190, 1191–92, 1194 (9th Cir. 2017). In *Fortson*’s case, a sentencing judge had modified his sentence to allow him to keep firearms for use at work. *Id.* at 1192. The challenged seizure of firearms and ammunition instead occurred at his home. *Id.* at 1192–93. *Cf.* *United States v. Chapman*, 666 F.3d 220, 223 (4th Cir. 2012) (rejecting an “as applied” challenge to § 922(g)(8) by an appellant who possessed six firearms and threatened to kill himself in his ex-wife’s presence while he was subject to a DVRO).

<sup>255</sup> See *supra* notes 29–30 and accompanying text (summarizing other scholars’ criticisms of the laxity of domestic violence gun laws and their enforcement).

## 2. The Batterer Paradigm and the Scope of Gun Prohibitions

The Supreme Court recently adopted a broad interpretation of “misdemeanor crime of domestic violence,” the predicate offense that triggers § 922(g)(9).<sup>256</sup> In doing so, it also relied on the model of coercive control developed by scholars and other well-meaning opponents of violence against women. For example, in *United States v. Castleman*, the Court adopted the common-law definition of force—“offensive touching”—as the meaning incorporated in § 921(a)(33)(A)’s definition of a “misdemeanor crime of domestic violence.”<sup>257</sup> The *Castleman* opinion is notable for the extent to which it accepts the paradigm of the inevitably homicidal, gun-carrying male abuser. Writing for the majority, Justice Sotomayor asserted that there are “hundreds of deaths from domestic violence each year” and that “[d]omestic violence often escalates in severity over time.”<sup>258</sup> The majority also cited familiar statistics about how “the presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide.”<sup>259</sup> The Court then turned to the patterned nature of abuse as grounds for declining to require a violent offense to trigger the § 922(g)(9) gun prohibition. Rejecting *Castleman*’s claim that “force” must include violence, the majority argued, “‘Domestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.”<sup>260</sup> Because intimate-partner abuse is comprised of a pattern of coercive behavior, “the accumulation of such acts over time can subject one intimate partner to the other’s control.”<sup>261</sup>

The following year, in *Voisine v. United States*, the Court interpreted the phrase “misdemeanor crime of domestic violence” for the purposes of § 922(g)(9) to include reckless, as well as intentional or knowing, assaults.<sup>262</sup> Because “the word ‘use’ does not demand that the person applying the force have the purpose or practical certainty that it will cause harm,”<sup>263</sup> someone who throws a plate at a wall, causing injury to his or her partner, or slams a door, inadvertently spraining his or her partner’s finger, has committed a qualifying predicate offense.<sup>264</sup> This activates the potentially perpetual federal gun

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<sup>256</sup> See *Voisine v. United States*, 136 S. Ct. 2272, 2280, 2282 (2016); *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014).

<sup>257</sup> *Castleman*, 134 S. Ct. at 1410.

<sup>258</sup> *Id.* at 1408.

<sup>259</sup> *Id.* at 1408–09 (citing Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT’L INST. JUST. J., Nov. 2003, at 14, 16 (“When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed.”)).

<sup>260</sup> *Id.* at 1411 (citing *Domestic Violence*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence> [<https://perma.cc/EQD2-VBBX>] (defining physical forms of domestic violence to include relatively minor acts like “[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling”)).

<sup>261</sup> *Id.* at 1412.

<sup>262</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2280, 2282 (2016).

<sup>263</sup> See *id.* at 2279.

<sup>264</sup> See *id.*

disability. My use of the awkward phrase “his or her” is quite deliberate: such a conviction could just as easily be obtained against a woman as a man.

Justice Scalia went too far in his *Castleman* concurrence when he argued that extending the definition of “misdemeanor crime of domestic violence” to encompass virtually any harm inflicted upon a woman by her intimate partner would render the phrase meaningless and absurd. “When everything is domestic violence,” he wrote, “nothing is.”<sup>265</sup> But Scalia’s overstatement contains an important kernel of caution against the overbroad imposition of punitive consequences on persons convicted of minor offenses associated with domestic abuse. Much good scholarship describes the role of less severe violence (as well as psychological, economic, and other forms of coercion) in a pattern that may eventually result in murder.<sup>266</sup> Journalistic reports also hint at possible links between intimate terrorism, misogynistic or homophobic gender violence, and the mass shooting of strangers.<sup>267</sup> For example, Omar Mateen allegedly engaged in a pattern of financial control, isolation, and severe beating of his wife before

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<sup>265</sup> *Castleman*, 134 S. Ct. at 1420–21 (Scalia, J., concurring).

<sup>266</sup> See, e.g., Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/ Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 93–94 (1992) (“[T]he majority of men who kill their wives have a documented history of violent assaults . . . [M]en who kill and men who batter have remarkably similar personality traits and similar motivations.”); Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 356 (2008) (“We now have a far more extensive understanding of forms of abuse that go beyond physical abuse. The core concept is the exercise of power and control, for domestic violence involves a wide range of behaviors including physical abuse, verbal abuse, threats, stalking, sexual abuse, coercion, and economic control.”); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 961 (2004) (“Domestic violence is generally understood—outside the criminal law—as patterned in nature and largely defined by non-physical manifestations of domination.”).

<sup>267</sup> See, e.g., Nancy Leong, *What Do Many Mass Shooters Have in Common? A History of Domestic Violence*, WASH. POST (June 15, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence/?utm\\_term=.ee2e5d223fad](https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence/?utm_term=.ee2e5d223fad) [<https://perma.cc/5YMQ-R925>]; Jane Mayer, *The Link Between Domestic Violence and Mass Shootings*, NEW YORKER (June 16, 2017), <https://www.newyorker.com/news/news-desk/the-link-between-domestic-violence-and-mass-shootings-james-hodgkinson-steve-scalise> [<https://perma.cc/RT6P-4EX3>]; Amanda Taub, *Control and Fear: What Mass Killings and Domestic Violence Have in Common*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/2016/06/16/world/americas/control-and-fear-what-mass-killings-and-domestic-violence-have-in-common.html> [<https://perma.cc/E4K5-KT8A>]. Most sources that make the connection between domestic violence and mass shootings are journalistic. Charlotte Alter, *Why So Many Mass Shooters Have Domestic Violence in Their Past*, TIME (June 14, 2017), <http://time.com/4818506/james-hodgkinson-virginia-shooting-steve-scalise/> [<https://perma.cc/E44N-R5ZJ>] (quoting Susan B. Sorenson, an expert from the University of Pennsylvania who studies firearms and domestic violence, for the caution that no published academic research has established a firm link between domestic violence and mass shootings). News reports indicate that relatively few mass shootings involve domestic abusers as perpetrators, but that when they do, the incident tends to be more lethal. See Beckett, *supra* note 81.



he massacred forty-nine people at a gay nightclub in Orlando, Florida.<sup>268</sup> However, recent research indicates that there are other types of intimate-partner conflict, besides intimate terrorism, as well as various categories of abusers, some of whom might never employ lethal force against their intimate partner or any law-abiding person. The different models are not mutually exclusive.<sup>269</sup>

Indeed, the one-size-fits-all paradigm of the “batterer” employed by advocates of mandatory criminal justice responses to domestic violence is now being questioned. The iconic narrative of inevitably escalating abuse inflicted by an omnipotent, controlling man simply fails to describe all situations that are prosecuted as domestic violence.<sup>270</sup> A critical problem that gave rise to the Lautenberg Amendment was the tendency of many state codes to lump plate-throwing and door-slamming with potentially lethal acts like strangulation, under the rubric of misdemeanor offenses.<sup>271</sup> Such classifications recently have begun to change. For instance, Arizona reclassified strangulation as an aggravated assault felony in 2010, and other states have followed suit.<sup>272</sup> Although the reclassification process is slow, in the long run it is preferable to slapping all domestic violence misdemeanants with potentially permanent gun prohibitions and imprisonment for violating them, in cases where that offender might never use a gun to threaten, let alone kill, his or her partner.

#### a. *Over-Inclusiveness: Misdemeanants Who Are Unlikely to Kill*

Let us now consider the potential for firearms laws to apply punitively to individuals who are unlikely to become homicidal shooters.<sup>273</sup> Courts largely

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<sup>268</sup> See Taub, *supra* note 267.

<sup>269</sup> For an example of a social-scientific study positing more than one type of domestic violence, see MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 3 (2008).

<sup>270</sup> See Ramsey, *supra* note 9, at 381, 387–414 (arguing that perpetrators of intimate-partner violence are not invariably controlling, heterosexual men; they can be heterosexual women, gay men, lesbians, and heterosexual males who neither fit a single psychological profile nor enjoy power in socioeconomic or racial hierarchies).

<sup>271</sup> The Lautenberg Amendment sought “to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns.” *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016). According to the *Voisine* Court, “[b]ecause fully two-thirds of . . . state [assault and battery] laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision’s design.” *Id.* at 2278. The Court refused, for this reason, to distinguish reckless acts, such as plate-throwing and door-slamming, that cause injury from intentionally or knowingly harmful conduct, like strangulation. *See id.* at 2278–80. For further critical discussion of the *Voisine* case and its potential impact, see *supra* notes 262–64 and *infra* notes 282–88 and accompanying text. *Cf. infra* notes 475–76 (noting that *Voisine* does not prevent plea deals in which the defendant pleads guilty to a charge, such as disorderly conduct, that does not include a “force” element).

<sup>272</sup> Jamie Balson, *Using Danger Assessment in the Prosecution of Domestic Violence Cases*, 9 FAM. & INTIMATE PARTNER VIOLENCE Q. 33, 38 (2016).

<sup>273</sup> See *supra* note 269 and *infra* notes 276, 279–311 and accompanying text.

have dismissed concerns about the over- and under-inclusiveness of the domestic-violence gun prohibitions; indeed, “no [federal] circuit has accepted an over-breadth challenge in the Second Amendment context.”<sup>274</sup> Admittedly, the defendants in many of the leading § 922(g)(9) cases were hardly paragons of virtue. They looked more like the violent law-breakers that some gun-rights advocates readily agree should be excluded from the Second Amendment protections.<sup>275</sup> Yet, others subject to § 922(g)(9) never used a firearm against an intimate partner.<sup>276</sup>

From a theoretical and practical perspective, rather than a constitutional one,<sup>277</sup> § 922(g)(9) reaches too far. If calls for more vigorous enforcement of this statute were followed, domestic violence misdemeanants who committed relatively trivial conduct would lose their guns, despite their generally law-abiding, nonaggressive lifestyles. Some would have to surrender firearms or face federal charges, even if the misdemeanor of which they were convicted constituted an act of resistance against a partner who clearly should have been deemed the primary aggressor, and even if their employment required carrying a gun.

One does not need to embrace largely discredited theories of gender parity in domestic violence perpetration<sup>278</sup> or deny the prevalence of coercive, controlling abuse to be concerned that batterer stereotypes have led to unsound

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<sup>274</sup> *United States v. Chester*, 514 F. App'x 393, 395 (4th Cir. 2013).

<sup>275</sup> *See Kates & Cramer, supra* note 178, at 1341, 1343, 1360. For example, even though Christopher Meade had a previous domestic assault conviction and was subject to a restraining order, he banged on his estranged wife's door, threatening to shoot her, and then reached for a loaded handgun when police confronted him. *United States v. Meade*, 175 F.3d 215, 217–18 (1st Cir. 1999). Meade was also convicted of violating § 922(g)(9). *Id.* In another case, Michael Wyman threatened his estranged partner and her companions with a shotgun by firing into some trees, six years after he was barred from possessing a gun for assaulting the same woman. *See United States v. Booker*, 644 F.3d 12, 15 (1st Cir. 2011).

<sup>276</sup> *See, e.g., United States v. Tooley*, 717 F. Supp. 2d 580, 581–83, 597–98 (S.D.W. Va. 2010) (denying a Second Amendment challenge to § 922(g)(9) by a male defendant with three prior domestic violence convictions, none involving use of a firearm, who tried to become the registered owner of a shotgun that his girlfriend had given him for Christmas), *aff'd*, 468 F. App'x 357, 359 (4th Cir. 2012).

<sup>277</sup> Constitutional challenges to § 922(g)(9) based on over-breadth have been unsuccessful. For example, the Fourth Circuit stated resoundingly that:

[T]he net cast by § 922(g)(9) may be somewhat over-inclusive given that every domestic violence misdemeanor would not necessarily misuse a firearm against a spouse, former spouse, or other person with whom such person had a domestic relationship . . . if permitted to possess one. However, this observation merely suggests that the fit is not perfect. Intermediate scrutiny does not require a perfect fit . . . .

*United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011); *see also United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (addressing a Second Amendment challenge to another provision of the Gun Control Act, § 922(k)).

<sup>278</sup> *See Ramsey, supra* note 9, at 396 & nn.334–35 (explaining the “gender parity” thesis and its widely perceived shortcomings).

laws and policies, including the Lautenberg Amendment. Michael Johnson has suggested, for example, that there are multiple forms of intimate-partner violence, including the type of patriarchal terrorism that has long been the target of battered women's advocates.<sup>279</sup> Besides forceful self-protection by abuse victims, another common type—situational couple violence—arises sporadically from tensions over money, unemployment, parenting, sex, and communication styles, not from patterns of coercive control and violent resistance.<sup>280</sup> Both men and women engage in situational couple violence, and although it can be lethal, it often involves little or no physical injury. In other words, it does not seem to follow the pattern associated with intimate terrorism.<sup>281</sup>

Compared to other methods of inflicting injury, “[g]uns are not commonly used in domestic abuse incidents.”<sup>282</sup> A recent study based on the National Crime Victimization Survey found that guns were used by intimate partners to inflict only 3.4% of nonfatal intimate-partner injuries.<sup>283</sup> The majority of domestic violence committed between 2003 and 2012 was simple assault.<sup>284</sup> Katherine Vittes and Susan Sorenson found that “[b]eing hit, beat[en], kicked, and/or pushed was the most common type of abuse (84.5%)” suffered by temporary restraining order applicants, whereas only 16% of the applicants mentioned firearms.<sup>285</sup> Abusers with access to guns tend to engage in the most severe nonfatal abuse,<sup>286</sup> but they do not always use guns directly to inflict injury.<sup>287</sup> The available studies show that high-risk individuals often possess guns, *not* that gun access causes them to be especially violent.<sup>288</sup> Moreover, as the empirical data above indicates, most domestic violence is not inflicted with firearms.<sup>289</sup> Some people who are convicted of predicate misdemeanors that include an element of “offensive touching” or “reckless infliction of bodily injury” possess firearms for self-defense, work, or sport that they did not (and might never) use to hurt an intimate partner. Should all of them be forced to relinquish their guns and barred for the long term from buying new ones? Access to firearms seems to add fuel to the fire and increase the likelihood of death.<sup>290</sup>

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<sup>279</sup> See JOHNSON, *supra* note 269, at 2–12.

<sup>280</sup> See *id.* at 63–68, 70.

<sup>281</sup> See *id.* at 60–62.

<sup>282</sup> Vigdor & Mercy, *supra* note 89, at 323.

<sup>283</sup> TRUMAN & MORGAN, *supra* note 88, at 9 tbl.7.

<sup>284</sup> *Id.* at 7.

<sup>285</sup> Vittes & Sorenson, *supra* note 114, at 273.

<sup>286</sup> See Campbell et al., *supra* note 1, at 1092; Zeoli, *supra* note 26, at 1.

<sup>287</sup> See Zeoli, *supra* note 26, at 1–2.

<sup>288</sup> See *supra* notes 90–94 and accompanying text (noting the strengths and limitations of several prominent empirical studies of the connection between guns and domestic homicide).

<sup>289</sup> See *supra* note 114 (discussing National Crime Victimization Survey data and a study by Vittes and Sorenson on allegations regarding firearms in restraining order applications).

<sup>290</sup> See *supra* note 93 (discussing the role of guns' greater lethality, compared to other weapons, in homicide causation).

Yet, as Franklin Zimring acknowledged in 2004: “Firearm ownership and use is neither a necessary nor a sufficient cause of violent death in the United States.”<sup>291</sup> Correlations between guns and lethality are much stronger than the evidence that modern gun-control efforts save lives.<sup>292</sup> Zimring believed that categorical bans for certain classes of individuals or guns might be effective,<sup>293</sup> but he cautioned, “[m]ost gun control efforts do not make measurable impacts on gun use, particularly low budget symbolic legislation.”<sup>294</sup>

Besides prohibiting a broader class of men from possessing guns than the especially dangerous abusers for whom they are most appropriate,<sup>295</sup> a rigorously-enforced version of § 922(g)(9) would almost certainly sweep some battered women into the courts and prisons, too. In fact, despite the relatively low number of prosecutions, the existing § 922(g)(9) has already imposed harsh results on female defendants.<sup>296</sup> The predominant theory about female use of force maintains that women arrested for domestic violence usually acted in self-protection or retaliation for abuse,<sup>297</sup> which domestic violence experts have

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<sup>291</sup> Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, *supra* note 93, at 36.

<sup>292</sup> *See id.* at 34.

<sup>293</sup> *Id.* at 37.

<sup>294</sup> *Id.*

<sup>295</sup> Long-term gun prohibitions are most appropriate for a core group of intimate terrorists prone to recidivism and escalating violence. Assessing other interventions, such as batterer treatment and incarceration, several domestic-violence experts have focused on the problem posed by habitual offenders. *See* EDWARD W. GONDOLF, *THE FUTURE OF BATTERER PROGRAMS* 6, 72, 125, 237 (2012); *see also* Goodmark, *supra* note 9, at 102 (“Even those who are most concerned about the detrimental aspects of criminalization have experience with offenders who they believe should be isolated from the greater society.”); *id.* at 106 (“Criminal legal interventions should target habitual domestic violence offenders.”); Ramsey, *supra* note 9, at 380 (acknowledging that these are the most difficult offenders to rehabilitate or deter).

<sup>296</sup> For example, Myrna Raeder recounted the case of a Virginia woman who received a state sentence of more than seven years in prison after she pled guilty to the manslaughter of her abusive husband, against whom she had obtained eight protection orders and two arrest warrants. Raeder, *supra* note 29, at 99. She claimed he threatened her with a gun before she shot him. *Id.* She was also charged with two federal gun offenses, based on a prior domestic violence misdemeanor conviction. *Id.* She received two consecutive prison sentences amounting to 210 months, due to the federal judge’s view that she acted with malice (in part due to her efforts to buy firearms illegally). *Id.* (noting the federal sentence was vacated in light of *United States v. Booker*, but that there was “a distinct possibility . . . that she could receive the same sentence in light of the judge’s previous findings” of malice as a sentencing factor). *See* *United States v. Holbrook*, 368 F.3d 415, 425 (4th Cir. 2004), *aff’d* 207 F. Supp. 2d 472 (W.D. Va. 2002).

<sup>297</sup> L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE & VICTIMS 125, 128, 134–35 (1994); Kris Henning et al., *Treatment Needs of Women Arrested for Domestic Violence: A Comparison with Male Offenders*, 18 J. INTERPERSONAL VIOLENCE 839, 841–42, 851 (2003).

variously described as “violent resistance”<sup>298</sup> or “dynamic resistance.”<sup>299</sup> Even though female violence may not satisfy the requirements of self-defense doctrine,<sup>300</sup> women rarely engage in repeat battering underpinned by a desire to control their partners coercively in the long term.<sup>301</sup> They are less likely than men to inflict serious injury<sup>302</sup> and also “less likely than male perpetrators to have offending histories that suggest a propensity to commit further violence.”<sup>303</sup> Even if African-American women tend to use physical force against their abusers more often than white females do, the proportion of black males killed by an intimate has declined since 1980.<sup>304</sup>

I am not arguing that all women convicted of intimate-partner assaults are blameless or that gun prohibitions are always inappropriate for female misdemeanants. Nor do I think women should be encouraged to rely on arms-bearing for self-protection in a way that exempts society and the state from the burden of supporting and providing safety for abuse victims. However, while purchasing a handgun is associated with an increased risk of being killed by an intimate partner, the available evidence is not strong enough to support denying abuse resisters a choice about whether to purchase and possess a weapon.<sup>305</sup> Indeed, Campbell and her coauthors concede that “[a] victim’s access to a gun could plausibly reduce her risk of being killed, at least if she does not live with the abuser.”<sup>306</sup> The current inability of police and prosecutors to screen out resisting victims with sufficient accuracy at the misdemeanor arrest stage offers little confidence that domestic violence gun prohibitions will be applied justly, especially if future reforms require prosecutors to take the most punitive course possible when charging misdemeanor abuse and seeking convictions for weapons offenses.<sup>307</sup>

Women who use force in their intimate relationships do not fit the stereotype of the batterer for whom mandatory criminal justice responses (including the

<sup>298</sup> JOHNSON, *supra* note 269, at 52.

<sup>299</sup> POTTER, *supra* note 165, at 9, 28, 46–55 (coining the phrase “dynamic resistance” to describe African-American women’s response to intimate-partner abuse but stating that it does not necessarily involve physical retaliation). As noted above, fighting back and distrust of the state’s willingness or ability to help is prevalent among lesbians and women of color. See *supra* notes 201, 204, 207 and accompanying text.

<sup>300</sup> See Ramsey, *supra* note 9, at 398–99.

<sup>301</sup> See Shamita Das Dasgupta, *A Framework for Understanding Women’s Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1366–68, 1378 (2002); Lisa Young Larance, *When She Hits Him: Why the Institutional Response Deserves Reconsideration*, VIOLENCE AGAINST WOMEN NEWSL. (Violence Against Women Project), Summer 2007 at 10, 11, 13.

<sup>302</sup> See Hamberger & Potente, *supra* note 297, at 125.

<sup>303</sup> See POTTER, *supra* note 165, at 119.

<sup>304</sup> See COOPER & SMITH, *supra* note 110, at 18–19.

<sup>305</sup> See *supra* note 94 and accompanying text.

<sup>306</sup> Campbell et al., *supra* note 1, at 1092.

<sup>307</sup> See Lininger, *supra* note 19, at 198, 204 (advocating such reforms).

imposition of gun bans) were designed, but they are still subject to them.<sup>308</sup> Door slammers and plate throwers, whether male or female, can be ordered to surrender their guns and prevented from buying new ones, even if they need their weapons for self-defense or job-related use.<sup>309</sup> They both can be convicted and punished for gun offenses based on a misdemeanor conviction; and they both can be sentenced to substantial prison terms.<sup>310</sup> A hasty turn towards aggressive enforcement of domestic violence gun prohibitions might further entrench paternalistic assumptions about female incapacity for self-protection and penalize abused women for trying to defend themselves or keep others safe.<sup>311</sup>

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<sup>308</sup> See *supra* Part III.A.1 and notes 215–17, 296–307 and accompanying text (discussing women’s use of force against abusive partners).

<sup>309</sup> See *supra* notes 262–64 and accompanying text (discussing the *Voisine* case); *supra* notes 19–20, 24–25 and accompanying text (describing the restrictions that § 922(g)(9) imposes).

<sup>310</sup> This Article focuses on problems with basing long-term firearms prohibitions on misdemeanor convictions that do not distinguish accurately between extremely violent individuals with a high likelihood of reoffending and those whose use of force is minimal, rare, and even self-defensive. Although some empirical research indicates that handguns are more likely to be used in domestic violence than long guns, see Sorenson & Schut, *supra* note 89, at 2 fig.1, this Article does not recommend that domestic violence firearms prohibitions differentiate among types of guns. A discussion of whether certain types of firearms, such as assault weapons, should be banned independently from the problem of domestic violence lies beyond the scope of this Article.

<sup>311</sup> Constructive possession of a firearm by a prohibited person requires intent to exercise control, which would likely preclude a § 922(g)(8) or § 922(g)(9) conviction of a woman for illegal gun possession simply because someone in her household kept a firearm on the premises. See *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) (“Section 922(g) . . . covers possession in every form . . . , preventing the felon from knowingly *possessing* his (or another person’s) guns . . . [and] encompassing what the criminal law recognizes as ‘actual’ and ‘constructive’ possession alike . . . . Constructive possession is established when a person, though lacking such physical custody, still has the power and *intent* to exercise control over the object.” (emphasis added)). However, the law of the federal circuits remains unsettled as to whether, and under what circumstances, a person charged with a § 922(g) crime could successfully raise a defense based on the temporary use and control of a gun for self-defense or to remove it from the hands of a child.

One circuit has authorized a defense, in the context of a § 922(g)(1) charge (felon in possession of a firearm), for possession that is both “innocent” and “transitory.” *United States v. Mason*, 233 F.3d 619, 624–25 (D.C. Cir. 2001). However, at least a half dozen other circuits reject such a defense. See *United States v. Webster*, 296 F. App’x 777, 778 (11th Cir. 2008) (stating that the majority of circuits have declined to recognize an innocent possession defense and that the D.C. Circuit is the only one to adopt it); see also *United States v. Jackson*, 598 F.3d 340, 349 (7th Cir. 2010); *United States v. Palma*, 511 F.3d 1311, 1316 (11th Cir. 2008); *United States v. Baker*, 508 F.3d 1321, 1324–25 (10th Cir. 2007); *United States v. Johnson*, 459 F.3d 990, 998 (9th Cir. 2006); *United States v. Gilbert*, 430 F.3d 215, 218 (4th Cir. 2005). Without absolutely precluding a “fleeting” or “innocent” possession defense, at least a couple of circuits have found it inapplicable to the facts of the cases before them. See *United States v. Wright*, 682 F.3d 1088, 1090–91 (8th Cir. 2012); *United States v. DeJohn*, 368 F.3d 533, 545–46 (6th Cir. 2004). Yet, some of these holdings

b. *Under-Inclusiveness: Excluded Relationships*

At the same time, the relevant provisions of the Gun Control Act exclude certain types of intimate or family relationships in which violence can lead to tragic results.<sup>312</sup> In other words, domestic violence gun laws also tend to be under-inclusive. A “misdemeanor crime of domestic violence” that triggers the § 922(g)(9) firearms ban must have been committed by:

[A] current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.<sup>313</sup>

By its terms § 922(g)(8) requires that the respondent be an intimate partner of the victim or an intimate partner of the parent of a child-victim.<sup>314</sup>

These definitions of qualifying relationships for the purposes of § 922(g)(8) and § 922(g)(9) exclude dating partners who are not current or former cohabitants and who do not share a common child with their victims.<sup>315</sup> Yet, from 2003 to 2012, “[c]urrent or former boyfriends or girlfriends (7.8%)

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were based on a pre-*Henderson* view that Congress sought to prohibit all “knowing” possession of guns and ammunition by prohibited persons and that knowledge was sufficient to show constructive possession. *See, e.g., Wright*, 682 F.3d at 1090; *Baker*, 508 F.3d at 1325. Other courts suggest, perhaps with excessive optimism, that no general exception is needed because prosecutors and juries will be sensible enough not to convict prohibited persons in sympathetic cases. *See, e.g., United States v. Teemer*, 394 F.3d 59, 64 (1st Cir. 2005) (“Consider if a schoolboy came home with a loaded gun and his ex-felon father took it from him, put it in drawer, and called the police . . .”).

With regard to cases involving self-defensive conduct, defendants might have a stronger argument using the common-law defense of justification. *See United States v. Paolello*, 951 F.2d 537, 541–42 (3d Cir. 1991). However, the applicability of the justification or necessity defense is also quite narrow. *See, e.g., United States v. Al-Rekabi*, 454 F.3d 1113, 1121–22 (10th Cir. 2006) (“The necessity defense is a narrow exception to stringent federal firearms laws” that should be “strictly and parsimoniously applied.”). Some courts indicate that, if a justification defense exists, it is limited to circumstances in which the defendant possessed the gun no longer than absolutely necessary and can meet a high burden in showing each element. *See, e.g., United States v. Singleton*, 902 F.2d 471, 472–73 (6th Cir. 1990). To establish a justification defense in jurisdictions that recognize it, a defendant must show all four elements of a multi-factor test that the Fifth Circuit established, and that several other circuits, including the Sixth Circuit, have adopted. *See United States v. Gant*, 691 F.2d 1159, 1162–63 (5th Cir. 1982); *see also Singleton*, 902 F.2d at 472–73.

<sup>312</sup> 18 U.S.C. § 921(a)(33)(A) (2012) (requiring that a “misdemeanor crime of domestic violence” be committed by a perpetrator in at least one of several designated relationships with the victim).

<sup>313</sup> *Id.*

<sup>314</sup> 18 U.S.C. § 922(g)(8)(B).

<sup>315</sup> *Id.* § 921(a)(32) (defining “intimate partner” for the purposes of § 922(g)(8)(B)); *Id.* § 921(a)(33)(A)(ii) (providing that a “misdemeanor crime of domestic violence” must be committed by a person in a qualifying relationship with the victim).

committed a greater percentage of all violent victimizations than spouses (4.7%) and ex-spouses (2.0%).”<sup>316</sup> Non-marital intimate-partner homicides—that is, killings by a boyfriend or girlfriend of the victim—have increased since 1980, such that in 2008, boyfriends and girlfriends perpetrated a slightly larger percentage of killings than spouses.<sup>317</sup> At least one empirical study has found some positive effects of state DVRO firearm prohibitions on nonfatal violence in dating relationships,<sup>318</sup> but federal § 922(g)(8) and § 922(g)(9) do not extend to non-cohabiting dating partners.<sup>319</sup>

Judicial interpretation of the relationships covered by the federal misdemeanor gun ban indicates that children who victimize their parents are also excluded,<sup>320</sup> although the statute expressly covers the reverse situation.<sup>321</sup> This constitutes a significant omission, in light of the growing problem not only of elder abuse, but also of patricide and matricide. Adult children commit the most elder abuse—by one estimate, 47% of all incidents.<sup>322</sup> According to a report by the Bureau of Justice Statistics, “[p]arents killed by one of their

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<sup>316</sup> TRUMAN & MORGAN, *supra* note 88, at 3 tbl.1 (reporting data from the National Crime Victimization Survey or NCVS). The victim-defined terms “boyfriend” or “girlfriend” that the NCVS data uses apparently include persons who do not cohabit with the victim, as well as those who do, since the Truman & Morgan report notes that some might consider the offenders mere acquaintances or friends, likely due to the casual nature of the relationship. *See id.* at 14.

<sup>317</sup> COOPER & SMITH, *supra* note 110, at 19 & fig.28 (showing that spouses committed 46.7% of intimate-partner homicides, compared to 48.6% perpetrated by boyfriends and girlfriends).

<sup>318</sup> *See* April M. Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGY REV. 125, 131 (2016) (citing Laura Dugan, *Domestic Violence Legislation: Exploring Its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY PUB. POL’Y 283, 302 (2003)); *see also infra* note 365 and accompanying text (discussing the impact of state firearms restrictions for DVRO respondents who allegedly abused their dating partners).

<sup>319</sup> *See* 18 U.S.C. § 921(a)(32) (omitting non-cohabiting dating partners from definition of “intimate partner” under § 922(g)(8)(B)); *Id.* § 921(a)(33)(A)(ii) (establishing the same limits to qualifying relationships under § 922(g)(9)).

<sup>320</sup> *See* *United States v. Skuban*, 175 F. Supp. 2d 1253, 1254–55 (D. Nev. 2001) (“The relationship defendant had with his victim, i.e. child-aggressor and parent-victim, is not specified in the statute as one that meets the predicate requirements for a ‘misdemeanor crime of domestic violence.’”). The court further stated that the relationships listed in § 921(a)(33)(A) do not merely constitute examples, that the Lautenberg Amendment arose from Congressional concern about *spousal* abuse, and that it was meant to be limited in scope. *Id.* at 1255.

<sup>321</sup> 18 U.S.C. § 921(a)(33)(A) (providing that the term “misdemeanor crimes of domestic violence” includes a misdemeanor that has as an element “the use or attempted use of physical force, or the threatened use of a deadly weapon . . . by . . . [a] parent or guardian of the victim”).

<sup>322</sup> Margaret Sholian, Comment, *An Ethical Dilemma: Attorneys’ Duties Not to Reveal Elder Abuse in Washington State*, 90 WASH. L. REV. 1471, 1479–81 (2015).



children have been an increasing proportion of family homicides, rising steadily from 9.7% of all family homicides in 1980 to 13% in 2008.”<sup>323</sup>

Several states have adopted laws that extend gun prohibitions to stalkers and those who commit elder abuse.<sup>324</sup> But proposals to address some of these gaps at the federal level have, to date, been unsuccessful. For example, Representative Lois Capps, a Democrat from California, introduced a bill in May 2015 that would have expanded the definition of “intimate partner” in federal firearms provisions to include a current or former dating partner and the definition of “misdemeanor crime of domestic violence” to include a misdemeanor offense perpetrated by a current or former dating partner.<sup>325</sup> Capps’ bill also would have barred possession of a firearm by someone convicted of a misdemeanor crime of stalking or threatening his victim with a deadly weapon.<sup>326</sup> Less than one-third of states classify stalking as a felony on the first offense; yet, more than three-quarters of femicide victims have been stalked; more than one-half reported the stalking to police before their deaths; and about one-fifth of stalking cases involve the use of a weapon to threaten or inflict harm.<sup>327</sup> Since one-quarter of women and almost of one-third of men who suffer stalking are stalked by acquaintances, rather than spouses or intimate partners,<sup>328</sup> an amendment to § 921(a)(33)(A) is necessary to bring them under the protection of the misdemeanor gun ban. Yet, Capps’ bill was referred to committee, and it apparently proceeded no further.<sup>329</sup> A similar Senate bill, introduced by Democratic Senator Amy Klobuchar, from Minnesota, also appears to have died in committee.<sup>330</sup>

Hence, while the Supreme Court has interpreted misdemeanor crimes of domestic violence to include relatively trivial “offensive touching” and reckless infliction of bodily injury,<sup>331</sup> § 921(a)(33)(A)’s definition of qualifying misdemeanors leaves out stalking and threatened use of a deadly weapon by a

<sup>323</sup> COOPER & SMITH, *supra* note 110, at 21.

<sup>324</sup> *See Domestic Violence and Firearms, supra* note 22; *see also* Jolly, *supra* note 30, at 694–95 (discussing California’s protection of a broader class of restraining order petitioners and its extension of gun bans to “certain violent misdemeanors such as assault or battery without reference to the relationship between the victim and the defendant”).

<sup>325</sup> *See* Protecting Domestic Violence and Stalking Victims Act, H.R. 2216, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/2216/text> [<https://perma.cc/YW2A-WPB6>].

<sup>326</sup> *See id.* The existing federal DVRO gun ban includes stalking, *see* 18 U.S.C. § 922(g)(8)(B) (2012), but § 922(g)(9) does not.

<sup>327</sup> STALKING RES. CTR., THE NAT’L CTR. FOR VICTIMS OF CRIME, STALKING FACT SHEET (Jan. 2015), [http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015\\_eng.pdf?sfvrsn=2](http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf?sfvrsn=2) [<https://perma.cc/288J-UPAX>].

<sup>328</sup> *See id.*

<sup>329</sup> *See* H.R. 2216.

<sup>330</sup> *See* Protecting Domestic Violence and Stalking Victims Act of 2015, S. 1520, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1520/text> [<https://perma.cc/L7BP-UP3P>].

<sup>331</sup> *See supra* notes 262–64 and accompanying text.

stalker who does not meet the specified relationship criteria, such as current or former spouse, cohabiting intimate-partner, or parent of a common child.<sup>332</sup> It also excludes crimes against dating partners and vulnerable, elderly parents.<sup>333</sup>

Ironically, the Lautenberg Amendment and federal courts' interpretation of it inverts the problem that Deborah Tuerkheimer saw in the criminalization of stalking, but not domestic violence, as a menacing course of conduct.<sup>334</sup> The gun prohibition extrapolates from one act of domestic violence to condemn all misdemeanants as intimate terrorists, while ignoring the potential of stalkers and adult children to engage in an escalating pattern of abuse that might culminate in a gun homicide. Moreover, it treats a slap, a thrown plate, or a slammed door as conduct that portends a fatal shooting, when a spouse or cohabiting intimate partner does it, while ignoring the import of an actual threat with a gun by someone who is not in a qualifying relationship with the victim.

#### IV. WHAT WORKS, WHAT DOESN'T: THE COSTS OF POORLY-CONCEIVED DOMESTIC VIOLENCE GUN-CONTROL LAWS

This Part provides a detailed analysis of the scope and enforcement of two broad categories of gun prohibitions at the federal and state levels: (1) those triggered by civil and criminal restraining orders and (2) bans applicable to domestic violence misdemeanants. Some other types of laws, including scene-of-the-crime gun confiscation and firearms prohibitions imposed under *ex parte* orders, are also briefly considered.

##### A. *The Limited Success of DVRO Gun Prohibitions*

An amendment to the Gun Control Act in 1994 established a federal ban on the possession or receipt, by anyone subject to a qualifying DVRO, of a firearm or ammunition that has been shipped or transported in interstate or foreign commerce.<sup>335</sup> This amendment is § 18 U.S.C. § 922(g)(8). Court orders that bring a respondent under the control of § 922(g)(8) “restrain[] such person from harassing, stalking, or threatening an intimate partner . . . 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.”<sup>336</sup> In addition to satisfying certain Due Process requirements,<sup>337</sup> a qualifying order includes a finding that the respondent “[1] represents a credible threat to the physical safety of such intimate partner or child; or . . . [2] by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against” the

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<sup>332</sup> See 18 U.S.C. § 921(a)(33)(A) (2012).

<sup>333</sup> See *id.*

<sup>334</sup> See Deborah Tuerkheimer, *Breakups*, 25 YALE J.L. & FEMINISM 51, 52–53 (2013).

<sup>335</sup> 18 U.S.C. § 922(g)(8) (2012).

<sup>336</sup> *Id.* § 922(g)(8)(B).

<sup>337</sup> *Id.* § 922(g)(8)(A).

protected persons.<sup>338</sup> The DVRO gun ban ends upon expiration of the order and contains an exemption for official use.<sup>339</sup> Section 922(g)(8)(A) requires that the order be issued after a hearing in which the respondent had actual notice and an opportunity to participate.<sup>340</sup>

Section 922(g)(8) does not contain any provision specifying how the ban is to be enforced; federal law leaves the task of compelling relinquishment of the abuser's firearms to the states.<sup>341</sup> The majority of states now have laws that support, imitate, or even exceed § 922(g)(8).<sup>342</sup> Some only allow the confiscation of firearms pursuant to a permanent or final restraining order obtained after a hearing in which the respondent could participate, while others, such as California, also extend the ban to ex parte orders.<sup>343</sup> The heterogeneity of gun bans imposed as part of civil and criminal protection orders—including what kinds of victim-offender relationships the law covers, how much discretion the issuing judge has, what conduct the gun provision prohibits (e.g. possession and/or purchase), whether the defendant must have the opportunity to participate in a hearing, and whether a criminal restraining order is paired with police officers' on-the-scene authority to confiscate firearms—makes these laws difficult to summarize and even harder to assess in terms of impact.<sup>344</sup> State laws supplement and sometimes exceed federal law in the severity, scope, and duration and the level of Due Process accorded to defendants/respondents.<sup>345</sup> In contrast, some states have few, if any, laws or only lax restrictions—a situation that undercuts the federal restraining order provision, which depends on state and local cooperation.

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<sup>338</sup> *Id.* § 922(g)(8)(C)(i)–(ii).

<sup>339</sup> See *supra* notes 23–25 and accompanying text.

<sup>340</sup> 18 U.S.C. § 922(g)(8)(A).

<sup>341</sup> See Gildengorin, *supra* note 21, at 819–20.

<sup>342</sup> See *Domestic Violence and Firearms*, *supra* note 22.

<sup>343</sup> See Gildengorin, *supra* note 21, at 831, 833. Another source indicates that Illinois, Massachusetts, Texas, and West Virginia also allow gun prohibitions under ex parte orders. *Domestic Violence and Firearms*, *supra* note 22.

<sup>344</sup> See Jolly, *supra* note 30, at 688 (“This wide variety in state approaches creates a patchwork of protection for potential victims of domestic violence.”); Vigdor & Mercy, *supra* note 89, at 317 (making a similar observation).

<sup>345</sup> Several writers describe California as having adopted one of the strictest approaches to reinforcing federal firearms prohibitions with even tougher state laws. See Gildengorin, *supra* note 21, at 833, 835–37; see also Jolly, *supra* note 30, at 692–97. Note that, although one writer characterizes California gun laws as being “progressive,” her use of this term ties it to a narrow feminist understanding of the benefits of punitive laws in the battle against gender violence, without regard to their cost to individual victims, their families, or communities. See Gildengorin, *supra* note 21, at 835–37. In contrast, this Article calls attention to the potential harms of ratcheted-up criminalization of firearms possession and enforcement of such laws against low-level domestic violence offenders.

One researcher sorts states into a three-part typology in which Arkansas exemplifies the most lenient approach.<sup>346</sup> In Arkansas, persons subject to a civil DVRO are neither prohibited from purchasing or possessing guns, nor compelled by Arkansas law to relinquish them in compliance with federal statute.<sup>347</sup> The only state law that restrains domestic violence offenders from gun possession authorizes criminal courts to strip batterers of their guns pursuant to a domestic violence no-contact order.<sup>348</sup> Arkansas has one of the highest femicide rates in the United States.<sup>349</sup> A second approach gives state judges the discretion, but not the legal obligation, to ban persons subject to a DVRO from possessing firearms.<sup>350</sup> In “discretion” states, courts are also authorized, but not required, to enforce gun relinquishment laws.<sup>351</sup> Pennsylvania takes this type of approach.<sup>352</sup> Lastly, in the strictest state, California, the relevant laws exceed the federal provision covering DVROs<sup>353</sup> by encompassing ex parte orders and including victims of harassment, stalking, and elder abuse.<sup>354</sup> California has one of the most aggressive models for removing guns from the hands of DVRO respondents.<sup>355</sup> Under California law, a person served with a restraining order, including an ex parte order, must surrender firearms immediately at a law enforcement officer’s request.<sup>356</sup> In the absence of a request from the police, the respondent has twenty-four hours to surrender his firearms and forty-eight hours to notify the court that he has done so.<sup>357</sup> Protocols exist to help California courts determine whether the offender has complied,<sup>358</sup> and police officers now can obtain a search warrant to look for firearms that a DVRO respondent has not relinquished.<sup>359</sup>

Empirical studies of laws that prohibit DVRO respondents from purchasing *and* possessing a gun suggest that such laws have a positive impact, especially

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<sup>346</sup> See Gildengorin, *supra* note 21, at 834. Another writer chooses Missouri as an example of a state that leaves firearm purchase and possession largely unregulated. See Jolly, *supra* note 30, at 697.

<sup>347</sup> See Gildengorin, *supra* note 21, at 834. Missouri leaves the same areas unregulated, which Aaron Jolly characterizes as a deliberate choice by the Missouri legislature, rather than an oversight. Jolly, *supra* note 30, at 697–98.

<sup>348</sup> See Gildengorin, *supra* note 21, at 834.

<sup>349</sup> See *id.*

<sup>350</sup> See *id.* at 834–35.

<sup>351</sup> See *id.* at 835.

<sup>352</sup> See *id.*

<sup>353</sup> 18 U.S.C. § 922(g)(8) (2012).

<sup>354</sup> See Jolly, *supra* note 30, at 694–95 (citing CAL. PENAL CODE § 646.91 (West 2010 & Supp. 2017); CAL. FAM. CODE §§ 6218, 6389 (West 2013); CAL. WELF. & INST. CODE § 15657.03 (West 2011 & Supp. 2017)); see also Gildengorin, *supra* note 21, at 835–37 (describing California’s provisions at the time of her article’s publication).

<sup>355</sup> See Gildengorin, *supra* note 21, at 835–37; Jolly, *supra* note 30, at 695.

<sup>356</sup> Jolly, *supra* note 30, at 695 (citing CAL. FAM. CODE § 6389).

<sup>357</sup> *Id.*

<sup>358</sup> See Gildengorin, *supra* note 21, at 836–37; Jolly, *supra* note 30, at 695–96.

<sup>359</sup> See Gildengorin, *supra* note 21, at 836.

with regard to intimate-partner homicide.<sup>360</sup> In 2006, for example, Elizabeth Vigdor and James Mercy published a population-based, ecological study that used state variation in restricting abusers' access to firearms to assess the impact of three types of laws on intimate-partner homicide: (1) laws prohibiting persons subject to a restraining order from possessing or purchasing a firearm, (2) laws that prevent domestic violence misdemeanants from possessing or purchasing a firearm, and (3) laws allowing police officers to confiscate firearms from the scene of a domestic violence incident.<sup>361</sup> This study also contrasted statutes that bar purchase *and* possession with those that only bar possession.<sup>362</sup>

State laws prohibiting both the purchase *and* possession of guns under a DVRO were associated with an 8% reduction in the rate of intimate-partner homicides and a 9% reduction in the rate of such homicides perpetrated with a firearm.<sup>363</sup> Although the primary effect was on the killing of women, there was also "a reduction in [intimate-partner homicide] rates for both genders when a restraining order law [was] passed;" the researchers surmised that this showed a decline in self-defensive homicides, too, due to the availability of greater legal protection for victims.<sup>364</sup> Another study demonstrated a 14% reduction in the rate of nonfatal dating violence, but not spousal violence, in states that had DVRO gun bans extending to these relationships.<sup>365</sup> In sum, although federal prosecutors have brought relatively few charges under § 922(g)(8), states with complementary laws barring DVRO respondents from possessing and purchasing firearms have achieved some measurable success in reducing intimate-partner violence and homicides.<sup>366</sup> By contrast, restraining order laws that only ban possession and *not* purchase have not shown a positive impact.<sup>367</sup> Confiscation requires a lot of effort on the part of judges and law enforcement officers; in states that lack a firearms registry, it is difficult to know which

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<sup>360</sup> See Zeoli et al., *supra* note 318, at 135.

<sup>361</sup> See Vigdor & Mercy, *supra* note 89, at 314.

<sup>362</sup> See *id.* at 318 tbls.1 & 2.

<sup>363</sup> See *id.* at 332 (noting that, in absolute terms, this means only an average of 2.9 fewer intimate-partners homicides and 2.0 fewer intimate-partner homicides committed with a gun each year in a state with a DVRO gun law in effect). These findings must be qualified by an acknowledgement of the study's limitations. Chiefly, it did not control for additional factors that might have reduced the rate of intimate-partner homicide, such as victims' increased access to domestic violence hotlines and other support services. See *id.* at 340.

<sup>364</sup> See *id.* at 332 (finding that states with DVRO gun laws experienced a 10% reduction in the rate in fatal shootings of women by their intimate partners).

<sup>365</sup> See Zeoli et al., *supra* note 318, at 131 (citing Dugan, *supra* note 318, at 302).

<sup>366</sup> See Vigdor & Mercy, *supra* note 89, at 332; Zeoli et al., *supra* note 318, at 131.

<sup>367</sup> See Vigdor & Mercy, *supra* note 89, at 333, 337; see also Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 2 (citing KATHRYN E. MORACCO ET AL., PAC. INST. FOR RESEARCH & EVALUATION, DOC. NO. 215773, FINAL REPORT: PREVENTING FIREARM VIOLENCE AMONG VICTIMS OF INTIMATE PARTNER VIOLENCE: AN EVALUATION OF A NEW NORTH CAROLINA LAW 6 (Aug. 2006)) ("An analysis of individual-level data found that simply requiring respondents to surrender firearms did not reduce the proportion of respondents who possessed firearms or the rate of firearm-related IPV."). For more on the study by Moracco and her collaborators, see *infra* note 372.

abusers possess guns.<sup>368</sup> Thus, purchase restrictions seem to be more effective.<sup>369</sup>

Although police chiefs and public health experts agree that the removal of firearms under a DVRO constitutes a beneficial approach to lowering the risk of lethal violence,<sup>370</sup> a counter-narrative tells a bleaker story: Courts decline to impose firearms restrictions in restraining orders;<sup>371</sup> abusers deny possessing guns or refuse to comply with provisions requiring relinquishment;<sup>372</sup> and law enforcers fail to detect and remove weapons.<sup>373</sup> Anecdotal reports abound of judges who decided not to deprive a respondent of a gun required for his employment or desired for use in hunting season.<sup>374</sup> Furthermore, whether or not a judge checks a box requiring the surrender of firearms, DVRO applicants are often left in the dark about which provisions their order includes.<sup>375</sup>

While proponents of strong Second Amendment protections worry about “cases in which the right to bear arms is denied to the targets of restraining

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<sup>368</sup> See Zeoli et al., *supra* note 318, at 136.

<sup>369</sup> However, purchase restrictions only work well if states put DVRO information into a background check system. See Vigdor & Mercy, *supra* note 89, at 334; Zeoli et al., *supra* note 318, at 136.

<sup>370</sup> See Campbell et al., *supra* note 1, at 1094; Vittes et al., *supra* note 208, at 603 (noting that a 2007 meeting of the International Association of Chiefs of Police resulted in a recommendation that officers remove guns when serving a DVRO).

<sup>371</sup> See Zeoli et al., *supra* note 318, at 136 (according to qualitative research, judges’ views on both gun control and intimate-partner violence affect their willingness to require firearm surrender as a DVRO provision). In a North Carolina study, judges asked fewer than half the victims seeking an ex parte protection order about their batterer’s possession of firearms, even though North Carolina law required judges to do so. See MORACCO ET AL., *supra* note 367, at 4.

<sup>372</sup> According to the North Carolina study cited, *supra* note 367, and further discussed, *supra* note 371, only 14% of the victims who reported that the DVRO required their abuser to relinquish his guns said that sheriff’s deputies confiscated the weapons, and only 5% reported that the defendant voluntarily surrendered his firearms to authorities. Thirty-seven percent of the DVRO petitioners said that the abuser kept his weapons, and another 37% either did not know or did not respond to the question. See MORACCO ET AL., *supra* note 367, at 6.

<sup>373</sup> See *infra* notes 383–411 and accompanying text (discussing the findings of recent empirical studies regarding the difficulty of detecting and removing guns from abusers).

<sup>374</sup> See, e.g., Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 2–3, 22, 29 (2005) (recounting her observation of a judge’s practices in denying the requests of battered women for restraining orders in rural Missouri).

<sup>375</sup> See Daniel Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN’S HEALTH 93, 97 (2010). But see *id.* at 97 (noting that “[t]hese checkboxes have since been eliminated, and firearm prohibition language is now a standard part of all California’s [domestic violence protection order] forms”). In this study of DVRO petitioners in New York and Los Angeles, Webster and his collaborators noted that their findings of “significant gaps in the enforcement of firearms surrender conditions of domestic violence restraining orders” were in line with research based on other types of data, as well as studies like theirs that used victim self-reporting. *Id.* at 96–97.

orders even in the absence of a credible finding of threat or violence,”<sup>376</sup> empirical research on judicial responsiveness<sup>377</sup> suggests that such concerns are overstated, at least with regard to jurisdictions that give courts discretion about whether to order gun removal. For example, in a study of DVRO petitioners in New York and Los Angeles, Daniel Webster and his collaborators found that, out of eighty-two cases with a respondent who owned a firearm, petitioners in only twenty-one cases (i.e. 26%) reported that the judge ordered the surrender or confiscation of firearms under the DVRO.<sup>378</sup> Unlike in California, New York courts at the time were allowed (but not required) to mandate the relinquishment of guns in cases where the abusive incident did not actually involve the use or threatened use of a gun.<sup>379</sup> According to the researchers, judges were more likely to order firearm removal if the abuser had tried to kill the victim; yet, despite the letter of the law, threats with a gun did not increase the likelihood that judges would order removal.<sup>380</sup>

California’s relinquishment laws have been described as being among the most effective at keeping guns out of the hands of domestic violence perpetrators.<sup>381</sup> But while California’s approach to DVRO firearms prohibitions is comparatively strict, it still has shown only limited success.<sup>382</sup> In 2010, two California counties—San Mateo and Butte—participated in pilot studies in which sheriff’s detectives proactively tried to determine whether DVRO respondents had access to firearms.<sup>383</sup> They then tried to recover those firearms or ensure that the respondent sold them to a licensed retailer.<sup>384</sup>

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<sup>376</sup> Volokh, *supra* note 253, at 1507.

<sup>377</sup> See e.g., Webster et al., *supra* note 375, at 96.

<sup>378</sup> See *id.* In thirty-seven of the eighty-two cases, women expressly requested that batterer’s guns be confiscated, but courts granted only eighteen of these requests. Three women said the judge ordered removal without their request. Fourteen petitioners did not know if the order mandated firearm removal. 52% of the petitioners whose DVROs included a firearms removal provision reported that the respondent kept at least one gun. *Id.*

<sup>379</sup> See *id.* at 96–97. To impose gun restrictions in such circumstances, there had to be a “substantial risk of future gun assault.” See *id.*

<sup>380</sup> *Id.* Courts reportedly included gun prohibitions in DVROs more often in Los Angeles than in New York, where the law permitted greater judicial discretion. *Id.* at 96.

<sup>381</sup> See Gildengorin, *supra* note 21, at 835–37.

<sup>382</sup> Vittes et al., *supra* note 208, at 604.

<sup>383</sup> In San Mateo County, sheriff’s detectives used standardized procedures to screen DVRO respondents for access to firearms. This involved reviewing petitioner declarations; other court documents; California’s Automated Firearms System, which records handgun purchases from licensed retailers, as well as denied purchases, since 1996; applications for concealed weapons permits; the Armed and Prohibited Persons System, which lists prohibited persons believed to possess a firearm; and other databases. When these procedures associated a DVRO respondent with a firearm, detectives often followed up by interviewing the petitioner. Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 3.

<sup>384</sup> Garen J. Wintemute et al., *Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation and an Initiative in California*, 104 AM. J. PUB. HEALTH e113, e114 (2014) [hereinafter Wintemute et al., *Identifying Armed Respondents*].

Several problems recurred in the San Mateo program. The first and most common cause of the non-recovery of firearms from a respondent who had been linked to them “was that the order was [issued but] never served.”<sup>385</sup> Slightly fewer than 70% (361) of the 525 San Mateo respondents linked to firearms were served with a DVRO.<sup>386</sup> Some abusers were not served because their victims changed their minds about imposing the restraining order. If the abuser was already banned from firearms possession, but kept illegal weapons, “the possibility of [his] incarceration might . . . deter some petitioners from having DVROs served.”<sup>387</sup> Other petitioners probably feared retaliation.<sup>388</sup>

Respondents’ nondisclosure or lying about firearms represented a second problem, which occurred in Butte County, as well.<sup>389</sup> Law enforcement recovered guns from only about one-third (119) of the 361 respondents linked to firearms who were served with a DVRO in San Mateo County.<sup>390</sup> Civil division deputies who served DVROs on respondents not in custody and explained the firearms prohibition to them lacked authority to recover guns; hence, there was a period of time before a detective arrived, during which unsupervised abusers might hide or otherwise temporarily dispose of their firearms.<sup>391</sup> Many respondents were subject to prior firearms disabilities.<sup>392</sup> They thus had “particular incentive to deny possession or dispose of firearms if given the opportunity[] [because] recovery could lead to a felony prosecution for illegal possession.”<sup>393</sup> Respondents from whom law enforcers successfully recovered guns tended to be older and less likely to have extensive criminal records, which reduced their motivation to resist.<sup>394</sup>

The study authors noted that “CalDOJ no longer accepts uncorroborated claims of non-possession,” which should help combat the problem of abusers’ nondisclosure of firearms.<sup>395</sup> In addition, San Mateo County sheriff’s detectives

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<sup>385</sup> *Id.* at e115 & tbl.2.

<sup>386</sup> Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 4. In San Mateo County, detectives screened 2972 respondents to DVROs issued between May 2007 and June 2010. Of these, 525 (17.7%) were linked to firearms. DVROs were served on only 56.4% of all the respondents (1677 of 2972) and 68.8% of those linked to firearms (361 of 525). *Id.*

<sup>387</sup> *Id.* at 9.

<sup>388</sup> *Cf.* Webster et al., *supra* note 375, at 97 (surmising that fear of retaliation is one reason some women whose abusers have guns do not ask for gun removal, even when they seek a protection order).

<sup>389</sup> See Wintemute et al., *Identifying Armed Respondents*, *supra* note 384, at e115.

<sup>390</sup> “Firearms were recovered from 33.0% of respondents linked to firearms [119 of 361].” Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 4.

<sup>391</sup> See Wintemute et al., *Identifying Armed Respondents*, *supra* note 384, at e114–16; see also Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 3 (noting that “service by the detectives themselves was generally limited to respondents who were in custody”).

<sup>392</sup> See Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 9.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 5.

<sup>395</sup> *Id.* at 8.



rarely obtained search warrants before January 2010, the effective date of a new California statute enabling officers to search for DVRO respondents' guns, and their lack of search-and-seizure authority further limited the success of the San Mateo program.<sup>396</sup>

Unfortunately, the researchers who studied the San Mateo program "did not find that firearm recovery reduced the incidence of violent criminal activity, arguably the goal of the initiative."<sup>397</sup> Why did confiscating abusers' guns fail to have a positive effect on their risk of subsequent arrest? The authors offered several possible explanations. One relates to the victims' false sense of security. Petitioners who felt safe because their abusers surrendered their guns might have been more likely to stay in those intimate relationships, thus increasing their exposure to violence.<sup>398</sup> Second, some respondents whose guns were confiscated might have been angry and resentful about it, which likely increased their brutal behavior and risk of arrest.<sup>399</sup>

While the San Mateo study revealed hurdles to firearms recovery<sup>400</sup> and was "inconclusive" as to the effect of recovery on DVRO respondents' risk of incident arrest,<sup>401</sup> the Butte County program seemed to demonstrate greater cause for optimism about the potential for enforcing prohibitions and confiscating guns.<sup>402</sup> The Butte County study highlighted a couple of factors that may have made that county's approach more successful: First, judges apparently participated in the program and supported its goal of recovering guns from DVRO respondents; second, and related to the first point, officers were able to obtain search warrants, which helped counteract batterers' nondisclosure of weapons.<sup>403</sup> The fact that, in Butte County, detectives could get a warrant to search for firearms if the evidence justified it, whereas in San Mateo County warrants were seldom obtained, constituted a key difference between the two programs.<sup>404</sup> Warrants were more readily available to law enforcement in Butte County because Butte County judges participated in the pilot program.<sup>405</sup> When officers learned about the existence of guns, they usually could recover them

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<sup>396</sup> Wintemute et al., *Identifying Armed Respondents*, *supra* note 384, at e114.

<sup>397</sup> Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 5.

<sup>398</sup> *Id.* at 5–6.

<sup>399</sup> *Id.* at 5.

<sup>400</sup> *See supra* notes 389–96 and accompanying text (discussing problems encountered in the efforts to recover firearms in San Mateo County).

<sup>401</sup> Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 9.

<sup>402</sup> Wintemute et al., *Identifying Armed Respondents*, *supra* note 384, at e115 (stating that firearms were recovered from more than half of all respondents to whom they were linked in Butte County).

<sup>403</sup> *See id.* at e114. Nevertheless, in Butte County, where "detailed data were largely limited to cases in which the order was served," the respondent's false denial or failure to disclose that he possessed firearms constituted the most common reason for nonrecovery. *Id.* at e115.

<sup>404</sup> *Id.* at e114.

<sup>405</sup> *Id.*

without a violent or threatening response.<sup>406</sup> Hence, the researchers concluded that “it is possible to enforce prohibitions on firearms possession among persons subject to domestic violence restraining orders. Hundreds of firearms were recovered without significant adverse effects.”<sup>407</sup>

These California studies contain some red flags, however. First, DVRO respondents tended to “select themselves into 2 groups—those who would comply with the [gun] prohibition and those who would not.”<sup>408</sup> The noncompliant respondents, mostly young men with extensive criminal records and even prior gun prohibitions, were already at higher risk for domestic violence perpetration and arrest.<sup>409</sup> In other words, the confiscation of guns may have taken guns from the hands of the *least* dangerous men and driven higher-risk respondents further to the margins of illegal and violent behavior. Second, the safety goals of gun bans may backfire in the context of domestic abuse. Even when DVROs led to the confiscation of a batterer’s firearms, his partner was sometimes lulled into believing things would get better, when the assaultive behavior actually continued and perhaps got even more violent due to the batterer’s anger over the loss of his weapons.<sup>410</sup> Third, in some cases, rigorous efforts to enforce California’s gun laws inhibited victims from having a DVRO served on an abuser because of fear that he would retaliate, be incarcerated, or both.<sup>411</sup> A strict, discretionless gun-control regime thus might put abuse victims at risk by providing a disincentive to seek the law’s protection.

Mandating the confiscation or surrender of firearms when a petitioner for a civil protection order does not request it constitutes an undue infringement on her autonomy. A major advantage of civil protection orders, compared to mandatory criminal justice responses, is that they allow a person subject to domestic abuse to retain a measure of control over the remedy she seeks.<sup>412</sup> Some researchers advocate making gun relinquishment a mandatory DVRO

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<sup>406</sup> Only two out of forty-five Butte County cases in which officers recovered guns involved a violent response. *See id.* at e115. Three additional cases involved threats, and “another 5 respondents were considered uncooperative.” There were five arrests and one minor injury to an officer. *Id.*

<sup>407</sup> *Id.* at e115.

<sup>408</sup> Wintemute et al., *Firearms and the Incidence of Arrest*, *supra* note 89, at 9.

<sup>409</sup> *See id.* at 4–5. More than 80% of the DVRO respondents who were already barred from possessing weapons had felony convictions; just over 10% had prior domestic violence misdemeanor convictions; and the rest had been convicted for other violent misdemeanors which trigger gun prohibitions under California law. *Id.* at 4–5.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 5, 9.

<sup>412</sup> *See* SCHNEIDER, *supra* note 131, at 95. Because many civil DVRO petitioners file pro se, the need for police officers and others to dispense information about the availability of firearms restrictions and other provisions to protect abuse victims remains critical. Mary Fan has noted the benefits that might flow from making scene-of-the-assault advice about the civil protection order process a uniform practice. *See* Fan, *Disarming the Dangerous*, *supra* note 87, at 176–77.

condition in a wide variety of circumstances.<sup>413</sup> This trend poses problems for both petitioners and respondents. The concern that numerous respondents are being forced to surrender their guns, without evidence of illegal gun use or even past violence against the protected party,<sup>414</sup> does not track the situation currently prevalent in many jurisdictions. Even in restrictive states like California and New York, judges sometimes decline to impose gun bans when victims ask and/or the law requires them to do so.<sup>415</sup> Yet, a move to sweeping, mandatory prohibitions—especially pursuant to emergency proceedings in which the respondent had no opportunity to participate—might raise Second Amendment and Due Process issues, as well as concerns about the ineffectiveness of gun confiscation and the denial of victim autonomy.

The issuance of *ex parte* orders containing gun prohibitions under state laws is a thorny matter that has received relatively little attention from appellate courts.<sup>416</sup> Due to the lifesaving potential of gun removal, this Article rejects the position of the NRA, some father's rights groups, and other activists that respondents must have an opportunity to be heard before firearms can be confiscated, even in emergency situations.<sup>417</sup> The types of restrictions often

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<sup>413</sup> See, e.g., Webster et al., *supra* note 375, at 97 (encouraging states to “follow California’s approach and require, rather than merely allow, judges to order firearm removal from IPV offenders”).

<sup>414</sup> See Volokh, *supra* note 253, at 1505–07 (suggesting that cases from California, Delaware, Hawaii, and Iowa show that DVROs containing gun prohibitions are imposed on respondents who engaged in relatively minor verbal abuse, offensive touching, or reckless driving). Three of these states—California, Hawaii, and Iowa—have among the most restrictive and least discretionary state gun laws related to domestic violence in the nation. See EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA’S UNIQUELY LETHAL DOMESTIC VIOLENCE PROBLEM, app. at 12–13 (2014), <https://everytownresearch.org/reports/guns-and-violence-against-women/> [<https://perma.cc/PJ8-GD3P>].

<sup>415</sup> See *supra* notes 378–80 and accompanying text.

<sup>416</sup> Federal law requires notice and an opportunity to be heard, under 18 U.S.C. § 922(g)(8)(A), but some states allow gun prohibitions to be included in *ex parte* orders. See *supra* notes 356–57 and accompanying text (offering California as an example); see also *United States v. Hamm*, 134 F. App’x 328, 330 (11th Cir. 2005) (*per curiam*) (distinguishing an *ex parte* order authorized by an Alabama statute from an order that qualifies for § 922(g)(8)’s federal gun prohibition). Thirty-seven states provided preliminary protection against domestic violence, though not necessarily gun removal, via *ex parte* orders as early as 1988. See *Blazel v. Bradley*, 698 F. Supp. 756, 760 (W.D. Wis. 1988). Yet, “[e]xactly what or how much process is due” to a person restrained by a temporary protection order is an issue that “courts have had little opportunity to decide.” *Whitesel v. Sengenberger*, 222 F.3d 861, 871 (10th Cir. 2000); see also *Nollet v. Justices of Trial Courts*, 83 F. Supp. 2d 204, 212 (D. Mass. 2000) (stating “there is very little case law on the constitutionality of . . . *ex parte* temporary restraining order procedure[s]” that require the restrained party to vacate the home, avoid contact with the victim and their children, and/or refrain from possessing or using firearms).

<sup>417</sup> See, e.g., Letter from Christopher Kopacki, Conn. State Liason, NRA-ILA, to Honorable Members of the Joint Comm. on Judiciary (Mar. 14, 2016), <https://www.cga.ct.gov/2016/JUDdata/Tmy/2016HB-05054-R000314-Kopacki%20Ph.D.,>

imposed under temporary DVROs—not only relinquishment of firearms, but also exclusion from the family home, loss of contact with children, and the depletion of financial resources due to child or spousal support, as well as the criminal repercussions of violating the order—implicate the restrained party’s liberty and property interests.<sup>418</sup> Such orders generally meet federal Due Process requirements, as interpreted in *Mathews v. Eldridge*,<sup>419</sup> if they involve “participation by a judicial officer; a prompt post-deprivation hearing; verified petitions or affidavits containing detailed allegations based on personal knowledge; and risk of immediate and irreparable harm.”<sup>420</sup> They must be temporary and brief in duration and followed by a hearing, in which both parties have the opportunity to participate.<sup>421</sup>

However, the nature of the alleged injury or threat to the DVRO petitioner is a pivotal matter on which courts and legislatures have provided insufficient guidance. Statutes allowing emergency orders define the requisite showing of “abuse” in different ways: Some include threats, as well as “physical abuse,” “bodily injury,” and “assault,”<sup>422</sup> others expressly require “a substantial

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%20Christopher%20G.%20-%20Connecticut%20State%20Liason,%20National%20Rifle%20Association-TMY.PDF [https://perma.cc/PA2Z-KAGG] (expressing opposition of Connecticut gun owners to House Bill 5054, which would require subjects of an ex parte restraining order to relinquish all firearms within twenty-four hours); *see also Nollett*, 83 F. Supp. 2d at 212–14 (dismissing Due Process challenge by alleged perpetrators of domestic abuse and father’s rights group, Fatherhood Coalition/CPF, to Massachusetts statute allowing ex parte restraining orders as temporary protection against domestic abuse). Some challenges to ex parte gun restrictions by exceedingly violent individuals have been particularly unpersuasive and ironic. For example, Nathaniel Wood claimed that his violation of an emergency protection order should not have counted as an aggravating circumstance in his murder of the ex-girlfriend the order was imposed to protect. *Wood v. Pancake*, No. Civ.A.1:06CV00197JHM, 2007 WL 2874442, at \*7 (W.D. Ky. Sept. 26, 2007) (“[S]ince Wood violated a condition of his bond in murdering Jones, any alleged error with respect to the EPO is harmless.”).

<sup>418</sup> *State v. Poole*, 745 S.E.2d 26, 35–38 (N.C. Ct. App. 2013) (holding that although an ex parte domestic violence order deprived defendant of “a fundamental right” to “keep and bear arms,” neither the deprivation nor the prosecution of defendant for violating the order offended procedural Due Process); *Moore v. Moore*, 657 S.E.2d 743, 746–47 (S.C. 2008) (describing impact of ex parte orders on various liberty and property interests, including job loss by law enforcement employees due to inability to possess a weapon). Other courts have acknowledged the burden that ex parte orders put on the restrained party’s right to use his home and have a relationship with his children. *See Willmon v. Daniel*, No. 3:05-CV-1391-M, 2007 WL 518555, at \*2 (N.D. Tex. Feb. 20, 2007); *see also Blazel*, 698 F. Supp. at 762.

<sup>419</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

<sup>420</sup> *Nollett*, 83 F. Supp. 2d at 213 (quoting *Blazel*, 698 F. Supp. at 763–64).

<sup>421</sup> *See, e.g., Hamm*, 134 F. App’x at 328 (ruling that the issuance of ex parte order pursuant to an Alabama statute that required “a hearing [at which defendant could be represented by counsel] within fourteen days of the filing of a petition” did not violate Due Process); *Nollett*, 83 F. Supp. 2d at 213–14 (within ten business days); *Poole*, 745 S.E.2d at 32–34 (within ten days of order’s issuance or seven days of service on defendant).

<sup>422</sup> *Moore*, 657 S.E.2d at 749–50 (analyzing South Carolina statute).

likelihood of *immediate* danger of abuse.”<sup>423</sup> Judges have supplemented legislative provisions by confirming an implicit requirement of immediacy,<sup>424</sup> which is satisfied in some states by demonstrating “a threat of future occurrence.”<sup>425</sup> While not all courts require a definitive finding of past physical abuse,<sup>426</sup> others have held that a petitioner’s subjective fear of future injury, arising from alleged verbal threats, does not suffice.<sup>427</sup>

The practice of issuing ex parte domestic abuse orders “based on the petition alone,” without any judicial contact with the petitioner, further complicates matters.<sup>428</sup> Can a valid ex parte order be granted after only a perfunctory review of the alleged victim’s petition? Federal and state cases are not especially clear on this issue.<sup>429</sup> Although an emergency DVRO petitioner must provide detailed allegations of immediate harm,<sup>430</sup> some jurisdictions do not require the judge to make findings based on anything beyond the aggrieved party’s written statement in the complaint.<sup>431</sup> In my view, the court should make a preliminary finding of

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<sup>423</sup> *Nollet*, 83 F. Supp. 2d at 214 (quoting Massachusetts law) (emphasis added).

<sup>424</sup> *See, e.g., Blazel*, 698 F. Supp. at 766 (concluding that “the legislature was aware of the constitutional requirement that ex parte orders be issued only when risk of immediate and irreparable harm exists and that it intended to require that showing”).

<sup>425</sup> *Moore*, 657 S.E.2d at 750; *see also Williamson v. Basco*, No. 06-00012 JMS/LEK, 2007 WL 4570496, at \*3 (D. Haw. Dec. 31, 2007) (stating that family court in Hawaii is authorized to issue an ex parte temporary restraining order “only upon ‘probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent’”) (emphasis added).

<sup>426</sup> *See Moore*, 657 S.E.2d at 750.

<sup>427</sup> *See, e.g., Kopelovich v. Kopelovich*, 793 So. 2d 31, 33 (Fla. Dist. Ct. App. 2001) (holding that husband’s alleged emotional abuse of wife and threats to harm her and her dog physically and ruin her financially “fail to satisfy even the relatively minimal requirements of the statute” governing temporary DVROs).

<sup>428</sup> *Blazel*, 698 F. Supp. at 759 (describing the prevalence of this practice in Wasau, Wisconsin, in the 1980s).

<sup>429</sup> Judicial interpretation of § 922(g)(8)(C) indicates that, for the federal gun ban to apply, a court order enjoining the respondent’s use of physical force against a protected party must either be uncontested or based on evidence of “a real threat or danger of injury to the protected party.” *See United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001). According to *Emerson*, § 922(g)(8)(C)(ii) passes muster under the Second Amendment, even though it does *not* require the issuing judge to include any *express* finding about the threat in the order itself. *Emerson*, 270 F.3d at 263. However, because an ex parte order, by definition, does not allow the respondent to contest the evidence against him, this Article contends that an issuing court ought to make specific, preliminary findings about the reason for ordering gun confiscation under state law.

<sup>430</sup> *See, e.g., Blazel*, 698 F. Supp. at 768 (holding that ex parte order violated *Blazel*’s due process rights because his wife’s petition contained “no allegation that she feared he would attack her again in the near future”).

<sup>431</sup> *Compare State v. Poole*, 745 S.E.2d 26, 33 (N.C. Ct. App. 2013) (deeming North Carolina’s ex parte protection order process a “hearing” because the aggrieved party must appear and the judge cannot decide simply by reading the verified complaint), *with Blazel*, 698 F. Supp. at 764 (stating that “a personal appearance is not a constitutional requirement”

serious violence or a credible threat to kill before imposing a gun ban in an emergency proceeding. Demanding that the petitioner appear or at least provide some documentation of physical injuries, such as bruises, so the judge could assess his or her credibility, would give firearms restrictions under an *ex parte* restraining order a stronger claim to constitutionality, fairness, and effectiveness.<sup>432</sup> Deborah Epstein has also urged caution with regard to *ex parte* orders:

[V]irtually no attention has been paid to the data demonstrating a close connection between batterers' sense of unfair treatment and victim safety.

Of course, providing defendants with due process is a concept firmly rooted in the U.S. Constitution. Ensuring that an accused person is treated with fairness, respect, and neutrality enhances the morality and decency of our justice system. But if such treatment has the additional benefit of increasing compliance with the law, it is of particular importance in domestic violence cases.<sup>433</sup>

Epstein refers here to a protection-order respondent who is “ordered out of his home, forced to stay away from a range of persons and places, with no access to his children, and without the use of his car,”<sup>434</sup> rather than specifically to gun restrictions.

What about guns? The burdensomeness of a firearms provision in a DVRO varies from case to case. Relinquishment of guns used for target shooting and hunting is arguably a minor inconvenience, compared to loss of one's residence, vehicle, or parenting time. However, for some Americans, firearms form an integral part of social identity, and their confiscation might trigger a sense of persecution and rage. Social research confirms that guns have a variety of deeply-felt meanings and attractions, depending on the gun carrier: the “citizen-protector,”<sup>435</sup> the African-American who obtains a gun to address the deficiencies and abuses of law enforcement;<sup>436</sup> the gang member for whom guns confer power, action, and protection;<sup>437</sup> the black-market dealer who sees guns

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and that “*ex parte* temporary restraining orders may be issued on the basis of affidavits without other documentary or physical proof”).

<sup>432</sup> *But see Blazel*, 698 F. Supp. at 764 (maintaining that both the Constitution and Fed. R. Civ. P. 65(b) allow the issuance of *ex parte* restraining orders without the personal appearance of the petitioner or documentary or physical proof of harm).

<sup>433</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1873–74 (2002).

<sup>434</sup> *Id.* at 1873.

<sup>435</sup> CARLSON, *supra* note 7, at 19–20.

<sup>436</sup> *Id.* at 123.

<sup>437</sup> In a series of interviews conducted at a juvenile corrections facility in Arizona, Bernard Harcourt discerned several clusters of meaning surrounding guns. See BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY 58–59 (2006). He associated at least one of these—the action/protection cluster—with youths involved in gangs. See *id.* at 61–65; see also *id.* at 42–43 (describing how some of the teens, including gang members, associated guns with power).

as a form of entrepreneurship,<sup>438</sup> the recreational user,<sup>439</sup> even the suicide.<sup>440</sup> For many men who carry, firearms are connected intimately to an ideal of masculinity,<sup>441</sup> and being deprived of them amounts to emasculation, humiliation, and loss of self. The confiscation of guns required for military, police, and other careers might even have a financially devastating impact on the prohibited person and his family. Epstein's exhortation to legislators and scholars to look at the fairness of domestic abuse laws and policies, including the issuance of ex parte DVROs, from the perspective of an alleged abuser thus provides wise counsel that might reduce violent recidivism by assuring abusers that the outcome of their cases was not arbitrary or unjust.

A final question surrounds the effectiveness and desirability of several types of laws that authorize the removal of guns, after a domestic violence arrest, but before the defendant has been convicted of a crime. In many states, a judge must impose a criminal restraining order that includes firearms restrictions when a defendant is charged with a domestic violence offense. For example, in Colorado, the court "shall order" the defendant to "refrain from possessing or purchasing any firearm or ammunition" and "relinquish . . . any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control" as part of any mandatory criminal protection order that fits the federal description under § 922(g)(8).<sup>442</sup> The court may require the relinquishment of firearms and ammunition before the defendant is released from custody on bond; otherwise, the defendant "shall relinquish" all firearms and ammunition not more than twenty-four hours after being served, unless he can make a satisfactory showing of inability to comply with this deadline.<sup>443</sup> The order remains in effect until final disposition of the criminal case. However, if the defendant is convicted or pleads guilty, the

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<sup>438</sup> Another reason that guns appeal to youths (and perhaps adults, too) is that they are a source of money for both legal and black market sellers. *See* HARCOURT, *supra* note 437, at 65–67 (describing how an African-American youth from a low-income part of Tucson got involved exchanging guns for cash).

<sup>439</sup> Another of the youths Harcourt interviewed—an Anglo boy who grew up target shooting in the Arizona desert before he ran afoul of the law—espoused sentiments that might also be associated with law-abiding, adult gun carriers: "I think [guns] are a tool . . . [.] For life. For hunting. For protection . . . . It's in the Constitution, the right to bear arms because of protection, like your dog for protection." HARCOURT, *supra* note 437, at 70.

<sup>440</sup> *See id.* at 54–55 tbls.3.1, 3.2; *see also* CARLSON, *supra* note 7, at 7 (noting that "white, rural, middle-aged men are most likely to commit suicide," the most common type of gun death).

<sup>441</sup> *See, e.g.,* CARLSON, *supra* note 7, at 175 (connecting guns to the masculine ideal of protecting one's family and community). For some of the youths that Harcourt interviewed, "[g]uns are attractive and eroticized because they confer control." HARCOURT, *supra* note 437, at 10.

<sup>442</sup> COLO. REV. STAT. § 18-1-1001(9)(a)(I)(A)–(B) (2016). Under other circumstances, the imposition of gun restrictions in pre-trial restraining orders in criminal cases is discretionary. *Id.* § 18-1-1001(3)(c).

<sup>443</sup> In that case, the court may allow a defendant up to seventy-two hours to relinquish firearms and up to five days to relinquish ammunition. *Id.* § 18-1-1001(9)(b).

federal prohibition kicks in and remains permanent unless the conviction is expunged, the defendant obtains a pardon, or otherwise gets his civil rights restored.<sup>444</sup>

Eighteen states also allow, or even require, police officers to remove guns from the scene of a domestic violence assault;<sup>445</sup> state laws vary as to whether the abuser must be arrested for the confiscation to occur.<sup>446</sup> There is no federal statute regarding at-the-scene confiscation. Such laws, properly applied and combined with appropriate search-warrant authority, might have the potential to protect victims in the short term. Yet, thus far, they have not had a significant impact on intimate-partner homicide rates<sup>447</sup> and have even lead to retaliatory crimes like burglary and assault.<sup>448</sup>

At least part of the reason for the ineffectiveness of at-the-scene-confiscation laws lies in the narrow scope of police officers' authority. Many jurisdictions only allow confiscation of the gun used in the domestic violence offense, which obviously reduces the effectiveness of the procedure, since the batterer likely has other guns.<sup>449</sup> Some states require that the firearms be found during a consensual search or in plain view.<sup>450</sup> Giving officers greater authority to conduct a full search for weapons at the scene of a domestic violence arrest might interrupt an escalating situation more effectively and avert a fatal shooting in the short term. At-the-scene confiscation would not necessarily lead to the imposition of the long-term disabilities associated with the Lautenberg Amendment; hence, it imposes a lesser burden on Second Amendment rights.

However, any criminal justice response that the abused person does not choose—including a mandatory criminal protection order and at-the-scene gun confiscation—sacrifices her autonomy, distrusts her judgment, and may actually put her in greater danger. She may not even have been the person who called the police. When the police confiscate weapons before a no-contact order is imposed, they leave “the enraged perpetrator—freshly bereft of expensive property—in proximity to the target of violence.”<sup>451</sup> If we respect the victim's autonomy and ability to assess the best course of action for her individual circumstances, mandatory criminal justice approaches have less to recommend

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<sup>444</sup> 18 U.S.C. § 921(a)(33)(B)(ii) (2012).

<sup>445</sup> See *Domestic Violence and Firearms*, *supra* note 22.

<sup>446</sup> Vigdor & Mercy, *supra* note 89, at 317, 318 tbl.1. Thirteen of eighteen states require removal of firearms used to assault or threaten the victim, while the other five give officers discretion with regard to firearms removal. See *Domestic Violence and Firearms*, *supra* note 22.

<sup>447</sup> Vigdor & Mercy, *supra* note 89, at 337 (“We find no evidence of an effect [on intimate-partner homicide rates] from . . . laws that allow police to confiscate firearms at a domestic violence scene.”).

<sup>448</sup> See *id.* at 335 (noting that confiscation laws are “significantly associated” with these other crimes).

<sup>449</sup> See *id.* at 317; see also Zeoli et al., *supra* note 318, at 135 (“One might not expect a policy that leaves all but 1 firearm in the home to prevent homicide.”).

<sup>450</sup> See Vigdor & Mercy, *supra* note 89, at 317.

<sup>451</sup> Fan, *Disarming the Dangerous*, *supra* note 87, at 175.



them than encouraging the abuse survivor to seek a civil protection order that includes gun possession and purchase restrictions. In the latter scenario, the decision is her own, even if she is counseled to ask the court to impose a firearms disability on her batterer.

### B. *The Shortcomings of Misdemeanor Gun Bans*

Many states also have gun prohibitions for domestic violence misdemeanants; a few extend such bans to persons convicted of stalking and/or dating violence.<sup>452</sup> However, these state-level misdemeanor gun prohibitions have not shown any significant effect on intimate-partner homicide rates, and the view that the federal Lautenberg Amendment also “fails spectacularly” is starting to become widespread.<sup>453</sup>

A few scholars express dissenting views. For example, in a recent study that accounted for uneven implementation of federal law at the state level and changes in judicial interpretation of the term “misdemeanor crime of domestic violence,” Kerri Raissian claims that the Lautenberg Amendment has reduced gun-related homicides of female intimate partners by 17%<sup>454</sup> and that homicides without guns did not increase to offset the reduction in fatal shootings.<sup>455</sup> Raissian attributes the federal misdemeanor ban’s impact on intimate-partner homicide to several possible effects. First, the Lautenberg Amendment “makes it more difficult for a convicted domestic offender to obtain a firearm,” despite such notorious loopholes in the background check system as the private sale exemption.<sup>456</sup> According to Raissian, between 1998 and 2009, approximately 188,000 potential gun sales were denied because a background check revealed that the would-be purchaser had a domestic assault conviction.<sup>457</sup> Second, the federal law removes guns from the home earlier (i.e., before a homicide or severe assault occurs) and for the long term.<sup>458</sup> Third, it disrupts the offender’s access to new firearms, which Raissian believes may be “particularly protective” of victims who try to leave abusive relationships.<sup>459</sup> She also speculates that the Lautenberg Amendment deters people from committing domestic violence misdemeanors because they know they will be barred from

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<sup>452</sup> See, e.g., Jolly, *supra* note 30, at 689.

<sup>453</sup> Lininger, *supra* note 19, at 193 (quoting Kimberly Brusk, *Gun Laws Still Don’t Protect Women from Abusers*, USA TODAY (July 30, 2014), <https://www.usatoday.com/story/opinion/2014/07/30/gun-control-deaths-women-column/13332165/> [<https://perma.cc/2WFJ-DND4>]).

<sup>454</sup> Kerri M. Raissian, *Hold Your Fire: Did the 1996 Federal Gun Control Act Expansion Reduce Domestic Homicides?*, 35 J. POL’Y ANALYSIS & MGMT. 67, 69, 90 (2016).

<sup>455</sup> *Id.* at 90. According to Raissian, the reduction in gun-related killings of male children was even greater (31% fewer). *Id.* at 69, 90.

<sup>456</sup> *Id.* at 73.

<sup>457</sup> *Id.* at 72.

<sup>458</sup> See *id.* at 74 (discussing post-conviction effects).

<sup>459</sup> *Id.* at 74.

possessing guns if they are convicted, and they will face substantial prison terms if they disobey the federal prohibition.<sup>460</sup>

However, many abusers still circumvent the federal gun ban for domestic violence misdemeanants, as the next sub-part of this Article will show. Furthermore, backlash and strategic behavior produced by the harsh law may even mean that abusers get treated more leniently than they would have been before the Lautenberg Amendment.

### 1. *Enforcement Woes and Backlash*

The Lautenberg Amendment has not been rigorously enforced.<sup>461</sup> Flaws in the background check system—including exceptions for sellers who are not federally-licensed, the existence of a robust black market, and incomplete databases that undercount domestic violence crimes—have been well-documented by other scholars.<sup>462</sup> These gaps allow persons prohibited from purchasing guns under § 922(g)(8) or § 922(g)(9) and related state laws to obtain them anyway. Moreover, the failure of many states to enact enforcement legislation or background check requirements that support federal law has hampered the effectiveness of § 922(g)(9).<sup>463</sup>

This Article nevertheless eschews advocating either discretion-stripping measures or a more punitive approach to keeping guns out of the hands of batterers. A variety of people involved in the system—including offenders, judges, prosecutors, and police officers—view gun prohibitions for domestic violence misdemeanants as an overreaction to low-level, even unintentional infliction of bodily injury, often without the use of a gun. Eliminating discretion might offer a cure for backlash. But there is reason to think that, if defendants and institutional actors perceive the system to be unfair, gun control in the context of domestic violence will remain an intractable part of the culture war over firearms. Consequently, it will not produce real accountability and reform on the part of abusers or safety for victims, no matter how severe the “law on the books” is.

State misdemeanor gun prohibitions are at least “weakly associated with higher rates of rape and assault,” which suggests a “substitution by batterers into less lethal violence, or a backlash by angry abusers.”<sup>464</sup> Law enforcers may also be motivated by resentment, or at least skepticism, toward such laws. For instance, beneath the level of the International Association of Chiefs of Police

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<sup>460</sup> See Raissian, *supra* note 454, at 74 (discussing pre-conviction effects).

<sup>461</sup> See *supra* notes 29–30 and accompanying text (describing critics’ complaints about low levels of prosecution and lenient sentencing decisions).

<sup>462</sup> See Gildengorin, *supra* note 21, at 822–24; Jolly, *supra* note 30, at 700–01; Lininger, *supra* note 19, at 189.

<sup>463</sup> See Gildengorin, *supra* note 21, at 838. For this reason, some scholars advocate the passage of state legislation requiring universal background checks for firearms, regardless of source, and tougher surrender and removal laws. See, e.g., Jolly, *supra* note 30, at 706.

<sup>464</sup> See Vigdor & Mercy, *supra* note 89, at 335–37.

(“IACP”), which has adopted “zero-tolerance” toward domestic violence,<sup>465</sup> officers dislike the Lautenberg Amendment for a variety of reasons.<sup>466</sup> Foremost among them is its detrimental impact on the employment of police convicted of qualifying offenses. The tendency to circle the wagons to shield an abusive officer makes it difficult for his victimized intimate partner to obtain support services, get the abuser arrested and charged with a domestic violence crime, and have his gun confiscated if he is convicted.<sup>467</sup>

Judges can also impede federal and state bans. They may fail to make requisite findings of fact, exercise their discretion not to impose gun and “use of force” prohibitions in restraining orders, and neglect to order gun confiscation or notify offenders about applicable firearms laws. Although the existing empirical studies shed little light on *why* judges behave this way,<sup>468</sup> anecdotal evidence suggests they have strong beliefs about Second Amendment rights, sympathize with defendants who claim to need guns for work or hunting, or both.<sup>469</sup>

Prosecutors also play a big role in the lax enforcement of § 922(g)(9), though legal scholar and former prosecutor Tom Lininger believes more fault lies with local prosecutors than with U.S. Attorney’s offices.<sup>470</sup> Because federal prosecutors rely on databases like the National Instant Criminal Background Check, the willingness of district attorney’s offices to seek convictions that can be identified as domestic violence offenses in such databases assumes paramount importance.<sup>471</sup> Prosecutors often charge defendants under generic assault or battery laws, instead of specialized statutes—that is, if they pursue the case at all. Instead, they might dismiss the matter or order the defendant to pretrial diversion.<sup>472</sup>

Indeed, the Lautenberg Amendment actually seems to have led some prosecutors to treat domestic violence more *leniently* than they otherwise would have because the firearms ban has raised the costs of bringing a case. Defendants are now more likely to go to trial and seek acquittal, rather than plead guilty to an offense that triggers a potentially permanent prohibition on gun possession.<sup>473</sup> Since the costs of trial are high, and victims often refuse to cooperate, prosecutors may be more willing to negotiate deals that evade the firearms ban.<sup>474</sup> The recent Supreme Court decision, *Voisine v. United States*,

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<sup>465</sup> See Goodmark, *supra* note 229, at 1230.

<sup>466</sup> According to survey data, for example, both victims and abusers on a police force “tended to disagree with the gun ban, believing spouses would use the law to take advantage of their partners.” Walton & Zelig, *supra* note 197, at 367.

<sup>467</sup> See Goodmark, *supra* note 229, at 1187, 1193, 1199–1201, 1230–32.

<sup>468</sup> See *supra* notes 377–80 and accompanying text.

<sup>469</sup> See Gildengorin, *supra* note 21, at 828–29.

<sup>470</sup> See Lininger, *supra* note 19, at 190–91.

<sup>471</sup> See *id.*

<sup>472</sup> See *id.* at 191–92.

<sup>473</sup> See Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1459–60 (2005).

<sup>474</sup> See *id.* at 1465.

only ensures that generic assault and battery convictions qualify as misdemeanor crimes of domestic violence for the purposes of § 922(g)(9).<sup>475</sup> *Voisine* does *not* prevent prosecutors and defendants from negotiating a guilty plea to a charge that lacks an element of force—disorderly conduct, for example.<sup>476</sup> Nor does it solve the problem of identifying violators in federal databases.

Lininger argues that, whether prosecutors sympathize with alleged batterers or simply bargain cases down for the sake of expediency, the solution to the under-enforcement of the Lautenberg Amendment lies in codifying an ABA model rule that obliges prosecutors to charge the most serious offense provable.<sup>477</sup> In doing so, he fails to respond adequately to the concern that, in reaction to such a rule, prosecutors might become more reluctant to prosecute batterers at all. Another possibility is that even more victims, fearing or disagreeing with the imposition of harsh gun prohibitions, would decide not to call the police.

## 2. *A Vicious Circle? Socioeconomic Impacts, Retaliation, and Recidivism*

Perhaps if their guns are confiscated, domestic violence misdemeanants simply pay an acceptable price for inflicting injury. But several costs of misdemeanor gun prohibitions warrant further consideration. First, victims may lose autonomy without gaining safety if the criminal justice system automatically and permanently bars the offender from having a firearm, no matter how minor or unintentional the disqualifying harm. Victims' fear of retaliation by their enraged partners is legitimate. The incarceration of abusers for weapons offenses also affects victims and their children emotionally and financially. Second, the lack of any exemption for guns required for employment ought to be reexamined, given the contribution of joblessness to both coercive, controlling abuse and situational couple conflict. At least on paper, the Lautenberg Amendment's blanket prohibition against the on-duty possession of firearms by police, military personnel, prison guards, and other public employees convicted of domestic violence misdemeanors is particularly hard to justify, since the "official use" exemption *does* extend to violent felons.<sup>478</sup>

Stake-in-conformity variables, including employment status, play a significant role in reoffending. When researchers compare men who murder their female intimate partners to other abusive males, unemployment emerges as "the most important demographic risk factor for acts of intimate partner

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<sup>475</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016); *see also supra* notes 262–64 and accompanying text (discussing the holding and reasoning in *Voisine*).

<sup>476</sup> *See Mikos, supra* note 473, at 1460.

<sup>477</sup> *See Lininger, supra* note 19, at 197–98, 204.

<sup>478</sup> *See* 18 U.S.C. § 925(a)(1) (2012) (indicating that domestic violence misdemeanants are the only class of public employees who cannot claim the exemption).

femicide.”<sup>479</sup> Indeed, “[u]nemployment appears to underlie increased risks often attributed to race/ethnicity.”<sup>480</sup> An experimental study in Broward County, Florida, found that young, unmarried men who lacked jobs and permanent housing were more likely to be reported for subsequent “incidents of severe violence” and cited for probation violations than employed, married men.<sup>481</sup> Due to the correlation between unemployment and severe, repeat offenses, reconsideration of the impact of the Lautenberg Amendment on military and police couples is especially warranted.

Some police officers use their weapons, as well as their “command presence,” to intimidate, rape, and inflict other abuse on their intimate partners and family members.<sup>482</sup> Their violence at home is all the more dangerous because they have specialized training in the use of force to subdue others; they are socialized in a hyper-masculine police culture that emphasizes the need for dominance and often denigrates women and homosexuals; and they enjoy a great deal of influence with the very organizations—shelters and other service providers, courts and prosecutors—supposedly dedicated to helping abuse victims obtain safety and justice.<sup>483</sup> Indeed, despite their own brutality, arresting batterers is part of their job description.

This Article deplores the violent conduct of some officers at home, as well as their use of excessive force against suspects on the street.<sup>484</sup> Yet, acknowledging the need to prevent and punish police-perpetrated domestic violence does not necessarily mean embracing the Lautenberg Amendment’s one-size-fits-all approach to the problem. Several courts have upheld the constitutionality of the misdemeanor gun ban insofar as it applies to people who need their guns for official government use.<sup>485</sup> The leading case, *Fraternal Order of Police v. United States*, was decided under a pre-*Heller* interpretation of the Second Amendment as a collective right to bear arms for militia

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<sup>479</sup> Campbell et al., *supra* note 1, at 1092.

<sup>480</sup> *Id.*

<sup>481</sup> SHELLY JACKSON ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, NCJ 195079, SPECIAL REPORT: BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? 1, 9–10, 12 (June 2003), <https://www.ncjrs.gov/pdffiles1/nij/195079.pdf> [<https://perma.cc/7N6R-PMWU>].

<sup>482</sup> See Goodmark, *supra* note 229, at 1188, 1190–91, 1196–97.

<sup>483</sup> See *id.* at 1199–1201, 1233–34.

<sup>484</sup> More than one-fifth of police officers who were the subject of a recent study, due to their domestic violence arrests, also had been named as defendants in one or more federal civil rights cases. See Philip M. Stinson, Sr. & John Liederbach, *Fox in the Henhouse: A Study of Police Officers Arrested for Crimes Associated with Domestic and/or Family Violence*, 24 CRIM. JUST. POL’Y REV. 601, 618–19 (2013).

<sup>485</sup> See, e.g., Nat’l Ass’n of Gov’t Emps. v. Barrett, 968 F. Supp. 1564, 1575–78 (N.D. Ga. 1997) (upholding the Lautenberg Amendment against Tenth Amendment, Equal Protection, Commerce Clause, substantive Due Process, and ex post facto claims), *aff’d*, Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998), *reh’g denied*, 189 F.3d 487 (11th Cir. 1999).

service.<sup>486</sup> But one federal district court, considering a challenge by a police officer whose misdemeanor battery conviction jeopardized his employment, asserted that the Lautenberg Amendment could even survive strict scrutiny.<sup>487</sup>

My goal here is neither to promote American gun culture, nor augment Second Amendment rights already enhanced by *Heller* and *McDonald v. City of Chicago*.<sup>488</sup> This Article nevertheless questions the wisdom of an absolute, federal gun ban that extends to domestic violence misdemeanants who need to possess guns for their jobs. Even if unemployment were not a risk factor for reoffending and femicide, a career-ending prohibition for the batterer likely would impose heavy financial costs on the victim and her children. Whether the victim remained in the relationship, separated, or divorced, she probably would retain financial ties to her abuser, including reliance on his contribution to child support. Thus, there are valid, victim-centered reasons for questioning the lack of an on-duty use exemption from § 922(g)(9).

Some proponents of gun restrictions for batterers have expressed concern about the potential impact of the Lautenberg Amendment on law enforcement families. For example, Democratic Representative and former police officer Bart Stupak unsuccessfully spearheaded a House Bill in 1997 that would have allowed “police officers to carry their departmental-issued firearm while on duty—not at home, not to go hunting, or any other place—just while on duty.”<sup>489</sup> Stupak further claimed, “This law was never intended—never intended—to end the careers of law enforcement officers, which is exactly what this law is doing.”<sup>490</sup> Indeed, Senator Lautenberg did not actually draft the proposed legislation in the form that eventually passed. He later suspected that Senator Bob Barr had removed the exception for police officers and military personnel to make the proposal “less attractive to his fellow Republicans and decrease the likelihood of its passage.”<sup>491</sup> In short, the lack of an exemption was an anomaly, a change that crept into the legislation in the eleventh hour.

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<sup>486</sup> *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (reasoning that “§ 922(g)(9) does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged”).

<sup>487</sup> *Gillespie v. City of Indianapolis*, 13 F. Supp. 2d 811, 827 (S.D. Ind. 1998). The Indianapolis Police Department sought to terminate Gillespie after he pled guilty to misdemeanor battery of his wife, on the grounds that he could not do his job if he were barred from possessing a firearm. *See id.* at 814–15.

<sup>488</sup> *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*, which means it can be enforced against state and local governments).

<sup>489</sup> *See Amend Section 658 of the Fiscal Year 1997 Omnibus Appropriations Act: Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence: Hearing on H.R. 445 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 27 (1997) (statement of Rep. Bart Stupak, Bill Sponsor), [http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_of.htm) [<https://perma.cc/GZ6K-APKW>].

<sup>490</sup> *Id.*

<sup>491</sup> *See* Lininger, *supra* note 19, at 180.

Federal law technically makes it certain that a police officer convicted of misdemeanor assault will lose not only his right to carry a firearm, but also his job. However, this rule seems to be honored more in the breach than in the observance. Citing a variety of empirical evidence, Leigh Goodmark claims that abusive officers often stay on the force without facing serious sanctions.<sup>492</sup> Some are never convicted of offenses that trigger the Lautenberg gun prohibition or comparable state laws, but others escape serious repercussions despite qualifying misdemeanor convictions.<sup>493</sup> According to a 2013 study by Philip Stinson and John Liederbach, for example, fewer than half of the officers who were convicted of domestic violence offenses lost their jobs, “either through resignation or termination.”<sup>494</sup> An abusive officer might be reassigned to a desk position, whereas colleagues who test positive for drugs get fired.<sup>495</sup> But Stinson and Liederbach actually found that “many of the police convicted of misdemeanor domestic assault are . . . still employed as sworn law enforcement officers who routinely carry firearms daily” in violation of the Lautenberg Amendment.<sup>496</sup>

Prosecutors and courts are complicit in some of these outcomes. Numerous officers in the cases Stinson and Liederbach studied “received professional courtesies of very favorable plea bargains where they readily agreed to plead guilty to *any* offense that did not trigger the firearms prohibitions of the Lautenberg Amendment.”<sup>497</sup> Even in prosecuted cases, fewer than half of the officers who used only their hands or fists in an assault, or who only inflicted minor injuries, were convicted.<sup>498</sup> (By contrast, convictions occurred in 87% of the cases in which the defendant used a personally owned gun against the intimate-partner or family member.)<sup>499</sup> But officers who committed serious crimes sometimes escaped permanent firearms disabilities, too. For example, to prevent a police officer from losing his job, a California judge expunged his conviction for raping his estranged wife multiple times.<sup>500</sup>

Cases in which an incident of officer-involved domestic violence results in conviction likely represent the tip of a large iceberg of unreported or unprosecuted assaults. The hushing of cases to prevent prosecution is perhaps the inevitable product of a police culture that erects a “blue wall of silence” to shield comrades from scrutiny and even places the blame on victims.<sup>501</sup> If this

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<sup>492</sup> See Goodmark, *supra* note 229, at 1187, 1193, 1231–32.

<sup>493</sup> See Stinson & Liederbach, *supra* note 484, at 618.

<sup>494</sup> *Id.* at 612–13. Only about one-third of the convicted officers lost their jobs. *Id.* at 612, 618. The majority of them suffered a suspension without job separation. *Id.* at 612.

<sup>495</sup> See Sarah Cohen et al., *Departments Slow to Police Their Own Abusers*, N.Y. TIMES (Nov. 24, 2013), <http://www.nytimes.com/projects/2013/police-domestic-abuse/?mcubz=0> [<https://perma.cc/2PVU-78UD>].

<sup>496</sup> See Stinson & Liederbach, *supra* note 484, at 618.

<sup>497</sup> See *id.*

<sup>498</sup> *Id.* at 613–15.

<sup>499</sup> *Id.* at 614.

<sup>500</sup> See Mikos, *supra* note 473, at 1463.

<sup>501</sup> See Goodmark, *supra* note 229, at 1200.

were the whole problem, the solution might lie in enacting laws and policies to compel (1) police departments to give teeth to the “zero tolerance” approach the IACP recommends; (2) prosecutors to charge abusive officers with serious offenses; (3) judges to order the confiscation of guns; and (4) police departments to fire officers who perpetrate domestic violence. But lawmakers also need to listen to the voices of abused women. A lawyer and former director of a victim-advocate program for police families justified the Chicago Police Department’s rejection of a “zero tolerance” approach to terminating officers convicted of domestic violence by saying, “Most victims don’t want abusers to lose their job . . . They just want to be safe.”<sup>502</sup> The latter is an outcome that gun confiscation, especially paired with job loss, does not guarantee.

The Lautenberg Amendment also puts military personnel convicted of misdemeanor crimes of domestic violence at risk of discharge. A soldier convicted after the effective date of the amendment is given a reasonable time to get the conviction expunged or petition for a pardon, but if he does not, the commander “must initiate adverse action, including bars to reenlistment, or alternatively, discharge from the military.”<sup>503</sup> He can lose his retirement benefits, as well as his job, even after years of honorable service,<sup>504</sup> and even though “[s]oldiers . . . are not permitted to take their weapons home during non-duty hours.”<sup>505</sup> Because the military has undergone public scrutiny of the way its culture and hierarchy seem to promote domestic and sexual violence, soldiers convicted of crimes triggering § 922(g)(9) may experience more severe repercussions than police officers do.<sup>506</sup> However, the termination of soldiers for a first-time misdemeanor offense could backfire. Families in the armed services are often young, poorly paid, and subject to the stress of frequent moves, so loss of employment is likely to be combined with other risk factors for recidivism and even femicide.<sup>507</sup>

### 3. *The Problem of Permanence*

Because a domestic violence misdemeanor conviction leads to a gun prohibition, the violation of which is punishable as a felony, it contributes to the problem of collateral consequences that saddle “a significant portion of the [United States] population with a seemingly permanent, crippling criminal

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<sup>502</sup> See Cohen et al., *supra* note 495.

<sup>503</sup> Jason M. Fritz, Comment, *Unintended Consequences: Why Congress Tossed the Military-Family Out of the Frying Pan and into the Fire When It Enacted the Lautenberg Amendment to the Gun Control Act of 1968*, 2004 WIS. L. REV. 157, 173 (2004).

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 178 (quoting *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 29).

<sup>506</sup> See Goodmark, *supra* note 229, at 1189.

<sup>507</sup> See *supra* notes 479–80 and accompanying text.



record history.”<sup>508</sup> There is no federal procedure through which the § 922(g)(9) gun ban can be lifted. If a defendant is convicted of a state domestic violence crime, as most individuals subject to § 922(g)(9) are, he might be able to get the conviction expunged under state law, which removes the misdemeanor from his record;<sup>509</sup> obtain a pardon; or have his civil rights restored.<sup>510</sup> The Seventh Circuit noted in *United States v. Skoien* that “[s]ome of the largest states make expungement available as of right to misdemeanants who have a clean record for a specified time.”<sup>511</sup> Expungement “is generally done by court order, and it can be automatic, mandatory upon request, or discretionary upon request.”<sup>512</sup> Thus, it perhaps overstates the problem to describe the Lautenberg gun ban as “permanent” or “perpetual,” as Steven Skoien tried to do after being convicted of possessing multiple guns while on probation for a domestic violence offense.<sup>513</sup>

Skoien, who had beaten both his former wife and his new fiancée, was hardly a poster child for reformed batterers.<sup>514</sup> However, while the Seventh Circuit did not hold in Skoien’s favor,<sup>515</sup> it admitted that the Lautenberg Amendment “tolerates different outcomes for persons convicted in different states,” which may have “widely disparate approaches to restoring civil rights,” issuing pardons, or making expungement available to misdemeanants.<sup>516</sup> A couple of possible results arise from this uncertainty about the restoration of firearms rights, and both are problematic. First, as Robert Mikos found when he researched the expungement of domestic violence misdemeanors, some states expunged the records of thousands of convicted abusers in the first five years

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<sup>508</sup> Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327 (2015). A burgeoning area of legal scholarship is devoted to the collateral consequences of a criminal conviction, which obstruct the offender’s reintegration into society. See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015) (describing how the permanence and ubiquity criminal record information can preclude an ex-convict from engaging in myriad activities vital to livelihood and full citizenship).

<sup>509</sup> See Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 362 (2016). However, as Jenny Roberts notes: “There is no one definition of sealing or expungement. These terms may have a variety of definitions under different state laws, which can range from actual destruction of a record to leaving the record open to the public but marking it ‘expunged.’” Roberts, *supra* note 508, at 323.

<sup>510</sup> Any of these procedures eliminates his domestic violence misdemeanor for the purposes of § 922(g)(9). See 18 U.S.C. § 921(a)(33)(B)(ii) (2012).

<sup>511</sup> *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc).

<sup>512</sup> Roberts, *supra* note 508, at 323–24.

<sup>513</sup> See *Skoien*, 614 F.3d at 645.

<sup>514</sup> See *id.*; see also *United States v. Chovan*, 735 F.3d 1127, 1141–42 (9th Cir. 2013) (denying appellant’s “as applied” challenge to § 922(g)(9) when his prior domestic violence conviction occurred fifteen years before). Although Chovan had not been arrested or convicted of domestic violence following the initial misdemeanor, he allegedly told his ex-wife that he would “hunt her down and shoot her” just four years later. *Id.* at 1130–31.

<sup>515</sup> See *Skoien*, 614 F.3d at 645.

<sup>516</sup> *Id.*

after the Lautenberg Amendment was passed.<sup>517</sup> Like prosecutors' lenient charging and plea bargaining practices and police officers' inclination to protect comrades accused of domestic violence, the wholesale expungement of convictions in certain states indicates that § 922(g)(9) has provoked more backlash than accountability. Expungement is seldom automatic and is often granted on the basis of extremely subjective and even capricious decision-making.<sup>518</sup> Whether it arises from a rubber-stamping process, a gut reaction of sympathy for a particular offender, or disagreement with the harsh effects of federal law on domestic violence misdemeanants, it does not represent the cautious, neutral, and fair determination that should precede the lifting of gun prohibitions.<sup>519</sup> Indeed, some defendants probably manage to get their records wiped clean, even though they are exceedingly dangerous individuals. Others, by contrast, may really deserve an expungement, based on a showing of law-abiding behavior and non-violence.<sup>520</sup>

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<sup>517</sup> See Mikos, *supra* note 473, at 1463–64 & nn.187 & 188.

<sup>518</sup> See JACOBS, *supra* note 508, at 120.

<sup>519</sup> The balance to be struck between a sufficiently individualized response and data-driven knowledge is a delicate one. Risk assessment tools do not constitute evidence; however, recent case law indicates that judges may use them to inform decisions in both civil and criminal contexts, *after* the requisite findings of fact have been made. See Liberty Aldridge, *The Use of Risk Assessments in Judicial Decision-Making*, 9 FAM. & INTIMATE PARTNER VIOLENCE Q. 19, 20–21 (2016); see also Julie Saffen, *Using Judicial Knowledge of Lethality Factors in Civil Domestic Violence Matters*, 9 FAM. & INTIMATE PARTNER VIOLENCE Q. 23, 26–27 (2016) (discussing *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. 2015), which held that family-court judges may use lethality factors to establish their background knowledge about the risk of future domestic violence, but not to make factual findings, when issuing or modifying a DVRO). It thus appears that, although judges cannot take judicial notice of domestic violence lethality factors, such risk assessment tools may still constitute part of their training. See Saffen, *supra*, at 26–27. Prosecutors also employ risk assessments in various ways in criminal cases, subject to evidentiary restrictions on character and propensity evidence. See Balson, *supra* note 272, at 36.

If risk assessment tools were used to determine whether a domestic violence misdemeanor conviction should be expunged and the offender's gun rights restored, the tools might need to be revised to place less emphasis on gun ownership and possession—given the circularity of relying on these factors to determine whether lawful gun access could safely be restored. The potential for impermissible traits, such as race, to serve as proxies for dangerousness also constitutes a legitimate concern.

<sup>520</sup> For example, in one Ohio case, a female defendant appealed the denial of her motion to have her domestic violence misdemeanor expunged. The appellate court held in her favor because it believed that her past act of domestic violence was “an aberration resulting from a specific and unique set of circumstances.” *Cleveland v. Cooper-Hill*, No. 84164, 2004 WL 2931001, at \*3 (Ohio Ct. App. Dec. 17, 2004). The court further stated:

Hers was a situational response, and the evidence shows that Ms. Cooper-Hill has carefully managed her life to avoid repeating such a situation.

[She] testified that she is no longer involved with her husband, who had girlfriends and spent the grocery money on drugs. She has, instead, invested enormous energy and persistence into establishing a service career. Her eight years of demonstrated model

The second possibility is that jumping through the requisite hoops to get a misdemeanor expunged will be legally or practically impossible. In such instances, the ban really is permanent. Some state legislatures expressly have removed expungement as an option in cases involving domestic violence,<sup>521</sup> and in other states, there are restrictions that make expungement difficult to obtain for misdemeanors in general. The dissenting judge in *Skoien* observed, for example: “In Wisconsin the expungement remedy is extremely narrow; it applies only to misdemeanants under the age of 21 and must be ordered at the time of sentencing. There is no after-the-fact or generally available opportunity to seek expungement.”<sup>522</sup> The concurrence in a Ninth Circuit case, *Fisher v. Kealoha*, described another road to the restoration of Second Amendment rights—gubernatorial pardon—“as notably slender” and completely dependent on the mercy of the executive.<sup>523</sup>

The near impossibility of getting one’s gun rights restored, in some jurisdictions, after conviction for a domestic violence misdemeanor might be the right outcome for serial batterers like *Skoien*.<sup>524</sup> Indeed, a core of especially dangerous men continues to pose an intractable problem for the prevention of violence against women.<sup>525</sup> But after the Supreme Court’s decisions in *Castleman* and *Voisine*, the range of conduct that qualifies as a “misdemeanor crime of domestic violence” is quite large; it extends from “offensive touching,” which recklessly results in minor injury,<sup>526</sup> to aggravated attacks that defendants manage to bargain down to simple assault.

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citizenship carry greater weight than the state’s need to preserve a record for the purpose of enhancing a future domestic violence offense that is merely a theoretical possibility.

*Id.* at \*3–4; *see also In re Criminal Records of H.M.H.*, 960 A.2d 821, 822 (N.J. Super. Ct. Law Div. 2008) (holding that the prosecutor failed to demonstrate basis for denying expungement considering that H.M.H. and his wife remained married, and there had been no active restraining order and no subsequent allegations of domestic violence in twelve years).

<sup>521</sup> *See, e.g., State v. Cardenas*, 145 So. 3d 362, 369 (La. 2014); *Williams v. State*, 879 So. 2d 77, 79 (Fla. Dist. Ct. App. 2004); *see also City of Maple Heights v. McCants*, No. 80128, 2002 WL 451292, at \*3 (Ohio Ct. App. Mar. 14, 2002) (finding that a statutory amendment making domestic violence convictions nonexpungeable “simply foreclosed [defendant’s] opportunity to have his record sealed, which has been found not to violate the ban against *ex post facto* application of the law”); *City of Euclid v. Sattler*, 756 N.E.2d 201, 202–04 (Ohio Ct. App. 2001) (holding that because expungement is a remedial request and thus exempt from constitutional limits on retroactivity, a statutory amendment excluding certain violent misdemeanors from expungement was applicable).

<sup>522</sup> *United States v. Skoien*, 614 F.3d 638, 652–53 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (internal citations omitted).

<sup>523</sup> *Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., “ruminating”).

<sup>524</sup> *See Skoien*, 614 F.3d at 643.

<sup>525</sup> *See supra* note 295.

<sup>526</sup> *See supra* notes 256–72 and accompanying text (explaining and critiquing the *Castleman* and *Voisine* cases).

For defendants who use a relatively trivial amount of force and then remain nonviolent for an extended period of time, a perpetual gun ban is unnecessary and perhaps unconstitutional.<sup>527</sup> Even with regard to supposedly incorrigible recidivists, the assumption that an offender cannot or will not reform is often self-fulfilling. Epstein warns about mandatory criminal justice responses to domestic violence:

These developments, along with other system reforms . . . reduce the ability of state actors to tailor their actions in response to individual circumstances. This, in turn, reduces the likelihood that defendants will voice their version of events, perceive they are being treated with respect, and feel that state authorities are attempting to be fair.<sup>528</sup>

The offender who places high value on his firearms may be pushed further into a violent (and perhaps misogynistic) firearms sub-culture by the judgment that he does not deserve an opportunity to strive for a restoration of his rights. The congressional decision to make § 922(g)(9) a ban of virtually perpetual duration lacking a “a good-behavior clause” (which would restore gun rights to those who avoid committing new domestic violence offenses for a certain number of years) may not make the statute unconstitutional.<sup>529</sup> However, the permanent, one-size-fits-all nature of the ban *does* make it ineffective and ill-advised.<sup>530</sup>

### *C. The Potential Impact of More Rigorous Enforcement on Vulnerable, Minority Communities*

A final cost, to which I have already alluded, is the impact on vulnerable communities.<sup>531</sup> Men of color constitute the majority of weapons possession offenders, despite the cultural and political association of gun ownership with rural, white, working-class males.<sup>532</sup> When domestic violence is added to the equation, racial minorities still bear the brunt of enforcement in many jurisdictions, especially in urban areas.<sup>533</sup> Domestic violence misdemeanants constitute a very small percentage of total weapons offenders.<sup>534</sup> But, in Manhattan, for example, more than 80% of the individuals arrested for domestic

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<sup>527</sup> *Skoien*, 614 F.3d at 653 (Sykes, J., dissenting).

<sup>528</sup> Epstein, *supra* note 433, at 1846.

<sup>529</sup> See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013) (“The breadth of the statute and the narrowness of [its] exceptions reflect Congress’s express intent to establish a ‘zero tolerance policy’ towards guns and domestic violence.”).

<sup>530</sup> As clarified, *supra* note 310, this Article focuses on the triviality or severity of the predicate offense, the offender’s subsequent behavior, and the duration of the ban, rather than the type of gun prohibited.

<sup>531</sup> See *supra* notes 184–85 and accompanying text.

<sup>532</sup> See Levin, *supra* note 173, at 2194.

<sup>533</sup> See Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 2, 60 n.250 (2006).

<sup>534</sup> See Lininger, *A Better Way to Disarm Batterers*, *supra* note 29, at 532.

violence are black or Hispanic.<sup>535</sup> If these arrestees plead guilty or are convicted of misdemeanors involving even a reckless use of force, they will be barred from possessing guns, possibly for life. The prohibition arises from the offender's status (a domestic violence misdemeanant), but even more troublingly, from a stereotype (a monster who will inexorably become a fatal shooter). The enforcement of the prohibition, in turn, subjects the offender to surveillance and potentially to imprisonment simply due to the risk that he *might* inflict future harm on his intimate partner with a gun, whether or not the predicate misdemeanor involved serious bodily injury.

Because black and Hispanic men are already subject to greater police surveillance, more aggressive apprehension and prosecution of domestic violence weapons offenders would have a greater impact on them, particularly in large cities, than on the paradigmatic rural, white male with a gun rack in his pick-up truck. One-size-fits-all criminalization of gun possession by batterers, many of whom are racial minorities, thus has the potential to tie a rigid, crime-control approach to domestic violence to racially-based stop-and-frisk policies like the one for which the New York Police Department became infamous.<sup>536</sup> Indeed, some federal cases hint that this type of selective surveillance and enforcement of § 922(g)(9) is already in play.<sup>537</sup>

Although mass incarceration and race-based policing constitute serious concerns, they would not, in my opinion, be sufficient to defeat rigorous enforcement of gun prohibitions for domestic violence offenders, if such prohibitions were finely tuned and showed success in saving lives. Low-income, black women who rent their homes or apartments and are separated or divorced face an especially high risk of suffering abuse.<sup>538</sup> But a turn to zealous prosecution of domestic-violence gun crimes comes without any guarantee that the surveillance and conviction of minority men will actually keep their partners safe. Indeed, as Lawrence Sherman and his colleagues found years ago, when they explored the correlation between mandatory arrest policies and recidivist violence in cities with large African-American populations, the discretion-less imposition of criminal sanctions on black men actually may put black women at greater risk.<sup>539</sup>

Moreover, since women of color often do not fit the stereotype of the innocent and passive victim, their reliance on self-help—including physical resistance to abuse—could place them on the receiving end of surveillance and

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<sup>535</sup> Suk, *supra* note 533, at 60 n.250.

<sup>536</sup> See *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 561–62 (S.D.N.Y. 2013) (holding, in a § 1983 suit, that New York's stop-and-frisk policy was based on racial classifications and discriminatory intent, which violated the Fourth and Fourteenth Amendments).

<sup>537</sup> See, e.g., *United States v. White*, 593 F.3d 1199, 1201 (11th Cir. 2010) (stating that the illegal gun was found on defendant's person during a frisk after police "received a complaint about loud music coming from a vehicle parked in a high-crime area of Mobile, Alabama").

<sup>538</sup> See SAMPSON, *supra* note 35, at 14.

<sup>539</sup> See LAWRENCE W. SHERMAN ET AL., *POLICING DOMESTIC VIOLENCE* 3 (1992).

punishment for gun possession.<sup>540</sup> Women (or men) incarcerated for felony weapons offenses, such as a violation of § 922(g)(9), may lose contact with their children. This collateral consequence of a conviction is especially likely for female prisoners, who often serve time hundreds of miles from their families, due to the scarcity of women's correctional facilities.<sup>541</sup> A highly prosecutorial use of firearms prohibitions in response to intimate-partner violence thus threatens to contribute to the further destabilization of precarious social and family relationships in poor, minority communities.

#### V. TOWARDS REASONABLE GUN CONTROL FOR DOMESTIC VIOLENCE OFFENDERS

The enforceability of permanent firearms disabilities, which even extend to offenders whose jobs require them to carry a gun on-duty, presents what Dan Kahan calls a “sticky norms” problem:

If the law condemns the conduct substantially more than does the typical decisionmaker, the decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law, and she will balk. Her reluctance to enforce, moreover, will strengthen the resistance of other decisionmakers, whose reluctance will steel the resolve of still others, triggering a self-reinforcing wave of resistance.<sup>542</sup>

Although a “gentle nudge” in the domestic violence context<sup>543</sup> could occur outside the realm of statute (for example, educating judges, prosecutors, police, and victims about the homicide risks posed by batterers' access to firearms),<sup>544</sup> this Article also advocates tailoring gun prohibitions to ensure that they target the right offenders, avoid pushing an already abusive relationship over the brink by destroying the couple's economic livelihood, and incorporate a careful mechanism for restoring firearms rights if the offender changes his behavior. It would be preferable to acknowledge various interests, besides the goal of lowering homicide rates, and try to re-draft the laws so that they are not only more reasonable, but also more enforceable. Without discounting the lives of domestic abuse victims, this Article has demonstrated that the relevant considerations are more numerous and complicated than simply debating how many murders the existing statutes have averted.

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<sup>540</sup> See *supra* Part IV.C.

<sup>541</sup> See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1496 (2012).

<sup>542</sup> Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000).

<sup>543</sup> See *id.* at 628–31.

<sup>544</sup> Cf. Fan, *Disarming the Dangerous*, *supra* note 87, at 176–77 (suggesting that police advice to victims about obtaining gun removal through a civil DVRO should become standard practice); May, *supra* note 374, at 32 (advocating judicial education).

Such considerations include respect for victims' autonomy and capacity to help determine whether their abusers' guns should be confiscated and the non-stereotypical reality of women's use of force for self-protection. There are hidden costs, as well. Section 922(g)(9) and state-level firearms laws for domestic violence misdemeanants have proved problematic. Their perceived harshness, potentially perpetual duration, and lack of an "official use" exemption for employees who need guns on-duty make them difficult to enforce. I have critiqued proposals to make such firearms laws even less discretionary and more punitive because this approach might have a detrimental impact on victims and their families and drive offenders deeper into a violent (and perhaps misogynistic) gun sub-culture. It might lead to recidivism and even homicide, despite ostensibly eclipsing the victim's preferences for the sake of her safety. Moreover, not all domestic violence misdemeanants are male batterers. Women who use force in reaction to trauma and abuse should not end up in federal prison on weapons charges. For similar reasons, we should be cautious about increasing the policing and punishment of vulnerable, minority communities under the appearance of protecting families.

In my view, civil DVRO provisions barring the restrained party from possessing and purchasing firearms hold the most promise. They have produced the best results, to date, in jurisdictions that have taken them seriously, and they have the greatest potential to respect an abuse victim's preferences. A protection order could empower her to set the boundaries of her relationship with her abuser, including his access to guns, if she can offer evidence of the need to confiscate them and prevent him from buying new ones. I also briefly discussed *ex parte* orders and scene-of-the-crime gun confiscation. With regard to these emergency measures, precautions like brief duration and an express, preliminary finding of severe violence or a credible threat to kill may be essential to uphold the respondent's constitutional rights and preserve his sense that he has received fair treatment, which in turn may help reduce retaliatory assaults.

This Article has aimed to spark a conversation about a more reasonable approach to gun control in the context of intimate-partner abuse that rejects the manipulation of gender and "the politicization of safety" by both gun-rights and gun-control camps.<sup>545</sup> It is impossible to remove discretion from the system completely. This means that we need to give judges, prosecutors, and police good reasons to support domestic violence firearms restrictions and apply them fairly. We also need to listen to the voices of abuse victims, who may have legitimate concerns about the enforcement of one-size-fits-all gun bans.

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<sup>545</sup> I owe the phrase "the politicization of safety" to the name of a conference hosted by the U.C. Irvine Initiative to End Family Violence, at which I was privileged to present a draft of this Article. Other scholars' conference papers will be published as chapters in *THE POLITICIZATION OF SAFETY* (Jane Stoeber ed., forthcoming 2018), an anthology to which time constraints prevented me from contributing.

