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Keeping Guns in the Hands of Abusive Partners: Prosecutorial and Judicial Subversion of Federal Firearms Laws

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PROSECUTORIAL AND JUDICIAL SUBVERSION OF FEDERAL FIREARMS LAWS

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INTRODUCTION

Domestic violence and firearms are a dangerous combination for victims. When there was a gun in the household, one study found an abusive partner was five times more likely to kill his victim than when no gun is present.[1] Another study found domestic assaults were twelve times more likely to end in death when a gun was present.[2] Though domestic violence is a global problem, domestic homicide committed by firearm is a particularly American issue; in comparison with women from other high-income countries, women in the United States are twenty-one times more likely to be killed with a gun.[3] Many abusive partners who threaten their partners with a gun end up dying by firearm suicide.[4]

The damage done by an abusive partner's access to a firearm is not only the increased risk of homicide, though that increased risk is of course severe. Today, 4.5 million women in the United States report that an intimate partner has threatened them with a gun.[5] Victims threatened with a gun are

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[1] 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).

[2] Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3044 (1992).

[3] Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 PREVENTATIVE MED. 20, 22 (2019).

[4] EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 10 (2019) [hereinafter EVERYTOWN FOR GUN SAFETY], https://everytownresearch.org/reports/guns-intimate-partner-violence/#foot_note_18 [https://perma.cc/3D4U-5Z2X].

[5] *Id.* at 11.

more likely to suffer from symptoms of post-traumatic stress disorder (PTSD) than those who had not been threatened or did not fear that a gun would be used against them.[6] Abusive partners also use guns to gain power over their victims and coerce them to do things they otherwise would not do.[7] Children who witness their parents being threatened or abused with a gun also suffer PTSD symptoms, behavioral problems, and suicidal thoughts.[8]

Congress has recognized the vulnerability of domestic violence victims, and particularly the risk they face when their abusive partners had firearms. In the mid-1990s, Congress passed two laws banning respondents subject to protection orders and individuals convicted of misdemeanor crimes of domestic violence from possessing firearms.[9] This legislation limited the discretion available to prosecutors and judges to permit abusive partners to possess guns, or put differently, to constrain a domestic violence victim's right to have her abusive partner dispossessed of his firearms. These laws were Congress's attempt to save the lives most threatened by domestic violence.[10] For a number of reasons, though, these laws have failed to live up to their promise. There are insufficient agents in the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to investigate violations and an insufficient number of US attorneys dedicated to prosecuting these violations.[11] Federal prosecutors are also limited by information that state agents—be they prosecutors, judges, or police officers—put into the National Crime Information Center's (NCIC) database; some states fail to provide complete, or even any, domestic violence conviction or protection order data, with the result that federal prosecutors have no way of bringing violations.[12] A combination of these barriers has meant that

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[6] *Id.* at 13.

[7] *See* APRIL M. ZEOLI, BATTERED WOMEN'S JUST. PROJECT, NON-FATAL FIREARM USES IN DOMESTIC VIOLENCE 6–8 (2017), https://vaw.msu.edu/wp-content/uploads/2018/06/nonfatal-gun-dv-zeoli-1-1.pdf [https://perma.cc/F9PV-ED5Y].

[8] EVERYTOWN FOR GUN SAFETY, *supra* note 4, at 15.

[9] See *infra* Part I for an in-depth discussion of these laws.

[10] *See infra* Part I.

[11] AMS. FOR RESPONSIBLE SOLS. & NAT'L DOMESTIC VIOLENCE HOTLINE, SAVING WOMEN'S LIVES: ENDING FIREARMS VIOLENCE AGAINST INTIMATE PARTNERS 14 (2014) [hereinafter SAVING WOMEN'S LIVES].

[12] *Id.* at 16–17; *see also* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 322 (2006); ARKADI GERNEY & CHELSEA PARSONS, CTR. FOR AM. PROGRESS, WOMEN UNDER THE GUN: HOW GUN VIOLENCE AFFECTS WOMEN AND 4 POLICY SOLUTIONS TO BETTER PROTECT THEM 3 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolencereport.pdf [https://perma.cc/KV27-WE26] (identifying only three states—Connecticut, New Hampshire,

federal prosecutions for violations of these two laws have been very limited: violations of these provisions have led to charges in only 1,795 cases from 2008 to 2017, out of a total 103,304 federal gun prosecutions.[13]

The above are barriers that advocates on the ground have identified as undermining the effectiveness of federal laws preventing abusive partners from possessing firearms, and much has been written about how to overcome them. There is one substantial additional barrier, though, about which little has been written: the intentional efforts of state actors to subvert these federal laws. In some instances, state prosecutors are failing to fully charge and prosecute domestic violence crimes which would trigger the federal firearm ban, with the intent of subverting the ban.[14] State judges sometimes cross out the mandatory firearm ban provisions on preprinted protection order forms.[15] It is not known how common these subversive behaviors are, and this subversion is only one piece of an overarching systemic mishandling of disarming those who abuse their partners. But these actions are deeply problematic, because they undermine Congress's authority and cause real harm to the vulnerable people Congress acted to protect.

Subversion occurs when a person acting within an institution engages in an effort to undermine that institution or other source of authority.[16] The institution of American democracy is made up of the three branches—legislative, judicial, and executive—and subversion can occur both inter- or intrabranch, or between federal and state governments. American history is replete with examples of state actors willfully subverting the law. In 1954, the US Supreme Court held in *Brown v. Board of Education of Topeka* that racial segregation in schools was unconstitutional.[17] Three years after this landmark ruling, then-Governor of Arkansas Orval Faubus enlisted the Arkansas National Guard to physically prevent nine African American students from entering the formerly all-white Central High School.[18] President Eisenhower countered by

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and New Mexico—as "submitting reasonably complete records" and noting that records from these states constitute 79 percent of all records nationwide).

[13] *Federal Weapons Prosecutions Rise for Third Consecutive Year*, SYRACUSE UNIV.: TRAC (Nov. 29, 2017), https://trac.syr.edu/tracreports/crim/492/ [https://perma.cc/M33C-DHC9].

[14] See *infra* Part II.B below for a more in-depth discussion of these charging practices.

[15] See *infra* Part III for an in-depth discussion of this practice.

[16] *Subversion*, FINDLAW LEGAL DICTIONARY, https://dictionary.findlaw.com/definition/subversion.html [https://perma.cc/EV6E-A54E].

[17] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

[18] *This Day in History: September 4, 1957*, *Arkansas Troops Block "Little Rock Nine" from Entering Segregated High School*, HISTORY (Feb. 9, 2010) [hereinafter *This*

sending in one thousand troops from the National Guard to enable the nine African American students to enter the school. The students entered the school and the academic year was ultimately completed, but Governor Faubus and the Arkansas legislature then shut down Little Rock's four high schools for the following year in a further attempt to resist integration.[19] After the schools were closed for a full school year, voters recalled several members of the Little Rock School Board and accepted that their schools would integrate.[20]

The actions of Governor Faubus and the Arkansas legislature in attempting to block nine African American students from entering Central High School constitute subversion. In the *Brown* ruling, the highest court in the federal judiciary issued an opinion that immediately became binding law. However, the state of Arkansas's executive branch, and later its legislative branch, refused to accept the Court's mandate to integrate its schools; instead of fulfilling their obligation to enforce the law, Governor Faubus and the Arkansas state legislature used their power subversively to maintain their desired—but now illegal—political outcome of racially segregated schools.

Subversion by state officials is problematic on its face. It undermines the authority of the other branches of government and destabilizes our system of separation of powers.[21] Subversion can have particularly insidious outcomes, though, when committed in defiance of laws intended to protect vulnerable individuals. Decided at the end of the Jim Crow era, the *Brown* Court found that the Arkansas state legislature had unconstitutionally abrogated African American children's rights under the equal protection clause of the US Constitution.[22] In so deciding, it protected a group of individuals who had heretofore been unprotected by the state. By subverting the law of *Brown*, the Arkansas executive and legislative branches not only undermined the authority of the US Supreme Court, but they also caused a great deal of harm to the vulnerable people the law was intended to protect. They exposed nine African American children to the unimaginable trauma of trying to enter a school

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Day in History: Little Rock Nine], https://www.history.com/this-day-in-history/arkansas-troops-prevent-desegregation [https://perma.cc/3X7C-F67R].

[19] Sondra Gordy, *Lost Year*, CALS: ENCYC. OF ARK. (June 2, 2017), https://encyclopediaofarkansas.net/entries/lost-year-737/ [https://perma.cc/5JL9-ZDV4].

[20] *Id.*

[21] Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1790 (2007).

[22] *Brown*, 347 U.S. at 483.

defended by armed guards.[23] On a broader scale, they prevented 3,665 children from attending school for an entire academic year.[24] Expressively, their actions sent the message that the rights of white children to attend racially segregated schools outweighed the rights of African American students to attend racially integrated schools.

Part I of this article lays out the history behind the passage of two federal laws enacted to remove firearms from the hands of abusive partners, as well as the requirements of the laws themselves. Part II describes the difference between prosecutorial discretion (which is both necessary and desirable) and prosecutorial subversion (which is harmful and inappropriate), briefly discusses the history of state prosecutors subverting the law in the context of domestic violence cases, and then offers examples of state prosecutors engaging in subversion as it relates to federal firearms bans. It then offers several proposals to determine the scope of this subversion on a national level, and solutions for limiting it moving forward. Part III provides a parallel analysis in the judicial context.

I. FEDERAL FIREARMS LEGISLATION PROTECTING DOMESTIC VIOLENCE VICTIMS

In the aftermath of the assassinations of President John F. Kennedy Jr., Martin Luther King Jr., and Robert Kennedy, and in the face of increasing crime and rioting, Congress enacted the Gun Control Act of 1968.[25] Among other provisions, the Gun Control Act enumerated categories of individuals, including those individuals who suffer from mental illness and those convicted of felonies, who would be banned from possessing firearms.[26] It was the first piece of federal legislation that limited the right to possess firearms for specific individuals.[27]

By the 1980s, the connection between domestic violence and firearm use was becoming clear. In 1980, 69 percent of all intimate partner homicides were committed with a gun.[28] By the

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[23] *This Day in History: Little Rock Nine*, *supra* note 18.

[24] Gordy, *supra* note 19.

[25] Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—and What People Get Wrong About that History*, TIME (Oct. 25, 2018), https://time.com/5429002/gun-control-act-history-1968/ [https://perma.cc/FMQ4-VL6M].

[26] 18 U.S.C. 922(g).

[27] Jodi L. Nelson, Note, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 NOTRE DAME L. REV. 365, 370 (1999).

[28] Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008*, BUREAU OF JUST. STAT. (2011), https://www.bjs.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/DE93-LJR5].

early 1990s, the number of gun homicides in the United States reached its peak.[29] Congress, along with the rest of America, was starting to realize that "all too often, the difference between a battered woman and a dead woman is . . . a gun."[30] In 1994, Congress amended the Gun Control Act to ban a new category of individuals from possessing firearms: persons subject to a protection order (legislation hereinafter referred to as the "protection order prohibition").[31] A protection order is a state court-issued order which directs an individual to stop harming another individual.[32] Most protection orders also require respondents to stay away from the petitioner, the petitioner's home, and other locations the petitioner frequents.[33] Protection orders often prohibit or limit the respondent from contacting the petitioner entirely.[34] Depending on the state, other forms of relief may be available in a protection order,[35] and protection orders generally last between one to three years.[36] In addition to banning possession of firearms, the protection order prohibition also bans shipping, transporting, or receiving firearms or ammunition.[37] To qualify for the gun ban under the protection order provision, the protection order must order the respondent not to harass, stalk, threaten, or otherwise place an intimate partner or their child in fear of bodily injury.[38] The protection order must also either find the respondent to be a credible threat to the petitioner or explicitly prohibit the use, attempted use, or

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[29] D'Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RSCH. CTR. (May 7, 2013), https://www.pewsocialtrends.org/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware/ [https://perma.cc/C84G-72VQ].

[30] 142 CONG. REC. S11,226–27 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

[31] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c), 108 Stat. 1796, 2014–15 (codified at 18 U.S.C. § 922(g)(8)).

[32] *See General Domestic Violence Restraining Orders*, WOMENSLAW.ORG, https://www.womenslaw.org/laws/general/restraining-orders [https://perma.cc/DE84-DM74].

[33] *Id.*

[34] *Id.*

[35] *Id.* Relief available often includes temporary child support, temporary child custody and visitation rights, exclusive use and possession of a jointly owned vehicle, exclusive use and possession of a residence, or mandatory treatment for the respondent, including batterer's intervention programs or alcohol or drug counseling. *Id.*

[36] ABA Comm'n on Domestic & Sexual Violence, *Domestic Violence Civil Protection Orders (CPOs)*, AM. BAR ASS'N (Aug. 20, 2016), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf [https://perma.cc/AZ2E-5YHS]. There are some exceptions to this. For example, Connecticut orders are 120 days, *see* CONN. GEN. STAT. ANN. § 46B-15(d) (West, Westlaw current through the 2022 Supplement to the Gen. Statutes of Conn., revised to Jan. 1, 2022); in Mississippi, the duration of the order is at the court's discretion and can be indefinite, *see* MISS. CODE ANN. § 93-21-15(2)(b) (West, Westlaw current through the 2022 Reg. Sess.).

[37] 18 U.S.C. § 922(g)(8).

[38] *Id.*

threatened use of violence against the petitioner.[39] The individual subject to the protection order must have received actual notice of the hearing at which the protection order was issued.[40] The gun ban for persons subject to a protection order is in place for the life of the order.[41]

In 1996, Congress took further steps to remove firearms from the hands of those who abuse their partners. Although the Gun Control Act prohibited felons from possessing firearms at this time, the vast majority of acts of domestic violence were being charged as misdemeanors.[42] In cases where an individual perpetrated violence against an intimate partner as opposed to against a stranger, the violence against the intimate partner was often taken less seriously by the criminal legal system; acts of violence that were charged as felonies when perpetrated upon a stranger were charged as a misdemeanor when perpetrated upon an intimate partner.[43] Even in the rare cases where abusive partners were initially charged with felonies, which would have triggered the gun ban upon conviction, they were often able to plead their cases down to misdemeanors.[44]

Congress found this to be a problematic and dangerous loophole in the Gun Control Act. In 1996, Senator Frank Lautenberg proposed what became known as the Lautenberg Amendment,[45] which bans individuals convicted of misdemeanor crimes of domestic violence from possessing, shipping, transporting, or receiving firearms or ammunition.[46] To qualify as a misdemeanor crime of domestic violence, the offense must be prosecuted under a law which includes "as an element, the use or attempted use of physical force, or the threatened use of a deadly

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[39] *Id.*

[40] *Id.*

[41] *See id.*

[42] *See* 142 CONG. REC. H10,434 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder); *see, e.g.*, Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES (July 11, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-07-11-mn-14289-story.html [https://perma.cc/ELJ6-3W2X] (noting that at that time, 90 percent of domestic violence cases in Los Angeles were being charged as misdemeanors); Rene Lynch, *Spousal Abuse Is Rarely Prosecuted as a Felony in O.C.*, L.A. TIMES (June 26, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-06-26-mn-8868-story.html [https://perma.cc/59BA-7UT2] (stating that in Orange County, more than 95 percent of domestic violence felony arrests were charged as misdemeanors).

[43] EVE S. BUZAWA & CARL F. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 58 (1990) (citing a study which found that a third of misdemeanor domestic violence charges would have been charged as felonies if committed against a stranger).

[44] 142 CONG. REC. H10,434 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder).

[45] S. 1632, 104th Cong. (1996); 142 Cong. Rec. S2646 (daily ed. Mar. 21, 1996) (statement of Sen. Lautenberg); *see also* Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 177–81 (2015) (summarizing initial proposal to passage of the Lautenberg Amendment).

[46] 18 U.S.C. § 922(g)(9).

weapon."[47] The statute also contains a relational requirement where the defendant must be "a current or former spouse, parent, or [similarly situated person with the victim]."[48] The gun ban is self-executing immediately upon conviction. The ban is permanent and there is no provision in the law for lifting it.[49]

The Lautenberg Amendment passed in the House of Representatives by a vote of 370–37[50] and in the Senate by a vote of 84–15,[51] and was signed into law on September 30, 1996.[52] In his remarks from the Senate floor before Congress voted on his Amendment, Senator Lautenberg stated:

> We hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun.[53]

Congress's motivation in passing the Lautenberg Amendment was clear: to bridge the gap between the seriousness of domestic violence and the undercriminalized or undercharged way that states were treating domestic violence. By widening the prohibition on gun possession to include misdemeanor convictions of domestic violence, Congress hoped to capture this previously unaffected category of individuals.

One critical distinction exists between the Lautenberg Amendment and the rest of the Gun Control Act, including the protection order prohibition. While the other provisions of the Gun Control Act include an "official use" exception allowing for law enforcement officers, members of the military, or other government employees to keep their firearms for work purposes, no such exception exists in the Lautenberg Amendment.[54] There were no

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[47] *Id.* § 921(a)(33)(A)(ii).

[48] *Id.*

[49] *See* 18 U.S.C. § 922(g)(9); *see also* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1419 (2005).

[50] 142 CONG. REC. H12109–10 (daily ed. Sept. 28, 1996).

[51] 142 CONG. REC. S11936 (daily ed. Sept. 30, 1996).

[52] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-372 (1996) (codified at 18 U.S.C. § 922(g)); *see also 1117. Restriction on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, U.S. DEP'T OF JUST.: CRIM. RES. MANUAL [hereinafter *US DOJ Criminal Resource Manual*], https://www.justice.gov/archives/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted [https://perma.cc/VYA5-TAYK].

[53] 142 CONG. REC. S11878 (daily ed. Sept. 30, 1996).

[54] The Lautenberg Amendment states that,

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or

hearings in the House of Representatives or in the Senate on the Lautenberg Amendment,[55] and it is not clear from the congressional records why the Lautenberg Amendment omitted this exception.[56] The lack of the official use exception was challenged in the courts almost immediately, but was ultimately found to be constitutional.[57] As discussed herein, this distinction becomes a critical one.

Though Congress's intent in omitting the official use exception was not clear, there was good reason for its exclusion at the time the bill passed. Data available from the 1990s demonstrates that police officers and members of the military were more likely than other individuals to commit domestic violence. One study from 1992 found that 41 percent of police officers admitted to using violence against a spouse.[58] Another report from 1999 found that domestic violence was five times higher in the military than among civilians.[59] Although there has been minimal recent research into the prevalence of domestic violence among police officer and military communities, the data that does exist continues to suggest that domestic violence remains more common among those professions than among the general population.[60]

> issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

18 U.S.C. § 925(a)(1); *see also US DOJ Criminal Resource Manual*, *supra* note 52.

[55] Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of* United States v. Castleman*—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 123 (2015).

[56] Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 836–38 (2000); *see also* Naftali Bendavid, *A Political Gunfight*, LEGAL TIMES, Mar. 3, 1997, at 18 (noting that the exception actually was present in Senator Lautenberg's originally proposed bill and that after the Lautenberg's Amendment's passage, the *Associated Press* reported that Representative Bill Barr, a Republican from Georgia who was known to oppose gun control legislation, had removed the exception in an attempt to doom the bill's success); Guy Gugliotta, *Gun Ban Exemption Ricochets in the Struggle*, WASH. POST (June 10, 1997), https://www.washingtonpost.com/archive/politics/1997/06/10/gun-ban-exemption-ricochets-in-the-struggle/575a5f11-e1c2-4ae3-a800-ba72978185b0/ [https://perma.cc/X26Y-P8XX] (noting Representative Barr denied the allegation that he was responsible for removing the exception).

[57] *See* Fraternal Ord. of Police v. United States, 173 F.3d 898, 898–99 (D.C. Cir. 1999).

[58] Nathan, *supra* note 56, at 856.

[59] *Id.*

[60] *See, e.g.*, Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem than the NFL Does*, ATLANTIC (Sept. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/FCX9-UMJ2] ("Research suggests that family violence is two to four times higher in the law-enforcement community than in the general population."); Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1186 (2015) ("Studies suggest that police officers are more likely than others to commit intimate partner abuse."); Shirley Ragsdale, *Domestic Abuse Punishable Especially If It's a Policeman*, ARGUS LEADER, Feb. 27, 2000, at B.14 (noting that "40 percent of police officer families experience domestic abuse in contrast to 10 percent of families in the

With the Lautenberg Amendment and the protection order prohibition, Congress explicitly limited discretion of both prosecutors and judges: the firearm ban would apply even when prosecutors charged a crime of domestic violence as a misdemeanor instead of a felony, and the ban was nondiscretionary for judges entering protection orders. Congress recognized that judges were not well-equipped to predict future violence in intimate partner relationships,[61] and therefore removed the judicial option to allow an abusive partner to keep their firearms.

Although they are federal laws, enforcement of the Lautenberg Amendment and protection order prohibition rely on enforcement of domestic violence statutes at the state level. The Lautenberg Amendment and protection order prohibition are only operative upon a misdemeanor conviction of domestic violence or entry of a final protection order,[62] both of which take place in state court.[63] However, violations of the Lautenberg Amendment and protection order prohibition are both prosecuted in federal courts.[64] Therefore, while state prosecutors and judges are not directly involved in prosecutions of Lautenberg Amendment or protection order prohibition violations, they still have tremendous power to undermine the impact of the laws.

Importantly, after Congress passed the protection order prohibition and the Lautenberg Amendment, a number of states passed similar firearm prohibition laws for abusive partners. Currently, thirty states and Washington, D.C. prohibit people convicted of misdemeanor domestic violence from possessing firearms.[65] Forty-two states and Washington, D.C. prohibit those subject to protection orders from possessing firearms when some conditions are met.[66] These state laws have been shown to reduce domestic homicides; one study found that states that enacted legislation prohibiting protection order respondents from possessing firearms lowered their intimate partner homicide rate

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general population"); Richard L. Frierson, *Combat-Related Posttraumatic Stress Disorder and Criminal Responsibility Determinations in the Post-Iraq Era: A Review and Case Report*, 41 J. AM. ACAD. PSYCHIATRY L. 79, 79–80 (2013) (showing that this risk is particularly exacerbated when military members suffer from PTSD).

[61] Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 2–7, 32 (2005).

[62] 18 U.S.C. § 922(g)(8)–(9).

[63] *See supra* notes 32–41 and accompanying text.

[64] *See Federal Weapons Prosecutions Rise for Third Consecutive Year*, *supra* note 13.

[65] *Domestic Violence & Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/ [https://perma.cc/UGM8-2X23].

[66] *Id.* (explaining that, generally, respondents must be given notice of the hearing and the opportunity to appear, although some states permit prohibitions on firearm possession following an *ex parte* hearing).

by 8 percent after the law's passage.[67] Another study found a 19 percent reduction in intimate partner homicide risk following the passage of similar laws.[68]

II. PROSECUTORIAL SUBVERSION OF FEDERAL FIREARMS LAWS

Prosecutors play a major role in implementing the American system of criminal justice. They initiate criminal cases by filing charges, they determine whether and what plea bargains to offer to defendants, they investigate cases and develop evidence, and they decide which cases to take to trial. They have broad discretion in each of these steps in the process of prosecution, which is largely unreviewable by the courts.[69] Charging and plea decisions, for example, are only subject to judicial review when the charging decision was vindictive or when it was based on unlawful criteria, such as race.[70] This Section explores how prosecutorial decisions about charges to be filed and plea deals to be offered can subvert the Lautenberg Amendment.

A. What Is Prosecutorial Subversion?

Prosecutorial discretion is a fundamental component that is built into the criminal legal system, and it is important that it be preserved so that prosecutors may act in the interest of justice in each case. Prosecutorial subversion, though, goes beyond proper discretion; it is a prosecutor acting out of her own personal disagreement with what the legislative branch determined constitutes justice. When prosecutors decline to prosecute a crime, or decide to bring lesser charges than the available evidence supports, based entirely on a personal disagreement with the applicable law, they are engaging in prosecutorial subversion.[71] This most often occurs when the prosecutor believes that the potential sanction for a crime is too harsh, that the law criminalizes behavior that should not be criminalized, that enforcing the law conflicts with larger community interests, or that the law as applied to a particular

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[67] Vigdor & Mercy, *supra* note 12, at 337.

[68] April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 INJ. PREVENTION 90, 92 (2010).

[69] Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 519, 542–46 (2012).

[70] Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1017–18, 1041–45 (2014).

[71] Roger Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011).

defendant is unfair.[72] This type of prosecutorial subversion essentially allows prosecutors to make certain laws inoperative within their jurisdictions.[73]

The following example may help clarify when a prosecutor acts within her discretion as opposed to when she acts to subvert the law. The Tennessee domestic abuse statute criminalizes assaultive behavior committed by defendants in a variety of relationships to their victims, including spouses.[74] In 2015, the US Supreme Court established the legality of same-sex marriage nationwide in *Obergefell v. Hodges*.[75] Craig Northcott, a district attorney in Tennessee, announced in June 2019 that his office would not prosecute any case involving domestic violence in same-sex marriages, as he believed those relationships were not valid marriages.[76] With this decision, Northcott subverted two different laws: he subverted the law of *Obergefell* by refusing to treat same-sex spouses the same as opposite-sex spouses in domestic abuse cases, and he subverted Tennessee's domestic abuse statute by refusing to apply it to same-sex spouse defendants.

A prosecutor's actions need not be as broadly applicable or as explicit as Northcott's to constitute subversion. For example, if Northcott had declined to prosecute in one particular domestic abuse case by a same-sex partner against his spouse, but that decision was made based on his belief that the marriage was invalid, that would still constitute subversion of both *Obergefell* and the Tennessee domestic abuse statute. The intent of the prosecutor, rather than the scale of the action, is the determinative factor in whether a declination to prosecute constitutes subversion. By contrast, Northcott would have been acting within his discretion had he declined to prosecute domestic violence charges against certain same-sex partners because he had insufficient evidence, because the victim did not want to testify, or because it was an appropriate case for pretrial diversion, among other reasons.[77] Even within this example, it is

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[72] *Id.*

[73] *Id.* at 1265.

[74] TENN. CODE ANN. § 39-13-111(a) (West, Lexis Advance through ch. 641 of the 2022 Reg. Sess.).

[75] *See* Obergefell v. Hodges, 576 U.S. 664, 681 (2015).

[76] Maya Oppenheim, *Attorney Who 'Refuses to Prosecute' Domestic Violence Cases Between Same-Sex Partners Faces Suspension*, INDEPENDENT (Aug. 28, 2019, 5:06 PM), https://www.independent.co.uk/news/world/americas/domestic-violence-prosecution-tennessee-district-attorney-suspended-a9082081.html (last visited Apr. 10, 2022).

[77] *See* Fourth Edition of *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (last visited Apr. 10, 2022); NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS 52–54 (3d ed. 2009),

evident how instances of appropriate prosecutorial discretion are very difficult to distinguish from instances of inappropriate prosecutorial subversion. This difficulty should not dissuade us, however, from examining prosecutorial decision-making, as prosecutors' decisions ultimately can have a tremendous impact on the lives of both defendants and their victims.

There may be instances where a prosecutor publicly subverts the law in order to garner public attention or gain support from her electorate, and it is possible this was part of Northcott's motivation.[78] This type of subversion would be significantly easier to identify than subversion that is based on a prosecutor's privately held beliefs and never announced publicly. Generally, though, it is not common for a prosecutor to do what Northcott did and make a subversive charging policy decision publicly known. Had Northcott simply declined to prosecute domestic abuse cases against same-sex spouses but not announced that policy, his subversion would have been the same, because his intent would have been the same; the only difference would have been that his subversion would likely not have been detected for some time. Absent such an explicit declaration of their intent to subvert the law, how can outside observers properly identify when a prosecutor is engaging in subversion versus when she is acting within her discretion? It would take an internal review of cases within a prosecutor's office to identify initial charging discrepancies between different types of cases or defendants. For example, if data showed that Northcott was bringing charges in 50 percent of cases against abusive partners in opposite-sex marriages and only in 10 percent of offenses in same-sex marriages, assuming all other factors were controlled, Northcott's intent to subvert the law treating same-sex marriages equally to opposite-sex marriages could at least be inferred. This type of data, though, is not easily accessible to the public as charging decisions are almost always made behind closed doors.[79] While criminal convictions are generally publicly searchable, if a prosecutor never files charges against an individual, that information is not available and,

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https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf [https://perma.cc/3M7T-7KYT].

[78] *See, e.g.*, David Eggert, *Michigan's Dana Nessel:* Roe v. Wade *'Likely' to Be Overturned by U.S. Supreme Court*, DETROIT FREE PRESS (Apr. 17, 2019, 11:36 AM), https://www.freep.com/story/news/politics/2019/04/17/michigan-attorney-general-dana-nessel-abortions/3495723002/ [https://perma.cc/QV36-2WDT] (reporting that Michigan's Democratic Attorney General Dana Nessel announced before a receptive crowd at a Planned Parenthood Advocates of Michigan Conference that she would not prosecute violations of an abortion ban in the state).

[79] Fairfax, *supra* note 71, at 1269.

therefore, prosecutors can generally avoid public accountability for those decisions.

It is important to note that, in some instances, prosecutorial subversion could be considered positive. Two particular categories fit this bill: subversion of laws which, when violated, are victimless crimes, and subversion of laws which disproportionately harm vulnerable communities. An example that fits both of these categories is the policy decision by some prosecutors' offices that they will not prosecute low-level marijuana possession crimes.[80] Marijuana possession is a victimless crime, and data demonstrates that marginalized communities are disproportionately negatively impacted by marijuana possession arrests.[81] As a result, then, prosecutorial subversion of marijuana possession laws may be more beneficial to society as a whole than strict enforcement of the laws would be. While declination to prosecute marijuana possession cases based on a disagreement that such possession should be criminalized remains subversive, it is less harmful in that there is no victim being denied access to justice or legal relief. That is less likely to be the case when the law being subverted criminalizes conduct which, by definition, harms another individual. Subversion is not appropriate where the subverted law was passed to protect a vulnerable population or when the failure to enforce that law creates real danger for a category of individuals.[82]

In addition to the lack of transparency of a prosecutor's charging decisions, prosecutors also are able to subvert the law because they are generally immune from civil and criminal sanctions.[83] Their charging decisions are protected and they are not subject to liability for those decisions.[84] Even where prosecutors enjoy only qualified and not complete immunity, the unlikelihood of criminal or civil charges being brought against a prosecutor on this basis makes liability an insufficient barrier to prosecutors

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[80] *See, e.g.*, Justin Jouvenal & Rachel Weiner, *Prosecutors Won't Pursue Marijuana Possession Charges in 2 Northern Va. Counties*, WASH. POST (Jan. 2, 2020), https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173_story.html [https://perma.cc/J9MT-JEVR].

[81] AM. C.L. UNION, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 8, 12, 41 (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform [https://perma.cc/89GZ-UWKR].

[82] Section II.B discusses that some victims do not want their abusive partners to be subject to the gun ban. In these cases, where the victim herself does not want the criminal penalty imposed, a prosecutor who proceeds with the case in a way that avoids the ban is not engaging in subversion but rather is properly using their discretion to consider the victim's wishes.

[83] Frederick F. Schauer, *When and How (If At All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 787 (2010).

[84] Angela Davis, *The American Prosecutor—Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 26 (2008).

inappropriately failing to charge certain crimes or defendants.[85] Ultimately, prosecutors rely heavily on the broad discretion which they have been granted, and may use this discretion as a cover for acting in ways that are actually subversive.

A prosecutor can be held accountable for her subversive actions by her voting base.[86] However, even this layer of accountability does not serve as a proper backstop for several reasons. First, given the private nature of prosecutorial charging decisions, the electorate may simply not be aware that subversion is taking place.[87] In high-profile cases, prosecutors may hold a press conference to announce charges and the media may report on plea deals reached, but such public distribution of information is rare and would almost certainly not take place for a routine misdemeanor domestic violence charge. Where the public is aware of subversion taking place, they may view the subversion as a positive, rather than a negative. For example, Northcott may have reasonably believed that his electorate would support his decision to decline prosecution of domestic violence in same-sex marriages because he believed there was community opposition to same-sex marriage generally.

Second, and in part because of the dearth of information available to the public about charging decisions, accountability from the local electorate is rare in practice: 85 percent of prosecutor incumbents face no opponents in their reelection.[88] For this and other reasons, prosecutors are successful in their reelection bids more than 95 percent of the time.[89] When the reelection process for a state prosecutor is largely a community rubber-stamp of approval, there is little room for local voters to hold prosecutors accountable for their charging decisions.

Prosecutorial subversion causes harm in a variety of ways. It harms individual victims by failing to hold perpetrators accountable for their actions. It denies victims any ancillary relief that would accompany a criminal conviction, such as a criminal protection order, a negative presumption against the perpetrator in a custody determination, or safety by incarcerating the perpetrator or monitoring him through probation. On a broader scale, if prosecutorial subversion is identified publicly, it sends the message that a particular class of victims is not worthy of governmental protection. It creates confusion among the public about what laws will be enforced and against whom they will be enforced.

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[85] *Id.* at 34, 37.

[86] Rapping, *supra* note 69, at 543.

[87] Fairfax, *supra* note 71, at 1269.

[88] Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1606 (2010).

[89] *Id.*

B. Prosecutorial Subversion of Legislation Intended to Protect Domestic Violence Victims

Domestic violence cases have long served as a particularly ripe area for prosecutorial subversion. Historically, this manifested as a refusal to treat domestic violence cases seriously as crimes,[90] effectively nullifying local statutes in many jurisdictions. In the late 1980s and early 1990s, completed prosecution rates of domestic violence charges were significantly lower than those of other types of cases.[91] Even where police effectuated arrests in domestic violence cases, prosecutors rarely pursued charges.[92] Specifically, prosecutors nationwide were dismissing 50 to 80 percent of domestic violence charges.[93] Prosecutors were often charging and trying defendants with assault for actions committed against a stranger while not charging or trying defendants with assault for similar actions committed against an intimate partner.[94] In their systemic undercharging of intimate partner assaults as opposed to stranger assaults, prosecutors were subverting their states' domestic violence criminal statutes.[95]

There are a number of reasons why domestic violence cases were prosecuted at such low rates during this time. Many prosecutors held the attitude that domestic violence cases were not serious or not a matter of public safety, but were rather a matter of intrafamilial concern.[96] As such, they declined to file charges or offered lenient plea deals in these cases.[97] Rates of prosecution were also low because of victims refusing to cooperate.[98] On its face, dropping domestic violence charges

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[90] *See* LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 73 (2008).

[91] Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854 n.7 (1994).

[92] Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 YALE J.L. & FEMINISM 3, 15 (1999).

[93] Corsilles, *supra* note 91, at 857 (citing David A. Ford & Mary Jean Regoli, *Criminal Prosecution of Wife Assaulters*, *in* LEGAL RESPONSES TO WIFE ASSAULT 127, 160 n.3 (N. Zoe Hilton ed., 1993)).

[94] GOODMAN & EPSTEIN, *supra* note 90, at 73–74.

[95] This harkens to the state's refusal to prosecute people who committed lynchings in the early 1900s. Though lynching should have been treated as other homicide cases, prosecutors rarely pursued these cases. Only 1 percent of people who committed lynchings after 1900 were ever convicted of any crime. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 48 (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf [https://perma.cc/288V-MM93].

[96] Corsilles, *supra* note 91, at 867.

[97] Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, ONLINE J. ISSUES NURSING (Jan. 31, 2002), http://ojin.nursingworld.org/MainMenuCategories/ANAketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html [https://perma.cc/943C-9JYP].

[98] *Id.*

based on such a lack of victim cooperation could be considered a legitimate exercise of prosecutorial discretion; when a victim refuses to cooperate, securing a conviction becomes much more difficult and a prosecutor may be forced to drop or plead down a domestic violence charge.[99] However, prosecutorial policy to dismiss cases upon a victim's refusal to cooperate was problematic and itself subversive. Prosecutors were not asking victims whether they truly wanted to dismiss the charges against their abusive partners, or whether they were being coerced into saying as much by their abusive partners.[100] The practical result was that cases were dropped at high rates,[101] effectively subverting states' domestic violence laws.

Low prosecution rates and the general ineffectiveness of the criminal legal system in handling domestic violence cases were so prevalent that many jurisdictions began to adopt "no-drop" policies.[102] While no-drop prosecution policies vary between jurisdictions, generally they are policies which limit a prosecutor's ability to dismiss a domestic violence case based on victim noncooperation.[103] No-drop policies were considered a way to force the state to respond to domestic violence as seriously as they responded to violence between strangers.[104] About two-thirds of prosecutors' offices nationwide had adopted some type of no-drop domestic violence prosecution policy by 1996.[105]

No-drop policies made an immediate impact on prosecution rates of domestic violence: a 2002 study based on the records of state courts over fifteen counties found that defendants charged with aggravated assault against an intimate partner were as likely (66 percent) to be prosecuted as defendants charged with aggravated assault against a nonintimate partner (67 percent); the same study found that defendants charged with aggravated assault against an intimate partner were more likely (87 percent) to be convicted as defendants charged with

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[99] Corsilles, *supra* note 91, at 875.

[100] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 15, 38 (1999).

[101] Deborah Epstein referred to this as an "automatic drop" policy. GOODMAN & EPSTEIN, *supra* note 90, at 73–74.

[102] Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 466 (2003).

[103] Corsilles, *supra* note 91, at 858.

[104] GOODMAN & EPSTEIN, *supra* note 90, at 73–74.

[105] CHRIS S. O'SULLIVAN ET AL., A COMPARISON OF TWO PROSECUTION POLICIES IN CASES OF INTIMATE PARTNER VIOLENCE: MANDATORY CASE FILING VS. FOLLOWING THE VICTIM'S LEAD 11 (2007), https://www.courtinnovation.org/sites/default/files/Case_Processing_Report.pdf [https://perma.cc/6Y9U-HMGN].

aggravated assault against a non-intimate partner (78 percent).[106] There is significant debate within the domestic violence advocacy community about whether no-drop policies have gone too far in removing the victim's wishes from the calculus of whether to move forward with a case.[107] But there is no question that the policies themselves led to an increase in prosecution of domestic violence cases, which was necessary to put domestic violence in parity with other crimes. There is no evidence today that any significant number of prosecutors continue to routinely dismiss domestic violence charges.[108]

Given the history of prosecutorial subversion in the context of domestic violence, current prosecutorial behavior is worthy of particularly acute scrutiny. Although prosecutors now nearly uniformly prosecute domestic violence cases at the rate they prosecute other charges, and although there is no evidence that prosecutorial subversion of state domestic violence statutes continues to the same extent today, there are ways in which subversion persists.

An example of prosecutors subverting the law in domestic violence cases is by intentionally undercharging domestic violence crimes when they want defendants to avoid the firearms ban. Prosecutors are the threshold to the effectiveness of the Lautenberg Amendment: where they charge and obtain convictions for misdemeanor domestic violence crimes appropriately, the gun ban is triggered. When they fail to do so, for example by charging destruction of property instead of domestic violence, they subvert not only the Lautenberg Amendment, but their own jurisdiction's domestic violence statutes as well. They deprive domestic violence victims of the right to have their abusive partner be prohibited from accessing firearms and of the right to have their abusive partner held accountable by the criminal legal system for the offense committed against them.

Given the broad discretion that prosecutors enjoy, it is extremely challenging to identify when a prosecutor is engaging in subversion versus appropriately exercising her discretion. Not all prosecutorial decisions to not proceed with charges in a

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[106] ERICA SMITH ET AL., BUREAU OF JUST. STATS., STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 2 (2008), https://www.bjs.gov/content/pub/pdf/scpdvc.pdf [https://perma.cc/TLY2-4C5U].

[107] Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2114, 2114 (2014).

[108] ANDREW KLEIN, NAT'L INST. OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 36 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf [https://perma.cc/9QR3-YL8N].

domestic violence case where the defendant possesses a gun constitute prosecutorial subversion. Prosecutors may reduce charges to avoid carceral penalties for first time offenders, or may use the attachment of Lautenberg Amendment consequences as a bargaining chip to secure a lesser conviction. These are standard discretionary decisions prosecutors make and tools they use to effectively dispose of their cases.

Additionally, some domestic violence victims do not want their abusive partners to be prosecuted[109] or to be dispossessed of their firearms. When victims believe their safety is best served by their abusive partner maintaining access to firearms, prosecutors act within their discretion when they lower charges to avoid the gun ban. This example does not constitute subversion, because it is not based on a disagreement with the law, but rather on a concern for the victim's safety, which is a permissible factor to consider.[110] To avoid the "automatic drop" policies,[111] which many prosecutors employed in the 1980s and 90s, prosecutors would need to make a genuine inquiry into the authenticity of the victim's request to ensure she is not being manipulated by her abusive partner. With prosecutors having such broad discretion to consider whether a defendant's charge is a first-time offense, whether the risk of trial is worth sacrificing the gun ban for the guarantee of a lesser conviction, or whether the victim herself wants the gun ban enforced, it is clear that what may appear to be a subversive avoidance of Lautenberg consequences is actually an appropriate exercise of discretion. Similarly, though, what may appear to be an appropriate exercise of discretion could be an act of subversion. In some circumstances, it may simply be impossible to differentiate the two. But it remains critical to discuss and attempt to uncover acts of prosecutorial subversion in this context because of the tremendous harm it can cause to victims.

That said, subversive prosecutorial undercharging of domestic violence to avoid the Lautenberg Amendment gun ban is not uncommon. According to Tom Lininger, an expert on the federal gun ban and the first federal prosecutor in the United States to charge a defendant with a violation of the Lautenberg Amendment,

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[109] This is the central issue that antidomestic violence advocates take with the continued use of no drop prosecution policies: they generally fail to account for what the victim wants. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4–5, 43–48 (2009).

[110] *See Criminal Justice Standards for the Prosecution Function*, *supra* note 77; NAT'L DIST. ATTY'S ASS'N, *supra* note 77, at 52.

[111] GOODMAN & EPSTEIN, *supra* note 90, at 72.

> [T]he last decade has shown that the most important limitation on the gun ban is not jurisprudential. It is the reluctance of local prosecutors to charge domestic violence in a way that would maximize the applicability of the federal gun ban. Until local prosecutors charge domestic violence appropriately, the vast majority of convicted batterers will dodge the gun ban with impunity.[112]

One prosecutor from Northern Virginia acknowledged that she has pleaded down a case of misdemeanor domestic violence to a lesser charge that would not trigger the domestic violence ban where the defendant was a police officer, so that he could keep his job.[113] She pleaded down the charge based on letters of recommendation she received, the defendant's good track record and history of being an upstanding citizen, and her confidence that the violence had been a "one-off situation."[114] This was an instance of subversion because the Lautenberg Amendment explicitly does not exempt from the firearm ban police officers or other professionals who need a firearm for their work.

Like with police officers, prosecutors may also subvert the gun ban when the defendant is a corrections officer or otherwise works within the legal system in a capacity that requires a firearm. For example, State Attorney Rod Smith in Gainesville, Florida, acknowledged that he has a special policy for corrections officers accused of domestic violence.[115] He implemented this policy after the Lautenberg Amendment went into effect in 1999 because he wanted corrections officers to maintain their employment, for which they needed to be able to possess a firearm.[116] Under this policy, when a charge was the defendant's first offense, he would offer a deferred prosecution where the defendant had to take classes and meet other conditions.[117] Upon completion of those conditions, Smith would drop the charges.[118]

The same Northern Virginia prosecutor mentioned above also acknowledged intentionally pleading down a domestic violence charge for a defendant who was a member of the military.[119] The prosecutor stated that she felt comfortable pleading down the charge after talking to the defendant's

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[112] Lininger, *supra* note 45, at 175 (footnote omitted).

[113] Telephone interview with Anonymous, Prosecutor, Northern Virginia (Apr. 28, 2020) (notes on file with author).

[114] *Id.*

[115] Adam C. Smith, *Crimes Often Don't Cost Guards Their Jobs*, TAMPA BAY TIMES (Sept. 29, 2005), https://www.tampabay.com/archive/1999/08/29/crimes-often-don-t-cost-guards-their-jobs/ [https://perma.cc/SGU5-NGY5].

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Interview with Anonymous, *supra* note 113.

commanding officer and learning that the defendant would be monitored separately by the military.

There are concededly only a handful of known stories of prosecutors who explicitly subverted the Lautenberg Amendment to allow defendants to keep their guns. The prevalence of this practice, however, largely remains unknown, at least in part because it can be difficult to distinguish between appropriate prosecutorial discretion and inappropriate prosecutorial subversion. Prosecutors have incentives to conceal their true intentions when subverting the law, so making this determination can be nearly impossible. Nevertheless, the stories mentioned here are alarming and worth further exploration.

Prosecutors have a variety of motivations to subvert the Lautenberg Amendment and allow defendants to avoid the firearms ban. They may be tempted to engage in subversion to protect the reputation and employment interests of police officer perpetrators. Like with other crimes,[120] prosecutors are known to charge police officers accused of domestic violence less harshly than members of the general public.[121] One study on police officer-involved domestic violence cited "numerous instances" where police officers received "professional courtesies" from prosecutors wherein they were not charged with a crime that would trigger the gun ban; rather, prosecutors allowed them to plead guilty to other offenses that would not trigger the ban.[122]

Another reason prosecutors might subvert firearm bans in officer-involved domestic violence cases is that they rely on the officers' cooperation in the successful prosecution of their other cases, and charging an officer fully could harm their relationship with or otherwise embarrass the police department.[123] Prosecutors work daily with police officers on investigations and call them as witnesses at trial, and the relationship with the local police department is an important one for prosecutors' offices to foster.[124]

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[120] Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1471 (2016); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 763 (2016).

[121] Gina Barton, *Both Sides of the Law: Police Department Ignores National Standards for Officers Accused of Domestic Violence*, MILWAUKEE J. SENTINEL (Apr. 25, 2019, 9:57 AM), https://www.jsonline.com/story/archives/2019/04/25/mpd-ignores-national-standards-cops-accused-domestic-violence/3565434002/ [https://perma.cc/9C7M-PKCC].

[122] Philip Matthew 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. 598, 618 (2013).

[123] Diane Wetendorf, *Article: Abusive Police Officers Working the System*, ABUSEOFPOWER.INFO (2004), http://www.abuseofpower.info/art-worksystem.html [https://perma.cc/2P8C-F3YR].

[124] Caleb J. Robertson, Comment, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 865–69 (2018).

This is clear from prosecutors' favorable treatment of police officers involved in citizen fatalities, which has led several states to require that special prosecutors be appointed in these cases to avoid bias or impropriety.[125] Treating officers favorably so that they get to keep their firearms and their jobs benefits prosecutors looking to maintain these relationships for the purpose of prosecuting other cases.

Similarly, like with police and other court officers, prosecutors may be more tempted to subvert the firearms ban when the defendant is a member of the military. Because the military has its own criminal justice and disciplinary systems, some prosecutors feel that those systems will adequately monitor servicemembers who have perpetrated domestic violence and protect victims of domestic violence without the civilian criminal legal system becoming involved.[126] This makes prosecutorial subversion more appealing because it provides the cover of another agency holding the defendant responsible.

Prosecutors' decisions to nullify the domestic violence gun ban may also be based on a personal or community-based sympathy for gun ownership. For example, Daniel Spickler, a prosecutor in Nez Perce County, Idaho, has asserted that the Lautenberg Amendment is in tension with Idaho's gun culture, and that this fact has led him to decrease domestic violence charges so as not to trigger the gun ban.[127] Spickler explains, "A law that is perfectly appropriate for New York City or Los Angeles is probably not equally effective in Lewiston, Idaho."[128] As a frame of reference, 60.1 percent of adult residents of Idaho have guns in their homes versus 28.3 percent of Californians and 19.9 percent of New Yorkers.[129] In 2012, Idaho had 4.4 domestic homicides of women per one million residents, as opposed to 3.05 per million in California and 2.61 per million in New York.[130] Importantly, higher rates of firearm possession are correlated with higher rates of domestic homicide.[131]

Regardless of the specific motivation to subvert the Lautenberg Amendment, it appears that these prosecutors are

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[125] *Id.* at 855.

[126] *See* Interview with Anonymous, *supra* note 113.

[127] *Prosecutors Say Federal Gun Law Backfires in Domestic Violence*, MD. DAILY REC. (Feb. 9, 2004), https://thedailyrecord.com/2004/02/09/prosecutors-say-federal-gun-law-backfires-in-domestic-violence-cases/ (last visited Apr. 10, 2022).

[128] *Id.*

[129] Jessica Learish & Elisha Fieldstaft, *Gun Ownership by State*, CBS NEWS (July 23, 2020, 5:32 PM), https://www.cbsnews.com/pictures/gun-ownership-rates-by-state/48/ [https://perma.cc/DQL4-7UNZ].

[130] *State Results*, SILENT WITNESS NAT'L INITIATIVE, http://www.silentwitness.net/states-results.html [https://perma.cc/5YJK-AFDX].

[131] Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTIVE MED. 311, 312, 317–19 (2019).

placing a higher value on defendants' interests or on maintaining a community's gun culture than they are on victim's interests. Their desire for a defendant to maintain his employment outweighs their desire to keep victims safe from violence. Domestic violence victims' safety—the motivation behind not only the Lautenberg Amendment but each jurisdiction's domestic violence criminal laws as well—is being disregarded, to the benefit of the very individuals who cause the victims' harm.

A prosecutor who seeks to subvert the Lautenberg Amendment has several means of effectuating this result. The first, and perhaps most common, is to allow domestic violence defendants to plead guilty to a lesser charge, such as disorderly conduct, that does not trigger the gun ban.[132] Because pleading down charges is such a common way for cases to resolve, this type of subversive action by a prosecutor could take place relatively undetected.

In addition, because the Lautenberg Amendment's gun prohibition only attaches upon conviction,[133] prosecutors can subvert the law by allowing a domestic violence charge to be disposed of without a conviction. Pretrial diversion programs, in which criminal charges are dropped, expunged, or not filed at all[134] upon the defendant's completion of some probation, treatment, or other conditions, give prosecutors an avenue to help defendants avoid conviction and therefore avoid the gun ban. Pretrial diversion programs generally target nonviolent offenders; their purpose is to address the root causes of criminal behavior rather than to impose criminal sanctions.[135] These programs are still policy in some offices for domestic violence offenders,[136] although they have been largely discouraged in this context as a failure to hold abusive partners traditionally accountable within the criminal legal system.[137]

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[132] Mikos, *supra* note 49, at 1417–18.

[133] *Id.* at 1419.

[134] Jane Sadusky, Battered Women's Justice Project, Prosecution Diversion in Domestic Violence: Issues and Context 2 (July 2003) (unpublished manuscript), https://www.bwjp.org/assets/documents/pdfs/prosecution_diversion_domestic_violence_cases.pdf [https://perma.cc/5PJY-NVC3].

[135] CATHERINE CAMILLETTI, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PRETRIAL DIVERSION PROGRAMS: RESEARCH SUMMARY 1 (2010), https://bja.ojp.gov/sites/g/files/x yckuh186/files/media/document/PretrialDiversionResearchSummary.pdf [https://perma.cc/C48R-NYNL].

[136] *See* Rebecca G. Goddard, Note, *When It's the First Time Every Time: Eliminating the "Clean Slate" of Pretrial Diversions in Domestic Violence Crimes*, 49 VAL. U. L. REV. 267, 284 (2014).

[137] Sadusky, *supra* note 134, at 9 (explaining that "[t]he dynamics of *battering*—control, coercion, intimidation, and violence—require limitations on the use of prosecution diversion"); NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, MODEL CODE ON DOMESTIC AND

Another more subtle avenue for prosecutorial subversion exists. Federal prosecutions of firearm violations must be based entirely on what is in the state court record; federal prosecutors cannot rely on extrinsic documents to supplement their case.[138] Therefore, if certain requisite information, like the relationship between the defendant and the victim, is not in the state court record, a federal prosecutor cannot move forward with a Lautenberg Amendment violation prosecution. When state prosecutors charge abusive partners under generic battery statutes and the relationship between defendant and victim is found only in a police report, for example, state prosecutors can choose to not admit the police report into evidence or otherwise ensure the relationship is not stated anywhere in the record.[139] One defense attorney in New York acknowledged that, although rare, he has struck bargains with prosecutors to intentionally omit identifying relationship information into the record.[140] In these cases, an individual convicted of a misdemeanor crime of domestic violence who is in possession of a firearm would still be violating the Lautenberg Amendment; however, practically speaking, that violation would be unprosecutable for failure to prove each element of the crime. Although it is possible that such omissions are caused by a lack of training or understanding on the part of the prosecutor, victim advocates believe it is a practice prosecutors engage in intentionally to limit defendants' Lautenberg liability.[141] Domestic violence and firearms expert Roberta Valente reports that many victim advocates have called her about this practice and inquired what could be done to stop it.[142]

The adoption of "no-drop" policies in the 1990s led to a decrease in obvious overall prosecutorial subversion in domestic violence cases, but there is some evidence that prosecutors are still nullifying or otherwise subverting domestic violence law when the defendant's right to gun possession is at stake. The

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FAMILY VIOLENCE 15–16 (1994), https://www.ncjfcj.org/wp-content/uploads/2012/03/modecode_fin_printable.pdf [https://perma.cc/JHP4-JVYD] (prohibiting diversion in domestic violence cases); NAT'L DIST. ATT'YS ASS'N WOMEN PROSECUTORS SECTION, NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 34 (2017), https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf [https://perma.cc/4NEU-PY46] (stating that "[z]ero tolerance and offender accountability policy considerations favor a prohibition against the use of plea bargains, diversion programs, or fines in domestic violence crimes").

[138] *See* Shepard v. United States, 544 U.S. 13, 20–23 (2005).

[139] Interview with Roberta Valente, Principal, Domestic Violence Policy & Advocacy (Apr. 29, 2020) (notes on file with author) (citing this practice as one that state prosecutors engage in when they are facing reelection and do not want to upset their constituents).

[140] Email from Anonymous to author (Oct. 5, 2020) (on file with author).

[141] *Id.*

[142] Interview with Roberta Valente, *supra* note 139.

rights and safety of domestic violence victims are now taken more seriously than they have been in the past; however, some prosecutors appear to be engaging in a balancing test where they weigh the rights and safety of a domestic violence victim against a perpetrator's countervailing rights: in this case, the right to possess firearms. The next Section addresses how to respond to this problem.

C. Assessing and Responding to Prosecutorial Subversion of the Lautenberg Amendment

Of course, one way for victims of domestic violence to avoid the possibility of subversive prosecutors allowing their abusive partners to have guns is to avoid the criminal legal system altogether. Certainly, there is significant literature exploring the benefits of transformative justice or restorative justice programs.[143] For the purposes of this article, however, I will focus on solutions that exist within the criminal legal system itself. Before implementing any response, though, it is important to uncover how common this type of nullification is. Once that information is known, possible responses must center on two equally important goals: (1) protecting victims' physical safety, and (2) giving victims a voice in the disposition of these cases.

Faced with the knowledge that there are prosecutors who are subverting the Lautenberg Amendment, a critical first step is to determine how widespread this practice is. The above Section provided anecdotal evidence of prosecutorial nullification, but no studies have been done to determine its prevalence. It is difficult to get prosecutors to acknowledge that they have engaged in this practice, or that they know of others who have done so; as a result, there is no evidence that prosecutorial subversion in this context is a major systemic problem. It is possible the examples recounted above are indicative of a broader problem; it is also possible the examples are representative of a small number of "bad apples" in the field who simply need to be better trained or supervised. Determining the scope of the problem is critical to charting a path forward for solving it.

Given the private nature of prosecutors' charging decisions, information about charging and disposition about domestic violence

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[143] *See, e.g.*, Donna K. Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 131, 143–45 (Heather Strang & John Braithwaite eds., 2002). *See generally* Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219 (2018) (discussing how "restorative and transformative justice interventions offer new anti-violence options . . . [and] prompt a re-imagining of the role of social work in relationship to social justice and social movements").

cases needs to be gathered internally. The following steps would help prosecutors' offices highlight whether and how often their attorneys are engaging in subversion. First, prosecutors' offices should conduct yearly internal audits collecting the following information: (1) the number of individuals initially charged with misdemeanor crimes of domestic violence, (2) the employment of individuals charged and whether that employment required the ability to possess a firearm, (3) whether individuals possessed firearms at the time of the underlying incident, (4) the number of cases where an initial misdemeanor domestic violence charge was pleaded down to a non-Lautenberg Amendment triggering charge, and (5) the reasons charges were reduced if the reduction was against the victim's wishes. Offices should aggregate this data and compile it in annual reports made available to the public. They should also evaluate the data internally and make policy decisions based on their findings. For example, if they see that multiple prosecutors in their office are engaging in subversion, as described above, they may decide to implement a new policy, such as having all domestic violence cases reviewed by a second prosecutor before disposition.

Because it is possible that prosecutors' offices will be reluctant to gather data and publish such reports, Congress should amend the Violence Against Women Act (VAWA)[144] to condition the receipt of federal funding for domestic violence prosecution on the annual submission of such reports. Several of VAWA's grant programs fund the prosecution of domestic violence,[145] and a reporting requirement for these grantees would allow Congress to determine the extent of prosecutorial subversion and condition future funding on its eradication.

Assuming the scope of the problem is serious, several possible solutions should be adopted, focusing on two goals. The first goal is to promote victims' physical safety. Based on the overwhelming data demonstrating a correlation between fatality and other dangers when abusive partners possess firearms,[146] eliminating abusive partners' right to possess firearms is a critical resolution to promoting victims' safety in these cases. Additionally, removing guns from their possession is important because data demonstrates that guns are used uniquely as fatal weapons by

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[144] Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.); *see also Violence Against Women Act*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/content/violence-against-women-act/ [https://perma.cc/7T8X-U4QU].

[145] U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, THE 2018 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 24–25 (2018), https://www.justice.gov/ovw/page/file/1292636/download [https://perma.cc/4XYE-H92U].

[146] See *supra* Part I for an in-depth discussion of this risk.

abusive partners; they do not replace guns with other weapons, such as knives, in order to commit assaults.[147]

The second goal of the proposed solutions is to amplify the voices of victims of domestic violence and their desired case outcomes. Sometimes a victim wants her abusive partner to lose his access to firearms based on all the safety considerations identified above. Sometimes, though, a victim may determine that taking away her abusive partner's gun would actually put her in greater physical danger; for example, economic insecurity resulting from their partner's loss of firearm access for work may leave victims more vulnerable to future violence.[148] Sometimes, a victim may want their abusive partner to maintain possession of his firearm not for purposes of economic security but rather because the victim knows that taking it away will enrage him and create more danger for her. Sometimes, though, safety simply is not a victim's goal.[149] Because subversion ignores the victim's wishes, it makes sense that a counter to this problem would be to amplify victims' voices and allow victims to explicitly identify their needs and wishes.

These two solutions—protecting victims' physical safety and allowing victims to voice their own desired case outcomes—go hand in hand, as victims understand their safety needs better than any other individual involved in the criminal legal system. However, these goals may either align or be in tension with one another. Ultimately, the prosecutor makes the determination on how to proceed with the case, but knowing the victim's safety concerns or other goals is critical to making this determination.

To accomplish both of these goals, the first step that prosecutors' offices should take is to enact a policy that, before making a plea offer in any domestic violence case where the defendant is known to possess a firearm, a victim must be offered the opportunity to provide a victim impact statement directly to the prosecutor. This will allow a victim to explain to the prosecutor the past impact of the abusive partner's firearm possession, the anticipated future impact of the abusive partner's firearm possession, and how the victim wants the case to be resolved.

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[147] APRIL M. ZEOLI, DOMESTIC VIOLENCE AND FIREARMS: RESEARCH ON STATUTORY INTERVENTIONS 3–4 (Nov. 2018), https://www.preventdvgunviolence.org/dv-and-firearms-zeoli.pdf [https://perma.cc/BTW5-L9P7].

[148] *See* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1015–17 (2000) (explaining that imposing penalties which cause abusers to become unemployed may increase danger for victims).

[149] *See* Mimi E. Kim, *Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of Social Work Responses to Domestic Violence in the USA*, BRIT. J. SOC. WORK 1, 6–7 (2012) (describing as a "fetishisation of safety": the antidomestic violence movement's sole focus on immediate physical safety to the exclusion of other goals that victims may have).

As a part of the impact statement process, victims should be offered the opportunity to speak with a victim's advocate both before and after she speaks with the prosecutors. Before the victim makes the impact statement, the advocate should discuss with the victim the danger of firearms and could complete an individual lethality assessment[150] for the victim to determine their level of risk.[151] This would provide an opportunity for victims who are otherwise unaware of the attendant risks of their abusive partners having firearms to learn of that danger. For the conversation with the advocate after the victim provides the statement to the prosecutor, the victim could develop a comprehensive safety plan that accounts for the abusive partner's continued possession of a firearm, or that accounts for the abusive partner's anticipated anger at being dispossessed of firearms.

Under circumstances where, upon hearing from a victim that they want their abusive partner to maintain firearm possession, a prosecutor still decides to reduce the charge to a non-Lautenberg triggering offense in order to allow the defendant to keep their firearms, the prosecutor should be required to write a report detailing why this charge reduction is the most just outcome. The report should explain the prosecutor's decision as it relates to the two central goals: how it protects the victim's safety and how it takes into consideration the victim's expressed preferences on the abusive partner's gun possession. These reports would serve several ends. First, knowing that they would have to submit a written report explaining aberrant charge reduction decisions may chill this type of behavior. Second, these reports would be available, upon request, to the victim, which could provide more accountability for the prosecutor. Prosecutors' offices should collect these reports annually to monitor how often each prosecutor in their office is allowing defendants to maintain possession of firearms against the victim's wishes.

When a prosecutor decides to reduce a charge, allowing a defendant to keep their firearms against a victim's wishes, that prosecutor should also be required to inform the victim of the availability of the civil protection order process. As discussed above, federal law and the majority of states' laws ban a respondent to a protection order from possessing a firearm.[152] Victims in nineteen

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[150] *See* Nat'l Res. Ctr. on Domestic Violence, *Tools & Strategies for Assessing Danger or Risks of Lethality*, VAWNET, https://vawnet.org/sc/tools-strategies-assessing-danger-or-risk-lethality [https://perma.cc/3Z3A-7MU4] (lethality assessments in domestic violence cases attempt to measure the danger of a victim being killed by her abusive partner based on the partner's past actions).

[151] *See* Jacquelyn Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 653–54 (2009).

[152] *See supra* Part I.

states and Washington, D.C. can also apply for extreme risk protection orders, which would temporarily disarm an individual who the court perceives to be a threat.[153] These are not perfect solutions, and Part III of this article discusses the ways in which judges can impede the effectiveness of civil protection orders, but they are a tool that is codified in the law in every jurisdiction in this country and have helped countless victims. Prosecutors should be required to inform victims of this option and its accompanying firearm possession consequences when they allow a defendant to keep their firearms through a criminal case disposition.

Once a prosecutor has heard an impact statement from a victim who wants their abusive partner to lose access to firearms and decides that is the outcome to pursue, that prosecutor should consider a broad spectrum of ways to remove the firearms. Instead of seeking a misdemeanor conviction for domestic violence, for example, a prosecutor could offer a plea to a lesser charge that does not trigger the Lautenberg Amendment, but still requires that the defendant surrender his firearms. Or, a prosecutor could agree to drop criminal charges altogether, in exchange for the defendant surrendering his firearms via a civil protection order, or some other legal mechanism.

A prosecutorial strategy that focuses on gun removal, as opposed to incarceration, also avoids the deleterious effects of mass incarceration which many in the feminist movement are fighting against.[154] Lengthy periods of incarceration have not been found to be a strong deterrent of future domestic violence as compared with other penalties[155] and are often inconsistent with a victim's goals. Unlike those forms of increased criminalization, the solutions proposed herein of removing an abusive partner's access to firearms more directly addresses a victim's safety needs. While there is no evidence that incarceration reduces recidivism of domestic violence,[156] the data is clear that eliminating firearms from the abusive partner saves victims' lives.[157] Ultimately, this was the goal

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[153] *Extreme Risk Protection Orders: Summary of State Law*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#state [https://perma.cc/5SSE-XRSL]. Although filing for an extreme risk protection order is, in fact, engaging with the criminal legal system, I am treating it as a distinct option when victims file the petitions on their own behalf. In most jurisdictions, law enforcement can file these petitions without the victim's consent or knowledge, which mirrors a more traditional criminal legal system response. *See id.*

[154] *See, e.g.*, AYA GRUBER, THE FEMINIST WAR ON CRIME; THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020) (analyzing the failure of the carceral response to combat domestic and sexual violence).

[155] LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 24–25 (2018).

[156] *Id.*

[157] *See supra* Introduction.

of the Lautenberg Amendment, and criminal penalties pursued in the name of victim safety should align directly with what we know about how best to actually protect victims' safety.

One model for such an approach can be found in Manhattan District Attorney Cyrus Vance's 2016 creation of an Alternatives to Incarceration Unit for his office. This unit is responsible for identifying treatment and other rehabilitative dispositions besides incarceration.[158] Other prosecutors' offices could mirror this approach, but with a focus on firearm possession; prosecutors could be trained in where, how, and to whom defendants are able to surrender their firearms. They could enter a plea deal under which the defendant volunteers to surrender his firearms in exchange for a reduced charge, a reduced jail sentence, or a diversion of conviction after a period of compliance. This would be an opportunity for victims to participate in the case disposition as well. If victims wanted their abusive partners dispossessed of firearms but without a criminal record, the prosecutor's office could offer a diversionary plea under which the defendant surrenders his firearms and then can repossess them after a period of good behavior, after which the charge would be dropped. If victims feared that forcing their abusive partner to surrender their firearm to the state would further enrage the abusive partner and place the victim in danger, the victim could work with the prosecutor to identify a third party to which the defendant would feel more comfortable surrendering the weapon. The victim could also ask the prosecutor to permit the defendant to sell the firearm to a third party within a certain timeframe, potentially providing economic assistance to the victim and the victim's family.[159]

It is important that any solutions to the issue of prosecutorial subversion in this context not be hypercarceral. One previously proposed but ultimately unworkable solution to the problem of

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[158] Sabrina Margaret Bierer, *Bettering Prosecutorial Engagement to Reduce Crime, Prosecutions, and the Criminal Justice Footprint*, 32 FED. SENT'G REP. 212, 212 (2020).

[159] Because a policy of this kind would only impact defendants who actually possess firearms, it would be made significantly more feasible by the existence of a nationwide firearm registry which prosecutors could check to verify whether defendants in their cases possessed firearms. Currently, no such national registry exists, and most states do not have one either. *See* Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 585 (2020) (citing 18 U.S.C. § 926(a) and 28 C.F.R. § 25.9(b)(3)). In fact, eight states have banned the creation of such a registry. *See Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/ [https://perma.cc/EVM2-K5XZ]. Absent a database of current gun possession, prosecutors would be forced to rely upon the defendant's word that he does not have a gun. If a defendant says he does not have a gun, there is currently very little a prosecutor could do to verify that claim. With a gun registry, prosecutors would enter their trial preparation and plea negotiation with a more complete picture of the defendant and whether the removal of firearms would need to be a priority in the disposition of the case.

prosecutorial nullification was to require that prosecutors charge domestic violence crimes at the highest possible level.[160] This is what Tom Lininger—a federal prosecutor and expert on the federal gun ban—proposed.[161] He recommended creating an ethical obligation, in the American Bar Association Rules of Professional Conduct or another source, wherein prosecutors are required to move forward on the most serious charge which the evidence would support against individuals accused of domestic violence.[162] However, Lininger's proposed requirement would fail for several reasons.

Historically, placing mandates on prosecutors in domestic violence cases has not been the solution for domestic violence which feminist activists hoped it would be.[163] Given the systematic refusal by prosecutors to properly charge and pursue domestic violence cases in the 1980s and 1990s, feminist activists allied with the state to support no-drop prosecution and other mandatory policies in order for domestic violence to be taken more seriously.[164] The alliance appeared to have been successful: by the early 2000s domestic violence charges were being pursued at approximately the same rate as nondomestic violence charges.[165] However, although rates of domestic violence have gone down since that time, they have decreased less than other crimes have over the same time period.[166] The reliance on the criminal legal system as a response to domestic violence has also disproportionately and negatively impacted communities of

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[160] *See* Lininger, *supra* note 45, at 195.

[161] *Id.* at 204.

[162] The language of the ethical obligation Lininger proposes is:

> In a case involving an allegation of domestic violence, a prosecutor must charge the most serious offense readily supported by evidence accessible at the time of the charging decision. The charging instrument must include any possibly applicable offense or enhancement that specifies the intimate or familial relationship between the assailant and victims and/or witnesses, assuming that such offense or enhancement is readily supported by evidence accessible at the time of the charging decision. The prosecutor shall not consent to any negotiated disposition involving dismissal or expunction except under extraordinary circumstances, and in any event, the prosecutor must seek a disposition reflecting the gravity of the offense and ensuring reasonable protection of all victims from further violence. In a case involving a misdemeanor crime of domestic violence, a prosecutor shall file thorough records with the court and shall submit, or cause to be submitted, thorough information to the National Instant Criminal Background Check System (NICS) in order to ensure that the defendant is subject to any applicable firearms disability under federal and state law.

Id. at 197.

[163] Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 55 (2017).

[164] See *supra* Part I for a more in-depth discussion of prosecutorial treatment of domestic violence during this time.

[165] SMITH ET AL., *supra* note 106, at 1.

[166] Goodmark, *supra* note 163, at 55.

color[167] and has contributed to the exponential increase in incarceration rates.[168] From a broader feminist perspective, mandatory criminal prosecution policies disempower domestic violence victims by ignoring their voices or desired outcomes.[169] Prosecutors operating under no-drop policies were forced to move forward on domestic violence charges against the victim's wishes, regardless of her motivations. Some prosecutors took the extreme step of having domestic violence victims arrested for refusing to cooperate with prosecution.[170]

Rather than doubling down to end prosecutorial subversion by restricting prosecutors on their charging decisions as they relate to domestic violence cases, feminist activists should take a lesson from the movement's past efforts and look at what can be done practically to disarm abusive partners while giving victims a voice in case outcomes. Prosecutors should understand the victim's opinion on their abusive partner's firearm possession before disposing of a case, and when the prosecutor decides to allow a defendant to possess firearms in contravention of the victim's opinion and of the Lautenberg Amendment, that prosecutor should be required to account for that decision.

III. JUDICIAL SUBVERSION OF FEDERAL FIREARMS LAWS

Judges play a central role in the course of any civil or criminal case. They are responsible for ruling on pretrial motions, authorizing pretrial civil discovery, determining the admissibility of evidence at trial, and deciding appropriate jury instructions. In bench trials, they are also responsible for making findings of fact. Judges are bound by the relevant law in their jurisdiction, either statutory or from binding court decisions, but they also often have a great deal of discretion. Some safeguards exist to ensure that judges do not abuse their discretionary authority; the most common of these is the appellate system. Where a party is not satisfied with a lower court's ruling, she can ask that ruling to be vacated, reversed, or otherwise modified by an appellate court. Though standards of review vary in different types of appeals, the appellate process itself is inaccessible to many litigants and can be

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[167] *Id.* at 71 (citing a study from Milwaukee in 2000, where the population was 24 percent people of color but the "defendants in domestic violence cases" were 66 percent people of color).

[168] *See* Kim, *supra* note 143, at 222.

[169] *See generally* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (explaining that the solution of mandating criminal prosecution policies ignores victims' decisions and constrains their autonomy).

[170] *See, e.g.*, Corsilles, *supra* note 91, at 860.

an insurmountable barrier to justice for indigent and unrepresented litigants in particular. Ultimately, given their broad authority, judges have the power to determine a case outcome; it is important, then, to understand the proper scope of judicial discretion and when that discretion becomes improper subversion.

A. What Is Judicial Subversion?

The critical difference between appropriate discretion and inappropriate subversion for judges is the judge's intent in making a particular decision. When the decision is driven by a genuine interpretation of the applicable law, that is an appropriate act of discretion. However, when the decision is driven by a personal objection to the law and a refusal to apply it as the legislature intended, that is an inappropriate act of judicial subversion. This subversion is more common than many may assume.[171] Judges might have strong incentives to deny that they subvert the law, but there is evidence of judicial sympathy on how to rule when a judge fundamentally disagrees with the required legal outcome.[172]

Given that judges are themselves individuals with their own sets of opinions and preferences, some resistance to the law seems inevitable. This is particularly true when judges believe, often accurately, that they will not be subject to sanctions or other consequences for engaging in subversive behavior; judges are largely immune from civil and criminal sanctions.[173] Trial judges may have policy preferences which differ from those of federal or state legislators, but are in line with those of local constituents. In these cases, the judge, who may be an elected official, may feel that loyalty or adherence to the opinion of his local constituents are more important than adherence to federal law.

It is difficult to imagine a judge publicly announcing that she simply would not apply a particular law; such an announcement would be an invitation for criticism, would undermine her authority from the bench, and may lead to her not being reelected or otherwise being reseated. Rather, intentionality can be read into the actions of judges when data shows that certain parties or cases are being treated differently than others. Most individual cases, both criminal and civil, are

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[171] Jeffrey Goldsworthy, *Should Judges Covertly Disobey the Law to Prevent Injustice?*, 47 TULSA L. REV. 133, 134 (2011); *see also* Butler, *supra* note 21, at 1785.

[172] Butler, *supra* note 21, at 1800 (citing *Selection and Confirmation of Federal Judges: Hearing Before Comm. on the Judiciary*, 96th Cong. 450 (1980) (statement of Judge Harry Pregerson)).

[173] Schauer, *supra* note 83, at 787.

publicly searchable; however, it would take a great deal of resources to investigate one judge's cases thoroughly and completely enough to identify any type of pattern. This insulates judges from some of the public scrutiny that could flow from the awareness of judicial subversion. Appellate records are also available, and lower court judges do worry about their overturn rate, but this is again information that would take resources to compile. The average member of the public is not going to take the time to review their jurisdiction's appellate records to determine which judges are more regularly overturned on which type of cases, so the subversion can continue undetected.

Judges cause several types of harm when they engage in subversion. On a macro level, the existence of judicial subversion leads to confusion and uncertainty about when or whether the law will be applied in different contexts. When the judge subverts the law in a particular case, she sends the message to the party or other individuals, depending on the circumstances, that the state does not find that person's legal needs important. This undermines the public's faith in the judicial system as an institution to which they can turn for a fair and predictable enforcement of the law, and is a fundamental violation of the separation of powers.

B. Judicial Subversion of Legislation Intended to Protect Domestic Violence Victims

Judges have historically engaged in subversion in the context of domestic violence by only ordering limited relief for domestic violence victims.[174] By 1993, civil protection order statutes nationwide authorized a variety of remedies for petitioners: nearly every state statute and that of Washington, D.C. provided no further abuse clauses or stay-away clauses, and authorized courts to order respondents to vacate the parties' home.[175] Additionally, thirty-seven states and Washington, D.C. included no contact orders as a standard provision in civil protection orders;[176] thirty-five states and Washington, D.C. allowed courts to order possession or right to use of certain property;[177] thirty-two states and Washington, D.C. authorized

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[174] Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 186–95 (1993).

[175] Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 914–32 (1993).

[176] *Id.* at 925.

[177] *Id.* at 937.

courts to order respondents to complete domestic violence treatment programs;[178] forty-two states and Washington, D.C. allowed courts to determine custody in a civil protection order;[179] and thirty-six states' protection order statutes included a "catch-all" provision, which courts used to grant child support, damages, or custody of a pet, among other types of relief.[180]

Despite the widespread availability of these forms of relief on paper, many courts would not, in practice, actually grant the relief when petitioners requested it. One study from the early 1990s found that 42.9 percent of petitioners reported that judges had been unwilling to even consider granting certain types of relief that were expressly authorized by statute.[181] Most commonly, judges were denying requests "for custody, child support, and other financial remedies."[182] 11.2 percent of petitioners surveyed reported that judges would not even consider granting custody.[183] Survey responses indicated that this judicial refusal to grant certain types of relief in civil protection orders was based on the plainly incorrect position that they lacked the authority to grant the remedies, despite being explicitly authorized to do so under the law,[184] or that judges simply did not want to deal with these issues in their courtrooms.[185] Where judges refused to order certain types of relief, they caused real harm to petitioners seeking relief: financial dependency may leave victims with no choice but to return to their abusive partners,[186] and mothers unable to leave the abusive relationship with legal custody of their children often made the decision to stay.[187]

Because of their history of failing to utilize domestic violence laws to the extent legislatures intended, it is important to examine what judges may currently be doing to subvert laws that are meant to protect domestic violence victims. Immediately following the passage of the Lautenberg Amendment in 1996, state judges began using their power to subvert the law.[188] For example, in Rhode Island, between 1997 and 2001, judges expunged "over

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[178] *Id.* at 944.
[179] *Id.* at 954.
[180] *Id.* at 912.
[181] Kinports & Fischer, *supra* note 174, at 205.
[182] *Id.*
[183] *Id.*
[184] *Id.* at 206–07.
[185] *Id.* at 207.
[186] *Id.* at 206.
[187] *Id.* at 205.
[188] *See, e.g.*, Hector Tobar, *Officer's Expunged Conviction Angers Ex-Wife*, L.A. TIMES (May 26, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-05-26-me-62676-story.html [https://perma.cc/NYD3-YWKR] (explaining that judges in California expunged the domestic abuse convictions of three sheriff's deputies in 1997).

1,300 domestic assault convictions and *nolo* [*contendere*] pleas."[189] This number stands in stark contrast to the five years immediately preceding the passage of the Lautenberg Amendment, when the state judiciary expunged fewer than 350 such convictions.[190] Although judges in the Rhode Island study did not state that they were acting with the intent of allowing those convicted of domestic assault to maintain firearms, no other factors exist to account for such a drastic increase. Rhode Island was not alone in this trend.[191] Police officers in California[192] and South Dakota[193] similarly took advantage of judicial sympathy by utilizing their states' expungement statues in the wake of the Lautenberg Amendment's passage. Judges in some states also allowed defendants to petition for modification of their domestic violence convictions, with the explicit understanding that they were doing so to avoid losing their jobs.[194] As one commentator put it, "'[I]nstead of taking away the guns,' . . . 'the courts have taken away the convictions.'"[195]

Such postconviction judicial subversion continues to the present day, and it is sometimes done with an explicit statement of the judge on the record. In 2015, for example, California highway patrolman, Mark Geelan, was convicted of domestic assault, and therefore subject to the gun ban, losing his job as a result.[196] After losing his job as a patrolman, he sought employment with another police agency or with private security.[197] He returned to court to ask the gun ban to be lifted so that he could obtain employment.[198] The judge was sympathetic to Geelan's concerns, and told Geelan that he would remove the firearm restriction upon him if Geelan was able to find another job in law enforcement: "The gun restriction will be lifted for employment reasons," said the judge.[199] "If you want to

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189 Mikos, *supra* note 49, at 1463–64 (emphasis added).

190 *Id.*

191 *Id.* at 1464.

192 Maria C. Hunt, *New Gun Law for Batterers Comes Armed with Loophole*, SAN DIEGO UNION TRIB., Jan. 20, 1997, at A1.

193 Ragsdale, *supra* note 60.

194 *See, e.g.*, Matt Lait, *L.A. Police Panel Reviews Its Watchdog's Action Dispute*, L.A. TIMES (Nov. 7, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-nov-07-me-51189-story.html [https://perma.cc/FC4P-WAA4] (noting that a judge allowed a Los Angeles police officer to modify his domestic violence plea to a lesser disturbing the peace plea in order to save his job).

195 Mikos, *supra* note 49, at 1463 (alteration in original) (quoting *California Abusers Find Way to Skirt Gun Law*, CHARLESTON DAILY MAIL, May 29, 1997, at A1).

196 Jesse Marx & Katy Stegall, *Police Officers Accused of Domestic Violence Can Plead Down Charges—and Keep Their Guns*, VOICE SAN DIEGO (Nov. 12, 2019), https://www.voiceofsandiego.org/topics/public-safety/police-accused-of-domestic-violence-often-plead-down-charges-and-keep-their-weapons/ [https://perma.cc/RSX7-YVCY].

197 *Id.*

198 *Id.*

199 *Id.* (quoting Judge Ronald Frazier).

come back and let me know, OK. Just letting you know it will be."[200] In another case, a judge stated on the record that he was vacating a defendant's misdemeanor domestic violence conviction because he was employed by the Minneapolis Police Department and his job required a gun. In expunging it, the judge called the conviction a "manifest injustice."[201]

A similar wave of judicial subversion followed the passage of the federal protection order prohibition. Judges subvert the protection order prohibition by writing in exceptions in protection orders allowing respondents to maintain possession of their firearms. Protection order cases are particularly ripe for judicial subversion because parties are most often not represented and cases are rarely appealed,[202] shielding judges from the scrutiny of appellate review.

One study examining protection orders that were active in the California Domestic Violence Restraining Order System on June 6, 2003,[203] found that about 9.2 percent contained no firearm prohibitions on respondents.[204] This gap existed despite the fact that even under California law, all protection order respondents at the time of the study were prohibited from possessing firearms.[205] Despite the uniformity of the law, there was a checkbox on the standard California protection order forms indicating the applicability of the gun ban, and some judges were simply not checking the box.[206] The study could not determine whether any particular judge's failure to check the box was willful or merely negligent, but the existence of the checkbox itself appears to have emboldened judges to feel that they had the option to not check the box.

A 2005 report out of California found that there were "a small number" of judges who actively crossed out the firearms prohibition on protection order forms.[207] The findings were based on interviews in two counties and from regional hearings in three

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[200] *Id.* (quoting Judge Ronald Frazier).

[201] May, *supra* note 61, at 1 (citing *Guns and Domestic Violence Change to Ownership Ban*, *Hearing on H.R. 26 and H.R. 445 Before the House Subcomm. on Crime Comm. on the Judiciary*, 104th Cong. (1997) (statement of Bernard H. Teodorski, National Vice President, Grand Lodge, Fraternal Order of Police)).

[202] *Id.* at 33 (citing Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1968–69 (1995)).

[203] Susan B. Sorenson & Haikang Shen, *Restraining Orders in California: A Look at Statewide Data*, 11 VIOLENCE AGAINST WOMEN 912, 918 (2005).

[204] *Id.* at 925.

[205] *Id.* at 924.

[206] *Id.* at 926–27.

[207] CASEY GWINN ET AL., ATTORNEY GENERAL'S TASK FORCE ON CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE, KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY 33 (2005), https://bit.ly/35YMGbb [https://perma.cc/XMC8-YXJ3].

counties.[208] In 2004, California had 76,787 active protection orders—4,215 failed to contain the mandatory firearm prohibition provision. One prosecutor out of the San Diego District Attorney's Office remarked that it was "troubling . . . how often a judge, in violation of the law, would cross out the firearms prohibition or simply ignore it when issuing an order."[209] Although it is not clear from the report how many of those 4,215 crossed out firearm prohibition language, it is clear that this has been a commonplace practice that impacts a significant number of domestic violence victims. Mary Malefyt, while senior attorney at the Pennsylvania Coalition Against Domestic Violence, found judges physically cross out the requirement that a respondent not possess a firearm, noting that "[t]hey don't believe the federal law is a good law. They don't want people's guns taken away from them so they are doing sneaky things."[210]

In one such instance in 2017, charges against former California Police Officer Toney Canty initially included misdemeanor battery.[211] In order to keep his firearms under the Lautenberg Amendment, he pleaded guilty to the lesser charge of false imprisonment.[212] However, Canty's ex-girlfriend obtained a protection order against him, triggering the federal gun ban. Canty, who was then employed as a firearms instructor, argued that he needed his firearms for work.[213] In granting his requested exemption and allowing him to keep his firearms, the judge said, "I don't know that I can do anything else."[214]

Judges may have a variety of motivations for exempting protection order respondents from federal firearms prohibitions. For example, expressly erasing the language referring to the firearm ban was found to be especially common when respondents were employed in fields that required the possession of a firearm, regardless of whether an exemption already existed in federal law.[215] As one attorney put it, "some judges perceive the attachment of gun

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[208] *Id.*

[209] Casey Gwinn, *Domestic Violence and Firearms; Reflections of a Prosecutor*, 30 EVALUATION REV. 237, 242 (2006).

[210] Michelle N. Deutchman, Note, *Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218*, 75 S. CAL. L. REV. 185, 209 (2001).

[211] Robert Lewis & David DeBolt, *Police Officers Who Commit Domestic Violence Often Get to Keep Their Guns*, VOICE SAN DIEGO (Nov. 10, 2019), https://www.voiceofsandiego.org/topics/public-safety/police-officers-who-commit-domestic-violence-often-get-to-keep-their-guns/ [https://perma.cc/PLC3-ABYF].

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* ("Reporters also found that judges used special exemptions for cops to let at least 14 officers keep their guns even though they were the subject of restraining orders or violated laws that would have required them to give up their firearms.").

control restrictions as potential career ending penalties, and they likely rectify the perceived inequity by denying protective orders to victims who deserve them and by dismissing misdemeanor violence offenses altogether."[216]

But judicial efforts to subvert the domestic violence gun prohibition go beyond an intent to protect a perpetrator's employment. Judges have also subverted the law in order to protect an abusive partner's ability to use guns in a hobby-related capacity for an activity such as hunting. Data demonstrates that the practice of judges crossing out firearm restriction provisions is more common in rural and more conservative jurisdictions, where hunting is likely to be more popular.[217] Specifically, 11.5 percent of protection orders issued in rural counties with populations under one hundred thousand failed to include the firearms prohibition language—more than twice the percentage of orders issued in nonrural counties.[218] Mary Malefyt also noted based on her experience that the judicial practice of crossing out firearm prohibition provisions in protection orders is particularly common in areas where hunting is popular.[219] One attorney recounts hearing a judge in Missouri cite the oncoming quail hunting season as a reason not to issue a domestic violence victim a civil protection order.[220] Another district court judge in Iowa amended a criminal no-contact order to allow a defendant "to possess firearms for hunting," an order which the Iowa Supreme Court ultimately ruled violated federal law.[221]

Colorado judges have also used hunting as a reason to refuse to apply clear federal domestic violence gun mandates. One civil legal aid attorney who practiced in rural Colorado in the late 2000s recounted her clients' experiences with their local courts being reluctant to restrict abuser's firearm possessions.[222] Their protection order forms at that time had a separate box which the judge would have to check indicating that the respondent was banned from possessing firearms under federal law.[223] One judge in particular was known to refuse to check the box indicating that the federal gun ban applied.[224] After receiving training from local

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[216] May, *supra* note 61, at 9–10.

[217] Benjamin Thomas Greer & Jeffry G. Purvis, *Judges Going Rogue: Constitutional Implications When Mandatory Firearm Restrictions Are Removed from Domestic Violence Restraining Orders*, 26 WIS. J.L. GENDER & SOC'Y 275, 282 (2011).

[218] Greer & Purvis, *supra* note 217, at 282.

[219] Deutchman, *supra* note 210, at 209.

[220] May, *supra* note 61, at 1–2.

[221] Weissenburger v. Iowa Dist. Ct. for Warren Cnty., 740 N.W.2d 431, 433 (Iowa 2007).

[222] Telephone interview with Anonymous, Attorney (Apr. 23, 2020) (notes on file with author).

[223] *Id.*

[224] *Id.*

domestic violence advocates, that judge changed his practice and began checking the box regularly.[225] However, upon this change of practice, the judge got pushback from the local defense bar.[226] The judge's solution was to check the box indicating that the federal firearm ban applied, but then to write in his own provision stating: "Court received evidence that respondent has weapons; court will not enter order for respondent to relinquish weapons until April 15, the last day of hunting season" or "I'm choosing to allow respondent to keep his firearms for the duration of hunting season."[227] Like with prosecutors pleading down cases to allow defendants to keep their firearms, it appears in many of these cases that judges are valuing an abusive partner's right to possess a firearm more highly than they are valuing a victim's right to safety.

It is important to note that, even when judges cross out the firearm prohibition on protection orders, they are not actually stopping the protection order from triggering the firearm ban.[228] Under the protection order prohibition, as long as the requisite elements are met—the respondent had notice, the protection order finds the respondent to be a credible threat to the petitioner or explicitly prohibits the use of violence, and it orders the respondent not to harass, stalk, threaten, or otherwise place an intimate partner or their child in fear of bodily injury[229]—the firearm ban applies.

In the little case law that does exist in this area, appellate courts have recognized and overturned the trial court judges' improper use of subversion in their attempts to free protection order respondents from the constraints of the gun ban. In one case, an appellate court in California reversed the trial court, which had extended a petitioner's protection order but vacated the firearm prohibition.[230] The appellate court, reversing the extension of the protection order on other grounds, stated: "[A]s independent and sufficient grounds for reversal, we conclude the court lacked statutory authority to eliminate the firearm restriction and remand for the judge to reweigh the risks and burdens of renewal with the firearm restriction intact."[231]

In response to some state judges subverting the federal firearms legislation, when Congress reauthorized the VAWA in

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[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *See* Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. REV.: J. AM. JUDGES ASS'N, July 2002, at 32, 32–33.

[229] 18 U.S.C. 922(g)(8).

[230] Ritchie v. Konrad, 10 Cal. Rptr. 3d 387, 391 (Cal. Ct. App. 2004).

[231] *Id.*

2005, it added a provision to VAWA attempting to force states into compliance.[232] The new law required that states receiving certain federal funding be obligated to provide notice to defendants in domestic violence misdemeanor cases and respondents in protection order cases of the gun bans under the Lautenberg Amendment and the protection order prohibition.[233]

This approach was not entirely successful, though. In one case in Iowa, two years after the congressional mandate, a respondent moved to modify the protection order against him to allow him to possess firearms.[234] The trial judge acquiesced to the request, stating "[t]here was no evidence that the [respondent] should not be allowed to possess firearms for hunting."[235] The district court physically crossed out the firearm prohibition in a newly issued, modified protection order.[236] The case was appealed up to the Supreme Court of Iowa, which held:

> [W]e conclude the district court had no power to authorize [respondent] to possess firearms in violation of federal law. Once the court determined the no-contact order should continue in effect, [respondent] was prohibited under federal law from possessing firearms regardless of whether this prohibition was included in the court's no-contact order.[237]

But while a judge crossing out the firearm prohibition does not legally exempt that individual from the firearm prohibition, it sends the message to the respondent that firearm possession is permissible. Apparent judicial permission increases the likelihood that abusive partners will, in fact, maintain possession of firearms. It also provides a roadblock to federal prosecution of a violation of the protection order prohibition; a prosecutor would have to prove beyond a reasonable doubt that the defendant knew they were part of a class of individuals prohibited from possessing a firearm, which a defense attorney could easily—and realistically—dispute. As prosecutors are already selective with the protection order prohibition violations they actually prosecute, the anticipation of a notice defense may dissuade them from bringing charges in these cases.

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[232] SAVING WOMEN'S LIVES, *supra* note 11, at 29. In 2005, when Congress reauthorized VAWA, it took note of the tension that existed between state courts and their willingness to apply federal law. Congress added a provision to VAWA requiring that states receiving certain federal funding are obligated, at a minimum, to provide notice to defendants in domestic violence misdemeanor cases and respondents in protection order cases of the gun bans under the Lautenberg Amendment and the protection order prohibition. *Id.*

[233] *Id.*

[234] Weissenburger v. Iowa Dist. Ct. for Warren Cnty., 740 N.W.2d 431, 433 (Iowa 2007).

[235] *Id.* at 436.

[236] *Id.* at 433.

[237] *Id.* at 436.

Domestic violence and firearms expert Roberta Valente explains judicial subversion as follows: "They're taking the Second Amendment more seriously than domestic violence. They are doing a kind of balancing test and they are deciding that protecting a person's Second Amendment rights is more important than protecting a domestic violence' victim's safety."[238] There is no balancing test written into either the Lautenberg Amendment or the protection order prohibition; Congress did not give judges the discretion to weigh the safety concerns of a domestic violence victim against the rights of an abusive partner to possess firearms. Rather, gun removal from an abusive partner is to occur automatically by statute.[239] Despite the clarity of both laws and this absence of discretion given to judges, some judges place such a higher premium on an abusive partner's rights to possessing firearms than a domestic violence victim's right to safety that they have chosen to subvert the laws to reflect this value placement.

The federal protection order prohibition only functions when states fulfill their obligations to issue protection orders appropriately. When judges grant exemptions to protection order respondents that are invalid, they subvert Congress's intent to protect domestic violence victims from their abusive partners. The next Section proposes several solutions to this problem.

C. Assessing and Responding to Judicial Subversion of Federal Firearms Legislation

Little data exists regarding the prevalence of the above-described judicial subversion.[240] A record review to monitor judicial subversion may be fruitful because many records are publicly accessible. The accessibility of such records is what made the Rhode Island study,[241] revealing a spike in domestic violence expungements post-Lautenberg, possible. A study of judges granting expungements in domestic violence cases would be relatively straightforward and would require only a comprehensive search of documents that are publicly available. Many expungements took place in the immediate aftermath of the Lautenberg Amendment's passage since the convictions had

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[238] Interview with Roberta Valente, *supra* note 139.

[239] Of course, as discussed in Part II in the context of criminal domestic violence cases, there may be civil protection order cases in which the victim indicates that her safety would best be protected by her abusive partner maintaining possession of his firearm. These circumstances are discussed in Section III.C.

[240] There is some quantitative data, such as the studies referenced from California in the early 2000s. *See supra* notes 207–214 and accompanying text.

[241] Mikos, *supra* note 49, at 1463–64.

been entered before its passage, so we may not expect the expungement numbers to be as high in recent years, but we simply do not have this information currently.

Additionally, a records review program could uncover how often judges are attempting to grant exceptions to the protection order prohibition for respondents. Final protection orders are publicly available, and a review of all orders entered by a certain judge over a particular time period would reveal whether, or how often, that judge has engaged in subversion by crossing out the firearm ban or writing in exceptions. In addition to reviewing records, observing hearings through a court watch program where judges grant such exceptions would also provide insight into a judge's motivations for doing so and could better direct any intervention against that judge. For example, if a judge were revealed to routinely be crossing out the firearms ban on behalf of petitioners who were police officers, that judge could receive targeted training about the prevalence of domestic violence among police officers and the danger that abusive police officers pose to their partners.

Once more data has been collected to document how often judges are signing protection orders with apparent exceptions for firearm possession, the Department of Justice (DOJ) must better ensure compliance with federal firearms laws. It should do so by monitoring the protection order information that state judges and other members of the criminal legal system enter into the NCIC, an electronic database accessible to federal law enforcement.[242] The DOJ should conduct yearly reviews of the protection order information put into NCIC and monitor for jurisdictions where there are significant numbers of orders being entered without the gun ban. Once the DOJ has identified these jurisdictions, it should send a letter to judges in that jurisdiction seeking an explanation for the aberrant orders. The DOJ should notify those courts that VAWA grants awards, which fund many domestic violence courts nationwide,[243] will be contingent upon future compliance with the protection order prohibition and consistent record entry into NCIC.

The DOJ has been successful when engaging in this type of oversight in the past. One example can be found in California, where the DOJ was notified in 2004 that judges and other system actors were entering protection orders into the federal database without

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[242] Anne Gallegos & Becki Goggins, *State Progress in Record Reporting for Firearm-Related Background Checks: Misdemeanor Crimes of Domestic Violence*, NAT'L CTR. FOR STATE CTS. (Dec. 2016), https://www.ncjrs.gov/pdffiles1/bjs/grants/250392.pdf?ed2f26df2d9c416fbddddd2330a778c6=gptsldjkqt-gdklqkek [https://perma.cc/V9X7-UPV7].

[243] *See* U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 145, at 24–25.

firearms bans.[244] Upon receipt of this information, the DOJ sent a letter to 274 agencies in California—beyond just courts—who had entered protection orders into their statewide database.[245] In the letter the DOJ asked the agencies to account for the discrepancies in its database entries and to provide copies of any erroneous orders.[246] This letter was remarkably effective, reducing both the number and percentages of orders in the database containing firearms exceptions in only two months:[247] the percentage of erroneous orders in large counties fell from 5.3 percent to 2.6 percent and the percentage of erroneous orders in small counties fell from 11.5 percent to 4.5 percent.[248] In a study of the aforementioned erroneously entered protection orders, there had been a variety of reasons for improper orders existing within the database ranging from judicial subversion to simple oversights in paperwork.[249] The letter from DOJ requesting an explanation for the deviance, though, fostered compliance quickly and effectively.[250] However, it is not clear how many of the remaining deficient orders were the result of judicial subversion or of negligence in administrative paperwork filing; additional intervention would likely be necessary to ensure complete compliance with the protection order prohibition.

Additionally, Congress should amend VAWA to require a petitioner in a protection order case to have the opportunity, on the record, to state her position on the gun ban where the respondent has requested an exception. Because these are civil cases, victims are parties to the litigation and should be given the chance to tell the court about how different forms of relief may benefit her. This is particularly true when the type of relief in question is mandated by federal law. When a victim informs the court that she wants her abusive partner to lose his access to firearms, and the judge still attempts to write in a gun ban exception for that respondent, judges should be required to attach a written explanation of their decision to the protection order. This written explanation should include relevant findings of fact and an acknowledgement that the victim objected to this outcome. Because protection orders are publicly available, a periodic records search by an outside party such as the Brady Campaign to Prevent Gun Violence[251] could facilitate the identification of these subversive decisions. These

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244 GWINN ET AL., *supra* note 207, at 37.

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.*

249 *Id.*

250 *Id.*

251 *About Brady*, BRADY, https://www.bradyunited.org/about [https://perma.cc/HJ2R-SME5].

written explanations would also provide additional information to benefit the DOJ as they monitor and communicate with jurisdictions they find to be out of compliance with federal law.

Judges handling domestic violence cases must also be better educated about their state law on gun possession for abusive partners, if and how that differs from federal law on the subject, and the applicability of both sets of laws for parties against whom they enter misdemeanor convictions of domestic violence and protection orders. This training should include a thorough discussion of the data demonstrating gun possession by abusive partners. If judges better understand why the federal laws exist, they are less likely to subvert them.

In protection order cases, unlike misdemeanor domestic violence cases, victims are parties to their own cases. They draft and file their own petition and have the right to ask for any statutorily enumerated relief. They also have the right to dismiss their petition at any time, which would negate any firearm ban, if that were their desired goal. A victim could request, when asked on the record her position on the gun ban, that the judge not remove her abusive partner's firearm despite moving entering a protection order. As discussed above, though, even were a judge to write in this type of exception, the federal law banning respondents to a protection order from possessing a firearm still applies. Victims should be informed about the federal law's application but should also be informed that such a violation may be very difficult to prosecute, for the reasons discussed above. This would be a complicated set of circumstances to explain to victims, but it is imperative that they fully understand the relief the court can and cannot grant to them, and that they make a fully informed decision on how to proceed as the driver of the litigation. If a victim's priority is for her abusive partner to keep his firearm, it may be in her best interest to dismiss her petition for a protection order altogether.

CONCLUSION

The American democratic system relies on cooperation between the three branches of government and the federal and state governments. When individuals within the government use their position to undermine the actions taken by another branch, they act in subversion of the law. While this subversion is facially problematic, it is particularly insidious when it is done to nullify a law that was intended to protect a vulnerable population. Congress recognized the particular vulnerability of domestic violence victims when their abusive partners possess firearms, and they passed the protection order prohibition and the Lautenberg Amendment to

protect domestic violence victims from that danger. Unfortunately, because the federal law relies upon the entry of convictions and orders at the state level, some state prosecutors and judges have manipulated their positions of authority to effectively nullify the law.

This article proposes several solutions to temper the ability of prosecutors and judges to subvert the Lautenberg Amendment and the protection order prohibition, and proposes giving victims more of a voice in both the criminal and civil legal processes. These solutions can, if implemented, make a real difference for victims of domestic violence by ensuring Congress's intent to disarm abusive partners is more fully met and by otherwise empowering victims. However, the small solutions proposed are not sufficient to address the underlying motivations behind prosecutors and judges acting subversively in this context. Until there is a major cultural shift and the experiences and safety of domestic violence victims are valued as highly as the employment and hobby needs of abusive partners, state actors will continue to find ways to subvert the law, leaving abusive partners armed and dangerous to their victims.