

# Disarming Domestic Abusers

Natalie Nanasi\*

*Guns and domestic violence are a deadly combination. Every sixteen hours in the United States, a woman is fatally shot by her intimate partner; the mere presence of a gun in a domestic violence situation increases the risk of femicide by 500 percent.*

*Recognizing these risks, federal law and some states prohibit domestic abusers from possessing firearms. But these laws are not being enforced. Perpetrators of domestic violence are rarely ordered to surrender firearms, and even when they are, there are often no mechanisms to ensure that weapons are safely relinquished.*

*This Article proposes strategies to disarm domestic abusers, proceeding in three parts. First, it describes legislation that would prohibit perpetrators of intimate partner violence from owning or possessing firearms. Next, it explains the mechanisms required to implement that legislation. Finally, it recommends litigation strategies to ensure meaningful enforcement. Only all three, working together, have the potential to prevent the gun-related deaths of intimate partners.*

INTRODUCTION . . . . .	560
I. INTIMATE PARTNER VIOLENCE AND FIREARMS . . . . .	562
II. OVERVIEW OF GUN SURRENDER LAW . . . . .	566
<i>A. Federal Statutes . . . . .</i>	566
<i>B. Legal Challenges and Critiques . . . . .</i>	570
III. RECOMMENDATIONS . . . . .	575
<i>A. Legislation . . . . .</i>	575
1. <i>State-Level Legislation is Necessary . . . . .</i>	575
2. <i>Statutes Prohibiting Firearm Possession by Domestic             Violence Offenders . . . . .</i>	577
3. <i>Funding Programs to Enforce Domestic Violence Firearm             Prohibitions . . . . .</i>	583
4. <i>Domestic Violence Prohibitions as Part of a Broader Gun             Safety Framework . . . . .</i>	585
<i>B. Implementing a Successful Gun Surrender Program . . . . .</i>	587
1. <i>Coordination is Critical . . . . .</i>	588
2. <i>Codify Programs and Collect Data . . . . .</i>	594
3. <i>Educate and Train All Stakeholders . . . . .</i>	595
4. <i>Ensure Compliance With Orders . . . . .</i>	596
5. <i>Implement Safeguards for Return of Firearms . . . . .</i>	600
<i>C. Litigation . . . . .</i>	601

---

\* Assistant Professor and Director, Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women, SMU Dedman School of Law. Thank you to Courtney Cross, Deborah Epstein, Michelle Gilman, Laurie Kohn, Tammy Kuennen, Jessica Miles, Carolyn Ramsey, and Jane Stoever for your insights. The attendees and organizers of the AALS Clinical Conference and the NYU Clinical Law Review Writers' Workshop provided, as always, invaluable feedback. Devan Dal Col provided skillful research assistance and the editors at the Harvard Law & Policy Review improved this article immeasurably. I am also enduringly grateful to Roz Katz for her leadership and commitment. Lastly, I owe much to my colleagues Jenia Turner, for planting the seed that became this Article, Tom Mayo, Joanna Grossman, and Eric Ruben for their advice and guidance.

1. <i>Writ of Mandamus</i> .....	601
2. <i>Constitutional Challenges</i> .....	602
3. <i>Tort Liability</i> .....	603
4. <i>Relief Under the Crime Victims' Rights Act</i> .....	606
CONCLUSION .....	606

## INTRODUCTION

Intimate partner violence and firearms are a deadly combination. In an instant, a gun can turn domestic violence into domestic homicide, as was the case with a 39-year-old accountant and mother of two from Virginia Beach named Deborah Wigg.<sup>1</sup> In 2011, Ms. Wigg obtained a protective order against her husband, whose abusive behavior had recently escalated.<sup>2</sup> In her application for the protective order, she indicated that her husband owned a 9-millimeter semiautomatic handgun.<sup>3</sup> A few months later, Mr. Wigg “showed up at his wife’s home and began ringing the doorbell and pounding on the door.”<sup>4</sup> Before the police could arrive, Mr. Wigg broke in.<sup>5</sup> He shot his wife, who died of a single gunshot wound to the head.<sup>6</sup>

Among the many tragedies of Ms. Wigg’s story is that the likelihood of her death could have been reduced by more comprehensive and vigorously enforced gun laws. Under existing state and federal law, the protective order she obtained against her husband made it unlawful for him to have the gun that he used to kill her.<sup>7</sup> Yet although federal law and some states prohibit domestic abusers from possessing firearms, officials tasked with enforcing these laws are not doing so.<sup>8</sup> Abusers are rarely ordered to surrender their

---

<sup>1</sup> Tracy Agnew, *Victim was “Sweet, Quiet,”* SUFFOLK NEWS HERALD (Nov. 9, 2011, 11:05 PM), <https://www.suffolknews herald.com/2011/11/09/wife-husband-dead-in-apparent-murder-suicide/> [<https://perma.cc/BXQ8-FYYE>].

<sup>2</sup> Sarah Hutchins, *Slain Suffolk Woman Remembered as “a Good Soul,”* VIRGINIAN-PILOT (Nov. 10, 2011, 12:00 AM), [https://pilotonline.com/news/local/crime/article\\_a2d4b7cf-d4b7-521c-b049-0453eac14b45.html](https://pilotonline.com/news/local/crime/article_a2d4b7cf-d4b7-521c-b049-0453eac14b45.html) [<https://perma.cc/48NK-TJBE>].

<sup>3</sup> Michael Luo, *In Some States, Gun Rights Trump Orders of Protection*, N.Y. TIMES (Mar. 17, 2013), <https://www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html> [<https://perma.cc/Z3SP-KWTG>].

<sup>4</sup> *Id.*

<sup>5</sup> Cindy Clayton, *Man Kills Wife, Self in Suffolk Neighborhood*, VIRGINIAN-PILOT (Nov. 9, 2011, 12:00 AM), [https://pilotonline.com/news/local/crime/article\\_b6ba7a98-35bd-5824-a3d9-891453d3c984.html](https://pilotonline.com/news/local/crime/article_b6ba7a98-35bd-5824-a3d9-891453d3c984.html) [<https://perma.cc/5RYA-TEJ7>].

<sup>6</sup> Luo, *supra* note 3.

<sup>7</sup> See VA. CODE ANN. § 18.2-308.1:4(A). See 18 U.S.C. § 922(g)(8) (2018). This Article will address firearm prohibitions under Section (g)(8), for those subject to family violence protective orders, as well as under Section (g)(9), for persons convicted of misdemeanor crimes of domestic violence. See 18 U.S.C. § 922(g)(9) (2018).

<sup>8</sup> See *infra* Section II.A. This Article primarily addresses laws and programs that mandate abusers to relinquish firearms they already have, as opposed to the related area of preventing them from acquiring new weapons. Purchase prohibitions are relatively straightforward to implement (although needed improvements to aspects such as background check systems are discussed in Section III.A.4 below).

firearms, and even when they are, mechanisms do not exist to ensure that prohibited possessors relinquish their weapons.<sup>9</sup>

Survivors are safer in jurisdictions that have programs and protocols in place to remove guns from perpetrators of intimate partner violence and where broader gun safety measures exist.<sup>10</sup> Researchers analyzing two decades of data found that states with laws that limited access to firearms for individuals subject to domestic violence protective orders had significantly lower rates of intimate partner homicides than states without these laws.<sup>11</sup> Importantly, the data show no “substitution effect,” whereby other weapons are used to kill where firearms are not available, demonstrating that domestic violence firearm prohibitions can save lives.<sup>12</sup>

Our current legal system is reactive. A perpetrator found with a weapon he<sup>13</sup> is not legally permitted to possess can be arrested and prosecuted. But by then, as was the case with Ms. Wigg, it is often too late. Few jurisdictions

<sup>9</sup> See, e.g., Lindsay Nadrich, *SPD Starts Cracking Down on Domestic Violence Offenders who do not Surrender Guns*, KREM2 (Mar. 26, 2018, 4:58 PM), <https://www.krem.com/article/news/local/spokane-county/spd-starts-cracking-down-on-domestic-violence-offenders-who-do-not-surrender-guns/293-532307862> [<https://perma.cc/A6PW-BUQ6>] (describing a review of nearly ten years of intimate partner homicide data in Washington State, which revealed that more than half of defendants had been ordered to their surrender firearms prior to murdering their partners).

<sup>10</sup> See generally Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589 (2004) (utilizing empirical evidence as a basis for effective recommendations regarding gun policy).

<sup>11</sup> See Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 *EVALUATION REV.* 313, 332 (2006); see also F. Stephen Bridges, Kimberly M. Tatum & Julie C. Kunselman, *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide*, 19 *CRIM. JUST. POL'Y REV.* 117, 127 (2008) (stating that “the family homicide rate decreased across 47 states as the number of states restricting firearms during a restraining order increased”); April M. Zeoli & Daniel M. 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) (analyzing data from forty-six cities from 1979 to 2003 and finding that any state that prohibited firearm possession by those subject to domestic violence protective orders and those with domestic violence misdemeanor convictions saw a nineteen percent reduction in total intimate partner homicides and had twenty-five percent fewer intimate partner homicides committed with guns).

<sup>12</sup> Kerri M. Raissian, *Hold Your Fire: Did the 1996 Federal Gun Control Act Expansion Reduce Domestic Homicides?*, 35 *J. POL'Y ANALYSIS & MGMT.* 67, 67 (2016) (finding “no evidence that reductions in gun homicides were offset by an increase in nongun homicides” after the Gun Control Act was amended to include a ban on possession by misdemeanant domestic violence offenders). See also CONSORTIUM FOR RISK-BASED FIREARM POL'Y, GUNS, PUBLIC HEALTH AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR FEDERAL POLICY 15 (2013), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/\\_archive-2019/\\_pdfs/GPHMI-Federal.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_archive-2019/_pdfs/GPHMI-Federal.pdf) [<https://perma.cc/Q4FK-CLMC>].

<sup>13</sup> Although both men and women experience intimate partner abuse, this Article uses female pronouns to refer to survivors because men and women are not equally impacted by violence in the home: one in four women has been the victim of severe physical violence by a partner as opposed to one in seven men. *CTRS FOR DISEASE CONTROL & PREVENTION, National Data on Intimate Partner Violence, Sexual Violence, and Stalking* (2014) <http://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf> [<https://perma.cc/Q38F-SBLB>]. Another study reports that between 1994 and 2010, four in five victims of domestic violence were female. *NAT'L DOMESTIC VIOLENCE HOTLINE, STATISTICS: GET THE FACTS*

have mechanisms in place to proactively ensure surrender of firearms from abusers, and the gun surrender programs that exist need improvement. This Article therefore focuses on the critical enforcement stage of the legal process.

Section I explains the connection between intimate partner violence and firearms, demonstrating through narrative and data how guns increase both the severity and lethality of domestic abuse. Section II provides an overview of existing gun surrender laws. It details the federal and state legal framework of civil and criminal prohibitions and explores both critiques of gun surrender programs and the nearly universally unsuccessful legal challenges against them.

Section III provides recommendations for removing firearms from the hands of domestic abusers, proceeding in three parts. The first part addresses legislative measures relating to gun surrender. It explains the need for state-level action, details what specific components legislation prohibiting abusers from owning or possessing firearms could include, and discusses related gun safety efforts that decrease the general public's ease of access to firearms. The second part of Section III describes features of gun surrender programs that successfully ensure that offenders dispossess themselves of weapons and do not acquire new ones. It explains why coordination among agencies is critical and why programs should be codified and data collected. Section III.B also addresses education and training requirements for key stakeholders, recommends mechanisms to ensure compliance with gun surrender orders, and proposes measures to ensure the safe return of firearms. The final part of Section III provides an overview of litigation strategies that could ensure governments' compliance with federal and state gun surrender law, including mandamus actions, constitutional challenges, tort suits, and relief under the Crime Victims' Rights Act.

As Dr. K.J. Wilson—a professor, advocate, and survivor of domestic violence—states, “regardless of their empowerment abilities, [gun surrender] orders without enforcement offer little protection and often increase women’s danger by creating a false sense of security.”<sup>14</sup> Because without implementation and enforcement, the law is not worth the paper it is written on, this Article fills that critical gap.

## I. INTIMATE PARTNER VIOLENCE AND FIREARMS

When a perpetrator of domestic violence has access to a firearm, the results are often lethal. As experts have unequivocally stated, “[t]he evidence

---

AND FIGURES, <http://www.thehotline.org/resources/statistics/> [<https://perma.cc/T6TB-8EVQ>].

<sup>14</sup>K.J. WILSON, WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE 79 (1997).

is clear: when a woman is killed, it is most likely to be at the hands of an intimate partner with a gun.”<sup>15</sup>

As a threshold matter, domestic violence correlates strongly to homicide rates. In 2017, half of femicides in the United States involved an intimate partner.<sup>16</sup> And as common sense would dictate, the presence of a gun in an abusive household increases the risk of death. A landmark study found that when an abuser has access to a gun, the risk of homicide increases by 500 percent.<sup>17</sup> In other words, an abuser is five times more likely to murder his intimate partner if there is a gun in the home.

Several nationwide studies confirm that guns pose a grave risk to survivors of intimate partner abuse. The United States Department of Justice reports that more than two-thirds of spouse and ex-spouse homicide victims between 1980 and 2008 were killed with firearms.<sup>18</sup> A recent study found that of the 1,352 intimate partner homicides in 2015, fifty-five percent were committed with firearms.<sup>19</sup> If “collateral victims”—family members, friends, new intimate partners, acquaintances, police officers, or strangers who are killed in the same incident as the perpetrator’s intimate partner—are considered, the number killed increases.<sup>20</sup>

Perpetrators are more likely to use a gun than all other means combined to murder their female intimate partners.<sup>21</sup> Firearms are used in fifty-four percent of homicides, which is more than double the number of victims killed with a sharp instrument, the next most-prevalent murder weapon.<sup>22</sup> In

<sup>15</sup> April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers’ Access to Guns*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 53, 53 (Daniel W. Webster et al. eds., 2013).

<sup>16</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, RACIAL AND ETHNIC DIFFERENCES IN HOMICIDES OF ADULT WOMEN AND THE ROLE OF INTIMATE PARTNER VIOLENCE — UNITED STATES, 2003–2014 (2017) [hereinafter CDC HOMICIDE REPORT], [https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s\\_cid=MM6628a1\\_w](https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=MM6628a1_w) [<https://perma.cc/4GWE-4YRQ>]. A report from the Violence Policy Center echoes the CDC’s findings, noting that in 2011, more than half of women killed with guns were killed by their intimate partners. VIOLENCE POL’Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA (2013) [HEREINAFTER WHEN MEN MURDER WOMEN], <http://www.vpc.org/studies/wmmw2013.pdf> [<https://perma.cc/YC9X-Z4QA>].

<sup>17</sup> Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

<sup>18</sup> ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 (2011), <http://bjs.gov/content/pub/pdf/htus8008.pdf> [<https://perma.cc/8XKQ-DLUP>].

<sup>19</sup> April Zeoli, et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Association with Intimate Partner Homicides*, AM. J. EPIDEMIOLOGY (2017) (article subsequently retracted for other reasons; retraction does not implicate the data in support of this statement).

<sup>20</sup> Sharon G. Smith, Katherine A. Fowler & Phyllis H. Niolon, *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003–2009*, 104 AM. J. PUB. HEALTH 461 (2014). The study found that “nearly half of the corollary victims who were family members of the suspect were minors, and more than one third were elementary school aged or younger.” *Id.* at 463.

<sup>21</sup> Leonard J. Paulozzi et al., *Surveillance for Homicide Among Intimate Partners—United States, 1981–1998*, 50 MORBIDITY AND MORTALITY WKLY. REP. 461, T.4 (2001).

<sup>22</sup> CDC HOMICIDE REPORT, *supra* note 16.

fact, simply living in a state with a higher rate of gun ownership is correlated with a higher rate of intimate partners fatally shooting women in a domestic violence incident.<sup>23</sup>

Even if violence is non-lethal, the presence of a firearm increases the severity of intimate partner abuse.<sup>24</sup> A gun is often part of a broader pattern of coercive control, an abuser's manipulative behaviors intended to restrict a victim's liberty or freedom.<sup>25</sup> If a weapon is "displayed in a hostile way, it can create an ongoing environment of threat and intimidation. . . . It can facilitate chronic, ongoing, physical—as well as sexual and psychological—abuse."<sup>26</sup> An abuser need not fire a single shot to effectuate harm. Imagine, for example, a man who has previously abused or threatened his wife and now sleeps with a loaded weapon on his bedside table. In such situations, "a gun is a great intimidator—the ultimate power tool in the arsenal of a batterer."<sup>27</sup>

Here again, the data confirm the prevalence of guns in the overall cycle of violence in situations of domestic abuse. Approximately 4.5 million women have reported that their intimate partner threatened them with a gun.<sup>28</sup> Twenty-two percent of respondents to a National Domestic Violence Hotline survey on the role of firearms in abusive relationships indicated that

<sup>23</sup> Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311 (2019) (finding that residents of states with higher levels of gun ownership are more likely to be shot to death by a family member or intimate partner). The study, examining gun ownership on a state-by-state level from 1990 to 2016, found that states with the highest firearm ownership rates had a sixty-five percent higher rate of domestic firearm homicide than states with lower ownership rates. Importantly, the study found no association between rates of gun ownership and non-domestic firearm homicides; homicide involving friends, acquaintances, or strangers was not impacted by rates of gun ownership in a particular state. As the lead author of the study stated, "it is women, in particular, who are bearing the burden of this increased gun ownership . . . it is not a risk that is equally shared across the population." Sarah Mervosh, *Gun Ownership Rates Tied to Domestic Homicides, but not Other Killings, Study Finds*, N.Y. TIMES (July 22, 2019), <https://www.nytimes.com/2019/07/22/us/gun-ownership-violence-statistics.html> [<https://perma.cc/4HDT-QNKP>].

<sup>24</sup> Stephanie E. F. Folks, N. Zoe Hilton & Grant T. Harris, *Weapon Use Increases the Severity of Domestic Violence but Neither Weapon Use nor Firearm Access Increases the Risk or Severity of Recidivism*, 28 J. INTERPERSONAL VIOLENCE 1143 (2013). See also Judith McFarlane et al., *Severity of Abuse to Pregnant Women and Associated Gun Access of the Perpetrator*, 15 PUB. HEALTH NURSING 201 (1998) (finding that women who reported that their abuser had access to a gun also reported higher levels of abuse in their relationship).

<sup>25</sup> See EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 11–14 (2007).

<sup>26</sup> Maura Ewing, *An Estimated 4.5 Million Women Have Been Bullied with Guns by Abusive Partners*, TRACE (Oct. 3, 2016), <https://www.thetrace.org/2016/10/nonfatal-gun-use-domestic-violence/> [<https://perma.cc/4E6Q-UQTM>].

<sup>27</sup> *New Law a Good One: Take Handguns From Abusers*, SYRACUSE HERALD-J. at A22 (Dec. 20, 1996). In fact, a recent study suggests that abusers who use guns (versus another type of weapon) against their intimate partners intend to intimidate, coerce, and frighten their victims, as opposed to inflict physical harm. Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 255 (2017).

<sup>28</sup> Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 431 (2016).

their partners had used a gun to threaten or hurt them.<sup>29</sup> Threats of violence often co-occur with physical violence; a 2005 study found that nearly half of women who reported intimate partner abuse to law enforcement also reported a history of the perpetrator using firearms to threaten them.<sup>30</sup>

Lastly, a proven nexus exists between intimate partner violence and mass shootings. A study conducted by the advocacy group Everytown for Gun Safety revealed that of the mass shootings committed in the United States from 2009 to 2017, more than half were related to domestic or family violence, meaning that the perpetrator shot a current or former intimate partner or family member in the incident.<sup>31</sup> Domestic violence is a significant predictor of mass violence, as evidenced by both available data and an anecdotal review of recent attacks. The Pulse Nightclub shooter, who killed forty-nine people and wounded fifty-three others in a shooting at an Orlando nightclub, “had an extensive history of domestic abuse.”<sup>32</sup> The man who opened fire at a congressional baseball practice in June 2017 had previously been arrested for domestic battery and discharge of a firearm.<sup>33</sup> The man who drove a truck through a Bastille Day celebration in 2016 was known to French authorities for abusing his wife, who left him two years prior to the attack.<sup>34</sup> One of the Boston Marathon bombers had previously been arrested on a domestic violence charge.<sup>35</sup> And the man who murdered twenty parishioners at a church Sutherland Springs, Texas in 2017 was “a documented domestic abuser.”<sup>36</sup>

Domestic violence gun prohibitions can mitigate the dire consequences for victims of intimate partner abuse. A 2017 study in the *Annals of Internal*

<sup>29</sup> NAT'L DOMESTIC VIOLENCE HOTLINE, HOTLINE FOCUS SURVEY PROVIDES FIRST-HAND LOOK AT INTERSECTION OF FIREARMS & DOMESTIC VIOLENCE; HIGHLIGHTS NEED FOR STRONGER LAWS AND EQUAL PROTECTION (2014), <http://www.thehotline.org/2014/06/hotline-focus-survey-provides-firsthand-look-at-intersection-of-firearms-highlights-need-for-stronger-laws-and-equal-protection/> [<https://perma.cc/HU98-SDXB>]. Ten percent of survey respondents also reported that their partner had fired a gun during an argument.

<sup>30</sup> Casey Gwinn, *Domestic Violence and Firearms: Reflections of a Prosecutor*, 30(3) EVALUATION REV. 237, 241 (2006).

<sup>31</sup> EVERYTOWN FOR GUN SAFETY, MASS SHOOTINGS IN THE UNITED STATES: 2009–2017, at 5 (2018), <https://everytownresearch.org/wp-content/uploads/2018/11/Mass-Shootings-Research-Report-121018A-2.pdf> [<https://perma.cc/ES3E-ZRC9>].

<sup>32</sup> Rebecca Traister, *What Mass Killers Really Have in Common*, THE CUT (July 15, 2016), <https://www.thecut.com/2016/07/mass-killers-terrorism-domestic-violence.html> [<https://perma.cc/VFP7-BH52>].

<sup>33</sup> Jane Mayer, *The Link Between Domestic Violence and Mass Shootings*, NEW YORKER (June 16, 2017), <http://www.newyorker.com/news/news-desk/the-link-between-domestic-violence-and-mass-shootings-james-hodgkinson-steve-scalise> [<https://perma.cc/XM27-6F5B>].

<sup>34</sup> Rafia Zakaria, *Toxic Masculinity*, DAWN (June 14, 2017), <https://www.dawn.com/news/print/1339370> [<https://perma.cc/3S84-FW86>].

<sup>35</sup> Matthew Mosk & Michele McPhee, *Accused Boston Bomber Faced 2009 Arrest on Domestic Violence Charge*, ABC NEWS (Apr. 22, 2013), <http://abcnews.go.com/Blotter/accused-boston-bomber-faced-2009-arrest-domestic-violence/story?id=19017079> [<https://perma.cc/53DJ-W4GN>].

<sup>36</sup> Melissa Jeltsen, *The Day Domestic Violence Came to Church*, HUFFINGTON POST (Nov. 18, 2017, 7:01 AM), [https://www.huffingtonpost.com/entry/domestic-violence-texas-church-massacre\\_us\\_5a0ca92e4b0c0b2f2f77a69](https://www.huffingtonpost.com/entry/domestic-violence-texas-church-massacre_us_5a0ca92e4b0c0b2f2f77a69) [<https://perma.cc/T3WT-H5DQ>].

Medicine demonstrated that state gun surrender laws are linked to lower rates of fatal domestic violence.<sup>37</sup> States that restrict access to firearms by those under domestic violence restraining orders have seen up to a twenty-five percent reduction in intimate partner gun homicides.<sup>38</sup> The federal ban on possession by domestic violence misdemeanants led to seventeen percent fewer gun-related homicides among female intimate partner victims.<sup>39</sup>

Section III addresses specific elements of the gun surrender process that engender these lifesaving results. But before recommendations can be understood, it is first necessary to review the legal framework underlying weapons prohibitions for perpetrators of domestic violence.

## II. OVERVIEW OF GUN SURRENDER LAW

### A. Federal Statutes

The Gun Control Act (GCA), enacted as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, was a sweeping statute that created a comprehensive set of regulations governing the manufacture, sale, production, and transfer of firearms and ammunition.<sup>40</sup> The GCA limited the ability of individuals who were likely to use firearms for harmful or criminal purposes from possessing them, including barring firearms possession by all convicted felons.<sup>41</sup>

Several decades later, Congress created the first domestic violence gun restriction. The Violent Crime and Law Enforcement Act, which was enacted as part of the Violence Against Women Act (VAWA) of 1994, makes it unlawful for any person who is subject to a family violence protective order to possess a firearm or ammunition.<sup>42</sup> The protective order firearm prohibition, codified in 18 U.S.C. §922(g)(8), recognizes that “[r]espondents to [Domestic Violence Protective Orders] have high rates of criminal justice system involvement . . . and often have committed severe domestic vio-

---

<sup>37</sup> See generally Carolina Díez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536 (2017).

<sup>38</sup> EVERYTOWN FOR GUN SAFETY, DOMESTIC ABUSE PROTECTIVE ORDERS AND FIREARM ACCESS IN RHODE ISLAND 10 (2005) [hereinafter RHODE ISLAND REPORT], <https://everytownresearch.org/reports/domestic-abuse-protective-orders-and-firearm-access-in-rhode-island/> [<https://perma.cc/G4TJ-MY3M>].

<sup>39</sup> Raissian, *supra* note 12, at 69. The study also found a twenty-four percent reduction in homicide among family members, including parents and siblings. *Id.* at 86.

<sup>40</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220 (codified after amendment at 18 U.S.C. § 922(d)(1)–(7) (2012 & Supp. III)).

<sup>41</sup> Other categories of individuals disqualified from gun ownership under the GCA include fugitives, drug addicts, those deemed to be mentally incompetent, undocumented immigrants, those dishonorably discharged from the armed services, and those who have renounced their U.S. citizenship. *Id.*

<sup>42</sup> 18 U.S.C. § 922(g)(8) (2018). A qualifying order must have been issued after a hearing in which the respondent had notice. 18 U.S.C. § 922(d)(8)(A) (2018).



lence.”<sup>43</sup> Thus, even though a protective order is a civil remedy,<sup>44</sup> federal law that prohibits those who have committed violence against their intimate partners from possessing firearms takes into account the underlying violence that might implicate the criminal justice system.

The federal protective order firearm restriction contains several exceptions. First, the statute provides an “official use” exemption, which allows law enforcement officers, military personnel, and others who use firearms in the course of their government employment to possess guns.<sup>45</sup> The definition of “intimate partner” utilized in Section (g)(8) also limits its applicability; covered relationships include spouses, former spouses, those who have a child in common, and those who are currently or have previously cohabitated. Two significant omissions from the definition, and therefore categories of individuals who are left unprotected, are victims of non-intimate partner elder abuse and dating partners who are not current or former cohabitants and do not share a child in common.

According to data from the Department of Justice, the proportion of family homicides that involve a child murdering a parent is increasing, rising from 9.7% in 1980 to 13% in 2008.<sup>46</sup> The exclusion of elder abuse from the protective order firearm prohibition thus puts this increasingly vulnerable population at risk. The data on dating violence similarly reveals the danger that group of survivors faces. In 1980, dating partners committed twenty-seven percent of intimate partner homicides.<sup>47</sup> By 2008, they were murdering their partners at close to the same rate as spouses.<sup>48</sup> Nationwide statistics collected from 2003 to 2012 reveal that “[c]urrent or former boyfriends or girlfriends . . . committed a greater percentage of all violent victimizations

---

<sup>43</sup> Zeoli & Frattaroli, *supra* note 15, at 56.

<sup>44</sup> The option of a civil remedy is critical because many survivors of domestic violence are reluctant to involve the criminal justice system in their lives. Criminal interventions “are premised on the notion that battered women want to end their relationships, invoke the power of the legal system to keep their batterers away, and ultimately sever all legal ties with their abusers,” which may not be the case for many survivors. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004). If an abuser is arrested, he may lose his job or get deported, which can be devastating for a woman who is dependent on him for financial support, childcare, housing, transportation, healthcare, or other critical needs. Escalation of violence resulting from an abuser’s arrest is also a significant concern. See *infra* Section III.A.2.ii. Moreover, survivors may fear that “dual arrest” policies could lead to their own detention, which for immigrant victims, could be a precipitating event for deportation. See Natalie Nanasi, *The U Visa’s Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 303–08 (2018). Lastly, victims from minority groups may be disinclined to report domestic abuse to law enforcement because of “legitimate concerns that they will be subjected to differential treatment because of their ethnicity, gender . . . [,] immigration status,” race, class, or sexual orientation. See Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4 W. CRIMINOLOGY REV. 155, 158 (2003).

<sup>45</sup> 18 U.S.C. § 925 (2018).

<sup>46</sup> COOPER & SMITH, *supra* note 18, at 21.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> *Id.*

than spouses . . . and ex-spouses” combined.<sup>49</sup> Legislation to close the so-called “boyfriend loophole” and expand the statute’s definition of intimate partner to include former and current dating partners has been proposed in Congress but has thus far been unsuccessful.<sup>50</sup>

A few years after the enactment of the Section (g)(8) protective order statute, Congress passed the Lautenberg Amendment, which extended federal firearms prohibitions to persons convicted of misdemeanor crimes of domestic violence.<sup>51</sup> A misdemeanor domestic violence conviction results in a permanent ban on firearms possession;<sup>52</sup> violations are punishable by up to ten years in prison.<sup>53</sup>

The statute defines a misdemeanor crime of violence as any state, federal, or tribal misdemeanor that involves “the use or attempted use of physical force, or the threatened use of a deadly weapon.”<sup>54</sup> It also includes a broader range of relationship categories than the protective order statute, covering acts “committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated” to any of the above.<sup>55</sup> The “similarly situated” language and the lack of an “official use” exemption for members of law enforcement and the military makes the Lautenberg Amendment more broadly applicable than the federal protective order firearm prohibition.

The sponsor of the Amendment, the late Senator Frank Lautenberg, explained the reasoning behind expanding criminal firearm prohibitions to

<sup>49</sup> See JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NONFATAL DOMESTIC VIOLENCE, 2003–2012, AT 3 (2014), <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [<https://perma.cc/FQA6-BFY2>]. In a study of domestic violence protective orders in Los Angeles, researchers found that dating was the most common relationship between the victim and abuser. See Katherine A. Vittes & Susan Sorenson, *Are Temporary Restraining Orders More Likely to be Issued When Applications Mention Firearms?*, 30 EVALUATION REV. 266, 271 (2006).

<sup>50</sup> See, e.g., Zero Tolerance for Domestic Abusers Act, H.R. 3207, 115th Cong. (2017).

<sup>51</sup> See 18 U.S.C. § 922(g)(9) (2018) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); see also Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>52</sup> *Id.*

<sup>53</sup> See 18 U.S.C. § 924(a)(2) (2012 & Supp. III).

<sup>54</sup> 18 U.S.C. § 921(a)(33)(A)(ii) (2018). In *United States v. Castleman*, the Supreme Court held that *any* application of physical force against a domestic partner, not just force that is violent or excessive, could satisfy the requirements for a misdemeanor crime of domestic violence. 572 U.S. 157 (2014). Further, in *Voisine v. United States*, the Court ruled that *reckless* (in addition to intentional or knowing) domestic assault qualifies as a misdemeanor crime of domestic violence. 136 S. Ct. 2272 (2016).

<sup>55</sup> 18 U.S.C. § 921(a)(33)(A)(ii) (2018). In 2009, *United States v. Hayes* established that a domestic relationship need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of the misdemeanor crime of domestic violence. 555 U.S. 415 (2009).

misdemeanants by noting that the existing “felon-in-possession” laws allowed abusers to retain weapons, because “many people who engage in serious spousal . . . abuse ultimately are not charged with or convicted of felonies.”<sup>56</sup> He posited the hypothetical of a man who “beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor and got away with a slap on the wrist.”<sup>57</sup> The Amendment, he argued, “closes this dangerous loophole and keeps guns away from violent individuals who threaten their families.”<sup>58</sup>

Senator Lautenberg’s views regarding the importance of barring domestic violence misdemeanants from possessing firearms are supported by studies that indicate that previous intimate partner violence, including abuse that is ultimately adjudicated as a misdemeanor violation, is the “strongest predictor” for intimate partner homicide.<sup>59</sup> As the Battered Women’s Justice Project explains, “those who have been convicted of misdemeanor violence against intimate partners or others are high risk for future violence, and preventing them from accessing firearms may reduce both their risk of future violence and the severity of future violence they may commit.”<sup>60</sup>

The federal prohibitions against firearm possession by felons, domestic violence misdemeanants and those subject to domestic violence protective orders all contain one substantial omission—none of the statutes discussed above include a provision specifying how the law is to be enforced. The law does not detail enforcement mechanisms or outline the procedure for relinquishing or seizing firearms from prohibited possessors.

Congress has attempted to give the federal statutes teeth. The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) required states and local governments to certify that their judicial administrative policies and practices included notification to domestic violence offenders of both federal firearm prohibitions and any applicable

---

<sup>56</sup> 142 Cong. Rec. 22,985 (1996).

<sup>57</sup> 142 Cong. Rec. 26,674 (1996).

<sup>58</sup> 142 Cong. Rec. 19,415 (1996).

<sup>59</sup> Sharon G. Smith et al., *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003–2009*, 104 AM. J. PUB. HEALTH 461, 461 (2014). Relatedly, a report from the Department of Justice found that half of defendants accused of killing their spouses had a prior criminal history. See U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 5 (1994), <https://static.prisonpolicy.org/scans/bjs/vbi.pdf> [<https://perma.cc/UBC7-BFQ8>]; see also THE CONSORTIUM FOR RISK-BASED FIREARM POL’Y, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR FEDERAL POLICY (DEC. 2013), <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-Federal.pdf> [<https://perma.cc/JT5G-2CMD>] (reporting that approximately half of women killed by their intimate partners had contact with the criminal justice system, related to the abuse, within the year prior to their abuser murdering them); *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (noting that “persons convicted of domestic violence are likely to offend again, so that keeping the most lethal weapon out of their hands is vital to the safety of their relatives.”).

<sup>60</sup> BATTERED WOMEN’S JUSTICE PROJECT, DOMESTIC VIOLENCE AND FIREARMS: RESEARCH ON STATUTORY INTERVENTIONS 10 (on file with author).

related federal, state, or local laws.<sup>61</sup> Yet VAWA 2005 still did not require states or local governments to establish a procedure for the surrender of firearms by abusers.

Federal law therefore remains silent on many critical aspects of enforcement, including a number of the issues that will be addressed in Section III below: who must notify victims and perpetrators of firearm prohibitions, how law enforcement agencies can determine if a defendant or respondent possesses guns, how to seize or effectuate surrender, when to return relinquished or seized weapons, and much more. Prior to discussing enforcement and implementation, however, one must understand both the legal challenges and critiques that gun surrender laws and programs have faced.

### B. Legal Challenges and Critiques

Numerous legal challenges have been brought against both the Lautenberg Amendment and the domestic violence protective order firearms prohibition. However, because intimate partner-based firearm restrictions have withstood nearly all constitutional scrutiny, this Article will provide only a brief review of the relevant legal claims.

The Second Amendment may at first blush appear to be a strong basis for a legal challenge to gun restrictions, even those that limit the access of domestic abusers. In *D.C. v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to bear arms (in *Heller*, a handgun) for self-defense, a ruling that significantly expanded gun rights in the United States.<sup>62</sup> However, the case does not stand for the proposition that the reach of the Second Amendment is unlimited. As the *Heller* Court itself stated, "[f]rom Blackstone through the nineteenth-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . ." <sup>63</sup> In fact, since *Heller*, all circuits to consider the issue have upheld the constitutionality of the Lautenberg Amendment in the face of Second Amendment challenges.<sup>64</sup>

---

<sup>61</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2959 (expired 2018).

<sup>62</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Prior to the *Heller* decision, the Second Amendment had been understood as only protecting firearm possession connected to service in a state militia. See Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 169 (2017) (noting that "*Heller* instructed that the first half of the Amendment ('A well regulated Militia being necessary for the security of a free State') does not establish a militia-centric underpinning for the right.>").

<sup>63</sup> *Heller*, 554 U.S. at 626. See also Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1489 (2018) (observing that 60 percent of post-*Heller* opinions about the Second Amendment cite *Heller*'s language about the presumptive lawfulness of such "longstanding prohibitions").

<sup>64</sup> See, e.g., *Stimmel v. Sessions*, 879 F.3d 198, 203 (6th Cir. 2018); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); cf. *United States v. Chester*, 514 Fed. Appx. 393,

Similar unanimity has also been found with respect to Commerce Clause challenges to the Lautenberg Amendment. Due in large part to the Amendment's jurisdictional element, which requires prosecutors to prove in each case that the gun at issue traveled across state lines, every court of appeals that has considered a legal challenge has concluded that the misdemeanor firearm prohibition is a valid exercise of Congress' power under the Commerce Clause.<sup>65</sup>

Equal Protection challenges have also failed. In *Fraternal Order of Police v. United States*, the D.C. Circuit held that any distinctions between prohibitions for misdemeanants and protective order respondents survive rational basis review because denial of firearms to those subject to domestic violence protective orders is rationally related to a legitimate governmental interest of reducing gun-related violence.<sup>66</sup> Many other federal circuit courts have upheld the constitutionality of the Lautenberg Amendment in the face of similar Equal Protection challenges.<sup>67</sup>

Finally, constitutional challenges under the Fifth Amendment right against self-incrimination,<sup>68</sup> the Eighth Amendment's prohibition of cruel and unusual punishment,<sup>69</sup> the Tenth Amendment,<sup>70</sup> and the Ex-Post Facto Clause<sup>71</sup> have also proved unsuccessful.

394–95 (4th Cir. 2013) (per curiam); *United States v. Booker*, 644 F.3d 12, 22–26 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 639–45 (7th Cir. 2010) (en banc); *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010); cf. *Fisher v. Kealoha*, 855 F.3d 1067, 1070 (9th Cir. 2017) (per curiam). An empirical analysis by Professors Joseph Blocher and Eric Ruben revealed that in the over 1200 challenges to laws regulating firearms brought in the ten years after *Heller* was decided, courts upheld vast majority of the firearm restrictions. See generally Ruben & Blocher, *supra* note 63.

<sup>65</sup> See, e.g., *Stimmel*, 879 F.3d at 203; *Chovan*, 735 F.3d at 1141; *United States v. Staten*, 666 F.3d 154, 160–61 (4th Cir. 2011); *Booker*, 644 F.3d at 22–26; *Skoien*, 614 F.3d at 639–45; *White*, 593 F.3d at 1205–06; *United States v. Lewis*, 236 F.3d 948 (8th Cir. 2001); *United States v. Jones*, 231 F.3d 508, 514–15 (9th Cir. 2000); *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999); *United States v. Pierson*, 139 F.3d 501 (5th Cir. 1998), *cert. denied*, 525 U.S. 896 (1998).

<sup>66</sup> See *Fraternal Order of Police*, 173 F.3d at 898.

<sup>67</sup> See, e.g., *United States v. Pfeifer*, 371 F.3d 430 (8th Cir. 2004); *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002); *United States v. Hancock*, 231 F.3d 565–67 (9th Cir. 2000); *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999); *United States v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999); *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999).

<sup>68</sup> See, e.g., *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006); *In re Grand Jury Subpoena*, 383 F.3d 905, 909 (9th Cir. 2004); *United States v. Hubbell*, 530 U.S. 27, 38 (2000); *Doe v. United States*, 487 U.S. 201, 210–12 (1988).

<sup>69</sup> See, e.g., *Lewis*, 236 F.3d 948 (citing *United States v. Jester*, 139 F.3d 1168, 1170–71 (7th Cir. 1998)); *United States v. Baker*, 197 F.3d 211 (6th Cir. 1999).

<sup>70</sup> See, e.g., *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *Lewis*, 236 F.3d at 950; *United States v. Meade*, 175 F.3d 215, 224–25 (1st Cir. 1999); *United States v. Bostic*, 168 F.3d at 723–24; *Fraternal Order of Police*, 173 F.3d at 906 (“FOP’s Tenth Amendment challenge fails because § 922(g)(9) does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeanants’ possession of firearms.”); *United States v. Wilson*, 159 F.3d [start page], 287–88 (YEAR); *United States v. Collins*, 61 F.3d 1379, 1384 (7th Cir. 1995).

<sup>71</sup> See, e.g., *United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004); *United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000).

Policy arguments against domestic violence gun prohibitions exist in addition to legal ones. Scholars and courts have maintained that gun surrender laws are over-inclusive, noting that “every domestic violence misdemeanor would not necessarily misuse a firearm against a [current or former intimate partner] if permitted to possess one.”<sup>72</sup>

A survivor of domestic violence may also not want her partner’s gun removed, as Professor Carolyn Ramsey explains in her article, *Firearms in the Family*.<sup>73</sup> First, a survivor may wish to have a firearm in the home for self-defense.<sup>74</sup> She may also fear that forced surrender resulting from her initiation of a legal proceeding could lead to increased violence.<sup>75</sup> Loss of a firearm may result in the abuser’s unemployment (if, for example, he works as a security guard and is required to carry a gun in order to perform his duties), which is a risk factor for abuse.<sup>76</sup> Moreover, as discussed in detail below,<sup>77</sup> many gun owners have a personal attachment to their weapons, which they view as symbols of masculinity. Thus, “[t]he potential for retaliatory violence in response to firearms removal may be particularly great given the central role of firearms in the lives of some gun owners.”<sup>78</sup> A domestic violence advocate described a client in precisely this situation, explaining that when a judge required the survivor to surrender the abuser’s firearms, her client froze.<sup>79</sup> “I knew what she was thinking,” the advocate stated, “her husband was going to be even angrier when he discovered that she had voluntarily turned his weapons over to the police.”<sup>80</sup>

Scholars have long criticized mandatory interventions as a means for the legal system to disempower survivors of domestic violence and remove from them a sense of agency and autonomy.<sup>81</sup> Any measure that eliminates

<sup>72</sup> United States v. Staten, 666 F.3d 154, 167 (4th Cir. 2011).

<sup>73</sup> Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L. J. 1257, 1295–98 (2017) (describing the important “role of victim preferences” in the conversation surrounding removing firearms from abusers).

<sup>74</sup> *Id.* at 1295–96. However, although a gun may make a survivor feel safer, the data show that women are “over 100 times more likely to be murdered by a man with a gun than to use it to kill a man in self-defense.” George Zornick, *A New Study Debunks the NRA’s Claim that Guns Protect Women*, NATION (Sept. 22, 2017), <https://www.thenation.com/article/a-new-study-debunks-the-nras-claim-that-guns-protect-women/> [<https://perma.cc/ZRZ8-TEXB>] (citing WHEN MEN MURDER WOMEN, *supra* note 16).

<sup>75</sup> See Ramsey, *supra* note 73, at 1296–97.

<sup>76</sup> See Jacqueline C. Campbell, et. al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93(7) AM. J. PUB. HEALTH 1089, 1092 (2003) (finding that unemployment is “the most important demographic risk factor for acts of intimate partner femicide.”).

<sup>77</sup> See *infra* Section III.B.1.v.

<sup>78</sup> Katherine Vittes, et. al., *Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California*, 19(5) VIOLENCE AGAINST WOMEN 602, 603 (2013).

<sup>79</sup> Maria Kelly, Note, *Domestic Violence and Guns: Seizing Weapons Before the Court Has Made A Finding of Abuse*, 23 VT. L. REV. 349 (1998).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 3–4 (2009) (noting that mandatory arrest and no-drop policies “gave protection to women who had been abused with one hand, but took their freedom to choose with the other.”); Laurie S. Kohn, *The*

choice from survivors, even if intended to protect them from harm, risks supplanting the abuser's control with State control. Mandatory legal interventions in the lives of those who have endured intimate partner violence are therefore not only disempowering, but if the survivor does not believe that law enforcement agents will respect her or act in a way that will keep her safe, the reporting of abuse could ultimately be chilled.

The leading role of the criminal justice system in the process of removing firearms from the hands of domestic violence offenders could also be a barrier to programs' success. The United States' response to intimate partner abuse has historically centered around law enforcement, a decision that many have criticized for not addressing the root causes of violence or taking into account either "the ways in which race, class, gender identity, and immigration status leave certain women more vulnerable to violence" or "that greater criminalization often places these same women at risk of state violence."<sup>82</sup> A singular focus on a criminal justice response also marginalizes alternative responses, such as community based interventions that involve "community or collective solutions and/or [engage] the perpetrator without involving the state."<sup>83</sup>

Finally, it is important to recognize the racial implications of any criminal justice response to gender-based violence, including gun surrender laws. Men of color bear the brunt of harsh domestic violence laws.<sup>84</sup> For example,

---

*Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 211–25 (2008) (critiquing mandatory arrest and no-drop policies as suppressing of victims' voices); Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999) (proposing therapeutic jurisprudence and batterer re-education and healing as an alternative to mandatory prosecution).

<sup>82</sup> Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), <http://www.com/10/against-carceral-feminism> [<https://perma.cc/6XU8-VX67>]. Many legal scholars have also criticized the outsized role law enforcement plays in combatting domestic violence. See e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (critiquing the overemphasis of criminal justice interventions in attempts to solve the problem of domestic violence); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999) (considering ways in which prosecutors, judges, and the courts can play a constructive role in combating family abuse); Goodmark, *supra* note 44 (examining the legal interventions most frequently employed by advocates for survivors and detailing the problems that result from reliance on these strategies); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (positing that survivors are safest and feel most respected when they willingly partner with state actors to investigate and prosecute domestic violence crimes).

<sup>83</sup> Mimi Kim, *Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 18 (James Ptacek ed., 2010). Examples of community-based programs include Creative Interventions, "an Oakland-based organization established to create models, tools and other accessible community resources supporting alternative community-based, non-state interventions to intimate violence," *Id.* at 2 and the Community Justice Reform Coalition, which works at the intersection of gun violence prevention and criminal justice reform in urban communities of color. <https://communityjusticerc.org> [<https://perma.cc/YU6K-AYTZ>].

<sup>84</sup> Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 319 (2002) (describing a study in Milwaukee County, Wisconsin which found that Afri-

“disproportionate numbers of African American and somewhat lower but still disproportionately high numbers of Latina/os are the subject of criminal justice intervention in domestic violence cases.”<sup>85</sup> Victims whose abusers are men of color may therefore be hesitant to cooperate with state agencies to secure the removal of an abuser’s firearm because they fear the benefit to their safety might outweigh serious negative and unequal consequences for the perpetrator. Victims of color may also have “legitimate concerns that they will be subjected to differential treatment [themselves] because of their ethnicity, gender, and immigration status.”<sup>86</sup> As Professor Ramsey argues, “to the extent that the anti-gun vision of America also exhibits distaste for punitive, racialized crime-control policies, it fails to acknowledge that zealously enforced gun laws aimed at preventing domestic violence would put more people—including more men and women from vulnerable communities of color—behind bars.”<sup>87</sup> In an era with increasing attention to both criminal justice reform and concerns about hyper-incarceration,<sup>88</sup> law-enforcement-centric proposals seeking to assist survivors of domestic violence must take into account that “. . . for many battered women[,] criminal prosecution is deeply problematic . . . [A]ctivists and legal reformers continue to raise questions concerning criminalization, reflecting tensions around issues involving women’s autonomy, poor women, and women of color . . .”<sup>89</sup>

Although the concerns articulated above are valid, there are ways to mitigate the most dire effects. As will be discussed below, the involvement of survivors is key to any successful gun surrender program. By incorporating the voices of those who have experienced intimate partner abuse into the conversation about how best to disarm their abusers, programs can achieve an appropriate balance between enforcing domestic violence firearms prohibitions and ensuring survivors’ safety and autonomy.

---

can Americans represented only twenty-four percent of the total population, but constituted sixty-six percent of domestic violence arrests.).

<sup>85</sup> Donna K. Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1034–35 (2000).

<sup>86</sup> Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4 W. CRIMINOLOGY REV. 155, 158 (2003).

<sup>87</sup> Ramsey, *supra* note 73 at 1260–61. See also Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007) (detailing how a program that aggressively enforces gun laws targets African American communities).

<sup>88</sup> Professors Donna Coker and Ahjané D. Macquoid address the connection between domestic violence and hyper-incarceration, which they define as “the tremendous growth in incarceration [that] is concentrated in particular geographic locations (low-income neighborhoods of color) and has concentrated effects felt disproportionately by African Americans.” Donna Coker, Ahjané D. Macquoid, *Reimagining Mobilization, Action and Pedagogy: Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 597 (2015).

<sup>89</sup> ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 196 (2000).



### III. RECOMMENDATIONS

Removing firearms from the hands of prohibited possessors such as domestic abusers requires substantial and coordinated effort. This Section details three critical areas: legislation to prohibit perpetrators of intimate partner violence from owning or possessing firearms, mechanisms to implement that legislation, and potential litigation strategies to ensure that jurisdictions are enforcing the law. Only all three, working in tandem, have the potential to prevent the gun-related deaths of intimate partners.

#### A. Legislation

##### 1. State-Level Legislation is Necessary

Although some states have enacted statutes that restrict firearm possession by domestic violence offenders, many others do not have laws that prevent perpetrators of intimate partner violence from owning or possessing firearms.<sup>90</sup> This omission is significant because federal prosecutions of those who possess prohibited weapons are rare.<sup>91</sup> No prosecutions were initiated in the first year after the Lautenberg Amendment took effect.<sup>92</sup> The following year saw only three prosecutions nationwide.<sup>93</sup> Cases have remained in the double digits—up to a maximum of sixty-eight in 2001—since.<sup>94</sup> All told, charges for unlawful possession under the Lautenberg Amendment account for a mere one percent of cases filed by federal prosecutors each year against defendants who illegally possess firearms.<sup>95</sup>

Prosecutors have not initiated more actions under the federal domestic violence protective order statute. Despite estimates that one million potential defendants would meet the requirements for prosecution under the statute,<sup>96</sup> only one case was brought in 1996, ten in 1997, and the number had in-

---

<sup>90</sup> See BATTERED WOMEN'S JUSTICE PROJECT, FIREARMS AND DOMESTIC VIOLENCE: STATE AND TERRITORIAL STATUTORY PROVISIONS (2015), <http://www.bwjp.org/ncpoffc-firearms-and-dv-state-and-territorial-statua.pdf> [<https://perma.cc/7K3H-QSR3>]. Some state statutes are more expansive and comprehensive, including outlining procedure for surrender, than federal law while others are less exacting than federal requirements. See *id.*

<sup>91</sup> See Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525 (2003).

<sup>92</sup> *Id.* at 530–31.

<sup>93</sup> *Id.* at 530.

<sup>94</sup> *Id.* Federal prosecutors charged 13 defendants under the Lautenberg Amendment in 1997 and had only increased the number to 67 nearly ten years later in 2008. The number of prosecutions dropped to 49 the following year, rose to 56 in 2010, dropped again in 2011 (to 40) and dropped further in the following year, down to only 32 cases initiated in 2012. Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 188 (2015).

<sup>95</sup> Lininger, *supra* note 91, at 531. Judge Posner has noted that the number of prosecutions for violating Section (g)(8) “has been minuscule.” *United States v. Wilson*, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting).

<sup>96</sup> James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at A12.

creased to only 159 by 2000.<sup>97</sup> The trajectory seems to be decreasing; in 2012, federal prosecutors filed only fifty cases charging violations under the protective order firearm prohibition statute.<sup>98</sup>

Many reasons exist for under-enforcement.<sup>99</sup> Limited federal resources likely contribute to low prosecution rates.<sup>100</sup> Lack of coordination between federal and state law enforcement agencies also plays a large role. A domestic violence offender who does not turn over his firearm as required by law will likely be identified to local police by, for example, a survivor who calls 911 or contacts her city's police department to report his unlawful possession. Federal officials may not become aware of illegal activity identified at the local or state level, for

[a]lthough violation of the provisions is a federal crime, their central underlying predicates, a protection order or a misdemeanor conviction, are most likely to be based on state law, and thus cases are handled in state courts. This dichotomy has blurred the line of whether state or federal authorities possess the power and the responsibility to ensure that the laws are enforced.<sup>101</sup>

These issues are particularly pronounced if a state has not codified domestic violence gun prohibitions.

As such, in order to properly enforce the gun laws aimed at dispossessing domestic violence offenders, all states should pass laws prohibiting abusers from possessing firearms. And if states cannot or will not act, city or other local government entities can also enact relevant legislation.<sup>102</sup>

<sup>97</sup> Lininger, *supra* note 91, at 532.

<sup>98</sup> Luo, *supra* note 3.

<sup>99</sup> Lagging federal enforcement of gun laws is not necessarily unique to domestic violence offenders. Experts have noted that “over 99.99 percent [of felons deemed ineligible to purchase firearms] were never charged with violating federal law by trying to buy guns.” Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORT* 78 (Timothy D. Lytton ed., 2006) [hereinafter *Suing the Gun Industry*].

<sup>100</sup> Lininger, *supra* note 91, at 533 n.30, 534.

<sup>101</sup> Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CTR. FOR FAMILIES, CHILD. & CTS. 3, 7–8 (2005).

<sup>102</sup> See, e.g., Lauren Segal, *City Announces Proposals to Bridge Gap Between Federal and State Gun Laws*, COLUMBUS UNDERGROUND (Mar. 21, 2018), <https://www.columbusunderground.com/city-announces-proposals-to-bridge-gap-between-federal-and-state-gun-laws-1s1> [<https://perma.cc/8C98-KBH7>] (describing proposed ordinances in the City of Columbus, Ohio that prohibit gun possession by perpetrators of domestic violence). This too may be challenging, however, as many states have preemption laws that could either prohibit or sharply limit the enactment of local gun control policies. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

## 2. *Statutes Prohibiting Firearm Possession by Domestic Violence Offenders*

State laws that prohibit perpetrators of intimate partner violence from possessing firearms are not monolithic.<sup>103</sup> Some state provisions closely mirror federal law, some impose more stringent requirements, while others are less onerous. All told, great variation exists with respect to the content of gun surrender laws. This Section details a variety of considerations for what such legislation could encompass, including whether criminal or civil violators should be prohibited from possessing firearms, whether bans are appropriate for temporary *ex parte* protective orders or only permanent ones, whether the law should mandate that judges order gun surrender or permit them to retain discretion to do so, and what criteria should be met in order for law enforcement to remove guns at the scene of an incident of domestic violence.

### i. *Criminal or Civil Violations*

An initial consideration is whether firearms prohibitions should attach for criminal violations, upon entry of a family violence protective order, or both. Given the variety of ways that perpetrators can become known to the legal system and the need to recognize and support survivors' wide-ranging responses to intimate partner violence, laws that encompass offenders in both the criminal and civil areas provide the greatest level of victim safety. Moreover, firearms prohibitions for both criminal and civil offenders would make state laws as consistent as possible with existing federal law.

### ii. *Temporary or Permanent Protective Orders*

In the civil sphere, a subsequent consideration is whether domestic violence offenders should be prohibited from possessing firearms while subject to a temporary protective order, which is granted after an *ex parte* hearing and is typically valid for only two weeks, or if gun bans should attach only after a permanent order is issued. Existing state law varies in this area, with states like North Carolina<sup>104</sup> and California<sup>105</sup> mandating surrender upon is-

---

<sup>103</sup> See generally BATTERED WOMEN'S JUSTICE PROJECT, *supra* note 90.

<sup>104</sup> N.C. GEN. STAT. ANN. § 50B-3.1 (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Ex. Sess., including through 2019-163, of the Gen. Assemb., subject to changes made pursuant to the direction of the Revisor of Statutes) ("Upon issuance of an emergency or *ex parte* order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant . . .").

<sup>105</sup> CAL. FAM. CODE § 6389(a) (West, Westlaw through Ch. 870 of 2019 Reg.Sess) ("A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect.").

suance of a temporary order of protection, and states like Connecticut<sup>106</sup> imposing firearms restrictions only when permanent orders are entered.

Removing guns from the hands of abusers whose victims have sought temporary, or emergency, protective orders can save lives. Because intimate partner violence is rooted in one person's desire to exercise power and control over another, a challenge to that dynamic will often cause the abuser to retaliate against a survivor who asserts herself by, for example, seeking external protection against violence.<sup>107</sup> Seeking a protective order sends a clear signal that a victim will no longer tolerate the batterer's control and can therefore be a significant triggering event for what is known as separation assault.<sup>108</sup> In fact, the National Institute of Justice reported that attempting to leave a violent relationship was the precipitating factor in 45 percent of murders of a woman by a man.<sup>109</sup>

As such, even though due process concerns may exist when depriving an abuser of his firearm after a hearing in which he did not participate, the fact that at least half of women who leave their abusers are followed, harassed, or further attacked by them, supports expansive and time-sensitive protections for survivors.<sup>110</sup> Concerns are also mitigated by the fact that temporary protective orders are, as the name suggests, only temporary, making the restriction relatively limited in scope.<sup>111</sup> The minimal deprivation juxtaposed with the strong countervailing safety interests of the victim and the community counsels towards inclusion of temporary protective orders in the gun surrender legislative framework.

---

<sup>106</sup> CONN. GEN. STAT. § 53a-217c(a) (West, Westlaw through the 2019 Jan. Reg. Sess. and the 2019 July Spec. Sess.) (“A person is guilty of criminal possession . . . when such person possesses a pistol or revolver . . . and knows that such person is subject to a restraining or protective order of a Connecticut court that was issued against such person, after notice and an opportunity to be heard were provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person . . .”).

<sup>107</sup> See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65–66 (1991).

<sup>108</sup> Separation assault, or separation violence, has been defined by Professor Martha Mahoney as “the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship.” *Id.*

<sup>109</sup> Carolyn Rebecca Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, in 250 NAT’L INST. JUST. J. 4, 6 (2003).

<sup>110</sup> Mahoney, *supra* note 107, at 64. Researchers who followed a group of women who had filed for protective orders in Houston, Texas found that 44 percent reported at least one violation over the 18 months of the study. Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94(4) AM J. PUB. HEALTH 613, 616 (April 2004).

<sup>111</sup> A temporary ex parte protective order is typically only valid for two weeks. See, e.g., D.C. CODE ANN. § 16-1004 (West 2019) (“an initial temporary protection order shall not exceed 14 days”); TEX. FAM. CODE ANN. § 83.002(a) (“A temporary ex parte order is valid for the period specified in the order, not to exceed 20 days.”).

iii. *Mandatory or Discretionary Removal*

Another important consideration is whether a statute should mandate removal of firearms or leave the decision of whether or not to order surrender of a weapon to the discretion of the judge entering the conviction or issuing the protective order. Here again, states are all over the map. In Iowa, a court *must* order a defendant to sell or transfer his firearms upon conviction for a domestic violence misdemeanor.<sup>112</sup> The Colorado statute, referencing the related federal law, requires judges issuing domestic violence protective orders to direct abusers to relinquish their firearms.<sup>113</sup> Some states mandate surrender only if certain conditions are met, such as in New York, where the law requires a court to find “a substantial risk that the respondent may use or threaten to use a firearm, rifle or shotgun unlawfully against the person or persons for whose protection the temporary order of protection is issued” before ordering surrender.<sup>114</sup> Conversely, in “discretion” states, courts are authorized but not required to order abusers to relinquish weapons.<sup>115</sup> Lastly, many states, such as Virginia<sup>116</sup> and Minnesota<sup>117</sup>, have so-called “catch-all” provisions in their protective order statutes, that do not specifically address firearms but allow judges to order any relief they deem necessary to protect the petitioner.

The law is different in nearly every state because the question of mandatory versus discretionary removal is one of the most challenging issues in gun prohibition legislation. On one hand, returning to the critiques de-

<sup>112</sup> IOWA CODE ANN. § 724.26(4) (West, Westlaw through the 2019 Reg. Sess., subject to changes made by Iowa Code Editor for Code 2020) (“[A] court that . . . enters a judgment of conviction . . . and that finds the subject of the order or conviction to be in possession of any firearm, offensive weapon, or ammunition *shall* order that such firearm, offensive weapon, or ammunition be sold or transferred . . .”) (emphasis added).

<sup>113</sup> COLO. REV. STAT. ANN. § 13-14-105.5(1) (West, Westlaw through the end of the 2019 Regular Session) (“If the court subjects a person to a civil protection order pursuant to a provision of this article and the protection order qualifies as an order described in 18 U.S.C. sec. 922(d)(8) or (g)(8), the court, as part of such order: (a) *Shall* order the person to: (I) Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and (II) Relinquish, for the duration of the order, any firearm or ammunition in the respondent’s immediate possession or control or subject to the respondent’s immediate possession or control.”) (emphasis added).

<sup>114</sup> N.Y. FAM. CT. ACT § 842-a(1)(b) (West, Westlaw through L.2019, chap. 444).

<sup>115</sup> See, e.g., ALASKA STAT. § 18.66.100 (West, Westlaw through the 2019 First Regular Session and 2019 First Special Session of the 31st Legislature) (“A protective order under this section may . . . (6) prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence; (7) direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence . . .”).

<sup>116</sup> VA. CODE ANN. § 16.1-253.1(A) (“A preliminary protective order may include any one or more of the following conditions to be imposed on the allegedly abusing person . . . Any other relief necessary for the protection of the petitioner and family or household members of the petitioner.”).

<sup>117</sup> MINN. STAT. ANN. § 518B.01(6)(a) (“Upon notice and hearing, the court may provide relief as follows . . . order, in its discretion, other relief as it deems necessary for the protection of a family or household member . . .”).

tailed in Section II.B. above, “any criminal justice response that the abused person does not choose . . . sacrifices her autonomy, distrusts her judgment, and may actually put her in greater danger.”<sup>118</sup> As a long-held objective of domestic violence advocates is to return a sense of power to survivors, mandating the relinquishment of firearms against the wishes of a victim—who is best situated to assess the attendant risks—jeopardizes that goal.

On the other hand, judges are notorious for abusing their discretion in the area of intersection between domestic abuse and firearms. Many judges fail to understand that intimate partner abuse is “a complex web of social and psychological difficulties; instead, they operate from a lifetime of exposure to the myths that have long warped the public’s attitude toward the problem.”<sup>119</sup> As such, judicial discretion “invariably offers the opportunity for preconceived, stereotypical gender notions and beliefs to influence decision making.”<sup>120</sup> This lack of knowledge or understanding of intimate partner violence may cause judges to not order potentially dangerous offenders to turn over their guns, posing a risk to both the victim and public safety.

A less generous assessment supports the conclusion that judges’ personal belief systems lead to “a widely prevalent anti-victim bias” that causes them to not enforce gun surrender laws.<sup>121</sup> For example, in declining to order an abuser to relinquish his weapons, one judge expressed “skepticism about the ability of [a gun surrender] order to prevent a determined batterer from committing lethal violence.”<sup>122</sup> Another judge “was concerned that an order to surrender firearms elevated the risk to law enforcement serving the orders.”<sup>123</sup> An attorney with the Children’s Law Center described “the practice amongst some judges . . . to protect batterers from unemployment or even to protect them from simply missing hunting season.”<sup>124</sup> Lastly, judges who are personally opposed to gun control have also declined to exercise their discretion to order abusers to surrender their firearms.<sup>125</sup>

<sup>118</sup> Ramsey, *supra* note 73, at 1328.

<sup>119</sup> Epstein, *supra* note 82, at 6 (1999). As Professor Epstein explains, “[t]he most persistent of these myths is the belief that battered women could leave their relationships if they simply chose to do so.” *Id.* at 39. Judges also “misinterpret victim behavior as intentional when in fact it may be symptomatic of the psychological trauma induced by extended abuse,” *Id.* at 6. Additionally, judges “frequently underestimate the seriousness and potential danger inherent in family abuse cases.” *Id.* at 42.

<sup>120</sup> REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE (June 1993), reprinted in 58 MO. L. REV. 485, 583 (1993) [hereinafter MISSOURI TASK FORCE REPORT]. Examples include justifying batterers’ violence, see *Huesers v. Huesers*, 560 N.W.2d 219, 223 (N.D. 1997) (Maring, J. concurring) (stating that the victim’s behavior “would have made most reasonable persons commit domestic violence”), or subscribing to the myth that women fabricate abuse “in order to gain an advantage in domestic relations proceedings,” MISSOURI TASK FORCE REPORT at 519.

<sup>121</sup> Epstein, *supra* note 82, at 6.

<sup>122</sup> Sharon Frattaroli & Stephen P. Teret, *Understanding and Informing Policy Implementation: A Case Study of the Domestic Violence Provisions of the Maryland Gun Violence Act*, 30 EVALUATION REV. 347, 353 (2006).

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

<sup>124</sup> Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUMB. J. GENDER & L. 1, 22 (2005).

<sup>125</sup> See Frattaroli & Teret, *supra* note 122, at 353.

Anecdotal evidence is supported by national data on judicial enforcement of domestic violence gun prohibitions. In a study of female victims of intimate partner violence in New York and Los Angeles, where state law either permitted or mandated judges to order abusers to surrender firearms in domestic violence protective order cases, only twenty-six percent of victims reported that judges used this authority.<sup>126</sup> A report from Rhode Island found that courts required abusers to turn in their guns in just five percent of protective order cases.<sup>127</sup> In that state, “even when the written records indicated a firearm threat, courts ordered abusers to turn in their guns in less than thirteen percent of cases.”<sup>128</sup> Lastly, the authors of a 2009 study reviewed a year of sentencing records for protective order violations in the largest district court in Utah.<sup>129</sup> Although federal guidelines mandated that all defendants be ordered to surrender firearms, only six defendants were ordered to do so.<sup>130</sup>

To find the appropriate balance between respecting survivors’ autonomy and ensuring that judges’ personal biases do not allow abusers to remain armed, a model legal framework should incorporate aspects of both mandatory and discretionary policies. Gun surrender statutes should allow judges to exercise limited discretion in ordering abusers to surrender weapons, for as fact-finders, they have heard from the victim and are therefore well situated to ascertain the dynamics of a relationship and whether surrender is in the best interest of a survivor. However, where the record demonstrates a meaningful risk to the life or safety of the victim, surrender should be mandatory. This would ensure that in the most serious cases, judges cannot refuse to enforce laws enacted to protect survivors. Such safeguards are necessary, for as experts have stated, “[i]t is difficult to imagine an area of the law other than firearms prohibitions . . . where agencies and courts have almost uniformly chosen to exercise [their] discretion in favor of nonenforcement.”<sup>131</sup> Additionally, as will be discussed in further detail below, judicial education, court observation, and data collection should all be employed to ensure that judges are exercising their discretion in an appropriate fashion.

---

<sup>126</sup> Daniel W. Webster, et. al., *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners Results from an Exploratory Study*, 19 J. WOMEN’S HEALTH 93, 93–98 (2010). Most of the women interviewed for another California study of domestic violence protective orders “reported that judges did not inquire about firearms or order their surrender.” Katherine Vittes, et. al., *Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California*, 19 VIOLENCE AGAINST WOMEN, 602, 611 (2013).

<sup>127</sup> RHODE ISLAND REPORT, *supra* note 38, at 2.

<sup>128</sup> *Id.*

<sup>129</sup> See Charles L. Diviney, Asha Parekh & Lenora M. Olson, *Outcomes of Civil Protective Orders: Results from One State*, 24 J. INTERPERSONAL VIOLENCE 1209, 1211–12 (2009).

<sup>130</sup> *Id.* at 1215.

<sup>131</sup> Paul L. Seave, *Disarming Batterers Through Restraining Orders: The Promise and Reality in California*, 30 EVALUATION REV. 245, 264 (2006).

*iv. Seizure at the Scene*

Another issue to consider when enacting gun surrender legislation is whether and how police officers responding to a scene of domestic violence (i.e., prior to judicial intervention in the form of a warrant or order) can seize firearms. Officers have clear legal authority to confiscate a gun that is identified as contraband (discovered pursuant to a consensual<sup>132</sup> or other lawful search) or used in an assaultive incident. If, for example, a defendant shoots or threatens his partner with a weapon, police can seize that weapon as evidence of a crime. Some states, such as Oklahoma, have limited the seizure of firearms used in domestic abuse incidents to situations where the perpetrator is simultaneously arrested.<sup>133</sup>

Drawing on existing exceptions to the Fourth Amendment's warrant requirement, many states have enacted legislation to allow officers responding to the scene of a domestic violence crime to seize weapons. California, for example, requires a law enforcement officer responding to a domestic violence incident that involves a physical assault or threat to human life to take temporary custody of any firearm in plain sight.<sup>134</sup> Several other states require guns to be removed upon a showing of probable cause that domestic violence has occurred.<sup>135</sup> Specifically delineating the criteria that allows police officers at the scene of a domestic violence incident to seize weapons from perpetrators of intimate partner violence in a statute can thus ensure clarity for both law enforcement agents and courts.

---

<sup>132</sup> A victim who cohabitates with the perpetrator can lawfully provide consent for the police to search their shared home subject to the limitations in *Georgia v. Randolph*. See 547 U.S. 103 (2006) (holding that police do not have a constitutional right to conduct a warrantless search of a home when one resident consents to a search but the other objects). An interesting related issue is whether, in a community property state, a victim could then voluntarily surrender weapons that are considered joint—or common—property. If either occurs however, it is critical that a survivor's actions be truly voluntary, and not due to the coercive exercise of the power of the state. Moreover, any decisions about surrender in these circumstances should be made after a victim advocate provides information and education as well as safety planning resources to the survivor to ensure that surrender does not escalate tensions or violence in the relationship.

<sup>133</sup> OKLA. STATE ANN. tit. 22, § 60.8 (West, Westlaw through enacted legislation of the First Reg. Sess. of the 57th Leg. (2019)). Oklahoma law also permits only the seizure of the weapon(s) used in the assaultive incident, not any other guns owned by the abuser.

<sup>134</sup> CAL. PENAL CODE § 18250 (West, Westlaw through Ch. 860 of the 2019 Reg. Sess.).

<sup>135</sup> See, e.g., N.H. REV. STAT. ANN. § 173-B:10 (West, Westlaw through Chapter 345 of the 2019 Reg. Sess.) (“Whenever any peace officer has probable cause to believe that a person has been abused . . . that officer shall use all means within reason to prevent further abuse including, but not limited to: (a) Confiscating any deadly weapons involved in the alleged domestic abuse and any firearms and ammunition in the defendant’s control, ownership, or possession.”); N.J. STAT. ANN. § 2C:25-21(d)(1) (West, Westlaw through L.2019, c. 266 and J.R. No. 22) (The statute references “a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed” and instructs that “upon observing or learning that a weapon is present on the premises,” the officer shall “seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.”).



v. *Storage and Return*

Legislators should consider the related issues of storage and return of firearms after prohibitions expire. Where weapons will be stored; who is responsible (physically and legally) for their safekeeping; whether storage will be funded by the state, by fees paid by perpetrators, or a combination of both; and when and how to dispose of abandoned firearms or those subject to lifetime bans are among many to consider. Additionally, requirements for the return of firearms (e.g., a background check or ballistics test to determine if the gun was used in another crime) should also be clearly delineated.

vi. *Protocols for Seizure or Surrender*

Finally, and importantly, a critical feature of any state law is detail regarding enforcement. States should follow the lead of Tennessee<sup>136</sup> and Colorado<sup>137</sup> and include specific protocols regarding the seizure or surrender process in their statutes. Section III.B provides comprehensive recommendations for enforcement mechanisms, but in brief, the law, or the implementing regulations mandated by the law, should outline the disarmament process with as much precision as possible. It should clearly specify who is responsible for each step of implementation and enforcement and how it will occur. A model statute should also require monitoring of implementation efforts and include mechanisms for holding agencies accountable.

3. *Funding Programs to Enforce Domestic Violence Firearm Prohibitions*

Programs that dispossess perpetrators of domestic violence of their firearms cannot be successful without sufficient funding to implement them. The most obvious source of funding is the federal Violence Against Women Act (VAWA), which must be reauthorized by Congress every five years. Funding authorized by VAWA is distributed by the Department of Justice's Office on Violence Against Women, which has, since its inception in 1995, awarded over \$7 billion in grants to support organizations and programs seeking to prevent domestic violence.<sup>138</sup> The vast majority of VAWA funds are dispersed to criminal justice agencies.<sup>139</sup> Alternatively, state, county, or

---

<sup>136</sup> TENN. CODE ANN. § 36-3-625 (West, Westlaw through end of the 2019 First Ex. Sess. of the 111th Tenn. General Assemb.).

<sup>137</sup> COLO. REV. STAT ANN. § 13-14-105.5 (West, Westlaw through the end of the 2019 Reg. Sess.).

<sup>138</sup> *About the Office*, U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, <https://www.justice.gov/ovw/about-office> [<https://perma.cc/N2YF-R7X3>].

<sup>139</sup> Jill Theresa Messing et al., *The State of Intimate Partner Violence Intervention: Progress and Continuing Challenges*, 60 SOC. WORK 305 (2015). The study notes that in 1994, 62 percent of appropriated funds were for criminal justice agencies and 38 percent for social services. By 2013, VAWA authorizations had doubled, but the proportion of funding for social services "had decreased to approximately 15 percent of the total, resulting in a smaller dollar amount appropriated for social services in 2013 than in 1994."

local funding, as well as funds from private foundations (many of whom already support anti-domestic violence work<sup>140</sup>), could provide financial support to programs seeking to remove firearms from perpetrators of intimate partner violence.

Funds could be used to support bureaucratic infrastructure (e.g., creation of task forces and hiring of personnel); develop physical infrastructure (e.g., facilities to store surrendered weapons); or finance training for police, prosecutors, and judges on successful implementation. Federal grants could incentivize states to enact legislation that prohibits firearm ownership and possession by domestic abusers and clearly outlines the process for seizure or surrender. Government funders could also use VAWA or other funds to promote cooperation between federal and state law enforcement authorities. Although Congress has attempted to provide funding to states to implement gun surrender, any bills to that effect have to date been unsuccessful.<sup>141</sup>

Regardless of the specific purpose of funding, receipt of funds should be contingent on detailed reporting of data and outcomes. Such information is particularly critical because in 1996, Congress passed the “Dickey Amendment,” which prohibits the U.S. government, specifically the Centers for Disease Control and Prevention (CDC), from conducting research on issues related to firearms.<sup>142</sup> The National Rifle Association (NRA) successfully lobbied for the passage of the Amendment after the CDC reframed gun violence as a public health issue and issued a number of studies (including one that found that the presence of a gun in the home was associated with an increased risk of homicide) that the NRA branded as biased.<sup>143</sup> In the two decades since the enactment of the Dickey Amendment, which codified restrictions on the study of how gun violence affects public health, “CDC funding for firearm injury prevention has fallen ninety-six percent.”<sup>144</sup> Data on the number of firearms relinquished by domestic abusers, how and to whom they are surrendered, and the effect of gun surrender enforcement on the rate of intimate partner homicides would therefore be critical to understanding and assessing domestic violence firearms prohibitions.

---

<sup>140</sup> See, e.g., *Criminal Justice & Violence: Funders*, INSIDE PHILANTHROPY, <https://www.insidephilanthropy.com/crime-violence-funders> [https://perma.cc/CM8W-B5W4].

<sup>141</sup> The Domestic Violence Criminal Disarmament Act of 2013 would have amended the Omnibus Crime Control and Safe Streets Act of 1968 to provide funding to states that adopted policies, procedures, protocols, laws, or regulations pertaining to gun surrender. It died in committee. H.R. 3566 (113th): Domestic Violence Criminal Disarmament Act of 2013. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3566> [https://perma.cc/Q97R-HPSR]. A similar bill, the Domestic Violence Gun Homicide Prevention Act of 2014, was introduced in the Senate in 2014, but it too was unsuccessful. S. 2676 (113th): Domestic Violence Gun Homicide Prevention Act of 2014. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s2676> [https://perma.cc/9L3E-594U].

<sup>142</sup> Pub. L. No. 104-208, 1110 Stat. 3009.

<sup>143</sup> Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 866 (2018).

<sup>144</sup> MAYORS AGAINST ILLEGAL GUNS, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE 2 (Jan. 2013), [http://libcloud.s3.amazonaws.com/9/c1/6/1017/3/access\\_denied.pdf](http://libcloud.s3.amazonaws.com/9/c1/6/1017/3/access_denied.pdf) [https://perma.cc/TDX5-TE8Y].

#### 4. *Domestic Violence Prohibitions as Part of a Broader Gun Safety Framework*

Gun surrender law and protocols do not exist in a vacuum. In order to make survivors as safe as possible and to ensure that guns are removed from the hands of prohibited possessors, programs relating to domestic violence and firearms must be considered alongside and paired with other sensible gun safety measures.

Americans own more guns per capita than residents of any other country in the world.<sup>145</sup> It is therefore unsurprising that in 2015, ninety percent of women killed by firearms in “high-income countries” were in the United States.<sup>146</sup> Guns proliferate in the U.S. because they “have been a central part of American life from its beginnings,” but problematically, “no one knows exactly how many there are in America, their breakdown by type and caliber.”<sup>147</sup>

We also do not know who owns the guns and where they are. A comprehensive national system for gun registration does not exist because federal law prohibits using the National Instant Criminal Background Check System (NICS) to register firearms or firearm owners.<sup>148</sup> The 1986 Firearm Owners Protection Act also prevents the federal government from creating a gun registry.<sup>149</sup> The vast majority of states also do not have a gun registry. Only Hawaii and the District of Columbia require registration of all firearms.<sup>150</sup> And only five states—California, Connecticut, Maryland, New Jersey and New York—require registration of some weapons, while eight states prohibit gun registries altogether.<sup>151</sup>

Without an up-to-date database of registered gun owners, a judge seeking to disarm a perpetrator of domestic violence has no way to definitively ascertain gun ownership or assess the veracity of a defendant’s denial of gun possession. Creating a federal or state registry or licensing system, while

---

<sup>145</sup> SMALL ARMS SURVEY, SMALL ARMS SURVEY: GUNS AND THE CITY (2007), <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2007.html> [<https://perma.cc/LN3Z-MYTQ>]. The report also notes that Americans own nearly half (48 percent) of the estimated 650 million civilian-owned guns worldwide.

<sup>146</sup> Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266, 269 (2016).

<sup>147</sup> SUING THE GUN INDUSTRY, *supra* note 99, at 87.

<sup>148</sup> 18 U.S.C. § 926(a) (2018); 28 C.F.R. § 25.9(b)(3) (2019).

<sup>149</sup> 18 U.S.C. § 926(a) (2018) (“No such rule or regulation prescribed [by the Attorney General] after the date of the enactment of the Firearms Owners Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or disposition be established.”)

<sup>150</sup> *Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/> [<https://perma.cc/QH79-BSFA>].

<sup>151</sup> *Id.*

likely politically challenging,<sup>152</sup> is the only way to conclusively eliminate uncertainty about ownership.<sup>153</sup> Experts who study the issue of gun violence and intimate partner homicide unequivocally assert that “. . . the value of complete registry or record-of-sales databases that capture all gun transactions (long guns and handguns; private sales and dealer sales) cannot be overstated for any effort to fully enforce [domestic violence restraining order] possession prohibitions.”<sup>154</sup>

A related area is ensuring that domestic abusers are not able to purchase new guns. The existing background check system is rife with loopholes, most significantly, that only licensed dealers are required to perform background checks. Guns purchased from unlicensed sellers, private parties, or individuals selling weapons at gun shows are unregulated. As a result, nearly a quarter of American gun owners obtain firearms without undergoing a background check.<sup>155</sup> Comprehensive processes to determine whether potential purchasers are lawfully entitled to weapons can save lives; in states that require a background check for every handgun sale, 38 percent fewer women are shot to death by intimate partners.<sup>156</sup>

Of course, a background check is only effective if the underlying databases contain current and accurate information. Many law enforcement agencies do not reliably enter domestic violence misdemeanors into the databases that are used to flag prohibited purchasers.<sup>157</sup> Protective orders are also not consistently entered.<sup>158</sup> These seemingly administrative measures matter; studies have shown that firearm homicide deaths are lower when

<sup>152</sup> See Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 156 (2015) (declaring that “[p]assing new firearms laws is excruciatingly hard.”). Creating a gun registry is particularly challenging for fears that the government will use such to eventually confiscate firearms. See Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004).

<sup>153</sup> See Vigdor & Mercy, *supra* note 11, at 337 (asserting that “one way to increase the potential effectiveness of possession-only laws would be to maintain a registry of all firearm owners.”).

<sup>154</sup> Zeoli & Frattaroli, *supra* note 15, at 59. A 2018 study by researchers at Johns Hopkins found that licensing systems were the policy most associated with fewer firearm homicides. Cassandra K. Crifasi et. al., *Association Between Firearms Laws and Homicide in Urban Counties*, 95 J. OF URB. HEALTH 383 (2018).

<sup>155</sup> Matthew Miller, et. al., *Firearm Acquisition Without Background Checks: Results of a National Survey*, 166 ANNALS INTERNAL MED. 233 (2017).

<sup>156</sup> EVERYTOWN FOR GUN SAFETY, BACKGROUND CHECKS REDUCE GUN VIOLENCE AND SAVE LIVES, [https://everytownresearch.org/wp-content/uploads/2017/01/Background-Check-FactSheet\\_011317\\_5.pdf](https://everytownresearch.org/wp-content/uploads/2017/01/Background-Check-FactSheet_011317_5.pdf) [<https://perma.cc/UM4Y-5626>].

<sup>157</sup> See U.S. DEP’T JUST., INFORMATION NEEDED TO ENFORCE THE FIREARM PROHIBITION: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE (Nov. 2007), [http://www.ncdsv.org/images/MCDV\\_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf](http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf) [<https://perma.cc/9RKX-7DDG>].

<sup>158</sup> BATTERED WOMEN’S JUSTICE PROJECT, FULL FAITH AND CREDIT FOR PROTECTIVE ORDERS: ASSISTING SURVIVORS WITH ENFORCEMENT ACROSS JURISDICTIONAL LINES 13, [http://www.bwjp.org/assets/documents/pdfs/ffc\\_advocate\\_guide.pdf](http://www.bwjp.org/assets/documents/pdfs/ffc_advocate_guide.pdf) [<https://perma.cc/9ZGL-FJFT>] (“Not all states, tribes, territories, and localities have developed computerized databases that contain records of current, valid protection orders issued or registered within the jurisdiction.”).

states include restraining orders in their background check systems.<sup>159</sup> Thus, in order to prevent abusers who are prohibited by law from purchasing new firearms from doing so, states should ensure that all criminal and protective order information is entered into the appropriate databases.<sup>160</sup>

In sum, broad-based legislative efforts are necessary to both supplement and complement existing federal domestic violence gun prohibitions. State level initiatives can work in tandem with federal restrictions to ensure that all guns are identified and removed. Dedicated funding can support the success and longevity of programs, and general gun safety measures ensure that programs focused on intimate partner violence operate holistically and therefore most effectively. Of course, legislation is merely the starting point; the following Section focuses on the implementation of gun surrender laws—the critical enforcement piece of the puzzle.

### B. *Implementing a Successful Gun Surrender Program*

Laws prohibiting perpetrators of domestic violence from possessing firearms are only effective if the relevant authorities enforce them, and unfortunately, enforcement has been a significant issue for programs across the United States seeking to disarm domestic abusers. For example, the founders of a program in Dallas, Texas estimated that they would collect 1600 guns from domestic violence offenders in the first two years of its existence, but only sixty guns were ultimately seized or surrendered in that time period.<sup>161</sup>

The data show that the guns are out there; research “findings suggest that it is relatively common for an abusive partner to have access to a gun and for there to be a gun in the home where abuse is occurring.”<sup>162</sup> National statistics on firearm ownership in the U.S. generally also suggest that abusers have access to guns that they can use to harm their intimate partners. The United States has higher levels of household gun ownership than all other developed countries.<sup>163</sup> Data from the General Social Survey show that be-

<sup>159</sup> See, e.g., Bisakha Sen & Anantachai Panjamapirom, *State Background Checks for Gun Purchase and Firearm Deaths: An Exploratory Study* 55 PREVENTATIVE MED. 346 (2012).

<sup>160</sup> A model program is California’s Armed and Prohibited Persons System, a “database that cross-references firearms purchasers against a list of people convicted of crimes, or who are subject to . . . domestic violence restraining orders.” Patrick McGreevy, *10,000 Californians barred from owning guns are still armed. This law aims to change that*, L.A. TIMES (Jan. 19, 2018, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-gun-seizures-felons-20180119-story.html> [<https://perma.cc/R8KR-CW6Z>].

<sup>161</sup> JUDGE ELMO B. HUNTER LEGAL CENTER FOR VICTIMS OF CRIMES AGAINST WOMEN, TAKING AIM AT FAMILY VIOLENCE: A REPORT ON THE DALLAS COUNTY GUN SURRENDER PROGRAM 6 (2017), <https://www.smu.edu/-/media/Site/Law/clinics/elmo-b-hunter/2599-GunSurrender-LowRes.pdf?la=en> [<https://perma.cc/QH2A-RVRD>].

<sup>162</sup> Sorenson & Schut, *supra* note 28. See also Susan B. Sorenson & Douglas Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412 (2004) (finding that women who experienced chronic or severe violence in the home and sought refuge at a shelter were twenty percent more likely to report the presence of a gun in the home than a member of the general population).

<sup>163</sup> SMALL ARMS SURVEY, *supra* note 145. As a result, the U.S. leads the developed world in gun violence. A 2018 study found that there are, on average, more than one hundred gun

tween 2006 and 2016, thirty-nine percent of men in the United States lived in a household where a gun was present.<sup>164</sup> Given the prevalence of guns in the U.S. male population, it is safe to extrapolate that many abusers are in possession of firearms. This Section will detail procedures for removing those guns from their dangerous hands.

The recommendations that follow could potentially apply to any jurisdiction in the United States that seeks to either create or improve a gun surrender program. However, it is important to note that despite applicable federal (and sometimes state) laws, a one-size-fits-all approach is not feasible. Tremendous variation exists within local law enforcement entities and court systems. For example, some jurisdictions have dedicated domestic violence protective order courts while others allow all family court judges to consider those matters. Some cities' law enforcement offices exist independently of county law enforcement while others have overlapping jurisdiction between police departments and sheriff's offices. In prosecutors' offices across the country, significant differences exist with respect to staffing and even selection (e.g., appointment versus election) of district attorneys. This Article will therefore not attempt to prescribe the minutiae of gun surrender program protocols; those decisions are best left to the localities themselves. The proposals herein are intended to provide overarching guidance and recommendations that localities could implement regardless of specific program structure or jurisdictional variation.

### 1. *Coordination is Critical*

Ensuring that domestic abusers relinquish their firearms requires cooperation and coordination of a range of stakeholders. Each entity in the law enforcement system has an important role to play, and without the active participation of them all, prohibited possessors—and their firearms—can slip through the cracks. Because each of the many individual actors has its own, but interdependent role, collaboration cannot occur by happenstance, nor should it be imposed on agencies or their staff. Instead, coordination to enforce firearms bans is most successful “when those who have a role in their inclusion in restraining orders or enforcement are supportive of them.”<sup>165</sup>

---

deaths in the U.S. per day. The civilian gun death rate in the United States is nearly four times that of Switzerland, five times that of Canada, thirty-five times that of the United Kingdom, and fifty-three times that of Japan. Mohsen Naghavi et. al., *Global Mortality From Firearms, 1990-2016*, 320(8) J. AM. MED. ASS'N 792 (2018).

<sup>164</sup> Tom W. Smith, Faith Laken & Jaesok Son, *Gun Ownership in the United States: Measurement Issues and Trends*, GENERAL SOCIAL SURVEY, tbl.4 19 (Jan. 2014), <http://gss.norc.org/Documents/reports/methodological-reports/MR123%20Gun%20Ownership.pdf> [<https://perma.cc/8RGP-CLKZ>]. In 2017, researchers estimated that there were 120.5 firearms per 100 civilian residents in the U.S. Put another way, there are more guns in the United States than people. SMALL ARMS SURVEY, GLOBAL FIREARMS HOLDINGS (2017), <http://www.smallarmssurvey.org/weapons-and-markets/tools/global-firearms-holdings.html> [<https://perma.cc/6A4C-RF79>].

<sup>165</sup> Frattaroli and Teret, *supra* note 122.

This Section will address mechanisms for coordination and the specific responsibilities of each agency or entity in enforcing gun surrender laws.

One mechanism to ensure that all stakeholders are on the same page is for them to enter into a Memorandum of Understanding (“MOU”). An ideal agreement would memorialize agencies’ agreement to participate as fully as possible in a program to disarm domestic abusers, establish clear lines of communication between them,<sup>166</sup> and clearly delineate each entity’s role and responsibilities. Signatories to an MOU should include all relevant government agencies—police and sheriff’s departments, prosecutors, judges, city and county officials, probation departments—as well as non-government agencies such as domestic violence shelters and representatives of the criminal defense bar.<sup>167</sup> Each of these entities’ roles will be discussed in detail below.

Prior to discussing individual stakeholder’s responsibilities, however, one should consider the timing of a Memorandum of Understanding. Timing is an aspect of an agreement that may initially seem trivial but can in fact be vital to its success. When contemplating collaboration, a best practice is to get buy-in from all relevant agencies prior to launching efforts to dispossess perpetrators of intimate partner violence of firearms. El Paso, Texas provides a model for achieving this early consensus. The program in that city was initiated after a three-year process through which multiple law enforcement agencies, prosecutors, defense attorneys, survivors’ advocates, and members of the judiciary came together to form a “Domestic Violence Firearms Surrender Advisory Committee.”<sup>168</sup> The committee developed and implemented the program’s procedures and protocols, ensuring that everyone involved was aware of and both ready and willing to undertake their responsibilities from Day One.

Given the vast bureaucracies often involved, doing the work of planning and getting buy-in from all necessary stakeholders is considerably easier at the outset, as opposed to introducing a flawed or incomplete program that will need drastic improvement. With the latter approach, the imperfect program often becomes the status quo and advocates face challenges when seeking to motivate decision-makers to devote the resources to ameliorating a program that the powers-that-be have deemed sufficient.

An important part of the planning process is to create accountability; a model Memorandum of Understanding should therefore include a compre-

---

<sup>166</sup> As researchers have noted, “[f]acilitating disclosure of information about guns by petitioners through the [domestic violence restraining order] application and hearing process is critical.” Zeoli & Frattaroli, *supra* note 15, at 59.

<sup>167</sup> In some jurisdictions, MOUs have been signed by private citizens, their non-binding signatures intended to show public support for disarming domestic abusers. An example of an MOU signed by private citizens is on file with the author.

<sup>168</sup> BATTERED WOMEN’S JUSTICE PROJECT, EL PASO, TEXAS: A COORDINATED EFFORT TO REMOVE FIREARMS FROM DOMESTIC ABUSERS (Dec. 2014), [http://www.bwj.org/assets/documents/pdfs/promising\\_practice\\_el\\_paso\\_texas\\_a\\_coordinated\\_effort\\_to\\_remove\\_firearms\\_from\\_domestic\\_abusers.pdf](http://www.bwj.org/assets/documents/pdfs/promising_practice_el_paso_texas_a_coordinated_effort_to_remove_firearms_from_domestic_abusers.pdf) [<https://perma.cc/K48F-2DRA>].

hensive list of each signatory's measurable responsibilities. Those entities and their respective obligations are discussed in the following sub-sections.

*i. Police and Sheriff's Departments*

Police and sheriff's departments are the first line of defense in limiting perpetrators' access to firearms. Those agencies should commit in an MOU to asking both alleged offenders and victims about firearms whenever called to a scene of domestic violence. This inquiry would obviously include guns used in the incident for which they were dispatched, but officers should also be instructed to question parties about any other firearms the perpetrator might own or have access to. Officers and detectives should document information about guns that they observed or learned of in the course of their investigation so that a written record can later be available to prosecutors and judges.<sup>169</sup> Officers responding to a scene should also inquire about preexisting legal prohibitions on firearms ownership so that they can effectuate any required seizures or surrenders. And even if the perpetrator does not have a criminal history or is not subject to a protective order which makes him ineligible to possess a firearm, officers can ask for voluntary surrender or remove guns subject to the legal requirements discussed in Section III.A.2.iv above. Lastly, an MOU should obligate officers to work with the courts to execute judges' gun surrender orders.<sup>170</sup>

*ii. Prosecutors*

Like with police officers, prosecutors should commit in an MOU to asking victims about offenders' possession of or access to guns. Given prosecutors' substantial caseloads in many jurisdictions, as well as the lack of continuity that results from horizontal prosecution models,<sup>171</sup> a victim advocate within an district attorney's office could be well-suited to make such an inquiry. An advocate would also likely have training that would allow such questioning to be trauma-informed and sensitive to both the safety concerns and issues regarding victims' agency previously addressed in this Article.<sup>172</sup> Any information about gun ownership ascertained from the victim, the arrest record (e.g., a probable cause affidavit or lethality assessment), or a re-

---

<sup>169</sup> One method by which information about firearm ownership could be recorded is through use of a "lethality assessment," a document that helps first responders identify "victims of domestic violence who are at the highest risk of being seriously injured or killed by their intimate partners . . ." *How LAP Works*, LETHALITY ASSESSMENT PROGRAM, <https://lethalityassessmentprogram.org/about-lap/how-lap-works/> [https://perma.cc/P6QP-TM83]. The lethality assessment form includes several questions about the abusers ownership of, access to, or use of firearms.

<sup>170</sup> Further discussion about law enforcement's role in effectuating surrender can be found in Section III.B.4 below.

<sup>171</sup> In horizontal prosecution models, prosecutors are assigned to specific functions of a matter—such as an initial appearance, preliminary hearing, or trial—as opposed to working on a case from beginning to end.

<sup>172</sup> See *supra* Sections II.B and Section III.A.2.



lated proceeding (such as a protective order hearing involving the same parties as the criminal case) should be actively utilized by prosecutors in the criminal case. District attorneys can use such evidence to make detailed inquiries of the defendant on the record or even impeach any statements denying gun ownership.

A prosecutor can also ensure that judges enforce firearm prohibitions against perpetrators of domestic violence to the fullest extent of the law. This could mean asking for relinquishment as a condition of bail or bond, requesting that conditions imposed pursuant to deferred adjudication or probation include surrender of weapons, or making motions on the record for judges to order the surrender of firearms. Considerations regarding firearms restrictions can also inform decisions about the specific details of plea agreements. Lastly, prosecutors, like law enforcement officers, should also commit in an MOU to facilitating compliance with gun surrender orders.

### *iii. Judges*

Judges have perhaps the most important role to play in the legal process of disarming domestic abusers. In brief, criminal, family, and civil court judges should commit in a Memorandum of Understanding to ascertain ownership of guns in all applicable cases, order surrender whenever legally permissible, and do everything in their power to ensure that defendants comply with surrender orders.

Ascertaining ownership is challenging, due in large part to the lack of national or state databases with information about gun ownership.<sup>173</sup> In the absence of a definitive source to determine whether an abuser owns a gun, judges should utilize a combination of secondary sources.<sup>174</sup> These can include the arrest and prosecution record or concealed handgun permits that can identify a subset of the gun-owning population.<sup>175</sup>

Of course, another important source of information about weapons is the parties themselves. Like police officers and prosecutors, judges should ask both victims and defendants/respondents about gun ownership. Judges should question perpetrators on the record and multiple times; they should not simply take the word of an alleged abuser who denies owning or possessing a firearm. Ascertaining whether a denial is truthful is a challenging endeavor, but judges have several tools at their disposal, including search

---

<sup>173</sup> See *supra* Section III.A.4.

<sup>174</sup> Consulting a variety of sources is critical to identifying gun owners. A study conducted in California revealed that no single source of information adequately detected respondents in possession of firearms. In fact, in one county, fewer than five percent of respondents were linked to firearms by all three sources officials used to determine ownership. Garen Wintemute, et. al., *Identifying Armed Respondents to Domestic Violence Restraining orders and Recovering Their Firearms: Process Evaluation of an Initiative in California*, 104(2) AM. J. PUB. HEALTH 113 (2014).

<sup>175</sup> Thirty-eight states require a state-issued permit for an individual to carry a concealed weapon in public. See *Concealed Carry*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [<https://perma.cc/G2LE-P39M>].

authority<sup>176</sup> and the ability to require a defendant to swear to the fact that he does not possess firearms under oath and under penalty of perjury (typically in the form of an Affidavit of Non-Possession). Training on how and when to ask defendants can make a difference as well.

As discussed above, judges can order surrender as condition of bond or after a defendant's conviction. When ordering surrender, whether orally or (ideally) in writing, judges should provide defendants with notice of the requirement to dispossess; instructions on how, when, and where to surrender firearms; and information regarding penalties for failure to do so.<sup>177</sup> Describing firearms to be surrendered in the order itself facilitates potential prosecution upon violation and, for full-faith-and-credit purposes, provides notice to law enforcement in other states that the order is subject to federal firearm prohibitions.<sup>178</sup> Proper identification of seized or surrendered weapons can also help facilitate the process of returning firearms to perpetrators once they are deemed eligible to possess them again. Lastly, judges should agree in an MOU to strictly enforce any orders that they issue, including setting follow-up hearings to confirm or monitor compliance and address non-compliance.

*iv. Probation and Elected Officials*

The two final government entities that should sign onto an MOU—probation departments and elected officials—have smaller but still important roles to play. Probation officials should continue to inquire about gun ownership and advise prosecutors or judges if they receive information about non-compliance. Elected officials should commit to fully funding programs that remove firearms from the hands of perpetrators of intimate partner violence, as programs will not succeed without adequate political support and financial resources.

*v. Non-Governmental Actors*

Although government actors are central to the gun surrender process, private individuals working in the areas of criminal justice and domestic violence advocacy should also formalize collaboration through the MOU process. Public defenders or others in the defense bar should commit to advising their clients about gun surrender law and procedures. Those arguably most

---

<sup>176</sup> Before a judge could issue a search warrant to ascertain firearm ownership or possession, prosecutors would be required to establish the requisite probable cause. The timely and detailed information about gun ownership needed to establish that probable cause could likely not be obtained without cooperation among agencies, demonstrating again the importance of information sharing.

<sup>177</sup> If judges do not order surrender, they should, at a minimum, inform defendants or respondents of applicable state and federal prohibitions relating to firearms.

<sup>178</sup> See Sack, *supra* note 101, at 18. A resource judges can use to help victims correctly describe abusers is the Bureau of Alcohol, Tobacco, Firearms and Explosives' "Firearms Photo Gallery," which contains photographs and names of many common firearms. See *Firearms Photo Gallery*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/firearms/firearms-photo-gallery> [<https://perma.cc/H2X5-K7EF>].

impacted by laws requiring them to relinquish weapons must know what their obligations are in order to uphold ideals of due process and ensure that they do not unwittingly face criminal consequences. As Justice Roberts stated, a defendant “should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history.”<sup>179</sup>

Advocacy agencies such as domestic violence shelters should also commit through a Memorandum of Understanding to educating survivors about gun surrender laws and working to ensure victim safety through the relinquishment process. Because a gun can be “a symbol of self-defense, self-sufficiency, empowerment, and virility,”<sup>180</sup> the loss of a weapon can anger an abuser, especially if he sees gun control as an attack on his “masculinity, independence, and moral identity.”<sup>181</sup> To the extent that a gun is a symbol of manhood, removing it is emasculating, and, if a firearm is an integral part of one’s identity, taking it away amounts to a loss of self.<sup>182</sup> Advocates should be aware of these dynamics—that operate alongside the dynamics of power and control in a relationship involving intimate partner violence—and help survivors strategize about how to remain safe if an abuser lashes out violently in response to the loss of his weapon.

Relatedly, advocates can advise law enforcement partners about how to structure programs that are trauma-informed and victim-centered. Lastly, advocates should also, in consultation with individual survivors, inform governmental agencies about guns possessed by abusers and communicate with police and prosecutors about both ongoing threats and the best opportunities to seize firearms.

#### *vi. Dedicated Personnel*

Information that is garnered from a strong collaborative infrastructure is critical to any successful effort to disarm domestic abusers. In order, for example, for a probation officer to know to ask an offender about gun possession or use, that officer must be aware of the existence of a gun surrender

<sup>179</sup> U.S. v. Hayes, 555 U.S. 415, 437 (2009) (Roberts, J., dissenting).

<sup>180</sup> Fan, *supra* note 152, at 160.

<sup>181</sup> Tom Jacobs, *For Some Americans, the Gun is a Sacred Object*, PAC. STANDARD (Nov. 28, 2017), <https://psmag.com/news/for-many-white-men-god-is-in-the-gun> [<https://perma.cc/2MN4-K652>]. See also F. Carson Mencken & Paul Froese, *Gun Culture in Action*, 66 SOC. PROBLEMS 3, 4 (2019) (“[T]he symbol of the gun has become a source of identity and moral meaning to specific populations within the United States . . . [for these men, gun control] has come to represent an attack on their masculinity, independence, and moral identity.”).

<sup>182</sup> For many abusers, particularly white men who have undergone or fear economic distress, “. . . fighting for the right to own a gun is a way of asserting control against a society that many feel is encroaching on their values and freedoms.” David Ropeik, *Gun Control: It’s Really About Guns as Symbols, Not Weapons*, PSYCHOL. TODAY (Dec. 18, 2012), <https://www.psychologytoday.com/us/blog/how-risky-is-it-really/201212/gun-control-its-really-about-guns-symbols-not-weapons> [<https://perma.cc/B38E-6ZA7>]. Being ordered to surrender a weapon is therefore about more than just the gun itself; the firearm “delivers a sense of meaning to life that neither economic status nor religious devotion currently provide. The owners’ attachment to guns draws directly from popular narrative concerning American masculinity, freedom, heroism, power, and independence.” Mencken & Froese, *supra* note 181, at 2.

order. Similarly, because judges rely on information gathered by police and prosecutors to critically ascertain possession, each patrol officer, detective, and prosecutor must inquire and document information about firearms throughout the criminal process. Although an MOU is a vital step, the best way to facilitate this necessary communication and cooperation among the many entities and organizations involved is through a dedicated multi-disciplinary unit or office.<sup>183</sup>

A dedicated office can oversee the many aspects of a program, ensuring that applicable laws are consistently applied and enforced. The office's staff can identify cases in which surrender or seizure is required, share information with relevant agencies, and urge parties to undertake their role in removing firearms from the abuser. Program staff could also track cases in which surrender has been ordered and identify offenders who fail to relinquish their firearms so that police, prosecutors, and judges can be made aware of their non-compliance. Staff can not only monitor the paper and electronic trails through various agencies, but could help create that trail by drafting standardized forms. Such an office could also serve as the public face of a program, conducting outreach and creating educational materials for survivors as well as officers, prosecutors, and judges. A visible online and physical presence could increase both transparency and accessibility. Lastly, program administrators could be responsible for collecting and analyzing data that they can use to assess and improve performance.

In sum, a coordinated response is critical to successfully removing guns from perpetrators of domestic violence. Agencies, ideally operating under the umbrella of a single entity or office, should understand the unique roles articulated above and commit (in writing) to undertaking their responsibilities to not only accomplish their mission(s) but to facilitate the critical work of others in the system.

## 2. *Codify Programs and Collect Data*

Although the El Paso gun surrender program was a model with respect to its thorough preparation and coordinated efforts, the protocols ultimately developed by the Domestic Violence Firearms Surrender Advisory Committee were not memorialized in writing. The county also did not invest in staff

---

<sup>183</sup> A model for this type of collaboration is the Regional Domestic Violence Firearms Enforcement Unit in Seattle/King County (Washington state). The multi-jurisdictional unit encompasses both the criminal and civil justice systems and includes “three dedicated Firearms Prosecutors, a Firearms Advocate . . . , a Court Orders Problem-Solver (to help law enforcement quickly resolve any issues on orders . . . ), a Firearms Court Coordinator, a Paralegal, a Data Technician, and a Program Manager.” This team of professionals works together to address gaps in the system, prioritize cases, and ensure the success of firearm removal. In the initial six months of the program, 232 guns firearms were removed; by comparison, only 124 firearms were relinquished in 2016. REGIONAL DOMESTIC VIOLENCE FIREARMS ENFORCEMENT UNIT, *Reducing Harm Through More Effective Enforcement of Firearms Laws* (July 30, 2018) (on file with author).

specifically dedicated to the program and its long-term success.<sup>184</sup> As such, after the judge who spearheaded the program left the bench, the program floundered.<sup>185</sup> El Paso serves as a cautionary tale for jurisdictions to codify gun surrender protocols in local rules, judicial policies, procedure manuals, and Memoranda of Understanding.

Moreover, once in place, programs cannot remain stagnant. As such, any implementing measures should require reporting on both the operation of the program and its outcomes. Reporting and assessment can be undertaken by a dedicated office established to implement domestic violence firearm prohibitions; city, county, or state officials; or by unrelated entities such as advocacy organizations or academic centers who can both review data and engage in court monitoring or observation. Regular evaluation and data collection can identify gaps in enforcement, determine whether programs are working effectively (i.e., collecting firearms and reducing fatalities), and support recommendations for either legal reforms or increased resources. As experts who have studied existing gun surrender programs have stated, “perhaps the most important lesson . . . is that publicly monitoring the counties, and providing data directly to them, can significantly impact their performance. In the absence of such data, which is the normal state of affairs, local agencies and courts cannot assess and modify their practices.”<sup>186</sup>

### 3. *Educate and Train All Stakeholders*

Education for all parties—police officers and detectives, prosecutors, judges, and advocates—is necessary for uniform implementation of laws that prohibit firearm possession by perpetrators of intimate partner violence. All agencies charged with enforcement should receive regular training on federal and, if applicable, state laws and procedures regarding firearm relinquishment, the dynamics of domestic abuse, and how firearms increase the risk of intimate partner homicide. This critical background knowledge allows them to understand not only their legal responsibilities, but the potential of consistent implementation to save lives.

In addition to this general training, police officers should receive specific instruction regarding seizure of weapons at the scene of a domestic violence incident. In a study of officers seeking to enforce the Maryland Gun Violence Act, researchers discovered that “when an officer believes that domestic violence occurred and learns that the batterer owns a gun during the course of an investigation, whether the law permits removal was unclear to most interviewees.”<sup>187</sup> The limitations imposed by the Fourth Amendment are complex but critical to the work of law enforcement; providing specific

---

<sup>184</sup> See HUNTER LEGAL CENTER FOR VICTIMS OF CRIMES AGAINST WOMEN, *supra* note 161, at 37.

<sup>185</sup> *Id.*

<sup>186</sup> Seave, *supra* note 131, at 258.

<sup>187</sup> Frattaroli & Teret, *supra* note 122, at 355.

information related to domestic violence and firearms would go a long way in helping officers understand and lawfully exercise their obligations.

Judges would also benefit from supplemental education on issues directly related to their unique role in disarming domestic abusers. A training, ideally facilitated or offered in collaboration with a supportive currently sitting judge in the jurisdiction, should include information about the relevant laws and procedures for relinquishment and protocols to ensure follow-up. Importantly, as discussed above, judges should know not just to ask about firearms, but how and when to do so. Judges should also be provided forms, bench cards, and bench books that can facilitate their enforcement role.

Lastly, victims and advocates should also have information about gun surrender programs. Because survivors are best situated to know about any weapons their abuser owns or has access to and how he is likely to respond to a surrender order, survivor-specific materials can help them make informed decisions and best advocate for themselves in the legal process.<sup>188</sup>

A high-quality training program for each of these constituencies is no small task. In some jurisdictions, statewide domestic violence coalitions or local organizations may have the capacity to provide training in this area to relevant stakeholders. However, in areas where such resources do not exist, a dedicated office working to enforce domestic violence gun prohibitions could produce and conduct educational sessions, as well as create the necessary materials for all parties. And in states that are fortunate to have nongovernmental entities already working on issues at the intersection of family violence and firearms, such an office could serve as a partner to improve the quantity and quality (particularly with respect to jurisdiction-specific information) of the information that is already provided.

#### 4. *Ensure Compliance With Orders*

Enforcement of a gun surrender order is typically the final step in the firearms relinquishment process, but it is an absolutely critical one. Lack of enforcement is problematic for all parties involved. Offenders who do not dispossess themselves of their firearms are in violation of federal and (depending on the jurisdiction) state law; their continued possession thus exposes them to serious legal penalties. The credibility of the entire law enforcement system is jeopardized if defendants and the public do not believe that judicial orders, and the law generally, will be enforced.<sup>189</sup> Most importantly, allowing prohibited possessors to retain control of their guns threatens the safety and lives of survivors. This Section details recommenda-

---

<sup>188</sup> An example of survivor-centered education is the website developed by the Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women at SMU Law School. TEXAS GUN SURRENDER, [www.DisarmingTexasAbusers.org](http://www.DisarmingTexasAbusers.org) [<https://perma.cc/BG7S-RPEW>].

<sup>189</sup> See Michelle N. Deutchman, *Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218*, 75 S. CAL. L. REV. 185, 200-01 (2001) (documenting minimal enforcement, and therefore compliance, with gun surrender orders issued in California, including no process to verify that weapons were actually relinquished).

tions for three critical entities—police, prosecutors, and the courts—that would increase their ability to promptly, safely, and consistently enforce relinquishment orders and remove guns from the hands of abusers.

Although the most effective way for police officers to effectuate judicial orders relating to gun surrender is in person, individual visits to offenders' homes is admittedly not an easy task. As a spokesperson for the California Attorney General's Office recently stated, "[i]t is dangerous and expensive to get guns out of the hands of people who are prohibited from owning them."<sup>190</sup> At baseline, assignments or calls related to intimate partner violence can be dangerous for law enforcement; according to the FBI, ten percent of officers killed in 2016 were responding to domestic disturbance calls.<sup>191</sup> The nature of a visit relating to gun surrender could exacerbate an already tense situation, as an abuser may become angry or violent at the prospect of relinquishing his weapon(s), leading to direct violence against an officer or retaliatory violence against victims who may be blamed for the confiscation of the offender's guns.<sup>192</sup> Given these risks, as well as the time involved in effectuating surrender,<sup>193</sup> "you can't just ask an overwhelmed police department to do this in their spare time."<sup>194</sup>

Multi-agency task forces are the most effective mechanism for effectively enforcing domestic violence firearm prohibitions. For example, in January 2018, the City of Seattle and King County, Washington came together to create the Regional Domestic Violence Firearms Enforcement Unit (DVFEU), which includes staff from the King County Prosecutor's Office, the Seattle City Attorney's Office, the King County Sheriff's Office, and the Seattle Police Department.<sup>195</sup> The DVFEU collected more guns in a three-month pilot period in 2017 than all the guns seized in the jurisdiction in the

---

<sup>190</sup> McGreevy, *supra* note 160.

<sup>191</sup> See Press Release, FBI, FBI Releases 2016 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty (May 15, 2017), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty> [<https://perma.cc/JXX4-HRP5>]. See also Nick Breul & Mike Keith, *Deadly Calls and Fatal Encounters: Analysis of U.S. Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched Calls for Service and Conducted Enforcement (2010-2014)*, in U.S. DEPT' T JUST., COMMUNITY ORIENTED POLICING SERVICES, at 4, 13–15, <https://www.hsdl.org/?view&did=794863> [<https://perma.cc/QL6E-4MND>] (reporting that twenty-two percent of "line of duty deaths" were in the category of "domestic dispute." In all but one of the cases, the officers were killed with a firearm.).

<sup>192</sup> See *supra* Section II.B. The volatile nature of such visits resulted in the California Department of Justice's policy of sending five agents "whenever an operation was undertaken to confront someone . . . [to] take away his or her guns." McGreevy, *supra* note 160.

<sup>193</sup> Efforts can be time-intensive because an offender's whereabouts may be unknown, and even if an address is available, officers may need to visit a home numerous times before making contact.

<sup>194</sup> The Seattle Times Editorial Board, Editorial, *New Seattle-King County Task Force Makes Gun Laws Work*, SEATTLE TIMES (March 2, 2018), <https://www.seattletimes.com/opinion/editorials/new-seattle-king-county-task-force-makes-gun-laws-work/> [<https://perma.cc/X7T8-TFFM>].

<sup>195</sup> Telephone Interview by Roz Katz of Moms Demand Action with Sandra Shanahan, Program Manager of the Seattle-King County DV Firearm Enforcement Program (Feb. 6, 2019). (Call notes on file with author).

previous calendar year.<sup>196</sup> An alternative to a full-scale task force is for departments to conduct periodic “sweeps.” A two-day operation in Santa Cruz, California—involving the sheriff’s department, police department, and the California Department of Justice Bureau of Firearms—allowed officials to ascertain the firearms ownership of forty-seven offenders.<sup>197</sup>

However, even with a dedicated task force, progress can sometimes be slow; in Santa Cruz, California, officers worked for nine hours to check six houses and ultimately recovered only two guns.<sup>198</sup> Yet when asked if it was worth all the hard work, a participating special agent said, “yes, it is . . . I feel like what we’re doing, by taking one gun at a time off the streets of California, is making our community safer.”<sup>199</sup> Nevertheless, given the resources required, most jurisdictions will likely need to triage and target the most dangerous cases, or those determined to be most likely to result in intimate partner homicide or other violence. This determination is best made in consultation with partners, again highlighting the importance of communication and collaboration between agencies.

A final recommendation for police officers enforcing gun surrender orders is to minimize the opportunities for confrontation and escalation of violence. Police departments in California and Maryland have developed the “W.A.R.M.” approach for gun removal, which involves seeking out as much information as possible about the offender, the circumstances surrounding the surrender order, and the firearm, as well as dressing in plain clothes and driving unmarked cars.<sup>200</sup> The combination of preparation and respect can help de-escalate a potentially tense situation. As a Seattle-King County officer explained, “[i]n most cases, the gun removal task force chooses the route of persuasion.”<sup>201</sup> He described the approach as requiring a lot of time on the phone, talking to the gun owners’ lawyers—and their family: “we call people’s moms, we call their aunt, we call their uncle . . . [a]nd we explain to them, ‘look, he’s not just a risk to the victims . . . he’s a risk to himself. And it’s just better if we have the guns.’”<sup>202</sup> Similarly, “officers often seek out accused abusers at their workplaces, where they’re more likely to be coopera-

<sup>196</sup> *Id.* The three month pilot cost \$1 million.

<sup>197</sup> California News Wire Servs., *Firearms Recovery Operation Held In Santa Cruz County*, WATSONVILLE PATCH (Jan. 19, 2018), <https://patch.com/california/watsonville/firearms-recovery-operation-held-santa-cruz-county> [<https://perma.cc/JVP7-HB68>].

<sup>198</sup> *California Task Force Takes Illegal Guns Off the Street*, CBS NEWS (March 19, 2018), <https://www.cbsnews.com/news/california-task-force-takes-illegal-guns-off-the-street/> [<https://perma.cc/VW7M-X672>].

<sup>199</sup> *Id.*

<sup>200</sup> PROSECUTORS AGAINST GUN VIOLENCE & THE CONSORTIUM FOR RISK-BASED FIREARM POLICY, FIREARMS REMOVAL/RETRIEVAL IN CASES OF DOMESTIC VIOLENCE (Feb. 2016), <http://efsgv.org/wp-content/uploads/2016/02/Removal-Report-Updated-2-11-16.pdf> [<https://perma.cc/6ZYP-BH8A>].

<sup>201</sup> Martin Kaste, *What It Takes to Get Guns Out of the Wrong Hands*, NAT’L PUB. RADIO (Jan. 26, 2018), <https://www.npr.org/2018/01/26/580143957/what-it-takes-to-get-guns-out-of-the-wrong-hands> [<https://perma.cc/C8Z2-YNJR>].

<sup>202</sup> *Id.*



tive.”<sup>203</sup> These measures, if undertaken with care and in partnership with a survivor and her advocate, can also minimize the potential of retaliatory violence against a survivor or the perpetrator’s family and friends who cooperate with law enforcement.

Prosecutors have a less involved but equally important role in enforcement of gun surrender orders. Their function is largely limited to initiating compliance actions if they learn—from either law enforcement, probation officers, or the victims themselves—about an offender’s failure to surrender firearms as ordered.

Lastly, judges and the court system, as issuers of gun surrender orders, are the cornerstone of the enforcement system. Before turning to punishment of noncompliant offenders, an initial consideration is the protocols for surrender itself. Providing only a short timeframe for offenders to surrender firearms demonstrates the seriousness of domestic violence gun prohibitions. For example, in Colorado, respondents must relinquish any firearms within twenty-four hours of service of a domestic violence protective order.<sup>204</sup> A twenty-four to forty-eight hour window for surrender should be the goal in each state.

Another important consideration is to whom a perpetrator can surrender a gun. The ideal relinquishment entity is law enforcement, as police and sheriff’s departments can best ensure firearms’ security. Moreover, in the event of a permanent ban, law enforcement can destroy a weapon, thereby ensuring it does not end up back on the street and in the hands of a potentially dangerous person. Other alternatives include the abuser selling his weapon to a licensed firearms dealer or relinquishment to a private third party.

Surrender to a private third party is the least preferable option, as permitting perpetrators to simply give their weapons to a family member, friend, or attorney can lead to compliance problems (e.g., the third party simply returning it to the abuser upon request) and therefore safety concerns for the survivor. Consequently, if private party surrender is permitted, courts should impose and enforce strict limitations, including a requirement for both the offender and the third party to appear in court and attest—orally as well as in an affidavit signed under penalty of perjury—to knowledge of the legal restrictions placed on the offender and the consequences (including civil and criminal liability) for either party’s noncompliance. Any third party should also submit to a background check to verify eligibility to possess firearms. Lastly, states should consider survivor-centered measures similar to the

---

<sup>203</sup> *Id.*

<sup>204</sup> COLO. REV. STAT ANN. § § 13-14-105.5(2)(a)(I) (West, Westlaw through the end of the 2019 Reg. Sess.). The deadline is extended to forty-eight hours if service is effectuated outside of court. A judge also has the discretion to extend the deadline up to a period of seventy-two hours.

one in Wisconsin, which allows protective order recipients to object to third party surrender.<sup>205</sup>

Regardless of whom the gun is surrendered to, judges should require offenders to prove that any prohibited weapons are no longer in their possession. At the time a surrender order is issued, judges should automatically schedule a follow-up hearing to verify compliance.<sup>206</sup> At this hearing, the offender should provide the judge either a receipt of relinquishment (that the offender received from law enforcement), a sales receipt from a licensed firearms dealer, or an affidavit of surrender executed by the defendant or respondent himself.

Finally, judges should immediately address non-compliance. They can do this in a variety of ways, depending on the status of a case, including bond revocation, contempt, probation revocation, or a “show cause” hearing to ascertain whether any of the aforementioned actions are merited. Courts also have the power to issue search warrants to enforce their orders. Some states, like Colorado, explicitly authorize judges to issue arrest warrants if an offender fails to surrender firearms.<sup>207</sup>

### 5. *Implement Safeguards for Return of Firearms*

A final consideration with respect to enforcement is the eventual return of seized or surrendered guns, which may occur at the expiration of a protective order; if the offender is pardoned or a court orders the expungement of a criminal conviction;<sup>208</sup> or if gun rights are otherwise restored.<sup>209</sup> Safeguards should be put into place throughout the process to ensure firearms are only returned to lawful possessors.

First, offenders should be required to initiate the process through, for example, filing a Motion to Retrieve Firearms with the court that issued the order to surrender. The judge should then hold a hearing to determine

<sup>205</sup> See Danielle Long, *Wisconsin Addresses Firearms Surrender*, BATTERED WOMEN’S JUSTICE PROJECT (April 2015), <http://www.bwjp.org/resource-center/resource-results/wisconsin-firearms-surrender-protocols.html> [<https://perma.cc/7558-5HDA>]. [hereinafter *Wisconsin Firearms*].

<sup>206</sup> Again, Wisconsin is a model in this regard, as state law requires courts to hold follow up hearings when they issue injunctions with firearms restrictions and the court finds that the respondent possesses firearms. *Id.*

<sup>207</sup> COLO. REV. STAT ANN. § 13-14-105.5 (West, Westlaw through the end of the 2019 Reg. Sess.) (“Not more than three business days after the relinquishment, the respondent shall file a copy of the receipt issued . . . with the court as proof of the relinquishment. If a respondent fails to timely file a receipt or written statement as described in this subsection . . . the court shall issue a warrant for the respondent’s arrest.”).

<sup>208</sup> See 18 U.S.C. § 921(a)(20) (2018) (excluding “[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored” from the definition of conviction under § 922(g)).

<sup>209</sup> See 18 U.S.C. § 925(c) (2018) (authorizing the Attorney General restore gun rights if s/he deems that “the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”). Since 1993, the Bureau of Alcohol, Tobacco, Firearms and Explosives has not received funding to investigate or act upon applications for relief under 925(c). See Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

whether the offender is eligible to possess a firearm, including verifying the expiration date of the firearm prohibitions stemming from the court's surrender order and conducting a background check to ensure that no other basis for firearms restrictions exist.

Survivors should also be involved in the return process; at bare minimum a victim should be notified of the impending return of firearms to allow her to conduct any necessary safety planning. Finally, notice should also be provided to prosecutors to give them an opportunity to assess whether a legal basis exists to oppose the return of firearms.

In sum, full enforcement of gun prohibitions for perpetrators of intimate partner violence requires a concerted effort at coordination, codification, education, and implementation. Establishing programs and processes allows key stakeholders to ensure compliance with the law and work most effectively to disarm domestic abusers.

### C. *Litigation*

Even after careful consideration of the underlying law and its implementation, jurisdictions may still not remove guns from the hands of domestic abusers who are prohibited from possessing them. In such situations, litigation may be a necessary next step to ensure victims' safety. Because litigation is reactive, it is often an imperfect mechanism for change; it can, however, be a useful tool used in combination with other tactics to protect survivors. This Section details four potential avenues—writs of mandamus, constitutional challenges, tort action, and relief under the Crime Victims' Rights Act—for ensuring that officials enforce the law.

#### 1. *Writ of Mandamus*

A mandamus action is used to compel a governmental entity to perform “a particular duty required by law.”<sup>210</sup> Thus, for example, if a judge does not order an offender to surrender his guns as mandated by a state statute, or if a police or probation department does not enforce a judicial order to relinquish a firearm, a victim could initiate a mandamus action to compel the court or agency to do so.

The burden for mandamus, however, is high. Considered a “‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes’”<sup>211</sup> it is available “only to one who has a clear legal right to the performance sought” and “only in limited circumstances to achieve limited purposes.”<sup>212</sup> Although

---

<sup>210</sup> 52 AM. JUR. 2D *Mandamus* § 1. Writs of mandamus are codified under 28 U.S.C. § 1651(a), which asserts: “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a) (2018).

<sup>211</sup> *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

<sup>212</sup> *State ex rel. Stratton v. Alto Land & Cattle Co.*, 824 P.2d 1078, 1084 (N.M. Ct. App. 1991).

scholars have declared that “[s]uccess is improbable,”<sup>213</sup> the Supreme Court has noted that the hurdles imposed by mandamus requirements are not “insuperable,” and the Court itself has issued such writs.<sup>214</sup>

But because mandamus is “among the most potent weapons in the judicial arsenal,”<sup>215</sup> there are three stringent requirements that a petitioner must establish in order for a writ to issue. First, no other available means of adequate relief must be available to the party seeking mandamus.<sup>216</sup> Second, the petitioner must satisfy her burden by showing that she has a “clear and indisputable” right to issuance of the writ.<sup>217</sup> Significantly here, mandamus will not issue regarding a court’s discretionary decisions. Thus, to successfully invoke mandamus relief, the party seeking it must establish that “the duty which is sought to be compelled is ministerial in nature.”<sup>218</sup> Third, even if the first two requirements are satisfied, “the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.”<sup>219</sup>

Accordingly, in order to obtain a writ of mandamus that would compel a government agency to issue or enforce a gun surrender order, a petitioner would have to first exhaust all other available remedies. Then, because “[t]he writ of mandamus may not issue to compel performance in doubtful cases, or if the act contains any element of discretion, however slight” it would only apply in situations where, for example, a state law imposes an unambiguous duty on judges to order the surrender of firearms upon criminal conviction or the issuance of a protective order.<sup>220</sup> Finally, a court would also need to elect to exercise its discretion to issue a writ of mandamus.

## 2. Constitutional Challenges

Although the constitutional foundation of domestic violence gun prohibitions is strong,<sup>221</sup> constitutional challenges to lack of enforcement are likely to fail. The Supreme Court has consistently declined to recognize a right to be free from family violence, holding that the Fourteenth Amendment’s Due Process Clause does not impose a duty on states to protect an individual from harms caused by private actors. In *Deshaney v. Winnebago County Department of Social Services*, after state officials failed to protect a young child from physical abuse perpetrated by his father, the Court stated

<sup>213</sup> 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3935.7 (3d ed. 2019).

<sup>214</sup> *Cheney*, 542 U.S. at 381.

<sup>215</sup> *Will v. United States*, 389 U.S. 90, 107 (1967).

<sup>216</sup> *Cheney*, 542 U.S. at 380–81. This requirement prevents mandamus from supplanting the regular appeals process.

<sup>217</sup> *Id.* at 381 (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

<sup>218</sup> 55 C.J.S. *Mandamus* § 2 (citing *Johnson v. Tenth Judicial Dist. Court of Appeals at Waco*, 2008 WL 4724104 (Tex. Crim. App. 2008)).

<sup>219</sup> *Cheney*, 542 U.S. at 381.

<sup>220</sup> 55 C.J.S. *Mandamus* § 2 (citing *City of Hammond v. Parish of Tangipahoa*, 985 So. 2d 171 (La. Ct. App. 1st Cir. 2008)).

<sup>221</sup> See *supra* Section II.B.

that the Constitution does not impose an affirmative obligation on the government to provide aid, “even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>222</sup>

The Supreme Court expanded this notion to the area of intimate partner violence in *Town of Castle Rock v. Gonzales*, where it found that no constitutional duty of protection stems from the Fourteenth Amendment’s procedural Due Process clause.<sup>223</sup> In that case, the police took no action after Jessica Gonzales’ abusive husband kidnapped her children in violation of a protective order. After he opened fire on the police station that Ms. Gonzales had earlier visited to beseech aid, the bodies of the couple’s three daughters, whom Mr. Gonzales had murdered earlier that evening, were found in the bed of his pickup truck.<sup>224</sup> The Court declined to find that Colorado officials’ actions (or inaction) violated Ms. Gonzales’ constitutional rights.

Taken together, “the *DeShaney* and *Gonzales* cases teach that government protection from the wrongful acts of others does not fall within the spectrum of constitutionally protected individual rights.”<sup>225</sup> Constitutional challenges to a lack of enforcement of gun surrender laws are therefore unlikely to succeed (and also limit the effectiveness of statutes that mandate action by law enforcement or judges). “This is not to say, however, that the individual states or Congress are barred from imposing a statutory tort duty of protection on government actors,” and that civil torts generally, as will be discussed in the next Section, are not a viable alternative to constitutional actions.<sup>226</sup>

### 3. Tort Liability

Tort action is another potential avenue for ensuring agencies’ enforcement of domestic violence gun prohibitions. In fact, the mere “threat of tort liability can provide individuals . . . with a powerful incentive to comply with regulations where enforcement resources are limited.”<sup>227</sup> Such litigation falls generally within an area of the law that has come to be known as “social policy torts.”<sup>228</sup>

---

<sup>222</sup> 489 U.S. 189, 196 (1989).

<sup>223</sup> 545 U.S. 748 (2005).

<sup>224</sup> *Id.*

<sup>225</sup> Mary M. Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 57 (2010).

<sup>226</sup> *Id.* For example, a California statute states that “where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” CAL. GOV’T CODE § 815.6 (2012).

<sup>227</sup> *Suing the Gun Industry*, *supra* note 99, at 263.

<sup>228</sup> Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy* *Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495 (2001).

In recent years, advocates have increasingly used civil lawsuits in their efforts to combat gun violence in America. Victims have sued individual manufacturers (under theories of personal injury, negligence, or product liability), and in the late 1990s, cities filed suit against “the entire industry, seeking not only money damages but also injunctive relief in the form of design standards and marketing restrictions.”<sup>229</sup> Lawsuits by individuals seeking to compel government entities to enforce firearms prohibitions against domestic abusers could follow this path, specifically, using legal theories of public nuisance and negligent infliction of emotional distress.

*i. Public Nuisance*

A nuisance is categorized as public when “it interferes with the exercise of a public right by . . . causing a common injury.”<sup>230</sup> A central element of public nuisance is a substantial and “unreasonable interference with a right common to the general public,” including “interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”<sup>231</sup> Public nuisance is a “super tort,” demanding a lower standard of fault and causation than personal injury claims; it is, essentially, a strict, or no-fault, liability claim.<sup>232</sup>

Public nuisance has long been used by plaintiffs seeking to abate a range of public health problems. The tort theory was central to the “Master Settlement Agreement” between the four largest tobacco companies and the state Attorneys General of forty-six states, five U.S. territories, and the District of Columbia in the 1990s.<sup>233</sup> In *In re Lead Paint Litigation*, twenty-six New Jersey municipalities and counties representing children harmed by lead paint used the theory of public nuisance in a suit against manufacturers and sellers of lead pigments.<sup>234</sup> More recently, in August of 2019, an Oklahoma court found Johnson & Johnson liable, and issued a \$572 million judgment, for the public nuisance the company created when it engaged in a marketing campaign that promoted opioid use.<sup>235</sup> Finally, and most relevant to this Article, public nuisance has been used in suits against gun manufacturers, alleging that they pose a risk to public health and safety.<sup>236</sup>

---

<sup>229</sup> *Suing the Gun Industry*, *supra* note 99, at 3. The Protection of Lawful Commerce in Arms Act limits the liability and types of civil actions that can be brought against gun manufacturers. 15 U.S.C. §§ 7901–03 (2018).

<sup>230</sup> *Sullivan v. Chief Justice for Admin. and Management of Trial Court*, 858 N.E.2d 699, 715 (2006) (quoting *Connerty v. Metro. Dist. Comm'n*, 495 N.E.2d 840, 845 (Mass. 1986)).

<sup>231</sup> Restatement (Second) of Torts § 821B (AM. LAW INST. 1979).

<sup>232</sup> Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 552 (2006).

<sup>233</sup> See Master Settlement Agreement, <https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/AZ3B-SQKZ>].

<sup>234</sup> *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

<sup>235</sup> *Oklahoma ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. Aug. 26, 2019).

<sup>236</sup> See generally Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J. L. REFORM 1 (2004).

Allowing a perpetrator of domestic violence who is prohibited by law from possessing a firearm to continue to do so poses an obvious threat to his victim. But an abuser's unlawful possession also poses a threat to the public at large; researchers have shown that twenty percent of fatalities in situations of intimate partner homicide are "collateral victims"<sup>237</sup> and have demonstrated a correlation between mass shootings and domestic violence.<sup>238</sup> A court or law enforcement agency's refusal to enforce laws that prohibit possession of firearms by perpetrators of intimate partner violence could therefore be classified as an action that both interferes with and causes injury to public peace or safety.

In fact, some states have statutorily designated possession of a firearm as a nuisance. Texas law, for example, defines as a nuisance the unlawful "carrying [of] a weapon" by anyone prohibited by law from possessing it.<sup>239</sup> California labels certain firearms, specifically short-barreled rifles and short-barreled shotguns, as a nuisance.<sup>240</sup> Finally, a Florida statute classifies as a nuisance the use of a firearm by those engaged in gang-related activity.<sup>241</sup>

*ii. Negligent Infliction of Emotional Distress*

Another tort theory that survivors could use to compel authorities to disarm domestic abusers is negligent infliction of emotional distress. The Supreme Court has defined that cause of action as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury but that may manifest itself in physical symptoms."<sup>242</sup>

The right to obtain damages based on negligent infliction of emotional distress is not, however, unrestrained. The Court has imposed limitations, including requiring plaintiffs to demonstrate that they contemporaneously sustained a physical injury<sup>243</sup> and were "placed in immediate risk of physical harm" by the defendant's conduct.<sup>244</sup> Recovery is also restricted to those who can prove that the defendant "could have reasonably foreseen the emotional injury to the plaintiff."<sup>245</sup>

These restrictions on recovery mean that not every victim would have a cause of action against a government agency that did not remove guns from

<sup>237</sup> See *supra* note 20 and accompanying text.

<sup>238</sup> See *supra* note 31–36 and accompanying text.

<sup>239</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 125.0015(a)(14) (2019).

<sup>240</sup> CAL. PENAL CODE § 33290 (2019).

<sup>241</sup> See Fla. Stat. §§ 790.25(5), 823.05 (2019).

<sup>242</sup> *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994).

<sup>243</sup> The Court described the "physical impact" test as requiring "a plaintiff seeking damages for emotional injury stemming from a negligent act [to] have contemporaneously sustained a physical impact (no matter how slight) or injury due to the defendant's conduct." *Id.* at 547.

<sup>244</sup> The "zone of danger" test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547–48.

<sup>245</sup> *Id.* at 548 (describing the "relative by-stander" test).

an abuser. However, given the inherently dangerous nature of firearms, many victims could likely demonstrate that an abuser's continued possession caused both mental and physical injury as well as an immediate risk of physical harm. Similarly, a law enforcement agency or court could likely reasonably foresee injury from a domestic violence offender's unlawful possession of a firearm.

#### 4. Relief Under the Crime Victims' Rights Act

Lastly, survivors seeking to direct agencies to remove firearms from their abusers may have the possibility of relief under the federal Crime Victims' Rights Act, or a state equivalent.<sup>246</sup>

Pursuant to the federal statute, victims have the right to be reasonably protected from the accused and to be treated with fairness and with respect for their dignity and privacy.<sup>247</sup> If an abuser's continued possession of a firearm infringes on these enumerated rights, a victim can file a motion for relief in the district court in which the defendant is facing prosecution or where the crime occurred. If court denies that motion, the victim can file a writ of mandamus with the relevant appeals court, which the court must address within seventy-two hours of filing.<sup>248</sup>

### CONCLUSION

Perpetrators of intimate partner violence who have access to guns use them against their victims with alarming frequency. A woman living in a home with firearms is almost three times as likely to be murdered than a woman in a gun-free home.<sup>249</sup> Too much is at stake to continue to allow the legal system to operate on an honor system when it comes to domestic abusers and guns.

Experts are clear that "past abuse in a relationship is [both] the best predictor of future abuse and . . . the leading risk factor associated with

---

<sup>246</sup> Thirty-two states have amended their constitutions to include some form of protection for victims' rights. *Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/our-programs/public-policy/amendments> [<https://perma.cc/9TG7-98TV>].

<sup>247</sup> 18 U.S.C. § 3771(a)(8) (2018).

<sup>248</sup> 18 U.S.C. § 3771(d)(3) (2018).

<sup>249</sup> Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 ANNALS EMERGENCY MED. 771, 775 (2003). The study also found that a gun in the home was a risk factor for homicide by firearm but not for homicide by other means. *Id.* at 778. This finding suggests that removing guns saves lives, as abusers will not find alternative means to murder their intimate partners. Other researchers have also found that a gun in the home is a risk for homicide. See Peter Cummings, et. al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974, 975 (1997); Linda L. Dahlberg, Robin M. Ikeda & Marci-Jo Kresnow, *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 974 (2004).



[intimate partner homicide].”<sup>250</sup> We therefore know who is likely to abuse an intimate partner and the circumstances that exist when abuse escalates to murder. We also know that guns are the most likely weapon to result in death. More lives will be lost unless the legal system does everything it can to disarm domestic abusers.

Although there is some disagreement about the specifics (i.e., the duration of a ban or to whom it is applicable), the general proposition of requiring perpetrators of intimate partner violence to relinquish their firearms is not controversial. A recent survey indicates that between eighty-five and eighty-eight percent of Americans, including those in gun-owning households, support a ban on the sale of guns to people convicted of violent crimes.<sup>251</sup> A national poll conducted in 2013 found that eighty percent of people surveyed, including seventy-five percent of gun owners, supported prohibiting gun ownership for ten years after a person has been convicted of violating a domestic violence restraining order.<sup>252</sup> The same poll found that seventy-three percent of gun owners supported prohibiting gun ownership for ten years after a person is convicted of domestic violence.<sup>253</sup>

Importantly, dispossessing abusers of firearms is not a constitutional issue. Even the founder of the gun rights advocacy group The Second Amendment Foundation has stated, “[w]e also don’t want guns in the hands of prohibited people.”<sup>254</sup> And as discussed in Section II.B above, the underlying legal foundation for domestic violence gun prohibitions is strong. States must therefore build on that solid foundation and both pass laws that prohibit domestic abusers from owning and possessing firearms and ensure that existing laws are enforced.

Proper implementation is absolutely critical, because if it “goes awry, an evaluation of the law may conclude that the law is ineffective, when the law may have been well designed, but was underfunded, mismanaged, or not enforced.”<sup>255</sup> In order to be successful, gun surrender programs require a significant investment of time and resources, but each minute and every penny is worth it. Front-end intervention is not only more cost effective,<sup>256</sup> but more importantly, saves lives.

<sup>250</sup> Zeoli & Frattaroli, *supra* note 15, at 56.

<sup>251</sup> Nicholas Kristof, *How To Reduce Shootings*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/interactive/2017/11/06/opinion/how-to-reduce-shootings.html> [<https://perma.cc/AJ4R-BSVD>].

<sup>252</sup> Colleen L. Barry et al., *After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1078 (2013).

<sup>253</sup> *Id.*

<sup>254</sup> Kaste, *supra* note 201.

<sup>255</sup> Frattaroli and Teret, *supra* note 122, at 358.

<sup>256</sup> Estimates of the cost of intimate partner violence against women are often in the range of billions of dollars a year. *See, e.g.*, Robert Pearl, *Domestic Violence: The Secret Killer That Costs \$8.3 Billion Annually*, FORBES (Dec. 5, 2013, 1:00 PM), <https://www.forbes.com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/#284a12ed4681> [<https://perma.cc/742U-MYZ3>] (“Domestic violence costs \$8.3 billion in expenses annually: a combination of higher medical costs (\$5.8 billion) and lost productivity (\$2.5 billion).”); GLADYS McLEAN & SARA GONZALEZ BOCINSKI, INSTITUTE FOR WOMEN’S POLICY RESEARCH, THE ECONOMIC COST OF INTIMATE PARTNER VIOLENCE, SEX-

---

UAL ASSAULT AND STALKING 4 (Aug. 14, 2017), [https://iwpr.org/wp-content/uploads/2017/08/B367\\_Economic-Impacts-of-IPV-08.14.17.pdf](https://iwpr.org/wp-content/uploads/2017/08/B367_Economic-Impacts-of-IPV-08.14.17.pdf) [<https://perma.cc/X47N-TB9E>] (“Converted to 2017 dollars, the cost of IPV in the United States would be \$9.3 billion.”); *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> [<https://perma.cc/XCV8-TDBW>] (“The lifetime economic cost associated with medical services for IPV-related injuries, lost productivity from paid work, criminal justice and other costs, was \$3.6 trillion.”)