THE BACKFIRING OF THE DOMESTIC VIOLENCE FIREARMS BANS

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I. INTRODUCTION

Dale Barsness was a convicted wife batterer. At the time of his conviction, he had a full and fair opportunity to be heard. He admitted in open court that he assaulted his wife, and the court found him guilty in a final adjudication of the matter. Because he was a convicted abuser, 18 U.S.C. § 922(g)(9), which prohibits all persons convicted of a domestic violence misdemeanor from possessing firearms, applied to Barsness.

Barsness's employer, the Minneapolis Police Department, required him to possess a gun. Since the federal law compelled Barsness to surrender his gun, he faced losing his job. A local judge took it upon himself to expunge Barsness's domestic violence record, not because the matter was wrongly decided, or because it had been reversed and resolved in his favor,[1] but simply because Barsness would otherwise be subject to suffer the consequences of the federal gun control law. The Hennepin County judge set aside Barsness's adjudicated conviction, stating that because the federal law would force him to relinquish his gun and likely his job, the conviction created a "manifest injustice."[2] That local judge single-handedly overrode federal legislation, and Barsness was reissued his firearm and restored to his gun-carrying position (subject to appeal by the County Prosecutor).[3]

In February 2003, a rural Missouri judge credited the testimony of a severely battered woman who described her husband throwing her to the

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[1] Another Minnesota case explains that expunging criminal records "is an extraordinary form of relief," requiring that all evidence of an event be erased "as if it never occurred." Such relief is available only if an action has been resolved in favor of the person petitioning for expungement. State v. MBM, 518 N.W.2d 880, 882 (Minn. App. 1994).

[2] Guns and Domestic Violence Change to Ownership Ban: Hearing on H.R. 26 and H.R. 445 Before the House Subcomm. on Crime, Comm. on the Judiciary, 104th Cong. (1997) [hereinafter Guns and Domestic Violence Congressional Hearing] (statement of Bernard H. Teodorski, National Vice President, Grand Lodge, Fraternal Order of Police).

[3] *Id.*

ground, threatening her with death, and waking her in the middle of the night by holding her down and beating her.[4] The woman's husband admitted to the abuse in testimony under oath.[5] The judge, however, denied the victim's request for an order of protection, instead advising the woman to change the locks on her doors to keep herself safe.[6] By denying the protective order, the judge allowed the batterer to escape the Domestic Violence Gun Safety Law,[7] which prohibits individuals with civil protective orders entered against them from owning or possessing firearms. Later that day in open court, the same judge cited the approach of quail hunting season in open court as one reason not to issue another protective order.[8]

The Hennepin County judge and the rural Missouri judge exceeded their discretion and allowed batterers to evade a federal gun restriction. Judicial discretion may not be exercised for an unjustified purpose, against reason and evidence. If a decision issues in contravention of the evidence or the law, the court has abused its discretion.[9] In passing the Domestic Violence Firearms Bans, the legislature effected a policy decision based upon batterers' propensities for violence. Drawing bright lines with respect to domestic violence is a distinction for lawmakers, not judges, to make.[10]

Although it is impossible to know how often judges issue decisions in favor of domestic violence perpetrators because of the federal gun restrictions, the practice of the Minnesota and Missouri judges apparently is not exceptional.[11] Judges are inappropriately denying orders of protection[12] and throwing out misdemeanor domestic violence pleas,[13] thereby allowing

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[4] The author watched the parties' testimony and the judge's response from the courtroom gallery but was unable, as is common in such cases, to obtain the court records.

[5] *Id.*

[6] *Id.*

[7] Codified as 18 U.S.C. § 922(g)(8) (2004).

[8] Author's observation of court proceedings, *supra* note 4.

[9] *See* Quintana v. Guijosa, 132 Cal. Rptr. 2d 538 (App. 2 Dist. 2003) (holding that trial court abused its discretion by deciding adult protective order case on facts regarding victim's performance as a mother, which were irrelevant to the state domestic violence laws).

[10] U.S. v. Lewitzke, 176 F.3d 1022 (7th Cir. 1999).

[11] *See, e.g.*, Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Bernard H. Teodorski, National Vice President Grand Lodge, Fraternal Order of Police) (citing a similar case in Indiana).

[12] The author's experience comports with experiences of her colleagues in rural Missouri.

[13]. *See* Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Bernard H. Teodorski, National Vice President Grand Lodge, Fraternal Order of Police). Teodorski also noted that an officer with the Allen County Sheriff's Department in Indiana successfully had his guilty plea to a misdemeanor domestic violence offense thrown out so that he could continue to possess a firearm.

batterers to continue owning, possessing, transferring, and using firearms despite the federal statutes that specifically prohibit them from doing so.[14] The impact of such decisions can be deadly. Nearly one in ten incidents of domestic violence involves a gun. Moreover, domestic violence involving a gun is twelve times more likely to result in death than domestic violence not involving a gun.[15]

Whether to protect the employment of those required to carry guns for their jobs or simply to protect pastimes such as hunting and shooting, judges hearing domestic violence cases deny valid requests for protective orders, dismiss the prosecution of violent crimes, and in effect make up their own laws. The result may be saving a batterer's income, and perhaps in turn, his victim's maintenance and his children's support. This result comes at the extreme price of risking women's safety.[16] Judges' imposition of that risk is unlawful and unacceptable. The problem could be improved, first, by educating judges as to the laws' intentions as well as the consequences that may flow from their failure to implement them, and second, by holding judges accountable when they fail to invoke the laws.

II. LEGISLATIVE HISTORY

Domestic violence is typically characterized "by a pattern of abusive behavior . . . which escalates in frequency and severity over time."[17] Recidivism rates for abusers are high,[18] even after an abuser has

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[14] Patty Rellergert, Public Safety Manager, Missouri Department of Public Safety and former police officer in rural Missouri, stated in conversation with the author that it is commonly recognized in rural Missouri that the issuance of orders of protection decreases dramatically during hunting season. Dec. 3, 2003.

[15] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

[16] While the issues raised in this Article apply to all domestic violence scenarios—male on female violence, female on male violence, and violence in same sex relationships—the author uses the male on female prototype because that is the most commonly occurring type of domestic violence and the most commonly occurring type of fatal domestic violence. *See* Carla M. Da Luz, A Legal and Social Comparison of Heterosexual and Same Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response, 4 S. Cal. Rev. L. & Women's Stud. 251, 252 (1994) ("[t]he most prevalent form of domestic violence is committed by a man against a woman . . ."); *see also* FaithTrust Institute, Domestic Violence, *at* http://www.faithtrustinstitute.org/Domestic-Violence/index.htm (last visited Nov. 27, 2004).

[17] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (prepared testimony of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

[18] *Id.*

been arrested,[19] participated in a batterer treatment program,[20] or had an order of protection issued against him.[21] Without active police or court intervention, recurrence and intensification of the abuse are even more certain.[22] If firearms remain in a household with a history of domestic violence, the risk of death or firearm injury to the victim increases dramatically.[23] Battered women are approximately five times more likely than other women to be murdered in a shooting,[24] and domestic assaults involving firearms are twelve times more likely to result in death than all non-firearm domestic assaults.[25] Indeed, two-thirds of domestic violence fatalities involve firearms.[26] Statistics like these led federal legislators to recognize that a "gun is the key ingredient most likely to turn a domestic violence incident into a homicide . . . . To get the gun out of [a] home [where domestic violence is present] mean[s] the difference between life and death."[27]

Therefore, in both 1994 and 1996, Congress passed legislation to reduce gun-related domestic violence. Originally, Senator Wellstone, with the bipartisan support of Democratic Senator Biden and Republican Senator Hatch, introduced the Domestic Violence Firearm Prevention Act,[28]

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[19] Although police intervention alone stops the immediate incidence of violence, it does very little to deter recidivism. Barbara Hart, Battered Women and the Criminal Justice System, 36 Am. Behav. Sci. 624, 625-26 (1993).

[20] *See* Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 Wm. & Mary L. Rev. 1505, 1533 (1998) (citing a study that found recidivism rates after treatment as high as fifty-four percent within six months of treatment). "Blind faith in treatment does not minimize the risks women . . . face when their partners remain free to get counseling." *Id.* at 1534; *see also* The Honorable Judge Randal B. Fritzler & Leonore M.J. Simon, The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Judicial Paradigms, 69 UMKC L. Rev. 139 (2000) (discussing the "lack of proven effectiveness of treatment"); *id.* at 150 (arguing that batterer treatment programs increase the danger to women by "lull[ing] victim[s] into a false sense of security," thus encouraging those victims to reconcile or stay with their batterers); *id.* at 167.

[21] Over sixty percent of individuals restricted by restraining orders violate the terms of the orders. James Ptacek, Battered Women in the Courtroom: The Power of the Judicial Responses, 163 (1999).

[22] *See* H. Morley Swingle, Angel M. Woodruff, & Julia A. Hunter, Unhappy Families: Prosecuting and Defending Domestic Violence Cases, 58 J. Mo. B. 220, 220 (2002).

[23] *See, e.g.*, 139 Cong. Rec. S16288-03 (1993).

[24] 139 Cong. Rec. S14011 (1993) (statement of Sen. Wellstone) (citing a study published in the New England Journal of Medicine).

[25] 139 Cong. Rec. S16288 (1993) (statement of Sen. Chafee).

[26] 142 Cong. Rec. H8100-01 (1996) (statement of Rep. Woolsey).

[27] 142 Cong. Rec. S10379-01 (1996) (statement of Sen. Murray).

[28] *See* 139 Cong. Rec. S14011-07 (1993) (statement of Sen. Wellstone).

authored in part by Senator Chafee.[29] The proposed amendment prohibited persons convicted of a domestic violence misdemeanor, as well as persons with a domestic violence protective order issued against them, from owning or possessing a gun.[30] Domestic violence misdemeanors fall under state criminal laws, and civil protection orders are issued pursuant to state civil laws. Domestic violence misdemeanors are certain crimes, defined differently from state to state, committed against an intimate partner, family member, or household member. Most states include amongst them, for example, the crimes of assault, battery, harassment, coercion, sexual assault, unlawful imprisonment, and stalking.[31] Orders of protection are civil remedies available to adult victims of domestic violence who have been subject to abuse or threats of abuse by a family or household member.[32] These orders may provide several forms of relief, including prohibiting an abuser from having any contact with the victim.[33]

In 1994, as a provision of the Violence Against Women Act, Congress passed the portion of the amendment that applied to persons with protective orders entered against them.[34] Senator Lautenberg subsequently assumed the responsibility of sponsoring the portion of the bill that imposed firearms restrictions on domestic violence misdemeanants. In 1996, Congress imposed the same firearms restrictions on any person convicted of a misdemeanor offense of domestic violence (the "Lautenberg Amendment").[35]

Although enacted separately, the two acts of legislation, presently encoded as 18 U.S.C. §§ 922(g)(8)[36] and 922(g)(9)[37] (hereinafter "Domestic

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[29] 139 Cong. Rec. S16288 (1993) (statement of Sen. Chafee).

[30] *See* 140 Cong. Rec. S7884 (1994).

[31] Statutory definitions of domestic crimes vary from state to state. For example, in Missouri, misdemeanor domestic assault is defined, in part, as an act that "involves a family or household member or an adult who is or has been in a continuing social relationship of a romantic nature with the actor . . . and . . . the person attempts to cause or recklessly causes physical injury to such family or household member . . . ." Mo. Rev. Stat. § 565.074.1 (2003).

[32] *See, e.g.*, Mo. Rev. Stat. § 455.020.1 (2003).

[33] *See, e.g.*, Mo. Rev. Stat. § 455.045 (2003).

[34] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 2014 (1994).

[35] Pub. L. No. 104-208, Div. A, sec. 101(f), 58 Tit. VI, § 658, known as the "Domestic Violence Offender Gun Ban." The Lautenberg Amendment was enacted into law as part of the massive Omnibus Consolidated Appropriations Act of 1996, H.R. 4278.

[36] 18 U.S.C. § 922(g)(8) (2004) provides:

It shall be unlawful for any person who is subject to a court order that (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in

Violence Firearms Bans"), are companion pieces. Both grew out of the same recognition: domestic violence offenders with access to firearms pose an intolerable danger.[38] And both serve the same purpose: removing firearms from the hands of those likely to use them in domestic disputes.[39] As Senator Wellstone said in endorsing the original bill,[40] and as Senator Lautenberg repeated in promoting the 1996 bill, the motivation for both laws was the statistically supported understanding that "all too often the only difference between a battered woman and a dead woman is the presence of a gun."[41]

Unlike other criminal and civil laws concerning domestic violence, the Domestic Violence Firearms Bans are preventative measures; they target deadly abuse before it happens.[42] By requiring abusers to relinquish their firearms as soon as courts find them to be abusive, the laws protect domestic abuse victims from gun violence before guns have been implicated in the abuse pattern. Indeed, this was the statutory intent for the

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other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .

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.

[37] 18 U.S.C. § 922(g)(9) (2004) provides:

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.

[38] 139 Cong. Rec. S16288 (1993) (statement of Sen. Chafee) ("Restraining orders are issued for the express reason that a woman sincerely believes—and a court agrees—that she is in imminent danger of being harmed, attacked or killed. It therefore is nothing short of insanity for Federal law to allow such dangerous persons to possess a gun.").

[39] See 139 Cong. Rec. S16288 (1993) (statement of Sen. Chafee) (noting that depriving persons with protective orders against them of guns "will remove weapons that are extremely lethal from the reach of these dangerous persons, and give law enforcement one more tool to combat this terrible problem").

[40] 140 Cong. Rec. S7884 (1994) (statement of Sen. Wellstone).

[41] 142 Cong. Rec. S11226 (1996) (statement of Sen. Lautenberg).

[42] Other remedies, like criminal laws targeting battery and assault or civil laws providing victims with access to orders of protection, are largely available only after violence has already occurred or after very specific threats have been made. *See, e.g.*, Jodi L. Nelson, The Lautenberg Amendment: An Essential Tool for Combating Domestic Violence, 75 N.D. L. Rev. 365, 379 (1999).

bills.[43] Appellate courts have embraced Congress' logic and the federal laws themselves. One court stated that "the dangerous propensities of persons with a history of domestic abuse are no secret, and the possibility of tragic encounters has been too often realized . . . . [Courts cannot shut their] eyes to the realities of life and the policies that have driven the federal statute."[44]

The only significant difference between the two laws is that 18 U.S.C. § 925(a)(1),[45] the so-called "Government Exception,"[46] which exempts government employees from federal firearm restrictions that impinge on their governmental duties, applies to abusers subject to orders of protection but not to misdemeanant abusers. In other words, government employees with protective orders entered against them are not subject to the firearms restrictions to the extent they use or possess government-issued firearms in their official capacities. In contrast, government employees who are convicted of domestic violence misdemeanors are subject to the restrictions. Pursuant to the "Government Exception," government employees, such as law officers and members of the military, are exempted from the firearms disabilities imposed by 922(g)(8).[47] The exception "frees members of the armed forces and law enforcement agencies who might otherwise be prohibited from carrying firearms to do so in connection with their public responsibilities."[48]

The application of the "Government Exception" is, in fact, the norm for gun control laws. Federal gun control statutes,[49] including even the gun

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[43] *See, e.g.*, 142 Cong. Rec. S10377 (1996) (statement of Sen. Lautenberg) (asserting that the bills sought to prevent fatal abuse by "keep[ing] guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones").

[44] People v. Adams, 193 Misc. 2d 78, 89 (N.Y. Misc. 2002) (holding that domestic violence offender who is subject to order of protection is ineligible for restoration of right to possess a weapon); *see also* U.S. v. Meade, 175 F.3d 215 (1st Cir. 1999); U.S. v. Lewitzke, 176 F.3d 1022, 1026 (7th Cir. 1999) (finding 18 U.S.C. § 922(g)(9) "eminently reasonable," based on Congressional rationale that "the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder.").

[45] 18 U.S.C. § 925(a)(1) states:

The provisions of this chapter, except for section [922(g)(9)] . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency or political subdivision thereof.

[46] The exception is also referred to as the "public interest exemption."

[47] 18 U.S.C. § 925(a)(1).

[48] Lewitzke, 176 F.3d at 1027, n.4.

[49] 18 U.S.C. § 922(g) (2000).

ban imposed on convicted felons,[50] exempt police officers and members of the military from gun control restrictions that would impact their public employment.[51] Domestic violence misdemeanants are the only category of persons restricted by the Gun Control Act, 18 U.S.C. § 922(g) who do not benefit from the "Government Exception." This results in a widely criticized, but constitutionally permissible, anomaly: a government employee who is a domestic violence *felon* receives the "Government Exception," and thus will not lose his job due solely to an inability to possess a gun. In contrast, a domestic violence *misdemeanant*—who *by definition* has been convicted of a lesser crime—does not receive the benefit, and may consequently lose his job based on his incapacity to carry a weapon while on duty.[52] This is the basis upon which the strongest constitutional attacks have been launched.[53]

III. FIREARM POSSESSION AS A MATTER OF EMPLOYMENT

Police officers and members of the military, as well as many other people within the classification of those convicted of domestic violence misdemeanors and those subject to protective orders, will lose jobs because of the Domestic Violence Firearms Bans. For example, a corrections officer

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[50] *See* 18 U.S.C. § 922(g)(1) (2000). Of course, as a matter of practice, neither police departments nor the military generally accept convicted felons into their ranks. *See* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999) [hereinafter FOP II].

[51] *See* Captain E. John Gregory, The Lautenberg Amendment Gun Control in the U.S. Army, 2000-Oct. Army Law 3, 8-10 (Since "[a]ll soldiers in the Army must be ready and willing to bear arms in defense of the nation . . . a soldier prohibited from carrying a weapon . . . [is][constructively dismiss[ed]"; "even long-time soldiers . . . will be without their livelihood."); *see also* Kerri Fredheim, Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. § 922(g)(9), 19 Pace L. Rev. 445 (1999) (commenting that both federal and state law enforcement agencies retrieve agency-issued firearms and ammunition from domestic violence misdemeanants, sometimes resulting in an inability for those individuals to perform their duties).

[52] *See, e.g.*, Lewitzke, 176 F.3d at 1027, n.4 (explaining that the statutory language allows "a person with a prior felony conviction . . . to carry a gun in connection with federal or state employment notwithstanding the felon-in-possession ban in section 922(g)(1), [while] a person convicted of a domestic violence misdemeanor" is not so allowed).

[53] Even supporters of firearms restrictions for domestic violence offenders criticize the felon-misdemeanor anomaly of § 922(g)(9). *See* H.R. 445 (proposal by Rep. Bart Stupak, who supports firearms restrictions for most domestic violence misdemeanants, that the law be modified so that the "Government Exception" applies to domestic violence offenders, thereby safeguarding the statute from attacks on the constitutionality of the felon-misdemeanant anomaly), *at* http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_0.htm, 26 (last visited Nov. 27, 2004).

at a state[54] or federal[55] facility, an armored car officer, a private security guard, a pilot who carries a gun, or a pawn shop or liquor store owner who reasonably feels unsafe without a weapon[56] can each lose his source of income as a consequence of the Domestic Violence Firearms Bans.[57] The statutes also have "great practical import [in rural states] . . . as [they] prevent[] gun uses such as hunting or simply having a gun on a farm."[58]

The statutes specifically prohibit relevant actors from owning or possessing firearms and make no exceptions for possession for the purpose of earning a living in the private sector or using firearms for entirely legal sporting purposes. Batterers, of course, are not a protected group, and no particular type of employment is guaranteed to be available to them; as a result, courts have repeatedly held that the statutes are rational and constitutional.[59] Batterers who lose their employment as a result of the Domestic Violence Firearms Bans have no legally cognizable defense to remedy this consequence.[60]

It was never Congress' intent to force an abuser out of employment[61] as an additional punishment for committing domestic violence. Nonetheless, enforcement of the statutes results in lost wages for abusers as well as their victims, who rely on the financial support of their abusers. Therefore, some judges perceive the attachment of gun control

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[54] *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998). A corrections officer at a state facility would fall under the Gillespie analysis as a government employee. *See* Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) (finding that gun carried by adult corrections officer who is a felon would be "owned by and used exclusively for the state").

[55] *See* White v. Dep't of Justice, 328 F.3d 1361 (Fed. Cir. 2003) (upholding the termination of a federal prison guard due to his loss of qualification for the position based on an assault conviction that rendered him unable to possess firearms).

[56] *See* Nelson, *supra* note 42, at 365-66, for a discussion of the gun bans' impact on protecting one's property.

[57] *See also* Peter Shinkle, More Employers Insist on Background Checks, St. Louis Post-Dispatch, Sept. 21, 2003, at A1 (explaining that a mass workplace shooting by Salvador Tapia, who had several domestic violence arrests on his record, could have been prevented had the company for which Tapia worked required a background check before hiring him).

[58] Nelson, *supra* note 42, at 376-77.

[59] FOP II, 173 F.3d 898 (D.C. Cir. 1999); U.S. v. Lewitzke, 176 F.3d 1022 (7th Cir. 1999); U.S. v. Meade, 175 F.3d 215 (1st Cir. 1999); Nat'l Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997).

[60] *See* White, 328 F.3d at 1368-69 (analyzing both the constitutionality of the statute as well as the effect of the statute's application under personnel law).

[61] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Sen. Stupak) (asserting that § 922(g)(9) was never intended to end the careers of law enforcement officers), *at* http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_0.htm, 26 (last visited Nov. 27, 2004).

restrictions as potential career ending penalties,[62] and they likely rectify the perceived inequity by denying protective orders to victims who deserve them and by dismissing misdemeanor violence offenses altogether.

Despite the statutes' constitutionality,[63] some judges prevent the triggering of the statutes by misapplying or refusing to apply state domestic violence laws. In other cases, courts find inequitably in favor of the batterer in order to remedy a perceived injustice inflicted by the laws. For example, in In re Marriage of Muhammad[64] the court divided marital assets heavily in favor of the abusive husband, because the wife had previously been granted an order of protection that had deprived her husband of his job in law enforcement. The trial court stated:

> [S]he had to know . . . that if she proceeded with this protection order, that he was not going to have a job and he wasn't going to have an income and he wasn't going to be able to pay his debts, let alone the mortgage payments . . . . She had to recognize the consequences and you can't just ignore the fact that there are consequences. Those consequences have been taken into consideration in terms of trying to make the distribution somewhat equitable.[65]

The judicial misapplication of state domestic violence law eludes review because the relevant cases tend to be low profile matters with little money at stake. The victims, who are often unrepresented by counsel,[66] rarely appeal adverse decisions and the records created at trial are usually unrevealing and difficult to access.[67]

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[62] *See generally*, Guns and Domestic Violence Congressional Hearing, *supra* note 2.

[63] *See, e.g.*, FOP II, 173 F.3d at 901; Nat'l Ass'n of Gov't Employees, 968 F. Supp. at 1572; Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998); White, 328 F.3d at 1371.

[64] 79 P.3d 483 (Wash. Ct. App. 2003).

[65] *Id.*

[66] *See, e.g.*, District of Columbia Courts, Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts *at* 143 (1992) (finding that approximately 65 percent of petitioners are unrepresented in civil protection order cases); *see also* Missouri Task Force on Gender and Justice, Report of the Missouri Task Force on Gender and Justice, 58 Mo. L. Rev. 485, 514 (Summer 1993).

[67] The author attempted to retrieve trial records from a rural Missouri court that had improperly denied a civil protective order. The court clerk explained that not all cases were put on record and that if the one sought happened to be on record, only a party could retrieve the record, and in that case, she could do so only if she had already filed an appeal.

IV. CONSTITUTIONAL ATTACKS

While supporters of the laws praise them as successfully reducing gun-related domestic violence deaths,[68] gun control opponents argue that the laws are impermissible federal gun control measures "[d]ress[ed] up . . . as domestic violence laws."[69] Both statutes, §§ 922(g)(8) and 922(g)(9), have come under and withstood constitutional attacks on multiple fronts. Various parties have attempted to condemn the laws as violations of the Ex Post Facto Clause, the notice[70] and fair warning principles of the Fifth Amendment,[71] the equal protection component of the Fifth Amendment's Due Process Clause,[72] and the Tenth Amendment's guarantee of state sovereignty.[73] In addition, parties also condemn the laws as an overreaching of Congress's Commerce Clause authority,[74] as an impermissible Bill of Attainder,[75] and as an impermissible restriction on the right to bear arms guaranteed by the Second Amendment.[76]

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[68] *See, e.g.*, Statement of Join Together Online, *at* http://www.jointogether.org/gv/issues/response/laws/strlaws2/ (last visited Nov. 27, 2004).

[69] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Bernard H. Teodorski, National Vice President, Grand Lodge, Fraternal Order of Police).

[70] U.S. v. Meade, 175 F.3d 215, 222 (1st Cir. 1999).

[71] U.S. v. Wilson, 159 F.3d 280, 288 (7th Cir. 1998); U.S. v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999); U.S. v. Kafka, 222 F.3d 1129 (9th Cir. 2000); U.S. v. Reddick, 203 F.3d 767, 769-71 (10th Cir. 2000); U.S. v. Baker, 197 F.3d 211, 218-20 (6th Cir. 1999); Meade, 175 F.3d at 225-26.

[72] U.S. v. Lewitzke, 176 F.3d 1022, 1025 (7th Cir. 1999) (explaining that, since no suspect class is involved, the law "need only have a rational basis to survive equal protection scrutiny;" the rationale for keeping guns out of the hands of domestic assault offenders is "eminently reasonable").

[73] Bostic, 168 F.3d at 723-24; Wilson, 159 F.3d at 287-88 (finding no Tenth Amendment violation).

[74] U.S. v. Pierson, 139 F.3d 501, 503 (5th Cir. 1998) (holding that, by including a jurisdictional element, Congress expressly required "a nexus between the illegal firearm and interstate commerce," and thereby, Congress exercised "its delegated power under the Commerce Clause to reach 'a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce'"); Wilson, 159 F.3d at 285-86 (minimal nexus to interstate commerce is shown, thereby satisfying the Commerce Clause).

[75] Nat'l Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997) (holding that the statute is not a bill of attainder).

[76] Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998) (holding that because "the right to bear arms guaranteed by the Second Amendment is not a fundamental right for equal protection purposes," the court was not required to apply the compelling governmental interest standard in analyzing defendant's equal protection argument).

This Article primarily considers the practical impact of the Domestic Violence Firearms Bans on employment and the judicial actions that compensate for that impact. Therefore, the Article focuses only on the constitutional challenges implicating the loss of or threat to a batterer's employment.[77]

Critics of the statutes complain that § 922(g)(9) unfairly targets police personnel, since they are most likely to suffer financially from the law.[78] Accordingly, the significant employment-related cases and constitutional analyses implicate those groups.

As a result of the federal firearms prohibitions, some batterers undoubtedly face demotion in or dismissal from their employment and may consequently suffer a diminishment or loss of livelihood. However, as analyzed by courts in various circuits, this result has no constitutional infirmities.

A. Case Law Analyzing the Domestic Violence Firearms Bans' Effects on Government Employment

Various government employees whose jobs require gun possession challenged § 922(g)(9) when they lost or found themselves in imminent danger of losing their jobs because of previous domestic violence misdemeanor convictions. Ultimately, the courts found that the law's classification of domestic violence misdemeanants as persons to be restricted from possessing firearms had a rational basis;[79] the statute did not compel, in violation of the Tenth Amendment, state and local law enforcement agencies to fire domestic violence misdemeanants;[80] the statute's disparate impact on law enforcement officers could not be traced to a discriminatory purpose;[81] and a government employer could dismiss a domestic violence misdemeanant whose job required him to carry a gun, even if he had not yet been investigated, arrested, or convicted for possessing a firearms in violation of § 922(g)(9).[82]

The most thoroughly reviewed case on the Domestic Violence Firearms Bans' effect on employment was brought in the District Court of

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[77] For a more general analysis of the constitutional challenges to 18 U.S.C. §§ 922 (g)(8) and (9), *see* Fredheim, *supra* note 51.

[78] *See* Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Bernard H. Teodorski, National Vice President, Grand Lodge, Fraternal Order of Police).

[79] FOP II, 173 F.3d 898 (D.C. Cir. 1999).

[80] Gillespie, 13 F. Supp. 2d at 819.

[81] *Id.* at 824; Nat'l Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997).

[82] White v. Dep't of Justice, 328 F.3d 1361 (Fed. Cir. 2003).

the District of Columbia by the Fraternal Order of Police. Originally upholding the federal statute, the case was appealed, reversed, reheard, and reversed again.[83]

The Fraternal Order of Police challenged § 922(g)(9) on behalf of two of its police officer members, each of whom had been convicted of domestic violence misdemeanors and were required to relinquish their department-issued firearms.[84] One officer was reassigned to a position of lesser responsibility, and the other was put on leave.[85] Off-duty, the officers, otherwise well-suited to work as security guards, were unable to secure such employment because they were prohibited from possessing firearms.[86] The Fraternal Order of Police challenged the statute, claiming, *inter alia*, that it infringed on the officers' "constitutional rights to possess firearms, impeding their ability to serve as law enforcement officers, diminishing their job related responsibilities, and resulting . . . in termination of their employment."[87] Despite the plaintiff's invocation of the Second Amendment, the first appellate decision (hereinafter FOP I) focused, in most part, on the equal protection component of the Fifth Amendment's guarantee of due process.[88] In that regard, the plaintiff argued that because the statute did not provide the "Government Exception" for police officers convicted of a domestic violence misdemeanor, the result was anomalous: a person with a prior felony conviction for domestic violence was eligible to carry a gun in connection with federal or state employment, while a person convicted of a domestic violence misdemeanor was not.[89]

The FOP I court could find no rational basis for barring police officers who commit domestic violence misdemeanors from the "Government Exception" while imposing a lesser restriction on police

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[83] FOP II, 173 F.3d. at 898.

[84] Fraternal Order of Police v. U.S., 981 F. Supp. 1 (D.D.C. 1997) [hereinafter FOP I], *rev'd*, 152 F.3d 998 (D.C. Cir. 1998), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, FOP II, 173 F.3d 898 (D.C. Cir. 1999).

[85] *Id.*

[86] *Id.*

[87] FOP I, 981 F. Supp. at 1-2.

[88] In analyzing the equal protection element of the Fifth Amendment's Due Process clause, the FOP I court applied rational basis review because the class of persons subject to the law is not a suspect class for equal protection analysis, and because the law does not infringe on a fundamental right. 981 F. Supp at 4-5. To withstand an equal protection challenge, a statute being analyzed under rational basis review requires only that there is a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (citing F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). Therefore, the classification of domestic violence misdemeanants need only be reasonably related to the achievement of the legitimate governmental interest of reducing the risk of fatal violence by disarming individuals prone to committing domestic violence.

[89] FOP I, 152 F.3d at 1004.

officers who commit domestic violence felonies.[90] The court held that the Lautenberg Amendment failed even the permissive rational basis review.[91] "The government may not bar police officers with domestic violence misdemeanors from possessing firearms (and therefore from holding their jobs) while it imposes a lesser restriction on those convicted of crimes that differ only in being more serious."[92] It held that § 922(g)(9), in conjunction with § 925(a)(1), was underinclusive and therefore unconstitutional "insofar as it purport[ed] to withhold the public interest exception from those convicted of domestic violence misdemeanors."[93]

Upon rehearing the issue, the court reversed itself (hereinafter FOP II), finding that the felon-misdemeanant distinction was rational, thereby allowing the provision to survive rational basis review.[94] The court explained that it would not be unreasonable "for Congress to believe that existing laws and practices adequately deal with the problem of [allowing] official firearms to felons but not to domestic violence misdemeanants . . . [because] nonlegal restrictions such as formal and informal hiring practices may . . . prevent felons from being issued firearms covered by section 925(a)(1) . . . . [Therefore,] there is a reasonably 'conceivable state of facts' under which it is rational to believe that the felon problem makes a weaker claim to federal involvement than the misdemeanant one."[95] The "informal hiring practices" that the court relied on in its rationale presumably include the refusal of police and military organizations to hire or employ felons altogether.

The Fraternal Order of Police also relied on several other arguments relating to the effect of the statute on police officers' employment. It argued, *inter alia*, that the law violates the substantive due process guarantee of the Fifth Amendment by burdening individuals' possession of firearms, which hinders their ability to pursue their established careers.[96]

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[90] *Id.*

[91] *Id.* at 1002.

[92] *Id.* at 1004.

[93] *Id.*

[94] FOP II, 173 F.3d at 904-05.

[95] *Id.* at 903-04. The FOP II court acknowledged that the statute did in fact have a disparate impact on law enforcement officers, but it reasoned that since the law was facially neutral, it would not be considered unconstitutional unless the uneven effect was the result of a discriminatory purpose.

[96] *Id.* at 905. The court acknowledged that if "government action against a particular person 'precludes' him from pursuing his profession, that action can infringe a 'liberty interest.'"

The court disposed of the issue, stating that the plaintiff failed to develop a factual record on that issue.[97]

The plaintiff also implied that the statute's effect on its members' employment affected the State's police activity itself, infringing the State's power in contravention of the Tenth Amendment.[98] The court discounted the claim as overbroad, noting that it is "commonly . . . a side effect of federal prohibitions to impair offenders' fitness for service as a police officer. Showing up for work at some spot other than a federal prison," it explained sarcastically, by way of example, "is a qualification for most state positions; federal incarceration intrudes inescapably."[99]

The remaining arguments raised in FOP I and FOP II did not touch on employment issues, but it is noteworthy that the court rejected the claims that the law infringed upon the Second Amendment right,[100] that it otherwise violated the Tenth Amendment,[101] and that Congress exceeded its Commerce Clause authority by enacting it.[102]

In Gillespie v. City of Indianapolis,[103] the District Court for the Southern District of Indiana also considered the Lautenberg Amendment's effect on police employment. A police officer who had been on the force for over twenty-five years was required to surrender his government-issued weapon because he had a prior domestic violence conviction for battery against his ex-wife.[104] He was suspended without pay, and his discharge was pending.[105] The court recognized "that a firearms disability operates as virtually a total bar to employment as a police officer."[106] As in FOP II, the plaintiff launched a Tenth Amendment attack on the law, claiming that the federal law "effectively supplant[s] state civil law by dictating

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[97] *Id.* The court also explained that even if the government action infringes a liberty interest, the government's procedures may still satisfy due process requirements. FOP did not develop whether the liberty interest was so burdened as to require such a justification.

[98] *Id.* at 906.

[99] *Id.* at 907.

[100] *Id.* at 906 (finding no showing that the restriction would have a material impact on the militia).

[101] *Id.* (holding that the law does not force state officials to do anything affirmative, and therefore does not violate the Tenth Amendment prohibition of conscripting the States officers to enforce a federal regulatory program).

[102] *Id.* at 907 (holding that, because the statute contains a jurisdictional element, it is not beyond Congress's power to enact under the Commerce Clause).

[103] 13 F. Supp. 2d 811 (S.D. Ind. 1998).

[104] *Id.* at 814.

[105] *Id.* at 817.

[106] *Id.*

qualifications of state and local law enforcement officials."[107] The court disagreed, explaining that "while it is true that, on the basis of the federal firearms disability . . . state and local law enforcement agencies are unlikely to continue employing domestic violence offenders . . . these agencies are not 'compelled' to change their employment qualifications by the statute."[108] The "ancillary effect of the firearms disability on the employment of state and local law enforcement officers does not violate state sovereignty under the Tenth Amendment."[109]

Like the Fraternal Order of Police, Gillespie contended that the statute violates the Fifth Amendment's equal protection guarantee.[110] Unlike the Fraternal Order of Police, he argued that the court should review the law applying strict scrutiny because the statute effectively deprives law enforcement personnel of their property interest in their employment.[111] The court refused to apply strict scrutiny review because no fundamental right to public employment exists for purposes of the Equal Protection Clause.[112] The court instead undertook a rational basis review. Citing Senator Lautenberg's statement that an "individual 'who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk and should be prohibited from possessing firearms,'"[113] the court found Congress's approach rational. It held that preventing domestic violence misdemeanants from possessing firearms is reasonably related to the legitimate government purpose of protecting victims of domestic violence from being murdered by their attackers.[114]

Gillespie further argued that the statute violated his Equal Protection rights because it had a disproportionate impact on law enforcement officials. Noting that the statute is facially neutral, the court recognized that the ultimate effect "likely will be the loss of employment because [law enforcement] positions generally mandate possession of a firearm."[115] However, the court explained that the disparate impact of a facially neutral law is not unconstitutional unless the disparate impact can

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[107] *Id.* at 819.

[108] *Id.* at 820. In fact, police departments are welcome to reassign offending officers to positions that do not require firearms possession, or they can even change the firearms requirement for on-duty officers.

[109] *Id.*

[110] *Id.* at 823.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 824.

[115] *Id.*

be traced to a discriminatory purpose.[116] Since no such purpose was alleged or shown, the statute withstood scrutiny on that point as well.[117]

Although the court had rejected a strict scrutiny approach with respect to the Equal Protection Clause, it applied the strict scrutiny standard of review for Gillespie's Second Amendment argument. Gillespie argued that he had a basic constitutional right to bear arms because his particular possession specifically "relate[d] to a state militia, or in the alternative, the collective right of the state to preserve and regulate the militia."[118] The court accepted *arguendo* that Gillespie's possession of firearms related to a state militia[119] and held that, even under strict scrutiny, the Lautenberg Amendment is in fact narrowly tailored to serve the compelling governmental interest of keeping deadly weapons out of the hands of those people Congress believes to be dangerous.[120]

Gillespie further argued that the statute interfered with his employment because it "substantially impair[ed] his oath-based contractual obligations" in violation of the Contract Clause.[121] The court also rejected this argument, explaining that a Contract Clause claim against a federal statute is analyzed under the Due Process Clause of the Fifth Amendment. Since the court had already analyzed and accepted the rationality of the statute's enactment, the contract claim was dismissed.[122]

The District Court for the Northern District of Georgia also analyzed the statute's impact on police officer offenders' employment. In National Association of Government Employees, Inc. v. Barrett (hereinafter NAGE),[123] the plaintiffs argued that the Lautenberg Amendment bars participation by domestic violence misdemeanants in specific employment, namely employment as law enforcement officers, and is therefore an unconstitutional Bill of Attainder with a disproportionate impact on police officers.[124]

The NAGE court acknowledged that "the ultimate effect of this facially neutral statute may be to bar certain domestic violence misdemeanants from a career that requires the ability to possess a firearm legally," but it maintained that such effects are constitutionally problematic

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[116] *Id.*

[117] *Id.*

[118] *Id.* at 826-27.

[119] The court applied a strict scrutiny review without reaching the question of whether the Second Amendment right is individual or collective. *Id.*

[120] *Id.* at 827.

[121] *Id.* at 827-28.

[122] *Id.* at 828.

[123] 968 F. Supp. 1564 (N.D. Ga. 1997).

[124] *Id.* at 1576.

only if they result from discriminatory intent.[125] Since the court found no congressional intent to discriminate against law enforcement officers, it held that the statute did not violate equal protection mandates.[126]

In White v. Department of Justice,[127] the plaintiff, a corrections officer at the Federal Bureau of Prisons, Federal Correctional Institution, Petersburg, Virginia, pled guilty to misdemeanor assault of a girlfriend.[128] White was subsequently removed from his position by the warden, who had determined "that it was illegal for White to carry a firearm, and that he therefore could not perform the full range of his duties as a prison guard."[129] Although White possessed his firearm after his assault conviction, he had not been convicted of violating § 922(g)(9).[130] White challenged his dismissal on the grounds that the Lautenberg Amendment was unconstitutional and on the grounds of state law.[131] Although the court undertook a constitutional analysis in rejecting the plaintiff's argument that the statute is unconstitutionally vague,[132] the analysis more relevant to the effect on White's employment was the court's scrutiny of the personnel action taken by the plaintiff's employer.[133]

White argued that since he had not been convicted—or even accused—of violating § 922 by illegally possessing a firearm, he could not be dismissed from his position. He further argued that his superior and the board reviewing his dismissal did not have the authority to effectively try him on the issue of violating § 922. The court rejected White's arguments, holding that White's superior was not required to wait for White "to commit or be investigated or arrested for a violation of § 922 to conclude that he was not permitted by law to carry a firearm."[134] The board that reviewed his dismissal did not find him guilty of *any* offense.[135] "Rather, the Board merely analyzed the circumstances surrounding White's conduct that resulted in previous state court conviction . . . to ascertain whether White

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[125] *Id.*

[126] *Id.* at 1575.

[127] 328 F.3d 1361 (Fed. Cir. 2003).

[128] *Id.* at 1362-63.

[129] *Id.* at 1363.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1368.

[133] *Id.* at 1370.

[134] *Id.* ("[I]n fact, it was incumbent on the Warden to remove any person who is unable to perform the full range of required duties because he or she is prohibited under 922(g) from possessing a firearm.").

[135] *Id.*

met the federal statutory definition" of a person who had committed a domestic violence assault.[136] White's dismissal was justified because he failed to meet a condition of employment.

For the law enforcement officer plaintiffs in FOP I and FOP II, Gillespie, NAGE, and White, possessing a firearm was more than a sport, hobby, or personal preference—it was a matter of sustaining an income. Despite their debilitating impact on law enforcement agents' livelihoods, the Domestic Violence Firearms Bans withstood legal attack. As it is for law enforcement officers, "possessing a firearm is an integral part of [the] employment and livelihood" of members of the military.[137] Constitutional review of the statutes in that context has not yet been pursued.

B. Constitutional Review in the Military Context

Scholars are divided as to whether § 922(g)(9) would fail constitutional review in the military context.[138] The issue has not arisen in the courts, but scholarly debate exists as to whether the statute's application to members of the military would survive even rational basis review. One camp reasons that the only rational basis for § 922(g)(9) is to keep firearms out of the hands of people who might use them to commit domestic violence offenses.[139] That function is moot in the military context, they purport, because military weapons are so closely regulated that they are under the "constructive control" of a commanding officer at all times.[140] One such scholar argues that since there "exists virtually no possibility that an Army-issued weapon could be involved in an incident of domestic violence,"[141] the law serves only as a punitive measure, punishing offenders by denying them access to military weapons and effectively terminating their military careers.[142] If the law serves no preventative purpose, he

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[136] *Id.* at 1371.

[137] Gregory, *supra* note 51.

[138] *See, e.g., id.* (arguing that § 922(g)(9) has no rational basis in the military context); *see also* Jessica A. Golden, Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations and Implementation Flaws, 29 Fordham Urb. L.J. 427, 450 (Oct. 2001) (supporting the Domestic Violence Firearms Bans in both civilian and military contexts, but believing that the Lautenberg Amendment would likely not survive constitutional review).

[139] Gregory, *supra* note 51, at 16 (arguing that punitive rationale to § 922(g)(9) is impermissible violation of ex post facto clause).

[140] *Id.*

[141] *See id.* (explaining that soldiers must check out their weapons, are supervised while in possession of the weapons, and are supervised until the weapons are returned).

[142] *Id.* at 16 (arguing that, if there is no preventative purpose, the only function of the statute is to "twice punish those convicted of misdemeanor crimes of domestic violence.").

concludes, it has no rational basis and is unconstitutional under a Fifth Amendment analysis.[143]

In diametric contrast to this line of argument, gun control advocates argue that the military provides "easy access to guns," which has resulted in a disproportionate number of domestic violence fatalities among members of the military and their intimate partners.[144] According to these scholars, the Lautenberg Amendment *does* serve its preventative function, and the gun control restrictions are a constitutional, proper, and effective means of reducing domestic homicides in the military.[145]

In 2000, the Department of Defense appointed a Task Force on Domestic Violence, which specifically found that civilian orders of protection were inadequately enforced on military installations.[146] The Task Force reported that in determining whether a domestic violence crime has been committed, the military's current system allows weight to be placed on improper and irrelevant considerations, such as the effects a finding of criminal activity will have on a batterer's employment.[147] The Task Force wrote, "It should not matter that . . . [criminal convictions will result in] adverse financial or career consequences . . . but in fact it does."[148] In a December 2001 memorandum, General John M. Keane, Vice Chief of Staff, reported that the Army's Family Advocacy Program "has experienced a noticeable decline in [domestic violence] incidence reporting [by both victims and senior officers to whom incidences are reported] . . . partly

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[143] Another issue raised in opposition to the law is that there is not adequate funding for the enforcement of the law; therefore, its only effect is to deprive police and members of the military of their jobs, rather than removing guns from domestic violence homes. Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Bernard H. Teodorski, National Vice President Grand Lodge, Fraternal Order of Police).

[144] Alison J. Nathan, At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment, 85 Cornell L. Rev. 822, 856 (March 2000). On the Fort Bragg, N.C. army base, for example, four military wives were killed by their spouses in June and July of 2002. One victim was stabbed 70 times. Alan Elsner, Wife Beating Seen as Epidemic In U.S. Military, Rense.com *at* http://www.rense.com/general32/epi.htm (Dec. 8, 2002) (last visited Nov. 27, 2004).

[145] Nathan, *supra* note 144, at 857 ("[T]he policy considerations underlying the Lautenberg Amendment extend equally well, if not more convincingly, to members of the police and military who commit acts of domestic violence.").

[146] Defense Task Force on Domestic Violence, Memorandum for Secretaries of the Military Dep'ts Chairman of Joint Chiefs of Staff, et al., *at* http://www.dtic.mil/domesticviolence/Report.pdf at 29 (last visited Nov. 27, 2004) (reporting "confusion in the enforceability of civilian orders of protection issued against or to protect service members while on the installation").

[147] *Id.* at 51.

[148] *Id.* at 52.

attributed to fears of an adverse impact on career progression."[149] Despite the prevalence of domestic violence in the military, the incidences are underreported and overlooked to protect abusers from losing their military positions.[150]

Partly in response to a spate of military domestic violence fatalities, Representative Robin Hayes introduced, and on December 2, 2002, President George W. Bush signed into law, the Armed Forces Domestic Security Act, which provides for the enforcement of civilian orders of protection on military installations.[151] Representative Hayes acknowledged the enactment of the law as "real progress, [but merely] a first step, not a final solution" to the domestic violence problem in the military.[152]

Members of the military and police forces are arguably the most detrimentally affected by the Lautenberg Amendment and they likely have the strongest legal arguments against it. Ironically, studies show that domestic violence is significantly more prevalent in police populations than it is in the general population.[153] One study shows that forty-one percent of police officers admit to having had "marital conflicts involving physical aggression," which is much higher than a random sampling of civilians;[154] according to another study, domestic violence is as much as five times higher in the armed forces than in the civilian population.[155] If the theory underpinning the Domestic Violence Firearms Bans is to disarm people with a proclivity towards domestic violence, then excluding members of the police force and military—whether in the misdemeanor *or* protective order

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[149] Memorandum from John M. Keane, General, U.S. Army, Vice Chief of Staff, *at* http://www.dtic.mil/domesticviolence/Images/news-see.jpg. (Dec. 5, 2001) (last visited Nov. 27, 2004).

[150] *See* Christine Hansen, A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military, 8 Domestic Violence Rep. (April/May 2001).

[151] News Release, Rep. Robin Hayes, 8th District, North Carolina, Congressman Robin Hayes Continues Efforts to Address Problem of Domestic Violence in the U.S. Armed Forces (May 12, 2003) (explaining that the act declares that a civilian order of protection shall have the same force and effect on a military installation as it has within the jurisdiction of the court that issued the order).

[152] *Id.* (announcing that Rep. Hayes had also introduced the Military Family Advocacy Act, which would give military chaplains resources to work with all military family members—not just military personnel—to prevent domestic violence).

[153] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (prepared testimony of Donna F. Edwards, Executive Director, National Network to End Domestic Violence); *see also id.* (statement of Ronald E. Hampton, Executive Director, National Black Police Association) (according to the FBI, "policing has the highest proportion of batteries of all U.S. occupations").

[154] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

[155] 60 Minutes: The War at Home (CBS television broadcast, Jan. 17, 1999).

context—undermines the validity of the statute.[156] There is no justification for exempting police officers and military members who abuse intimate partners from the statutes, since they "are no less likely to kill [their victims] than other abusers."[157] If police officers are exempted from the law, they are effectively "held to a different, lower standard than ordinary citizens."[158] Such a double standard is particularly unacceptable because it allows those charged with enforcing the law impermissible latitude in violating the law.[159]

Domestic violence misdemeanants who are police and military personnel have the strongest factual circumstances to argue against the Domestic Violence Firearms Bans. But the FOP II, Gillespie, NAGE, and White courts each held that the effective termination of an individual's law enforcement or military career is not dispositive in determining the validity of the gun control laws.[160]

V. JUDICIAL REFUSAL TO APPLY THE DOMESTIC VIOLENCE FIREARMS BANS

Although appellate courts have considered, thoroughly analyzed, and explicitly found that the actual or threatened loss of one's livelihood as a consequence of the Domestic Violence Firearms Bans is constitutionally insignificant, the practice amongst some judges is to protect batterers from unemployment or even to protect them from simply missing hunting season.[161] The result is judge-made law that disserves victims of domestic violence—historically, a common judicial practice.

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[156] *See, e.g.*, Fredheim, *supra* note 51, at 501-02 ("[A]n officer with a misdemeanor conviction of domestic violence . . . should not only be unable to carry a firearm or ammunition, but should not be a law enforcement officer. Period. It does not matter how long ago the predicate offense occurred. The Lautenberg Amendment works to close [a] loophole that police officers were previously able to use in acquiring and maintaining employment that required them to possess a firearm.").

[157] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (statement of Rep. John Conyers, Jr.), *at* http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_0.htm, 13 (last visited Nov. 27, 2004) (commenting that "if an officer is willing to beat his spouse," questions arise regarding his integrity in responding to domestic violence calls).

[158] Guns and Domestic Violence Congressional Hearing, *supra* note 2 (prepared testimony of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

[159] *Id.* ("Those who are responsible for enforcing the law should be expected to obey the law—no exemptions, no exceptions.")

[160] *See supra* Part IV.A.

[161] *See supra* text accompanying notes 4-8.

A. A Historical Perspective on Judicial Response to Domestic Violence

"Historically, there has been a dramatic difference between the written law and the law in practice regarding violence against wives."[162] Unfortunately, judicial discretion[163] "invariably offers the opportunity for preconceived, stereotypical gender notions and beliefs to influence decision making."[164] Despite specific findings of assault and battery, judges have long invented ways to protect batterers, including the application of judge-made laws to domestic violence occurrences.[165] A 1985 study documented widespread patterns of judges' noncompliance with state domestic violence laws, including "incorrect applications of the law, biased attitudes toward women, inappropriate denials of protective orders and inaccurate advice or ignorance of the law."[166]

B. Judicial Abrogation of Domestic Violence Statutes

1. State Statutes

Judges have the power to impede the implementation of progressive state domestic violence laws by both direct and indirect measures. Judges acting as factfinders—as they so often do in domestic violence cases—may refuse to find that the requisite violence existed to sentence a perpetrator or issue a civil order of protection. Judges may disallow certain probative evidence, or they may wholly ignore admitted evidence. Some judges even intentionally misapply the local statutes.[167] Even in jury trials, judges control the admission of evidence, jury instructions, and sentencing.[168]

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[162] Ptacek, *supra* note 21, at 3.

[163] Judicial discretion is discussed *supra*, Part I.

[164] Missouri Task Force on Gender and Justice, *supra* note 66, at 583.

[165] Judges have long created arbitrary rules when it comes to domestic violence. For example, almost two hundred years ago, a judge decided that a man was permitted to whip his wife with an object no wider than his thumb to enforce "domestic discipline." Bradley v. State, 1 Miss. 156 (1824).

[166] Ptacek, *supra* note 21, at 52.

[167] For example, judges may habitually disallow statutorily permitted remedies, such as child support, maintenance, and mandated counseling for batterers. *See, e.g.* 13 Mo. Rev. Stat. § 455.523.2 (2003), which provides remedies that judges sometimes ignore. For instance, in a protective order case in rural Missouri, the author was advised by a law clerk before the hearing to abandon her pursuit of obtaining child support for her client. According to him, although statutory law provided for child support in such cases, "country law" did not.

[168] *See* Judith Armatta, Getting Beyond the Law's Complicity in Intimate Violence Against Women, 33 Willamette L. Rev. 773 (Fall 1997).

When judges abrogate the state domestic violence laws, the federal firearms bans are never triggered, leaving victims unprotected from gun violence.

2. Federal Statutes

Judges also have the power to void the federal gun bans of their meaning and effect. For example, in Missouri's Thirteenth Judicial District, judges maintain that if an abuser consents at hearing to an order of protection against him, the federal firearms restrictions do not apply to him.[169] A literal reading of the statute provides no such latitude.[170] Moreover, once a federal domestic violence gun control measure has been violated, some judicial guidelines allow judges to reduce the offense level of the crime,[171] which, in turn, can allow them to "significantly reduce the [punishment] for . . . possession."[172] For example, if a judge finds that a firearm possessed in violation of the law was possessed solely for a sporting purpose, such as hunting or target shooting, he or she may reduce the offender's sentence significantly.[173] No logical reason exists for judges to reduce the punishment; a hunter or target shooter who is a batterer and has access to a gun is equally as dangerous—arguably more so, since his gun handling is polished by experience—as any other batterer.[174]

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[169] In the author's experience, this practice is used as a tool by both judges and lawyers to persuade respondents to agree to orders of protection, allowing them to keep their firearms, rather than go to trial and risk having the order imposed, whereby they would lose their firearms.

[170] *See* 18 U.S.C. § 922(g)(8) (2004).

[171] Both sentencing guidelines and local statutes can undermine the federal laws. For example, in Missouri, legislation prohibits the issuance of a concealed weapons permit (which, with exceptions, are otherwise lawful) to an individual who has been convicted of a misdemeanor domestic violence offense within the five-year period immediately preceding application for a certificate of qualification for a concealed carry endorsement. *See* H.B. No. 349, Missouri 92nd General Assembly. The state legislation implies that a domestic violence offender who committed his offense prior to the five-year period in the statute is eligible for a concealed carry endorsement. Of course, the federal statute imposes a lifetime prohibition on weapons or ammunition ownership, concealed or otherwise. Implicit in the state legislation is a message that the federal legislation will be ignored.

[172] U.S. v. Lewitzke, 176 F.3d 1022, 1029, n.7 (7th Cir. 1999).

[173] U.S. v. Mojica, 214 F.3d 1169, 1172-73 (10th Cir. 2000) (reason for possession of gun is a mitigating factor, though not a defense to conviction under § 922(g)(9)); Federal Sentencing Guidelines, USSG § 2k2.1(b)(2) ("If the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined."); *see also* Lewitzke, 176 F.3d at 1028.

[174] Federal Sentencing Guidelines, USSG § 2k2.1(b)(2), recommend a reduced sentence for a batterer who has a gun in violation of § 922(g) for "sporting purposes,"—which is to say he has the gun only for fun—but no such guidelines exist to reduce sentencing for a batterer who has a gun solely for his job or to provide for his family.

Both by their conduct at trial and in their discretion in applying the laws, judges take the teeth out of the Domestic Violence Firearms Bans.

C. Victim Biases

Local trial judges continue to disregard domestic violence laws, derailing the progress intended by the enactment of both the local laws themselves and the Domestic Violence Firearms Bans.[175] Notwithstanding the progressive gun control laws and the strong support of those laws by appellate courts, little has changed over the years in judicial attitudes toward victims of domestic violence. A recent study of battered mothers in Massachusetts[176] revealed "an enormous amount of ignorance and denial and bias" by judges.[177] The data showed that judges who adjudicate domestic violence trials regularly ignore the law and violate women's rights.[178] It reported "the same type of discrimination and biases [against battered women] as were found in the late 1980s . . . . Indeed, some were worse now."[179]

Judicial refusal to apply state domestic violence laws properly is due, at least in part, to individual judges' ingrained biases against battered women.[180] Judges, like anyone else, "operate from a lifetime of exposure to the myths that have long warped the public's attitude toward [domestic violence]."[181] Some judges discount the credibility of women because they

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[175] Gena L. Durham, The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem, 71 S. Cal. L. Rev. 641, 663 (Mar. 1998) (some judges "seem bent on creating their own ad hoc set of solutions"); Elena Salzman, The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention, 74 B.U. L. Rev. 329, 353-54 (Mar. 1994) (arguing that "judicial misbehavior presents the most significant obstacle to [a domestic violence prevention program's] successful operation").

[176] Battered Mothers' Testimony Project at the Wellesley Centers for Women, Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts (Nov. 2002), *at* http://www.wcwonline.org/wrn/batteredreport.html (last visited Nov. 27, 2004).

[177] Joan Zorza, Battered Mothers Speak Out About Court Injustices, 8 Domestic Violence Rep. 33, 34, 44 (Feb./Mar. 2003).

[178] *Id.* at 34.

[179] *Id.* at 45.

[180] *See, e.g.*, Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 Yale J. Law & Feminism 3 (1999).

[181] *Id.* at 6. As Justice Cardozo explained, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by." Benjamin N. Cardozo, The Nature of the Judicial Process, 168 (1921).

view women as unreasonable and overly emotional.[182] Some judges identify with the batterers[183] and can subconsciously side with them, or blame the victims for provoking the violence or failing to leave their abusers.[184] Some object to helping a victim who has previously requested and dropped protective orders or has refused to cooperate with prosecutors.[185] Others believe victims allege abuse to harass their partners or to obtain an advantage in pending domestic relations proceedings.[186] Some judges disagree with the existing sentencing laws[187] and can be induced to compensate batterers who suffer job loss due to these laws with monetary compensation from the victim when marriage assets are being divided.[188] And some believe that the abuse is merely a relationship problem,[189] not worthy of the court's attention,[190] or a private matter, the resolution of

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[182] Missouri Task Force on Gender and Justice, *supra* note 66, at 505 (observing that while one Missouri judge sometimes asks women in court if they like being beaten, other judges ask why the victim has not left the abuser if the abuse is so bad).

[183] In Huesers v. Huesers, 560 N.W.2d 219, 223 (N.D. 1997) (Maring, J. concurring), a concurring judge memorialized in writing her feelings that the victim's behavior "would have made most reasonable persons commit domestic violence."

[184] Judges have been known to ask victims what they had done to provoke their partners' abuse or to lecture female victims, implying their behavior caused their abusers' violence. Missouri Task Force on Gender and Justice, *supra* note 66, at 505.

[185] In Missouri, for example, the Missouri Task Force on Gender and Justice reports that "judges deny protective orders or refuse to waive the filing fee because previous requests have been dropped." *Id.* at 504.

[186] In reference to Missouri's Adult Abuse statute, one judge said, "This is a terrible law. Most (60-70 percent of female petitioners) don't even show up for the full order hearing. The law is used to gain advantage in pending domestic litigation." Cited by the Missouri Task Force on Gender and Justice, *supra* note 66, at 519.

[187] For example, judges sometimes gut the existing statutes so that the relief to the victim does not provide her with the help she is entitled to and needs in order to escape the abusive relationship. "[S]ome judges are reluctant to order child support, maintenance, supervised visitation, payment to shelters for housing and services to petitioners, and other remedies authorized by" the local adult abuse statute. *Id.* at 524.

[188] *See* In re Marriage of Muhammad, 79 P.3d 483 (Wash. Ct. App. 2003) (dividing marital assets heavily in favor of husband because another court had granted wife an order of protection which ultimately deprived husband of his job in law enforcement). The trial court stated, "she had to know . . . that if she proceeded with this protection order, that he was not going to have a job and he wasn't going to have an income and he wasn't going to be able to pay his debts, let alone the mortgage payments...She has to recognize the consequences and you can't just ignore the fact that there are consequences. Those consequences have been taken into consideration in terms of trying to make the distribution somewhat equitable." *Id.* at 484.

[189] In fact, a local judge in Missouri ruled against the author's client because, according to the judge, the abuse—which resulted in the victim's treatment at a hospital—"is just something that happens in a bad break-up."

[190] In State v. Busch, 669 N.E.2d 1125, 1128 (Ohio 1996), the court stated, "certainly, a court's resources in a domestic violence case are better used by encouraging a

which should occur in the privacy of the home.[191] For example, in Baltimore County, a man who had fatally shot his wife in the head was sentenced to a short term to be served weekends only; the judge commented that the worst part of his job was "sentencing non-criminals as criminals," as if shooting one's wife in the head is a non-criminal act.[192] The thread that ties together the reasons judges disregard and misapply domestic violence statutes is judicial ignorance; the only way to bring courts in line with the legislature is through judicial education. When the bias against the victims "comes from someone with the clout of a judge . . . it reinforces a woman's self-blame and assumes that under certain circumstances it is acceptable for a man to hit his partner. The message that couples need to receive consistently is that violence against an intimate is intolerable.[193]

D. The Trend Toward Relaxing Gun Control

The Domestic Violence Firearms Bans were passed despite a national trend of weakening gun control. Thirty-six states currently allow their citizens to carry concealed weapons,[194] and at least five of those states passed their laws within the past year.[195] In 2003, Alaska changed its gun

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couple to receive counseling and ultimately issuing a dismissal than by going forward with a trial . . . ." The judge's choice of family over the policy objectives stated by Congress is implicit in his preference for reuniting the offender and victim. By enacting domestic violence laws, Ohio's legislature eliminated judicial authority to make that choice.

[191] In her article, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, *supra* note 180 at 6-7, Deborah Epstein shares a personal experience directly on point, in which the presiding judge told the victim:

Ma'am, I credit your testimony, and am convinced that your husband assaulted you in violation of the law. As a result, I am authorized to award you a civil protection order, which could order him to stay away from you and stop hurting you. But I am not going to do that today . . . . I want you to go home and try to work things out in private. And I suggest that you go see a movie I saw recently called "Mrs. Doubtfire," where Robin Williams and his wife decide to separate but still manage to find a creative way to work together when it came to their children.

[192] For a detailed discussion of the case, *see* Lynn Hecht Schafran, There's No Accounting for Judges, 58 Alb. L. Rev. 1063 (1995).

[193] Missouri Task Force on Gender and Justice, *supra* note 66, at 506, quoting a St. Louis Women's Self Help Center spokeswoman.

[194] Ann M. Hynek, Conceal and Carry Not Such a New Thing, Missouri Digital News, Sept. 15, 2003, *at* http://mdn.org/2003/STORIES/GUNS3.HTM (last visited Nov. 27, 2004).

[195] NRA-ILA, Right to Carry 2004, *at* http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18 (Mar. 31, 2003) (last visited Nov. 27, 2004) (noting that Colorado, Minnesota, Missouri, and New Mexico each adopted "right to carry" laws in 2003; Ohio adopted one in 2004).

carrying law to mirror Vermont's lenient law, which allows individuals to carry concealed weapons without a permit.[196] Some towns are even *requiring* households to possess a gun and ammunition for home protection.[197] It should come as no surprise that, in this era of legislative support for gun possession, judges are disinclined to impose orders or sentences that will ultimately ban firearms possession.

"Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem."[198] Common misperceptions, like the belief that victims could leave the relationships if they wanted to and the resulting frustration with them for not leaving, lead to inherent biases against victims. Women encounter judicial ignorance in the forms of hostility and prejudice, which in turn prevents them from receiving justice and acts to condone the violence of their batterers.[199] Moreover, judges are adjudicating in a time of relaxed gun control. Therefore, making decisions that will ultimately prohibit an individual from possessing firearms, both at home and for his work, may seem excessive to them. Consequently, women are forced into more dangerous situations, the cycle of abuse continues, and the victims suffer significant psychological and physical harm.

VI. THE IMPACT OF THE JUDICIAL RESPONSE

The impact of a judge failing to adjudicate the facts fairly or to apply the state domestic violence laws and the federal firearms laws accurately can be physically dangerous and psychologically devastating for the victim.[200] Inappropriate judicial response is a systematic failure, and it perpetuates the extent and severity of violence against women.

A. Physical Dangers

By seeking protective orders, pressing charges against abusers, or simply cooperating with prosecutors, battered women assume "considerable

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[196] *Id.*

[197] Joyce Howard Price, Town Orders Guns in All Homes, Wash. Times, Nov. 25, 2003 (reporting that the town council of Geuda Springs, Kansas had passed a statute requiring all households to have firearms, and that Kennesaw, Georgia has had such a law in effect for over two decades). The Geuda Springs statute was subsequently vetoed by the mayor. *See* http://www.cnn.com/2003/US/Central/12/12/gun.veto.ap/ (last visited Nov. 24, 2004).

[198] Epstein, *supra* note 180, at 39.

[199] Armatta, *supra* note 168, at 805.

[200] *See* Ptacek, *supra* note 21, at 145-57.

risk."[201] "By claiming their rights under the law to be protected from violence, they . . . challeng[e their abusers'] control over their lives."[202] Abusers seek "vengeance against women for being held accountable to the law."[203] When dangerous batterers are excused of their behavior by an improper denial of a protective order or a wrongful exculpation of a criminal defendant, the experience is likely to enrage them while sanctioning their violence, triggering additional—and even more severe—violence.

The ultimate backfiring of the Domestic Violence Firearms Bans occurs when a batterer recognizes he can use the potential impact on his employment to his advantage. A manipulative abuser can exploit his employment—or even prospective employment—as an informal defense to a misdemeanor charge of domestic violence and as a practical response to a petition for a protective order against him. If losing his gun license affects his employment, he can argue that an order or conviction against him will jeopardize the family income and the wellbeing of *all* the family members. If the judge in such a case properly applies the state criminal or domestic relations laws, the federal firearms bans will jeopardize the family's support.[204] The judge's other option is to contravene the state laws, thereby protecting the family income, but putting the victim at a continued risk of violence. Unfortunately, judges in such cases often see their job as consisting of "more than adjudicating the facts,"[205] and choose the latter course of action.

Judges who refuse to issue protective orders or to convict perpetrators of domestic violence in order to protect an abuser from losing his job endanger the lives of victims. They allow offenders to return to their victims' homes, affording them unlimited access to their victims and to the availability of guns. They thereby rob victims of the protection offered not

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[201] *Id.* at 146.

[202] *Id.*

[203] *Id.* at 85. Women commonly fear that taking legal action will only provoke retaliatory violence. In a study by Ptacek, twelve percent of women who accounted for the motives of their abusers identified a connection to legal actions they had taken. *Id.* at 84. "He thought I called the police . . . and he grabbed me, dragged me by my hair into the kitchen and threatened to kill me . . . with kitchen knives." *Id.*

[204] *See* Hanna, *supra* note 20, at 1557 (discussing "punch and pay" theory, under which criminal prosecution of domestic violence yields to treatment programs so as not to risk the family income).

[205] Judge Austin T. Philbin, Domestic Violence and Abuse in Massachusetts: A Survey, 24 New Eng. L. Rev. 713, 713 (Spring 1990). Although Judge Philbin's intentions—that domestic violence cases require special attention and sensitivity—are honorable, his statement is dangerous. Judges are neither recommended nor permitted to consider more than the facts at issue and the applicable law. *See, e.g.*, Mo. Rev. Stat. § 455.050.3 (2003) (allowing courts issuing orders of protection to award a wide range of supplemental remedies, including custody, visitation, and support).

only by §§ 922(g)(8) and (g)(9), but also the protection intended for the victims by the underlying statutes—the protective order statutes and the domestic violence criminal law statutes.[206]

B. Psychological Impact

When judges disregard domestic violence laws in response to the impact of §§ 922(g)(8) or (g)(9), they not only endanger the physical safety of the victims, but they also precipitate victims' frustration with the court system, reluctance to seek public sources of support, and psychological devastation. Judges, as the "ultimate gatekeepers of the...justice system,"[207] convey societal norms and the proper moral standards to the parties who come before them. Their attitudes of indifference or disrespect to the domestic violence laws hinder the achievement of justice, both directly in the cases over which they preside, and indirectly by what they generally convey to victims and batterers in the community. "The fact that this happens at the end of a lengthy and, for the victim, traumatic proceeding, combined with the prestige accorded judges," proves psychologically destructive to victims.[208]

Improperly denying orders of protection or dismissing criminal domestic violence misdemeanors may discourage abused women from pursuing other victim support, such as psychological services, vocational training, or safe shelter. Moreover, if local judges have a reputation for not taking the issue of domestic violence seriously, other women may be dissuaded altogether from seeking help through the justice system, and abusers will not be deterred from committing abuse.

One judge writes, "[J]udges are a very important part in setting the tone for legal proceedings . . . . The judge must reflect the proper temperament . . . "[209] Judges who discount the written law implicitly communicate that domestic violence is a trivial concern, not worthy of attention from the justice system, and not socially harmful. By failing to apply domestic violence laws properly, judges trivialize the illegality of domestic violence and erode any deterrent effect of the legislation.[210]

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[206] When courts deny a protective order for fear of the gun bans' impact, the victim loses not only the physical protection promised by a civil protective order, but also all of the other remedies, such as custody provisions and safe visitation arrangements, that she is statutorily entitled to receive.

[207] Armatta, *supra* note 168, at 826.

[208] *Id.*

[209] Fritzler & Simon, *supra* note 20, at 174.

[210] For further discussion on deterrence and punishment theory, see Durham, *supra* note 175, at 649.

C. Financial Considerations

In a sincere belief that the financial consequences the victim suffers if the federal gun bans apply are worse than the physical abuse she may suffer, some judges may find in favor of abusers. Even some domestic violence activists favor this approach.

According to one activist, a "problem with many current domestic violence laws . . . is the tendency to ignore the importance of women's economic subordination in their vulnerability to battering."[211] If a batterer loses his job because he cannot possess a firearm pursuant to §§ 922(g)(8) or (g)(9), the victim and her children will suffer the loss of child support, maintenance, and health care benefits that they are entitled to receive from him. Moreover, she will suffer an increased likelihood of physical danger since unemployed batterers are "more likely to engage in repeat violence."[212] Financial dependence is such a powerful force of trapping victims in battering relationships that one author argues that laws "diminish[ing] battered women's material resources should be eliminated."[213] Laws meant to help battered women can be used against them and become yet another "tool of the abuser."[214]

These views are paternalistic at best. Even if the cause of judicial behavior is noble, making false findings or misapplying state domestic relations or criminal law is not within a judge's discretion. The federal legislature made a clear and measured decision to prioritize women's physical safety above their or their batterers' financial security. An improper judicial decision may ensure a batterer or his victim financial security, but it also allows that batterer access to his victims as well as to firearms, at a time when he is likely angry at his victim for challenging his control of her by seeking help through the judicial system.

In recognition of the potential financial consequences of the federal firearms laws, a victim may decide not to call the police, cooperate with the prosecutor, or file for a protective order, for fear that her actions will force her batterer out of a job, rendering her unable to collect financial support. However, that is her decision to make—not the judge's.[215]

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[211] Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. Davis L. Rev. 1009, 1015 (Summer 2000).

[212] *Id.* at 1017.

[213] *Id.* at 1053.

[214] Armatta, *supra*, note 168, at 792.

[215] The author's client filed for an order of protection against her sexually and physically abusive husband, who happened to be a pilot. During discussions, she said, "If I don't walk out of [court] with an order of protection, he's going to beat the shit out of me." The respondent's attorney insisted that an order of protection against the respondent would

The failure of some judges to apply domestic violence law properly poses an unacceptable risk to abuse victims. Judges who misapply state laws simply to prevent the applicability of the federal laws must be held accountable.

VII. JUDICIAL EDUCATION AND ACCOUNTABILITY

In the realm of domestic violence law, both scholars and the public tend to overlook the very premise upon which the judicial system is based: judges do not have the discretion to ignore or circumvent applicable laws.[216] The legislature explicitly concluded that judges are not qualified to determine an individual's propensity for violence, and for that reason, the legislature drew a bright line. An appellate court, in this precise context, has made the point clearly and succinctly: "Distinctions [concerning the propensity of batterers to commit gun violence] are for lawmakers, rather than judges to make."[217] Disregarding entirely the very finite limits of their powers, some judges go so far as to cross out the language contained on orders of protection that notify batterers of the federal firearms prohibitions.[218]

With the enactment of the Domestic Violence Firearms Bans, the legislature has taken great strides forward, but "a law is only as good as the system that delivers on its promises, and the failure of courts . . . to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence."[219]

While the formation of domestic violence units and mandatory arrest policies have improved police response to domestic violence, and no-drop policies have improved prosecution of domestic violence, no parallel

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cause him to lose his job and the family's primary income. The client consequently dropped the protective order, exposing herself to the risk of weaponless violence as well as firearm violence. Frustrating on some levels, the decision was the client's. Only she can weigh the risks and benefits of the effects of § 922(g)(8) on her particular set of circumstances. Ultimately, she must be trusted to make that decision.

[216] People v. Adams, 747 N.Y.S.2d 909, 919 (Sup. Ct. 2002) (recognizing that the court does not have discretion to disregard the federal statute that bars possession of a firearm by defendant who has a history of domestic abuse).

[217] U.S. v. Lewitzke, 176 F.3d 1022, 1026 (7th Cir. 1999).

[218] Michelle N. Deutchman, Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218, 75 S. Cal. L. Rev. 185, 209 (Nov. 2001).

[219] Epstein, *supra* note 180, at 4. Domestic violence scholarship widely recognizes that "the effectiveness of [the] . . . legislative response is . . . dependent on the attitude of the judiciary." Armatta, *supra* note 168, at 813, 821 (discussing the use of police forces and commenting that "changes in law and policy have not always translated to changes in action"). *See also* Nelson, *supra* note 42, at 381 ("Legislative action is only half the story . . . Quite possibly the most tragic element of domestic violence is the response its victims have received from society, the criminal justice system and the courts.").

progress has been made within the judiciary.[220] Moreover, because victims of domestic violence often are not represented and are unlikely to appeal, judges escape accountability for their failures to apply state laws accurately and trigger the federal firearms bans.[221] One potential solution is developing additional integrated domestic violence courtrooms, where the judges and courtroom personnel handle only domestic violence issues. A second is requiring judges to record all portions of a hearing and make written findings, which would provide a full record upon which appeals could be based. A third is educating judges who hear adult abuse and criminal domestic violence cases with mandatory domestic violence training, increasing their sensitivity and understanding of both the issue of domestic violence and the laws that relate to it.

Requiring judges to make written findings is a weak solution. Although such requirements theoretically would expose judges to review and accountability, victims without representation would still lack the legal resources to challenge illegitimate decisions. Even if decisions were appealed and reversed, the judges themselves rarely receive censure or discipline for even the most outrageous decisions, and therefore they have little reason to change their practices.[222]

Integrated domestic violence courtrooms, though invaluable assets to the judicial system, are implausible as a panacea. Integrated domestic violence courts have been widely applauded for facilitating court access,[223] coordinating legal and community services for victims and children, managing treatment for batterers,[224] and ensuring the sensitivity and expertise of judges and courtroom personnel.[225] However, the systems are costly everywhere and entirely impractical in rural areas.

A more effective answer is judicial education. Courts are in a unique position to affect the situations of many victims every time they issue verbal directives, written orders, and even when they make offhand

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[220] *See* Epstein, *supra* note 180, at 4-5. Deplorably, "[i]n contrast to the remarkable progress made by legislators, those responsible for applying and enforcing the law . . . have lagged far behind," and the system is "unresponsive and oriented toward non-enforcement."

[221] Schafran, *supra* note 192, at 1068-69 (asserting that judges are the "weakest link" in the chain of protection for battered women).

[222] *Id.* at 1065 (contending that judges making decisions in domestic violence cases recognize the near anonymity of their opinions and the unlikelihood that they will face review).

[223] *See* Fritzler & Simon, *supra* note 20, at 145 (observing that one benefit of integrated courts is that they recognize the danger of gun possession; one risk factor used by integrated domestic violence court judges is the defendant's access to or ownership of guns).

[224] *Id.* at 145.

[225] *See* Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, 69 UMKC L. Rev. 33, 40 (Fall 2000).

comments from the bench;[226] informing the judiciary can only bring favorable results.[227] Domestic violence educators believe the reasons the judiciary misapplies and circumvents the law stems from a lack of sensitivity to domestic violence victims, unawareness of the relevant social issues, and ignorance of the law.[228] Educating judges about the psychology and pathology of domestic violence increases their compassion toward and understanding of the surrounding issues and equips them to ensure victims' safety.

Although judges are presumed to be knowledgeable about the applicable law, they may not understand the statistical impetus behind the law and the implications of enforcing or ignoring the law. Educating judges about both the local domestic violence laws and the federal laws that are triggered by their decisions alerts them to the value of protecting victims of domestic violence. Moreover, if judicial education results in the correct application of the laws, some level of consistency is reached on a systemic level. This prevents victims' frustration with the judiciary's apparent arbitrariness, ensures their safety, and encourages them to use the judicial system to escape violent relationships. Consistency across the judiciary ultimately serves to strengthen the legitimacy of the justice system, which in turn bolsters respect for the judiciary and its orders.[229]

VIII. CONCLUSION

The Domestic Violence Firearms Bans prevent those with a propensity to commit domestic violence from using guns in domestic disputes. The enactment of the bills represented tremendous progress in safeguarding the lives of victims of domestic abuse, and the laws have been found constitutionally sound time and again.

However, the laws have backfired. The practical impact of the federal firearms bans, when triggered, is to deprive some abusers—such as police officers, security guards, pilots, and members of the military—not only of their firearms, but also of their employment. Rather than properly applying state laws that would trigger the federal statutes, some judges misapply the state laws for the very purpose of circumventing the

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[226] Sean D. Thueson, Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?, 4 Wyo. L. Rev. 271, 302 (2004).

[227] See Schafran, *supra* note 192, at 1072-76, for a discussion on the general and specific benefits of judicial training on the dynamics of domestic violence and on domestic violence laws.

[228] *See* Deutchman, *supra* note 218, at 209-210. "Judges must understand the role that guns, gun violence, and the threat of gun violence plays in domestic violence relationships, as well as the increased risks posed by allowing respondents to keep their firearms while under a protective order." *Id.* at 227.

[229] Fritzler & Simon, *supra* note 20, at 169.

application of the federal firearms bans. Consequently, victims of domestic violence not only lose the protection afforded them by the federal firearms bans, but also the protection and remedies afforded them by state civil protective order statutes and state domestic violence criminal statutes. Some judges abuse their discretion and thereby impede the change and the progress intended by the enactment of the Domestic Violence Firearms Bans.

Legal reform does not end with the passing of legislation; it cannot be attained without the judiciary's support. Therefore, judicial education and accountability are the keys to ensuring that the statutes are triggered and applied when they are properly warranted. "A well-informed and unbiased judiciary can provide justice while helping to change societal attitudes about the historically permitted crime of domestic violence."[230] Although judicial cooperation with the laws may create significant financial burdens for abusers and even for victims, those costs do not outweigh the benefit of protecting the safety of victims of domestic violence.

[230] Armatta, *supra* note 168, at 826.