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Disarming Abusers and Triggering the Sixth Amendment: Are Domestic Violence Misdemeanants Guaranteed the Right to a Jury Trial?

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DISARMING ABUSERS AND TRIGGERING THE SIXTH AMENDMENT: ARE DOMESTIC VIOLENCE MISDEMEANANTS GUARANTEED THE RIGHT TO A JURY TRIAL?

*Julia Hatheway**

Domestic violence is a global issue, but in the United States it is especially lethal. Hundreds of women are shot and killed in the United States by intimate partners every year. Federal and state legislatures have enacted laws that focus on the issue of domestic violence and gun violence. In 1996, Congress passed the Lautenberg Amendment to the Gun Control Act of 1968, which permanently prohibits individuals convicted of domestic violence misdemeanors from possessing firearms. Twenty-nine states and the District of Columbia have also enacted laws that mirror the Lautenberg Amendment. In many jurisdictions, misdemeanor domestic violence convictions carry a maximum prison term of six months. Such offenses are deemed "petty" and do not entitle the accused to the procedural right to a jury trial. Following the enactment of domestic violence misdemeanor firearm prohibitions, misdemeanants have challenged their convictions. They have argued that the firearm prohibitions are so severe that they upgrade the offenses to serious offenses and require jury trials under the Sixth Amendment. Most courts have found that the firearm prohibitions are not so severe that they guarantee the right to a jury trial. However, a minority of courts have determined and some scholars argue that the firearm prohibitions are severe and therefore guarantee the right to a jury trial.

This Note examines U.S. Supreme Court jury trial precedent and scholarship on collateral consequences to consider whether firearm prohibitions upgrade domestic violence misdemeanor offenses. Focusing on Supreme Court precedent, legislative intent, and the movement to incorporate collateral consequences into criminal procedure, this Note argues that domestic violence misdemeanants, charged with presumptively petty offenses and subject to permanent firearm prohibitions, are not guaranteed the right to a jury trial.

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INTRODUCTION

In November 2001, Rocky Mosure murdered his wife, Michelle Monson Mosure, and their two young children.[1] Michelle was twenty-three at the time, and her two children were six and seven years old.[2] On the day of the murders, Rocky purchased a gun, returned to the family home, and killed his wife and children before shooting himself.[3]

In early 2003, after years of abuse, Crystal Brame filed for divorce against her husband, Tacoma Police Chief David Brame.[4] In April 2003, David murdered Crystal in front of the couple's two children before shooting himself.[5]

On Christmas Eve in 2016, seventeen-year-old Heather King went to break up with her twenty-two-year-old boyfriend, Matthew Wilson.[6] Wilson shot and murdered Heather before killing himself.[7]

These women's stories are sadly not unique. In the United States, hundreds of women are shot and killed by their intimate partners every year.[8] And each year, over ten million adults experience domestic violence or intimate partner violence (IPV).[9] Domestic violence is commonly defined as a pattern of abusive behavior perpetrated against an intimate partner to maintain power and control over that individual.[10] This behavior can include physical, sexual, emotional, psychological, and economic abuse, among

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1. RACHEL LOUISE SNYDER, NO VISIBLE BRUISES: WHAT WE DON'T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US 2–3 (2019).
2. *Id.* at 3.
3. *Id.* at 75–76.
4. Jerry Mitchell, *Most Dangerous Time for Battered Women?: When They Leave*, CLARION-LEDGER (Jan. 28, 2017, 7:01 PM), https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552/ [https://perma.cc/ZT4S-S23Y].
5. *Id.*
6. *Id.*
7. *Id.*
8. *See* EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 4 (2019), https://everytownresearch.org/wp-content/uploads/sites/4/2019/10/IPV-for-WEB-042921A-1.pdf [https://perma.cc/T3NB-RXJW].
9. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, NATIONAL STATISTICS DOMESTIC VIOLENCE FACT SHEET 1 (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457 [https://perma.cc/7GC2-QUET]. Although the terms "IPV" and "domestic violence" are often used interchangeably, domestic violence often refers broadly to all violence between family members or violence that takes place in the home, while IPV refers to violence between intimate partners. EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 6. For consistency, this Note uses the term "domestic violence" throughout.
10. *Id.*

other forms of abuse.[11] It is estimated that one in four women and one in ten men have been abused by an intimate partner in the United States.[12]

The presence of guns in domestic violence situations often has lethal results. The risk of domestic violence homicide increases by 400 percent when the abuser has access to a gun.[13] On average, abusers shoot and kill fifty-seven women in the United States each month.[14] Almost one million women have been shot or shot at by an intimate partner.[15] And this number is increasing. Between 2008 and 2017, the number of female domestic violence homicides increased by 15 percent.[16] Women of color, including Black, Native American, and Hispanic women, are more likely to be shot at or killed by an intimate partner than white women.[17]

Access to guns coupled with domestic violence not only leads to the murder of intimate partners but also is closely connected to mass shootings. More than 50 percent of the individuals who carried out mass shootings in the last ten years killed an intimate partner or family member.[18] Thus, prohibiting abusers' access to guns is important to protect victims of domestic violence and to reduce gun violence.

However, because the right to keep and bear arms is enshrined in the Second Amendment of the U.S. Constitution,[19] firearm prohibitions, which infringe a constitutionally protected right, are a contentious issue and are frequently challenged in court.[20] One challenge that has emerged before a few state and federal courts is based on the argument that permanent firearm prohibitions that result from misdemeanor criminal convictions are so serious a penalty that the accused must be guaranteed the Sixth Amendment right to a jury trial.[21]

This Note analyzes the argument that the government cannot restrict an individual's Second Amendment right, while simultaneously denying the individual's Sixth Amendment right to a jury trial. Specifically, this Note considers the issue of whether a penalty restricting an individual's Second Amendment right, stemming from a misdemeanor conviction, triggers the

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11. *See id.* Not all acts of domestic abuse are illegal and thus are not criminally prosecuted. Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, ONLINE J. ISSUES NURSING, Jan. 2002, https://ojin.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.aspx [https://perma.cc/X4X2-C3XV].

12. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 9, at 1.

13. *Id.*

14. EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 4. While domestic violence affects men, women, children, nonbinary, and gender nonconforming individuals, and can be perpetrated by anyone, domestic violence is overwhelmingly perpetrated by men against women. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 9, at 1.

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

16. *Id.* at 9.

17. *Id.* at 16–17.

18. *Id.* at 5.

19. U.S. CONST. amend. II.

20. *See infra* Part I.B.2.

21. *See infra* Parts II.A.1–2, II.B.1–2.

individual's Sixth Amendment jury trial right as it pertains to domestic violence misdemeanors.

This Note proceeds in three parts. Part I provides relevant background information regarding Sixth Amendment and Second Amendment jurisprudence and the history of federal and state legislation that seeks to prohibit domestic abusers' access to firearms. Part II examines two opposing perspectives on whether permanent firearm prohibitions that apply as a result of a domestic violence misdemeanor conviction are such serious penalties that they upgrade a presumptively petty offense to a serious offense and trigger the right to a jury trial under the Sixth Amendment. Part III argues that a court presented with this question should find, based on Sixth Amendment precedent, that a firearm prohibition stemming from a misdemeanor domestic violence conviction does not trigger the accused's jury trial right. Part III also recommends that Congress, state legislatures, and domestic violence advocates focus on enforcing firearm prohibitions and enhancing civil protection orders that prohibit abusers from possessing firearms to enhance domestic violence victims' safety.

I. THE SIXTH AND SECOND AMENDMENTS AND DOMESTIC VIOLENCE FIREARM PROHIBITIONS

Part I presents relevant Sixth and Second Amendment jurisprudence and details the enactment and scope of federal and state legislation intended to restrict domestic abusers' access to firearms. Part I.A discusses the U.S. Supreme Court's Sixth Amendment jurisprudence, specifically the cases that established and refined the applicable test to determine when a defendant's Sixth Amendment jury trial right is triggered by noncarceral penalties. Part I.B reviews the Court's Second Amendment jurisprudence, including two of the Court's decisions that expanded the interpretation of the right to bear arms, and discusses lower courts' applications of different levels of scrutiny to Second Amendment challenges. Part I.C introduces federal and state legislation that restrict abusers' access to firearms.

A. The Sixth Amendment: The Right to a Jury Trial for Serious Offenses

The Sixth Amendment right to a jury trial[22] in criminal cases provides a check on the government's power to criminally prosecute individuals.[23] The jury trial right acts as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[24] However, early Supreme Court precedent established that, despite the text of the Sixth Amendment providing the right to an impartial jury in all criminal prosecutions, not all criminal defendants are guaranteed the right to a jury

22. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

23. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

24. *Id.* While the Sixth Amendment lists multiple rights afforded to an individual facing a criminal prosecution, this Note focuses only on the right to a jury trial. *See* U.S. CONST. amend. VI.

trial.[25] The rationale for restricting this procedural protection to certain offenses rests on the notion that in less serious cases, the accused benefits from an expeditious and inexpensive adjudication, which also lends greater efficiency to the court system.[26]

The Supreme Court has long distinguished between petty and serious offenses, finding that only the latter trigger the accused's right to a jury trial.[27] In the nineteenth and early twentieth centuries, the Court relied on precedent established at English common law and at the time the Constitution was drafted to distinguish petty from serious offenses.[28] The Court focused on the nature of the offense, the penalty imposed, and the treatment of similar penalties and offenses at common law to determine whether an offense was petty or serious.[29] In the second half of the twentieth century, the Court began to expound a test to distinguish petty from serious offenses.

1. Distinguishing Petty Offenses from Serious Offenses

In *Duncan v. Louisiana*,[30] the Supreme Court held that the right to a jury trial in criminal prosecutions is fundamental to the American scheme of justice and was incorporated against the states under the Fourteenth Amendment.[31] The Court emphasized the history of the jury trial right and precedent at common law, as well as its establishment in both Article III and the Sixth Amendment to the Constitution.[32] The Court held that the jury trial right for "serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[33] However, the Court cautioned that the jury trial right did not extend to all crimes.[34]

Turning to the issue of petty offenses, the Court reaffirmed its previous decisions[35] and recognized that there were offenses to which the Sixth Amendment right to a jury trial did not extend.[36] While recognizing the important role of the jury trial to protect the accused from injustice, the Court also noted that, in some situations, an efficient and inexpensive nonjury

25. *See* District of Columbia v. Clawans, 300 U.S. 617, 624–27 (1937); Schick v. United States, 195 U.S. 65, 69–70 (1904); Callan v. Wilson, 127 U.S. 540, 555 (1888).

26. *See Duncan*, 391 U.S. at 158–60.

27. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 543–44 (1989); Baldwin v. New York, 399 U.S. 66, 70 (1970); *Duncan*, 391 U.S. at 157–58; *Clawans*, 300 U.S. at 624–27; *Schick*, 195 U.S. at 69–70; *Callan*, 127 U.S. at 555.

28. *See Clawans*, 300 U.S. at 625–26; *Schick*, 195 U.S. at 69–70; *Callan*, 127 U.S. at 557.

29. *See Clawans*, 300 U.S. at 623–25; *Schick*, 195 U.S. at 67–68; *Callan*, 127 U.S. at 556.

30. 391 U.S. 145 (1968).

31. *Id.* at 149.

32. *Id.* at 151–57.

33. *Id.* at 158.

34. *Id.* ("[W]e hold no constitutional doubts about the practices . . . of . . . prosecuting petty crimes without extending a right to jury trial").

35. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 543–44 (1989); Baldwin v. New York, 399 U.S. 66, 70 (1970); *Duncan*, 391 U.S. at 157–58; District of Columbia v. Clawans, 300 U.S. 617, 624–27 (1937); Schick v. United States, 195 U.S. 65, 69–70 (1904); Callan v. Wilson, 127 U.S. 540, 555 (1888).

36. *Duncan*, 391 U.S. at 159.

adjudication outweighed this concern.[37] The Court suggested it need not establish an absolute rule demarcating petty from serious offenses; however, it nevertheless suggested that the appropriate line was a potential prison term falling somewhere between six months and one year.[38] In doing so, the Court held that the potential maximum authorized penalty, not the penalty actually imposed, was the relevant criteria to distinguish petty from serious offenses.[39] The Court also focused on the legislature's intent, stating that "[t]he penalty authorized by the law of the locality" reflected the legislature's perception of the offense in question.[40]

Two years after *Duncan*, the Court decided *Baldwin v. New York*,[41] where it explicitly established the line distinguishing petty from serious offenses.[42] The Court held that a potential prison sentence of more than six months signaled that the offense was serious and triggered the accused's Sixth Amendment jury trial right.[43] In doing so, the Court held that New York could not deny misdemeanants the right to a jury trial when they faced a potential prison term of six months to one year.[44]

In its analysis, the Court held that the severity of the maximum potential penalty for an offense was the most pertinent factor to consider when distinguishing petty from serious offenses.[45] The Court reasoned that the six-month line was consistent with federal procedure, the system in place at the time the Constitution was drafted, and the practices of the majority of states.[46] The Court further explained that the significant protections afforded by a jury trial, especially the prevention of government oppression, became particularly significant when individuals could be deprived of their liberty for more than six months.[47] While the Court recognized that establishing a strict dividing point was to some degree arbitrary, it nevertheless held that six months appropriately reflected a balancing point between the degree of restriction on individual liberty requiring greater protection against government oppression and the benefits of a speedy, efficient, and inexpensive nonjury adjudication.[48] The following section introduces the Court's jury trial analysis as it applies to noncarceral penalties.

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37. *Id.* at 158–60.
38. *Id.* at 159–61. The Court recognized that the federal system drew this line at six months, which was consistent with practices in the eighteenth century, and that forty-nine states drew the line at one year. *Id.* at 161.
39. *Id.* at 159–60.
40. *Id.*
41. 399 U.S. 66 (1970).
42. *Id.* at 69.
43. *Id.* ("[W]e have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized.").
44. *Id.* at 69–74.
45. *Id.* at 68.
46. *Id.* at 71–72.
47. *Id.* at 72.
48. *Id.* at 73–74.

2. Presumptively Petty Offenses and Noncarceral Penalties

In *Blanton v. City of North Las Vegas*,[49] the Supreme Court held that an offense with a maximum prison term of six months was presumptively petty and that additional penalties attached to a conviction could enhance the offense to become a serious offense if the additional penalties clearly demonstrated that such was the intent of the legislature.[50] The Court clarified that "penalty" referred to the maximum period of incarceration, as well as to fines, license suspensions, or community service requirements.[51]

In *Blanton*, Melvin R. Blanton and Mark D. Fraley were separately charged with driving under the influence of alcohol.[52] Both Blanton and Fraley requested jury trials, which the municipal court denied.[53] On appeal, the district court denied Blanton's jury trial request but granted Fraley's.[54] On appeal to the Supreme Court of Nevada, Blanton argued that the additional penalties imposed entitled him to a jury trial.[55] The Supreme Court of Nevada determined that even with the additional penalties—namely community service as an alternative to a maximum six-month prison term, a ninety day driver's license suspension, a $1000 fine, and a required alcohol abuse course—the accused were not guaranteed the right to a jury trial under the Sixth Amendment.[56] The Supreme Court agreed.[57]

The Court identified that the most relevant measure to determine whether an offense was serious or petty was the maximum potential penalty, specifically the maximum potential prison term the accused might face.[58] The Court explained that the measure provided an objective reflection of the legislature's determination that an offense is petty or serious.[59]

The Court further recognized that other potential penalties imposed by the legislature demonstrated the perceived pettiness or seriousness of the offense.[60] However, it reaffirmed that the maximum period of incarceration remained the most important measure.[61] The Court reasoned that the severity of the loss of liberty that resulted from a prison term longer than six months was uniquely different from other penalties that restricted individual freedoms.[62] Thus, an additional statutory penalty likely would only upgrade a presumptively petty offense to the level of a serious one if it was "so severe" to unquestionably demonstrate the legislature's intent that the offense was

49. 489 U.S. 538 (1989).
50. *Id.* at 543.
51. *Id.* at 542.
52. *Id.* at 540.
53. *Id.*
54. *Id.*
55. *Id.* at 540–42.
56. *Id.* at 539–40.
57. *Id.* at 543.
58. *Id.* at 541.
59. *Id.*
60. *Id.* at 542.
61. *Id.*
62. *Id.*

serious.[63] The Court also noted that while many penalties infringe on an individual's rights, this infringement is not comparable to the loss of liberty that results from an extended prison sentence.[64] The Court acknowledged that this standard was ambiguous but held that the penalties imposed on a DUI (driving under the influence) misdemeanant in Nevada did not demonstrate that the legislature intended to elevate the offense to a serious offense.[65]

After *Blanton*, the Court has never held that a noncarceral penalty upgrades a petty offense to a serious offense triggering the right to a jury trial.[66] The Court has found that a defendant, charged with multiple petty offenses, is not guaranteed the right to a jury trial.[67] It has also held that a $5000 fine and a five-year probation term as a prison alternative do not upgrade a presumptively petty offense.[68] In that decision, the Court recognized that additional penalties, including fines and probation terms, do not "approximate in severity the loss of liberty that a prison term entails."[69]

3. Collateral Consequences and the Sixth Amendment

The Court's decision in *Blanton* presented a framework for how courts should assess collateral consequences, or noncarceral penalties, when addressing the severity of the offense at issue and the right to a jury trial. Collateral consequences are penalties or restrictions imposed on criminal defendants, such as license restrictions, firearm prohibitions, sex offender registration, public benefit eligibility, and deportation for noncitizens.[70] Thousands of state and federal laws and regulations affect ex-offenders by creating collateral consequences.[71] These consequences are often justified and promoted as regulations intended to increase public safety.[72]

Collateral consequences are distinguished from "direct" penalties, specifically incarceration, because the former are labeled as civil penalties and traditionally are not considered in the sentencing of defendants.[73] This distinction has been widely accepted and adopted into criminal procedure.[74] The collateral consequences rule established the requirement that defense

63. *Id.* at 543.
64. *Id.* at 542.
65. *Id.* at 543–44.
66. Kansas v. Woolverton, 371 P.3d 941, 944 (Kan. Ct. App. 2016).
67. Lewis v. United States, 518 U.S. 322, 327 (1996).
68. United States v. Nachtigal, 507 U.S. 1, 5–6 (1993).
69. *Id.* at 5 (quoting *Blanton*, 489 U.S. at 542).
70. Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 240–42 (2018).
71. *See* John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, FEDERALIST SOC'Y REV., Jan. 2018, at 36, 37.
72. Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences*,*"* 59 HOW. L.J. 341, 370 (2016).
73. Malcolm, *supra* note 71, at 37.
74. *See* Kaiser, *supra* note 72, at 359–60.

counsel need only inform a criminal defendant of direct consequences resulting from a conviction or plea, not collateral consequences.[75]

Many scholars argue that the distinction between direct and collateral consequences is misguided and incoherent.[76] Critics argue that collateral consequences are not only ineffective but also are often as, if not more, burdensome and punitive than the direct consequences criminal defendants face.[77] These penalties can last longer than a prison term and can be permanent.[78] As such, critics have argued that criminal procedure should no longer ignore noncarceral penalties.[79]

One of the Court's decisions may demonstrate a trend toward incorporating such consequences into criminal procedure and eliminating the distinction between collateral and direct consequences.[80] In *Padilla v. Kentucky*,[81] the Supreme Court held that constitutionally competent counsel was required to advise a client if a conviction by guilty plea could result in deportation.[82] The Court also recognized that the direct-collateral dichotomy was not applicable to deportation, given its close relationship with the criminal process.[83] This decision, which requires deportation to be addressed in criminal procedure, moves away from the direct-collateral distinction and contradicts the collateral consequences rule.[84]

While the Court has not recently considered whether criminal defendants have the right to a jury trial in prosecutions where a conviction will result in the defendant's deportation, lower courts have considered this issue.[85] In *Bado v. United States*,[86] the U.S. Court of Appeals for the District of Columbia Circuit held that the Sixth Amendment guarantees the right to a jury trial to a defendant charged with a deportable offense, regardless of the maximum authorized prison term.[87] The court reasoned that the consequence of deportation was sufficiently severe that it transformed a presumptively petty offense into a serious offense, triggering the accused's Sixth

75. *Id.* at 359.

76. Chin, *supra* note 70, at 258; Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 21 (2019); Kaiser, *supra* note 72, at 343; Malcolm, *supra* note 71, at 36–37.

77. Kaiser, *supra* note 72, at 343–46; *see also* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").

78. *See* Kaiser, *supra* note 72, at 342–44.

79. *See* Crane, *supra* note 76, at 21–22.

80. Kaiser, *supra* note 72, at 344.

81. 559 U.S. 356 (2010).

82. *Id.* at 359–60.

83. *Id.* at 365.

84. Crane, *supra* note 76, at 25.

85. *See* United States *ex rel.* Turner v. Williams, 194 U.S 279, 290 (1904) (stating that "the provisions of the Constitution securing the right of trial by jury have no application" to deportations).

86. 186 A.3d 1243 (D.C. 2018). For a more thorough discussion of this issue, see Emily Ahdieh, Comment, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to a Jury Trial*, 30 GEO. MASON C.R.L.J. 65 (2019).

87. *Bado*, 186 A.3d at 1260.

Amendment jury trial right.[88] The court found that deportation was a severe penalty, in some cases having more damaging effects than incarceration.[89] In *People v. Suazo*,[90] the New York Court of Appeals came to the same conclusion as the court in *Bado*.[91] The court determined that defendants facing deportation as a result of conviction must be guaranteed a jury trial under the Sixth Amendment.[92]

Part I.A focused on the Court's jurisprudence and analysis of one procedural right under the Sixth Amendment. Part I.B discusses the substantive right guaranteed by the Second Amendment.

B. The Second Amendment: An Individual and Fundamental Right to Bear Arms

The Second Amendment to the U.S. Constitution guarantees that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[93] Shortly after the Constitution was ratified in 1787, Congress passed the Second Amendment to protect the rights of individuals to keep militias in their respective states.[94] The need to protect this right stemmed from the desire to protect state sovereignty and to defend against the formation of an overly powerful federal government.[95] In the nineteenth century, the Court interpreted the Second Amendment to restrict only the powers of the federal government, not the powers of the states.[96]

The Court's early Second Amendment jurisprudence also interpreted the Second Amendment in relation to the preservation of a militia. In 1939, the Court decided *United States v. Miller*,[97] where it held that the Second Amendment did not protect an individual's right to possess a firearm, which had no "reasonable relationship to the preservation or efficiency of a well regulated militia."[98] *Miller* dealt with a Second Amendment challenge to a provision of the National Firearms Act,[99] which restricted the interstate transportation of an unregistered shotgun with a barrel length measuring less

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88. *Id.*
89. *Id.* at 1251.
90. 118 N.E.3d 168 (N.Y. 2018).
91. *Id.* at 171.
92. *Id. But see generally* Amezcua v. Eighth Jud. Dist. Ct., 319 P.3d 602 (Nev. 2014) (holding that a defendant was not guaranteed the right to a jury trial under the Sixth Amendment when facing deportation as a result of conviction, where the offense was otherwise presumptively petty).
93. U.S. CONST. amend. II.
94. District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).
95. *Id.*
96. *See, e.g.*, Miller v. Texas, 153 U.S. 535, 538 (1894) (holding that the Second Amendment restricts only the powers of the federal government, not the powers of state governments); Presser v. Illinois, 116 U.S. 252, 264 (1886) (same); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (same).
97. United States v. Miller, 307 U.S. 174 (1939).
98. *Id.* at 178.
99. National Firearms Act, 26 U.S.C. § 1132 (1934) (repealed 1976).

than eighteen inches.[100] The Court held that the statute did not violate the Second Amendment because the firearm in question was not related to the preservation of the militia.[101] In doing so, the Court focused on the Second Amendment's relationship to Article I of the Constitution, which affords Congress the power to assemble a militia, comprised of the militias of each state, in order to protect the safety and security of the nation and to enforce its laws.[102] It explained that the states ratified the Second Amendment to ensure such power could be executed.[103] Following its decision in *Miller* in 1939, the Court did not decide another Second Amendment case until 2008.

1. *Heller* and *McDonald* Individualize and Incorporate the Second Amendment

In 2008, the Court decided *District of Columbia v. Heller*.[104] In *Heller*, the Court held that the Second Amendment was not limited to the right to bear arms in relation to military service but was an individual right to keep and bear arms.[105] The Court struck down two laws passed by the District of Columbia.[106] The first required individuals to apply for and receive a license to keep a handgun in their home, and the second required firearm owners to store their guns either in a disassembled fashion or bound by a trigger lock.[107] The Court found that banning handguns, "the most preferred firearm in the nation,"[108] or requiring firearms to be inoperable while stored[109] denied Americans the right to self-defense in the home, which the Court held was critical to the Second Amendment right.[110]

The *Heller* decision, authored by Justice Antonin Scalia, focused on whether the Amendment's prefatory clause, "[a] well regulated Militia, being necessary to the security of a free State"[111] restricts the operative clause, "the right of the people to keep and bear Arms, shall not be infringed."[112] If the prefatory clause does restrict the operative clause, the right to carry a firearm would exist only in connection to military service.[113] Alternatively, if it does not restrict the operative clause, the prefatory clause simply states the Amendment's purpose.[114] The Court held the latter, that the prefatory clause

100. *Miller*, 307 U.S. at 175.
101. *Id.*
102. *Id.* (citing U.S. CONST. art. 1, § 8).
103. *Id.*
104. 554 U.S. 570 (2008).
105. *Id.* at 601–02.
106. *Id.* at 635.
107. *Id.* at 628–30.
108. *Id.* at 628.
109. *Id.* at 630.
110. *Id.* at 628–29.
111. U.S. CONST. amend. II.
112. *Id.*; *Heller*, 554 U.S. at 577–600.
113. *Heller*, 554 U.S. at 577.
114. *Id.*

clarified the purpose of the amendment—to preserve the existence of a militia[115]—but did not influence the scope of the operative clause.[116]

The Court's decision focused on the amendment's text. Beginning with the operative clause, the Court noted that "the people" referred to all members of the political community[117] and that "keep and bear Arms" referred to possessing or carrying firearms for confrontation, specifically for self-defense,[118] regardless of their use for military purposes or the individual's military status.[119] Turning to the prefatory clause, the Court held that the "Militia" referred to all able-bodied men, that "well-regulated" meant effectively trained, and that "security of a free State" referred to a safe and free country.[120]

Finding that the Second Amendment conferred an individual right to bear arms, the Court was careful to recognize its limits.[121] The Court acknowledged that legislation regulating commercial gun sales, prohibiting the possession of firearms by certain groups, including felons and people with mental infirmities, and restricting the possession of firearms in specific spaces, such as schools and government buildings, remained presumptively lawful.[122]

The Court revisited its prior decisions and found that none precluded an individual right analysis.[123] The Court found that its previous decisions reflected an interpretation of the right to bear arms that was broader than just the right in connection to service in a militia,[124] neglected to interrogate the amendment's scope,[125] or dealt with laws that restricted firearms which fell outside the amendment's scope, and thus did not limit the right to military use.[126] Thus, the Court determined that its holding was consistent with Second Amendment precedent.[127]

Two years after *Heller*, the Court decided *McDonald v. City of Chicago*,[128] where it held that the Second Amendment was a fundamental right and thus applicable to the states through the Due Process Clause of the Fourteenth

115. *Id.* at 599.
116. *Id.* at 578.
117. *Id.* at 579–80.
118. *Id.* at 584–87.
119. *Id.* at 579–95.
120. *Id.* at 596–98.
121. *Id.* at 595.
122. *Id.* at 626–27.
123. *Id.* at 620–25.
124. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Second Amendment protected the right to bear arms for a lawful purpose).
125. *See* Presser v. Illinois, 116 U.S. 252, 264–65 (1886) (holding that a law prohibiting unauthorized individuals from associating as a militia did not violate the Second Amendment).
126. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment did not protect the right to possess a type of firearm that fell outside the amendment's scope); *Heller*, 554 U.S. at 620–25.
127. *Heller*, 554 U.S. at 625.
128. 561 U.S. 742 (2010).

Amendment.[129] The ordinances at issue in *McDonald* required all individuals to have a valid registration to own a firearm and prohibited the registration of most handguns.[130] The petitioners argued that these ordinances prohibited them from possessing handguns in their homes for self-defense.[131]

The Court sought to determine whether the Second Amendment was incorporated against the states under the Due Process Clause of the Fourteenth Amendment.[132] Relying on *Heller*, the Court found that the individual right to keep and bear arms, particularly for self-defense in the home, is "deeply rooted in this Nation's history and tradition."[133] Thus, the Court held that the Second Amendment was binding on the states as a fundamental right and Bill of Rights guarantee.[134] Following the Court's decisions in *Heller* and *McDonald*, lower courts have sought to apply the Court's decisions to Second Amendment challenges.

2. Standards of Review Applied to Second Amendment Challenges

The Supreme Court did not identify in *Heller* or *McDonald* the level of scrutiny that should be applied to Second Amendment challenges.[135] This section presents lower courts' interpretations of this silence and their applications of intermediate or strict scrutiny to Second Amendment challenges.

In reviewing constitutional challenges, the Court tends to apply one of three standards of review: rational basis review,[136] intermediate scrutiny,[137] or strict scrutiny.[138] Rational basis review is the most deferential and least

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129. *Id.* at 791. The Fourteenth Amendment, in relevant part, states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

130. *McDonald*, 561 U.S. at 750.

131. *Id.*

132. *Id.* at 753–67.

133. *Id.* at 767–68. The Court proceeded to review precedent dating back to before the Second Amendment's ratification and found that the right was deeply rooted in the tradition and history of the United States. *See id.* at 768–80.

134. *Id.* at 785.

135. In *Heller*, the Court stated that rational basis review was not the appropriate test for Second Amendment challenges. 554 U.S. 570, 628 n.27 (2008).

136. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (applying rational basis review); Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 291 (1984) (same); Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983) (same); Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 489 (1977) (same).

137. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny); Mills v. Habluetzel, 456 U.S. 91, 99–100 (1982) (same).

138. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) (applying strict scrutiny); Johnson v. California, 543 U.S. 499, 505 (2005) (same); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (same); Miller v. Johnson, 515 U.S. 900, 904 (1995) (same); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (same); Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 906 (1986) (same).

exacting standard.[139] Rational basis review requires that the government have a legitimate interest and that the challenged law be rationally related to that interest.[140] Intermediate scrutiny requires that the government have an important interest and that the challenged law be substantially related to that interest.[141] Strict scrutiny is the most stringent of the three standards.[142] The test applied under strict scrutiny requires that a statute be narrowly tailored to advance a compelling state interest.[143]

As the Supreme Court has not identified the applicable standard of review for Second Amendment challenges, lower courts have endeavored to determine which standard is appropriate.[144] When considering Second Amendment challenges to federal law that prohibits domestic violence misdemeanants from possessing a firearm,[145] a number of lower courts have applied intermediate scrutiny.[146] Other courts have analyzed domestic violence firearm prohibition challenges using strict scrutiny.[147]

To determine whether a law violates the Second Amendment, many courts have employed the two-step test first expounded in *United States v. Marzzarella*.[148] The first step determines whether the conduct that is restricted by the law is within the Second Amendment's scope.[149] If not, the inquiry ends and the challenge fails.[150] Alternatively, if the law imposes a burden on conduct that falls within the amendment's scope, courts employ either intermediate or strict scrutiny to evaluate the law.[151] Whether the law passes under one of these tests determines if it is constitutional.[152] Because

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139. *See Garrett*, 531 U.S. at 367.

140. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Because the Court in *Heller* explicitly stated that rational basis review was not the appropriate test for these challenges, it will not be discussed further in this Note. *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

141. Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1567 (2009).

142. *See Pena*, 515 U.S. at 275 (Ginsburg, J., dissenting).

143. Gould, *supra* note 141, at 1566.

144. *Id.* at 1537–38.

145. 18 U.S.C. § 922(g)(9); *see infra* Part I.C.1.

146. Stimmel v. Sessions, 879 F.3d 198, 206 (6th Cir. 2018) (holding that § 922(g)(9) is subject to intermediate scrutiny); Fisher v. Kealoha, 855 F.3d 1067, 1070–71 (9th Cir. 2017) (same); United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (same); United States v. Smith, 742 F. Supp. 2d 855, 862 (S.D.W. Va. 2010) (same).

147. United States v. Knight, 574 F. Supp. 2d 224, 226 (D. Me. 2008) (finding that "[r]educing domestic violence is a compelling government interest" and that a provision prohibiting individuals subject to certain court orders from possessing a firearm was "narrowly tailored to that compelling interest"); United States v. Luedtke, 589 F. Supp. 2d 1018, 1024–25 (E.D. Wis. 2008) (holding that § 922(g)(8) is constitutional and that, were the court to apply strict scrutiny, § 922(g)(8) would meet the requirements of a compelling state interest and narrow tailoring); United States v. Erwin, No. 1:07-CR-556, 2008 WL 4534058, at *2 (N.D.N.Y. Oct. 6, 2008) (same); United States v. Grote, No. CR-08-6057, 2009 WL 853974, at *7 (E.D. Wash. Mar. 26, 2009) (holding that § 922(g)(8) would pass either intermediate or strict scrutiny).

148. 614 F.3d 85 (3d Cir. 2010).

149. *Id.* at 89.

150. *Id.*

151. *Id.*

152. *Id.*

the Supreme Court has not prescribed a standard of review for gun laws, the Court's Second Amendment jurisprudence has resulted in uncertainty.[153] The next section focuses on federal and state legislation that was enacted to reduce gun violence perpetrated by domestic abusers.

C. Domestic Violence Firearm Prohibitions

Over the past twenty-five years, Congress and state legislatures have passed laws aimed at prohibiting domestic abusers from possessing firearms. One challenge that implicates these laws argues that where individuals are denied their Second Amendment right due to firearm prohibitions that result from domestic violence misdemeanor convictions, those individuals must be guaranteed the right to a jury trial. This challenge emerged after laws were enacted at the federal and state levels to prohibit domestic violence misdemeanants from possessing guns. This section discusses these federal and state laws.

1. The Lautenberg Amendment

In 1968, Congress passed the Gun Control Act,[154] which provided federal oversight and control of the interstate commerce of firearms to support anti-crime efforts of law enforcement at the local, state, and federal levels.[155] The provisions passed in 1968 made it unlawful for unlicensed firearm manufacturers, importers, and dealers to sell or transport firearms or ammunition in interstate commerce.[156] The 1968 provisions also made it unlawful for anyone convicted of a felony or deemed mentally infirm to possess a gun.[157]

In 1994, Congress added § 922(g)(8) to the Gun Control Act, prohibiting the possession of a firearm or ammunition by an individual subject to a court order—commonly termed a restraining order, protective order, or order of protection—that prohibits the individual from "harassing, stalking, or threatening an intimate partner of such person."[158] An order of protection is often issued by a civil court after the petitioning party has demonstrated that there has been an incident of domestic violence.[159] A protective order instructs the perpetrating party to cease contact with the petitioner and to refrain from harassing or threatening them.[160] Section 922(g)(8) requires a

153. *See* Gould, *supra* note 141, at 1549 ("*Heller* has simultaneously clarified and clouded the constitutional mystery surrounding the Second Amendment."); *see also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009) ("The Court has invited future challenges . . . by not providing a standard of review for firearms regulation").

154. 18 U.S.C. §§ 921–928.

155. *Id.*

156. 18 U.S.C. §§ 922–924.

157. 18 U.S.C. § 922.

158. 18 U.S.C. § 922(g)(8); Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 535–36 (2003); *Restraining Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

159. *Restraining Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

160. *See id.*

showing that the parties have an intimate partner relationship and that the responding party presents a threat to the safety of the petitioning party or the petitioning party's child.[161] The text mandates that the responding party must be afforded a hearing and notice.[162] A responding party that violates this provision can be prosecuted and sentenced to a prison term of up to ten years.[163]

In 1996, Congress passed the Lautenberg Amendment[164] to the Gun Control Act of 1968.[165] The Lautenberg Amendment prohibits individuals convicted of domestic violence misdemeanors under state or federal law from owning or possessing firearms.[166] Therefore, if an individual is convicted of a misdemeanor crime of domestic violence and is later found in possession of a firearm, that individual can be federally prosecuted under § 922(g)(9) and sentenced to a prison term of up to ten years.[167] The statute requires that the elements of the underlying misdemeanor conviction include use or attempted use of physical force and that the relationship between the perpetrator and the victim fit one of the following categories: current or former spouses, parents, guardians, persons who share a child in common, or persons who currently or previously lived together in a spousal, parental, guardian, or similar relationship.[168]

Congress passed the Lautenberg Amendment to "close th[e] dangerous loophole," whereby violent domestic abusers, who were charged with or pled guilty to misdemeanors, were not prohibited from possessing firearms.[169] Domestic abusers may be charged with or plead guilty to misdemeanors for multiple reasons.[170] Domestic abuse often occurs in private, and therefore such cases often lack witnesses, corroboration, or physical evidence.[171] Often police officers responding to domestic abuse are not equipped to deal with such incidents or do not take victims seriously.[172] Further, victims who have been in abusive relationships may also suffer from battered women's syndrome, which, like post-traumatic stress disorder, can affect an individual's cognitive functions and precipitate coping mechanisms, such as denial, minimization, and repression, which make it more difficult for a victim to testify effectively.[173] Lastly, victims face other factors that may inhibit their desire or ability to participate in a prosecution, including a victim's relationship with the abuser, financial dependence on the abuser,

161. 18 U.S.C. § 922(g)(8)(A)–(C)(i).
162. *Id.*
163. 18 U.S.C. § 924(2).
164. 18 U.S.C. § 922(g)(9) (1996); H.R. REP. NO. 104-863, at 382–83 (1996) (Conf. Rep.).
165. 18 U.S.C. §§ 921–931.
166. 18 U.S.C. § 922(g)(9).
167. 18 U.S.C. § 924(2).
168. 18 U.S.C. § 921(a)(33)(A)(ii).
169. United States v. Hayes, 555 U.S. 415, 426 (2009).
170. Erez, *supra* note 11.
171. *See* Michelle Byers, Note, *What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 560 (2012).
172. Erez, *supra* note 11.
173. Byers, *supra* note 171, at 558.

children in common with the abuser, or societal pressures that reinforce the notion that domestic violence is a private matter.[174]

On multiple occasions the Supreme Court has clarified the applicability and scope of § 922(g)(9).[175] Lower courts have also upheld the relevant section as constitutional, finding it does not violate the Second Amendment.[176]

2. State Laws

Following the enactment of the Lautenberg Amendment, twenty-nine states and the District of Columbia have enacted laws that restrict domestic abusers' access to firearms.[177] Some state laws that restrict domestic violence misdemeanants' access to firearms are more expansive than the federal law. For example, some states define the relationship between the abuser and the victim more broadly and may include dating partners or family members, while other states restrict access to firearms for anyone convicted of any violent misdemeanor.[178] Sixteen states require convicted domestic violence misdemeanants to relinquish any firearms they possess.[179]

Forty-three states have enacted laws that prohibit individuals subject to domestic violence restraining orders from possessing firearms after notice and a hearing.[180] Some of these state laws are more restrictive than the

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174. Ed Furman, Note, *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-*Crawford, 25 TEMP. POL. & C.R.L. REV. 143, 146–51 (2016).

175. *See, e.g.*, Voisine v. United States, 136 S. Ct. 2272, 2277–78 (2016) (holding that § 922(g)(9) applies where misdemeanor domestic assault is committed recklessly); United States v. Castleman, 572 U.S. 157, 171 (2014) (interpreting the physical force requirement of § 922(g)(9)); United States v. Hayes, 555 U.S. 415, 418 (2009) (holding that the domestic relationship requirement of § 922(g)(9) must be established but need not be an element of the predicate offense).

176. *See, e.g.*, Stimmel v. Sessions, 879 F.3d 198, 211 (6th Cir. 2018) (holding § 922(g)(9) is constitutional under intermediate scrutiny); United States v. Chovan, 735 F.3d 1127, 1130 (9th Cir. 2013) (same); United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011) (same); United States v. Staten, 666 F.3d 154, 168 (4th Cir. 2011) (same); United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (holding that § 922(g)(9) is presumptively lawful); United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc) (finding § 922(g)(9) constitutional under intermediate scrutiny).

177. EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 22 n.75.

178. *See Domestic Violence & Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#state [https://perma.cc/3WJT-K54Z] (last visited Aug. 9, 2021); *See, e.g.*, 430 ILL. COMP. STAT. ANN. 65/8(k), (l) (West 2021); CAL. PENAL CODE § 29805 (West 2021).

179. *Domestic Violence & Firearms*, *supra* note 178; *see, e.g.*, CAL. PENAL CODE § 29810(a) (West 2021); COLO. REV. STAT. ANN. § 18-6-801(8)(a)(I)(B) (West 2021); CONN. GEN. STAT. ANN. § 29-36k(a) (West 2021); HAW. REV. STAT. ANN. § 134-7.3(b) (West 2021); 430 ILL. COMP. STAT. ANN. 65/8(k), (l) (West 2021); IOWA CODE ANN. § 724.26(2)(a)–(d) (West 2021); LA. CODE CRIM. PROC. ANN. art 1002 (2021); MD. CODE ANN., CRIM. PROC. § 6-234 (West 2021); MASS. GEN. LAWS ANN. ch. 140, § 129B (West 2021); MINN. STAT. ANN. § 609.2242(3)(f)–(h) (West 2021); NEV. REV. STAT. ANN. § 202.361 (West 2021); N.J. STAT. ANN. §§ 2C:25-27 (West 2021); OR. REV. STAT. ANN. § 166.259(1)(c)–(d) (West 2021); 23 PA. STAT. AND CONS. STAT. ANN. § 6108(a)(7) (West 2021); 12 R.I. GEN. LAWS ANN. § 12-29-5(d)(3) (West 2021); TENN. CODE ANN. § 39-13-111(c)(6)(A) (West 2021).

180. *Domestic Violence & Firearms*, *supra* note 178.

federal law and require that specific circumstances be met before including a firearm prohibition in the order.[181]

Twenty-one states prohibit individuals subject to an ex parte restraining order from possessing firearms.[182] Ex parte orders are granted almost immediately after an individual petitions the court for a protective order, before a hearing and notice.[183] The temporary order remains in place until a hearing or trial takes place, following notice to the respondent, at which point the court decides whether to issue a final order of protection.[184] The following section discusses the effects of these laws.

3. Domestic Violence Gun Laws and Victim Safety

Statistics suggest that laws restricting domestic abusers' access to firearms increase victims' safety.[185] States that restrict access to firearms by individuals subject to domestic violence protection orders reported a reduction of domestic violence firearm homicides by 13 percent.[186] States that require or encourage those who are subject to domestic violence protection orders to relinquish guns and ammunition have reported a reduction in domestic violence firearm homicides of 14 to 16 percent.[187] Moreover, between 1998 and 2019, federal background checks blocked the sale of almost 400,000 firearms to domestic abusers, either misdemeanants or individuals subject to protective orders.[188]

While many state and federal legislatures have enacted laws aimed at reducing domestic violence gun violence, these laws have been challenged, in some cases successfully, in both federal and state courts.[189] Successful procedural challenges, which argue that domestic violence misdemeanants subject to § 922(g)(9) or comparable state laws are entitled to a jury trial because of the severity of such a penalty, could result in fewer prosecutions of domestic abusers under offenses that trigger firearm prohibitions.[190] This could result in fewer victims receiving the protection such laws were enacted to provide. Part II presents opposing arguments to these challenges.

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181. *Id.*; *see, e.g.*, ALASKA STAT. ANN. § 18.66.100(c)(7) (West 2021) (requiring "the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence").

182. EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 22 n.75.

183. *See* Sarah Martin, *Evidence-Based, Constitutionally-Sound Approaches to Reducing Gun Violence*, 6 BELMONT L. REV. 245, 267 (2018); *see also Restraining Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

184. *See Domestic Violence & Firearms*, *supra* note 178.

185. *See* EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 22.

186. *Id.*

187. *Id.*

188. *Id.* at 25. This only covers sales by licensed dealers. Domestic abusers can still illegally purchase firearms privately and at gun shows. *Id.*

189. *See infra* Part II.

190. *See infra* notes 223–27 and accompanying text.

II. DO FIREARM PROHIBITIONS TRIGGER MISDEMEANANTS' JURY TRIAL RIGHT?

In *Blanton*, the Supreme Court set forth its Sixth Amendment jury trial analysis to determine whether a noncarceral consequence upgrades a presumptively petty offense—an offense with a maximum prison term of six months—to a serious offense, triggering the accused's jury trial right.[191] This part discusses the conflict that has emerged as courts apply the *Blanton* analysis to determine whether misdemeanants, who face restrictions to their Second Amendment rights, are entitled to a jury trial.

Part II.A presents the argument that those subject to restrictions of their Second Amendment rights, due to domestic violence misdemeanor convictions, must be guaranteed the right to a jury trial under the Sixth Amendment. Parts II.A.1 and II.A.2 present case law from a federal district court and one state supreme court that determined that domestic violence misdemeanants are guaranteed the right to a jury trial due to the severity of applicable firearm prohibitions. Part II.A.3 introduces scholarly analysis that incorporates collateral consequences into criminal procedure and argues that domestic violence misdemeanants are guaranteed the right to a jury trial. Part II.B discusses the argument that domestic violence misdemeanants, who are prohibited from possessing firearms, are not guaranteed the right to a jury trial. Parts II.B.1 and II.B.2 present relevant case law from federal and state courts. Part II.B.3 introduces the work of Professor Sandra Mayson, who advocates for keeping collateral consequences distinct from direct consequences.

A. Firearm Prohibitions Are Serious and Guarantee Misdemeanants the Right to a Jury Trial

Most state and federal courts that have expressly addressed whether a domestic violence misdemeanant is afforded the right to a jury trial have found that a restriction on an accused's Second Amendment right, as a result of a misdemeanor conviction, does not trigger the right to a jury trial under the Sixth Amendment.[192] However, in *United States v. Smith*[193] and *Andersen v. Eighth Judicial District Court*,[194] both an Oklahoma federal district court and the Nevada Supreme Court found that firearm prohibitions resulting from misdemeanor convictions do upgrade the offense and trigger the accused's jury trial right.[195]

1. *Smith*: The Lautenberg Amendment Imposes a Serious Punishment

In *United States v. Smith*, the accused, who was charged with misdemeanor assault of his ex-wife, faced a maximum prison term of six months and was

191. *See supra* notes 49–50 and accompanying text.
192. *See infra* Part II.B.1.
193. 151 F. Supp. 2d 1316 (N.D. Okla. 2001).
194. 448 P.3d 1120 (Nev. 2019).
195. *See Smith*, 151 F. Supp. 2d at 1318; *Andersen*, 448 P.3d at 1124.

subject to § 922(g)(9).[196] Smith requested a jury trial, which the court granted.[197] The district court found that the permanent firearm prohibition was a serious punishment, demonstrating the seriousness of the offense and thus guaranteed Smith the right to a jury trial under the Sixth Amendment.[198] The court's reasoning was threefold. First, it found that firearm prohibitions are serious because of the important role guns play in American life—for self-defense, in leisure activities, and in the military.[199] Second, the court stated that gun restrictions reflect serious penalties given the divisiveness and urgency of such restrictions in public discourse.[200] And third, it asserted that the severity of the penalty for violating § 922(g)(9), and the fact that the neighboring provisions of § 922(g) applied to dangerous individuals, including convicted felons, reflected the seriousness of the provision.[201]

The court recognized that its holding diverged from the Eleventh Circuit's decision in *United States v. Chavez*,[202] but it determined that the Eleventh Circuit's analysis was misplaced.[203] The court reasoned that the appropriate analysis looked at the severity of the penalty imposed by Congress, not at whether Congress was aware that domestic violence misdemeanants, subject to the firearm prohibition, may not have the right to a jury trial in underlying proceedings.[204]

2. *Andersen*: The Nevada Legislature Determined Domestic Battery Is a Serious Offense

In 2019, the Supreme Court of Nevada in *Andersen v. Eighth Judicial District Court* held that because the legislature had specifically added a penalty prohibiting individuals convicted of misdemeanor domestic violence battery from possessing firearms, "the Legislature ha[d] determined that the offense [was] a serious one."[205] The court therefore found that the accused was guaranteed the right to a jury trial.[206]

In *Andersen*, Christopher Andersen was charged with domestic battery and simple battery.[207] Andersen demanded a jury trial, which the municipal court denied on the basis of the misdemeanor offense having a maximum prison sentence of six months, which was presumptively petty.[208] Andersen entered a no contest plea to the domestic battery charge, and the court dismissed the

196. *Smith*, 151 F. Supp. 2d at 1316.
197. *Id.* at 1318.
198. *Id.* at 1317.
199. *Id.*
200. *Id.*
201. *Id.* at 1317–18.
202. 204 F.3d 1305 (11th Cir. 2000). In *Chavez*, the Eleventh Circuit recognized that Congress had specifically intended for § 922(g)(9) to apply regardless of an individual's right to a jury trial in the underlying proceeding. *Id.* at 1314.
203. *See Smith*, 151 F. Supp. 2d at 1317.
204. *Id.*
205. *Id.* at 1122.
206. *See id.*
207. *Id.*
208. *Id.* at 1123 (citing Blanton v. City of N. Las Vegas, 489 U.S. 538, 542–43 (1989)).

simple battery charge.[209] On appeal, Andersen argued that the additional penalties, specifically the firearm prohibition, signified that the legislature had determined the offense was serious, triggering his Sixth Amendment jury trial right.[210] The Supreme Court of Nevada agreed.[211] The court, citing U.S. Supreme Court precedent,[212] stated that the maximum penalty imposed by the legislature provided the appropriate framework to determine whether the legislature deemed the offense to be serious.[213] Specifically, the court found that because the Nevada legislature had added a provision that restricted the right to possess a firearm "that *automatically* and *directly* flows from a conviction for misdemeanor domestic battery . . . . this new penalty . . . 'clearly reflect[s] a legislative determination that the offense [of misdemeanor domestic battery] is a serious one.'"[214]

The Supreme Court of Nevada clarified and differentiated the *Andersen* holding from its 2014 decision in *Amezcua v. Eighth Judicial District Court*.[215] In *Amezcua*, the court held that misdemeanor domestic battery was not a serious offense such that the accused must be guaranteed the right to a jury trial.[216] The court held that the additional penalties, including the permanent federal firearm prohibition, did not reflect the Nevada legislature's determination that the offense was so serious as to implicate the right to a jury trial.[217] At the time the court decided *Amezcua*, there was no Nevada state law restricting a domestic violence misdemeanant's access to firearms.[218] Instead, *Amezcua* dealt with the federal law, § 922(g)(9).[219] The court determined that because the firearm penalty arose out of federal law, it was a collateral consequence and was not indicative of the Nevada legislature's perspective that the offense was serious.[220]

In *Andersen*, the court identified that the difference between the present case and *Amezcua* was the Nevada legislature's intervening decision to amend the statute prohibiting specific groups from possessing firearms to cover anyone convicted of a misdemeanor crime of domestic violence.[221] The court found that the legislature's action demonstrated that it perceived misdemeanor domestic battery to be a serious offense, triggering the accused's right to a jury trial.[222]

209. *Id.* at 1122.
210. *See id.* at 1122–24.
211. *Id.* at 1123.
212. *Blanton*, 489 U.S. at 542; United States v. Nachtigal, 507 U.S. 1, 3 (1993).
213. *Andersen*, 448 P.3d at 1123.
214. *Id.* at 1124 (third and fourth alterations in original) (emphasis added) (quoting *Blanton*, 489 U.S. at 543).
215. 319 P.3d 602 (Nev. 2014).
216. *See id.* at 606.
217. *See id.* at 605.
218. *Id.* at 604; *see also Andersen*, 448 P.3d at 1123.
219. *Amezcua*, 319 P.3d at 604.
220. *See id.* at 605.
221. *See Andersen*, 448 P.3d at 1123; NEV. REV. STAT. ANN. § 202.360 (West 2021).
222. *See Andersen*, 448 P.3d at 1124.

The Supreme Court of Nevada's decision has disrupted the state's criminal justice system.[223] Following *Andersen*, the Las Vegas city council passed a law creating a domestic violence criminal offense that does not restrict those convicted of domestic violence from possessing firearms.[224] The city enacted this new provision because, due to the lack of resources, it was unable to conduct jury trials for domestic violence misdemeanors.[225] Since *Andersen*, Nevada courts have charged domestic abusers with simple battery and other offenses that do not trigger the defendant's jury trial right.[226] As a result, these individuals can lawfully possess guns, while their victims are not protected by federal or state firearm prohibitions.[227]

3. Incorporating Collateral Consequences Would Require Jury Trials for Domestic Violence Misdemeanants

Some scholars argue that collateral consequences, including gun prohibitions, function as additional forms of punishment that criminal procedure fails to consider.[228] Professor Paul T. Crane argues that collateral consequences should be incorporated into criminal procedure.[229] Crane developed a framework to consistently incorporate collateral consequences.[230] In developing his framework, Crane focuses on four collateral consequences: deportation, sex offender registration, firearm prohibitions, and disqualification of public benefits.[231] Crane applies the *Blanton* analysis to determine whether a collateral consequence triggers the right to a jury trial.[232]

Crane's multistep framework first determines that only automatically imposed consequences trigger a procedural right.[233] Next, Crane argues that whether a collateral consequence triggers a procedural right depends on whether the consequence is as severe as the potential prison term triggering that right.[234] To compare the severity of imprisonment to different collateral consequences, Crane compares the degree to which the consequence impedes on the individual's constitutional liberty interest to the degree to which the

223. *See generally* Miranda Wilson, *Las Vegas Approves Domestic Violence Charge That Doesn't Take Offenders' Guns*, LAS VEGAS SUN (Sept. 18, 2020, 3:46 PM), https://lasvegassun.com/news/2019/oct/16/las-vegas-approves-new-domestic-violence-charge-th/ [https://perma.cc/6M3Q-J3PV].

224. *See* LAS VEGAS, N.V., MUN. CODE tit. 10, § 10.32.010-020 (2019); *see also* Wilson, *supra* note 223.

225. *See* Wilson, *supra* note 223.

226. *See id.*

227. *See id.*

228. *See, e.g.*, Crane, *supra* note 76, at 29–61; Chin, *supra* note 70, at 235–46; Kaiser, *supra* note 72, at 343–44; Malcolm, *supra* note 71, at 42.

229. *See* Crane, *supra* note 76, at 62.

230. *See id.* at 29–61.

230. *See id.*

231. *See id.* at 10.

232. *See id.* at 54–61.

233. *See id.* at 30–31.

234. *See id.* at 32. Crane's framework also considers the right to counsel. *Id.* at 43–49. This Note only considers Crane's framework as applied to the jury trial right.

relevant prison term infringes on an individual's liberty interest.[235] Crane also argues that when considering the jury trial right, collateral consequences imposed by a different sovereign from the one prosecuting the offense should not be considered because they do not reflect the intent or perspective of the legislature that enacted the law under which the defendant is being prosecuted.[236]

Applying this framework to firearm prohibitions, Crane determines that prohibitions permanently restricting firearm possession are equivalent to a prison term ranging from one day to six months.[237] Under Crane's framework, firearm prohibitions are less severe than deportation and sex offender registration requirements but more severe than disqualification of public benefits.[238] Crane finds that permanent firearm prohibitions, "viewed in conjunction with the maximum authorized period of incarceration," should trigger the accused's jury trial right under the Sixth Amendment.[239] However, Crane qualifies his finding and states that, in a case where the accused does not face any potential prison term, the permanent firearm prohibition should not trigger the jury trial right.[240]

While scholars and courts alike have found that firearm prohibitions are sufficiently severe to overcome the presumption that an offense is petty and to guarantee the right to a jury trial, a majority of state and federal courts have found the opposite.

B. Firearm Prohibitions Do Not Trigger Misdemeanants' Right to a Jury Trial

Over the past two decades, following the passage of § 922(g)(9) and similar state laws, a majority of federal and state courts that have considered whether the accused is guaranteed the right to a jury trial where a misdemeanor conviction will result in a permanent restriction of the defendant's Second Amendment right have found that there is no guaranteed right to a jury trial in such cases.[241] This part analyzes those decisions and the issue of collateral consequences and criminal procedure.

1. Section 922(g)(9) Does Not Upgrade a Presumptively Petty Offense

In *United States v. Chavez*,[242] the Eleventh Circuit held that the accused's jury trial right was not triggered when he was permanently prohibited from possessing a firearm under § 922(g)(9) as a result of his misdemeanor assault

235. *See id.* at 40.
236. *See id.* at 55.
237. *See id.* at 41.
238. *See id.* at 41–42.
239. *Id.* at 59–60 (quoting Blanton v. City of N. Las Vegas, 489 U.S. 538, 543 (1989)).
240. *See id.* at 60 n.285.
241. *See generally* United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000); United States v. Snow, No. 11-0149, 2011 WL 5025535 (D. Or. Oct. 21, 2011); United States v. Jardee, No. 09-mj-091, 2010 WL 565242 (D.N.D. Feb. 12, 2010); United States v. Combs, No. 05CR271, 2005 WL 3262983 (D. Neb. Dec. 1, 2005).
242. 204 F.3d 1305 (11th Cir. 2000).

conviction.[243] Zoilo Chavez was convicted of misdemeanor assault under federal law for assaulting his wife.[244] The Eleventh Circuit found that Chavez was not guaranteed the right to a jury trial because misdemeanor assault was a petty offense and Chavez had not established that Congress deemed the offense to be serious when it added the firearm prohibition.[245] Specifically, the court reasoned that because the language in 18 U.S.C. § 921 acknowledges that those subject to § 922(g)(9) includes misdemeanants who may not be entitled to a jury trial, the court found that Congress did not intend for the provision to upgrade relevant underlying petty offenses under the Sixth Amendment jury trial analysis.[246]

In 2005, the District of Nebraska was faced with the same question in *United States v. Combs*.[247] Richard Combs was charged with misdemeanor domestic battery.[248] Combs was convicted and sentenced to two days in jail and six months of probation; however, he faced a maximum prison term of six months and was subjected to § 922(g)(9).[249] Combs argued that the lifetime firearm prohibition upgraded the petty offense to a serious offense and thus guaranteed his right to a jury trial.[250] The district court held that the permanent firearm prohibition did not upgrade the petty offense and found that Combs was not guaranteed the right to a jury trial.[251] The court held that there was no evidence that Combs required a gun for any specific, legal purpose.[252]

Two district courts answered this question after the Supreme Court ruled in *Heller*. Both courts found that the accused was not guaranteed the right to a jury trial under the Sixth Amendment. In *United States v. Jardee*,[253] a North Dakota federal district court found that the federal firearm prohibition neither upgraded the otherwise petty offense to a serious offense nor triggered the accused's Sixth Amendment jury trial right.[254] The court, relying on the Supreme Court's jury trial precedent, recognized that the maximum potential prison term was the most important factor to consider and that the firearm prohibition was a collateral consequence.[255] The court found, however, that analyzing the lifetime firearm prohibition under the Supreme Court's analysis required examining whether the penalty resulted in a severe deprivation of liberty, comparable to the deprivation resulting from a prison term of more than six months.[256] The court held that while the

243. *Id.* at 1310, 1314.
244. *Id.* at 1308–09.
245. *Id.* at 1310–11.
246. *Id.* at 1314; *see* 18 U.S.C. § 921(a)(33)(B)(i)(II)(aa)–(bb).
247. No. 05CR271, 2005 WL 3262983 (D. Neb. Dec. 1, 2005).
248. *Id.* at *1–3.
249. *Id.*
250. *Id.*
251. *Id.* at *3–4.
252. *Id.* at *3.
253. No. 09-mj-091, 2010 WL 565242 (D.N.D. Feb. 12, 2010).
254. *Id.* at *3–4.
255. *Id.* at *3.
256. *Id.* at *3–4.

firearm prohibition infringed on Jardee's rights, it did not infringe on his rights to the degree necessary to upgrade the offense to a serious offense.[257] The court also reasoned that when Congress added the relevant provision, it was aware that misdemeanants subject to § 922(g)(9) may not have been guaranteed the right to a jury trial in the underlying state or federal prosecution.[258]

Similarly, in *United States v. Snow*,[259] the Oregon federal district court found that Brian Gene Snow, who was charged with assault qualifying as a domestic violence misdemeanor and subject to § 922(g)(9), was not entitled to a jury trial because the crime was a petty offense and Snow had not demonstrated that the firearms prohibition turned the presumptively petty offense into a serious one.[260] The court explained, relying on the Supreme Court's decision in *Blanton*, that the presumption was a high bar to overcome because it rested on the liberty interest lost from a six-month prison term, which is "'intrinsically different' from any other penalty."[261]

Very few state supreme courts have confronted this issue, and of those that have, most have found that a domestic violence misdemeanant is not guaranteed the right to a jury trial.[262] Both the Supreme Court of Arizona and the Court of Appeals of Kansas have found that the accused, charged with a domestic violence misdemeanor, is not guaranteed a jury trial when, if convicted, they will be permanently prohibited from possessing a firearm under § 922(g)(9).[263] The Court of Appeals of Kansas focused on legislative intent and reasoned that the federal statute prohibiting firearm possession was irrelevant to the Kansas legislature's intent or perspective.[264] The court held that only the state legislature's intent should be taken into account when considering the seriousness of an offense for the Sixth Amendment jury right analysis.[265] The court also noted that the Supreme Court had never found that a noncarceral penalty upgraded a presumptively petty offense to a serious one.[266]

The Supreme Court of Arizona reached the same conclusion and held that the defendant, convicted of misdemeanor domestic violence, and subject to § 922(g)(9), was not guaranteed the right to a jury trial.[267] The court stated that the maximum potential punishment imposed by the legislature

257. *Id.* at *4.
258. *Id.*
259. No. 11-0149, 2011 WL 5025535 (D. Or. Oct. 21, 2011).
260. *Id.* at *3.
261. *Id.* at *2. (quoting Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989)).
262. *See* Kansas v. Woolverton, 371 P.3d 941, 944–45 (Kan. Ct. App. 2016); Arizona *ex rel.* McDougall v. Strohson, 945 P.2d 1251, 1258 (Ariz. 1997) (en banc). *But see* Andersen v. Eighth Jud. Dist. Ct., 448 P.3d 1120, 1123–24 (Nev. 2019).
263. *Woolverton*, 371 P.3d at 944; *Strohson*, 945 P.2d at 1258.
264. *Woolverton*, 371 P.3d at 944–45. The court affirmed its holding two years later in *Kansas v. Race*, No. 117,536, 2018 WL 1247211, at *3 (Kan. Ct. App. Mar. 9, 2018).
265. *Woolverton*, 371 P.3d at 944–45.
266. *Id.* at 944.
267. *Strohson*, 945 P.2d at 1255.

prosecuting the crime determined whether an offense was petty or serious.[268] The court explained that it was not feasible for the state court to account for every potential federal consequence or penalty a defendant faces when prosecuted under state law.[269] The following section introduces a petition to the Supreme Court that asked the Court to consider whether firearm prohibitions are serious penalties that trigger the right to a jury trial.

2. *Zoie H.*: Nebraska Declines to Follow Nevada Precedent

In October 2020, the U.S. Supreme Court denied certiorari to the petition, *Zoie H. v. Nebraska*,[270] wherein the petitioner asked the Court to consider whether firearm prohibitions were serious penalties triggering the right to a jury trial.[271] The petitioner argued that the Supreme Court of Nebraska erred when it upheld the decision by a judge, in a juvenile proceeding, denying the juvenile a jury trial where the juvenile would be prohibited from possessing a firearm until she turned twenty-five.[272] The case dealt with the application of a newly enacted state statute extending a firearm prohibition to cover juvenile offenders.[273] The lower court denied the juvenile's request for a jury trial, reasoning that Nebraska requires juvenile proceedings to occur before a judge and not a jury.[274] The Supreme Court of Nebraska affirmed.[275] The court stated that the Sixth Amendment jury trial right did not apply to the juvenile because the firearms prohibition was not a penalty but a collateral consequence.[276] In the petition to the U.S. Supreme Court, the petitioner argued that the firearm prohibition, which "directly and automatically" deprived the juvenile of her right to bear arms until she turned twenty-five, upgraded the juvenile offense to a serious offense, triggering the Sixth Amendment jury trial right.[277]

The petitioner relied extensively on the Supreme Court of Nevada's *Andersen*[278] decision and argued that *Andersen* was consistent with the Court's Second Amendment precedent, while the Supreme Court of Nebraska's decision was inconsistent with such precedent.[279] The petitioners further argued that because the Court had held in *Heller*[280] and *McDonald*[281] that the right protected by the Second Amendment is an individual and fundamental right, to deprive an individual of that fundamental constitutional

268. *Id.*
269. *Id.* at 1256.
270. Petition for Writ of Certiorari at 9–10, Zoie H. v. Nebraska, 141 S. Ct. 259 (2020) (No. 19-1418), 2020 WL 3512841, at *9–10.
271. *See id.*
272. *Id.* at 7–9.
273. *Id.* at 9; *see* NEB. REV. STAT. ANN. § 28-1204.05(1) (West 2021).
274. Petition for Writ of Certiorari, *supra* note 270.
275. *In re* Zoie H., 937 N.W.2d 801 (Neb.), *cert. denied*, 141 S. Ct. 259 (2020).
276. Petition for Writ of Certiorari, *supra* note 270, at 11.
277. *Id.* at 10–11.
278. *See supra* Part II.A.2.
279. Petition for Writ of Certiorari, *supra* note 270, at 13–15.
280. 554 U.S. 570 (2008).
281. 561 U.S. 742 (2010).

right, the accused must have the protections of the Constitution that are guaranteed for serious criminal proceedings, specifically the right to a jury trial.[282]

The respondent argued that the Supreme Court of Nebraska's decision was correct because the prohibition was intended to act as a public safety regulation, not as a punishment, and thus because it was not punitive, it was not an additional penalty.[283] The respondent also stated that because the legislature did not authorize any period of incarceration for the juvenile adjudication, the offense was not serious because the applicable test, which analyzes the civil penalty together with the maximum potential prison term, was inapplicable where there was no potential term of imprisonment attached to the offense.[284] The respondent also emphasized that the prohibition as applied to juveniles was temporary.[285] The Supreme Court denied the petitioner's writ of certiorari in October 2020 and thus declined to hear the case.[286] The following section discusses the difficulties of classifying and incorporating collateral consequences.

3. Keeping Collateral Consequences Collateral

In response to scholars' calls to incorporate collateral consequences and abolish the direct-collateral dichotomy,[287] Professor Sandra Mayson argues that collateral consequences should be analyzed separately.[288] Mayson argues that because most collateral consequences focus on reducing future risk and are thus part of the preventive state, they are not punishment, which is inherently tied to culpability and blame.[289] Unlike punishment, which seeks to assign punitive sentences commensurate with an individual's conduct, preventive restraints employ cost-benefit analysis of the risk of future harm—the security interest—and the liberty deprivation caused by the measure.[290]

Mayson theorizes that distinguishing collateral consequences from punishment encourages more thorough consideration of collateral consequences and of their purpose, legitimacy, and constitutionality.[291] Recognizing the important societal role preventive restraints play, as well as the harmful effects collateral consequences can have, Mayson argues that

282. Petition for Writ of Certiorari, *supra* note 270, at 12–13.

283. Respondent's Brief in Opposition at 27–29, Zoie H. v. Nebraska, 141 S. Ct. 259 (2020) (No. 19-1418), 2020 WL 4678907, at *27–29. The respondents also argued that the Nevada and Nebraska decisions deal with substantially different situations and proceedings—juvenile versus criminal—and thus argued that no split, and no question for the Court, emerged. *Id.* at 17–20.

284. *Id.* at 29.

285. *Id.* at 30.

286. *In re* Zoie H., 937 N.W.2d 801 (Neb.), *cert. denied*, 141 S. Ct. 259 (2020).

287. *See supra* Part II.A.3.

288. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 361 (2015).

289. *Id.* at 318–19.

290. *Id.* at 324–26.

291. *Id.* at 361.

proper oversight of such restrictions is important to protect individual liberty, enhance public safety, and guard against the proliferation of unconstitutional or unnecessary collateral consequences.[292]

Mayson does not claim to establish a formal test to determine whether a collateral consequence is a preventive measure; however, she argues the purported purpose for which the restriction was authorized is instructive.[293] Specifically, whether a collateral consequence was enacted to punish culpable conduct or to prevent future harm distinguishes punishment from preventive restrictions.[294] Mayson suggests that collateral consequences fall along a spectrum from purely preventive to purely retributive.[295] Mayson proposes that often probation or parole would fall in the middle of the spectrum and argues that most collateral consequences, focused on potential future risks, should be designated as preventive restraints.[296] Moreover, Mayson argues that the degree to which preventive restraints infringe on individual liberty must be proportional to the perceived risk.[297]

Under this framework, Mayson contends that collateral consequences should be afforded procedural guarantees, considered in sentencing, and scrutinized to dispose of any unconstitutional provisions.[298] Mayson proposes that the severity of the consequence, not its purpose for punishment or prevention, should determine procedural guarantees.[299] And, Mayson argues that applicable collateral consequences, while not punishment, should be considered by judges when imposing a sentence, to give effect to the purposes of deterrence and rehabilitation.[300] Lastly, Mayson asserts that collateral consequences should not be afforded the presumption of constitutionality and instead should be scrutinized to determine whether such provisions require the disparate treatment of convicted persons.[301] Mayson asserts that such analysis calls for a heightened degree of scrutiny and that only those restrictions that are narrowly applied—in scope, form, and duration—would survive such review.[302] Mayson also argues that collateral consequences should not be applied categorically—but should instead be reviewed on an individual basis, considering liberty interests, risks, and safety concerns at issue—and should be imposed through separate civil proceedings.[303]

While Professor Mayson does not speak specifically to firearm prohibitions applying to domestic violence misdemeanants, she does characterize firearm prohibitions generally as falling at the preventive end of

292. *Id.* at 344–45.
293. *Id.* at 345.
294. *Id.*
295. *Id.* at 333–34.
296. *Id.* at 334, 346.
297. *Id.* at 326.
298. *Id.* at 348.
299. *Id.* at 327.
300. *Id.* at 350.
301. *Id.* at 359.
302. *Id.* at 359–60.
303. *Id.* at 351.

the punishment-prevention spectrum.[304] Felon firearm prohibitions are enacted to prevent gun crimes and are concerned with future harm and, thus, future risk.[305]

III. FOLLOWING LEGISLATIVE INTENT AND FOCUSING ON VICTIM SAFETY

This part is divided into two sections. Part III.A argues that courts, consistent with Supreme Court precedent, should find that an individual, who has been charged with misdemeanor domestic violence and who may thus be permanently prohibited from possessing a firearm, is not guaranteed the right to a jury trial under the Sixth Amendment because such prohibitions do not infringe on the individual's liberty to the degree a prison term of more than six months does. While the Supreme Court recently denied certiorari when presented with a similar question, the issue may continue to emerge in state or federal courts. Part III.B sets forth recommendations for Congress, state legislatures, and domestic violence advocates to improve domestic violence victims' safety. These recommendations focus on enforcing and expanding firearm prohibitions, specifically those stemming from civil protective orders.

A. *Applying* Blanton *and Incorporating Firearm Prohibitions*

This section considers the issue set forth in Part II by revisiting Supreme Court precedent and applying Professor Crane's[306] framework of incorporating collateral consequences to consider whether a domestic violence misdemeanant is guaranteed the right to a jury trial. This Note follows the approach taken by the majority of courts and argues that courts should find that permanent firearm prohibitions do not upgrade petty misdemeanor domestic violence offenses to serious offenses so as to guarantee misdemeanants the right to a jury trial.

This Note argues that, first, collateral consequences should be scrutinized and rejected if they are unconstitutional and, second, constitutional collateral consequences should be factored into criminal procedure to determine whether such additional restrictions infringe on the accused's liberty to such a degree as to require additional procedural protections. This Note argues, based on Supreme Court and lower court precedent, that § 922(g)(9) is constitutional under intermediate or strict scrutiny[307] and that misdemeanor domestic violence firearm prohibitions can be presumed constitutional under Professor Mayson's analysis.[308]

While Professor Mayson argues that collateral consequences should be analyzed separately from direct consequences, she also contends that criminal procedure should account for the severity of deprivation of liberty imposed by restrictions, regardless of their purpose as punitive or

304. *Id.* at 335–36.
305. *Id.* at 336.
306. *See supra* Part II.A.3.
307. *See supra* notes 146–47 and accompanying text.
308. *See supra* notes 299–300 and accompanying text.

preventive.[309] As set forth by the Supreme Court, this analysis requires comparing collateral and direct penalties.[310] Moreover, the Supreme Court has demonstrated a willingness to dissolve the collateral-direct distinction.[311] Thus, this Note applies Supreme Court precedent to determine whether permanent firearm prohibitions upgrade petty offenses and trigger the jury trial right.

In *Blanton*, the Supreme Court determined that the severity of the penalty imposed by the legislature is indicative of the legislature's determination that the offense is serious.[312] Firearm prohibitions—and other collateral consequences—are imposed by both the federal and state legislatures.[313] Thus, when considering whether the jury trial right is guaranteed, it is consequential whether the same sovereign is prosecuting the offense and implementing the collateral consequence.[314] This issue is highlighted by the Supreme Court of Nevada's decisions in *Andersen* and *Amezcua*.[315] In *Andersen* and *Amezcua*, the defendants were convicted of misdemeanor crimes of domestic violence and as a result were prohibited from possessing firearms.[316] While the penalties were nearly identical, the disparate outcomes depended on the sovereign imposing the penalty.[317]

The *Andersen* and *Amezcua* decisions likely demonstrate the appropriate approach to legislative intent. The Court expounded this approach in *Duncan* when it recognized that courts should look to the "penalty authorized by the law of the locality" to assess the severity of an offense.[318] While this approach undoubtedly appears futile or arbitrary from the perspective of the accused, whose concern is the liberty lost, it would be problematic to confuse or intertwine the intent of distinct sovereigns. First, to do so would trigger issues of federalism because it would blur the line between the separate sovereigns of the state and federal governments and would be contrary to the practice of applying legislative intent. Second, failure to separate the sovereigns would result in the immense task of upending state and federal criminal procedure to account for the thousands of federal and state laws that affect defendants regardless of whether they are prosecuted by the federal or state government.[319]

The next consideration is the liberty interest at stake. In *Baldwin*, the Court focused on distinguishing severe from petty penalties by examining the severity of the penalty, namely the length of the prison term.[320] The Court's

309. *See supra* note 304 and accompanying text.
310. *See supra* Part I.A.2.
311. *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010).
312. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989).
313. *See supra* Parts I.C.1–2.
314. *See* Crane, *supra* note 76, at 55.
315. *See* Andersen v. Eighth Jud. Dist. Ct., 448 P.3d 1120, 1123–24 (Nev. 2019) (distinguishing *Andersen* from the court's previous decision in *Amezcua*).
316. *See id.*
317. *See id.*
318. Duncan v. Louisiana, 391 U.S. 145, 160 (1968).
319. *See* Chin, *supra* note 70, at 240–42. That task is beyond the scope of this Note.
320. *See* Baldwin v. New York, 399 U.S. 66, 68–69 (1970).

analysis centered on the deprivation of liberty resulting from a prison term of more than six months.[321] In *Blanton*, the Court held that if a collateral consequence was so severe that it demonstrated that the legislature considered the offense to be serious, it would upgrade the otherwise petty offense to a serious one if the additional penalty "approximate[d] in severity the loss of liberty that a prison term entails."[322] The Court emphasized the unique severity of a prison term of more than six months and explained how this loss of liberty was distinct from other penalties that infringe on other freedoms.[323]

Based on this precedent, a constitutional test determining whether a collateral consequence upgrades an otherwise petty offense to a serious offense should consider whether the additional penalty or consequence is a proxy for confinement or a restriction on the liberty interests that imprisonment infringes.[324] As set forth by Professor Crane, to upgrade the offense, the penalty must encroach on the liberty interest to a degree comparable to the degree a prison term of more than six months would.[325]

The argument that domestic violence misdemeanants should be guaranteed the right to a jury trial has rested on the *Heller* and *McDonald* decisions, which deemed the Second Amendment right to gun ownership to be individual and fundamental.[326] Thus, a permanent firearm prohibition is such a severe restriction that it reflects the legislature's determination that the offense is serious.[327] However, the Court has not determined that the right to a jury trial applies when the right that is infringed is fundamental but whether the interest restricted is that liberty interest that is infringed by a prison term of more than six months.[328] In *Duncan*, the Court held that the Sixth Amendment jury trial right was a fundamental right.[329] However, the Court did not adopt the reasoning that the jury trial right was automatically triggered when a fundamental right was restricted.[330] Arguably, the opposite is true. The Court has interpreted the Sixth Amendment to mean that the accused is not always guaranteed the right to a jury trial.[331] Instead, when a criminal prosecution begins and the accused's liberty is potentially infringed, one or more of the accused's Sixth Amendment rights are triggered.[332] The

321. *Id.* at 72.
322. Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989).
323. *See id.* at 542; *see also* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (noting that the collateral consequence did not infringe on the defendant's liberty to the degree infringed on by a prison term).
324. *See* United States v. Snow, No. 11-0149, 2011 WL 5025535 (D. Or. Oct. 21, 2011); United States v. Jardee, No. 09-mj-091, 2010 WL 565242 (D.N.D. Feb. 12, 2010).
325. Crane, *supra* note 76, at 32.
326. *See supra* Part II.
327. *See supra* Part II.A.2.
328. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989).
329. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
330. *See id.* at 159–61.
331. *See id.* at 159.
332. *Id.*

right that is triggered depends on the degree to which the accused's liberty interest is restricted.[333]

Additionally, as Professor Crane notes, other penalties actually infringe on one's relevant liberty interest to a greater degree than firearms prohibitions do.[334] Deportation, like imprisonment, results in the physical removal of individuals from their families, communities, and work.[335] Sex offender registration requirements can restrict where individuals can live, at times removing them from their families and communities or requiring that the individuals be monitored by GPS.[336] By contrast, while permanent firearms prohibitions infringe on an individual's Second Amendment right, they infringe on one's relevant liberty interest—that which is restricted when an individual serves more than six months in prison—to a lesser degree than deportation or sex offender registration do.[337]

Moreover, Congress intended for § 922(g)(9) to apply to misdemeanants who may not have had the right to a jury trial.[338] As the Eleventh Circuit determined in *United States v. Chavez*, the language in 18 U.S.C. § 921 specifically recognizes that individuals subject to § 922(g)(9) includes misdemeanants who were not entitled to a jury trial in the underlying offense.[339] Thus, Congress authorized the provision's application to individuals who were not guaranteed the right to a jury trial and did not intend for the provision to upgrade such offenses to serious offenses requiring jury trials.[340]

One could argue that § 922(g)(9) was enacted before the Court explicitly held that the Second Amendment right is individual and fundamental and, thus, the provision is no longer consistent with this interpretation of the Second Amendment. However, as this part discussed, precedent does not focus on whether the right infringed is fundamental but rather whether the right infringed is commensurate with the liberty interest infringed by a prison term longer than six months.

Professor Crane argued that permanent firearm prohibitions, taken together with the maximum authorized prison term, trigger the right to a jury trial under the Sixth Amendment.[341] This Note argues that the opposite is true—that firearm prohibitions do not upgrade an otherwise petty offense—because the firearm prohibition, taken together with the maximum six-month prison term, does not result in an individual's relevant liberty interests being infringed to a degree comparable to the infringement resulting from a prison

333. *See Blanton*, 489 U.S. at 542.
334. *See* Crane, *supra* note 76, at 41.
335. *Id.*
336. *Id.* at 13–14.
337. *Id.*
338. *See* United States v. Chavez, 204 F.3d 1305, 1314 (11th Cir. 2000); *see also* United States v. Jardee, No. 09-mj-091, 2010 WL 565242, at *4 (D.N.D. Feb. 12, 2010).
339. 204 F.3d at 1314.
340. *Id.* Congress passed § 922(g)(9) in 1996, after the Supreme Court decided *Blanton*, *Baldwin*, and *Duncan*. *See supra* Part I.A.; *supra* notes 164–67 and accompanying text.
341. Crane, *supra* note 76, at 59.

term of more than six months. This Note reaches this conclusion on two grounds. First, the Court's precedent established a high bar for a collateral consequence to upgrade an otherwise petty offense, which the firearm prohibitions do not meet. And, the Court has never held that an additional penalty overcomes the presumption of pettiness.[342] Second, Congress explicitly intended for the firearm prohibition to apply regardless of the accused's right to a jury trial in the underlying offense.[343] There was no intent for the provision to upgrade the underlying offenses.

While state statutes may not be as explicit as the federal law, the above analysis applies equally. The Court's test looks to whether the liberty interest infringed is comparable to a prison term of more than six months. Though the intent of each state legislature should be considered, this Note argues that such intent should be explicit so as to override the analysis set forth above. Absent such intent, under the Court's test, such a prohibition does not upgrade a petty offense.

Whether or not domestic violence misdemeanants have the right to a jury trial may affect victim safety.[344] Application and enforcement of firearm prohibitions are also vital to domestic violence victims' safety from gun violence. The next section focuses on recommendations for advocates and legislatures to enhance the safety of domestic violence victims with regard to gun violence.

B. Enforcing and Expanding Gun Laws to Improve Victim Safety

This Note proposes that legislatures and domestic violence advocates should focus on expanding and enforcing legislation that prohibits access to firearms by those subject to civil protective orders.[345] Civil protective orders are more immediate than criminal convictions, are controlled by the victim, and are immune from the challenge discussed in this Note.[346]

Under federal law, individuals subject to civil protective orders are prohibited from possessing a firearm.[347] A majority of states also have laws that prohibit an individual, who is subject to a domestic violence restraining order, from possessing a firearm.[348] These protective orders are ordered by a family or civil court, and the firearm prohibition is often limited in time to the duration of the order.[349] Thus, these provisions are shielded from the

342. *See* Kansas v. Woolverton, 371 P.3d 941, 944–45 (Kan. Ct. App. 2016).
343. *See* 18 U.S.C. § 921(a)(33)(B)(i)(II)(aa)–(bb).
344. *See* Wilson, *supra* note 223.
345. While there are a number of measures that should be taken to reduce domestic violence more generally—including education about and societal recognition of the pervasiveness of the issue, access to support and justice for victims, batterer intervention programs for abusers, expanded access to mental health and other social services, and criminal justice reform—this Note focuses only on measures specific to preventing abusers' access to firearms in order to reduce the risk of gun violence for domestic violence victims.
346. *Protective Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).
347. *See* 18 U.S.C. § 922(g)(8); *supra* Part I.C.1.
348. *See supra* note 180 and accompanying text.
349. *Protective Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

challenge discussed in this Note.[350] Because these are civil orders, the Sixth Amendment jury trial right, which applies in criminal prosecutions, is inapplicable. In addition, while firearm prohibitions for domestic violence misdemeanants are often permanent and thus infringe individual liberty more, firearm prohibitions stemming from civil orders of protection are confined to the period of the protective order.[351] These laws also prove to be effective: states with these laws report a reduction in domestic violence homicides.[352]

While most states have enacted laws that restrict domestic violence misdemeanants and abusers subject to civil protective orders from possessing firearms, enforcement of these laws is lacking. Only sixteen states require the relinquishment of firearms by domestic violence misdemeanants or abusers subject to restraining orders.[353] This Note recommends that advocates and legislatures focus on enforcement of firearm relinquishment for misdemeanants and abusers who are subject to protective orders. Enforcement of such laws has had positive results on reducing domestic violence homicides.[354]

In 2003, the sheriff in King County, Washington, established a domestic violence firearm enforcement unit that enforces firearm relinquishment and forfeiture by individuals who are subject to domestic violence protective orders.[355] In 2018, the number of firearms forfeited to the unit was four times the number forfeited in 2016.[356] The program's success is also reflected in rearrest statistics. In 2006, of individuals who were rearrested after their firearms were removed, 15 percent were arrested for domestic violence charges and 20 percent for other crimes, but none of these individuals were arrested for firearm possession.[357]

Amending legislation and establishing task forces nationwide at the county level to work with sheriff's offices, judges, and prosecutors to ensure that domestic abusers forfeit their firearms would result in fewer firearms in the hands of abusers. These task forces should focus on enforcement of gun prohibitions stemming from both domestic violence civil orders of protection and from misdemeanor convictions.

The focus on enforcement and the relinquishment of firearms by domestic abusers should also be extended to ex parte orders of protection. When individuals petition a civil or family court for a civil order of protection, they

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350. *See supra* Part II. However, these provisions are not immune from constitutional attacks. *See* David T. Hardy, District of Columbia v. Heller *and* McDonald v. City of Chicago*: The Present as Interface of Past and Future*, 3 NE. U. L.J. 199, 214–16 (2011).

351. *See* 18 U.S.C. § 922(g)(8); *Protective Order*, BLACK'S LAW DICTIONARY (11th ed. 2019).

352. *See supra* Part I.C.3.

353. *See supra* note 179 and accompanying text.

354. *See* EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 22; *supra* Part I.C.3.

355. *See generally* Andrew Klein, *Disarming Batterers, Seattle Sheriffs Lead the Way*, QUINLAN, L. ENFORCEMENT EMP. BULL., Aug. 2006.

356. EVERYTOWN FOR GUN SAFETY, *supra* note 8, at 23.

357. Klein, *supra* note 355.

are often granted a temporary order or ex parte order.[358] The temporary order remains in place until a hearing, following notice to the respondent, at which point the court decides whether to extend the order or issue a final order of protection.[359] The federal firearm prohibition provision only applies after this final order is issued.[360] However, evidence shows that the most dangerous time for domestic violence victims is the short period of time after they leave their abusers.[361] As such, twenty-two states have passed laws that prohibit individuals subject to ex parte protection orders from possessing a firearm.[362] This Note encourages legislatures and advocates to focus on passing ex parte provisions in states that do not have them, to lobby for an amendment to the federal law to apply to ex parte orders, and to establish and expand task forces that will enforce firearm prohibitions and require the relinquishment of firearms temporarily. While this Note is mindful that such laws are vulnerable to constitutional due process challenges that argue that restricting an individual's Second Amendment right without notice or a hearing is unconstitutional, there are strong arguments to the alternative. Other federal provisions permit firearm restrictions prior to or without a criminal conviction, including provisions that prohibit firearm possession by those subject to a felony indictment[363] and by drug users.[364]

Challenges to domestic violence misdemeanor firearm prohibitions focus on the permanence of such prohibitions. As such, advocates and state legislatures might choose to pass or amend legislation that prohibits firearm possession for domestic violence misdemeanants for a limited period of time. While this approach would not prohibit firearm possession indefinitely, it would prohibit the possession in the period following the initial separation between the abuser and the victim, which is often the most dangerous time.[365]

Finally, judges, attorneys, and law enforcement presiding over or practicing in family, civil, and criminal courts should receive training and education about the compounding dangers that result when domestic abusers have access to firearms. Increased training and education would likely lead to judges, lawyers, and law enforcement taking victims' fears and concerns seriously and would likely increase safety through the application and enforcement of firearm prohibitions.

CONCLUSION

This Note argues that, consistent with the Supreme Court's Sixth Amendment jury trial precedent, domestic violence misdemeanants convicted of petty misdemeanor offenses and subject to permanent firearm

358. *Restraining Order*, BLACK'S LAW DICTIONARY (11th ed. 2019); Martin, *supra* note 183, at 267.

359. *See Domestic Violence & Firearms*, *supra* note 178.

360. *See* 18 U.S.C. § 922(g)(8).

361. Mitchell, *supra* note 4.

362. *Domestic Violence & Firearms*, *supra* note 178.

363. *See* 18 U.S.C. § 922(n); Martin, *supra* note 183, at 268.

364. 18 U.S.C. § 922(g)(3); Martin, *supra* note 183, at 268.

365. Mitchell, *supra* note 4.

prohibitions are not guaranteed the right to a jury trial. The Court's analysis looks at whether the liberty interest infringed by a noncarceral punishment is equivalent or comparable to the degree an individual's liberty is infringed on by a prison term of more than six months. While permanent firearm prohibitions undoubtedly infringe on an individual's liberty, they do not do so in the form or degree that a prison term of more than six months does. As such, courts should find, consistent with Supreme Court precedent, that firearm prohibitions do not upgrade presumptively petty offenses to guarantee domestic violence misdemeanants the right to a jury trial.

Moreover, despite frequent challenges to firearm prohibitions and in light of the ongoing danger guns present to victims of domestic violence and society more generally, state and federal firearm legislation has been enacted to reduce future violence. However, enforcement of firearm prohibitions is lacking. Increasing enforcement and requiring abusers to relinquish firearms in criminal and civil procedures would reduce access to guns by those this proposed solution seeks to prohibit from possessing the guns. These measures have and likely will continue to provide greater safety for victims.