

## An Ethical Duty to Charge Batterers Appropriately

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*Access to a gun increases the likelihood that a batterer will kill his victim. Studies indicate that the risk of fatality increases five-fold when a firearm is available during an incident of domestic abuse. This risk led Congress to pass the Lautenberg Amendment, 18 U.S.C. § 922(g)(9), which criminalizes the possession of a firearm by any person convicted of domestic violence.*

*When the Supreme Court recently accepted certiorari in a case involving the Lautenberg Amendment, many observers feared that a restrictive interpretation would jeopardize the efficacy of the gun ban for domestic abusers. The Court's ruling on March 26, 2014, did not seem to weaken the Lautenberg Amendment. The reality, however, is that the Lautenberg Amendment was egregiously ineffective even before the Court's ruling, and the "victory" in the recent case masks an enduring problem in the enforcement of the gun ban.*

*Specifically, the charging practices of local prosecutors have minimized the opportunities to apply the federal firearms disability for convicted abusers. When local prosecutors undercharge domestic violence – by sidestepping charges that would clearly signal the defendant's disability, or by consenting to charges that would likely result in expunction – they thwart the intent of Congress to disarm convicted batterers. Each year federal prosecutors only charge approximately fifty among hundreds of thousands of convicted domestic abusers who possess guns.*

*This article proposes an ethical rule that would obligate all prosecutors to charge domestic violence offenses appropriately. In jurisdictions adopting the rule, the federal gun ban and other ancillary consequences intended by federal and state legislators would be more likely to attend a conviction for domestic violence. The article concludes by addressing foreseeable objections to the proposed rule.*

### INTRODUCTION

On June 5, 2008, Utah prosecutors charged Ronald Lee Haskell with a misdemeanor crime of domestic violence.<sup>1</sup> Records show that he hit his wife in the head and dragged her by her hair while their children were watching.<sup>2</sup> In

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1. Michael McFall, *Ex-Utahn Is Suspect in Fatal Texas Shooting*, SALT LAKE TRIB. (July 10, 2014, 12:31 PM), <http://www.sltrib.com/sltrib/news/58170309-78/haskell-county-ronald-cache.html.csp>.

2. Michael Graczy, *Former Utahn Charged in Texas with Killing Four Kids, Parents*, SALT LAKE TRIB. (July 10, 2014, 2:29 PM), [www.sltrib.com/sltrib/world/58169710-68/haskell-hickman-county-](http://www.sltrib.com/sltrib/world/58169710-68/haskell-hickman-county-)

plea negotiations, Haskell's attorney persuaded the prosecution to reduce the charge to simple assault.<sup>3</sup> The prosecution agreed to recommend that the court hold Haskell's plea "in abeyance" so that it would not appear on his record if he avoided further convictions in the next year.<sup>4</sup> This disposition allowed Haskell to evade the gun ban for convicted domestic abusers under 18 U.S.C. § 922(g)(9), known as the Lautenberg Amendment.<sup>5</sup>

Haskell's conviction disappeared, but his violence continued. After his wife divorced him and fled with their children, he went on a rampage. On July 2, 2014, he tied his mother to a chair and choked her after he learned that she had spoken with his ex-wife.<sup>6</sup> He then drove to Texas on July 9, 2014, to find his ex-wife at her sister's residence near Houston.<sup>7</sup> He disguised himself as a deliveryman for Federal Express.<sup>8</sup> He became outraged when he discovered that his ex-wife was not there. He approached the house disguised as a deliveryman for Federal Express, and asked to see his ex-wife under the pretense of delivering a package. When he learned she was not there, he became enraged, brandished a gun, and ordered the six occupants of the residence—most of them children—to lie facedown on the floor.<sup>9</sup> Then he tied them up and shot each of them in the head. All but one of the victims, a fifteen-year-old girl, died in the shooting.<sup>10</sup> Next, he drove to the residence of his ex-wife's parents, where the death toll would likely have increased, had it not been for police intervention after the fifteen-year-old survivor of the shooting called 911.<sup>11</sup>

The Haskell case demonstrates the urgent need for, and the limited effectiveness of, the federal gun ban for convicted domestic abusers. Convicted batterers are much more likely than the general population to commit homicide when allowed access to firearms.<sup>12</sup> Yet the federal government has rarely enforced the gun ban, prosecuting approximately thirty to seventy each year among hundreds of thousands of potentially eligible defendants.<sup>13</sup> Critics

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parents.html.csp.

3. Mark Saal et al., *Houston Shooter Had Utah Rap Sheet*, OGDEN STANDARD-EXAMINER (July 11, 2014, 5:21 PM), [www.standard.net/National/2014/07/10/Gunman-in-delivery-man-garb-kills-4-kids-parents.html](http://www.standard.net/National/2014/07/10/Gunman-in-delivery-man-garb-kills-4-kids-parents.html).

4. *Id.*

5. For a detailed discussion of 18 U.S.C. § 922(g)(9), see *infra* Part I.C.

6. Tony Perry, *Texas Slaying Suspect Had Been Violent with Mom in California, Deputies Say*, L.A. TIMES (July 11, 2014, 7:33 AM), <http://www.latimes.com/local/lanow/la-me-ln-texas-killings-suspect-mother-restraining-order-20140711-story.html>.

7. St. John Barned-Smith & Cindy Horswell, *Prosecutor: Suspect in Spring Family Slaying Shot Victims 'Execution-Style'*, HOUSTON CHRON. (July 10, 2014), [www.chron.com/neighborhood/spring/news/article/FedEx-disguise-divorce-among-emerging-details-in-5611869.php](http://www.chron.com/neighborhood/spring/news/article/FedEx-disguise-divorce-among-emerging-details-in-5611869.php).

8. *Id.*

9. *Id.*

10. St. John Barned-Smith, *Grieving Spring Community Gathers for Stay Family Funeral*, HOUSTON CHRON. (July 16, 2014), <http://www.chron.com/neighborhood/spring/news/article/Grieving-Spring-community-gathers-for-Stay-family-5624952.php>.

11. *See id.*

12. For evidence demonstrating the heightened risk of homicide when convicted batterers have access to firearms, see *infra* Part I.A.

13. See *infra* note 118 and accompanying text for statistics on annual charging rates under 18 U.S.C. § 922(g)(9).

ranging from the U.S. Senate Judiciary Committee<sup>14</sup> to columnists for the New York Times<sup>15</sup> and U.S.A. Today<sup>16</sup> have bemoaned the ineffectual enforcement of the federal gun ban.

Why is the federal gun ban utilized so infrequently? Advocates seeking to enhance its effectiveness have focused on the Supreme Court's interpretation of the Lautenberg Amendment, and have claimed that the lack of clarity in the interpretation of the statute has hindered its application.<sup>17</sup> These advocates won a commendable victory in *United States v. Castleman* on March 26, 2014, and improved the uniformity of court decisions interpreting the ban.<sup>18</sup> Yet, the last decade has shown that the most important limitation on the gun ban is not jurisprudential. It is the reluctance of local prosecutors to charge domestic violence in a way that would maximize the applicability of the federal gun ban.<sup>19</sup> Until local prosecutors charge domestic violence appropriately, the vast majority of convicted batterers will dodge the gun ban with impunity.

This article proposes an ethical duty for prosecutors to charge batterers to the full extent of the law. The duty would obligate prosecutors to seek all possible enhancements based on the relationship of the accused to the victim and/or any witnesses, and to oppose any proposed dispositions that would lead to expunction. The new rule would increase the recognition that convicted abusers are ineligible to possess guns. The appropriate charging of domestic violence would also have ancillary benefits, allowing employers to recognize abusers, allowing victims to demonstrate their eligibility for certain government

14. *E.g., Hearing on VAWA Next Steps: Protecting Women from Gun Violence, Before the S. Judiciary Comm.* 113th Cong. (2014) (statements of Sen. Pat Leahy, Sheriff Christopher Schmalig, and Professor Jacqueline Campbell), available at <http://www.judiciary.senate.gov/meetings/vawa-next-steps-protecting-women-from-gun-violence> (last visited Aug. 3, 2014) (noting various problems that hinder enforcement of federal ban on possession of firearms by convicted domestic abusers); see also Michele Richinick, *Senate Holds First-Ever Hearing on Guns and Domestic Violence*, MSNBC (July 30, 2014, 3:10 PM), <http://www.msnbc.com/msnbc/senate-holds-first-ever-hearing-guns-and-domestic-violence> (noting that Senate Judiciary Committee had never before held a hearing on this subject; the Lautenberg Amendment passed after a floor debate in 1996, not a hearing before the Senate Judiciary Committee).

15. Editorial, *Disarmament for Domestic Abusers*, N.Y. TIMES, Apr. 26, 2014, available at [http://www.nytimes.com/2014/04/27/opinion/sunday/disarmament-for-spousal-abusers.html?\\_r=0](http://www.nytimes.com/2014/04/27/opinion/sunday/disarmament-for-spousal-abusers.html?_r=0) (last visited Aug. 3, 2014) (arguing that "existing federal laws intended to disarm spousal abusers have proved largely unenforceable.") [hereinafter *Disarmament*].

16. Kimberly Brusk, *Gun Laws Still Don't Protect Women from Abusers*, USA TODAY (July 30, 2014), [www.usatoday.com/story/opinion/2014/07/30/gun-control-deaths-women-column/13332165/](http://www.usatoday.com/story/opinion/2014/07/30/gun-control-deaths-women-column/13332165/) ("[C]urrent federal law fails spectacularly" at protecting women from gun crimes committed by convicted domestic abusers).

17. See, e.g., Brief for Children's Defense Fund and American Academy of Pediatrics as Amici Curiae Supporting Petitioner, *United States v. Castleman*, 134 S. Ct. 1405 (2014) (No. 12-1371); Brief for Mayors Against Illegal Guns as Amicus Curiae Supporting Petitioner, *United States v. Castleman*, 134 S. Ct. 1405 (2014) (No. 12-1371); Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioner, *United States v. Castleman*, 134 S. Ct. 1405 (2014) (No. 12-1371); Brief for Brady Center for Gun Violence, et al. as Amici Curiae Supporting Petitioners, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608); Brief for United States Senators Frank R. Lautenberg, Diane Feinstein and Patty Murray as Amici Curiae Supporting Petitioner, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608).

18. *United States v. Castleman*, 134 S.Ct. 1405 (2014). For a detailed analysis of the *Castleman* ruling, see *infra* Section II.B.

19. See *infra* Part III.

benefits, and increasing the odds that batterers will receive necessary counseling.<sup>20</sup>

The analysis in this article will proceed in four steps. Part I will examine the Lautenberg Amendment and the rationale for disarming convicted abusers. Part II will focus on the Supreme Court's recent interpretation of the Lautenberg Amendment in *United States v. Hayes*<sup>21</sup> and *United States v. Castleman*,<sup>22</sup> and will challenge the widely held belief that the limited enforcement of the gun ban is attributable to restrictive judicial interpretations. Part III will explore the reasons for and harmful effects of local prosecutors undercharging domestic violence. Part IV will set forth the proposal to establish an ethical duty obligating prosecutors to charge domestic violence as zealously as possible and consider objections to that proposal.

## I. THE LAUTENBERG AMENDMENT AND ITS RATIONALE

When Senator Lautenberg first sought to disarm convicted domestic violence misdemeanants nearly twenty years ago, his purpose was clear: to decrease the grave risk that batterers with guns will kill their victims. Research subsequent to the passage of the Lautenberg Amendment has strengthened the evidence that perpetrators of fatal shootings are more likely to have a history of domestic violence

### A. Firearms and Domestic Violence

Today, there are a significant number of convicted domestic abusers in the United States. In fact, offenders convicted of domestic violence account for about 25% of violent offenders in local jails and 7% of violent offenders in state prison.<sup>23</sup> Justice Sotomayor noted that more than a million acts of domestic violence occur in the U.S. every year.<sup>24</sup> Given that 40% of U.S. households have guns, it is likely that hundreds of thousands of convicted domestic violence misdemeanants possess firearms.<sup>25</sup>

Domestic violence is much more likely to result in the victim's death if the abuser owns a firearm. The risk of violence increases by 500% when batterers have access to firearms.<sup>26</sup> Domestic violence assaults involving a gun are twenty three times more likely to result in death than those involving other weapons or

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20. See *infra* Part IV.

21. *United States v. Hayes*, 555 U.S. 415 (2009).

22. 134 S.Ct. 1405.

23. RANA SAMPSON, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PROBLEM-ORIENTED GUIDES FOR POLICE NO. 45, DOMESTIC VIOLENCE 12 (2007), available at <http://ric-zai-inc.com/Publications/cops-p123-pub.pdf>.

24. *Castleman*, 134 S.Ct. at 1408.

25. See *United States v. Wilson*, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, C.J., dissenting) (discussing 40% figure and speculating about gun ownership by batterers).

26. Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003); see Melissa Jeltsen, *Mass Shooting Analysis Finds Strong Domestic Violence Connection*, HUFFINGTON POST (July 17, 2014), [http://www.huffingtonpost.com/2014/07/17/domestic-violence-gun\\_n\\_5595898.html?utm\\_hp\\_ref=crime&ir=Crime](http://www.huffingtonpost.com/2014/07/17/domestic-violence-gun_n_5595898.html?utm_hp_ref=crime&ir=Crime) (arguing that the risk increases eight-fold when a firearm is present).

bodily force.<sup>27</sup> In 2011, intimate partners committed nearly two-thirds of fatal shootings in which women were the victims.<sup>28</sup> Between 1980 and 2008, firearms were the cause of death for more than two-thirds of homicide victims who were spouses or ex-spouses of the assailants.<sup>29</sup>

The single most accurate predictor of homicide with a firearm is a background of domestic violence. Mary Fan at the University of Washington School of Law analyzed recently released data in the National Violent Death Reporting System, and sought to identify common denominators among people who killed others with firearms. She found that one characteristic was more likely than any other to correspond with fatal shootings: a history of domestic abuse.<sup>30</sup> Domestic violence also correlates with mass shootings, as 57% of shootings with four or more victims included a family member or current or former intimate partner of the shooter.<sup>31</sup>

The dangers posed by armed domestic abusers extend beyond fatal shootings. Domestic abusers also use firearms to commit non-fatal assaults and to threaten homicides. In 2004, among residents of battered women's shelters in California, 37% reported that their abusers had threatened to shoot them or had otherwise harmed them with firearms.<sup>32</sup> In the same study, 65% of respondents who had lived in households with a firearm reported that their abusers had used firearms against them, usually threatening to shoot them.<sup>33</sup>

Conversely, domestic violence fatalities decrease when jurisdictions restrict batterers' access to firearms. When police increase enforcement of state statutes denying firearms to domestic abusers, the rate of homicides committed against intimate partners goes down significantly.<sup>34</sup>

## B. Passage of Lautenberg Amendment

On March 21, 1996, Senator Frank Lautenberg introduced S. 1632, "a bill to prohibit persons convicted of a crime involving domestic violence from owning or possessing firearms."<sup>35</sup> As originally introduced, the bill prohibited the possession of firearms by any person who had committed a "crime involving

27. Linda Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267, No. 22 JAMA 3043, 3043-47 (1992).

28. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA (Sept. 2013), available at <http://www.vpc.org/studies/wmmw2013.pdf> visited.

29. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 20 (2011), available at <http://bjs.gov/content/pub/pdf/htus8008.pdf>.

30. Mary Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L. J. (forthcoming 2015).

31. MAYORS AGAINST ILLEGAL GUNS, ANALYSIS OF RECENT MASS SHOOTINGS 4 (2013), available at <https://s3.amazonaws.com/s3.mayorsagainstilllegalguns.org/images/analysis-of-recent-mass-shootings.pdf>.

32. Susan B. Sorenson, et al., *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1413 (2004).

33. *Id.* at 1414.

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

35. 142 CONG. REC. S2646 (daily ed. Mar. 21, 1996) (statement of Sen. Lautenberg).

domestic violence,” whether the charged offense was a felony or misdemeanor.<sup>36</sup> The bill created a disability not only for defendants who had been convicted of such an offense, but also for defendants who had been indicted and were awaiting trial.<sup>37</sup> The original version of the bill did not require that the predicate offenses include specific elements, so long as they involved domestic violence.<sup>38</sup>

Senator Lautenberg’s intent was evident in a number of his 1996 floor statements. He explained that, “we proposed that no wife beater, no child abuser . . . ought to be able to have a gun, because we learned one thing—that the difference between a murdered wife and a battered wife is often the presence of a gun.”<sup>39</sup> In addition, he noted that approximately two million cases of domestic abuse are reported each year, and that approximately 150,000 of these cases involve a firearm.<sup>40</sup> He also discussed the fatal consequences of gun possession by batterers: “[t]here is no question that the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder.”<sup>41</sup> According to Senator Lautenberg, “for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death.”<sup>42</sup> If abusers are permitted to retain their guns, “[t]he end result, without any question, would be more shootings, more injuries, and more death.”<sup>43</sup>

Co-sponsors echoed these concerns, stressing the urgent need to deny firearms to batterers. Senator Murray stated:

[W]e know from the research that nearly 65 percent of all murder victims known to have been killed by intimates were shot to death. We have seen that firearms-associated family and intimate assaults are 12 times more likely to be fatal than those not associated with firearms. A California study showed when a domestic violence incident is fatal, 68% of the time the homicide was done with a firearm. . . [T]he gun is the key ingredient most likely to turn a domestic violence incident into a homicide.<sup>44</sup>

Senator Feinstein stated that, “many perpetrators of severe and recurring domestic violence are still permitted to possess a gun. Mr. President, these

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36. This bill included the following language defining the predicate offense that would result in a firearm disability under federal law:

The term “crime involving domestic violence” means a felony or misdemeanor crime of domestic violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or a by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was convicted.

A copy of the bill was printed in the Congressional Record with Senator Lautenberg’s floor statement on March 21, 1996. *See id.*

37. *Id.* at S2647.

38. *Id.*

39. 142 CONG. REC. S11363 (daily ed. Sept. 26, 1996).

40. *Id.*

41. 142 CONG. REC. S11227 (daily ed. Sept. 25, 1996).

42. 142 CONG. REC. S11872 (daily ed. Sept. 30, 1996), S 11878.

43. 142 CONG. REC. S11226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

44. 142 CONG. REC. S10379 (daily ed. Sept 12, 1996).

people are like ticking time bombs. It is only a matter of time before the violence gets out of hand, and the gun results in tragedy.”<sup>45</sup> Representative Torricelli, the primary sponsor of the House analog to the Lautenberg Amendment, stated in a press release on September 19, 1996, that, “[it] is critical to the health and well-being of countless American women and children that we move promptly to disarm wife beaters and child abusers.”<sup>46</sup>

Senator Lautenberg made a number of concessions to win the support of Republicans in the Senate.<sup>47</sup> They insisted that he drop the language creating a firearms disability based solely on an indictment for a misdemeanor crime of domestic violence.<sup>48</sup> The Republicans also required that no predicate would qualify under the Lautenberg Amendment unless the defendant had been represented by counsel in the misdemeanor proceeding or had knowingly and intelligently waived his right to counsel.<sup>49</sup>

After these revisions, the Senate approved the Lautenberg Amendment by a voice vote on July 25, 1996. The Senate approved it again by a resounding 97-2 vote when Senator Lautenberg added it to a new vehicle, the Treasury, Postal and General Appropriations Act.<sup>50</sup>

Senator Lautenberg faced a tougher challenge in overcoming the opposition of the Republicans in the House of Representatives.<sup>51</sup> They sought sweeping changes to the Lautenberg Amendment as a price for their approval.<sup>52</sup> They proposed, *inter alia*, limiting the ban to misdemeanants who had been entitled to a jury trial, were notified of the law at the time of their conviction, and had abused their intimate partners (as opposed to only their children).<sup>53</sup>

In order to fend off these major changes, which he felt would “gut” his bill,<sup>54</sup> Senator Lautenberg agreed to other changes that he deemed to be less significant. He reached a compromise with the Republican negotiators in the early morning

45. 142 CONG. REC. S10380 (daily ed. Sept. 12, 1996).

46. Source on file with author.

47. Senator Lautenberg complained in a floor statement that the Republicans had threatened to hold up President Clinton’s judicial appointments if Senator Lautenberg did not relent with his amendment. 142 CONG. REC. S9458-59 (daily ed. Aug. 2, 1996).

48. 142 CONG. REC. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg).

49. Both these changes appeared in the version of the bill published on July 25, 1996. 142 CONG. REC. S8922 (daily ed. July 25, 1996).

50. 142 CONG. REC. S10380 (daily ed. Sept. 12, 1996).

51. Senator Lautenberg was aware that his greatest challenge lay in persuading the House conferees, who had thwarted the gun ban for domestic violence misdemeanants that the Senate had passed back in 1994. “There is no reason why wife beaters and child abusers should have guns, and only the most progun extremists could possibly disagree with that. Unfortunately, these same extremists seem to have veto rights in the House of Representatives.” 142 CONG. REC. S 9458 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

52. In a floor statement on September 25, 1996, Senator Lautenberg said, “I was told last night that, behind closed doors, the Republican leadership has decided to entirely gut this legislation and say that someone who beats his wife and beats his child ought to be able to own a gun.” 142 CONG. REC. S11226 (daily ed. Sept. 25, 1996). Senator Lautenberg feared a “complete cave-in to the most radical fringe of the gun lobby,” which was trying to “emasculat[e] this legislation.” *Id.*

53. These proposals were summarized in a floor statement by Senator Lautenberg on September 30, 1996. 142 CONG. REC. S11872 (daily ed. Sept. 30, 1996).

54. *Id.* at S11877.

hours on September 28, 1996,<sup>55</sup> the very day when the House voted on the bill. Senator Lautenberg accepted eleventh-hour amendments that, according to Lautenberg, had been authored by “enemies of the ban—lawmakers who oppose any curbs on guns.”<sup>56</sup>

The most significant of the revisions incorporated a new “use-of-force” requirement. As Lautenberg would later recount, “[s]ome argued that the term ‘crime of violence’ [in the original bill] was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition.”<sup>57</sup> The Republican negotiators proposed, and Senator Lautenberg accepted, a version of the use-of-force requirement that was more restrictive than the typical definition in the federal gun laws.<sup>58</sup>

One final amendment by Republican Representative Bob Barr added language that subjected police officers and military personnel to the new gun ban.<sup>59</sup> Senator Lautenberg later indicated that Representative Barr inserted this amendment after Senator Lautenberg had gone to sleep on September 28, 1996.<sup>60</sup> Senator Lautenberg did not object to the revision when he learned of it the next day, but he had concerns about Representative Barr’s motives; Senator Lautenberg suspected that the amendment was part of a strategy to make the bill less attractive to fellow Republicans and decrease the likelihood of its passage.<sup>61</sup>

Even with Representative Barr’s last-minute amendment, the House approved the conference report on September 28, 1996, by a vote of 370-37.<sup>62</sup> The Senate passed the bill on September 30, 1996, by a vote of 84-15.<sup>63</sup> The President signed the bill into law on September 30, 1996.<sup>64</sup>

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55. *See id.* (“The language in the final agreement was worked out early Saturday morning, September 28, through further negotiations with the Republican leadership”).

56. Guy Gugliotta, *Gun Ban Exemption Ricochets in the Struggle*, WASH. POST, June 10, 1997, at A15.

57. 142 CONG. REC. S11872 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

58. The new “use of force” requirement in the Lautenberg Amendment required that the predicate offense must involve “the use or attempted use of force, or the threatened use of a deadly weapon.” Typically in the U.S. Code, this requirement is defined more broadly to include “the use, attempted use, or threatened use of physical force.” *Compare* 18 U.S.C. § 921(a)(33)(A)(ii) (narrow definition in Lautenberg Amendment) with 18 U.S.C. § 922(g)(8) (broader definition), and 18 U.S.C. § 924(c) (broader definition) with 18 U.S.C. § 924(e) (broader definition). Senator Wellstone had used the broader definition in his original proposal of a gun ban for convicted domestic abusers. *See supra* note 45.

59. Naftali Bendavid, *A Political Gunfight*, 19 LEGAL TIMES 42, March 3, 1997, at 19 (on file with author). Representative Barr denied that he had authored this change, but most other observers have attributed it to him. *E.g., id.*; Guy Gugliotta, *Gun Ban Exemption Ricochets in the Struggle*, WASH. POST, June 10, 1997 (on file with author); Press Release, Office of Senator Lautenberg, (Jan. 8, 1997) (on file with author).

60. Gugliotta, *supra* note 56, at A15.

61. Bendavid, *supra* note 59, at 19; *see also* Press Release, Office of Senator Lautenberg (Jan. 8, 1997) (“Gun ban opponents, at the last minute, insisted into the law a provision that exempts covered offenders from a provision of the Gun Control Act that generally excludes government entities from the Act”).

62. 142 CONG. REC. H12110 (daily ed. Sept. 28, 1996).

63. 142 CONG. REC. S11922 (daily ed. Sept. 30, 1996), at S11936.

64. CONG. Q. NEWS, Oct. 1, 1996 (on file with author).



Two themes emerged in the legislative record that culminated in the passage of the Lautenberg Amendment. First, Congress expressed its intent that the new gun ban be applied broadly.<sup>65</sup> Second, Congress intended for the new law to be applied uniformly so that it would reach any conviction for an act involving domestic violence, notwithstanding the vagaries of state statutory definitions.<sup>66</sup>

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65. Senator Lautenberg stated that his bill “establishes a policy of zero tolerance when it comes to guns and domestic violence.” 142 CONG. REC. S8831 (daily ed. July 25, 1996). In a press release on September 12, 1996, Senator Lautenberg emphasized that “[w]e need to ensure that every innocent child or terrorized woman enjoys the fullest protection of the law.” Press Release, Office of Senator Lautenberg, (Sep. 12, 1996).

Senator Lautenberg indicated that any person who has committed an act of domestic violence, in any form, should forfeit the right to possess a firearm: “In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.” 142 CONG. REC. S11872 (daily ed. Sept. 30, 1996), at S11877. That Senator Lautenberg intended a broad construction of the statute is clear in the following statement:

We hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you will lose your right to possess a gun. That is the way it ought to be.

*Id.* at S11878. Senator Lautenberg believed that broad application of the statute was crucial because “[t]here is no margin of error when it comes to domestic abuse and guns.” 142 CONG. REC. S10377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). “The lives of thousands of women and children are at stake.” 142 CONG. REC. S9628 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

Others in Congress stressed that the law should be construed broadly. Senator Kerry stated that “guns absolutely must be forbidden for those who abuse their spouses.” 142 CONG. REC. S12136-01 (daily ed. Oct. 1, 1996), at S12141. Representative Woolsey made this categorical statement: “It is simple. Wife-beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period.” 142 CONG. REC. 118100 (daily ed. July 23, 1996). No less an authority than House Speaker Newt Gingrich stated that “I’m very much in favor of stopping people who engage in violence against their spouses from having guns.” Transcript of interview on MEET THE PRESS (Sept. 15, 1996), *available at* 9/15/96 MTPRESS.

66. Senator Lautenberg made clear that his bill targeted “domestic violence, no matter how it is labeled. . .” 142 CONG. REC. S10378 (daily ed. Sept. 12, 1996). He said that variation among the states’ laws should not hinder the enforcement of the federal firearms ban. For example, Senator Lautenberg did not want the applicability of the statute to depend on whether the defendant had been convicted by a jury, because “states vary considerably with respect to the types of crimes for which a jury trial is required.” 142 CONG. REC. S11226 (daily ed. Sept. 25, 1996). He insisted that variation in states’ plea bargaining practices should not determine whether an offense involving domestic violence would qualify under the definition in his statute. *See* 142 CONG. REC. S10377-78 (daily ed. Sept. 12, 1996). Senator Lautenberg intended for his bill to apply uniformly even though “in many places today, domestic violence is not taken as seriously as other forms of brutal behavior.” *Id.* at S10378. Many sponsors agreed that the application of the new law should not be thwarted by variation among states’ statutory definitions of domestic violence and assault. As Senator Feinstein stated, “[t]his amendment looks to the type of crime, rather than the classification of the conviction.” *Id.* at S10380. Senator Dodd indicated that the law would “prevent anyone convicted of *any kind* of domestic violence from owning a gun.” 142 CONG. REC. S12341 (daily ed. Oct. 3, 1996) (emphasis added). Senator Feinstein, Senator Wellstone, and Representative Schroeder all noted the variation in states’ charging practices, which necessitated a generic federal definition of the predicate offense so that batterers would uniformly be denied the right to possess firearms. *See* 142 CONG. REC. H10434 (daily ed. Sept. 17, 1996); 142 CONG. REC. S10378-79 (daily ed. Sept. 12, 1996).

### C. Definition of Predicate Offenses

Section 922(g)(9) of Title 18 (“Lautenberg Amendment”) creates a firearms disability for any person convicted of “a misdemeanor crime of domestic violence.”<sup>67</sup> The Lautenberg Amendment also criminalizes the act of selling or otherwise disposing of a firearm by giving it to a person who has been convicted of a misdemeanor crime of domestic violence.<sup>68</sup> Only convictions—not indictments—for a misdemeanor crime of domestic violence can result in a firearms disability under § 922(g)(9).<sup>69</sup> Like the rest of 18 U.S.C. § 922(g), § 922(g)(9) has a jurisdictional predicate: the government must prove that the firearm or ammunition in question has traveled in interstate commerce.<sup>70</sup> A violation of the Lautenberg Amendment is punishable by a prison term of up to ten years<sup>71</sup> and a fine of up to \$250,000.<sup>72</sup>

The term “misdemeanor crime of domestic violence” is defined in 18 U.S.C. § 921(a)(33)(A):

[M]isdemeanor crime of domestic violence” means an offense that —

- (i) is a misdemeanor under Federal or State law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

In addition to these definitional requirements for the predicate offense, § 921(a)(33)(B)(i) also imposes procedural requirements:

A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless —

- (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
- (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

67. 18 U.S.C. § 922(g)(9) provides in pertinent part: “It shall be unlawful for any person., who has been convicted in any court of a misdemeanor crime of domestic violence., to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . .” Of course, there was no need to create such a gun ban for felony crimes of domestic violence, because all felons are already subject to the long-standing gun ban under 18 U.S.C. § 922(g)(1).

68. 18 U.S.C. § 922(d)(9) (2012).

69. By contrast, in the context of felony offenses, either a conviction or an indictment will result in a firearms disability. *See id.* §§ 922(g)(1)-(n).

70. *See id.* § 922(g)(9) (making it illegal for a convicted domestic violence misdemeanant “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

71. *Id.* § 924(a)(2).

72. *Id.* § 3571.

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.<sup>73</sup>

The Lautenberg Amendment includes other language allowing an exception to the gun ban for defendants whose civil rights were forfeited as a result of the misdemeanor conviction and then restored at a later time. For purposes of the Lautenberg Amendment, the forfeiture and restoration of civil rights will be evaluated under state, not federal, law.<sup>74</sup> A defendant seeking to invoke the exception for restoration of civil rights bears the burden of proof on this issue.<sup>75</sup> A defendant who appeals a conviction for a misdemeanor crime of domestic violence is still subject to the gun ban until the conviction is vacated.<sup>76</sup>

One unique provision of the Lautenberg Amendment is its coverage of military and law enforcement personnel, who are exempted from all the other gun bans under 18 U.S.C. §§ 922(g)(1)–922(g)(8).<sup>77</sup> These personnel are subject to the same criminal penalties that apply to ordinary citizens who possess firearms after a misdemeanor crime of domestic violence.

Congress revisited the Lautenberg Amendment in 2006 as part of reauthorization of the Violence Against Women Act. At that time, Congress amended the definition of the predicate offense under 18 U.S.C. 18 U.S.C. § 921(a)(33)(A) to indicate that a conviction under tribal law would also be subject to the gun ban.<sup>78</sup>

## II. THE SUPREME COURT'S REVIEW OF THE LAUTENBERG AMENDMENT

In the last decade, the Supreme Court has interpreted the Lautenberg Amendment twice. In 2009, the Court considered the statute's requirement of a

73. . *Id.* § 921(a)(33)(B)(i).

74. . *See id.* § 921(a)(33)(B)(ii) (“A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored, if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense, unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”); *United States v. Wegrzyn*, 305 F.3d 593, 595-96 (6th Cir. 2002) (illustrating interplay of Michigan’s restoration statute and 18 U.S.C. § 921(a)(33)(B)(ii), which required vacatur of conviction under Lautenberg Amendment where defendant had successfully completed probation for misdemeanor crime of domestic violence).

75. . *United States v. Bethurum*, 213 F.Supp.2d 679, 686 (N.D.Tex. 2002).

76. . *United States v. Blosser*, No. 02-40074-01-JAR, 2002 WL 31261170, at \*3 (D. Kan. Oct. 4, 2002).

77. . 18 U.S.C. § 925(a)(1) provides that, “The provisions of this chapter, *except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(g), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued of the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.*” The italicized language was added by the Lautenberg Amendment.

78. . Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005) (amending 18 U.S.C. § 921(a)(33)(B)(i) to cover not only misdemeanor convictions for crimes of domestic violence under Federal and State law, but also misdemeanor convictions for crimes of domestic violence under Tribal law).

current or past intimate relationship between the offender and the victim (the “relational requirement”).<sup>79</sup> In 2014, the Court considered the statute’s requirement that the predicate offense involve the use of force against the victim (the “use-of-force requirement”).<sup>80</sup> The next two Subparts will analyze the 2009 and 2014 decisions, and the third Subpart will challenge the widely held belief that jurisprudence is a significant limitation on the effectiveness of the Lautenberg Amendment.

#### A. *Hayes* and the Relational Requirement

In 2004, police in West Virginia responded to the home of Randy Edward Hayes after receiving a 911 call reporting domestic violence. Upon arrival, police found that Hayes possessed several weapons.<sup>81</sup> The federal grand jury returned an indictment of Hayes for violating the Lautenberg Amendment by possessing firearms after a 1994 conviction for a misdemeanor crime of domestic violence.<sup>82</sup> Hayes had committed the 1994 assault against his wife, but the local prosecutor had charged Hayes under a generic battery statute that did not require proof of any particular relationship between the assailant and the victim.<sup>83</sup> Hayes entered a conditional guilty plea to the federal charges in 2004 so that he could appeal.<sup>84</sup>

When the case reached the Fourth Circuit, Hayes argued that his previous misdemeanor conviction did not meet the relational requirement for a predicate offense under the Lautenberg Amendment.<sup>85</sup> He insisted that the definition of “misdemeanor crime of domestic violence” in 18 U.S.C. § 921(a)(33)(A) requires that the statute defining the predicate offense include, as a discrete and indispensable element, the relationship between the assailant and the victim.<sup>86</sup> Hayes also argued that the rule of lenity should favor the defendant when a criminal statute is ambiguous.<sup>87</sup> The Fourth Circuit reversed Hayes’ conviction, agreeing with his narrow interpretation of § 921(a)(33)(A).<sup>88</sup>

The United States petitioned for certiorari, and the Supreme Court granted review. The United States argued that § 921(a)(33)(A) does not require that the relationship between abuser and victim to be an element of the predicate offense; rather, the United States contended that the relationship need only have existed at the time of the offense, whether or not the charging instrument mentioned the relationship.<sup>89</sup> In support of this argument, the United States offered technical arguments of statutory construction and also relied heavily on the legislative

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79. *United States v. Hayes*, 555 U.S. 415 (2009).

80. *United States v. Castleman*, 134 S.Ct. 1405 (2014). For a detailed analysis of the Castleman ruling, see *infra* Section II.B.

81. *Hayes*, 555 U.S. at 418–19.

82. *Id.* at 418–19.

83. *Id.* at 419–420.

84. *Id.* at 420.

85. *Id.* at 419.

86. *Id.*

87. *Id.* at 429.

88. *Id.* at 420, 423–25.

89. Brief for Petitioner at 7–8, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608), 2008 WL 4650594.

history of the Lautenberg Amendment, particularly the comments of sponsors who sought universal application of the gun ban.<sup>90</sup> The United States argued that the Supreme Court's broad interpretation of § 921(a)(33)(A) would make a real difference in protecting battered women from homicide.<sup>91</sup>

Various amici suggested that the *Hayes* ruling would be vital in determining the efficacy of the Lautenberg Amendment. Senators Lautenberg, Feinstein, and Murray – the most ardent supporters of the Lautenberg Amendment in 1996 – submitted an amicus brief indicating that the Court's decision in *Hayes* would determine whether the Lautenberg Amendment would be a “dead letter.”<sup>92</sup> Other amici urged a ruling in favor of the United States in order to ensure effective enforcement of the Lautenberg Amendment and to protect “victims of thousands of domestic violence abusers.”<sup>93</sup>

By a 7-2 vote, the Supreme Court adopted the Government's position. Justice Ginsburg wrote for the majority, opining that the most “sensible” interpretation of § 921(a)(33)(A) did not require that the statute defining the underlying offense must include the relationship as an element.<sup>94</sup> “Practical considerations strongly support our reading of § 921(a)(33)(A)'s language,” the majority opinion observed.<sup>95</sup> The Court emphasized the importance of effectuating, rather than thwarting, congressional intent to disarm convicted batterers throughout the United States.<sup>96</sup>

Advocacy groups hailed the Court's decision as a major victory for battered women. The National Network to End Domestic Violence issued a press release commending the *Hayes* ruling for “keeping guns out of the hands of batterers.”<sup>97</sup> The Brady Campaign to Prevent Handgun Violence praised the Court's decision to “protect domestic violence victims.”<sup>98</sup> It appeared that the Supreme Court cleared away the hurdles to effective enforcement of the Lautenberg Amendment.<sup>99</sup>

90. *See id.* at 7–11. (analyzing the text of the amendment and countering the respondent's attempt at a narrow reading of the statute's “original purpose” with the statements of Senators Lautenberg, Feinstein, and Dodd).

91. *Id.* at 22-27.

92. Brief for United States Senator Frank R. Lautenberg et al. as Amici Curiae Supporting Petitioner, at \*23, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608), 2008 WL 2468545.

93. Brief for Brady Center to Prevent Gun Violence, et al. as Amicus Curiae Supporting Petitioner at 6-7, 27, *United States v. Hayes*, 555 U.S. 415 (2009).

94. *United States v. Hayes*, 555 U.S. 415, 426 (2009).

95. *Id.*

96. *See id.* at 426–29. (examining the legislative history, as well as the practical considerations, behind the amendment).

97. Press Release, National Network to End Domestic Violence (Feb. 25, 2014), available at [www.ncdsv.org/images/NNEDVPraisesLandmarkSupremeCTDec\\_2-25-09.pdf](http://www.ncdsv.org/images/NNEDVPraisesLandmarkSupremeCTDec_2-25-09.pdf) (last visited Aug. 15, 2014).

98. Bill Mears, *Court: No Guns for People Guilty of Domestic Violence*, CNN INT'L (Feb. 24, 2009), <http://edition.cnn.com/2009/CRIME/02/24/supreme.court.gun.rights/> (quoting Paul Helmke, president of Brady Campaign to Prevent Handgun Violence).

99. *See* Tanjima Islam, *The Fourth Circuit's Rejection of Legislative History: Placing Guns in the Hands of Domestic Abuse Perpetrators*, 18 AM. U. J. GENDER SOC. POL'Y & L., 341, 365 (2010) (“The Supreme Court's holding in *Hayes* ensures that courts will apply the Lautenberg Amendment appropriately to properly punish domestic violence offenders”).

### B. *Castleman* and the Use-of-Force Requirement

Five years later, in 2014, the United States and a long list of amici were once again asking the Supreme Court to breathe life into the Lautenberg Amendment. The 2014 case involved a defendant in Tennessee, James Alvin Castleman, who had possessed firearms in 2008 after a 2001 conviction for “intentionally or knowingly causing bodily injury to” the mother of his child.<sup>100</sup> Charged in federal court with violating the Lautenberg Amendment, he moved to dismiss the indictment on the ground that the predicate offense did not meet the use-of-force requirement in § 921(a)(33)(A).<sup>101</sup> He claimed that the act at issue in his 2001 conviction was simply an offensive touching, not an act of violence within the meaning of the use-of-force requirement in § 921(a)(33)(A). The Sixth Circuit agreed with Castleman and reversed his conviction.<sup>102</sup>

The United States petitioned for certiorari to make the argument that an offensive touching involves a sufficient use of force to qualify as a predicate under the Lautenberg Amendment.<sup>103</sup> According to the United States, the phrase “domestic violence” is a term of art that means something broader than mere “violence,” and spans a range of harmful conduct that does not necessarily involve a forceful blow.<sup>104</sup> As in *Hayes*, the United States highlighted comments in the legislative history of the Lautenberg Amendment to support their position that the sponsors’ intent that the gun ban apply broadly irrespective of variations in states’ definitions of domestic violence.<sup>105</sup>

The government’s position attracted support from several amici. For example, Mayors Against Gun Violence filed a brief asserting that a ruling for the United States in *Castleman* would “keep guns out of the hands of convicted abusers.”<sup>106</sup> The National Network to End Domestic Violence beseeched the Court to support the United States’ position and “allow Section 922(g)(9) to do the important work that Congress enacted it to do.”<sup>107</sup> The Brady Center to Prevent Gun Violence filed a brief contending that the proper interpretation of the Lautenberg Amendment would make “[gun-related] violence less likely by punishing – and thus deterring – such conduct.”<sup>108</sup>

The Supreme Court ruled in favor of the government. The Court explained that while minor uses of force may not amount to “violence” in the generic sense, they do suffice for the use-of-force requirement in the Lautenberg Amendment.<sup>109</sup> Within the unique context of domestic violence, offensive touching can be very

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100. United States v. Castleman, 134 S. Ct. 1405, 1409 (2014).

101. *Id.*

102. *Id.* at 1409–10.

103. Brief for Petitioner at 13–19, United States v. Castleman, 134 S.Ct. 1405 (2014) (No. 12-1371).

104. *Id.* at 19.

105. *Id.* at 35–47.

106. See Brief for Mayors Against Illegal Guns as Amicus Curiae Supporting Petitioner at 2, United States v. Castleman, 135 S. Ct. 1504 (2014) (No. 12-1371).

107. Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioner at 33, United States v. Castleman, 134 S.Ct. 1405 (2014) (No. 12-1371), 2013 WL 6228470.

108. Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae Supporting Petitioner at 11, United States v. Castleman, 134 S. Ct. 1405 (2014) (No. 12-1371) 2013 WL 6213274.

109. United States v. Castleman, 134 S. Ct. 1405, 1411 (2014).

harmful, especially when continued over a prolonged period.<sup>110</sup> The Court was mindful that a broad reading of the use-of-force requirement could facilitate the more effective implementation of the Lautenberg Amendment because many local prosecutors charge domestic violence under statutes that do not require use of force in the strictest sense.<sup>111</sup>

Advocates for the government's position celebrated the *Castleman* ruling as a huge step forward for battered women. Jonathan Lowy, a lawyer for the Brady Center to Prevent Gun Violence, described it as "an important victory for women, children and families across the nation who will continue to be protected by strong, sensible federal laws that keep domestic-violence abusers from obtaining guns."<sup>112</sup> The White House issued a press release expressing confidence in the efficacy of the *Castleman* ruling: "[t]his week the Supreme Court decided a case that will save women's lives."<sup>113</sup>

### C. The Fallacy That Judicial Interpretations Constrain Lautenberg

There is a widespread belief that judicial interpretation of the Lautenberg Amendment played a significant role in determining the effectiveness of the gun ban for convicted domestic abusers.<sup>114</sup> For example, one commentator predicted that the Supreme Court's holding in *Hayes* would "effectuate the purpose" of the Lautenberg Amendment and deny firearms to batterers.<sup>115</sup> Another commentator wrote that a broad judicial interpretation of Lautenberg would "give full effect to Congress's intent,"<sup>116</sup> but that "the wrong decision by the Court could leave abused women and children vulnerable to gun violence."<sup>117</sup> A press release from Mayors Against Illegal Guns in 2014 summed up the prevailing belief about the importance of the judiciary in implementing the gun ban for convicted abusers: "[w]e're counting on the Supreme Court to keep Americans safe."<sup>118</sup>

110. *Id.* at 1412.

111. *Id.* at 1413.

112. David G. Savage, *High Court Adds Muscle to Limits on Gun Ownership*, SEATTLE TIMES, Mar. 27, 2014, at A2 (on file with author).

113. Press Release, The White House, Lynn Rosenthal (Mar. 28, 2014) (on file with author).

114. *E.g.*, Abigail Browning, *Domestic Violence and Gun Control: Determining the Proper Interpretation of 'Physical Force' in the Implementation of the Lautenberg Amendment*, 33 WASH. U. J. L. & PUB. POL'Y 273, 293 (2010) (discussing the "vital role" played by the courts).

115. See Tanjima Islam, *The Fourth Circuit's Rejection of Legislative History: Placing Guns in the Hands of Domestic Abuse Perpetrators*, 18 AM. U. J. GENDER SOC. POL'Y & L., 341, 365 (2010) ("The Supreme Court's holding in *Hayes* ensures that courts will apply the Lautenberg Amendment appropriately to properly punish domestic violence offenders").

116. Babk Lalezari, *Domestic Violence: Enough is Enough, Any Force Is Enough*, 1 PHOENIX L. REV. 295, 319 (2008) (suggesting that a pro-government ruling in *Hayes* would "effectuate Congress's efforts to curb the violent outcomes of a pervasive social problem.").

117. This quote is from an opinion piece about *Castleman* by a leader of Moms Demand Action for Gun Sense in America. Linda McFadyen-Ketchum, *Supreme Court Must Protect Victims of Domestic Violence*, HUFF. POST, Jan. 15, 2014, available at 2014 WLNR 1225727.

118. Press Release, Mayors Against Illegal Guns, Case Will Determine Whether Domestic Violence Offenders Can Possess Guns (Jan. 15, 2014), available at <http://www.prnewswire.com/news-releases/statement-from-mayors-against-illegal-guns-on-united-states-v-castleman-240313601.html>).

This faith is misplaced. The Supreme Court's interpretations of the Lautenberg Amendment matter very little if federal prosecutors rarely utilize the statute. Favorable interpretations of the relational requirement or the use-of-force requirement do not put gun-toting batterers in prison. The Court's willingness to construe 18 U.S.C. § 921(a)(33)(A) in accordance with congressional intent is a necessary, but not sufficient, condition for successful prosecution of gun possession by convicted domestic violence misdemeanants. The most important variable for effective enforcement is the number of charges filed by federal prosecutors under the Lautenberg Amendment.

Charging rates remained low after the *Hayes* ruling in 2009. The year before it was decided, federal prosecutors charged 67 defendants under the Lautenberg Amendment.<sup>119</sup> The Supreme Court decided *Hayes* in February 2009, and one might have expected an increase in the number of charges filed thereafter. But the number of defendants charged under the Lautenberg Amendment in 2009 actually *dropped* to 49. The number rose to 56 in 2010, dropped to 40 in 2011, and dropped further to 32 in 2012.<sup>120</sup> In none of the four years following the *Hayes* ruling did the number of defendants charged under the Lautenberg Amendment exceed the number charged in the year immediately prior to the *Hayes* ruling.<sup>121</sup> These data cast doubt on the assumption that the *Hayes* ruling fixed a jurisprudential problem that had constrained the enforcement of the gun ban for domestic abusers. The commentators who predicted that the *Hayes* ruling would increase prosecutors' use of the Lautenberg amendment were mistaken.

There is no cause for optimism that *Castleman* will make more of a difference. Indeed, very few jurisdictions had interpreted the use-of-force requirement restrictively before the Court overruled this interpretation in *Castleman*,<sup>122</sup> so there is little reason to expect that it will bring increased prosecutions under the Lautenberg Amendment.

Some advocates who defend the efficacy of the gun ban for convicted abusers point to the total number of background checks that led to denials due to a prior conviction for domestic violence. For example, Senator Lautenberg himself referred to thousands of purchases prevented by his amendment.<sup>123</sup> Background checks do not deny guns to all convicted batterers, however. One

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119. This figure indicates the number of cases in which a charge under 18 U.S.C. § 922(g)(9) was the "lead charge," which is generally true when an indictment includes § 922(g)(9), because U.S. Attorneys like to draw attention to their use of this statute. See TRANSACTION RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., FEDERAL WEAPONS ENFORCEMENT: A MOVING TARGET, (2013), available at <http://trac.syr.edu/tracreports/crim/307/>.

120. *Id.*

121. *Id.*

122. *United States v. Castleman*, 134 S.Ct. 1405, 1410 (2014); see also Adam Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of the Debate Over "Physical Force" and 18 U.S.C. § 922(g)(9)*, 49 WILLIAM & MARY L. REV., 1904-16 (2008) (noting that even by 2008, most federal circuit courts reaching the question had taken the position that the United States would later advocate in *Castleman*).

123. In 2008, Senator Lautenberg claimed on his campaign website that the Lautenberg Amendment had stopped thousands of attempted gun purchases by convicted domestic violence misdemeanants. See *On The Issues*, ON THE ISSUES [http://www.ontheissues.org/Domestic/Frank\\_Lautenberg\\_Gun\\_Control.htm](http://www.ontheissues.org/Domestic/Frank_Lautenberg_Gun_Control.htm) (last visited Aug. 15, 2014) (citing to Senator Lautenberg's original statement on [www.lautenbergforj.com](http://www.lautenbergforj.com), Aug. 12, 2008).



problem is that the background checks rely on an incomplete database of convictions that undercounts misdemeanor crimes of domestic violence.<sup>124</sup> Even when a background check thwarts an attempted purchase by a convicted domestic violence misdemeanant, the hindrance is usually only momentary. Purchasers disqualified in background checks easily buy guns from sellers who are not federally licensed, and who do not need to run background checks on purchasers.<sup>125</sup> For example, neighbors and vendors at gun shows are exempt from running background checks.<sup>126</sup> Further, the black market provides many options to a determined purchaser. Enforcement that consists primarily of background checks by licensed dealers, as opposed to prosecution for unlawful possession, provides scant protection for victims of domestic violence.

In sum, the sanguine commentary on *Hayes* and *Castleman* masks a more basic problem that limits the effectiveness of the Lautenberg Amendment. Federal prosecutors simply do not utilize the Lautenberg Amendment very much, and their willingness to use the statute does not seem sensitive to the Supreme Court's construction of the language in § 921(a)(33)(A). The reasons for underutilization of the Lautenberg Amendment by federal prosecutors are the focus of the Part III.

### III. THE REAL CULPRIT: UNDERCHARGING BY LOCAL PROSECUTORS

Why do federal prosecutors file so few charges under the Lautenberg Amendment? These charges are fairly easy to prove<sup>127</sup>—the evidence need only show the fact of possession and the fact of the prior qualifying conviction (a task

124. Senator Chuck Grassley testified on July 30, 2014, that states' submissions to the federal NCIS database are woefully insufficient to ensure that background checks will detect all gun purchasers with convictions for misdemeanor crimes of domestic violence. According to Senator Grassley's testimony, only 36 states have submitted any domestic violence misdemeanor convictions to the NCIS index, and of these, 21 states have submitted 20 or fewer records. *Taking Effective Action Against Perpetrators of Domestic Violence: Hearing on VAWA Next Steps: Protecting Women from Gun Violence*, (July 30, 2014), available at <http://www.grassley.senate.gov/news/news-releases/taking-effective-action-against-perpetrators-domestic-violence>.

125. The National Network to End Domestic Violence noted that gun shows allow convicted domestic violence misdemeanants to obtain firearms despite the Lautenberg Amendment, because dealers at gun shows do not need to run background checks: "In more than 40 states, criminal convicted of domestic violence offenses (and other prohibited purchasers) can avoid background checks by buying guns – often at gun shows or through anonymous online transactions – from unlicensed private sellers who are not required by current federal law to conduct background checks." *Too Many Domestic Homicide Victims*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE (Feb. 24, 2014), <http://nnedv.org/news/4218-too-many-domestic-violence-homicide-victims.html> (last visited Aug. 19, 2014); see also Interview by Bob Schieffer with Michael Bloomberg, Mayor of New York (July 22, 2012), available at <http://www.cbsnews.com/news/face-the-nation-transcripts-july-22-2012-aurora-mayor-and-police-chief-mayor-bloomberg-pm-netanyahu/> (last visited Aug. 19, 2014) (asserting that there are no background checks in approximately 40% of all gun transactions).

126. Bloomberg, *supra* note 125; NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 125.

127. Proof of possession is usually fairly straightforward. In a large percentage of prosecutions under 18 U.S.C. § 922(g)(9), the prosecutor just calls the police officer who found the weapon, typically in a vehicle stop or during execution of a search warrant. Unlike other prosecutions of batterers, a prosecution for firearm possession by a convicted batterer rarely necessitates that the government call a battered woman to the stand. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 817-18 (2005) (noting that charge of gun possession by convicted domestic violence misdemeanant is easier to prove than charge of domestic assault).

made easier by the Supreme Court's favorable jurisprudence).<sup>128</sup> The low number of federal prosecutions filed under the Lautenberg Amendment is not due to the difficulty of proving such cases, but rather to the lack of opportunity to charge them. In other words, federal law enforcement agents are not referring many cases that meet the requirements of 18 U.S.C. § 922(g)(9).<sup>129</sup>

Why do federal law enforcement officers refer so few prosecutable cases under the Lautenberg Amendment? The explanation lies in the difficulty of finding such convictions in federal databases such as the National Instant Criminal Background Check System (NICS).<sup>130</sup> Underreporting of qualifying convictions to NICS remained a significant problem even in 2014.<sup>131</sup> Even when local jurisdictions enter qualifying convictions into NICS, they are not conspicuous as predicates for 18 U.S.C. § 922(g)(9), because most are under generic assault statutes that do not require proof of domestic abuse.<sup>132</sup> As Senator Lautenberg himself cautioned when advocating for passage of his amendment in 1996:

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128. See *infra* subsections II.A-B.

129. During the period from 2000 to 2002, referrals for prosecutions under *both* § 922(g)(8) (the gun ban for batterers subject to restraining orders) and § 922(g)(9) (the gun ban for convicted domestic violence misdemeanants) made up just 3% of all referrals to federal prosecutors under the broad heading of family violence. MATTHEW R. DUROSE et al., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 51 (2005) (referring to 2000-02), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (last visited Aug. 15, 2014). The 3% figure includes referrals of both felony predicates and misdemeanor predicates involving domestic violence, so the number of referrals that uniquely matched the requirements of the gun ban for convicted domestic violence misdemeanants (as opposed to the general gun ban for felons) was even smaller. Kersey, *supra* note 122, at 1920.

130. Bernard H. Teodorski, the National Vice President of the Fraternal Order of Police, testified before Congress when the Lautenberg Amendment was under consideration. He expressed his fear that convictions for misdemeanor crimes of domestic violence would be difficult to detect. "The statute has created a large new category of prohibited persons lacking adequate definition – enforcement turns on the highly fact-specific findings in each individual case. From any standpoint, the statute is an enforcement nightmare." *Amend Section 658 of the Fiscal Year 1997 Omnibus Appropriations Act: Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski, National Vice President of the Fraternal Order of Police) (source on file with author).

131. Senator Chuck Grassley testified on July 30, 2014, that states' submissions to the federal NCIS database are woefully insufficient to ensure that background checks will detect all gun purchasers with convictions for misdemeanor crimes of domestic violence. According to Senator Grassley's testimony, only 36 states have submitted any domestic violence misdemeanor convictions to the NCIS index, and of these, 21 states have submitted 20 or fewer records. Testimony of Senator Chuck Grassley, Senate Judiciary Committee, Hearing on VAWA Next Steps: Protecting Women from Gun Violence, July 30, 2014, prepared statement available at <http://www.grassley.senate.gov/news/news-releases/taking-effective-action-against-perpetrators-domestic-violence> (last visited Aug. 16, 2014).

132. Elizabeth Richardson Vigdor & James A. Mercy, *Disarming Batterers: the Impact of Domestic Violence Firearm Laws*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 186-77 (Jens Ludwig & Philip J. Cook eds., 2003) (discussing challenge that misdemeanor crimes of domestic violence are not properly memorialized in federal databases of convictions; this problem significantly limits the effectiveness of the gun ban for convicted domestic violence misdemeanants); cf. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-720, GUN CONTROL: OPPORTUNITIES TO CLOSE LOOPHOLES IN THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 17-23 (2003) (noting that NICS process for recording convictions for misdemeanor crimes of domestic violence is insufficient swift and through, and as a result, an alarming number of convicted domestic violence misdemeanants are able to buy firearms despite undergoing background checks).

Convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.<sup>133</sup>

The challenge of discerning domestic violence is particularly difficult when the defendant enters a guilty plea – the most common type of conviction under simple assault statutes.<sup>134</sup> There may be an abundance of misdemeanor convictions that could qualify under the Lautenberg Amendment, but these convictions are difficult to recognize in federal databases.

The lack of clarity is due in large part to local prosecutors' practice of undercharging domestic violence in the first place. Local prosecutors rarely charge defendants under the specialized statutes that clearly indicate the commission of domestic violence,<sup>135</sup> even though these statutes now exist in half the states.<sup>136</sup> Prosecutors are presently under no obligation to invoke the specialized statutes, and they prefer to file more general assault charges or reduced charges.<sup>137</sup> The following subsections consider the reasons why prosecutors undercharge domestic violence, the harmful effects of such undercharging, and the inadequacy of current safeguards designed to ensure appropriate charging.

#### A. Reasons for Undercharging

Undercharging of domestic violence can take several forms. Sometimes, local prosecutors select a lenient charge, or a charge without an enhancement

133. 142 CONG. REC. 26675 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

134. *E.g.*, *United States v. Kavoukian*, 315 F.3d 139, 140-41, 145 (2d Cir. 2002) (attempting to discern whether requisite relationship existed by examining documents from state proceeding, including statement of conviction and transcript from plea hearing, and ultimately remanding question because there was “no information in the indictment, the plea hearing transcript, or the statement of conviction describing the nature of the relationship between the Defendant and his victim”).

135. Local prosecutors generally charge domestic violence under generic assault statutes, even when more specialized statutes are available. As the Supreme Court observed in 2014, “even perpetrators of severe domestic violence are often convicted under generally applicable assault and battery laws”. *U.S. v. Castleman*, 134 S.Ct. 1405, 1415 (2014) (internal quotation marks omitted); *see also U.S. v. Hayes*, 555 U.S. 415, 427 (“[Even in states] with criminal statutes that specifically proscribed *domestic* violence . . . domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws”).

136. Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae Supporting Petitioners at 6, *United States v. Hayes*, 555 U.S. 415 (2009); *see also* BATTERED WOMEN'S JUSTICE PROJECT, NAT'L CTR. ON FULL FAITH AND CREDIT, STATE STATUTES: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE (2008), available at <http://www.abanet.org/domviol/docs/State-MCDV-Matrix.pdf> (setting forth a matrix of state statutes defining misdemeanor crimes of domestic violence).

137. JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 3.09 (3d. 2003) (noting that charging decision is made “virtually free from judicial control”); Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae Supporting Petitioners, *United States v. Hayes*, 555 U.S. 415 (2009), *supra* note 136 (“Even in states that have laws that include such a relationship as an element, prosecutors have been free to bring charges or accept pleas that do not include the relationship as an element of the crime . . .”).

based on the relationship between the offender and the victim. Other times, prosecutors dismiss the case altogether. Even when they file strict charges at the outset, they might later engage in “charge bargaining” as part of plea negotiations. Prosecutors might agree to dispose of charges by means of pretrial diversion, such that the defendant would avoid punishment if he keeps a clean record. Sometimes the prosecution might agree to expunction or restoration of gun rights after conviction and service of the sentence. This subsection will refer to all of the foregoing strategies by the shorthand “undercharging.”

The reasons for undercharging are manifold. Some prosecutors simply do not take domestic violence seriously.<sup>138</sup> One author discussed an old-fashioned view that is “disdainful of prosecuting domestic violence cases” because of the perception that such cases are “trivial.”<sup>139</sup> A prosecutor with such a view might sympathize with defendants and not want to take away their rights to possess firearms, especially if the defendants are law enforcement officers or military personnel whose loss of gun rights might cause them to lose their jobs.<sup>140</sup>

Alternatively, some local prosecutors might choose to “deal down” cases for the sake of expediency.<sup>141</sup> These prosecutors may believe that they will accomplish more good by charging a large volume of domestic violence cases and disposing of them quickly through plea agreements. The prosecutors might also choose to accept guilty pleas because judges want to clear their dockets.<sup>142</sup> Defendants are eager to plead when presented with the alternative of a reduced charge less likely to result in a firearms disability.

Some prosecutors undercharge domestic violence because they believe it is difficult to take such cases to trial. Complainants in domestic violence cases often recant or refuse to testify.<sup>143</sup> Their reluctance can create major problems for the prosecution, especially after the Supreme Court’s rulings under the

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138. Senator Frank Lautenberg discussed this problem in a floor statement. “Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. Often acts of serious spousal abuse are not even considered felonies.” 142 CONG. REC. S10377-78 (daily ed. Sept. 12, 1996).

139. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 176-77 (1996).

140. Kersey, *supra* note 122, at 1924 (“The decision to prosecute may hinge on the decision to take away the ability to possess a firearm. The decision to remove firearms may be especially difficult in law enforcement or military contexts.”).

141. EVE S. BUZAWA et al., RESPONDING TO DOMESTIC VIOLENCE: THE INTERSECTION OF CRIMINAL JUSTICE AND HUMAN SERVICES 130 (4th ed. 2012) (analyzing prosecutors’ tendency to charge generic, simple battery even when a more specific charge for domestic violence might be possible, and attributing this tendency in part of budget pressures, among other factors).

142. See generally GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (noting that one reason for the growing popularity of plea bargaining is the desire to clear up crowded dockets).

143. The California Supreme Court cited expert testimony that “[a]bout 80 to 85 percent of victims ‘actually recant at some point’ in prosecutions of domestic violence. See *People v. Brown*, 33 Cal.4th 892, 897 (2004).

Confrontation Clause that an accuser's hearsay statement might be inadmissible unless cross-examination is possible.<sup>144</sup> For all these reasons, undercharging is attractive.

Ironically, the *Hayes* and *Castleman* decisions may hinder enforcement of the Lautenberg Amendment by decreasing local prosecutors' reliance on specialized domestic violence statutes. The Court's recent jurisprudence might breed overconfidence among local prosecutors that a generic assault conviction with a scant record is all that federal prosecutors need to charge the Lautenberg Amendment. While *Hayes* and *Castleman* may improve the likelihood that federal prosecutors can use simple assaults as predicates, these decisions may have also decreased the likelihood that federal law enforcement officials can recognize the predicates in databases.

### B. Effects of Undercharging

As noted at the outset of Part III, undercharging of domestic violence by local prosecutors hinders the enforcement of the Lautenberg Amendment because the potential predicates are hard to detect. Many commentators have noted the consequence that the Lautenberg Amendment is virtually "unenforceable"<sup>145</sup> and "unworkable."<sup>146</sup> Convicted batterers still have access to firearms,<sup>147</sup> and this fact greatly increases the likelihood that the batterers will kill their victims.<sup>148</sup> An op-ed in *USA Today* opined that the Lautenberg Amendment "fails spectacularly" in its goal of protecting women from gun violence.<sup>149</sup> When the U.S. Senate Judiciary Committee held a hearing, on July 30, 2014, concerning the enforcement of the Lautenberg Amendment, senators and witnesses expressed dismay that many convicted domestic abusers are still able to possess guns with impunity.<sup>150</sup>

144. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 (2005) (noting dramatic increase in dismissals of domestic violence prosecutions following Supreme Court's reinvention of the Confrontation Clause in *Crawford v. Washington*).

145. See *Disarmament*, *supra* note 15 ("[E]xisting federal laws intended to disarm spousal abusers have proved largely unenforceable").

146. Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 547 (2008) (declaring that Lautenberg Amendment is "manifestly unworkable" even when courts are willing to interpret language favorably to law enforcement).

147. Jennifer L. Vainik, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113, 1130 (2007). According to Vainik, the federal gun bans for domestic abusers "have not proven to be an effective means of addressing gun violence against women." *Id.* at 1127.

148. See *infra* Part I.A.

149. Kimberly Brusk, *Gun Laws Still Don't Protect Women from Abusers*, U.S.A. TODAY (July 30, 2014), available at [www.usatoday.com/story/opinion/2014/07/30/gun-control-deaths-women-column/13332165/](http://www.usatoday.com/story/opinion/2014/07/30/gun-control-deaths-women-column/13332165/) (last visited Aug. 3, 2014) ("[C]urrent federal law fails spectacularly" at protecting women from gun crimes committed by convicted domestic abusers).

150. E.g., *VAWA Next Steps: Protecting Women From Gun Violence: Hearing Before the S. Judiciary Comm.*, 113th Cong. (2014) (statements of Sen. Pat Leahy, Chairman, S. Judiciary Comm., Christopher Schmaling, Sheriff, Racine County, Wisconsin, and Jacqueline Campbell, Professor, Johns Hopkins School of Nursing), available at <http://www.judiciary.senate.gov/meetings/vawa-next-steps-protecting-women-from-gun-violence> (follow hyperlinks to each individual's statement) (noting various problems that hinder enforcement of federal gun ban for convicted domestic abusers).

Even if undercharging did not impede the detection of defendants who violate Lautenberg, another significant problem would remain: defendants convicted of simple assault sometimes lack notice of the gun ban.<sup>151</sup> As Chief Justice Roberts noted in his *Hayes* dissent, “an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history.”<sup>152</sup> The notice problem is an important issue of fairness, which also erodes the protection of victims because armed abusers may not know of their firearm disability.<sup>153</sup> By contrast, if local prosecutors were to utilize the specialized statutes for domestic assault, courts could develop protocols for informing defendants that they have lost their gun rights.

A third adverse consequence of undercharging is that the applicability of the gun ban may turn on prosecutorial discretion. Some commentators welcome a high level of discretion for prosecutors,<sup>154</sup> but other commentators note that discretion invites arbitrariness or vindictiveness in the selection of charges.<sup>155</sup> The application of the gun ban should not turn on whether a local prosecutor liked or disliked the defendant at the time the prosecutor charged the predicate offense. The elimination of discretion would ensure that all similarly situated defendants receive the same treatment.

Undercharging of domestic violence has many harmful effects unrelated to the Lautenberg Amendment. Undercharging thwarts the intent of state legislatures to match certain punishments to the crime of domestic violence. Undercharging also diminishes the protection of battered women. An accused returning home from jail shortly after a complaint may increase the complainant’s vulnerability by demonstrating the futility of calling the police. Other harms result from the mislabeling of domestic violence as general assault. An employer who is considering whether to hire an abuser convicted of simply assault for a sensitive job might not be able to discern from a background check that the defendant is a domestic abuser. A survivor of domestic violence might have difficulty demonstrating her eligibility for government benefits and

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151. For a general discussion of prosecutors’ motives and tactics in plea bargaining and charge bargaining, see George Fisher, *Plea Bargaining’s Triumph*, 109 *YALE L. J.* 857 (2000).

152. *United States v. Hayes*, 555 U.S. 415, 436 (2009).

153. *Hayes*, 555 U.S. at 436-37 (Roberts, C.J., dissenting) (in his dissent, Chief Justice Roberts raises concerns about “fair warning” due to the uncertain application of the Lautenberg Amendment to particular categories of predicate offenses).

154. Michael A. Caves, *The Prosecutor’s Dilemma: Obligatory Charging under the Ashcroft Memo*, 9 *J.L. & SOC. CHALLENGES* 1, 1-2 (2008) (arguing that Ashcroft’s memo did not adequately take account of the prosecutor’s duty to balance several goals, some of which do not align with a charge-to-the-hilt mandate); see Kersey, *supra* note 122121122, at 1932 (favoring prosecutorial discretion in determining whether to charge predicates that will result in firearms disability under Lautenberg Amendment; the “state prosecutor is in the best position to determine whether the domestic offender is a violent offender who will “reach for the gun” or an offender whose actions are mildly offensive but unlikely to lead to further violence”).

155. See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 *WASH. U. L. Q.* 713, 732-3 (1999) (noting that unchecked prosecutorial discretion “can lead to violations of citizens’ rights through the arbitrary or, worse, malevolent exercise of authority”); Murray R. Garnick, *Two Models of Prosecutorial Vindictiveness*, 17 *GA. L. REV.* 467, 467 (1983) (“With this discretion comes a real possibility of prosecutorial abuse”); cf. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *WIS. L. REV.* 837, 870 (stressing that charging decision should not turn on arbitrary discretion of prosecutor).

resources that state legislatures have made available for battered women. In short, undercharging is a dishonest characterization of domestic violence that redounds to the detriment of battered women and society as a whole.

### C. Inadequacy of Safeguards

There are several safeguards designed to prevent, or mitigate the harms of, prosecutors' tendency to undercharge cases involving domestic violence. This Subpart will consider four categories of safeguards, and argue that none of them is sufficient to fix the problem of undercharging and ensure the adequate application of the Lautenberg Amendment to convicted abusers.

One safeguard is the reporting requirement imposed by Congress in 2005 as a condition for states to receive funding under the Violence Against Women Act. The statute required states to improve their processes for providing information to the FBI about the facts underlying misdemeanor convictions involving domestic violence,<sup>156</sup> so that federal law enforcement officials could recognize convicted abusers even if local prosecutors had filed charges that did not require proof of domestic violence. Notwithstanding these improvements, there are still significant gaps in the reporting system.<sup>157</sup> Many jurisdictions are not completing the questionnaires used to determine whether ambiguous misdemeanor convictions might qualify as predicates under the Lautenberg Amendment.<sup>158</sup> As a result, a significant number of convicted batterers are able to escape accountability in background checks because domestic violence is not conspicuous in their conviction records. The greater use of factual questionnaires for the FBI's databases has not offset the harm caused by local prosecutors' reluctance to charge batterers appropriately.

A second safeguard, the U.S. Department of Justice's requirement that prosecutors must charge the most serious offense,<sup>159</sup> has not solved the problem of undercharging in the context of domestic violence. The requirement applies at the federal level, but the federal government handles very few misdemeanors involving domestic violence. State agencies and local district attorneys' offices prosecute the lion's share of domestic violence offenses, but these offices generally have not imposed such requirements. Further, the U.S. Department of Justice altered its charging policy in 2010 due to concerns about overcharging of drug cases, so now even federal prosecutors have more discretion in selecting charges.<sup>160</sup>

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156. For a summary of the relevant requirements in the 2005 VAWA Reauthorization Act, see Ronald Adrine & Alexandria Ruden, *Domestic Violence and Firearm Prohibition*, in OHIO DOMESTIC VIOLENCE LAW, at § 18:13 (Baldwin's Ohio Handbook Ser. Series., 2014).

157. As Senator Grassley noted in his testimony during the hearing of the Senate Judiciary Committee on July 30, 2014, there are no submissions of Lautenberg predicates to NICS in some states, and there are very few submissions in other states. See *supra* note 124, 129.

158. *Id.*

159. Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, DEPARTMENT POLICY CONCERNING CHARGING CRIMINAL OFFENSES, DISPOSITION OF CHARGES, AND SENTENCING (Sept. 22, 2003).

160. Memorandum from Attorney General Eric Holder to All Federal Prosecutors (May 19, 2010), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-challenging-sentencing.pdf>.

A third safeguard against undercharging is sentencing based on the conduct underlying an offense, rather simply the conviction. The goal behind this approach is to sentence offenders based on what they actually did, irrespective of how prosecutors charged them.<sup>161</sup> Proponents of sentencing based on offense conduct have suggested that it might reduce some of the incentives for undercharging and might promote uniformity in the disposition of cases.<sup>162</sup> Sentencing based on offense conduct has fallen far short of this goal. State courts—which handle the vast majority of cases involving domestic violence—did not embrace the new sentencing system to the same extent as federal courts.<sup>163</sup> Even at the federal level, prosecutors were able to limit their presentation of offense conduct to judges in order to ensure that sentences aligned with the charges actually filed.<sup>164</sup> An even more fundamental problem with sentencing based on offense conduct arose when the Supreme Court held that the right to trial by jury limits the ability of judges to sentence defendants for conduct not charged in the indictment.<sup>165</sup> In short, sentencing reform has not been a viable means of reining in prosecutorial discretion in charging.

Some states allow crime victims to express their views when prosecutors are contemplating plea agreements with perpetrators of violent crime. One rationale for the involvement of victims is that their input might limit the willingness of prosecutors to offer overly generous terms to defendants. Yet, research does not indicate that victims exert much influence over plea offers.<sup>166</sup> Survivors of domestic violence are particularly unlikely to insist on strict charges, because 80 percent of these survivors will change their stories or refuse to cooperate with the prosecution.<sup>167</sup>

In sum, there is little reason for confidence in the various safeguards that

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161. See generally U.S. SENTENCING GUIDELINES MANUAL § 2 (2013) (explaining that sentencing under the guidelines is based on the conduct actually committed by the defendant in the course of committing the offense).

162. See Gregory Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 179 (2011) (noting that one purpose of the U.S. Sentencing Commission in basing sentences on offense conduct rather than the offense of conviction was to limit prosecutorial discretion in undercharging or dealing down charges, which would undermine the uniformity valued by the Commission).

163. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196-1206 (2005) (discussing wide variety of sentencing guidelines at state level; few states track the federal sentencing model).

164. Douglas A. Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines?*, FED. SENT'G REP., May–May/June 1996, at 300 (discussing results of study that found large number of federal sentences were based not on actual facts of case, but on recital of facts and proposed guideline calculations in plea agreements).

165. *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) (holding that any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury at trial phase and proved beyond reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (reversing the trial court's imposition of a statutory sentencing enhancement in a domestic violence case because the prosecution had not proven the predicate facts to the jury, as required by the Sixth Amendment).

166. Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT. 225, 229-37 (1992) (noting that even when statutes permit their involvement, victims rarely are able to influence plea negotiations); see Sarah N. Weilling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301, 338-42 (1987) (summarizing states' varying approaches to allowing or mandating victims' participation in plea negotiations).

167. See *supra* note 143.



purport to limit the harmful effects of undercharging. The only way to solve the problem is to impose a specific obligation on local prosecutors to file the right charges in cases involving domestic violence.

#### IV. A PROPOSED ETHICAL DUTY TO CHARGE BATTERERS APPROPRIATELY

The next subsection will set forth a proposed ethical rule guiding prosecutors who charge cases involving domestic violence. The following Subpart will consider the best vehicle for codifying such a duty. Finally, attention will focus on possible objections to the proposed rule.

##### A. Nature of the Ethical Duty

An ethical duty to charge domestic violence appropriately must include several elements. It must include an obligation to bring the most serious applicable charge, and to invoke all statutes and enhancements specifically tailored to cases involving intimate partners as victims or witnesses. The ethical duty to charge appropriately must include an obligation to avoid dispositions that will hinder the subsequent detection of a qualifying predicate under the Lautenberg Amendment. The ethical duty must include a “safety valve” that permits adjustment of charges in extraordinary circumstances, so long as the disposition remains proportionate to the offense and accords adequate protection to victims and witnesses.

Here is one possible formulation of an ethical duty to charge batterers appropriately:

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

The proposed rule rests on compelling principles. Prosecutors should not subordinate the interests of accusers just because the United States’ adversarial system puts the primary emphasis on the conflict between the government and the accused. Prosecutors sometimes exploit victims instrumentally to secure convictions in cases that proceed to trial,<sup>168</sup> regarding victims as nuisances

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168. See Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1358 (2005) (“The simple adversarial model does not capture the complexity [of a trial involving domestic violence]. A better

hindering the efficient disposition of cases through plea bargains or dismissals. The ethical duty to charge domestic violence cases appropriately would align with the deontological imperative that every person, including a crime victim, has inherent dignity and moral autonomy; no person is simply a means to an end. Deontological philosophy also posits that violent crime is a lapse of moral duty deserving a particular punishment irrespective of prosecutors' concerns about efficiency and streamlining caseloads. Put a different way, the gravity of domestic violence does not vary depending on a prosecutor's workload.

The proposed duty would also result in several other tangible benefits. The rule would increase the odds that local prosecutors would select charges that clearly signal the defendant's commission of domestic violence. Convictions for such offenses would be more easily recognizable in NCIS and other law enforcement databases, leading to greater accuracy in background checks and greater detection of § 922(g)(9) violators when police consult the databases after search warrants and traffic stops. More generally, the new duty proposed here would promote consistency in the treatment of cases involving domestic violence, thereby increasing deterrence of prospective offenders. Victims would gain greater confidence to file complaints without fear of reprisals after abrupt dismissals. The proper charging of domestic violence would lead to greater precision and clarity in court records. When prosecutors explicitly label domestic violence as such, there is a great likelihood that judges in marital dissolution cases will not award custody to batterers, that battered women will be able to qualify for special government benefits, and that prospective employers will not hire batterers for jobs in sensitive settings.

### B. Codifying the Duty

There are several bodies of authority regulating the ethics of prosecutors. Which would be the best vehicle for the proposed rule requiring prosecutors to charge batterers appropriately? This Subpart will consider four options: the ABA Model Rules of Professional Conduct, the ABA Standards for Practice (Prosecution Function), the internal rules of prosecuting agencies, and state statutes.

The optimal home for the new ethical rule would be the ABA Model Rules of Professional Conduct, because they provide a template adopted in virtually all states' ethical codes. State bars enforce their ethics codes through disciplinary proceedings. Harmful consequences, ranging from censure to disbarment, could befall violators of the state ethical codes, so attorneys are more attentive to these codes than to hortatory, nonbinding guidelines. Another advantage of regulating prosecutors under state bars' ethical codes is that the panels evaluating bar complaints consist primarily of attorneys who are not prosecutors. These "outsiders" bring a degree of accountability that an in-house review by fellow prosecutors would lack.

The proposed rule would insert a new topic into the ABA Model Rules. But the rule would fit well alongside other existing rules. Many of these rules take

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model posits a trilateral adversarial process, in which the defense, the prosecution, and the accuser all vie against one another.")

account of third-party interests when such interests might not otherwise attract sufficient attention. One example is the Rule 1.6(b) list of exceptions to attorney-client confidentiality, allowing disclosure of client information when necessary to avert “reasonably certain death of substantial bodily harm to a third party,” among other categories of harm to third parties.<sup>169</sup> Rule 1.6(b)(7) also allows attorneys to reveal client information when necessary to comply with statutes that mandate reporting of child abuse.<sup>170</sup> Another relevant example is Rule 4.4(a), which directs that a lawyer representing a client shall not unduly “embarrass, delay or burden a third person.”<sup>171</sup> The most on-point example is Rule 3.8, which sets forth several duties of prosecutors with respect to both the accused and third parties, including a subpoint that regulates the charging decision.<sup>172</sup> A new ethical rule to charge batterers appropriately is a reasonable extension of principles that already underlie the ABA Model Rules in general, and Rule 3.8 in particular.<sup>173</sup>

A less desirable option for codifying the new duty would be to include it in the Standards for Criminal Practice (Prosecution Function). Approved by the ABA House of Delegates in 1993, these standards set forth specific guidance for both prosecutors and defense attorneys. The standards for prosecutors include a list of considerations to take into account when charging a case initially,<sup>174</sup> and

169. Rule 1.6(b)(1)-(3) and (6)-(7) of the ABA Model Rules provides that:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

MODEL RULES OF PROF’L CONDUCT R. 1.6 (2014).

170. The ABA Model Rules authorize a lawyer to disclose client information when necessary “to comply with other law or a court order.” MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(6) (2014). Most states have enacted laws that require or permit several categories of professionals, including lawyers, to report otherwise confidential information to the appropriate authorities when those professionals encounter evidence of child abuse. For a state-by-state analysis of such statutes, see Comm’n on Domestic Violence, American Bar Ass’n, MANDATORY REPORTING OF CHILD ABUSE (2009) (on file with author).

171. Rule 4.4(a) of the ABA Model Rules provides that, “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” MODEL RULES OF PROF’L CONDUCT R. 4.4 (2014).

172. MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (2014) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

173. The rule proposed in this article could go at the end of Rule 3.8 as a freestanding subpoint (i).

174. The standard labeled “Discretion in the Charging Decision” includes the following guidance concerning decisions to charge or decline prosecution:

other considerations to bear in mind when considering a negotiated disposition.<sup>175</sup> On first examination, the Standards might seem to be a good home for the new duty to charge batterers appropriately: after all, they treat the issues of charging and plea negotiation in more detail than do the ABA Model Rules.<sup>176</sup> But no state bar has adopted the Standards for Criminal Practices as part of mandatory regime subject to enforcement through bar discipline. At best, the Standards for Criminal Practice are precatory and aspirational, and prosecutors would be less likely to follow such nonbinding guidelines than to obey the first-tier authority in the state ethics codes based on the ABA Model Rules.

Some prosecutorial agencies have extensive in-house rules and guidelines for their attorneys. For example, the U.S. Attorneys' manuals span nine volumes.<sup>177</sup> However, the ethical duty to charge batterers appropriately deserves to be codified universally, and in-house regulation would lead to a patchwork approach. The local jurisdictions that handle the great bulk of domestic violence misdemeanors are the least likely to have in-house ethical codes. Even if all prosecutorial agencies had ethics codes, the relegation of an ethical matter to this level of authority would result in a wide disparity of approaches, thwarting the

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(b) The prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.

Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of the complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension of conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

ABA Standards for Criminal Justice: Prosecution and Defense Function Standard 3-3.9 (1993).

175. Standard 3-3.4.1, labeled "Availability for Plea Discussions," includes the following provisions:

The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.

A prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval. Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant, although, where feasible, a record of such discussions should be made and preserved.

A prosecutor should not knowingly make false statements or representations of fact or law in the course of plea discussions with defense counsel or the accused.

*Id.* at 3-3.4.1.

176. MODEL RULES OF PROF'L CONDUCT, *supra* note 171; MODEL RULES OF PROF'L CONDUCT, *supra* note 172.

177. The text of the U.S. Attorneys' Manual is available in the Justice Department's FOIA Reading Room. See U.S. ATTORNEY'S MANUAL (2014), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/) (last visited Aug. 20, 2014).

intent of Congress to treat domestic abusers uniformly.<sup>178</sup> Another problem with in-house regulation is the apparent conflict of interest when prosecutors sit in judgment of other prosecutors within the same agency.

State statutes deserve consideration as a vehicle for the regulation of prosecutorial ethics, but this approach might be too radical. State bars are generally reluctant to cede their self-regulation to legislatures. In fact, the legislative branch has rarely taken up the regulation of the legal profession at all. Examples of statutes regulating the legal profession are most noteworthy for their infrequency.<sup>179</sup> A proposal to legislate new standards for lawyers might provoke backlash in state bars at a time when it is important to build a consensus in favor of appropriate charging for cases involving domestic violence.

In sum, the best place to incorporate an ethical duty to charge batterers appropriately would be in the ABA Model Rules of Professional Conduct. The new rule could be a freestanding subpoint (i) at the end of Model Rule 3.8. Codification at this level would be most likely to achieve uniform results.

### C. Foreseeable Objections

Several objections to this Article's proposal are possible. The first is that limits on prosecutorial discretion are generally undesirable. When Attorney General John Ashcroft instructed federal prosecutors to charge the most serious offense in all categories of cases (subject to very limited exceptions),<sup>180</sup> critics complained that the policy led to draconian sentences and failed to account for unique circumstances that might warrant leniency in a particular case.<sup>181</sup> The zealous charging of drug cases – which federal prosecutors handle more commonly than cases involving spousal abuse – drew especially strong condemnation.<sup>182</sup> Eventually Attorney General Eric Holder heeded the critics and revised the Ashcroft guidelines to allow federal prosecutors greater

178. Senator Lautenberg wanted his amendment to apply uniformly in all states. *See* 142 CONG. REC. S11226 (daily ed. Sept. 25, 1996); 142 CONG. REC. S10377-78 (daily ed. Sept. 12, 1996). Co-sponsors shared this concern. *See* 142 CONG. REC. S12341 (daily ed. Oct. 3, 1996) (statement of Sen. Dodd); 142 CONG. REC. H10434 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder); 142 CONG. REC. S10380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein); 142 CONG. REC. S10380 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

179. One example is the Sarbanes-Oxley Act that Congress passed in the wake of corporate scandals in which attorneys neglected their whistleblowing duties. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (imposing, in Section 307, a set of ethical obligations on attorneys who practice before the Securities and Exchange Commission).

180. Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, (Sept. 22, 2003), *available at* [http://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm).

181. Michael A. Caves, *The Prosecutor's Dilemma: Obligatory Charging Under the Ashcroft Memo*, 9 J.L. & SOC. CHALLENGES 1, 1-2 (2008) (arguing that Ashcroft's memo did not adequately take account of the prosecutor's duty to balance several goals, some of which do not align with a charge-to-the-hilt mandate); *see* Kersey, *supra* note 122, at 1932 (favoring prosecutorial discretion in determining whether to charge predicates that will result in firearms disability under Lautenberg Amendment; the "state prosecutor is in the best position to determine whether the domestic offender is a violent offender who will "reach for the gun" or an offender whose actions are mildly offensive but unlikely to lead to further violence").

182. *See generally* Susan P. Weinstein, *Ethical Considerations for Prosecutors in Drug Courts*, 15 CRIM. JUST. 26, 29 (complaining that overcharging of drug cases was common and harmful in traditional courts).

discretion in charging.<sup>183</sup> The criticism of overcharging in federal drug cases, however, does not apply with the same force to this article's proposal. The punishments prescribed by federal drug statutes were extremely harsh during the era of obligatory charging. By contrast, the punishments for misdemeanor crimes of domestic violence are generally lenient. Drug prosecutions do not present the same practical challenges as domestic violence prosecutions, such as unavailable witnesses, lack of cooperators and lack of physical evidence. Moreover, the history of prosecutorial reluctance to charge domestic violence is unique to this category of crime. Simply put, the need to mandate prosecutorial zeal is greater, and the effects are less dangerous, in the context of domestic violence.<sup>184</sup>

Some might argue that a requirement of strict charging could reduce opportunities for cooperation by defendants in cases involving domestic violence. But batterers typically have little value in cooperating as government witnesses against co-defendants, because domestic violence is generally a single-defendant crime. It is true that prosecutors might want batterers to agree to participate in treatment programs,<sup>185</sup> but lenient initial charges are not necessary to entice such participation; the court can require it as part of the sentence, or the prosecutor can incentivize it by recommending a reduced sentence, if not a reduced charge. A stricter initial charge might actually increase the likelihood of cooperation by the defendant, because he would have more to lose if he were uncooperative.

Another possible criticism is that this article's proposal might have a "chilling effect" on prosecutors or victims of domestic violence. Perhaps prosecutors might prefer to forego charges altogether for fear that dismissals and charge bargaining would not be possible if a particular prosecution proved difficult. Or perhaps victims of domestic violence would not complain to police in the first place if the only possible outcome were a strict charge. These concerns are not new, however. The same concerns arose in response to prior initiatives to treat domestic violence more seriously.<sup>186</sup> The concerns seem to lack merit with respect to prosecutors, who are under political pressure to charge domestic violence even if lenient dispositions are no longer possible. Victims need to summon police and extricate themselves from danger even if the consequences befalling the batterers will be more serious due to the new rules. Enlightened policy makers have long ago realized that the victims' sympathy for the abusers cannot lead to lower sanctions; punishment is not less urgent just

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183. Memorandum from Attorney General Eric Holder to All Federal Prosecutors, DEPARTMENT POLICY ON CHARGING AND SENTENCING (May 19, 2010).

184. *But see* Kersey, *supra* note 122, at 1932 (favoring prosecutorial discretion in determining whether to charge predicates that will result in firearms disability under Lautenberg Amendment; the "state prosecutor is in the best position to determine whether the domestic offender is a violent offender who will "reach for the gun" or an offender whose actions are mildly offensive but unlikely to lead to further violence.").

185. *E.g.*, Mary M. Lovik, *Specialized Services for Survivors and Perpetrators of Battering*, 90 MICH. B. J. 44 (2011) (indicating that "courts frequently order batterer intervention as a probation condition for persons convicted of misdemeanor domestic violence crimes").

186. Mandatory arrest policies and no-drop policies also drew criticism that they might result in a "chilling effect." For a review of arguments on both sides, see Elizabeth M. Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING 123 (2000).

because a victim fearing reprisals urges leniency for the offender.

One last foreseeable objection is that the proposed rule is too specific for the ABA Model Rules. Yet Rule 3.8 already includes many rules that impose highly specific duties on prosecutors, such as the duty to refrain from calling lawyers before the grand jury except in certain limited circumstances.<sup>187</sup> The general trend is for ethical rules to become more specific,<sup>188</sup> and specificity is particularly important for rules governing prosecutors.<sup>189</sup> Some critics might argue that a unique ethical rule for charging cases involving domestic violence does not make sense when the ABA Model Rules do not regulate the charging of other cases, but the uniqueness of domestic violence justifies this special treatment.<sup>190</sup> In any event, it is certainly possible to add ethical rules for charging other categories of cases in the future.

In sum, the advantages of establishing an ethical rule for the charging of domestic violence outweigh the possible disadvantages. While prosecutors might resent limitations on their discretion, it is more important to promote uniformity in charging and to protect battered women from potentially lethal violence.

#### CONCLUSION

Many commentators hailed the Supreme Court's ruling in *Castleman* as an important step forward in the reduction of gun-related violence by convicted batterers. The reality is more complicated.

The Court in *Castleman* adopted the broad reading of the Lautenberg Amendment urged by the government and amici representing women's groups and law enforcement organizations. Yet this interpretation will not necessarily lead to an increase in the number of prosecutions under the Lautenberg Amendment. Ironically, *Castleman* may have engendered greater confidence among local prosecutors that convictions under a wide range of assault statutes can count as predicates for the federal gun ban, heightening the risk that potentially qualifying convictions will escape detection by federal law enforcement officials when the records do not clearly indicate that the convictions involved domestic violence. For example, local prosecutors may opt to charge generic assault rather than domestic assault because the two charges

187. The Model Rules provide that, "A prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege; the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and there is no other feasible alternative to obtain the information. MODEL RULES OF PROF'L CONDUCT R. 3.8(e) (2014).

188. The trend in ethical codes has been a reduction of general, hortatory provisions and an increase in more specific provisions. Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873, 874 n.4 (2002) (noting "the broader trend in legal ethics toward specific rules and away from broad statements and principles"); Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001) (stating that lawyers' ethical codes "have migrated away from broad standards and toward clearly defined rules").

189. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 243 (1993) (stating that ethical rules that "direct particular conduct" are "simpler to enforce").

190. See *supra* note 142 (discussing unique challenges that arise in prosecuting batterers).

seem fungible under Lautenberg, but the former charge may not be conspicuous enough to signal the firearms disability to federal officials.

The best way to ensure the appropriate punishment of gun possession by convicted domestic batterers is to charge them appropriately in the first instance. Local prosecutors who handle cases involving domestic violence should not select generic charges in order to simplify and hasten disposition of these cases. Local prosecutors should not consent to reduced charges, dismissals or expunctions that allow defendants to gain access to firearms.

This article has proposed an ethical duty that would obligate prosecutors to charge the most serious offense in a case involving domestic violence, assuming that the offense is readily provable at the time of the charging decision. The proposal would fit well alongside other provisions in the ABA Model Rules that require attorneys to take account of third-party interests (in this case, the interests of victims and potential victims) when such interests might otherwise attract insufficient attention.

Implementation of the rule proposed in this article would help to ensure that a defendant's conduct, rather than a local prosecutor's discretion, will be the key determinant of the defendant's eligibility to possess firearms. As Senator Lautenberg urged nearly 20 years ago, no convicted batterer should be able to evade firearms the disability under 18 U.S.C. § 922(g)(9), because "[t]here is no margin of error when it comes to domestic abuse and guns."<sup>191</sup>

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191. 142 CONG. REC. S10377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).