American University Washington College of Law

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Articles


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Letter from the Editor

Jacquelyn Solomon, The Criminal Law Practitioner

Dear Readers,

Thank you for your interest in *The Criminal Law Practitioner*. On behalf of our Editorial Board and Staff, I am proud to share with you Volume XIII, Issue I (Fall 2022). This issue continues our mission of producing informative and timely content for criminal law practitioners, as authors Amelia Shooter, Sarah Cooper, and Danielle Woo provide their insight on the importance of science literacy for attorneys and the inadequacy of state laws surrounding domestic violence firearm restrictions.

In "A Case for Conceptualizing Science Literacy for Lawyers," authors Shooter and Cooper highlight the frequent intersection of forensic science and criminal law, but also the lack of opportunity for legal professionals to develop their science literacy. Shooter and Cooper focus on how lawyers, especially public defenders, should have a foundation of scientific knowledge to better carry out criminal justice. They then discuss a potential way to achieve a solution for building such a foundation.

In "Domestic Violence and Firearm Relinquishment: Closing the Fatal Chasm Between Federal Law and State Enforcement," author Danielle Woo identifies the disconnect between state and federal laws surrounding domestic violence firearm relinquishment. Woo proposes three main ways to resolve the inadequacies: addressing the root causes of domestic violence at the policy level, providing monetary incentives for states to comply with the federal laws, and amending the federal firearm relinquishment statutes.

Thank you to the authors for the time and effort they committed to the production of their articles. Second, I appreciate the Editorial Board and Staff for their incredibly hard work in spading these articles. I especially want to thank our Executive Editor, Equity & Inclusion Editor, Managing Articles Editor, and Articles Editors for their dedication, efficiency, and skill in preparing these articles for publication.

Finally, readers, I encourage you to visit our website, CrimLawPractitioner.org, to read our latest legal analysis and our profiles of criminal law practitioners. If you are interested in publishing with *The Criminal Law Practitioner*, or you would like to be featured in our practitioner profiles, please contact CLP@wcl.american.edu.

Warmly,
Jacquelyn Solomon
Editor-in-Chief


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A CASE FOR CONCEPTUALIZING SCIENCE LITERACY FOR LAWYERS

BY SARAH COOPER & AMELIA SHOOTER

ABSTRACT

Forensic science is routinely used in the service of the United States' criminal legal system. In such cases, lawyers, judges, and jurors each have distinct competencies. Trial judges must determine the admissibility of expert evidence and deliver jury instructions; lawyers must select, present, and challenge the evidence; and jurors must determine the weight of the evidence. As they discharge these competencies, each agent might need to engage with the often unfamiliar methods introduced and discussed by a forensic science expert. These activities represent an intersection between law and science—two culturally divergent disciplines—where it is recognized science literacy—"the disposition and knowledge needed to engage with science"—for legal professionals and jurors is important to serving justice. There are limitations, however, in the current provision for supporting legal professionals to develop their science literacy, which is foundational to optimizing the carrying out of juror competencies. Despite this, the criminal legal system is organized in such a way as to routinely defer to the decision-making competencies of lawyers, judges, and jurors. Through a content analysis of case law referencing the National Academy of Sciences' (NAS) forensic science report portfolio in criminal proceedings—which is positioned as a case study—this paper demonstrates how this systemic practice—driven by the legal system's fidelity to factors associated with the legal process vision—should motivate stakeholders to prioritize delivery of a meaningful science literacy provision for lawyers. Part I broadly outlines the roles of lawyers, judges, and jurors in criminal legal proceedings involving forensic science evidence, explaining this interaction as an intersection of law and science. Part II describes our research design, including the rationale for selecting case law referencing the NAS' forensic science report portfolio as a case study. Part III presents our findings in three thematic areas: (1) deference to lawyers' strategic decisions, particularly in the context of cross-examination; (2) deference to the gatekeeping function of trial judges and the role of precedent; and (3) deference to the jury's fact-finding role. It concludes that these findings, coupled with the reality that an institutional overhaul is unlikely, should focus minds on supporting—as a priority—lawyers to develop their science literacy, and that conceptualizing 'science literacy' for lawyers is a necessary step in moving towards that goal.

INTRODUCTION

Forensic science evidence is used "routinely in the service of the criminal justice system"[1] and has "long been at the forefront in answering complicated questions brought

[1] THE COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., STRENGTHENING THE FORENSIC SCIENCES IN THE UNITED STATES: A PATH FORWARD 9 (The Nat'l Acads. Press 2009) [hereinafter STRENGTHENING].

before the bar of justice."[2] In such cases, judges, lawyers, and jurors each have distinct competencies. Trial judges must determine the admissibility of expert evidence and deliver jury instructions; lawyers must select, present, and challenge the evidence; and jurors must determine the weight of the evidence.[3]

However, there is limited education and training for these key agents with respect to supporting them to evaluate forensic science evidence,[4] a situation recognized by the National Academy of Sciences ("NAS"), the United States' premier scientific think tank. Since the early 1990s, following the introduction of DNA technology within the criminal legal system, the NAS has reported on various forensic disciplines—including DNA, polygraph, ballistics, fingerprint, and bite-mark evidence—parallel to (and sometimes motivated by) growing interest in their reliability.[5] Following a critical appraisal of the entire field,[6] in 2009 the NAS recommended that Congress establish an independent oversight body to monitor the implementation of its recommendations,[7] which included support measures for lawyers, judges, and jurors.[8] A comprehensive support package, however, has not fully emerged. Yet, the need for one remains. This is because the criminal legal system is organized in such a way as to routinely defer to the decision-making competencies of these agents, and that configuration is unlikely to change.

Through a content analysis of case law, this paper posits this organizational practice is driven by—as suggested previously—the criminal legal system's fidelity to factors associated with the legal process vision.[9] Part I broadly outlines key competencies of lawyers, judges and jurors in criminal legal proceedings involving forensic science evidence, explaining them as an intersection of two culturally divergent disciplines: law and science. Part II describes our research design, which used case law referencing the NAS' forensic science report portfolio as a case study. Part III presents our findings in three thematic areas: (1) deference to lawyers' strategic decisions, particularly in the context of cross-examination; (2) deference to the gatekeeping function of trial judges and the role of precedent; and (3) deference to the jury's fact-finding role. It concludes that these findings, coupled with the

2 Matthew F. Redle & Hon. Christopher J. Plourd, *A Path Forward: The Value of Forensic Science Standards Development and Use to the American Legal System*, 35 CRIM. JUST. 61 (2020).

3 Obviously, many more agents are involved in criminal proceedings, and experts are particularly relevant to the competencies summarized in this opening paragraph. The focus of this paper, however, is on specific competencies of lawyers, judges, and jurors i.e., non-experts in a scientific sense.

4 *See* STRENGTHENING, *supra* note 1, at 26–28 (summarizing the Committee's findings regarding "Insufficient Education and Training").

5 *See* Amelia Shooter & Sarah L. Cooper, *A Template for Enhancing the Impact of the National Academy of Sciences' Reporting on Forensic Science*, 8 BR. J. AM. LEG. STUDIES (SPECIAL ISSUE) 443 (2019).

6 STRENGTHENING, *supra* note 1 at xix ("Recognizing that significant improvements are needed in forensic science, Congress directed the National Academy of Sciences to undertake the study that led to this report. . . . In adopting this report, the aim of our committee is to chart an agenda for progress in the forensic science community and its scientific disciplines.").

7 *Id.* at 80–83.

8 *Id.* at 26–28.

9 *See, e.g.*, Shooter & Cooper, *supra* note 5, at 462; Sarah Lucy Cooper, *Judicial Responses to Shifting Scientific Opinion in Forensic Identification Evidence and Newly Discovered Evidence Claims in the United States: The Influence of Finality and Legal Process Theory*, 4 BR. J. AM. LEG. STUDIES 649 (2015); SARAH LUCY COOPER, *Judicial Responses to Challenges to Firearms-Identification Evidence: A Need for New Judicial Perspectives on Finality*, 31 T.M. COOLEY L. REV. 457 (2014).

reality that an institutional overhaul is unlikely, should focus minds on the need to develop an appropriate education and training support package for lawyers, as a priority group. We suggest that conceptualizing 'science (or scientific) literacy'—"the disposition and knowledge needed to engage with science"[10] —for lawyers is a necessary step in moving towards this goal and offer the criminal legal system's consumption of forensic science as a possible exploratory case study.

I. Competencies and Cultural Differences

In criminal proceedings involving expert forensic science evidence, lawyers, judges, and jurors have distinct competencies that can be described in a broad sequence.

Lawyers, in line with their monopoly on determining case strategy, must first decide whether to include expert evidence within their case. Lawyers will call upon experts that have "scientific, technical, or other specialized knowledge"[11] capable of assisting the fact finder to understand the evidence in a case and/or to resolve a contentious fact. For example, a lawyer might need a firearms examiner to compare ammunition found at a crime scene to ammunition test fired from a client's firearm. Applying the "reliable principles and methods"[12] of their discipline (for example, the discipline of firearms identification) to the case facts, experts are expected to use their experience and training to testify to opinions (for example, whether the defendant's firearm discharged suspect ammunition) based on "sufficient facts and data."[13]

Trial judges are tasked with safeguarding this expectation. In overseeing evidentiary and *in limine* hearings, they must make admissibility decisions that ensure only relevant and reliable expert evidence is admitted in proceedings. In so deciding, they generally consider whether a method can or has been tested; has a known or potential error rate; has been subject to peer review; has standards controlling its operation; and is generally accepted within the relevant scientific community.[14] If expert evidence is deemed admissible, lawyers will, through their oversight of direct-examination, shape how it is presented on behalf of their party at trial. They will design questions to elicit an expert's qualifications, experience, methods, and findings (for example, how a firearms examiner made the comparison between suspect and test-fired ammunition). In controlling cross-examination, lawyers also shape how opposing expert evidence is challenged by designing questions that, for instance, highlight limitations in an opposing expert's methods and findings (for example, limitations associated with expert subjectivity).

[10] Comm. on Science Literacy and Pub. Perception of Science, Science Literacy: Concepts, Contexts, and Consequences 27 (Nat'l Acads. Press 2016) [hereinafter Science Literacy].

[11] Fed. R. Evid. 702. The federal framework is provided by way of a general example.

[12] *Id*.

[13] *Id*.

[14] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591–94 (1993); Clifford S. Fishman & Anne Toomey McKenna, Jones on Evidence § 45:5 (7th ed. 2022) ("Although *Daubert* is only binding on federal courts, many states have expressly adopted its standard or apply the *Daubert* factors in interpreting their own rules of evidence. Some states continue to follow *Frye* while others apply their own, separate framework or a hybrid approach.").

In their role as fact finders, jurors are then charged with weighing the probative value of expert evidence alongside all other evidence presented. Trial judges may provide jury instructions to inform this task. Model instructions typically remind jurors about the witness's expertise, that they can afford as much weight (including no weight) to the expert's testimony, and what factors they may take into consideration, such as the expert's qualifications and the reliability of the information underpinning the expert's opinion.[15] Jurors then determine a verdict.

Finally, if a defendant is convicted, a lawyer may later bring appeal proceedings, which could involve claims that a lawyer, judge, and/or jury discharged competencies improperly.

A. LAW & SCIENCE

The above sequence represents an intersection between two culturally divergent disciplines: law and science, a relationship that has been described as "an uneasy alliance."[16] The two disciplines can be "strange partners"[17] given their different approaches to the world.[18] These differences present "both systemic and pragmatic dilemmas for the law and the actors within it."[19] These dilemmas include knowledge gaps of various shapes. Legal education has been described as a "black hole" for STEM education,[20] leading to judges and lawyers "generally lack[ing] the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner."[21] Similar concerns exist about jurors.[22]

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15 *See, e.g.,* 8TH CIR. MODEL CRIM. JURY INSTR. § 4.10, at 104 (2021) ("You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion. Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.").

16 STRENGTHENING, *supra* note 1, at 86.

17 Redle & Plourd, *supra* note 2, at 61.

18 *Id.* ("Science is an empirical method of learning anchored to the principals of observation and discovery as to how the natural world works. Scientific knowledge advances human understanding by developing experiments that provide the scientist with an objective answer to the question presented. Through a scientific method of study, a scientist systematically observes physical evidence and methodically records the data that support the scientific process. The law, on the other hand, starts out with at least two competing parties who use the courthouse as a battleground to resolve factual issues within the context of constitutional, statutory, and decisional law. In science, all answers are provisional, while the law seeks finality."); DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 56 (W.H. Freeman & Co., 1999) ("Science progresses while law builds slowly on precedent. Science assumes that humankind is determined by some combination of nature and nurture, while law assumes that humankind can transcend these influences and exercise free will. Science is a cooperative endeavor, while most legal institutions operate on an adversary model."); M.A. Berger and L.M. Solan, *The Uneasy Relationship Between Science and Law: An Essay and Introduction*, 73 BROOK. L. REV. 847 (2008).

19 *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1484 (1995) [hereinafter *Confronting the New Challenges of Scientific Evidence*].

20 Jessica D. Gabel*, Forensiphilia: Is Public Fascination with Forensic Science A Love Affair or Fatal Attraction?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 255–58 (2010).

21 STRENGTHENING, *supra* note 1, at 110.

22 *Id.* at 236–37; Sarah Lucy Cooper*, Challenges to Fingerprint Identification Evidence: Why the Courts Need A New Approach to Finality*, 42 MITCHELL HAMLINE L. REV. 785–89 (2016) [hereinafter *Challenges to Fingerprint Identification Evidence*]. It is also recognised that forensic examiners require up-skilling. *See* STRENGTHENING, *supra* note 1,

At the same time, there remains much to determine within individual forensic disciplines, especially with regards to scientific validity:

> The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.[23]

The adversarial system can exacerbate these gaps. Adversarial practices can improperly polarize forensic science evidence—"information that reaches the legal system does not represent the scientific field more generally"[24]—and can blur reality, with "[jurors] hear[ing] highly practiced alternative stories that only roughly approximate what might be termed reality."[25] Experts at the "margins of their disciplines"[26] can be "chosen . . . because they are willing to be . . . more certain of their conclusions."[27] In fact, Jennifer Laurin asserts that the "criminal justice system does far too little to grapple with the implications of scientific change for its truth-finding functions."[28]

The criminal legal system has been particularly struggling with these knowledge gaps relating to forensic science since the introduction of DNA evidence in the 1980s.[29] This is not surprising. When science progresses, challenges can often emerge in law. The law "will always lag behind the sciences to some degree because of the need for solid scientific consensus before the law incorporates its teachings."[30] As Laurin describes, "Law cannot, of course, fully bend to science's pace and manner of truth production."[31] Yet, as Thomas D. Albright and Brandon L. Garrett suggest,

> The "law incorporating the teachings" of science should not remain static. "The law" need not wait for "finished" science, either…. law should use standards sufficiently flexible to incorporate an evolving scientific understanding of the world in which we live.[32]

As agents of the law, lawyers, judges, and jurors are key to properly incorporating the teachings of science into the criminal legal system. Developing a deeper understanding of their competencies in cases involving scientific evidence, including forensic science,

at 238 ("Forensic science examiners need additional training in the principles, practices, and contexts of scientific methodology, as well as in the distinctive features of their specialty.").

23 STRENGTHENING, *supra* note 1, at 8. For a recent account, see Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879 (2022).

24 FAIGMAN, *supra* note 18, at 54.

25 *Id*. at 65.

26 *Id.* at 54.

27 *Id.*

28 Jennifer E. Laurin, *Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding*, 93 TEX. L. REV. 1751, 1753 (2015).

29 STRENGTHENING, *supra* note 1, at 40 ("In the 1980s, the opportunity to use the techniques of DNA technologies to identify individuals for forensic and other purposes became apparent.").

30 Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (quoting State v. Long, 721 P.2d 483, 491 (Utah 1986)).

31 Laurin, *supra* note 28, at 1753.

32 Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 578 (2022).

is therefore instructive to finding out what support they need to properly discharge their competencies.

II. The National Academy of Sciences' Forensic Science Portfolio As A Case Study

Broadly, our objective was to explore how the competencies of lawyers, judges, and jurors are considered and promoted in criminal proceedings involving claims concerning forensic science. What is expected of them? What drives those expectations? One way to explore this objective is through analyzing case law, and—based on Shooter's previous research[33]—we knew case law referencing the NAS's forensic science report portfolio would be helpful.

A. The National Academy of Sciences & Forensic Science Reporting

The NAS, established in 1863, is considered an important voice on scientific matters.[34] Designed to provide "independent, objective advice to the nation on matters related to science and technology,"[35] it carries a statutory mandate to report on any scientific subject when called upon by the federal government.[36] The NAS is committed to "furthering science in America"[37] and its members are "active contributors to the international scientific community."[38] Over time, the NAS has developed a diverse research portfolio, including reports on matters of national security and welfare,[39] warfare technology,[40] education,[41] healthcare (including COVID-19),[42] and climate change.[43]

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33 Amelia Shooter, 100 Years of the National Research Council: A Critical Examination of Judicial References to Forensic Science NAS Reports (November 2019) (Ph.D. thesis, Birmingham City University) (on file with the author). This thesis explored case law to determine that judicial decision-making is inherently linked to one (or more) of four factors – following precedent, institutional settlement, finality and rationality. The first two justifications demonstrate that the role of judges, lawyers and juries is key in ensuring that good decision-making takes place, particularly when said agents are deliberating on scientific evidence.

34 Sarah Lucy Cooper, *Judicial Responses to Shifting Scientific Opinion in Forensic Identification Evidence and Newly Discovered Evidence Claims in the United States: The Influence of Finality and Legal Process Theory*, 4 BRIT. J. AM. LEG. STUDIES 649, 658 (2015) (describing the NAS as "one of the world's premier sources of independent, expert advice on scientific issues").

35 *Mission*, NAT'L ACAD. OF SCIS., http://www.nasonline.org/about-nas/mission/ (last visited Aug. 26, 2022).

36 36 U.S.C §§ 251, 252, 253 (1863).

37 NAT'L ACAD. OF SCIS., *supra* note 35.

38 *Id*.

39 Albert L. Barrows, *The Relationship of the National Research Council to Industrial Research, in* RESEARCH: A NATIONAL RESOURCE: II: INDUSTRIAL RESEARCH 365 (U.S. Gov't Printing Off. 1940).

40 *Id.* at 396–97.

41 NAT'L RSCH. COUNCIL, A FRAMEWORK FOR K-12 SCIENCE EDUCATION: PRACTICES, CROSSCUTTING CONCEPTS, AND CORE IDEAS (The Nat'l Acads. Press 2012).

42 *Coronavirus Resources Collection*, NAT'L ACAD. OF SCIS., http://www.nap.edu/collection/94/coronavirus-resources (last visited Aug. 22, 2022).

43 NAT'L ACADS. OF SCIS., ENG'G, AND MED. FUTURE WATER PRIORITIES FOR THE NATION: DIRECTIONS FOR THE U.S. GEOLOGICAL SURVEY WATER MISSION AREA (The Nat'l Acads. Press 2018).

The NAS also has a forensic science portfolio, which includes six reports of relevance to the criminal legal system ("the portfolio"). To answer questions about the introduction of DNA evidence into legal proceedings in the late 1980s, the NAS published two reports—DNA Technology in Forensic Science [44] and The Evaluation of Forensic DNA Evidence [45]—on the forensic use of DNA technology. Both reports were in part funded by the U.S. Department of Justice.[46] The earlier report focused on resolving the issues raised by relevant scientific communities around the use of DNA evidence [47] and the latter answered questions about Polymerase Chain Reaction ("PCR") methods.[48] In sum, the NAS encouraged the criminal legal system to harness properly prepared DNA technology on the basis that scientific evidence demonstrated the technology's high reliability.[49] In four reports that followed, the NAS reported on several non-DNA forensic science techniques.[50] Three of these reports focused on specific disciplines. In the Polygraph and Lie Detection report,[51] the NAS concluded polygraph testing exhibited accuracy "considerably better than chance"[52] under controlled conditions, but those conditions fell "far short"[53] of what would be desirable. In 2002, the FBI commissioned the NAS to produce "an impartial scientific assessment of the soundness of the scientific principles underlying CABL [("Compositional Analysis of Bullet Lead")] to determine the optimum manner for conducting the examination and to establish scientifically valid conclusions."[54] In the report that followed, Forensic Analysis: Weighing Bullet Lead Evidence,[55] the NAS found some merit in the FBI's method for comparing the chemical composition of bullet fragments,[56] but reported a range of concerns including about FBI reporting procedures,[57] variability of bullets and manufacturing processes,[58] and interpretation of evidence.[59] The NAS recommended further research in the area[60] and that

[44] COMM. ON DNA TECH. FORENSIC SCI., DNA TECHNOLOGY IN FORENSIC SCIENCE (Nat'l Acads. Press 1992) [hereinafter DNA TECHNOLOGY IN FORENSIC SCIENCE].

[45] COMM. ON DNA FORENSIC SCI.: AN UPDATE., THE EVALUATION OF FORENSIC DNA EVIDENCE (Nat'l Acads. Press 1996) [hereinafter THE EVALUATION OF FORENSIC DNA EVIDENCE].

[46] DNA TECHNOLOGY IN FORENSIC SCIENCE, *supra* note 44.

[47] *Id.* at vii.

[48] THE EVALUATION OF FORENSIC DNA EVIDENCE, *supra* note 45, at 177.

[49] *Id.* at 204.

[50] COMM. TO REV. THE SCI. EVIDENCE ON THE POLYGRAPH, THE POLYGRAPH AND LIE DETECTION (Nat'l Acads. Press 2003) [hereinafter THE POLYGRAPH AND LIE DETECTION] (commissioned by the U.S. Department of Energy); COMM. ON SCI. ASSESSMENT BULLET LEAD ELEMENTAL COMPOSITION COMPARISON, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE (Nat'l Acads. Press 2004) [hereinafter FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE] (commissioned by the FBI); COMM. TO ASSESS THE FEASIBILITY, ACCURACY AND TECH. CAPABILITY OF A NAT'L BALLISTICS DATABASE, BALLISTIC IMAGING (Nat'l Acads. Press 2008) [hereinafter BALLISTIC IMAGING] (commissioned by the National Institute of Justice); STRENGTHENING, *supra* note 1 (commissioned by Congress).

[51] THE POLYGRAPH AND LIE DETECTION, *supra* note 50.

[52] *Id.* at 224.

[53] *Id*.

[54] FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE, *supra* note 50, at ix.

[55] *Id*. Note, this is also referred to as CBLA, or Comparative Bullet-Lead Analysis. These two terms are used interchangeably.

[56] *Id.* at 23.

[57] *Id.* at 16.

[58] *Id.* at 68.

[59] *Id.* at 107.

[60] *Id.* at 106.

the FBI strengthen its protocols.[61] In 2005, the FBI stopped using CBLA.[62] In the report Ballistic Imaging,[63] the NAS recommended against the establishment of a national ballistics database,[64] commenting that the uniqueness of firearms-related tool-marks had not been fully demonstrated.[65] The fourth report, Strengthening Forensic Science in the United States: A Path Forward ("Strengthening"), provided a broader evaluation of the forensic science field, following a commission from the U.S. Congress.[66] It provided a critique of several commonly used forensic science disciplines, including the analysis of fingerprint,[67] ballistics,[68] bite-marks,[69] and hairs.[70] The report's key findings included that, on the basis of existing evidence, only nuclear DNA technology was capable of individualization consistently and with a high degree of certainty,[71] and that the fragmented forensic science sector was in need of national oversight.[72]

The portfolio provides a useful case study to explore system perspectives on the competencies of lawyers, judges, and jurors in the context of forensic science evidence. Broadly, case law referencing the portfolio reflects an interaction between scientific knowledge and its application in the criminal legal system, thus providing insight into how system agents handle scientific knowledge offered by revered bodies that harness interdisciplinary expertise to investigate and report on issues of societal interest. More specifically, such case law is likely to be addressing a point of controversy or contention about forensic science evidence and therefore involve commentary on the competencies of judges, lawyers and jurors involved in the case—directing or reflecting on their past, present or future decision-making. It also means case law involving a broad range of forensic science disciplines can be considered, and that approaches across a substantial time period—thirty years (1992–2022)—can be evaluated.

B. APPROACH

Shooter's study of references to the portfolio in U.S. appellate case law in criminal proceedings, located through application of search terms on Westlaw U.S., analyzed 644 published decisions between 1992 and 2017.[73] Following the application of a consistent analytical framework to each decision—referencing information, case facts, judicial decision,

61 *Id.* at 109–10.
62 Press Release, FBI National Press Office, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations (Sept. 1, 2005), https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.
63 BALLISTIC IMAGING, *supra* note 50.
64 *Id.* at 5.
65 *Id.* at 55.
66 STRENGTHENING, *supra* note 1, at xix ("Recognizing that significant improvements are needed in forensic science, Congress directed the National Academy of Sciences to undertake the study that led to this report.").
67 *Id.* at 136–44.
68 *Id.* at 150–55.
69 *Id.* at 174–76.
70 *Id.* at 156–61.
71 *Id.* at 7.
72 *Id.* at 80–83.
73 Shooter, *supra* note 33, at 7.

report specific engagement, legal process drivers[74]—she found decisions were characterized by "fidelity to the legal process vision through four principles: the dominance of precedent; deference to institutional settlement; pursuit of finality; and fidelity to the rationality assumption."[75] Her main conclusion was that "legal cultural norms and scientific progress can be reconciled through developing legal actors' forensic science knowledge…"[76]

For this study, we interrogated Westlaw U.S. using the same search terms but expanded the analysis window to cover 1992 to 2022, generating a total of 785 decisions.[77] We then harnessed Shooter's analytical framework to explore how the competencies of trial judges, lawyers, and jurors emerged in the dataset. Our methodology, content analysis, is well described by Mark Hall and Ronald Wright: "Using this method, a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning."[78] This approach "is more than a better way to read cases. It brings the rigor of social science to our understanding of case law, creating a distinctively legal form of empiricism."[79] We share some key findings from our analysis in Part III.

III. FINDINGS: STRATEGY, PRECEDENT, AND WEIGHT

Our analysis confirmed that lawyers, judges, and jurors have distinct and well-defined competencies in criminal proceedings involving forensic science, and that appellate courts will generally defer to their original decision-making or, in some other way, emphasize their competence when reviewing decisions. The following sections, categorized by agent, share key findings, with examples taken from across decades, forensic disciplines, and jurisdictions.

A. LAWYERS

Lawyers monopolize trial proceedings in that they select, present, and challenge forensic science evidence. The decisions lawyers make in exercising these competencies are crucial, and our analysis shows upon review that they will be afforded considerable deference.

In particular, case law shows decisions around cross-examination strategy are crucial, following Shooter's finding that "cross-examination is given significant weight by appellate judges."[80] We provide various examples, starting with DNA. The admissibility of certain DNA analysis techniques—particularly PCR in the 1990s—has been challenged frequently.[81] In response, courts have stressed the importance of cross-examination

[74] *Id.* at 70.
[75] *Id.* at 7–8.
[76] *Id.* at 8.
[77] Full case list on file with authors.
[78] Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008).
[79] *Id.*
[80] Shooter, *supra* note 33, at 214.
[81] *See, e.g.*, discussion in People v. Amundson, 41 Cal. Rptr. 2d 127 (Cal. Ct. App.), *modified*, (May 16, 1995), review granted and opinion superseded, 899 P.2d 896 (Cal. 1995). In such cases, petitioners generally sought to challenge

in determining the probative value of evidence. For instance, courts have considered issues concerning contamination and misuse of DNA evidence to be an "'open field' for cross-examination."[82] In finding that PCR-DNA evidence satisfied *Daubert v. Merrell Dow Pharmaceuticals Inc*,[83] as part of an *in limine* application, a New York U.S. District Court in *United States v. Cuff*,[84] for example, commented that concerns about forensic DNA evidence were "grist for cross-examination."[85] Equally, courts have allowed appeals where a trial court has improperly limited a lawyer's strategy to cross-examine DNA evidence. For instance, in *Williams v. State*, the Maryland Court of Appeals court found the trial court had erred in restricting defense counsel's cross-examination concerning "testing errors and possible spill-over contamination in the lab."[86]

Challenges concerning so-called "soft"[87] forensic science disciplines have also attracted comments that underscore the importance of cross-examination. In *Rodriguez v. State*, the Supreme Court of Delaware found a trial court did not abuse its discretion in finding that a latent fingerprint examiner qualified as an expert in the analysis of tire tracks and shoe prints.[88] The court reasoned that by "probing [the fingerprint examiner] on his particular experience in tire track and shoeprint analysis"[89] defense counsel had "challenged his credibility before the jury and the weight to be given the impression evidence."[90] The opportunity to cross-examine was key, as "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[91] The court also noted their decision aligned with other jurisdictions.[92] Similarly, in *Garrett v. Commonwealth*, the Supreme Court of Kentucky rejected an appeal arguing that, with reference to Strengthening, individualization testimony by the state's firearms expert was unreliable.[93] The court stated that "[t]he proper avenue . . . to address . . . concerns about the methodology and reliability . . . was through cross-examination, as well as through the testimony of his own expert. In this way, the jury was presented with both parties' positions, and with any limitations to the testimony."[94] Further, in *United States v. McCluskey*,[95] a U.S. District Court in New

the admission of DNA evidence prepared via PCR method, as only RFLP analysis had been recommended in DNA Technology in Forensic Science. Other challenges prior to the publication of The Evaluation of Forensic DNA Evidence questioned the admissibility of alternative was to calculate random match probability, particularly the product rule, as seen in decisions such as People v. Soto, 35 Cal. Rptr. 2d 846 (Cal. Ct. App. 1994).

82 *Amundson*, 41 Cal. Rptr. 2d at 134.

83 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

84 United States v. Cuff, 37 F. Supp. 2d 279, 280 (S.D.N.Y. 1999).

85 *Id.* at 283.

86 Williams v. State, 679 A.2d 1106, 1119 (Md. 1996), disapproved of by Wengert v. State, 771 A.2d 389 (Md. 2001) (but not in relation to the PCR issue).

87 Sarah Lucy Cooper, *Forensic Science Identification Evidence: Tensions Between Law and Science*, 16 J. PHIL., SCI. & L. 1 (2016) ("[T]he soft sciences comprise disciplines that interpret human behaviour, institutions and society on the basis of investigations for which it can be difficult to establish such levels of precision.").

88 Rodriguez v. State, 30 A.3d 764, 765 (Del. 2011).

89 *Id.* at 770.

90 *Id*.

91 *Id.* (citing Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 595–96 (1993)).

92 *Id.*

93 Garrett v. Commonwealth, 534 S.W.3d 217, 222 (Ky. 2017), *modified,* (Dec. 20, 2017).

94 *Id.* at 223.

95 United States v. McCluskey, No. CR 10-2734 JCH, 2013 WL 12335325 (D.N.M. Feb. 7, 2013).

Mexico dismissed a challenge to the admissibility of firearms evidence on the basis that defense counsel had the opportunity to cross-examine the expert about their methods and conclusions.[96]

As with DNA evidence, some courts have found it improper to limit cross-examination in cases involving soft forensic sciences. For instance, in *State v. Harper*, defense counsel wanted to cross-examine the state's firearms expert using the Ballistic Imaging report, but the trial court excluded the report.[97] The state later conceded— and a Wisconsin appeal court agreed—that this restriction on cross-examination was an error.[98] Yet, the appeals court found, even without Ballistic Imaging, that the "trial counsel was able to effectively cross-examine"[99] the ballistics evidence. Indeed, the idea that effective cross-examination can occur absent authoritative scientific literature also manifested in *State v. Fields*.[100] In that case, the Superior Court of New Jersey found that a trial court had correctly decided that Strengthening did not qualify as a "learned treatise"[101] and, therefore, had also correctly determined that defense counsel could not cross-examine the state's forensic expert using the report to explore the limitations of fingerprint evidence.[102] These sorts of decisions underscore the need for lawyers to have a thorough scientific understanding of forensic evidence. Lawyers need to be prepared for all eventualities, be that to make compelling arguments as to why scientific literature is needed to support cross-examination, or to carry out effective cross-examination without it.

Decisions by counsel not to cross-examine or perform limited cross-examination will also attract deference. For instance, in *United States v. Berry*, the petitioner alleged CBLA evidence presented against him at trial rendered proceedings "fundamentally unfair."[103] In rejecting the claim, the Ninth Circuit Court of Appeals "acknowledged the questionable nature of the [CBLA] evidence"[104] but stated it was for counsel to exercise "the normal adversary process to expose any flaws in the science."[105] In the court's view, criticisms of such evidence are "precisely the kind of evidence that the adversary system is designed to test. Vigorous cross-examination would have exposed its flaws to the jury."[106] This perspective was captured by the Fourth Circuit Court of Appeals in *United States v. Higgs*,

96 *Id.* at *3.
97 State v. Harper, No. 2011AP1593-CR, 821 N.W.2d 412, at *1 (Wis. Ct. App. Aug. 8, 2012).
98 *Id.* at *2.
99 *Id.* at *3, n.5.
100 State v. Fields, No. A–4815–13T3, 2017 WL 1955254, t *6 (N.J. Super. Ct. App. Div. May 11, 2017) ("[T]he trial judge correctly found that defense counsel could not cross-examine Carames using those [including Strengthening] texts.").
101 *Id.* at *5 (quoting Jacober v. St. Peter's Med. Ctr., 128 N.J. 475, 486 (1992) ("In general, 'learned treatises are inadmissible hearsay when offered to prove the truth of the matter asserted therein because the author's out-of-court statements are not subject to cross-examination.' . . . Although learned treatises are 'inadmissible as substantive evidence, [they] may be used to impeach the credibility of witnesses on cross-examination.'").
102 *Id.* at 5–6.
103 United States v. Berry, 624 F.3d 1031, 1039 (9th Cir. 2010).
104 *Id.* at 1040.
105 *Id*.
106 *Id*.

when explaining why defense counsel had not been ineffective in confronting the CBLA evidence in the case.[107]

We have found, as Erin Murphy describes, "[a]s currently configured, our [criminal justice] system . . . heavily depends upon the skill of counsel and in-court confrontation."[108] Gary Edmond and colleagues have noted this in the context of forensic science previously, finding, as we have, cross-examination to be an important consideration for appellate courts resolving concerns.[109] Cooper has argued previously that this institutional configuration and judicial practice is symptomatic of the criminal legal system's loyalty to finality:

> By focusing on the role of defense counsel (and the adversarial system) as a basis for rejecting such appeals [claims based on concerns related to the reliability of forensic science evidence], the courts have been drawing upon an 'instrumental' value of finality; namely, incentivizing defense counsel to prevent errors at trial level.[110]

As such, the need for lawyers to be properly trained and educated in forensic science is crucial to their strategic role. Views on the usefulness of cross-examination are mixed, with some describing it as "largely futile"[111] and others considering it "the greatest legal engine invented for the discovery of truth."[112] Regardless, cross-examination is a staple of the adversarial system. As such, as Carol Henderson and Diana Botluk have said, lawyers need to vigorously cross-examine expert witnesses, including cross-examination of scientific principles underpinning their field of expertise, as a primary means to ensure justice.[113] Lawyers need to be equipped to exercise their competencies to the best of their ability, especially in the context of cross-examination. This is especially so considering that, in addition to their likely limited scientific knowledge, lawyers are likely to be navigating "limited resources, and a low-impact and/or depleted adversarial arsenal."[114]

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[107] United States v. Higgs, 663 F.3d 726, 739 (4th Cir. 2011) ("Here, Higgs has failed to demonstrate that defense counsel's handling of the CBLA evidence at trial was constitutionally ineffective simply because counsel did not ferret out the two preliminary studies or present a defense expert armed with the same information. On the contrary, counsel went a long way towards impeaching the uniqueness and homogeneity of lead melts, as well as the overall probative value of the CBLA evidence, demonstrating that counsel was well-versed in the subject and able to obtain important concessions.").

[108] Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 672 (2014).

[109] Gary Edmond, Simon Cole, Emma Cunliffe & Andrew Roberts, *Admissibility Compared: The Reception of Incriminating Expert Evidence (I.E., Forensic Science) in Four Adversarial Jurisdictions*, 3 U. DENV. CRIM. L. REV. 31 (2013).

[110] Cooper, *supra* note 22, at 759.

[111] Jonathan J. Koehler, *If the Shoe Fits they Might Acquit: The Value of Forensic Science*, TESTIMONY 8 J. EMPIRICAL LEGAL STUD. 21, 31 (2011).

[112] 5 J. Wigmore, *Evidence* § 1367, at 32 (J. Chadbourn rev. ed.1974), https://www.worldcat.org/title/evidence-in-trials-at-common-law/oclc/264714538 .

[113] Carol Henderson & Diana Botluk, *Sleuthing Scientific Evidence Information on the Internet*, 106 J. CRIM. L. & CRIMINOLOGY 59, 60 (2016).

[114] *Challenges to Fingerprint Identification Evidence, supra* note 22, at 784.

B. TRIAL JUDGES

As part of their role of presiding over trial court proceedings, trial judges must decide if expert evidence is admissible, typically through an assessment of the *Daubert* factors.[115] Our analysis confirms this gate-keeping competency is deep-rooted in legal practice, and trial court decisions will generally be afforded deference upon review.[116]

Loyalty to precedent emerges as integral to this practice. This is evident in the resolution of the admissibility of DNA evidence in the 1990s. A group of cases, published in 1992 and 1993 from several US jurisdictions,[117] evidently formed core precedent in favor of the admissibility of DNA evidence "accompanied by a deliberately conservative statistical calculation regarding the likelihood of a random match."[118] These cases were quickly cited by later courts.[119] Analysis also suggests that "although elements of these decisions have become outdated (particularly following the publication of [Forensic DNA Evidence]), they remain strong authorities in support of the admissibility of DNA evidence in general."[120]

Following precedent may not always mean aligning with the portfolio, however. Appellate courts will defer to trial judges making decisions in line with precedent, even where reputable authorities—like NAS reports—demonstrate that scientific thinking is moving on. For example, in *State v. Davidson*, the petitioner challenged the trial court's decision to *inter alia* admit fingerprint evidence against him, citing reliability concerns set out in Strengthening.[121] In finding no error, the Supreme Court of Tennessee noted that the trial court relied "heavily on the facts 'that fingerprint analysis has been used by law enforcement for approximately 100 years and that the rate of error is extremely low.'"[122] Strengthening had reported zero error rates to be clearly "unrealistic"[123] and more research was needed.[124] Similarly, in *State v. Hoff*, a petitioner cited a report of the National Academy of Sciences to argue fingerprint evidence should not have been admitted against him.[125] In rejecting the appeal, the Court of Appeals of North Carolina stated "[o]ur Supreme Court has long recognized the validity of fingerprint analysis. . . . This well-established precedent is controlling on defendant's admissibility argument. . . . Given our Supreme Court's long-

115 *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591–94 (1993).

116 Shooter, *supra* note 33, at 126.

117 *See* People v. Barney, 10 Cal. Rptr. 2d 731, 739–40 (Cal. Ct. App. 1992); United States v. Bonds, 12 F.3d 540 (6th Cir. 1993); State v. Bible, 858 P.2d 1152 (Ariz. 1993); Nelson v. State, 628 A.2d 69 (Del. 1993); Commonwealth v. Lanigan, 596 N.E.2d 311 (Mass. 1993); State v. Vandebogart, 616 A.2d 483 (N.H. 1992); State v. Cauthron, 846 P.2d 502 (Wash. 1993).

118 Shooter, *supra* note 33, at 94; *see also* DNA TECHNOLOGY IN FORENSIC SCIENCE, *supra* note 44, at 85 (also recommending the accompaniment of similar statistical evidence).

119 *Id.* at 102.

120 *Id.*

121 State v. Davidson, No. E2013-00394-CCA-R3DD, 2015 WL 1087126, at *1 (Tenn. Crim. App. Mar. 10, 2015), aff'd in part, vacated in part, 509 S.W.3d 156 (Tenn. 2016).

122 *Id.* at *28.

123 STRENGTHENING, *supra* note 1, at 143.

124 *Id.* at 144–45.

125 State v. Hoff, 736 S.E.2d 204, 208–09 (N.C. Ct. App. 2012). Note this was framed as an ineffective assistance of counsel claim.

standing acceptance of the reliability of fingerprint evidence, defendant would not have been entitled to exclude the expert testimony."[126] The trial court had followed precedent.

Another example relates to microscopic hair analysis. In *Meskimen v. Commonwealth*, the petitioner claimed such evidence should not had been admitted against him at trial.[127] The Supreme Court of Kentucky acknowledged—and the petitioner referenced—that microscopic hair analysis had been criticized in Strengthening and by the FBI.[128] However, in rejecting the appeal, the court noted that the state "offered evidence that has been admissible in the state of Kentucky for many years"[129] and it would not "disturb the decisions of the trial court without a clear showing of abuse of discretion."[130] The court determined that the decision of the trial court to dispense with a *Daubert* hearing and take judicial notice that hair comparison evidence is scientifically reliable was not an error.[131] Citing its own precedent, the Kentucky Supreme Court said there was no need to "reinvent[ ] the wheel every time by requiring the parties to put on full demonstrations of the validity or invalidity of methods or techniques that have been scrutinized well enough in prior decisions."[132] Despite this, the court recognized the changing nature of science. It acknowledged that "the state of scientifically accepted evidence is ever changing, and what is scientifically acceptable today may be found to be incorrect or obsolete in the future."[133] As such, judicial notice in context was not "set in stone."[134] In so holding, the court underscored the competency of trial judges to monitor this:

> It is up to the trial courts to stay abreast of currently accepted scientific methods, as they are the gatekeepers for the admissibility of evidence. Therefore, even though case law may be in acceptance of a certain method of analysis, it is the trial court's duty to ensure that method is supported by scientific findings, or at least not seriously questioned by recent reputable scientific findings.[135]

Even where appellate courts find error, trial courts' fidelity to precedent emerges as integral. One example is *State v. Alt*, where the Court of Appeals of Minnesota concluded the statistical frequencies of individual loci should be admitted alongside evidence of a DNA match, if calculated according to the modified ceiling principle set out in DNA Technology in Forensic Science, and that the trial court had erred in excluding such evidence.[136] Consideration of judicial precedent on the issue was key. The court stated, "[s]everal courts have strongly suggested that statistical probability evidence as calculated by means of the NRC modified ceiling principle . . . should be admitted"[137] and noted the Washington

[126] *Id.* at 209.
[127] Meskimen v. Commonwealth, 435 S.W.3d 526, 529 (Ky. 2013).
[128] *Id.* at n.9.
[129] *Id.* at 535.
[130] *Id.*
[131] *Id.* at 535–36.
[132] *Id.* at 535.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] State v. Alt, 504 N.W.2d 38 (Minn. Ct. App. 1993).
[137] *Id.* at 50.

Supreme Court had considered the NAS's adoption of the methodology as indicative of "general acceptance."[138]

Another example is *State v. Roman Nose*, where the Supreme Court of Minnesota found a trial court had improperly denied a petitioner a hearing on the general acceptance of the PCR-STR method of testing DNA.[139] For the court, this was generally a matter of precedent, not science. The state used decisions of other appellate courts to uphold admission of the DNA evidence obtained from PCR-STR testing to argue that a hearing on general acceptance was unnecessary.[140] However, the Supreme Court of Minnesota found that those decisions were not dispositive.[141] This was on the basis that different standards were applied across jurisdictions and the appellate decisions affirming admissibility generally followed a hearing at trial level.[142] As such, to follow them "would be a departure from our precedent requiring a . . . hearing."[143] The court remanded the case back to the trial court to exercise its competency at such a hearing,[144] showing deference to the trial court's competence. The same can be seen in *State v. Celaya.* In that case, the Arizona Court of Appeals found that the trial court's refusal to admit evidence discrediting firearms evidence based on Strengthening may have amounted to plain error, but referred the question of admissibility back to the lower court for an evidentiary hearing.[145]

It has been concluded previously that there is an institutional "commitment to precedent"[146] and that "precedent is the biggest driving force behind [judicial] decision-making."[147] Precedent is relied upon by courts to "resolve and neutralize"[148] concerns about the reliability of forensic science. Judges have recognized this too, and associated pitfalls. As Judge Jed S. Rakoff has said regarding the general acceptance standard:

> A lot of U.S. law is judge-made law, and that requires very heavy attention to stare decisis, to precedent . . . . That is built into the system, and there are a lot of positive things to be said for it, but in this area, it operates very negatively because all of the precedents allowing in all this stuff were set during a time when *Frye* applied, and in which *Frye* was not really taken seriously, and so almost anything came in.[149]

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138 *Id*.

139 State v. Roman Nose, 649 N.W.2d 815, 823 (Minn. 2002).

140 *Id.* at 820 ("The state points to the decisions of other appellate courts that have upheld admission of DNA evidence obtained from PCR-STR testing to argue that a *Frye-Mack* hearing on general acceptance of the PCR-STR method is unnecessary.").

141 *Id.* At 821 ("However, we have not decided general acceptance for Minnesota courts.").

142 *Id.* at 820.

143 *Id.* at 820.

144 *Id.* at 823.

145 State v. Celaya, No. 2 CA-CR 2013-0554-PR, 2014 WL 4244049, at *7 (Ariz. Ct. App., Aug. 27, 2014).

146 Sarah Lucy Cooper, *Forensic Science Developments and Judicial Decision-Making in the Era of Innocence: The Influence of Legal Process Theory and Its Implications*, 19 RICH. J.L. & PUB. INT. 211, 226 (2016) (referring to "the American common law system's commitment to the principle of *stare decisis*.").

147 Shooter, *supra* note 33, at 116.

148 Cooper, *Challenges to Fingerprint Identification Evidence, supra* note 22, at 759 (quoting Sarah Lucy Cooper, *The Collision of Law and Science: American Court Responses to Developments in Forensic Science*, 33 PACE L. REV. 234, 277 (2013)) (commenting in the context of fingerprinting).

149 The Honorable Jed S. Rakoff, Keynote Address: *"Judging Forensics" Remarks and Q&A Session*, 6 VA. J. CRIM. L. 29, 38 (2018).

The organization of the criminal legal system means courts (and not the scientific community) determine "good science."[150] As such, judges need to be equipped with relevant scientific understanding. Jasanoff has proposed that judges need a better understanding of scientific evidence and its underlying principles to make informed gatekeeping decisions.[151] In particular, they need to be equipped "to interrogate the usefulness of precedent more closely, and not allow the passage of time to dictate scientific validity and reliability."[152]

C. JURORS

Jurors must determine the weight of forensic science evidence. Case law explored in this section shows appellate courts defer widely to this competence when dealing with challenges to such evidence, broadly finding that reliability challenges are a matter of weight not admissibility. This "highlights the defined nature of the jury, showing their broad competence and discretion to determine the weight of evidence within the trial process, even if evidence has significant limitations."[153] What we see clearly across these cases, too, is the layering of competencies—appellate courts simultaneously make points about associated competencies of lawyers and trial courts.

This approach is evident from the 1990s in cases concerning DNA evidence. For instance, in *State v. Peters*, Peters challenged the reliability of DNA evidence against him, specifically probability calculations used by the FBI.[154] In finding no error by the trial court, the Court of Appeals of New Mexico noted that the state's expert had defended his calculations on both cross and direct examination, and cited state precedent that had held "questions about the accuracy of results goes to the weight of the evidence and is therefore a jury question."[155] *People v. Lee* is another example. The trial court had admitted DNA evidence obtained using PCR analysis against Lee.[156] Lee challenged this, arguing PCR was not appropriately validated.[157] The Court of Appeals of Michigan disagreed, citing precedent to support a holding that "trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method."[158] It warned, however, of measures to be taken by trial courts and lawyers to support juries in their determinations of weight. Before admitting such evidence, a trial court must ensure the prosecutor has shown "generally accepted laboratory procedures were followed."[159] Furthermore, in the course of expert testimony, the inherent limitations of PCR testing should be "made clear to juries"[160] and "care [should be] taken" to help jurors not confuse PCR and RFLP methods and

[150] John B. Meixner & Shari Seidman Diamond, *The Hidden* Daubert *Factor: How Judges use Error Rates in Assessing Scientific Evidence*, 2014 WIS. L. REV. 1063, 1080 (2014).
[151] *See* Sheila Jasanoff, *Research Subpoenas and the Sociology of Knowledge*, 59 LAW & CONTEMP. PROBS. 95, 95–97 (1996).
[152] Cooper, *supra* note 87, at 23.
[153] Shooter, *supra* note 33, at 183.
[154] State v. Peters, 944 P.2d 896, 903 (N.M. Ct. App. 1997).
[155] *Id*. (citing State v. Anderson, 881 P.2d 29, 46 (1994)).
[156] People v. Lee, 537 N.W.2d 233, 248 (Mich. Ct. App. 1995).
[157] *Id.* at 257–58.
[158] *Id*.
[159] *Id.* at 258.
[160] *Id*.

understand relevant "probative limitations."[161] Although the appeal court did not explicitly nominate lawyers for these tasks, they fall obviously within the remit of direct and cross-examination.

Similar approaches are evident beyond DNA evidence. For example, in *Commonwealth v. Joyner*, Joyner argued the testimony of the state's fingerprint expert was insufficient because the expert "provided no standard by which he measured the comparison or the probability that the fingerprints came from the same source."[162] In support, Joyner cited precedent arguing that the state may not introduce evidence of a DNA match or non-exclusion without accompanying statistical evidence.[163] The Supreme Judicial Court of Massachusetts found this use of precedent "inapposite"[164]—those cases addressed *admissibility* (which was not in question), not *sufficiency*.[165] Instead, the court cited precedent that underscored the competency of the jury and counsel in such instances. This included the court's decision in a 1977 case, *Commonwealth v. Lacorte*: "[I]t is for the jury to determine—after listening to cross-examination and the closing arguments of counsel—what significance, if any, they will attach to the discovery of the defendant's fingerprints at the scene of the crime."[166]

Jurors must use permitted information to weigh forensic science evidence. Deference to lawyering and trial court competencies are evident in this context too. For example, case law underscores that cross-examination is a preferred vehicle to provide critical information to jurors, even if counsel performing cross-examination is unarmed with current knowledge. For instance, in *Commonwealth v. Lykus*, a Superior Court of Massachusetts found that the report Forensic Analysis: Weighing Bullet Lead Evidence was new evidence, requiring a new trial.[167] The court determined that if the report had been available to the jury at the time of the defendant's trial it "almost certainly would 'probably have been a real factor in the jury's deliberations.'"[168] Yet, this decision was overruled, with a subsequent court finding *inter alia* that the report contained "the same kind of evidence that was elicited . . . on cross-examination"[169] of the relevant witness. Where jurors bring unauthorized information into a trial, outcomes from that trial may be illegitimate. This was the case in *People v. Pizarro*, where a juror read an earlier court decision in the defendant's case, which included details about forensic DNA evidence not included in the instant proceedings.[170] The trial court had denied a new trial, however the review court determined that the juror had "made a mockery of the trial process"[171] and a reversal of the trial court's decision to not allow a new trial was warranted. Yet, even in making this decision, the reviewing court made several express statements in support of the trial court's decision-making:

[161] *Id*.
[162] Commonwealth v. Joyner, 4 N.E.3d 282, 290–91 (Mass. 2014).
[163] *Id.* at 291.
[164] *Id*.
[165] *Id*.
[166] Commonweath v. LaCorte, 373 Mass. 700, 369 N.E.2d 1006 (1977).
[167] Commonwealth v. Lykus, No. 43558, 2005 WL 3804726, at *18 (Mass. Super. Dec. 30, 2005).
[168] *Id.*
[169] Commonwealth v. Lykus, 885 N.E.2d 769, 784 (Mass. 2008).
[170] People v. Pizarro, 158 Cal. Rptr. 3d 55 (Cal. Ct. App. 2013).
[171] *Id.* at 60.

> We sympathize with the trial judge who, having presided over two jury trials and a prolonged . . . hearing amid two appeals, was called upon to make the difficult decision of whether to grant yet another new trial in a case that was then almost 20 years old. The trial court ultimately denied defendant's new trial motion, finding it to be a "close case" and a "real hard, hard decision to make." While we agree with the trial judge that the juror misconduct in this case amounted to "gross misconduct" and was "absolutely outrageous," we disagree with his decision denying the new trial motion.[172]

The courts' routine deference to the jury's decision-making competence has been linked to the criminal legal system's loyalty to legal process theory.[173] The scope afforded to jurors in evaluating forensic science has been subject to criticism.[174] The vast majority of jurors are not scientists.[175] They may have a thirst for scientific evidence[176] and expect to see it "particularly in cases where the majority of evidence is circumstantial."[177] Their expectations of science may be inflated too,[178] with some finding that jurors are easily influenced by testifying experts,[179] and place special trust in scientific evidence.[180] Jurors may find expert testimony confusing, especially statistical evidence,[181] and, therefore, may also find judging the weight afforded to scientific evidence a challenging exercise. That said, "research has demonstrated a consistency between jury and bench trial verdicts, regardless of the level of scientific complexity involved."[182] There is also evidence that jurors raise appropriate concerns about forensic evidence,[183] deliver generally justified outcomes,[184] and that errors in juror interpretation may well be "traceable in part to misleading presentations and instructions by attorneys and judges."[185] This suggests, like our analysis, that the competencies of lawyers, judges and jurors are interdependent.

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172 *Id.* at 59.

173 *See, e.g.*, Cooper, *supra* notes 9, 22, 87 & 146.

174 *See, e.g.,* Ryan McDonald, *Juries and Crime Labs: Connecting the Weak Links in the DNA Chain*, 24 AM. J. L. & MED. 345 (1998); David H. Kaye, Valerie P. Hans, B. Michael Dann & Erin Farley, *Statistics in the Jury Box: How Jurors Respond to Mitochondrial DNA Match Probabilities*, 4 J. EMPIRICAL LEGAL STUD. 797 (2007); Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random Match Probability*, 34 J. LEGAL STUD. 395 (2005).

175 FAIGMAN, *supra* note 18, at 53.

176 Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006).

177 Pete Frick, *Forensic Science in Court: Challenges in the Twenty-First Century*, 27 SYRACUSE J. SCI. & TECH. L. 145, 157 (2012).

178 Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact,* 59 HASTINGS L.J. 1159, 1187–88 (2008).

179 *See* Simon Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings From Jennings to Llera Plaza and Back Again*, 41 AM. CRIM. L. REV. 1189 (2004) (General proposition that jurors are easily seduced).

180 Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 32 (2009).

181 McQuiston-Surrett & Saks, *supra* note 178, at 1189. *See also* STRENGTHENING, *supra* note 1, at 236–37.

182 STRENGTHENING, *supra* note 1, at 236.

183 *Id.* at 237.

184 *Id.* at 236.

185 *Id*.

IV. CONCLUSIONS: CONCEPTUALIZING SCIENCE LITERACY FOR LAWYERS

Lawyers, trial judges, and jurors form part of the fabric of the criminal legal system. An overhaul of the system's deep reliance on them to properly discharge their competencies in cases involving forensic science (or any other case for that matter) is very unlikely. They are the hands through which the criminal legal system aims to achieve justice through legitimate and accurate outcomes, public confidence and, thus, the maintenance of social order. Calls to "educate the users of forensic science analyses, especially those in the legal community"[186] have been made far and wide, including by the NAS, President's Council of Advisors on Science and Technology ("PCAST"),[187] and American Bar Association.[188] Several considerations are foundational to determining an education and training provision that equips key agents with the scientific understanding they need. We present two.

First is a consideration of who should be prioritized, and our recommendation is that lawyers' needs are targeted. Lawyers make key calls about forensic science evidence at all stages of its journey through the criminal legal system—its selection, how it is presented and challenged, and what role it plays in a case narrative. Moreover, lawyers become judges, who then make other key calls, for instance about what precedent to follow, the admissibility of expert evidence, the boundaries of direct and cross-examination, and the tools lawyers can use in both pursuits. The proper exercise of competencies by lawyers and judges is ground-laying for that of jurors, who play a passive role in trial proceedings. Essentially, if support for lawyers and trial judges is optimized, it follows that jurors will be better equipped to perform their competencies, as they would—through careful selection, presentation and challenges to scientific evidence by a lawyer—have access to a better toolkit on which to weigh the value of evidence. The case law in Part III (*Jurors*) suggests this is an idea to which the criminal legal system is already expectant. Furthermore, lawyers are intended to be permanent, frequent, and expert players in the system, which stands in stark contrast to jury service, which is temporary, infrequent, and entirely intended to bring a "lay" perspective to matters. Although the idea of jurors being lay members in proceedings is a staple of the justice system, to counter their lack of specific scientific knowledge, the idea of "science-qualified" and "rational" juries has been mooted.[189] Lawyers also have a generally uniform education pathway and established professional associations, which provide potential spaces (e.g., law school) to deliver science education and training, albeit there are notable challenges.[190] Lawyers are also bound in disciplinary cultures and norms

[186] *Id.* at 218.

[187] *See generally,* EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE COMPARISON METHODS (EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES 2016).

[188] Brandon L. Garrett et. al., *Forensic Science in Legal Education*, 51 J.L. & EDUC. 1, 12 (2022).

[189] *See, e.g.,* Pooja Chaudhuri, *A Right to Rational Juries? How Jury Instructions Create The "Bionic Juror" In Criminal Proceedings Involving DNA Match Evidence*, 105 CALIF. L. REV. 1807 (2017); *Confronting the New Challenges of Scientific Evidence*, *supra* note 19.

[190] SCIENCE LITERACY, *supra* note 10, at 111 ("Education systems provide opportunities to develop science literacy and that the structures within these systems may enable or constrain the development of science literacy..."); *see also* Garrett et al., *supra* note 188.

that obligate, expect and value expertise, continuing professional development (CPD), and ethical and effective performance, which should motivate engagement with development opportunities and offer frameworks (like CPD) to scaffold them. Moreover, the influence of lawyers can go beyond individual cases, as there is scope for them to bring their expertise to wider issues of, for instance, legal policy, law-making, and education.

Second is to consider the existing provision of scientific education for lawyers.[191] Programs[192] and literature have been developed,[193] as have ideas for "customized training."[194] Some law schools offer access to forensic science education.[195] The National Commission on Forensic Science (NCFS), which was established in 2013, had a dedicated Training in Science and Law sub-committee that: "explored mechanisms . . . to ensure that legal professionals understand the probative value and limitations of forensic science"[196] and offered several recommendations before the NCFS was disbanded in 2017.[197] Following an evaluation of the concerns raised in Strengthening,[198] the National Institute of Scientific Standards launched the Organization of Scientific Area Committees ("OSAC") for Forensic Science,[199] which aims to "strengthen the nation's use of forensic science by facilitating the development and promoting the use of high-quality, technically sound standards."[200] These standards, which are publicly available, are of relevance and support to legal professionals,[201] yet there are barriers to engagement.[202] Generally, concerns exist about the lack of mandatory, continuing, and assessed training on offer to lawyers.[203] Evidently,

[191] For a comprehensive provision overview, see Amy Evans et al., *Toward A More Effective Use and Understanding of Forensic Evidence in Courts of Law: Developing Strategies for the Scientific Education of Legal Practitioners*, 25 WIDENER L. REV. 1 (2019).

[192] *Id.*; *see generally,* STRENGTHENING, *supra* note 1, at 234–36. Organizations such as the Forensic Institute provide training to legal professionals, and conduct work across the UK, USA and Canada. *See Training, Seminars and Conferences*, THE FORENSIC INST., http://www.theforensicinstitute.com/training (last visited Aug. 30, 2022). The National Courts and Sciences Institute also provides training for legal professionals. *See Welcome to the National Courts and Sciences Institute*, https://www.courtsandsciences.org/ (last visited Aug. 30, 2022).

[193] *Id.*; *see also* Paul S. Miller, Daubert *and the Need for Judicial Scientific Literacy*, 77 JUDICATURE 254 (1994). The American Bar Association publishes material designed to support lawyers' knowledge of forensic science and its application. *See* DP LYLE, ABA FUNDAMENTALS: FORENSIC SCIENCE (ABA Book Publ'g 2012).

[194] STRENGTHENING, *supra* note 1, at 235.

[195] *Id.* at 236; *see* Garrett et al., *supra* note 188 (discussing the teaching of forensic science in law schools); *see also* Evans et al., *supra* note 191 (highlighting the lack of forensic science training in law schools).

[196] *See Training on Science and Law*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/ncfs/training-science-and-law (last visited Aug. 30, 2022).

[197] *See, e.g.*, NAT'L COMM. ON FORENSIC SCI., U.S. DEPT. OF JUST., RECOMMENDATION TO THE ATTORNEY GENERAL FORENSIC SCIENCE CURRICULUM DEVELOPMENT, https://www.justice.gov/archives/ncfs/page/file/818206/download.

[198] Redle & Plourd, *supra* note 2, at 58 ("The Organization of Scientific Area Committees (OSAC) for Forensic Science can trace its origins back to the 2009 report of the National Academy of Sciences Strengthening Forensic Science in the United States: A Path Forward . . . .").

[199] *NIST Launches an Updated Organization of Scientific Area Committees for Forensic Science* (OCT. 1, 2020), https://www.nist.gov/news-events/news/2020/10/nist-launches-updated-organization-scientific-area-committees-forensic (last visited Aug. 30, 2022).

[200] *The Organization of Scientific Area Committees for Forensic Science*, https://www.nist.gov/organization-scientific-area-committees-forensic-science (last visited Aug. 30, 2022).

[201] Redle & Plourd, *supra* note 2.

[202] *Id.* ("Most standards are voluntary in that they are offered for adoption by people or industry without being mandated in law.").

[203] STRENGTHENING, *supra* note 1, at 234. ("However, these courses are not mandatory, there is no fixed routine of continuing education in legal practice with regard to science, and there are no good ways to measure the proficiency of

although a considerable patchwork of support is on offer, there remains more to do in terms of developing a joined-up provision that meets, to the fullest extent possible, all relevant complexities and needs.

A. SCIENCE LITERACY

Our suggestion is that generating greater understanding of lawyers' base position, namely their 'science literacy'—"the disposition and knowledge needed to engage with science"[204] is foundational to developing such provision. The benefits of fostering science literacy across society broadly have been recognized,[205] as they have for legal professionals specifically.[206] David L. Faigman and Claire Lesikar, for example, have written that "[t]he process of translating scientific knowledge for legal use requires some degree of scientific literacy and an understanding of the sum and substance of the law[,]"[207] and David S. Caudill has explored science literacy specifically in the context of judges as public actors.[208] Similar references extend to several legal issues, including education,[209] technology,[210] environment and public health,[211] consumer choices,[212] and forensic science.[213] Indeed, the NAS has even reported on the need to focus on the science literacy of legal professionals, commenting that participation in particular social systems, like the legal system, requires

judges who attend these programs.").

204 SCIENCE LITERACY, *supra* note 10, at 27 ("The phrase was coined as a means of expressing the disposition and knowledge needed to engage with science— both in an individual's personal life and in the context of civic issues raised by both the use of science and technology and the production of more knowledge.").

205 SCIENCE LITERACY, *supra* note 10, at 22–26.

206 *See, e.g.*, Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1273 (2007) ("Judicial education programs are a sound step toward improving the ability of judges to handle scientific evidence."); Jules Epstein, Preferring the Wise Man to Science: The Failure of Courts and Non-Litigation Mechanisms to Demand Validity in Forensic Matching Testimony, 20 WIDENER L. REV. 81, 83-4 (2014) ("The failure to re-examine and respond to the question of validation may be attributable to . . . the lack of scientific training and education among the judiciary, corps of prosecutors, and defense counsellors . . . ."). *See generally*, Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 ARIZ. L. REV. 915 (1990).

207 David L. Faigman & Claire Lesikar, *Organized Common Sense: Some Lessons from Judge Jack Weinstein's Uncommonly Sensible Approach to Expert Evidence*, 64 DEPAUL L. REV. 421, 424 (2015).

208 *See* David S. Caudill, *Ibsen's an Enemy of the People and the Public Understanding of Science in Law*, 16 GEO. INT'L ENVTL. L. REV. 1 (2003).

209 *See* James O. Freedman, *Liberal Education and the Legal Profession*, 39 SW. L.J. 741 (1985).

210 Massimiano Bucchi & Barbara Saracino, *"Visual Science Literacy": Images and Public Understanding of Science in the Digital Age*, 38 SCI. COMMC'N 812 (2016).

211 Jay Austin, George Gray, Jim Hilbert & David Poulson, *The Ethics of Communicating Scientific Uncertainty*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10105 (2015).

212 Robert C. Bird, *Anti-Gmo and Vaccine-Autism Public Policy Campaigns in the Court of Public Opinion*, 72 HASTINGS L.J. 719, 764 (2021) ("A consumer's best defense against misleading science is basic scientific literacy.").

213 Citations have also been made in contexts specific to this article. For instance, references have been made in relation to the trial judge's gate-keeping role under *Daubert.* Paul S. Miller, Bert W. Rein, & Edwin O. Bailey, Daubert *and the Need for Judicial Scientific Literacy*, 77 JUDICATURE 254 (1994) ("To carry out the [Supreme] Court's purpose [in *Daubert*], each federal trial judge must achieve at least a basic level of scientific literacy."). *See also* Redle & Plourd, *supra* note 2, at 59 ("As noted by the NAS report, occasionally American courts have been proven wrong when they face the impenetrable problem of when to admit or exclude new or novel scientific evidence. This dilemma reflects the reality of the scientific illiteracy of lawyers and judges, which renders them unable on their own to decide the admissibility of evidence proffered through expert witnesses correctly.").

system agents, such as lawyers and judges, to have different, perhaps deeper levels of science literacy.[214]

However, science literacy in the legal system requires further study.[215] There is a need to conceptualize science literacy for lawyers from the perspective of lawyers. The process of conceptualization requires the identification of indicators and dimensions (or aspects), the latter being aspects of a concept determined by groups of the former. For instance, statements by lawyers to the effect that holding or not holding scientific qualifications made them more or less able to understand scientific evidence might be indicators that a dimension of science literacy for lawyers is education. Beyond specific studies suggesting schooling, politics, language skills, and inequalities inform concepts of science literacy,[216] the NAS has collated proposed dimensions of science literacy, namely *Foundational Literacies*, *Content Knowledge*, *Understanding of Scientific Practices*, *Identifying and Judging Appropriate Scientific Expertise*, *Epistemic Knowledge*, *Cultural Understanding of Science*, and *Dispositions and Habits of Mind.*[217] This collation provides a framework ("the framework") for investigating lawyers' perspectives on science literacy.

Within the framework we suggest the topic of this article—the criminal legal system's consumption of forensic science evidence where the NAS's forensic science portfolio is relevant—would provide a helpful case study through which to engage lawyers. One, it would appropriately focus the research by allowing for a specific group of lawyers—public defenders (as a sub-set of criminal defense lawyers)—to be targeted. This would focus the research design, but also allow for coordinated engagement with a large and diverse research participant base, with a range of experiences and who work within a broadly consistent employment framework. This would maximize the application of outcomes.

Two, the breadth of legal practice and existing research on the topic should permit exploration of the framework in ways that are timely and relevant to lawyers. The longevity and diversity of the application of forensic science in criminal proceedings[218] means the case study would align with the NAS' recommendation to focus science literacy research for legal professionals on "fields of science [that] are most frequently referenced in the legal arena."[219] The portfolio also provides a picture of scientific understanding across both a range of individual disciplines and the general forensic science field; meaning reports can be used as, for example, benchmarks as to "what level of understanding of scientific principles, methodologies, and habits of mind are needed"[220] by lawyers. Scholarship highlights possible tensions to interrogate within the framework's dimensions. For example, doctrinal research—like that in this article—demonstrates the criminal legal system has

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214 SCIENCE LITERACY, *supra* note 10, at 110-11 ("[C]itizens participating in the legal system (judges, lawyers, jurors, plaintiffs, defendants) may require different understanding of scientific concepts for justice to be served.").

215 *Id*.

216 *See, e.g.,* Juanita V. Field, *Serendipitous Result Obtained in Developing Science Literacy Course*, 19 IDEA 183 (1977-1978); Noah Feinstein, *Salvaging Science Literacy*, 95 SCI. EDUC. 168 (2011); Larry D. Yore & David F. Treagust, *Current Realities and Future Possibilities: Language and Science Literacy Empowering Research and Informing Instruction*, 28 INT'L J. SCI. EDUC. 291 (2006).

217 SCIENCE LITERACY, *supra* note 10, at 32–33.

218 Cooper, *supra* note 87, at 1 ("For decades, courtrooms around the world have admitted evidence from forensic science analysts, such as fingerprint, tool-mark and bite-mark examiners, in order to solve crimes.").

219 SCIENCE LITERACY, *supra* note 10, at 111.

220 *Id*.

certain 'habits of mind,' which might clash with dispositions identified as relevant to science literacy, such as open-mindedness.[221] A loyalty to precedent might, for instance, impinge on such a disposition.

Lawyers play a vital role in the criminal legal system, which is organized to defer widely to their decision-making, a configuration that is unlikely to change. In cases involving forensic science evidence, the law intersects with science, and lawyers may encounter a range of institutional and personal challenges in executing their role. To limit these challenges, stakeholders have recommended scientific education and training for lawyers, recognizing that their science literacy is relevant to the system's aim of serving justice. We suggest that conceptualizing 'science literacy,' from the perspective of lawyers, is a necessary next step towards this goal.

[221] *Id*. at 33.


THE CRIMINAL LAW PRACTITIONER
-EST. 2009-

DOMESTIC VIOLENCE AND FIREARM RELINQUISHMENT: CLOSING THE FATAL CHASM BETWEEN FEDERAL LAW AND STATE ENFORCEMENT

BY DANIELLE M. WOO

INTRODUCTION

> *Verbal and emotional abuse became a daily occurrence. When Katie would try to talk to her husband about what she needed from the marriage—like time together—arguments always followed. . . . At one point, he forbade her from using the word "needs" . . . . One morning when it all became too much, Katie decided to contact a divorce attorney. Her husband overheard the phone call and stormed into the kitchen holding a loaded revolver to his head, threatening to kill himself if she left. Then, he turned the gun on Katie.*[1]

In the United States, "1 in 3 female murder victims and 1 in 20 male murder victims are killed by intimate partners."[2] Around 4.5 million women in the United States have been threatened with a firearm, and nearly one million women have been shot at by an intimate partner.[3] It should not come as a surprise that the presence of a gun within a domestic violence ("DV")[4] situation statistically raises the risk of homicide for women by 500%.[5] Coercion and control are primary tools that abusers use to maintain power over their victims; weapons, namely guns, only serve to exacerbate this dynamic.[6]

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1 Julia Garlich, *Lost in the Fight: As Gun Laws Expand in MO., Domestic Violence Victims Pay the Price*, COLUMBIA MISSOURIAN (May 2, 2021), https://www.columbiamissourian.com/news/local/lost-in-the-fight-as-gun-rights-expand-in-mo-domestic-violence-victims-pay-the/article_b25c76d4-a94b-11eb-9a89-eb1cbb4798f4.html.

2 NAT. COAL. AGAINST DOMESTIC VIOLENCE, GUNS & DOMESTIC VIOLENCE 1 (2013) (citing F. Stephen Bridges et al., *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide: A Research Note*, 19 CRIM. JUSTICE POL'Y REV. 117 (2008)), https://assets.speakcdn.com/assets/2497/guns_and_dv0.pdf.

3 Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014-2019*, INJURY EPIDEMIOLOGY, 1 (2021) https://doi.org/10.1186/s40621-021-00330-0.

4 The term *domestic violence* ("DV") is commonly used interchangeably with *intimate partner violence* ("IPV"). This Article, however, will use DV as an umbrella term as it can also encompass "child and elder abuse, or abuse by any member of a household" while IPV more specifically refers to abuse within partnerships between two people who are or were involved in an intimate relationship. *See* CLAUDIA GARCIA-MORENO, ALESSANDRA GUEDES & WENDY KNERR, WORLD HEALTH ORG., *Intimate Partner Violence*, *in* UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 2 n.1 (2012).

5 *Domestic Violence and Firearms: A Lethal Combination*, COLO. COAL. AGAINST DOMESTIC VIOLENCE 1 (2013), https://www.violencefreecolorado.org/wp-content/uploads/2013/11/DV-and-Firearms-handout.pdf [https://perma.cc/VM7K-ARXP].

6 *Domestic Violence*, NAT. COAL. AGAINST DOMESTIC VIOLENCE (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596811079991 ("Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats, economic, and emotional/psychological abuse. The frequency and severity of domestic violence varies dramatically.").

The legislative and policy landscape in the United States has slowly devoted more resources to understanding and addressing DV, however, the fight is ongoing. One of the main issues plaguing victims[7] of abuse today is the threat of gun violence. Studies show that domestic violence plays a relevant role in mass shootings as well: between 2014 and 2019, 68.2% of mass shooters killed at least one partner or family member or had a history of DV.[8] Researchers have found that domestic violence-related mass shootings resulted in a 32.6% increase in case-related fatalities when compared to non DV-related mass shootings.[9] DV-related gun fatalities are clearly a public health and safety risk. Despite the serious harm posed by DV gun violence to both spousal victims and the public, there remains ignorance around the fact that DV is not a simple problem and certainly does not affect all populations equally. Much of the research used in this Article utilizes highly gendered language, typifying the average DV victim as female and the abuser as male.[10] While male violence against female partners makes up the majority of intimate partner violence ("IPV") and intimate partner homicide ("IPH") cases, male IPV victims should not be overlooked.[11] In addition, systemic problems at the level of law enforcement become glaringly evident in studying same-sex IPV particularly due to the misconception that those of the same sex are partaking in "mutual combat" rather than an episode of domestic abuse.[12] LGBTQ victims also experience different types of threats from their abusers than do heterosexual couples, such as the threat of exposing their partner's sexual orientation or "outing" as a form of repression and control.[13] Racial and ethnic minority groups are also at a much higher risk for DV and IPV. The rate of IPH in Black women is more than twice as high as it is for white women.[14] In 2019 alone, more than 91% of Black female victims knew their

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7 I use the term *victim* as both a legal term and a term to address those who have lost their lives to domestic violence. I also use *survivor* as a term of empowerment and to signify that the person is still alive after enduring violence. To encompass both, I will use "victim/survivor." *See The Language We Use*, WOMEN AGAINST ABUSE (2022), https://www.womenagainstabuse.org/education-resources/the-language-we-use (differentiating the term *victim* as language often used by law enforcement or in legal proceedings from *survivor* which serves to emulate a "sense of empowerment"). *See also* SEXUAL ASSAULT KIT INITIATIVE, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION 1 (stating that the term "*victim* is a legal definition necessary within the criminal justice system" while "*survivor* can be used as a term of empowerment to convey that a person has started the healing process" and does not see themselves as a victim).

8 Geller et al., *supra* note 3, at 5, 6 tbl.3.

9 *See id.* at 5–6 (noting that DV-related mass shooters may have a greater intent to assure all victims are killed based on revenge, jealousy, suicidality, or a desire to assert dominance and power).

10 Consider the fact that DV is not exclusively an issue for heteronormative couples—it pervades the entire spectrum of gender identities and sexualities. Despite this reality, there is limited research on intimate partner violence among LGBTQ people. *See* ADAM P. ROMERO ET AL., THE WILLIAMS INST., GUN VIOLENCE AGAINST SEXUAL AND GENDER MINORITIES IN THE UNITED STATES: A REVIEW OF RESEARCH FINDINGS AND NEEDS 9 (2019) (finding that IPV in LGBTQ relationships is at "a prevalence equal to or higher than the general U.S. population.").

11 *See* NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURV. 38 (2010) (finding that, in the United States, 9.9% of men experienced IPV-related rape, physical violence, or stalking; in comparison, 28.8% of women experienced the same).

12 Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 341 (1995) (Stating that "[w]hen handling same-sex domestic violence cases, police departments and courts, rather than acknowledge or understand that abuse can and does occur between members of the same sex, often believe that a situation of mutual combat is taking place in which the same-sex partners are just fighting").

13 *Id.* at 341–42.

14 VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2019 HOMICIDE DATA 1, 7 (2021).

killers, and 70% of them were shot and killed with guns.[15] The overwhelming majority of homicides of Black women by male offenders were not related to the commission of any other felony crime and, most often, these women were killed by men in the course of an argument.[16] A myriad of legal issues has also plagued indigenous tribal communities. For example, because of the previous gap in jurisdictional authority over American Indian territories, Non-Indian abusers were once effectively immune from tribal prosecution for abuse against tribal members.[17] These examples are only the tip of the iceberg, however, and should illustrate the need for an informed and sensitive policy approach.

As a nation that embraces gun ownership so passionately as to inscribe it into the Constitution as a protected liberty, the United States has struggled to strike a balance between firearm relinquishment laws at the federal level and the actual effective enforcement of such laws at the state level.[18] It wasn't until the 1990s that the federal government first instituted a domestic violence-specific provision to the Gun Control Act of 1994, barring offenders subject to a domestic violence restraining order from possessing or purchasing firearms.[19] From there, federal law has evolved into 18 U.S.C. § 922(g)(8) and (9), which prohibits anyone convicted of a "misdemeanor crime of domestic violence" or subject to a protection order from possessing any firearm or ammunition.[20] Because the federal government cannot force states to effect its enacted regulatory schemes, there is a gross lack of uniformity when it comes to preventing abusers from obtaining firearms in the United States.[21] States are free to establish their own legislative schemes that can supplement or enhance the federal regime against unlawful firearm possession—but they are also free not to.[22]

Racial background, sexual orientation, nationality, and gender are all relevant factors when it comes to analyzing DV and firearm-related deaths. Many instances of DV go under the radar or are underreported due to mistrust of law enforcement and

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15 *Id.*

16 *Id.* at 8.

17 *See* NAT'L INST. OF JUSTICE, FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016), https://www.ojp.gov/pdffiles1/nij/249815.pdf [https://perma.cc/R2F4-6Q6E]; *see also* NAT'L CONGRESS OF AMERICAN INDIANS, VAWA 2013's SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) 1 (2016), https://www.ncai.org/tribal-vawa/overview/VAWA_Information__Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf [https://perma.cc/J62V-MAGQ] ("The 2013 reauthorization of [VAWA] affirmed tribes' 'inherent power' to exercise criminal jurisdiction over all persons, including non-Indians, who commit domestic violence, dating violence, or who violate protection orders in Indian Country.").

18 *See* Laura Lee Gildengorin, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807, 830–31 (2016); Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 564 (2002).

19 *See* Gildengorin, *supra* note 18, at 811–12 (stating three shortcomings of the 1994 amendment including the temporary nature of the applicable ban commensurate with the length of the restraining order, the exception for law enforcement officers and military personnel, and the requirement for the offender to be an intimate partner of the victim).

20 18 U.S.C. § 922(g)(8), (9).

21 *See* Printz v. United States, 521 U.S. 898, 926 (1997) (citing New York v. United States, 505 U.S. 144, 188 (1992); *see also* Stacie J. Osborn, *Preventing Intimate Partner Homicide: A Call for Cooperative Federalism for Common Sense Gun Safety Policies*, 66 LOY. L. REV. 235, 245 (2020) (describing *Printz* as a "key federalism decision by the Rehnquist Court that increasingly scrutinized and invalidated federal legislation on constitutional federalism principles").

22 *See Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

the government.[23] Other DV incidents are overlooked based on internalized stigmas and assumptions about the people involved.[24] It is important to keep these dynamics in mind when assessing the complex scheme required to help resolve the problem of DV and IPV. Gun violence is merely one of many threats that victims/survivors of DV must face.[25]

This Article argues that the current slate of DV firearm relinquishment laws at the state level is woefully inconsistent to further the goal of effectively preventing gun violence in intimate partner relationships. Part I examines the background of the federal statutory landscape, its shortcomings, and the role of key state actors like police and judges. Part II explores the enforcement of firearm relinquishment laws across three different states with varying levels of legislative strictness and the efficacy of each state's enforcement procedures. Part III proposes ways in which the gap between federal law and state enforcement may be achieved via broad policy revisions tailored to the root cause of domestic violence, federal amendments to the gun relinquishment statute, and federal funding incentives for states.

I. BACKGROUND: THE FEDERAL LANDSCAPE OF DOMESTIC VIOLENCE FIREARM RESTRICTION LAWS

Understanding the federal backdrop of domestic violence firearm restrictions is crucial for analyzing the divide between federal law and state action. Legislators have become more aware of the dangerous link between domestic abusers and firearms and have enacted increasing restrictions meant to apply nationally.[26] This Part will analyze the two critical federal statutes that govern firearm relinquishment in a DV context: 18 U.S.C. § 922(g)(8) and (9). Section 922(g)(8) ("Section 8") restricts those subjected to a restraining order from possessing or receiving a firearm or ammunition, while 922(g)(9) ("Section 9") addresses the broad category of convicted DV misdemeanants.[27] While headed in the right direction, the federal statute as codified in Section 8 and Section 9 both have their limitations. Section 8 is limited by the fact that the restrained party must have been subject to a hearing before the provision can apply, which complicates ex parte restraining orders but aims to satisfy Due

[23] *See generally* TK LOGAN & ROB VALENTE, NAT'L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 4 (2015).

[24] *See, e.g.*, Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 44 (2008) (describing biases held by judges presiding over DV cases that "can be directly attributed to the fallacious belief that domestic violence issues are less important, private matters"); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 27 (1998) (describing the stereotypes often associated with victims of DV: "[that] the victim precipitates her own assault, that she is masochistic . . . that she is 'crazy,' that even if she leaves one abusive relationship, she will just find another, and that she is free to end her victimization at any time without assistance.").

[25] *See* Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1320 n.388 (2017) (pointing out fear of retaliation as a reason that victims do not ask for gun removal in court orders).

[26] The Violence Against Women Act ("VAWA") was one of the first DV statutes enacted at the federal level. *See* LISA N. SACCO, CONG. RSCH. SERV., THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 2 (2019) (stating that VAWA was originally enacted as a part of Congress's Violent Crime Control and Law Enforcement Act of 1994 and contained a number of unprecedented programs, funding opportunities, and services geared toward eliminating the growing rate of violence against women).

[27] 18 U.S.C. § 922(g)(8), (9).

Process requirements.[28] Section 9 is broader, but it is still limited by its ambiguous terms. Both provisions lack enforcement protocols and provide only vague implications for state actors. Examining the misdemeanant provision in Section 9 first will provide the historical framework which depicts a glimpse of Congress's shifting awareness of the threat posed by DV offenders who have access to guns. After a review of the broader substantive criminal acts[29] prohibited in Section 9, a look at Section 8 will reveal the procedural challenges that accompany things like restraining orders.

A. 18 U.S.C. § 922(g)(9)

Section 9 prohibits those convicted of a "misdemeanor crime of domestic violence" from possessing or transporting any firearm or ammunition.[30] The Congressional background and inception of Section 9, also called the Lautenberg Amendment, will be introduced in Part A.1 of this Article. Part A.2 will then analyze specific cases in which the Supreme Court has interpreted the wording of the provision and how it is to be applied in criminal cases.

i. The Lautenberg Amendment of 1996

Realizing the insufficiency of existing federal firearm regulations, Congress passed the Lautenberg Amendment in 1996 which imposes a "lifetime ban on firearms possession for those convicted of misdemeanor crimes of domestic violence."[31] The Lautenberg Amendment was proposed by Senator Frank Lautenberg (D-NJ) who testified in favor of the amendment, stating, "[e]very year thousands of women and children die at the hands of a family member, and 65 percent of the time, those murderers use [a] gun . . . . Wife beaters should not have guns. Child abusers should not have guns."[32] The Amendment aimed to close the "dangerous loophole" presented by the previous felon-in-possession laws that failed to extend to domestic violence offenses that were often pled down to misdemeanors.[33]

The Lautenberg Amendment defines the term "misdemeanor crime of domestic violence" ("MCDV") as "a misdemeanor under Federal, State, or Tribal law" that "has, as

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28 *See* Ramsey, *supra* note 25, at 1315.

29 While it is important to analyze the ways in which the U.S. legal system is currently attempting to protect victims of DV, it is critical to note that domestic violence is not exclusively a criminal justice issue and that it takes much more than criminal statutory reforms to help solve this harmful and pervasive epidemic. *See* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE (Claire M. Renzetti ed., 2018) (arguing that intimate partner violence is more than just a criminal justice problem; it is an economic problem, a public health problem, a community problem, and a human rights problem that requires a deemphasis of the criminal legal system's role in order for a more balanced policy approach to work).

30 18 U.S.C. § 922(g)(9).

31 Cynthia M. Menta, *The Misapplication of the Lautenberg Amendment in* Voisine v. United States *and the Resulting Loss of Second Amendment Protection*, 51 AKRON L. REV. 189, 190 (2017).

32 104 CONG. REC. S9628 (daily ed. Aug. 2, 1996) (statement of Sen. Frank Lautenberg).

33 United States v. Hayes, 555 U.S. 415, 426 (citing 142 Cong. Rec. 22985–86 (1996) (statement of Sen. Lautenberg)) ("Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.' . . . By extending the federal firearm prohibition to persons convicted of 'misdemeanor crimes of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'").

an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" by a spouse, cohabiting partner, parent, or guardian.[34] The language of this statute, however, has presented some ambiguity that has been left to the courts to decipher.

ii. The Supreme Court's Evolving Interpretations of 18 U.S.C. § 922(g)(9) in Hayes, Castleman, and *Voisine*

Over time, the blanks left by the vague language in Section 9 and its defining provisions required the Supreme Court to step in and resolve issues regarding required elements of the crime, statutory interpretation, and qualifying mens rea. The Court released opinions in three landmark cases that clarified the breadth of the federal DV firearm relinquishment law as applied.[35]

In 2009, the Court resolved the issue of whether a "domestic relationship" was a required element of a MCDV offense in *United States v. Hayes*, finding that it was not a required element of the predicate offense.[36] Five years later, in 2014, the Court in *United States v. Castleman* established what type of crime qualifies as a MCDV and defined "use of force" to include common law crimes of battery.[37] Finally, in 2016, the Court in *Voisine v. United States* addressed the necessary minimum mens rea for a misdemeanor crime of domestic violence, extending the law to cover, at minimum, crimes of recklessness.[38] Across the board, the Court appears to take an expansive approach in applying the federal law, signaling, at the very least, a commitment to broader legal protection for DV victims/survivors. These cases also highlight the lack of clear direction from the federal statute and the blanks it leaves open for states to fill in (or not).

a. United States v. Hayes (2009)

Section 9's MCDV requires that the misdemeanor offense be committed by a person who has a specific domestic relationship with the victim.[39] In *United States v. Hayes,* the question raised was whether a specific domestic relationship was a required *element* of a misdemeanor crime of domestic violence—that is, whether the state misdemeanor statute describing the predicate offense must explicitly require a domestic relationship between offender and victim as part of the crime.[40]

Randy Edward Hayes was indicted for possessing firearms after having been convicted of a misdemeanor crime of domestic violence, namely, a conviction for battery

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34 18 U.S.C. § 921(a)(33)(A).

35 United States v. Hayes, 555 U.S. 415, 426 (1996); United States v. Castleman, 572 U.S. 157, 167 (2014); Voisine v. United States, 579 U.S. 686, 692, 695 (2016).

36 555 U.S. at 429.

37 United States v. Castleman, 572 U.S. 157, 162 (2014); *see also Battery*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining battery as "the nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact").

38 Voisine v. United States, 579 U.S. 686 (2016).

39 18 U.S.C. § 921(33)(A)(ii) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that . . . [is] 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[.]").

40 *Hayes*, 555 U.S. at 421.

under West Virginia law.[41] Hayes plead guilty and appealed, asserting that his battery conviction did not fall under Section 9 because it was a "generic battery proscription" rather than an offense that designated a domestic relationship between offender and victim.[42] The Court relied on statutory interpretation, finding that the word "element" was singular in Section 9, denoting only one required element for the predicate offense—the actual or attempted use of physical force.[43] Justice Ginsburg, writing for the majority, explained that "exclud[ing] the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose."[44] Thus, while a domestic relationship does not need to be a formal element specified in the predicate statutory offense, the Court nonetheless established that the Government still needs to prove such a relationship beyond a reasonable doubt to obtain a conviction under Section 9.[45]

Hayes broadened the scope of conduct proscribed under Section 9, dispelling any requirements that the MCDV predicate offense needed to be charged as a domestic violence offense at the state level. For defendants like Hayes, convictions for battery that take place within a domestic relationship are enough to trigger a Section 9 felony should the abuser be found in ownership of firearms. While *Hayes* cleared up the elemental parameters of a predicate offense for Section 9, the substantive language of the statute defining the actual predicate MCDV offense remained ambiguous.

b. United States v. Castleman (2014)

In defining Section 9's "misdemeanor crime of domestic violence," § 921(a)(33) requires that the misdemeanor have, "as an element, the use or attempted use of physical force."[46] This definition was clarified by the Supreme Court in its 2014 decision *United States v. Castleman.*[47]

In 2001, respondent Castleman was charged under Tennessee law for "intentionally or knowingly caus[ing] bodily injury to the mother of his child."[48] Years later, upon indictment for selling firearms on the black market, Castleman moved to dismiss his Section 9 charges by arguing that his previous conviction did not qualify as a MCDV because the statute defining the offense did not specify the use of physical force as a required element.[49] The Court determined that a MCDV supports conduct found in a common-law battery[50] conviction, finding it unlikely that Congress intended the force requirement to rise to the level of a violent felony.[51] In support of its decision that the literal words "physical force" were not requirements for qualifying Section 9 offenses, the Court explained, "[w]hereas the word 'violent' or 'violence' standing alone connotes a substantial degree of force, that

41 *Id.* at 418–19.
42 *Id.* at 419.
43 *Id.* at 421.
44 *Id.* at 426–27.
45 *Id.* at 426.
46 18 U.S.C. § 921(a)(33)(A)(ii).
47 572 U.S. 157 (2014).
48 *Id.* at 161.
49 *Id.*
50 *See* BLACK'S LAW DICTIONARY, *supra* note 37.
51 *Castleman*, 572 U.S. at 164.

is not true of 'domestic violence.' Domestic violence . . . is a term of art encompassing acts that one might not characterize as violent in a nondomestic context."[52]

Castleman demonstrates the types of DV crimes that, before the Court's ruling, could fall just short of triggering Section 9's firearm possession ban. The Court's decision was ultimately a landmark ruling that extended the scope of Section 9 felonies to abusers who commit statutorily lesser forms of violence. In states like Colorado, for example, where a harassment misdemeanor crime includes "offensive touching" such as striking, kicking, or shoving,[53] the decision in Castleman allows for abusers who wear down their victims over time with seemingly minor acts of physical abuse to be included in the Section 9 firearm possession ban.

c. Voisine v. United States (2016)

The case of *Voisine v. United States*[54] came to the Supreme Court after a circuit split over whether recklessness was a "sufficient hook for firearm disarmament law."[55] In 2004, Stephen Voisine pleaded guilty to assaulting his girlfriend, a misdemeanor defined as "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person" under Maine's Criminal Code.[56] Upon commission of an unrelated crime, Voisine was found to be in possession of a rifle and was convicted of felony possession of a firearm under Section 9.[57] Voisine argued that he was not subject to Section 9's firearm ban because his prior assault conviction could have been based on recklessness rather than knowing or intentional conduct.[58] In other words, Voisine asserted that because the assault he committed was not necessarily intentional and could have been simply committed recklessly, his conviction should not count as a Section 9 MCDV.[59]

In its decision, the Supreme Court articulated the recklessness mens rea—"to 'consciously disregard' a substantial risk that the conduct will cause harm to another"—and determined that a reckless offense was sufficient to satisfy Section 9.[60] The majority's reasoning for including recklessness as a qualifying mental state for a MCDV rested on the fact that "fully two-thirds of such [misdemeanor assault and battery] state laws extend to recklessness" and to exclude such crimes would "substantially undermine the provision's design."[61]

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52 *Id.* at 164–66 (internal quotation marks omitted) (citing DOJ, P. Tjaden & N. Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* 11 (2000)).

53 COLO. REV. STAT. ANN. § 18-9-111(1)(a) (West 2021).

54 579 U.S. 686 (2016).

55 Cassie Maneen, Note, *No Right to Bear Arms and Blows: Disarming Domestic Violence Misdemeanants and the Durability of* Voisine v. United States, 57 HOUS. L. REV. 1199, 1204 (2020).

56 *Voisine*, 579 U.S. at 689–90.

57 *Id.* at 690.

58 *Id.*

59 Intentional or purposeful conduct involves a conscious objective to engage in conduct that causes a certain result (such as harm). Reckless conduct, on the other hand, involves acting with disregard of an unjustifiable and substantial risk. *See* MODEL PENAL CODE § 2.02(2)(a)(i), (c) (AM. L. INST. 1985) ("(a) A person acts purposely . . . when: (i) it is his conscious object to engage in conduct of that nature or to cause such a result. . . . (c) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk. . . .").

60 *Voisine*, 579 U.S. at 691 (quoting ALI, *Model Penal Code §2.02(2)(c)* (1962)).

61 *Id.* at 692.

Thus, the *Voisine* majority opinion further expanded the scope of Section 9. The *Voisine* opinion served as "a victory for survivors by casting reckless behavior in its natural light . . . . A perpetrator's disregard for the risk of harm to their domestic partner may justify legal consequence, and societal condemnation is a stronger deterrent from such patterned behavior."[62]

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The Supreme Court's interpretations in *Hayes*, *Castleman*, and *Voisine* paved a partial path for judges and law enforcement to better analyze MCDVs. Such guidance, however, is only binding with regard to the federal law which is enforced at a much lower rate than mirroring state laws. State judges, prosecutors, and law enforcement are still left to decipher and enforce their own jurisdictional statutes which present unique challenges and obstacles.

B. 18 U.S.C. 922(g)(8): DVROs and the Important Role of State Actors

Section 8 restrains any person subject to a domestic violence restraining order ("DVRO") from possessing or receiving a firearm.[63] This provision's inception originated from three bills introduced in Congress in the fall of 1993 and was finalized in 1994 when the Crime Bill was signed into law by President Clinton.[64] Three themes were evident from legislators' floor statements:

> First, the sponsors stressed the great dangers posed by firearms in the hands of domestic abusers. Second, the sponsors expressed their intent to disarm every person against whom a domestic violence restraining order is pending, without extensive inquiry into the precise basis for the restraining order. Third, the sponsors relayed their concern that, under present law, the possibility of disarming batterers depended too much on the discretion of individual judges and prosecutors; a uniformly enforced gun ban was necessary to protect battered women and children.[65]

Partisan contention loomed over the specifics of the 1994 legislation; for example, the notice and hearing requirement was amended to remove "constructive" notice so that the statute instead requires *actual* notice to the restrained party.[66] Section 8 has also spurred several enforcement-related difficulties. The federal statute contains no provisions dictating

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62 Maneen, *supra* note 55, at 1210.

63 18 U.S.C. § 922(g)(8) (2021) ("It shall be unlawful for any person . . . (8) who is subject to a court order that-- (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]").

64 Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 538, 541 (2002).

65 *Id.* at 542–43.

66 *Id.* at 544.

how the gun ban is to be enforced, and Section 8 does not include relief for ex parte orders where the restrained party is not present for the hearing. Instances such as these are left to the states to deal with.[67] Police and judges are key players in the enforcement of the federal gun relinquishment provisions, though the breadth of their authority is largely dictated by their respective state statutes and often is left to individual discretion.[68] It is helpful to examine the scope of authority that judges and law enforcement officers have in the context of enforcing DV protective orders as well as the constitutional challenges that are presented.

i. The Role of State Enforcement Actors: Judges and Police Officers

At the state level, judges and police officers are at the forefront of issuing and enforcing DVROs. Judges issue protective orders, which means they get to determine the exact provisions both parties must abide by.[69] Police officers are the enforcement mechanism for protective orders; law enforcement must serve the orders to the restrained party and have the power to arrest anyone who violates the order's provisions.[70]

Because enforcement of protection orders is left to the states, judges play a key role in issuing types of protection orders for victims of DV and IPV. Judges are in a unique position because they oversee findings of fact and have the ability to communicate to offenders the parameters of the protective orders they are bound to.[71] There is no doubt that judges have their own opinions on domestic violence and guns—some may be naturally inclined to resist imposing firearm relinquishment provisions because of a personal background in law enforcement or hunting, while others may simply disagree with a statutory backdrop that restricts any individual from bearing arms. Some judges may be underinformed about DV and IPV, or may harbor underlying suspicions about a victim's claims, writing him or her off as overreactive or incredible. Regardless, it is this type of broad judicial discretion that often thwarts the aim of Section 8 to prevent abusers who are legally recognized as needing to be restrained from another person from possessing deadly firearms.

In an effort to save her own life, Rosemarie had asked a Kent County judge for an order of protection in October. In her affidavit, she noted that Jeremy owned guns and had threatened to shoot her. Judge Daniel V. Zemaitis approved the order, but he did not check the box that would have prohibited Jeremy from keeping his guns. In fact, of the 31 women who went to the Kent County Courthouse in Grand Rapids that month and swore that

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67 California is one state, for example, that extends its firearm prohibition to those subject to an ex parte restraining order. *See* CAL. FAM. CODE. § 6389(c) (WEST 2022).

68 *See* Gildengorin, *supra* note 18, at 819–20 ("[Federal DV firearm relinquishment laws] fail to specify procedures to compel abusers to surrender their firearms, leavings states with the formidable process of creating their own protocols.").

69 *Id.* at 828.

70 *See, e.g.*, COLO. REV. STAT. § 18-6-803.6(1); *see also* Gildengorin, *supra* note 18, at 824 ("[P]olice attitudes hamper enforcement efforts because the *federal* gun relinquishment laws must be enforced by *state* and *local* law enforcement agencies, causing some local police to perceive the law as an infringement on their power.").

71 *See* Gildengorin, *supra* note 18, at 828–30 (stating that, "[i]f a perpetrator is unaware of her relinquishment obligation and local law enforcement is failing to enforce a relinquishment protocol, the effectiveness of the relinquishment laws is undoubtedly diminished").

their partners had threatened to shoot them, only nine came away with protective orders that told their partners to relinquish their weapons.[72]

The excerpted text above serves as a vivid illustration of a judicial system that too easily overlooks the threat present in abusers who own firearms. Rosemarie Reilly, a Michigan woman who petitioned the family court for a protection order against her incessantly abusive ex-boyfriend Jeremy, was shot and killed the following month by him in a murder-suicide.[73] The judge who signed off on her protection order, Judge Zemaitis, did not check the box requiring relinquishment of Jeremy's pistol and two long guns.[74] Reflecting on the case later, Zemaitis claims that domestic violence is a complex issue and that he is weary of people who obtain restraining orders for the wrong reasons, such as to leverage power in a custody dispute.[75] Despite the fact that Rosemarie checked that box on her initial form indicating Jeremy did indeed possess firearms, Judge Zemaitis speculates that a potential reason for his failure to check the firearm relinquishment box in Rosemarie's order was because she did not include the fact of Jeremy's firearm possession in her written narrative.[76] Judge Zemaitis's concerns are not unfounded—false accusations as an attempt at revenge or to garner certain legal benefits like custody are a true reality.[77] Experts and advocates of domestic violence reform, however, counter Judge Zemaitis's logic by arguing that it is unreasonable for DV and IPV victims to bear the burden of providing exacting proof; victims of abuse should not be expected to have perfect memory recall of all legally relevant details in the midst of a terrifying, sometimes life-threatening situation.[78] Witness credibility is a murky area.

Rosemarie's story encapsulates the disconnect between state and federal law by demonstrating the reality of DV victims who are allowed to fall through the cracks due to insufficient judicial oversight. State trial court judges should be directed by their respective state legislatures on how to approach DVROs, though this is a difficult task when the state statutory backdrop is minimal or silent on the topic. While an individual may be federally prohibited from possessing or purchasing firearms after being subject to a state protection order, there are insufficient mechanisms for enforcement if judges undercut the federal scheme by allowing offenders to keep their guns or by overlooking that aspect in a protection order. Judges, however, are not the sole vehicle for enforcing protection orders. While they have discretion to issue and construct the parameters of DVROs, it is law enforcement officers who have the authority to serve offenders and conduct search and relinquishment procedures.

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72 Kim Salt, *When Protective Orders Don't Protect*, THE TRACE (Jan. 26, 2021), https://www.thetrace.org/2021/01/domestic-violence-gun-protective-order-rosemarie-reilly-michigan/ [https://perma.cc/TUQ7-8ECG].

73 *Id.*; *see also Domestic Violence & Firearms in Michigan*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-michigan/ [https://perma.cc/2EFJ-CYPL] (last visited Nov. 21, 2021) (stating that Michigan law does not prohibit individuals convicted of MCDVs from possessing firearms, nor does it require relinquishment).

74 Salt, *supra* note 72.

75 *Id.*

76 *Id.*

77 *See generally* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 815 (2007).

78 Salt, *supra* note 72.

Police are central to the enforcement of protection orders and gun relinquishment procedures. They are often the first responders to the scene of domestic disputes and are tasked with serving people court-mandated protection orders.[79] Police officers have the power to execute search warrants and supply the requisite bases for probable cause.[80] The issue with police and federal law is that police officers are arms of the *state*—they serve to enforce local and state laws.[81] Tasking law enforcement officers with carrying out the operation of federal firearm relinquishment statute is sometimes met with backlash. Police officers may feel that they should not be using their limited resources to enforce federal laws or may feel resentment for the federal statute as it no longer provides for the exemption of abusers who are also law enforcement officers.[82] Additionally, far too many police officers are unversed in the nature of DV and IPV, which poses problems beyond the realm of firearm relinquishment enforcement and creates an even less safe environment for abuse victims.[83]

One practice that has proven effective in response to DV situations is the implementation of lethality assessments, where an officer interviews a victim about the abuse they have experienced to develop an idea of how much danger that person could be in and the likelihood of future danger.[84] Well-trained law enforcement officials conduct lethality assessments with an understanding of the victim's traumatic background and understand the importance of preserving their dignity during the course of questioning. This is crucial for not only accurate reporting and information collection, but also to encourage survivors of abuse to come forward in an environment that is safe, respectful, and not overly paternalistic or controlling.[85]

Given the state of trauma that DV and IPV victims are often in, it is important that the involved state actors are understanding, patient, and attentive.

> [B]attered women are likely to evaluate state actors on the actors' ability to listen without interrupting them, or to ask detailed questions that enable the women to

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79 *See* Gildengorin, *supra* note 18, at 824–25.

80 *See, e.g.*, COLO. REV. STAT. § 18-6-803.6(1), *infra* note 88.

81 U.S. CONST. amend. X.

82 Gildengorin, *supra* note 18, at 814 (noting that the Lautenberg Amendment removed the "official-use" exception for firearm relinquishment "thereby abrogating the exemption of law enforcement officers, military personnel, and other government employees who use weapons in their official capacities").

83 *See* Craig S. Goralski, *Domestic Violence: Firearm Seizures & Lethality Assessments: Enhancing the Police Response*, 86 POLICE J. 235, 244–45 (2013) (arguing the need for law enforcement agencies to establish more comprehensive education for officers about domestic violence and encouraging agencies to partner with local district attorneys' offices, women's shelters, women's advocacy groups, and organizations dedicated to providing support and education to affected populations).

84 Kelly Weisberg, *Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years*, 30 HASTINGS WOMEN'S L.J. 211, 222 (2019) ("A significant outcome of the lethality assessment movement is the improved collaboration that developed between law enforcement personnel, domestic violence programs, health care providers, and allied professionals.").

85 There is a fine line between effectively communicating with DV and IPV victims to provide protection and constraining their autonomy by deeming them psychologically defective or unable to reason should they choose not to cooperate. *See* Goralski, *supra* note 83, at 244 (emphasizing the importance of maintaining the dignity of DV victims when police perform danger assessments). *See also* Gruber, *supra* note 77, at 751 ("[T]he domestic violence system treats victims with increasing amounts of parternalism and disdain, as more advocates and jurists buy into the belief that female victims are weak, damaged, and unable to recognize their own interests.").

> tell their stories. Along these lines, practitioners should expect that state actors' reactions and clumsy attempts to connect will inevitably disappoint intimate abuse victims, like other trauma survivors. As they come to expect certain reactions, practitioners can become less judgmental and more patient with battered women.[86]

State actors play a large role in the facilitation of DV cases. Not only must they be attentive and good at listening, judges and police officers must also be sensitive to the position of the victim regardless of how many times an officer or judge has dealt with similar cases. Because judges and police officers interact directly with victims and abusers, their cohesive facilitation of protective laws is crucial.

ii. Constitutional Challenges Accompanying the Enforcement of Protective Orders

Enforcement of protective orders is not unfettered, and people are necessarily afforded their individual constitutional protections which brings about a need to balance these protected interests. The two most notable and prevalent constitutional challenges in the DVRO context involve the right to bear arms and the right to due process of the law.[87] Therefore, challenges arise when it comes to issuing DVROs and effectuating their firearm relinquishment requirements. Perhaps most predictably, firearm relinquishment has triggered many Second Amendment challenges claiming that such relinquishment requirements violate a person's right to bear arms. As for due process claims, because ex parte DVROs do not require the restrained party to be present at the hearing where the order is issued, numerous challenges allege infringement on a restrained party's right to due process of the law.

Circumstances qualifying for emergency protective orders vary at the state level, further illustrating the insufficient guidance provided by Section 8 for effective enforcement. Some states require instances of threats as well as physical injury in order for a person to qualify for an emergency protective order, while others require a "substantial likelihood of immediate danger of abuse."[88] In states like Colorado, the arrest of DV offenders and the issuance of protection orders are mandatory.[89] "As of January 1, 2020, [forty-two] states and the District of Columbia" have enacted laws that prohibit the possession of firearms for those subject to DVROs—of those states, only eighteen prohibit possession when an order is issued ex parte.[90]

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86 Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 579 (1999).

87 U.S. CONST. amends. II, V, XIV.

88 Ramsey, *supra* note 25, at 1324–25.

89 *See* COLO. REV. STAT. ANN. § 18-6-803.6(1) (West 2021) ("When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence… has been committed, the officer shall, without undue delay, arrest the person suspected of its commission…."); *c.f.* Ramsey, *supra* note 25, at 1294 (criticizing mandatory arrest policies as ineffective; for example, abusers may manipulate the system and call police to arrest victims when they decide to fight back); Kate Picket, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), https://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/ [https://perma.cc/A7VY-CNTB] (last visited Nov. 15, 2021) (quoting Donna Coker's assertion that mandatory arrest policies have the "unintended consequence of increasing the potential for state control of marginalized women").

90 *The Effects of Prohibitions Associated with Domestic Violence*, RAND CORP., GUN POL'Y IN AMERICA (Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/domestic-violence-prohibitions.html [https://perma.cc/66R7-

Section 8 has consistently survived judicial scrutiny under a litany of challenges. In *United States v. Mahin*, the Fourth Circuit rejected Mahin's claim that a conviction under Section 8 and the subsequent ban on firearm possession violated his Second Amendment right.[91] Citing the substantial public interest in reducing gun-related domestic violence, the Court in *Mahin* determined that prohibiting DV misdemeanants from possessing firearms was sufficiently tailored to address the issue of gun violence.[92] The *Mahin* majority also found support for its decision by referencing the fact that Section 8 requires a factual finding to be made that the restrained person represents a credible threat before an order is issued.[93] This requirement ensures that credible factual findings made by a judge are relied upon as the underlying basis for issuing a protection order. Claims like Mahin's have been similarly rejected by other courts based on the same public interest and safety factors that outweigh Second Amendment freedoms.[94]

Due process challenges arise especially when it comes to ex parte protection orders. Because ex parte protection orders do not require both parties to be present, many have argued that this violates the "hearing" and opportunity to participate requirements found in Section 8.[95] States utilize ex parte protection orders particularly when there is an immediate threat of danger to the requesting party, promoting efficiency and protection in a timely manner.[96] Professors Joseph Blocher and Jacob D. Charles frame the Due Process right effectively:

> In short, the Due Process Clause protects against erroneous or wrongful deprivations of constitutionally protected liberty or property interests. But it does not erect insurmountable barriers. Though the situations justifying seizures prior to a full hearing are indeed 'extraordinary,' those situations occur where the government needs to act swiftly to ensure public safety.[97]

The Supreme Court has approved of infringement of constitutionally protected interests without a pre-deprivation hearing in multiple situations: the seizing and destroying of rotten foods, issuing rent orders in defense area housing, and confiscating mislabeled drugs.[98]

EWN7].

91 United States v. Mahin, 668 F.3d 119, 123 (4th Cir. 2012) (following the trend of other circuits to uphold the Section 8 ban on "firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections.").

92 *Id.* at 125.

93 *Id.*

94 *See* United States v. Chapman, 666 F.3d 220, 227–28, 231 (4th Cir. 2012); United States v. Emerson, 270 F.3d 203, 264–65 (5th Cir. 2001); United States v. Reese, 627 F.3d 792, 802–03 (10th Cir. 2010).

95 18 U.S.C. § 922(g)(8)(A) (emphasis added) ("It shall be unlawful for any person . . . (8) who is subject to a court order that (A) *was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate.*").

96 *See* Ramsey, *supra* note 25, at 1323–24 (describing how ex parte protection orders meet federal Due Process requirements by involving "participation by a judicial officer; a prompt post-deprivation hearing; verified petition or affidavits containing detailed allegations based on personal knowledge; and risk of immediate and irreparable harm.") (quoting Nollet v. Justs. of Trial Ct., 83 F. Supp. 2d 204, 213 (D. Mass. 2000) (quoting Blazel v. Bradley, 698 F. Supp. 756, 764 (W.D. Wis. 1988)).

97 Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1329 (2020).

98 *Id.* at 1322–23.

Thus, according to the Court, deprivation of certain rights without a hearing is not always an automatic due process violation.

In situations more similar to the confiscation of firearms pursuant to an ex parte DVRO, lower courts have also approved of the absence of pre-deprivation hearings in contexts such as "(1) removing a child from a parent's care and custody, (2) confining a person in psychiatric care against their will," and most similarly, "(3) imposing restraints on a person's right to contact or be around another person."[99] Cases like these illustrate that a state's interest in preserving public safety takes priority over the deprivation of certain property rights and liberties.

Such mandates regarding deprivation of firearms from an abuser's possession are not without valid criticism. For instance, it is easy for policymakers, legislators, law enforcement officers, and the judicial system to become paternalistic and order the relinquishment of firearms even when the actual wishes of the abused people differ. Professor Carolyn B. Ramsey argues that, from the perspective of a petitioner subject to abuse, mandating the confiscation of firearms when she does not request it "constitutes an undue infringement on her autonomy."[100] Rather than mandatory, state-issued criminal protection orders requiring the relinquishment of firearms indiscriminately, civil protection orders initiated by the person seeking relief offer an advantage to DV victims who are able to retain some control over the remedy they may choose to seek.[101] Professor Ramsey suggests a potential reinforcement mechanism for civil protection orders to survive due process challenges: more requirements for documentation of physical injuries so that the judge may better assess a petitioner's credibility.[102] While this could assure further fairness in civil DVRO proceedings, it may leave behind victims who do not have visible scars but are nonetheless subject to stalking, harassment, and threats by their abusers.

Overall, then, this array of procedural and constitutional challenges serves to highlight the complex and tumultuous nature of DV as a criminal issue and its interaction with state and federal laws. The government must balance the interest of public safety and welfare with the constitutional protections afforded to citizens as well as the interests of victims/survivors. While the federal law's aim is to protect DV victims from gun violence, it is up to states to enforce this scheme.

II. The Inconsistency of State Enforcement

State enforcement is the main vehicle by which firearm relinquishment is to be effectuated; states can either supplement, enhance, or completely detract from the federal statute's purpose of keeping guns away from domestic abusers. Unfortunately, given the uneven landscape of state positions on gun ownership rights and firearm safety legislation, the federal relinquishment statute is inconsistently enforced across the nation. Without

[99] *Id.* at 1325–28 (citing F.K. v. Iowa Dist. Ct. for Polk Cnty., 630 N.W.2.d 801, 804 (Iowa 2001); Newton v. Burgin, 363 F. Supp. 782, 787 (W.D.N.C. 1973), *aff'd*, 414 U.S. 1139 (1974); Kampf v. Kampf, 603 N.W.2d 295, 296 (Mich. Ct. App. 1999)).

[100] Ramsey, *supra* note 25, at 1322.

[101] *Id.*

[102] *Id.* at 1326.

effective enforcement at the state level, the intentions of the federal statute become null and void. On the other hand, rigorous enforcement and supplemental state laws can work to fill in the many holes left by the federal statute. While not a complete solution in and of itself, a cohesive state and federal legal scheme is certainly more desirable than the current inconsistent legal landscape. This Part presents a case study of state enforcement of DV firearm relinquishment laws across three different states: Missouri, Colorado, and California.

A. AN UNEVEN LANDSCAPE: STATE FIREARM RELINQUISHMENT LAWS AND THE FEDERAL STATUTE

Federal firearm relinquishment laws are essentially left to the states to enforce via their police powers. However, this has left an uneven playing field for the health and safety of DV and IPV victims/survivors as a national whole due to a lack of comprehensive enforcement mechanisms and directives. There is no question that state regulation of firearm possession is crucial to curtailing firearm-related IPV and DV injuries and death. One study found that states having more than forty state-level statutory provisions for firearm relinquishment were associated with a 56% decline in total female intimate partner homicide (IPH) rates and a 63% decline in homicide-only female IPH rates.[103] State firearm laws range from being either mandatory and explicit in their prohibition and relinquishment requirements to highly discretionary and without a strong legislative structure. Part A.1 will open with a look at Missouri's firearm relinquishment laws which will serve to illustrate a state that resists the federal firearm relinquishment law and thus underenforces DV-related relinquishment laws. Part A.2 will then examine Colorado, a state that more recently implemented legislation mirroring the federal law but that historically has had more lax gun possession laws. Lastly, Part A.3 will present a study of California, a state with some of the most rigorous gun safety laws that exceed the provisions of the federal statute.

i. Undercutting the Federal Law: Missouri

Missouri serves as an example of a state that undercuts federal laws intended to protect DV victims from their gun-owning intimate partners—a fact that seems closely connected to the state's gun violence statistics.

In 2018, the Violence Policy Center ranked Missouri second out of all fifty states for having the highest rates of women murdered by men; in circumstances where the murder weapon could be identified, 67% of those female homicide victims killed with a gun.[104] Missouri then ranked seventh in 2019 for most female homicide victims killed by men,[105] where, in cases where the murder weapon was identified, 81% of the sixty-four victims were

[103] Josie J. Sivaraman et al., *Association of State Firearm Legislation with Female Intimate Partner Homicide*, 56 AM. J. PREVENTATIVE MED. 125, 131 (2019).
[104] VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2018 HOMICIDE DATA 1, 12 (2020).
[105] VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2019 HOMICIDE DATA 1, 10 (2021).

killed with guns.[106] In cases where both victim and offender were identifiable and knew each other, 65% of female victims were wives, common-law wives, ex-wives, or girlfriends of the offenders.[107] Giffords Law Center ranked Missouri forty-seven out of fifty in 2021 for the overall strength of its gun laws and gave it an F letter score which indicates poor gun safety legislation.[108] As of 2022, Missouri shows an average of 23.9 gun deaths per 100,000 residents, which far exceeds the national average of fifteen and lands Missouri as the state with the fourth-highest rate of gun deaths overall.[109]

Missouri, being one of the least restrictive states, takes on an adversarial approach to the federal statute by barring any state entity or person from enforcing "any federal acts, laws, executive orders, administrative orders, rules, regulations, statutes, or ordinances infringing on the right to keep and bear arms."[110] Missouri's gun ownership culture is best summed up by its recent passage of HB85, also known as the Second Amendment Preservation Act ("SAPA"), passed in June 2021.[111] SAPA imposes a hefty $50,000 fine on state officials who try to enforce federal gun laws that are at odds with Missouri state laws.[112] The Missouri law has faced great backlash from the DOJ for undermining federal law and damaging valuable partnerships between law enforcement in federal and state jurisdictions.[113] On a constitutional level, the DOJ argues that SAPA runs afoul of the Supremacy Clause of the Constitution, which gives federal law precedence over any conflicting state laws.[114] Additionally, the Missouri Supreme Court is set to hear arguments by attorneys representing Missouri's two most populous counties which challenge the gun law for its interference with federal and state law enforcement.[115] Currently, Missouri law does not prohibit individuals subject to a DVRO from possessing or purchasing firearms, require courts to notify people when they become prohibited from possessing firearms for DV-related reasons, require

[106] *Id*. at 18 (finding that, where circumstances during the commission of the crime could be identified, 83% involved arguments between victim and offender).

[107] *Id*.

[108] *Annual Gun Scorecard*, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/resources/scorecard/?scorecard=-MO [https://perma.cc/RVU7-32KK] (hover over image of Missouri on the US map; then select "View Scorecard").

[109] *Gun Laws in Missouri*, EVERYTOWN RESEARCH & POL'Y (2022), https://everytownresearch.org/rankings/state/missouri/ [https://perma.cc/FL3P-GPBE] (select "Compare"; select "Missouri" in one column; select other states for comparison in the remaining column (to view data for the three states with the highest rates of gun deaths, select "Louisiana," "Mississippi," and "Wyoming")).

[110] MO. ANN. STAT. § 1.450 (West 2021) ("No entity or person, including any public officer or employee of this state or any political subdivision of this state, shall have the authority to enforce or attempt to enforce any federal acts, laws, executive orders, administrative orders, rules, regulations, statutes, or ordinances infringing on the right to keep and bear arms as described under section 1.420. Nothing in sections 1.410 to 1.480 shall be construed to prohibit Missouri officials from accepting aid from federal officials in an effort to enforce Missouri laws.").

[111] H.B. 85, 101st Leg., 1st Reg. Sess. (Mo. 2021).

[112] Luke X. Martin, *New 2nd Amendment Protections in Missouri Split Law Enforcement*, NPR (June 28, 2021, 4:13 PM), https://www.npr.org/2021/06/28/1010320106/new-2nd-amendment-protections-in-missouri-split-law-enforcement [https://perma.cc/FQ8H-6JZB].

[113] Dan Margolies, *Justice Department Says Missouri New 2nd Amendment Law is 'Legally Invalid,'* STLPR, NPR (Aug. 18, 2021, 3:49 PM), https://news.stlpublicradio.org/government-politics-issues/2021-08-18/justice-department-says-missouri-new-2nd-amendment-law-is-legally-invalid [https://perma.cc/JTL4-FCP2].

[114] *Id.*

[115] Kurt Erickson, *Challenge to Controversial Gun Law Set to be Heard by Missouri High Court*, ST. LOUIS POST-DISPATCH, STL TODAY (Feb. 4, 2022, 7:42 AM), https://www.stltoday.com/news/local/crime-and-courts/challenge-to-controversial-gun-law-set-to-be-heard-by-missouri-high-court/article_80182719-08ec-57ec-b5d7-60688935e1f5.html [https://perma.cc/4BMQ-LL9Z].

surrender or relinquishment for DV offenses, or explicitly authorize or require removal of firearms at the scene of a domestic violence incident.[116] Missouri firearm relinquishment laws, therefore, are discretionary to state government officials.

Criminal and civil legal recourse for DV victims in Missouri are slim. Katie, the woman described in the Introduction whose husband turned a gun on her for her attempt to leave him, is one of many Missouri IPV victims left to fend for her own safety due to wholly insufficient enforcement of DV firearm laws at the state level. [117] Upon filing for a protection order against her abusive husband, Katie's attorneys asked the judge to impose a firearm relinquishment provision for the duration of the case.[118] In response, her husband informed the judge he would give his firearms over to his family for "safe keeping."[119] During a later attempt to renew her protection order against her ex-husband, Katie discovered he had violated the previous order "more than 200 times in under four months."[120] Her renewal request was denied, and zero attention was given by the judge to the aggravating reality of her husband's disregard for the protection order.[121] Katie is now being treated for PTSD symptoms resulting from the ongoing distress and uncertainty of her safety.[122]

Missouri is an apt representation of a state that undercuts the federal law by actively repressing its state-level enforcement mechanisms. By leaving the field open to judges and law enforcement to decide when firearm relinquishment should be considered at all and actively stifling the important interplay between federal and state law enforcement, Missouri serves as an example of one of the most dangerous states for victims of gun related IPV and DV. Not only does it undermine the federal statute, but Missouri also essentially prioritizes gun ownership over the lives of abuse victims who continue to suffer at the hands of their abusers with little to no protection by their own state.

ii. In the Middle: Colorado

Colorado falls in the middle when it comes to the comprehensiveness of state DV firearm relinquishment laws. As a state that permits open and concealed carry,[123] Colorado has attempted to strike a balance between open and lawful firearm possession and state intervention of such.

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116 *See* ANNUAL GUN SCORECARD, GIFFORDS LAW CTR. (2020), https://giffords.org/lawcenter/resources/scorecard/ [https://perma.cc/B2V4-2FQN].

117 Garlich, *supra* note 1.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *See id.*

123 *See Location Restrictions in Colorado*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/state-laws/location-restrictions-in-colorado/ (last visited Oct. 11, 2022); *see also* COLO. REV. STAT. § 18-12-105.6(2)(a) (West 2022) ("[T]he general assembly concludes that carrying of weapons in private automobiles or other private means of conveyance . . . is a matter of statewide concern and is not an offense.").

In 2019, Colorado lost forty-two victims due to domestic violence.[124] Of these fatalities, 58.3% were from gunshot wounds.[125] Colorado was ranked twelfth out of the fifty states for total number of female IPH victims[126] and Giffords Law Center gave the state a B score for overall gun law strength in 2021.[127] As of 2022, Colorado has a gun violence rate of 15.4 per 100,000 residents.[128]

Criminal laws in Colorado require a protective order to be issued that prohibits a defendant "from harassing, molesting, intimidating, [or] retaliating against" the victim whenever a criminal DV case is pending.[129] In addition, Colorado requires the relinquishment of firearms and the prohibition of possession or purchase of firearms pursuant to that mandatory protection order.[130]

After having recently passed HB 21-1255, a bill aimed at amending and strengthening existing DVRO laws, Colorado has been on a steady track to improving legal protection for DV victims and the enforcement of firearm relinquishment.[131] Restrictions on gun ownership have always been a hot button issue in Colorado. Members of the Domestic Violence Unit at the Boulder County D.A.'s Office note that logistics and mechanisms for enforcement have been some of the main challenges for firearm relinquishment and DV prosecution in the state.[132] Prior to the passage of the new bill, for an offender subject to a protection order for a DV offense but not yet convicted, a judge would typically advise the offender of relinquishment requirements while the offender was required to affirm understanding and compliance.[133] However, there was no mechanism in place to verify that said relinquishment actually occurred.[134] No future compliance hearings were scheduled, and judges, along with law enforcement, had little means to check up on or enforce an offender's relinquishment. "Judges were creating their own forms [for relinquishment]," stated former Director of Public Policy for Violence Free Colorado Lydia Waligorski, noting the lack of a cohesive enforcement scheme in the Colorado courts.[135]

Signed into law in June 2021, HB 21-1255 modified procedures relating to firearm relinquishment following the issuance of a protection order.[136] The Act requires a respondent

[124] Jenn Doe & Dr. Joanne Belknap, COLORADO DOMESTIC VIOLENCE FATALITY REV. BD., ANNUAL REPORT 3 (2020).

[125] *Id.* at 38 (finding further that 25% of DV-related deaths to be from blunt trauma injuries and 16.7 percent from stabbing).

[126] VIOLENCE POL'Y CTR., *supra* note 105, at 10 (finding a homicide rate of 1.61 per 100,000 females).

[127] ANNUAL GUN SCORECARD, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/resources/scorecard/?scorecard=-CO [https://perma.cc/R443-YBBE].

[128] EVERYTOWN RESEARCH & POL'Y, GUN LAWS IN COLORADO (2022), https://everytownresearch.org/rankings/state/colorado/ [https://perma.cc/7KAZ-LEB6].

[129] COLO. REV. STAT. ANN. § 18-1-1001 (West 2021).

[130] *Compare* COLO. REV. STAT. ANN. § 18-6-801(8) (West, Westlaw through 2013 legislation) (requiring DV firearm relinquishment to private parties, law enforcement, or federally licensed firearms dealers with a receipt of such transfer filed with the court) *with* COLO. REV. STAT. ANN. § 18-6-801(8)(a)–(i) (West 2021) (providing for stricter DV firearm relinquishment procedures with additional requirements such as compliance hearing and affidavit; firearm storage by law enforcement agency, federally licensed firearms dealer, or private party with receipt from firearms dealer memorializing such a transfer; signed declaration owed to the court; and immunity clause).

[131] COLO. REV. STAT. ANN. § 13-14-105.5 (West 2021).

[132] Telephone interview with members of the Domestic Violence Unit, Boulder Dist. Att'y's Office (Nov. 5, 2021).

[133] *Id.*

[134] *Id.*

[135] Telephone interview with Lydia Waligorski, FAMLI Policy Manager, Colo. Dep't of Lab. and Emp. (Nov. 24, 2021).

[136] *See* HB 21-1255, 73d Leg., 1st Reg. Sess. (Co. 2021).

to complete a sworn affidavit within seven days of issuance of a protection order against them (civil or criminal) stating all firearms in their possession including make, model, and location of the weapon(s).[137] Firearms are to be relinquished to a federally licensed gun dealer, a law enforcement or contracted agency, or a private party that does not reside with the person.[138] In addition, the Act requires a compliance hearing no more than twelve business days after issuance of the protection order to ensure the respondent has complied with relinquishment.[139]

However, the issue of derivative criminal liability posed a challenge. Waligorski, who was a key player in crafting HB 21-1255, noted that a potential Fifth Amendment challenge arose with asking a defendant to state on the record if they possessed firearms.[140] If, for instance, an offender was barred from possessing firearms due to a separate prior criminal conviction and admitted they still possessed firearms in their affidavit in a DV hearing, they could incriminate themselves and thus be held criminally liable for that affirmative statement of possession.

The importance of having a way to constitutionally establish an offender's ownership beyond the testimony of a victim was crucial—Waligorski notes the many times DV survivors have told her, "I didn't know he had a gun until it was pointed at my head."[141] Policymakers contemplated ways in which firearm ownership could be divulged without infringing on defendants' Fifth Amendment right against self-incrimination. Illinois, for example, has a state gun registry that issues Firearm Owner Identification ("FOID") cards to all gun purchasers upon which prosecutors and law enforcement could rely to verify gun ownership data for DV cases.[142] Because Colorado does not have a state gun registry system like Illinois, policymakers considered other ways to obtain firearm ownership information, such as through police reports and 911 calls.[143] Sifting through reports and calls, however, proved too demanding on time and resources for prosecutors.[144] As a solution, Colorado legislators and policymakers included an immunity clause protecting defendants from having statements in their relinquishment affidavits used against them in another criminal proceeding.[145] "Our goal" stated a member of the Boulder D.A. Domestic Violence Unit who was also involved in the bill's passage, "is to get firearms away from offenders; our goal is not to trap offenders into making statements that would subject them to future criminal liability."[146] While the immunity clause could present a challenge for law enforcement should, say, a homicide investigation potentially implicate the offender, the provision's main

137 *Id.*

138 *Domestic Violence & Firearms in Colorado*, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-colorado/ [https://perma.cc/N54H-HKDF].

139 *Id.*

140 Waligorski, *supra* note 137.

141 *Id.*

142 430 ILL. COMP. STAT. 65 (2004).

143 Waligorski, *supra* note 137.

144 *Id.*

145 COLO. REV. STAT. ANN. § 18-1-1001(9)(e)(IV) (West 2021) ("No testimony or other information compelled pursuant to this subsection (9), or any information directly or indirectly derived from such testimony or other information, may be used against the defendant in any criminal case, except prosecution for perjury pursuant to section 18-8-503.").

146 Boulder DA Domestic Violence Unit, *supra* note 134.

goal is to encourage truthfulness and serves as a step toward more thorough enforcement against abusers and their access to firearms.

Moreover, the new bill standardized court forms statewide and bolstered the statutory language to be more comprehensive. The bill also closed the "boyfriend loophole"[147] that is present in the federal statute by also including partners who are casually dating in the definition of "intimate relationship" which is not covered in the federal statute.[148]

Colorado's laws and policies represent a middle ground between a staunch pro-Second Amendment attitude and a realistic recognition of the danger posed by offenders having open access to firearms. In the process of HB 21-1255's legislative journey, a member of the Boulder D.A.'s DV Unit and proponent of the bill stated that even pro-gun rights activists and organizations were not as active or vocal in their opposition to restrictive gun legislation.[149] The representative from the Boulder D.A.'s DV Unit observed, "what I gather from that is that it's a no-brainer even for gun proponents that domestic violence offenders should not have guns."[150] Colorado's firearm relinquishment laws also provide at least some provisions spelling out the procedures for relinquishment and an understanding of the need to verify that offenders are complying with state law. This fills in the enforcement gap that the federal law leaves to the states. Requiring rather than simply authorizing judicial and law enforcement officers to enforce gun safety measures in the context of domestic violence and IPV is one of the most effective ways that a state can further the existing federal laws found in Sections 8 and 9.

iii. Exceeding the Federal Law: California

California notably takes the position of a state with the most comprehensive gun safety legislation both in and out of the DV context. California's DV firearm relinquishment laws both mirror and exceed the federal law, modeling a restrictive and thorough state legislative scheme.

In 2018, 192 women were murdered by men in California with 49% of deaths resulting from gunshot.[151] Moreover, 68% of these victims were wives, common law wives, ex-wives, or girlfriends of the offender and 75% of these intimately related victims were killed with handguns.[152] For 2021, Giffords Law Center ranked California first for the strength of its gun laws across the fifty states and gave it an A letter score.[153] As of 2022,

147 *See* MICHAEL A. FOSTER, CONG. RSCH. SERV., GUN CONTROL: FEDERAL PROHIBITIONS ON DOMESTIC ABUSERS POSSESSING FIREARMS AND THE BOYFRIEND LOOPHOLE 1 (2019).

148 COLO. REV. STAT. ANN. § 18-6-800.3(2) (West 2021) (emphasis added) (defining "intimate relationship" as a relationship "between spouses, former spouses, *past or present unmarried couples*, or persons who are both the parents of the same child" regardless of marital status).

149 Boulder DA Domestic Violence Unit, *supra* note 134.

150 *Id.*

151 VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: CALIFORNIA 3 (2020) (finding that, of the 49% of female victims killed with a gun, 70% were killed with a handgun).

152 *Id.*

153 ANNUAL GUN SCORECARD, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/resources/scorecard/?scorecard=-CA [https://perma.cc/BEK5-S846].

California was ranked as having the seventh-lowest rate of gun deaths with an average of 8.5 gun deaths per 100,000 residents (almost half the national average).[154]

California takes the lead as a state that most heavily enforces and regulates DV firearm relinquishment. California law not only closely monitors and restricts DV offenders from owning firearms, but the state also has laws that prohibit people from acquiring or possessing guns for ten years after being convicted of a violent misdemeanor regardless of the offender-victim relationship.[155] California also extends its firearm prohibition to a person subject to multiple types of court orders such as a temporary restraining order ("TRO"), a TRO issued to an employer on behalf of an employee, a TRO issued to a postsecondary educational institution on behalf of a student, and an emergency or ex parte DVRO.[156]

By exceeding the federal law, California extends protection to more victims on an even broader basis with stricter enforcement mechanisms. Upon being served with a DV protection order, the respondent is required to relinquish all firearms immediately upon request of law enforcement or within twenty-four hours if no such request is made.[157] Relinquishment of firearms must be made to either a licensed firearms dealer or a law enforcement agency, differing from states like Colorado that permit relinquishment to third-party family or friends so long as they do not reside with the person.[158]

California's gun safety regulations, particularly in the violent crime and DV context, contain strong and comprehensive measures that assure they are vigorously enforced. With concrete procedures written into law clearly directing law enforcement and judges, California sees a lower rate of gun-related IPV and DV deaths than other states that do not provide these protections in their laws.

III. Bridging the Gap Between State and Federal Law: The Need for Uniformity

> Before she died, Asia described to her mother what happened: On the morning of Nov. 15, she and Graves had an argument, and it "got physical," Plagman said. To get Graves to leave, Asia grabbed her gun. He told her to put the gun down, so she did. Then he picked it up and shot her twice, once in the shoulder and once in the abdomen, before shooting himself.[159]

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154 EVERYTOWN RESEARCH & POL'Y, GUN LAWS IN CALIFORNIA (2022), https://everytownresearch.org/rankings/state/california/ [https://perma.cc/F3J4-5WZZ].

155 *Domestic Violence & Firearms in California*, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-california/ [https://perma.cc/5TMW-W9HL]; CAL. PENAL CODE § 29805 (2021).

156 *Domestic Violence & Firearms in California*, GIFFORDS LAW CTR. (2021), https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-california/ [https://perma.cc/5TMW-W9HL]; *see also* CAL. ANN. FAM. CODE § 6218 (West 2021) ("'[P]rotective order' means an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment: (a) An order described in Section 6320 enjoining specific acts of abuse. (b) An order described in Section 6321 excluding a person from a dwelling. (c) An order described in Section 6322 enjoining other specified behavior.").

157 CAL. FAM. CODE § 6389(c)(2) (West 2021).

158 *Id*; COLO. REV. STAT. ANN. § 18-6-801(8)(d)(III) (West 2021).

159 Garlich, s*upra* note 1.

In 2019, Asia Plagman was shot by her ex-boyfriend with her own gun—a gun she purchased for peace of mind after her home was robbed.[160] Asia was described as "strong-willed and independent" woman.[161] Like so many victims of ongoing domestic violence, Asia grew tired of the abuse and eventually left the man who would end up coming back to kill them both.[162]

While the exploration of firearm relinquishment legislation and DV policy triggers important questions about what laws should be implemented to curtail firearm-related deaths, there is no simple cure for domestic violence. As exhibited in Asia Plagman's case above, abuse pervades many circumstances of life and cannot always be perfectly prevented by rigid or mandatory criminal laws. DV and IPV are complex issues which involve human behaviors that the criminal legal system cannot always fix. It is important that the primary goal of DV firearm legislation not be shrouded by the technicalities and intricacies of procedural rules or politics. The main goal of implementing firearm relinquishment laws and enforcement provisions is to effectively protect victims of DV and IPV at both the state and federal level by restricting offenders' access to lethal weapons. In order to do so, there must be clear and thorough provisions dictating both impermissible conduct *and* a blueprint for enforcement and mitigation of harm. The root problems of DV and IPV must be addressed first and foremost before any specific firearm-related legislation can achieve its goals.

This Part proposes three ways in which to improve the loose and nebulous legislative landscape that is the current state of DV firearm relinquishment laws.

A. Addressing the Root Causes of Domestic Abuse with Policy Changes

Before potential solutions to the existing firearm relinquishment laws in Sections 8 and 9 can be explored, however, foundational resolutions for DV in America as a whole need to be brought into perspective. While criminal laws forbidding IPV validate the experiences of people subjected to abuse and expressly condemn such behaviors, punishment is not a sustainable primary solution on its own.

One of the main issues for both abusers and victims of DV is financial deficiency.[163] For male abusers, often there is perceived deficiency in masculinity when one is unable to hold down a job and provide income for their family.[164] Abusers may take this feeling of inadequacy out on their female partners as a way to reassert dominance and power whereby violence "becomes the vehicle for eradicating shame and reestablishing masculinity."[165] Conversely, victims of DV and IPV are often trapped in their abusive relationships because

[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *See* GOODMARK, *supra* note 29, at 36 (explaining that, in addition to the disproportionate prevalence of IPV in impoverished communities, "[i]ntimate partner violence is also associated with indicators of material deprivation: food insufficiency, lack of stable housing, and utility disconnection").
[164] *Id.* at 47 (stating "economic success through work is one of the hallmarks of masculinity in American society").
[165] *Id.* at 48.

they are wholly reliant on their abusers economically.[166] Without financial literacy or economic stability, victims are especially vulnerable to the control of their abusers and can often completely lose their sense of independence. From an economic standpoint, Leigh Goodmark proposes that funding through federal means be expanded for things like pilot microfinance or cash transfer programs to aid survivors in their attempts to rebuild financial independence.[167] Programs like the Independence Project,[168] for example, allow DV survivors to rebuild their credit scores by obtaining a micro-loan of $100 and repaying that loan over the course of 10 months.[169] Allowing survivors who have little to no economic support to slowly and incrementally build up their financial assets provides a stepping stone towards independent financial living.[170]

By expanding federal domestic violence prevention funding for things other than punitive criminal enforcement, legislation can then target the even more glaring issues that underlie domestic violence. As framed by Donna Coker:

> Economic development, I would suggest supports domestic violence prevention . . . as economic development is equal to domestic violence prevention work; and that economic development that targets women is domestic violence prevention work. Funding for violence research should address the needs of poor women and especially poor women of color with greater specificity and escape that black/white paradigm that limits much of the current domestic violence research because without that research, it will be impossible to . . . determine what the impact of any given policy would be.[171]

Coker espouses four common problems with current tendencies in responding to domestic violence: (1) the undervaluing of the importance of race, ethnicity, and immigration status in shaping a victim's experience; (2) the way in which poverty makes one more vulnerable to violence; (3) the increasingly punitive criminal legal sanctions against batterers with questionable benefits for victims; and (4) the incorrect assumption that separation from an abuser equates with safety.[172] Keeping these common misconceptions in mind is important in fashioning DV-related policies because socioeconomic issues, particularly in marginalized communities, exacerbate domestic violence as is.

Expanding federal funding to reach abusers is also a potential step toward effective rehabilitation. Instead of relying mostly on criminal reform efforts and prosecution, federal funding could expand resources for rehabilitative programs for abusers. For example, programs like the Men Stopping Violence Program in Georgia work with men convicted of MCDVs in a community-based setting to educate them on expectations and accountability

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166 Complete financial dependence on a partner can result from or in economic abuse. *See id.* at 38 ("Economic abuse includes economic control (blocking the acquisition of assets, controlling how resources are distributed, and monitoring how they are used), economic exploitation (depleting women's resources), and employment sabotage.").

167 *Id.* at 127.

168 *Credit Building through Micro-Lending*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/content/independence-project [https://perma.cc/4DBV-ERVK] (last visited Oct. 13, 2022).

169 *Id.*

170 *See id.*

171 Donna Coker, *Addressing Domestic Violence through a Strategy of Economic Rights*, 24 WOMEN'S RTS. L. REP. 187, 190 (2003).

172 *Id.* at 189–90.

for their behaviors.[173] Men in this particular program are encouraged to bring in other men "from their own microsystems" such as workplaces, peer groups, or their own families.[174] By focusing on rehabilitation and support for victims/survivors and offenders, this policy framework takes on less of a retributive focus and works to provide accountability and rehabilitation for abusers.

In addition to economic considerations, addressing the root social causes of DV and IPV requires acknowledgement of the government's fault in many intractable social problems. Excessive criminalization as a solution to social problems decreases the effectiveness of criminal punishment while also shielding lawmakers from having to confront the underlying causes that drive criminality.[175] Professor of Constitutional Law and Criminal Justice Aya Gruber argues that "[a]ccepting such binary characterizations of abusers and victims dispels the government and society's responsibility for creating the conditions precedent to domestic abuse. The message criminal law sends is that a distinct group of wicked people commit domestic violence and that once these persons are managed, the problem is solved."[176] The issues created by the United States' history of overcriminalization place us squarely where we are today: struggling to curtail crime borne out of social inequities exacerbated by overly retributive criminal justice policies.

It may seem counterintuitive to assert the failures of the criminal legal system in America while simultaneously promoting stronger criminal statutory provisions for DV gun violence. However, given the messy and mixed slate of state DV firearm laws and the number of preventable deaths caused by gun violence in DV and IPV relationships, a cohesive statutory regime should serve as at least a start to mitigating some of the harm caused by violent abusers and firearms. All DV-related policy reforms should function with the main goal of protecting victims/survivors and providing *sustainable* safety. To combat the endemic problem of domestic abuse, it is imperative that policymakers look at the root causes of DV and IPV in addition to adjudication of crimes that have already occurred. Without careful attention to these considerations, any resolve for DV and IPV is unlikely.

B. CREATING FEDERAL INCENTIVES FOR STATES TO COMPLY WITH AND ENFORCE FEDERAL GUN RELINQUISHMENT REGULATIONS

One way in which the federal government can improve firearm relinquishment enforcement and accountability is to provide incentives for states to comply with the federal law. Of course, Congress cannot force states to enact laws or compel them to participate in the administration of federal programs.[177] Despite this limit, Congress can still use its

[173] GOODMARK, *supra* note 29, at 58 (citing RICHARD M. TOLMAN ET AL., ENGAGING MEN IN VIOLENCE PREVENTION IN SOURCEBOOK ON VIOLENCE AGAINST WOMEN, 341 (Claire M. Renzetti, Jeffrey L. Edleson, & Raquel Kennedy Bergen eds., 3d ed. (2017))).

[174] *Id.*

[175] GOODMARK, *supra* note 29, at 17 (arguing that "[c]riminalization can make lawmakers feel as though they have done something to address a problem, but legislators do not, by and large, analyze the effectiveness of those actions in any meaningful way").

[176] Gruber, *supra* note 77, at 808–09.

[177] *See* New York v. United States, 505 U.S. 144, 188 (1992) (establishing the anti-commandeering principle barring the federal government from forcing states to enact or administer federal regulatory programs); Printz v. United States,

spending power to influence states based on conditions of federal funds.[178] To encourage states to adopt a statutory regime in line with federal law, the federal government could provide funding for certain programs contingent on state law provisions regarding firearm relinquishment.[179]

Recently, Congressman Eric Swalwel (D-CA) introduced the No Guns for Abusers Act of 2021, which would authorize grants to states that implement relinquishment statutes.[180] Economic grants would be given to states, tribes, or other local governments that have statutes and policies in place tailored according to the best practices outlined in the Act that require examining a multitude of factors specific to a jurisdiction's relinquishment policies.[181] The Bill requires a report to be submitted to Congress detailing types of offenses or court orders for which relinquishment may be authorized, the level of discretion of the ordering court, the power granted to a court or law enforcement agency to ensure compliance with relinquishment orders, and fees charged by persons or entities for storage of relinquished firearms.[182] Federal laws similar to the provisions in Swalwel's bill can be a promising way for states to hopefully receive economic support and guidance in exchange for effective and thorough statutory regulations of DV firearm relinquishment.

Federal programs may require states to adhere to a number of potential conditions in order to qualify for funding. Rather than reward only states that enact pro-arrest policies, the federal government, through laws like VAWA, should also provide funding for states that require local coalitions against DV.[183] Federal grant programs may also provide for designated relinquishment agencies so that firearms do not have the option of being transferred to an offender's friend or family member as is allowed in states like Missouri and Colorado. Funding upon the creation of special units designated to investigating firearm relinquishment protocols could relieve law enforcement agencies of the burden of facilitating relinquishment and storage as well as provide extra manpower to monitor that specific area of DV prosecution.

Special training for judges and police officers could also be beneficial by educating these state actors on the specifics of firearm-related fatalities and DV relationships. Such training should inform judges and law enforcement officials about the psychology and social factors that influence domestic violence, as well as the risks and credible threats posed by the mere presence of a firearm in the home. Prosecutors, judges, and law enforcement officers should have an adequate understanding of the socioeconomic inequalities that underlie DV and its multidimensional nature. Expanding incentives for states can provide a

521 U.S. 898, 935 (1997) (holding that states may not circumvent the anti-commandeering principle established in *New York* by conscripting state officers directly to enforce federal law).

178 *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that receipt of federal funds may be conditional if the exercise of the spending power meets certain criteria).

179 *See* Gildengorin, *supra* note 18, at 842 (proposing funding for states that implement laws requiring relinquishment of firearms, requiring judges to notify offenders of their obligation to relinquish, authorization of law enforcement to search an offender's home if there is probable cause to believe the offender has firearms).

180 H.R. 1441, 117th Cong. (2021).

181 *Id.*

182 *Id.*

183 Coker, *supra* note 173, at 189.

much needed bridge between the federal and state governments that would not impose on the principles of federalism.

C. AMENDING AND EXPANDING THE LANGUAGE OF THE FEDERAL FIREARMS RELINQUISHMENT STATUTE

Expanding and revising the language in the federal statute would also provide a much clearer framework for courts and law enforcement and could serve as a better example by which states can choose to follow in their own legislation. The language in Sections 8 and 9 of the federal statute has presented ambiguity as demonstrated by the cases discussed in Part I.A.2. of this Article, which could be addressed in several ways.

First, expanding the definition of intimate partner could close the glaring gap known as the "boyfriend loophole."[184] Under the Lautenberg Amendment, "intimate partner" is defined as the spouse, former spouse, or individual who is a parent of a child of the person, or an individual cohabiting with the person.[185] This provision, therefore, does not include partners who are casually dating. One researcher suggests that the definition of "intimate partner" be expanded to run in line with the language provided under the newly reauthorized VAWA statute in 18 U.S.C. § 2266(7):

> The term "spouse or intimate partner" includes . . . a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship[.][186]

Since a more expansive definition is already recognized in a separate federal statute, a change to the language of the Lautenberg Amendment can follow suit, providing further federal protections for those subject to abuse by casual dating partners.[187]

Second, a potential amendment could be placed in Section 9 to incorporate those charged with MCDVs rather than only those convicted. Because the felony gun ban already includes both charged and convicted defendants, one researcher argues that it would make sense for the misdemeanor provision to follow suit.[188] This would cover instances in which DV offenders have been charged and are awaiting trial. Despite the fact that this amendment could provide more uniform enforcement and better protection to victims, allowing the federal statute to encompass those charged with MCDVs may also give way to obstacles in cases where someone has been falsely accused or where charges are unfounded. While false accusations certainly do not make up the majority of DV cases, it is important to keep in mind that over-broad, discretion-less mandates can work against efficiency and fairness. One argument espoused by Professor Ramsey considers the abuser's perspective in gun relinquishment mandates:

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184 *See* Foster, *supra* note 149

185 18 U.S.C. § 921(32) (West 2021).

186 Sarah Martin, *Evidence-Based, Constitutionally-Sound Approaches to Reducing Gun Fatalities in Violent Relationships*, 6 BELMONT L. REV. 245, 266 n.175 (2018) (alteration in the original) (citing 18 U.S.C. § 2266(7)(A)(i)(II)).

187 *Id.*

188 *See* Lininger, *supra* note 18, at 600.

> Relinquishment of guns alone can trigger "a sense of persecution and rage" for Americans who find a sense of social identity in their firearms: the 'citizen protector'; the African-American who obtains a gun to address the deficiencies and abuses of law enforcement; the gang member for whom guns confer power, action, and protection; the black market dealer who sees guns as a form of entrepreneurship; the recreational user; even the suicide.[189]

Humanizing offenders beyond the binary label of "abuser" is an important consideration that is often overlooked. This should serve as a reminder to caution against overly punitive measures, as retaliation poses additional threats to victims.

Finally, to address the federal statute's absence of enforcement guidance, provisions should be added specifying how enforcement is to be executed, and by whom, to provide a guiding framework that state laws may look to for guidance. Because specificity and enforcement guidance are the two main elements that are lacking in the current federal relinquishment law, these amendments would be helpful for clarifying the areas of law that have so far proved inadequate to furthering the goal of keeping firearms away from abusers.

CONCLUSION

The current federal and state realm of firearm-relinquishment laws for DV offenders is remarkably inadequate due to inconsistent enforcement and unclear direction. Because the primary goal is always to protect victims/survivors of DV and prevent deaths at the hands of their abusers, governing statutes need to be comprehensive and mindful of multiple perspectives. Currently, keeping guns out of the hands of abusers is the most effective, common-sense way to prevent gun-related deaths in DV and IPV contexts. Because of the disconnect between federal and state laws, it is important that states take the initiative to provide for their own citizens avenues of recourse and protection.

States should not prioritize gun possession over the safety and well-being of their people. Laws like Missouri's Second Amendment Preservation Act evince a grossly inadequate understanding or care for the danger that guns pose to DV victims. In order to implement effective enforcement of gun relinquishment laws, federal incentives for states should be developed and clearer language needs to be adopted at both the federal and state statutory levels. States like Colorado and California can serve as examples of evolving cohesive policy landscapes that proactively work to prevent gun violence in DV contexts with actionable plans and standardized administration. The Lautenberg Amendment and its surrounding provisions do signify a step toward greater recognition of the threats posed by abusers and their access to guns; however, the federal law should be seen as a work in progress.

By acting as a guide for states and a source of aid, the federal government has in its power and budget the ability to create a comprehensive policy landscape for domestic violence and hopefully eliminate environments that are ill-equipped to deal with this

[189] Ramsey, *supra* note 25, at 1326–27.

pervasive problem. While criminalization is not the fix-all solution to DV and IPV, the realm of firearm-related deaths caused by abusers is far too prevalent to ignore. Balancing inherent social inequities and taking on a broader understanding of domestic violence in all of its dimensions is crucial to determining legal and policy approaches that address the entire scope of the problem rather than only its symptoms.


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