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WHAT'S LOVE GOT TO DO WITH IT? REDEFINING DOMESTIC VIOLENCE TO CLOSE FEDERAL FIREARM LOOPHOLES

Cecilia Shields-Auble

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Cecilia Shields-Auble*

ABSTRACT

Closing the "boyfriend loophole" by expanding the definition of a misdemeanor crime of domestic violence to include the abuse of "dating partners" further entrenches the law into an unworkable quasi-marital framework rooted in an antiquated understanding of domestic violence. The federal firearm prohibition would more effectively target high-risk offenders if 18 U.S.C. § 921(a)(33)(A) were revised to eliminate the quasi-marital framework and reflect a modern understanding of the power and control dynamics involved in intimate partner violence. This Comment begins by summarizing the emergence of federal domestic violence law and describing the limitations of the Lautenberg Amendment. It then examines the shortcomings of Congress's efforts to close the "boyfriend loophole" through the Violence Against Women Reauthorization Act and the Bipartisan Safer Communities Act. Next, this Comment argues the merits of abandoning the quasi-marital framework entirely by explaining the already broad support that the institution of marriage receives from the American legal system, the unfortunate historical link between marriage and domestic violence, and the stark reality that relationship status does not determine the risk of domestic violence or femicide. It also contends that current law inaccurately criminalizes domestic violence; specifically, that it makes little sense to separately prosecute stalking and domestic violence when the typical femicide case involves a cyclical pattern of both physical and non-physical abuse, including stalking, intended to exert power and control over the victim. Finally, this Comment concludes by proposing a modernized definition of a misdemeanor crime of domestic violence that sheds the quasi-marital framework, imports the "course of conduct" language from stalking statutes, and extends to both physical and non-physical abuse. It also offers a new standard for evaluating the relationship requirement which courts can implement through jury instructions in the absence of legislative innovation.

INTRODUCTION

In 1994, the Violence Against Women Act (VAWA) was enacted as the first federal legislation recognizing domestic violence as a crime.[1] Three years later,

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1. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in 42 U.S.C. ch. 136).

Congress passed the Lautenberg Amendment, codified at 18 U.S.C. § 922(g)(9), barring anyone convicted of a misdemeanor crime of domestic violence from possessing firearms or ammunition.[2] As originally drafted, however, this prohibition contained two significant limitations: (i) it only extended to offenders who abused their spouse or persons similarly situated to a spouse, including cohabitants, or persons with whom they shared a child in common, creating a "boyfriend loophole" that allowed dating partners convicted of misdemeanor domestic violence offenses to buy or own firearms;[3] and (ii) it did not extend to persons convicted of misdemeanor stalking crimes, which research has shown correlate strongly with domestic violence and an offender's propensity for femicide.[4] On March 8, 2021, a bipartisan bill to renew and expand VAWA was introduced in the House of Representatives, proposing amendments that would have added a provision extending the firearm prohibition to include persons convicted of misdemeanor stalking crimes, closed the "boyfriend loophole" by broadening the definition of a misdemeanor crime of domestic violence to include "intimate partners," and expanded the definition of "intimate partner" to include dating partners.[5]

Nearly identical provisions had been proposed in the earlier Violence Against Women Reauthorization Act of 2019[6] but were defeated after the National Rifle

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2. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 922(g)). Since its enactment, the provision containing the firearm prohibition has not significantly changed and reads as follows:

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9).

3. *See id.* § 921(a)(33)(A)(ii) (2018) (amended 2022).

4. *Id.*; *see* Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300, 303 (1999).

5. *See* Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021). As it is currently defined, the term "intimate partner" means, "with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." 18 U.S.C. § 921(a)(32).

6. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 801 (2019). Congress has historically enjoyed bipartisan support of its efforts to broaden federal prosecution of violent crimes against women by modifying various criminal penalties and definitions in VAWA reauthorizations. *See generally* LISA N. SACCO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION (2019). However, that support finally wavered when the Violence Against Women Reauthorization Act of 2019 passed in the House of Representatives but stalled in the Senate and was never enacted. *See generally* H.R. 1585. The Act aimed to close both the "stalking loophole" and the "boyfriend loophole" by making three changes: (i) prohibiting persons convicted of misdemeanor stalking crimes from possessing firearms under 18 U.S.C. § 922(g); (ii) revising the definition of a misdemeanor crime of domestic violence to include current or former dating partners; and (iii) expanding the scope of domestic violence protection orders that trigger the firearm prohibition under 18 U.S.C. § 922(g)(8). *Id.*; *see also* Susan Davis, *House Renews Violence Against Women Act, but Senate Hurdles Remain,* NPR (Mar. 17, 2021), https://www.npr.org/2021/03/17/977842441/house-renews-violence-against-women-act-but-senate-hurdles-remain.

Association (NRA) opposed such an expansion of the firearm prohibition, arguing that it was "too broad and ripe for abuse" and could result in individuals losing their right to own a firearm "for a tweet that cause[d] someone emotional distress."[7] Conservative lawmakers and the NRA renewed these criticisms against the firearm provision proposed in the 2021 reauthorization and, largely as a result of this opposition, the bill passed in the House but stalled in the Senate.[8] Ultimately, on March 15, 2022, President Biden—who was an original sponsor of VAWA as a senator in 1994—signed into law a version of the reauthorization that did not include any changes to the firearm prohibition.[9]

On June 25, 2022—spurred by the mass shootings in Buffalo, New York, and Uvalde, Texas—the Senate changed its tune and passed the Bipartisan Safer Communities Act, expanding the firearm prohibition to include individuals convicted of misdemeanor crimes of domestic violence who had "a current or recent former dating relationship with the victim."[10] The amendment is not retroactive, and it does not extend the firearm prohibition to individuals convicted of misdemeanor stalking crimes.[11]

This Comment argues that closing the "boyfriend loophole" by expanding the definition of a misdemeanor crime of domestic violence to include the abuse of "dating partners" further entrenches the law into an unworkable quasi-marital framework rooted in an antiquated understanding of domestic violence.[12] Moreover, this Comment contends that the federal firearm prohibition would more effectively target high-risk offenders if the definition of a misdemeanor crime of domestic violence were revised to eliminate the quasi-marital framework and

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7. Sheryl Gay Stolberg, *Why the N.R.A. Opposes New Domestic Abuse Legislation*, N.Y. TIMES (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/us/politics/nra-domestic-violence-congress.html.

8. *See* Daniel Villarreal, *Senate GOP, NRA Oppose Parts of Violence Against Women Act as COVID-Related Domestic Abuse Rises*, NEWSWEEK (Mar. 17, 2021), https://www.newsweek.com/senate-gop-nra-oppose-parts-violence-against-women-act-covid-related-domestic-abuse-rises-1577002; Philip Elliott, *How the NRA Weakened the Violence Against Women Act Update*, TIME (Mar. 16, 2022), https://time.com/6158049/violence-against-women-act-nra/.

9. Consolidated Appropriations Act, 2022, H.R. 2471, 117th Cong., Div. W (2022) (enacted). The bill did, however, successfully expand the firearm prohibition to offenders convicted of misdemeanor crimes of domestic violence under local law. *Id.* § 2(a)(1)(Q).

10. Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(a)(1), 136 Stat. 1313, 1332 (2022) (codified45e as amended at 18 U.S.C. § 921(a)(33)(A)(ii)); *see also* Lauren Fox, *Here's What's in the Bipartisan Gun Safety Bill*, CNN (June 24, 2022), https://www.cnn.com/2022/06/21/politics/whats-in-senate-gun-reform-bill/.

11. *See* Bipartisan Safer Communities Act § 12005(b) (stating that amendments to subsection (a) "shall not apply to any conviction of a misdemeanor crime of domestic violence entered before the date of enactment of this Act").

12. Although one term cannot possibly describe the multifarious abusive behaviors that occur between a perpetrator and their victim, this Comment will use "domestic violence" as a blanket term to refer to such conduct. *See generally* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (2003) (explaining that "spouse abuse, domestic violence, marital assault, woman abuse, and battering . . . are used interchangeably to refer to the broad range of behaviors considered to be violent and abusive within an intimate relationship"); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122 n.2 (2001) (citing FREDERICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 1–7 (1997)) (using "'domestic violence' to refer both to 'domestic violence' and to 'domestic abuse'").

reflect a modern understanding of the power and control dynamics involved in intimate partner violence.

This Comment proceeds as follows. Part I summarizes the emergence of federal domestic violence law, describes the limitations of the Lautenberg Amendment, and illustrates the confusion caused by the definition of a "misdemeanor crime of domestic violence"—specifically, how the focus on quasi-marital relationships in 18 U.S.C. § 921(a)(33)(A)(ii) impedes the consistent and effective application of the federal firearm prohibition.

Part II examines Congress's most recent efforts to rid federal domestic violence law of its limitations through VAWA reauthorization, and explores the amendments made through the recent passage of the Bipartisan Safer Communities Act.

Part III argues the merits of abandoning the quasi-marital framework in § 921(a)(33)(A)(ii) entirely because, regardless of whether the definition includes "similarly situated to a spouse," "intimate partner," or "dating partner," it inappropriately focuses the inquiry on the relationship instead of the law's intended purpose: preventing the most dangerous domestic violence offenders from accessing firearms. Part III expands on this contention by explaining the already broad support that the institution of marriage receives from the American legal system, the unfortunate historical link between marriage and domestic violence, and the stark reality that relationship status does not determine the risk of domestic violence or femicide.

Part IV highlights the danger of the current approach to domestic violence and stalking prosecution: (i) the modern understanding of domestic violence recognizes it as a cyclical pattern of physical and non-physical abuse intended to exert power and control over the victim, but current domestic violence statutes typically only criminalize discrete acts of physical violence that occur in an ongoing relationship; (ii) stalking statutes criminalize a course of non-physically violent conduct, but typically only apply once the victim separates from their abuser and focus on geographic distance instead of the offender's attempt to gain power and control over the victim; and (iii) research shows that stalking occurs regardless of an ongoing relationship and, when combined with a history of physical abuse, indicates a high risk of femicide.[13]

Part V proposes a modernized definition of a misdemeanor crime of domestic violence that eliminates the quasi-marital framework and targets high-risk offender behavior by importing the "course of conduct" language from stalking statutes and expanding the definition of domestic violence to include both physical and non-physical abuse. Part V also offers a new standard for evaluating the relationship requirement which courts can implement organically through jury instructions in the absence of legislative innovation.

13. Because this Comment focuses on violence against women, which is most often perpetrated by men in their effort to control women who fail to "perform their traditional gender roles in a manner consistent with the man's expectations," it will primarily refer to domestic abusers using male pronouns and refer to victims using female pronouns. *See* ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 12–13 (2d ed. 2007) (discussing the use of gender pronouns when referring to victims and the varied terminology for the violence that they experience).

I. THE LIMITATIONS OF FEDERAL DOMESTIC VIOLENCE LAW

A. The Evolution of Federal Domestic Violence Law

In 1969, following the assassinations of Dr. Martin Luther King Jr. and Senator Robert F. Kennedy, Congress passed the Gun Control Act (GCA).[14] Congress's aim was for the GCA to "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency and to assist law enforcement authorities in the states . . . in combating the increasing prevalence of crime in the United States."[15]

In 1994, Congress enacted VAWA in response to a growing concern about violence against women, as well as a rise in violent crime overall.[16] While domestic violence was historically considered a private family matter, perceptions had changed in the 1970s and '80s, and domestic violence increasingly grew to be regarded as a criminal offense of public concern.[17] VAWA criminalized domestic violence and provided grant programs to "state, local, and tribal law enforcement entities to investigate and prosecute violent crimes against women."[18] These programs primarily support the criminal justice and community response to crimes like "domestic violence, sexual assault, dating violence and stalking—crimes for which the risk of victimization is highest for women."[19]

Yet there remained a dangerous loophole in federal gun control efforts: while the GCA prohibited felons from possessing firearms, domestic violence abusers evaded the proscription because most states prosecuted domestic violence as a misdemeanor.[20] Accordingly, Congress passed the Lautenberg Amendment as part of the Omnibus Consolidated Appropriations Act of 1997, barring anyone convicted of a misdemeanor crime of domestic violence from possessing firearms or ammunition.[21]

There were nevertheless substantial limitations to the effectiveness of the Lautenberg Amendment because the underlying misdemeanor crime of domestic violence had to meet several conditions to trigger § 922(g)(9)'s application. First, the predicate offense had to be a misdemeanor under federal, state, or tribal law.[22] Second, the offense had to include

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14. SARAH HERMAN PECK & MICHAEL A. FOSTER, CONG. RSCH. SERV., R45629, FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS 1, 6 (2019).

15. S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113–14.

16. SACCO, *supra* note 6, at 1. The violent crime rate more than doubled between 1960 and 1969. *Id.*

17. *Id.* For instance, Congress enacted the Family Violence Prevention and Services Act in 1984 to help states prevent family violence and assist victims and their dependents. *Id.*

18. *Id.*

19. *Id.* at Summary.

20. Off. on Violence Against Women, *Supreme Court Decision Limits Batterers' Access to Guns*, U.S. DEP'T OF JUST. (Apr. 11, 2014), https://www.justice.gov/archives/ovw/blog/supreme-court-decision-limits-batterers-access-guns.

21. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). For the relevant text of the Lautenberg Amendment, see *supra* note 2.

22. 18 U.S.C. § 921(a)(33)(A)(i) (2018) (amended 2022).

> as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[23]

Unsurprisingly, these limitations led to a significant amount of litigation concerning which predicate offenses qualified as misdemeanor crimes of domestic violence triggering the § 922(g)(9) firearm prohibition.

B. Background: Confusion Among the Courts

1. Domestic Relationship as an Element

It was unclear for some time whether the definition of a misdemeanor crime of domestic violence required the offense underlying a § 922(g)(9) conviction to include, as an element, a domestic relationship between the abuser and the victim.[24] This was especially problematic because § 921(a)(33)(A)(ii) narrowly defines the requisite relationship, whereas state statutes often sweep broadly and do not contain explicit language specifying that a "domestic" relationship is an element of the offense.[25]

Every circuit except for the Fourth Circuit has considered the question and rejected the interpretation that § 921(a)(33)(A)(ii) requires a domestic relationship to be an element of the predicate offense.[26] The Supreme Court resolved the circuit split in *United States v. Hayes* when it reversed and remanded the Fourth Circuit's holding that § 921(a)(33)(A)(ii) required the predicate misdemeanor crime of domestic violence statute to include the existence of a domestic relationship as an element of the offense.[27] Instead, the Court held that

> [t]o obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way. But that relationship, while it must be established, need not be denominated an element of the predicate offense.[28]

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23. *Id.* § 921(a)(33)(A)(ii). This provision was not altered by the March 2022 amendment, but was ultimately amended in June 2022, as discussed in Part II.

24. *See generally* United States v. Hayes, 555 U.S. 415 (2009).

25. *See generally* CHRISTOPHER REINHART, CONN. GEN. ASSEMB., OFF. OF LEGIS. RSCH., 2013-R-0157, STATES WITH SPECIFIC DOMESTIC VIOLENCE CRIMES (2013).

26. *See* United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); White v. Dep't of Just., 328 F.3d 1361, 1364–67 (Fed. Cir. 2003); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); United States v. Barnes, 295 F.3d 1354, 1358–61 (D.C. Cir. 2002); United States v. Kavoukian, 315 F.3d 139, 142–44 (2d Cir. 2002); United States v. Chavez, 204 F.3d 1305, 1313–14 (11th Cir. 2000); United States v. Meade, 175 F.3d 215, 218–21 (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 619–21 (8th Cir. 1999).

27. *Hayes*, 555 U.S. at 420, 429–30.

28. *Id.* at 426; *see also Meade*, 175 F.3d at 219 ("[O]nly the mode of aggression, not the relationship status between perpetrator and victim, must appear within the formal definition of an antecedent misdemeanor to constitute it as a predicate offense.").

In *Hayes*, the defendant sought dismissal of his § 922(g)(9) indictment on the ground that the underlying crime of conviction—a state misdemeanor battery offense committed against his then-wife, with whom he shared a child in common and was cohabitating as a spouse—did not qualify as a misdemeanor crime of domestic violence because it did not include the existence of a domestic relationship as an element.[29]

The Court noted that it would frustrate Congress's purpose to interpret § 922(g)(9) to exclude domestic abusers convicted under generic use-of-force statutes because "[a]s of 1996, only about one-third of the States had criminal statutes that specifically proscribed *domestic* violence . . . [and e]ven in those States, domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws."[30] Additionally, there were no federal misdemeanors defining a domestic relationship as an element of the offense; thus, it was "highly improbable" that Congress only intended the firearm ban in § 922(g)(9) to apply to domestic abusers convicted under statutes containing a domestic relationship element.[31]

2. Use of Force as an Element

The federal government also faced challenges enforcing § 922(g)(9) because the underlying offense must include, as an element, "the use or attempted use of physical force" to qualify as a misdemeanor crime of domestic violence,[32] and the First and Ninth Circuits were split as to the requisite severity of such force.[33] When the Sixth Circuit deepened that split, holding that a defendant's state conviction for "'intentionally or knowingly caus[ing] bodily injury' to the mother of his child" could not sustain a § 922(g)(9) conviction because the predicate offense did not contain the requisite "violent force," the Supreme Court granted certiorari.[34] Ultimately, the Supreme Court reversed and remanded the Sixth Circuit's decision in *United States v. Castleman*, holding instead that the requisite element of "physical force" can be satisfied by the same degree of force that supports a common law battery conviction, such as "bodily injury" or "offensive touching."[35]

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29. *Hayes*, 555 U.S. at 418–19.

30. *Id.* at 427.

31. *Id.*; *see also Barnes*, 295 F.3d at 1364 (rejecting the idea that "Congress remedied one disparity—between felony and misdemeanor domestic violence convictions [and firearm possession]—while at the same time creating a new disparity among (and sometimes, within) states").

32. 18 U.S.C. § 921(a)(33)(A)(ii).

33. *Compare* United States v. Nason, 269 F.3d 10, 18 (1st Cir. 2001) (holding that § 922(g)(9) "encompass[es] crimes characterized by the application of *any* physical force"), *with* United States v. Belless, 338 F.3d 1063, 1068 (9th Cir. 2003) (holding that § 922(g)(9) only covers crimes including "the violent use of force").

34. United States v. Castleman, 695 F.3d 582, 588–90 (6th Cir. 2012), *rev'd and remanded*, 572 U.S. 157, 160–63 (2014) (holding that the defendant's state conviction was not a valid predicate offense under § 922(g)(9) because § 921(a)(33)(A) requires "violent force" and the defendant could have been convicted "for caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent").

35. United States v. Castleman, 572 U.S. 157, 162–63, 167–68 (2014).

Importantly, Justice Sotomayor noted in the majority opinion that "'[domestic] violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[36] "Minor uses of force may not constitute 'violence' in the generic sense,"[37] such as "a squeeze of the arm [that] causes a bruise,"[38] but they easily qualify as domestic violence "when the accumulation of such acts over time can subject one intimate partner to another's control."[39]

3. Reckless Assault

Although the Supreme Court in *Castleman* held that the "physical force" element of § 921(a)(33)(A)(ii) was broad enough to include offensive touching, and thus "the knowing or intentional application of force [was] a 'use' of force" for the purposes of a § 922(g)(9) conviction, the Court declined to specify whether reckless assault was also sufficient.[40] In 2016, the Supreme Court finally considered the issue in *Voisine v. United States* and held that a conviction for "reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence' under § 922(g)(9)."[41]

In that case, two defendants had been convicted of misdemeanor assault under a Maine statute and, years later, were charged under § 922(g)(9) for unlawfully possessing firearms.[42] The district court rejected defendants' claim that § 922(g)(9) was inapplicable because their underlying misdemeanor convictions "could have been based on reckless, rather than knowing or intentional, conduct."[43] The First Circuit affirmed both convictions, holding that "an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9)."[44] The Supreme Court then granted certiorari to resolve the circuit split over whether misdemeanors involving reckless assault may support § 922(g)(9) convictions.[45]

Ultimately, the Supreme Court found that both the statutory text and history of § 921(a)(33)(A)(ii) and § 922(g)(9) supported its holding that "reckless domestic

36. *Id.* at 165.

37. *Id.*

38. *Id.* at 166 (quoting Flores v. Ashcroft, 350 F.3d 666, 670 (2003)).

39. *Id.*

40. *Id.* at 162–63, 169–70. Indeed, the Supreme Court in *Castleman* pointed out that "the Courts of Appeals [had] almost uniformly held that reckless [force was] not sufficient" in the context of the physical force required in a crime of violence. *Id.* at 169 n.8.

41. Voisine v. United States, 579 U.S. 686, 692 (2016).

42. *Id.* at 689–90. Petitioners Stephen Voisine and William Armstrong had each been convicted under title 28, section 207-A(1)(A) of the Maine Revised Statutes for assaulting their girlfriend and wife, respectively. *Id.*

43. *Id.*

44. *Id.* at 690–91 (quoting United States v. Armstrong, 706 F.3d 1, 4 (2013)).

45. *Id.* at 691. *Compare* United States v. Voisine, 778 F.3d 176, 177 (1st Cir. 2015) (affirming a § 922(g)(9) conviction based on a state misdemeanor conviction for reckless assault against a domestic partner), *with* United States v. Nobriga, 474 F.3d 561, 564–65 (9th Cir. 2006) (per curiam) (holding that a § 922(g)(9) conviction is not supported by an underlying conviction for misdemeanor reckless domestic assault).

assault qualifies as a 'misdemeanor crime of domestic violence.'"[46] First, the word "use" in "use of force" is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct."[47] Nor does the text of § 922(g)(9) suggest the definition excludes reckless assault convictions.[48] Second, Congress specifically enacted § 922(g)(9) to extend the firearm prohibition to abusers convicted of "the States' ordinary misdemeanor assault laws," and a significant majority of states defined those misdemeanors to include recklessness.[49] Thus, disqualifying recklessness would improperly undermine Congress's intent and essentially render § 922(g)(9) inoperative in the majority of jurisdictions.[50]

4. Due Process and the Requisite Mens Rea

While § 922(g) lists the categories of individuals prohibited from possessing firearms,[51] § 924(a)(2) defines the penalty for anyone who "knowingly" violates § 922(g)(9).[52] Early on, courts consistently rejected due process challenges to § 922(g)(9) convictions based on a defendant's lack of notice that their possession of a firearm is illegal.[53] For example, in 1998 the Supreme Court held, in *Bryan v. United States*, that "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense," not of their illegality.[54] Accordingly, lower courts required the prosecution to "prove that the defendant knowingly possessed a firearm or ammunition, but not that the defendant knew or reasonably should have known that, due to their misdemeanor conviction, such possession was illegal."[55]

Over two decades later, however, the Court in *Rehaif v. United States* redefined the scope of the term "knowingly" to include both "the defendant's

46. *Voisine*, 579 U.S. at 692.

47. *Id.* at 693.

48. *Id.* at 692–95.

49. *Id.* at 696. In fact, at the time of this decision, thirty-four states plus the District of Columbia included reckless infliction of bodily harm in their definition of misdemeanor assault or battery offenses. *Id.* at 695. Additionally, section 2.02(3) of the Model Penal Code provided "that a *mens rea* of recklessness should generally suffice to establish criminal liability, including for assault." *Id.*

50. *Id.* at 692. The Court drew a comparison to its decision in *Castleman*, where it "declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in [ten] States." *Id.* at 696.

51. 18 U.S.C. § 922(g).

52. *Id.* § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of [18 U.S.C. § 922] shall be fined as provided in this title, imprisoned not more than [ten] years, or both.").

53. *See, e.g.*, United States v. Mills, 82 F. App'x 287, 289 (4th Cir. 2003); United States v. Mitchell, 209 F.3d 319, 323 (4th Cir. 2000); United States v. Barnes, 295 F.3d 1354, 1367 (D.C. Cir. 2002); United States v. Hutzell, 217 F.3d 966, 968–69 (8th Cir. 2000); United States v. Beavers, 206 F.3d 706, 709 (6th Cir. 2000); United States v. Meade, 175 F.3d 215, 226 n.5 (1st Cir. 1999); United States v. Wilson, 159 F.3d 280, 289 (7th Cir. 1998).

54. Bryan v. United States, 524 U.S. 184, 193 (1998). Although the Court's decision in *Bryan* pertained to 18 U.S.C. § 924(a)(1)(B), lower courts have extended its holding to § 924(a)(2) because it contains identical mens rea language. *See, e.g.*, *Meade*, 175 F.3d at 226 n.5.

55. James Lockhart, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 922(g)(9), Prohibiting Possession of Firearm by Persons Convicted of Misdemeanor Crime of Domestic Violence*, 50 A.L.R. Fed. 2d § 31 (2010).

conduct and . . . the defendant's status."[56] Thus, "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."[57] In *Rehaif*, the defendant had entered the United States on a nonimmigrant student visa and been dismissed from school after receiving poor grades.[58] Although the university notified Rehaif that his "immigration status would be terminated unless he transferred to a different university or left the country," he chose to remain in the United States and was subsequently prosecuted under § 922(g) and § 924(a)(2) when the government learned that he had shot firearms at a gun range.[59]

The Court reasoned that "the defendant's *status*, and not his conduct alone," marked the difference between the possession of a gun as an innocent act versus a wrongful behavior "to which criminal sanctions normally . . . attach."[60] Further, the Court found that the statutory text indicated Congress's intent "to require the Government to establish that the defendant knew he violated the material elements of § 922(g)."[61] The Court expressly refrained from providing guidance as to how the government might prove the defendant's knowledge of status with respect to § 922(g)'s other categories of prohibited persons.[62]

Since *Rehaif*, circuit courts have unanimously reiterated that a successful § 922(g) conviction requires only that the government prove that the defendant knew of their relevant status, not that the defendant was aware of the federal firearms prohibition itself.[63] For example, the First Circuit in *United States v. Austin* held that the government was required to prove that the defendant knew he was a felon for the purposes of a § 922(g)(1) conviction, rejecting the defendant's argument that *Rehaif* obligated the government to prove the defendant's subjective knowledge that he was violating the law by possessing a firearm.[64]

But while this knowledge requirement is fairly clear cut for some § 922(g) categories, such as a defendant's status as a felon under § 922(g)(1), it is markedly more difficult to determine whether a defendant knew they qualified as a domestic

56. Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

57. *Id.* at 2200.

58. *Id.* at 2194.

59. *Id.* (citation omitted).

60. *Id.* at 2197.

61. *Id.* at 2195–96.

62. *Id.* at 2200.

63. *See* United States v. Austin, 991 F.3d 51, 59 (1st Cir. 2021); United States v. Bryant, 976 F.3d 165, 172–73 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2825 (2021); United States v. Boyd, 999 F.3d 171, 182 (3d Cir.), *cert. denied*, 142 S. Ct. 511 (2021); United States v. Moody, 2 F.4th 180, 197–98 (4th Cir. 2021); United States v. Trevino, 989 F.3d 402, 405 (5th Cir. 2021); United States v. Bowens, 938 F.3d 790, 797 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 814, *and cert. denied*, 140 S. Ct. 2572 (2020); United States v. Maez, 960 F.3d 949, 954–55 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2813, *cert. denied*, 141 S. Ct. 2814, *and cert. denied*, 141 S. Ct. 2838 (2021); United States v. Robinson, 982 F.3d 1181, 1187 (8th Cir. 2020); United States v. Singh, 979 F.3d 697, 727 (9th Cir.), *cert. denied*, 141 S. Ct. 2671 (2020); United States v. Benton, 988 F.3d 1231, 1237–38 (10th Cir. 2021); United States v. Johnson, 981 F.3d 1171, 1181–82 (11th Cir. 2020); United States v. Brown, 845 F. App'x 1, 3 (D.C. Cir. 2021).

64. *Austin*, 991 F.3d at 59.

violence misdemeanant for the purposes of § 922(g)(9).[65] For example, the First Circuit in *United States v. Minor* vacated a defendant's § 922(g)(9) conviction "because the jury [had been] allowed to convict [the defendant] of knowingly violating § 922(g)(9) without finding that he knew that his assault conviction placed him in the category of persons convicted of a misdemeanor crime of domestic violence."[66]

In *Minor*, the defendant had initially been charged under a Maine domestic violence assault statute for conduct committed against his then-wife.[67] After Minor refused to plead guilty to the domestic violence charge, the state prosecutor reduced the charge to generic assault and removed all references to domestic violence, including a line indicating that the conduct was "committed against a family or household member."[68] The defendant then pleaded no contest to the assault charge.[69] Several years later, a federal grand jury charged the defendant "under sections 924(a)(2) and 922(g)(9) with possession of a firearm by a person who had previously been convicted of a misdemeanor crime of domestic violence," predicated on his conviction for simple assault against his ex-wife, and the defendant was convicted on those charges following a jury trial.[70]

At trial, the defendant had admitted that he knowingly possessed the firearm and that he had previously been convicted of a misdemeanor assault against his then-wife under Maine law.[71] Yet on appeal, despite there being sufficient evidence to support the defendant's § 922(g)(9) conviction, the First Circuit vacated the conviction because the jury had only been instructed to find, "which it did, that [the defendant] knew all of the features necessary to render his prior Maine conviction a domestic violence misdemeanor under section 922(g)(9)," but not that his prior assault conviction against his then-wife qualified as a misdemeanor crime of domestic violence under federal law.[72]

On September 14, 2022, the First Circuit withdrew the panel opinion and vacated the judgment in *Minor*.[73] The Court has since received supplemental briefing from the parties, and considered oral argument en banc, addressing questions posed in the Court's order that focus on clarifying the bounds of the *Rehaif* knowledge requirement as it pertains to § 922(g)(9) convictions.[74] The outcome of the First Circuit's rehearing is pivotal. Efforts to reduce the risk of femicide would be drastically impeded if the First Circuit were to conclude that domestic violence misdemeanants are liable under § 922(g)(9) only if the government can prove that they understood that their prior offense fell within §

65. *Compare id.*, *with* United States v. Minor, 31 F.4th 9, 11 (1st Cir.), *vacating* 2020 WL 8839888 (D. Me. Sept. 16, 2020), *withdrawn and reh'g en banc granted*, 49 F.4th 22 (1st Cir. 2022).

66. *Minor*, 31 F.4th at 11.

67. *See id.* at 12.

68. *Id.* at 12–13.

69. *Id.* at 13.

70. *Id.* at 11.

71. *Id.* at 12.

72. *Id.* at 25 (Lynch, J., dissenting).

73. United States v. Minor, 49 F.4th 22, 22–23 (1st Cir. 2022).

74. *Id.*

921(a)(33)(A)'s definition.[75] Certainly, a domestic violence offender's lethality does not hinge on their grasp of the statutory consequences of their prior convictions.[76] Moreover, such an outcome would be contrary to Congress's intent that § 922(g)(9) should prevent abusers convicted of only "garden-variety assault or battery misdemeanors" from avoiding the federal firearms prohibition.[77]

C. Application Issues

To obtain a successful § 922(g)(9) conviction, the original Lautenberg Amendment required the government to prove beyond a reasonable doubt that the defendant fell within one of four relationship categories: (i) "a current or former spouse, parent, or guardian of the victim"; (ii) "a person with whom the victim shares a child in common"; (iii) "a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian"; or (iv) "a person similarly situated to a spouse, parent, or guardian of the victim."[78]

Although it remains unsettled whether the conviction in *Minor* will stand, the case represents a fairly clear-cut § 922(g)(9) prosecution based on the defendant's predicate conviction for assaulting his then-spouse.[79] However, the relationship between the abuser and victim is not always so readily apparent.[80] In fact, while the Lautenberg Amendment's first two relationship categories are straightforward, the third and fourth categories have generated confusion among the courts. Specifically, when it comes to whether the government has proved that the victim was "similarly situated to a spouse" or "cohabitated with the victim as a spouse," courts have presented the question to the jury with inconsistent guidance,

75. *See, e.g.*, *Minor*, 31 F.4th at 20–24 (vacating a defendant's § 922(g)(9) conviction after concluding that the *Rehaif* "status" requirement had not been satisfied even where the defendant admitted that he had knowingly possessed a firearm and that he knew he had previously been convicted of assault against his then-wife).

76. *See infra* Parts III–IV.

77. *See* Voisine v. United States, 579 U.S. 686, 695 (2016); *supra* Section I.A.

78. 18 U.S.C. § 921(a)(33)(A)(ii) (2018) (amended 2022); *see also* United States v. Hayes, 555 U.S. 415, 420, 429 (2009) (concluding that the government must prove beyond a reasonable doubt that the victim of the misdemeanor crime underlying a § 922(g)(9) conviction was related to the defendant in one of the ways specified within the § 921(a)(33)(A)(ii) definition, but that the relationship did not have to be an element of the predicate offense). As discussed *infra* Section II.B., the issues explored in this section were not alleviated by Congress's addition of a fifth relationship category.

79. *See Minor*, 31 F.4th at 25.

80. Occasionally, the predicate offense requires a thorough analysis of the relationship, which creates a better record on which to base a subsequent § 922(g)(9) prosecution. For example, in *State v. Williams*, the Ohio Supreme Court devised an exacting analysis of whether a victim was "living as a spouse" of the offender under Ohio's domestic violence statute. State v. Williams, 683 N.E.2d 1126, 1126–31 (Ohio 1997). The court examined how other states defined cohabitation within the context of domestic violence and concluded there were two elements of cohabitation: (i) "sharing of familial and financial responsibilities" and (ii) "consortium." *Id.* at 1129–30. Further, the court advised that factors such as "provisions for shelter, food, clothing, utilities, and/or commingled assets" might establish the first element, and "mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship and conjugal relations" might establish the second. *Id.* at 1130.

characterizing these criteria as elements of a rule, factors to be considered in a standard, or providing no instruction at all.[81]

For example, the United States District Court for the District of Maine held in *United States v. Costigan* that a defendant's relationship with the victim of his predicate misdemeanor assault conviction qualified as "cohabitating . . . as a spouse" for the purposes of a § 922(g)(9) conviction.[82] The court provided the following non-exhaustive list of factors it considered in determining whether the relationship "functioned like a marriage, thereby bringing [it]" within the § 921(a)(33)(A)(ii) definition:

> length of the relationship; shared residence as indicated by spending the night and keeping one's belongings at the residence; intimate relations; expectations of fidelity and monogamy; shared household duties; regularly sharing meals together; joint assumption of child care; providing financial support; moving as a family unit; joint recreation and socialization; and recognition of the live-in relationship by family and friends as indicated by visits to the residence.[83]

Further, although the case proceeded as a bench trial, Judge Hornby offered the following jury instructions in a footnote "in preparation for the inevitable next case," averring that he could not "think of another criminal jury instruction that is so open-ended and standardless":

> The phrase "cohabit as a spouse" means to live together like a husband or wife although no valid marriage exists. Proof of cohabiting as spouses requires more than dating, spending the night or living together as platonic roommates. Intimate relations and sharing a residence do not necessarily establish proof that a victim and the defendant cohabited as spouses, but you may consider such factors. Similarly, no specific period of time together establishes that a couple was, in fact, living together as husband and wife. However, you may consider the length of the relationship and joint future plans as factors. Additionally, although a couple need not hold themselves out as husband and wife to "cohabit as spouses," you may consider any evidence presented that tends to show how the relationship was presented to family, friends, or the community in making your determination. In addition to any factors I have just mentioned, you may consider any evidence that tends to prove or disprove that the defendant lived as a spouse with the victim of the proven misdemeanor.[84]

In contrast, the Ohio Northern District Court in *Eibler v. Department of Treasury* conducted a much more conclusory analysis prior to holding that the

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81. *See, e.g.*, United States v. Barnette, 211 F.3d 803, 814–15 (4th Cir. 2000) (approving of the district court providing the jury with no standards by which to evaluate the phrase "as a spouse" in the context of 18 U.S.C. § 2261(a) charges).

82. United States v. Costigan, No. CRIM. 00-9-B-H, 2000 WL 898455, at *5 (D. Me. 2000), *aff'd*, 18 F. App'x 2 (1st Cir. 2001).

83. *Id.* at *5 n.14; *see also* United States v. Heckenliable, No. 2:04-CR-00697, 2005 WL 856389, at *8–16 (D. Utah Apr. 13, 2005) (applying the *Costigan* factors to determine the nature of a victim and abuser's relationship and interpreting "similarly situated to a spouse" to mean that Congress intended "to cover, without specifically enumerating, the myriad close personal relationships that could result in recurring conflicts—conflicts that could escalate to deadly violence if a previously convicted misdemeanant had access to a firearm").

84. *Costigan*, 2000 WL 898455, at *5 n.17.

defendant's relationship with the victim of his predicate misdemeanor assault conviction qualified as "similarly situated to a spouse" under § 921(a)(33)(A)(ii).[85] In that case, the court relied on the fact that the victim had been the defendant's girlfriend for over six years, and noted that it was not dispositive "that the two may not have been living together at the time of the assault."[86] Different still, the Pennsylvania Superior Court in *Commonwealth v. Coll* held that the victim of the defendant's predicate assault conviction qualified as "similarly situated to a spouse" because the arresting officer had testified that the victim was the defendant's girlfriend and that they had been living together at the time of the assault.[87]

This ad hoc approach to determining the relationship requirement is problematic for three reasons. First, absent proper instructions—providing a standard with context and an objective by which the jury may evaluate the relationship between the abuser and their victim—asking the jury to decide whether the relationship was sufficiently "marriage-like" inappropriately requires the jury to make a policy determination instead of a factual one. Section 922(g)(9) convictions are intended to solve a serious social problem: the risk of femicide when domestic violence offenders possess firearms. While the members of a jury must apply the law in a given case, they should not be asked to answer the policy question of which relationships trigger a firearm prohibition. Yet, absent further instruction, jurors are likely basing their determinations on their own preconceived notions of which relationships should qualify as sufficiently "marriage-like."

Second, courts are incorrectly interpreting the question of who is "similarly situated to a spouse" as a formulaic problem instead of concentrating on those whom the law is intended to protect. Each one of the prior judicial approaches misses the critical inquiry: whether the relationship is such that the victim's autonomy is restricted, and they are unable to exit a dangerous environment. Focusing on surface-level characteristics, such as how "marriage-like" a relationship appears to the factfinder, distracts from the fundamental danger in domestic abuse relationships and may lead to the under-detection of offenders who pose a high risk of committing femicide.[88] A more in-depth analysis of this issue is discussed in Part III.

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85. Eibler v. Dep't of Treasury, 311 F. Supp. 2d 618, 621–23 (N.D. Ohio 2004); *see also* United States v. England, No. 1:14-CR-73, 2014 WL 4988149, at *7–8 (S.D. Ohio Oct. 6, 2014) (holding that the defendant's relationship with the abuser qualified as "similarly situated to a spouse" because the police report identified the victim of the defendant's assault as his "live-in" girlfriend and, even if the report were incorrect, the defendant had admitted that he and the victim "had some romantic relationship and, in fact, had engaged in sexual relations").

86. *Eibler*, 311 F. Supp. 2d at 622.

87. Commonwealth v. Coll, No. 1928 MDA 2016, 2017 WL 4997189, at *4 (Pa. Super. Ct. Nov. 2, 2017). Notably, five circuits have held that assault against a "live-in girlfriend" satisfies the § 921(a)(33)(A)(ii) relationship requirement. *See* United States v. Denis, 297 F.3d 25, 31 (1st Cir. 2002); United States v. Shelton, 325 F.3d 553, 562–63 (5th Cir. 2003); Buster v. United States, 447 F.3d 1130, 1133 (8th Cir. 2006); United States v. Slaughter, 124 F. App'x 542, 543 (9th Cir. 2005); United States v. White, 593 F.3d 1199, 1204 (11th Cir. 2010).

88. Notably, parts of the jury instructions and factors suggested in *Costigan* bear a striking resemblance to the factors courts consider when evaluating the third prong in the test to determine the existence of a common law marriage. *See In re* Estate of Hunsaker, 1998 MT 279, ¶ 32, 291 Mont. 412,

Third, the inconsistency with which courts are determining a critical element of § 921(a)(33)(A)(ii) leaves § 922(g)(9) convictions even more vulnerable to *Rehaif* challenges. If the courts are uncertain about which relationships qualify as sufficiently "marriage-like," then a defendant can undoubtedly argue that they were unaware that their relationship status qualified their predicate offense as a misdemeanor crime of domestic violence under federal law.

II. LEGISLATIVE CHANGES

A. Reauthorizing the Violence Against Women Act

In an attempt to mitigate some of this confusion, Congress first considered an amendment, as part of the Violence Against Women Reauthorization Act of 2021, that would have extended the firearm prohibition to include persons convicted of misdemeanor crimes of stalking and closed the "boyfriend loophole" by broadening the definition of a misdemeanor crime of domestic violence to include "intimate partners" and expanding the definition of "intimate partner."[89]

Under existing law, "[t]he term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person."[90] Prior to the 2021–2022 reauthorization efforts, a "misdemeanor crime of domestic violence" was defined as an offense that qualifies as a misdemeanor under federal, state, or tribal law, and

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[91]

1. As Introduced

The Violence Against Women Reauthorization Act of 2021, as introduced in the House, looked to make three significant changes. First, the proposal sought to

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968 P.2d 281 ("[T]he party asserting that a common law marriage exists has the burden of proving: (1) that the parties were competent to enter into a marriage; (2) that the parties assumed a marital relationship by mutual consent and agreement; and (3) that the parties confirmed their marriage by cohabitation and public repute."). For example, in *In re* Estate of Alcorn, the Montana Supreme Court held that the existence of a common law marriage had been established where all three elements were met. *In re* Estate of Alcorn, 868 P.2d 629, 633 (Mont. 1994). In that case, it was undisputed that the couple had cohabitated for nearly nine years, and the court analyzed the following evidence to determine how the public viewed the couple: (i) whether the woman had taken the man's last name; (ii) whether the couple listed each other on tax, insurance, legal, or financial documents; (iii) how much of their free time they spent together; (iv) whether they regularly hosted people at their house; and (v) whether they cared for each other during illness. *Id.* at 631–33.

89. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 801 (2021) (as introduced in House, Mar. 8, 2021).

90. 18 U.S.C. § 921(a)(32).

91. 18 U.S.C. § 921(a)(33)(A)(ii) (2018) (amended 2022).

add misdemeanors under municipal law to the list of qualifying offenses[92] and to close the "boyfriend loophole" by inserting the term "intimate partner" after every mention of a "spouse" in the definition of a misdemeanor crime of domestic violence.[93] Second, the proposal intended to add an entirely new section following the existing "intimate partner" statutory language, expanding the definition as follows:

> a dating partner or former dating partner (as defined in section 2266); and any other person similarly situated to a spouse who is protected by the domestic violence or family violence laws of the State or Tribal jurisdiction in which the injury occurred or where the victim resides.[94]

Third, the amendment sought to insert a paragraph following § 922(g)(9) to close the "stalking loophole" by creating a tenth category of persons prohibited from possessing firearms: one "who has been convicted in any court of a misdemeanor crime of stalking."[95] Mirroring the proposed definition of a misdemeanor crime of domestic violence, the amendment aimed to define a misdemeanor crime of stalking in § 921(a) as an offense that is a misdemeanor under federal, state, tribal, or municipal law, and

> is a course of harassment, intimidation, or surveillance of another person that . . . places that person in reasonable fear of material harm to the health or safety of . . . that person; . . . an immediate family member (as defined in section 115) of that person; . . . a household member of that person; . . . or a spouse or intimate partner of that person; . . . or causes, attempts to cause, or would reasonably be expected to cause emotional distress to a person described [herein].[96]

2. As Engrossed

The engrossed version of the Violence Against Women Reauthorization Act of 2021 did not include significant changes to the proposed definition of a misdemeanor crime of domestic violence. The House of Representatives retained the addition of the term "intimate partner" in the definition and simply substituted the word "local" for the suggested inclusion of "municipal" in the list of qualifying misdemeanor offenses.[97] Additionally, the House did not alter the inclusion of persons convicted of misdemeanor crimes of stalking as a tenth category of persons prohibited from possessing firearms, nor the suggested definition of a misdemeanor crime of stalking.[98] Yet the proposed new section in the definition of an "intimate partner" received major alterations to include the following:

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92. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 801(2)(A) (as introduced in House, Mar. 8, 2021) (seeking to amend 18 U.S.C. § 921(a)(33)(A)(i) (2018)).

93. *Id.* § 801(2)(B) (seeking to amend 18 U.S.C. § 921(a)(33)(A)(ii) (2018)).

94. *Id.* § 801(1) (seeking to amend 18 U.S.C. § 921(a)(32) (2018)).

95. *Id.* § 802(1) (seeking to amend 18 U.S.C. § 922(g) (2018)).

96. *Id.* § 801(4) (seeking to amend 18 U.S.C. § 921(a) (2018)).

97. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 801(2) (as engrossed in House, Mar. 17, 2021).

98. *Id.* §§ 801(4), 802(1).

> a dating partner or former dating partner; and any other person similarly situated to a spouse. Nothing in this paragraph may be construed to require that sexual contact between two persons have [sic] occurred to establish the existence of any relationship for the purposes of this paragraph. For purposes of this paragraph, the term "dating partner" means, with respect to person, a person who is or has been in a social relationship of a romantic or intimate nature with the person.[99]

3. As Enacted

Advocates of the new provisions, recalling the failed reauthorization in 2019, were concerned that reviving the bill with identical amendments would merely result in a repeat of history.[100] While the core of the bill enjoyed bipartisan support, the provisions expanding firearm prohibitions to include those convicted of misdemeanor crimes of domestic violence or misdemeanor crimes of stalking raised red flags for lawmakers concerned about eroding Second Amendment rights.[101]

Before 2019, the NRA had never opposed reauthorizing the Violence Against Women Act,[102] and the organization's involvement forced Republican lawmakers to choose between "voting against a popular law to support victims of domestic and sexual violence, or voting against the gun lobby."[103] The NRA opposed the Violence Against Women Reauthorization Act of 2021, claiming that "anti-gun lawmakers chose to insert gun control provisions . . . to pit pro-gun lawmakers against it so that they [could] falsely and maliciously claim these lawmakers don't care about women."[104]

The House of Representatives approved the Violence Against Women Reauthorization Act of 2021 with bipartisan support; on March 17, 2021, the measure passed 244-172, and it was received in the Senate the next day.[105] President Joe Biden, who wrote and passed the original Violence Against Women Act in 1994, released a statement urging the Senate "to follow past precedent and bring a strong bipartisan coalition together to ensure the passage of VAWA."[106] On February 9, 2022, Senator Dianne Feinstein sponsored and introduced the

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99. *Id.* § 801(1).

100. Davis, *supra* note 6.

101. *See generally Congress Passes FY22 Appropriations Package with VAWA Reauthorization*, NRA-ILA (Mar. 15, 2022), https://www.nraila.org/articles/20220315/congress-passes-fy22-appropriations-package-with-vawa-reauthorization (outlining the NRA's political position regarding the proposed amendments); Davis, *supra* note 6 (discussing how the NRA's opposition of the firearm provisions tested lawmakers' support of the gun lobby).

102. Stolberg, *supra* note 7.

103. Davis, *supra* note 6.

104. *Id.*

105. *H.R. 1620 – Violence Against Women Reauthorization Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1620/all-actions (last visited Jan. 10, 2023).

106. *Statement by President Biden on the Passage of the Violence Against Women Reauthorization Act of 2021 in the House of Representatives*, WHITE HOUSE (Mar. 17, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/17/statement-by-president-biden-on-the-passage-of-the-violence-against-women-reauthorization-act-of-2021-in-the-house-of-representatives/ [https://perma.cc/TTJ4-BL9W].

Violence Against Women Reauthorization Act of 2022,[107] a bare-bones version of the bill that had passed in the House, stating the following on the Senate floor:

> This is not a perfect bill. I regret that certain provisions were not able to be included in this bill, most notably the closure of the "boyfriend loophole" to ensure that individuals convicted of domestic abuse against a dating partner could not purchase firearms. Individuals convicted of domestic violence against a spouse are already prevented from purchasing a firearm, and it is deeply disappointing that there is not sufficient bipartisan support for this commonsense provision to close this loophole. I would have liked to include those additional provisions, as would many of my Senate colleagues.[108]

The Violence Against Women Reauthorization Act of 2022 was ultimately included as part of the Consolidated Appropriations Act of 2022, which President Joe Biden signed into law on March 15, 2022.[109] VAWA was reauthorized without closing the "boyfriend loophole," extending the firearm prohibition to those convicted of misdemeanor stalking crimes, or redefining "intimate partner."[110] The definition of a misdemeanor crime of domestic violence, however, was successfully expanded to include offenses committed under "local law."[111] Senator Dick Durbin noted that the partisan split in the Senate meant that Democrats had to weigh the risk of failing to reauthorize VAWA against the value of the controversial new provisions.[112]

B. The Bipartisan Safer Communities Act

Just three months after the Senate failed to expand the firearm prohibition as part of the VAWA reauthorization, a group of senators announced a bipartisan agreement to reform gun safety that promised to revise the definition of a misdemeanor crime of domestic violence to include serious dating partners.[113] Predictably, closing the "boyfriend loophole" was one of the most significant

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107. *See generally* Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. (2022).

108. 117 Cong. Rec. S615 (daily ed. Feb. 9, 2022) (statement of Sen. Dianne Feinstein).

109. *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, § 1104(a), 136 Stat. 49, 921 (codified at 18 U.S.C. § 921(a)(33)(A)).

110. *See id.*

111. 18 U.S.C. § 921(a)(33)(A)(i).

112. Aris Folley, *Lawmakers Rolling Out Violence Against Women Act Without "Controversial" Provision*, THE HILL (Feb. 9, 2022), https://thehill.com/policy/finance/budget/593596-lawmakers-rolling-out-violence-against-women-act-without-controversial.

113. Lauren Fox & Devan Cole, *What's in the Bipartisan Gun Deal and What's Not*, CNN (June 13, 2022), https://www.cnn.com/2022/06/12/politics/whats-in-senate-gun-reform-agreement. The bipartisan agreement also promised to support (i) state and tribal crisis intervention programs; (ii) community-based mental health and suicide prevention programs; (iii) mental health initiatives in schools, such as early identification and intervention programs; (iv) school security and violence prevention efforts; and (v) telehealth programs improving access to mental and behavior health services. *Id.* Additionally, the proposed reforms would revise the definition of a federally licensed firearms dealer to improve compliance with federal background check requirements, increase penalties for straw purchasing and gun trafficking, and enhance background checks for firearm purchasers under the age of twenty-one. *Bipartisan Group of Senators Announce Agreement*, CHRIS MURPHY (June 12, 2022), https://www.murphy.senate.gov/newsroom/press-releases/bipartisan-group-of-senators-announce-agreement.

sticking points of bipartisan negotiations—serious dating partners, a relationship category which some legislators consider "nontraditional," proved difficult to define.[114]

Nonetheless, the Bipartisan Safer Communities Act was successfully enacted on June 25, 2022, expanding the firearm prohibition—though not retroactively—to include those convicted of misdemeanor crimes of domestic violence who had "a current or recent former dating relationship with the victim."[115] Lawmakers settled on defining dating relationships as those "between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature,"[116] and provided three factors to consider when determining whether a relationship falls within this category: (i) "the length of the relationship," (ii) "the nature of the relationship," and (iii) "the frequency and type of interaction between the individuals involved in the relationship."[117] Further, "casual acquaintanceship or ordinary fraternization in a business or social context" are explicitly excluded from the category.[118]

These factors, however, are far too general to provide practical guidance to factfinders attempting to categorize any relationship, much less determine whether a dating relationship is sufficiently "serious." Participants in most dating relationships struggle to align their perception of how "serious" the relationship is with that of their partner—some individuals believe a relationship becomes serious in its early stages, while others believe it remains casual for significantly longer. If the participants themselves have difficulty determining the seriousness of their relationship, then a factfinder will surely fail when armed with these three vague factors.

Moreover, how should courts now distinguish between individuals who are in a "continuing serious relationship"[119] and those who are "similarly situated to a spouse"?[120] While resolving such line-drawing questions is an appropriate jury function, lawmakers have failed to provide the context necessary for it to be an effective mechanism of determining which relationships trigger the firearm prohibition.

The Act also contains a related provision that lifts the firearm prohibition for offenders with "not more than [one] conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship . . . after [five] years have elapsed," so long as the individual has not subsequently been convicted

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114. Paul LeBlanc, *Here's What You Need to Know About the 'Boyfriend Loophole' Holding up Gun Safety Negotiations*, CNN (June 20, 2022), https://www.cnn.com/2022/06/19/politics/boyfriend-loophole-gun-negotiations-congress/ [https://perma.cc/B3NH-EDJL]. The NRA also reinvigorated its opposition of expanding the categories of those prohibited from possessing firearms. *Id.*

115. Pub. L. No. 117-159, § 12005(a)(1), 136 Stat. 1313, 1332 (2022) (codified at 18 U.S.C. § 921(a)(33)(A)(ii)); *see also* Fox, *supra* note 10.

116. 18 U.S.C. § 921(a)(37)(A).

117. *Id.* § 921(a)(37)(B).

118. *Id.* § 921(a)(37)(C).

119. *Id.* § 921(a)(37)(A).

120. *Id.* § 921(a)(33)(A)(ii). Notably, the Violence Against Women Reauthorization Act of 2021 had attempted to replace "similarly situated to a spouse" with "intimate partners," a category which the bill also proposed expanding to include dating partners. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021) (as engrossed in House, Mar. 17, 2021).

of any other disqualifying offenses under § 922(g)(9).[121] Oddly, the five-year restoration provision only applies to dating partners, while the lifetime firearm ban continues to apply to victims' spouses, parents, guardians, or cohabitants.[122] This disparity would make sense if the risk of femicide were lower in dating relationships than in more traditional relationships, but the reality is quite the opposite.[123]

Adding "dating partners" to the list of relationships that trigger the firearm prohibition, as well as attempting to replace the "similarly situated to a spouse" category with "intimate partner," are legislative efforts that appear to shift the law's focus further from traditional marital relationships. However, using any of these terms to determine the ambit of the rule still distracts from the law's intended function, reducing the policy question to the peripheral formalistic inquiry: "who is married or *most like* a married person"?[124] Although lawmakers purport to have created a non-traditional relationship category by adding serious dating partners, the factors accompanying the category's definition clearly track this antiquated quasi-marital framework.[125]

This relationship inquiry is problematic for two reasons. First, as demonstrated in Parts III and IV below, the power and control dynamics between individuals are a better measure of the risk of femicide than their relationship status—the "seriousness" of a relationship is not correlated with its lethality. Second, factors need context and an objective to be effectively implemented. Shifting the inquiry to evaluate the defendant's power and control over the victim would more precisely apply the firearm prohibition to high-risk offenders and avoid the definitional application issues and due process challenges arising from the quasi-marital framework.[126]

III. MARRIAGE SHOULD NOT BE THE STANDARD FOR PROTECTION

Given the law's acute and exclusive focus on quasi-marital relationships, an outsider looking in might infer that domestic violence must disproportionately affect married individuals.[127] In reality, women are at least as likely to be killed by

121. 18 U.S.C. § 921(a)(33)(C).

122. *Id.*

123. *See infra* Part III.

124. *See* Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1844 (2006) (emphasis added).

125. *See* LeBlanc, *supra* note 114; 18 U.S.C. § 921(a)(37).

126. *See supra* Section I.C.; *infra* Part V. In an attempt to close the "boyfriend loophole," a number of states have authorized firearm restrictions for dating partners as well as spouses subject to protective orders or convicted of domestic violence misdemeanors. *Domestic Violence & Firearms*, GIFFORDS L. CTR. (Mar. 25, 2022), https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/ [https://perma.cc/KD8Q-R5J2]. However, this approach has resulted in a patchwork of relationship definitions that often fail to trigger the federal firearm prohibition. *See supra* Section I.C.

127. The United States Supreme Court has resoundingly protected the institution of marriage, declaring it one of the "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "fundamental to our very existence and survival," Loving v. Virginia, 388 U.S. 1, 12 (1967). More recently, the Court deemed marriage to be "a keystone of our social order," proclaiming that "[n]o union

dating partners as by spouses,[128] and a report by the United States Department of Justice found that, "[f]or both men and women, divorced or separating persons were subjected to the highest rates of intimate partner victimization, followed by never married persons."[129] In fact, the highest rate of victimization of women was by perpetrators in the "friends and acquaintances" category, which the report defined as encompassing friends or ex-friends, roommates or boarders, schoolmates, neighbors, people at work or customers, and other non-relatives.[130]

A. Marriage and Domestic Violence: An Origin Story

Formal relegation of spousal abuse to the private sphere occurs as far back as early Roman society, where a woman was considered the property of her husband and, pursuant to laws enacted by a patriarchal legislature, a man could "beat, divorce, or murder his wife for offenses committed by her which besmirched his honor or threatened his property rights."[131] Roman society considered the husband's right of control over his wife to be a private matter, precluding public scrutiny of his actions.[132]

Religion also contributed to the continued societal degradation of women. The Old and New Testament perpetuated the idea that women who were not docile, chaste, or passive were subject to "death by mutilation or stoning," and the fifteenth-century Catholic church endorsed the view that women had no authority and that a husband was the judge of his wife's behavior and "should [first] bully and terrify his wife for [an] offense and, failing that, beat her."[133] According to the church, "wife battering showed the husband's concern for his wife's soul, which ultimately benefitted both husband and wife."[134]

With the modern era came a slight shift in attitudes—society began to limit the extent of punishment husbands could inflict upon their wives, and communities publicly shamed husbands for excessive beatings.[135] However, English common law continued to permit a husband to castigate his wife to maintain "family

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is more profound . . . for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family." Obergefell v. Hodges, 576 U.S. 644, 669, 681 (2015).

128. *See* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 19 (Morgan Young & Jill Thomas eds., 2011); Susan B. Sorenson & Devan Spear, *New Data on Intimate Partner Violence and Intimate Relationships: Implications for Gun Laws and Federal Data Collection*, PREVENTIVE MEDICINE, Feb. 2018, at 103, 103–04.

129. CALLIE M. RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE 5 (2000) (respondents' marital status was recorded at the time of the interview).

130. *Id.* at 8, 10.

131. Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 985 (1989).

132. *Id.*

133. *Id.* at 985, 985 n.31; *see also* TERRY DAVIDSON, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFEBEATING PATTERN 99 (1978).

134. Sewell, *supra* note 131, at 987, 987 n.32 ("Abusive attacks thus represented a method of control and a means of molding the wife in the image portrayed by Christian theologians and teachings."); *see also* DAVIDSON, *supra* note 133.

135. Sewell, *supra* note 131, at 987.

discipline and order," a practice which Sir William Blackstone "rationalized . . . based on a common law rule imputing a wife's misbehavior to her husband."[136]

The English common law's tolerance and rationalization of wife abuse was later adopted into the American legal system.[137] Although laws that developed in small religious communities in America during the colonial era initially departed from the common law's tolerance of family violence, they later realigned with English jurisprudence during the mass migration from Western Europe.[138] This realignment marked a distinct shift in public attitude, where "support of state interference in domestic matters for the good of the community yielded to the concept of family privacy."[139]

Domestic violence resurfaced in the late nineteenth century as a reform issue backed by temperance campaigners, social purist reformers, and feminists.[140] Initially, the judicial system was reluctant to revisit wife abuse and resisted reform, clinging to the English common law's justifications of family autonomy and privacy.[141] Public opinion eventually won out, however, and states began enacting statutes prohibiting husbands from abusing their wives.[142]

Nonetheless, even into the twentieth century, enforcement of these statutes focused on reconciliation and the preservation of the family unit rather than criminal sanctions against abusive husbands.[143] The unfortunate result of this judicial approach was that abuse victims were often denied legal aid and information about their rights, coerced into withdrawing criminal complaints, and encouraged to improve their appearance and seduce their husbands to keep them happy.[144]

The psychoanalytical theory of masochism emerged in the early 1900s and also perpetuated the idea that a wife was to blame for her husband's violence.[145] This theory, developed by Helene Deutsch, argued that masochism was central to female psychology and that women sought out abusive men to satisfy masochistic tendencies which derived from "innate penis envy and sadistic oedipal fantasies."[146] Psychoanalysts generally rejected the idea that men were to blame for their violence, concluding instead that these types of marital problems often stemmed from the wife's neediness and dissatisfaction, which they theorized were traits rooted in a problematic childhood.[147] As a result, women who filed criminal

136. *Id.*

137. *Id.*

138. *Id.* at 989–90 ("Prosecutions of private moral crimes, such as wife beating, incest, and child abuse declined, while public moral crimes such as drunkenness, prostitution, and vagrancy filled the courts.").

139. *Id.* at 990.

140. *Id.* at 991–92.

141. *Id.* at 992.

142. *Id.* at 992–93.

143. *Id.* at 994.

144. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 126, 138–41 (1987).

145. Sewell, *supra* note 131, at 995.

146. PLECK, *supra* note 144, at 158.

147. *Id.* at 160–63.

complaints against their husbands were frequently subject to psychological critique in an attempt to discover how they had caused the abuse.[148]

It was not until the mid-1980s that activists were able to garner enough public concern for the enormity of spousal abuse to persuade judges and legislators to address the problem and provide victim assistance in the form of legal aid and services.[149] Attempts to pass federal domestic violence legislation in the late 1970s and early 1980s were initially thwarted; opponents argued that domestic violence was strictly a state and local issue, and influential conservative groups like the Moral Majority insisted that federal intervention constituted an "unacceptable . . . intrusion into the domestic realm, an attack on the American family, and a means of funding feminist causes."[150] But by the mid-1980s, the federal government enhanced criminal penalties for domestic violence offenders and increased support to shelters for battered women.[151] Additionally, almost every state enacted statutes that "provide[d] protection for the victim, impose[d] sanctions on the abuser, provide[d] direction for law enforcement agents and the judiciary in handling spouse abuse cases, . . . allocate[d] funding for shelters and support services, . . . [and] authorize[d] courts to issue victim protection orders."[152]

While most of this successful state legislation was progressive, it still "followed a marital model of identifying which victims should be protected through the availability of shelters, civil protection orders, or criminal law enforcement."[153] Most states offered legal recourse only to married women or those in "marriage-like relationships characterized by a shared household, long-term relationship, sexually intimate relations, and children."[154]

Federal legislation has also remained focused on marital status. Following the 1996 enactment of the Defense of Marriage Act, a report from the General Accounting Office identified 1,049 "federal laws in which benefits, rights, and privileges [were] contingent on marital status."[155] When the Lautenberg Amendment was before Congress in 1996, Senator Frank Lautenberg's own testimony to President Clinton focused on a traditional marital relationship.[156] The Senator wove a tale about an "ordinary American woman" who loved her family but whose husband, "generally, a decent, law-abiding guy," sometimes lost his

148. *Id.*

149. Colker, *supra* note 124, at 1851–57; *see also* Sewell, *supra* note 131, at 996–97. It is also worth noting that domestic violence was termed "wife battering" or "wife beating" in the 1970s and 1980s, which further underscores the limited sociopolitical understanding of the issue at that time. *See generally* U.S. COMM'N ON C.R., UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982).

150. Sewell, *supra* note 131, at 998–1000; *see also* Colker, *supra* note 124, at 1856 n.62 (stating that conservative groups rallied against the domestic violence movement in an effort to preserve the sanctity of family and marriage). Notably, the United States Supreme Court has used similarly protectionist language about the institution of marriage. *See* cases cited *supra* note 127.

151. *See* Colker, *supra* note 124, at 1853.

152. Sewell, *supra* note 131, at 1002; *see also* Colker, *supra* note 124, at 1854–55.

153. Colker, *supra* note 124, at 1855.

154. *Id.* at 1857.

155. *Id.* at 1843 n.5 (quoting Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Acct. Off., to U.S. Representative Henry J. Hyde (Jan. 31, 1997)).

156. *See* 142 CONG. REC. S11876 (daily ed. Sept. 30, 1996) (statement of Sen. Frank Lautenberg).

temper and "str[uck] out violently at those closest to him" when life became stressful.[157]

Now in 2022, the Senate remains unwilling to expand the firearm prohibition beyond those relationships deemed sufficiently "marriage-like." This perpetuates the legal system's backward tradition of allocating protection to victims of domestic violence based on their relationship to the abuser instead of their risk of harm—in this case, femicide.[158]

B. Non-Marital Risk Factors and Vulnerability

The inappositeness of the current federal framework is exposed by the fact that domestic violence does not disproportionately affect women in quasi-marital relationships; thus, regardless of whether the relationship meets that threshold, women are still five times more likely to be killed if their abusive partner has access to a firearm.[159] Firearms are used in over half of all intimate partner homicides in the United States.[160] Between 1980 and 2008, guns were the most prevalent weapon used by intimate offenders against female homicide victims.[161] Furthermore, prior to killing their victims, "abusers who possess guns tend to inflict the most severe abuse," and abusers who use the firearm to threaten to injure or kill the victim are substantially more likely to commit femicide.[162] Although background checks do help prevent those with histories of domestic violence from accessing firearms, many abusers are able to bypass this barrier by turning to private, unlicensed sellers who are not required by federal law to screen buyers.[163]

Perhaps unsurprisingly, a prior history of physical violence continues to be the most predictive risk factor for intimate partner femicide because the majority of femicide victims are "physically abused before their deaths by the same intimate partner who killed them."[164] Encouragingly, "prior arrest for domestic violence actually decrease[s] the risk [of] femicide," indicating that responses involving effective adjudication of perpetrators and subsequent supervision through parole and risk management "can indeed be protective against domestic violence escalating to lethality."[165] However, in a substantial number of cases, victims of domestic abuse are unable to safely escape their abusers, much less involve law

157. *Id.*

158. *See* Folley, *supra* note 112.

159. *See* COOPER & SMITH, *supra* note 128; RENNISON & WELCHANS, *supra* note 129.

160. *Domestic Violence & Firearms*, *supra* note 126; *see also* James A. Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2015*, 4 VIOLENCE & GENDER 2, 37–43 (2017).

161. *See* COOPER & SMITH, *supra* note 128, at 20.

162. *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089–97 (2003) ("[F]emicide . . . [is] the homicide of women."); Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1412–17 (2004).

163. *Domestic Violence & Firearms*, *supra* note 126; *see also* CONNOR BROOKS, U.S. DEP'T OF JUST., BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2016−2017, at 6 (Edrienne Su ed., 2021).

164. Campbell et al., *supra* note 162, at 1091.

165. *Id.* at 1092.

enforcement to effect a conviction.[166] Indeed, "[m]ost intimate partner victimizations are not reported to the police" and "[t]he majority of victims who did not report their victimization . . . thought the police would not or could not do anything on their behalf."[167]

Although physical violence is one of the most conspicuous characteristics of domestic violence, it is but one tool abusers use to achieve power and control over their victims, and it is often combined with other coercive mistreatment to remind their target that the threat of harm is credible.[168] Many of these non-physical tactics are intended to restrict the victim's autonomy or otherwise impinge upon their freedom to leave their abuser. For example, one of the primary reasons victims of abuse remain in dangerous relationships is economic or financial manipulation, whereby the abuser frustrates the victim's ability to support themself, forcing the victim to be dependent on their abuser.[169] Diminished financial resources can hinder a victim's ability to secure alternative housing, forcing them "to choose between abuse at home and life on the streets."[170] In fact, sixty-three percent of homeless women have experienced domestic violence.[171]

Victims of domestic violence may also be coerced into using illegal substances by an abuser "who then sabotages their efforts toward recovery and threatens to undermine them with authorities . . . by disclosing their substance use."[172] The

166. *See Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/P6CM-YNCF].

167. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at v (2000).

168. *See* Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 86–88 (1998). *See generally Power and Control Wheel*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf (last visited Jan. 12, 2023).

169. *See Financial Abuse*, PA. COAL. AGAINST DOMESTIC VIOLENCE, https://www.pcadv.org/financial-abuse/ [https://perma.cc/3NJL-TNJC?type=image].

170. NAT'L COAL. FOR THE HOMELESS, DOMESTIC VIOLENCE AND HOMELESSNESS 2 (2009). Other factors contributing to housing instability of abuse victims include (i) a lack of affordable housing and long wait lists for assisted housing; (ii) discrimination by landlords against individuals with protection orders or other indicators of domestic violence, or landlords who evict victims when violence occurs in the rental property; and (iii) the fact that victims frequently have poor credit history and employment records as a result of the abuse that they have endured. *Id.*; *see also* Emily F. Rothman et al., *How Employment Helps Female Victims of Intimate Violence: A Qualitative Study*, 12 J. OCCUPATIONAL HEALTH PSYCH. 136, 136−43 (2007) (noting that intimate partner violence causes 21–60% of victims to lose their jobs due to their abuse). Additionally, individuals who live in "neighborhoods with high disorder, disadvantage, and poverty, and low social cohesion" are subject to an increased risk of intimate partner violence, and "underlying health inequities caused by barriers in language, geography, and cultural familiarity might contribute to homicides, particularly among racial/ethnic minority women." Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003-2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 745 (2017); *see also* Colker, *supra* note 124, at 1869 (noting that the "marriage-mimicry model reflects a middle-class bias" because middle-class individuals have longer-term marriages and more control over their households); SHANNON CATALANO ET AL., U.S. DEP'T OF JUST., FEMALE VICTIMS OF VIOLENCE 3 (2009) (concluding that "[b]lack females were four times more likely than white females to be killed by a boyfriend or girlfriend").

171. NAT'L COAL. FOR THE HOMELESS, *supra* note 170.

172. ECHO A. RIVERA ET AL., NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, THE RELATIONSHIP BETWEEN INTIMATE PARTNER VIOLENCE AND SUBSTANCE USE 2 (2015).

threat of revealing victims' substance abuse can obstruct their access to education, housing, government aid, employment, and child custody.[173] Abusers are thus often able to leverage drug addiction to gain ever-increasing control over their victims, which compounds to create a "chilling effect on [the victim's] ability to access safety and support and to retain custody of their children."[174]

The presence of children also significantly contributes to the abuser's ability to control the victim and can increase the victim's risk of death.[175] If the abuser is the father of the victim's children, he may "threaten to gain sole custody, kill, kidnap or otherwise harm [the] children" if the victim tries to leave.[176] Fathers who abuse the mothers of their children "are twice as likely to seek sole custody of their children as non-abusive fathers" and "[c]ourts award sole or joint custody to fathers in 70% of custody cases, despite the perception that mothers always win custody of children."[177] A woman is also more likely to be killed by her abuser if he is not the biological father of the child living in the home.[178] This statistic is especially concerning because, although sharing a "child in common" with the victim is one of the Lautenberg Amendment's recognized relationship categories, there is insufficient case law to clarify whether the abuser must be biologically related to the child to trigger the firearm prohibition.[179]

In sum, narrowly applying the firearm prohibition to those convicted of physically abusing a person with whom they share a quasi-marital relationship inappropriately focuses the law on the relationship status of the abuser and the victim instead of the dangerous dynamics between them that increase the victim's risk of femicide.

IV. CURRENT LAW CRIMINALIZES THE WRONG BEHAVIOR

A. Domestic Violence Prosecution

From a practical standpoint, domestic violence can be prosecuted under existing criminal laws that do not require a specific relationship between the offender and the victim, such as assault, kidnapping, and other physically violent crimes.[180] For some time, many jurisdictions followed this approach and did not

173. *Id.* at 2, 17.

174. *Id.* at 2.

175. *See* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1055 (2011); Campbell et al., *supra* note 162, at 1092. *See generally* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE & CHILDREN (2015), https://assets.speakcdn.com/assets/2497/children_and_dv.pdf [https://perma.cc/45PZ-V3NF].

176. *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 175.

177. *Id.*; *see also* Przekop, *supra* note 175.

178. Campbell et al., *supra* note 162, at 1090.

179. *See* 18 U.S.C. § 921(a)(33)(A)(ii). *See generally* D'Alessandro v. Pa. State Police, 937 A.2d 404, 410 n.4 (Pa. 2007) (noting that Pennsylvania's Protection from Abuse Act defines "family or household members" to include "persons who share biological parenthood").

180. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 554–55 (2007).

classify domestic violence as a separate offense in their criminal codes.[181] More recently, the federal government and most states have attempted to better contextualize domestic violence by designing statutes that apply only when a physically violent act occurs and the offender and the victim share a specific relationship.[182] However, this misdirected approach is based on an understanding of discrete, transactional criminal acts and, when "applied to domestic abuse, conceals the reality of an ongoing pattern of conduct occurring within a relationship characterized by power and control."[183]

Social science research has demonstrated that the cyclical pattern of domestic violence has three distinct phases, which include both physical and non-physical abuse:

> the tension-building phase, the acute-battering phase, and the contrite or "honeymoon" phase. The first phase, tension building, is characterized by seemingly minor incidents. The victim strives to please [their] abuser's desires, which are often irrational, anger-ridden, and ever-changing. Over time, the tension builds, with the abuser becoming increasingly more demanding, angry, and abusive. This continues until something snaps—there is a breaking point resulting in "an acute battering incident." . . . But this is not the end of the cycle. After the acute-battering phase, the abuser moves into the contrite, or honeymoon, phase, during which the abuser is apologetic, caring, even sweet; victims often describe an abuser as "the person they fell in love with." This phase rarely lasts. Soon the tension-building phase once again begins, and the entire cycle repeats itself.[184]

Current domestic violence law only criminalizes the "acute battering phase," which means that legal recourse is generally unavailable in ongoing relationships until the abuser's pattern of power and control escalates, enabling law enforcement to prosecute a unitary incident of abuse.[185] Punishing only a discrete act of physical violence is improper for two reasons: (i) it baldly ignores the extremely

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181. G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of* Deshaney, 29 COLUM. HUM. RTS. L. REV. 641, 673 n.147 (1998) ("Because most jurisdictions do not classify domestic violence as a separate crime, intimate violence is subsumed in general crime classifications, e.g., murders, rapes, larceny.").

182. *See* 18 U.S.C §§ 921(a)(33)(A), 922(g)(8)–(9); Deborah Tuerkheimer, *Breakups*, 25 YALE J. L. & FEMINISM 51, 65 (2013) (characterizing domestic violence statutes as "'assault-plus-relationship' laws"); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

183. Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960–61 (2004); *see also* Tina H. Nadeau, *Opportunity Lost, Opportunity Found: A Proposal to Amend Maine's Rule of Evidence 404 to Admit "Prior Acts" Evidence in Domestic Violence Prosecutions*, 62 ME. L. REV. 351, 355 (2010) ("'[D]omestic violence' encompasses a wide variety of behaviors through which an abusive partner exerts power and control, not all of which necessarily involve physical violence."); Burke, *supra* note 180, at 555, 567 ("Quantitatively, domestic violence, as a term of art at least, consists not just of a single incident, but of repeated acts by the same offender against the same victim. Qualitatively, the intention of the defendant is not solely to engage in the violent conduct with which he is charged. Rather, his intention is to exercise power over and restrict the autonomy of his victim.").

184. Patricia Sully, *Taking It Seriously: Repairing Domestic Violence Sentencing in Washington State*, 34 SEATTLE U. L. REV. 963, 983–84 (2011).

185. *Id.*; *see also* Tuerkheimer, *supra* note 182, at 55.

damaging non-physical violence that occurs in domestic abuse relationships;[186] and (ii) it fails to account for the fact that domestic violence perpetrators often reoffend against multiple victims, while implicitly perpetuating the antiquated notion that the abuser's violence was a momentary "loss of control" provoked by the victim's own behavior.[187]

For example, escalation often occurs when the victim attempts to leave the dangerous relationship.[188] Indeed, divorced or separated women are fourteen times more likely to report intimate partner violence by a spouse or ex-spouse,[189] and "the most extreme violence and the most severe injuries . . . [as well as] the majority of domestic violence fatalities happen shortly after separation."[190] The victim's efforts to escape frequently act as a catalyst for femicide, particularly when the abuser is highly controlling,[191] because "[w]omen who leave 'commit the ultimate act of rebellion, which triggers the fatal control/domination response from the abuser.'"[192]

> Ironically, the rage and overkill associated with the final act of wife killing is frequently seen as a mitigating factor fitting into a traditional framework for a heat of passion manslaughter defense. However, the very rage that judges and jurors view as lessening culpability is actually the culmination of a pattern of behavior which has terrorized the victim. Excessive violence in such circumstances actually demonstrates a conscious determination to kill; particularly for a batterer who has stopped short of murder previously in situations where equal "provocation" was present.[193]

Although the heat of passion defense has fallen out of favor, at least in the context of homicide within a relationship,[194] its policy justifications track society's

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186. *See* Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 330–38 (1997) (describing psychological as well as physical dynamics of domestic violence); Tuerkheimer, *supra* note 182, at 54, 57.

187. Dana H. Connor, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 917–18 (2006) (citing Edward W. Gondolf, *Do Batterer Programs Work?: A 15 Month Follow-Up of Multi-Site Evaluation*, 3 DOMESTIC VIOLENCE REP. 65, 66 (1998)). The frequency of recidivist abuse also counsels against punishing a single incident instead of a pattern of violence because "once an abusive incident has occurred . . . abusers tend to reassault at a rate of at least [39%]." *Id.*

188. *See* Myrna S. Raeder, People v. Simpson*: Perspectives on the Implications for the Criminal Justice System: The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. CAL. L. REV. 1463, 1483 (1996); Dalton, *supra* note 186, at 337–38 (discussing the dynamics of abuse, including the increased danger to women who leave abusive relationships); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64–65 (1991) (describing the same).

189. CAROLINE W. HARLOW, U.S. DEP'T OF JUST., FEMALE VICTIMS OF VIOLENT CRIME 5 (Thomas Hester ed., 1991).

190. *See* Sully, *supra* note 184, at 985; Mahoney, *supra* note 188, at 5–6.

191. *See* Campbell et al., *supra* note 162, at 1090; McFarlane et al., *supra* note 4, at 303.

192. Raeder, *supra* note 188, at 1483–84 (quoting Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138–39 (1993)).

193. *Id.* at 1480 (footnotes omitted).

194. *See, e.g.*, Girouard v. State, 583 A.2d 718, 723 (Md. 1991); Deborah E. Milgate, Note, *The Flame Flickers, but Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51

historical framing of domestic violence as male rage in the face of female provocation.[195] The concept that a man's homicidal act would be excused as a "loss of control," spurred by some perceived inadequacy in his victim, eerily resembles the victim-blaming inherent in permissive wife beating at early common law and in the twentieth century psychoanalytical theory of masochism.[196]

The "loss of control" narrative distracts from the typical abuser's pattern of violence and recidivistic behavior by focusing blame on the unique circumstances of a particular relationship. It is presumed that the circumstances giving rise to a reported outburst are unlikely to repeat because the abuser is unlikely to encounter another unusually provocative victim and lacks any "personal inclination to be violent with female intimate partners."[197] However, empirical studies demonstrate that domestic abusers tend to repeat their violent behavior in subsequent relationships: "[r]oughly 70% to 75% of domestic homicide offenders have been previously arrested and about 50% have been *convicted* for violent crimes."[198]

Thus, limiting domestic violence prosecution to instances of discrete, physical acts of violence fails to align with the modern understanding of domestic violence as the perpetrator's attempt to exercise power and control over the victim through patterned abusive conduct.

B. Stalking Prosecution

Stalking,[199] on the other hand, is a non-physical behavior which domestic violence offenders impose upon their victims as "an extreme form of dominance

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RUTGERS L. REV. 193, 211 (1998). *See generally* Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273 (2015) (discussing the feminist critique of the heat of passion doctrine and its history).

195. Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 94 (1992).

196. *Id.*; *see also* PLECK, *supra* note 144, at 125, 160–63 (noting that the psychoanalyst theory of masochism blamed a husband's domestic violence on his wife's neediness and dissatisfaction in the marriage); Sewell, *supra* note 131, at 985, 988.

197. Coker, *supra* note 195, at 76.

198. *Id.* at 89–90; *see also* Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218, 222−23 (Daniel Jay Sonkin ed., 1987) ("[A] person who has an already established pattern of woman beating or child abuse is likely to continue such abuse unless there is some intervention, such as criminal justice sanctions and/or treatment."). *See generally* Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse Is Charged*, 27 JUDGES J. 9 (1988) (discussing psychological factors which make abusers more likely to repeat their abusive behavior in subsequent relationships).

199. "Stalking is a course of conduct, including intimidation, surveillance or harassment, that places a person in reasonable fear of material harm to their health or safety or the health or safety of an immediate family member, household member, spouse or intimate partner, or pet." NAT'L COAL. AGAINST DOMESTIC VIOLENCE, STALKING (2020), https://assets.speakcdn.com/assets/2497/ncadv_fact_sheet_intimate_partner_stalking.pdf [https://perma.cc/3GEZ-7T27] (emphasis omitted). Stalking tactics can include the following: (i) "[u]nwanted following and watching of the victim"; (ii) "[u]nwanted approaching or showing up in places, such as the victim's home, workplace, or school"; (iii) "[u]nwanted use of global positioning system (GPS) technology to monitor or track the victim's location"; (iv) "[l]eaving strange or potentially threatening items for the victim to find"; (v) "[s]neaking into the victim's home or car and doing things to scare the victim or let the victim know that the perpetrator had been there"; (vi) "[u]se of technology . . . to spy on the victim from a distance"; (vii)

and control."[200] Yet the criminalization of stalking is implicitly conditioned upon the victim's separation from their abuser.[201] The cause of this separation "can take any number of forms, including breaking up, obtaining an order of protection, and dissolving a marriage by separation or divorce."[202]

However, stalking victimization does not occur exclusively in the aftermath of a separation; it frequently occurs during a relationship, and is often used in combination with other forms of violence to exert control over the victim.[203] Only 2.6% of women who have faced intimate partner violence—either rape, physical violence, or stalking—reported experiencing stalking without the other forms of violence.[204] Acquaintances and current or former intimate partners make up 40.6% and 43.4% of the perpetrators of female stalking victimization, respectively.[205]

The focus of existing stalking statutes is also inapposite, punishing the perpetrator's "pursuit" behavior in the context of his geographic distance from the victim instead of his attempt to gain control over her.[206] For example, the federal stalking statute criminalizes traveling interstate

> with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and *in the course of, or as a result of, such travel or presence* engages in conduct that (A) places that person in reasonable fear of the death of, or serious bodily injury to (i) that person . . . or (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that] person . . . .[207]

"[u]nwanted phone calls, including hang-ups and voice messages"; (viii) "[u]nwanted texts, emails, social media or photo messages"; and (ix) "[u]nwanted cards, letters, flowers, or presents." SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON STALKING—UPDATED RELEASE 1 (2022).

200. Tuerkheimer, *supra* note 182, at 54–57; *see also* Heather Melton, *Stalking in the Context of Intimate Partner Abuse: In the Victims' Words*, 2 FEMINIST CRIMINOLOGY 347, 361 (2007) ("Stalking may give the abuser greater control over his victim during the relationship and may be one of the many tactics batterers use to ensure that women stay in abusive relationships.").

201. Tuerkheimer, *supra* note 182, at 73.

202. *Id.* Obtaining a restraining order is not always enough to turn domestic violence into stalking, especially if the victim later returns to her abuser, even if only temporarily. *See* People v. Sirat, No. D036061, 2002 WL 555103, at *6–11 (Cal. Dist. Ct. App. Apr. 16, 2002). This can be especially problematic because most women make numerous attempts to leave, and it is unlikely that the initial attempt is successful. *See* Mindy B. Mechanic et al., *Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women*, 15 VIOLENCE & VICTIMS 55, 51–52 (2000). *See generally* Andrew J. Martin et al., *The Process of Leaving an Abusive Relationship: The Role of Risk Assessments and Decision-Certainty*, 15 J. FAM. VIOLENCE 109 (2000) (discussing psychological, emotional, and environmental reasons women return to abusive relationships); James C. Roberts et al., *Why Victims of Intimate Partner Violence Withdraw Protection Orders*, 23 J. FAM. VIOLENCE 369 (2008) (same).

203. *See* Tuerkheimer, *supra* note 182, at 54 ("Battering, emotional abuse, and stalking tend to be serial and ongoing and can occur during and after the termination of the romantic relationship."); SMITH ET AL., *supra* note 199, at 11.

204. MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 41 (2011).

205. SMITH ET AL., *supra* note 199, at 6.

206. Tuerkheimer, *supra* note 182, at 58–59.

207. 18 U.S.C. § 2261A(1) (emphasis added). The statute also prohibits the same stalking behavior conducted through surveillance by "mail, any interactive computer service or electronic communication

This approach to criminalization makes sense when the stalker happens to be a stranger—though the chances of that are statistically low[208]—and falls flat when stalking is viewed in the context of an ongoing, abusive relationship.[209] First, although "pursuit" behavior does occur within ongoing relationships, "the relationship status obscures criminality" because the necessary geographic distance effectively disappears in a domestic setting.[210] Second, absent the geographic distance, stalking more closely resembles domestic violence as a "course of conduct centered on controlling the victim through fear."[211]

Additionally, most research has focused on stalking that occurs once the victim and abuser part, perhaps because many women themselves do not identify the behavior as stalking until it endures after the relationship has ended.[212] As one study explained,

> [s]eparating psychological abuse, especially [the] monitoring and controlling aspects of psychological abuse, from stalking has proved to be particularly difficult for women . . . . This may especially be the case for women being stalked while they are living with or dating the stalking partner. In essence, a partner can monitor and control a woman through the traditional methods of stalking, such as surveillance, harassment, and threats; but may be able to reduce some of his behavior (e.g., surveillance) once he has established a certain level of control over her.[213]

Once again, the victim's legal recourse depends on her relationship status: if the relationship has ended, the abuser's patterned efforts to maintain power and control over the victim are criminal, but if the victim remains in a relationship with her abuser, the law only prosecutes his discrete, physically violent acts.[214]

State v. Vigil provides a vivid illustration of the disparate criminalization of a controlling pattern of abusive behavior before and after the victim's separation from her abuser.[215] In that case, the victim began dating her abuser when she was fifteen, moved in with him when she turned eighteen, and quickly became pregnant.[216] The abuser's subsequent conduct falls clearly within the ambit of domestic violence: verbal abuse quickly turned into physical abuse, and the

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service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce." *Id.* § 2261A(2).

208. SMITH ET AL., *supra* note 199, at 6.

209. Tuerkheimer, *supra* note 182, at 58–61. Notably, the federal interstate stalking statute does not contain a relationship requirement, but the federal interstate domestic violence statute applies only when the offender is the spouse, intimate partner, or dating partner of the victim. *Compare* 18 U.S.C. § 2261(a), *with id.* § 2261A. Convictions under either interstate statute trigger a firearm prohibition pursuant to § 922(g)(1) because each is punishable by a term of imprisonment exceeding one year. *See id.* §§ 2261(a), 2261A.

210. Tuerkheimer, *supra* note 182, at 59–60 (remarking that "the absence of physical separation only heightens the victim's vulnerability to patterns of controlling behavior").

211. *Id.* at 61.

212. *See* TK LOGAN ET AL., PARTNER STALKING: HOW WOMEN COPE, RESPOND, AND SURVIVE 7, 47, 107−47 (2006).

213. *Id.* at 289.

214. *See* Sully, *supra* note 184, at 982–84; Tuerkheimer, *supra* note 182, at 54–55.

215. *See* State v. Vigil, 65 S.W.3d 26, 28–30 (Tenn. Crim. App. 2001).

216. *Id.* at 28.

physical violence escalated after the victim gave birth to her son, resulting in several injuries.[217]

Believing he would hurt her son and kill her, the victim left the abuser and sought a protection order.[218] Following this separation, the abuser continued his controlling pattern of behavior: he visited the victim's house several times, at least once with a gun; mailed her a letter; tried to get into her house; tailed her in his car; and followed her to the supermarket where he tried to take their son from her.[219] A law enforcement officer testified that he had responded to at least ten domestic dispute calls involving the abuser at the victim's house, and on one occasion the abuser remained present at the scene, but the officer neither arrested him nor issued a citation.[220] That same officer was dispatched to the incident at the supermarket and still "did not arrest the [abuser] because he did not observe the misdemeanor assault being committed."[221] The officer finally arrested the abuser after responding to a domestic disturbance in progress at the abuser's parents' home where the "victim had locked herself in the house, and the [abuser] had kicked in the door and brought her outside."[222] The abuser was convicted of stalking.[223]

C. The Power and Control Disconnect

As the facts in *Vigil* demonstrate, the legal system's "failure to define accurately the nature and harm of domestic violence negates the experience of victims and effectively places battering outside the reach of criminal sanctions."[224] This piecemeal approach to criminalization does not reflect the reality that physical abuse and non-physical abuse, such as stalking, are part of the same behavioral cycle of domestic violence that exists independently of the abuser and victim's relationship. Indeed, the "archetypical case [of femicide] displays a continuous pattern of physical battering, psychological control and stalking activity," beyond the victim's separation from her abuser.[225]

Stalking, especially when coupled with physical assault, has been correlated with lethal and near-lethal violence against women.[226] A study of femicide and attempted femicide incidents in ten cities concluded that "76% of femicide victims and 85% of attempted femicide victims had experienced stalking within [twelve] months of their actual or attempted murder."[227] If a femicide victim experienced physical abuse prior to her murder, she was more likely to have been stalked by the perpetrator.[228]

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217. *Id.* at 28–29.
218. *Id.* at 29.
219. *Id.* at 29–30, 34–35.
220. *Id.* at 28.
221. *Id.*
222. *Id.*
223. *Id.*
224. Tuerkheimer, *supra* note 183, at 959–60.
225. Raeder, *supra* note 188, at 1473.
226. McFarlane et al., *supra* note 4, at 305, 312.
227. *Id.* at 311.
228. *Id.* at 309.

Among femicide victims who had been physically abused by the perpetrator, 89% had also been stalked, as compared to only 56% of femicide victims who had been stalked by the perpetrator but not physically abused.[229] Among attempted femicide victims, "91% . . . who reported [physical] abuse in the year prior to the incident also reported stalking compared to 68% of the nonabused women."[230] The study noted that "abused women are at the highest risk for further harm or actual death from the point of ending the relationship to about [two] years postseparation" and that although stalking has not traditionally been considered in risk profiles for lethality, it certainly exists "at the extreme end of the continuum of controlling psychologically abusive behaviors."[231]

Confronted with this data, there is little sense in separately prosecuting stalking and domestic violence, much less extending the firearm prohibition to misdemeanor convictions of the latter but not the former.[232] Physical abuse clearly occurs regardless of the perpetrator and victim's relationship status, and in fact often worsens when the relationship is terminated.[233] Stalking victimization, a non-physically abusive behavior, likewise exists independent of an ongoing relationship and, when combined with a history of physical abuse, indicates a high risk of femicide.[234]

V. PROPOSED SOLUTIONS

Numerous studies have demonstrated that (i) relationship status is not a valid measure of the risk of femicide;[235] (ii) firearms are the most common weapon used in femicide;[236] (iii) arrest for domestic violence reduces the risk of femicide, but the majority of intimate partner abuse is not reported to law enforcement;[237] (iv) stalking is highly correlated with violence and femicide, and it occurs during relationships as well as post-separation; [238] and (v) women are at the highest risk of further violence and death from the point of separating from their abuser to two years thereafter.[239]

Yet federal law is so deeply embedded in the quasi-marital framework that it neglects to account for these realities, and instead applies the firearm prohibition in

229. *Id.*

230. *Id.*

231. *Id.* at 311–12.

232. *See generally* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 199. Most states have the option of charging stalking offenses as felonies depending on the conduct at issue. *See* VIOLENCE AGAINST WOMEN GRANTS OFF., U.S. DEP'T OF JUST., STALKING AND DOMESTIC VIOLENCE 24 (1998). Felony stalking generally arises where the offender's conduct involves bodily injury, weapons, or violating a protective order; the victim belonged to an identifiable group; or the offender had prior stalking convictions. *Id.* at 24–25; *see also, e.g.*, 17-A M.R.S. § 210-A (2022). Offenders with felony convictions—crimes punishable by a term of imprisonment exceeding one year—are prohibited from possessing firearms. 18 U.S.C. § 922(g)(1).

233. *See generally* Connor, *supra* note 187.

234. McFarlane et al., *supra* note 4, at 303.

235. COOPER & SMITH, *supra* note 128.

236. *Id.*

237. *See Why Do Victims Stay?*, *supra* note 166; TJADEN & THOENNES, *supra* note 167.

238. *See* SMITH ET AL., *supra* note 199; McFarlane et al., *supra* note 4, at 303.

239. McFarlane et al., *supra* note 4, at 311–12.

ways that are incongruous to effectively reducing the risk of femicide. The sum effect of these gap-ridden laws is discussed below.

Because federal law does not prohibit stalking misdemeanants from possessing firearms, such offenders are disarmed only if they had prior stalking convictions or their conduct warrants felony sentencing because it involved crossing state lines, bodily injury, weapons, violating a protective order, or targeting a victim of an identifiable group.[240]

Victims of domestic violence can independently seek a court order to restrain their abuser from stalking them, but the order will not trigger the firearm prohibition under § 922(g)(8) unless the victim is an intimate partner of the abuser—this relationship category does not include dating partners.[241] The court order also only triggers the federal firearm prohibition if it is issued to restrain conduct that presents a threat to the victim's physical safety, which omits protection from the non-physical abuse inherent in domestic violence and commonly attached to stalking scenarios.[242] Further, federal law does not disarm abusers subject to temporary restraining orders issued in advance of the requisite hearing on the court order, a period of time during which victims are at a high risk of femicide in retaliation for their seeking legal recourse.[243]

Federal law similarly attaches a relationship requirement to nearly every domestic-violence-related firearm prohibition.[244] To obtain a successful § 922(g)(9) conviction of a domestic violence misdemeanant who has never had a marital relationship or shared children in common with the victim, the physical violence must have occurred during the relationship or soon after the relationship ended.[245] Further, the relationship between the victim and abuser must qualify as "similarly situated to a spouse"[246] or a "continuing serious relationship of a

240. *See* 18 U.S.C. §§ 922(g)(1), 2261A; VIOLENCE AGAINST WOMEN GRANTS OFF., *supra* note 232, at 24–25.

241. 18 U.S.C. § 922(g)(8). In this context, the term "intimate partner" does not expressly include "dating partners" but encompasses spouses, former spouses, parents, children, and those who cohabitate or have cohabitated with the offender. *Id.* § 921(a)(32).

242. *See* 18 U.S.C. § 922(g)(8); *supra* Part IV.

243. *See* McFarlane et al., *supra* note 4, at 311–12; *Why Do Victims Stay?*, *supra* note 166; Dalton, *supra* note 186, at 337–38; Mahoney, *supra* note 188; Daniel G. Atkins et al., *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WIS. WOMEN'S L.J. 69, 85 (1999).

244. *See, e.g.*, 18 U.S.C. §§ 922(g)(8)–(9), 2261(1), 2261A.

245. *See id.* § 921(a)(33)(A)(ii) (defining misdemeanor crimes of domestic violence to include offenses committed "by a person who has a current or recent former dating relationship with the victim"). Although it is unclear how courts will interpret the temporal aspect of "recent former" relationships, it is reasonable to assume that freshly severed relationships have a higher likelihood of qualifying under the statute. *See generally* cases cited in *supra* note 76. Studies have shown, however, that abused women experience the highest risk of femicide from the moment they end the relationship to about two years post-separation. McFarlane et al., *supra* note 4, at 311.

246. *See* United States v. Hayes, 555 U.S. 415, 426 (2009) ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way. But that relationship, while it must be established, need not be denominated an element of the predicate offense.").

romantic or intimate nature," such that the abuser knows that he belongs to a class of misdemeanants prohibited from possessing firearms under federal law.[247]

Even crimes that fall within the catch-all felony firearm prohibition generally track the quasi-marital framework.[248] For example, interstate domestic violence convictions require that the victim is a spouse, intimate partner, or dating partner of the abuser.[249] State-level domestic violence convictions that result in a sentence of imprisonment exceeding a year also trigger the firearm prohibition, but the underlying statute frequently includes a relationship element to distinguish it from simple assault crimes.[250]

Finally, as discussed above, court orders obtained to restrain the abuser from harassing, stalking, or threatening the victim will only prompt the firearm prohibition under § 922(g)(8) if the victim fits the definition of an intimate partner of the abuser.[251]

A. Legislative Changes

To fill these gaps, new legislation must be drafted that aligns with a modern understanding of domestic violence.[252] Congress should revise § 921(a)(33)(A) to include the following language:

> The term "misdemeanor crime of domestic violence" means an offense that is a misdemeanor under Federal, State, Tribal, or local law and involves conduct or a course of conduct intended to exert power and control over the victim, including the actual, attempted, or threatened use of physical force or a deadly weapon, harassment, or intimidation through surveillance or physical presence, committed by a person with whom the victim shares or shared a relationship.
>
> "Course of conduct" means a pattern of behavior composed of a series of acts, evidencing a continuity of purpose.[253]

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247. *See* 18 U.S.C §§ 922(g)(8)–(9), 921(a)(33)(A)(ii), 37(A); Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019); Eibler v. Dep't of Treasury, 311 F. Supp. 2d 618, 621–23 (N.D. Ohio 2004).

248. 18 U.S.C. § 922(g)(1).

249. *Id.* § 2261(1).

250. *See id.* § 922(g)(1); REINHART, *supra* note 25. Simple assault convictions with sentences of imprisonment exceeding one year also trigger the firearm prohibition, which enables states to prosecute domestic violence under general assault statutes. *See* 18 U.S.C. § 922(g)(1). While this caveat may seem to neatly avoid the quasi-marital framework while still prohibiting the abuser from possessing firearms, limiting intimate partner violence prosecution to acts of discrete, physical violence fails to criminalize the patterned behavior of both physical and non-physical conduct that victims experience. *See supra* Part IV.

251. *See* 18 U.S.C. §§ 921(a)(32), 922(g)(8)(B).

252. Other legal scholars have proposed statutes that better align domestic violence law with reality. *See* Tuerkheimer, *supra* note 183, at 1019–30 (proposing a "battering" statute requiring proof of a course of conduct that the defendant "knows or reasonably should know . . . is likely to result in substantial power or control" over the victim); Burke, *supra* note 180, at 601–11 (building upon Professor Tuerkheimer's call for a specialized domestic violence statute by suggesting a "coercive domestic violence" statute that prohibits "attempts to gain power or control over an intimate partner through a pattern of domestic violence").

253. *See generally* 18 U.S.C. § 2266(2) (defining "course of conduct" as "a pattern of conduct composed of [two] or more acts, evidencing a continuity of purpose"); Tuerkheimer, *supra* note 183, at

> "Relationship" means a sufficient dynamic of power and control created by circumstances including but not limited to economic reliance, such as financial and housing dependence, emotional or sexual involvement, and the presence of children.

This proposed amendment criminalizes both patterned and discrete behavior by importing some of the course of conduct language found in the § 2261A(1) stalking statute, broadens the definition of domestic violence to include both physical and non-physical behavior, and eliminates the quasi-marital framework limitation tied to the relationship requirement.[254]

By including non-physical conduct in the definition, the proposed statutory language recognizes that the cycle of domestic violence behavior largely consists of non-physically violent behavior and that a victim's lack of physical injury is not dispositive of the abuser's culpability.[255] Relatedly, applying an inchoate theory of liability avoids the typical "why didn't she leave" inquiry because an abuser's conviction will hinge on proof of their attempts to exert power and control over the victim, regardless of their success, rather than on evidence that they actually subjugated the victim.[256] This approach takes positive steps away from historical tendencies to victim-blame by permitting "the substantive criminal law to focus on the dynamics of domestic violence without talking solely about the psychological harm to victims."[257]

1020 (defining "course of conduct" as "a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose").

254. Although a full analysis is beyond the scope of this Comment, it is worth noting that it is unclear whether a firearm prohibition that takes non-physical violence into consideration would pass constitutional muster in light of the Supreme Court's recent related decisions. *See* Dist. of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010) (plurality opinion); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 2111 (2022). The Supreme Court has described regulations prohibiting felons and the mentally ill from possessing firearms as "presumptively lawful," which aligns with two of the nine categories of prohibited persons found in 18 U.S.C. § 922(g). *See Heller*, 554 U.S. at 626–27. This characterization was later reiterated by Justice Alito in his principal opinion in *McDonald*, *see McDonald*, 561 U.S. at 786, and by Justice Kavanaugh in his concurring opinion in *Bruen*, *see Bruen*, 597 U.S. at 2162 (Kavanaugh, J., concurring). However, the majority of the Supreme Court in *Bruen* interpreted *Heller* and *McDonald* as rejecting the use of any interest-balancing inquiry in the Second Amendment context. *Id.* at 2129. Instead, the *Bruen* Court adopted the following standard: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30. As discussed above, our Nation has historically failed to protect against domestic violence, much less the non-physical risk factors of femicide, which presents obvious barriers to demonstrating sufficient historical consistency for a related firearm prohibition to survive a Second Amendment challenge. *See supra* Parts III–IV. This hurdle, however, is not unique to § 922(g)(9), and delving further into such an analysis would distract from the present inquiry.

255. *See* Burke, *supra* note 180, at 555, 583 ("[T]he likelihood of inflicting serious physical injury is a misplaced measure of the level of a domestic violence defendant's culpability.").

256. See Tuerkheimer, *supra* note 183, at 1025–27, and Burke, *supra* note 180, at 602–11, for further discussion of the appropriate liability and mens rea in domestic violence law.

257. Burke, *supra* note 180, at 603–04 (critiquing the battered woman syndrome approach to domestic violence prosecution).

B. Jury Instructions

Until modernized legislation is enacted, courts should organically alter § 922(g)(9)'s application by implementing a new standard through jury instructions: autonomy.[258] Under current law, courts determine which category an offense falls into—"domestic violence" or "general violent crime"—by evaluating whether the victim's relationship with the abuser is sufficiently "marriage-like."[259] This practice is inapposite because it misses the critical aspect of the domestic abuse relationship: the power and control dynamics that weigh on a victim's dependence on their abuser and inability to exit a dangerous environment.[260]

The factfinder should instead measure autonomy through factors such as economic reliance (including financial and housing dependence), an emotional or sexual relationship, and the presence of children.[261] This jury instruction remedy would not require congressional approval,[262] and it would quell political concerns of overbroad application of the firearm prohibition and the erosion of Second Amendment rights by narrowly targeting only high-risk individuals while still effectively evading the antiquated quasi-marital framework.[263]

This approach also offers a defense to individuals charged with domestic violence misdemeanors whose relationships, while facially congruent with one of the § 921(a)(33)(A)(ii) categories, fundamentally lack the power and control dynamics associated with domestic violence. In these cases, defendants can raise a defense using the aforementioned factors to argue that their conduct was more akin to stranger violence and should be charged as simple assault, avoiding the inappropriate application of the collateral consequences associated with a misdemeanor domestic violence conviction.

One potential objection to this approach is that it appears to violate constitutional separation of powers principles, which the Framers "built into the tripartite Federal Government . . . [as] a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[264] Yet the lines between the powers of the branches were left intentionally forgiving

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258. *See* United States v. Turner, 871 F.2d 1574, 1578 (11th Cir. 1989) (concluding that a district court enjoys broad discretion in drafting jury instructions as long as the charge accurately reflects both law and facts); 26 MOORE'S FEDERAL PRACTICE — CRIMINAL PROCEDURE § 630.10 (2022) (noting that federal courts have "broad discretion in choosing the form and language of the jury instructions").

259. *See* 18 U.S.C. § 921(a)(33)(A).

260. *See supra* Section III.B.; Waits, *supra* note 168, at 41; *Power and Control Wheel*, *supra* note 168.

261. *See* United States v. Costigan, 2000 WL 898455, at *5 nn.14, 17 (D. Me. 2000), *aff'd*, 18 F. App'x 2 (1st Cir. 2001) (suggesting factors to consider in determining the depth of a relationship).

262. The United States Supreme Court has long recognized a district court's inherent power, not governed by rule of statute, to manage its affairs in the interest of the fair administration of justice. *See, e.g.*, Dietz v. Bouldin, 579 U.S. 40, 45 (2016).

263. *See generally* Stolberg, *supra* note 7; *Congress Passes FY22 Appropriations Package with VAWA Reauthorization*, *supra* note 101.

264. Buckley v. Valeo, 424 U.S. 1, 122 (1976).

because the Framers understood that an effective, workable government would require both separateness and interdependence.[265]

There is presently no coherence or harmony to the way trial courts have been instructing juries to interpret § 921(a)(33)(A)(ii), and the addition of the "dating partners" category further muddies the water. By asking juries to apply these factors, courts are not violating the separation of powers by engaging in judicial legislation, but simply giving meaning to legal terms not yet formally defined by the legislature. This is a patchwork solution designed to better align the application of the firearm prohibition with the original legislative intent—to keep firearms away from high-risk offenders—until Congress can pass improved legislation.

CONCLUSION

"Armed intimidation, violence, and abuse poses just as much a threat to victims' safety and wellbeing when the victims are married as when they are unmarried."[266] Thus, both state and federal domestic violence law should abandon the quasi-marital relationship framework and refocus prosecution on punishing the abuser's patterned and often lethal use of physical and non-physical tactics to exert power and control over the victim.

Incorporating this broader, modern understanding of domestic violence into our criminal justice system requires a fundamental reconceptualization of the law. While there have been significant efforts to enact more progressive legislation, none have come close to such substantive reform. This Comment has made clear that revising the definition of a misdemeanor crime of domestic violence to reflect this modern understanding of domestic violence is imperative to effectively applying the firearm prohibition to the most dangerous offenders, thereby reducing the risk of femicide.

265. *See* Loving v. United States, 517 U.S. 748, 756–57 (1996). Indeed, a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Valeo*, 424 U.S. at 121.

266. *Domestic Violence & Firearms*, *supra* note 126.