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When It's the First Time Every Time: Eliminating the "Clean Slate" of Pretrial Diversions in Domestic Violence Crimes

Rebecca G. Goddard
rebecca.goddard@valpo.edu

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WHEN IT'S THE FIRST TIME EVERY TIME: ELIMINATING THE "CLEAN SLATE" OF PRETRIAL DIVERSIONS IN DOMESTIC VIOLENCE CRIMES

I. INTRODUCTION

In the early morning hours of Christmas 2010, two of Samantha Miller's six children placed a frantic call to police. The children, ages twelve and thirteen, told the emergency dispatcher that their mother's boyfriend, Timothy Putnam, had been arguing with their mother and was holding her by her hair with a gun in his hand. When police arrived on the scene shortly after 2:40 a.m., they found Samantha with a gunshot wound to her head. She was transported to a local hospital, then transferred to Vanderbilt Medical Center where she died from her injuries. Samantha was a U.S. Army Veteran and Putnam was a military police officer at Fort Campbell, Kentucky at the time of the murder. Putnam initially told police he shot his girlfriend by accident. He later pleaded no contest to second-degree murder and was sentenced to fifteen years in prison.¹

Sadly, this was not the first time Putnam committed a domestic violence crime. In May 2009, he was arrested after he fired a gun at his then-wife in front of their children. In that incident, Putnam put a revolver to his head and threatened to kill himself. When the woman grabbed her three young children and ran from the house, he fired a shot into a desk. Prosecutors charged Putnam with domestic assault and three counts of reckless endangerment in conjunction with that episode. As a result, the court ordered Putnam to participate in domestic abuse and psychiatric counseling, and he received pretrial diversions on all charges.²

In cases like Putnam's, pretrial diversions offer a clean slate to offenders who successfully comply with specified terms for a short

¹ *Mom Dies After Christmas Morning Shooting, Boyfriend Charged*, WKRN (Dec. 25, 2010, 2:41 PM), <http://www.wkrn.com/Global/story.asp?S=13740278>, archived at <http://perma.cc/9BRU-8UH7>; *Timothy Putnam Pleads No Contest to Second Degree Murder*, LEAF CHRON., <http://www.theleafchronicle.com/VideoNetwork/2111917230001/Timothy-Putnam-pleads-no-contest-to-second-degree-murder> (last visited Mar. 5, 2015), archived at <http://perma.cc/9BRU-8UH7>; *Soldier Pleads in Murder Case*, EAGLE POST (Jan. 23, 2013), http://www.theeaglepost.us/fort_campbell/article_031706a4-6510-11e2-8d45-001a4bcf887a.html, archived at <http://perma.cc/XZG4-DE58>.

² *Military Police Officer Charged in Christmas Shooting Has History of Domestic Violence*, WOMEN'S SELF DEF. FED'N (Dec. 30, 2010), <http://womenselfdefensefederation.com/military-police-officer-charged-in-christmas-shooting-has-history-of-domestic-violence>, archived at <http://perma.cc/MRU-48DK>.

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period of time, usually six months to one year.³ At the end of that term, the prosecution dismisses the charges, which may then be expunged from the abuser's criminal history.⁴ For Putnam, this meant he would maintain his employment as a military police officer and would continue to own a firearm—a consequence that proved deadly for Samantha Miller.

Stories like this one are far too common.⁵ Victims of domestic abuse predominantly consist of women and children, while the vast majority of abusers are men.⁶ In fact, one in four women will become a victim of

³ See *infra* notes 78–80 and accompanying text (discussing the length of pretrial diversion agreements and commonly related treatment program requirements).

⁴ See *infra* notes 81–82 and accompanying text (evaluating the result of successful completion of a pretrial diversion agreement in various jurisdictions).

⁵ See Diana Moskovitz & Jared Goyette, *Father of 10-year-old Boy Killed in Aventura is Found Dead*, SUN SENTINEL (Mar. 12, 2010), http://articles.sun-sentinel.com/2010-03-12/news/fl-aventura-kid-shot-update-20100312_1_aventura-police-sunny-isles-beach-petition, archived at <http://perma.cc/3WQ4-BLMT> (describing the murder of a ten-year-old boy by his father). Erasmo Reina Moreno shot and killed his ten-year-old son, Esteban Reina Raigoso, before turning the gun on himself. *Id.* This tragedy occurred despite Moreno having had his gun previously confiscated by police following a prior domestic violence arrest. *Id.* The prior offense, committed against his wife while she was eight months pregnant, had been disposed of through a pretrial diversion. *Id.*; see also Mindrey Rodriguez-Sanchez, UNTIL DEATH DO US PART (Dec. 8, 2007), http://dvwatch.blogspot.com/2007_12_01_archive.html, archived at <http://perma.cc/J86D-2W6U> (describing the murder of Mindrey Rodriguez-Sanchez). On December 4, 2007, Humberto Cruz shot his estranged wife, Mindrey Rodriguez-Sanchez, to death and left her body in the doorway of his Christmas-lit house in Tampa, Florida. *Id.* Cruz had been arrested in September 2007 for choking his wife and received a pretrial diversion. *Id.* Within hours of the murder, Cruz committed suicide, and the couple left behind two daughters, ages eight and four. *Id.*; see also Sara Israelsen, *Shocked Orem Neighbors Describe 'Loving Pair'*, DESERET NEWS (Oct. 18, 2006), <http://www.deseretnews.com/article/650199607/Shocked-Orem-neighbors-describe-loving-pair.html>, archived at <http://perma.cc/35LC-9832> (describing the murder of Tonja Nash). Keith Morton received a diversion-like program stemming from an incident on Thanksgiving 2005 in which he attempted to strangle his girlfriend Tonja Nash. *Id.* He was still under the terms of that program on October 16, 2006 when he murdered the mother of two. *Id.* A report of the Utah Domestic Violence Council describes the attack in detail:

Neighbors said when Tonja Marie Nash ran from the house she didn't get far. Keith Lamont Morton pointed a shotgun and fired into her back. Morton then aimed at the fallen Tonja's head and pulled the trigger a second time before kicking her motionless body and walking back inside. . . . Following the shooting [her] two boys ran to their mother's bleeding body. Tonja was still alive when police arrived but she was pronounced dead when she arrived at a hospital.

UTAH DOMESTIC VIOLENCE COUNCIL, UTAH DOMESTIC VIOLENCE RELATED DEATHS 2006, 13–14, http://udvc.org/media/PDF/deaths/deaths_2006.pdf, archived at <http://perma.cc/HRJ5-7VMA>.

⁶ See MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS 1 (June 2005), available at <http://bjs.ojp.usdoj.gov/index>.

domestic violence within her lifetime.⁷ Domestic batterers have frighteningly high rates of recidivism.⁸ Despite the passage of state and federal laws to restrict the possession of firearms by batterers, more than three women per day are murdered by their husbands or boyfriends.⁹ Although the presence of a firearm greatly endangers the safety of women involved in abusive relationships, research suggests that limiting abusers' access to guns will result in less lethal domestic violence.¹⁰

The pervasiveness of various forms of domestic violence in the United States indicates that the criminal justice system's methods to resolve such cases are in desperate need of reform. Currently, most jurisdictions have some type of mandatory arrest laws.¹¹ These laws

cfm?ty=pbdetail&iid=828, archived at <http://perma.cc/DKA3-KJYV> (providing statistics on domestic violence and gender). According to the U.S. Department of Justice, Bureau of Justice Statistics, in a study of family violence between 1993 and 2002, 73% of family violence victims were female and 75 percent of perpetrators of family violence were male. *Id.* This Note will examine domestic violence crimes and the impact of their disposition on women, as does a great deal of the literature on the topic. This is a reflection of national statistics and is not intended to ignore the existence of male domestic violence victims.

⁷ See NAT'L COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1, 2 (July 2007), available at [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf), archived at <http://perma.cc/6JEJ-43AR> [hereinafter DOMESTIC VIOLENCE FACTS] (citing PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, NCJRS (2000)) (providing statistics on the prevalence of domestic violence in the United States).

⁸ See *infra* note 120 and accompanying text (discussing the tendency of domestic abusers to reoffend).

⁹ See *Get the Facts: The Facts on Domestic, Dating and Sexual Violence*, FUTURES WITHOUT VIOLENCE, http://www.futureswithoutviolence.org/content/action_center/detail/754 (last visited May 30, 2014), archived at <http://perma.cc/55KE-PVR7> (quoting SHANNAN CATALANO, *Intimate Partner Violence in the United States*, U.S. DEP'T. JUST. (2007), <http://www.bjs.gov/content/pub/pdf/ipvus.pdf> (last visited March 5, 2014), archived at perma.cc/GQ84-U2PP).

¹⁰ See JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, INTIMATE PARTNER VIOLENCE AND FIREARMS FACT SHEET 1, 2, available at http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf, archived at <http://perma.cc/3WYS-6HZN> [hereinafter INTIMATE PARTNER VIOLENCE AND FIREARMS FACT SHEET] (providing statistics on the relationship between firearms access and domestic violence related homicide). Domestic abuse involving firearms is twelve times more likely to result in death than non-firearm abuse. *Id.*; see also *infra* notes 107-11 and accompanying text (discussing the increased danger firearms present in abusive relationships).

¹¹ See AM. BAR ASS'N COMM'N OF DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf, archived at <http://perma.cc/NKF2-3D96> (listing the relevant statute pertaining to domestic violence arrest laws in each state and classifying arrest policies into three general categories: officer's discretion, mandatory arrest, and pro-arrest).

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frequently exist in conjunction with no-drop policies in prosecutor's offices.¹² In stark contrast to this outwardly stringent approach, a common practice in many states involves the use of pretrial diversion programs.¹³ These diversions require an offender to complete a brief period of probation and pay a fine.¹⁴ In exchange, the prosecution drops the charges and the offender does not receive a conviction.¹⁵

Although pretrial diversions provide a swift and efficient means of resolving cases, they are inherently problematic in domestic violence situations.¹⁶ Part II of this Note describes current laws and common practices related to domestic violence crimes.¹⁷ Part III analyzes the use of pretrial diversion programs as a resolution to criminal domestic violence charges.¹⁸ Finally, Part IV will propose eliminating the use of pretrial diversions in domestic violence prosecutions and will include three possible avenues for implementation of such a policy.¹⁹

II. BACKGROUND

The judicial system's approach to domestic violence has evolved significantly and currently includes several factors, which are considered in this Note. Part II.A defines domestic violence.²⁰ Part II.B explores the

¹² See *infra* notes 54–62 and accompanying text (explaining varying degrees of no-drop policies employed by prosecutors in domestic violence cases).

¹³ See *infra* notes 88–90 and accompanying text (discussing the prevalence of pretrial diversion programs as a means of resolving domestic violence prosecutions).

¹⁴ See Clifford Ward, *Kane County Unveils New Effort to Treat, Counsel Certain Domestic Abusers*, CHI. TRIB. (Oct. 13, 2010), http://articles.chicagotribune.com/2010-10-13/news/ct-met-kane-domestic-violence-1014-20101013_1_mutual-ground-domestic-abusers-domestic-violence, archived at <http://perma.cc/C3GX-2VGP> (detailing the terms of Kane County, Illinois' formal diversion program for domestic violence). Offenders participating in the Kane County program are required to pay a \$450 fee and make a \$200 donation to a domestic violence shelter, in addition to completing a specified course of counseling or other treatment within one year. *Id.*

¹⁵ See *id.* (providing that program participants are initially required to plead guilty to domestic violence, but upon successful completion of the program's terms, the charge will be dropped).

¹⁶ See *infra* notes 139–44 and accompanying text (exploring the consequences that arise from the use of pretrial diversions in domestic violence cases).

¹⁷ See *infra* Part II (describing current federal and state laws pertaining to and triggered by domestic violence crimes and also examining relevant law enforcement and judicial practices).

¹⁸ See *infra* Part III (analyzing the use of pretrial diversion programs in domestic violence crimes).

¹⁹ See *infra* Part IV (proposing that the use of pretrial diversion programs should be prohibited in prosecutions of domestic violence offenses).

²⁰ See *infra* Part II.A (providing statutory and social science definitions of domestic violence).

progression of judicial processing of domestic abuse crimes.²¹ Part II.C defines pretrial diversion in the context of this Note.²² Part II.D highlights some of the common scenarios in which pretrial diversion programs are employed.²³ Part II.E evaluates factors that impact the way domestic violence cases are prosecuted.²⁴

A. *Definition of Domestic Violence*

Acts of domestic violence are as varied as they are prevalent, with definitions provided by statutes as well as by social sciences.²⁵ Domestic violence is generally regarded as a pattern of abusive behavior used by one partner to gain or maintain control and power over the other partner, and can be physical, sexual, emotional, psychological, or economic, and can consist of actions or threats that influence another person.²⁶ This can include any behaviors that attempt to intimidate,

²¹ See *infra* Part II.B (explaining the emergence of several practices and policies used in domestic violence situations).

²² See *infra* Part II.C (discussing the elements of pretrial diversions and limiting the context in which it is discussed in this Note).

²³ See *infra* Part II.D (listing typical applications of pretrial diversions in criminal prosecutions).

²⁴ See *infra* Part II.E (exploring legal and social issues related to domestic violence prosecutions).

²⁵ See IND. CODE § 34-6-2-34.5 (2014) (defining domestic violence). Indiana statute provides:

“Domestic or family violence” means, except for an act of self-defense, the occurrence of at least one (1) of the following acts committed by a family or household member:

- (1) Attempting to cause, threatening to cause or causing physical harm to another family member or household member.
- (2) Placing a family or household member in fear of physical harm.
- (3) Causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress.
- (4) Beating (as described in IC 35-46-3-0.5(2)), torturing (as defined in IC 35-46-3-0.5(5)), mutilating (as defined in IC 35-46-3-0.5(3)), or killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member.

For purposes of IC 34-26-5, domestic and family violence also includes stalking (as defined in IC 35-45-10-1) or a sex offense under IC 35-42-4, whether or not the stalking or sex offense is committed by a family or household member.

Id.

²⁶ See *Domestic Violence: What is Domestic Violence?*, U.S. DEP'T OF JUSTICE, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Mar. 5, 2014), archived at <http://perma.cc/9GH5-JFLM> [hereinafter *Domestic Violence*] (defining domestic violence). Physical abuse can consist of hitting, slapping, shoving, grabbing, pinching, biting, hair pulling, etc., as well as forcing drugs or alcohol on a partner or denying medical care. *Id.* Sexual abuse involves coercing or attempting to coerce sexual contact without consent,

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humiliate, isolate, frighten, terrorize, threaten, hurt, or wound a partner.²⁷

The progressive pattern of violence in abusive relationships can have fatal consequences.²⁸ In 2007, 2340 deaths in the United States were related to domestic violence, accounting for approximately 14% of all homicides.²⁹ Domestic violence accounts for 40–50% of all murders of women in the United States, and in 70–80% of homicides, regardless which intimate partner was murdered, the male partner was found to have physically abused the female partner prior to the murder.³⁰ These

including, but not limited to, rape, attacks on sexual parts of the body, or treating a partner in a sexually demeaning way. *Id.* Emotional abuse includes undermining a partner's self-worth, including chronic criticism, name-calling, or damaging a partner's relationship with her children. *Id.* Psychological abuse can include creating fear through intimidation, threatening physical harm to a partner or others, destroying property, harming pets, or isolating a partner from family, friends, school, or work. *Id.* Economic abuse involves attempts to make a partner financially dependent by fully controlling financial resources, withholding a partner's access to money, or forbidding a partner's attendance at school or work. *Id.* See also EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 23 (2002), http://www.futureswithoutviolence.org/userfiles/file/Judicial/FinalCourt_Guidelines.pdf, archived at <http://perma.cc/LAVT-YZH3> (discussing the need for judges to understand that domestic violence is a pattern of abuse).

²⁷ See *Domestic Violence*, *supra* note 26 (providing descriptions of various types of domestic violence). Anyone can be a victim of domestic violence, regardless of race, age, sexual orientation, religion, or gender. *Id.* Such abuse happens at all socioeconomic backgrounds and education levels, and occurs in opposite-sex and same-sex relationships, involving partners who are married, cohabitating, or dating. *Id.* Domestic abuse extends beyond the partners involved to affect family members, friends, co-workers, and other witnesses, in addition to society as a whole. *Id.* Witnessing domestic violence also predisposes children to physical and social problems and increases their risk of becoming abusers or victims in the future by teaching them that such abuse is an acceptable way of life. *Id.*

²⁸ See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, UNDERSTANDING INTIMATE PARTNER VIOLENCE FACT SHEET, CDC 1 (2012), available at <http://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf>, archived at <http://perma.cc/7ZH3-9TBJ> (discussing the progression of violence in abusive relationships). Domestic violence often begins with emotional abuse and progresses into physical or sexual assault. *Id.* Physical assault is characterized by the use of physical force against another person. *Id.* The longer a victim stays in an abusive relationship, the more dangerous the situation becomes. *Id.* The effects of domestic violence may include isolation, depression, physical injuries, rape, or death. *Id.*

²⁹ *Id.* (citing Department of Justice, Bureau of Justice Statistics). Of these deaths, 70% were female. UNDERSTANDING INTIMATE PARTNER VIOLENCE FACT SHEET, *supra* note 28, at 1.

³⁰ See Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST. J. 14, 18 (Nov. 2003), <https://www.ncjrs.gov/pdffiles1/jr000250e.pdf>, archived at <http://perma.cc/R989-2PKG> (reporting the findings of a danger assessment study that revealed women are killed by domestic violence more often than by any other category of killer). Women threatened or assaulted with a gun by a partner are twenty

staggering statistics highlight the need for improvement in the criminal justice system's processing of domestic violence cases.

B. Judicial Treatment of Domestic Violence Cases

Historically, domestic violence in the United States justice system was not treated as a serious criminal matter.³¹ Rather, society viewed women as the property of their husbands, and wives were to be disciplined as husbands saw fit.³² Familial privacy was more important than protecting women from abuse.³³ For example, courts accepted that a man could whip his wife as long as the switch he used was no larger than his thumb.³⁴ To the extent that the legal system had any involvement with domestic matters, it was merely to establish guidelines

times more likely to be killed than other women. *Id.* at 16. Also, women threatened with murder by a partner are fifteen times more likely to be murdered. *Id.* These findings also revealed that female victims of domestic violence greatly underestimate the danger of their relationship. *Id.*

³¹ See MELISSA REULAND ET AL., POLICE-COMMUNITY PARTNERSHIPS TO ADDRESS DOMESTIC VIOLENCE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES 3, http://www.cops.usdoj.gov/Publications/domestic_violence_web3.pdf (last visited Oct. 16, 2014), archived at <http://perma.cc/6DWK-N2V2> (citing "noninterference" as the primary response of law enforcement officers to domestic violence situations). Although police were responsible for intervening in family violence, they typically had no recourse when responding to such calls and were directed not to make an arrest unless the victim was severely injured or the police officer personally witnessed the commission of the abuse. *Id.*

³² See *State v. Black*, 60 N.C. 266, 267 (1864) (providing justification for the position that a man can use physical means to discipline his wife, and guidelines for such discipline). The court stated:

A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.

Id.

³³ See, e.g., *State v. Rhodes*, 61 N.C. 453, 457 (1868) (holding that "however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber").

³⁴ See *id.* at 454 (citing the lower court's finding that a man had a right to whip his wife "with a switch no larger than his thumb"); *Black*, 60 N.C. at 267 (finding that a man has the right to use force against his wife as necessary to "make her behave herself").

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by which such family discipline should occur.³⁵ In 1871, Alabama was the first state to rescind the legal right of men to beat their wives.³⁶

Over time, society's position on domestic abuse began to change and increased awareness of its existence led to legal changes.³⁷ Organizations emerged and provided services to victims of domestic violence, mainly women and children.³⁸ One of the first domestic violence shelters opened in Maine in 1967.³⁹ In 1984, The Duluth Project became the country's first coordinated criminal justice response model for domestic violence.⁴⁰ Later that year, Congress passed the Family Violence Prevention and Services Act, which specifically designated federal funds for programs designed to serve women and children who were victims of domestic violence.⁴¹ The federal government took action by enacting

³⁵ *Rhodes*, 61 N.C. at 458. The court disagreed with the lower court's position, but found the defendant not guilty based on the notion that family privacy was a greater priority than domestic violence. *Id.* The court reasoned:

It will be observed that the ground upon which we have put this decision is not that the husband has the *right* to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife than where the wife whips the husband; and yet we would hardly be supposed to hold that a wife has a *right* to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.

Id. at 459.

³⁶ U.S. DEP'T OF JUSTICE, THE HISTORY OF THE VIOLENCE AGAINST WOMEN ACT, available at <http://www.ovw.usdoj.gov/docs/history-vawa.pdf> (last visited Oct. 16, 2014), archived at <http://perma.cc/4CZA-7GXF> [hereinafter *HISTORY OF THE VIOLENCE AGAINST WOMEN ACT*].

³⁷ See REULAND ET AL., *supra* note 31, at 3 (discussing the evolution of societal norms and the impact on law enforcement response to intimate partner violence).

³⁸ See *id.* at 4-5 (defining coalitions and explaining their focus as well as Coordinated Community Response ("CCR") models). These coalitions promote understanding of the domestic violence problem, assess current practices, and create mechanisms for sharing information between agencies and organizations. *Id.* at 5.

³⁹ *HISTORY OF THE VIOLENCE AGAINST WOMEN ACT*, *supra* note 36.

⁴⁰ *Id.*; *Home of the Duluth Model: Social Change to End Violence Against Women*, DAIP, <http://www.theduluthmodel.org/about/index.html> (last visited Oct. 16, 2014), archived at <http://perma.cc/QD8W-3M82>. The Duluth Model approach "[h]as ongoing discussions between criminal and civil justice agencies, community members and victims to close gaps and improve the community's response to battering." *Id.*

⁴¹ *HISTORY OF THE VIOLENCE AGAINST WOMEN ACT*, *supra* note 36. The Family Violence Prevention and Services Act ("FVPSA") is the largest source of funding for emergency services offered to domestic violence victims and their children, providing emergency shelters, crisis lines, counseling, and victim assistance. *Id.* Congress authorized \$175 million per year for FVPSA programs, but programs for children have not been enacted because FVPSA has been funded below \$130 million each year between 2002 and 2007. *Id.* at 1-2. FVPSA provides funding to over 2000 domestic violence shelters and safe-houses that provide core services, including physical shelter and protection for victims and

the Violence Against Women Act ("VAWA") as part of the Violent Crime Control and Law Enforcement Act of 1994.⁴² Congress reauthorized and expanded VAWA in 2000, 2006, and 2013, establishing new programs and strengthening federal laws.⁴³ Domestic violence and its effects received a great deal of attention in 2014 following media reports that several National Football League players were involved in domestic abuse incidents.⁴⁴

As society's view of the problem continued to change and the federal government took action, state policies also evolved.⁴⁵ Although police

children, hotline services, individual and group counseling, legal assistance, and referrals to other community services. *Id.* at 1.

⁴² 42 U.S.C. § 13981 (2012). This legislation requires a coordinated community response to domestic violence and other crimes against women, creates full faith and credit provisions to ensure that states enforce orders for protection that have been issued in other states, allows domestic violence victims to seek civil rights remedies, and provides federal funding for training of law enforcement and prosecutors as well as funding for victim's service organizations such as shelters and education programs. *HISTORY OF THE VIOLENCE AGAINST WOMEN ACT*, *supra* note 36.

⁴³ *See id.* (discussing the VAWA legislation that was signed into law in 2000 and 2006). As a result of VAWA, the Office on Violence Against Women ("OVW") was created in 1995 and became an independent office within the Department of Justice in 2003. FAITH TRUST INSTITUTE, *HISTORY OF VAWA 2*, available at <http://www.ncdsv.org/images/historyofvawa.pdf> (last visited Nov. 20, 2014), archived at <http://perma.cc/48UY-YNTP>. The OVW is responsible for legal and policy issues relating to violence against women, coordinates departmental efforts, provides technical assistance to communities across the country, and responds to requests for information regarding violence against women. *Id.* OVW has awarded over \$1.6 billion in grants, consisting of over 3700 discretionary grants and 500 STOP (Services, Training, Officers, Prosecutors) grants to states and territories. *Id.* These grants help state, tribal, and local governments and agencies train personnel and establish programs to help victims of violence and hold perpetrators accountable. *Id.* at 2-3. VAWA programs are also implemented by the Department of Health and Human Services ("HHS") which administers the National Domestic Violence Hotline and has expanded resources for domestic violence programs and shelters, and raises awareness of domestic violence in workplaces and among health care providers. *Id.* at 3. HHS also provides states with grants for rape prevention and education programs and helps build new community programs designed to prevent domestic violence. *Id.*

⁴⁴ Chris Serico, 'No More': NFL Stars, Celebs Team Up for Domestic Violence PSAs, TODAY NEWS (Oct. 22, 2014), available at <http://www.today.com/news/no-more-nfl-stars-celebs-team-domestic-violence-psas-1D80232711>, archived at <http://perma.cc/D64X-GCDU>. These incidents prompted NFL Commissioner Roger Goodell to collaborate with representatives of nineteen organizations and groups to discuss issues of domestic violence and sexual assault. *Id.* In addition to the PSA campaign, an NFL spokeswoman said that the NFL has "started to revise the league's conduct policy; begun conducting mandatory education sessions for league owners, players and personnel; and explored programs to promote character development and healthy relationships among children and young adults who play football." *Id.*

⁴⁵ *See* H. Morley Swingle et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220, 221 (2002) (discussing changes Missouri implemented in his handling of domestic violence situations). Missouri's creation of the crime of domestic

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officers became increasingly active in domestic violence situations, their biases created a tendency that domestic abuse crimes were not pursued as vigorously as other violent crimes.⁴⁶ Police officers were generally hesitant to arrest batterers and invest time in taking reports because so few cases were prosecuted.⁴⁷

Eventually police officers began to enforce warrantless arrest policies, authorized by state statute.⁴⁸ In considering the intentions of such practices, one scholar noted “[w]arrantless arrests mean immediate arrests are possible, further injury to the victim is avoided, and violent behavior is punished.”⁴⁹ Mandatory arrest policies go further than warrantless arrest statutes.⁵⁰ The mandatory arrest policies that currently exist in many jurisdictions mean that police officers responding to a call involving domestic abuse must arrest the perpetrator if there is probable cause for the officer to believe that abuse has occurred.⁵¹ The

assault in the second degree elevates the level of a violent offense that would have been a misdemeanor if committed against a stranger, to a felony when the victim is an intimate partner. *Id.* (citing MO. REV. STAT. § 565.070 (2000)). See generally HISTORY OF THE VIOLENCE AGAINST WOMEN ACT, *supra* note 36 (providing a timeline of significant events concerning society and the government’s response to violence against women); Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 874 (2013) (discussing the addition of specialized courts in Indiana, including domestic violence courts).

⁴⁶ See Gena L. Durham, Note, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 648 (1998) (comparing police response to domestic violence crimes to the response in other violent crimes).

⁴⁷ See Diane E. Reynolds, Note, *The Use of Pretrial Diversion Programs in Spouse Abuse Cases: A New Solution to an Old Problem*, 3 OHIO ST. J. ON DISP. RESOL. 415, 420 (1988) (discussing the evolution of police handling of domestic violence cases).

⁴⁸ See REULAND ET AL., *supra* note 31, at 1 (summarizing the changes in law enforcement response to domestic violence as societal norms evolved from treating domestic violence as a family matter to recognizing that domestic violence is as much a crime as a battery committed upon a stranger); Reynolds, *supra* note 47, at 420 (discussing warrantless arrest statutes as “an important step in triggering the criminal justice system to reduce violence”).

⁴⁹ Reynolds, *supra* note 47, at 420. Reynolds also notes negative implications of more frequent arrests, including the likelihood that the offender will become angrier and more abusive, fewer incidents may be reported as victims do not want to see batterers arrested and prosecuted, and that more frequent arrests without prosecution weakens the message that domestic violence is a crime. *Id.* at 420–21. However, these problems are often outweighed by the benefits of more frequent arrests. *Id.* at 420. For example, increased arrests leads to more frequent prosecutions, a greater likelihood of victim cooperation, and conveys the message that an abuser has committed a crime and a victim has a right not to be abused. *Id.* at 420–21.

⁵⁰ See Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 174 (2003) (comparing mandatory arrest policies to warrantless arrest statutes).

⁵¹ *Id.* In some states, officers are required to arrest a batterer, even if the victim is unwilling to testify. REULAND ET AL., *supra* note 31, at 4. These mandatory arrest laws have

distinction between warrantless arrest and mandatory arrest lies in the ability of the officer to use his discretion—in warrantless arrests he may choose whether to arrest a batterer, whereas mandatory arrest policies require him to make an arrest regardless of his assessment of the situation.⁵² These policies are often coupled with mandatory prosecution policies once a batterer is arrested.⁵³

The effect of a mandatory prosecution, or no-drop policy, is that a prosecutor files charges against a suspect arrested for domestic battery and moves forward with the prosecution, regardless of the wishes of the victim.⁵⁴ These prosecutorial policies may vary somewhat between jurisdictions, with some offices having hard no-drop policies, while others employ non-coercive no-drop policies.⁵⁵ A hard no-drop policy

been praised by advocates because the result is that victims no longer have to press charges against their abuser. *Id.* In light of evidence suggesting that arrest or prosecution policies alone may not prevent repeat domestic violence, many police agencies are attempting to enhance their responses to domestic violence victims through partnerships with community resources and other criminal justice agencies that make victim safety a priority. *Id.*

⁵² Han, *supra* note 50, at 174. Han analyzes four characterizations of mandatory arrest policies:

- 1) that they are disempowering because they take away control from victims of domestic violence; 2) that they empower victims by showing that the state will support their efforts to leave their batterers; 3) that mandatory arrest policies do take control away from victims, but that this usurpation of control is warranted while the victim is incapacitated by trauma; and 4) that this stage in law enforcement is neither empowering nor disempowering because it need not involve the victim at all, but is a matter between the defendant and the state.

Id. at 175 (citations omitted); see Tom B. Bricker, *Bad Application of a Bad Standard: The Bungling of Georgia v. Randolph's Third-Party Consent Law*, 44 VAL. U. L. REV. 423, 457–58 (2010) (discussing the third-party consent law as it relates to police responses to domestic violence).

⁵³ See Reynolds, *supra* note 47, at 421 (discussing the correlation between arrests and prosecutions of domestic violence crimes). “[T]he willingness of police to arrest batterers becomes a function of the prosecutor’s willingness to follow up those arrests with prosecution.” *Id.* at 422. Prosecutors are using a wider range of available options for handling domestic violence cases and policies vary greatly between jurisdictions. REULAND ET AL., *supra* note 31, at 1. These options include no-drop policies, evidence-based prosecution, and special district attorneys who are specifically assigned to domestic violence cases. *Id.*

⁵⁴ See Durham, *supra* note 46, at 650 (describing the characteristics of no-drop policies). No-drop prosecution began in the late 1980s largely due to high rates of dismissals of domestic violence cases in which the victim was not willing to testify. Robert C. Davis, Barbara E. Smith & Heather J. Davies, *Effects of No-Drop Prosecution of Domestic Violence Upon Conviction Rates*, 3 JUST. RES. & POL’Y 2 (Fall 2001), available at <https://www.ncjrs.gov/pdffiles1/Photocopy/193235NCJRS.pdf>, archived at <http://perma.cc/6GDK-EVZU>.

⁵⁵ See Davis et al., *supra* note 54, at 3 (discussing the differences between “hard” versus “soft” no-drop policies); Han, *supra* note 50, at 181 (describing the characteristics of no-drop policies).

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means that the state will use any and all means available to pursue the prosecution, including using evidence such as testimony of police officers, neighbors, and the excited utterances of the victim at the time of the abuse.⁵⁶ Strict versions of this policy can include the requirement that a victim testify or face prosecution for contempt for her refusal to testify.⁵⁷ Under the most extreme no-drop policies, a victim risks prosecution for false reporting or perjury if she subsequently recants a statement she made to a police officer indicating that abuse had occurred.⁵⁸ Justifications for this approach include victim safety, the benefit of society, emotional empowerment of victims, and even constitutional concerns based on equal protection violations.⁵⁹

⁵⁶ See Swingle et al., *supra* note 45, at 223–24 (discussing methods available to prosecutors when victims are uncooperative and explaining that the test for admissibility of an excited utterance is “whether a particular statement was made under such circumstances as to indicate trustworthiness”). An uncooperative victim’s prior inconsistent statement may be admissible as substantive evidence if she testifies at trial, but absent her testimony, there is nothing with which her prior statement is inconsistent. *Id.* at 223. See also Han, *supra* note 50, at 181 (explaining the implications of hard no-drop policies). Han suggests that such policies are actually detrimental to victims in domestic violence cases because of their rigidity and the potential consequences to victims who do not comply to the prosecutor’s satisfaction. *Id.*

⁵⁷ Durham, *supra* note 46, at 650. See Margaret E. Bell et al., *Battered Women’s Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Processes*, 17 VIOLENCE AGAINST WOMEN 71, 82 (2011) (discussing the benefits and risks of mandatory policies). Advocates believe these mandatory policies are beneficial in that they transfer responsibility for arrest and prosecution from the victim to the legal system, making the victim less susceptible to coercion to drop the charges. *Id.*

⁵⁸ Telephone Interview with Jeffrey D. Drinski, Prosecutor, Newton County, Indiana (Sept. 23, 2013) [hereinafter Drinski Interview]. Drinski notes that this approach can be problematic because it may deter a victim from reporting domestic violence incidents out of fear that she may face prosecution herself. *Id.* Drinski suggests that such a technique should be reserved for abuse involving severe injuries or in cases where there is a long history of repeat violence. *Id.*; see Swingle et al., *supra* note 45, at 222 (stating that holding a victim in contempt of court should only be used as a last resort in order to avoid further victimization); Linda G. Mills, Commentary, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 556 (1999) (“state actors’ abusive posture toward survivors comes dangerously close to mirroring the violence in the battering relationship.”).

⁵⁹ Han, *supra* note 50, at 181–82; see Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 206, 223–24 (1999) (suggesting that no-drop policies are constitutionally mandated based on the notion that police and prosecutors responding differently to domestic violence than to stranger assaults constitutes discrimination in the state’s provision of police protection, thus violating the victim’s right to equal protection). *But see* Davis et al., *supra* note 54, at 10 (criticizing no-drop policies for their negative effect upon a victim’s willingness to call the police when she becomes a victim of domestic violence). Critics of no-drop policies also argue that victims may be placed in greater jeopardy because prosecution may “result in blind anger and retaliation at the most convenient target—the victim.” *Id.* at 11.

In contrast to hard no-drop policies, a non-coercive no-drop policy allows a victim to make decisions regarding the extent of her own involvement in the prosecution.⁶⁰ In the event that the victim chooses not to cooperate, the prosecutor retains the authority to make the decision as to whether the prosecution will continue on the basis of other evidence.⁶¹ Further, some jurisdictions employing non-coercive no-drop policies require a victim to receive counseling from a victim advocate about the domestic violence cycle before she withdraws her cooperation.⁶² One scholar suggests that the criminal justice community's investment of time and resources in attempting to meet the needs of a victim often results in her increased willingness to cooperate in the prosecution of her abuser.⁶³

In terms of prosecuting domestic violence, it is worth noting that state statutes differ in terms of the type of relationship that must exist between the parties under domestic violence laws.⁶⁴ Generally, the

⁶⁰ Han, *supra* note 50, at 187. A third type of prosecutorial policy is a deferential policy, in which the victim has the ability to make the ultimate decision as to whether the abuser is prosecuted at all. *Id.*

⁶¹ *See id.* at 188 (discussing the implications of non-coercive no-drop prosecutorial policies). Without the victim's testimony, prosecutors can proceed with outside evidence including "[t]estimony of police officers, family members, and neighbors as to the state of the defendant, victim, and the home; photographs of physical injuries and property damage; medical records; audio tapes of emergency 911 calls; and excited utterances." *Id.*; *see also* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1174-75 (2002) (describing prosecutors' use and courts' acceptance of 911 calls and follow-up conversations as evidence in a criminal domestic violence trial).

⁶² Drinski Interview, *supra* note 58. This practice has been successfully employed in Newton County, Indiana and surrounding counties with counseling sessions conducted by victims' advocates from the North Central Indiana Rural Crisis Center. *Id.*; *see also* Han, *supra* note 50, at 188-89 (discussing requirements imposed on domestic violence victims seeking to withdraw their participation in the prosecution of their abusers). Not all prosecutors are receptive to victim requests to dismiss cases. *See* Bell et al., *supra* note 57, at 78 (describing a victim's experience in attempting to drop the charges against her abuser). The victim said the prosecutor "was nasty, made fun of me, she humiliated me in front of everyone." *Id.*

⁶³ Han, *supra* note 50, at 189. *See generally* Davis et al., *supra* note 54, at 7-9 (discussing the benefits and problems associated with no-drop prosecution of domestic violence). In a study of the results of no-drop prosecution policies, a large increase in guilty pleas and a significant decrease in dismissals followed implementation of the policy. *Id.* at 7. Researchers note that the success of the no-drop policy in the studied jurisdictions may not have been possible without the additional funding needed to provide training for police officers, judges, specialized officers who worked with prosecutors to conduct follow up investigations, and advocates to work with victims to ensure cooperation in prosecuting the abuser. *Id.* at 10. Another noteworthy result of the no-drop policy in the studied jurisdictions is an increase in pretrial diversion dispositions, which were virtually unheard of prior to the no-drop policy, but accounted for more than one in five dispositions following implementation. *Id.*

⁶⁴ DOMESTIC VIOLENCE FACTS, *supra* note 7, at 2.

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perpetrator and the victim must be current or former spouses, live together, or have at least one child in common.⁶⁵ Many states also include current or former dating relationships as qualifying relationships for domestic violence offenses.⁶⁶ This is important because the abuser meeting the state's definition of domestic violence serves as a predicate for other relevant state and federal statutes.⁶⁷

Once a domestic batterer has been arrested and charged with a crime, he has three basic options.⁶⁸ One option is to accept a plea agreement offered by the prosecutor.⁶⁹ In this scenario, the batterer would plead guilty to some offense, often a lesser charge, and is likely to receive a reduced sentence compared to what a defendant would typically receive if convicted at trial.⁷⁰ The second option is to take the

⁶⁵ *Id.* In some states, such as Missouri, a charge of domestic violence requires that the prosecutor prove the relationship between the defendant and victim as an additional element of the crime. Swingle et al., *supra* note 45, at 221 (citing MO. REV. STAT. §§ 565.072-74).

⁶⁶ See DOMESTIC VIOLENCE FACTS, *supra* note 7, at 2 (discussing the relationships that can meet statutory definitions of domestic violence).

⁶⁷ See CRIMINAL RESOURCE MANUAL 1117, RESTRICTIONS ON THE POSSESSION OF FIREARMS BY INDIVIDUALS CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE (July 2013), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm, archived at <http://perma.cc/ZUL6-CDB5> [hereinafter CRIMINAL RESOURCE MANUAL 1117] (providing instructions to U.S. Attorneys' Offices regarding the application and enforcement of 18 U.S.C. § 922(g)(9) ("The Lautenberg Amendment")). The *Criminal Resource Manual* reads:

As enacted the statute defines "misdemeanor crime of domestic violence" (MCDV) as any state or federal misdemeanor that - '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.'

Id.

⁶⁸ See Swingle et al., *supra* note 45, at 223 (detailing potential options for the defense of domestic battery prosecutions and the associated ethical considerations).

⁶⁹ See *id.* at 226 (explaining that plea agreements achieve justice while sparing the victim from incurring further trauma by testifying about the abuse).

⁷⁰ See Jonathan Schmidt & Laurel Beeler, *State and Federal Prosecutions of Domestic Violence*, 11 FED. SENT. R. 159, 160 (1998) (discussing the use of plea agreements in the resolution of misdemeanor domestic violence offenses without significant injury); Interview with Lake County, Indiana Court Referee Jeff Boling, November 7, 2013 [hereinafter Boling Interview] (explaining that while a plea agreement is initially offered by a prosecutor, it is also subject to approval by a judge, who may reject an agreement with which he does not agree).

case to trial, usually in front of a jury.⁷¹ This scenario is more costly, in terms of both financial and judicial resources.⁷² It likely also requires the victim, and any other individuals who witnessed the violence, to testify against the batterer, although some prosecutors are focusing on evidence-based prosecutions in which a case can proceed even without a victim present in court to testify.⁷³ A third, and increasingly popular option, is to enter into a pretrial diversion.⁷⁴

C. Definition of Pretrial Diversion

The specific terms of diversions can vary widely. In some jurisdictions, diversions require an admission of guilt.⁷⁵ Most involve a term of probation and can include such additional terms as restraining orders forbidding contact with the victim of the domestic assault or participation in a batterer's intervention program or anger management counseling.⁷⁶ For purposes of this Note, a discussion of diversion will focus on those arrangements that "suspend[] criminal justice case processing of a domestic violence related charge, with one or more of the following results: no charges filed, charges dismissed, or charges expunged."⁷⁷

⁷¹ See Davis et al., *supra* note 54, at 4 (discussing the necessity of trial in some domestic violence cases).

⁷² See *id.* at 10 (discussing the cost of domestic violence prosecutions). In a study of two jurisdictions in which no-drop prosecution policies had been implemented, researchers found that the proportion of cases proceeding to trial increased tenfold. *Id.* at 9. In one jurisdiction, researchers estimated that each misdemeanor domestic violence prosecution averaged a cost of \$1000 in federal funds alone, in addition to local contributions. *Id.* at 10.

⁷³ See Durham, *supra* note 46, at 652 (considering the roles of victims and witnesses in testifying at domestic violence trials); Davis et al., *supra* note 54, at 9 (discussing the success of two jurisdictions whose no-drop, or evidence-based, prosecution policies resulted in an increased conviction rate in domestic violence cases).

⁷⁴ See generally Reynolds, *supra* note 47, at 415 (evaluating the use of pretrial diversion agreements in domestic violence prosecutions).

⁷⁵ Jane Sadusky, *Prosecution Diversion in Domestic Violence: Issues and Context*, THE BATTERED WOMEN'S JUSTICE PROJECT 2 (July 2003). This type of diversion is referred to as a post-plea program. CATHERINE CAMILLETI, BUREAU OF JUSTICE ASSISTANCE, PRETRIAL DIVERSION PROGRAMS RESEARCH SUMMARY 2-3 (Oct. 25, 2010), available at <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>, archived at <http://perma.cc/VB3Z-UBNN>. In a post-plea diversion, an offender must plead guilty to the crime with which he has been charged and participate in court ordered programs. *Id.* at 2. Once the offender completes the terms of the diversion, the charges and plea are thrown out or dismissed. *Id.* at 2-3.

⁷⁶ See Sadusky, *supra* note 75, at 2 (discussing the terms commonly included in diversion agreements for domestic violence crimes). The three types of diversion programs that do not require an admission of guilt are statewide pretrial diversion programs, prebooking diversion programs, and postbooking diversion programs. CAMILLETI, *supra* note 75, at 2.

⁷⁷ See Sadusky *supra* note 75, at 2 (listing characteristics of typical diversion programs).

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The specific terms of pretrial diversions are usually determined by the prosecutor, who has wide discretion, and may also be influenced by the judge who will hear the case.⁷⁸ Terms of these diversions can vary widely between states and even between county or municipal jurisdictions within the same state.⁷⁹ Diversion agreements may require participation in some type of counseling program such as anger management, marital therapy programs, batterer intervention programs, or substance abuse treatment, beyond the diversion requirements contained in state statutes.⁸⁰

In addition to variations in the terms of pretrial diversions, the outcome that flows from them can vary greatly as well. For instance, the completion of a diversion program in some jurisdictions results in a

⁷⁸ See Interview with Newton County Superior Court Judge Daniel Molter, December 27, 2013 [hereinafter Molter Interview] (discussing pretrial diversion as it is typically applied in Newton County, Indiana); Reynolds, *supra* note 47, at 430 (discussing the role of the prosecutor in determining which cases should be diverted). Reynolds also suggests that specific eligibility requirements should be implemented to guide prosecutors' discretion in offering pretrial diversions to "avoid[] the danger of the program becoming a dumping ground for case overload, and maintain[ing] consistency in the types of defendants admitted." *Id.*

⁷⁹ See, e.g., IND. CODE § 33-39-1-8 (2008) (providing the terms under which a prosecutor may withhold prosecution). Indiana's statute provides that a pretrial diversion agreement may include conditions that the person:

- (1) pay to the clerk of the court an initial user's fee and monthly user's fee in the amounts specified in IC 33-37-4-1;
- (2) work faithfully at suitable employment or faithfully pursue a course of study or career and technical education that will equip the person for suitable employment;
- (3) undergo available medical treatment or counseling and remain in a specified facility required for that purpose;
- (4) support the person's dependents and meet other family responsibilities;
- (5) make restitution or reparation to the victim of the crime for the damage or injury that was sustained;
- (6) refrain from harassing, intimidating, threatening, or having any direct or indirect contact with the victim or a witness;
- (7) report to the prosecuting attorney at reasonable times;
- (8) answer all reasonable inquiries by the prosecuting attorney and promptly notify the prosecuting attorney of any change in address or employment; and
- (9) participate in dispute resolution either under IC 34-57-3 or a program established by the prosecuting attorney.

Id. The statute also provides that a pretrial diversion agreement "may include other provisions reasonably related to the defendant's rehabilitation, if approved by the court."

Id.

⁸⁰ See David Adams, *Treatment Programs for Batterers*, 5 CLINICS FAM. PRAC. 159, 162 (Mar. 2003) (providing examples of the wide range of minimum program durations in various states); CAMILLETTI, *supra* note 75, at 2 (discussing the conditions that are commonly imposed on defendants in diversion programs).

lesser conviction, while in others the result is a complete dismissal of all criminal charges stemming from the incident, and can also include expunging the record of the arrest.⁸¹ The diversion standards developed by the National Association of Pretrial Services Agencies ("NAPSA") state that enrollment in a pretrial diversion program should not be conditioned on a formal plea of guilty.⁸² Despite this, diversions are commonly used by most jurisdictions in a variety of case types because of their benefits.

D. Uses of Pretrial Diversion

Pretrial diversion programs have a wide variety of beneficial applications.⁸³ They may be used to resolve misdemeanor cases in specialized settings such as drug courts.⁸⁴ Traffic violations that are more severe than simple infractions are also commonly disposed of through diversion programs.⁸⁵ Diversions are also used in standard court settings for certain offenses, although some jurisdictions limit their use to criminal prosecutions involving nonviolent offenses.⁸⁶

⁸¹ Sadusky, *supra* note 75, at 6; see Melissa Hooper, Note, *When Domestic Violence Diversion Is No Longer an Option: What to Do with the Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 170 (1996) (providing that once a case was diverted under California law, the defendant's record would be expunged).

⁸² See NAT'L ASSOC. OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION viii (Nov. 2008), http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf, archived at <http://perma.cc/F8K-UAUB> (establishing standards to be implemented in pretrial diversion programs).

⁸³ See C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 345 (2012) (listing petty drug offenses, juvenile offenses, and family violence offenses as typical situations in which the use of pretrial diversion programs can be beneficial).

⁸⁴ See *id.* at 347-48 (considering pretrial diversion programs in the context of minor drug offenses); CAMILLETI, *supra* note 75, at 2-3 (discussing the types of pretrial diversions designed to assist different types of offenders). Diversion programs attempt to help offenders suffering from mental illnesses, drug or alcohol abuse, or co-occurring disorders by diverting them from the criminal justice system into treatment programs. *Id.* at 3.

⁸⁵ See *Infraction Diversion Program*, MONROE CNTY. PROSECUTOR, <http://www.monroe.prosecutor.us/criminal-justice/traffic-court-infraction-diversion-program/program-eligibility> (last visited Sept. 1, 2014), archived at <http://perma.cc/F4TF-B9LG> (detailing the infraction diversion program available for specific traffic offenses). Speeding and operating a vehicle with a suspended driver's license are typical examples of such violations. *Id.*

⁸⁶ See CAMILLETI, *supra* note 75, at 1 (providing the New York City diversion program as an example, which is limited to first-time offenders with nonviolent misdemeanor offenses and inadequate employment); Reynolds, *supra* note 47, at 425-26 (discussing Ohio's statute which prohibits the use of the diversion process for repeat offenders or those accused of a violent offense).

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Additionally, some state statutes restrict the use of pretrial diversions to only those offenders with no prior criminal history.⁸⁷

In many areas, diversions are the primary method of resolving domestic violence crimes.⁸⁸ One attorney's description of her community's approach highlights the prevalence of pretrial diversion as a catch-all for such cases:

Most first time offenders are given the option of the [pretrial diversion] which gives the offender an opportunity to successfully complete a period of probation, after which the case is dismissed. There are no criteria or guidelines for eligibility. Many practitioners, including probation officers, gave examples of seeing a wide range of defendants (e.g., a push and shove case to a case where a man put bruises all over his wife's body) receive the same sentence.⁸⁹

A similar situation was found in California, where diversion began "as a way of managing cases that were not considered too serious, [but] became a dumping ground for cases in which prosecutors did not believe they could get convictions, even where the violence was severe."⁹⁰ Moreover, in states such as New Jersey, cases are often downgraded or dismissed entirely when victims do not wish to pursue charges.⁹¹ This means that the diversion-type arrangement granted to Baltimore Raven football player Ray Rice in 2014 is actually a more severe outcome than a typical batterer would normally receive in New Jersey.⁹²

⁸⁷ Reynolds, *supra* note 47, at 425-26; see CAMILLETI, *supra* note 75, at 1 (listing eligibility conditions that may apply for common diversion programs, including prior criminal history, current charge, substance abuse history, mental health history, victim approval, restitution repayment, and arresting officer approval).

⁸⁸ See Hopkins, *supra* note 83, at 351-52 (evaluating the use of pretrial diversion programs in Arizona and Virginia).

⁸⁹ See Sadusky, *supra* note 75, at 7 (quoting a Mar. 25, 2003 telephone interview with Rhonda Martinson, J.D., of the Battered Women's Justice Project).

⁹⁰ Hooper, *supra* note 81, at 170. Counties were diverting offenders who were not eligible for the program as a means of clearing the court's calendar, and offenders were not monitored while participating in the diversion program. *Id.*

⁹¹ *Program that Accepted Ray Rice Rare in Domestic Cases*, USA TODAY (Sept. 16, 2014), <http://www.usatoday.com/story/sports/nfl/2014/09/16/program-that-accepted-rice-rare-in-domestic-cases/15704943/>, archived at <http://perma.cc/PH9C-C9GQ>.

⁹² See Scott Brown & Jamison Hensley, *Ray Rice OK'd for Diversion Program*, ESPN (May 21, 2014), http://espn.go.com/nfl/story/_/id/10960822/ray-rice-baltimore-ravens-accepted-pretrial-diversion-program, archived at <http://perma.cc/TMV3-GMCJ> (explaining that the pretrial intervention program is a diversion program that permits certain

The existence of pretrial diversion programs is typically authorized by state statute and may be limited to specific types of offenses.⁹³ However, some states, such as Utah, North Dakota, and Ohio, do not permit diversions in domestic violence cases.⁹⁴ Further, Utah's statute includes a provision that permits an uncooperative victim to be treated as an unavailable witness under the state's Rules of Evidence.⁹⁵ California eliminated its pretrial diversion program for domestic violence cases in 1996 under Chapter 641, instead requiring that prosecutors bring every domestic violence charge to trial and the

defendants to avoid formal prosecution); *Program that Accepted Ray Rice Rare in Domestic Cases*, *supra* note 91 (suggesting that Rice's case "appears to have been handled more harshly, in fact, because of his fame."). Rice was admitted into the pretrial intervention program after punching his then-fiancée in the face and knocking her unconscious in a hotel elevator. *Id.* Under the terms of the program, Rice agreed to receive anger management counseling and pay \$125 in fines. *Id.* This agreement was made available to Rice after his case was taken over by county prosecutors and moved from a lower-level municipal court. *Id.* According to ESPN:

Of the 15,029 people charged with assault in domestic violence cases from 2010 to 2013, [8203] had their cases dismissed or downgraded to a lower court, according to the data provided by the state judiciary. Nearly [3100] pleaded guilty, [thirteen] were found guilty at trial and nine were found not guilty.

Id.

⁹³ See IND. CODE § 33-39-1-8 (2008) (authorizing pretrial diversion programs for most misdemeanor offenses, Level 6 felonies, and Level 5 felonies, excluding the following: commercial driver's license holders charged with an offense involving the operation of a motor vehicle in accordance with the federal Motor Carrier Safety Improvement Act of 1999, or a person arrested for or charged with operating a vehicle while intoxicated). The statute also prohibits pretrial diversions for individuals under age eighteen who hold probationary driver's licenses and are charged with illegal possession, consumption, or transportation of alcohol by a minor; operation of a motor vehicle following suspension of certificate of registration, or in violation of restricted driving privileges; criminal recklessness involving a vehicle; obstruction of traffic using a motor vehicle; or criminal mischief while the defendant was operating a motor vehicle. *Id.* The Indiana statute contains no exclusion for domestic violence crimes. *Id.*

⁹⁴ See N.D. CENT. CODE § 29-01-16 (2013) (providing that an offense may be compromised except "[i]f the offense involves a crime of domestic violence as defined in section 14-07.1-01 or is a violation of section 12.1-20-05, 12.1-20-07, 12.1-20-12.1, or 12.1-20-12.2"); OHIO REV. CODE ANN. § 2935.36 (2006) (providing for pretrial diversion programs, but excluding "[p]ersons accused of an offense of violence"); OHIO REV. CODE ANN. § 2901.01 (defining "[o]ffense of violence" to include domestic violence under § 2919.25); UTAH CODE ANN. § 77-36-2.7(6) (LexisNexis 2014) (providing that "[t]he court may not approve diversion for a perpetrator of domestic violence").

⁹⁵ See UTAH CODE ANN. § 77-36-2.7(5) ("When the privilege of confidential communication between spouses, or the testimonial privilege of spouses is invoked in any criminal proceeding in which a spouse is the victim of an alleged domestic violence offense, the victim shall be considered to be an unavailable witness under the Utah Rules of Evidence.").

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defendant must enter a plea in response to the charges.⁹⁶ The National Council of Juvenile and Family Court Judges published a model state code for cases involving family violence, which prohibits diversions for such crimes.⁹⁷ Instead, the model code provides that the court may defer sentencing of a perpetrator who meets specific eligibility criteria if several conditions are satisfied, including a hearing in which the perpetrator enters a plea of guilty or a judicial admission to the crime.⁹⁸ When a prosecutor or judge weighs the possibility of a pretrial diversion agreement in a domestic violence case, a number of factors should be considered.

E. *Factors in Domestic Violence Prosecutions*

In a criminal case involving domestic violence, a judge or prosecutor should be aware of the implications that the disposition will have on the

⁹⁶ See Hooper, *supra* note 81, at 171 (discussing the changes in domestic violence prosecutions brought about by Chapter 641). Chapter 641 amends Penal Code § 1203.097. *Id.* California's terms of probation for domestic violence crimes now requires an offender complete a minimum of thirty-six months of probation, be subject to a criminal court protective order protecting the victim from further violence, a minimum fee of \$500, successful completion of a batterer's intervention program, and community service. CAL. PENAL CODE § 1203.097 (West 2014). Conditions of probation may also include requirements that the batterer make payments to a battered women's shelter of up to \$5000 and reimburse the victim for reasonable expenses resulting from the offense. *Id.* If it appears that the defendant is not performing satisfactorily in the program, a hearing can be held at the request of the probation officer, prosecuting attorney, or the court's own motion, to determine whether further sentencing should proceed. *Id.* Factors to be considered in such a hearing include violence by the defendant against the previous or a new victim, and noncompliance with any other condition of the probation. *Id.*

⁹⁷ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE (1994), available at http://www.ncjfcj.org/sites/default/files/modocode_fin_printable.pdf, archived at <http://perma.cc/JHP4-JVYD>. The National Council of Juvenile and Family Court Judges writes:

The Model Code was developed with the collegial and expert assistance of an advisory committee composed of leaders in the domestic violence field including judges, prosecutors, defense attorneys, matrimonial lawyers, battered women's advocates, medical and health care professionals, law enforcement personnel, legislators, educators and others. . . . [The Code] treats domestic and family violence as a crime which requires early, aggressive and thorough intervention.

Id. at v-vi.

⁹⁸ See *id.* at 15-16 ("Criteria adopted in many jurisdictions address the history and pattern of the perpetrator's violence, the severity of injuries to the victim, the criminal history of the defendant, the nature of the presenting crime (misdemeanor or felony), and prior diversion or participation in deferred sentencing."); Molter Interview, *supra* note 78 (suggesting that a court should consider the specific details of an arrest, rather than blindly granting diversion agreements).

offender in other areas of the law. Part II.E.1 defines the Lautenberg Amendment and details how it and similar state legislation can apply in domestic violence situations.⁹⁹ Part II.E.2 highlights the statutory penalty enhancements for repeat domestic violence offenses in selected states.¹⁰⁰ Part II.E.3 evaluates social factors that should be weighed when determining the appropriate course in the prosecution of a domestic violence offense.¹⁰¹

1. The Lautenberg Amendment

In addition to the requirements imposed on police officers and prosecutors at the state level, the federal government enacted gun control laws to prohibit gun possession by individuals who had been convicted of felony domestic violence crimes.¹⁰² Unfortunately, these laws did not originally apply to many batterers because domestic violence crimes in most states are misdemeanors.¹⁰³ In response to this

⁹⁹ See *infra* Part II.E.1 (explaining the intent and implications of the Lautenberg Amendment on individuals convicted of domestic violence crimes).

¹⁰⁰ See *infra* Part II.E.2 (discussing state statutes providing increased penalties for repeat domestic violence offenses).

¹⁰¹ See *infra* Part II.E.3 (considering the societal implications of various approaches to domestic violence prosecutions).

¹⁰² See 18 U.S.C. § 922(g)(8) (2012) (providing a federal statute forbidding convicted abusers from owning guns). The statute provides:

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

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

¹⁰³ See Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1457 (2005) (explaining the failure of previous gun control legislation to reach the

problem, Congress passed the Lautenberg Amendment in 1996.¹⁰⁴ This legislation went further than existing federal gun regulations, making it a crime for a person with a misdemeanor domestic violence conviction to possess a gun.¹⁰⁵ Since its enactment, the Lautenberg Amendment has been heavily criticized for its broad application and lack of exceptions.¹⁰⁶

majority of domestic abusers because the regulations applied only to convicted felons); *see also* 142 Cong. Rec. H10,434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder) (elaborating on the discrepancies between the laws). Representative Schroeder explains:

Our biggest problem is many States have not lifted domestic violence convictions to the level of a felony. They consider them a misdemeanor. Other States have allowed people, even though it is considered a felony, to plead guilty to a lesser crime. Therefore, when they do the checks for whether or not you should be able to buy the gun, an awful lot of people who have been convicted of domestic violence problems are able to escape.

Id.

¹⁰⁴ 18 U.S.C. § 922(g)(9). *See* 142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone) (offering hypothetical situations to illustrate the problem with the current law). Senator Wellstone cautions:

In all too many cases, unfortunately, if you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor. If the offense is a misdemeanor, then under the current law there is a huge loophole. We do not let people who have been convicted of a felony purchase that firearm. What the Senator from New Jersey is trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, of purchasing a firearm. For example, in my State of Minnesota, an act of domestic violence is not characterized as a felony unless there is permanent physical impairment, the use of a weapon, or broken bones.

Id.

¹⁰⁵ 18 U.S.C. § 922(g)(9).

(g) It shall be unlawful for any person—

(9) 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.

Id.

¹⁰⁶ *See generally* Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 827 (2000) (discussing the lack of a public interest exception to exclude police officers and military members from the law's application); *see also* CRIMINAL RESOURCE MANUAL 1117, *supra* note 67 (discussing the absence of an exception for police and military members in the Lautenberg Amendment). The *Criminal Resource Manual* elaborates:

Thus, as of the effective date, any member of the military or any police officer who has a qualifying misdemeanor conviction is no longer able to possess a firearm, even while on duty. We now have the anomalous situation that 18 U.S.C. § 925(a)(1) still exempts felony convictions for

Proponents of the Lautenberg Amendment point to the strong correlation between domestic violence and gun violence.¹⁰⁷ A 2001 study on homicide among intimate partners conducted by the Centers for Disease Control and Prevention revealed that female intimate partners are more likely to be murdered with a firearm than by all other means combined.¹⁰⁸

The Lautenberg Amendment seeks to protect victims of domestic violence by prohibiting all abusers from owning firearms.¹⁰⁹ The

these two groups. Thus if a police officer is convicted of murdering his/her spouse or has a protection order placed against them, they may, under federal law, still be able to possess a service revolver while on duty, whereas if they are convicted of a qualifying misdemeanor they are prohibited from possessing any firearm or ammunition at any time. Currently pending before Congress are at least two bills that would substantially modify the impact of the amendment to this section.

Id.; U.S. Dep't of Veterans Affairs, *Intimate Partner Violence*, NATIONAL CENTER FOR PTSD, <http://www.ptsd.va.gov/public/types/violence/domestic-violence.asp> (last visited June 29, 2014), archived at <http://perma.cc/6C3N-UK4V> (citing statistics pertaining to rates of intimate partner violence among Veterans and active duty service members).

¹⁰⁷ See CRIMINAL RESOURCE MANUAL 1117, *supra* note 67 (describing the impact of the Lautenberg Amendment on law enforcement). The *Criminal Resource Manual* explains:

This new provision affects law enforcement in three interrelated ways. First, it will assist in preventing those individuals who have demonstrated a propensity for domestic violence from obtaining a firearm. Second, it will assist law enforcement by providing a tool for the removal of firearms from certain explosive domestic situations thus decreasing the possibility of deadly violence. Finally, it will serve as a federal prosecution tool in certain situations where alternatives have failed.

Id. On average, more than three women per day are killed by an intimate partner, and guns are a significant factor in the level of lethality. *NNEDV Encourages Senate to Protect Victims from Gun Violence*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (Apr. 17, 2013), <http://www.nnedv.org/news/national/3670-toomey-manchin-amendment-2013.html>, archived at <http://perma.cc/RCM8-AH8A> [hereinafter *NNEDV Encourages*] (analyzing the correlation between murder rates and a domestic abuser's access to a gun).

¹⁰⁸ SARAH HENRY, BATTERED WOMEN'S JUSTICE PROJECT NAT'L CTR. ON PROTECTION ORDERS AND FULL FAITH & CREDIT, DOMESTIC VIOLENCE AND THE MILITARY (Apr. 24, 2013), available at https://bwjp.ilinc.com/perl/ilinc/lms/async_launch.pl?pvr_id=fpfppyr&session_id=32246807&activity_id=jxspjck&user_id=kyvbsbym&type=recording, archived at <http://perma.cc/7WC6-4KE6> (emphasizing the importance of reducing access to firearms in houses affected by intimate partner violence).

¹⁰⁹ See 18 U.S.C. § 922(g)(9) (discussing the requirements and effects of the Lautenberg Amendment); see also HENRY, *supra* note 108 (discussing the difficulty associated with the enforcement of the Lautenberg Amendment); MARY MALEFYT SEIGHMAN & DAVID R. THOMAS, NAT'L CTR. ON FULL FAITH AND CREDIT, MODEL LAW ENFORCEMENT POLICY: SERVING AND ENFORCING PROTECTION ORDERS & SEIZING FIREARMS IN DOMESTIC VIOLENCE CASES 19 (Oct. 2005), available at <http://www.fullfaithandcredit.org/files/bwjp/files/ModelLEPolicyFINAL.pdf>, archived at <http://perma.cc/5SDD-NBMP> (providing

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rationale for the law is apparent from the comments of the sponsor of the Amendment, Senator Frank Lautenberg, who referred to the provision as “nothing short of a matter of life and death.”¹¹⁰ Senator Lautenberg went on to testify that “in households with a history of battering, the presence of a gun increases the likelihood that a woman will be killed threefold . . . all too often, the difference between a battered woman and a dead woman is the presence of a gun.”¹¹¹ The statute provides that:

[i]t 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.¹¹²

Under this Amendment, batterers who own guns are to surrender them upon entry of a domestic violence conviction.¹¹³ Individuals who violate this law can receive a fine and a sentence of up to ten years in prison.¹¹⁴

Some form of gun control aimed at domestic abusers exists in most states, although the specifics of those laws vary widely, with some states prohibiting all gun ownership by an individual convicted of domestic violence, while others only restrict firearms actually used in the commission of a domestic violence offense.¹¹⁵ A statute prohibiting gun

model policies and standard operating procedures intended for use by law enforcement agencies involved in domestic violence cases).

¹¹⁰ 142 Cong. Rec. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

¹¹¹ *Id.*; see GEORGIA COALITION AGAINST DOMESTIC VIOLENCE & GEORGIA COMM’N ON FAMILY VIOLENCE, FINDINGS AND RECOMMENDATIONS FROM THE GEORGIA DOMESTIC VIOLENCE FATALITY REVIEW PROJECT 12 (Dec. 2004), available at <http://gcadv.org/wp-content/uploads/2011/01/Fatality-Review-Annual-Report-2004.pdf>, archived at <http://perma.cc/9T5W-KF9G> [hereinafter GEORGIA COALITION] (acknowledging that homicide can be committed without guns, but evaluating “the intersection of gun access with significant events” and questioning “what if the offender did not possess such a lethal weapon at the time of such an intense event in his life?”).

¹¹² 18 U.S.C. § 922(g)(9).

¹¹³ See Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 949 (2003) (discussing the challenges in enforcing the Lautenberg Amendment and similar state laws).

¹¹⁴ 18 U.S.C. § 924(a)(2).

¹¹⁵ See INTIMATE PARTNER VIOLENCE AND FIREARMS FACT SHEET, *supra* note 10, at 3–4 (discussing the differences in state laws pertaining to firearms and domestic violence). Some states have regulatory systems that far exceed federal law, some are only slightly more restrictive than federal law, and others simply rely on the federal protections. *Id.* See, e.g., IND. CODE § 35-47-4-7 (2014) (prohibiting possession of a firearm by a person convicted

ownership by a person with a domestic violence conviction exists in Indiana, but unlike the Lautenberg Amendment, the Indiana law includes the terms upon which an individual can petition for restoration of the right to possess a firearm, provided the petition is filed at least five years after the date of conviction for a domestic violence offense.¹¹⁶ According to the Indiana statute, factors the court should consider when deciding whether to restore an individual's right to possess a firearm include: whether the person has been subject to any variety of protective order or another court order that prohibits the person from possessing a firearm, completion of substance abuse programs or parenting classes, whether the person still poses a threat to the victim of the domestic abuse, and whether there is any other reason the person should not be permitted to possess a firearm, including the commission of a subsequent offense.¹¹⁷

2. State Statutory Penalty Enhancements for Repeat Offenses

In addition to treating domestic violence crimes more seriously, many state legislatures took a more aggressive approach to the problem of repeat offenders. For example, in Indiana, the first time a person is charged with a crime of domestic abuse, he may be charged with a Class A Misdemeanor; however, if a person is charged with a crime of domestic abuse and has a prior conviction for a similar offense, the charge is elevated to a Class D Felony.¹¹⁸ In other states, such as Utah,

of domestic violence, but allowing the offender to petition the court for restoration of rights beginning five years from the date of the conviction, provided the individual meets specified criteria). *But cf.* ALASKA STAT. 18.66.100(C)(6)-(7) (2014) (providing that a protective order may "prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence" and may direct the respondent to surrender any such firearm). *See generally* BATTERED WOMEN'S JUSTICE PROJECT NATIONAL CENTER ON PROTECTION ORDERS AND FULL FAITH & CREDIT, FIREARMS AND DOMESTIC VIOLENCE: STATE AND TERRITORIAL STATUTORY PROVISIONS (Nov. 2010), available at <http://www.fullfaithandcredit.org/files/bwjp/files/Firearms%20and%20Domestic%20Violence%20State%20and%20Territorial%20Statutory%20Provisions%20Matrix%202010%20%28Updated%2011-17-10%29.pdf>, archived at <http://perma.cc/N7KK-W45F> (listing and explaining the firearms statutes for each state within three categories: (1) civil protection orders, (2) criminal offenses, procedures, orders, and prohibited transferees, and (3) licenses/permits, background checks, and miscellaneous provisions).

¹¹⁶ *See, e.g.*, IND. CODE § 35-47-4-7 (providing that "a person who has been convicted of a crime of domestic violence may not possess a firearm.").

¹¹⁷ *See id.* (providing criteria to be considered by the court when ruling on a convicted domestic batterer's petition for reinstatement of the right to possess a firearm).

¹¹⁸ IND. CODE § 35-42-2-1.3. The statute provides:

- (a) A person who knowingly or intentionally touches an individual who:

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the underlying crime may be a lower level offense than in Indiana, but a subsequent offense still carries an enhanced penalty.¹¹⁹ These statutory

-
- (1) is or was a spouse of the other person;
 - (2) is or was living as if a spouse of the other person as provided in subsection (c); or
 - (3) has a child in common with the other person;
- in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A Misdemeanor.
- (b) However, the offense under subsection (a) is a Level 6 felony if the person who committed the offense:
- (1) has a previous, unrelated conviction:
 - (A) under this section (or IC 35-42-2-1(a)(2)(E) before that provision was removed by P.L. 188-1999, SECTION 5); or
 - (B) in any other jurisdiction, including a military court, in which the elements of the crime for which the conviction was entered are substantially similar to the elements described in this section; or
 - (2) committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense.

Id.

¹¹⁹ See UTAH CODE ANN. § 77-36-1.1 (West 2014) (providing enhanced offenses and penalties for subsequent domestic violence offenses).

- (1) For purposes of this section, “qualifying domestic violence offense” means:
 - (a) a domestic violence offense in Utah; or
 - (b) an offense in any other state, or in any district, possession, or territory of the United States, that would be a domestic violence offense under Utah law.
- (2) A person who is convicted of a domestic violence offense is:
 - (a) guilty of a class B misdemeanor if:
 - (i) the domestic violence offense described in this Subsection (2) is designated by law as a class C misdemeanor; and
 - (ii) (A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or
 - (B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense;
 - (b) guilty of a class A misdemeanor if:
 - (i) the domestic violence offense described in this Subsection (2) is designated by law as a class B misdemeanor; and
 - (ii) (A) the domestic violence offense described in this subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

enhancements recognize that battering is rarely an isolated incident, and that it tends to increase in both frequency and severity over time.¹²⁰ In addition to statutory concerns, domestic violence prosecutions also have substantial societal implications.

3. Societal Implications

Domestic abuse has substantial effects on society as a whole, from those family members directly involved in abusive situations, to extended family, friends, and even employers. Between 1996 and 2001, the National Incident Based Reporting System received reports of

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense; or

(c) guilty of a felony of the third degree if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class A misdemeanor; and

(ii) (A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense.

(3) For purposes of this section, a plea of guilty or no contest to any qualifying domestic violence offense in Utah which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

Id.

¹²⁰ See Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 344 (1994) (discussing the approaches taken by judges in the Quincy Program to address repeat offenses); LOIS A. VENTURA & GABRIELLE DAVIS, UNIV. OF TOLEDO URBAN AFFAIRS CTR., DOMESTIC VIOLENCE: COURT CASE CONVICTION AND RECIDIVISM IN TOLEDO 3-11 (Oct. 2004), available at <http://uac.toledo.edu/Publications/Davis-Ventura-domestic-violence.pdf>, archived at <http://perma.cc/8PQB-YBLC> (discussing a study of domestic violence cases in the Toledo Municipal Court that revealed one-third of abusers were arrested on a subsequent domestic violence charge within one year following disposition of the original abuse charge). Of the 1982 cases studied, 67.6% were dismissed, while 23.8% resulted in a conviction, and 8.6% were still pending after eighteen months. *Id.* at 3; see also GEORGIA COALITION, *supra* note 111, at 12 (highlighting the significant findings of the report). A review of Georgia domestic violence fatalities for the year 2003 revealed that in more than 80% of the cases, the perpetrator had previously committed at least one act of domestic violence. *Id.*

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1,551,143 incidents of family violence.¹²¹ The annual cost of direct health care expenses associated with domestic violence is \$4.1 billion.¹²² The cost of domestic violence to American employers due to absences and lost productivity is approximately \$13 billion each year.¹²³ Domestic violence accounts for over \$37 million per year in law enforcement, legal services, medical and mental health treatment, and lost productivity.¹²⁴

Perhaps the most disturbing statistics on domestic violence are those pertaining to children. Approximately 15.5 million children annually are exposed to domestic violence.¹²⁵ Men who were exposed to such violence as children are four times more likely to be domestic abusers as adults.¹²⁶ Eighty percent of men in prisons grew up in homes where violence was present.¹²⁷ Studies suggest that girls who witness domestic

¹²¹ FAMILY VIOLENCE—FACTS AND FIGURES, NAT'L CRIMINAL JUSTICE REFERENCE SERVS., available at https://www.ncjrs.gov/spotlight/family_violence/facts.html (last visited Mar. 5, 2014), archived at <http://perma.cc/TKX4-DQSZ> (providing statistics from an FBI study on violence among family members and intimate partners). Of the 1,551,143 incidents reported, opposite-sex dating relationships between the parties were the most common (29.6% of incidents), followed by marital relationships (24.4%). *Id.*

¹²² NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 30 (Mar. 2003), available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>, archived at <http://perma.cc/VZT7-MCFP> (detailing health care expenses associated with domestic violence and categorizing those expenses according to the type of abuse inflicted). The total health care cost per victimization was \$816 per physical assault, \$838 per rape, and \$294 per stalking incident. *Id.*

¹²³ NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND SEXUAL ASSAULT FACT SHEET 1, available at http://nmedv.org/downloads/Policy/AD14/AD14_DVSA_Factsheet.pdf (last visited Oct. 16, 2014), archived at <http://perma.cc/8VD8-KF8W> (providing statistics on the economic impact of domestic violence).

¹²⁴ See *Domestic Violence: Statistics & Facts*, SAFE HORIZON, <http://www.safehorizon.org/page/domestic-violence-statistics--facts-52.html> (last visited Sept. 6, 2014), archived at <http://perma.cc/UP2W-K6QQ> (detailing various consequences of domestic violence).

¹²⁵ Renee McDonald et al., *Estimating the Number of American Children Living in Partner Violent Families*, 20 J. FAM. PSYCHOL. 137, 137 (2006) (providing statistics on the prevalence of children residing in homes where domestic violence occurs). It is estimated that approximately seven million children live in families in which severe domestic violence has occurred within the previous year. *Id.*

¹²⁶ DOMESTIC VIOLENCE AND SEXUAL ASSAULT FACT SHEET, *supra* note 123; see *Domestic Violence*, *supra* note 26 (discussing the immediate and long-term consequences to children who are frequently exposed to domestic violence in their homes). Witnessing abuse in the home increases children's risk of becoming society's next generation of victims and abusers by teaching them that violence is a normal way of life. *Id.* Research also suggests a connection between a child's exposure to domestic violence and the perpetration of other types of violence, such as animal abuse, as an adult. Danielle K. Campbell, Note, *Animal Abusers Beware: Registry Laws in the Works to Curb Your Abuse*, 48 VAL. U. L. REV. 271, 281 (2013).

¹²⁷ See *The Generational Cycle of Violence*, CRISIS CONNECTION, http://www.crisisconnectioninc.org/justformen/generational_cycle_of_violence.htm (last visited Mar. 5,

abuse as children are more likely to tolerate it as adults.¹²⁸ However, these damaging consequences to children can be reduced through intervention by the legal system and domestic violence programs.¹²⁹

III. ANALYSIS

One trend of the legal system's intervention in domestic violence situations has been the increased use of pretrial diversion programs to resolve criminal abuse charges. Part III assesses the value of pretrial diversion in the context of domestic violence cases. Part III.A explores the benefits of pretrial diversions to the criminal justice system, the abuser, and the victim.¹³⁰ Part III.B evaluates the concerns associated with the use of pretrial diversions in domestic violence situations.¹³¹

A. Benefits of Pretrial Diversion

Proponents of pretrial diversions tout the benefits these programs offer to offenders, the criminal justice system, and even victims. The benefit to offenders is clear—pretrial diversions allow an abuser to avoid a criminal conviction without the expense and uncertainty of taking the case to trial.¹³² Pretrial diversions are beneficial to the criminal justice system for similar reasons—quite simply, diversions can be implemented more quickly and less expensively than cases can be prosecuted.¹³³ Pretrial diversions are also an attractive alternative to a

2014), archived at <http://perma.cc/82ZT-UZCJ> (providing facts and statistics on the effects of violence on families).

¹²⁸ See *Long-Term Effects of Domestic Violence*, CLARK CNTY. PROSECUTING ATT'Y <http://www.clarkprosecutor.org/html/domviol/effects.htm> (last visited Mar. 6, 2014), archived at <http://perma.cc/L6C5-PQJN> (discussing the causes and long term effects of domestic violence on women and children).

¹²⁹ *Id.* See Ron Cooper, Note, *Lack of State Accountability in Acts of Domestic Violence: Understanding the Contrast Between the U.S. and International Approaches*, 29 ARIZ. J. INT'L & COMP. L. 657, 670 (2012) (discussing the impact on families and society of the criminal justice system's approach to disposing of domestic violence offenses).

¹³⁰ See *infra* Part III.A (considering the potential benefits of pretrial diversion as a means of resolving criminal cases involving domestic violence).

¹³¹ See *infra* Part III.B (analyzing the negative effects of pretrial diversion in domestic violence cases).

¹³² See *supra* notes 75–77 and accompanying text (defining pretrial diversion); Molter Interview, *supra* note 78 (explaining that defendants receiving pretrial diversions may benefit from completing the terms included in the agreement, such as substance abuse treatment or batterers intervention programs).

¹³³ Reynolds, *supra* note 47, at 426; see CAMILLETTI, *supra* note 75, at 3 (discussing benefits of pretrial diversion programs to the criminal justice system). These programs are efficient in terms of time and cost, and have been shown to reduce overcrowding in prisons. *Id.*

dismissal in cases involving victims who may be uncooperative for a variety of reasons.¹³⁴

Indeed, the perspective of the victim is often the most complicated in a domestic violence situation. For these victims, pretrial diversions are a juxtaposition of benefits and potentially dangerous consequences. Frequently, a victim of domestic violence wants her abuse to stop and wants to be taken seriously, but may not want her partner to be sentenced to time in jail because she may simply want the abuser to get help so that the parties can reconcile.¹³⁵ Moreover, a victim may need her abuser to maintain employment in order to provide financial support to her and possibly her children.¹³⁶ Pretrial diversions serve to further all of those interests, and may prevent a victim from being called to testify against her abuser.¹³⁷ This may be important to a victim for a variety of reasons, including fear of retaliation, privacy concerns, prior negative experiences with the legal system, or a desire to preserve harmony for her children.¹³⁸ In contrast to these benefits, pretrial diversions also involve significant consequences.

B. Consequences of Pretrial Diversion

Although pretrial diversions allow for the efficient disposition of criminal cases, they are especially troublesome in domestic violence situations. Regardless of the terms attached to such an agreement, the end result of their use in most domestic violence cases is consistent and problematic: the offender disposes of his abuse charges in a manner that allows him to escape a domestic violence conviction on his criminal

¹³⁴ CAMILLETTI, *supra* note 75, at 3; see Swingle et al., *supra* note 45, at 222 (discussing the challenges prosecutors face in cases involving uncooperative victims). Victims in domestic violence cases often become hostile witnesses for the prosecution. *Id.* “The clash between prosecutors seeking to stop the cycle of violence and defense lawyers trying to use the victim’s lack of cooperation to get a client off scot-free can involve a variety of complex legal issues.” *Id.*

¹³⁵ See Sadusky, *supra* note 75, at 7 (highlighting common reasons that domestic violence victims may favor diversion over other dispositions).

¹³⁶ *Id.*; see CAMILLETTI, *supra* note 75, at 3 (explaining that when offenders are diverted from the traditional criminal justice system, they avoid criminal convictions and are better able to obtain employment and become productive members of society); Swingle et al., *supra* note 45, at 226 (discussing the importance of pretrial diversion to victims whose spouse would lose his job if he received a conviction for domestic violence).

¹³⁷ See Sadusky, *supra* note 75, at 7 (stating that diversion may make a victim more receptive to advocates and prosecutors, thus increasing opportunities for safety planning and to receive information about legal options and community resources).

¹³⁸ *Id.* In a study of battered women’s responses to court interventions, many victims expressed that a helpful part of the court intervention was getting the abuse “on the record” as well as to “create consequences” and “hold him accountable.” Bell et al., *supra* note 57, at 77.

record.¹³⁹ The fact that diversions do not result in a conviction allows for the circumvention of several state and federal laws.¹⁴⁰ Part III.B.1 analyzes how this lack of conviction may allow a known abuser to continue possessing a firearm despite alarming statistics concerning the correlation between domestic abuse and gun violence.¹⁴¹ Part III.B.2 examines how a pretrial diversion enables an abuser to avoid statutory enhancements for subsequent offenses.¹⁴² Part III.B.3 concludes by exploring the myriad of social implications that arise when a batterer is permitted to resolve criminal charges without being held accountable for his actions.¹⁴³ However, the most significant consequence of pretrial diversions is that absent a conviction, laws such as the Lautenberg Amendment that would otherwise prevent a domestic batterer from owning a gun do not apply.¹⁴⁴

1. The Lautenberg Loophole

Without question, preventing domestic batterers from owning guns is an appropriate and desirable goal.¹⁴⁵ However, the legal loopholes

¹³⁹ See CAMILLETTI, *supra* note 75, at 1 (listing shared characteristics of pretrial diversion programs, including the fact that completion of the program results in the dismissal of criminal charges); Sadusky, *supra* note 75, at 2 (explaining that if a perpetrator successfully completes the sentencing conditions imposed by the court, the case may be dismissed); Swingle et al., *supra* note 45, at 226 (“If the abuser successfully completes the probation term, he ends up with no criminal record whatsoever.”).

¹⁴⁰ See 18 U.S.C. § 922(g)(8)-(9) (2012) (citing the federal gun control statute predicated on a felony conviction for domestic violence and triggered by a misdemeanor felony conviction for domestic violence); IND. CODE § 35-42-2-1.3 (2014) (citing the Indiana statute elevating domestic battery from a Class A Misdemeanor to a Class D Felony where the defendant has a prior conviction for a similar offense); UTAH CODE ANN. § 77-36-1.1 (West 2014) (citing the Utah statute providing several levels of elevation for domestic violence offenses where the defendant has a prior conviction for a “qualifying domestic violence offense”).

¹⁴¹ See *infra* Part III.B.1 (analyzing the effect of pretrial diversions to circumvent federal firearms regulations imposed upon domestic abusers).

¹⁴² See *infra* Part III.B.2 (evaluating the inapplicability of statutory enhancements for repeat offenses when convictions are avoided through pretrial diversion).

¹⁴³ See *infra* Part III.B.3 (discussing the social consequences of using pretrial diversions in criminal prosecutions for domestic violence crimes).

¹⁴⁴ See GEORGIA COALITION, *supra* note 111, at 39 (finding that when abusers receive a diversion, they cannot be held accountable for their firearm possession). For this reason, the Georgia Coalition Against Domestic Violence recommends judges consistently issue orders for the removal of firearms from domestic abusers and that diversion should not typically be granted in such cases. *Id.*; see also Mikos, *supra* note 103, at 1460 (explaining that defendants can “skirt the Lautenberg ban” by agreeing to a disposition that does not result in a conviction).

¹⁴⁵ See Campbell et al., *supra* note 30, at 18-19 (suggesting that the legal prohibition against gun ownership by those convicted of domestic violence is especially important to enforce and judicial orders should include firearms search-and-seizure provisions).

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created by pretrial diversions make that goal impossible to accomplish.¹⁴⁶ Simply put, when a batterer receives a pretrial diversion, the resulting lack of conviction means that the Lautenberg Amendment and similar state legislation will not apply.¹⁴⁷ Not only does the lack of a conviction allow abusers to continue possessing the guns they have previously obtained, this scenario imposes no restrictions on the ability to purchase additional firearms in the future.¹⁴⁸ Given the strong correlation between domestic violence and gun violence, this discrepancy is especially troublesome.¹⁴⁹ An abuser's access to a gun drastically increases the risk of murder to the victim, compared to situations in which there are no weapons.¹⁵⁰ Abusers who possess guns tend to inflict the most severe abuse upon victims.¹⁵¹ Statistics show that women in the United States are eleven times more likely to be murdered with guns than women in any other developed nation.¹⁵² Most startling is the Analysis of Recent Mass Shootings conducted in 2014, which

¹⁴⁶ See *supra* notes 139–42 and accompanying text (evaluating the effect of an absence of guilty plea or conviction resulting from pretrial diversion on gun control laws).

¹⁴⁷ See 18 U.S.C. § 922(g)(8)–(9) (2012) (discussing the requirement of a conviction to trigger the protections offered by firearm laws directed at felony domestic abusers and the extension of federal gun regulations to abusers with felony domestic violence convictions).

¹⁴⁸ See Mikos, *supra* note 103, at 1461 (considering the effects of pretrial diversions on federal statutes). “Avoiding a conviction not only undermines the congressional aims behind the firearms ban, it may dilute the state sanctions as well. When defendants are put through pretrial diversion programs, for example, they may not be punished at all for their actions – by either the state or Congress.” *Id.*

¹⁴⁹ See HENRY, *supra* note 108 (discussing the connection between domestic abuse and gun violence). The enforcement of the prohibition is another troubling aspect of domestic violence related firearms restrictions. *Id.* Removal of firearms from a domestic abuser is a problematic area because numerous federal, state, and local agencies are implicated in the process. *Id.* Enforcement of federal laws should be conducted by federal agencies, but state court judges typically enact the predicate orders and in many jurisdictions there may be no mechanism for reporting misdemeanor domestic violence convictions. *Id.*; see also SEIGHMAN & THOMAS, *supra* note 109, at 19 (listing the model policies and procedures for law enforcement agencies involved in domestic violence cases). The model code recommends that a law enforcement officer who has determined through a criminal records search that an offender has a previous conviction for a misdemeanor crime of domestic violence should seize the offender's firearms as contraband. *Id.* However, the model code fails to recommend any proactive means by which firearms could be confiscated upon the entry of the conviction rather than after a violation of the Lautenberg Amendment has occurred. *Id.*

¹⁵⁰ See NNEDV *Encourages*, *supra* note 107 (analyzing the correlation between murder rates and a domestic abuser's access to a gun).

¹⁵¹ See *id.* (discussing the level of lethality posed to domestic violence victims by an abuser's ownership of firearms).

¹⁵² See *id.* (providing statistics on the prevalence of gun violence directed toward women in the United States).

found that more than half of mass shootings are acts of domestic violence or family violence.¹⁵³

The Lautenberg "loophole" is not only known within the legal field, but is openly exploited by criminal defense attorneys who advertise their success in obtaining diversion agreements for previous clients as a means of preserving clients' Second Amendment rights.¹⁵⁴ Even worse, tactics such as pretrial diversions are sometimes offered by prosecutors for the specific purpose of circumventing the Lautenberg Amendment for batterers whose occupation requires the possession of a firearm, such as police officers, corrections officers, or members of the military.¹⁵⁵ A domestic batterer should not receive a special exemption from the Lautenberg Amendment simply because he is a police officer or a

¹⁵³ See EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS 1 (July 2014), available at <http://3gbwir1ummda16xrhf4do9d21bsx.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/analysis-of-recent-mass-shootings.pdf>, archived at <http://perma.cc/7AY-B6RA> (defining "mass shooting" as "any incident where at least four people were murdered with a gun"). "In at least [sixty-three] of the cases (57%), the shooter killed a current or former spouse or intimate partner or other family member, and in at least [twenty] incidents the shooter had a prior domestic violence charge." *Id.* at 3.

¹⁵⁴ See *Case Results*, LAW OFFICES OF SCOT SIKES, <http://www.scotsikes.com/case-results/> (last visited Oct. 1, 2013), archived at <http://perma.cc/HBU2-SE6C> (advertising prior representation of a military member with a rank of SSG/E-6 "charged with Battery (Domestic Violence). Early and aggressive intervention led to pretrial diversion plan and dismissal of all charges."); *Domestic Violence*, ARNOLD LAW FIRM, <http://www.arnoldlawfirmllc.com/CM/FamilyLaw/Domestic-Violence.asp> (last visited Oct. 1, 2013), archived at <http://perma.cc/CH87-7JNF> (advertising the prior outcomes of domestic violence cases). Arnold Law Firm advertises:

We have represented numerous persons who are in the military stationed and living in the Jacksonville area who absolutely cannot be convicted or even receive a withhold of adjudication for domestic battery because of the Lautenberg Amendment to the Gun Control Act that prohibits one to carry a firearm who has pled to any charge related to a domestic battery.

Id.; see also *Domestic Violence Pretrial Diversion (Batterer Intervention)*, ERIC M. MATHENY LAW, <http://www.ericmathenylaw.com/Criminal-Defense-Blog/2012/March/Domestic-Violence-Pretrial-Diversion-Batterer-In.aspx> (last visited Nov. 20, 2013), archived at <http://perma.cc/KJ3L-B4ZC> (discussing the use of diversions in defending domestic violence cases). Matheny states:

Sometimes you have to work hard to get diversion in a [domestic violence] case. It is possible for the state to offer jail or prison one day and then diversion the next. This takes work to expose weaknesses in the state's case as many [domestic violence] cases are he-said/she-said. . . . When you go into diversion, you are maintaining your plea of not guilty. You are simply agreeing to complete the conditions in exchange for dismissal of your charges.

Id.

¹⁵⁵ See Mikos, *supra* note 103, at 1461 (citing an example of a Florida State Attorney who "acknowledged giving corrections officers accused of domestic violence preferential treatment because of the firearms ban").

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member of the military; on the contrary, the argument could be made that because police officers and military service members have higher than average incidences of post-traumatic stress disorder, enforcement of the Lautenberg Amendment is even more critical in their situations.¹⁵⁶ In addition to firearm laws, pretrial diversions also provide a means for abusers to skirt other state statutes, especially those aimed at repeat offenders.

2. It's the First Time Every Time

Studies indicate that the recidivism rate for domestic violence is two and one-half times the rate of violence between strangers.¹⁵⁷ As such, it is not surprising that many states, including Indiana, have statutory provisions that elevate the severity of domestic violence crimes when the offender has a prior conviction.¹⁵⁸ However, because a diversion does not result in the entry of a conviction against the offender, there can be no enhanced penalty for future offenses under these statutes.¹⁵⁹ In this sense, a diversion gives an offender a "clean slate" and makes each incident of violence the first offense.¹⁶⁰ Even in jurisdictions without statutory enhancements, prior convictions for domestic violence can make the consequences more severe for repeat offenses.¹⁶¹ For example, a prosecutor might take previous offenses into account when offering a plea agreement to a defendant accused of a domestic violence crime.¹⁶² Additionally, a judge may consider prior convictions as aggravating factors when imposing a criminal sentence or accepting a plea

¹⁵⁶ See U.S. Department of Veterans Affairs, *supra* note 106 (citing statistics pertaining to rates of post-traumatic stress disorder and intimate partner violence among Veterans and active duty service members). "Estimates of [intimate partner violence] committed by Veterans and active duty servicemen range between 13.5% and 58% and these rates have been found to be up to three times higher than seen among civilians." *Id.*

¹⁵⁷ See Salzman, *supra* note 120, at 344 (providing statistics on rates of recidivism in relationships involving domestic violence).

¹⁵⁸ See, e.g., Ind. Code § 35-42-2-1.3 (2008 & Supp. 2012) (providing for an enhanced penalty in repeat domestic violence offenses).

¹⁵⁹ *Id.*; see GEORGIA COALITION, *supra* note 111, at 46 (finding that diverted cases result in the inability of future prosecutors to file enhanced felonies based on prior cases). For this reason, the Georgia Coalition Against Domestic Violence recommends that domestic violence cases in which there is strong evidence of a crime should never be diverted. *Id.*

¹⁶⁰ GEORGIA COALITION, *supra* note 111, at 46; see *supra* notes 81, 139 and accompanying text (explaining that pretrial diversions do not result in a conviction entered against the offender and in some instances lead to an expungement of the arrest record); SACK, *supra* note 26, at 23 (recognizing that by definition, domestic violence is a pattern of repeated abuse and that completion of a batterer's intervention program does not ensure "recovery" of an abuser that justifies dismissal of the conviction).

¹⁶¹ Drinski Interview, *supra* note 58.

¹⁶² *Id.*

agreement.¹⁶³ By avoiding convictions, pretrial diversions circumvent statutory elevation of criminal charges as well as discretionary sentence enhancements.¹⁶⁴ Beyond the statutory implications, pretrial diversions carry significant social consequences.

3. Social Consequences of Avoiding Accountability

Arguably as important as the statutory concerns surrounding pretrial diversions are social consequences. Most significantly, a diversion does not require the offender to accept accountability for his actions.¹⁶⁵ Jane Sadusky of the Battered Women's Justice Project suggests that "[w]here offenders are not required to plead guilty in order to participate in the diversion program, they can easily deny accountability for their conduct and further minimize coercive and violent behavior."¹⁶⁶ Statistics show that a batterer's acceptance of responsibility is critical to preventing recidivism and reducing overall incidents of domestic violence.¹⁶⁷ This acceptance can also be instrumental in aiding the victim's recovery.¹⁶⁸ Some scholars suggest that when a batterer is not required to accept responsibility for his violent acts, he is likely to minimize the abuse he inflicts, blame the

¹⁶³ *Id.*; see SACK, *supra* note 26, at 23 (stating that the information contained in a batterer's criminal history is important to a judge hearing a domestic violence case). When diversions result in the dismissal of the domestic violence conviction, the case history is erased and is not available to the court in future domestic violence cases involving the same offender. *Id.*

¹⁶⁴ See *id.* at 22 (suggesting that judges should consider whether a diversion, or other sentencing method that results in an ultimate dismissal of a domestic violence conviction, undermines the court's goals).

¹⁶⁵ See GEORGIA COALITION, *supra* note 111, at 45 (finding that holding and eventually dismissing domestic violence cases only lessens perpetrator accountability and therefore decreases victim safety); Hooper, *supra* note 81, at 170 ("[I]t was quite easy for an offender to get diversion and avoid any accountability for his violence against a female partner."); SACK, *supra* note 26, at 23 (stating that the ultimate goal of dispositions in domestic violence cases should be to stop the violence, keep the victims safe, and hold perpetrators accountable).

¹⁶⁶ Sadusky, *supra* note 75, at 7.

¹⁶⁷ See Hopkins, *supra* note 83, at 328 ("Requiring batterers to admit to their behavior can help initiate the steps towards permanent behavioral change."); VENTURA & DAVIS, *supra* note 120, at 16 (concluding that domestic violence convictions had a significant impact on recidivism among batterers and recommending that aggressive, evidence-based prosecution should continue); see also Hooper, *supra* note 81, at 171-72 (concluding that a California bill prohibiting diversions in domestic violence cases requires a batterer to acknowledge the violence and that it was wrong to ensure that the post-conviction counseling required by his probation will be more effective).

¹⁶⁸ See Hopkins, *supra* note 83, at 325 (stating that a victim's opportunity to publicly recount the experience as well as hearing public acknowledgment of wrongdoing by the abuser can aid the victim's recovery).

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violence on the victim, and even deny that it ever occurred.¹⁶⁹ This denial takes place not only with the victim, friends, and family members, but a batterer may even deny to himself the seriousness of the violence and his responsibility for it.¹⁷⁰ A batterer's acceptance of responsibility for the violence both diminishes his ability to deny prior violence and limits his ability "to get away with future violence so easily."¹⁷¹

Finally, pretrial diversion programs fail to recognize the severity of domestic violence crimes. By consistently diverting domestic violence cases, prosecutors convey a message that domestic abuse is a private matter rather than a serious crime.¹⁷² This results in the victim feeling that she has been abused again by the judicial system.¹⁷³ At least one scholar suggests "state approaches that involve coercive and dismissive tactics may effectively revictimize the battered woman, first by reinforcing the batterer's judgments of her, and then by silencing her still further by limiting how she can proceed."¹⁷⁴ On the contrary, if consequences and accountability were imposed upon batterers, the victim would receive the message that the crime committed against her

¹⁶⁹ See *id.* at 325–26 (suggesting that an offender's public admission of wrongdoing can help to "undo" the abuser's denial of the violence).

¹⁷⁰ See *id.* at 326 (explaining the resulting doubt family and friends feel toward the victim when an abuser denies the violence that happened in private); Hooper, *supra* note 81, at 170 (discussing the use of diversion as a "dumping ground" for domestic violence and the resulting environment in which a spousal abuse charge was not viewed as serious by either the court or the offender). "Offenders were not required to admit that they had done anything wrong, so they viewed the program as a means of expunging the record of the incident rather than as a means of improving their behavior." *Id.* at 171.

¹⁷¹ Hopkins, *supra* note 83, at 326. This Note does not discuss methods of requiring offender accountability beyond eliminating pretrial diversions. At least one scholar has suggested increasing public awareness of a batter's prior offenses through a system she refers to as "The Scarlet Letter Proposal" in which protective order databases would be made public. See generally Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 257 (2010) (suggesting that making a perpetrator's acts of domestic violence public would allow women to be proactive in avoiding batterers).

¹⁷² See Reynolds, *supra* note 47, at 427 (discussing the public policy implications that result from the criminal justice system's handling of domestic violence cases); Bell et al., *supra* note 57, at 81 (stressing that the judge's behavior can send a powerful message to both offenders and victims about the importance, or unimportance, of domestic abuse).

¹⁷³ See Mills, *supra* note 58, at 556 (criticizing typical state actors' handling of domestic violence cases). Domestic violence victims reported feeling frustrated by court dispositions that seemed to provide little or no consequences for the abuser's behavior. Bell et al., *supra* note 57, at 80. Victims also expressed displeasure with a lack of enforcement regarding the court's dispositions and felt they were left without the help they needed and that offenders received the message that the court could be ignored. *Id.*

¹⁷⁴ Mills, *supra* note 58, at 556.

is wrong.¹⁷⁵ Some scholars suggest that such a message by our criminal justice system would be perhaps the greatest condemnation of domestic abuse available.¹⁷⁶ Further, at least one court has reasoned that when compared to abuse against a stranger, domestic abuse "should not be excusable or somehow less egregious because one is in a marriage or partnership. In these circumstances, the court must provide the forum to call abusers to account for their actions."¹⁷⁷

In short, a batterer's acceptance of accountability is crucial to preventing recurrences of domestic violence, as well as to providing the victim with a sense that justice has been served.¹⁷⁸ At a minimum, diversion diminishes the severity of the crime that has been committed against a victim, and causes the victim to feel that the system failed.¹⁷⁹

¹⁷⁵ Hopkins, *supra* note 83, at 326-27; Bell et al., *supra* note 57, at 78-79 (discussing the strong impact of a judge's disapproval and explicitly denouncing abuse). Many of the victims studied reported feeling appreciative of a judge's support, even when the abuse was not reduced. *Id.* at 79.

¹⁷⁶ Hopkins, *supra* note 83, at 326-27; see Hooper, *supra* note 81, at 172 (discussing a California bill prohibiting diversion in cases involving violence against a partner). The bill sends a message that domestic violence is a serious crime by requiring such cases to be prosecuted rather than permitting the charge to be expunged. *Id.* On the contrary, when a court chooses not to make domestic violence cases a priority, it essentially "[makes] the choice the other way around." Salzman, *supra* note 120, at 339 (quoting Chief Probation Officer Andrew Klein).

¹⁷⁷ Ohio v. Busch, 669 N.E.2d 1125, 1129 (Ohio 1996) (Stratton, J., concurring); see Robbins, *supra* note 59, at 205-06 ("The only way to effectively diminish [domestic violence] is through the full force of the criminal justice system, which must treat domestic violence the same as it treats crime by strangers."). "Nonprosecution and underprosecution . . . of domestic violence charges is tantamount to 'de facto criminalization of domestic abuse' which is clearly unconstitutional." Robbins, *supra* note 59, at 230-31 (quoting Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLIN L. REV. 115, 117 (1991)).

¹⁷⁸ See Bell et al., *supra* note 57, at 77 (examining a study of battered women's responses to court interventions, in which many victims expressed that a helpful part of the court intervention was getting the abuse "on the record" as well as to "create consequences" and "hold him accountable."); GEORGIA COALITION, *supra* note 111, at 45 (finding that holding and eventually dismissing domestic violence cases only lessens perpetrator accountability and therefore decreases victim safety); Hooper, *supra* note 81, at 170 ("[I]t was quite easy for an offender to get diversion and avoid any accountability for his violence against a female partner."); Hopkins, *supra* note 83, at 328 ("Requiring batterers to admit to their behavior can help initiate the steps towards permanent behavioral change."); VENTURA & DAVIS, *supra* note 120, at 16 (concluding that domestic violence convictions had a significant impact on recidivism among batterers and recommending that aggressive, evidence-based prosecution should continue).

¹⁷⁹ See Cooper, *supra* note 129, at 670 (discussing the impact on victims and society of the criminal justice system's handling of domestic violence offenses). In commentary to its Model Code on Domestic and Family Violence, the National Council of Juvenile and Family Court Judges explains:

Too often, diversion creates a dangerous combination by failing to protect the victim while allowing the batterer to avoid a conviction and shirk responsibility for his actions.¹⁸⁰ Most ominous, diversions serve to maintain the status quo with regard to the abuser's ability to own a firearm.¹⁸¹

IV. CONTRIBUTION

The problems that arise from diversions in domestic violence cases can be remedied by simply eliminating their use. This can be accomplished through several avenues with varying degrees of legal difficulty. The most effective, but most drastic, means of implementation is federal legislation prohibiting the use of diversion agreements for perpetrators of domestic violence.¹⁸² A less sweeping approach is the enactment of similar legislation at the state level.¹⁸³ Another effective, although even narrower method, is the rejection of diversion agreements

The Model Code departs from state statutes or practices that approve pretrial diversion or deferred prosecution programs for perpetrators of domestic or family violence for many reasons. Pretrial diversion or deferred prosecution programs for these perpetrators convey the notion that domestic or family violence does not constitute serious crime. It is particularly inappropriate when other violent offenders are not eligible for similar enrollment. Second, domestic and family violence cases are difficult to prosecute successfully after failed diversion; and thus noncompliance may result in charges being dismissed, whereas the immediate imposition of sentence; including possible incarceration, upon failure of the perpetrator to successfully complete a program of deferred sentencing serves as a more powerful deterrent. Third, professionals offering specialized treatment or counseling programs for perpetrators prefer that participants mandated to counseling have acknowledged the use of violence toward the victim.

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 97 at 15-16.

¹⁸⁰ See *supra* Part III.B.3 (discussing the social consequences associated with pretrial diversions).

¹⁸¹ See GEORGIA COALITION, *supra* note 111, at 39 (finding that when abusers receive a diversion, they cannot be held accountable for their firearm possession and recommending that judges consistently issue orders for the removal of firearms from domestic abusers and that diversion should not typically be granted in such cases); Mikos, *supra* note 103, at 1460 (explaining that defendants can "skirt the Lautenberg ban" by agreeing to a disposition that does not result in a conviction).

¹⁸² See *infra* Part IV.A (proposing and analyzing a federal approach to eliminating diversion in domestic violence cases).

¹⁸³ See *infra* Part IV.B (offering and evaluating a state approach that would prohibit diversion in domestic abuse prosecutions).

in domestic violence cases by prosecutors and judges.¹⁸⁴ Each of these approaches will be explored in turn.

A. Federal Approach

The most effective means of implementation, especially in terms of preventing batterers from circumventing the Lautenberg Amendment, is for Congress to add language to the Amendment that would prohibit the use of pretrial diversions for domestic violence crimes. This change will require amendments to two existing statutes. The first is the addition of a definition of a diversion to 18 U.S.C. § 921. This addition to the present regulation should read as follows:

*(36) The term "diversion" means any agreement in a criminal prosecution that results in a disposition of criminal charges which does not result in an entry of a conviction on the criminal record of the accused individual.*¹⁸⁵

The second part of the proposed amendment would follow 18 U.S.C. § 922(z), and would consist of an additional subsection, which would provide:

*(aa) No court shall approve diversion in a criminal case involving any charge in which a conviction would restrict an individual's right to possess a firearm under this section.*¹⁸⁶

An alternative means of federal legislation involves implementing an additional section in Title 42, Chapter 136, Subchapter III, in the Violence Against Women Act Improvements. This section would be codified in 42 U.S.C. § 14017 and provide as follows:

*No court shall approve diversion for an accused perpetrator in a criminal case involving domestic violence.*¹⁸⁷

¹⁸⁴ See *infra* Part IV.C (suggesting that prosecutors and judges avoid using pretrial diversions as a means of resolving domestic violence cases in their individual jurisdictions).

¹⁸⁵ This Note proposes an amendment to 18 U.S.C. § 921 (2012). The text that appears in italics is the proposed language that the author wishes to add.

¹⁸⁶ This Note proposes an amendment to 18 U.S.C. § 922 (2012). The text that appears in italics is the proposed language that the author wishes to add.

¹⁸⁷ This Note proposes the creation of 42 U.S.C. § 14017. The text that appears in italics is the proposed language that the author wishes to add.

B. *State Approach*

Another effective, yet less drastic, means to implement the solution is the establishment of legislation to eliminate diversion programs in domestic violence cases at the state level. The federal government can require such legislation by conditioning the receipt of federal grants upon a state's compliance. Such a statute currently exists in Utah and should be used as a model for other states to follow.¹⁸⁸ A state can accomplish this by simply adding one provision either to existing statutes on pretrial diversion programs or to existing statutes relating to domestic violence. For example, the Indiana statute that authorizes pretrial diversion programs would read as follows:

- (c) This section does not apply to a person:
 - (1) *who is arrested for or charged with an offense under IC 35-42-2-1.3; or*
 - ~~(1)~~ (2) who is arrested for or charged with an offense under:
 - (A) IC 7.1-5-7-7(a), if the alleged offense occurred while the person was operating a motor vehicle;
 - (B) IC 9-30-4-8(a), if the alleged offense occurred while the person was operating a motor vehicle;
 - (C) IC 35-42-2-2(c)(1);
 - (D) IC 35-44.1-2-13(b)(1); or
 - (E) IC 35-43-1-2(a), if the alleged offense occurred while the person was operating a motor vehicle; and
 - ~~(2)~~ (3) who held a probationary license (as defined in IC 9-24-11-3.3(b)) and was less than eighteen (18) years of age at the time of the alleged offense.¹⁸⁹

Alternatively, Indiana's criminal statute pertaining to domestic violence offenses could be modified to include the following provision:

- (d) The court may not approve diversion for a perpetrator of domestic violence.*¹⁹⁰

¹⁸⁸ UTAH CODE ANN. § 77-36-2.7(6) (West 2014).

¹⁸⁹ This Note proposes an amendment to IND. CODE § 33-39-1-8 (2008). The normal font is the language of the original statute. The text that appears in italics is the proposed language the author wishes to add, and the language with a line through it is the language the author wishes to strike from the original statute.

Rather than granting diversions, states should require that plea agreements offered in domestic violence cases result in a conviction on the offender's record and include the offender's participation in a batterer's intervention program or similar rehabilitative sessions. In cases involving victims who are unwilling to testify against an abuser, the victim should be considered an unavailable witness under the state's rules of evidence.

C. *Jurisdictional Approach*

Absent both federal and state legislation, a third, less sweeping scenario exists to accomplish the goal of eliminating diversions for domestic batterers. Individual prosecutors and judges should simply use their considerable discretion to eliminate the use of pretrial diversions in domestic violence cases within their jurisdictions. Although the use of diversions is commonplace in many areas, prosecutors are not required to provide this option to batterers, nor is a judge required to approve an agreement that he does not find to be just.¹⁹¹ Rather, a judge is free to reject diversions or plea agreements that contain terms with which he does not agree.¹⁹²

D. *Counterarguments*

Counterarguments to such a proposal are likely to center on the areas of judicial efficiency, financial resources, and victim cooperation.¹⁹³ Each of these concerns can be addressed in some other manner.¹⁹⁴ For example, judicial efficiency can still be obtained through the use of plea agreements that require a conviction to be entered against the abuser.

¹⁹⁰ This Note proposes an amendment to IND. CODE § 35-42-2-1.3 (2014). The text that appears in italics is the proposed language the author wishes to add.

¹⁹¹ See Reynolds *supra* note 47, at 430 (discussing a prosecutor's discretion in determining what cases should be eligible for pretrial diversion).

¹⁹² Boling Interview, *supra* note 70. Referee Boling has a policy by which he does not accept pretrial diversions or plea agreements in domestic violence crimes when the victim has not indicated approval of the arrangement or when he does not believe such approval was voluntary. *Id.*

¹⁹³ See Reynolds *supra* note 47, at 426 (listing reasons in favor of pretrial diversion as: judicial economy, criminal justice resources, victims' unwillingness to testify resulting in no-win cases, parties' desire to preserve whatever is left of a marital relationship, and intrafamily assault cases frequently characterized by the victim and offender as noncriminal).

¹⁹⁴ See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 97, at 16 (providing deferred sentencing as an alternative disposition for domestic violence crimes). The National Council of Juvenile and Family Court Judges explains "[t]he benefits of expedited disposition, including judicial and prosecutorial economies and victim cooperation, are realized by the option of deferred sentencing." *Id.*

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Plea agreements can also include fines so that the revenue previously generated by diversions is not forfeited. The judicial resources expended in eliminating diversions are likely to be offset, at least in part, by reduced recidivism, which will reduce future demands on judicial resources.

It may be argued that eliminating the option of pretrial diversion in domestic violence cases will lead to an increase in the number of cases taken to trial, and therefore will increase the strain on the judicial system.¹⁹⁵ However, one should consider that the cost of a trial for a domestic violence offense is far less than the cost of the murder trial that may be prevented.¹⁹⁶ Further, at least one scholar has suggested that costs associated with reforming the domestic violence system “should be viewed as an investment in strengthening the infrastructure of our society.”¹⁹⁷

Proponents of pretrial diversion programs are likely to point out the potential pitfalls of uncooperative victims. As previously discussed, domestic violence cases can be successfully prosecuted even absent victim participation.¹⁹⁸ The Utah statute that prohibits diversion for domestic violence contains a provision that permits the victim to be treated as an unavailable witness under the rules of evidence.¹⁹⁹ This means that her statements to law enforcement officers could be admissible in a trial, in addition to the testimony of other witnesses and any other evidence that may be available in the particular case. It is already a common practice in some jurisdictions for prosecutors to offer a recording of a 911 call, as well as statements made by the caller to responding police officers, as evidence in a domestic violence prosecution.²⁰⁰ As such, lack of victim participation in a domestic violence case is not an insurmountable hurdle for the prosecution, and such cases should still be tried when necessary.

In sum, prohibiting the use of diversions in domestic violence prosecutions is an ideal solution to the numerous problems such diversions create. Without diversion as an option, a batterer would

¹⁹⁵ See Sadusky *supra* note 75, at 3 (listing the goals of pretrial diversion programs, including “to reduce the costs and caseload burdens on district courts and the criminal justice system.”).

¹⁹⁶ See GEORGIA COALITION, *supra* note 111, at 46 (“[t]ougher prosecution and victim centered advocacy can provide an opportunity for homicide prevention.”).

¹⁹⁷ Durham, *supra* note 46, at 643.

¹⁹⁸ See *supra* note 61 and accompanying text (discussing non-coercive no-drop policies and the types of evidence that can be used by prosecutors in lieu of victim testimony).

¹⁹⁹ UTAH CODE ANN. § 77-36-2.7 (West 2014).

²⁰⁰ See Friedman & McCormack, *supra* note 61, at 1174-75 (describing prosecutors’ use and courts’ acceptance of 911 calls and follow-up conversations as evidence in a criminal domestic violence trial).

receive a conviction for his crime. He would be prevented from lawfully owning a firearm and would be subject to stricter punishments if he were to reoffend. Furthermore, he would be required to accept accountability for his actions and the crime he committed would be viewed with the severity it warrants.

V. CONCLUSION

Domestic violence is an epidemic in the United States with no simple solution. Although an effective remedy has yet to be identified, it is possible to eliminate judicial practices that compound the problem. The inherent harms associated with the use of diversion in domestic violence cases should preclude its consideration as a means of disposition in such prosecutions. Diversion agreements circumvent targeted gun control laws, as well as statutory penalty enhancements for repeat offenses. They also allow batterers to avoid accountability for the violence they inflict on their intimate partners.

Eliminating the use of diversions for domestic violence crimes will close the loopholes in the Lautenberg Amendment and similar state legislation. It will also make abusers subject to state laws designed to impose stricter penalties for repeat offenses. Finally, removing the option of diversions will require domestic batterers to accept responsibility for their crimes and will help convey the message that domestic violence is a serious matter that the criminal justice system regards as being worthy of its resources. Only when the true severity of domestic violence is recognized throughout society will this plague be eliminated. The justice system must treat domestic abuse as a crime and punish abusers as criminals.

A statute eliminating diversion arrangements in domestic abuse prosecutions would have protected Samantha Miller and countless other women who have been murdered by their spouses or intimate partners.²⁰¹ Without the availability of a diversion on his original domestic assault charge, Timothy Putnam would have been forced to either plead guilty to his crime or risk being found guilty by a jury at trial. In either scenario, his criminal record would likely have reflected a conviction. That conviction would have required him to take accountability for his actions and could have required him to complete treatment for the psychological problems he was suffering. That conviction would have barred him from legally owning a handgun, including his military service weapon. That conviction could have

²⁰¹ See *supra* Part I (detailing the circumstances surrounding Samantha Miller's murder).

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prevented Samantha Miller's six children from losing their mother at the hands of a gun-wielding domestic abuser.

Rebecca G. Goddard*

* J.D. Candidate, Valparaiso University Law School (2015); B.S., Criminal Justice, University of Phoenix (2012). I would like to thank my husband, Brian Goddard, for his unwavering love, encouragement, and sacrifice throughout my law school career. Special thanks to my children, Braden, Keely, and Addison, for their endless support and patience. I would also like to thank my parents, Greg and Nya Price, for always being there for me and giving me perspective when I needed it most. Additionally, thank you to my grandparents, Wes and Juanita Price, for their visits, valuable advice, and home cooked meals. Finally, I want to thank my faculty advisor, Dean Emily Janoski-Haehlen, my Law Review mentor, Katlyn Rowe, and the other members of the Valparaiso University Law Review Volume 48 for their advice and comments on prior drafts of this Note.