

Commonsense Solutions:

State Laws to Address Gun Violence
Against Women

THE **COMMONSENSE**
GUN LAWS PARTNERSHIP

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EXECUTIVE SUMMARY

The vast majority of American gun owners are responsible and abide by the law. However, guns do not belong in the hands of domestic abusers and other people known to violently target women or others in relationships. When an abuser has access to firearms, the victim is 500 percent more likely to be murdered.

Unfortunately, the federal laws intended to reduce domestic abusers' access to guns are filled with loopholes. These federal provisions do not apply to many known abusers, and states have sometimes struggled to effectively enforce these laws even when they do apply. The result is a constant stream of news reports about women and others killed by abusers with guns. States must take action to prevent further tragedies.

This report provides a series of proposals that state legislators should consider enacting in their states to help protect women and families in abusive situations. These policies go beyond current federal law, but have been proposed in Congress. These proposals include:

- Prohibiting the purchase or possession of guns by anyone who has been convicted of violence against a dating partner, as well as anyone involved in domestic violence as the federal law currently defines it. While current federal law prohibits gun possession by any abuser who has been convicted of domestic violence or who is subject to a domestic violence protective order, states can encourage enforcement of these provisions by enacting their own laws and can broaden these laws to apply to abusers of dating partners.
- Prohibiting the purchase or possession of guns by anyone convicted of stalking, even at the misdemeanor level, and anyone subject to a protective order against stalking. Current federal law does not generally apply to stalkers.
- Prohibiting the purchase or possession of guns by abusers while they are subject to temporary restraining orders, which cover the short period before a full court hearing, as well as while they are subject to full domestic violence protective orders. Current federal law only prohibits gun possession by abusers subject to full protective orders.
- Providing the National Instant Criminal Background Check System with all the details necessary to identify all people prohibited from possessing firearms because of domestic or similar violence under federal and state law. By providing these records, states can ensure that these people cannot pass a background check to purchase a gun.
- Requiring the removal of firearms that an abuser already owns whenever he or she becomes prohibited from possessing them, with clear procedures to ensure that these firearms are promptly surrendered or removed.

This product provides arguments in support of these proposals, along with the legal and factual background for each proposal. It also provides a list of the features that make up a strong law on each topic. It is our hope that this report will provide a "toolkit" for legislators and advocates who want to move forward with these proposals.

INTRODUCTION

1. THE BURDEN OF GUN VIOLENCE ON WOMEN AND OTHERS IN ABUSIVE RELATIONSHIPS

Gun violence is taking a terrible toll on women in the United States. Every year, over 4,000 women are killed with guns, including over 1,700 homicides.¹ In fact, more than half of all murders of women are committed with a gun, meaning that guns are used to kill more women than all other methods combined.²

Gun violence against women differs from gun violence against men in one main feature: women are significantly more likely to be victimized by someone they know, while men are more likely to be victimized by a stranger.³ The biggest definable group of female murder victims consists of those killed by intimate partners:

- One study found that between 1976 and 2005, 30% of female murder victims were killed by intimate partners, while only 5% of male murder victims were killed by an intimate partner.⁴
- More recent data confirms this fact: between 2003 and 2012, 33.7% of homicides of women were intimate partner violence.⁵

Access to firearms plays a central role in this disturbing trend.

- Between 2001 and 2012, more than 6,410 women were murdered in the U.S. by an intimate partner using a gun.⁶
- Abused women are five times more likely to be killed by their abuser if the abuser has access to a firearm.⁷
- Domestic violence assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily force.⁸
- The firearm homicide rate for women in the U.S. is 11 times higher than that in other comparable high income countries.⁹

The Center for American Progress has pointed out that the statistics listed above may significantly understate the problem. Many of these numbers were derived using a very limited definition of "intimate partner," since they only include people killed by their spouses, ex-spouses, and current dating partners.¹⁰ For example, people sometimes abuse former girlfriends or boyfriends, even if the couple never lived together and never married. These victims would not be included in the statistics above. Men, children, law enforcement officers, and other family members are also often the direct or indirect victims of abuse. Most egregiously, stalkers sometimes terrorize victims whose relation to the perpetrator only ever existed in the perpetrator's imagination. As a result, this statistics listed above significantly undercount the overall number of victims killed or victimized in abusive relationships.

Domestic violence also plays a role in mass shootings: one study found that 57% of these tragedies involve the killing of a family member or a current or former intimate partner of the shooter.¹¹

The impact of guns in domestic violence situations is not limited to homicides. A survey of female domestic violence shelter residents in California found that, in nearly two-thirds of the households that contained a gun, the intimate partner had used the firearm against the victim, usually threatening to shoot or kill her.¹²

Similarly, an eight-week survey of domestic abuse victims conducted by the National Domestic Violence Hotline found that, among victims whose partners have access to firearms:

- 22% said their partner had threatened to use their firearm to hurt themselves, their intimate partner, their children, family members, friends and even pets with a firearm.
- 67% believe their partner is capable of killing them.
- 52% said they would feel safer if law enforcement took their partner/spouse/ex's firearms.
- Only 34% said they were aware that the court may be able to order their partner to surrender their firearms and ammunition.¹³

The statistics demonstrate that allowing people known to be dangerous access to guns makes many situations more deadly. The proposals listed in this report address only the most common situations.

2. THE ROLE OF STATE GUN LAWS IN REDUCING THESE FATALITIES

Most domestic violence homicides are preceded by a history of domestic abuse. In fact, situations in which a woman is being abused precede about 70% of intimate partner homicides.¹⁴ When an abuser has access to guns, he is five times more likely to kill his victim.¹⁵ Consequently, laws that remove guns from domestic violence situations can prevent those situations from turning fatal.

However, the federal laws intended to reduce domestic abusers' access to guns are filled with loopholes. Federal law prohibits the purchase or possession of guns by any person who has been convicted of a felony, who is subject to a certain kind of domestic violence protective order, or who has been convicted of a "misdemeanor crime of domestic violence," as federal law defines that term.¹⁶

As described throughout this publication, these federal provisions do not apply to many known domestic abusers and others known to violently target women or others with whom they share a relationship. These laws also rely heavily on state courts and law enforcement agencies for implementation. As a result, it is crucial that states enact their own laws to reduce the toll of guns in domestic violence by both restating the federal law and enacting broader laws.

There is significant evidence that state laws on the subject can be effective. One study found that state laws that restrict access to firearms by a person subject to a domestic violence restraining order are associated with a 19% reduction in the risk of intimate partner homicides.¹⁷

3. RECENT DEVELOPMENTS IN STATE LEGISLATION

A growing number of states are taking action to address the problem of guns being used to target women and those in abusive relationships. In fact, states have enacted over 30 new laws addressing guns in domestic violence since 2008.¹⁸ Even states with strong gun cultures, like Iowa and Tennessee, enacted strong laws on this topic as long ago as 2009 and 2010, respectively. In 2014 alone, six states enacted laws to protect domestic violence victims from guns: Indiana, Louisiana, Massachusetts, Minnesota, Washington, and Wisconsin.¹⁹ Yet every state's laws still have loopholes.

The catalysts for many of these laws are news stories of particular women whose lives might have been saved if stronger laws had prevented the abusers from accessing guns. Iowa's 2010 law, for example, was a response to the death of Therese Ann Lynch. Lynch had been kidnapped by her abusive husband, Randall Moore, from a shopping mall and shot at their apartment. Moore was under a protective order at the time of the shooting, but had failed to surrender his guns.²⁰ The Iowa Legislature responded by enacting a law that establishes a procedure for subjects of domestic violence protective orders to surrender their guns.²¹

The laws enacted in 2014 follow this pattern. For example, Louisiana enacted several domestic violence laws in 2014 in response to a series of killings, including the murders of Rashonda Taylor and her mother. Roshanda's estranged husband, Keith D. Martin, gunned down both women at her mother's home in February 2011. According to the Shreveport Times, the law that Louisiana enacted in 2014 prohibiting gun possession by domestic abusers might have prevented these murders.²²

The sad truth is that violence prevention advocates can point to plenty of these news reports. Progress must therefore continue.

4. A NOTE ON THE SECOND AMENDMENT

In 2008, the Supreme Court held for the first time that the Second Amendment protects the individual right of "law-abiding, responsible citizens" to possess an operable handgun in the home for self-defense.²³ However, the Supreme Court cautioned that this right is "not unlimited," should not be understood as conferring a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."²⁴

Since the 2008 decision, courts across the country have been faced with challenges to a variety of gun regulations. Courts have overwhelmingly upheld strong gun laws, including those aimed at reducing gun access by convicted domestic violence misdemeanants²⁵ and abusers subject to domestic violence protective orders.²⁶ As a result, legislators should not hesitate to enact these kinds of laws.

Endnotes

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2. Violence Policy Center, *When Murder Women: An Analysis of 2012 Homicide Data* (Sept. 2014), at <http://www.vpc.org/studies/wmmw2014.pdf>.

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4. Jacqueline Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 *Trauma, Violence & Abuse* 246, 246 (2007).

5. Center for American Progress, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them*, 9 (June 2014), at <http://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf>.

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- ¹¹ Everytown for Gun Safety, *Analysis of Recent Mass Shootings* (July 2014), at <http://3gbwir1ummda16xrhf4do9d21bsx.wpengine.netdna-cdn.com/wp-content/uploads/2014/07/analysis-of-recent-mass-shootings.pdf>.
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- ¹³ National Domestic Violence Hotline, *Hotline Focus Survey Provides Firsthand Look at Intersection of Firearms & Domestic Violence; Highlights Need for Stronger Laws and Equal Protection* (June 18, 2014), at <http://www.thehotline.org/2014/06/hotline-focus-survey-provides-firsthand-look-at-intersection-of-firearms-highlights-need-for-stronger-laws-and-equal-protection/>.
- ¹⁴ Jacqueline Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 Trauma, Violence & Abuse 246, 247 (2007).
- ¹⁵ Jacquelyn C. Campbell et al. *supra* note 7, at 1092.
- ¹⁶ 18 U.S.C. § 922(g).
- ¹⁷ April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes, and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 Inj. Prev. 90 (2010). See also Elizabeth R. Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Evaluation Rev. 313, 332 (June 2006).
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- ¹⁹ Indiana H.B. 1155 (signed by Governor March 26, 2014), Louisiana H.B. 753 (signed by Governor May 22, 2014), Massachusetts H.B. 4376 (signed by Governor Aug. 13, 2014), Minnesota H.B. 3238 (signed by Governor May 9, 2014), Washington H.B. 1840 (signed by Governor March 28, 2014), Wisconsin A.B. 464 (signed by Governor April 16, 2014).
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- ²² Melody Brumble, *In Louisiana, 4 in 10 of Domestic Spree Slayings Involve Multiple Victims*, Shreveport Times (June, 28, 2014), at <http://www.shreveporttimes.com/article/20140629/NEWS03/306290019/In-Louisiana-4-10-domestic-spree-slayings-involve-multiple-victims>.
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- ²⁴ *Id.* at 626-627.
- ²⁵ See, e.g., *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010).
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Protecting Women from Abusive Dating Partners

Inappropriate access to guns often plays a deadly role in abusive romantic or sexual relationships. Yet, our nation's gun laws do not generally restrict access to guns by people who have committed violent acts against dating partners if the couple never married, lived together, or had a child together. Now, as more couples delay marriage and children, states are wisely beginning to update their laws to cover these situations.

THE PROBLEM

In July 2006, Teri Lee broke up with Steven Van Keuren, her boyfriend of three and a half years. Later that month, Van Keuren broke into Lee's home and threatened her at knifepoint. A court subsequently issued a protective order directing him to stay away from Lee. Van Keuren repeatedly violated the order, however, and federal law did not prohibit him from possessing guns because the couple never married, lived together, or had children together. Then, on September 22, 2006, Van Keuren shot and killed both Lee and her current boyfriend, Tim Hawkinson.¹

Violence in dating relationships is startlingly common. In fact, violence consistently occurs more frequently among current and former dating partners than among spouses and ex-spouses,² and the proportion of homicides that fit this scenario has risen steadily for decades.³ In 2008, the number of these homicides exceeded the number of people killed by a spouse or ex-spouse.⁴

Dating relationships that turn violent threaten the lives of victims in the same way as other forms of intimate partner violence. In fact, a study of applicants for domestic violence restraining orders in Los Angeles found that the most common relationship between the victim and abuser was a dating relationship, and applications for protective orders were more likely to mention firearms when the parties had not married or lived together.⁵ Yet federal law does not currently limit access to guns by these abusers.

THE LOOPHOLE IN FEDERAL LAW AND HOW STATES HAVE RESPONDED

Federal law prohibits the purchase or possession of guns by any person who has been convicted of a felony, who is subject to a certain kind of domestic violence protective order, or who has been convicted of a "misdemeanor crime of domestic violence," as federal law defines that term.⁶

These federal laws are narrowly drafted. More specifically, a protective order triggers the federal gun prohibition only if the victim was an “intimate partner” of the abuser or a child of an intimate partner or the abuser. Unfortunately, federal law defines the term “intimate partner” to cover an abuser only if he or she was previously married to the victim, lived with the victim as a spouse, or had a child with the victim.⁷ Similarly, a crime may only qualify as a “misdemeanor crime of domestic violence” that triggers the federal gun prohibition if it was:

....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.⁸

This limitation in the federal law means that if the abuser and the victim merely dated without living together or having children together, the abuser is not prohibited from possessing a gun under federal law. The abuser would still be able to legally buy and own guns even after he or she is convicted of a violent crime against the victim or the victim obtained a protective order.

Notably, researchers often use a definition of “intimate partner” that is broader than the definition in the federal law. So, for example, the Virginia Department of Public Health reported that, in 2005, 69 people in Virginia were murdered in violence among “intimate partners.” However, a closer look at this data reveals that 56% of these homicides involved current or former boyfriends or girlfriends, not spouses or ex-spouses. And most of these homicides involved guns.⁹

A growing number of states now impose gun restrictions on people who have abused dating partners. Both Arizona and Nebraska enacted laws in 2009 that prohibit gun possession by people convicted of violent crimes against dating partners, and Minnesota enacted a similar law in 2014.¹⁰ As of August 2014, twelve states prohibit people convicted of violent misdemeanors against dating partners from possessing firearms,¹¹ and 25 states prohibit gun possession by at least some people subject to protective orders for dating partners.¹²

Bills pending in both houses of Congress would prohibit abusive dating partners, including those convicted of violent misdemeanors against the victim and those subject to protective orders, from purchasing or possessing guns.¹³

FEATURES OF A STRONG LAW AGAINST GUN VIOLENCE BY DATING PARTNERS

A strong state law that restricts access to guns by the perpetrators of violence against their current or former dating partners would include the following features:

- **State-Level Gun Prohibition for Domestic and Dating Violence Offenders:** State law prohibits the purchase and possession of firearms by anyone convicted of a misdemeanor crime of domestic violence. This provision is at least as broad as the federal law, 18 U.S.C. § 922(g)(9), but also applies to anyone convicted of a violent misdemeanor against someone with whom they have had a dating relationship.
- **State-Level Gun Prohibition during Domestic and Dating Violence Protective Orders:** State law prohibits the purchase and possession of firearms by anyone subject to a domestic violence protective order. This provision is at least as broad as the federal law, 18 U.S.C. § 922(g)(8), but also applies to anyone subject to a protective or restraining order issued to protect a current or former dating partner.
- **Definition of Dating Relationship:** A person is considered to have been in a dating relationship with the victim so that a conviction or protective order triggers a gun prohibition if the parties were at one time either romantically or intimately involved. For example, a couple may have dated, within the meaning of the law, even if they were never sexually intimate, or if they were sexually intimate but never formally dated. The law should also apply to any couple that was ever engaged to be married, to cover those communities where arranged marriages occur.

- **Notice to the Abuser:** A court that convicts a person of a violent crime against a dating partner or issues such a protective order must notify the abuser of the prohibition on purchasing or possessing guns.
- **Removal of Guns Already in the Person's Possession:** The person is required to surrender guns he or she may already possess as soon as he or she is convicted of the violent crime or a protective order is issued. *See the relevant section of this report for more information about requirements for the removal of guns.*
- **Reporting for Background Checks:** A court that convicts a person of dating partner violence or issues a protective order that triggers the gun prohibition must report the person to the proper agency, so that the person cannot pass a background check to obtain a gun. *See the relevant section of this report for more information about reporting requirements.*
- **Ammunition:** Each provision of the law should apply to ammunition as well as firearms.

CONCLUSION

When dating partners turn violent, their access to guns should be restricted. States should enact strong laws to prohibit gun possession by people who have been convicted of violent crimes against dating partners and people who are subject to protective orders against dating partner violence. These laws will save lives.

Endnotes

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- ⁵ Katherine A. Vittes et al., *Are Temporary Restraining Orders More Likely to be Issued When Application Mention Firearms?*, 30 *Evaluation Rev.* 266, 271, 275 (2006).
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- ⁷ 18 U.S.C. § 921(a)(32).
- ⁸ 18 U.S.C. § 921(a)(33).
- ⁹ Virginia Dep't of Health, *Homicides Related to Intimate Partner Violence*, at http://www.vdh.state.va.us/medExam/PHC/Intimate_Partner_Violence.pdf.
- ¹⁰ 2009 Ariz. ALS 129, see Ariz. Rev. Stat. §§ 13-3101, 13-3102, 2009 Neb. ALS 63 § 15, see Neb. Rev. Stat. § 28-323.
- ¹¹ These states are: California, Connecticut, Hawaii, Illinois, Maryland, Minnesota, Nebraska, New Jersey, New York, Texas, Washington, and West Virginia. The District of Columbia has also filled this loophole.
- ¹² These states are: Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, and Wisconsin. The District of Columbia has also filled this loophole.
- ¹³ *Protecting Domestic Violence and Stalking Victims Act* of 2013, S.B. 1290 (Sen. Amy Klobachur D-Minn., introduced July 11, 2013), *Lori Jackson Domestic Violence Survivor Protection Act*, S.B. 2483, (Sen. Richard Blumenthal, D-Conn., introduced June 17, 2014), *Domestic Violence Survivor Protection Act*, H.R.1177 (Rep. Lois Capps, D-Cal., introduced April 15, 2013).

RESTRICTIONS ON GUNS FOR STALKERS

Stalking is a serious crime that often threatens the lives of victims. Federal law prohibits those convicted of domestic violence misdemeanors or subject to domestic violence restraining orders from possessing firearms, but does not restrict access to guns by most people convicted of stalking or subject to restraining orders against stalking. States have begun to fill this loophole.

THE PROBLEM

Stacey Sutera had known Robert McLaughlin for ten years when he began stalking her in 2010. He repeatedly keyed her car, sent her threatening emails and harassed her with phone calls. He also created a website with fabricated sexual information about Sutera and sent sexually explicit business cards about her to other members of their community. Finally, Sutera contacted the police, and in December 2010 McLaughlin pleaded guilty to misdemeanor telephone harassment and menacing by stalking. He was sentenced to six months in jail. After he was released, the stalking continued, however, and in 2011, Sutera filed a civil lawsuit against him. Then on February 8, 2012, McLaughlin shot and killed Sutera as she was attempting to leave her apartment. A couple of days later, he also shot and killed himself.¹ Because he had only been convicted at the misdemeanor level, he was still eligible to possess guns.

Stalking is generally defined as a course of conduct by the stalker against the victim that is designed to put her in fear for her personal safety. About 1 in 6 women and 1 in 19 men experience stalking at some point in their lifetime.² In many cases stalking is closely related to domestic violence: in 2010, slightly more than half of stalking victims were current or former intimate partners with the perpetrators.³ However, stalking can occur regardless of the prior relationship between the parties: sometimes the victim and the perpetrator had been intimate partners in the past, but sometimes perpetrators stalk other acquaintances or people they have never met.⁴

Too often, stalking escalates into more dangerous crimes. Among women killed by their intimate partners, 76% had been stalked by those partners before their death.⁵ Among women whose intimate partners attempted to kill them, 85% had been previously stalked by those partners.⁶

Guns do not belong in the hands of stalkers. The Department of Justice has estimated that about 139,000 stalking victims were attacked with a weapon in one 12-month period, and 23% of the weapons used were handguns.⁷

Every state has made stalking a crime, although the exact definition of the crime varies. Many states also provide a procedure for a person to obtain a protective order against stalking. However, very few of these laws have the necessary provisions to prevent stalkers from obtaining access to guns.

THE LOOPHOLE IN FEDERAL LAW AND HOW STATES HAVE RESPONDED

Federal law prohibits gun possession by anyone who has been convicted of a felony – generally, a misdemeanor conviction does not trigger a gun prohibition. However, the purchase or possession of guns is prohibited by any person who has been convicted of a “misdemeanor crime of domestic violence” or who is subject to a certain kind of domestic violence protective order.*

Almost every state has both a felony stalking crime and a misdemeanor level stalking crime. People who are convicted of felony stalking are prohibited by federal law from possessing guns, but a person convicted of misdemeanor level stalking is not subject to this prohibition. The federal law only restricts a misdemeanant stalker’s access to guns if the stalker and the victim previously had a domestic relationship, such as a relationship between intimate partners or between parents and children, and the stalker used or attempted to use physical force or threatened to use a deadly weapon against the victim.

This leaves many victims of stalking unprotected. In fact, the Center for American Progress obtained data from 20 states and found that over the last decade, 11,986 people were convicted of misdemeanor stalking in those 20 states alone.⁹ Except in the eleven states that have enacted laws that prohibit gun possession by convicted stalkers, most people convicted of misdemeanor stalking can still legally buy and possess guns.¹⁰

Similarly, a person who is subject to a protective order against stalking is not prohibited from purchasing or possessing guns under the federal law, unless the victim and the perpetrator had a domestic relationship. Even when the parties did previously have a domestic relationship, this fact may not be recorded, which means that the background check system used for gun purchases will not recognize that the person is prohibited from buying a gun.

Bills pending in both houses of Congress would prohibit the purchase and possession of guns by anyone convicted of a stalking misdemeanor.¹¹ The bill pending in the House would also impose gun prohibitions on anyone subject to a protective order against stalking.¹²

Several states have taken action over the last few years to restrict stalkers’ access to guns. In 2012, Florida enacted a law prohibiting gun possession by anyone subject to a restraining order against stalking or cyberstalking.¹³ In 2014, Minnesota enacted a law prohibiting gun possession by convicted stalkers and people subject to anti-stalking protective orders, and providing a procedure for stalkers to surrender guns they already possess.¹⁴ Other states should consider similar legislation.

FEATURES OF A STRONG LAW AGAINST GUN VIOLENCE BY STALKER

A strong state law that restricts access to guns by stalkers would include the following features:

- **Gun Prohibition for Stalking Convictions:** State law prohibits any person convicted of stalking, at the felony or misdemeanor level, from purchasing or possessing guns, regardless of the relationship between the victim and offender.
- **Gun Prohibition for Stalking Protective Orders:** State law prohibits the purchase or possession of guns by any person subject to a restraining order that restrains the defendant from harassing, stalking, or threatening a victim, regardless of the relationship between the victim and stalker.
- **Notice to the Stalker:** A court that convicts a person of such a crime or issues such a protective order must notify the person of the prohibition on purchasing or possessing guns.

Temporary Restraining Orders Prohibiting Guns

Federal law prohibits abusers from purchasing or possessing guns when they are subject to full domestic violence protective orders, but not temporary restraining orders. While full protective orders are issued after the abuser has had the opportunity for a full court hearing, courts issue temporary restraining orders to cover the short period before this hearing can occur, the most dangerous time for victims of abuse. States can and should restrict abusers' access to guns during this time period.

THE PROBLEM

In April 2014, fearing for the safety of herself and her two young children, Lori Jackson Gellatly of Connecticut filed for a restraining order against her estranged husband Scott. The court set May 8 as the hearing date for Lori and Scott to both appear in court and, based on the evidence Lori presented, issued a temporary restraining order to protect her until the hearing. One day before this hearing was to occur, however, Scott Gellatly broke into the couple's home, and shot both Lori and her mother, Merry Jackson. Lori Jackson Gellatly later died at the hospital.¹

This story is not unique. When a victim of abuse tells the abuser the relationship is over, the abuser often responds with anger and violence, and the victim seeks a protective order. A study of 231 women killed by intimate partners found that, among the victims who had a restraining order at the time of her murder:

- About 1/5 were killed within two days of the order being issued.
- About 1/3 were killed within the first month after the order was issued.²

Despite these statistics, federal law does not provide victims of abuse with any immediate protection from guns in the hands of their abusers. A victim of abuse must wait until the court can hold a full hearing for the abuser's access to guns to be removed, unless a state law addresses the issue. This means that, in the days or weeks leading up to the hearing, abusers remain armed and victims remain exposed.

THE LOOPHOLE IN FEDERAL LAW AND HOW STATES HAVE RESPONDED

Federal law prohibits a person from buying or possessing guns if he or she is subject to a domestic violence protective order that "was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate."³ This apparently simple procedural requirement limits the effectiveness of the federal law.

In most states, when a victim of domestic abuse files a petition seeking a protective order, the court immediately sets a date for a full hearing when the abuser and the victim may appear in court, or notifies the abuser of the opportunity to seek such a hearing. The full hearing occurs within weeks of when the victim filed her petition.⁴ This short waiting period is designed to ensure that the alleged abuser has time to receive notice of this hearing and prepare for it.

As soon as the victim files the petition for the protective order, however, the court may immediately hold a preliminary hearing, in which the judge evaluates the evidence presented by the victim to see whether the situation warrants an “ex parte” order, sometimes called an “emergency protective order” or temporary restraining order (“TRO”). The court can only issue this kind of order if the court finds, based on the evidence, that there is an immediate need for protection.

A TRO automatically expires when a full hearing occurs, the abuser has an opportunity to appear and challenge the victim’s claims, and the court decides whether or not to issue a full protective order. Unlike TROs, full protective orders may last a number of years.

Although TROs are issued before a full hearing, they can significantly restrict the abuser’s liberty: these orders often prohibit abusers from having contact with their own family members or entering their own residence. Some abusers have challenged courts’ authority to issue these orders before a full hearing, arguing that they violate their constitutional right to procedural due process. However, courts have rejected these challenges in situations where there is an immediate danger of harm to the victim and a prompt hearing is available.⁵ Consequently, states now allow courts to issue such orders only in these circumstances.

The federal law that restricts abusers’ access to guns when they are subject to full domestic violence protective orders was the result of political compromise and is inadequate to protect victims of domestic abuse.⁶ In fact, nine states go beyond federal law and prohibit firearm purchase or possession by people subject to TROs as well as full protective orders.⁷

Massachusetts, for example, requires a court that is issuing a TRO to immediately suspend any firearms license that the defendant holds, require the defendant to surrender all firearms to law enforcement for the duration of the order, and report the defendant to the background check system so he or she cannot pass a background check.⁸ In addition to the eight other states with laws like Massachusetts’, ten more states prohibit firearm purchase or possession by abusers subject to some, but not all, TROs.⁹

These laws are consistent with the Constitution. In the only case directly addressing this issue, a Court of Appeals in North Carolina in 2013 upheld that state’s firearm prohibition relating to TROs against a constitutional challenge. The court found that the state’s interest in protecting victims of domestic violence justifies the temporary removal of firearms from the abuser during the period when a TRO is in effect.¹⁰

Research confirms the effectiveness of laws that prohibit firearm possession by abusers subject to protective orders. One study found that such laws are associated with a 19% reduction in the risk of intimate partner homicides.¹¹ The prohibition against gun possession has also been shown to deter people subject to protective orders from applying to purchase a firearm.¹² States can make protective orders even more effective by adding a gun prohibition for abusers subject to TROs.¹³

FEATURES OF A STRONG LAW RESTRICTING ACCESS TO GUNS UNDER TEMPORARY

A strong state law that restricts access to guns by abusers subject to temporary restraining orders (“TROs”) would have the following features:

- **Gun Prohibition for TROs:** State law includes a gun prohibition for anyone subject to a domestic violence protective order. This provision is at least as broad as the federal law, 18 U.S.C. § 922(g)(8), but also applies to anyone subject to a temporary restraining order.
- **Applies to All TROs:** The state gun prohibition applies to all abusers subject to temporary restraining orders, regardless of the circumstances that led to the order. For example, the abuser should be temporarily restricted from access to guns even if firearms were not used in the abuse leading up to the TRO.

- **Gun Prohibition is Mandatory:** The state law requires courts to include a gun prohibition in every TRO. Judges do not have discretion to issue a protective order or TRO without the gun prohibition.¹⁴
- **Both Purchase and Possession Are Prohibited:** The state law applies to both the purchase and possession of guns, so that the purchase of a gun constitutes a violation of the law, but abusers must also surrender any guns they may already own in order to avoid violating the law by continuing to possess them.
- **Notice to the Abuser:** A court that issues a domestic violence protective order, including a TRO, must notify the abuser of the prohibition on purchasing or possessing guns. If the state or court uses a form for TROs, the form explicitly includes the gun prohibition.
- **Removal of Guns Already in the Abuser's Possession:** An abuser is required to surrender guns he or she may already possess as soon as a domestic violence protective order is issued, even if the order is a TRO. *See the relevant section of this report for more information about requirements for the removal of guns.*
- **Reporting for Background Checks:** A court that issues any protective order that triggers the gun prohibition must report the abuser to the proper agency as soon as the order is issued, even if the order is a TRO, so that the person cannot pass a background check to obtain a gun. *See the relevant section of this report for more information about reporting requirements.*
- **Ammunition:** Each provision of the law should apply to ammunition as well as firearms.

CONCLUSION

Victims of domestic abuse need immediate protection from guns in the hands of their abusers. Waiting until a full court hearing occurs before disarming abusers often results in tragedies. States should restrict gun access to abusers when they are subject to temporary restraining orders.

Endnotes

¹ *Support the Lori Jackson Domestic Violence Survivor Protection*, newstimes.com, June 18, 2014, at <http://www.newstimes.com/news/article/Support-the-Lori-Jackson-Domestic-Violence-5562755.php>; *Man Pleads Not Guilty to Murder of Wife*, NBC Connecticut, June 3, 2014, at <http://www.nbcconnecticut.com/news/local/Two-Injured-in-Oxford-Shooting--258262651.html>; Amanda Cuda, *Gellatly Death Highlights Gaps in the System*, ctpost.com, May 11, 2014, at <http://www.ctpost.com/local/article/Gellatly-death-highlights-gaps-in-system-5469075.php>.

² Katherine A. Vittes & Susan B. Sorenson, *Restraining Orders among Victims of Intimate Partner Homicide*, 14 Inj. Prev. 191 (2008).

³ 18 U.S.C. § 922(g)(8).

⁴ Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525 (2009).

⁵ See *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).

⁶ Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525 (2009).

⁷ All abusers subject to ex parte domestic violence protective orders are prohibited from purchasing and possessing guns in California, Hawaii, Illinois, Massachusetts, Nebraska, New Jersey, New York, Utah, and West Virginia.

⁸ Mass. Gen. Laws ch. 209A, § 3B, Mass. H.B. 4376 § 72.

⁹ Some abusers subject to ex parte domestic violence protective orders are prohibited from purchasing and/or possessing guns in Arizona, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Pennsylvania, Texas, Virginia, and Washington.

¹⁰ *State v. Poole*, 745 S.E.2d 26, 38 (N.C. Ct. App. 2013).

¹¹ April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes, and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 *Inj. Prev.* 90, 92 (2010). See also Elizabeth R. Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 *Evaluation Rev.* 313, 332 (June 2006).

¹² Katherine A. Vittes & Susan B. Sorenson, *Keeping Guns Out of the Hands of Abusers: Handgun Purchases and Restraining Orders*, 98 *Am. J. Public Health* 828 (May 2008), at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2374807/>.

¹³ A bill pending in the U.S. Senate would also address this issue. *Lori Jackson Domestic Violence Survivor Protection Act*, S.B. 2483, (Sen. Richard Blumenthal, D-Conn., introduced June 17, 2014).

¹⁴ See Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 *Colum. J. Gender & L.* 1 (2005) (describing judges' reluctance to properly enforce gun prohibitions for domestic abusers).

Removal of Guns Already in Abusers' Possession

Federal law prohibits the purchase or possession of guns by abusers who have been convicted of certain crimes or who have become subject to certain kinds of domestic violence protective orders. However, federal law does not provide a procedure for the removal of guns from abusers who have fallen into these categories. A growing number of states are enacting laws to address this problem.

THE PROBLEM

In April 2011, Robert Wigg of Virginia Beach was arrested and charged with assault after he grabbed his wife Deborah by her hair, threw her down, ripped out a door and threw it at her. Deborah obtained a protective order against her husband and began divorce proceedings. In her petition for the protective order, she made clear that her husband owned a 9-millimeter semiautomatic handgun. However, even after a court held a full hearing and issued Deborah Wigg a full protective order, Robert kept his gun, which he used in his business installing and servicing A.T.M.'s. Deborah Wigg openly fretted with her co-workers about the gun. Then, on November 8, 2011, Robert broke into their house, shot and killed Deborah. He killed himself soon thereafter.¹

Federal law prohibits the purchase or possession of guns by any person who has been convicted of a felony, who is subject to a certain kind of domestic violence protective order, or who has been convicted of a "misdemeanor crime of domestic violence," as federal law defines that term.² However, many abusers already possess guns when they fall into these categories and federal law does nothing to remove these guns from abusers.

Most states have also not adequately addressed this problem. One survey of 82 women who had obtained protective orders in New York and Los Angeles and who had reported that their abusers owned firearms found that only 10 of those abusers had surrendered their firearms or had their firearms removed.³

When abusers retain their guns, tragedy often results.

- A March 2013 investigation by the New York Times found that, over the last decade, five women were shot to death in Washington State within a month of obtaining a protective order, and more than 50 people subject to protective orders in that state were arrested on gun charges in 2011 alone.
- The investigation also found that over a three-year period, more than 30 people in Minnesota were convicted of an assault with a dangerous weapon while subject to protective orders.⁴
- A survey of domestic abusers enrolled in Massachusetts batterer intervention programs found that perpetrators who continued to possess firearms after they were prohibited from doing so by federal law were more likely to attempt homicide or threaten their partners with guns than domestic violence perpetrators who had relinquished their firearms.⁵
- A study of 231 women killed by intimate partners found that 11% already had a restraining order against the partner when she was killed.⁶

These statistics demonstrate the urgent need for removal of guns when an abuser becomes ineligible to possess them.

HOW FEDERAL AND STATE LAW ADDRESS GUNS THAT AN ABUSER ALREADY OWNS

Under a law Congress enacted in 2005, state and local governments had to certify that they notify domestic violence abusers about firearm prohibitions in order for those states and local governments to receive certain kinds of federal funding.⁷ This law did not require states or local governments to establish a procedure for abusers to surrender firearms, however.

Nevertheless, the removal of guns from abusers who are subject to protective orders has been an active topic of legislation in a number of states in recent years. In 2008, 20 states had laws providing a procedure for abusers who are subject to protective orders to surrender guns; by 2014, 27 states had these laws. Colorado enacted this kind of law in 2013,⁸ followed by Minnesota and Washington in 2014. Other states, like Connecticut, New York, and Wisconsin have recently strengthened previously existing laws governing these procedures.¹⁰

The strongest state laws not only require abusers to surrender their guns, but also require law enforcement officers to remove these guns. In Massachusetts, for example, when law enforcement serves a domestic violence protective order, law enforcement must immediately take custody of all firearms and ammunition in the abuser's possession or under his or her ownership or control.¹¹ Illinois and Hawaii have similar laws.¹²

About half of the states authorize domestic violence protective orders that require the abuser to surrender firearms in some circumstances. However, these laws are still filled with loopholes that allow abusers to retain guns. Surrender of guns is only mandatory in 15 states,¹³ and only six of these states (California, Illinois, Maryland, New Hampshire, Tennessee, and Wisconsin) require subjects of domestic violence protective orders to surrender all firearms in their possession, regardless of the circumstances leading to the order. Note that the federal prohibition on firearm possession may apply even if these state laws do not require the abuser to surrender all firearms.

In addition to abusers subject to protective orders, guns should also be removed from abusers when they are convicted of domestic violence crimes. Only five states require the surrender of firearms by every individual who has become ineligible to possess them: California,¹⁴ Connecticut,¹⁵ Hawaii,¹⁶ New York,¹⁷ and Pennsylvania.¹⁸ However, four more states (Colorado,¹⁹ Illinois,²⁰ Iowa,²¹ Minnesota,²² and Tennessee²³) specifically require surrender of firearms when a person is convicted of a domestic violence misdemeanor. In Iowa, for example, a state court that enters a judgment of conviction for a domestic violence misdemeanor and finds that the abuser is in possession of any firearm or ammunition must order the firearm or ammunition to be sold or transferred by a specific date.²⁴

These state laws also vary in the procedures set forth for surrender, with the strongest laws requiring abusers to surrender firearms directly to law enforcement and provide a receipt to the court demonstrating that this has occurred.²⁵

If done properly, law enforcement can peaceably remove guns from domestic abusers. One county in California that undertook to increase the removal of guns from protective order defendants reported that it took custody of 324 firearms through seizure or surrender from 81 people in one year, out of more than 800 protective orders it reviewed.²⁶

A bill pending in Congress would provide incentives for states to establish a procedure for abusers who are prohibited from possessing guns to surrender guns they already own.²⁷ The bill would apply to both abusers subject to protective orders and abusers convicted of domestic violence misdemeanors.

FEATURES OF A STRONG LAW TO REMOVE GUNS THAT ABUSERS POSSESS

A strong state law that requires the removal of firearms from domestic abusers would include the following features:²⁸

- **State-Level Gun Prohibitions for Abusers:** The state law incorporates the federal prohibitions on possession of firearms by domestic abusers (18 U.S.C. §§ 921(a)(32), (33), 922(g)(8), (9)) or includes broader prohibitions. The state law imposes state criminal penalties for violations of these prohibitions.
- **Applies to Both Types of Abusers:** The law prohibits gun possession and requires the removal of guns both whenever a qualifying protective order is issued and whenever an abuser is convicted of a domestic violence crime.
- **Inquiry into Whether the Abuser Owns Guns:** The law requires any court that is issuing a qualifying protective order or convicting a person of a domestic violence misdemeanor to inquire of the victim and other witnesses whether the abuser owns, possesses or controls any firearms, and if so, where the firearms are located. The application form for a protective order also includes these questions. The court or law enforcement must also search any available records of firearm ownership.²⁹
- **Court Notifies Abuser and Requires Surrender:** The law requires any court that is issuing a qualifying protective order, or convicting a person of a domestic violence misdemeanor, to:
 - o Provide written and oral notice to the abuser about the federal prohibition and any analogous state prohibition on firearms possession;
 - o Require the abuser to provide law enforcement and the court with a list, certified under penalty of perjury, of all firearms that he or she possesses, owns, or controls. The abuser must also identify the location of these firearms. If the abuser does not possess, own, or control any firearms, he or she must certify this fact;
 - o Issue an order requiring the abuser to surrender any firearms that he or she owns, possesses, or controls, with details about the procedure involved; and
 - o Verbally direct the abuser to surrender these firearms.
- **Specified Time for Surrender:** Under the terms of the order, the abuser must provide the list of firearms and surrender these firearms promptly upon service of the order. If it is necessary to set forth a time period for these requirements, the time period is short.³⁰
- **Only Law Enforcement Can Take Custody of Firearms:** The abuser must surrender guns to the custody of a law enforcement officer. While some states allow abusers to surrender guns to licensed dealers or third parties, the safest approach requires abusers to surrender the guns to a law enforcement officer, who may then verify that the abuser has surrendered these guns. The abuser may subsequently transfer the guns through a licensed dealer as described below.
- **Immediate Warrant to Remove Guns:** Any court that has issued a qualifying protective order or convicted a person of a domestic violence misdemeanor and that has probable cause to believe the defendant owns or possesses firearms must also issue a warrant so that law enforcement may search for and remove those firearms. Law enforcement officers must execute this warrant. This requirement will help ensure that law enforcement officers retrieve an abuser's firearms even if he or she is currently incarcerated.

- **Service of Protective Orders by Proper Officers:** Domestic violence protective orders must be served on abusers by law enforcement officers authorized to take custody of firearms.³¹
- **Removal during Service of Protective Orders:** When a law enforcement officer serves a domestic violence protective order, the officer must direct the abuser to complete the certified list of his or her firearms, and surrender all these firearms. The officer must then immediately take possession of all firearms surrendered, in plain sight, or available pursuant to a lawful search.³² Law enforcement officers must also seek a warrant if necessary to obtain custody of all guns known to be in the abuser's possession or under his ownership or control.
- **Receipt for Firearms:** When a law enforcement officer takes custody of firearms from an abuser, the law enforcement officer must issue the abuser a receipt identifying each of the firearms by make, model, and serial number. The abuser is then required to submit a copy of the receipt to the court within a specified period of time, and to certify, under penalty of perjury, that law enforcement has taken custody of all of his or her firearms.
- **Abuser in Custody May Use a Representative:** An abuser who is in police custody may arrange to fulfill the requirements listed above through his or her legal representative.
- **Court Verifies Surrender or Removal and Notifies Victim:** If the abuser has not submitted a receipt demonstrating that law enforcement has taken custody of all of his or her firearms within a specified period of time, the court must ask law enforcement whether it has done so. If law enforcement has not yet taken custody of all of the abuser's firearms, the court must issue a warrant (if a warrant hasn't already been issued) and law enforcement officers must execute that warrant. In addition, the court or law enforcement must immediately inform the victim that the abuser has failed to surrender guns as required.
- **Suspension or Revocation of Gun Permits:** When an abuser becomes subject to a protective order or is convicted of a domestic violence crime, law enforcement must suspend or revoke and take custody of any firearm-related licenses or permits that an abuser might have been issued.
- **Mandatory Requirements:** Courts and law enforcement officers are required to follow the procedures described above for every convicted domestic abuser or person subject to a domestic violence protective order. These procedures must be mandatory and not depend on the circumstances of a particular case. Judges and police officers must not have discretion to ignore these requirements even if, for example, firearms or other weapons were not used in prior abuse.³³
- **Abuser May Sell Guns in Custody:** An abuser subject to a protective order may regain custody of his or her firearms when the protective order expires by undergoing a background check and presenting a copy of the receipt that law enforcement provided to him or her upon removal of the firearms.
- **Return of Firearms:** If a law enforcement agency has taken custody of firearms from a domestic violence misdemeanor or abuser under a protective order, the abuser or the abuser's legal representative may then arrange for the sale or transfer of the firearms to a federally licensed dealer.
- **Storage Fees:** The abuser must compensate the law enforcement agency for the reasonable costs of storing the firearms.
- **Assisting an Abuser to Retain Guns Is a Crime:** It is a crime for a third party to assist an abuser in avoiding law enforcement's removal of the abuser's firearms by taking possession of the firearms or otherwise.
- **Ammunition:** These requirements should apply to ammunition as well as firearms.

CONCLUSION

States can establish effective procedures for the removal of guns from convicted domestic abusers and abusers subject to protective orders. Given the horrific threat associated with leaving guns in the hands of domestic abusers, all states should act to close loopholes in this process. Lives will be saved if states act to ensure that domestic abusers cannot retain firearms when they become ineligible to possess them.

Endnotes

¹ Michael Luo, *In Some States, Gun Rights Trump Orders of Protection*, The New York Times, March 17, 2013, at <http://www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html?pagewanted=all&r=0>.

² 18 U.S.C. § 922(g).

³ Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: An Exploratory Study*, 19 J. Women's Health 93 (Jan. 2010), at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3120094/#B7>.

⁴ Michael Luo, *supra* note 1.

⁵ Emily F. Rothman et al., *Gun Possession Among Massachusetts Batterer Intervention Program Enrollees*. 30 Evaluation Review 283, 291 (2006).

⁶ Katherine Vittes & Susan B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, 14 Injury Prevention 195 (March 2008).

⁷ 42 U.S.C. § 3796gg-4.

⁸ CO S.B. 197 (2013).

⁹ MN H.B. 3238 (2014), WA H.B. 1840 (2014).

¹⁰ CT H.B. 6702 (2013), N.Y. S.B. 2230 (2013), WI A.B. 464 (2014).

¹¹ Mass. Gen. Laws ch. 209A, § 3B.

¹² 750 Ill. Comp. Stat. 60/214; Haw. Rev. Stat. § 134-7(f); New Jersey authorizes, but does not require a judge issuing a domestic violence protective order to order law enforcement to search for and remove any firearm in the abuser's possession. N.J. Stat. Ann. § 2C:25-29b(16).

¹³ These states are California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Hampshire, New York, North Carolina, Tennessee, Washington, and Wisconsin. Twelve states authorize (but do not require) courts to direct the abuser to surrender certain firearms in various circumstances. These states are Alaska, Arizona, Delaware, Florida, Indiana, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Vermont.

¹⁴ Cal. Penal Code § 29800-29830. See also California Department of Justice, *General Notice of Firearm Prohibition and Power of Attorney for Firearms Relinquishment, Sale, or Transfer for Storage*, at <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/poofirearmsdecl.pdf?>.

¹⁵ Conn. Gen. Stat. §§ 29-36k.

¹⁶ Haw. Rev. Stat. § 134-7.3.

¹⁷ N.Y. Crim. Proc. Law §§ 330.20, 380.96.

¹⁸ 18 Pa. Cons. Stat. § 6105(a)(1)(i).

¹⁹ Colo. Rev. Stat. §§ 18-1-1001(3)(c), 18-12-108(6)(c)(I), 18-6-801(8).

²⁰ 730 Ill. Comp. Stat. 5/5-6-3(a)(9).

²¹ Iowa Code §§ 236.2, 708.1, 708.2A, 708.11, 724.15(1), 724.26.

²² Minn. Stat. § 609.2242, subd. 3.

²³ Tenn. Code Ann. §§ 39-13-111(c)(6), 39-17-1307(f)(1)(A).

²⁴ Iowa Code § 724.26(4).

²⁵ 750 Ill. Comp. Stat. 60/214.

²⁶ Michael Luo, *supra* note 1.

²⁷ *Domestic Violence Criminal Disarmament Act of 2013*, H.R.3566 (Rep. Gwen Moore D-Wisc., introduced Nov. 20, 2013).

²⁸ See also Johns Hopkins Center for Gun Policy and Research, *Removing Guns from Domestic Violence Offenders: An Analysis of State Level Policies to Prevent Further Abuse* (Oct. 2009), at <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/RemovingGunsfromIPVOffenders7Oct09.pdf>; Shannon Frattaroli & Jon S. Vernick, *Separating Batterers from Guns: A Review and Analysis of Gun Removal Laws in 50 States*, 30 Eval. Rev. 296 (2006) (comparing state laws and recommending many of these features); Emily J. Sack, *Courts Responding to Domestic Violence: Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. Center for Fam. Child. & Cts. 3 (2005) (describing procedures in specific courts and making recommendations).

²⁹ See Garen J. Wintemute et al., *Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation of an Initiative in California*, 104 Am. J. Pub. Health e 133 (March 2014), at <http://www.ucdmc.ucdavis.edu/vprp/publications/wintemute%20et%20al%20identifying%20armed%20respondents.pdf>; Paul L. Seave, *Disarming Batterers Through Restraining Orders: The Promise and the Reality in California*, 30 Eval. Rev. 245, 262 (June 2006). In many states, law enforcement agencies and the courts simply do not know who owns guns and how many, since only a handful of states keep complete records of gun ownership. See Law Center to Prevent Gun Violence, *Maintaining Records and Reporting Gun Sales Policy Summary*, at <http://smartgunlaws.org/maintaining-gun-sales-background-check-records-policy-summary/>.

³⁰ In California, the abuser must surrender firearms immediately if requested by a law enforcement officer, but if no request is made, within 24 hours. See Cal. Fam. Code § 6389. In Connecticut, the time period is two days. See Conn. Gen. Stat. § 29-36k.

³¹ Some states allow private individuals or personnel who are not authorized to take custody of weapons to serve protective orders on abusers. This system often misses the best opportunity for the removal of guns. See Garen J. Wintemute et al., *supra* note 29.

³² Mass. Gen. Laws ch. 209A, § 3B.

³³ See Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 Colum. J. Gender & L. 1 (2005) (describing judges' reluctance to properly enforce gun prohibitions for domestic abusers).

Reporting Domestic Violence to the Background Check System

Domestic abusers are often able to pass background checks despite being legally ineligible to purchase and possess guns because of the lack of detail about domestic abuse cases in the federal background check system. States must act to correct this problem and prevent abusers from buying guns.

THE PROBLEM

Federal law prohibits the purchase or possession of guns by certain specific groups of people, including convicted felons, abusers subject to certain kinds of domestic violence protective orders, and abusers who have been convicted of certain kinds of domestic violence misdemeanors.¹ Whether a protective order or misdemeanor conviction disqualifies a person from purchasing a gun under federal law depends on a series of technical legal questions, including the specific relationship between the victim and abuser, the specific nature of the abuse, and the procedural protections afforded the abuser in the hearing or trial that led to the conviction or protective order.² Unfortunately, our current background check system often lacks the detail to accurately answer these questions.

Federal law requires licensed dealers to conduct background checks on gun purchasers. This background check involves a search through the National Instant Criminal Background Check System (“NICS”), a group of databases maintained by the FBI.³ Each of these databases relies on information that state and local courts and law enforcement agencies submit voluntarily for various purposes. Some of the databases that are searched, such as the “NICS Index,” were developed specifically for gun purchaser background checks. Other databases included within NICS were initially developed for other law enforcement purposes, such as the Interstate Identification Index (“III”), which includes criminal history records, and the National Crime Information Center (“NCIC”), which includes protective order information, among other things.

These databases often lack the detail necessary to determine whether a particular person is eligible to purchase or possess guns under federal or state law. For example, the criminal history records in the III may indicate that a man was convicted of an “assault” without mentioning that the victim was his wife. In order for a NICS operator to identify this relationship and therefore determine that the person was convicted of a domestic violence misdemeanor that disqualifies him from possessing guns under federal law, the NICS operator may have to retrieve and search back through old local court records.

Because of the lack of detail in NICS, a NICS operator may also have to search back through old court records to determine the nature of the abuse in a particular case, as well as the court procedures used for an abuser’s conviction or protective order. In some of the worst cases, the records in the III only indicate that a person was arrested for a specific crime, without indicating whether or not he or she was actually convicted for that crime.⁴

In addition, abusers often move from one state to another. States sometimes have their own laws prohibiting gun possession by domestic abusers or other violent criminals that overlap with the federal prohibitions. If properly reported, these state-level prohibitions limit the abuser's access to guns while the abuser remains in the state. If the abuser leaves the state, however, he or she may be able to pass a background check and buy a gun unless the abuser's former state of residence has indicated to the background check system that the abuser is also federally disqualified.

These loopholes have allowed domestic abusers to obtain guns. Each year, the FBI determines that about 3,000 people have passed a background check despite being legally ineligible to purchase or possess a gun.⁵ According to data from the Office of the Inspector General, domestic violence is involved in a disproportionate number of these cases.⁶

HOW STATES CAN FILL THIS LOOPHOLE

There are two ways states can identify a domestic abuser as ineligible to purchase a gun in NICS. A state can flag an abuser's criminal history record or protective order in III or NCIC, or can submit a separate record identifying the person as ineligible to possess a gun to the NICS Index. According to the FBI, the practice of submitting records to the NICS Index, even if the records may already exist in NCIC or the III, "often eliminates an otherwise lengthy review process where research and evaluation are performed to determine if ... the subject is eligible to receive or possess firearms."⁷

Most states still do not submit adequate records of domestic violence convictions or protective orders to NICS.

- o As of December 2012, only 22 states were flagging people prohibited from possessing firearms in the criminal history records of the III.⁸
- o As of December 2013, 79% of all state domestic violence conviction records submitted to the NICS Index came from just three states: Connecticut, New Hampshire, and New Mexico.⁹
- o The Center for American Progress has estimated that the number of domestic abuser records in the NICS Index makes up about 5% or fewer of the total number of such records that should be there.¹⁰

Four states have recently enacted laws designed to facilitate the reporting of abusers whose crimes fall within the federal definition of a "misdemeanor crime of domestic violence" to NICS. In 2011, New York established a procedure to be used in trials for certain violent misdemeanors to determine whether the crime qualifies as domestic violence under the federal definition of that term. If the crime is found to fall within the definition, the clerk of the court must send a written report to a state agency, who then reports the determination to NICS.¹¹ Illinois,¹² Minnesota,¹³ and Massachusetts¹⁴ enacted similar laws in 2011, 2013, and 2014 respectively.

FEATURES OF A STRONG LAW TO REPORT DOMESTIC ABUSERS TO NICS

A strong state law that requires the reporting of domestic violence misdemeanants to NICS would include the following features:

- **State-Level Gun Prohibition for Domestic Violence Offenders:** State law prohibits the purchase and possession of firearms by anyone convicted of a misdemeanor crime of domestic violence. This provision is at least as broad as the federal law, 18 U.S.C. § 922(g) (9).
- **Reporting of State Gun Disqualifications:** A court that convicts a person of a domestic violence misdemeanor that disqualifies the person from purchasing or possessing firearms under state law must report the person and the duration of the firearm disqualification to NICS, or a state agency that must report the person to NICS.

- **Notice to Defendant of Possible Federal Gun Restriction:** A prosecutor must notify a defendant whenever the defendant is charged in state court with a crime that might constitute a “misdemeanor crime of domestic violence,” within the meaning of 18 U.S.C. §§ 921(a)(33) and 922(g)(9), the federal law that prohibits purchase and possession of firearms by a person who has been convicted of such a crime.
- **List of Crimes that May Trigger a Federal Gun Restriction:** State law includes a list of all crimes under that state’s laws that might constitute a “misdemeanor crime of domestic violence,” within the meaning of federal law. This includes any crime that has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. A crime may fall within this definition if, for example, it has, as an element, the intentional or knowing causation of bodily injury.¹⁵
- **Alleged Relationship and Conduct that May Trigger a Federal Gun Restriction:** The notice provided by the prosecutor to the defendant must specify: (1) the name of the person alleged to be the victim of the crime, (2) the nature of the alleged relationship between the victim and the defendant, and (3) the conduct that may trigger the gun restriction, including the specific section or subsection of the offense for which the defendant has been charged.
 - **Court May Raise Federal Gun Issue Independently:** If a prosecutor fails to provide the notice described above in a case involving a crime that might fall within the federal definition of a “misdemeanor crime of domestic violence,” the court must independently raise this issue.
 - **Federal Gun Issue May Be Raised at Any Time:** The prosecutor or the court may raise this issue at any time, provided the defendant is notified and given the opportunity to seek a hearing as described above.
 - **Hearing on the Federal Gun Issue:** If the defendant chooses to contest whether the crime falls within the federal definition of a “misdemeanor crime of domestic violence,” the court must hold a hearing where the state bears the burden of proving this fact beyond a reasonable doubt.
 - **Reporting of Federal Gun Disqualifications:** If the court finds for the state at this hearing, or the defendant chooses not to contest that the crime constitutes a misdemeanor crime of domestic violence under federal law, and the defendant is then convicted of the crime, the court must report the person to NICS, or to a state agency that must report the person to NICS.
 - **Reporting to NICS Index and III:** When a court reports a convicted abuser to NICS, a record must be created in the NICS Index that indicates whether the abuser is prohibited from possessing guns under federal law, state law, or both. In addition, the disposition of the case must be entered into the defendant’s criminal history record in the III, and this record must be flagged to indicate the federal and/or state gun prohibition(s).

A strong state law that requires the reporting of domestic abusers subject to protective orders to NICS would include the following features:

- o **State-Level Gun Prohibition during Domestic Violence Protective Orders:** State law prohibits the purchase and possession of firearms by anyone subject to a domestic violence protective order. This provision is at least as broad as the federal law, 18 U.S.C. § 922(g)(8).
- o **Reporting of State Gun Restriction to NCIC:** Whenever a court issues a protective order that trigger a state law prohibition on the purchase or possession of firearms, the court must submit it to a state agency for inclusion within the state’s protective order file, with a flag indicating that the protective order defendant is ineligible to purchase or possess firearms under state law. The state agency must then submit the protective order to NCIC with this flag.
- o **Court Must Address Federal Gun Issue:** State law requires a court that is issuing a protective order to determine whether the order triggers a prohibition against the purchase or possession of firearms under federal law (18 U.S.C. §§ 921(a)(32) and 922(g)(8)).

- o **Notice to Defendant of Possible Federal Gun Restriction:** The state's form for a notice to an abuser informing him or her of a hearing on a protective order also notifies the abuser that, if the order is issued, it may trigger a prohibition against the purchase or possession of firearms under federal law.
- o **Reporting of Federal Gun Restriction to NCIC:** Whenever a court issues a protective order that triggers the federal prohibition on the purchase or possession of firearms, the court must submit it to a state agency for inclusion within the state's protective order file, with a flag indicating that the protective order defendant is ineligible to purchase or possess firearms under federal law. The state agency must then submit the protective order to NCIC with this flag, also known as a "Brady indicator."¹⁶
- o **Reporting of Gun Restrictions to NICS Index:** The state agency must also submit to the NICS Index identifying information about any protective order defendant subject to the federal and/or state prohibitions on purchasing or possessing firearms. This information should include the duration of the protective order and whether the abuser is prohibited from possessing guns under federal law, state law, or both.

State-Level Monitoring: State authorities must publicly monitor local courts and law enforcement agencies to ensure that these requirements are met, and quickly inform courts and agencies about discrepancies.¹⁷

Assisting with Background Checks: When NICS operators or other law enforcement agencies are conducting background checks and contact a state or local court or law enforcement agency for assistance in determining whether a potential gun purchaser is legally eligible to possess a gun, the court or law enforcement agency must provide the necessary information. This kind of assistance should be made available regardless of whether the court addressed the issue as described above.

Funding to Improve Reporting Systems: Finally, certain federal programs provide grant funding to states to improve their collection of criminal history records and submission of information to NICS.¹⁸ If a state needs additional resources to improve the information about domestic abusers that it provides to NICS, it should apply to the federal government for this funding.

CONCLUSION

Many states currently fail to provide the background check system with sufficient detail about domestic abuse cases. The result is that too many domestic abusers fall through the cracks, pass background checks, and obtain guns, despite being legally ineligible to do so. States should better protect victims of abuse by eliminating this problem.

Endnotes

¹ 18 U.S.C. § 922(g).

² See 18 U.S.C. §§ 921(a)(32), (33), 922(g)(8), (9). U.S. Dep't of Justice, *Information Needed to Enforce the Federal Prohibition Misdemeanor Crimes of Domestic Violence* (Nov. 2007), at http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf.

³ Some states act as "points of contact" for the FBI. In these states, a dealer must contact a state or local agency for the background check. This agency will conduct the search of NICS and may also conduct a search of in-state databases.

⁴ Bureau of Justice Statistics, *Promising Practices for Improved Record Reporting, County Record Briefs Focused on the Completeness of Criminal History Records for NICS Disqualifying Data*, at http://www.bjs.gov/content/pub/pdf/practices/Arizona_Disqualifiers.pdf.

⁵ See, e.g., U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS) Operations 2013*, at <http://www.fbi.gov/about-us/cjis/nics/reports/2013-operations-report>.

- ⁶ Center for American Progress, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them 18* (June 2014), at <http://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf>; U.S. Dep't of Justice, *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System 6* (July 2004), <http://www.justice.gov/oig/reports/ATF/e0406/final.pdf>.
- ⁷ U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS) Operations 2013*, at <http://www.fbi.gov/about-us/cjis/nics/reports/2013-operations-report>.
- ⁸ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012*, (Jan. 2014) at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.
- ⁹ Center for American Progress, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them 21* (June 2014), at <http://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf>.
- ¹⁰ *Id.*
- ¹¹ N.Y. Crim. Proc. Law §§ 370.15, 380.97. For background information, see A00698 Memo, at http://assembly.state.ny.us/leg/?default_fld=&bn=A00698&term=2011&Memo=Y. Bureau of Justice Statistics, *Promising Practices for Improved Record Reporting, Establish a Misdemeanor Crime of Domestic Violence Through Legislation*, at http://www.bjs.gov/content/pub/pdf/practices/NewYork_MCDV.pdf.
- ¹² 725 Ill. Comp. Stat. 5/112A-11.1, 5/112A-11.2.
- ¹³ Minn. Stat. § 624.713, subd. 5.
- ¹⁴ 2013 MA H.B. 4376 §§ 72, 76.
- ¹⁵ See *United States v. Castleman*, 134 S. Ct. 1405 (2014).
- ¹⁶ See National Center on Full Faith and Credit, *NCIC Protection Order File Toolkit for Control Terminal Operators* (Oct. 2005), at <http://www.bwjp.org/files/bwjp/articles/NCICToolkitFinal11%2014.pdf>
- ¹⁷ See Paul L. Seave, *Disarming Batterers Through Restraining Orders: The Promise and the Reality in California*, 30 Eval. Rev. 245 (June 2006) (quantifying how different California counties implemented the state's requirements regarding protective orders and guns).
- ¹⁸ See Bureau of Justice Statistics, *National Criminal History Improvement Program*, at <http://www.bjs.gov/index.cfm?ty=tp&tid=47>; Bureau of Justice Statistics, *The NICS Improvement Amendments Act of 2007*, at <http://www.bjs.gov/index.cfm?ty=tp&tid=49>.

GUN RESTRICTIONS FOR OTHER ABUSERS

This report addresses only the most glaring loopholes in the federal law to restrict access to guns by domestic abusers. States should also ensure that they restrict access to guns in the following situations, where some states have struggled to implement the federal law. Namely, an abuser may be prohibited from purchasing or possessing guns under federal law if he or she:

- Is subject to a domestic violence protective order issued by a family court (a “civil protective order”). Some states only effectively enforce a gun prohibition if the order was issued by a criminal court. The federal gun law does not distinguish between these two kinds of orders.¹
- Is subject to a protective order for which he or she waived the right to a hearing, or a “stipulated” protective order (a protective order to which the abuser has consented), or a “mutual” restraining order (restraining order that restricts the actions of both parties).²
- Is a law enforcement officer who has been convicted of a “misdemeanor crime of domestic violence,” as federal law defines that term.³
- Has pled guilty or “no contest” to a misdemeanor crime of domestic violence.⁴
- Has been convicted of a violent misdemeanor against a same-sex intimate partner, or is subject to a domestic violence protective order against abuse of a same-sex intimate partner.
- Is subject to a protective order sought by one individual on behalf of another, such as an order sought by one family member on behalf of another family member, an employer on behalf of an employee, or by a college or university on behalf of a student.
- Has been convicted of a misdemeanor crime of domestic violence in another state, or is subject to a domestic violence protective order that triggers the federal law issued by a court in another state.

States should also consider the other loopholes in the federal law. The federal law does not apply to a person who has been convicted of a violent misdemeanor against, or is subject to a protective order against abuse of:

- A family member who falls outside the protection of the federal law, such as a sibling, parent, in-law, or other relative.
- A household member who falls outside the protection of the federal law, such as a roommate.
- A same-sex dating partner, unless he or she lives with the abuser or shares a child with the abuser.
- A child if the abuser is not situated as a parent or guardian to the victim.
- An elderly person or a person with a disability.
- Any other person who falls outside the protection of the federal law, such as a co-worker, friend, other community member, or even a stranger. In the absence of a domestic relationship with the victim, people convicted of assault or battery at a misdemeanor level are legally eligible to possess a gun under federal law.

The federal law also does not apply to a person who:

- Has been charged with, but not yet convicted of, a domestic violence misdemeanor.
- Was convicted of violating a restraining order, unless the violation was a felony or qualifies as a misdemeanor crime of domestic violence.
- Has been convicted of a misdemeanor sex crime outside the context of a domestic or intimate relationship.
- Has been convicted of misdemeanor harassment, intimidation, menacing, or terroristic threatening or is subject to a protective order against harassment, intimidation, menacing, or terroristic threatening.
- Is a law enforcement officer or other government employee who is exempted from the federal gun prohibition for abusers subject to domestic violence protective orders.⁵
- Is subject to a “no contact” order that does not prohibit conduct that would place the other person in reasonable fear of bodily injury (so that it would trigger the federal law).⁶
- Has been repeatedly arrested for domestic violence or similar crimes, but has never been convicted of these crimes because the victim prefers not to bring charges or testify.
- Has been admitted into a pretrial diversion program to avoid prosecution for domestic or other violence.
- Is subject to a protective order that does not contain the required language under 18 U.S.C. § 922(g)(8)(C). Many protective orders do not meet this formalistic requirement, even though they are intended to protect a victim from domestic abuse.⁷

The federal law, unlike some state laws, also does not address removal of firearms at the scene of a domestic violence incident.⁸

A comprehensive law on this topic would address all these situations.

Endnotes

¹ See Paul L. Seave, *Disarming Batterers Through Restraining Orders: The Promise and the Reality in California*, 30 Eval. Rev. 245 (June 2006).

² Cf. *United States v. Spruill*, 292 F.3d 207, 219-220 (5th Cir. 2002).

³ 18 U.S.C. § 925(a).

⁴ See, e.g., *United States v. Stein*, 712 F.3d 1038 (7th Cir. Wis. 2013).

⁵ 18 U.S.C. § 925(a).

⁶ Federal law only prohibits gun possession if the protective order prohibits the 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.” 18 U.S.C. § 922(g)(8).

⁷ Subsection (C) is arguably unnecessary given the requirement of subsection (B). See Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 569 (2009).

⁸ For a survey of state laws on this topic, see Law Center to Prevent Gun Violence, *Domestic Violence and Firearms Policy Summary*, at <http://smartgunlaws.org/domestic-violence-firearms-policy-summary/>. The discussion of state laws regarding removing guns at the scene of an incident is near the end of the page.

NOTE ON BACKGROUND CHECKS

Each of the proposals set forth in this report will save lives. However, the effectiveness of these laws depends on having a strong background check system that treats almost all firearms sales and transfers the same.

Currently, there is a loophole in federal law. The law requires federally licensed firearms dealers, known as FFLs, to conduct background checks on gun purchasers, but it does not require unlicensed, “private” sellers to do so.¹

The lack of a background check requirement for sales by unlicensed, private sellers is known as the “private sale loophole.” It is estimated that up to 40% of all firearms sold in the U.S. are transferred through this loophole without a background check.² These private sales include transfers made through the internet, at gun shows, and through classified ads.

The private sale loophole means that in most states, guns can easily fall into the hands of dangerous people, even people who are prohibited from gun ownership and have been included in the background check system. This may include domestic abusers as identified through the proposals in this report.

In the absence of action at the federal level, it is up to states to close this loophole, and 17 states have extended the background check requirement to at least some private sales.³ In states that require a background check for every handgun sale, 38% fewer women are shot to death by intimate partners.⁴

A system that requires background checks on some firearms transactions but not others reduces the effectiveness of all other gun laws. The proposals in this publication do not extend the situations in which a background check is required. Instead, these proposals would extend the categories of people who would be denied a gun if they underwent a background check, and would address the removal of guns already in the possession of abusers.

A background check should be conducted for the vast majority of gun sales and transfers, including sales conducted by unlicensed sellers. A comprehensive background check, used in conjunction with the proposals set forth in this publication, will prevent many dangerous people from accessing guns, and will save many lives.

Endnotes

¹ 18 U.S.C. § 922(t).

² Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997), at <https://www.ncjrs.gov/pdffiles/165476.pdf>.

³ Law Center to Prevent Gun Violence, *Universal Background Checks and the Private Sale Loophole Policy Summary*, at <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/>.

⁴ Mayors Against Illegal Guns, *Gun Laws and Violence Against Women*, at http://3gbwir1ummda16x-rhf4do9d21bsx.wpengine.netdna-cdn.com/wp-content/uploads/2014/02/Gun_Laws_and_Violence_Against_Women.pdf.