

Notes

Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims

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In 2011, two-thirds of murdered women died at the hands of a current or former intimate partner who used a firearm. Thus, it is imperative to remove guns from the control of domestic violence offenders. With increased media coverage, domestic violence is at the forefront of the minds of many, but this growing awareness is not a new phenomenon. The federal government recognized the terrors of domestic offenders and firearms in two amendments to the Gun Control Act in 1994 and 1996, respectively.

In this Note, I examine the federal and state approaches of gun relinquishment laws pertaining to domestic violence offenders. The federal laws, although worthy of recognition, have done very little to actually compel offenders to give up their weapons. Instead, state and local laws are necessary to achieve this end since the triggering events (for example, a misdemeanor domestic violence conviction or a domestic violence restraining order) are widely dealt with on a state level. Currently, however, the states provide us with a broad range of statutory approaches, from nonexistent to quite impressive.

My conclusion provides for a set of possible reforms to bolster the success of the federal and state laws. One must not forget that the goal of these provisions is to protect domestic violence victims from perpetrators who are often manipulative and vengeful. Thus, swift and deliberate action must be taken to seize offenders' firearms. The potential consequences of not doing so—the deaths of innocent victims—are unacceptable.

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INTRODUCTION

“I’ve never hurt anybody. I’m not a violent man, but I do collect firearms,” said Ian Elias in a video that he posted online on Saturday, November 8, 2014.¹ “The judge said I’m not allowed to say anything about any of this to anybody and I’m not allowed to have any guns.”² Two days later, his ex-wife, Nicolette Elias, was found murdered.³ After

1. *Autopsy: Man Who Shot and Killed Ex-Wife Used Gun, Arrows*, FOX 12 OREGON (Nov. 11, 2014, 6:26 PM), <http://www.kptv.com/story/27359254/autopsy-man-who-shot-and-killed-ex-wife-used-gun-arrows>.

2. *Id.*

3. Maxine Bernstein, *Portland Man Faced Restraining and Stalking Orders for Escalating Threats Before He Killed Ex-Wife, Then Self*, OREGONIAN (Nov. 10, 2014, 7:26 PM), http://www.oregonlive.com/portland/index.ssf/2014/11/portland_man_faced_restraining.html.

shooting Nicolette, Ian took his own life.⁴ In the year prior to her untimely death, Nicolette had repeatedly told authorities that Ian was a violent man.⁵ In restraining and stalking orders, Nicolette alleged that he had physically and sexually abused her on several occasions, including some incidents in front of their children.⁶ More specifically, she wrote that he “pushed, choked, slapped and punched her in the face and dragged her on the floor.”⁷

Nicolette took all of the steps that domestic violence victim advocates would have encouraged her to take. In the months leading up to her murder, she arranged safety plans, adjusted her daily routines, and obtained both restraining and stalking orders against Ian.⁸ In the restraining order petition, Nicolette noted that he “regularly kept high-powered firearms in the home.”⁹ Ian had even posted photographs of himself “with an M1 carbine, a Ruger P89, [and] ‘my AR15’” on Facebook.¹⁰ By May 7 of that year, a judge ordered that all firearms be removed from Ian’s possession.¹¹ Following the murder-suicide, the judge who had presided over the couple’s custody and parenting time case commented that “[a]ll of the professionals in the case, including the court, were extremely concerned about Ian Elias and took his behavior seriously.”¹² Even so, in the morning hours of November 10, 2014, Ian Elias, armed with a gun and a bow and arrow, entered his ex-wife’s home and murdered her.¹³

Guns in the hands of domestic abusers pose a severe and distinct threat to the victims of domestic violence.¹⁴ In the United States, over twelve million women and men are victims of some sort of domestic

4. *Id.*

5. Maxine Bernstein, *Man Kills Ex-Wife in SW Portland, Then Kills Himself, Police Say; 2 Daughters Safe*, OREGONIAN (Nov. 10, 2014, 4:13 PM), http://www.oregonlive.com/portland/index.ssf/2014/11/man_kills_ex-wife_in_sw_portla.html#incart_river (describing Nicolette Elias’ allegations against Ian Elias).

6. *Id.*

7. *Id.*

8. *Id.* (describing the numerous times that Nicolette Elias had sought court intervention to protect her from her ex-husband, Ian Elias).

9. *Id.*

10. Sunshine Simmons, *A Portland Man Murders Wife, Abducts Children, Then Kills Himself*, EXAMINER (Nov. 11, 2014, 12:10 AM), <http://www.examiner.com/article/a-portland-man-murders-wife-abducts-children-then-kills-himself>; see also Bernstein, *supra* note 3.

11. Bernstein, *supra* note 3 (explaining that the order to remove all firearms from Ian Elias was connected to the grant of a temporary stalking restraining order).

12. Amy Holmes Hehn, *‘Heartsick’ Elias-case Judge Challenges Domestic Violence Myths: Guest Opinion*, OREGONIAN (Nov. 11, 2014, 3:15 PM), http://www.oregonlive.com/opinion/index.ssf/2014/11/heartsick_elias-case_judge_tak.html (discussing Nicolette’s attempts to convey how dangerous Ian was and how hard the court tried to protect her).

13. *Autopsy: Man Who Shot and Killed Ex-Wife Used Gun, Arrows*, *supra* note 1.

14. WINNIE STACHELBERG ET AL., CTR. FOR AM. PROGRESS, PREVENTING DOMESTIC ABUSERS AND STALKERS FROM ACCESSING GUNS (May 9, 2013).

violence annually.¹⁵ Of those victims, 1.3 million women and 835,000 men suffer from physical abuse.¹⁶ Further, there are approximately 16,800 domestic violence homicides annually.¹⁷ Approximately five percent of domestic violence incidents against women are carried out with the use of a firearm.¹⁸ Just over sixteen percent of murder victims are killed by an intimate partner.¹⁹ In other words, on average, three women are killed by their intimate partner each day.²⁰ If an abuser owns a gun, the female victim is five times more likely to be killed.²¹ When a gun is used in a domestic violence assault, it is twelve times more likely to result in death than when compared to assaults using other weapons or bodily force.²² Time and time again, “the difference between a battered woman and a dead woman is the presence of a gun.”²³

This Note argues that current firearm laws for restricting domestic violence offenders’ possession of guns are ineffective because they lack strong relinquishment provisions. Part I explains the scope of current federal gun relinquishment laws, including the impact of the recent Supreme Court cases, *United States v. Castleman*²⁴ and *Henderson v. United States*,²⁵ and highlights their shortcomings. Part II turns to the current legal landscape of state gun relinquishment laws and highlights the different levels of success in the states’ efforts to fill the legal gaps within the federal laws. Part III concludes with various proposals to improve gun relinquishment laws. Specifically, Congress could incentivize states to develop and implement state relinquishment laws, improve the background check system, and provide states with a detailed

15. *Domestic (Intimate Partner) Violence Fast Facts*, CNN (Sept. 9, 2014, 3:26 PM), <http://www.cnn.com/2013/12/06/us/domestic-intimate-partner-violence-fast-facts/> (citing M. C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT (2011)).

16. *How Widespread Is Intimate Partner Violence?*, NAT’L INST. OF JUSTICE (Oct. 24, 2007), <http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/extent.aspx>.

17. DOMESTIC VIOLENCE FACTS, NAT’L COAL. AGAINST DOMESTIC VIOLENCE I n.19 (July 2007).

18. Civic Research Institute, *Intimate Partner Violence: Spotlight on Victimization, 1993–2011*, DOMESTIC VIOLENCE REP. 39 (2014) (citing data from 2002 to 2011).

19. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T. OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008: ANNUAL RATES FOR 2009 AND 2010, at 18 (Nov. 2011) (explaining that 16.3% of murder victims, between 1980 and 2008, were killed by intimate partners). “Intimate partner homicides make up 40–50 percent of all murders of women in the United States.” *How Widespread Is Intimate Partner Violence?*, *supra* note 16.

20. *Domestic (Intimate Partner) Violence Fast Facts*, *supra* note 15.

21. DOMESTIC VIOLENCE FACTS, *supra* note 17 (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (July 2003)).

22. *Domestic Violence and Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (May 11, 2014), <http://smartgunlaws.org/domestic-violence-firearms-policy-summary/>.

23. 142 CONG. REC. S11227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) (quoting Senator Wellstone’s earlier remark).

24. 134 S. Ct. 1405 (2014).

25. 135 S. Ct. 1780 (2015).

implementation plan so they conform better to federal mandates. In order to evaluate firearm relinquishment laws, and to advance reforms that can increase the safety of victims, it is important to first look to the federal provisions.

I. FEDERAL GUN RELINQUISHMENT LAWS

Federal statutes and case law provide the backdrop for an analysis of the effectiveness of gun relinquishment laws. Although an increased awareness of the dangers of domestic violence pointed the spotlight on the federal government to respond to this silent epidemic, the resulting statutes are anything but perfect. Furthermore, the disparate responses of the multiple players responsible for implementing and executing these statutes make for an unpredictable result. Understanding the federal gun relinquishment laws begins with an examination of the 1994 Gun Control Act amendment and the Lautenberg Amendment of 1996, which focus on removing firearms from the hands of domestic violence perpetrators.

A. THE GUN CONTROL ACT AMENDMENT OF 1994

The federal gun relinquishment laws are compiled in the Gun Control Act amendment of 1994 and the Lautenberg Amendment of 1996. The Gun Control Act, passed in 1968²⁶ in response to escalating urban violence, intended to help the fight against crime while protecting the rights of gun owners.²⁷ Prior to 1994, the Gun Control Act kept firearms and ammunition out of the hands of certain designated persons, such as convicted felons, drug addicts,²⁸ and mentally ill persons,²⁹ by precluding them from possessing, purchasing, or selling firearms. The legislature attempted to accomplish this preclusion by making it unlawful for people to sell or “otherwise dispose of” firearms to the designated persons.³⁰ In 1994, as risks posed by domestic violence offenders possessing guns became increasingly clear to lawmakers, Congress amended the Gun Control Act to include offenders subject to a domestic

26. See 18 U.S.C. § 921 (2015).

27. James O'Connor, Note, *Criminal Law—“But I Didn’t Know Who He Was!”: What Is the Required Mens Rea for an Aider and Abettor of a Felon in Possession of a Firearm?*, 32 W. NEW ENG. L. REV. 245, 256 (2010); see Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213 (1968) (codified as amended throughout 18 U.S.C.) (“The Congress hereby declares that the purpose of this title is to provide support to . . . officials in their fight against crime and violence.”).

28. Drug addict is defined in the Act as “any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.” 21 U.S.C. § 802(1).

29. Mentally ill person is defined in the Act as one who “has been adjudicated as a mental defective or has been committed to any mental institution.” 18 U.S.C. § 922(d)(4).

30. See Gun Control Act, § 101.

violence restraining order in the list of persons excluded from possessing or purchasing a firearm.³¹

Despite this step toward broader relinquishment, this revision includes three limitations that hinder its effectiveness. First, the prohibition only lasts as long as the order is in place, so offenders have the ability to possess firearms as soon as the restraining order expires.³² Second, it is subject to an “official-use” exemption that permits law enforcement officers, military personnel, and other government employees who use weapons in their official duties to evade this provision.³³ Third, in order to be subject to the restrictions, the offender must be considered an intimate partner to the victim.³⁴ As part of this amendment, Congress defined the term “intimate partner” as “with respect to a person, the spouse . . . , a former spouse . . . , an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.”³⁵ This definition is too narrow as it excludes dating relationships where the partners have not lived together or do not share a child, thereby eliminating one of the most common types of abusive relationships.³⁶ Although this was a step in the right direction, Congress quickly became aware that more changes needed to occur, and subsequently passed the Lautenberg Amendment.

B. THE LAUTENBERG AMENDMENT

In 1996, armed with mounting data on the harmful link between firearms and domestic violence, Senator Frank Lautenberg (D-N.J.) introduced another amendment to the Gun Control Act to supplement the 1994 amendment.³⁷ Widely known as the Lautenberg Amendment, this provision, codified as 18 U.S.C. § 922(g)(9), sought to protect

31. See Emily J. Sack, *Courts Responding to Domestic Violence: Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CTR. FOR FAMILIES, CHILD, & THE CTS. 3, 12 (2005).

32. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 2014, 2014-15 (codified as amended at 18 U.S.C. § 922(g) (2000)).

33. Sack, *supra* note 31, at 4.

34. 18 U.S.C. § 922(g)(8) (2000).

35. 18 U.S.C. § 921(a)(32) (2000).

36. *Domestic Violence and Firearms Policy Summary*, *supra* note 22 (citing a 2008 study where almost half of all domestic violence homicide victims were killed by their current dating partner and another study finding that the most common relationship type for restraining order applicants in Los Angeles was a dating relationship).

37. Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws*, 29 FORDHAM URB. L.J. 427, 428-29 (2001) (“Citing national domestic violence statistics including the percentage of domestic violence homicides involving firearms each year, Senator Lautenberg intended to close a dangerous loophole in the Gun Control Act enabling domestic violence offenders to evade an additional felony conviction for gun possession by getting domestic violence felony charges reduced to misdemeanors.”); *see also id.* at 428 n.5 (explaining that four months after the provision passed in the Senate, President Clinton signed the Amendment into law as part of the 1997 Consolidated Omnibus Appropriations Act).

domestic violence victims in the vast number of cases where domestic violence crimes were pleaded down from felonies to misdemeanors.³⁸ Specifically, it prohibited the possession of any firearm or ammunition by anyone previously convicted of a “misdemeanor crime of domestic violence” (“MCDV”) and proscribed the act of selling or disposing of a firearm by a gratuitous transfer to a convicted domestic violence misdemeanant.³⁹ The statute immediately begs the question: what exactly qualifies as an MCDV?

Congress defined the term “misdemeanor crime of domestic violence” in a specific manner as an offense that “is a misdemeanor under Federal, State, or Tribal law . . . [and] has, as an element, *the use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by [an intimate partner].”⁴⁰ This is the *only* federal law that prohibits gun possession by a misdemeanant,⁴¹ signaling Congress’ recognition of the significant risk posed by domestic violence offenders. However, the federal law did not enumerate the specific misdemeanors that would serve as predicate offenses, forcing the states to devise their own lists of state-specific offenses that they deem to be in tune with the spirit of the statute. This lack of specificity creates confusion as to what crimes actually qualify an offender for the federal relinquishment laws.⁴² Nonetheless, the law did specify that the qualifying misdemeanor must include the use of “physical force” or “threatened use of a deadly weapon,”⁴³ foreshadowing the need for the judiciary to further define these terms.

In addition to the ambiguous language of the statute, the substantive requirements also pose significant hurdles when attempting to utilize the federal firearms laws. Notably, a conviction, not merely an indictment, is necessary to trigger the Lautenberg Amendment, providing several loopholes to perpetrators. For example, a domestic violence misdemeanant would not be excluded from firearm ownership if there had been a “withhold of adjudication,” an “adjournment in contemplation of dismissal,” a “deferred adjudication,” or if the record had been expunged or set aside.⁴⁴ This conviction requirement is problematic because these nonconviction outcomes do not mean that the defendant is any less guilty

38. Sack, *supra* note 31, at 4; *United States v. Hayes*, 555 U.S. 415, 426 (2009) (“Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because ‘many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.’”).

39. 18 U.S.C. § 922(g)(9) (2015).

40. 18 U.S.C. § 921(33)(A) (2015) (emphasis added).

41. Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination; The Juxtaposition of Federal and Florida Laws*, 79 FLA. B.J. 79, 80 (2005).

42. This confusion is evident in *United States v. Castleman* discussed in Part I.C.

43. 18 U.S.C. § 921(33)(A) (2015).

44. Karan & Stampalia, *supra* note 41, at 80.

or dangerous than those who end up being convicted within the narrow bounds of the amendment. Furthermore, the defendant must have received certain due process protections, in essence, representation by counsel and a jury trial, or the right to waive such a trial, if entitled to one.⁴⁵ The due process requirement was added to the amendment as a result of a compromise between Senator Lautenberg and opponents of the strong gun ban, providing the opponents with reassurance that citizens would not lose their right to possess a gun without a fair trial.⁴⁶ Senator Lautenberg opined that the due process requirement would have no substantive effect on the statute.⁴⁷ Although the statute appears to be a straightforward, easily applicable law that protects the victims of domestic violence, the numerous qualifications and requirements severely limit its reach and applicability.

The Lautenberg Amendment, with its many drawbacks, does include some noteworthy differences that make it superior to other provisions. Unlike previous amendments to the Gun Control Act, this firearm prohibition is permanent, and there is no “official-use” exception, thereby abrogating the exemption of law enforcement officers, military personnel, and other government employees who use weapons in their official capacities.⁴⁸ While these are significant steps in the right direction, the actual implementation of the Lautenberg Amendment is dependent, to its detriment, on the actions of law enforcement, prosecutors, and judges, as well as the public at large, such as gun dealers and other third parties who might transfer firearms to offenders.

The amendments to the Gun Control Act signified the growing recognition of the existence of domestic violence, but there are still aspects of the amendments that need clarification. In a recent decision, the Supreme Court provided some guidance as to the interpretation of the Lautenberg Amendment’s statutory requirements.⁴⁹

C. *UNITED STATES V. CASTLEMAN*

Many courts have wrestled with the question of what exactly constitutes a predicate crime of domestic violence sufficient to trigger the federal firearm ban.⁵⁰ A central issue in this debate is the amount of force needed to fulfill the element of “physical force” required under the

45. 18 U.S.C. § 922(g)(9) (2015).

46. See 142 CONG. REC. S11877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

47. *Id.* (“And so this language really does not change anything.”).

48. Sack, *supra* note 31, at 4, 23 n.17 (“In some limited circumstances the firearm ban may be lifted, such as when the conviction is ‘expunged or set aside’ or the defendant has been pardoned for the offense or has had his civil rights restored.”).

49. See *United States v. Castleman*, 134 S. Ct. 1405 (2014).

50. *Id.* at 1410 (discussing the “split of authority among the Courts of Appeals”).

Lautenberg Amendment.⁵¹ In 2014, in *United States v. Castleman*, the Supreme Court definitively held that even “minor uses of force” such as “pushing, grabbing, shoving, slapping, and hitting” constitute the requisite predicate crime of domestic violence.⁵² In light of the states’ confusion surrounding qualifying misdemeanor offenses, this decision made it clear to state agencies that the Lautenberg Amendment was created to meaningfully expand the reach of the firearm prohibitions.

In 2001, James Castleman pled guilty to “‘intentionally or knowingly caus[ing] bodily injury’ to the mother of his child,” a misdemeanor offense in Tennessee.⁵³ Seven years later, Castleman was indicted for violating 18 U.S.C. § 922(g)(9) because he was selling firearms on the black market after being convicted of an MCDV.⁵⁴ Castleman filed a motion to dismiss, arguing that his 2001 domestic violence conviction lacked the requisite element of “physical force” that would render it a qualifying MCDV.⁵⁵ He argued, and the district court agreed, that the Tennessee statute under which Castleman was originally convicted did not require “violent contact” with the victim.⁵⁶ The Court of Appeals for the Sixth Circuit affirmed the district court decision, but on different grounds.⁵⁷ That court held that Castleman’s conviction did not trigger the Lautenberg Amendment because the force necessary to be a predicate crime of domestic violence had to be “violent force,” as defined by § 924(e)(2)(B)(i), and his offense lacked the requisite degree of violence.⁵⁸ In

51. *United States v. Castleman*, 695 F.3d 582, 588–89 (6th Cir. 2012), *rev’d*, 134 S. Ct. 1405 (2014) (holding that the necessary force is “violent force”); *cf.* *United States v. Nason*, 269 F.3d 10, 16–17 (1st Cir. 2001) (holding that “all types of physical force, regardless of whether they could reasonably be expected to cause bodily injury” fulfill the physical force requirement); *see also* Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 519–35 (2008) (explaining the differing judicial views of the interpretation of “the use of physical force”).

52. *Castleman*, 134 S. Ct. at 1412 (“Minor uses of force may not constitute ‘violence’ in the generic sense . . . [b]ut an act of this nature is easy to describe as ‘domestic violence,’ when the accumulation of such acts over time can subject one intimate partner to the other’s control . . . [therefore], it does not offend common sense . . . to characterize the resulting conviction as a ‘misdemeanor crime of domestic violence.’”).

53. *Id.* at 1409.

54. *See id.*

55. *See id.* at 1406–07.

56. *See id.*

57. *United States v. Castleman*, 695 F.3d 582, 583 (6th Cir. 2012), *rev’d*, 134 S. Ct. 1405 (2014).

58. *Id.* at 587 (discussing the definition of a “violent felony” and its requisite “violent force”). Castleman was convicted under Tennessee Code section 39-13-111(b), which criminalizes the infliction of bodily injury, regardless of whether violent force was used. Castleman’s indictment did not indicate the amount of force he used, so the Sixth Circuit would not hold that he used violent force. Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of United States v. Castleman—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 131 (2015).

fact, the issue of whether “physical force” had to be “violent force” had troubled numerous federal courts and led to a split of authority.⁵⁹

The Supreme Court ruled on this split of authority, disagreeing with the Sixth Circuit’s interpretation of “use of physical force.”⁶⁰ It held that the common law meaning of “force” is “offensive touching,” and thus only a lower level of force was required to satisfy the statutory “use of force” element.⁶¹ In recognizing that batterers are often charged under general assault or battery statutes, the Court acknowledged that this common law meaning of “force” is the most applicable.⁶² The Court also pointed to the intent of Congress to explain the holding, finding that Congress must have intended to utilize the “offensive touching” definition of force because otherwise § 922(g)(9) would not have applied in at least ten states.⁶³ More often than not, when the statute was enacted, domestic offenders were charged pursuant to general state assault and battery laws that fell into two categories: “those that prohibit[ed] both offensive touching and the causation of bodily injury, and those that prohibit[ed] only the latter.”⁶⁴ Mere “offensive touching” does not inescapably involve the use of violent force, of course.⁶⁵ Thus, in at least ten states that required the causation of bodily injury, § 922(g)(9) would have been ineffectual if violent force was required to trigger the statute.⁶⁶ The important result of this landmark decision is that offenders convicted of MCDVs that involve lesser forms of violence, that is “offensive touching,” are clearly subject to the federal firearm prohibition.⁶⁷

Although heralded as a significant victory for domestic violence advocates, *Castleman* only expands the number of perpetrators that are covered by federal laws. The case does not address the extensive issues, such as the lack of relinquishment protocols, which prevent the federal laws from actually removing firearms from offenders’ hands. Shortly after deciding *Castleman*, the Supreme Court decided a case regarding

59. See, e.g., *United States v. Nason*, 269 F.3d 10, 18 (1st Cir. 2001) (finding § 922(g)(9) “encompass[es] crimes characterized by the application of any physical force”); cf. *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003) (holding § 922(g)(9) covers only “the violent use of force”).

60. *Castleman*, 134 S. Ct. at 1409–10.

61. *Id.* at 1410–11 (discussing both the common law meaning of force and distinguishing it from the required use of violent force necessary to satisfy the Armed Career Criminal Act’s (“ACCA”) definition of a “violent felony”).

62. *Id.* at 1410.

63. See *id.* at 1413.

64. *Id.*

65. *Id.*

66. *Id.*

67. Lynn Rosenthal, *Supreme Court Decision in U.S. v. Castleman Will Save Women’s Lives*, WHITE HOUSE BLOG (Mar. 28, 2014, 2:23 PM), <http://www.whitehouse.gov/blog/2014/03/28/supreme-court-decision-us-v-castleman-will-save-womens-lives> (explaining that some courts did not consider “offensive touching” to be a crime of domestic violence, and therefore, did not require defendants to relinquish their guns).

offenders' access to firearms that was viewed as a significant loss in the eyes of domestic violence advocates.⁶⁸

D. *HENDERSON V. UNITED STATES*

In May 2015, the Supreme Court issued the *Henderson v. United States* opinion.⁶⁹ Although not specifically about domestic violence offenders, the *Henderson* ruling applies to all persons subject to § 922(g), including domestic violence offenders. The case involved a U.S. Border Patrol agent, Tony Henderson, who was charged with felony distribution of marijuana.⁷⁰ As a federal agent, Henderson was required to relinquish all of his firearms to the Federal Bureau of Investigation (“FBI”) in order to be released on bail, and he complied.⁷¹ Shortly thereafter, he pled guilty to the felony, triggering § 922(g), which precluded him from repossessing his guns.⁷² Upon release from prison, Henderson contacted the FBI to request that they transfer his firearms to his friend.⁷³ The FBI denied his request, citing § 922(g) and telling Henderson the transfer would amount to “constructive possession,” which is prohibited under § 922(g).⁷⁴ The district court and the Court of Appeals for the Eleventh Circuit affirmed the FBI’s decision on the grounds that the transfer would indeed give Henderson “constructive possession” of the firearm.⁷⁵ The Supreme Court granted certiorari “to resolve [the] circuit split over whether, as the courts below held, § 922(g) categorically prohibits a court from approving a convicted felon’s request to transfer his firearms to another person.”⁷⁶

The Court reversed the decision of the lower courts.⁷⁷ It reasoned, “§ 922(g) does not prohibit a felon from *owning* firearms. Rather, it interferes with a single incident of ownership . . . by preventing the felon from knowingly *possessing* his (or another person’s) guns.”⁷⁸ So, in Henderson’s case, he may well have a property right over a firearm, but he cannot have the firearm on his person or in his dwelling. The Court further explained that this preclusion includes both actual and

68. See *Henderson v. United States*, 135 S. Ct. 1780 (2015).

69. *Id.*

70. *Id.* at 1783.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Prohibition of “possession” of a firearm under § 922(g) includes the prohibition of “constructive possession.” See *Nat’l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) (explaining that the word “possession . . . interchangeably . . . describe[s]” both actual and constructive possession).

75. *Henderson*, 135 S. Ct. at 1783.

76. *Id.* at 1784.

77. *Id.* at 1783.

78. *Id.* at 1784.

constructive possession.⁷⁹ Thus, § 922(g) does not allow a felon's firearms to be transferred to a third party who would give the felon access to the firearms at a later date.⁸⁰ Nonetheless, the Court discussed that the transfer to a third party of a felon's choice "serves only to divest the felon of his firearms—and even that much depends on a court's approving the designee's fitness and ordering the transfer to go forward."⁸¹ This, the Court held, is not a possessory interest, and holding otherwise would "extend § 922(g)'s scope far beyond its purpose."⁸² Thus, § 922(g) does not bar a felon from, with a court's approval, transferring her lawfully owned firearms to a third party.⁸³

Nonetheless, the Court acknowledged that some transferees might not be trustworthy.⁸⁴ In such cases, it urged to courts generally responsible for ensuring compliance with gun relinquishment laws to deny the felon's request for transfer.⁸⁵ However, the concern that friends or family members of domestic violence offenders can take possession of a firearm, only to return it to the offender, is pertinent and should not be lightly brushed off. With oversized caseloads and the potential lack of familiarity with an individual defendant, judges might not be able to easily assess a transferee's credibility. As the only assurance provided by the Court, the use of judiciaries to screen a transferee's credibility does not provide the protection that § 922(g) is seeking. *Henderson* provides domestic violence offenders with a great deal of latitude and will undoubtedly put guns back into the hands of some prohibited persons. However, even though *Henderson* undermined the current legislation, members of Congress continue to push for legislation to protect victims. The most recent effort is the introduction of the Zero Tolerance for Domestic Abusers Act.

E. ZERO TOLERANCE FOR DOMESTIC ABUSERS ACT

In July 2015, Congresswoman Debbie Dingell and Congressman Robert Dold publicly recognized some of the issues in the current federal relinquishment laws, such as the exclusion of dating partners and stalkers from the statutory language.⁸⁶ In response to the shortcomings, they

79. *Id.* ("Actual possession exists when a person has direct physical control over a thing Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.").

80. *Id.*

81. *Id.* at 1785.

82. *Id.* at 1786.

83. *Id.* at 1786–87.

84. *Id.*

85. *Id.* at 1787.

86. Gabby Giffords, *National Domestic Violence Prevention Leaders Applaud New House Legislation to Keep Guns Out of the Hands of Abusers*, AMS. RESPONSIBLE FOR SOLUTIONS (July 22, 2015), <http://americansforresponsiblesolutions.org/2015/07/22/dv/>.

introduced the Zero Tolerance for Domestic Abusers Act.⁸⁷ If passed, the act would accomplish two goals toward improved relinquishment efforts. First, it would expand the definition of “intimate partner” to include former and current dating partners.⁸⁸ In today’s society, where more couples are unmarried or do not live together, this would close a considerable gap in the legislation’s reach. Second, the act would prohibit stalking misdemeanants from possessing or purchasing firearms.⁸⁹ This portion of the proposed act is a reflection of the greater awareness of the dangers of stalkers and would be a substantial addition to the current federal laws.⁹⁰ However, only time will tell whether this act will pass.⁹¹ With an understanding of the federal laws currently in place and the case law surrounding them, it is important to now discuss their deficiencies.

F. CRITICISMS OF FEDERAL FIREARMS LAWS

The federal firearms prohibition laws, especially when coupled with the *Castleman* holding, seemingly provide domestic violence victims with enhanced protection from batterers. These laws were implemented to give law enforcement greater authority to keep guns out of the hands of all batterers, no matter how “minor” their crimes might seem. However, in practice, these laws are rarely enforced. This Part will consider the deficiencies of the federal laws, from statutory shortcomings to the roles of several major players that make enforcement difficult—if not impossible.

I. Statutory Shortcomings

A central component that explains the lack of enforcement is the failure of the federal laws to provide the states with effective guidelines on how to enforce the gun relinquishment provisions.⁹² The federal laws make it a crime to possess, acquire, or sell firearms while subject to a domestic violence restraining order or, alternatively, after being convicted of an MCDV.⁹³ However, these same laws fail to specify procedures to compel

87. *Id.*

88. *Id.*

89. *Id.*

90. *Intimate Partner Stalking: Comparing Abusive Partners Who Do and Do Not Stalk*, NAT’L INST. OF JUST. (Apr. 20, 2012), <http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/pages/stalkers-nonstalkers.aspx> (“Stalking was highly prevalent in cases of actual or attempted femicides. Approximately 90 percent of actual or attempted lethality victims who experienced a physical assault in the preceding year were also stalked by the violent partner.”).

91. Currently, the Act has been introduced in the House and has been referred out to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. *H.R. 3130—Zero Tolerance for Domestic Abusers Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/3130/actions> (last visited Apr. 10, 2016).

92. Sack, *supra* note 31, at 7.

93. 18 U.S.C. §§ 922(g)(8)–(9) (2015).

abusers to surrender their firearms, leaving states with the formidable process of creating their own protocols.

The chances of relinquishment are further hindered by the reality that federal prosecutors are oftentimes unaware of violations of the federal law because the predicate offenses—namely the domestic violence restraining order and the MCDV—are generally cases heard in state court.⁹⁴ Although in the digital era state information on restraining orders and crimes is transmitted to federal authorities electronically by a law enforcement telecommunications system, many states do not reliably enter domestic violence misdemeanors or restraining orders into the correct databases.⁹⁵ This is oftentimes a symptom of the disjunctive nature of many crimes that could qualify as an MCDV.⁹⁶ For example, an assault statute might criminalize the use of physical force or the use of verbal threats. If the requisite domestic relationship is present, then a perpetrator could be convicted of an MCDV under the first prong (physical force), but not under the second prong (verbal threats).⁹⁷ Without a clear indication of the relationship between the victim and perpetrator and the specific prong implicated in the crime within the electronic record, these types of convictions can easily go unnoticed by firearm distributors, prosecutors, and law enforcement officers. In other words, one of these players could mistakenly believe that there is no requisite MCDV because the electronic system does not provide enough information about the underlying crime. In effect, the absence of instruction and specific requirements in the federal laws regarding gun relinquishment procedures leaves state court judges and local law enforcement unwilling and unable to reliably collect guns from those offenders subject to the gun relinquishment laws.

Another obstacle in this context is that the federal gun relinquishment laws do not provide incentives for states to enforce the federal laws.⁹⁸ Incentives, especially in light of the current financial status of many states, could be the determining factor in whether a state opts to enforce or implement the respective statute or procedure. In order to receive certain funding,⁹⁹ the Violence Against Women and Department of Justice Reauthorization Act of 2005 required states and local

94. Sack, *supra* note 31, at 7–8 (explaining that predicate offenses are most often issues of state law).

95. *Domestic Violence and Firearms Policy Summary*, *supra* note 22; see also U.S. DEP'T OF JUSTICE, INFORMATION NEEDED TO ENFORCE THE FIREARM PROHIBITION: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE (2007) (providing a discussion of the complicated legal issues that arise in state reporting of misdemeanor crimes of domestic violence, including disjunctive statutes that require a sophisticated and accurate reporting system).

96. U.S. DEP'T OF JUSTICE, *supra* note 95.

97. *Id.*

98. Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607, 634 (1998).

99. See, e.g., 42 U.S.C. § 3796gg-4 (2015) (providing funding for rape examinations).

governments to certify that their judicial policies included notification to domestic violence offenders of the federal, state, and local firearm prohibitions.¹⁰⁰ However, the act did not require the establishment of procedures for the relinquishment of the firearms as a prerequisite for funding. Implementing gun relinquishment protocols is an expensive process,¹⁰¹ and the federal government has not provided states with any funding to enforce the federal gun relinquishment laws.¹⁰²

In an attempt to address this problem, two bills have been introduced in Congress. The first, entitled the Domestic Violence Criminal Disarmament Act of 2013, was introduced in the House of Representatives in November 2013.¹⁰³ This bill sought to amend the Omnibus Crime Control and Safe Streets Act of 1968 in order to provide grant money to states that enacted laws and procedures to seize and force surrender of firearms from those subject to the federal gun relinquishment laws.¹⁰⁴ Unfortunately, the bill soon died in committee.¹⁰⁵ The Senate introduced the second bill, the Domestic Violence Gun Homicide Prevention Act of 2014, in July 2014.¹⁰⁶ It adopted a parallel approach to the previous bill by creating grants for states that (1) implemented laws mirroring the federal relinquishment laws, and (2) took significant steps to retrieve guns from domestic violence offenders.¹⁰⁷ Again, this bill died quickly after it was introduced.¹⁰⁸ These unsuccessful legislative efforts signify that even when federal legislators attempt to remedy the lack of funding for state agencies, they cannot surmount even initial hurdles of statutory enhancement, thereby allowing the problematic status quo to reign.

The federal firearm prohibition laws exist, in part, to create a safer community for victims of domestic violence by preventing offenders from accessing firearms. However, the statutes themselves have failed to produce the desired results. These statutory deficiencies must be addressed in order to strengthen relinquishment efforts, but to date, Congress has

100. *See, e.g., id.*

101. For example, effective gun relinquishment protocols would likely require the formation of working groups to develop and oversee the protocol implementation, increase communication amongst the various entities responsible for implementation, and implement training for these entities.

102. *See, e.g.,* DOMESTIC VIOLENCE PRACTICE & PROCEDURE TASK FORCE, DOMESTIC VIOLENCE: FINAL REPORT OF THE DOMESTIC VIOLENCE PRACTICE PROCEDURE TASK FORCE 18 (Jan. 16, 2008), http://www.courts.ca.gov/documents/dvpp_judicialcouncilreport.pdf (providing that even the cost of a task force to look into the implantation of a gun relinquishment program will require a great deal of resources); Mecka, *supra* note 98, at 634.

103. H.R. 3566, 113th Cong. (1st Sess. 2013).

104. *Id.*

105. H.R. 3566 (113th): Domestic Violence Criminal Disarmament Act of 2013, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3566> (last visited Apr. 10, 2016).

106. S. 2676, 113th Cong. (2d Sess. 2014).

107. *Id.*

108. S. 2676 (113th): Domestic Violence Gun Homicide Prevention Act of 2014, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s2676> (last visited Apr. 10, 2016).

failed to remedy these issues. Yet, the statutes are not the only issues reducing the success of the federal laws.

2. *Role of Background Checks*

Background checks pose another problem for the enforcement of the federal firearm prohibition laws. They are the only systems that alert gun dealers to a prospective buyer's eligibility for gun ownership, making them immensely important. The Brady Handgun Violence Prevention Act of 1993 authorized the creation of the National Instant Criminal Background Check System ("NICS"),¹⁰⁹ which only applies to licensed gun dealers.¹¹⁰ Pursuant to the Act, a licensed gun dealer must check a photo ID and receive a completed basic information form from the potential purchaser before selling a gun.¹¹¹ The gun dealer is required to conduct a background check using the NICS and cannot sell firearms to individuals who are prohibited from buying or possessing guns.¹¹² Unless there is a delay, indicating a possible match with a prohibitory record, most background checks can be completed within thirty seconds.¹¹³ If NICS reports that the sale is permitted, then the dealer may complete the sale of the firearm.¹¹⁴ The dealer may not complete the sale if NICS reports that the sale is denied.¹¹⁵ Authorities have three business days to conduct a more thorough background check and report back to the dealer if there is a delay.¹¹⁶ If three days pass and the dealer has not yet heard back regarding the prospective buyer, the dealer has the discretion to decide whether to sell the firearm to the buyer if state laws allow it.¹¹⁷ The integrity of the federal gun laws relies on the background check system to keep firearms out of the hands of prohibited persons, but there are several issues that prevent the system from fully succeeding.

The NICS fails on several levels, starting with the actual information that is supplied to the system. In order for the NICS to be as effective as possible, it must contain accurate and up-to-date data, but in its current

109. *National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics> (last visited Apr. 10, 2016).

110. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (requiring only licensed importers, licensed manufacturers, or licensed dealers to participate in background check system).

111. EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL DOMESTIC VIOLENCE PROBLEM 6 (June 18, 2014).

112. *Id.*

113. *National Instant Criminal Background Check System: Fact Sheet*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Apr. 10, 2016).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

form, it contains neither.¹¹⁸ Many states do not voluntarily report the necessary information, including criminal history records, mental health records, and drug abuse records, to background check systems because there is no punishment for failure to do so.¹¹⁹ As a result, hundreds of thousands of records have not been entered into the NICS.¹²⁰ Aside from no requirement to report, states are having a difficult time identifying the perpetrators who should be prohibited from possessing firearms.¹²¹ This is likely in part a result of the federal government's failure to provide states with sufficient instruction as to what exactly qualifies as an MCDV, as discussed above. Furthermore, a large percentage of domestic violence restraining orders are never even entered into the NICS for varying and unknown reasons.¹²² Due to privacy laws, a state's failure to enter data into the NICS creates a massive problem in light of the fact that the FBI does not have access to this information.¹²³ With such large gaps in the system's information, it is not feasible for gun dealers to accurately assess each sale and prevent the sale of firearms to designated persons using the NICS. The inadequacies of the NICS loom large over licensed firearm dealers, but there exists another category of dealers who are not required to consider the NICS: the unlicensed dealers, discussed below.

Although the NICS has effectively prevented the purchase of over 2.4 million guns since its inception in 1998,¹²⁴ there are glaring deficiencies in federal gun laws that thwart the success of the NICS.¹²⁵ Notably, the federal law requiring background checks for the sale of guns

118. *Background Checks*, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/issue/background-checks/> (last visited Apr. 10, 2016) (discussing the failure of federal and state agencies to send records to the national background check databases).

119. See *Background Check Procedures Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (July 13, 2015), <http://smartgunlaws.org/background-check-procedures-policy-summary/>; see also 28 C.F.R. § 25.4 (2013). According to case law, a federal statute requiring states to disclose records to the FBI would violate of the Tenth Amendment. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that temporary Brady Act provisions obligating local law enforcement officers to conduct background checks on prospective handgun purchasers was unconstitutional).

120. *Background Check Procedures Policy Summary*, *supra* note 120.

121. See *supra* Part I.F.1; Sack, *supra* note 31, at 8. See generally U.S. DEP'T OF JUSTICE, *supra* note 95 (providing an overview of the criteria of misdemeanor crimes of domestic violence and why it can be difficult to enforce the gun prohibition).

122. Devon Spurgeon, *450 Restraining Orders Not Logged into System, Baltimore Police Say*, BALT. SUN (Nov. 20, 1999), http://articles.baltimoresun.com/1999-11-20/news/9911200315_1_restraining-state-police-orders (explaining that almost twelve percent of domestic violence restraining orders in Baltimore were not entered into the background check system).

123. See *Background Check Procedures Policy Summary*, *supra* note 119. The FBI is generally responsible for running the background checks. However, some states choose to use designated Points of Contact ("POCs") to run the checks. *National Instant Criminal Background Check System Fact Sheet*, *supra* note 113.

124. Alex Yablon, *The 12 Reasons Why Americans Fail Federal Gun Background Checks*, TRACE (July 31, 2015), <http://www.thetrace.org/2015/07/gun-background-checks-nics-failure/>.

125. EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 5-6 (discussing that hundreds of thousands of domestic violence perpetrators have been stopped from purchasing guns from licensed dealers).

only applies to licensed dealers.¹²⁶ As a result, domestic violence perpetrators are still free to purchase guns, without the threat of a background check, from unlicensed dealers online or at gun shows.¹²⁷ They do so in large numbers and with impunity.¹²⁸ When unlicensed dealers do not know a purchaser is prohibited, they act completely within their legal rights when they sell guns to abusers.¹²⁹ This loophole threatens the entire relinquishment process because even if states manage to develop strong relinquishment protocols, a domestic violence perpetrator can still purchase a weapon minutes after surrendering all of his firearms to law enforcement or a vetted third party.

If the background check system is ineffective and not required, then it makes the relinquishment of firearms a futile process. Offenders are aware of the system's loopholes and failures. Even if they feel compelled to surrender their firearms, they have a relatively easy way to evade the restrictions and acquire a new weapon. Not only does the legislature need to mandate use of background checks for all dealers—licensed and unlicensed—but the system also needs to be current and user friendly.¹³⁰ However, it will only be as good as the persons utilizing the information, which is where the police come into play.

3. *Role of Police*

The role of police in the enforcement of the gun relinquishment provisions is central to the utility of these provisions. After the relinquishment laws are triggered, law enforcement officers are responsible for the seizure or forfeiture of the firearms, a task that oftentimes proves to be time intensive and expensive. These laws are only operative if law enforcement officers enforce them. However, police attitudes hamper enforcement efforts because the *federal* gun relinquishment laws must be enforced by *state* and *local* law enforcement agencies, causing some local police to perceive the laws as an infringement on their power.¹³¹ Some local law enforcement officers have argued that they should not be using their limited resources to enforce federal laws.¹³² Instead, they believe that their funding should go toward enforcing their

126. *Id.* at 8.

127. *Id.* (providing examples of incidents where domestic abusers have purchased guns without background check only to murder their former partners).

128. *Id.* (citing 2013 study conducted by Mayors Against Illegal Guns that found one in thirty prospective online gun buyers were prohibited buyers, and one in four of those prohibited buyers had been arrested for domestic violence).

129. *Id.* However, in the sixteen states that “go beyond federal law and require background checks for all handgun sales . . . 38 percent fewer women are shot to death by intimate partners.” *Id.* at 9.

130. *See infra* Part III.C.

131. Sack, *supra* note 31, at 9.

132. Mecka, *supra* note 98, at 643–45 (discussing Utah’s refusal to adopt the federal laws).

respective state relinquishment laws (if they even exist).¹³³ Moreover, local law enforcement might feel a particular disdain for the Lautenberg Amendment as it purposefully removed the ability of law enforcement officers to be exempt from its reach.¹³⁴ Some have gone as far as to condemn the Lautenberg Amendment, including the former National Vice President of the Fraternal Order of Police, Bernard H. Teodorski, who called the Act “ill-crafted” and “ill-conceived.”¹³⁵ Police attitudes are only one contributing factor to the lack of enforcement. There are also systemic defects preventing law enforcement officers from fully cooperating with relinquishment efforts.

As discussed in Part I.F.2, much of the success of the gun relinquishment laws relies on the use of the NICS. Police play an important role in the execution of the NICS, as they are the enforcement mechanism that powers the system. Law enforcement officers have three days to execute a background check for a gun buyer before the buyer is approved by default.¹³⁶ In light of the issues with the NICS described above (such as containing incomplete and inaccurate information), three days is an insufficient amount of time to conduct these checks. Accordingly, if the police are unable or unwilling to perform their role, then the system cannot operate effectively.

Even the most stringent and thorough laws would be moot without enforcement by police officers. The background check system, as it currently stands, does not provide officers with the necessary information to prohibit firearm sales to designated persons. Further, officers are unable to reliably determine if firearms must be seized from offenders without a complete background check system. The officers’ failure to keep guns out of offenders’ hands subjects domestic violence victims to preventable and foreseeable harms, as evidenced by the murder of Nicolette Elias.¹³⁷ But before officers are involved, prosecutors must charge and convict domestic violence offenders to place them on the prohibited persons list.

4. *Role of Prosecutors*

Violations of the federal firearm prohibition laws are federal crimes. As such, it is the responsibility of federal prosecutors to charge and convict those who violate §§ 922(g)(8) and (9). Unfortunately, the reality that federal prosecutors rarely charge cases under these sections is an

133. *Id.* at 644 (citing Illinois as an example of a state that has created its own laws regarding domestic violence offenders and firearm prohibitions).

134. Sack, *supra* note 31, at 8.

135. *Domestic Violence Offender Gun Ban: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski).

136. 18 U.S.C. § 922(t) (2015).

137. *See supra* INTRODUCTION.

indication that they are not pursuing these cases diligently.¹³⁸ Prosecutions under §§ 922(g)(8) and (9) only add up to approximately three percent of the total prosecutions under § 922(g) as a whole.¹³⁹ The lack of prosecutions cannot be ascribed to a low number of possible defendants.¹⁴⁰ So why is this the case?

There are several probable reasons for this low rate of prosecutions, including the structure of the U.S. Attorneys' offices, a lack of resources, and a lack of sentencing guidelines. First, the structure of the U.S. Attorneys' offices can be detrimental to the prosecution of domestic violence crimes because many prosecution units do not inherently cover these crimes.¹⁴¹ For example, the U.S. Attorney's office in Wisconsin has a Criminal Litigation Unit that is broken down into the following subunits: Direct Prosecution,¹⁴² Special Prosecutions,¹⁴³ Sexual Predator Commitments,¹⁴⁴ Advice and Consultation,¹⁴⁵ and Prosecutor and Law

138. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 531–32 (2003) (“[T]he ninety-four U.S. Attorneys’ offices have failed to generate an annual average of one case per district since section 922(g)(8) was enacted in 1994. . . . [P]rosecutions under section 922(g)(9) make up just two to three percent of the total prosecutions under 18 U.S.C. § 922(g) . . .”).

139. Lininger, *supra* note 138, at 530–32. Section 922(g) prohibits the following persons from possessing a firearm: felons, fugitives, drug addicts, mentally ill, illegal immigrants, those who have been dishonorably discharged from the Armed Forces, those who have renounced their American citizenship, those subject to a domestic violence restraining order, and domestic violence misdemeanants. 18 U.S.C. § 922(g).

140. Lininger, *supra* note 138, at 531.

18 U.S.C. § 922(g)(8) was enacted in 1994 and the number of prosecutions for violating has been minuscule (perhaps fewer than 10, though I have not been able to discover the exact number, which is not a reported statistic) in relation to the probable number of violations. I estimate that every year the law has been in effect almost one hundred *thousand* restraining orders against domestic violence have been issued. Since 40 percent of U.S. households own guns, there can be very little doubt that a large percentage of those orders were issued against gun owners.

United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting).

141. Sack, *supra* note 31, at 8.

142. *Criminal Litigation Unit*, WIS. DEP’T OF JUSTICE, <https://www.doj.state.wi.us/dls/criminal-litigation-unit> (last visited Apr. 10, 2016) (“The unit has authority to initiate criminal prosecutions for violations of selected statutes including securities, tax, and the Wisconsin Organized Crime Control Act.”).

143. *Id.* (“At the request of district attorneys, unit members investigate and act as special prosecutors throughout Wisconsin in homicide, white-collar crime, public corruption, election fraud, multi-jurisdictional criminal cases, and other cases where the district attorney needs assistance or is unable to act.”).

144. *Id.* (“The unit has a primary role in prosecuting sexual predator commitments in counties across the state and also handles post-commitment proceedings in those cases.”).

145. *Id.* (“The unit provides advice and assistance to law enforcement and prosecutors on a variety of issues including specialized areas such as Internet Crimes Against Children, elder abuse, child abuse and neglect, and computer crimes. Unit attorneys also review and comment on criminal related legislation.”).

Enforcement Training.¹⁴⁶ None of these sub-units specializes in domestic violence related prosecutions, and domestic violence related prosecutions do not fall squarely within any of their purviews. Furthermore, the culture of these offices disfavors the prosecution of domestic violence crimes because this would require federal prosecutors to rely too heavily upon state convictions in their own work.¹⁴⁷ Federal prosecutions that depend on state-level prosecutions are not as highly regarded as white-collar criminal prosecutions.¹⁴⁸ A noticeably low level of coordination and communication between federal prosecutors and local law enforcement further exacerbates the challenge of reliance on state convictions.¹⁴⁹ Moreover, some U.S. Attorneys' offices fail to prosecute under the respective federal firearm prohibitions due to a lack of resources, especially a lack of funds.¹⁵⁰ Many federal prosecutors will pass up opportunities to charge these crimes because §§ 922(g)(8) and (9), unlike the other federal gun laws, come with low sentences.¹⁵¹ The tendency is to encourage these prosecutors to attain higher sentences than those that can be acquired by their state counterparts.¹⁵² Knowing that these offenders will likely get much lower prison sentences, federal prosecutors do not feel the need to aggressively pursue federal firearm possession cases.¹⁵³ With such a low probability of being charged with these crimes, domestic violence offenders might see no need to relinquish their firearms. In their minds, then, the price of nonrelinquishment is not high enough to convince them to actually surrender their firearms. However, this might not be the case if judges, who have face-to-face contact with offenders, are insistent upon educating offenders about their relinquishment duties. In addition to their ability to communicate directly with offenders, judges impact the implementation of relinquishment protocols in several ways.

146. *Id.* (“Attorneys from the unit provide general advice, training and education to prosecutors and law enforcement through a variety of means including its Statewide Prosecutors Education and Training (SPET) program.”).

147. *Id.*

148. *Id.*

149. *Id.*

150. Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse*, 23 VT. L. REV. 349, 364 (1998) (discussing the example of the Vermont U.S. Attorney's Office as unable to prosecute due to “limited resources”).

151. Lininger, *supra* note 138, at 596 (noting that prosecutions under §§ 922(g)(8) and (9) yield an average two-year sentence, while the average federal firearm prosecution yields an eight-year sentence).

152. *Id.* at 597.

153. *Id.*

5. *Role of Judges*

As gatekeepers to the issuance of domestic violence restraining orders or MCDV convictions, judges also play a role in the enforcement of the gun relinquishment laws. Although the most pertinent goal of the federal firearms laws is to protect domestic violence victims, “judges have long invented ways to protect batterers, including the application of judge-made laws to domestic violence occurrences.”¹⁵⁴ Due to personal biases, some judges may refuse to find that a perpetrator committed domestic violence by excluding evidence or “wholly ignor[ing] admitted evidence,” thereby avoiding the issuance of a restraining order or a misdemeanor conviction.¹⁵⁵ There are a number of reasons for this type of judicial behavior. For example, some judges might have sympathy for offenders because they are police officers or have served in the military.¹⁵⁶ Others might exhibit biases against victims of domestic violence.¹⁵⁷ Judges, reflexively guided by their personal belief systems, have a significant effect on the outcomes of relinquishment protocols. The federal laws are in place to protect the victims of domestic violence and should not be subject to the whim of a judge on any particular day. Nonetheless, the judicial system in this nation is set up such that judges have a great deal of discretion. There are instances where the legislature has sought to reduce the discretion of judges, such as through the implementation of sentencing guidelines. However, many people, including judges, have very strong opinions about domestic violence, and it seems improbable to believe that one can completely omit the personal beliefs of judges from the implementation of §§ 922(g)(8) and (9).

Although empirical data is lacking on these judicial practices, anecdotal evidence is available. One egregious, but not uncommon, example of a judge abusing discretion and allowing a domestic violence perpetrator to sidestep the federal gun bans took place in rural Missouri.¹⁵⁸ A judge, who believed a young wife’s testimony regarding the severe abuse that she endured at the hands of her husband and heard the husband confess to his actions, nevertheless denied the issuance of a restraining order.¹⁵⁹ Instead, the judge told the wife to increase her safety

154. Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 23 (2005).

155. *Id.*

156. *See, e.g.*, *Freeman v. Freeman*, 169 Wash. 2d 664, 676 (2010) (citing an offender’s war injury and amputation as a reason to terminate a permanent restraining order).

157. Joan Zorza, *Battered Mothers Speak out About Court Injustices*, 8 DOMESTIC VIOLENCE REP. 33, 34, 44 (2003).

158. May, *supra* note 154, at 2.

159. *Id.* at 1–2 (“A severely battered woman . . . described her husband throwing her to the ground, threatening her with death, and waking her in the middle of the night by holding her down and beating her.”).

by changing the locks on her door.¹⁶⁰ The same day in open court, this particular judge explained that the “upcoming quail hunting season” served as a reason to avoid the issuance of another restraining order.¹⁶¹ This remark signals the reality that many victims of domestic violence are faced with every day, namely, the belief of many Americans that a person’s right to possess a gun supersedes the safety of a victim. By providing loopholes, or wholly ignoring a victim’s plight, judges are able to avoid the need to seize firearms from offenders.

Although judges often evade the federal firearm laws, both federal and state judges lack the authority to actually strike down the federal firearms laws. Even in states that do not have state firearms prohibition laws that are as stringent as the federal law, neither statute can supersede the other.¹⁶² Thus, theoretically, state judges cannot avoid the reach of the federal firearms prohibitions. Instead, legal commentators explain:

[B]oth sets of laws remain in full force and both apply to this situation. The respondent would not be subject to a state-law firearm provision, because the judge opted not to invoke her authority to prohibit gun possession, but the respondent nonetheless would be subject to federal prosecution under the federal gun law, because the federal prohibition is independent of state law In fact, section 922(g)(8) does not rely upon state law definitions or standards to determine whether a person is prohibited from possessing a firearm [T]his means that the particular findings and terms of the order must be assessed against the federal requirements All of this is not to say, however, that the actions of state court judges do not profoundly affect the operations of federal law. In fact, the nature of the conduct proscribed by the order or of the findings of fact included therein determines whether the federal law applies.¹⁶³

Essentially, judges who believe that they can allow offenders to evade the federal law bans (by failing to check certain boxes on a restraining order or by writing a note indicating that the federal firearms laws do not apply) are misinformed.¹⁶⁴ In other words, if a restraining order meets the requirements, the federal firearms prohibition will apply to the offender because “state court judges do not determine the applicability of the federal law.”¹⁶⁵ Judges do, however, have the ability to control the findings of fact and to determine if the defendant’s conduct

160. *Id.* at 2.

161. *Id.*

162. Carrie Chew, *Domestic Violence, Guns, and Minnesota Women: Responding to New Law, Correcting Old Legislative Need, and Taking Cues from Other Jurisdictions*, 25 *HAMLIN J. PUB. L. & POL’Y* 115, 150 (2003).

163. Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, 39 *CT. REV.* 32, 38 (2002).

164. *Id.*

165. *Id.*

qualifies as “prohibited,” which then controls the applicability of the federal law.¹⁶⁶

On a practical level, judges are also responsible for the “deterrent effect” of the federal firearms laws.¹⁶⁷ Judges have the opportunity to interact with offenders to notify them of the federal statute.¹⁶⁸ As such, they are in the unique position of explaining that the prohibited persons must surrender their firearms. Without judicial clarification, a domestic violence perpetrator subject to a restraining order or convicted of an MCDV might not otherwise know of her obligation to relinquish firearms. If a perpetrator is unaware of her relinquishment obligation and local law enforcement is failing to enforce a relinquishment protocol, the effectiveness of the relinquishment laws is undoubtedly diminished.

While the passage of the federal firearm laws represented immense victories for domestic violence victims, survivors, and advocates, the actual consistent enforcement of these laws failed to meet expectations. One explanation for this failure is the federal government not presenting the states with guidelines or incentives to implement the relinquishment provisions. Further, the glaring defects in the NICS and the loopholes in the background check system allow offenders to easily obtain firearms even if they abide by the relinquishment protocols initially. Aside from the statutory deficiencies, law enforcement officers, prosecutors, and judges all play a role in the failed relinquishment system. Each bringing their own biases to the table, these players can, and often do, disrupt the federal relinquishment laws. With such a large number of issues preventing the realization of the federal laws, the only chance for more success is the enactment and enforcement of state laws.

II. STATE RELINQUISHMENT LAWS

This Part will discuss the enactment, or lack thereof, of state laws that support or mimic the federal firearm bans. Without a statutory scheme to dictate how to collect firearms from offenders, the federal gun relinquishment laws cannot be successfully implemented. Although some federal legislators are attempting to enact improved laws, their inability to push federal bills through Congress makes the need for state laws even greater. Consequently, one must turn to the state relinquishment laws in order to determine the value of federal prohibitions. In fact, Lautenberg Amendment proponents have argued that the “[federal] laws are an attempt to supplement local [and state] law enforcement’s role—not supplant it—with the federal government’s ‘traditional role in restricting

¹⁶⁶. *Id.*

¹⁶⁷. Chew, *supra* note 162, at 151.

¹⁶⁸. *Id.*

the availability of firearms.”¹⁶⁹ However, this statement neglects to recognize that many individual states do not see the federal laws as a supplementation, especially those states that have no domestic violence firearm bans in place. Moreover, these proponents seemingly fail to appreciate the financial and procedural burden the federal statutes place on individual states. As a result, state laws reflect a range of provisions about gun relinquishment, indicating both an indifference to the federal laws in states that have not enacted any additional legislation and a progressive understanding of the necessity of supplemental state laws in states that have mirrored or even gone above and beyond the borders of the federal provisions.

A. RANGE OF STATE LAWS

Despite the anticipated reliance on more local enforcement, state laws in this context profoundly lack strength, comprehensiveness, and enforceability. Although federal law mandates relinquishment, in a majority of states, state laws do not require domestic violence offenders to surrender guns that they already own.¹⁷⁰ Only eleven states require domestic violence misdemeanants to surrender their guns, and sixteen states require subjects of domestic violence restraining orders to do the same.¹⁷¹ Fifteen other states and Washington, D.C. only authorize, but do not require, courts to issue restraining orders with gun relinquishment provisions for *some* offenders.¹⁷² However, in as much as the states have a mixture of different language, requirements, and conditions in their statutes, they also have some very broad similarities.

State laws predominantly adopt two approaches regarding the enforcement of gun relinquishment provisions.¹⁷³ The first, and more

169. Mecka, *supra* note 98, at 643.

170. EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 3 (noting that in forty-one states all domestic violence offenders are not required to surrender guns that they already own). The actual number is now forty states as Delaware enacted a new gun relinquishment law. *Domestic Violence and Firearms in Delaware*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 19, 2015), <http://smartgunlaws.org/domestic-violence-and-firearms-in-delaware/>.

171. EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 9. These numbers have been altered slightly because of new legislation passed by Delaware in 2015. See *Domestic Violence and Firearms in Delaware*, *supra* note 170.

172. EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 9. These numbers have been altered slightly because of new legislation passed by Delaware and Nevada in 2015. See *Domestic Violence and Firearms in Delaware*, *supra* note 170; *Domestic Violence and Firearms in Nevada*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 14, 2015), <http://smartgunlaws.org/domestic-violence-and-firearms-in-nevada/>. For example, “Alaska law provides that restraining orders against ‘household members’ (including former and current dating partners) may prohibit the use or possession of firearms if the subject of the restraining order possessed a firearm at the time of an incident giving rise to the restraining order.” EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 14.

173. SHANNON FRATTAROLI, JOHN HOPKINS CTR. FOR GUN POLICY & RESEARCH, REMOVING GUNS FROM DOMESTIC VIOLENCE OFFENDERS: AN ANALYSIS OF STATE LEVEL POLICIES TO PREVENT FUTURE ABUSE 4 (2009).

effective, approach accords law enforcement the explicit authority to remove guns from offenders in response to a domestic violence call.¹⁷⁴ For example, in Tennessee, if law enforcement officers have probable cause to believe that a domestic violence offense was committed, all firearms that might have been used to harm or threaten the victim *must* be seized.¹⁷⁵ Moreover, “[i]ncident to an arrest for a crime involving domestic abuse[,] . . . a law enforcement officer may seize a weapon that is in plain view . . . or discovered pursuant to a consensual search.”¹⁷⁶ The states that follow this approach¹⁷⁷ employ a wide variety of statutory language that alters the implementation results. Some states¹⁷⁸ require police officers to remove any firearms by using “shall” in the statute’s language.¹⁷⁹ For example, a Montana statute provides: “A peace officer who responds to a call relating to partner or family member assault shall seize the weapon used or threatened to be used in the alleged assault.”¹⁸⁰ In comparison, other states¹⁸¹ utilize “may” language in the statutes, giving police officers the discretion to seize any weapons.¹⁸² In Connecticut, for example, a statute provides:

Whenever a peace officer determines that a family violence crime has been committed, such officer *may* seize any firearm or electronic defense weapon . . . or ammunition at the location where the crime is alleged to have been committed that is in the possession of any person arrested for the commission of such crime or suspected of its commission or that is in plain view.¹⁸³

Some states require that the firearm be used in the commission of the crime before it can be seized.¹⁸⁴ Other states require the alleged abuser to be arrested before seizure of firearms is allowed.¹⁸⁵ Yet other states only allow guns to be removed if the responding officers deem it necessary to protect the victim or other household members.¹⁸⁶ Although these states all allow police to remove firearms from domestic violence

174. *Id.* at 4, 11–18 (providing examples such as California, Illinois, and Montana).

175. TENN. CODE ANN. § 36-3-620(a)(1) (West 2010).

176. *Id.* § 36-3-620(a)(2) (not requiring officers to remove weapons that they deem to be necessary for the victim to protect herself). However, if multiple weapons are seized, only the weapon that was actually used to harm or threaten a victim may be confiscated, while all others must be returned to the offender. *Id.* § 36-3-620(b).

177. Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Maryland, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, Utah, and West Virginia are other states that follow this approach. FRATTAROLI, *supra* note 173, at 6.

178. For example, California, Illinois, and Montana. *Id.*

179. *Id.*

180. MONT. CODE ANN. § 46-6-603 (2015).

181. For example, Alaska, Arizona, and Connecticut. FRATTAROLI, *supra* note 173, at 6.

182. *Id.*

183. CONN. GEN. STAT. § 46b-38b(a) (2011).

184. FRATTAROLI, *supra* note 173, at 7.

185. *Id.*

186. *Id.*

offenders, the different statutory language significantly alters the officers' level of discretion to do so.

The second grouping of state laws is less far-reaching because its application is subject to judicial discretion and limited to the context of restraining order proceedings only. This type grants courts the authority to order the surrender of a firearm as a provision of a restraining order.¹⁸⁷ For example, in Maryland, upon the issuance of a final restraining order, a court “shall order the respondent to surrender to law enforcement authorities any firearm in the respondent’s possession, and to refrain from possession of any firearm, for the duration of the [restraining] order.”¹⁸⁸ The states that apply this approach also utilize different statutory language that results in varying degrees of success of these relinquishment laws. Parallel to the first approach, states use “shall” or “may” in the statutes to either require removal or allow discretion for removal of firearms following the issuance of a restraining order.¹⁸⁹ Importantly, these gun relinquishment provisions generally apply only to permanent restraining orders.¹⁹⁰ Many victims fail to obtain permanent restraining orders for various reasons that often mimic why victims stay in the relationship,¹⁹¹ making the statutes less influential. Requiring a permanent restraining order narrows the reach of these statutes, when the dangerousness of an offender subject to a temporary restraining order can be equal or more than an offender subject to a permanent restraining order. However, in some states (such as California), the relinquishment provisions also apply to *ex parte* orders.¹⁹² This is significant in light of the fact that the federal relinquishment laws require notice to the offender in order to trigger the provisions.¹⁹³ The ability to require an offender to surrender his or her firearms as a result of an *ex parte* hearing considerably widens the reach of the laws. The states that follow this approach may or may not require

187. *Id.* at 19.

188. MD. CODE ANN., FAM. LAW § 4-506(f) (West 2015).

189. Alaska, Arizona, California, Delaware, Hawaii, Illinois, Indiana, Maine, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin are other states that apply this approach. FRATTAROLI, *supra* note 173, at 19–28 (providing a comprehensive list of each state’s statutory language).

190. *Id.* (noting specific states that require final restraining order rather than temporary restraining order).

191. Judith A. Wolfer, *Top 10 Myths About Domestic Violence*, 42 MD. B.J. 38, 40 (2009). Some examples of why a domestic violence victim may not obtain a permanent restraining order include: (1) the offender threatened her and she was too frightened; (2) the violence escalated and the victim was too scared or unable to attend the hearing; (3) the violence decreased and the victim believed the offender had changed; and (4) the victim might feel “guilty.” See *Compelling Reasons Women Stay*, DOMESTIC ABUSE PROJECT, <http://www.domesticabuseproject.com/get-educated/compelling-reasons-women-stay/> (last visited Apr. 10, 2016).

192. See CAL. FAM. CODE § 6389(c) (West 2015).

193. 18 U.S.C. § 922(g)(8)(A) (2015) (explaining the Lautenberg Amendment applies to those who are subject to a domestic violence restraining order that “was issued after a hearing of which such person received actual notice.”).

the use or perceived use of the firearms to trigger the relinquishment protocols.¹⁹⁴ The easiest way to understand the effects of the various statutory approaches is to examine the spectrum of state statutes, ranging from least progressive to most progressive.

1. Least Progressive: Arkansas

State firearm relinquishment provisions run the gamut from weak to strong. Arkansas law provides an example of one of the least progressive approaches to state gun relinquishment. For example, the state does *not*: (1) prohibit domestic violence misdemeanants from purchasing or possessing guns; (2) prohibit offenders subject to domestic violence restraining orders from purchasing or possessing guns; (3) compel domestic violence offenders who are prohibited from possessing guns under federal law to relinquish their guns; or (4) make it mandatory for courts to notify these domestic abusers when they become subject to these prohibitions.¹⁹⁵ Moreover, there are no statutes requiring, or even authorizing, law enforcement officers to remove firearms from the scenes of domestic violence incidents.¹⁹⁶ The only relevant statute allows a criminal court to prohibit firearm possession as part of a no contact order.¹⁹⁷ Arkansas lawmakers have not created any state laws to bolster or mimic the federal gun relinquishment laws. As a consequence of the weak state laws, Arkansas has repeatedly been ranked amongst the states with the highest rates of men killing women, indicating a high level of domestic violence.¹⁹⁸ This is a striking example of how ineffective the federal laws can be without the backing of relevant state laws. If states do not require their local judiciaries to recognize and reiterate the firearm prohibitions, relinquishment efforts are futile. Fortunately, not all states follow this approach, and have instead implemented more progressive approaches to gun relinquishment.

2. In the Middle: Pennsylvania

While Arkansas provides almost no added protections to domestic violence victims, other states are taking steps that, although far from ideal, improve state gun relinquishment efforts. Pennsylvania, for example, has passed some gun relinquishment laws, but has not adopted

194. FRATTAROLI, *supra* note 173, at 19.

195. *Domestic Violence and Firearms in Arkansas*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 4, 2015), <http://smartgunlaws.org/domestic-violence-and-firearms-in-arkansas/>; EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 15.

196. *Domestic Violence and Firearms in Arkansas*, *supra* note 195.

197. ARK. CODE ANN. § 16-85-714 (West 2015); *see also id.* § 5-73.110.

198. Melissa Jeltsen, *This Is How a Domestic Violence Victim Falls Through the Cracks*, HUFFINGTON POST (Mar. 27, 2015, 4:59 PM), http://www.huffingtonpost.com/2014/06/16/domestic-violence_n_5474177.html.

the most far-reaching measures to keep firearms out of the hands of domestic abusers. Pennsylvania's laws provide a great deal of discretion to courts in deciding whether to require offenders to relinquish their firearms, and the statutes themselves are more lenient than they should be to effectuate far-reaching change. Pennsylvania prohibits individuals subject to the Lautenberg Amendment from purchasing firearms.¹⁹⁹ Pennsylvania law also requires those offenders subject to the Lautenberg Amendment to transfer their firearms to a nonprohibited person within "a reasonable period of time, not to exceed 60 days."²⁰⁰ In addition, there are Pennsylvania statutes that authorize, but do not require, courts to prohibit subjects of restraining orders from possessing guns.²⁰¹ Moreover, state law in Pennsylvania authorizes, but does not require, courts to enforce gun relinquishment from individuals subject to a domestic violence restraining order.²⁰² While these provisions are indicative of a greater understanding of the necessity of strong local laws, they allow too much discretion for the judiciary. Further, they do not require a quick transfer of offenders' firearms, which unquestionably diminishes the effect of the transfer as an offender is likely to be most upset (and dangerous) immediately following a conviction or issuance of a restraining order. States can, and some do, take more steps to seize firearms from domestic violence perpetrators. It is important to examine the most progressive states in order to recognize the potential states have to achieve success in the realm of gun relinquishment.

3. *Most Progressive: California*

Some states have taken significant steps toward enforcing the federal firearms prohibitions by reinforcing them with stronger state laws. For example, California law prohibits offenders from owning or possessing firearms.²⁰³ Significantly, California law pertains not only to convicted misdemeanants, but also to those who have only been *charged* with a misdemeanor.²⁰⁴ By broadening the reach of the firearm statutes to offenders who have been charged, California takes a substantial step in protecting victims in a timely manner. When victims do not have to wait for a conviction, firearms are, theoretically, removed from offenders' hands at a much earlier time in the process. Timing is of utmost

199. 18 PA. CONS. STAT. § 6105(c)(9) (2015).

200. *Id.* § 6105(a)(2)(i) (the nonprohibited person may not be a member of the person's household).

201. *Id.* § 6105(a.1); 23 PA. CONS. STAT. §§ 6102(a), 6108(a)(7) (2015) (applying also to restraining orders arising from incidents involving current or former sexual or intimate partners).

202. 23 PA. CONS. STAT. §§ 6108–6108.3 (noting guns may be surrendered to law enforcement, a licensed dealer, or a third party who has received a special "safekeeping permit" from law enforcement).

203. CAL. PENAL CODE § 29,805 (West 2015); *id.* §§ 136.2(a)(1)(G)(I)–(II), (d)(1)–(3).

204. CAL. PENAL CODE § 136.2(G)(ii)(I) (West 2015).

importance in these cases because the initiation of legal proceedings can spark the end of the relationship, which is oftentimes the most dangerous time for victims.²⁰⁵ Moreover, upon service of a domestic violence restraining order, the respondent must relinquish any firearms by surrendering them to a law enforcement officer upon request or within twenty-four hours if no request is made.²⁰⁶ The order itself contains a notice that informs the respondent of his obligation to relinquish her firearms.²⁰⁷ California law goes far beyond federal law in that those subject to stalking restraining orders are also required to surrender their weapons.²⁰⁸ Within forty-eight hours of being served, the offender must file a receipt of transfer, produced by a law enforcement officer or gun dealer, with the court and the law enforcement agency that served the restraining order.²⁰⁹ California law also allows the issuance of a search warrant when an offender subject to a restraining order does not surrender her firearms.²¹⁰ Search warrants are also available to law enforcement when a firearm is present at the scene of a crime of domestic violence involving a threat to human life or physical assault.²¹¹

In comparison to the federal laws that are silent on the matter, California law goes further by helping courts determine whether a defendant has complied with the gun relinquishment laws. Rule 4.700 of the California Rules of Court provides California courts with a firearm relinquishment protocol in cases of domestic violence misdemeanants that helps determine whether a defendant has complied with the court's relinquishment order.²¹² The rule has several components. First, if a court

205. See Chris Godsey & Renita Robinson, *Post-Separation Abuse Featured in the New Duluth Power and Control Wheel*, 18 DOMESTIC VIOLENCE REP. 81, 81 (2013).

206. CAL. FAM. CODE § 6389 (West 2015).

If no request is made by a law enforcement officer, the relinquishment must occur within 24 hours of being served the order, either by surrender to a law enforcement officer or sale to a licensed gun dealer. The court may grant an exemption from the relinquishment requirements for a particular firearm if the respondent can show that it is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm is unnecessary.

Domestic Violence and Firearms in California, LAW CTR. TO PREVENT GUN VIOLENCE n.15 (Oct. 29, 2015), <http://smartgunlaws.org/domestic-violence-and-firearms-in-california/>.

207. FAM. § 6389(b) ("On all forms providing notice that a protective order has been requested or granted, the Judicial Council shall include a notice that, upon service of the order, the respondent shall be ordered to relinquish possession or control of any firearms and not to purchase or receive or attempt to purchase or receive any firearms for a period not to exceed the duration of the restraining order.").

208. CAL. PENAL CODE § 29,825(d) (West 2015) (referencing PENAL § 29,830).

209. FAM. § 6389(c)(2); CAL. CIV. PROC. CODE § 527.9(a), (b), (d) (West 2015); see also PENAL §§ 136.2(d), 29,825(d); CIV. PROC. §§ 527.6(t)(2), 527.8(r)(2), 527.85(r)(2); CAL. WELF. & INST. CODE § 15,657.03(t)(2).

210. PENAL § 1524(a)(11).

211. PENAL § 1524(a)(9).

212. Cal. Rules of Court, rule 4.700(b) (2015).

has “good cause to believe” that a defendant owns, possesses, or controls a firearm, the court must set a review hearing to determine compliance within two days of the issuance of the criminal restraining order.²¹³ Second, the rule specifies procedures for the review hearing to determine whether the defendant has complied.²¹⁴ Lastly, the rule provides remedies if the court finds that the defendant has indeed failed to relinquish a firearm.²¹⁵ Specifically, upon determination that the defendant has a gun, the rule allows courts to arrest the defendant, set bail, and issue a bench warrant for failure to appear at the hearing.²¹⁶ Rule 4.700 is progressive because it provides courts with mandatory guidelines to maximize the enforcement of the gun relinquishment laws. Moreover, it removes a great deal of the court’s discretion and compels judges to actively remove firearms from offenders’ hands while providing courts accessible remedies if or when an offender does not comply. These laws work as evidenced by one program in San Mateo County, California, where a sergeant boasted of three years without any domestic violence homicides.²¹⁷ In 2012, that same program had 324 guns seized or surrendered from eighty-one people, using a careful system of restraining order examination and follow through.²¹⁸ California provides a phenomenal example of a state statutory scheme that exhibits awareness and specifies actual guidelines for the different entities to make implementation possible.

With the grave deficiencies of the federal statutes, stringent and wide-reaching state laws are necessary to achieve the intentions that propelled the federal firearm statutes to passage. Examination of the state laws, however, presents a diverse picture, illustrating some exceptionally progressive statutes, others that are severely lacking in foresight, and still others that fall somewhere in the middle. It is important to understand the criticisms of these state laws in order to recognize where the limitations exist and to develop superior laws in the future.

213. Cal. Rules of Court, rule 4.700(c)(2) (noting that under certain circumstances, the review hearing can take place up to five days after issuance of the criminal protective order, or if in custody, within two days after the defendant is released).

214. Cal. Rules of Court, rule 4.700(d) (noting that the court must give the defendant the opportunity to refute the allegation of possession of firearms).

215. *Id.*

216. *Id.* (“If . . . defendant has a firearm . . . the court must consider whether bail . . . [or] release on own recognizance is appropriate. If defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant.”).

217. Michael Luo, *In Some States, Gun Rights Trump Orders of Protection*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html?_r=0.

218. *Id.*

B. CRITICISMS OF STATE FIREARMS LAWS

As discussed above in Part II.A, there is a wide breadth of approaches that states take to enforce (or fail to enforce) the relinquishment of firearms by domestic violence offenders. More often than not, states are failing to enact sufficient legislation. Whether they are allowing too much discretion, requiring too many conditions, or seemingly ignoring the necessity of relinquishment laws, most states are simply not doing what is necessary to keep firearms out of the hands of domestic violence perpetrators. This Part will discuss the numerous problems that are rampant amongst the state firearm laws.

The state firearm relinquishment laws must provide local law enforcement with a clear standard for enforcement in order to redress the lack of direction in the federal laws. However, more often than not, the statutes do not deliver at all. In thirty states, no state laws prohibit all domestic violence misdemeanants and all restraining order subjects from buying or using guns.²¹⁹ Moreover, forty states do not require domestic abusers to relinquish their guns.²²⁰ The majority of states offer no protocol to ensure that abusers surrender their firearms. Without the proper methods of enforcement, the entire gun relinquishment program is rendered essentially meaningless.

In the remaining states that do have gun relinquishment laws on the books, the laws provide only limited guidance.²²¹ For example, in Tennessee, the statutes specify minimal requirements for courts issuing qualifying restraining orders.²²² First, the statutes provide that the restraining order shall, on its face (1) notify the respondent of the requirement to surrender any firearms within forty-eight hours; (2) notify the respondent that possession of a firearm is prohibited as long as the order is in effect, and (3) notify the respondent of any penalties for violating the gun relinquishment laws.²²³ In addition to the written notice on the restraining order, the court must also tell the respondent to relinquish any firearms within forty-eight hours and to fill out and return a firearm dispossession affidavit.²²⁴ Further, the court shall notify local law enforcement agencies of the issuance and provisions of the order.²²⁵

219. EVERY TOWN FOR GUN SAFETY, *supra* note 111, at 3.

220. *Id.* This number has been altered to reflect the new state laws that have been enacted in 2015.

221. *See, e.g., Guidelines for the Relinquishment and Storage of Firearms*, VT. DEP'T OF PUB. SAFETY 3 (2014), <http://dps.vermont.gov/sites/dps/files/Guidelines%20for%20Firearms%206-18-14.pdf> (providing a sample protocol for gun relinquishment).

222. *See* TENN. CODE ANN. § 36-3-625 (West 2015).

223. *Id.* §§ 36-3-625(a)(1)-(3).

224. *Id.* §§ 36-3-625(b)(1)-(2), (c). There are special loopholes for respondents who are licensed federal firearm dealers or “a responsible party under a federal firearms license” that allow these respondents to keep their gun “inventory” if there are “one . . . or more individuals who are responsible parties under the federal license who are not the respondent” *Id.* § 36-3-625(f)(2).

225. *Id.* 36-3-625(b)(1)-(2),(c).

Strikingly absent from these statutes are any guidelines as to how to enforce these laws. Without any federal or local guidance, judicial and law enforcement agencies are left to guess how to implement a relinquishment protocol. Again, state judiciaries and law enforcement agencies are, or should be, aware that abusers are required to relinquish their firearms. However, aside from state laws reiterating those laws, they do not provide much practical guidance as to enforcement mechanisms, leaving these agencies without the resources to successfully implement the laws.

While the objective of removing firearms from perpetrators' hands is of utmost importance, the person allowed to receive the firearm as a result of relinquishment can be just as significant. Generally, if state laws specify to whom offenders may transfer their firearms, offenders are given the option between: (1) a law enforcement officer, or (2) a third-party who is not a household member.²²⁶ In light of the *Henderson v. United States* decision, discussed in Part I.C above, these options are not going to change because the Supreme Court recognized the right of those subject to § 922(g) to select the recipient of the prohibited firearms. Given that the third party can be a friend or family member living outside the home,²²⁷ this option is fraught with peril. In situations where the abuser has access to the third party's home, such as a parent or close friend, the relinquishment might provide little or no protection for the victim. A third party might simply return the gun to the offender out of fear of harm, or a determined abuser might easily steal back the firearm unbeknownst to the third party, leaving the victim in a vulnerable, unprotected position. The innumerable ways in which an offender could manipulate her way into gaining access to the "relinquished" firearm makes the third-party option highly unappealing, if not absolutely dangerous and irresponsible. This prominent gap in the relinquishment laws is not the only problem, however.

Aside from the legal options, there are numerous illegal ways that offenders can reacquire guns, including the black market, straw purchasers, and gun shows. Both state and federal gun relinquishment laws rely on the notion that all firearms are accurately registered in gun registries. However, an enormous black market exists for stolen guns. Each year in the United States, more than half a million guns are stolen,

226. See, e.g., 23 PA. CONS. STAT. ANN. §§ 6108–6108.3 (2015).

227. Some state laws require that the third party obtain a special "safekeeping permit" from law enforcement. *Id.* In order to obtain a "safekeeping permit," one must not be prohibited from possessing guns and must execute an affidavit acknowledging that the respondent cannot obtain the firearm until law enforcement authorizes the return. *Id.*

many of which are then sold illegally.²²⁸ The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) identifies three common ways that firearms illegally end up in the hands of criminals.²²⁹ First, there are corrupt licensed gun dealers who sell guns “off the books” to both private sellers and criminals.²³⁰ Second, there are straw purchasers, those with a clean record who purchase firearms for prohibited persons.²³¹ This is the most common means through which prohibited persons acquire firearms.²³² Third, as discussed previously, gun shows and private gun sales provide an exceptional loophole for prohibited persons to purchase firearms without fear of being subject to a background check.²³³ These illegal opportunities undermine the foundation of the relinquishment laws as they are dependent upon the ability of courts and law enforcement to know of the presence of firearms in reach of the offenders.

With such a large number of unregistered firearms in the United States,²³⁴ gun relinquishment laws effectively become an honor system for domestic violence offenders. Judges can instruct an offender to surrender all firearms, but if there are no agencies that can trace a registered gun to that offender, there is no way of knowing whether the offender complies. Furthermore, domestic abusers tend to be extremely manipulative, oftentimes deceiving others into believing they are nonviolent people.²³⁵ This manipulation can easily spill over into the courtroom, convincing judges and law enforcement that there are no firearms to relinquish. Without the evidence of the registration of a gun, offenders can easily retain possession of their weapons.

In general, state firearm relinquishment laws, if they exist, are overwhelmingly insufficient. Like the federal firearm statutes, most of

228. Philip J. Cook & James A. Leitzel, “Smart” Guns: A Technological Fix for Regulating the Secondary Market 7 (Terry Sanford Inst. of Pub. Policy, Duke Univ., Working Paper Series SAN01-10, 2001).

229. DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 10 (June 2000).

230. *Id.*; see also MAYORS AGAINST ILLEGAL GUNS, INSIDE STRAW PURCHASING: HOW CRIMINALS GET GUNS ILLEGALLY 3 (2013) (“More than 85 percent of dealers in the U.S. had no crime guns traced to them at all in 1998, while about 1 percent of licensed firearm dealers accounted for 57 percent of traces that same year.”).

231. MAYORS AGAINST ILLEGAL GUNS, *supra* note 230, at 9 (noting that straw purchasers are often relatives or intimate partners).

232. *Id.* at 4 (noting statistics that reveal almost half of all trafficking investigations lead back to straw purchasing).

233. *Id.* at 20; see also Press Release, Violence Pol’y Ctr., Gun Shows Have Become “Tupperware Parties for Criminals” New Violence Policy Center Study Reveals (July 17, 1996) (on file with author) (“Gun shows have become ‘[t]upperware [p]arties for [c]riminals.’”).

234. In 2012, an estimated 190,342 guns were lost or stolen in the United States. U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, 2012 SUMMARY: FIREARMS REPORTED LOST AND STOLEN 4 (2013).

235. Lundy Bancroft, *Understanding the Batterer in Custody and Visitation Disputes*, LUNDY BANCROFT (1998).

the state laws also fail to provide the judiciaries and local law enforcement agencies with adequate standards for implementation. The shortcomings of these laws have a direct influence on the ability of the local entities, including both judiciaries and law enforcement, to remove guns from domestic violence offenders. Acknowledging this reality of ineffective legislation and poor enforcement, reform efforts ought to be considered in order to better protect victims and society at large.

III. PROPOSALS FOR REFORM

The ultimate goal of the federal gun prohibitions is to protect domestic violence victims from harm at the hands of their former or current intimate partners.²³⁶ In order to effectuate that goal, gun relinquishment protocols must be established at the state level, with the support of federal agencies. This Part introduces three possible reforms to improve current relinquishment laws. First, Congress should provide states with the funding necessary to implement standard gun relinquishment protocols. Second, Congress should provide states with a set of mandatory guidelines for the enforcement of the gun relinquishment laws. Lastly, the background check system must be improved and more widely used. By implementing these reforms, the removal of firearms from prohibited persons could increase drastically thereby saving innocent lives.

A. FUNDING AND INCENTIVES FOR STATES TO IMPLEMENT RELINQUISHMENT LAWS

In order to be operative, federal relinquishment laws depend on implementation by local law enforcement. However, this dependence places a serious financial burden on states to carry out a federal statute. It is clear that some members of Congress understand what is necessary to ensure that states are able to carry out the federal relinquishment laws because they have attempted to pass funding bills with these exact goals in mind.²³⁷ Although the Supreme Court has limited the ability of Congress to force state legislatures to adopt federal law,²³⁸ Congress is still able to influence states through the use of its spending power.²³⁹ Therefore, Congress should use its spending power to incentivize state legislatures to adopt, as state law, the federal relinquishment laws as a

236. "Intimate partners" as defined by the federal statutes includes parents and children.

237. Domestic Violence Criminal Disarmament Act of 2013, H.R. 3566, 113th Cong. (2013); Domestic Violence Gun Homicide Prevention Act of 2014, S. 2676 113th Cong. (2014).

238. *New York v. United States*, 505 U.S. 144, 146 (1992) (establishing the "anti-commandeering principle," which asserts that Congress cannot compel state legislatures to adopt federal law as state law).

239. U.S. CONST. art. I, § 8, cl. 1. *See generally* *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (holding that Congress can make federal funds conditional upon certain state actions).

minimum. Accordingly, the federal government could provide states with monetary incentives for passing relinquishment laws meeting certain criteria. As an example, states may be funded for the implementation of state laws that: (1) require the relinquishment of firearms; (2) require law enforcement officers to seize firearms at a domestic violence crime scene; (3) require judges to provide notice of an offender's obligation to relinquish her firearms; and (4) allow law enforcement officers to search an offender's home if there is probable cause to believe that the offender has firearms. Further, the federal government might create a tiered system that rewards states for implementing specific relinquishment protocols. As a check, the federal government should require annual statistics on the number of relinquished firearms and number of domestic violence homicides in order for the states to qualify for the funding. Opponents might argue that this would create a system where state agencies begin to intrude into the lives of their citizens. However, as seen in California, the use of careful relinquishment protocols does not remove the constitutional rights afforded to citizens. They do, however, protect domestic violence victims. At the very least, this would provide a significant increase in protection to victims who are in one of the forty states that do not mandate gun relinquishment.

Local law enforcement, with the support of federal funding, would be incentivized to adopt a more responsive attitude toward enforcing federal provisions and ensuring that offenders surrender their firearms. Although some states might remain politically opposed to gun relinquishment, a strong funding source can provide proponents with the necessary bargaining power to propose and implement gun relinquishment laws that state legislatures would more readily support.²⁴⁰ Furthermore, funding would provide law enforcement agencies with the ability to create specialized units to enforce the gun relinquishment provisions. By way of comparison, an agency comprised of officers lacking the requisite knowledge about the nature and risk inherent in a domestic violence situation might not prioritize the enforcement of these provisions. Instead, a specialized unit of local officers, funded by the federal government, could be comprised of officers with the knowledge, the resources, and the doggedness necessary to actually make significant progress in the surrendering of firearms by offenders.

Federal funding could also provide states with the ability to increase judicial training. Although the proposed protocol, discussed below, would reduce judicial discretion, judicial training in the area of gun relinquishment laws in the context of domestic violence could improve judicial response and avoid noncompliance. Judicial training in this area

240. Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1111, 1146 (2007).

should include a thorough education about: (1) the psychology of domestic violence; (2) the dangers of domestic violence; (3) how firearms increase the danger to victims; (4) how to provide adequate notice of an offender's relinquishment duty; and (5) protocols to ensure follow up on firearm relinquishment. Some might argue that the reduction of judicial discretion should be avoided because it removes the ability of judges to use individualized analyses to decide an offender's fate. While this might be true, the data proves that domestic violence offenders are manipulative and that allowing them to possess guns is exceedingly dangerous.²⁴¹ Removing a judge's ability to sidestep the federal and local laws would further the worthy goal of protecting victims. With training, judges would be more aware of the dangers of guns in the hands of domestic violence offenders, fostering a more empathic understanding of the intricacies involved in violent relationships. This type of training could also lead to judges having a better understanding of their own role in keeping the firearms away from offenders, possibly increasing the judges' sense of accountability to these victims.

B. FEDERAL GUIDELINES FOR STATE IMPLEMENTATION OF RELINQUISHMENT LAWS

One of the most glaring shortcomings in the federal gun relinquishment laws is the lack of guidelines or protocol as to how to actually implement these laws. The facilitation of a domestic violence offender's surrender of firearms is a nuanced and complicated procedure, calling on several levels of government agencies and actors, from prosecutors to judges to law enforcement officers. As such, the federal government should create a step-by-step protocol that would act as a minimum for state enforcement of the federal guidelines, backed by the funding described above. Ideally, state legislatures would adopt these enforcement statutes, allowing state prosecutors, as well as federal prosecutors, to charge offenders found to have violated relinquishment laws.²⁴²

An effective protocol should outline each step in the process of relinquishment. The beginning of the relinquishment process should begin when a court issues a restraining order (including *ex parte* orders)

241. See ILL. COAL. AGAINST DOMESTIC VIOLENCE, ACHIEVING ACCOUNTABILITY IN DOMESTIC VIOLENCE CASES: A PRACTICAL GUIDE FOR REDUCING DOMESTIC VIOLENCE 2 (2005) (noting that "[t]oo many perpetrators are skilled at manipulating the system effectively to further their aims and punish their victims"); see also *Domestic Violence and Firearms Policy Summary*, *supra* note 22.

242. "Double prosecution [by the federal and state governments] is permissible . . . because the respective governments are 'two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.'" Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 68 (2006) (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

or an offender is charged with a domestic violence misdemeanor. At that point, the judge should hear testimony from both the victim and the offender regarding the ownership of firearms.²⁴³ The victim's testimony is particularly important here as it can provide the courts with information about gun ownership, especially unregistered guns that the offender might be concealing. Preferably, the victim would be able to testify, orally or in writing, outside of the offender's presence in order to reduce fear and intimidation, and therefore decrease the likelihood of the victim withholding information. If the victim and offender give conflicting information regarding the current possession of weapons, and the court is unable to resolve the conflict, the case should be transferred to the district attorney's office for further proceedings.²⁴⁴

Second, and no matter the initial finding on current weapon status, the judge should inform the offender of the federal²⁴⁵ gun relinquishment requirement, and the offender should be required to complete a standard "statement of firearms" form, listing all firearms currently in her possession²⁴⁶ and providing a clear outline of the gun prohibition.²⁴⁷ The judge, as well as the order, should explain that the offender has forty-eight hours to relinquish any firearms to law enforcement.²⁴⁸ Relinquishment should only be allowed to law enforcement officers or licensed gun dealers. If a third party wants to purchase a firearm, she should have to go through a licensed gun dealer to purchase it. Next, in order to monitor compliance, the judge should set up a "firearms surrender hearing," during which the offender must prove compliance by providing the court with a receipt indicating that the firearms have been turned over to police officers. Victims should also be able to inform the court at this stage of whether they believe that the offender is complying with the relinquishment order. If an offender fails to surrender firearms in the allotted time period, does not appear at the hearing, or the victim provides credible testimony that the offender is not in compliance, this should lead to a warrant for the offender's arrest. The warrant should

243. See, e.g., Sack, *supra* note 31, at 18–19 (discussing the Miami-Dade County, Florida protocol requiring a judge to make an "on-record" inquiry of each respondent to confirm the status of weapons).

244. See, e.g., STEVEN G. BRANDL, UNIV. WIS.-MILWAUKEE, AN EVALUATION OF THE FIREARM SURRENDER PILOT IN WISCONSIN: FINAL REPORT 11 (2012).

245. Ideally, both federal law and state law would require relinquishment. However, as it stands, in states that do not require relinquishment, the judge would only need to inform the offender of the federal laws.

246. See, e.g., BRANDL, *supra* note 244, at 10 (providing that a "statement of firearms" form was to be filled out by both the respondent and the petitioner in restraining order cases).

247. For full faith and credit purposes, alerting law enforcement in other states can be accomplished through the gun prohibition explanation on the form. See Sack, *supra* note 31, at 18.

248. See Vainik, *supra* note 240, at 1147–50 (discussing the possibility of Congress to provide funding for locally operated gun units where offenders would be required to safely relinquish their firearms).

also provide law enforcement officers with the authority to search the offender's residence in order to seize the firearms.²⁴⁹ Rather than simply giving authorization for officers to conduct the search, the protocol should require the officers to conduct the search.

There are vast benefits to the implementation of a protocol of this nature. At a minimum, this protocol would require judges to enforce the federal gun relinquishment laws in a strong and uniform manner. It would prevent judges from using their own discretion. These types of guidelines would also increase the accountability of offenders and force them to surrender their firearms, while providing victims with the opportunity to be heard. The guidelines would also make it easier for victim advocates and counsel to see where judges are not complying and are using their own discretion to evade the federal relinquishment laws.²⁵⁰

By engaging the offenders on several levels, and having judges oversee their compliance with gun relinquishment provisions, there is a greater likelihood of positive results. It could be argued that offenders will still refuse to relinquish their firearms. However, on a threshold level, simply ensuring that the offenders are aware of the requirement to surrender their firearms would likely improve compliance. Moreover, having contact with a judge and law enforcement officers who are engaging with an offender and insisting on gun relinquishment could cause the offenders, who otherwise would simply ignore an initial relinquishment warning, to surrender her weapons. Engagement with the legal system is an important factor in ensuring obedience.²⁵¹ Although it would be far from perfect, legal presence is necessary to make any improvements.

Providing law enforcement officers with the authority to search and seize guns after noncompliance would be instrumental in improving relinquishment rates. Guidelines requiring the action of law enforcement officers would take away their discretion to act, ensuring that the relinquishment laws are enforced in greater numbers. Law enforcement officers would likely feel empowered to take action, as well, and might have a greater sense of urgency to protect domestic violence victims.

C. IMPROVEMENTS IN THE BACKGROUND CHECK USAGE AND PROTOCOL

The NICS is, in theory, an excellent idea. However, in practice, as discussed above, loopholes render the system worthless in many situations. The background check system must be overhauled. There should be a uniform system that provides a checkbox that officers or

249. See, e.g., N.H. REV. STAT. ANN. § 173-B:5(II) (Supp. 2006) (giving the court the authority to issue a search warrant for seizure of all firearms).

250. See Vainik, *supra* note 240, at 1154.

251. See, e.g., BRANDL, *supra* note 244, at 49 (“[G]reater legal attention on firearms may put the respondent on notice.”).

clerks can select to indicate that the underlying misdemeanor or restraining order subjects the offender to § 922(g) prohibitions. For ease of use, the orders themselves, filled out by the presiding judge, should include a similar checkbox system indicating whether the requisite relationship and minor use of force were present. Moreover, the states should be required to enter all of their data²⁵² into the NICS. Although some states dread the breach of privacy, the use of strong data protection should stifle these fears. The introduction of an easy-to-use NICS electronic system would undoubtedly improve the accuracy of the current system.

In order to prevent offenders from possessing guns, *all* sellers, including licensed and unlicensed dealers, should be required to conduct background checks prior to a gun sale. Conceding the fact that corrupt and illegal sellers will be elusive, simply increasing the number of dealers who are required to run background checks will improve the reach of the relinquishment laws by keeping firearms away from prohibited persons. The idea is to make purchasing a gun more difficult for offenders, which would prevent or at least slow down an offender looking to make a purchase. In addition, using background checks will improve the accuracy of gun registries. Consequently, law enforcement agencies and courts could use this information to determine the current status of weapons in cases where relinquishment is required. If stronger relinquishment protocols are implemented, there must also be a system to prevent the offender from simply purchasing another firearm.

In as much as the federal laws can only attain their goals with the support of state and local laws, the need for strong, explicit state laws is apparent. The federal government could take certain steps to lessen the burden on individual states, such as providing a complete guide to relinquishment protocols and incentives to implement those protocols. Extra resources could also allow states to improve the background check systems and provide training to the different entities that are responsible for carrying out the protocols. Granted, it is unrealistic to believe that these systems will be able to remove all handguns from all prohibited persons. Nonetheless, there is a wide variety of improvements that can bring us closer to this goal.

CONCLUSION

Victims of domestic violence deserve to be protected. At the point where victims are reaching out to the court system and law enforcement agencies, it is the responsibility of the legal system to take the necessary

252. This data would include: (1) temporary and permanent restraining orders; (2) relationship between victims and offenders; (3) presence of a gun at the crime scene; and (4) misdemeanor convictions.

steps to prevent more violence. The first step is to get the guns out of the hands of offenders. With the current awareness and understanding about the risks involved with domestic offenders and guns, the federal government must use its resources to quickly and efficiently disarm batterers. Although federal law has drastically improved over a relatively short period of time, the federal and state governments should work together to create the necessary relinquishment protocols. The most powerful tool that the federal government has is its funding power. Federal funding can be used to influence the states' adoption of stringent enforcement of relinquishment laws. By providing states with a set of guidelines, funded by the federal government, and changing the background check system, the federal government would ensure that victims across the nation are one step closer to being safe and finding support in their communities.
