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Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers?
Filling the Gap in State Domestic Violence Gun Laws

BY SHARON L. GOLD*

INTRODUCTION

Social reform in the battered women's movement has always involved aggressive attempts to save women's lives through legislation and community education. Gone are the days when the courts tolerated domestic violence so long as the husband used a "'rod not thicker than his thumb.'" Every state now allows arrests without a warrant for domestic violence abusers, and every state now enables victims to receive a protective order. With the passage of the Violence Against Women Act in 1994 and subsequent amendments to the Gun Control Act of 1968, Congress recognized that domestic violence is an epidemic worthy of national attention.

With two amendments to the Gun Control Act, Congress displayed innovation by making it a federal crime for an abuser to possess a firearm. Both amendments are examples of how social reform through the legal system can effectuate change. In practice, however, there are enforcement

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2 Id.


issues that make such progressive federal gun laws ineffective to accomplish the dual goals of saving women’s lives and holding batterers accountable.

This Note advocates the passage of a state domestic violence gun law in Kentucky to make it a crime to possess a firearm if under a protective order or if convicted of a domestic violence misdemeanor. Part I gives background on the problem of domestic violence and the strong correlation between domestic violence fatalities and guns. Part II discusses current federal gun laws, current state regulation on guns for domestic violence abusers, and other states’ attempts to regulate in this arena. Part III focuses on the enforcement issues surrounding federal gun laws. Part IV proposes adoption of Kentucky Senate Bill 172 that will fill the gap in Kentucky’s domestic violence gun laws by solving enforcement issues inherent in federal gun laws.

I. GUNS AND DOMESTIC VIOLENCE: A DEADLY COMBINATION

A. Background on the Problem of Domestic Violence

When people think of domestic violence victims, several images come to their minds. The common image is of a bruised and battered woman who is poor and uneducated. She is weak and frail. Some view her as a masochist. Why else would she stay in a violent relationship? Unfortunately, these images are common myths that plague the domestic violence movement. Perhaps these myths survive because it is easier to make her an “other,” or blame her as the victim, than it is to accept the truth about domestic violence.

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5 See infra notes 10-48 and accompanying text.
6 See infra notes 49-93 and accompanying text.
7 See infra notes 94-104 and accompanying text.
9 See infra notes 105-29 and accompanying text.
The truth is that battering cuts across all racial, economic, social, and sexual preference backgrounds. The problem is more accurately phrased as an epidemic, affecting nearly one-third to one-half of all marriages. Experts report that four million women in the United States suffer from abuse at the hands of their partners every year. The problem is predominantly one marked by gender. Studies indicate that ninety-five percent of victims of domestic violence assaults are female.

The kind of abuse experienced by the victim is often physical, including pinching, biting, slapping, kicking, and punching. The abuse usually becomes more severe over time and can sometimes lead to murder. The abuse can also be psychological, ranging from threatening to kill the victim or her children, calling her names, taunting her, to yelling at

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12 Id. at 13; see Soraya M. Coley & Joyce Beckett, Race and Domestic Violence, in DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES 153 (Nancy K.D. Lemon ed., 1996) (detailing a study of race and domestic violence); see also Martha Lucia Garcia, A “New Kind” of Battered Woman: Challenges for the Movement, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 165-71 (Beth Leventhal & Sandra E. Lundy eds., 1999) (challenging domestic violence advocates to take into account the complex issues facing victims who are women of color, battered lesbians, rural victims, and immigrant victims); Gloria Bonilla Santiago, Latina Battered Women: Barriers to Service Delivery and Cultural Considerations, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES, supra note 10, at 464-71 (discussing the cultural and language barriers that make it difficult or impossible for Latin women to receive assistance from the courts and social service providers).


14 Id. (noting also that one-fourth of all women will experience abuse in their lives).

15 WILSON, supra note 11, at 8. While there is an overwhelming majority of female versus male victims of domestic violence, it is important to note that male victims are less likely to report violence to the police or to prosecute their female abusers. PHILLIP W. COOK, ABUSED MEN: THE HIDDEN SIDE OF DOMESTIC VIOLENCE 2-3 (1997). Male victims face internal challenges based on societal gender stereotypes that make it difficult for a man to leave a violent female partner. For instance, he may feel weak or embarrassed that his female partner is an abuser. Id. at 91-94, 99-100. Also, while public approval of violence against women has decreased in last few decades, one study indicates that approval of female against male violence has not seen such a decrease. Id. at 128-30.

16 WILSON, supra note 11, at 8-9 (providing a detailed list of the types of physical abuse victims endure).

17 Id.
or humiliating her in public. Abusers are often extremely jealous, so a battered woman can face verbal attacks centering on the abuser's jealousy and control issues.

The violence occurs in phases, called the "Cycle Theory of Violence," developed by researcher and pioneer in the domestic violence movement Lenore Walker. Phase I is the "Tension-Building Phase" during which "minor battering incidents" take place. During this phase, the batterer uses severe verbal abuse and minor battering incidents to exert control over the victim. The battered woman tries everything to prevent the impending violence, but the tension inevitably escalates into a violent episode.

Phase II is the "Acute Battering Incident." During Phase II, the violence increases in severity from minor incidents to violent rages that can result in injuries or death. The acute battering incidents can last from two to twenty-four hours, the shortest of the three phases. Most people wonder what triggers the batterer. Some actually think it is something the battered woman did to trigger the abuse. On the contrary, it is most often an "external event or the internal state of the man." In fact, many battered women report being awakened from bed to an acute battering incident.

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18 Id. at 11-12. Psychologists liken the mental torture to mind control used in extremist cult groups. Batterers use many tactics to gain psychological control, including dominating, isolating, and intimidating the victim, and forcing the victim to keep the abuse secret. See Amy H. Schwartz et al., Psychological Maltreatment of Partners, in CASE STUDIES IN FAMILY VIOLENCE 350-54 (Robert T. Ammerman & Michael Hersen eds., 2000).
21 Id. at 56-59.
22 Id. at 59.
23 Id. at 59-65. See GOVERNOR'S OFFICE OF CHILD ABUSE AND DOMESTIC VIOLENCE SERVICES, DOMESTIC VIOLENCE GENERAL INFORMATION AND STATISTICS, at http://gocadvs.ky.gov/gidv.htm (last visited Mar. 3, 2003) ("Studies show 22-35% of women who seek aid in emergency room settings are in need of treatment for injuries stemming from domestic abuse."); see also KENTUCKY DOMESTIC VIOLENCE ASSOCIATION [hereinafter KDVA], ECONOMIC IMPACT OF DOMESTIC VIOLENCE FACT SHEET 2, at http://www.kdva.org/resources/EconomicImpactFactSheet.pdf (Mar. 2001) ("The total health care costs of domestic violence are estimated to be in the hundreds of millions each year, much of which is paid for by the employer.").
24 WALKER, supra note 20, at 60.
25 Id.
26 Id. at 61.
After the violence is completed, Phase III, the “Honeymoon Stage” begins. During Phase III, the abuser is nurturing and kind. He promises many things, including that he will never be violent again, attend counseling, or stop using drugs and/or alcohol. The batterer’s kindness and promises to change often convince the woman to stay in the abusive relationship. As the third phase ends, the first begins again, creating a never-ending cycle of violence.

It is easier to understand the problem of domestic violence and why women stay in abusive relationships in the context of the cycle of violence. A woman stays for reasons other than the countless promises to change. She stays for financial reasons. Often, the batterer controls all the finances in the home. The victim has no access to checking accounts, credit cards, vehicles, or in extreme cases, modes of communication to the outside world. She stays for the children. She also stays out of fear. In fact, leaving is the most dangerous time in a victim’s life.

27 The phrase “Honeymoon Stage” is now the recognized name of Phase III, see SHAWN D. HALEY & ELLIE BRAUN-HALEY, WAR ON THE HOME FRONT: AN EXAMINATION OF WIFE ABUSE 18 (2000). Lenore Walker originally called the phase the Kindness and Contrite Loving Behavior Phase. WALKER, supra note 20, at 65.

28 WALKER, supra note 20, at 65-70; WILSON, supra note 11, at 25. For an interesting multi-state study of the successes and failures of batterer counseling see EDWARD W. GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS 1-23, 200-12 (2002).

29 WALKER, supra note 20, at 67.

30 See generally id. at ch. 6.

31 See HALEY & BRAUN-HALEY, supra note 27, at 9.

32 The children of battered women learn to pattern behavior from the violent relationships of their parents. WILSON, supra note 11, at 31. In fact, children who witness violence in the home tend to be more hostile and aggressive in interpersonal relationships. See B.B. Robbie Rossman, Longer Term Effects of Children’s Exposure to Domestic Violence, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 52-54 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001) [hereinafter DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN]. Children in violent homes may also suffer from physical abuse. Thirty to sixty percent of children witnessing violence against their mothers also are victims of abuse by the same abuser. Jeffrey L. Edleson, Studying the Co-Occurrence of Child Maltreatment and Domestic Violence in Families, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, supra, at 91.

33 See WILSON, supra note 11, at 29.
B. The Dangerous Combination of Domestic Violence and Guns

Indeed, when a woman makes the difficult decision to leave her partner, she is in the most danger. Since the abuser uses physical and psychological abuse to gain power and control over the victim, the abuser loses control over the victim when she leaves. Advocate and former childhood victim of domestic violence, Ann Jones, states that the abuser is absolutely dependent upon [the victim's] submission for his own sense of power and control, [and] he can not bear to lose her. In many cases, that false sense of power is the only identity a man has; to lose “his woman” is to lose himself. Thus, he is far more likely to kill her (and perhaps himself as well) as she tries to leave or after she has left, than if she stays with him. (“If I can’t have you, nobody can,” he says.)

The abuser’s need for power and control over the victim does not just stop when the victim leaves the abuser, but drives him to kill her after she leaves.

Why do abusers kill? In one study, the reason given by most male abusers for killing their partners was “possessiveness,” while the reason given by most female offenders was “self-defense.” The batterer kills for the same reason he abused his partner with physical and psychological abuse. He kills because “[m]urder is . . . the ultimate expression of the batterer’s need to control his partner’s behavior.” The risk to women after separation is particularly acute during the first two months after separation.

When the victim is killed by her partner, the weapon of choice for the abuser is a gun. Specifically, handguns are most likely to be used. An analysis by the Violence Policy Center found that in 1997 “handguns were used in [seventy-five] percent of the shootings in which one man killed one

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34 ANN JONES, NEXT TIME, SHE’LL BE DEAD: BATTERING & HOW TO STOP IT 1-4 (rev. ed. 2000).
35 Id. at 95.
37 WILSON, supra note 11, at 29. In 1992, sixty-two percent of domestic violence homicides victims were shot. KDVA, supra note 36.
38 KDVA, supra note 36, at 2.
The Justice Department concluded that from 1990 through 2000 guns were the weapon of choice and were involved in two-thirds of cases where spouses or ex-spouses were murdered. In cases where the victim was the girlfriend of the murderer, fifty-seven percent of the homicides were perpetrated with a gun.

In fact, the presence of a gun in the home is a sign of potential domestic violence. In *The Gift of Fear*, Gavin De Becker includes gun possession as a pre-incident predictor connected not only with domestic violence, but also with domestic homicide. He states, "Weapons are a substantial part of [the abuser's] persona; he has a gun or he talks about, jokes about, reads about, or collects weapons." Also, the abuser "refers to weapons as instruments of power, control, or revenge."

Psychologist Lenore Walker also noted the presence of guns in a violent household as a weapon of psychological torture. "Batterers reportedly would frighten their women with terrorizing descriptions of how they would torture them. They often backed up these descriptions through the use of guns, knives, and other weapons in their abusiveness." Thus, guns may be used not only to perpetrate acts of physical abuse, but also may be used to inflict severe psychological abuse.

Another predictor of homicides in domestic violence cases is a documented history of abuse. The batterer usually has a police history that includes behavioral offenses like assault or battery.

Predictors like those listed above are stressed in domestic violence shelters and in counseling for abuse victims in hopes that the victims will seek protection from the police before it is too late. Unfortunately, women who call the police, file charges, and receive protective orders from the state, sometimes still fall prey to the guns possessed by their abusers.

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40 Id. at 2.  
42 Id.  
45 Id.  
46 WALKER, supra note 20, at 75.  
47 KDVA, supra note 36.  
48 DE BECKER, supra note 44, at 211.
II. CURRENT GUN REGULATIONS FOR DOMESTIC VIOLENCE ABUSERS

A. The Lautenberg Amendment's Regulations for Domestic Violence Abusers

Congress recognized the deadly combination of guns and domestic violence with the passage of an amendment to the Gun Control Act called the Gun Control Act of 196849 ("GCA") and the subsequent Lautenberg Amendment,50 passed in 1996. The GCA makes it a federal offense, punishable for up to ten years in prison, to possess a firearm if subject to a domestic violence protective order.51 The GCA provides:

(g) It shall be unlawful for any person—

... who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;52

With the passage of the Lautenberg Amendment in 1996, Congress also made it a federal offense, punishable for up to ten years in prison, to possess a firearm if convicted of a misdemeanor crime of domestic violence.53 The Lautenberg Amendment provides:

(g) It shall be unlawful for any person—

52 Id. § 922(g)(8).
53 Id. § 924(a)(2).
(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.\(^{54}\)

With the passage of the GCA and the Lautenberg Amendment, Congress showed its willingness to combat domestic violence fatalities from gun violence. Both the GCA and the Lautenberg Amendment are federal criminal laws that make it illegal for an abuser to possess or use a firearm if under a domestic violence order or after a conviction for a misdemeanor domestic violence charge. If enforced, the two laws would work to decrease domestic violence fatalities and hold the batterers accountable for their criminal behavior.

A recent Supreme Court decision left advocates of the domestic violence movement wondering if the GCA and the Lautenberg Amendment would be found to be an unconstitutional overreaching of Congress' Commerce Clause power. In *United States v. Lopez*\(^{55}\) the Supreme Court invalidated the Gun-Free School Zone Act,\(^{56}\) part of the same statutory scheme as both federal gun laws at issue, as unconstitutional. The Gun-Free School Zone Act made it a federal offense to carry a firearm within a school zone. In *Lopez*, the Gun-Free School Zone Act was found unconstitutional for overreaching Congress' Commerce Clause power because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."\(^{57}\) The Act failed to show that the activity regulated substantially affected interstate commerce.\(^{58}\) The Court noted that the Act also failed because it did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."\(^{59}\)

Unlike the Gun-Free School Zone Act, the GCA and the Lautenberg Amendment do contain jurisdictional "hooks," which save the Act's constitutionality. Several lower courts have interpreted *Lopez* 's jurisdictional hook analysis and have rejected Commerce Clause challenges to the

\(^{54}\) *Id.* § 922(g)(9).


\(^{57}\) *Lopez*, 514 U.S. at 551.

\(^{58}\) *Id.* at 561.

\(^{59}\) *Id.*
GCA and the Lautenberg Amendment because the statutes contain jurisdictional hooks linking the violation in question to interstate commerce. As a result, one can confidently argue that both Acts are still good law, even in the wake of Lopez.

Therefore, at the federal level, there are two laws that regulate and criminalize possession of guns by abusers who have either committed a misdemeanor domestic violence offense or have an active domestic violence order. Both the GCA and the Lautenberg Amendment seem to provide protection to a battered woman by getting the gun out of the hand of her abuser. However, there are serious enforcement issues with the federal laws that decrease their effectiveness.

B. The Lack of State Gun Regulations for Domestic Violence Abusers

Currently, there are no gun regulations in Kentucky that parallel the GCA and the Lautenberg Amendment. However, one proposed bill, Kentucky Senate Bill 172, provides for criminal penalties for possession of a gun by a domestic violence misdemeanant or an abuser subject to a domestic violence protection order. The current state laws listed below also offer some protection for victims through gun regulations, but leave a dangerous hole most abusers slip through. This hole could be filled by a state law mirroring GCA and the Lautenberg Amendment.

One way to protect victims by confiscating abusers’ guns is through judicial relief granted in a protective order. In Kentucky, a victim of domestic violence may receive a domestic violence order (“DVO”) after a hearing, provided there is evidence that domestic violence occurred and may occur again. In the order, the judge may enter relief that includes any combination of the following: denying the abuser access to the victim, denying the abuser the opportunity to further abuse the victim or damage property, forcing the abuser to leave the victim’s residence, awarding temporary custody of children to the victim, and requiring counseling for

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61 See infra Part III for discussion of the ineffectiveness of the GCA and the Lautenberg Amendment.
63 See infra Part IV.
64 See supra notes 65-73 and accompanying text.
both victim and abuser. The judge may also “[e]nter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse.”

Due to the lack of state gun laws pertaining to domestic violence orders, some judges use their discretion to order the abuser to relinquish all guns to the police. However, this is a discretionary matter and consequentially is not uniformly enforced. Thus, not all victims get the benefit of a judge willing to award this extra relief.

A second way guns are regulated at the state level is through the criminal justice system. Abusers who are guilty of felony charges are barred from possession of firearms in Kentucky. Unfortunately, most domestic violence charges are prosecuted as misdemeanors. As a result, the felony gun law in Kentucky is insufficient to protect most victims of domestic violence.

An abuser who is convicted of a misdemeanor for either assault or terroristic threatening may not receive a license to carry a concealed deadly weapon in Kentucky. However, there is no law making it a crime for a misdemeanant to possess a firearm that is not concealed.

Kentucky does provide victim notification when an abuser attempts to purchase a firearm when he is barred from doing so under the GCA. The law enforcement agency designated must “make reasonable efforts to ensure that the petitioner who obtained the domestic violence order is notified that the respondent has purchased or attempted to purchase a firearm.” Victim notification of her abuser’s attempt to purchase a firearm is a significant protection for a victim of domestic violence. She is on notice that her abuser is attempting to purchase a firearm, which indicates

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66 Id. The counseling may not be mediation “for the resolution of the issues alleged in the petition.” Id.

67 Id.

68 Id. § 527.040.

69 See generally Jessica A. Golden, Note, Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementation Flaws, 29 FORDHAM URB. L.J. 427, 427-28 (2001) (The motivation behind the Lautenberg Amendment is the common practice of judges lowering charges from a felony to a misdemeanor because the crime changed involves “domestic violence.” This practice diminishes the effectiveness of the felony gun laws that were in place before the Lautenberg Amendment.)

70 K.R.S. § 237.110 (Michie 2002).

71 Id. § 237.095.

72 Id.
the severity of her situation. Hopefully, with such notice, the victim can seek shelter in a domestic violence shelter or flee the state. What about the abusers who already possess firearms and are subject to protection orders and/or are domestic violence misdemeanants? Due to a lack of state gun regulations dealing with this problem, the victim is left with the protections of federal gun laws, which are not effectively enforced.\footnote{See infra Part III for a discussion of the ineffectiveness of the enforcement of the GCA and the Lautenberg Amendment.}

C. Other States' Action in the Area of Domestic Violence Gun Laws

Enforcement problems pertaining to federal domestic violence gun laws are not isolated to Kentucky. Problems with federal enforcement of gun laws are also not isolated to domestic violence laws. On a national level, there are some 22,000 federal gun regulations, but there has been a forty-four percent decrease in prosecutions of gun related offenses.\footnote{Project Exile: A Case Study in Successful Gun Law Enforcement: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the Comm. On Government Reform, H.R., 106th Cong. at 10 (1999) [hereinafter Hearing] (statement of Charlton Heston, President, NRA), available at http://www.house.gov/reform.} The effect of decreased enforcement and prosecution of current federal gun laws is felt in every state with each death perpetrated with an illegal gun. Several states and cities have used innovative approaches to confront the issue of lax enforcement of existing gun laws.

One city in particular, Richmond, Virginia, has pioneered in this area of gun enforcement and prosecution. In 1997, during which Richmond experienced a record number of murders, the United States Attorneys' Office for the Eastern District of Virginia began Project Exile.\footnote{Id. at 16 (statement of Mark Earley, Attorney General, Va.).} Project Exile is a partnership of federal, state, and local prosecutors and law enforcement officers that coordinates prosecution of illegal gun use or possession.\footnote{Id.} Project Exile targets three groups: felons, drug offenders, and domestic violence abusers.\footnote{Steve Dillingham, DOJ and APRI Target Gun Violence, PROSECUTOR, May-June 2001, at 22.}

At the heart of Project Exile is a partnership between federal and state law enforcement officers. To facilitate this partnership, Virginia implemented Project Exile statewide and subsequently passed state gun laws.
mirroring federal gun laws, thus making state enforcement and prosecution much easier.

Tough penalties are assessed for both state and federal violations of gun laws. If arrested for possession or use of an illegal weapon, an offender is almost never granted bail. Once convicted, the violations carry a mandatory prison sentence of close to five years in prison. Also, the project gets its name because when a violator is convicted, he is “exiled” to a federal prison outside of his home community.

An interesting part of the project is the use of media to educate Richmond citizens about Project Exile. The project uses the motto “An illegal gun will get you five years in federal prison” to convey the message to would-be violators that tough penalties will be assessed for illegal gun possession. The project spent a considerable amount of money on advertising, with the NRA and local businesses contributing to the media campaign. United States Attorney James B. Comey stated the purpose of the media campaign was to “market fear to the bad guys. . . . We were trying to send a shock wave through the criminal community and get them to do a cost-benefit analysis and make it a huge liability for them to carry a gun.”

The project has been successful in combating gun violence with a significant drop in murders every year since the program was implemented. When the project began, Richmond was among the top five U.S. cities for murders per capita. The first year in operation, murder rates dropped thirty-three percent. In the first year, 656 illegal guns were confiscated, preventing an unknown amount of further homicides. The project has attracted many supporters, including gun advocates. In fact, the NRA is one

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79 Id. at 16.
80 Id.
81 Id.
83 Id.
84 Id.
86 Id. at 16 (statement of Mark Earley, Attorney General, Va.).
87 Id.
of the strongest proponents of the project. The project’s success has piqued the interest of several other cities. Oakland, Philadelphia, Rochester, Camden, and others are considering implementing a program similar to Project Exile.

The partnership between federal and state law enforcement officers has been the main reason for Project Exile’s success. The project has quieted arguments that state police agents are acting as de facto federal agents when they arrest criminals for state drug or gun charges that may then be prosecuted as federal offenses. If the state officers were deemed de facto federal officers, then federal rights (such as a speedy trial) would be applicable. The Fourth Circuit held that the federal government and the state government may prosecute for the same offense, and that the state officers are acting within their state capacities when they enforce the state laws.

Another state that has innovative laws and procedures for confiscating guns is New Jersey, where victims may petition the court for seizure of guns from their abusers under a warrant. The petitioner must prove there is “reasonable cause” to believe there will be further violence and that the abuser has a gun in his/her possession. If these prerequisites are satisfied, the gun will be seized from the abuser. While this protection is helpful to victims, it does not allow for automatic seizure of firearms upon entry of a domestic violence order or a misdemeanor domestic violence conviction.

III. THE INEFFECTIVENESS OF THE LAUTENBERG AMENDMENT AND THE GCA TO UNIFORMLY PROTECT VICTIMS OF DOMESTIC VIOLENCE

A. Enforcement Issues Pertaining to the Effectiveness of the Lautenberg Amendment and the GCA

"Regardless of their empowerment abilities, orders without enforcement offer little protection and often increase women’s danger by creating a false sense of security."
Advocates for domestic violence victims were relieved by the passage of the GCA and the Lautenberg Amendment. National attention was finally given to the epidemic of domestic violence. However, Congress failed to provide guidance to states on the problem of enforcement of new federal regulations. Because the GCA and the Lautenberg Amendment are federal laws, local and state law enforcement officials have been left wondering how to confiscate illegal guns.

Traditionally, when a battered woman seeks assistance from the police, she calls local, city, or state law enforcement. Local officers are “on the scene” of the domestic incident. Every police officer in Kentucky has access to the Law Enforcement Network of Kentucky (“LINK”), which details whether an abuser is currently under an order of protection from the court. Police officers have the necessary information about protective orders via LINK to make arrests of abusers and/or confiscations of illegal guns, but state police officers must act within the jurisdiction of Kentucky law.

Likewise, when a victim is granted a protective order, barring judicial discretion, the abuser is simply told it is a federal offense to possess any guns while the order is in place. There is no uniform relinquishment process once the protective order is finalized by the state judge. Also, in the prosecution of a misdemeanor domestic violence charge, the county prosecutor is without authority to order a surrender of all firearms after conviction.

The federal agency in charge of enforcement of the Lautenberg Amendment and the GCA is the Bureau of Alcohol, Tobacco, and Firearms (“ATF”). The ATF released an “Open Letter” to the public describing in detail the firearm owners subject to the regulations. The ATF gives little, if any, guidance or incentive to misdemeanants to relinquish possession of illegal firearms. In the letter, the ATF states that “[i]ndividuals subject to this disability should immediately lawfully dispose of their firearms and ammunition.” The ATF goes on to say, “We recommend that such persons relinquish their firearms and ammunition to a third party, such as

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95 See generally Saylor, supra note 60.
96 K.R.S. § 403.737 (Michie 1999).
97 See infra Part II.B.
99 Id.
100 Id.
their attorney, to their local police agency, or a Federal firearms dealer." Taking into account the fact that "every day at least four women die violently at the hands of men who profess to love them," and realizing that the point of separation is the most dangerous time in a victim's life, it is easy to see that batterers will not often voluntarily relinquish control of the weapon that effectuates their goal.

Allowing batterers the opportunity to voluntarily relinquish possession of guns does not significantly prevent domestic homicides, if at all. The batterer will be charged with a violation of the federal gun laws after the incident of abuse, but this may be too late for the victim. It's time to "stop further harm by holding offenders, rather than their victims, accountable."  

IV. STATE GUN REGULATIONS FOR ABUSERS: A SOLUTION TO AN ENFORCEMENT PROBLEM

A. Pending State Legislation: Why Senate Bill 172 Should be Enacted

1. Arguments for Passage of Senate Bill 172

In February 2002, Kentucky State Senator Julie Denton introduced Senate Bill 172 that would bring domestic violence law in Kentucky in line with federal law. The law seeks to close the gap in Kentucky's domestic violence law to prevent further homicides.

Kentucky Senate Bill 172 has two components. One is analogous to the GCA, and one is parallel to the Lautenberg Amendment. The first component provides:

(1) A person is guilty of possession of a firearm or ammunition while subject to a domestic violence protective order when the person possesses or receives a firearm or ammunition while subject to:
   (a) A current domestic violence protective order issued under KRS 403.750 for the protection of the person's spouse or former spouse, an individual with whom the person has a child in common, or an individual with whom the person is currently living together or with whom the person has formerly lived together; or

\[\text{Id.}\]
\[\text{Id., supra note 34, at 87.}\]
\[\text{Id. at 95.}\]
\[\text{Id. at 219.}\]
(b) A current protective order of another state which meets the requirements of 18 U.S.C. sec 922(g)(8).

(2) The provisions of subsection (1) . . . shall not apply to antique firearms . . . or firearms . . . issued for the use of the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof.

(3) Possession of a firearm or ammunition while subject to a domestic violence protective order is a class A misdemeanor for the first offense and a class D felony for each subsequent offense.

(4) The provisions of this section shall not be retroactive . . .

The first component of Kentucky Senate Bill 172 is very similar to section 922(g)(8) of the GCA. Public interest exceptions in both bills allow police to carry firearms regardless of the issuance of a protective order.\(^{107}\) The bill also provides for full faith and credit for protective orders issued in another state, so long as these out of state orders meet the requirements of section 922(g)(8) of the GCA.\(^{108}\) There are a few differences between the Kentucky bill and the GCA. First, the proposed bill expressly provides that it shall not be retroactive and shall only apply to orders issued after the effective date of the law if enacted.\(^{109}\) There is also a difference in the penalties. The bill proposes that the first offense be a misdemeanor and that subsequent offenses be felonies.\(^{110}\) The GCA, on the other hand, provides that the first offense is a felony, punishable with up to ten years in prison.\(^{111}\)

The second component of Kentucky Senate Bill 172 provides:

(1) As used in this section:

(a) Misdemeanor crime of domestic violence means an offense that is committed against a person who is related to the actor by being a family member or a member of an unmarried couple and which:

1. Is a misdemeanor under federal law or state law; and

2. Has, as an element, the use or attempted use of physical force or the use or threatened use of a deadly weapon;

(2) A person is guilty of possession of a firearm or ammunition by a person convicted of a misdemeanor crime of domestic violence when the

\(^{106}\) Id. § 1.

\(^{107}\) Id. § 1(2); 18 U.S.C. § 925(a)(1) (2000).


\(^{109}\) Id. § 1(4).

\(^{110}\) Id. § 1(3).

person has been convicted of a misdemeanor crime of domestic violence and possesses a firearm, ammunition, or both.

(3) The provisions of subsection (2) of this section shall not apply to:
   (a) A person who has been granted a full pardon . . . pursuant to the Gun Control Act of 1968 . . .
   (b) Antique firearms . . . or firearms . . . issued for the use of the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof.

(4) Possession of a firearm . . . is a Class A misdemeanor for the first offense and a Class D felony for each subsequent offense.

(5) The provisions of this section shall not be retroactive . . .

This second component is analogous to the Lautenberg Amendment. Like the Lautenberg Amendment, Kentucky’s bill requires that the misdemeanor have as an element the “use or attempted use of physical force or the use or threatened use of a deadly weapon.” Many batterers, as a form of control, often threaten to use a weapon on the victim. This element covers the situation where a batterer does not commit a physical crime, like assault or battery, but does commit terroristic threatening.

This section of the bill deviates from the Lautenberg Amendment in two significant ways. First, the bill includes a public interest exception for state or federal government employees. The exception will probably give this bill a better chance at passage because the Lautenberg Amendment has repeatedly been attacked because it does not contain a public interest exception. Second, the bill deviates from the Lautenberg Amendment in that it authorizes the penalty to be a misdemeanor for the first offense and a felony for subsequent offenses. The Lautenberg Amendment provides for a felony, punishable for up to ten years in prison for the first offense.

The first reason to adopt Kentucky Senate Bill 172, or a similar measure, is to close the gap between state and federal domestic violence laws. Since local police are the primary source of law enforcement
assistance for victims of domestic violence, they would be better able to enforce a state gun law. At the scene of a domestic violence incident, if the batterer has previously been charged with a misdemeanor offense, the police can arrest the batterer on the spot for possession of a firearm in violation of the statute. At that point, the police can confiscate the weapon to better ensure victim safety.

Also, when a victim has obtained a protective order that the batterer violates by contact or further violence, the batterer can be arrested on the spot for 1) a gun violation charge if there is a gun present and 2) a violation of the order.

With the passage of a state gun law, local prosecutors will be able to prosecute violators for gun offenses. Since these prosecutors have jurisdiction over protective order violations and domestic violence misdemeanors, they can present a united case against the abuser. The current practice is to refer GCA or Lautenberg violations to the U.S. Attorney’s Office.

Under Kentucky law for protection orders, judges have discretion to award further relief when necessary. Because awarding extra relief is permissive and not mandatory, ordering compliance with federal gun laws is not uniformly enforced. With a state gun law analogous to the federal gun laws, the degree of protection afforded to a victim would not depend upon the progressive nature of the judge in her district. Until judicial attitudes about domestic violence comport with the philosophies of federal laws, there will be a need for a state law to fill the gap left by federal laws.

2. Barriers to Passage of a Complimentary State Law

The most easily dismissed argument opposing passage of Kentucky Senate Bill 172 is that the bill would be an enactment of an ex post facto law—a violation of both the Kentucky Constitution and the United States Constitution. This argument has also been raised against the Lautenberg

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119 There is a high likelihood that the police will encounter an individual who already has been convicted of a misdemeanor domestic violence charge or is violating a protective order. One study found that eighty-eight percent of victims killed in a domestic violence homicide had documented histories of abuse. KDVA, DOMESTIC VIOLENCE AND HOMICIDE FACT SHEET, supra note 36; see also DE BECKER, supra note 44, at 211 (stating that an abuser’s “history includes police encounters for behavioral offenses (threats, stalking, assault, battery”).


121 Id.

122 K.R.S. § 403.750(1)(h) (Michie 1999).
Amendment. To fall within the ambit of an *ex post facto* law, the "law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." Courts confronted with the issue of whether the GCA is an *ex post facto* law have found that "the activity prohibited ... is the post-enactment possession of a firearm, not the pre-enactment misdemeanor crime of domestic violence." Since the two components of Kentucky Senate Bill 172 are similar in scope to the GCA and the Lautenberg Amendment, it will not be found to be an *ex post facto* law.

Since Kentucky's bill is so similar to the Lautenberg Amendment, it may face the same vagueness challenges. However, this should not affect the Kentucky bill because the Lautenberg Amendment has survived vagueness challenges. In *United States v. Barnes*, the court explained that men of common intelligence can discern whether or not the relationship at issue is the same as specified in the Amendment. For example, a batterer can discern from the language of the act that his relationship with the battered woman is within the scope of the Lautenberg Amendment.

The Amendment has also been found to not violate the batterer's due process rights. It does not matter whether the defendant knows he was in violation of the Amendment’s gun restrictions. It only matters that he "knowingly" possessed the gun. The statute has also triumphed over equal protection attacks because misdemeanants are not a protected class and the government has a rational basis for the discrimination.

Opponents may urge that the new bill will not solve enforcement issues present with the Lautenberg Amendment or the GCA. It is true that without a uniform enforcement plan, the proposed bill could present similar enforcement issues on a smaller scale. For example, the bill would increase confiscation of guns when batterers are arrested for violations of the regulation. To adequately deal with the increase in confiscations, there should be a uniform procedure for confiscation at both the misdemeanor and protective order stage. Once an order of protection is entered against

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127 *Id.* at 1366-67.
128 *Id.* at 1368.
the batterer, the judge could order the defendant to turn over his weapons to the police within a specified time period. Similarly, batterers convicted of a misdemeanor domestic violence charge should be ordered by the presiding judge, through a uniform enforcement procedure, to surrender their weapons to the police. Adoption of this measure would decrease violations of the law and would therefore decrease domestic violence injuries and fatalities.

Advocates in the domestic violence field may worry that because the punishments in Kentucky’s bill are less severe, batterers will not be adequately held accountable for their actions. In response to this argument there are two strong points. First, the federal law is not being uniformly enforced. An unenforceable law that has greater punishment holds fewer batterers accountable than an enforceable law with less severe punishment. Second, several cities are adopting a program similar to Richmond, Virginia’s Project Exile, where state prosecutors work closely with federal prosecutors on gun violations that violate both federal and state laws.¹²⁹ If federal prosecutors wish to take the case because the sentence would be greater, then this option would be available. Thus, the bill would increase the accountability of the batterer on both the state and federal levels.

CONCLUSION

To accomplish the dual goals of establishing accountability for domestic violence abusers and saving the lives of battered women, it is essential that Kentucky enact Kentucky Senate Bill 172 or a similar measure. The enactment of the bill would increase accountability for the batterer because enforcement of the state law would be provided by state and local police, the ones most often at the scene of a domestic violence incident. The proposed bill would allow state law enforcement officers to confiscate the guns of batterers, and local prosecutors to pursue charges against batterers for violations of the state law—unlike the current federal gun laws. The enactment of the bill would thus close the enforcement gap between Kentucky and federal gun laws. The presence of an unenforced federal gun law only works to reinforce the idea that the batterer’s behavior is not serious enough to provide any punishment.

Finally, if the bill is enacted, prosecutors and law enforcement at the state level could work with federal prosecutors and the ATF to effectively confiscate guns from abusers, preventing further homicides. It is time to take the weapon of choice of batterers out of their hands before another battered woman dies in Kentucky.

¹²⁹ See Dillingham, supra note 77, at 22.