Note

Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives

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Steven Van Keuren and Teri Lee dated for two years before their relationship ended.[1] On July 29th, 2006, Van Keuren broke into Lee's home in Stillwater, Minnesota.[2] Wielding butcher knives in both hands, Van Keuren attacked Lee, screaming that "'the only way he could be together' with her was to kill her."[3] Lee threw chairs at him as he advanced, and shielded herself with one to block his slashing.[4] Incredibly, Lee managed to fend off Van Keuren, whom police later arrested at his home in River Falls, Wisconsin.[5]

At Van Keuren's August 1st, 2006 bail hearing, Lee told the judge, "I do feel physically threatened . . . . There's no doubt in my mind that he will come back to my home. He's stated . . . that he had nothing left to live for."[6] Despite Lee's fears, the judge released Van Keuren on bail, ordering him to stay "at least a mile away" from Lee.[7] The no-contact order did not stop Van Keuren from terrorizing Lee.[8] On September 20th, 2006,

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1. Sue Turner, *Intruder Kills Two, Then Shot by SWAT Team*, WCCO-TV, Sept. 22, 2006, http://wcco.com/local/local_story_265092706.html.
2. Alex Friedrich, *She Cried for Help. Did Anyone Listen?*, ST. PAUL PIONEER PRESS, Oct. 1, 2006, at A1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

Van Keuren attended Lee's young daughter's volleyball game.[9] Lee repeatedly notified the police, but officers never arrested Van Keuren for violating the order.[10]

Around four o'clock in the morning on September 22nd, 2006, Van Keuren broke into Lee's home once again.[11] Lee, her boyfriend, Tim Hawkinson, Sr.,[12] and her four young children—ages six to twelve—were asleep inside.[13] Using a .22 caliber handgun, Van Keuren shot and killed Lee and Hawkinson in their bedroom.[14] One of Lee's daughters witnessed the murders before fleeing with her sister to a neighbor's home.[15] Meanwhile, Lee's two sons hid in the home for ninety minutes until the police apprehended Van Keuren.[16]

Sadly, days before she was killed, Lee had started the process of installing a security system in her home.[17] The Lees had created an evacuation plan to be implemented if Van Keuren arrived at their home,[18] and Hawkinson stayed overnight to protect the family.[19] Anticipating the worst, Lee implored her sister to take care of her kids if Van Keuren killed her.[20] The four Lee children are currently living with Lee's sister and her husband, who have three children of their own.[21]

This Note argues that current approaches to disarming batterers are ineffective and place women like Teri Lee in grave danger despite victims' earnest efforts to seek protection. Part I explains the gendered nature of domestic violence and explores

9. *Id.*

10. *Id.*

11. Turner, *supra* note 1.

12. Alex Friedrich, *Couple Had Gun but Didn't Shoot It, Spent Cartridges Match Ammo Found at Suspect's Home*, ST. PAUL PIONEER PRESS, Oct. 3, 2006, at B1.

13. Turner, *supra* note 1.

14. Friedrich, *supra* note 12.

15. *Id.*

16. *Id.*

17. Sue Turner, *Murder Victims Knew Ex-Boyfriend Would Return*, WCCO-TV, Sept. 25, 2006, http://wcco.com/topstories/local_story_267200050.html.

18. *Id.*

19. Turner, *supra* note 1.

20. *Shooting Victim's Sister Says She Knew Life Was Threatened*, MINN. PUB. RADIO, Sept. 24, 2006, http://minnesota.publicradio.org/display/web/2006/09/24/domestic.

21. Elliot Mann, *Lee Children Adjust to Life After Mother's Passing*, STILLWATER GAZETTE (Minn.), Jan. 25, 2007, http://www.stillwatergazette.com/articles/2007/01/26/news/news200.txt.

the negative consequences of making the states primarily responsible for gun violence against women. Part II analyzes how recent federal attempts to correct the inadequacies of state approaches to gun violence unacceptably fail to establish a consistent, national approach to disarming batterers. After examining constitutionally permissible uses of federal power to secure state action, Part III concludes that Congress could more effectively disarm batterers by amending federal laws to include three new provisions. Specifically, federal law should provide monetary incentives to the states to enact the federal gun bans as state statutes, fund the creation of locally operated gun units for the purposes of identifying and disarming batterers, and require states to report information about batterers to federal law enforcement authorities.

I. DOMESTIC VIOLENCE, GUNS, AND GOVERNMENT RESPONSIBILITY

Tragically, the terror the Lee family experienced cannot be characterized as an anomaly. Women routinely experience violence at the hands of their intimate partners.[22] Any solution to domestic violence must take into account how abuse affects women and men differently, as well as the government's role in both ameliorating and perpetuating the disproportionate effects of domestic violence on women and men.

A. DOMESTIC VIOLENCE DEFINED

The American Medical Association defines domestic violence as "the physical, sexual, and/or psychological abuse to an individual perpetrated by a current or former intimate partner."[23] Alternatively referred to as "wife battering" or "intimate partner abuse," domestic violence describes a pattern of control that becomes more dangerous with time,[24] because batterers

22. *See* Elisabeth Rosenthal, *Women Face Greatest Threat of Violence at Home, Study Finds*, N.Y. TIMES, Oct. 6, 2006, at A7 ("Violence against women by their live-in spouses or partners is a widespread phenomenon, both in the developed and the developing world . . . ."); *see also* Bob Herbert, *Why Aren't We Shocked?*, N.Y. TIMES, Oct. 16, 2006, at A19 ("The disrespectful, degrading, contemptuous treatment of women is so pervasive and so mainstream that it has just about lost its ability to shock.").

23. Michael A. Rodriguez et al., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, 282 J. AM. MED. ASS'N 468, 468 (1999).

24. Lisa D. May, *The Backfiring of Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 3 (2005).

display high rates of recidivism and because the severity of the abuse tends to intensify.[25] Thus, once physical or psychological intimidation begins it usually escalates, becoming more frequent and severe.[26]

While the term "domestic violence" connotes gender neutrality,[27] statistics show that domestic violence affects men and women in vastly different ways.[28] The U.S. Department of Justice reports that eighty-five percent of victims of intimate-partner domestic violence are women.[29] Furthermore, 63.5% of female homicide victims are killed by intimate partners, as compared to 36.5% of male homicide victims.[30] Most violence that men experience occurs in public spaces, committed by male acquaintances or male strangers.[31] In stark contrast, women are most likely to encounter violence in their own homes,[32] perpetrated not by strangers, but by men whom the women intimately know and love.[33] These men are often women's long-term partners and the fathers of their children.[34]

B. WHEN BATTERERS POSSESS GUNS

While all forms of domestic violence are potentially lethal,

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25. *Id.* at 3–4.

26. *See id.* at 4 ("Without active police or court intervention, recurrence and intensification of the abuse are even more certain.").

27. *See* Rodriguez et al., *supra* note 23, at 468.

28. *See* Susan B. Sorenson, *Firearm Use in Intimate Partner Violence: A Brief Overview*, 30 EVALUATION REV. 229, 229 (2006) (noting that two primary differences between the homicides of men and women are the place of the homicide and the nature of the victim-suspect relationship).

29. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1993–2001, at 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf; *see also* Lauren E. Crais, *Domestic Violence and the Federal Government*, 6 GEO. J. GENDER & L. 405, 406 (2005) ("[M]ore than 960,000 incidents of domestic violence occur each year, and about eighty-five percent of the victims are women.").

30. JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 5 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf.

31. Sorenson, *supra* note 28, at 229.

32. *See id.* at 230 ("In recent years, intimate partner homicides composed only 4% of the murders of men but about one third of the murders of women."); *see also* Rosenthal, *supra* note 22 (citing a 2006 study by the World Health Organization which found that at six research sites around the world at least fifty percent of women were subject to moderate or severe violence in the home).

33. *See* Sorenson, *supra* note 28, at 230.

34. *See id.* (noting that women's abusers are often their intimate partners, whether boyfriends or husbands).

studies show that guns and domestic violence are a particularly deadly combination.[35] The Department of Justice reports that nationwide, two-thirds of intimate-partner homicide victims are killed by guns.[36] If a batterer possesses a firearm the likelihood that he will murder his girlfriend or wife increases substantially.[37] Intimate assaults involving firearms are twelve times more likely to end in fatality than assaults not associated with firearms.[38]

Even when batterers do not actually fire their guns, they still use guns to control women.[39] Abused women frequently report that their intimate partners brandish guns to threaten deadly force.[40] In the face of such threats, women are more likely to endure long-term abuse out of fear that leaving the relationship will result in their death or the death of their children.[41]

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35. Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, FLA. BAR J., Oct. 2005, at 79, 79 (2005); *see also* May, *supra* note 24, at 4 ("If firearms remain in a household with a history of domestic violence, the risk of death or firearm injury to the victim increases dramatically."); Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAM. CHILD. & CTS. 3, 3 (2005) (noting that (1) firearms caused 44% of the 61 homicides related to domestic violence in San Diego County between 1997 and 2003; (2) in the late 1990s the New York State Commission on Domestic Violence Fatalities concluded that firearms were used in more than half of the domestic violence homicides it investigated; and (3) in Washington State, 60% of the 209 victims of domestic violence homicides from January 1997 to August 2002 were killed with a firearm).

36. Karan & Stampalia, *supra* note 35, at 79; May, *supra* note 24, at 4; Sack, *supra* note 35, at 3.

37. *See* May, *supra* note 24, at 4 ("Battered women are approximately five times more likely than other women to be murdered in a shooting . . . .").

38. *Id.*

39. Casey Gwinn, *Domestic Violence and Firearms: Reflections of a Prosecutor*, 30 EVALUATION REV. 237, 239 (2006) ("[O]ffenders use . . . guns to intimidate and threaten their female victims even if they never shoot. In fact, the most common use of a firearm in the home of a batterer may well be to threaten the female victim."); Sorenson, *supra* note 28, at 235 ("Firearms are used in ways that do not result in firearm-related injuries. A gun can be used to coerce behaviors such as sex, as a means to inflict terror, and so on.").

40. *See* Gwinn, *supra* note 39, at 239; Sorenson, *supra* note 28, at 235 (speculating that handguns may be more common in homes where battering occurs than in the general population).

41. *See* Gwinn, *supra* note 39, at 239 (observing that an abuser's threats to "use his firearm on her, on the children and on himself" convinced the victim to stay in the abusive relationship); Karan & Stampalia, *supra* note 35, at 79 (noting that the domestic violence perpetrator "threatened to kill [his victim] every time she tried to leave him").

C. GOVERNMENT RESPONSIBILITY FOR DOMESTIC VIOLENCE AND GUNS

1. Understanding the State Sovereignty Paradigm

In order to determine the best strategy to prevent gun violence against women, policymakers should consider how the doctrine of federalism apportions government responsibility for this issue. Historically, states have been responsible for addressing domestic relations. As the Supreme Court stated in *In re Burrus*, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the [s]tates and not to the laws of the United States."[42] Federalism doctrine favors state power over domestic relations for two reasons.[43] First, the Tenth Amendment preserves the states' traditional power to regulate the family.[44] Second, as smaller political units, the states are more "in tune" with local mores.[45] As a result, the states can best enact laws that shape domestic relations to reflect the values of their constituents. The states' presumptive legislative and adjudicative authority over domestic relations is known as the state sovereignty paradigm.[46]

United States v. Morrison[47] provides a modern example of federalism's preference for state control of domestic relations. In *Morrison*, the Court declared unconstitutional a provision of the Violence Against Women Act that allowed victims of violence to sue their abusers for civil remedies in federal courts.[48] In so doing, the Court limited the federal government's ability to offer a national solution to domestic violence. *Morrison* held that if Congress could regulate domestic violence through the Commerce Clause, the distinction between what is "local" and what is "national" would be "negatively blurred."[49] The Court characterized domestic relations—including the violence that

42. 136 U.S. 586, 593–94 (1890).

43. *See* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1763–64 (2005).

44. *See* Collins, *supra* note 43, at 1764.

45. *See* Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 199 (1999) ("Regulation of the family, the thinking goes, is better-suited to the states because states are the locus of community dialogues on questions of values."); Collins, *supra* note 43, at 1764.

46. *See* Collins *supra* note 43, at 1770–71.

47. 529 U.S. 598 (2000).

48. *Id.* at 627.

49. *Id.* at 617–18.

may accompany those relations—as a "local matter" best resolved by the states, rather than a national civil rights problem necessitating a federal remedy.[50]

However, the states' power to control domestic relations is not absolute. Constitutional protections limit the state sovereignty paradigm, including the right of privacy protected by the Fourteenth Amendment.[51] The Court first recognized a right of privacy in marital relationships in *Griswold v. Connecticut*, asserting that the State cannot enter "the sacred precincts of marital bedrooms."[52] The Court extended the right of privacy to individuals in *Eisenstadt v. Baird*,[53] and reaffirmed the right in *Roe v. Wade*.[54] In *Roe*, the Court noted that precedent extends the right of privacy to "activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."[55] While domestic relations fall under the jurisdiction of the states, constitutional privacy rights limit the extent to which states may regulate such relationships.

Courts' reluctance to permit government intervention in the home—even when the home is the site of extreme violence—evidences the significance of privacy rights within the home. In *DeShaney v. Winnebago County Department of Social Services*, the Court held that state authorities had no affirmative responsibility to protect a toddler from his abusive father.[56] County social workers were aware of the child abuse, but took no action to remove the boy from his father's custody.[57] The boy's father subsequently beat him so severely that he suffered

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50. *See* Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 138 (2000) (contending that if the Violence Against Women Act had been upheld, it would have "[l]ocat[ed] acts of gender-based violence under the rubric of civil rights").

51. Roe v. Wade, 410 U.S. 113, 153 (1973).

52. 381 U.S. 479, 485 (1965).

53. 405 U.S. 438, 453 (1971) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . .").

54. 410 U.S. at 152 ("In a line of decisions . . . the Court has recognized that a right of personal privacy . . . does exist under the Constitution." (citation omitted)).

55. *Id.* at 152–53 (citations omitted).

56. 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests . . . .").

57. *Id.* at 192–93.

permanent brain injuries.[58] The Court asserted that while the Fourteenth Amendment protects citizens from the state, it does not protect citizens from *each other*.[59] Consequently, the State had no responsibility to protect the boy from his violent father.[60] Furthermore, the state authorities' knowledge of the abuse did not rise to the level of "state action" that necessitates constitutional protection.[61]

Together, the privacy cases and *DeShaney* suggest that while the Constitution limits a state's ability to regulate private relationships, it does not require that a state intervene when such relationships are violent. *Town of Castle Rock v. Gonzales*[62] demonstrates the impact of this interpretation of the scope of state authority. In this case, Jessica Gonzales's ex-husband took their three young daughters from their home while they were playing outside, despite the fact that a restraining order prohibited him from seeing the family unless he arranged a visit.[63] Jessica repeatedly called the police and even went to the police station, but the officers did not locate and return her children.[64] Later, Mr. Gonzales shot the three children to death.[65] Jessica filed a claim, stating that the police violated her property interest in the enforcement of her restraining order.[66] Justice Scalia rejected her argument, stating, "[w]e do not believe that these provisions of Colorado law truly made enforcement of the restraining orders *mandatory*,"[67] and reasoning that "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'"[68] According to *Gonzales*, even a specific legislative mandate to enforce restraining orders does not compel state au-

58. *Id.* at 193.

59. *Id.* at 196 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . , it does not confer an entitlement to such [government aid] as may be necessary to realize all the advantages of that freedom." (quoting Harris v. McRae, 448 U.S. 297, 317–18 (1980))).

60. *Id.* at 197 ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

61. *Id.* at 199–200 (contending that "state action" occurs when a state takes a person into its custody and holds him there against his will).

62. 545 U.S. 748 (2005).

63. *Id.* at 751.

64. *Id.* at 753–54.

65. *Id.* at 754.

66. *Id.* at 748.

67. *Id.* at 760.

68. *Id.* at 756.

thorities to intervene in domestic relations.[69]

The extent of the states' power to regulate domestic relations affects women and men differently. This disparity stems from the belief that the "public" sphere of industry, commerce and government is distinctly separate from the "private" sphere of the home.[70] In addition, the public and private spheres are gendered.[71] Historically, women have been associated with the home since women traditionally undertook homemaking and childbearing responsibilities.[72] In contrast, the public sphere is usually portrayed as "masculine," since men traditionally acted as breadwinners and authority figures in the public domain.[73]

The gender inequality inherent in the traditional construction of the public and private spheres affects the degree to which the government can intervene in domestic affairs and, consequently, domestic violence.[74] Both the federal and state governments may regulate the commercial, contractual, and governmental transactions that occur in the (male) public sphere.[75] In contrast, the state sovereignty paradigm rejects the possibility of federal intervention in the home[76] and the Constitution limits the extent of state regulation of the home.[77] Consequently, the state sovereignty paradigm renders women unprotected in the private sphere of the home.[78] By guarding

69. *See id.* at 775 (Stevens, J., dissenting). Justice Stevens argued that the Colorado law at issue in *Gonzales* required police to enforce restraining orders in an effort to correct the historical problem of police inaction in the face of domestic disputes. *Id.* at 775–76.

70. KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 5 (2003).

71. *Id.* at 33.

72. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."); KELLY, *supra* note 70, at 33.

73. *See* KELLY, *supra* note 70, at 33.

74. *See* Adler, *supra* note 45, at 256 ("[U]nderlying federal denial of the responsibility for family law are subliminal associations of federal law with masculinity, rights, market norms, individualist self-reliance, objectivity, and the public sphere; and state law with femininity, love, values, altruism, subjectivity, and the private sphere.").

75. *Cf.* United States v. Morrison, 529 U.S. 598, 610 (2000) (describing the ability of the federal government to regulate economic activity that affects interstate commerce).

76. *See, e.g.*, *id.* at 613–16; *In re* Burrus, 136 U.S. 586, 593–94 (1890).

77. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

78. *See* KELLY, *supra* note 70, at 34 (describing how "the designation of

the home's privacy, the government casts a blind eye on the power imbalance between domestic partners.[79] In effect, the State becomes the guardian of the notion that "a man's home is his castle."

2. Historic State Approaches to Domestic Violence

In addition to designating states as responsible for domestic relations, federalism doctrine also conceives of the states as "laboratories" that test different legal "experiments."[80] While some experiments will fail, others will succeed and serve as an example for the rest of the country.[81] In their role as laboratories, the states have historically devised a variety of approaches to domestic violence. While some states *prevented* violence against women,[82] others *condoned* it.[83]

The earliest response to domestic violence in the United States involved steps the colonies took to criminalize the behavior.[84] In 1641, the Massachusetts *Body of Liberties* stated that "[e]verie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault."[85] The Governor's Council of Massachusetts granted to at least nine battered women a legal separation with no right to remarry.[86] Similarly, the Plymouth Colony permit-

women as belonging to the private sphere" creates problems with domestic violence).

79. *See id.* ("[A] noninterventionist approach to domestic life has functioned to protect the privacy of men at the expense of the safety of women.").

80. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (acknowledging the states' role as "laboratories"); Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 84 & n.111 (2006) (recognizing that one of federalism's core values is the "ideal of democratic experimentalism and pluralism" wherein states may "undertake 'experiments without risk to the rest of the country'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

81. *See* Kathleen M. Sullivan, *The Balance of Power Between the Federal Government and the States*, *in* NEW FEDERALIST PAPERS 111, 117–18 (Alan Brinkley et al. eds., 1997).

82. *See* Elizabeth Felter, *A History of the State's Response to Domestic Violence*, *in* FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 5, 8–10 (Cynthia R. Daniels ed., 1997).

83. *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 156, 157–58 (1824).

84. *See* Felter, *supra* note 82, at 8–9.

85. *Id.* at 9 (quoting ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 21–22 (1987)).

86. *Id.*

ted one battered woman to live separately from her husband, who was required to pay maintenance to her until he was "reformed."[87]

While some states criminalized domestic violence, others reinforced it as a permissible component of marriage. For example, in *Bradley v. State*, the court found that a husband may "chastise" his wife so long as his "correction" is "reasonable."[88] Other courts justified this "right" on the basis of a man's ability to act freely within the privacy of his home. In *State v. Black*, the North Carolina Supreme Court held that unless "permanent injury or excessive violence" was involved, the law would "not invade the domestic forum, or go behind the curtain."[89] Similarly, the court in *State v. Rhodes* observed that "family government is recognized by law as being as complete in itself as the [s]tate government is in itself . . . . Every household has and must have, a government of its own, modelled to suit the temper . . . of its inmates."[90] These opinions suggest that states' reluctance to aid battered women derived from an assumption that domestic affairs were beyond the reach of the states' jurisdiction.[91]

3. Current State Approaches to Domestic Violence

Modern state law continues to reflect the historical disunity of the states' stances toward domestic violence.[92] An examination of state laws regarding gun ownership and domestic violence illustrates the diversity of actions—as well as non-action—states currently take to prevent gun violence against women. Two mechanisms that states often use to disarm bat-

87. *Id.*

88. 1 Miss. (1 Walker) 156, 157–58 (1824).

89. 60 N.C. (Win.) 262, 263–64 (1824), *overruled by* State v. Oliver, 70 N.C. 60 (1874), *as recognized in* Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675 (N.C. 1999).

90. 61 N.C. (Phil.) 453, 456–57 (1868), *overruled by Oliver*, 70 N.C. 60, *as recognized in Virmani*, 515 S.E.2d 675.

91. *See, e.g.*, *Bradley*, 1 Miss. (1 Walker) at 158 ("Family broils and dissentions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy."); *Rhodes*, 61 N.C. (Phil.) at 456–57 ("[W]e will not interfere with or attempt to control [the family government], in favor of either husband or wife . . . .").

92. *See* Anne Rousseve, *Domestic Violence and the States*, 6 GEO. J. GENDER & L. 431, 432 (2005) ("Because there is no uniform codification of criminal domestic violence on a national level, states vary significantly in their statutory organization of criminal domestic violence law.").

terers include allowing state courts to order firearm removal at order for protection hearings and permitting police officers to seize weapons when they respond to a domestic violence incident.[93]

Despite the danger guns pose to women nationwide, just sixteen states allow their courts to disarm batterers at order for protection hearings.[94] Among these states, court approaches to gun removal vary radically.[95] For example, nine of the sixteen states give judges discretion in deciding whether to include a gun removal provision in the order.[96] Furthermore, only two states, North Carolina and California, require judges to notify the parties that the respondent cannot possess firearms while under the order.[97] In other states, many victims may be unaware of the gun ban and therefore unlikely to notify the judge that the respondent must be disarmed.[98] In addition, some states make weapon removal contingent on the actual use or threatened use of a weapon in a domestic violence incident.[99] States also vary on how to physically take away the guns pursuant to an order of protection. Five states authorize law enforcement to seize the guns.[100] However, eleven states depend on the *abusers themselves* to surrender their firearms.[101]

Like the laws governing court-ordered disarmament, those concerning police removal are anything but uniform. Eighteen states authorize police officers to confiscate firearms at the

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93. *See* Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns: A Review and Analysis of Gun Removal Laws in 50 States*, 30 EVALUATION REV. 296, 297 (2006).

94. *See id.* at 299.

95. *See* Sack, *supra* note 35, at 10 (noting that state gun bans "vary tremendously").

96. Frattaroli & Vernick, *supra* note 93, at 307.

97. *See id.* at 308. ("California law requires courts to verbally inform both parties in the proceedings that the respondent cannot possess firearms while the order is in effect. . . . [I]n North Carolina, judges must ask if respondents have access to firearms.").

98. *See* Karan & Stampalia, *supra* note 35, at 79 ("Many people are unaware of a 1996 federal law that prohibits a person with a qualifying misdemeanor domestic violence conviction from possessing . . . a firearm or ammunition . . . ."); Judy Harrison, *Domestic Abuse Targeted by Gun Laws*, BANGOR DAILY NEWS (Me.), June 29, 2004, at B1 (positing that many people affected by federal gun bans might have no idea the laws exist).

99. *See* Frattaroli & Vernick, *supra* note 93, at 307 (listing Arkansas, Illinois, New York, North Carolina, North Dakota, and Pennsylvania).

100. *Id.* at 307–08 (listing Hawaii, Illinois, Massachusetts, New Hampshire, and New Jersey).

101. *Id.* at 308.

scene of a domestic violence incident.[102] While some states *require* the police to confiscate firearms, others simply *permit* removal.[103] In addition, some states only allow police to take guns if the accused abuser is arrested.[104] Also, while some states impose a blanket requirement that the police take "all firearms" in the suspect's possession,[105] others only allow officers to take guns in "plain view" or discovered through a "consensual search."[106] A few states further limit the requirement to only those firearms involved in the "incident at hand."[107] Even when the police are actually able to confiscate a weapon, some states stipulate that the gun can only be held for a brief period of time.[108] Due to the inconsistencies and shortcomings of state approaches to disarming batterers, recent federal legislation has attempted to address the issues of guns and domestic violence.

4. Federal Approaches to Domestic Violence and Guns

While the states have addressed domestic violence since the founding of the American colonies,[109] the federal government has only recently acted to protect battered women. It was not until the late 1970s that Congress first introduced two national domestic violence bills, both of which were defeated.[110] The first federal law on domestic violence is only thirteen years old—the Violence Against Women Act of 1994 (VAWA).[111] This

102. *Id.* at 299.

103. *See id.* at 299, 306 (observing that eight states require police to remove firearms, seven states permit police to remove firearms, and three states have ambiguous statutory language).

104. *See id.* at 306.

105. *See id.* ("Police gun removal laws apply to all firearms owned or possessed by the alleged batterer in nine states, provided other criteria . . . are met.").

106. *Id.*

107. *See id.* at 307 ("Six states . . . limit removal authority to firearms actually involved in the domestic violence incident."); Sack, *supra* note 35, at 11 (listing Montana and Ohio as examples of states that only allow police to seize guns that have been used or threatened to be used in the assault).

108. *See* Frattaroli & Vernick, *supra* note 93, at 307 (stating that the removal period is seven days or less in many states and that eight states do not provide a specific time frame for return of the seized guns).

109. *See* Felter, *supra* note 82, at 8–9.

110. *See* Rachelle Brooks, *Feminists Negotiate the Legislative Branch: The Violence Against Women Act*, *in* FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE, *supra* note 82, at 65, 68.

111. 18 U.S.C.S. § 2261 (LexisNexis 2006); *see also* Brooks, *supra* note 110,

landmark piece of legislation created federal causes of action for domestic violence victims and appropriated billions of dollars for battered women's shelters and other resources.[112] VAWA also attempted to overcome the shortcomings of state gun laws by instituting federal measures to protect women from gun violence.[113]

As part of VAWA, Congress passed two notable provisions amending the Gun Control Act of 1968.[114] The first, entitled the Violent Crime Control and Law Enforcement Act of 1994, prohibits individuals subject to an order for protection from purchasing or possessing a firearm.[115] The second, the Lautenberg Amendment of 1996, declares that anyone convicted of a domestic violence misdemeanor cannot possess or purchase a firearm or ammunition.[116] In the words of the late U.S. Senator Paul Wellstone, the laws sought to recognize that the "only difference between a battered woman and a dead woman is the presence of a gun."[117] In so doing, the laws attempted to protect women and children by establishing a national commitment to disarm batterers.[118]

While the federal gun bans were controversial from the outset, the capacity of the laws to accomplish their goals came under heavy scrutiny after *Morrison*. In light of *Morrison*'s re-

at 76–78 (describing VAWA's passage and its relevant provisions).

112. *See* 18 U.S.C.S. § 2261; Brooks, *supra* note 110, at 65, 76–77 (arguing that VAWA was "the most significant piece of legislation ever enacted on the subject of domestic violence against women" in the United States).

113. *See* 18 U.S.C.S. § 2261; Michelle W. Easterling, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 940 (1996) ("Congress . . . was apparently convinced that the states were not solving the domestic violence problem, and that the federal government's involvement was needed."); Editorial, *Why Give Wife-Beaters Guns?*, N.Y. TIMES, May 31, 1996, at A24 (referring to the need for legislation to "plug a potentially deadly gap" since no state then banned "the possession of a gun by those convicted of misdemeanor domestic-violence crimes").

114. Gun Control Act of 1968, 18 U.S.C.A. § 922 (West 2000 & Supp. 2006).

115. Pub. L. No. 103-322, § 110401, 108 Stat. 2014, 2014–15 (codified as amended at 18 U.S.C. § 922(g) (2000)).

116. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (1996) (codified as amended at 18 U.S.C. § 922(g) (2000)).

117. 142 CONG. REC. S10378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

118. *See id.* (statement of Sen. Lautenberg) ("The amendment . . . would . . . send a message about our [n]ation's commitment to ending domestic violence and about our determination to protect the millions of women and children who suffer from this abuse.").

iteration of the state sovereignty paradigm, many legal scholars predicted that federal judges would overturn the gun bans.[119] Scholars expected that judges would "characterize [federal domestic violence statutes] as 'family law' statutes and then point to the warning language in *Morrison* . . . as evidence of the statutes' unconstitutionality."[120] Just as *Morrison* invalidated federal civil remedies for domestic violence, scholars predicted that courts would also overrule the gun bans since they similarly mandated federal intervention in matters of "local concern," including the family, gun control, and criminal law.[121]

As legal scholars expected, courts considered numerous constitutional objections to the gun provisions.[122] Nevertheless, courts repeatedly declared the federal gun bans constitutional.[123] Notably, courts upheld the laws during a period of legislative and judicial relaxation of other gun control laws.[124] Yet although the gun laws were upheld, they have not proven to be

119. *See* Elizabeth S. Saylor, *Federalism and the Family After* Morrison*: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN'S L.J. 57, 137 (2002) ("If any of the remaining gun possession laws are subject to attack, the Lautenberg Amendment and [the Violent Crime Control and Law Enforcement Act of 1994] are perfect targets because they combine two core areas of supposed traditional state concern: family and criminal law.").

120. *Id.* at 60.

121. *See id.* at 137–40.

122. *See* United States v. Napier, 233 F.3d 394, 398 (6th Cir. 2000) (rejecting a due process challenge to the Lautenberg Amendment); Gillespie v. City of Indianapolis, 185 F.3d 693, 698, 704–05 (7th Cir. 1999) (distinguishing the Lautenberg Amendment from the Gun-Free School Zones Act struck down in *United States v. Lopez*, 514 U.S. 549 (1995), since the Lautenberg Amendment contained a jurisdictional hook); United States v. Bunnell, 106 F. Supp. 2d 60, 65 (D. Me. 2000) (finding that the Lautenberg Amendment has "both a specific jurisdictional element as well as a substantial effect on interstate commerce" and therefore is a "constitutional exercise of Congress' power under the Commerce Clause"); *see also* T.J. HALSTEAD, CONG. RESEARCH SERV., FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT 5–9 (2001), *available at* http://www.peaceathomeshelter.org/DV/readings/federal/lautenberg.pdf (summarizing.commerce clause, equal protection clause, and ex post facto clause challenges to the Lautenberg Amendment).

123. *See* 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, 442 (2001).

124. *See* May, *supra* note 24, at 27 ("Thirty-six states currently allow their citizens to carry concealed weapons, and at least five of those states passed their laws [between 2004 and 2005].").

a successful means of addressing gun violence against women.

II. THE FEDERAL GUN BANS IMPLICITLY ACCEPT THE FLAWED STATE SOVEREIGNTY PARADIGM

A. STATE AND FEDERAL GUN BANS ARE INEFFECTIVE

Recent federal and state actions to disarm batterers are not saving women's lives.[125] Surprisingly, men appear to be experiencing the greatest benefit from recent domestic violence policies.[126] Since the 1970s, the number of men killed by their intimate partners decreased substantially while the number of women murdered in domestic violence incidents did not decline.[127] Recent changes that make it easier for women to escape violent relationships, such as the liberal issuance of restraining orders,[128] increased recognition of no-fault divorce,[129] and the proliferation of battered women's shelters,[130] likely account for the reduction in female-perpetrated homicides against intimate partners.

Major flaws in federal and state approaches to disarming batterers cause women to continue to face deadly violence. At the state level, laws banning gun ownership by batterers are either non-existent or difficult to enforce. Overall, twenty-six states currently have *no* laws ordering batterers to disarm.[131] In states that do have such laws, conditions and qualifications

125. *See* Sorenson, *supra* note 28, at 231 ("[I]n the past generation, the phenomenon of intimate partner homicide has changed to be largely the homicide of *women*." (emphasis added)).

126. *See id.* ("An increasing female-to-male ratio of intimate partner homicide is observed for both [b]lacks (0.84 in 1976 to 2.25 in 1999) and [w]hites (1.72 in 1976 to 3.60 in 1999).").

127. *See id.* ("[F]ewer and fewer men were killed by their intimate partners during the past several decades [1976–2002], but the number of women, particularly [w]hite women, killed changed relatively little. . . . In 1976, there were 1.17 female victims for every male victim of intimate partner homicide; in 2002, there were 3.02 female victims for every male victim.").

128. Clare Dalton & Elizabeth M. Schneider, Battered Women and the Law 498 (2001).

129. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305, 325 (2006).

130. Archana Nath, Note, *Survival or Suffocation: Can Minnesota's New Strangulation Law Overcome Implicit Biases in the Justice System?*, 25 Law & Ineq. 253, 262 & n.64 (2007).

131. *See* Frattaroli & Vernick, *supra* note 93, at 299 (stating the law as of April 2004).

reduce the likelihood of disarming batterers. For instance, a judge might decide that the gun removal provision "is not important" and refuse to impose the ban.[132] If the batterer did not use the gun in the domestic violence incident, he might legally be able to continue to possess guns or purchase new ones.[133] In many cases, the batterer may only be disarmed for a couple days,[134] and, in states where the abuser must turn in his guns, he might simply refuse to comply.[135]

Even if states can legally disarm a batterer, many states lack the bureaucratic and physical infrastructure to actually remove the guns. Many states do not have gun repositories where the guns can be stored.[136] Nor do they have the extra law enforcement officers necessary to confiscate the weapons, catalogue them, store them in the repository and return them once an order for protection terminates or a misdemeanant's record is expunged.[137] Some states have no system in place to inform victims, abusers, employers and police officers of the gun bans.[138] Other states do not have a common database wherein they may flag the abuser as a "prohibited person."[139] Thus, gun

132. *See* Thomas B. Cole, *Disarming Violent Domestic Abusers Is Key to Saving Lives, Say Experts*, 292 J. AM. MED. ASS'N 557, 557 (2004) ("Some judges may be reluctant to deal with the gun issue . . . ."); May, *supra* note 24, at 22–28 (noting instances wherein local judges did not enforce the gun bans); Sack, *supra* note 35, at 21 ("The intersection of domestic violence and firearm possession . . . appears to be one in which significant confusion or resistance remains on the part of judges.").

133. *See* Cole, *supra* note 132, at 557 ("[T]he laws may not support taking the guns away from abusive partners . . . ."); *see also* Frattaroli & Vernick, *supra* note 93, at 306.

134. *See* Frattaroli & Vernick, *supra* note 93, at 307.

135. *See* Cole, *supra* note 132, at 557 (noting that if abusers do not tell the police or the judge that they have guns, law enforcement officers may not attempt to remove the guns); Sack, *supra* note 35, at 18 ("After an order to surrender firearms is issued, often little follow-up is done to determine whether the weapons were actually relinquished.").

136. *See* Sack, *supra* note 35, at 8 ("[T]he federal government provided no additional resources to the states to help them carry out their role in enforcing federal law.").

137. *See id.*

138. *See* Karan & Stampalia, *supra* note 35, at 80 ("[M]any people are unaware of a 1996 federal law that prohibits a person with a qualifying misdemeanor domestic violence conviction from possessing . . . a firearm or ammunition . . . ."); Harrison, *supra* note 98; Matthew A. Radefeld, *Ever Heard of the Lautenberg Amendment? You're Not Alone*, KAN. CITY DAILY REC., Nov. 5, 2005, at 3 (noting that many criminal defense attorneys have never heard of the Lautenberg Amendment).

139. *See* BRADY CAMPAIGN, DISARMING DOMESTIC VIOLENCE ABUSERS:

dealers and police may not know whether an individual can or cannot possess or purchase a gun.

While the federal disarmament laws were enacted to ameliorate the inadequacies of the state laws, the federal gun bans also fail to achieve their goal. The federal bans are severely under enforced, enabling batterers to continue to possess guns. From 2000 to 2002, 630 suspects were referred to U.S. Attorneys for violations of a firearms-related domestic offense, representing just three percent of the 18,653 federal suspects referred for alleged violent crimes.[140] This is a small fraction of the number of cases that can be prosecuted. Judge Posner of the Court of Appeals for the Seventh Circuit estimates that approximately forty thousand people violate the gun bans each year by possessing firearms while subject to a protection order.[141] A smaller percentage of suspects are convicted.[142] The federal time and money spent on enforcing weapons offenses is not commensurate to the scope of the problem.

The circumstances that inhibit state and federal authorities from disarming batterers place women in grave danger. The point at which women seek legal intervention to stop abuse, either by calling the police or obtaining an order for protection, is often a very risky moment.[143] Faced with the possibility of legal sanctions or a loss of power over their partner, some abusers, like Steven Van Keuren, reassert their control through deadly force.[144] If a batterer is neither disarmed by the State nor likely to face federal criminal penalties, he will continue to access guns. The laws simply do not impede gun violence against women at the critical point when women most need the laws' protection.

The inability of federal and state firearm bans to disarm

STATES SHOULD CLOSE LEGISLATIVE LOOPHOLES THAT ENABLE DOMESTIC ABUSERS TO PURCHASE AND POSSESS FIREARMS 7–8 (2003), http://www.bradycampaign.org/pdf/facts/reports/domestic_violence.pdf (noting that many states do not provide information about domestic misdemeanor convictions to the National Instant Check System or other databases).

140. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 51 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf.

141. Sack, *supra* note 35, at 8.

142. DUROSE ET AL., *supra* note 140, at 52 ("Of . . . 52 defendants, 47 (90.4%) were convicted of interstate domestic violence . . . . Of these 47, 37 defendants pleaded guilty (79%), and 10 defendants were convicted at trial (21%). Five cases were dismissed.").

143. *See* May, *supra* note 24, at 28–29.

144. *See supra* text accompanying notes 1–21.

abusers deserves further inquiry. Despite the constitutional validity of the laws and the tremendous need to protect women's safety, why are current approaches to gun violence and domestic abuse ineffective? A critical examination of the laws reveals that continued reliance on the state sovereignty paradigm impedes the ability of the federal government to fully protect women. Furthermore, ineffective federal action deters progressive state efforts to save women's lives. As a result, neither the federal nor state governments properly address gun violence and domestic abuse. Instead, domestic violence is once again relegated to a "private" sphere beyond the reach of government actors. Consequently, women like Teri Lee are left with no alternative but to rely on themselves for protection.[145]

B. THE STATE SOVEREIGNTY PARADIGM IMPERMISSIBLY FAILS TO PROTECT WOMEN

An analysis of how federalism doctrine appropriates government responsibility for domestic relations demonstrates why current approaches to gun violence against women fail.[146] The state sovereignty paradigm is not simply a legitimate, neutral idea essential to the operation of federalism. Instead, history shows that legislatures and courts have strategically manipulated the paradigm to accomplish specific political goals.[147] Legislatures and courts argue that the federal government has little power over domestic relations and in so doing, reinforce women's social, economic and political subordination.

Historically, the state sovereignty paradigm did not deter federal action in domestic relations to the extent that it does today. Instead, history shows that the federal government actively regulated family life during the pre-Civil War era.[148] Acting on the belief that a woman's care-giving activities promoted the development of a productive citizenry, Congress instituted programs that supported women and children, including the creation of widows' war pensions,[149] The legislative record

145. *See supra* text accompanying notes 1–21.

146. *See* Adler, *supra* note 45, at 201 ("Understanding the relationship between federalism and family has the potential to free feminist law reform efforts from the confines of the ideal of the private/state-governed family.").

147. *See* Collins, *supra* note 43, at 1768 (arguing that the state sovereignty paradigm is a "theory of convenience, strategically invoked and easily dismissed or ignored").

148. *See id.* at 1782–1843.

149. *See id.* at 1782–1803.

shows that no congressman objected to these federal programs on the grounds that domestic relations were exclusively a matter of state responsibility.[150] Federal courts also resolved domestic issues such as the regulation of married women's citizenship.[151] Federal regulation of domestic relations in the pre-Civil War era effectively restructured hierarchical male-female relationships by giving women greater access to economic and legal resources.[152]

The use of the state sovereignty paradigm to limit federal power arose out of the desire to maintain slavery in the South.[153] The possibility of federal involvement in domestic relations constituted an "ominous threat for slave owners."[154] If the federal government could regulate domestic relations of any sort, then by implication it could control master-slave relations.[155] To oppose federal intervention in slavery, southern congressmen contested the ability of the federal government to regulate marriage.[156] Hostility towards federal involvement in the family is evidenced by the debate over the Morrill Act, the first federal statute to criminalize polygamy.[157] Southern congressmen opposed the Act on the understanding that allowing the federal government to exercise power over a couple's marital affairs would ultimately lead to federal intervention in the master-slave relationship.[158]

While opposition to federal involvement in domestic relations increased, Congress nevertheless intervened to mitigate violence experienced at the local level. During Reconstruction, Congress enacted legislation that applied nationwide against the Ku Klux Klan and other terrorist organizations.[159] This leg-

150. *See id.* at 1785, 1802.

151. *See id.* at 1815 (noting that in *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830), a federal court overruled a state supreme court's determination of a married woman's citizenship).

152. *See id.* at 1767–68.

153. *See id.* at 1844–45.

154. *See id.* at 1844.

155. *Id.*

156. *See id.* at 1844–45; *cf.* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 157 (2004) ("[G]iven the history of Congress's judicially recognized plenary power to enforce the constitutionally secured property rights of slaveholders, Congress had to possess comparable power to enforce the human rights and equality of all Americans.").

157. Morrill Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910).

158. *See* Collins, *supra* note 43, at 1845.

159. *See* MacKinnon, *supra* note 50, at 152.

islation aimed to stop white supremacist groups from subjecting African Americans to physical and sexual violence.[160] As this federal legislation demonstrates, the state sovereignty paradigm did not stop previous Congresses from acting to prevent local violence.

The preservation of the gendered public and private spheres evolved to become the explicit goal of advocates of the state sovereignty paradigm during the early twentieth century.[161] At this time, opponents of women's suffrage asserted that a federal amendment allowing women to vote would corrupt the family.[162] Opponents argued that enfranchising women would introduce "'the bedlam of political debate' into the home,"[163] distract women from their household duties,[164] and "threaten[] the unity of the marriage relation."[165] Paradoxically, at the same time that legislators opposed federal intervention in the family, they also demanded federal solutions to nationwide marital "problems."[166] Alarmed by the frequency of divorce and a perceived increase in interracial marriage, legislators argued that the federal government *should* regulate domestic relations.[167] At the core of each of these contentious issues—women's suffrage, divorce, and interracial marriage—was women's "traditional" role in the family.[168] Advocates invoked either the primacy of state sovereignty or the necessity of federal power to preserve the family's gender hierarchy.[169]

The historically contingent arguments for and against federal regulation of domestic relations teach an important lesson about the operation of the state sovereignty paradigm. Traditionally, the state sovereignty paradigm has acted as a rhetori-

160. *See id.* at 155 ("[Ku Klux] Klan violence during Reconstruction, like much gender-based violence today, was often highly sexualized, including eroticized whipping, oral rape, genital mutilation, and other forms of sexual torture.").

161. *See* Adler, *supra* note 45, at 199 ("[I]nvestment in state rather than federal control over family is incidental to our legal culture's larger investment in preserving family's place in the private sphere.").

162. *See* Collins, *supra* note 43, at 1851–53.

163. *Id.* at 1852 (quoting H.R. REP. NO. 48-1330, at 3 (1884)).

164. *Id.*

165. *Id.* (quoting Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 993 (2002)).

166. *See id.* at 1851.

167. *Id.* at 1853–56.

168. *See id.*

169. *Id.* at 1856.

cal device to advance specific social agendas concerning women. The use of the paradigm continues today to women's detriment, as illustrated by a comparison of *United States v. Morrison*[170] and *Nevada Department of Human Resources v. Hibbs*.[171] In *Morrison*, the Supreme Court prevented victims of domestic violence from suing their abusers in federal court.[172] *Hibbs*, on the other hand, declared that the states are not immune from legal liability when they deny state employees unpaid leave to care for family members with a "serious health condition."[173] According to Chief Justice Rehnquist, "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [federal] legislation."[174] In contrast to *Morrison,* the Supreme Court in *Hibbs* allowed federal intervention in domestic relations by validating the Family Medical Leave Act (FMLA).

While the different outcomes in *Morrison* and *Hibbs* may be reconciled, they nevertheless reveal how the state sovereignty paradigm continues to subordinate women.[175] The Court's decision in *Hibbs* rested on the idea that Congress could permissibly regulate the "public" arena of the workplace, whereas in *Morrison*, privacy concerns preempted federal intervention in the home.[176] However, distinguishing these cases in this regard relies on a shallow analysis of *Hibbs*. Ultimately, the *Hibbs* decision expressly permitted the federal government to "fix" the gender hierarchy of the household.[177] Through federal legislation that allowed both men and women to take time off work for care-taking responsibilities, *Hibbs* attempted to correct state policies that assumed women alone were responsible for care-giving.[178] *Morrison* could have also ameliorated gender hierarchy in the home by providing federal redress for

170. 529 U.S. 598 (2000).

171. 538 U.S. 721 (2003).

172. 529 U.S. at 627.

173. 538 U.S. at 724–25.

174. *Id.* at 735.

175. Collins, *supra* note 43, at 1768.

176. *See id.* at 1774 ("[The] FMLA is more easily seen as a labor regulation and, as such, is more readily understood as addressing a 'federal' issue.").

177. *See id.* at 1773 ("[W]hen [the] FMLA was challenged on federalism grounds before the Supreme Court, much attention was given to the fact that [the] FMLA was intended to foster gender equality in the allocation of care-giving responsibilities within families.").

178. *Id.*

the violence that impedes gender equality. While privacy concerns were prevalent in *Morrison*, the Court did not display similar concerns in *Hibbs*,[179] despite the fact that the federal regulation in *Hibbs* did not impact the workplace so much as it attempted to achieve gender equality within the home.[180]

The inconsistent application of the state sovereignty paradigm in *Morrison* and *Hibbs* lends credibility to the suggestion that federal judges "tend to 'selectively invoke[]' federalism rules 'only when ideologically convenient.'"[181] While the gender discrimination at issue in *Hibbs* was cognizable as a federal matter, the gender discrimination targeted by VAWA was not.[182] Arguably, this "pick and choose" approach is "motivated largely (or entirely) by a hostility to women's rights."[183] Undoubtedly, women have gained a larger presence in the workplace since the 1960s.[184] Perhaps the growing acceptance of women's right to work has made federal laws that make it easier for women to work more permissible. In contrast, women's right to be free from violence remains socially tenuous, as demonstrated by the fact that many states, as well as the federal government, have only recently acted to try to stop violence against women.[185] While courts and legislators accept that the federal government may actively seek new roles for women in the workplace, the propriety of federal action designed to undermine what some deem a fundamental source of women's inequality—physical and sexual violence by men—remains controversial.[186]

179. *See id.* at 1762–63.

180. *See id.* at 1773.

181. *See id.* at 1771 (alteration in original) (quoting Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999)).

182. *See id.* at 1774.

183. Saylor, *supra* note 119, at 141.

184. Eduardo Porter, *Stretched to Limit, Women Stall March to Work*, N.Y. TIMES, Mar. 2, 2006, at C2.

185. *See* Rousseve, *supra* note 92, at 440 ("[I]t was not until the 1970s and 1980s that the criminal justice system abandoned its policy of non-intervention and began to treat domestic violence as a public crime."); Herbert, *supra* note 22 ("[W]e have become so accustomed to living in a society saturated with misogyny that violence against females is more or less to be expected.").

186. Feminist scholars argue that the *Morrison* decision demonstrates the legal system's reluctance to punish domestic violence. *See* MacKinnon, *supra* note 50, at 171 ("[*Morrison*'s decision that] systematic state nonintervention in the private is not a state act, is a public decision by the highest Court of the nation to support male power, i.e. sex inequality, in the most violent sphere in which it is socially exercised.").

C. ADMINISTERING THE FEDERAL GUN BANS IN ACCORDANCE WITH THE STATE SOVEREIGNTY PARADIGM DOES NOT DETER GUN VIOLENCE AGAINST WOMEN

Federal gun bans reinforce the state sovereignty paradigm by operating as "federal supplemental sanctions."[187] To be implemented, the laws rely on state courts to determine whether a person is "subject to an order for protection" or has been "convicted of a domestic violence misdemeanor" under state law.[188] However, the ways in which the bans are actually implemented remain unclear. Federal laws do not specify who must notify the victim and defendant of the gun bans, determine whether the defendant is armed, remove and store the gun, or inform the victim in cases when the defendant is rearmed.[189] The absence of these vital terms ensures that the federal laws must rely on the states' method of disarming batterers.[190] The lack of a meaningful federal process to disarm batterers presupposes that the states should regulate domestic relations. What the laws overlook is that many states have no mechanisms to remove guns and others do so erratically.

By implicitly accepting the flawed state sovereignty paradigm, the federal gun bans fail to deter violence against women. Three major problems result from this administration of federal law. First, states have few incentives to enforce the federal gun bans and the federal government does not do so itself. Second, the lack of transparency in regard to which the government entity is responsible for carrying out the federal gun bans means that neither the state nor federal governments are accountable for achieving the laws' mandate. This lack of clarity creates indeterminacy and unpredictability in the law

187. *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1416 (2005) (defining federal supplemental sanctions as "the consequences that follow by operation of federal law" after "a state official determines that a state law is violated").

188. *See id.* at 1416–18.

189. *See* Golden, *supra* note 123, at 456 ("The lack of clarity as to whether federal or state law prevails in the Lautenberg Amendment context could cause courts to apply the Lautenberg Amendment differently and arbitrarily."); Mikos, *supra* note 187, at 1419 ("The federal government makes no effort to even inform the convict of the sanction, and compliance with the sanction is entirely the responsibility of the party subject to it."); *id.* at 1414 ("In essence, Congress free rides on the efforts of state law enforcement agencies.").

190. *See* BRADY CAMPAIGN, *supra* note 139, at 2 ("[T]he federal laws cannot be fully enforced, and will not be completely effective in disarming abusers, without complementary and implementing legislation from the states.").

and consequently results in a third problem. State judges, not federal or state legislators, ultimately make the decisions that give substantive meaning to the federal firearm bans.

1. States Have Few Incentives to Implement the Federal Gun Bans

There is no provision in the federal gun bans that provides economic incentives to states to enforce the federal laws.[191] Without monetary support, many states may not carry out the laws. States that currently have no laws to disarm batterers are unlikely to use state resources to enforce a federal law that is not even a priority for—and may in fact be opposed by—their constituents. States that already disarm batterers in some capacity will not be compelled to divert their resources to enforce the federal bans, as these states will likely prefer to devote time and money to enforcing their own gun bans. However, many of the states' gun bans use poor or ineffective mechanisms to remove the guns. Although the federal gun bans may help some women pursue federal prosecution of their armed batterers when a state remedy is not available, providing a remedy after-the-fact is not the same as *preventing* batterers from becoming armed, the laws' original purpose.[192] When the federal government neither devotes its own police power to enforcing the gun laws nor effectively persuades the states to do so, the gun laws cannot achieve their goal.

The federal government's failure to establish an effective means of disarming batterers has several negative effects. Since federal legislators purportedly represent national norms and moral standards, their inability to develop a realistic method of disarming batterers signals that they do not consider gun violence against women a national problem worthy of a national solution.[193] Consequently, violence against women is not legitimized as a serious crime worthy of punishment.[194]

191. *See* Gun Control Act of 1968, 18 U.S.C.A. § 922 (West 2000 & Supp. 2006).

192. *See* May, *supra* note 24, at 6 ("[The federal gun bans] are preventative measures; they target deadly abuse before it happens. By requiring abusers to relinquish their firearms as soon as courts find them to be abusive, the laws protect domestic abuse victims from gun violence before guns have been implicated in the abuse pattern.").

193. *See* Adler, *supra* note 45, at 203 ("[F]ederal reluctance to address family litigation betrays a gendered stratification of legal issues in which federal . . . attention is reserved for matters of national significance.").

194. *See Developments in the Law—Legal Responses to Domestic Violence*,

Additionally, Congress undermines the unique, national representative capacity of federal law.[195] Since the federal laws do not delineate how batterers must be disarmed, both identifying batterers and removing their guns ultimately depends on state policies that are never formally approved by Congress.[196] The results is a political process problem. Rather than reflecting collective national interests, the federal gun bans acquiesce to local priorities on guns and domestic violence.[197] These localities—defined by their own values and worldviews—are not accountable to the interests of the nation as a whole. In the worst case scenario, the misogynist views of one jurisdiction may assume federal status by standing in for federal law.[198]

Lastly, by relying on state policies, Congress deprives women of a fundamental component of the constitutional design. Namely, it disables women from accessing an important "laboratory"—the federal government itself.[199] Ultimately, Congress denies women the opportunity to benefit from a solution that only the federal government can provide: a national, carefully crafted approach that adopts effective state laws while discarding those that have proven to be ineffective.

2. The Federal Gun Bans Abate State Responsibility for Domestic Violence

While reliance on the state sovereignty paradigm incapacitates the federal gun bans, the federal laws themselves also impair *the states* from deterring gun violence and domestic abuse. This dilution of government power occurs because the federal gun bans weaken the ability of the states to prosecute

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106 HARV. L. REV. 1498, 1543 (1993) [hereinafter *Legal Responses*] ("[Non-enforcement of the federal firearm bans] communicate[s] a message that domestic violence is not as serious as assault between strangers . . . .").

195. *See* Logan, *supra* note 80, at 87.

196. *See id.* (arguing that the political economies of the states are unavoidably incorporated into state law).

197. *See id.* at 67 ("[The United States] actually uses state laws and outcomes, and in doing so infuses federal law with the normative judgments of the respective states.").

198. *See id.* at 89 ("[B]y deferring to state laws and outcomes the [United States] allocates to states the power to define the content and application of federal law."); Mikos, *supra* note 187, at 1431 ("State laws differ, and those differences will carry over to congressional statutes that refer to them.").

199. *See* Logan, *supra* note 80, at 84 ("As a result of federal deference, there is one less 'lab' (the U.S. government) that can be used to address perceived anti-social behavior.").

domestic violence crimes.[200] Since a defendant faces the possibility of federal sanctions (and possibly state sanctions as well), suspected abusers have a compelling reason to refuse a guilty plea to a crime of domestic violence and to contest the issuance of an order for protection.[201]

State prosecutors thus face a dilemma—whether to take the case to trial or to offer the defendant a plea bargain.[202] Trials are costly both in terms of money and time. In addition, domestic violence cases are often "he said, she said" situations and many victims recant or refuse to cooperate, making the cases difficult to prove.[203] Furthermore, the stiff penalties that the court may be impose on the defendant strengthens the likelihood that he will vigorously defend himself.[204] Due to these inherent limitations, many prosecutors will hesitate to expend their scarce resources on a trial.[205]

Alternatively, prosecutors may opt to modify the criminal charges through plea deals.[206] For instance, to settle the case and avoid trial, a prosecutor might change the misdemeanor domestic violence charge to a misdemeanor conviction for "disorderly conduct."[207] This action guarantees the prosecutor a conviction while avoiding the expense of a trial. However, such a scenario allows prosecutors and defendants to avoid the gun bans entirely. Removing the domestic violence misdemeanor conviction—and the corresponding ban on firearms—from the

200. *See* Mikos, *supra* note 187, at 1415 ("[A] state may try to skirt the federal sanctions . . . to minimize the costs of enforcing its own laws or to thwart federal policies with which the state or its agents disagree.").

201. *See id.* at 1457 (demonstrating that while the significance of the firearms ban depends on the value the abuser attaches to the privilege of possessing a firearm, it is "particularly severe" for anyone who must handle a firearm on the job since they will lose their job once the ban is triggered).

202. *See id.* at 1420.

203. *See generally* Rosenthal, *supra* note 22 (noting that many women never speak of domestic abuse).

204. *See* Mikos, *supra* note 187, at 1459–60 ("Many convicted domestic abusers have sought to withdraw their guilty pleas, claiming they would have opted for trial had they known about the firearms ban. . . . Further, defense attorneys have noted a rise in trial rates for domestic violence cases since the Lautenberg Amendment was enacted.").

205. *See id.* at 1462 (noting that since prosecutors may not consider domestic violence cases to be a high priority, they are unlikely to divert resources from other cases to bring domestic violence cases to trial).

206. *See id.* at 1420.

207. *See id.* at 1460 (arguing that a defendant will be more likely to plead to disorderly conduct than to assault and battery so as to avoid the firearms ban).

table allows the prosecutor to get an easier conviction while the defendant gets to keep his guns.[208]

In addition to undermining federal law, plea bargaining also obstructs state law. Instead of using state statutes to punish domestic violence, the prosecutor may forego domestic violence convictions in favor of lesser charges.[209] Consequently, the prosecutor does not rely upon either the federal or state gun bans. As a result, plea bargaining circumvents both state and federal laws designed to help battered women.

Federal and state actors are further discouraged from carrying out the firearm bans because neither entity is held accountable for protecting women against gun violence. The firearm bans set up a blame game scenario wherein legislators, police officers, and state and federal attorneys avoid political consequences. On the one hand, state actors can easily attribute the failure of the firearm bans to federal authorities. After all, it is the U.S. Attorneys' offices that must prosecute and sentence individuals who violate the federal gun bans.[210] The states' integral role in identifying which persons are prohibited from owning guns and removing their guns is hidden from the average constituent, who may be unfamiliar with how the federal gun bans are implemented.

On the other hand, federal legislators can *also* blame the failure of the firearms bans on state governments. By simply reiterating the state sovereignty paradigm, members of Congress can argue that federal action is necessarily limited, since the "private sphere" is ultimately within the domain of the State.[211] According to this perspective, if state legislators and judges choose not to step into conflicts between intimate partners or to send police officers to disarm abusers in their homes, there is little that Congress can do.

When neither the state nor federal governments take responsibility for effectively implementing the firearm bans, women must resort to their own devices to protect themselves

208. *See id.* at 1461 ("State prosecutors have acknowledged that they reduce state charges to help some defendants avoid Lautenberg consequences.").

209. *See id.* ("Avoiding a conviction not only undermines the congressional aims behind the firearms ban, it may dilute the state sanctions as well. . . . [D]efendants . . . may not be punished at all for their actions—by either the [S]tate or Congress.").

210. *See* DUROSE ET AL., *supra* note 140, at 51–52.

211. *See* MacKinnon, *supra* note 50, at 171–72 (arguing that the federal government designates domestic violence as a "private" problem that does not require federal intervention).

and their families.[212] Unfortunately, as in the case of Teri Lee, even when women take steps to safeguard their own lives, their abusers often prevail.[213] In dire situations, an abused woman may have no alternative but to use a gun against her partner to end his destructive control.[214] The failure of state and federal authorities to disarm batterers is therefore likely to result in the continued abuse—and murder—of women.

3. The Federal Gun Bans Allow Excessive Judicial Discretion

The administration of the federal gun bans problematically allows for judicial discretion. When there is no state law to guide how the federal firearm bans are to be effectuated, state judges inevitably must fill in the gaps. Since the states already approach domestic violence in vastly distinct ways,[215] judges will likely interpret the federal gun bans very differently. The absence of a concrete standard results in unfairness both to victims and to defendants.[216] Some defendants are disarmed while other similarly situated defendants are not. Likewise, some victims are protected while other similarly situated victims are not. These unpredictable outcomes undercut the ability of the states and the federal government to administer gun removal programs that the public will view as a legitimate, just exercise of government power.[217]

In cases of domestic violence, it is questionable whether judicial discretion achieves fairness. Historically, judges have doubted the credibility of domestic abuse victims.[218] Judges,

212. *See, e.g.*, *supra* text accompanying notes 6–10, 17–21.

213. *See supra* text accompanying notes 1–21.

214. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 30 (1989) ("When a battered woman kills her abuser, she has reached the end of the line. She is absolutely desperate, in real despair. She believes, with good reason, that if she does not kill, she will be killed.").

215. *See* Mikos, *supra* note 187, at 1430 ("Under our federal system, states have wide latitude to define crimes and their consequences to suit local tastes . . . . It should thus come as no surprise that the criminal law differs substantively from state to state.").

216. *See id.* at 1428 ("Justice demands treating like cases alike. . . . The fairness of federal sanctions is called into doubt when they are triggered by some, but not all, similar cases." (footnotes omitted)).

217. *See id.* at 1430–31.

218. *See* May, *supra* note 24, at 25–26 ("[L]ittle has changed over the years in judicial attitudes toward victims of domestic violence. . . . Some judges discount the credibility of women because they view women as unreasonable and overly emotional.").

like the public, often believe the victim deserved the abuse or was irresponsible because she "should have left."[219] Unfortunately, the risk that such stereotypes will improperly influence a judge's decision remains real.[220]

Judicial discretion in the context of domestic violence poses further challenges since it easily eludes review.[221] Misdemeanor domestic violence cases and order for protection hearings tend to be low-profile matters with little money at stake.[222] At order for protection hearings, victims are usually not represented by counsel.[223] Victims rarely appeal adverse decisions and the records created at trial are often unrevealing and difficult to access.[224] Without the safeguarding effects of adversarial representation and appellate review, judges may apply the laws subjectively.

By relying on the state sovereignty paradigm, the federal gun bans place women and their families in a dangerous situation. Nationally, the federal government purports to be taking unprecedented steps to stop gun violence against women.[225] Locally, however, Congress abdicates its authority to the states, allowing home-grown values regarding women's roles, male violence, and gun ownership to determine the effectiveness of federal law. In the majority of states without laws mandating firearm removal, women are at risk. In the states where an abused woman's case satisfies the statutory requirements to remove the gun—and state authorities actually confiscate and retain the gun—some women may benefit. Congress will then applaud women's successes as evidence of the statutes' effectiveness,

219. *See id.* at 28 ("Common misperceptions, like the belief that victims could leave the relationships if they wanted to and the resulting frustration with them for not leaving, lead to inherent biases against victims."); Anne C. Johnson, Note, *From House to Home: Creating a Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859, 1862 (2006) ("Some people . . . including . . . judges . . . believe that victims 'provoke' their abusers, thereby holding victims responsible for their abuse.").

220. *See* May, *supra* note 24, at 25 (arguing that local judges continue to disregard domestic violence laws due to "ingrained biases against battered women").

221. *See id.* at 10.

222. *Id.*

223. *Id.*

224. *Id.*

225. President George W. Bush, Remarks on Domestic Violence Prevention, 39 WEEKLY COMP. PRES. DOC. 1341, 1342 (Oct. 8, 2003) ("The fight against domestic violence is a national movement. . . . Our government is engaged in the fight . . . .").

while disregarding women's losses as a matter of state concern. However, what Congress ignores is that a single adverse ruling for a battered woman like Teri Lee could prove fatal.[226]

III. RETHINKING THE FEDERAL GUN BANS

Ultimately, battered women do not have the luxury of concerning themselves with the proper exercise of federal and state power.[227] What women want is quick and effective protection for themselves and their families.[228] To realize this goal, Congress should take three immediate steps. First, Congress should provide funding for states to adopt the federal gun bans to serve as a minimum requirement for disarming batterers. Second, Congress should facilitate the states' ability to remove guns by providing monetary incentives for the creation of local gun units. Lastly, Congress should require states to report information regarding individuals prohibited from possessing firearms to federal authorities so that Congress may strategically disseminate grants to the areas of the country most in need.

A. USING CONGRESS'S SPENDING POWER TO ENCOURAGE STATE ACTION

Supreme Court precedent limits Congress's ability to induce state legislatures or executives to enforce federal law. In *New York v. United States*, the Supreme Court established an "anti-commandeering" principle, stating that Congress cannot compel state legislatures to adopt federal law as state law.[229] In addition, the Court held in *Printz v. United States* that Congress cannot coerce a state's executive branch to enforce federal law.[230] At issue in *Printz* was the Brady Handgun Violence Prevention Act of 1993.[231] This federal law directed state law enforcement officers to conduct background checks on individuals and to provide the information to firearm dealers.[232] The Court found that the Act unconstitutionally superseded state sovereignty by converting state police forces into an arm of the

226. *See supra* text accompanying notes 1–21.
227. *See* MacKinnon, *supra* note 50, at 176.
228. *See id.*
229. 505 U.S. 144, 146 (1992).
230. 521 U.S. 898, 900 (1997).
231. *Id.* at 902.
232. *Id.* at 904.

federal government.[233] Under *New York* and *Printz*, Congress can neither command state legislatures to adopt the federal gun bans as state statutes, nor amend the federal gun bans to require state authorities to execute the laws.

However, Congress still retains several important means of influencing the states. Foremost among these is Congress's ability to encourage state action through exercise of its spending power.[234] In *South Dakota v. Dole*, the Court held that Congress may attach conditions to federal funds.[235] In *Dole*, the Court found constitutional a federal law that withheld federal highway funds from any state that allowed persons under the age of twenty-one to purchase or possess alcohol.[236] At the time, a South Dakota law permitted nineteen-year-olds to buy beer.[237] Under *Dole*, South Dakota was forced to set its age limit at twenty-one years, as required by federal law, or forego federal funds.[238] The Court thus acknowledged that Congress can constitutionally achieve objectives not outlined in its enumerated powers through the conditional grant of federal funds.[239]

1. Congress Should Provide Funds to States to Induce Adoption of the Federal Gun Bans

In accordance with *Dole*, Congress should use its spending power to entice state legislatures to adopt the federal gun bans as state law.[240] An amendment to VAWA would make federal funds available to the states for several purposes. Money could be appropriated to train local judges to disarm batterers, to provide additional resources for state prosecutors and victim advocates, and to promote cooperation between state and federal authorities during the process of identifying, disarming, and prosecuting batterers who possess guns. As a condition for receipt of these funds, Congress should stipulate that state leg-

233. *Id.* at 935.
234. U.S. CONST. art. I, § 8, cl. 1.
235. 483 U.S. 203, 207 (1987).
236. *Id.* at 212.
237. *Id.* at 205.
238. *Id.* at 210.
239. *Id.* at 207.
240. *See* Sack, *supra* note 35, at 10 ("Although domestic violence offenders are already subject to the federal law, state legislation makes it straightforward that the state courts must implement the law and thereby prevents resistant judges from failing to enforce firearms laws in domestic violence cases.").

islatures must adopt the federal gun bans as a minimum requirement for disarming batterers. Since Congress already uses VAWA to distribute money to the states to create resources for battered women, VAWA would also be an effective vehicle for imposing this condition and disseminating the proposed grants.[241]

The federal law adopted by the states should first be amended to clearly outline the disarmament process. The law should require that, upon issuing an order for protection or a domestic violence misdemeanor conviction, the judge must ask both parties whether the defendant currently owns or possesses a gun.[242] The judge should then explain that the defendant can no longer possess or purchase a gun under state law.[243] The judge should issue a standardized form outlining the gun prohibition and specifying the types of guns in the defendant's possession.[244] The gun prohibition should be unambiguously included in both civil and criminal no-contact orders.[245]

Most importantly, the order should state that the respondent must turn in his guns to a local gun repository, as specified by the court, within forty-eight hours.[246] Alternatively, if

241. *Cf. id.* at 22 (arguing that the current lack of guidelines regarding the enforcement of the federal firearm bans resembles the confusion that resulted upon VAWA's requirement that each jurisdiction give full faith and credit to domestic violence protection orders, and noting that Congress allocated funds to train state law enforcement officials to standardize implementation of the full faith and credit provision).

242. *See* Cole, *supra* note 132, at 557 (stating that judges need to ask whether the defendant owns guns); *cf.* Sack, *supra* note 35, at 18–19 (noting that the protocol in Miami-Dade County, Florida requires a judge to make an "on-record" inquiry of each respondent to verify the current status of weapons).

243. *See* Frattaroli & Vernick, *supra* note 93, at 308 (showing that North Carolina and California already have similar policies).

244. *See* Sack, *supra* note 35, at 18 (stating that for full faith and credit purposes, clearly outlining the gun prohibition will alert law enforcement officers in other states that the order implicates the firearm bans); *cf.* BRADY CAMPAIGN, *supra* note 139, at 6 (demonstrating that six states and the District of Columbia have already taken steps toward issuing uniform orders for protection through their participation in a program called Project Passport, which requires that all restraining orders have a similar first page).

245. Generally, the Act has been interpreted to apply to orders for protection issued in civil courts. To target batterers more accurately, the firearm bans must also apply to no-contact orders issued in *criminal courts*. *See* BRADY CAMPAIGN, *supra* note 139, at 5. By applying the statute to both civil and criminal no-contact orders, the Act would cast a wider net.

246. *Cf.* CAL. FAM. CODE § 6389(c) (West 2004) (requiring that a respondent relinquish any firearms possessed within twenty-four hours, either by turning

the defendant is on probation, the court might order him to give up his guns to his probation officer, who would then be responsible for depositing the guns.[247] The order should state that if the respondent fails to turn in his weapons within the specified time period, a warrant will be issued for his arrest.[248] The warrant shall authorize police officers to search his residence and seize the guns.[249] During the time when the defendant remains armed, the judge should take proactive steps to ensure the victim's safety. For instance, the judge could ensure that the victim meets with a court-appointed "victim advocate" who could develop a safety plan with her, refer her to domestic abuse shelters, or help her change the locks at her residence.

The effect of the grant program would be particularly profound in the twenty-six states that currently have no laws to disarm batterers. Access to federal funds would entice such states to adopt the laws since states would not be independently responsible for paying for the program. Some states might remain politically opposed to taking guns away from individuals. Still, the grant program would likely help proponents of disarmament win greater support by creating a viable system for gun confiscation that state legislatures and lobbying groups could consider.

States that already have laws allowing judges and police to disarm batterers could also benefit from the federal grants.

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them in to local law enforcement or by selling them to a licensed dealer); N.Y. FAM. CT. ACT § 842-a5(a) (McKinney Supp. 2006) ("[T]he . . . order of protection shall specify the place where such firearms shall be surrendered, shall specify a date and time by which the surrender shall be completed and, to the extent possible, shall describe such firearms to be surrendered and shall direct the authority receiving such surrendered firearms to immediately notify the court of such surrender.").

247. *See* Sack, *supra* note 35, at 20 (noting that probation officers in Seattle are directly involved with confiscating weapons from respondents and that probation units routinely screen defendants to check for existing protection orders and to ask about firearms).

248. *Cf.* HAW. REV. STAT. § 134-7(f) (1998) (permitting a police officer to apply for a search warrant for the limited purpose of seizing a firearm or ammunition); N.H. REV. STAT. ANN. § 173-B:5 (Supp. 2006) (authorizing the court to issue a search warrant for a peace officer to seize any and all firearms).

249. *Cf.* N.J. STAT. ANN. § 2C:25-28j (West 2005) (authorizing an ex parte order to "forbid[] the defendant from possessing any firearm or other weapon . . . [or] order[] the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located"); *id.* § 2C:25-29b(16) (ordering the search for and seizure of any prohibited firearm at any location where the judge has reasonable cause to believe the weapon is located).

Since a state's adoption of the federal laws is the *minimum* required to receive the federal grants, doing so would not displace state laws that disarm batterers more aggressively. The federal legislation adopted by the states should provide that the federal gun bans supersede any prior state legislation or policy that *conflicts* with their operation. However, adoption of the federal laws would not curtail the states' ability to enact more progressive solutions to domestic violence. By using grants to encourage all states to ensure women a minimum level of protection from gun violence, Congress would take steps toward establishing a uniform approach to disarming batterers nationwide. States that agreed to adopt Congress's minimum standards would benefit from the extra funds they would receive to enforce the laws.

States that accept the federal grant and its conditions will better deter batterers from possessing guns.[250] Batterers will face a greater likelihood of being penalized if they fail to follow the law, since they can be prosecuted under either state or federal law, or both.[251] In addition, batterers would be more quickly and effectively disarmed. The same state judge who presides over the defendant's domestic violence misdemeanor case or issues the order for protection must require the defendant to give up his guns. State judges are therefore required to take immediate steps to remove the guns while the defendants are in their courtrooms.

2. Congress Should Provide Funds to Establish Local Gun Units

Congress should also provide funds through VAWA for the formation of locally operated gun units that would serve to disarm batterers.[252] Any state that receives this grant would be

250. *See* BRADY CAMPAIGN, *supra* note 139, at 7 (noting that after Illinois enacted a law prohibiting violent misdemeanants from purchasing a firearm in 1996, more than 28,000 Illinois domestic violence misdemeanants were added to databases that prohibited them from purchasing firearms).

251. *See* Logan, *supra* note 80, at 68 ("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.'" (quoting United States v. Lanza, 260 U.S. 377, 382 (1922))); Sack, *supra* note 35, at 10 (noting that the differing state and federal laws do not pose a Supremacy Clause issue since the laws are "'parallel restrictions,' both of which remain applicable").

252. Richmond, Virginia's Project Exile may be a model for the development of locally operated gun units. *See* Sack, *supra* note 35, at 20–21 (explaining that police officers in Richmond who participate in this program receive

required to establish gun units at an appropriate jurisdictional level.[253] The grant would further require that each gun unit be staffed by law enforcement officials, investigators, prosecutors, and administrative personnel. Teams within the units would be responsible for the operation of a gun repository as well as for investigation and enforcement of the gun bans.

Using federal funds to create locally operated gun repositories would establish secure sites where individuals could relinquish their guns.[254] Upon receipt of a firearm, state employees would catalogue the deposit and safely store the gun. The repository would issue a formal receipt to the defendant confirming that he had turned in his gun. A copy of the receipt would be sent to the judge who issued the court order as well as to the victim.[255] If the prohibited individual becomes eligible to retrieve his firearm—either because the order for protection expires or because his record is expunged—the gun repository employees would make reasonable efforts to notify the victim that the individual is once again armed.[256]

In addition to operating the repository, the gun units would be equipped to handle situations where a batterer either refuses to turn over his guns or purchases new firearms. The unit's law enforcement officers would be automatically updated if the prohibited individual does not comply with the court's order to turn in his gun. The officers would then undertake all necessary steps to find the individual and his firearms in order to arrest and disarm him. Furthermore, investigators would routinely compare databases that confirm information about prohibited individuals with those identifying gun purchases and licenses. Investigators could flag batterers who purchase guns after the court has issued an order for protection or misdemeanor conviction. The gun unit's police officers would then

special training to enforce state and federal firearm bans).

253. States should create the gun units at the most appropriate level of their jurisdiction. For instance, the gun units could be created at the state, county, or city level.

254. *Cf.* WIS. STAT. § 813.12(4m) (2006) (permitting storage of a firearm in a public warehouse).

255. *Cf.* CAL. FAM. CODE § 6389(c) (West 2004) (ordering respondents to file a receipt with the court that proves that any firearms were either relinquished to the police or sold within seventy-two hours of the issuance of the court order).

256. *See generally* Sack, *supra* note 35, at 19 (summarizing the court procedure defendants in one jurisdiction must undertake to obtain their confiscated guns).

obtain a warrant to apprehend and disarm the person.

Beyond these services, state personnel would monitor compliance with the gun bans. State employees would review whether police officers promptly and effectively disarm batterers. The gun unit would also administer volunteer-based "citizen watchdog groups."[257] Trained participants would attend court hearings to observe whether judges abide by the gun bans when arraigning domestic violence misdemeanants and issuing orders for protection. Volunteers would compile their observations in a published report. Sharing such information would increase the accountability of judges who fail to effectuate the gun bans, because battered women's advocacy groups and media outlets could subject such them to public recrimination. The reports could be submitted to the chief judicial officer to inquire into the judges' practices, thus stimulating greater judicial oversight.

Recent federal laws serve as models for how Congress could craft legislation to provide incentives for the states to create gun units. Both the Hate Crimes Prevention Program[258] and the Community Oriented Policing Services (COPS) Program[259] distribute federal funds to states and organizations for the purpose of combating specific crimes.[260] Congress could draw on the statutory language of both programs to amend VAWA to include grants for combating gun violence against women. For instance, the Hate Crimes Prevention statute authorizes the Department of Justice (DOJ) to make grants to local organizations "for the purpose of providing assistance to localities most directly affected by hate crimes."[261] Similarly, an amendment to VAWA should authorize the DOJ to distribute money to states to instruct police officers, prosecutors, and judges how to investigate, disarm, and prosecute batterers who possess guns.

257. Such volunteer-based groups could be modeled after WATCH, a community organization in Minneapolis that trains volunteers to monitor and report on the criminal justice system to ensure the fair treatment of domestic violence victims. *See* WATCH, http://www.watchmn.org (last visited Feb. 12, 2007).

258. 20 U.S.C. § 7133(a) (Supp. IV 2001–2006).

259. 42 U.S.C.A. §§ 3796dd to 3796dd-8 (West 2003 & Supp. 2006).

260. *See* 20 U.S.C. § 7133(a) (providing federal funds to local organizations to combat hate crimes); 42 U.S.C.A. § 3796dd(a) (authorizing grants to states and other entities to improve cooperation between law enforcement and the community).

261. 20 U.S.C.A. § 7133(a).

Also, just as Congress suggested in the COPS Program that federal funds be used for "innovative programs to increase and enhance proactive crime control and prevention programs involving law enforcement officers and young people,"[262] the VAWA amendment would state that the grant be used to establish gun units to proactively remove and retain guns. To accomplish this task, the VAWA grant would, like the COPS program, provide funds "to hire additional community policing officers and civilian personnel to investigate" persons who must be disarmed.

3. Conditioning Federal Funds to Accomplish These Goals Satisfies the *Dole* Test

A program that provides grants to states that adopt the federal gun bans and create gun units is constitutional under *Dole*. In *Dole*, Chief Justice Rehnquist advocated a five-part test to determine the constitutionality of Congress's use of its spending power.[263] This test requires that (1) the exercise of the spending power is in the pursuit of the "general welfare"; (2) Congress clearly states the conditions imposed on the funds; (3) a germane connection exists between the funds and the federal interest in the particular national program; (4) no independent constitutional bar impedes the distribution of federal funds; and (5) federal authorities do not coercively garner the states' compliance.[264]

According to *Dole*, the courts should "defer substantially to the judgment of Congress" in determining whether federal funding satisfies the "general welfare" requirement.[265] Given this undemanding standard of review, Congress could easily argue that disarming batterers promotes the public good. Removing guns helps to save the lives of intimate partners and keeps family and innocent bystanders safe. The grants would also deter costs which would otherwise tax the public purse, such as victims' use of emergency health care services.[266] The

262. 42 U.S.C.A. § 3796dd(b)(12).

263. South Dakota v. Dole, 483 U.S. 203, 207–08, 211 (1987).

264. *Id.*

265. *Id.* at 207.

266. *See* PAULA WEBER, MINN. DEP'T OF PUB. SAFETY, A REPORT OF THE INTERAGENCY TASK FORCE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT PREVENTION 3–4 (2005) (reporting that the health-related costs of intimate-partner violence exceed $5.8 billion per year in the United States, of which nearly $4.1 billion are direct medical and mental health care services and $1.8 billion are productivity losses).

program would enhance judicial efficiency because women would not need to go to court frequently to ensure that state authorities take away their abusers' guns. Reducing the number of armed batterers may also reduce the number of domestic calls to which police officers respond because fewer women would be threatened with guns. This sampling of the numerous public benefits of federal grants shows that Congress would likely satisfy the "general welfare" requirement.

The federal grants would also fulfill the second requirement of a "clear statement." Congress would simply need to state unambiguously that the distribution of the grants is conditioned on states' fulfillment of the specified requirements.[267] Because Congress has successfully outlined the conditions of its grants before, as in the Hate Crimes Prevention Program and the COPS Program,[268] Congress should also be able to provide a clear statement in the case at hand.

A "germane" connection between the funds and the federal program could also be proved. The Hate Crimes Prevention Program links funding for training and education improvements to the goal of deterring hate crimes,[269] and the COPS Program links funds for increased police presence to the goal of improving police/community relations.[270] Similarly, Congress could link the proposed grant program to the federal goal of protecting women from gun violence. Because courts use the rational basis standard to review the existence of a "germane connection,"[271] Congress would likely pass this requirement.

It is unlikely that an independent constitutional bar would prohibit the use of federal funds to compel the states to enact the gun bans and establish gun units. Opponents might claim a violation of the Second and Tenth Amendments. However, courts have already stated that the federal gun bans do not violate the Second Amendment.[272] In addition, *Dole* clearly noted that the Tenth Amendment does not limit the use of conditional

267. *See Dole*, 483 U.S. at 207.

268. *See* 20 U.S.C. § 7133 (Supp. IV 2001–2006); 42 U.S.C.A. §§ 3796dd to 3796dd-8 (West 2003 & Supp. 2006).

269. 20 U.S.C. § 7133.

270. 42 U.S.C.A. § 3796dd(a).

271. *See Dole*, 483 U.S. at 209 ("[It is sufficient that] Congress conditioned the receipt of federal funds in a way *reasonably* calculated to address th[e] particular impediment to a purpose for which the funds are expended." (emphasis added)).

272. *See* United States v. Jackubowski, 63 F. App'x 959, 961 (7th Cir. 2003); United States v. Emerson, 270 F.3d 203, 224–25 (5th Cir. 2001).

federal funds.[273] *Dole* also cautioned that the grants must not incite invidious discrimination or cruel and unusual punishment.[274] However, the proposed grant program is unlikely to create such problems because the gun bans apply to everyone and gun owners may retrieve their guns once their order for protection terminates or their record is expunged.[275] Furthermore, Congress could avoid coercing the states to change their laws by exercising only the "mild encouragement" that *Dole* sanctions.[276] Congress should ensure that the amount of money conditioned on the states' adoption of the federal gun bans and creation of gun units is not so substantial as to leave the states with no choice but to follow Congress's directive.[277]

B. CONGRESS SHOULD ESTABLISH STATE REPORTING REQUIREMENTS

To effectuate the work of the gun units, Congress should impose reporting requirements on state and local authorities. In *Printz*, Justice O'Connor stated that Congress may constitutionally mandate states to report information to the federal government, for example.[278] O'Connor specified that federal laws that require local law enforcement agencies to report cases of missing children to the DOJ remain constitutional.[279] Congress should assert the power it retained under *Printz* by requiring states to report domestic violence misdemeanants and persons subject to orders for protection to the DOJ.

Access to information about the number of domestic violence misdemeanor convictions and state-issued orders for protection would enable Congress to distribute the proposed grants appropriately. To establish a reporting requirement, Congress could look to the Hate Crimes Statistic Act (HCSA) of 1990[280] as a model. The HCSA requires the DOJ to obtain data from lo-

273. 483 U.S. at 210.

274. *Id.* at 210–11.

275. *See* May, *supra* note 24, at 9 (recognizing that batterers are "not a protected group" and that courts have found that batterers who lose their employment as a result of the firearm bans have no legally cognizable defense to remedy this consequence).

276. 483 U.S. at 211.

277. *See id.*

278. *See* Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

279. *Id.*

280. Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 (2000)).

cal law enforcement agencies concerning incidents of hate crimes.[281] An amendment to VAWA would impose a similar reporting requirement on state law enforcement agencies for domestic violence. Like the HCSA, the VAWA amendment would instruct the DOJ to publish an annual summary of its findings.[282] Congress could access this information to strategically appropriate grant money to areas where instances of abuse are high.

Reporting requirements would also help local gun units apprehend and disarm batterers. For instance, Congress could stipulate that states accept the grants on the condition that court personnel promptly enroll prohibited persons in the National Instant Check System (NICS).[283] NICS is an electronic database established as part of the Brady Act in 1998.[284] Federally licensed gun dealers must use NICS to conduct criminal background checks on all firearm purchasers.[285] Currently, many states do not enter their protective orders in the NICS system.[286] By compelling states to report information about abusers, disarmament would be more likely because abusers' domestic violence records would prevent them from purchasing a gun.[287]

In addition, Congress could stipulate that grant recipients

281. *Id.*

282. *Id.*

283. *Cf.* N.H. REV. STAT. ANN. § 173-B:5(IX)(b) (Supp. 2006) ("The administrative office of the courts shall enter information regarding the protective orders into the state database which shall be made available to police and sheriff departments statewide."); Sack, *supra* note 35, at 20 (stating that New York law requires courts to notify the statewide registry of protection orders); BRADY CAMPAIGN, *supra* note 139, at 6 (noting that California courts have provided information on almost one quarter of a million restraining orders to the NICS system).

284. *See* Brady Campaign, Gun Laws Work, Loopholes Don't, http://www.bradycampaign.org/facts/issues/?page=loop (last visited Jan. 28, 2007). NICS draws on information entered in the National Crime Information Center database (NCIC). BRADY CAMPAIGN, *supra* note 139, at 3.

285. *See* Karan & Stampalia, *supra* note 35, at 81 (describing how firearm dealers in Florida must conduct background checks on NCIC); BRADY CAMPAIGN, *supra* note 139, at 9.

286. *See* BRADY CAMPAIGN, *supra* note 139, at 3 (stating that in June 2003, the NCIC registery of protective orders contained only 781,574 entries, estimated to be less than half of the over two million protective orders that qualify for entry).

287. *See id.* California and a few other states already provide information on restraining orders to NICS. *See id.* at 6. In 2001, however, only eleven percent of the sixty-four million state criminal history records available nationwide were instantly accessible through NICS. *Id.* at 7.

report state firearm license records.[288] An investigator could then look at the license records to determine if an individual has a prior record of gun acquisition.[289] The investigator would compare this report to the individual's NICS entry,[290] identify prohibited persons who are likely to own firearms, and catch defendants who falsely testify that they do not own guns. Access to license records would also help identify prohibited persons who purchase guns from private gun dealers. These dealers are not legally required to conduct an NICS background check.[291] An investigator's knowledge of an individual's gun license may raise a red flag, prompting the investigator to find out if the person does own a gun illegally. Creating incentives for states to report this information will help gun units close the gaps that permit batterers to remain armed.

C. The Benefits of Providing Federal Incentives for the States to Disarm Batterers

While the proposed federal grant program may not provide a foolproof solution for protecting women from gun violence, it would substantially improve current approaches to disarming batterers. Under this solution, the combined use of federal and state law would avoid the problems of the state sovereignty paradigm while preserving important elements of federalism doctrine. Enticing the states to adopt federal law as a minimum requirement would rebut the presumption that domestic violence is a private matter not worthy of national attention.[292] Congress would preserve its historic role in regulating domestic relations by promoting a federal grant program that establishes a uniform, nationwide requirement for disarming batterers. This solution would also preserve a role for state governments as laboratories,[293] giving states freedom to devise creative pol-

288. *See id.* at 8.

289. *Cf.* CAL. PENAL CODE § 12010(a) (West. Supp. 2007) ("The Attorney General shall establish and maintain an online database to be known as the Prohibited Armed Persons File. The purpose of the file is to cross-reference persons who have ownership or possession of a firearm . . . as indicated by a record in the Consolidated Firearms Information System, and who, subsequent to the date of that ownership or possession of a firearm, fall within a class of persons who are prohibited from owning or possessing a firearm.").

290. *See* BRADY CAMPAIGN, *supra* note 139, at 8.

291. *Id.* at 9.

292. *See Legal Responses*, *supra* note 194, at 1543.

293. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

icy solutions to address gun violence against women, provided they do not fall below the minimum requirement.

The federal grants would also diminish the likelihood that judicial and prosecutorial discretion could obfuscate the purpose of the gun bans. By stipulating that judges follow a standard disarmament process, the grants would better enable victim advocates and counsel to discover when a judge strays from the guidelines. The creation of citizen watchdog groups could increase public oversight of judicial decisions. Prosecutors might continue to seek plea deals with defendants to avoid going to trial, but the public's increased courtroom observation could stir negative publicity over a local prosecutor's habit of cutting deals with defendants. As a result, the public may refuse to reelect state or county attorneys. In the face of losing their elected offices, state or county attorneys may reform prosecutors' practices by limiting a prosecutor's ability to make plea deals or by requiring that plea deals include an order to disarm.

Additionally, the creation of state gun units would establish the physical and bureaucratic infrastructure necessary to remove the guns. If states had the resources to disarm batterers, many batterers would voluntarily disarm in the face of the real possibility that a State may force them to do so. Even if an individual refused to comply, the improved ability of investigators to access data identifying prohibited persons and their guns would increase disarmament.

If the disarmament system failed or became inadequate, the public would be more likely to hold state and federal legislators accountable. If a state enacted the federal gun bans as its own law, it would be less likely to blame Congress for improper enforcement since this duty would be its own. The reporting requirements would increase public awareness of states that do not confiscate guns at the same rate as other jurisdictions. Constituents could use such data to rally federal legislators to offer greater assistance to those states, thereby holding Congress responsible for enforcing a uniform nationwide standard.

Ultimately, the effectiveness of this solution must be judged from the perspective of battered women. To do so, it is worth considering how such a solution could have changed Teri Lee's life.[294] While the tragic circumstances surrounding the Lee family may be attributed to a myriad of failed social and

294. *See supra* text accompanying notes 1–21.

government interventions, it is nevertheless important to ask, Would Teri Lee be alive today had Van Keuren been disarmed?

If Minnesota had adopted the federal gun bans and created gun units, the Lee case could have unfolded differently. Once the judge issued the criminal no contact order against Van Keuren, immediate steps would have been taken to disarm him. The judge would have asked whether Van Keuren owned a gun, informing both him and Teri Lee that he could no longer possess one under state and federal law. As a condition of his release, the judge would have required Van Keuren to give up his firearms at a local gun repository within forty-eight hours. A victim advocate would have met with Teri Lee to determine ways to keep her and her family safe, perhaps by staying at a battered women's shelter. If Van Keuren had not complied with the order, officers in the local gun unit would have been notified immediately. The officers then could have arrested and disarmed Van Keuren. Any one of these interventions could have resulted in Van Keuren's disarmament. By giving Teri Lee the full support of state judicial and law enforcement bodies, Teri Lee would not have had to defend herself and her children alone.

CONCLUSION

In light of the violence women continue to face, the federal government's recent efforts to assume responsibility for domestic violence should be supported. However, the public must critically analyze current approaches to gun violence to assure the best solution. Most importantly, the public must hold Congress accountable for the legislature's misguided habit of acquiescing to states' presumed sovereignty over domestic relations. To end the alarming amount of violence faced by women across the country, Congress must influence local action to the maximum of its constitutional ability. By providing monetary incentives to the states to adopt the federal gun bans, create gun units, and follow reporting requirements, Congress can effectively establish a uniform, national approach to combating domestic violence. This approach would recognize the federal government's unique capacity to provide a national solution and would affirm the importance of enabling women to live free from violence.