

CLOSING THE BOYFRIEND LOOPHOLE: PROPOSALS TO PROTECT DATING PARTNERS FROM GUN VIOLENCE

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INTRODUCTION

Advocates have long argued for restrictions on gun ownership for convicted domestic violence offenders.¹ The statistics suggest that the need for restrictions is more dire than ever. Between 2003 and 2014, nearly half of the 10,018 women murdered in the United States were killed by a current or former intimate partner.² In these homicides, guns were the most frequently used murder-weapon.³ In homes where firearms are present, the risk of homicide for women rises by approximately 500%.⁴ More to the point, 70% of women killed by their partners have been physically abused by that person prior to their murder.⁵

In 1996, Congress took action and amended the 1968 Federal Gun Control Act to ban certain convicted domestic violence offenders from possessing firearms.⁶ This amendment, known as the Domestic Violence Offender Gun Ban or the Lautenberg Amendment, remains the most significant piece of federal legislation addressing the link between

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¹ Sheryl Gay Stolberg, *Domestic Abusers Are Barred From Gun Ownership, but Often Escape the Law*, N.Y. TIMES, Nov. 6, 2017, at A15.

² Emiko Petrosky, et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence*, MORBIDITY AND MORTALITY WEEKLY REPORT (July 21, 2017),

https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.

³ CENTER FOR GUN POLICY AND RESEARCH, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, INTIMATE PARTNER VIOLENCE AND FIREARMS 1, https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf.

⁴ EVERYTOWN USA, GUNS AND VIOLENCE AGAINST WOMEN 4 (2014), <https://everytownresearch.org/documents/2015/04/guns-and-violence-against-women.pdf>.

⁵ Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 7, 1089 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.

⁶ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL CRM-1117 (July 2013), <https://www.justice.gov/usam/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted>; 18 U.S.C. § 922(g)(9) (2012).

firearms and domestic violence,⁷ and has prevented over 100,000 perpetrators of domestic abuse from purchasing guns since its enactment.⁸

Yet, a combination of factors has led to a resurgence in the debate over the adequacy of the Lautenberg Amendment, including the #MeToo movement's renewed public focus on gender-based violence⁹ and several recent mass shootings committed by domestic violence offenders.¹⁰ Some of the most thoughtful proposals aim to expand the reach of the Lautenberg Amendment's prohibition on gun ownership to dating partners instead of just spouses, co-habitants, and fellow parents. These proposals are driven by the recognition that "[d]angerous boyfriends can be just as scary as dangerous husbands," and "they hit just as hard and they fire their guns with the same deadly force."¹¹ This is an important observation, and lays bare the need for further legislation to protect women in relationships with abusive dating partners from gun violence.

PART I: FEDERAL LAW AND THE BOYFRIEND LOOPHOLE

The provisions of the Lautenberg Amendment are enforced through the federal background check system for firearm purchases.¹² When an individual attempts to purchase a firearm from a federal firearms licensed dealer, he must produce identification and complete a federal background check form.¹³ Among other questions, this form asks customers: "[h]ave you ever been convicted in any court of a misdemeanor crime of domestic violence?"¹⁴ Providing false information is punishable by up to 10 years in prison and a \$250,000

⁷ Stolberg, *supra* note 1.

⁸ ARKADI GERNEY & CHELSEA PARSONS, *WOMEN UNDER THE GUN* 16 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf>.

⁹ Surina Khan & Peter Long, *#MeToo Must Also Mean Stopping Domestic Violence*, SACRAMENTO BEE (Jan. 23, 2018), <http://www.sacbee.com/opinion/oped/soapbox/article196050034.html>.

¹⁰ Stolberg, *supra* note 1.

¹¹ *Protections for Women from Gun Violence, Hearing on VAWA Next Steps Before the S. Comm. on the Judiciary*, 113th Cong. (2014) (written testimony of Sherriff Christopher Schmaling), <https://www.judiciary.senate.gov/imo/media/doc/07-30-14SchmalingTestimony.pdf>.

¹² GIFFORDS LAW CENTER, *DOMESTIC VIOLENCE & FIREARMS* (2017), <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>.

¹³ Kaitlyn Schallhorn, *How Do Gun Background Checks Work?*, FOX NEWS (Feb. 22, 2018), <http://www.foxnews.com/politics/2018/02/22/how-do-gun-background-checks-work-look-at-current-system.html>.

¹⁴ BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FORM 4473 (Oct. 2016), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

fine.¹⁵ Once a purchaser completes the form, the firearms dealer will submit it to the National Instant Criminal Background Check System. In most cases, a seller will know whether a sale is permitted within minutes.¹⁶ Other than felony convictions and outstanding arrest warrants, a conviction for misdemeanor domestic violence is the most common reason for denying an application to purchase a firearm.¹⁷

Though undoubtedly effective in its present form, advocates for an expanded Lautenberg Amendment argue that current law fails to capture a relevant group of domestic violence offenders: dating partners. They point to the fact that women are now as likely to be killed by a dating partner as by a spouse, the result of a three decade upward trend in the prevalence of such homicides.¹⁸ As the law currently stands, the firearms ban only applies to a:

“current or former spouse, parent, or guardian of the victim, [] a person with whom the victim shares a child in common, [] a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or [] a person similarly situated to a spouse, parent, or guardian of the victim.”¹⁹

In other words, a dating partner who is not married to his victim, who is not living with his victim, or who does not have children with his victim is not subject to the prohibition on gun ownership under the Lautenberg Amendment because his violent acts do not constitute a “misdemeanor crime of domestic violence” under the statute’s definition.²⁰ This gap has been coined the “Boyfriend Loophole,” and has resulted in a flood of advocacy from nonprofit groups as well as perennial legislation in the House of Representatives and Senate to close it.²¹

In the current Congress, this legislation exists as the Protecting Domestic Violence and Stalking Victims Act in the Senate²² and the

¹⁵ Schallhorn, *supra* note 13.

¹⁶ *Id.*

¹⁷ GIFFORDS LAW CENTER, *supra* note 12.

¹⁸ EVERYTOWN USA, CLOSE THE BOYFRIEND LOOPHOLE, <https://everytownresearch.org/wp-content/uploads/2017/11/Boyfriend-Loophole-11.7.17.pdf>.

¹⁹ 18 U.S.C. § 921(a)(33) (2012).

²⁰ *Id.*

²¹ See Editorial, *Boyfriends Can Kill, Too*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/boyfriend-loophole-guns.html>.

²² Protecting Domestic Violence and Stalking Victims Act of 2017, S.1539, 115th Cong. (2017).

Zero Tolerance for Domestic Abusers Act in the House of Representatives.²³ Both bills amend current law to prevent dating partners from possessing firearms and adopt the definition of “dating partner” used in the Violence Against Women Act. This definition includes any “person who is or has been in a social relationship of a romantic or intimate nature with the abuser,”²⁴ contingent upon consideration of the length, type, and frequency of interaction present in the relationship.²⁵

Both laws would also prohibit gun ownership for individuals convicted of misdemeanor stalking, because of stalking’s close predictive relationship with domestic violence homicides.²⁶ Indeed, one study of ten major cities found that 76% of murders of women had been preceded by at least one incident of stalking.²⁷ Political realities suggest that there is little chance of either bill becoming law in this session of Congress, though previous versions have had a record of attracting at least some degree of bipartisan support.²⁸

PART II: STATE LAW AND THE BOYFRIEND LOOPHOLE

In lieu of federal action, however, some states have moved to include dating partners in gun ownership restrictions. A 2014 analysis showed that only ten states have enacted laws barring firearm possession by dating partners convicted of domestic abuse.²⁹ These states—Washington, California, Arizona, Tennessee, West Virginia, New Jersey, New York, Minnesota, Illinois and Nebraska³⁰—are a politically and geographically diverse group that reveals the unique legislative appeal of the issue.

In the wake of renewed public attention on the link between domestic violence and firearms, other states have moved to take action to include dating partners in their firearm bans. Oregon Governor Kate Brown made passage of H.B. 4145—a bill designed to close the “boyfriend loophole”—a centerpiece of her 2018 legislative agenda, noting that over half of the sixty-six domestic violence fatalities over the prior two years

²³ Zero Tolerance for Domestic Abusers Act, H.R. 3207, 115th Cong. (2017).

²⁴ 18 U.S.C. § 2266(7)(A)(i)(II) (2012).

²⁵ *Id.* § 2266(10).

²⁶ CLOSE THE BOYFRIEND LOOPHOLE, *supra* note 18.

²⁷ Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300, 311 (1999).

²⁸ *Boyfriends Can Kill, Too*, *supra* note 21.

²⁹ GERNEY AND PARSONS 12, *supra* note 8.

³⁰ *Id.*

in the state had been committed with a gun.³¹ That bill passed the Oregon House of Representatives just one day after a school shooting in Parkland, Florida killed seventeen students.³² Notably, the bill attracted substantial bipartisan support; one state senator spoke in support of the bill while affirming his desire to protect the Second Amendment.³³

Yet advocacy for state legislation restricting gun ownership for abusive dating partners is not without significant opposition. A 2015 Louisiana bill would have included dating partners in the state's domestic violence offender gun ban but was halted by lobbying efforts from firearms-rights lobbying groups.³⁴ Despite this legislative defeat, Louisiana is an instructive example. Two years later, a modified bill was passed by the legislature and signed into law.³⁵

One broad conclusion suggested by both these examples is that action to close the boyfriend loophole—while possible in both red and blue states—will need to be calibrated differently based on the political climate of a given region. Louisiana's modified legislation is not as expansive as its Oregonian counterpart, but political realities necessitated compromise in order to ensure passage. In states where outright bans on firearm possession by abusive dating partners are politically impossible, legislatures should look for room to compromise in order to ensure that women are protected from as many perpetrators of domestic violence as possible.

CONCLUSION

³¹ Lauren Dake, *Oregon Governor Wants 'Boyfriend Loophole' In Gun Law Closed*, OR. PUB. BROADCASTING (Feb. 7, 2018), <https://www.opb.org/news/article/gun-law-oregon-boyfriend-loophole-kate-brown-close/>.

³² Connor Radnovich, *Oregon Domestic Violence Gun Bill Passes House, Has Support In Senate*, STATESMAN-JOURNAL (Feb. 15, 2018), <http://www.statesmanjournal.com/story/news/politics/2018/02/15/oregon-domestic-violence-gun-bill-passes-house-has-support-senate/343045002/>.

³³ *Id.*

³⁴ The spokeswoman for one such group called the legislation overly broad, arguing that the bill “could make a felon out of a girlfriend who pulls a cell phone from her boyfriend's hand against his will.” Emily Lane, *Here's What the NRA Got Stripped From Louisiana's Anti-Domestic Violence Bill*, THE TIMES-PICAYUNE (May 18, 2015), http://www.nola.com/politics/index.ssf/2015/05/heres_what_the_nra_got_strippe.html.

³⁵ These modifications changed the definition of “dating partner” to avoid triggering an automatic firearms ban under federal law for a first offense, though any subsequent offenses do impact a perpetrator's right to possess firearms. Mark Ballard, *House OKs Including 'Dating Partners' Among Those Covered by Domestic Abuse Laws*, THE ADVOCATE (May 11, 2017),

http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_5fae5584-367b-11e7-8cae-db7b4ab95fb6.html.

The Lautenberg Amendment was passed in 1996 with nearly unanimous support in both houses of Congress. The aim of this amendment was to prohibit “anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk” from possessing firearms.”³⁶ Realizing this ambitious goal, however, will require the Lautenberg Amendment’s application to dating partners. to women like Sarah Engle,³⁷ Courtney Weaver,³⁸ and Cheryl Mascareñas,³⁹ who were shot by their respective boyfriends. Current federal law goes a long way towards preventing many domestic abusers from purchasing guns, but legislation to close the boyfriend loophole is the only way to extend these protections to women in abusive dating relationships.

³⁶ 142 CONG. REC. S.11878 (1996) (statement of Sen. Frank Lautenberg).

³⁷ Sarah Engle, *I Thought I’d Escaped the Abuse—Then He Shot Me In the Face*, GOOD HOUSEKEEPING (Oct. 31, 2016), <http://www.goodhousekeeping.com/life/inspirational-stories/a41151/domestic-abuse-sarah-engle/>.

³⁸ Courtney Weaver, *My Boyfriend Insisted A Gun Would Keep Us ‘Safer,’ Up Until the Day He Shot Me*, QUARTZ (May 22, 2016), <https://qz.com/688447/my-boyfriend-insisted-a-gun-would-keep-us-safer-up-until-the-day-he-shot-me-in-the-face/>.

³⁹ *Boyfriends Can Kill, Too*, *supra* note 21.