DIFFUSING DEADLY SITUATIONS: HOW MISSOURI COULD EFFECTIVELY REMOVE FIREARMS FROM THE HANDS OF DOMESTIC ABUSERS

"[A]ll too often the only difference between a battered woman and a dead woman is a gun."

- Senator Paul Wellstone[1]

INTRODUCTION

On November 18, 2012, 36-year-old Monica Webb begged for her life in her Joplin, Missouri apartment.[2] Moments later, Rondias Webb, Monica's estranged husband, shot her three times in the head.[3] Prior to the shooting, in September of 2012, Monica had moved to a new apartment after successfully obtaining an order of protection against Rondias.[4] In her petition for the order, Monica explained how Rondias prevented her from leaving their apartment and physically assaulted her when she managed to escape: "He was on top of me, telling me to stop yelling or he was gonna put a bullet in me. I continued to yell. He then grabbed a rock and told me to shut up."[5] Rondias violated the order in early November.[6] On the evening of November 18, Rondias Webb violated the order for a second and final time.[7] He should not have been in Monica's apartment. He should not have had that gun. Monica's order of protection should have protected her.

Few people outside of Joplin, Missouri, have heard of Monica Webb, but her story is an all-too-common one in Missouri and across the country, with

1. 140 CONG. REC. 13,854 (1994).

2. Susan Redden, *Joplin Woman Begged for Her Life Before Being Shot; Estranged Husband Charged with Murder*, JOPLIN GLOBE (Nov. 20, 2012), http://www.joplinglobe.com/topstories/x1332335544/Joplin-woman-begged-for-her-life-before-being-shot-estranged-husband-charged-with-murder.

3. *Id.*

4. *Joplin Man Gets Life in Prison for the Death of His Estranged Wife*, KOAM TV, http://www.koamtv.com/story/20131891/joplin-police-investigate-a-fatal-shoting-involving-a-husband-and-wife (last updated Oct. 10, 2013) (hereinafter *Life in Prison*).

5. Redden, *supra* note 2.

6. *Life in Prison*, *supra* note 4.

7. *Id.*

domestic violence and gun violence often going hand in hand.[8] Less than a month after Monica's murder, Kansas City Chiefs linebacker Jovan Belcher made national headlines when he fatally shot Kasandra Perkins, his girlfriend and mother to his child, nine times in their home before fatally turning the gun on himself.[9] Belcher's actions further fanned the flames of an ongoing national debate on gun control with *Kansas City Star* writer Jason Whitlock and NBC broadcaster Bob Costas contributing to the discussion. In an article, Whitlock stated, and Costas later agreed on national television,[10] that "if [Belcher] didn't possess/own a gun, he and Kasandra Perkins would both be alive today."[11]

However, not everyone agreed with Whitlock and Costas. National Rifle Association CEO Wayne LaPierre responded to their comments in an interview with *USA TODAY Sports*: "The one thing missing in that equation is [Perkins] owning a gun so she could have saved her life from that murderer."[12] Others chose to remove the incident from the gun debate completely. In an interview with radio host Mark Reardon, St. Louis Circuit Court Attorney Jennifer Joyce said, "My reaction to hearing Bob Costas' remarks was one of disappointment because, to me, this is not a gun issue. This is a domestic violence issue, and that's pretty clear to me."[13] Joyce went on to say:

> Domestic violence doesn't have anything to do with handguns though. That's a power and control issue. That's an issue of someone who can't manage their anger. And just this morning I got my report of cases that were issued over the weekend, and there's a good half a dozen domestic violence cases. Some of them pretty serious assaults, and they use all kinds of weapons: fists, beatings,

8. United States v. Hayes, 555 U.S. 415, 427 (2009) ("Firearms and domestic strife are a potentially deadly combination nationwide."); *see Domestic Violence and Guns*, EVERYTOWN FOR GUN SAFETY, http://everytown.org/issue/domestic-violence (last visited Apr. 26, 2015).

9. *Kasandra Perkins Shot 9 Times*, ESPN (Jan. 14, 2013), http://espn.go.com/nfl/story/_/id/8843179/kasandra-perkins-slain-girlfriend-kansas-city-chiefs-lb-jovan-belcher-shot-nine-times-autopsy.

10. Diesel Videos, *NBC's Bob Costas on Gun Control Following Jovan Belcher Tragedy Sunday Night Half-Time Show Tribute*, YOUTUBE (Dec. 2, 2012), http://www.youtube.com/watch?v=uOi7If0zW9s.

11. Jason Whitlock, *In KC, It's No Time for a Game*, FOX SPORTS (June 2, 2014), http://msn.foxsports.com/nfl/story/jovan-belcher-kansas-city-chiefs-murder-suicide-tragedy-girlfriend-self-leave-orphan-daughter-why-still-playing-sunday-120112.

12. David Leon Moore, *NRA Head: Kasandra Perkins Should Have Had Her Own Gun*, USA TODAY SPORTS (Dec. 6, 2012), http://www.usatoday.com/story/sports/nfl/chiefs/2012/12/06/nra-wayne-lapierre-jovan-belcher-gun-kasandra-perkins/1751293.

13. *Mark Reardon: KMOX's John Hancock, Jennifer Joyce, & Writer Julie Gunlock*, CBS ST. LOUIS (Dec. 3, 2012), http://stlouis.cbslocal.com/2012/12/03/mark-reardon-kmoxs-john-hancock-jennifer-joyce-writer-julie-gunlock.

> [. . .] stabbing. Domestic violence isn't so much about the weapon. It's about the relationship and the dynamic between two people.[14]

Joyce clarified that she is not a handgun enthusiast, but felt that the unnecessary commentary on America's "gun culture" was detracting from the real issue: domestic violence.[15]

While Joyce was correct that domestic violence could involve any weapon from firearms to fists, her comments minimized the role that guns play in the high rate of homicides committed by intimate partners.[16] For example, in a domestic violence situation, a woman is five times more likely to be murdered if a gun is present.[17] This Comment argues that the Missouri legislature should amend the current law to enforce firearm restrictions on all respondents subject to orders of protection for domestic violence and permit law enforcement to remove firearms from the hands of those respondents. These respondents are individuals whom the legal system has already determined to be dangerous and, as studies show, often do not change their mindsets towards women and abuse even with therapy.[18] Taking firearms away from these individuals will increase the effectiveness of protective orders and decrease the number of firearm-related domestic violence homicides.[19]

I. HISTORY OF THE BATTERED WOMEN'S MOVEMENT

For most of history, domestic violence has been codified into law.[20] For example, the law of the Roman Empire allowed a man to "beat, divorce, or murder his wife for offenses committed by her which besmirched his honor or threatened his property rights."[21] English common law, the basis of American

14. *Id.*

15. *Id.*

16. *Domestic Violence and Guns*, *supra* note 8.

17. *Id.*

18. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, NCJ 200331, DO BATTERER INTERVENTION PROGRAMS WORK?, at ii (2003), *available at* https://www.ncjrs.gov/pdffiles1/nij/200331.pdf.

19. *See* Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. REV., Summer 2002, at 32 ("[A]busers who gain access to firearms pose a lethal threat both to those they have abused and to the wider community."); *see also* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 529 (2003) ("[P]olice arrested John Allen Muhammad as one of the prime suspects in the most notorious criminal case of the year: a series of sniper attacks that left ten victims dead and three injured in the Washington, D.C. area. At the time of these shootings, Muhammad was subject to a restraining order obtained by his wife. In fact, it appears that the firearm he used in the shooting spree had been acquired shortly after the restraining order was entered.").

20. Bernadette D. Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 983–84 (1989).

21. *Id.* at 985.

law, carried on this tradition when it developed the "rule of thumb" which gave men legal permission to beat their wives with a stick as long as the stick was "no thicker than his thumb."[22] In addition to being legal, domestic violence was highly encouraged as a way of "disciplining" women and controlling their behavior,[23] much like a parent disciplines a child.[24]

The concept behind the rule migrated to the United States, and less than two hundred years ago, beating one's wife in this country was legal.[25] In *Bradley v. State*, the Mississippi Supreme Court stated that while it personally found the defendant's actions of beating his wife deplorable, it did not believe that it was the court's place to intrude into the domestic relations: "Let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."[26] A similar outcome was reached in *Poor v. Poor* where the New Hampshire Supreme Court, formerly the New Hampshire Superior Court, denied a woman's request for a divorce from her husband after he had beaten her and locked her in their cellar.[27] Relying heavily on scripture, the court wrote:

> [W]e are of opinion, on the whole, that however obnoxious to censure the conduct of the husband may have been on any, or on all the occasions to which we have adverted, the wife has no right to complain; because it is in the highest degree probable that in every instance she drew down upon herself the chastisement she received, by her own improper conduct. And it does not appear that on any occasion the injury she received was much out of proportion to her offence. Her remedy is to be sought, then, not in this court, but in a reformation of her own manners.[28]

The courts permitted a man to punish his wife as long as it was in "moderation," but in an effort to protect the privacy of the domestic setting and continue patriarchal traditions, the law ultimately turned a blind eye to the victims it should have been protecting.

In 1871, three and a half decades after *Poor*, and with a slow-moving shift in public opinion, two state courts, Alabama and Massachusetts, invalidated

22. Louise Ryterski, *'Till Death Do Us Part*, 47 J. MO. B. 577, 578 (1991).

23. G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty, and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 152–53 (2005).

24. Anna Clark, *Domestic Violence, Past and Present*, 23 J. WOMEN'S HIST. 193, 194 (2011).

25. Sewell, *supra* note 20, at 988.

26. Bradley v. State, 1 Miss. 156, 157–58 (Miss. 1824) (overruled by Harris v. State, 14 So. 266 (Miss. 1894)).

27. Poor v. Poor, 8 N.H. 307, 313 (N.H. 1836).

28. *Id.* at 319.

the laws allowing men to beat their wives.[29] Other states followed suit by enacting statutes rescinding the "rule of thumb" laws and punishing the abusers.[30] Others allowed abused women to escape their abusers through divorce.[31]

The battered women's movement remained relatively stagnant for almost a century until the feminist movement of the 1960s.[32] Legal aid lawyers and activists took the opportunity to pressure government and social service agencies to first recognize the enormity of the spousal abuse problem and then provide actual assistance to the victims.[33] Furthermore, the movement sought to increase public knowledge about domestic violence through the media, public speaking engagements, and various outreach programs.[34] Between 1976 and 1996, there was also a sharp increase in the number of domestic violence hotlines.[35] During that twenty-year span, the number of intimate partner homicides dropped about thirty percent, going from 1.3 to 0.9 victims per 100,000 people.[36] However, it should be noted that there was a much larger drop in the homicide rate for male victims than female victims.[37] Researchers, like Dr. Katherine van Wormer of the University of Northern Iowa, attribute this discrepancy to the fact that abused women gained access to services like hotlines and shelters, which provided alternatives to killing their abusers out of fear for their lives.[38]

The domestic violence movement continues to make great strides, but much work remains. Domestic violence continues to affect victims of varying ages, genders, cultures, ethnicities, and economic backgrounds[39] and remains

29. Sewell, *supra* note 20, at 992–93.

30. *Id.*

31. *Id.*

32. *Id.* at 995.

33. *Id.* at 996.

34. Sewell, *supra* note 20, at 997. For an extensive list of victim resources available in the St. Louis area, see *Resources for Domestic Violence Victims*, ST. LOUIS DOMESTIC AND FAMILY VIOLENCE COUNCIL, http://www.stlouiscodvcouncil.com/ResourcesForDVVictims.html (last visited Apr. 26, 2015).

35. Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 NAT'L INST. JUST. J. 20, 21 (2003), *available at* https://www.ncjrs.gov/pdffiles1/jr000250f.pdf.

36. *Id.*

37. *Id.*

38. Katherine van Wormer, *Women's Shelters and Domestic Violence Services Save the Lives of Men*, CRIMES OF VIOLENCE (Dec. 11, 2010), http://www.psychologytoday.com/blog/crimes-violence/201012/women-s-shelters-and-domestic-violence-services-save-the-lives-men. For a detailed example of the work advocates in Missouri have done to assist battered women convicted of murdering their abusers, see Bridget B. Romero et al., *The Missouri Battered Women's Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193 (2004).

39. Mitchell & Carbon, *supra* note 19, at 32.

one of the leading causes of serious injury to American women, surpassing both muggings and car crashes combined.[40]

II. DOMESTIC VIOLENCE STATISTICS

A. National Statistics

In her interview with Mark Reardon, St. Louis Circuit Court Attorney Jennifer Joyce correctly steered the debate about Perkins' murder toward domestic violence instead of focusing solely on the gun debate as did Whitlock, Costas, and LaPierre.[41] For those in the domestic violence community like Joyce, tragedies such as those of Kasandra Perkins and Monica Webb are frequent and do not require guns to end in tragedy. According to a 2006 Bureau of Justice report, intimate partners murder more than three women and one man in America every day.[42] In seventy to eighty percent of those homicides the man physically abused the woman before the murder.[43] The numbers are shocking, but not surprising when one considers the

40. Camille M. Davidson, *What's Love Got to Do with It?: Examining Domestic Violence as a Public Health Issue Using* Their Eyes Were Watching God, 81 UMKC L. REV. 867, 869 (2013).

41. Editorial, *Domestic Violence and Guns Make Lethal Combination*, ST. LOUIS POST-DISPATCH (Dec. 5, 2012), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-domestic-violence-and-guns-make-lethal-combination/article_eaf7cf5f-ca77-5ef8-bd68-cacf4c694b6c.html.

42. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CRIMINAL VICTIMIZATION, 2005, at 13 (2006).

43. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST. J. 14, 18 (2003). It should be noted that when the author is referring to domestic violence for the duration of this Comment, feminine pronouns will be used for victims and masculine pronouns for abusers. This is neither to imply that men cannot be victims and women cannot be the abusers nor that domestic violence only occurs in heterosexual relationships. The pronouns are not only for simplicity's sake, but also to reflect the fact that 85% of domestic violence victims are female and most abusers are male. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001 (2003). In Missouri, males accounted for 80.1% of the 6425 prosecuted domestic violence arrests between 1999 and 2010, and they make up 93.7% of reoffending domestic abusers. *See* Eric Chambers & Mark Krispin, *Domestic Violence Offenders in Missouri: A Study on Recidivism*, MO. STATE HIGHWAY PATROL, Mar. 2011, at 13, 19, *available at* http://www.mshp.dps.missouri.gov/MSHPWeb/SAC/pdf/DomesticViolenceFinalReport.pdf. For more information on the discrimination LGBT individuals face from the courts when seeking orders of protection, see COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE: OVERVIEW OF CPO PROTECTIONS FOR LGBT VICTIMS OF DOMESTIC VIOLENCE (2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/CPO_Protections_for_LGBT_Victims_7_08.authcheckdam.pdf.

fact that one in three American women will experience domestic violence during her lifetime.[44]

Furthermore, statistics show that the presence of firearms often leads to deadlier outcomes. Two-thirds of spouse and ex-spouse homicides involve the use of a firearm.[45] According to recent statistics, a woman in a domestic violence situation is five times more likely to be murdered if a gun is present.[46] American women are also eleven times more likely to be murdered with guns than women in other high-income countries, and fifty-four percent of women murdered with a gun were killed by an intimate partner or family member.[47] In states that require a background check for every handgun sale, thirty-eight percent fewer women are shot to death by their partners, and since 1998, background checks have already prevented more than 250,000 gun sales to domestic abusers.[48] It is a fact that the presence of a firearm increases the likelihood that an incident of domestic violence will result in the victim's death.

With these statistics, it seems that Joyce, Costas, Whitlock, and LaPierre were only correct to a point in the way each chose to analyze Perkins' murder. Guns do not cause an abuser to abuse or murder, but the statistics show that the presence of a gun significantly increases the likelihood of abuse escalating to homicide.[49]

B. Missouri Statistics

The number of domestic violence incidents in Missouri closely reflects the national statistics. In 2008, eleven percent of all homicides in Missouri were related to domestic violence.[50] In 2009, the Missouri State Highway Patrol reported that Missouri law enforcement agencies were called to 36,943 incidents of domestic violence, forty-five of which were homicides.[51] Wives

44. *Domestic Violence Facts*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/images/National_Domestic_Violence_Statistics.pdf (last visited Apr. 26, 2015).

45. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 20 (2011), *available at* http://www.bjs.gov/content/pub/pdf/htus8008.pdf.; Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAM., CHILD. & CTS., 2005, at 3.

46. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

47. *Gun Laws and Violence Against Women*, EVERYTOWN FOR GUN SAFETY, http://everytown.org/article/guns-and-violence-against-women/ (last visited Apr. 26, 2015).

48. Lininger, *supra* note 19, at 528.

49. *Id.*

50. Chambers & Krispin, *supra* note 43, at 5.

51. STATISTICAL ANALYSIS CENTER, MO. STATE HIGHWAY PATROL, CRIME IN MISSOURI—2009, at 77, 83 (2009), *available at* http://www.mshp.dps.missouri.gov/MSHPWeb/SAC/pdf/2009CrimeInMO.pdf.

and girlfriends were killed in almost forty-nine percent of all domestic violence related homicides.[52] That equals about one domestic violence murder victim every eight days, almost half of which were crimes committed against women by their intimate partners.

The statistics paint an even bleaker picture two years later. In 2011, there were 40,613 domestic violence related incidents of which 7825 were characterized as intimate partner violence.[53] The number of domestic homicides increased from forty-five to seventy-one, although the percentage of wives and girlfriends killed decreased to forty-two percent.[54] The actual number of women killed in intimate partner violence situations increased, however, from twenty-two to thirty.[55] According to a 2012 report by the Violence Policy Center, Missouri ranked seventh in the nation for female homicides per 100,000 people.[56]

III. DOMESTIC VIOLENCE LAWS

A. Federal Law: The Violence Against Women Act

Faced with the high frequency of domestic violence incidents, with one occurring about every fifteen seconds,[57] Congress sought to address the problem and subsequently passed the Violence Against Women Act (VAWA) as part of the Violent Crime Control and Law Enforcement Act of 1994.[58] VAWA prohibited interstate domestic violence and interstate violation of a state court's order of protection, provided the victim with restitution, and provided that all courts across the country "give full faith and credit" to any valid order of protection issued by a state court.[59]

52. *Id.*

53. STATISTICAL ANALYSIS CENTER, MISSOURI STATE HIGHWAY PATROL, CRIME IN MISSOURI—2011, at 77 (2011), *available at* http://www.mshp.dps.missouri.gov/MSHPWeb/SAC/pdf/2011CrimeInMO.pdf.

54. *Id.* at 81.

55. *Id.* at 83.

56. The states comprising the top ten are: (1) Alaska, (2) South Carolina, (3) Oklahoma, (4) Louisiana, (5) Mississippi, (6) Nevada, (7) Missouri, (8) Arizona, (9) Georgia, (10) Tennessee. *When Men Murder Women: An Analysis of 2012 Homicide Data*, VIOLENCE POL'Y CTR., https://www.vpc.org/studies/wmmw2014.pdf (last visited May 3, 2015).

57. David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 255 (1998).

58. *Id.* at 259.

59. *Id.* at 259–61.

VAWA has been reauthorized every year with bipartisan support since it first passed in 1994.[60] In 2013, Republicans attempted to pass their own version of VAWA which "deleted provisions from the Senate measure that gave tribal authorities jurisdiction to prosecute cases on Indian reservations, specifically targeted discrimination of LGBT victims, and allowed undocumented immigrant survivors of domestic violence to seek legal status."[61] Their measure ultimately failed to win a majority vote,[62] and the Violence Against Women Reauthorization Act of 2013 reinstated the 1994 version.[63] Along with VAWA's reauthorization, changes were made to the guidelines for VAWA grant funds to reauthorize critical grants created by the 1994 Act as well as to extend funds to newly established programs.[64] The Office of Violence Against Women currently funds twenty-one programs designed to increase public education about domestic violence and provide additional funds for victim services, the courts, and law enforcement.[65]

1. Amendment to the Gun Control Law Act of 1968

One of the provisions of the Violent Crime Control and Law Enforcement Act of 1994[66] made it illegal for an individual to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" if that individual is subject to an order of protection.[67] This statute prohibits individuals with protective orders against them from possessing a firearm in interstate commerce.[68] Similarly, it prohibits individuals from selling or in any way giving firearms to individuals subject to protective orders.[69] The prohibition lasts for the duration

60. Sam Levin, *Violence Against Women Act: Why Is Senator Roy Blunt Still Opposing? LGBT Protections?*, RIVERFRONT TIMES (Feb. 19, 2013), http://blogs.riverfronttimes.com/dailyrft/2013/02/violence_against_women_act_roy_blunt_missouri_lgbt.php.

61. Tom Cohen, *House Passes Violence Against Women Act After GOP Version Defeated*, CNN (Feb. 28, 2013), http://www.cnn.com/2013/02/28/politics/violence-against-women.

62. *Id.*

63. Valerie Jarrett, *No One Should Have to Live in Fear of Violence*, HUFFINGTON POST (Mar. 7, 2013), http://www.huffingtonpost.com/valerie-jarrett/no-one-should-have-to-liv_b_2830510.html.

64. OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, GRANT PROGRAMS TO END VIOLENCE AGAINST WOMEN (2014), *available at* http://www.ovw.usdoj.gov/docs/ovw-grant-programs-fact-sheet-grouped.pdf. For the full bill, see S. 47, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf.

65. *Id.*

66. 18 U.S.C. § 922(g)(8) (2012).

67. *Id*.

68. Lininger, *supra* note 19, at 535.

69. *Id.* at 536.

of the protective order.[70] It is important to note, however, that the law applies only to firearms involved in interstate commerce.[71] Furthermore, the wording of the law and requirement of due process implies that it only takes effect once the full protective order has been granted, so respondents are not expected to relinquish any firearms while an ex parte emergency order is in effect.[72]

2. The Lautenberg Amendment: 18 U.S.C. § 922(g)(9)

Two years after VAWA was enacted, Senator Frank Lautenberg, a Democrat from New Jersey, introduced S-1632, "a bill aimed at curbing domestic violence by taking firearms and ammunition out of the hands of anyone convicted of a misdemeanor crime of domestic violence," including law enforcement and military.[73] Later altered and included into proposed anti-stalking legislation, the Lautenberg Amendment passed with overwhelming approval by a vote of ninety-seven to two, but was still marked with controversy because of the law's content, the lack of debate on the House floor, and the fact that "it was just a very small portion of a huge spending bill."[74] The Amendment, states:

> [I]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[75]

Similar to provisions in section 922(g)(8), the firearm or ammunition must relate to interstate commerce in order for the statute to apply.[76]

A defendant who forfeited his civil rights as a result of the misdemeanor conviction but then has them restored may be allowed an exception to the gun

70. Sack, *supra* note 45, at 13.

71. *Gun Laws and Violence Against Women*, *supra* note 47.

72. Sack, *supra* note 45, at 6–7. Some courts have held that respondents can be required to relinquish weapons to law enforcement while an ex parte emergency protective order is in place. *See* United States v. Calor, 340 F.3d 428, 432 (6th Cir. 2003).

73. Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. 922(g)(9)*, 19 PACE L. REV. 445, 446, 447 (1999); *see also* 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, 430 (2001).

74. *Id.* at 446–47.

75. 18 U.S.C. § 922(g)(9) (2012). For an example of one of the first prosecutions under 18 U.S.C. § 922(g), see United States v. Smith, 171 F.3d 617, 619, 626 (8th Cir. 1999) (upholding the conviction of a man found guilty of violating his firearm restriction while subject to an order of protection after he purchased a gun and shot his former girlfriend in the back despite the victim's unwillingness to press charges).

76. Lininger, *supra* note 19, at 548–49.

ban pursuant to the language of the statute.[77] However, if the defendant, bearing the burden of proof, appeals his conviction for a misdemeanor crime of domestic violence, the case will be evaluated according to state law and the ban will remain in effect until the state determines the conviction should be vacated.[78]

A following amendment to the statute rescinded the exception for law enforcement that had been provided for in the Gun Control Act of 1968.[79] The Department of Justice immediately reacted by assembling a team to determine how to best implement the new law with federal employees.[80] However, because of the Tenth Amendment, state and local law enforcement agencies "are not, and indeed cannot be required to proactively seek out law enforcement officers in their ranks with misdemeanor convictions of domestic violence and disarm them."[81] This is reflected in both the amendment to the Gun Control Act and other firearm statutes.

3. Challenges to the Federal Law

The law has been challenged several times, by both criminal defendants and police organizations, on the basis of constitutionality.[82] Opponents claim that the law is unconstitutional because, among other claims, Congress exceeded its power under the Commerce Clause, the laws violate the Due Process Clause, and the statute's language is unconstitutionally vague.[83] Another argument presented is that the law violates the Equal Protection Clause under the Fourteenth Amendment.[84] In many states, including Missouri,[85] a defendant convicted of a misdemeanor does not forfeit his civil rights as punishment for his crime.[86] Thus far, though, no court has ruled sections 922(g)(8) or 922(g)(9) unconstitutional.[87]

77. *Id.* at 550.

78. *Id.*

79. 18 U.S.C. § 925(a)(1).

80. Fredheim, *supra* note 73, at 449.

81. *Id.* at 454.

82. *Id.* at 459.

83. *Id.* at 466.

84. *Id.* at 567.

85. *See* MO. REV. STAT. § 571.070.1(1) (2008) ("A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and: (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony.").

86. Lininger, *supra* note 19, at 561.

87. *Id.* at 559. For an analysis of Missouri law concerning the constitutionality of the firearm restriction and restoration of civil rights for misdemeanants, see United States v. Kirchoff, 387 F.3d 748, 750–52 (8th Cir. 2004).

B. Missouri Law

1. How to Obtain an Order of Protection in Missouri

Like every state, Missouri has its own domestic violence legislation, which includes the process for obtaining an order of protection as well as the additional remedies.[88] The current state law does not mirror the current federal law.[89] There are two types of orders of protection, ex parte and full, and there are various forms of relief available for both.[90] An ex parte order of protection is a temporary order that goes into effect as soon as the petitioner files it with the court, and it remains in effect until a hearing can be held in front of a judge to determine whether a full order is necessary.[91]

If the full order is granted, the respondent will be enjoined from "committing or threatening to commit domestic violence, molesting, stalking or disturbing the peace of the petitioner."[92] Additionally, the judge may award other terms and remedies as he or she deems appropriate such as requiring the respondent to provide child support,[93] maintenance,[94] court costs,[95] and medical expenses caused by the respondent's abuse.[96] The judge may also require the respondent to attend a batterer's intervention program.[97] If the respondent violates the order, he may be arrested and criminally prosecuted, which may result in either a misdemeanor charge or a class D felony.[98] A full order of protection can last from 180 days to one year, and may be renewed twice for an additional 180 days to one year.[99]

Nowhere in chapter 455 of the Missouri Revised Statutes is there any mention of a firearm prohibition against individuals with orders of protection against them.[100] However, Missouri uses a standard form for orders of

88. *See* MO. REV. STAT. §§ 455.003–.549 (2007).
89. *Compare id. with* 18 U.S.C. § 922(g) (2012).
90. MO. REV. STAT. §§ 455.045–.050 (2013).
91. *Id.* § 455.035.
92. *Id.* § 455.050.1.
93. *Id.* § 455.050.3(3).
94. *Id.* § 455.050.3(4).
95. MO. REV. STAT. § 455.050.3(11) (2013).
96. *Id.* § 455.050.3(12).
97. *Id.* § 455.050.3(9).
98. *Id.* § 455.549.
99. To see the forms for Adult Abuse/Stalking Petitions for an Order of Protection, see *Adult Abuse/Stalking Forms*, YOUR MISSOURI COURTS, http://www.courts.mo.gov/page.jsp?id=533 (last visited Apr. 26, 2015).
100. MO. REV. STAT. §§ 455.010–.085.

protection,[101] and the federal law, 18 U.S.C. § 922(g), appears in a bold font on the front page as a warning to the respondent.[102] Firearm restrictions are mentioned again on page three of the order.[103] Here, judges are given discretion whether to checkmark or leave blank a box in a section that reads:

> The Court finds that:
>
> a. as a result of a hearing at which the Respondent received notice and had an opportunity to participate; and,
>
> b. Respondent is a spouse, former spouse, is or was cohabitating, or has a child in common with the Petitioner; and,
>
> c. Respondent is a credible threat to the physical safety of, or is explicitly prohibited within this Order from the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury against the Petitioner; and,
>
> d. Respondent is restricted from harassing, stalking or threatening the Petitioner, the child they have in common or a child of the Petitioner's partner, or from engaging in any conduct that would place the Petitioner in reasonable fear of bodily injury to him or her self, the child in common, or child of the Petitioner's partner.
>
> Respondent is prohibited from possessing a firearm pursuant to Federal Law.[104]

As this box implies, firearm restrictions are not mandatory in every order of protection.[105] Missouri case law also does not make much mention of a state

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101. *See* Cheryl Rafert, *How to Handle an Order of Protection*, MO. BAR, at R—54, *available at* http://www.mobar.org/uploadedFiles/Home/CLE/Free_MoBarCLE_Course_Materials/Rafert% 20-%20How%20to%20Handle%20an%20Order%20of%20Protection.pdf.

102. *Id*. The warning reads:

> If you hold a concealed carry endorsement or certificate of qualification, you must surrender such to the court, officer or the official serving this order.
>
> This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Authorities in Indian Country (18 U.S.C. Section 2265). Crossing state, territory, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. Section 2262).
>
> Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. Section 922(g)(8)).
>
> Only the Court can change this order.

Id.

103. *Id*. at R—56.

104. *Id.*

105. *See* SHANNON FRATTAROLI, JOHNS HOPKINS CTR. FOR GUN POL'Y & RES., REMOVING GUNS FROM DOMESTIC VIOLENCE OFFENDERS: AN ANALYSIS OF STATE LEVEL POLICIES TO PREVENT FUTURE ABUSE 23 (2009) ("Research did not reveal any laws that explicitly grant the court authority to order an accused batterer to surrender firearms through a protective order.").

requirement for a firearm ban either, although it has provided some clarification of the law's applicability. In *Towell v. State*, the Missouri Court of Appeals, Southern District, stated:

> We are mindful that although the Adult Abuse Act does not itself impose criminal penalties, there are serious consequences to orders of protection being entered. Under the Federal Gun Control Act, 18 U.S.C. 922(g)(8), a person under an order of protection may not possess a firearm, even for recreational purposes. *Therefore, Appellant [Respondent] may violate federal laws if he possesses hunting weapons or legitimately hunts. There mere possession of firearms while under an order of protection violates 18 U.S.C. 922(g)(8).* The penalty provisions do not require knowledge of the law nor intent to violate it. Another consequence to the entry of an order of protection is that persons in the military or law enforcement, who become subject to an order of protection, may lose their livelihood.[106]

Both the Eastern and Western Districts have explained the law similarly to *Towell* and have added to its understanding in Missouri. In *Flaherty v. Meyer*, the Eastern District stated that the law "appears to only prohibit the appellant from possessing a firearm while he is 'subject to the court order'" and that after the order expires, the respondent is no longer subject to the restriction.[107] In *C.H. v. Wolfe*, the Western District further clarified how the ban applied to law enforcement.[108] The respondent in *C.H.* was a deputy sheriff, and if the court granted the petitioner's request for an order of protection, § 922(g)(8) would prohibit the respondent from carrying any firearm, including his service weapon.[109] The court explained:

> Given the potential consequences of a full order of protection, upon review of such order, it is incumbent that the trial courts exercise great vigilance to prevent abuse of the stalking provisions in the Adult Abuse Act and in making

106. Towell v. State, 154 S.W.3d 471, 475 (2005) (emphasis added) (citations omitted). Here, the court, in vacating the trial court's judgment granting a full order of protection, stressed that the petitioner must present sufficient evidence in order to warrant granting an order of protection because of the hardship and stigmas respondents potentially face when they have orders of protection against them. *Id.* at 475–76.

107. Flaherty v. Meyer, 108 S.W.3d 131, 132 (Mo. Ct. App. 2003). The court simply dismissed the case for mootness because the order of protection against the appellant had expired in May 2003 but the appeal was not brought before the court until June of that year. *Id.*

108. C.H. v. Wolfe, 302 S.W.3d 702, 706 (Mo. Ct. App. 2009). This case concerned a dispute and alleged stalking complaint between neighbors, not intimate partner violence. *Id.* at 707. The court ultimately concluded that the petitioner failed to meet his burden of establishing that the respondent's conduct caused him to fear the danger of physical harm. *Id.* at 708.

109. *Id.* at 706.

> sure that sufficient credible evidence exists to support *all elements* of the statute before entering a protective order.[110]

While not explicitly saying so, the *C.H.* court stresses consideration of the respondent's job if he is law enforcement or military when determining whether to grant an order of protection.[111]

2. The Reality of Orders of Protection

For the duration of the protective order, the victim is supposed to be kept safe from further abuse, but in many cases, the issuance of the order does not stop the abuser. In spite of an order's legal power and the potential criminal punishments it carries if violated, the reality is that an order of protection is really nothing more than a piece of paper.[112] An order of protection is a legal document, and if a respondent already has little to no respect for the law, he will be unlikely to obey any judgment handed down by a court.[113] The order of protection and, specifically, the order to give up firearms may work in situations where the respondent has much to lose such as a respected job or his reputation in the community.[114] However, in many situations, the respondent either has nothing to lose or his abusive relationship with the victim is more important to him than anything else.[115] Studies also show that the most dangerous times for a woman in an abusive relationship is when she is preparing to leave or has already left her abuser.[116] An abuser's violent

110. *Id.*

111. *See* S.D. v. Wallace, 364 S.W.3d 252, 254 n.4 (Mo. Ct. App. 2012) ("[A] full order of protection that meets the requirements of this federal statute may impinge on the ability to work in certain occupations, and pursue some recreations.").

112. *See* United States v. Mahin, 668 F.3d 119, 124 (4th Cir. 2012) ("For a victim of domestic abuse, seeking refuge in the court system may be a measure of last—or even desperate—resort. Indeed, it may require some summoning of courage for a victim to request a protective order against an intimate partner. But although a restraining order aims to avert a credible future risk of domestic violence, it offers no guarantee.").

113. *See* NAT'L INST. OF JUSTICE, *supra* note 18, at 1–2.

114. *Id.* at ii ("Those [batterers] with the most to lose were the least likely to reoffend."); *see also Batterer Intervention Programs Often Do Not Change Offender Behavior*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (July 6, 2011), http://www.nij.gov/topics/crime/intimate-partner-violence/interventions/pages/batterer-intervention.aspx.

115. Dugan et al., *supra* note 35 ("But certain interventions designed to help victims gain access to helpful resources may actually increase the risk of homicide—they have a backlash or retaliation effect. The outcome depends on the type of intervention and the characteristics of the victim and the offender.").

116. Mitchell & Carbon, *supra* note 19 ("Studies and experience show that the time of leaving a relationship can be the most dangerous for a survivor, a phenomenon that is often referred to as 'separation violence.'"); *see* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 10–11 (1987) (stating a woman is most likely to be murdered by her abusive partner when attempting to report the abuse or leave the abuser).

behavior will likely escalate as a form of retaliation against the victim seeking the protective order.[117]

In regard to the firearm restriction, more problems arise from actual enforcement of the law.[118] When a respondent is commanded to forfeit his weapons pursuant to an order of protection because the judge determines that it is in the best interests of the petitioner's safety, the respondent is expected to give his firearms up to the state on what could best be described as a volunteer basis.[119] No law enforcement officer will retrieve the weapons from the respondent, nor will the state follow up on the order to ensure that all weapons owned by the respondent are forfeited.[120] Unless the respondent uses the firearm or a law enforcement agent sees the respondent in possession of the firearm,[121] the respondent will likely not face any punishment for violating the order, and any prosecution will be highly unlikely.[122]

The high risk associated with leaving an abuser combined with the lack of authority to ensure that he relinquishes his firearms creates a huge threat to the victim's safety and often leads to deadly results. Furthermore, the limitations placed on law enforcement ultimately render the law ineffective because even

117. Mitchell & Carbon, *supra* note 19.

118. FRATTAROLI, *supra* note 105, at 14 ("Research did not reveal any laws that explicitly grant law enforcement officers the authority to remove a firearm from a domestic violence scene.").

119. *See id.*

120. The author spoke to the Saint Louis City's Sheriff's Office, Saint Louis County's Sheriff's Office, and Saint Charles County's Sheriff's Office in July of 2013, and all offices confirmed that law enforcement cannot legally retrieve firearms from the home of a respondent who has been ordered by a court to do so.

121. For example, if the respondent is pulled over for a traffic violation and the officer spots the weapon in his vehicle, the respondent can be arrested for violating the order of protection.

122. *See* Lininger, *supra* note 19, at 530–31. Prosecutions under 18 U.S.C. § 922(g)(8) occurring across the country, not just in Missouri, are few and far between:

> In 1995, the first year when section 922(g)(8) took effect, no prosecutions were filed under that statute. In 1996, three cases were filed under section 922(g)(8); in 1997, thirteen cases were filed; in 1998, twelve cases were filed; in 1999, thirty-six cases were filed; in 2000, fifty-five cases were filed; and in 2001, sixty-eight cases were filed. EOUSA's report predicted that by the end of 2002, a total of fifty-eight cases would be filed under section 922(g)(8). These statistics represent approximately one percent of the 6,000 cases filed by federal prosecutors each year against defendants who illegally possess firearms. Put another way, the ninety-four U.S. Attorneys' offices have failed to generate an annual average of one case per district since section 922(g)(8) was enacted in 1994. The infrequency of charges under section 922(g)(8) cannot be attributed to a lack of defendants eligible for prosecution: Judge Posner of the Seventh Circuit estimated that approximately 40,000 people violate section 922(g)(8) each year, and he complained that the federal government only prosecutes a "minuscule" number of potential cases under this statute.

Id. at 531.

if a firearm restriction is placed on the abuser, law enforcement have little to no ability to ensure that the abuser has complied with the order of protection.

C. California Law

1. The Evolution of California Law

For a victim of domestic violence, seeking an order of protection against her abuser is a huge act of defiance that will hopefully lead her to a life free from abuse, but in order for her to achieve this, the law must stand by her. Currently, only seven states have laws mirroring the federal law requiring all individuals with an order of protection against them to give up their weapons, regardless of judicial discretion.[123] One of those states is California,[124] where even when a respondent is served with an ex parte order, he must turn over any weapons he owns within twenty-four hours to law enforcement or sell them to a licensed gun dealer.[125] However, California's law was not always so strict. In 1990, legislation was introduced that prohibited people subjected to domestic violence orders of protection from obtaining guns.[126] The glaring problem with the law was that it never addressed those firearms that respondents already owned—it just stopped them from purchasing any more to add to their arsenal.[127]

In 1994, California State Senator Gary Hart introduced legislation to build on the already existing law.[128] This bill, closely resembling Missouri's current law, allowed judges to use their discretion in ordering respondents subject to

123. *Rock Center with Brian Williams: Subtracting Guns from the Domestic Violence Equation: Rare but Effective* (NBC television broadcast May 3, 2013), *available at* http://rockcenter.nbcnews.com/_news/2013/05/03/18020730-subtracting-guns-from-the-domestic-violence-equation-rare-but-effective?lite. The seven states with laws mirroring federal law are Alaska, Arizona, California, Connecticut, Maryland, New Hampshire, and New Jersey. *See* FRATTAROLI, *supra* note 105, at 7.

124. CAL. PENAL CODE § 6389(a) (2013) ("A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect.").

125. *Id.* § 6389(c)(2) ("The relinquishment offered pursuant to paragraph (1) shall occur by immediately surrendering the firearm in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the protective order. A law enforcement officer serving a protective order that indicates that the respondent possesses weapons or ammunition shall request that the firearm be immediately surrendered. Alternatively, if no request is made by a law enforcement officer, the relinquishment shall occur within 24 hours of being served with the order, by either surrendering the firearm in a safe manner to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer . . . .").

126. Michelle N. Deutchman, Note, *Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218*, 75 S. CAL. L. REV. 185, 189 (2001).

127. *Id.* at 189–90.

128. *Id.* at 190.

protective orders to relinquish firearms they already owned if the petitioner proved "by a preponderance of the evidence that the respondent is likely to use or display or threaten to use a firearm in any further act of violence."[129] The burden petitioners faced was high, and the bill did not prove to be as effective as intended.[130]

This led another California state senator, Hilda Solis, to draft Senate Bill 218.[131] Passed in 1999, Senate Bill 218 mandated that all respondents subject to orders of protection, ex parte orders and full orders, relinquish their firearms, thereby eliminating the petitioner's burden of proving that the respondent was likely to violently use his firearm.[132] This legislation was then accompanied by section 18250 of the California Penal Code, which authorized various law enforcement and peace officers serving domestic violence protective orders to take "temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons[.]"[133]

2. The San Mateo County Gun Retrieval Program

One program that has had positive results is in San Mateo County, California, where law enforcement actively seeks to remove firearms from the hands of respondents.[134] Deputy Sheriff John Kovach of the San Mateo Police Department handles a variety of domestic violence cases and will personally go to the homes of respondents to serve them the orders.[135] He tries to simultaneously serve respondents their orders and collect their firearms by convincing them to relinquish their weapons voluntarily.[136] If he believes that the respondent will be uncooperative, then he brings a search warrant with him in order to seize the guns at the time of service.[137] Of course, not all guns are registered, so Kovach will meet with the petitioners and interview them to find

129. *Id.* (quoting S. 1278, 1994 Leg., 1994 Sess. (Cal. 1994)).

130. *Id.*

131. Deutchman, *supra* note 126, at 190–91.

132. *Id.* at 191; *see California Laws 2000*, L.A. TIMES (Dec. 26, 1999), http://articles.latimes.com/1999/dec/26/news/mn-47826/2.

133. CAL. PENAL CODE § 18250 (2013).

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

135. *Id.*

136. *Id.*

137. *Id.*

the number of guns and the type of guns the respondent owns.[138] With this information, Kovach knows what to look for when serving the orders.

As expected, San Mateo County's program requires significant time, manpower, and money.[139] At the start of the program in 2006, the state of California was providing the necessary funding.[140] In 2010, funding ran out as the state faced fiscal difficulties.[141] Spurred by the positive results of the program, San Mateo County obtained alternative funding through a grant from the federal government.[142] The work Kovach does is difficult and time consuming.[143] It also does not guarantee that every woman with an order of protection will be safe from her abuser or that the abuser will not find an alternative means of obtaining a firearm. However, the results of the program show that this proactive approach of removing guns directly from the hands of respondents is working. In 2012 alone, the program reviewed over 800 protective orders and successfully confiscated 324 firearms, both voluntary and seized, from eighty-one different individuals.[144] Most impressively, at the time NBC interviewed the San Mateo County Police Department in May of 2013, there had not been a single firearm-related domestic violence homicide in three years.[145]

IV. SOLUTIONS FOR REDUCING THE NUMBER OF FIREARM-RELATED DOMESTIC VIOLENCE HOMICIDES IN MISSOURI

While domestic violence laws in Missouri have improved over the years, more still needs to be done, and effective change would need to come from both the legislature and law enforcement. First, the Missouri legislature needs to mandate that all respondents subject to an order of protection be required to relinquish all firearms they own and be prohibited from purchasing any more for the duration of the order. This would remove the current system of allowing a judge to use his or her own discretion in determining which respondents need to forfeit their firearms by creating a uniform law that equally applies to all respondents who have already been deemed dangerous

138. *See id.*; *Rock Center with Brian Williams*, *supra* note 123.

139. Luo, *supra* note 134.

140. *Id.*

141. *Id.*

142. *Rock Center with Brian Williams*, *supra* note 123. In May of 2013, California Governor Jerry Brown signed Senate Bill 140, granting an additional $24 million to add additional investigators to the Armed Prohibition Persons System (APPS) to further help law enforcement track down guns. Mary Flynn, *Taking Guns from Perpetrators of Domestic Violence an Ongoing Challenge*, CAL. HEALTH REPORT (Feb. 21, 2014), http://www.healthycal.org/archives/14589.

143. *See* Luo, *supra* note 134.

144. *Id.*

145. *Rock Center with Brian Williams*, *supra* note 123.

enough to warrant the protective order in the first place.[146] Next, the legislature needs to authorize law enforcement officers to seize the respondents' firearms at the time the order is handed down. This step would be more costly and place a heavier burden on law enforcement, but it is essential to the enforcement and effectiveness of the law.[147] Furthermore, Missouri should begin implementing programs similar to the one in San Mateo County so law enforcement can collect respondents' firearms if they are unwilling to give them up voluntarily.

A. Step 1: Changing the Law to Reflect Federal Laws

The current Missouri domestic violence laws are too lax on respondents and give judges too much discretion. However, changing the current domestic violence laws in Missouri to allow the government to step in and take away guns from respondents subject to orders of protection would undoubtedly face opposition. The first hurdle to overcome is the argument that such laws are unconstitutional.

1. These Laws Do Not Violate the Second Amendment

Article I, Section 23 of the Missouri Constitution states: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."[148] However, effective February 26, 2004, Missouri also permitted its citizens to apply for concealed weapons permits.[149] Missouri, as a largely conservative state, is highly in favor of rights for gun owners,[150] and the National Rifle Association has a strong presence.[151] The NRA opposes stricter gun laws that

146. *See infra* note 158 and accompanying text.

147. *See* Luo, *supra* note 134.

148. MO. CONST. art. I, § 23.

149. MO. REV. STAT. § 571.101 (2013); *see* PUB. INFO. & EDUC. DIV., MO. STATE HIGHWAY PATROL, MISSOURI CONCEALED WEAPONS LAW 2 (2013), *available at* http://www.mshp.dps.mo.gov/MSHPWeb/Publications/Brochures/documents/SHP-863.pdf.

150. For example, in 2013, Missouri House Bill 486, also known as the "Second Amendment Preservation Act," narrowly failed in the Senate with a 22–12 vote, just under the two-thirds necessary to override Governor Jay Nixon's veto. *See* H.R. 436, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013). The bill was then reintroduced before the Missouri legislature in 2014. *See* H.R. 1439, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

151. For example, in 2007, then Governor Matt Blunt signed into legislation a law "barring firearms confiscation at the NRA's national convention in St. Louis." Later that year, NRA lobbyist Chris Cox joined Gov. Blunt on a signing tour for the "Castle Doctrine" and "Hunting Heritage Protection Areas Act" bills. *See* Jason Rosenbaum, *On the Trail: NRA Keeps Low Profile on Missouri's 'Gun Nullification' Bill*, STL BEACON (Aug. 26, 2013), https://www.stlbeacon.org/#!/content/32429/onthetrail_nra_nullification_silence.

would require respondents in domestic abuse cases to give up their guns.[152] They argue that these local laws mirroring the federal law, like in California, "ignored due process" and served as a "punishment without prosecution" since orders of protection are considered civil, not criminal, matters.[153] However, several federal courts, including the Eighth Circuit, have upheld the constitutionality of the federal firearm prohibitions.[154]

The United States Supreme Court has never directly ruled on the constitutionality of gun restrictions on respondents subject to orders of protection in either civil or criminal cases,[155] but lower federal courts have. In *United States v. Mahin*, the Fourth Circuit Court of Appeals affirmed in part the defendant's conviction under 18 U.S.C. § 922(g)(8) and found the defendant's argument on appeal that the law was unconstitutional meritless.[156] In that case, the defendant obtained a membership for a small arms range, purchased two boxes of ammunition, and rented a Glock 22 handgun within an hour of a court granting his wife an order of protection against him after he assaulted her and threatened her life.[157] In analyzing the defendant's argument as to constitutionality, the Fourth Circuit noted that "the courts of appeals have generally applied intermediate scrutiny to uphold Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections."[158] The court found that the law was constitutionally valid for two particular reasons: (1) "the prohibition on firearm possession is temporally limited and therefore 'exceedingly narrow'" and (2) it only applies to "persons individually adjudged to pose a future threat of domestic abuse" after a hearing where the accused received notice and had an opportunity to participate.[159]

In *United States v. Lippman*, the Eighth Circuit Court of Appeals provided an even stricter analysis of the defendant's constitutionality argument in his appeal of his conviction under § 922(g)(8). In that case, the defendant was apprehended by United States Customs and Border Protection officers in possession of a gun in violation of the order of protection his girlfriend had

152. *Rock Center with Brian Williams*, *supra* note 123.

153. *Id*.

154. *See infra* notes 159–62 and accompanying text.

155. Often cited by lower courts, both federal and state, is the civil case *District of Columbia v. Heller*, where the United States Supreme Court found that an individual's right to keep and bear arms is subject to limitations but that an "absolute prohibition of handguns held and used for self-defense in the home" is unconstitutional per the Second Amendment. 554 U.S. 570, 636–37 (2008).

156. United States v. Mahin, 668 F.3d 119, 120 (2012).

157. *Id.* at 120–21.

158. *Id.* at 123.

159. *Id.* at 125.

against him.[160] There, the court reaffirmed its belief that the Second Amendment protects the right to bear arms "when it is reasonably related to the maintenance of a well regulated militia" and, therefore, denied the defendant's Second Amendment argument because he failed to show this.[161] The court further explained that even if the Eighth Circuit had held that the Second Amendment protected a "freestanding individual right to bear arms," the defendant's unconstitutionality argument would still fail.[162] Keeping in mind Congress's interest in decreasing domestic violence with § 922(g)(8), the court held similarly to the court in *Mahin* that (1) the protective order issued against the defendant was "narrowly tailored to restrict his firearm possession for a limited duration" and (2) "to protect the individual applicant [petitioner]."[163]

As the *Mahin* and *Lippman* courts both explained, firearm restrictions placed on respondents subject to orders of protection do not violate an individual's Second Amendment rights because each restriction is only temporary and is specified for one particular person who the court has already deemed a potential threat to the petitioner and the community.[164]

2. These Laws Reduce the Possibility of Judicial Error

Amending the current laws to mandate firearm prohibitions for individuals subject to orders of protection creates more uniformity in the law and leaves less room for judicial error. In the *Columbia Journal of Gender and Law*, author Lisa May describes an order of protection hearing she witnessed in a rural Missouri courtroom in February of 2003:

> [The] judge credited the testimony of a severely battered woman who described her husband throwing her to the ground, threatening her with death, and waking her in the middle of the night by holding her down and beating her. The woman's husband admitted to the abuse in testimony under oath. The judge, however, denied the victim's request for an order of protection, instead advising the woman to change the locks on her doors to keep herself safe. By denying the protective order, the judge allowed the batterer to escape the Domestic Violence Gun Safety Law [. . .] Later that day in open court, the same judge cited the approach of quail hunting season in open court as one reason not to issue another protective order.[165]

160. United States v. Lippman, 369 F.3d 1039, 1040–41 (8th Cir. 2004).

161. *Id.* at 1043–44 (citing United States v. Miller, 307 U.S. 174, 178–79 (1939) (where the Court held that the Second Amendment protects the right to bear arms in "some reasonable relationship to the preservation or efficiency of a well-regulated militia")).

162. *Id.* at 1044.

163. *Id.*

164. *Mahin*, 668 F.3d at 125; *Lippman*, 369 F.3d at 1044.

165. Lisa D. May, *The Backfiring of the Domestic Violence Firearms Ban*, 14 COLUM. J. GENDER & L. 1, 1–2 (2005).

Additionally, Missouri judges need more in-depth training on the relationship between domestic violence and firearms. Despite judges receiving unprecedented training about domestic violence since the early 1990s, the issue of firearms is rarely discussed.[166] It is imperative that judges understand the public policy behind firearm restrictions, the relationship between the federal laws and applicable state laws, their role in the implementation and enforcement of firearm restrictions, and the dangers posed to the petitioners as well as the community when ruling on an order of protection case.[167] Judges also need to know the right questions to ask the parties when addressing the issue of firearms.[168] For example, if a respondent says he no longer "possesses" a gun because he sold it, the judge should inquire about the terms of the sale to ensure that it was a valid sale.[169] In addition to improving the uniformity of law, simply mandating that all respondents be required to relinquish their weapons reduces the amount of decisions the judge is forced to make and, therefore, will reduce the chance for judicial error.

B. Step 2: Changing the Law to Increase Law Enforcement's Power

Of course, this new legislation would not be able to reach its maximum potential without enforcement, and many gun owners who become the subjects of an order of protection would likely be unwilling to part with their firearms.[170] This is why it is necessary to implement some type of program similar to that in San Mateo County across Missouri.[171]

1. The Low Success Rate of Court-Mandated Batterer Intervention Programs Indicates that Strict Enforcement is Necessary for Success of Firearm Restrictions

The low success rate of batterers intervention programs (BIPs) provides two explanations for why enforcement programs to render firearm restrictions effective are so necessary. BIPs, popularized in the 1970s, are court mandated sessions a respondent must attend where the focus is on accountability for the respondent's actions and on changing the respondent's attitude about women

166. Mitchell & Carbon, *supra* note 19, at 33 ("The issue may be ignored because judges in jurisdictions without state law on the issue believe that it is federal law, and they needn't worry about that, or because judges have philosophical differences of opinion about the propriety or efficacy of state and federal laws on the subject.").

167. *Id.*

168. *Id.* at 39.

169. *Id.*

170. *See* H.R. 1439, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); Rosenbaum, *supra* note 151.

171. Luo, *supra* note 134.

and abuse.[172] First, many batterers do not successfully complete the program.[173] According to a 2006 review of BIP effectiveness, forty to sixty percent of men ordered by the court to attend a BIP either dropped out before successfully completing the program or never enrolled in treatment at all.[174] A 2000 study conducted by Johns Hopkins University and reviewed by the University of Missouri–St. Louis analyzing the cost effectiveness of BIPs found that across the country the average dropout rate for those who did enroll ranged from thirty to fifty percent.[175] The low success rate and the number of abusers who never enrolled in treatment at all indicate just how unwilling many abusers are to cooperate with the order of protection. For firearm restrictions, Missouri's law currently trusts abusers to voluntarily hand their weapons over and does not pursue them to ensure that they have abided by the order.[176] Permitting law enforcement to remove the firearms themselves increases accountability and the law's effectiveness by taking the power out of the abusers' hands.

A second failure of BIPs that further necessitates permitting law enforcement to take an abuser's firearms is that those abusers who do complete the program rarely have a change in attitude toward domestic abuse and women.[177] One study done in Florida found "no significant differences between those who had treatment and those who did not as to whether they battered again or their attitudes [changed] toward domestic violence."[178] This is not to say that BIPs never work. A study of BIPs in New York showed a positive relationship between the length of treatment and probability of

172. Amanda Dekki, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT 549, 566 (2004). Some abusers attend BIPs voluntarily.

173. PATRICIA CLUSS & ALINA BODEA, THE EFFECTIVENESS OF BATTERER INTERVENTION PROGRAMS: A LITERATURE REVIEW & RECOMMENDATIONS FOR NEXT STEPS 7 (FISA Foundation, 2011), *available at* http://fisafoundation.org/wp-content/uploads/2011/10/BIPsEffectiveness.pdf.

174. *Id.* (citing C.I. Eckhardt et al., *Intervention Programs for Perpetrators of Intimate Partner Violence: Conclusions from a Clinical Research Perspective*, *in* 121 PUB. HEALTH REPS. 369, 372 (2006)). Note that BIP attendance may actually be improving, as one 1986 study showed that 84% of the study's samples were no-shows and dropouts. *See* Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL CRIMINOLOGY 239, 248 (2005).

175. Alison Snow Jones, *The Cost of Batterer Programs: How Much and Who Pays?*, 15 J. INTERPERSONAL VIOLENCE 566, 566, 578 (2000), *available at* https://www.musc.edu/vawprevention/research/program_costs.shtml.

176. MO. REV. STAT. §§ 455.010–.085 (2000).

177. NAT'L INST. OF JUSTICE, *supra* note 18.

178. *Id.*

reoffending.[179] However, that same New York study showed that regardless of the amount of time a batterer spent in a treatment program, their attitudes toward women and domestic violence rarely changed.[180] This evidence reveals that even with treatment, a batterer will still rarely hold himself accountable or fully understand the value of a woman's life. This type of mindset combined with a dangerous weapon like a gun can, and often does, lead to deadly consequences. Because the studies show that a batterer's mindset rarely changes, the next best option is to at least remove the gun from the equation.

2. The Cost in Human Lives Far Outweighs the Financial Costs

The largest criticism of gun retrieval programs is the cost in terms of money and manpower. With the ongoing recession, government agencies have been forced to make cuts across the board to accommodate a smaller budget.[181] The good news is that state economies, including Missouri's, have been on the rise in the past few years.[182] The bad news is that most states, Missouri included, are still in a deep financial hole.[183] In June of 2013, Governor Jay Nixon, exercising his constitutional authority, restricted $400 million from Missouri's 2014 budget.[184] Cuts like these affect law enforcement. For example, in 2013, St. Louis Police Chief Sam Dotson faced about $5 million in budget cuts on top of impending cut-backs from federal funding that had paid the salaries of twenty city officers.[185] The year prior, budget cuts were so restrictive that the St. Louis police was forced to eliminate eighty officers from the force.[186]

However, despite these budgetary concerns, there are still ways to fund a gun retrieval program. The first step to implementing this program is to start

179. *Id.* Batterers who successfully completed a twenty-six-week program were less likely to commit another act of domestic violence than those in an eight-week program. *Id.*

180. *Id.*

181. PHIL OLIFF, CHRIS MAI & VINCENT PALACIOS, CENTER ON BUDGET AND POL'Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1 (2012), *available at* http://www.cbpp.org/cms/?fa=view&id=711.

182. *Id.* at 2.

183. TOM KRUCKEMEYER, THE MISSOURI BUDGET PROJECT, NEW YEAR, OLD PROBLEM–MISSOURI FACING MAJOR BUDGET SHORTFALL IN FY 2013 (2012), *available at* http://www.mobudget.org/files/Missouri_Facing_Majo r_Budget_Shortfall_in_FY%202013.pdf.

184. *Gov. Nixon Restricts $400 Million from Fiscal Year 2014 Budget, Citing Costs of House Bill 253*, OFFICE OF MO. GOVERNOR JAY NIXON (June 28, 2013), http://governor.mo.gov/news/archive/gov-nixon-restricts-400-million-fiscal-year-2014-budget-citing-costs-house-bill-253.

185. *Crime Down, Budget Woes Up for St. Louis City Police*, ST. LOUIS KMOX (Aug. 17, 2013), http://stlouis.cbslocal.com/2013/04/17/crime-down-budget-woes-up-for-city-police/.

186. Talia Kaplan, *City of St. Louis Will Soon Have Fewer Police Officers*, ST. LOUIS KSDK (Apr. 18, 2012), http://www.ksdk.com/news/article/316621/3/Budget-cuts-will-eliminate-police-officer-positions.

small. Missouri's two largest cities, St. Louis and Kansas City, could begin their own starter projects and request funding through the Office of Violence Against Women. For example, the S.T.O.P. (Services-Training-Officers-Prosecutors) Violence Against Women Grant provides funding to states for the purpose of "[d]eveloping, training, or expanding units of law enforcement officers, judges, other court personnel, and prosecutors specifically targeting violent crimes against women, including sexual assault and domestic violence."[187] Missouri is already anticipated to receive around $4 million from the S.T.O.P program for the 2014–2015 fiscal year with twenty-five percent allocated to law enforcement,[188] so some of this money or any additional money may go to funding gun retrieval programs.

Furthermore, while the costs of hiring additional law enforcement to handle gun retrievals will be high, removing guns from already volatile individuals will inevitably save money as well. Since beginning the gun retrieval program, San Mateo County has had no domestic violence related homicides.[189] A decrease in the number of homicides will mean fewer investigations and prosecutions which will save law enforcement and the courts time and money. Most importantly, taking guns out of the hands of violent offenders will save an incalculable amount in human lives.[190] Not only will the victims be safer, but so will the community and law enforcement who are called to handle potentially deadly situations of domestic violence.[191] A price cannot be placed on that.

CONCLUSION

If in September of 2012, Joplin police had forced Rondias Webb to give up his guns pursuant to his estranged wife's order of protection, would Monica Webb still be alive today? There could never be a guaranteed answer to this question, but domestic violence related homicide statistics and the results from San Mateo County indicate that Monica's chances of survival would have dramatically increased. Moreover, these laws are not about violating an individual's constitutional right to bear arms. They are simply taking

187. GRANT TITLE: STOP VIOLENCE AGAINST WOMEN ACT GRANT (VAWA), DIST. ATT'YS COUNCIL (2012), *available at* http://www.ok.gov/dac/Federal_Grants/Grants_Available/Grants:_S.T.O.P._Violence_Against_Women_Act_Grant_(VAWA).html.

188. *See* Mo. Dep't of Pub. Safety, Pre Bid-Seminar: 2014-2015 STOP-Violence Against Women Act Grant Program (Aug. 16, 2013), *available at* http://dps.mo.gov/dir/programs/cvsu/documents/stopvawa/pre-bid-08-13.pdf.

189. Luo, *supra* note 134.

190. *Id.*

191. *Rock Center with Brian Williams*, *supra* note 123.

advantage of an opportunity to remove dangerous weapons from an individual who has already been deemed legally unsafe to have them.[192]

In an interview with Bob Schieffer on *Face the Nation* following the Sandy Hook massacre in Newtown, Connecticut, NRA president David Keene defended the NRA's opposition to bans on semiautomatic weapons: "The question isn't how many bullets are going to fit in a magazine; is the gun somebody has got ugly or not ugly? The question is, can we keep guns out of the hands of people who are potential killers?"[193] Gun retrieval programs partially answer Keene's question because domestic violence related homicides are unique in that they are easier to predict than other violent crimes, and because of that, legislatures are put in a position where they can actually create laws to stop a violent crime before it happens.

As hopeful as we may be, removing guns from the hands of abusers subject to orders of protection will not save every victim. The real solution to domestic violence and the related-homicides involves much more than just taking guns away. It will require the continued efforts of domestic violence advocates to educate the public, both men and women, on why domestic abuse is unacceptable and how we can identify it and stop it. However, social progress is slow, so alternative means of rectifying the problem must be taken in the meantime. The numbers prove that these proactive steps to tighten the

192. *Id.*

193. Interview by Bob Schieffer with David Keene, NRA President, in Washington D.C. (Dec. 23, 2012), *available at* http://www.cbsnews.com/news/nra-we-will-oppose-semi-automatic-weapons-ban/.

laws on firearm restrictions taken by the legislature and law enforcement would render protective orders more effective and save countless lives from domestic violence. Saving just one life should make it worth it.

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*J.D., 2015, St. Louis University School of Law. Special thanks to Professor John Ammann for his helpful guidance and insight. I would also like to thank my family and friends for their ceaseless love and support, especially my mom, Insuk Washam, my sister, Bailey Washam, and my boyfriend, Stephen Lenivy. Finally, I would like to give a special thanks to my dad, Rodney Washam, who always believed in and supported me and continues to inspire me.