

**DIFFUSING DEADLY SIT**



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

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.<sup>15</sup>

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.<sup>16</sup> For example, in a domestic violence situation, a woman is five times more likely to be murdered if a gun is present.<sup>17</sup> This Comment argues that the Missouri legislature should

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.”<sup>22</sup> In addition to being legal, domestic violence was highly encouraged as a way of “disciplining” women and controlling their behavior,<sup>23</sup> much like a parent disciplines a child.<sup>24</sup>

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.<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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

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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).

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one of the leading causes of serious injury to American women, surpassing both muggings and car crashes combined.<sup>40</sup>

## 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.<sup>41</sup> 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.<sup>42</sup> In seventy to eighty percent of those homicides the man physically abused the woman before the murder.<sup>43</sup> The numbers are shocking, but not surprising when one considers the

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40. Camille M. Davidson,

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fact that one in three American women will experience domestic violence during her lifetime.<sup>44</sup>

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.

and girlfriends were killed in almost forty-nine percent of all domestic violence related homicides.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> The actual number of women killed in intimate partner violence situations increased, however, from twenty-two to thirty.<sup>55</sup> According to a 2012 report by the Violence Policy Center, Missouri ranked seventh in the nation for female homicides per 100,000 people.<sup>56</sup>

### 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,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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: A 24-Year Report on the National Crime Victimization Survey* (2008), available at <http://www.bjs.ojp.gov/pub/nvcs08.pdf> (2008).



VAWA has been reauthorized every year with bipartisan support since it first passed in 1994.<sup>60</sup> 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.”<sup>61</sup> Their measure ultimately failed to win a majority vote,<sup>62</sup> and the Violence Against Women Reauthorization Act of 2013 reinstated the 1994 version.<sup>63</sup> 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.<sup>64</sup> The Office of Violence Against Women currently funds twenty-one programs designed to increase public education about domestic violence and provide

of the protective order.<sup>70</sup> It is important to note, however, that the law applies only to firearms involved in interstate commerce.<sup>71</sup> 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.<sup>72</sup>

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-

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ban pursuant to the language of the statute.<sup>77</sup> Howev]

## 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.<sup>88</sup> The current state law does not mirror the current federal law.<sup>89</sup> There are two types of orders of protection, *ex parte* and full, and there are various forms of relief available for both.<sup>90</sup> 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.<sup>91</sup>

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.”<sup>92</sup> Additionally, the judge may award other terms and remedies as he or she deems appropriate such as requiring the respondent to provide child support,<sup>93</sup> maintenance,<sup>94</sup> court costs,<sup>95</sup> and medical expenses caused by the respondent’s abuse.<sup>96</sup> The judge may also require the respondent to attend a batterer’s intervention program.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup>

Nowhere in chapter 455 of the Missouri Revised Statutes is there any

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protection,<sup>101</sup> 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.<sup>102</sup> Firearm restrictions are mentioned again on page three of the order.<sup>103</sup> Here, judges are given discretion whether to checkmark or leave blank a box in a section that reads:

The Court finds that:9 747.704

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 i(d)-5(er)5( )-167(t)12(h)(eq)-41(n)7naltb2







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.<sup>123</sup> One of those states is California,<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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

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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](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 BT287.3f6n

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.”<sup>129</sup> The burden petitioners faced was high, and the bill did not prove to be as effective as intended.<sup>130</sup>

This led another California state senator, Hilda Solis, to draft Senate Bill 218.<sup>131</sup> 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



enough to warrant the protective order in the first place.<sup>146</sup> 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.<sup>147</sup> 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

would require respondents in domestic abuse cases to give up their guns.<sup>152</sup> 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.<sup>153</sup> However, several federal courts, including the Eighth Circuit, have upheld the constitutionality of the federal firearm prohibitions.<sup>154</sup>

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,<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup> 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-

against him.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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].”<sup>163</sup>

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.<sup>164</sup>

## 2. These Laws Reduce the Possibility of Judicial Error

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.<sup>166</sup> 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.<sup>167</sup> Judges also need to know the right questions to ask the parties when addressing the issue of firearms.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> This is why it is necessary to implement some type of program similar to that in San Mateo County across Missouri.<sup>171</sup>

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

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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.





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reoffending.<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup> The good news is that state economies, including Missouri's, have been on the rise in the past few years.<sup>182</sup> The bad news is that most states, Missouri included, are still in a deep financial hole.<sup>183</sup> In June of 2013, Governor Jay Nixon, exercising his constitutional authority, restricted \$400 million from Missouri's 2014 budget.<sup>184</sup> 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.<sup>185</sup> The year prior, budget cuts were so restrictive that the St. Louis police was forced to eliminate eighty officers from the force.<sup>186</sup>

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

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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, CENTT/F1 6.96 Tf21204.61 Td8hosNON2 Tf408.31 315.65 -215(pr)3(i)S7TBT/F1 6.96 TFB

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-

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advantage of an opportunity to remove dangerous weapons from an individual who has already been deemed legally unsafe to have them.<sup>192</sup>

In an interview with Bob Schieffer on *Face the Nation* following the

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.

LIZ WASHAM

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