

# **DOMESTIC VIOLENCE AND GUNS: SEIZING WEAPONS BEFORE THE COURT HAS MADE A FINDING OF ABUSE**

## **INTRODUCTION**

It's a Friday night around 6:00 p.m. I sit down to dinner at a local restaurant with some relatives who are visiting when my pager begins to beep loudly. After excusing myself, I quickly make my way to the pay phone outside and dial an 800 number. "Hello, this is Maria from Safeline," I say to the woman from the answering service. She tells me a name and a number and I jot them down on an old receipt I find in my wallet. I hang up and dial the number, blocking out the traffic noise around me so I can focus completely on the woman who answers. Her name is Rita and she is a victim of domestic violence.

Unfortunately, Rita (not her real name), like many other victims of domestic violence, lives in a household with an abuser who owns several guns. After our brief telephone conversation, I drove twenty miles to the Orange County Sheriff's Department in order to help her obtain a temporary restraining order against her husband. Rita was older than I had expected—she was in her sixties. She told me that her husband, who had been depressed lately due to work troubles, had gotten drunk that day. She believed he was angry because she had been visiting with a neighbor in the street (actually, she told me she was learning how to roller skate). When she went back into the house, he pulled a gun off a shelf and threatened to kill her and himself, too. Rita's neighbor called for help. When the police arrived, they found Rita physically unhurt. They took her husband into custody and seized the weapon, advising her that they would not hold her husband overnight unless she obtained a temporary restraining order.

The after-hours court worker and I spent the next two hours talking to Rita, explaining her options and helping her complete the affidavit, complaint, and other necessary paperwork. The court worker then contacted the on-call judge. When he returned, he conveyed what I thought was distressing news. The judge had refused to grant the temporary restraining order unless Rita turned the other three weapons in the household over to the police. I saw Rita freeze. I knew what she was thinking—her husband was going to be even angrier when he discovered that she had voluntarily turned his weapons over to the police.

Rita agreed that she would drive forty minutes back to her home and then back to the police station, bringing the weapons with her. The judge granted the restraining order.

## I. BACKGROUND

An individual who has had a domestic violence complaint filed against him but who has not yet been convicted of the crime (usually a misdemeanor if in criminal court) or has not yet had a finding of abuse made against him (if in family court) may pose a danger to society equal to that of a convicted batterer. When I met Rita, her husband had never been convicted of domestic violence, nor was he currently subject to a restraining order. Rita ultimately dropped her complaint against her husband at the final hearing a week later. If she had not, the court may have made a finding of abuse against her husband and granted her a final restraining order. Additionally, the court has discretion to seize and hold her abuser's weapons while the order was in effect.<sup>1</sup>

The Violence Against Women Act (VAWA), enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>2</sup> makes it a crime for anyone under a restraining order to possess firearms or ammunition. Neither VAWA nor the Law Enforcement Act, however, address the pre-conviction seizure of weapons from an individual accused of abuse.<sup>3</sup>

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1. *See* VT. STAT. ANN. tit. 15, §§ 1101-1115 (1989). For a full discussion, see *infra* Part III.

2. Violence Against Women Act (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections 8, 18, and 42 U.S.C.). VAWA was introduced in Congress in 1990, reintroduced in 1991 and 1993, and finally passed both Houses in 1994. *See* Carolyn Peri Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 726-27 (1997). The purpose of the Act was to address "the escalating problem of violence against women." S. REP. NO. 103-138, at 37 (1993). The Act increases penalties for sex offenders and domestic abusers by doubling sentences for repeat sex offenders and authorizing more stringent federal sentences for abusers traveling interstate with the intent to injure, intimidate, or harass a domestic partner or violate a restraining order. *See* U.S. DEP'T OF JUSTICE, THE VIOLENCE AGAINST WOMEN ACT: BREAKING THE CYCLE OF VIOLENCE at ii (updated March 21, 1996). The Attorney General is authorized to make grants to states to implement mandatory or pro-arrest programs and policies in police departments; improve tracking of domestic violence arrests, protection orders, violations of protection orders, prosecutions and convictions; strengthen legal advocacy programs for victims of domestic violence; and educate judges on the dynamics of domestic violence. *See* 42 U.S.C. §§ 3796gg, 3796hh (1994).

3. *See* 18 U.S.C. § 922(g)(8), (g)(9) (1994 & Supp. II 1996). The Violence Against Women Act, included in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, and the Domestic Violence Offender Gun Ban, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (passed as part of the Omnibus Appropriations Act of 1997), amended the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 213. Individuals subject to a court order are prohibited from possessing firearms or ammunition. *See* 18 U.S.C. § 922(g)(8) (1994). Individuals convicted of a misdemeanor crime of violence are prohibited from possessing firearms or ammunition. *See* 18 U.S.C. § 922(g)(9) (Supp. II 1996). VAWA protects only those individuals falling within the definition of an "intimate or spouse." 18 U.S.C. § 921(a)(33)(A)(ii) (1994). This definition does not include a girlfriend or individual with whom the batterer has not cohabitated. *See id.* Additionally, as with many other firearms disabilities, federal or state law enforcement officers and members of the military who are subject to a court order under 18 U.S.C. § 922(g)(8) (as opposed to those who have misdemeanor convictions under 18 U.S.C. § 922(g)(9)) are exempt from the firearm prohibitions. *See* 18 U.S.C. § 925(a)(1) (Supp. II 1996); *see also* *Don't Rearm Abusers*, N.Y. TIMES, March 20, 1997, at 24; NATIONAL NETWORK TO END DOMESTIC VIOLENCE, GET THE FACTS:

Although several cases have been brought under VAWA,<sup>4</sup> a gap has been left in federal law because individuals who are dangerous, yet have not, for whatever reason, been subjected to a final hearing, may still possess guns. All state statutes, including Vermont's, allow courts to prohibit possession of weapons post-conviction or while a restraining order is in force.<sup>5</sup> Most, however, do not address the issue of whether they may be seized and retained by the state absent a conviction under a criminal statute or without a finding of abuse under a civil statute.<sup>6</sup> Assaults occur whether restraining orders are in force or not.<sup>7</sup> Woman-battering by husbands, ex-husbands, and lovers remains the single largest cause of injury to women in the United States today.<sup>8</sup> If our society wishes to encourage and to allow women to leave abusive relationships successfully, legal provisions that provide greater protection must be explored further.

At least one state has recognized that restraining orders do not provide adequate protection against armed batterers and that further statutory

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DOMESTIC VIOLENCE OFFENDER GUN BAN (on file with the National Network to End Domestic Violence, in Washington, D.C., 1997) [hereinafter GET THE FACTS].

4. See e.g., Patricia Nealon, *Everett Case is a Rare Use of U.S. Law on Domestic Violence*, THE BOSTON GLOBE, Apr. 28, 1997, at B12. Edward J. Trainor III was indicted by a federal grand jury for planting explosives outside a house belonging to an elderly woman whose grandson owed him money. See *id.* Trainor was charged with illegally possessing ammunition while subject to a restraining order. See *id.*; see also Ron Hutchison, *Bond Refused in Federal Spousal Abuse Case*, CHARLESTON DAILY MAIL, Sept. 30, 1997, at C1. Michael J. Bostic was charged under the 1995 Provision of VAWA for possessing a gun while subject to a restraining order. See *id.* He faces a maximum of ten years in prison and a \$250,000 fine. See *id.*

5. See FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 4 app. 4A at 4-44 to 4-106 (1997).

6. See *id.*

7. See Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 207 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); PANEL ON RESEARCH ON VIOLENCE AGAINST WOMEN ET AL., UNDERSTANDING VIOLENCE AGAINST WOMEN 120-21 (Nancy A. Crowell & Ann W. Burgess eds., 1996).

8. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2171-72 (1996). Statistics presented during the VAWA Congressional hearings revealed that approximately four million American women were battered annually by their husbands or partners. See *id.* During the hearings, it was estimated that "about 35 [percent] of women visiting hospital emergency rooms were there due to injuries sustained as a result of domestic violence," Weiss, *supra* note 2, at 728 (quoting S. REP. NO. 103-138, at 41 (1993)); and that one-third of all murdered women were killed by their present or former husbands or boyfriends. See *id.* VAWA supporters believed that the law was needed to address the "puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes." S. REP. NO. 102-197, at 33 (1991).

Women bear the disproportionate burden of some of the most pernicious crimes, like rape, and some of the most persistent crimes, like beatings in the home. At the same time, survivors of these crimes often face barriers to justice not shared by male victims of assault: barriers of law, barriers of enforcement, and perhaps most importantly, the even stronger barriers of attitude.

protections should be made available to victims.<sup>9</sup> New Jersey's domestic violence statute attempts to extend protection to abuse victims beyond protections currently afforded by federal legislation or other state statutes,<sup>10</sup> in that it allows a prosecutor to request that weapons be confiscated and retained by the State in cases where a finding of abuse or a conviction is absent.<sup>11</sup> In other words, New Jersey's statute fills the gap that was left in VAWA. This Note argues that Vermont should adopt New Jersey's statutory language in order to better protect women from lethal domestic violence.

The right to possess a gun is a qualified right, not an unconditional one.<sup>12</sup> When an individual is found, after an adversarial court hearing, to be dangerous to society or to his victim, state courts are within their constitutionally-defined powers to seize, hold, and even sell an accused batterer's weapons.<sup>13</sup> This Note proposes that New Jersey's progressive stance in helping domestic violence victims should serve as an example for Vermont and other states in reforming their own statutory law.

## II. DOMESTIC VIOLENCE AND GUNS

### *A. The Concept of Separation Assault*

Most domestic violence victims are female.<sup>14</sup> In 1992, the rate of violence committed by males against their female partners or ex-partners was ten times greater than that by females against males.<sup>15</sup> Many victims do not

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9. See David VanHorn, *Officials Call for the Next Step in Safeguarding Spouses: Education*, THE STAR-LEDGER (Newark), Oct. 4, 1996, at 29.

10. The only other state with a statute equally progressive in scope is Arizona. See ARIZ. REV. STAT. ANN. § 13-3601 (West Supp. 1998).

11. See N.J. STAT. ANN. § 2C:25-21(d)(3) (West 1991). The provision states:  
Weapons seized in accordance with the above shall be returned to the owner except upon order of the Superior Court. The prosecutor who has possession of the seized weapons may, upon notice to the owner, petition a judge of the Family Part of the Superior Court, Chancery Division, within 45 days of seizure, to obtain title to the seized weapons, or to revoke any and all permits, licenses and other authorizations for the use, possession, or ownership . . . or may object to the return of the weapons . . . on the grounds that the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular.

*Id.*

12. See U.S. CONST. amend. II, *infra* note 318. For a discussion of the qualified nature of this right, see *infra* Part V.

13. Many states, including New Jersey, have disability provisions. See N.J. STAT. ANN. § 2C:25-17 (West 1991). For a full discussion of the statute, see *infra* Part IV.

14. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NO. NCJ-149259, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, DOMESTIC VIOLENCE, VIOLENCE BETWEEN INTIMATES 2 (November 1994) [hereinafter BUREAU OF JUSTICE STATISTICS].

15. See *id.* Because approximately 95% of all domestic violence victims are women, the feminine

report domestic violence incidents because they believe domestic violence is a private or personal matter.<sup>16</sup> In fact, because women who have been assaulted by an intimate partner fear reprisal, they are six times less likely to report the incident than women victimized by strangers.<sup>17</sup> Studies show that women are in danger of abuse regardless of whether they are married, divorced, granted a restraining order, or whether or not they cooperate in a criminal prosecution.<sup>18</sup> Husbands, lovers, or estranged intimates are responsible for killing approximately 70% of all murdered women.<sup>19</sup>

Perhaps most disheartening about the issue of domestic violence is how women attempting to leave their abusers typically incur more violence.<sup>20</sup> According to Department of Justice statistics, divorced and separated women are fourteen times more likely to report being battered than married women.<sup>21</sup> Battering and other abuse generally increase after separation,<sup>22</sup> since the batterer feels he has lost control over his victim. The batterer attempts to manipulate the victim into returning, either by reconciling with her, or by making her fearful of further retaliatory actions.<sup>23</sup> Although separated or divorced women represent only 10% of the female population, these women represent 75% of the victims of spousal violence.<sup>24</sup> According to one study, "73% of battered women seeking emergency medical services sustained injuries after they left their batterer."<sup>25</sup>

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pronoun will be used in this Note to describe victims. *See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN* (3d ed. 1994) [hereinafter NATIONAL CLEARINGHOUSE].

16. *See id.*; *see also* Kathryn Fahnestock, *Not in My County*, 31 JUDGE'S J. 10, 11 (1992).

17. *See BUREAU OF JUSTICE STATISTICS, supra* note 14, at 5.

18. *See Klein, supra* note 7, at 197-99, 200, 207-09. *See generally* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850 (1996) (advocating mandated victim participation in prosecuting domestic violence cases).

19. *See NATIONAL CLEARINGHOUSE, supra* note 15, at 3. *See also* Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* 96, 97 (Jacquelyn C. Campbell ed., 1995). Homicide of a female partner or ex-partner followed by the male's suicide is a form of homicide where the woman has usually been battered. *See id.* Between 75% and 90% of all hostage situations in the U.S. are related to domestic violence. *See Barbara J. Hart, Assessing Whether Batterers Will Kill* 103, 104 (1990) (unpublished manuscript, on file with Pennsylvania Coalition Against Domestic Violence). There is a high risk of homicide in these hostage situations. *See id.*

20. *See CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME* 5 (1991).

21. *See id.*

22. *See Martha F. Davis & Susan J. Kraham, Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1146 (1995); *see also* Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, MEDIATION Q., Summer 1990, at 324.

23. *See Davis & Kraham, supra* note 22, at 1146-47.

24. *See HARLOW, supra* note 20, at 5.

25. *Hart, supra* note 22, at 324.

Battered women who separate from their abusive partners are also at an increased risk of becoming homicide victims.<sup>26</sup> Their batterers are most likely to murder them when they attempt to separate from the abusive relationship or when they report an abusive incident to authorities.<sup>27</sup> In one study, the majority of male batterers reported that the impetus for the murder was an act of rejection by their partner or ex-partner.<sup>28</sup> “[A] walkout, a demand, a threat of separation were [sic] taken by the men to represent intolerable desertion, rejection, and abandonment.”<sup>29</sup> In fact, the typical profile of a man who has killed his wife is one of a batterer who shot her when she attempted to leave him.<sup>30</sup>

Despite the statistics, most women do try to leave.<sup>31</sup> Between 50% and 90% of battered women attempt to escape their abuser.<sup>32</sup> Their efforts are frequently frustrated by the violent response of the abuser as well as the economic deprivation that frequently accompanies separation.<sup>33</sup> Even escape to domestic violence shelters may not be successful in terms of separation since many batterers stalk their victims.<sup>34</sup> Abusers typically search desperately for their partners once they have fled, so leaving does not always stop the violence.<sup>35</sup> As a result, women who wish to escape abuse often move

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26. See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 144 (1987); Margo Wilson & Martin Daly, *Till Death Us Do Part*, in FEMICIDE: THE POLITICS OF WOMEN KILLING 83, 90 (Jill Radford & Diana E. H. Russell eds., 1992) [hereinafter FEMICIDE]. An Australian study determined that there was a strong association between estrangement and wife murder: 98 of 217 women (45%) killed by their husbands had been separated or in the process of separating from them at the time of their deaths. In a study of male and female spousal killers, 56.5% of the male offenders (as opposed to 9.1% of the female offenders) had been separated on the day of the crime. See George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 271, 275 (1982). See also Davis & Kraham, *supra* note 22, at 1147. An Arkansas study conducted between 1985 and 1991 “shows that 88 percent of battered women who were homicide victims . . . were murdered during or after separation from their abuser.” Fahnestock, *supra* note 16, at 15. Another study revealed that half of the homicides of female partners and spouses were committed after the women separated from their batterers. See NATIONAL CLEARINGHOUSE, *supra* note 15, at 3.

27. See Campbell, *supra* note 19, at 98; Fahnestock, *supra* note 16, at 11; Hart, *supra* note 22, at 324.

28. See BROWNE, *supra* note 26, at 144 (referencing the Barnard Study).

29. *Id.* A 1972 Detroit study showed that 17 out of 18 male domestic murderers “simply [could] not abide being deserted.” Wilson & Daly, *supra* note 26, at 90.

30. See NATIONAL CENTER FOR EDUCATION IN MATERNAL AND CHILD HEALTH, FIREARM FACTS, WOMEN AND GUNS (Laurie Duker ed., 1994). A study of homicides in Dayton, Ohio from 1975-1979 revealed that approximately two thirds of all women murdered by their husband, boyfriend, or estranged husband had previously been battered. See Jacqueline Campbell, “*If I Can’t Have You, No One Can*”: *Power and Control in Homicide of Female Partners*, in FEMICIDE, *supra* note 26, at 99, 102.

31. See Davis & Kraham, *supra* note 22, at 1146.

32. See *id.*

33. See *id.*

34. See *id.* at 1148.

35. See *id.* at 1146.

to other communities.<sup>36</sup> Victims frequently do not have access to cash, checking accounts or charge cards because batterers commonly isolate their partners from financial resources.<sup>37</sup> Victims often escape with no time to pack, leaving behind personal items as well as items of economic value.<sup>38</sup>

The concept that battering happens more frequently and with greater intensity after separation from a batterer is expressed in the term "separation assault."<sup>39</sup> The phrase was first coined by Martha Mahoney, a feminist who has written extensively about domestic violence.<sup>40</sup> Mahoney proposes that "separation assault" be used to refer to an "attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return."<sup>41</sup> Assaults are more likely to occur when she leaves the relationship than at any other time.<sup>42</sup> Additionally, once she has left the relationship, her chances of being assaulted are greater during the first few months of separation.<sup>43</sup> "Separation" does not just include physical separation from the batterer; it may also be defined as the decision to separate.<sup>44</sup> Since the victim will probably still be living in the mutual home when she decides to leave, the decision itself may precipitate an attack.<sup>45</sup> Usually, the woman's first few attempts to separate are merely efforts to improve the relationship rather than end it.<sup>46</sup>

Although experts have developed explanations as to why battered women act as they do and why their behavior may be rational under conditions of oppression,<sup>47</sup> the general public, the courts, and the press frequently explain

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36. *See id.* at 1149.

37. *See id.* at 1150. According to one study, "27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car." *Id.* at 1150-51. According to domestic violence experts, a woman who is economically dependent on her batterer is more likely to be at risk for serious injury. *See id.* at 1151.

38. *See id.* at 1150.

39. Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991).

40. *See id.*

41. *Id.* at 65. Mahoney also describes separation assault as "overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship . . . [i]t is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time." *Id.* at 65-66.

42. *See supra* notes 20-25 and accompanying text.

43. *See* Davis & Kraham, *supra* note 22, at 1147. In 1992-1993, "the victimization rate of women separated from their husbands was about 3 times higher than that of divorced women and about 25 times higher than that of married women." RONET BACHMAN & LINDA E. SALTZMAN, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN, ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995).

44. *See* Mahoney, *supra* note 39, at 65.

45. *See id.*

46. *See id.* at 61.

47. *See id.* at 4. Domestic violence victims identify with their oppressors in the same way that hostages identify with their aggressors. *See* OLA W. BARNETT & ALYCE D. LA VIOLETTE, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 83 (1993). "The Stockholm Syndrome" is frequently

the phenomenon of battering in simpler terms: these victims are too helpless and dysfunctional to pursue any reasonable course of action.<sup>48</sup> Instead of examining the batterer's behavior and holding him accountable for his violence, the focus becomes the victim's failure to leave the abusive situation.<sup>49</sup> Although the batterer's quest for control may become most acutely violent and potentially lethal at the moment of separation or attempted separation,<sup>50</sup> the public tends to conclude that the victim must be irrational or weak because she continues to submit to the abuse.<sup>51</sup>

Although societal and legal structures such as the granting of protective orders and the proliferation of shelters demonstrate the dangers accompanying separation, the woman's "failure" to leave mystifies society in general.<sup>52</sup> Societal denial of widespread battering continues to protect the institution of marriage, concealing both the commonality of violence within that partnership and the ways in which society participates in the subordination of women.<sup>53</sup> Denial of this oppression has had a profound impact on the development of explaining women's behavior and experience so that it can fit within the masculine conceptual structure of the law.<sup>54</sup>

Meaningful legal change requires reevaluating the relationship between our cultural beliefs and our legal practices within the context of domestic violence.<sup>55</sup> Separation assault should not justify or excuse a woman's failure to leave, but rather should encourage reformation of legal constructs and societal attitudes which now place the burden of leaving on the woman.<sup>56</sup>

Because of the way statutes pertaining to domestic violence have been designed, the burden of obtaining protection has been placed wholly on the

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cited as an example. *See id.* In 1974, during a bank robbery in Stockholm, three tellers were held hostage for 10 days. *See id.* At first, the robbers threatened them, held them at gunpoint, denied them food and use of the bathroom. *See id.* After a period of time however, "normalcy" evolved and the hostages and kidnappers began to converse with each other. *See id.* After the hostages were released, two of the three tellers testified in defense of their captors. *See id.* One of the tellers married one of the men after he was released from prison. *See id.*

48. *See Mahoney, supra* note 39, at 4.

49. *See id.* at 5-6.

50. *See id.* A 1991 Study by the Department of Justice revealed that 79% of spousal abuse was committed by divorced or separated men, with the remaining 21% being committed by husbands. *See id.*

51. *See id.* at 3, 18.

52. *See id.* at 6.

53. *See id.* at 10-12. "Some scholars estimate that as many as 50 percent or more of all women will be battering victims at some point in their lives." *Id.* at 10-11. The most conservative figures show that women are abused in 12% of all marriages. *See id.* at 10. Estimating the number of victims is difficult in part because of the likelihood of under-reporting. *See id.* at 11. Many women perceive the battering incident as a private, personal matter and this is the most common reason given for under-reporting. *See Bureau of Justice Statistics, supra* note 14, at 5.

54. *See Mahoney, supra* note 39, at 13.

55. *See id.* at 7.

56. *See id.*

victim.<sup>57</sup> In defining most crimes, including domestic violence, our legal system utilizes an incident-based, rather than a control-based definition.<sup>58</sup> Because an incident-based definition uses a short time frame, examining only the immediate act of violence, the abuser's previous efforts to control the victim and her previous attempts to separate tend to be concealed.<sup>59</sup> Statutory law shields and protects the abuser's recidivism. He is held accountable for only one act when there may have been many violent episodes.<sup>60</sup> One woman described her attempt to make the violence stop:

[One day, when he seemed receptive, I told him it had to stop.] He wouldn't listen. *I said I couldn't live like that anymore and would leave if he didn't stop. He kept saying I couldn't leave because we didn't have enough money to support two households. I said that only his failure to listen could make me leave—I couldn't live like that anymore . . .*

Suddenly he lost his temper . . . He stormed upstairs and I heard him pushing around in the closet. I thought, "That's funny. It sounds like he's getting the gun." And I didn't sit down or move—I stood in the middle of the living room floor and waited. He came down the stairs shouting and I saw that he really did have the shotgun. I knew it was fully loaded. I remember making the conscious decision that this was different than waiting through other outbursts, and that any argument would be deadly.

I turned around and ran out the front door screaming that I was pregnant and ran up the landlady's front steps. I was going to call the police. But I realized that I had heard the baby crying upstairs. All the noise had wakened her from her nap. I couldn't believe he would shoot his child, but I didn't know why he'd gotten the gun, how well he actually knew what he was doing . . . how irritating her crying might be. I turned around and went back into the house. I could hear him putting the gun away in the closet. We got to the baby at the same moment.

I dressed her, put on my own clothes, and left. I had \$1.60 and no more money coming for several days. I took the better car. I drove away without knowing where I was going to go.<sup>61</sup>

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57. See *infra* Parts II.C & III.

58. See Mahoney, *supra* note 39, at 71-93.

59. See *id.* at 79.

60. See *id.*

61. *Id.* at 66 (emphasis in original).

A woman might make several unsuccessful attempts to leave the mutual household.<sup>62</sup> But if her husband murders her before she can successfully separate from him, the history of his abusive behavior might be lost in discussions of that murder.<sup>63</sup> For example, the United States Supreme Court never addressed the issue of domestic violence in the case of *Godfrey v. Georgia*.<sup>64</sup> The only issue before the Court in *Godfrey* was whether the murder was “outrageously or wantonly vile, horrible or inhuman,”<sup>65</sup> which would have made the husband eligible for the death penalty.<sup>66</sup> The facts of the case, as stated in the opinion, were these:

On a day in early September in 1977, the petitioner and his wife of 28 years had a heated argument in their home. During the course of this altercation, the petitioner, who had consumed several cans of beer, threatened his wife with a knife and damaged some of her clothing. At this point, the petitioner’s wife declared that she was going to leave him, and departed to stay with relatives [this was not the first time that he and his wife had been separated as a result of his violent behavior]. That afternoon she went to a Justice of the Peace and secured a warrant charging the petitioner with aggravated assault. A few days later, while still living away from home, she filed suit for divorce [a court hearing date was set and several efforts to persuade the wife to return home were rebuffed] . . . [a]t some point during this period, his wife moved in with her mother . . . [Several angry phone calls were exchanged, and she refused to reconcile]. At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.<sup>67</sup>

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62. See *id.* at 61-63.

63. See *id.* at 72. See generally *State v. Wood*, 391 N.E.2d 206 (Ill. App. Ct. 1979) (holding that threats defendant made to former wife seven months before her death were admissible).

64. See *Godfrey v. Georgia*, 446 U.S. 420 (1980).

65. *Id.* at 422.

66. See *Mahoney*, *supra* note 39, at 72; *Godfrey*, 446 U.S. at 422.

67. *Godfrey*, 446 U.S. at 424-25.

Without examining the Godfreys' twenty-eight year relationship as a whole, the Court concluded that the husband did not fit the death eligible criteria based on the one lethal incident and further stated that the husband had committed a rather "ordinary murder."<sup>68</sup> The dissent focused on the gruesome aftermath of a shotgun murder at close range in an effort to demonstrate that the incident was indeed "vile," "inhuman," and "horrible," and that the mother-in-law must have felt "torture" in her last "sentient moments."<sup>69</sup> Because the Court discussed only the part and not the whole, there was no discussion of the fact that the husband had likely treated his wife inhumanely and horribly for twenty-eight years.

While many victims must contend with the obstacles involved in separating from an abusive relationship, many victims in Vermont may be forced to overcome additional challenges that rarely present themselves to women in more populated states. Women in rural areas face obstacles such as lack of anonymity, community disbelief, isolation, traditional attitudes, and fewer services.<sup>70</sup> Perhaps the most significant barrier that Vermont women face is a lack of anonymity.<sup>71</sup> Victims are frequently too humiliated to seek protection because everyone knows everyone else in a small community.<sup>72</sup> Victims may know the court workers whom they ask for assistance.<sup>73</sup> Abusive husbands or boyfriends are often known in the community as "nice guys" or charming individuals who could not possibly be batterers.<sup>74</sup> Through her accusations, the victim runs the risk that she will be perceived as the one doing the assaulting.<sup>75</sup>

Batterers often isolate their families by choosing homes where their victims will have difficulty associating with others.<sup>76</sup> They live on back roads, sometimes without telephones or access to a vehicle.<sup>77</sup> If a victim obtains a

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68. Mahoney, *supra* note 39, at 73. "The Supreme Court essentially found Mrs. Godfrey's death to be quite an ordinary murder. I believe the majority was correct—this was an ordinary murder—but the facts were even more ordinary than the majority realized." *Id.* at 72-73.

69. *Godfrey*, 446 U.S. at 450-51 (White, J., dissenting).

70. See Fahnestock, *supra* note 16, at 12-13. Kathryn Fahnestock's article is based on a study conducted by the Rural Justice Center located in Montpelier, Vermont. *See id.* at 16. The results were based on multiple data sources that included surveys mailed to court administrative offices, telephone surveys of court clerks, and site visits. *See id.* Data regarding *ex parte* restraining order requests was gathered from 805 rural counties. *See id.*

71. *See id.* at 12.

72. *See id.*

73. *See id.*

74. *See id.* at 13.

75. *See id.*

76. *See id.*

77. *See id.*

protection order and decides to return home, she will be virtually unprotected if her abuser decides to violate the order.<sup>78</sup>

Rural victims are also confronted with “traditional attitudes” in terms of gender roles and the shame associated with seeking help for “family problems.”<sup>79</sup> Many rural judges believe that men have more of a right to a house than the woman does, even when the property is jointly owned.<sup>80</sup>

Impoverished victims have even fewer options. Seventeen percent of rural Vermont households live at or below the poverty level.<sup>81</sup> Female headed households experience poverty at a rate of 45%, a statistic which may discourage women from even attempting to leave their relationships.<sup>82</sup> They have few job opportunities—often a job at McDonald’s or some other minimum wage job is their only option.<sup>83</sup> In short, financial pressures often force these women to stay in abusive relationships.<sup>84</sup> Statistics show that as the poverty level increases, the temporary (*ex parte*) restraining order request rate decreases.<sup>85</sup> Impoverished women requesting restraining orders must also contend with a lack of transportation, child care arrangements, alternate housing, and money for the victim to feed herself and her children.<sup>86</sup>

Additionally, fewer services exist in poorer counties.<sup>87</sup> The poorer a county is, the more likely a battered women’s shelter will be further away from those who need it.<sup>88</sup> Funding for shelters is based on “numbers served” which by definition favors urban or near urban areas.<sup>89</sup>

The Rural Justice Center found that rural court workers often use practices that actively discourage women from filing for *ex parte* orders.<sup>90</sup> Two of the most reported were a failure to inform women that restraining orders were an option and a failure to inform them that they could waive the filing fees.<sup>91</sup> When asked for help, only 44% of rural county court workers responded that they would advise victims to seek a restraining order.<sup>92</sup> Thirty-three percent responded that they would send her to the local prosecutor, while

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78. *See id.*

79. *Id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *Id.*

90. *See id.*

91. *See id.*

92. *See id.*

22% stated they would advise her to consult an attorney.<sup>93</sup> One clerk responded to the survey by stating, "I'd tell her I can't help."<sup>94</sup>

Lastly, while hunting weapons are commonplace in rural Vermont homes, an individual purchasing a rifle or shotgun from a gun dealer is not required to undergo a weapons check.<sup>95</sup> If a shotgun has been used in a homicide, it is likely that the victim was a wife or girlfriend.<sup>96</sup>

Victim safety can only be assured through strong legal and community protections.<sup>97</sup> If Vermont legislators deem that laws encouraging victims to separate from their abusers constitute good public policy, then they, the courts, law enforcement officials, scholars, and advocates must do their part in aiding the victim, because frequently she risks her life when she attempts to separate on her own.<sup>98</sup>

### *B. Why Seize Firearms from Dangerous Abusers?: The Statistics*

Firearm use in domestic violence incidents is becoming less and less unusual. In 1992, 62% of all murder victims killed by their partners or ex-partners were shot to death.<sup>99</sup> Handguns were used in three-quarters of these deadly firearm encounters.<sup>100</sup> It is important to note that while these statistics include both female and male victims, the two genders commit spousal murders for very different reasons.<sup>101</sup> Women primarily kill their partners in self defense or in retribution for prior acts of violence, while men commonly kill in response to the woman's attempt to leave the abusive relationship.<sup>102</sup> More than twice as many women are shot by their husbands or partners than are shot by strangers.<sup>103</sup>

When a batterer possesses weapons he has used or has threatened to use, his access to them increases his potential to kill as well as the likelihood that

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93. *See id.*

94. *Id.*

95. *See Telephone Interview with Captain David Rich, Hartford Police Department, in Montpelier, Vt. (Sept. 11, 1998).*

96. *See BUREAU OF JUSTICE STATISTICS, supra* note 14, at 4.

97. *See generally* Mahoney, *supra* note 39.

98. *See supra* Part II.A.

99. *See BUREAU OF JUSTICE STATISTICS, supra* note 14, at 4. Survey findings in one study indicate that at least 190,000 American men threaten their wives and partners with either a knife or a gun at a rate of four or five times a year. *See LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS* 130 (1986) (referencing a study done by Murray A. Straus). The survey results also implied that at least 144,000 males shoot or stab at their female partners at an average of over five times a year. *See id.*

100. *See BUREAU OF JUSTICE STATISTICS, supra* note 14, at 4.

101. *See Arthur L. Kellerman & James A. Mercy, Men, Women and Murder: Gender Specific Differences in Rates of Fatal Violence and Victimization, J. TRAUMA, July 1992, at 1, 3-4.*

102. *See id.*

103. *See id.*

he will.<sup>104</sup> Abusers frequently use weapons such as firearms when victims decide to leave the violent relationship.<sup>105</sup> Most domestic violence-related murders are committed with firearms.<sup>106</sup> Firearm assaults are twelve times more likely to result in death than non-firearm assaults, three times more likely to result in death than assaults involving knives, and twenty-three times more likely to result in death than assaults involving non-firearm weapons or bodily force.<sup>107</sup>

The majority of homicides within the home occur during arguments or altercations.<sup>108</sup> In cases of assault, people tend to reach for the most lethal weapon readily available.<sup>109</sup> In a large number of cases where assaults are committed with guns or knives, fatality seems to be an almost accidental outcome.<sup>110</sup> Therefore, easy access to firearms may be particularly dangerous in households prone to domestic violence since there is a greater chance of fatality with firearms than with other types of weapons.<sup>111</sup> If access to firearms were reduced, some domestic violence homicides would be prevented because abusers would be forced to substitute less lethal weapons.<sup>112</sup>

Most handgun owners cite protection from crime as the single most important reason for keeping a gun in the home.<sup>113</sup> This practice, however, may be counterproductive.<sup>114</sup> Although forced entry followed by homicide is the most serious of household crimes, it occurs far less frequently than other

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104. See Hart, *supra* note 19, at 103. Experts have identified various risk factors to assess the potential for lethality in a violent relationship. See Campbell, *supra* note 19, at 111. These predictors include access to or ownership of guns, use of a weapon in prior abusive incidents, threats with weapons, threats to kill, and serious injury in prior abusive incidents. See *id.*; see also DANIEL JAY SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 80 (1985) (listing the following indicators in assessing lethality in a violent relationship: weapons in the home, use of weapons in prior incidents, threats to kill, threats with weapons). The greatest threat to a woman comes from the people and guns within her home. See NATIONAL CENTER FOR EDUCATION IN MATERNAL AND CHILD HEALTH, *supra* note 30.

105. See OKUN, *supra* note 99, at 43. One researcher found a strong correlation between estrangement and violence involving weapons in a shelter sample. See *id.* at 210. While 40% of the women in estranged relationships had been threatened and/or assaulted with a gun or knife, only slightly less than 16% of women in active relationships had been similarly abused. See *id.*

106. See BUREAU OF JUSTICE STATISTICS, *supra* note 14, at 4.

107. See L. E. Saltzman et al., *Weapon Involvement and Injury, Outcomes in Family and Intimate Assaults*, 262 JAMA 3043, 3044 (1992).

108. See Arthur L. Kellerman & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1559 (1986).

109. See *id.*

110. See Franklin E. Zimring, *Firearms, Violence and Public Policy*, SCI. AM., Nov. 1991, at 48-49.

111. See Kellerman & Reay, *supra* note 108, at 1559.

112. See Saltzman et al., *supra* note 107, at 3045.

113. See Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1084 (1993).

114. See *id.* at 1087.

types of household crime.<sup>115</sup> The mere presence of a gun in the home, however, increases the risk of homicide among family members and other intimates.<sup>116</sup>

Even if weapons were seized from abusers before conviction, abusers might still be able to purchase weapons illegally or to gain access to another individual's weapon. No statistics are available on how many domestic violence murders have been committed with illegal firearms. Arguably, if an abuser has a criminal history, he may be more inclined to obtain weapons illegally. In fact, half of the defendants who kill their spouses have criminal histories.<sup>117</sup> Additionally, although an individual is currently subject to a Brady weapons check when he purchases a handgun from a dealer, if two individuals enter a private transaction, Vermont, like all states, will have no record that the transaction occurred.<sup>118</sup>

Because domestic violence firearm attacks are three times more likely to be fatal than attacks with knives,<sup>119</sup> and because studies show that violence in the home is independently associated with firearm assaults,<sup>120</sup> legislation prohibiting dangerous and abusive individuals from possessing firearms is justified. A provision prohibiting dangerous abusers from owning firearms would not be infallible, but it would be a step in the right direction.

### *C. The Federal Response: The Violence Against Women Act and the Domestic Violence Gun Ban*

The Violence Against Women Act provides that individuals subject to restraining orders are prohibited from possessing firearms.<sup>121</sup> In other words,

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115. See *id.* at 1090. "We did not find evidence of a protective effect of keeping a gun in the home, even in the small subgroup of cases that involved forced entry." *Id.*

116. See *id.* at 1087.

117. See BUREAU OF JUSTICE STATISTICS, *supra* note 14, at 5. Men are more likely to have a previous arrest record than women. See BROWNE, *supra* note 26, at 143; see also Klein, *supra* note 7, at 204 (stating that, in general, men brought to court for restraining orders have criminal records). Additionally, a strong association exists between household members who have arrest records and a risk of homicide in the home. See Kellerman et al., *supra* note 113, at 1087.

118. See Telephone Interview, *supra* note 95.

119. See Saltzman et al., *supra* note 107, at 3044.

120. See Kellerman et al., *supra* note 113, at 1087.

121. See 18 U.S.C. § 922(g)(8) (1994 & Supp. II 1996). The provision states:

It shall be unlawful for any person— . . .

(8) who is subject to a court order that—

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

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

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

VAWA makes it illegal for a person to possess a firearm while subject to any court order restraining him from harassing, stalking, or threatening an intimate partner.<sup>122</sup> The order must have been issued after an evidentiary hearing at which the defendant had notice and opportunity to appear.<sup>123</sup> The final orders obtained civilly and granted by the family courts in Vermont would constitute such court orders.

The Domestic Violence Offender Gun Ban, passed as an amendment to the Omnibus Appropriations Bill of 1997, provides additional protection to victims by prohibiting any person convicted of a misdemeanor domestic violence offense from purchasing or possessing a firearm.<sup>124</sup> The law is retroactive and applies to convictions both before and after the law's effective date—September 30, 1996.<sup>125</sup> In other words, if an individual has ever been convicted under Vermont law of misdemeanor crimes such as simple assault, domestic assault, or violation of an abuse protection order,<sup>126</sup> he may be disqualified from possessing a weapon under this provision.

These federal laws, however, do not authorize the removal and retention of weapons in every dangerous domestic violence situation. For example, due to limited resources, it would be rare that the Vermont U.S. Attorney's Office would enforce the 18 U.S.C. § 922(g)(8) provision prohibiting individuals subject to restraining orders from possessing firearms.<sup>127</sup> If a family court

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

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.

*Id.*

122. See 18 U.S.C. § 922(g)(8)(B) (1994).

123. See *id.* § 922(g)(8)(A).

124. See 18 U.S.C. § 922(g)(9) (Supp. II. 1996). The Domestic Violence Offender Gun Ban states: It 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 commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g) (1994 & Supp. II 1996). 18 U.S.C. § 921 defines a misdemeanor crime of domestic violence as an offense that "(i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse . . ." 18 U.S.C. § 921 (1994 & Supp. II 1996).

125. See JOHN W. MAGAW, U.S. DEPT' OF THE TREASURY, OPEN LETTER FROM THE DIRECTOR (1996). See also GET THE FACTS, *supra* note 3. The law has been defended on the basis that it merely sets conditions for possessing a firearm, rather than applying punishment *ex post facto*. See *id.*

126. See VT. STAT. ANN. tit. 13, §§ 1023 (1974 & Supp. 1998) (simple assault provisions), 1030 (Supp. 1998) (violation of abuse prevention order provisions), 1042 (Supp. 1998) (domestic assault provisions).

127. See Charles Tetzlaff, *Domestic Violence and Guns, in DOMESTIC VIOLENCE FURTHERING*

judge specifically includes a prohibition against possessing firearms in a final order, the victim will be entitled to state protection.<sup>128</sup> Advocates should educate the victim so that she may ask the judge to write such protection into the order. Neither VAWA nor Vermont state law prohibits abusers from possessing guns when civil restraining orders against them have expired or when complaints have been dropped by the victim prior to a final hearing.<sup>129</sup> Vermont's statute does not include a standard time period for restraining orders; the court has discretion.<sup>130</sup>

### III. THE VERMONT PROVISION ON WEAPONS SEIZURE

In Vermont, as in most states, and as specified under VAWA and the Domestic Violence Offender Gun Ban, persons convicted of misdemeanor domestic violence and subject to a restraining order are prohibited from purchasing or possessing a firearm.<sup>131</sup> The Vermont Abuse Prevention Act provides the following definition of abuse in the context of domestic violence: "'Abuse' means the occurrence of one or more of the following acts between family or household members: (A) attempting to cause or causing physical harm; (B) placing another in fear of imminent serious physical harm; (C) abuse to children as defined in subchapter 2 of chapter 49 of Title 33."<sup>132</sup> Vermont courts have interpreted section 1103(c) to allow the seizure of weapons under an *ex parte* order issued by Family Court. The section states: "If the court finds that the defendant has abused the plaintiff and that there is a danger of further abuse, *the court shall make such orders as it deems*

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VERMONT'S VISION 14 (1997) (conference materials on file with Vermont U.S. Attorney's Office, Burlington) [hereinafter *Domestic Violence and Guns*].

128. *See id.*

129. *See* 18 U.S.C. § 922(g)(8); 15 VT. STAT. ANN. tit. 15, §§ 1101-1115 (1989).

130. *See* VT. STAT. ANN. tit. 15, § 1103(d) (Supp. 1998). However, it is the author's experience as a victim advocate in a family court in Chelsea, Vermont that in practice, Vermont courts utilize a one year time limit. In fact, the majority of states do utilize and specifically state the one year time limit. *See* LEHRMAN, *supra* note 5, at 4A app. 45-105.

131. *See* 18 U.S.C. § 922(g)(9) (1996). *See also* DONNA F. EDWARDS, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, THE GUN BAN SAVES LIVES—IT'S TIME TO STEP UP ENFORCEMENT 1-2 (1997) [hereinafter GUN BAN SAVES LIVES].

132. VT. STAT. ANN. tit. 15, § 1101 (1989 & Supp. 1998). For the purposes of this Note, only parts (1)(A) and (1)(B) of section 1101 will be discussed. Child abuse (part (1)(C)) is beyond the scope of this Note. Section 1101(2) defines "household members" as persons who, for any period of time, are living or have lived together or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship, or minors who are dating or who have dated. *See* VT. STAT. ANN. tit. 15, § 1101(2) (Supp. 1998). The federal Gun Ban uses a narrower definition, limiting protection to those acts "committed by a current or former spouse . . . by a person who is cohabiting with or has cohabited with the victim as a spouse . . ." 18 U.S.C. § 921(a)(33)(A)(ii) (Supp. II 1996).

*necessary to protect the plaintiff, the children or both, which may include the following [protection options].*<sup>133</sup>

The protection options expressly included in the statute address such alternatives as: restricting the defendant's ability to contact the plaintiff or the children in person; fixing a distance between the defendant and plaintiff that the defendant may not violate; requiring the defendant to vacate the household; and awarding temporary parental rights and providing conditions for child visitation and monetary support.<sup>134</sup> Although weapons may be seized *ex parte* in order to "protect the plaintiff,"<sup>135</sup> they cannot be held by the State unless the defendant is convicted of a crime or unless a temporary or final restraining order is in force against the defendant.<sup>136</sup> In the case of a restraining order, when the order expires the weapons must be returned to the owner.<sup>137</sup>

Because Vermont does not provide a mechanism for the State to request a permanent forfeiture hearing, once civil orders have expired, guns are returned to known abusers.<sup>138</sup> Additionally, although convicted abusers are prohibited from possessing weapons under VAWA, officials unofficially suggest that given the lack of federal enforcement resources, convicted abusers may be able to regain possession of their weapons or obtain new ones.<sup>139</sup>

The weapon of choice in the majority of Vermont's domestic violence murders was a firearm.<sup>140</sup> During the seven years between January 1, 1990 and December 31, 1996, police believe 109 murders took place in Vermont.<sup>141</sup> Sixty-two of the 109 murders occurred during the commission of a domestic

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133. VT. STAT. ANN. tit. 15, § 1103(c) (Supp. 1998) (emphasis added).

134. See VT. STAT. ANN. tit. 15, § 1103(a), (c) (1989 & Supp. 1998).

135. *Id.* §1103(b).

136. See 18 U.S.C. § 922(g)(8), (g)(9) (1994 & Supp. II 1996). State law also applies in the case of a restraining order in effect, if such provisions have been written into the order. See *supra* notes 122, 123 and accompanying text; see also Panel Discussion including law enforcement officials, U.S. Attorneys, domestic violence advocates and victims, Domestic Violence Conference in Killington, Vermont, June 4, 1997 [hereinafter Panel Discussion].

137. See VT. STAT. ANN. tit. 13, § 5311 (Supp. 1998).

A law enforcement agency holding property of any individual shall take reasonable care of the property. Upon authorization of the prosecutor, the law enforcement agency holding the property, unless it is contraband or subject to forfeiture, shall promptly notify the individual that the property is no longer needed for evidentiary purposes and may be picked up by the individual.

*Id.* This reference to seizure of weapons appears in the Criminal portion of the Vermont Statutes Annotated. See *id.*

138. See VT. STAT. ANN. tit. 15, § 1103(c) (Supp. 1998).

139. See *Domestic Violence and Guns*, *supra* note 127, at 14; see also Panel Discussion, *supra* note 136.

140. See *Domestic Violence and Guns*, *supra* note 127, at 21.

141. See *id.*

violence incident.<sup>142</sup> Of those sixty-two murders, thirty-six people (56%) died from gunshot wounds.<sup>143</sup> The breakdown of Vermont's domestic violence gun-related homicides by gender and motivation for 1990-1996 is shown in Appendix I.

After discounting non-intimate relationships from the data,<sup>144</sup> the Appendix shows that all ten of the male homicides (100%) occurred because a man was jealous of his girlfriend's or ex-wife's new lover or imagined lover or because a woman had rejected his romantic advances.<sup>145</sup> Sixty-two percent of the male on female homicides (eight of thirteen) involved either jealousy, estrangement or retaliation.<sup>146</sup> Although the statistics do not specifically state that abuse occurred in four of the thirteen cases of male on female homicide (i.e., no restraining orders had been filed),<sup>147</sup> this can probably be assumed. At least five of the six female on male homicides involved protection from an on-going abusive situation.<sup>148</sup> No woman shot another woman in the context of domestic violence.<sup>149</sup> In the one instance where a father killed his daughter, the murder was committed in retaliation toward the ex-wife who had won custody of the three-year-old girl.<sup>150</sup>

Despite these statistics, Vermont law enforcement officials and state and U.S. Attorneys are hesitant to seize and retain weapons under VAWA or under the state statute when effective restraining orders are involved.<sup>151</sup> Vermont police stations are not equipped to store weapons and officials fear that they may face lawsuits concerning damage to property if and when the weapons are returned to their owners.<sup>152</sup> Vermont is not alone in its storage concerns. Police departments across the country are concerned about a lack of storage space and an inability to store weapons properly so they do not become damaged.<sup>153</sup> In an effort to alleviate that concern in Massachusetts, a proposed bill would give police chiefs the option of storing weapons in warehouses run by licensed firearms dealers, rather than storing them at police stations.<sup>154</sup>

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142. *See id.*

143. *See id.*

144. Two of the domestic violence homicides involved an argument between brothers, two involved sons shooting parents, one involved the unsolved murder of a female and one involved an individual with a brain disorder shooting his stepdaughter. These incidents were not included in Appendix I.

145. *See Domestic Violence and Guns, supra* note 127, at 21-24.

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See Panel Discussion, supra* note 136.

152. *See id.*

153. *See Cynthia Koury, Seized Guns Pose Storage Nightmare, TELEGRAM & GAZETTE (Worcester), June 10, 1997, at A1.*

154. *See id.* State Representative David H. Tuttle, R-Barre, is sponsoring the Bill.

Under this bill, licensed firearms dealers may offer the storage service to the gun owner, who would then be responsible for the storage costs.<sup>155</sup> The warehouses would individually box, label and store the weapons which would alleviate some of the administrative headaches police departments now experience with gun storage.<sup>156</sup>

While the responsibility for the storage and disposition of weapons lies with the public safety officer in Vermont,<sup>157</sup> in New Jersey county prosecutors have been given this responsibility.<sup>158</sup> In one New Jersey case, the court observed that delivering confiscated weapons to the county prosecutor was not a legislative accident.<sup>159</sup> The court stated that the prosecutor, as the chief law enforcement official in the county, was best-suited to assure even-handed approaches as to the disposition of seized weapons.<sup>160</sup> Public safety officers may be more concerned with storage space and that might have some bearing on policy as to whether weapons are held for an extended period of time.

Vermont can better handle weapons belonging to convicted abusers than those belonging to abusers subject to a civil restraining order. A restraining order will expire within a stated amount of time,<sup>161</sup> whereas convicted abusers are no longer legally entitled to possess weapons.<sup>162</sup> "Unlawful firearms" may be disposed of under Vermont's criminal statute.<sup>163</sup> The statute provides that the commissioner of public safety may deliver unlawful firearms to the state treasurer who then may sell them.<sup>164</sup> Weapons belonging to convicted abusers can thus presently be disposed of under the terms of this section.

Those opposing gun forfeiture in general may advance the argument that abusers might still have access to friends' weapons or could purchase a weapon illegally. While these assertions may hold true, the law could be

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155. *See id.*

156. *See id.*

157. *See VT. STAT. ANN. tit. 20, § 2305 (1987).*

158. *See State v. Saavedra*, 647 A.2d 1348, 1350 (N.J. Super. Ct. App. Div. 1994).

159. *See id.*

160. *See id.*

161. *See VT. STAT. ANN. tit. 15, § 1103 (Supp. 1998).*

162. *See 18 U.S.C. § 922(g)(9) (Supp. II 1996).* Although the U.S. Supreme Court held the Brady Bill's requirement for background checks by state chief law enforcement officers (CLEO's) was unconstitutional, *see Printz v. United States*, 117 S.Ct 2365, 2384 (1997), presently Vermont law enforcement officers voluntarily perform Brady background checks. *See Telephone Interview, supra* note 95.

163. *VT. STAT. ANN. tit. 20, § 2302 (1987).* This section describes the disposition of unlawful firearms. Unlawful firearm possession is defined as "the possession of [firearms] which constitute[ ] a violation of federal or state law and firearms carried or used in violation of any federal or state law . . . ." *Id.* The issue of disposition of unlawful firearms is specifically addressed in Section 2305(b) which states that "unlawful firearms will be delivered to the state treasurer as directed by him for disposition by public sale . . ." *Id.* § 2305 (emphasis added). This would apply to convicted abusers but not to those subject to *civil* restraining orders. *See id.*

164. *See id.* § 2305(c).

structured so that an abuser who attempts to circumvent the possession law, as well as individuals who assist him, would face serious criminal repercussions. Under VAWA and the federal Gun Ban, for example, section 922(d)(8) prohibits the transfer of firearms to persons subject to protection orders and section 922(d)(9) prohibits the transfer of firearms to individuals convicted of a misdemeanor crime of domestic violence.<sup>165</sup> A Vermont provision could be structured to prohibit individuals from transferring weapons to abusers found to be a threat to society or their victims.

By allowing stricter gun control measures, Vermont may better enable victims to leave their abusers with less risk of lethal violence. Such measures may not have an immediate, visible effect in terms of victims leaving their abusers, but they will serve as a step in the right direction. Some victims will be able to successfully separate from their husbands and partners because they will no longer fear that their lives will be ended with a single gunshot.

#### IV. NEW JERSEY'S FORFEITURE PROVISION

New Jersey has taken unprecedented steps to protect victims of domestic violence.<sup>166</sup> The state has the toughest domestic violence law in the country.<sup>167</sup> The enactment of the Prevention of Domestic Violence Act of 1991<sup>168</sup> was a strong response to a problem thought to require a more expeditious response by all levels of law enforcement and the court system.<sup>169</sup> In a statement of legislative findings incorporated into the Act itself, the New Jersey Legislature made the purpose of the Act clear:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not

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165. See 18 U.S.C. § 922(d)(8), (d)(9) (Supp. II 1996).

166. Arizona recently enacted similar tough gun control measures in that prosecutors may file a notice of an intent to retain a weapon for as long as six months. See ARIZ. REV. STAT. §13-3601(A) (1996); VanHorn, *supra* note 9. See also Rhonda Bodfield, *Law Lets Police Take Weapons in Abuse Cases*, THE TUCSON CITIZEN, July 31, 1996, at A1. The gun need not be used during the commission of a crime. See *id.* If the owner of the gun objects, a court hearing is held within 10 days to determine whether the gun should be released. See *id.*

167. See Van Horn, *supra* note 9.

168. N.J. STAT. ANN. § 2C:25-17 (West 1991).

169. See State v. Saavedra, 647 A.2d 1348, 1349 (N.J. Super. Ct. App. Div. 1994).

themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is, therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.<sup>170</sup>

Among other tough domestic violence provisions included in the Act, police are authorized to seize weapons from a domestic violence incident with immunity from civil lawsuits.<sup>171</sup> A New Jersey statute authorizes law enforcement officers to seize weapons from the premises during a domestic violence incident if an officer reasonably believes that the weapon would expose the victim to a risk of serious bodily injury.<sup>172</sup> Upon confiscating weapons, Section 2C:25-21d(2) specifies that the law enforcement officer shall deliver them to the county prosecutor and shall append an inventory of the seized weapons to the domestic violence report.<sup>173</sup> Section 2C:25-21d(3) describes in detail the duties of the county prosecutor as they relate to the weapons seizure:

Weapons seized in accordance with the above shall be returned to the owner except upon order of the Superior Court. The prosecutor who has possession of the seized weapons *may*, upon notice to the owner, petition a judge of the Family Part of the Superior Court, Chancery Division, within 45 days of seizure, to obtain title to the seized weapons, or to revoke any and all permits, licenses and other authorizations for the use, possession, or ownership . . . or *may* object to the return of the weapons . . . on the grounds that the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular.<sup>174</sup>

In other words, if the prosecutor files a petition with the Family Part of the Superior Court, Chancery Division, within 45 days of the seizure, the owner is then notified and a hearing is held to determine whether the owner is “unfit” or whether he poses a threat to the public or his victim.

The progressive stance has been challenged on the basis that the first paragraph (quoted above) conflicts with the fourth paragraph of the same provision, which states:

After the hearing the court *shall* order the return of the firearms, weapons and any authorization papers relating to the seized

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170. N.J. STAT. ANN. § 2C:25-18 (West 1991).

171. *See id.* § 2C:25-21(5).

172. *See id.* § 2C:25-21d(1)(b).

173. *See id.* § 2C:25-21d(2).

174. *Id.* § 2C:25-21d(3) (emphasis added).

weapons to the owner if the complaint has been dismissed at the request of the complainant *and* the prosecutor determines that there is insufficient probable cause to indict; *or* if the defendant is found not guilty of the charges; *or* if the court determines that the domestic violence situation no longer exists.<sup>175</sup>

The return of weapons appears to be mandatory when: (1) the complaint is dismissed and there is insufficient probable cause for an indictment; (2) when the defendant is found not guilty of the charges; or (3) if the court determines the domestic violence situation no longer exists.<sup>176</sup> At least one court has interpreted the provision so that the mandatory language of the fourth paragraph overrides the permissive language of the first paragraph.<sup>177</sup> In other words, if any of the three situations described above have occurred, the prosecutor would not be entitled to a forfeiture hearing where she could assert that the accused abuser is "unfit" or "poses a threat to the public in general or a person or persons in particular."<sup>178</sup>

Based on the New Jersey case law discussed in the following section, it appears that the most common situation of the three is one where a civil complaint has not been filed or has been dropped by the complainant and the prosecutor proceeds to file a request for a forfeiture hearing. These cases analyze whether the prosecutor has that right based on the conflicting paragraphs, and whether seizure and disposal of weapons by the State is justified in cases where the owner is "unfit" or poses a danger to others. None of the cases have addressed a situation where the defendant has been found not guilty of the charges. Although forfeiture of weapons appears to be rare, the trend of New Jersey case law has been that a victim's safety takes precedence over an accused abuser's rights if he poses a threat to the victim or to society in general.

#### *A. Forfeiture of Weapons Without a Finding of Abuse*

In *State v. Warrick*, the court used an incident-based, rather than a control-based definition of violence, ordering the weapons to be returned to the abuser.<sup>179</sup> In that case, Ellyn Warrick filed a domestic violence complaint against her husband.<sup>180</sup> She claimed that the defendant had punched her in the

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175. *Id.* (emphasis added).

176. *See id.*

177. *See State v. Warrick*, 661 A.2d 335, 340 (N.J. Super. Ct. Ch. Div. 1995).

178. N.J. STAT. ANN. § 2C:25-21(d)(3) (West 1991).

179. *See Warrick*, 661 A.2d at 336.

180. *See id.* at 336.

face, had thrown a hammer at her, and had threatened to kill her.<sup>181</sup> The municipal judge issued a restraining order which, among other things, ordered the seizure of a Remington shotgun and a 9-MM automatic pistol.<sup>182</sup> Ellyn Warrick dropped the complaint shortly thereafter and the judge dissolved the temporary restraining order.<sup>183</sup> The State then moved for forfeiture of the weapons, but the judge ordered that they be returned to the defendant because the State was "unable to present any evidence that any disability set forth in [the statute]"<sup>184</sup> applied to Willis Warrick.<sup>185</sup>

Approximately one year later, Ellyn Warrick filed a second domestic violence complaint against her husband.<sup>186</sup> In her complaint, she alleged that the defendant was "harassing [her] and making sexual advances at her . . . to the point that she has to push him off and away from her."<sup>187</sup> The court again ordered that the weapons be seized from the defendant.<sup>188</sup> One month later, Ellyn Warrick requested that this second restraining order also be dismissed and the court again dissolved the order.<sup>189</sup> After the complaint was dismissed two days later, the State again moved for forfeiture of the weapons.<sup>190</sup> A hearing was held several months later at which both Ellyn and Willis Warrick testified.<sup>191</sup>

The State argued that Willis Warrick "poses a threat to the public in general or a person or persons in particular."<sup>192</sup> The State asserted that evidence of domestic violence history was relevant in determining whether Willis was a threat to society, and at the very least, to Ellyn.<sup>193</sup> Willis argued that Ellyn had voluntarily dropped both complaints prior to the final hearing

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181. *See id.*

182. *See id.*

183. *See id.*

184. *Id.* (quoting Dec. 23, 1993 order issued by Hon. Mark A. Sullivan, Jr., J.S.C.). The statute states in part:

No handgun purchase permit or firearms purchaser identification card . . . shall be issued: (1) To any person . . . convicted of a crime; (2) To any drug dependent person or to any person who is presently an habitual drunkard . . . ; (3) To any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms . . . ; (5) To any person where the issuance would not be in the interest of the public health, safety or welfare; (6) To any person subject to a court order. . . .

N.J. STAT. ANN. § 2C:58-3(c) (West 1991).

185. *See Warrick*, 661 A.2d at 336.

186. *See id.*

187. *Id.* at 336-37.

188. *See id.* at 337.

189. *See id.*

190. *See id.* at 339.

191. *See id.* at 337.

192. *Id.* (quoting N.J. STAT. ANN. § 2C:25-21(d)(3) (West 1991)).

193. *See id.* at 337-38.

and, therefore, the court could not make a finding of abuse, nor could it make a finding that he was a threat to the public or to Ellyn.<sup>194</sup>

In analyzing the case, the court contrasted the first and fourth paragraphs of section 2C:25-21d(3) of the New Jersey Statutes.<sup>195</sup> The court noted that the State's argument was based on the sentence in the first paragraph which provides that the prosecutor "may object to the return of the weapons . . . on the grounds that the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular."<sup>196</sup> The court then analyzed the fourth paragraph of the same section which states that the court "'shall order the return' of the weapons if any one of a number of events has occurred."<sup>197</sup> The court described the events that would compel a return of the weapons: the "complaint has been dismissed at the request of the complainant and the prosecutor determines that there is insufficient probable cause to indict[.] . . . the defendant is found not guilty of the charges [or] . . . the court determines that the domestic violence situation no longer exists."<sup>198</sup>

The second event, finding the defendant not guilty of the charges, was not applicable in this case and therefore was not discussed by the court.<sup>199</sup> In uncovering the meaning of "complaint" as it is used in the context of the first event compelling return of the weapons, the court referenced *State v. Solomon*.<sup>200</sup> In particular, *Warrick* noted how the *Solomon* court determined that this phrase refers to both criminal and civil complaints arising from the domestic violence incident.<sup>201</sup> In *Warrick*, since no civil or criminal complaint was pending at the time the weapons forfeiture hearing was conducted, the first paragraph of section 2C:25-21d(3) could not be used as a basis for forfeiting the weapons to the State.<sup>202</sup> In its analysis, the court changed the wording of the first paragraph to read: "The weapons must be returned if the complaint is dismissed *or* the prosecutor finds insufficient cause to indict."<sup>203</sup> Therefore, the court did not discuss the second part of the clause—whether the prosecutor in this case had determined that there is insufficient probable cause to indict.<sup>204</sup>

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194. *See id.* at 340.

195. *See id.* at 338.

196. *Id.*

197. *Id.*

198. *Id.* at 338-39 (quoting N.J. STAT. ANN § 2C:25-21(d)(3) (West 1991)).

199. *See id.* at 339.

200. *See id.* at 339; *see also State v. Solomon*, 661 A.2d 559 (N.J. Super. Ct. Ch. Div. 1993).

201. *See Warrick*, 661 A.2d at 338-39 (citing *Solomon*, 661 A.2d at 559).

202. *See id.* at 339.

203. *Id.* at 340 (emphasis added). The paragraph actually reads, "if the complaint has been dismissed at the request of the complainant *and* the prosecutor determines that there is insufficient probable cause to indict . . ." N.J. STAT. ANN. § 2C:25-21(d)(3) (West 1991) (emphasis added).

204. *See Warrick*, 661 A.2d at 340.

Although the court commented that the legislature, in passing the Act, recognized the “insidious nature of the cycle of domestic violence,” it nevertheless concluded that evidence of a prior violent relationship diminishes over time.<sup>205</sup> The court cited the fact that Willis’ weapons had been returned to him after the first incident, which indicated to the court that the judge who ordered their return did not believe Willis was a threat.<sup>206</sup> Additionally, the court stated that the preliminary findings of domestic violence made in the two *ex parte* orders could not be equated with a finding that domestic violence actually occurred.<sup>207</sup> The court ruled that the prior history of abuse was relevant and therefore admissible, but over time the weight of that evidence had diminished.<sup>208</sup> As discussed previously, women drop restraining orders for many reasons, frequently out of fear and because they do not receive adequate support from the legal and criminal system.<sup>209</sup> The reasoning and conclusion reached by the court demonstrated a marked lack of understanding regarding the continuing and worsening cycle of domestic violence—a cycle during which many women obtain and then drop restraining orders against their abusers.

The third event compelling a court to return weapons is “if the court determines that the domestic violence situation no longer exists.”<sup>210</sup> The *Warrick* court stated that this provision was “quite vague.”<sup>211</sup> Emphasizing that Ellyn twice voluntarily requested and obtained dismissals of the complaints and that neither case went to final hearing, the court stated, “[c]learly, whatever the Legislature meant when it used the phrase ‘domestic violence situation,’ each ‘situation’ between the parties had come to an end by the time the prosecutor moved for forfeiture.”<sup>212</sup>

Again, the court chose a literal reading of paragraphs one and four and determined that the fourth paragraph overrode the first.<sup>213</sup> In analyzing the statute in this manner, the court did not have to examine the event that would occur if the first paragraph superceded the fourth: *even if* all complaints had been dismissed or dropped and a prosecutor could not secure an indictment, could the outcome of a forfeiture hearing be one where the court determined that the domestic violence situation still existed? The court short-circuited any examination of this question because under its statutory interpretation,

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205. *Id.* at 337-38.

206. *See id.* at 336.

207. *See id.* at 337.

208. *See id.* at 338.

209. *See supra* Part II.A.

210. *Warrick*, 661 A.2d at 339.

211. *Id.*

212. *Id.*

213. *See infra* Part III.A.

such a possibility could not exist. The court stated, “[h]appily, the court need not grapple with [the legislature’s intentions in N.J.S.A. 2C:25-18] . . . since both events, on the circumstances presented, require the return of the weapons.”<sup>214</sup> The court focused on the fact that the legislature did not use the word “may” but the word “shall” to describe the return of weapons upon circumstances detailed in the fourth paragraph.<sup>215</sup> The court continued its analysis by stating, “it is clear that the statute’s express terms compels [sic] the court to return the weapons to Willis.”<sup>216</sup> The court concluded that a finding of any one of the events contained in the fourth paragraph compels a return of weapons seized, despite the existence of any of the grounds contained in the first paragraph of that section.<sup>217</sup>

One year later, the Appellate Division overruled *Warrick* in *State v. Volpini*.<sup>218</sup> As in *Warrick*, Mrs. Volpini requested that the domestic violence complaint and temporary restraining order be dismissed; however, unlike the *Warrick* court, the Appellate Division held that the prosecutor should be allowed to proceed with the forfeiture hearing.<sup>219</sup>

When police responded to Mrs. Volpini’s domestic violence call, she claimed that her husband had physically assaulted her.<sup>220</sup> Police noted that she had a bruised cheek.<sup>221</sup> Mrs. Volpini refused to file a complaint or seek a temporary restraining order, but the police arrested Mr. Volpini for simple assault anyway.<sup>222</sup> The officers seized Mr. Volpini’s Browning 12-gauge shotgun, his Marlin .22 caliber rifle, and a bag of ammunition.<sup>223</sup>

The following day, Mrs. Volpini reported that her husband had telephoned her six times while she was at work.<sup>224</sup> He threatened to kill both her and their son “if he did not straighten out his problem and get his guns back.”<sup>225</sup> This time, Mrs. Volpini filed a domestic violence complaint.<sup>226</sup> The police then arrested Mr. Volpini on a charge of terroristic threats.<sup>227</sup>

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214. *Id.* at 340.

215. *See id.* at 340.

216. *Id.*

217. *See id.* at 340-41.

218. *See State v. Volpini*, 677 A.2d 780 (N.J. Super. Ct. App. Div. 1996).

219. *See id.* at 782.

220. *See id.* at 781.

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *Id.*

226. *See id.*

227. *See id.* This charge was later administratively downgraded to a charge of harassment and was ultimately dismissed. *See id.*

The court issued an *ex parte* temporary restraining order (TRO) that directed Mr. Volpini to surrender his other weapons.<sup>228</sup> Police seized a handgun, a Remington .308 caliber rifle, and a second bag of ammunition.<sup>229</sup> At the final hearing a week later, Mrs. Volpini requested that her complaint and the TRO be dismissed and the court granted the request.<sup>230</sup>

The next day, the county prosecutor moved for forfeiture of the weapons and revocation of Mr. Volpini's permits and licenses.<sup>231</sup> The motion was filed within the time limit required by N.J.S.A. 2C:25-21d(3), but due to a heavy court docket, the case was not scheduled for argument until two and a half months later.<sup>232</sup> After several requests for adjournment from both parties, the State sought an adjournment at a proceeding that was ultimately held six months after the domestic violence incident.<sup>233</sup> The State informed the judge that it had been unable to subpoena Mrs. Volpini as a hostile witness because she had left the jurisdiction.<sup>234</sup> Nevertheless, the State indicated that it was willing to proceed with its case by relying on police testimony.<sup>235</sup> The judge in assessing the motion, relied on *Warrick* and thus concluded that the mandatory duty imposed upon the court by the fourth paragraph superseded the permissive authority granted to the prosecutor to seek forfeiture of the weapons.<sup>236</sup>

The appellate court disagreed with the trial court and stated it would take a pragmatic approach in construing N.J.S.A. 2C:25-21d(3). The court stated:

A statute should not be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context. The reason of the statute prevails over the literal sense of the terms; the obvious policy is an implied limitation on the sense of the general terms, and a touchstone for the expansion of narrower terms.<sup>237</sup>

The court held that the motion judge erred when he returned the weapons because the domestic violence complaint had been dismissed at Mrs. Volpini's

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228. *See id.*

229. *See id.* at 781-82.

230. *See id.* at 782.

231. *See id.*

232. *See id.* There is a time limit from seizure until the forfeiture hearing. *See* N.J. STAT. ANN. § 2C:25-21d(3) (West 1991).

233. *See Volpini*, 677 A.2d at 782.

234. *See id.*

235. *See id.*

236. *See id.*

237. *Id.* at 783-84 (citing *Saavedra*, 647 A.2d at 1350 (quoting *Wene v. Meyner*, 98 A.2d 573 (N.J. Super. Ct. 1953))).

request.<sup>238</sup> By taking this action, the court stated that the judge effectively placed prosecutorial discretion in the hands of an alleged domestic violence victim.<sup>239</sup> The court emphasized that the Legislature had gone to great lengths in N.J.S.A. 2C:25-18 to identify domestic violence as a "serious crime against society."<sup>240</sup> The court concluded that the lower court's method "would inhibit the Act's stated purpose of 'maximum protection' to the victim by precluding a prosecutor from questioning a defendant's fitness to possess weapons in light of the qualifying circumstances provided for in the first paragraph of N.J.S.A. 25-21d(3)."<sup>241</sup>

A 1990 case, *Hoffman v. Union County Prosecutor*, best demonstrates the breadth of the New Jersey statute.<sup>242</sup> The case was decided one year before sections 2C:25-17 through 2C:25-21 were passed by the legislature. In this case, Mr. Hoffman brought an action for replevin seeking return of weapons that had been seized by police during a domestic dispute.<sup>243</sup> Mr. Hoffman was not present during the dispute which occurred on June 28, 1987.<sup>244</sup> The altercation was between Mrs. Hoffman and the couple's son and no weapons were involved in the incident.<sup>245</sup> Mrs. Hoffman did not file a complaint, but asked officers to remove her husband's weapons from the house in order to ensure her safety.<sup>246</sup> The officers complied with her request, removing the following weapons from the home: a Japanese saber, a 12-gauge Fox Savage shotgun, a .22 caliber Stevens rifle, a Mauser rifle, a .22 caliber Winchester rifle, a 12-gauge Richard shotgun, a 12-gauge Remington shotgun, a 30-06 Remington rifle, and a 12-gauge Browning shotgun.<sup>247</sup>

Two years before the incident, in July 1985, all Union County police chiefs had received a directive from the Union County Prosecutor which stated: "Police Officers responding to domestic violence calls should inquire whether the accused possesses any firearms. If so, the firearms should be kept for safekeeping."<sup>248</sup> At the time of Mr. Hoffman's hearing, the weapons that were seized during the domestic dispute had been held by the state for a total of two and a half years.<sup>249</sup>

Mr. Hoffman had a record of violence including the following:

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238. See *id.* at 786.

239. See *id.*

240. *Id.* at 785.

241. *Id.* at 786.

242. See *Hoffman v. Union County Prosecutor*, 572 A.2d 1200 (N.J. Super. Law Div. 1990).

243. See *id.* at 1200-01.

244. See *id.* at 1201.

245. See *id.*

246. See *id.*

247. See *id.*

248. *Id.* (quoting directive issued by Union County Prosecutor Stamler dated July 25, 1985).

249. See *id.*

- In January 1982, he was convicted in municipal court of assaulting a woman.<sup>250</sup>
- In September 1982, he was arrested for assaulting a police officer.<sup>251</sup> The municipal court dropped the charges and the counterclaims against the police.<sup>252</sup>
- In December 1982, the police responded to domestic violence calls on two different occasions.<sup>253</sup> Mr Hoffman was intoxicated on both occasions and no complaints were filed.<sup>254</sup>
- In July 1983, Mr. Hoffman was involved in a street fight and threatened to use one of his shotguns against the individual who had hit him.<sup>255</sup>
- In December 1983, the police responded to a domestic violence call at the Hoffman residence.<sup>256</sup> Mr. Hoffman was intoxicated but no complaints were filed.<sup>257</sup>
- In May 1984, Mr. Hoffman was arrested for possession of a weapon (he was armed with a pipe) and aggravated assault.<sup>258</sup> He was eventually found guilty of disorderly conduct.<sup>259</sup>
- In April 1986, an intoxicated Mr. Hoffman was arrested for striking Mrs. Hoffman and beating her head against a wall.<sup>260</sup> He pled guilty to assault and was fined \$250.<sup>261</sup>
- In June 1988, police responded to a domestic violence call regarding the Hoffmans.<sup>262</sup> Both Mr. and Mrs. Hoffman were intoxicated.<sup>263</sup> Order was restored and the police made no arrests.<sup>264</sup>
- Also in June 1988, police responded to a call that someone in the Hoffman house was cursing at kindergarten children who were passing by.<sup>265</sup>

Mr. Hoffman argued that the weapons were not *prima facie* evidence of a crime nor had they been forfeited because of unlawful use.<sup>266</sup> He asserted

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250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.*

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.* at 1202.

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.*

that the State seized his weapons without a search warrant or through any legal process.<sup>267</sup>

The court first clarified that Mr. Hoffman was being denied only temporary possession of his weapons, while the court assessed whether he was qualified to continue possessing them.<sup>268</sup> It began its analysis by quoting *State v. Cunningham*, which recognized that there are times when police are authorized to seize weapons to protect the public from danger, even if the weapon had not been used unlawfully.<sup>269</sup>

Clearly, the statutory design is to prevent firearms from coming into the hands of persons likely to pose a danger to the public. It seeks to achieve this result by providing for the revocation of a firearms purchaser identification card when its possessor has become disqualified under N.J.S.A. 2C:58-3(c) subsequent to the issuance of the card. We note that forfeiture is another remedy that can be invoked, in an appropriate case. Forfeiture applies when a gun is possessed or used for criminal purpose, whether or not its owner has been convicted. *But we can imagine many circumstances when, without the owner using a gun unlawfully, the police would be authorized to seize a gun in order to protect the public from danger.* . . . This could occur, for example, if an owner carelessly allowed his children to play with a loaded gun . . . [s]uch conduct would not be criminal, but would justify the denial of a permit to acquire a gun. To further legislative policy, we conclude that the police need not return a gun to its owner in such a case, although the owner had not used the gun unlawfully and no one had yet been injured. But the owner would have a right to a hearing to determine if he is disqualified on the standards of N.J.S.A. 2C:58-3(c) from receiving the gun.<sup>270</sup>

The statute makes it clear that owning a gun is a qualified right. If owners are unfit to possess weapons due to alcoholism or some other disability (even reckless carelessness, according to *Cunningham*), or if they may cause future harm or death due to their propensity for violence, a court may make a finding in favor of a complainant, tipping the balance in favor of personal and societal safety.

The two questions before the court were: (1) whether the seizure of weapons was lawful and (2) whether the revocation of Mr. Hoffman's

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267. *See id.*

268. *See id.*

269. *See id.*; *see also State v. Cunningham*, 453 A.2d 239, 243-44 (N.J. Super. Ct. App. Div. 1982).

270. *Hoffman*, 572 A.2d at 1202 (emphasis in original).

purchaser identification card was justified.<sup>271</sup> The court determined that the seizure was lawful under the authority of *State v. Cunningham* and need not be based on underlying criminal activity.<sup>272</sup> In analyzing the State's argument, the court stated that the Legislature had gone to "great pains" to deal with the increasing problem of domestic violence.<sup>273</sup> The court reasoned that denying a plaintiff temporary possession of his guns is less intrusive than ejecting him from his residence under an *ex parte* order.<sup>274</sup> The court found that Mr. Hoffman had a pattern of violent behavior which included domestic violence and alcohol abuse.<sup>275</sup> He had threatened to use his gun against another and had already utilized a pipe as a weapon.<sup>276</sup> The local police officers had repeatedly been summoned to the Hoffman residence.<sup>277</sup>

The court mentioned that one of the measures police might have taken was to ask the county prosecutor to exercise his authority to file a complaint seeking revocation of the plaintiff's firearms purchaser identification card—but this would have left the weapons in the Hoffman residence.<sup>278</sup> "Seeking judicial approval prior to seizure of Mr. Hoffman's weapons would jealously guard Mr. Hoffman's right to his property while leaving Mrs. Hoffman in jeopardy."<sup>279</sup> Although the court recognized Mr. Hoffman's right to his property had been infringed upon, the court noted that the rights of Mr. and Mrs. Hoffman and the State "all must be balanced."<sup>280</sup> Again, the court quoted *State v. Cunningham*: "The law is not aimed at ownership or property rights, but its purpose is gun registration and the protection of the public from the possession of guns by unfit persons."<sup>281</sup> In concluding that the seizure was lawful, the court asked rhetorically, "[w]as the police conduct in this case so egregious that we would really want to discourage such conduct in the future, or should the system wait for actual harm to occur and then assess culpability after the fact! After all, Mr. Hoffman was not engaged in violence—that night."<sup>282</sup>

In answering the second question of whether Mr. Hoffman's firearms purchaser identification card should be revoked, the court identified the

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271. *See id.* at 1204.

272. *See id.* at 1203.

273. *Id.* at 1203.

274. *See id.*

275. *See id.* at 1204.

276. *See id.*

277. *See id.*

278. *See id.*

279. *Id.*

280. *Id.*

281. *Id.* (quoting *Cunningham*, 453 A.2d at 239).

282. *Id.* at 1204 (citing *State v. Kelly*, 487 A.2d 364 (N.J. 1984)).

disqualifications found in N.J.S.A. 2C:58-3(c).<sup>283</sup> The court found that Mr. Hoffman no longer qualified for a firearms purchaser identification card because continuation of the card would not be in the interest of the public health, safety, or welfare.<sup>284</sup> Additionally, his alcoholism disqualified him under N.J.S.A. 2C:58-3(c)(2) and (3).<sup>285</sup> The court then ordered Mr. Hoffman's card revoked and his weapons sold with the proceeds turned over to him.<sup>286</sup>

A different complication arose in the case of *In the Matter of Return of Weapons to J.W.D.*<sup>287</sup> In that case, the Chancery Division, Family Part, dismissed the temporary restraining order at the conclusion of a final hearing.<sup>288</sup> The court held that the defendant posed a threat to public health, safety, or welfare despite its dismissal of the underlying domestic violence complaint.<sup>289</sup> While the Appellate Division agreed that the Family Part had the authority to retain and dispose of the weapons, it disagreed with the finding that *this* defendant posed a threat to the public.<sup>290</sup>

The issue before the Supreme Court of New Jersey was whether a defendant in an action under the Prevention of Domestic Violence Act was entitled to the return of weapons if, at a forfeiture hearing held after the domestic violence final hearing, the trial court concluded that the defendant poses a threat to public health, safety, or welfare.<sup>291</sup> The Supreme Court of New Jersey affirmed the holding that the Family Part had the authority to retain and dispose of the weapons even after dismissal of the complaint, and remanded the matter to the Family Part for further factual findings on the specific issue of whether this particular defendant's weapons should be returned.<sup>292</sup>

The Supreme Court of New Jersey, like the *Volpini* and *Warrick* courts, recognized that a "gap" exists in the Act between the first and fourth paragraphs of N.J.S.A. 2C:25-21(d)(3).<sup>293</sup> The court then stated that N.J.S.A. 2C:58-3(c)(5) provides that "[n]o handgun purchase permit or firearms purchaser identification card shall be issued . . . [t]o any person where the issuance would not be in the interest of the public health, safety or welfare."<sup>294</sup>

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283. See *id.*; see also N.J. STAT. ANN. § 2C:58-3(c) (West 1991).

284. See *Hoffman*, 572 A.2d at 1205.

285. See N.J. STAT. ANN. § 2C:58-3(c)(2) - (3).

286. See *Hoffman*, 572 A.2d at 1205.

287. See *In re Return of Weapons to J.W.D.*, 693 A.2d 92 (N.J. 1997).

288. See *id.* at 93.

289. See *id.*

290. See *id.* (emphasis added).

291. See *id.*

292. See *id.*

293. See *id.* at 95.

294. *Id.* at 96.

The court stated that when the two statutes are read together, they reflect the legislative intent that a court “should not return weapons to a defendant who is a threat to the public health, safety or welfare.”<sup>295</sup> The court added that “[t]he contrary result—the return of weapons to a defendant who is a threat to the public—would be an invitation to a tragedy. We doubt that the Legislature would have intended so disastrous a result.”<sup>296</sup>

In this case, the lower courts agreed on the statutory interpretation; however, they disagreed on whether this particular defendant posed a threat to public safety.<sup>297</sup> The Supreme Court of New Jersey emphasized that deference to a trial court’s finding of fact is appropriate when the evidence involves witness credibility and is largely testimonial, as it was in this case.<sup>298</sup> The court concluded that the lower courts reached conflicting conclusions because they emphasized different facts and remanded the case to the trial court for further fact-finding as to whether this defendant posed a threat to the general public or to his ex-wife.<sup>299</sup>

The Supreme Court affirmed that the safety of the victim is a higher priority when measured against the qualified right to own a weapon. According to the Court, even if a court has dismissed the underlying domestic violence complaint, requests for forfeiture should still be heard. If an individual is a danger to society in general or to a person in particular, he should not be allowed to own a gun, let alone an arsenal, which appears to be the rule rather than the exception in these cases. The mere presence of weapons in the household places the domestic violence victim at greater risk of becoming a front-page homicide victim. As the court stated in its opinion, the Legislature could not have intended such a “disastrous” result when it passed the law.<sup>300</sup>

#### *B. Forfeiture of Weapons that Are Not Prima Facie Evidence of the Crime*

New Jersey courts have also examined whether weapons may be forfeited to the state if they are not prima facie evidence of a domestic violence crime. New Jersey has determined that a court can order a defendant to forfeit his household weapons based upon a determination that the defendant is a danger either to the public or his victim.

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295. *Id.*

296. *Id.*

297. *See id.*

298. *See id.*

299. *See id.* at 97.

300. *Id.* at 96.

In *State v. Saavedra*, the court dealt with an instance of weapons mistakenly housed at the police station instead of with the prosecutor.<sup>301</sup> Since the police did not turn the weapon over to the prosecutor as statutorily required, the prosecutor was unaware of its existence and missed the forty-five day deadline to request a hearing pertaining to its forfeiture.<sup>302</sup> Because the prosecutor was not at fault, the court decided in the State's favor and allowed the hearing.<sup>303</sup> However, the more important issue that the court addressed was whether a weapon may be seized, retained, and potentially forfeited to the State if it is not *prima facie* evidence of any crime.<sup>304</sup>

Victoria Saavedra filed a domestic violence complaint against her husband, alleging that Omelio Saavedra, the defendant, had confided in her father that he was thinking about shooting her, their four-year-old son, and himself.<sup>305</sup> Victoria did not report any previous domestic violence in her complaint.<sup>306</sup> The municipal court issued a temporary restraining order and directed the police to seize the defendant's 9 MM Beretta.<sup>307</sup>

Four days after police seized the weapon, the Family Part conducted a hearing on the complaint.<sup>308</sup> At the hearing, the judge issued a final restraining order and directed that the weapon remain in police custody.<sup>309</sup> Four months later, Victoria Saavedra signed a contempt complaint alleging that the defendant had violated the restraining order.<sup>310</sup> Within forty-five days of learning of the weapon seizure, but 150 days after police had actually seized the weapon, the county prosecutor filed a motion for forfeiture of the weapon under the Prevention of Domestic Violence Act.<sup>311</sup> The court determined that it would be counter to the intent of the Legislature to deny the hearing.<sup>312</sup> The court reasoned that the Legislature had found that "battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation."<sup>313</sup> The court concluded that protection of the victim was the clear and unequivocal message

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301. See *Saavedra*, 647 A.2d at 1348.

302. See *id.* at 1349.

303. See *id.* at 1351. The court ultimately held that the 45 days to request a forfeiture hearing does not begin to run until the date of seizure or the prosecutor has possession of the weapon. See *id.* at 1348.

304. See *id.*

305. See *id.*

306. See *id.*

307. See *id.*

308. See *id.*

309. See *id.* at 1348-49.

310. See *id.* at 1349.

311. See *id.*

312. See *id.*

313. *Id.* (citing N.J. STAT. ANN. § 2(C):25-18 (West 1991)).

of the Legislature and stated that it "would not be surprising to find, for example, that in the zealous enforcement of this Act, there will be weapons seized out of a heightened sense of caution, erring on the side of safety rather than running the risk of being sorry."<sup>314</sup> The ends, according to the court, would justify the means because the primary objective of the Act was protection of the victim.<sup>315</sup>

In *Hoffman*, the court also determined that weapons that had not been used during the commission of a crime may be seized and held by the State, and ultimately may be forfeited to it.<sup>316</sup> That case went a step further than the other cases discussed in Part IV, in that Mr. Hoffman was not even involved in the immediate domestic dispute.<sup>317</sup>

## V. THE CONSTITUTIONALITY OF NEW JERSEY'S FORFEITURE PROVISION IN VERMONT

### A. The U.S. Constitution and the Right to Bear Arms

The language of the Second Amendment to the Constitution suggests that the right to bear arms is a militia-related right and not a personal one in that it makes reference to a "well regulated Militia."<sup>318</sup> This has been the traditional view.<sup>319</sup> However, recent scholarship has criticized this view, maintaining that gun ownership is indeed a personal right.<sup>320</sup>

Only one Supreme Court case has dealt with the right to bear arms, and that decision did not reach the ultimate question as to whether the right to bear arms is a personal right, and, if it is, what standard of Constitutional review should be utilized.<sup>321</sup> The question in *United States v. Miller* was whether a sawed-off shotgun with a barrel less than eighteen inches in length was a type

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314. *Id.* at 1351.

315. *See id.* at 1351.

316. *See Hoffman*, 572 A.2d at 1201.

317. *See id.*

318. The Second Amendment of the U.S. Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

319. See, e.g., Dennis A. Henigan, *Arms, Anarchy & The Second Amendment*, 26 VAL. U. L. REV. 107, 121 (1991) (noting that Madison viewed state militias "as a military counter point to the power of the regular standing army" that Congress had been empowered to create).

320. See, e.g., Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, STAN. L. & POL'Y REV. (1997); see also Randy Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 451 (1995).

321. *See United States v. Miller*, 307 U.S. 174 (1939).

of weapon protected by the Second Amendment.<sup>322</sup> The Court seemed to think that it was not, asserting:

[i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>323</sup>

Thus, not only did the Court apply the rational basis test, but it did so in the context of a militia-related right rather than a personal right.<sup>324</sup>

The debate will continue as to what the framers' intentions were, the symbolism of the Second Amendment's placement in the Bill of Rights, whether the use of the word "people" in the First and Fourth Amendments is a clear indication of a personal right, and the relevance of the Founding Fathers' beliefs in today's society. But the question for the Supreme Court remains: is the right to own a weapon a personal right? If the Supreme Court were to grant certiorari on this issue, not only would the Court have to decide whether the right is a personal or militia-related one, but, if the right is a personal one, the Court must decide the appropriate standard of review. If this is a militia-related right, and not an individual right, the Court will review any legislation restricting personal ownership under the lenient rational basis test and the legislation will most likely be upheld.

If the Court decides that the right to bear arms is a personal right, the process will become a bit more tricky. The Court must then decide which standard of review to apply: strict scrutiny, intermediate level scrutiny (middle-tier), or rational basis review. If owning a weapon is a fundamental right (it is, after all, part of the Bill of Rights), it will receive strict scrutiny review. The State will presumably argue that only law-abiding citizens may own weapons and that society effectively disables other individuals it thinks may be a danger to it. For example, we do not allow felons, the mentally defective, drug addicts, abusers subject to a domestic violence court order, or abusers convicted of misdemeanor domestic violence to own guns because we believe the accompanying risk to society is great.<sup>325</sup> A provision which allows

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322. *See id.* at 175, 177.

323. *Id.* at 178.

324. *See id.* Barnett argues that because the case involves an individual possessing a weapon, the Court implicitly recognized a personal right to bear arms by remanding the case. *See* Barnett, *supra* note 320, at 451.

325. *See* 18 U.S.C. § 922(g)(1-9) (1994 & Supp. II 1996). Subsection (g)(9) states: "It shall be unlawful for any person—[who][listing separate disabilities]—to ship or transport in interstate or foreign

the State to prosecute individuals accused of domestic violence who are judged “a threat to the public in general or a person or persons in particular” merely allows the State to catch dangerous—perhaps more dangerous—individuals who have managed to slip through the system.<sup>326</sup> These individuals most likely have successfully eluded prosecution or civil liability because they have forced their victims into submission through fear. The State will most likely argue that this law is necessary to achieve the compelling objective of preventing the deaths of those women, the ones who are too terrified to come forward. And in order to accomplish this, the abuser must forfeit his weapons. This is no different than prohibiting any other violent individual from owning a weapon.

The opponents will likely argue that there must be no less restrictive means that would prevent those deaths. While the goal may be compelling, weapons seizure is not a *necessary* means. Other methods might work just as well. Perhaps the legislature can provide more support to women in terms of protection so that they will be able to come forward and testify. That way, the victim can effectively disable her abuser through Section 922(g)(8) or (9).<sup>327</sup> The opponents may also argue that no studies have been done in New Jersey demonstrating that this measure has had a substantial impact on the number of domestic violence related gun deaths. After all, weapons can always be obtained illegally. Under the strict scrutiny test, the law would most likely be invalidated because there must be no less restrictive means that would also accomplish this compelling goal.

The Court, however, could adopt the heightened scrutiny review that Justice Harlan introduced in his dissent in *Poe v. Ullman*.<sup>328</sup> This viewpoint was adopted by the majority four terms later in *Griswold v. Connecticut*.<sup>329</sup> In discussing the scope of liberty guaranteed by the Due Process Clause, Justice Harlan wrote,

[t]his ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all *substantial arbitrary impositions* and *purposeless restraints* . . . and which also recognizes, what a reasonable and sensitive judgment must, that

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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.” *Id.*

326. *See supra* Parts II, IV.

327. *See supra* Part II; *see also supra* text accompanying note 325.

328. *See Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

329. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>330</sup>

If this standard were used, the State could argue that this provision is not an arbitrary imposition or purposeless restraint. The evidence shows that death is a very real risk given indicators such as ownership of a weapon and a violent, abusive home life.<sup>331</sup> The restriction is not arbitrary nor is it purposeless. Therefore, such legislation might survive under this standard.

The provision will most likely survive under either a middle-tier or rational basis review. Under a middle-tier review, the government objective must be "important" and the means must be "substantially related" to the objective. The government objective is important (fewer deaths of women in abusive homes) and the means (seizing weapons belonging to individuals who have been adjudged to be dangerous to society and/or their victims) is substantially related to that objective.

Under rational basis review, the law most certainly would survive. The Court might very well use a rational basis test "with bite" as it did in *City of Cleburne, Texas v. Cleburne Living Center*,<sup>332</sup> which means the court might perceive being a "gun owner" as a classification with attending prejudices. While the court recognizes "suspect" strict scrutiny classifications such as race or middle tier classifications, such as gender, gun owners are not a suspect class. However, the Court might take the position that gun owners are a moderately unpopular class as it did in *Cleburne* with mentally retarded persons. Here, the Court would apply a more rigorous review than usual but the test would remain the same: does the government objective have a rational basis and is the legislation reasonably related to achieving that objective? The State's goal of less domestic violence related deaths is a rational one and the legislation of prohibiting high risk abusers from obtaining weapons is reasonably related to that goal. The legislation would almost certainly stand under the Second Amendment.

#### *B. The Constitutionality of the Provision Under the Vermont Constitutions*

The language of the Vermont Constitution strongly suggests that the right to bear arms under the state constitution is militia-related.<sup>333</sup> There are three

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330. *Poe*, 367 U.S. at 543 (emphasis added).

331. See Kellerman et al., *supra* note 113, at 1084, 1087.

332. See *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

333. The language of the articles relating to the right to bear arms in the Vermont Constitution was derived from the Pennsylvania Constitution, a derivation itself of the Virginia Constitution. See Interview with Peter Teachout, Professor, Vermont Law School, in S. Royalton, Vt. (January 23, 1997); see also Paul

provisions in the Vermont Constitution which relate to the right to bear arms. Two are clearly militia-related: Chapter 1, Articles 9 and 17. Article 9 discusses conscientious objectors and taxation.<sup>334</sup> Article 17 provides that only those in the army can be subject to martial law.<sup>335</sup> Article 16 parallels the Second Amendment to the United States Constitution. The text of Article 16 is as follows:

That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.<sup>336</sup>

The word “people” seems to indicate an individual rather than a collective right. On the other hand, the right to bear arms is limited to the right to do so “for the defence of themselves [collectively] and the State,”<sup>337</sup> which might be interpreted as “not for personal use.” For instance, one might

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Gillies, *Not Quite a State of Nature: Derivations of Early Vermont Law*, 23 VT. L. REV. 99 (1998). In discussing the text of the Virginia Constitution in *United States v. Miller*, 307 U.S. 174 (1938), the Court makes the right sound militia-related:

The General Assembly of Virginia, October 1785, (12 Hening’s Statutes) declared, “The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty.”

It further provided for organization and control of the Militia and directed that “All free male persons between the ages of eighteen and fifty years,” with certain exceptions, “shall be inrolled or formed into companies.” “There shall be a private muster of every company once in two months.”

Also that “Every officer and soldier shall appear at his respective muster-field on the day appointed . . . equipped, and accoutred, as follows: . . . every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet . . .”

*Miller*, 307 U.S. at 181-82.

334. See VT. CONST. ch. I, art. IX. The text of Article 9 is as follows:

That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member’s proportion towards the expense of that protection, and yield personal service, when necessary, or an equivalent thereto, but no part of any person’s property can be justly taken, or applied to public uses, without the person’s own consent, or that of the Representative Body, nor can any person who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if such person will pay such equivalent . . .

*Id.*

335. See VT. CONST. ch. I, art. XVII. The text of Article 17 is as follows: “That no person in this state can in any case be subjected to law-martial, or to any penalties or pains by virtue of that law except those employed in the army, and the militia in actual service.” *Id.*

336. VT. CONST. ch. I, art. XVI.

337. *Id.*

argue that the Framers should have made their intentions clearer by including a separate article for personal uses if that was what they intended. If standing armies are dangerous in times of peace, might not individuals with weapons be dangerous in times of peace as well?

Only one case pertaining to the right to bear arms has reached the Vermont Supreme Court.<sup>338</sup> The issue was whether, under a Fish and Game statute,<sup>339</sup> it was a criminal offense to carry a loaded shotgun or rifle in a vehicle on a public highway without having a special permit.<sup>340</sup> According to the court, “[t]he language of the constitutional provision does not suggest that the right to bear arms is unlimited and undefinable.”<sup>341</sup> The court decided the case narrowly by simply holding that the constitutional right to bear arms had not been infringed upon by requiring weapons to be transported unloaded rather than loaded.<sup>342</sup> Again, this case left open the question of whether the right to bear arms is a collective right or a personal one in Vermont.

### C. Statutory Issues

Most states, including Vermont, provide that abusers may be deprived of possession of their own homes for as long as a court order is in effect under both *ex parte* and final orders.<sup>343</sup> If a finding has been made by the court that an individual has been abusive, the court may limit the abuser’s access to his children.<sup>344</sup> Even without a finding of abuse, but with the agreement of the accused abuser, the court may limit his access to the children, or restrict his access to the family home.<sup>345</sup> The taking of weapons is arguably a lesser intrusion than requiring an abuser to live elsewhere for a year or limiting the time he spends with his children.

There are several key differences in discussing the matter of depriving an abuser of his residence (to which he may have sole title), limiting his access to the children, or granting temporary custody to the victim as opposed

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338. *See State v. Duranleau*, 128 Vt. 206, 207-09, 260 A.2d 383, 384 (1969).

339. The applicable provision of Title 10 Section 4705(b) was:

A person shall not carry or possess while in or on a vehicle propelled by mechanical power . . . within the right of way of a public highway a rifle or shotgun containing a loaded cartridge or shell in the chamber, mechanism, or in a magazine, or clip within a rifle or shotgun . . . (g) A person who violates this section shall be fined no more than \$50.00.

VT. STAT. ANN. tit. 10, § 4705(b) (1997).

340. *See Duranleau*, 128 Vt. at 207, 260 A.2d at 384.

341. *Id.* at 210, 260 A.2d at 386.

342. *See id.*

343. *See VT. STAT. ANN. tit. 15, § 1104(a)(2) (1989). See generally LEHRMAN, *supra* note 5.*

344. *See VT. STAT. ANN. tit. 15, § 1104(a)(3) (1989).*

345. *See supra* note 134 and accompanying text.

to discussing forfeiture of weapons. In most cases, even under a final order, depriving the abuser to access of his home or children would be a temporary measure. During the final hearing, the court will take into account considerations, such as pending child custody and divorce proceedings, which will ultimately take precedence over any temporary custody or temporary economic arrangements decided in an abuse prevention hearing.<sup>346</sup> Before granting a long-term order, the court wants to be assured that the couple is making other efforts to ameliorate the situation—usually by separating.

In contrast, a forfeiture provision, unlike deprivations of home or child visitation limitations, permanently deprives an accused abuser of his property (at least until he can prove that he is no longer a danger to society or his victim).<sup>347</sup> The provision can be justified on the basis that (1) gun ownership is a qualified right, and (2) when balancing the rights of society and the victim (who is a member of society) against those of the accused abuser, forfeiture of weapons is favored.

First of all, New Jersey has made it clear statutorily that the right to possess weapons is a “qualified” right. By demonstrating that he is a danger to society and/or the victim, the abuser disqualifies himself from possessing or purchasing a weapon as set forth under the disability provisions.<sup>348</sup> Instead of finding that the individual was “disabled” before he purchased the weapon, New Jersey simply finds the individual “disabled” after he commits an act (of domestic violence) or has become “disabled” through, for instance, alcoholism or drug addiction. The statute effectively allows the State to say, “We never should have allowed you to possess a weapon in the first place.”

New Jersey’s disability provision operates the same way that VAWA and the federal Gun Ban do.<sup>349</sup> The difference is that only those *convicted* of domestic violence or *presently under the force of a restraining order* may not possess weapons under the federal law. Under the New Jersey provision, no finding of abuse is made and no restraining order is in effect, but the court does make a finding of dangerousness.<sup>350</sup> New Jersey has recognized that victims drop complaints for many reasons and that a control-based definition of violence should operate within the context of domestic violence.

In addition, the court should balance the rights of the various parties involved in the forfeiture hearing.<sup>351</sup> Under the New Jersey statute, the

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346. See VT. RULES OF FAM. PROC. 4(n)(1) (Supp. 1998).

347. See N.J. STAT. ANN. § 2C:58-3(c)(d) (West 1991). If a person no longer falls into one of the disability categories, it follows that he is qualified to obtain a handgun purchase permit and firearms purchase identification card. *See id.*

348. *See id.* § 2C:58-39(c)(5).

349. *See supra* Part II.C.

350. *See supra* Part IV.

351. “The law is not aimed at ownership or property rights, but its purpose is gun registration and

accused abuser is entitled to notice and an evidentiary hearing before the State may confiscate his weapons.<sup>352</sup> He also receives compensation if his weapons are sold.<sup>353</sup> The right of the accused abuser to retain his property must be balanced against the right of his victims to separate with less potential for lethal assault and the right of the public to disarm an individual who has demonstrated he is not qualified to carry a lethal weapon. Because of the power differential between the victim and the abuser, and because that differential becomes greater when an abuser is armed, if the court finds him to be a danger to society and/or the victim, it should have the authority to order him to forfeit his weapons to the State.

## CONCLUSION

While separating from an abuser can be potentially lethal, domestic violence victims living with gun owners receive little support from the legal system. Because our legal system has been built on masculine constructs, an incident-based rather than a control-based definition of crime has developed. Most state criminal statutes do not recognize the dynamics of domestic violence. Victims frequently are unable to complete the process of obtaining a final restraining order because they fear retribution from their abuser. They know that a restraining order cannot protect them from a loaded firearm.

By enacting provisions similar to those in N.J.S.A. 2C:25-21d(3) and allowing prosecutors the authority to request forfeiture, the weapons could be removed from the household and the abuser would no longer be able to hold the victim responsible for the removal. Weapons should be systematically seized, held, and then forfeited if a finding has been made that the defendant is a "threat to the public in general or a person or persons in particular."<sup>354</sup> Assuming that a societal goal is to better enable victims to separate from their abusers with less potential for lethal violence, Vermont should adopt the New Jersey forfeiture provision.

*Maria Kelly\**

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the protection of the public from the possession of guns by unfit persons." *See Hoffman v. Union County Prosecutor*, 572 A.2d 1200, 1204 (N.J. Super. Law Div. 1990) (quoting *State v. Cunningham*, 453 A.2d 239, 239 (N.J. Super. Ct. App. Div. 1982)).

352. *See supra* Part IV. Notice and a hearing are constitutionally required by *Mitchell v. W.T. Grant Co.* 416 U.S. 601 (1973). Under the New Jersey statute defendants are entitled to notice and a prior hearing (the forfeiture hearing) at which he has an opportunity to be heard. N.J. STAT. ANN. § 2C:25-21.

353. *See In re Matter of Return of Weapons to J.W.D.*, 693 A.2d 92, 96 (N.J. 1997) (citing *Cunningham*, 453 A.2d at 244).

354. N.J. STAT. ANN. § 2C:25-21d(3) (West 1991).

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**APPENDIX 1. Domestic Violence Related Homicides in Vermont by Gender and Motivation where the Murder Weapon was a Gun 1990-1996.**

<b>Relationship</b>			<b>Motivation</b>	
<u>Offender</u>	<u>Victim</u>	<u>Total</u>	<u>Jealousy/Spurned Romance</u>	<u>K n o w n</u>
<u>Abuse</u>				
Male	Female	16	5	3
Male	Male	11	9	0
Female	Female	0	0	-
Male	Child	1	-	1
Child	Male	1	1	-

Source: *Domestic Violence and Guns*, *supra* note 127, at 21-24.