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**All's Fair in Love and War ... or Is It?
Domestic Violence and Weapons Bans**

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I. Introduction

Society has long struggled with the issue of domestic violence. Our courts and laws historically provided scant protection to women from abuse at home. Until the 1970s, American women were usually only able to obtain protective orders after they filed for divorce.ⁱ

This article will refer to abusers as male in gender, and to domestic violence victims as women, which is supported by the gender breakdown in reality. Ninety to ninety-five percent of the victims of domestic abuse are women.ⁱⁱ

Domestic violence is endemic in our culture. Researchers estimate that between 12 and 60 percent of wives are abused by their partners during the marriage.ⁱⁱⁱ

II. How Bad is the Problem of Domestic Violence?

Some suggest there is no real problem of domestic violence. They say the abuse continues only because the woman tolerates it and does not leave. In fact, it is more dangerous for a woman to try to leave her abuser than to stay.^{iv} "Indeed, when a woman makes the difficult decision to leave her partner, she is in the most danger."^v

The perpetrator uses abuse to obtain power and control over the victim.^{vi} When the woman leaves, the abuser loses control over her.^{vii} When an abuser loses that power, he often loses his only identity.^{viii} This renders him more likely to kill

her when she tries to leave or after she leaves him.^{ix} It is the phrase heard all too often: "If I can't have you, nobody can."^x

Women are the victims of domestic violence in alarming and intolerable numbers. More women in American are killed by their intimate partners than by any other type of perpetrators.^{xi} Intimate partners are defined as "husbands, lovers, ex-husbands, or ex-lovers."^{xii} "Each year, approximately 1.5 million U. S. women are raped, physically assaulted, or both, by their intimate partners."^{xiii} While only four percent of male murder victims were killed by intimates, thirty-three percent of women murder victims were killed by intimates.^{xiv}

The situation becomes even more deadly when guns are in the mix. Domestic assaults involving firearms are 12 times more likely to be fatal than those not involving firearms.^{xv} Having guns present in the home increases the likelihood of domestic violence ending in firearm homicide nearly eight-fold.^{xvi} In the United States, two-thirds of domestic violence homicides involve guns."^{xvii}

We have a serious problem with domestic violence and guns in America. But what can be done about it? Can human behavior be controlled by law, judges and court orders? Does it do any good to obtain an order of protection, when about half of them are violated?^{xviii} Is an order of protection merely a piece of paper?

III. Federal Statutes

The 1994 Violence Against Women Act's amendment to the Gun Control Act of 1968 was federal legislation that made it illegal for a person against whom a qualifying order of protection has been issued "to possess, ship, or receive a firearm or ammunition which has been shipped or transported in interstate or foreign

commerce.”^{xix} A “qualifying order” is one in which the restrained person received actual notice, and had an opportunity to participate.^{xx} In other words, in order to be a qualifying order, it must conform to the basic concepts of due process.^{xxi} In addition, the language of the court order must prohibit the defendant “from harassing, stalking, or threatening an intimate partner or child of such person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily harm to the partner or child.”^{xxii} Further, there must be a finding in the order that the defendant is “a credible threat to the physical safety of such intimate partner or child that would reasonably be expected to cause bodily injury.”^{xxiii}

Congress amended 18 U.S.C. 922(g) in 1996 by adding the Lautenberg Amendment, 18 U.S.C. 922(g)(9), which made it illegal for a person convicted of a misdemeanor domestic violence offense to possess a firearm.^{xxiv} “Violations of this statute subject the defendant to a fine and/or imprisonment for up to ten years, and actual knowledge of the prohibitions is not required.”^{xxv} The Lautenberg Amendment is unique in that it “is the only federal misdemeanor law that prohibits firearm or ammunition possession.”^{xxvi}

While some argue this legislation goes too far, former President Bill Clinton said, in favor of the Lautenberg Amendment, “If you’re stalking or harassing women or children, you shouldn’t have a gun. If you commit an act of violence against your spouse or your child, you shouldn’t have a gun.”^{xxvii} The late U. S. Senator Paul Wellstone frequently stated, “[All too often], the only difference between a battered woman and a dead woman is the presence of a gun.”^{xxviii}

IV. Problems with Domestic Violence Weapons Bans

While the reasoning behind the legislation is clear, the implementation has been fraught with problems. Some argue that, due to these problems, the domestic violence weapons banned should be eliminated. Others suggest that saving even one woman's life is worth the inconvenience to convicted batterers.

A. Unintended, Unexpected Repercussions

Lack of awareness. As practitioners in this field know, plaintiffs and defendants in domestic violence cases aren't always aware of the federal weapons ban triggered by the entry of a final order of protection. Plaintiffs are often unaware of the protections they are given by the federal weapons laws. Defendants can be unaware of the restrictions imposed on them by the federal law. In order to avoid surprises, courts should explain the applicable state and federal weapons prohibitions at all domestic violence hearings.^{xxix} “[M]any people affected by federal gun bans might have no idea the laws exist.”^{xxx} One prosecutor described the misdemeanor domestic violence crimes and the subsequent forfeiture of firearms as similar to the crime of “tearing the tag off a mattress – who’s going to know?”^{xxxi}

Fewer protection orders granted. Mandatory gun bans are opposed by some domestic violence advocates, out of concern that judges might issue fewer orders of protection because of the bans.^{xxxii} This might be due to the judge's personal beliefs about Second Amendment rights.^{xxxiii} This may be particularly true when the defendant is a hunter, as the weapons ban applies to rifles as well as handguns.^{xxxiv}

Disempowerment of victims. Some researchers argue that domestic violence orders of protection can backfire, when they disempower the very victims

they are intended to help.^{xxxv} Often the victim does not want the offender arrested or put in jail – she just wants him to stop abusing her.^{xxxvi} She wants the violence to end, not the relationship.^{xxxvii}

Advocate interference. Well-intentioned domestic violence advocates will, on occasion, coach a woman on what to say in order to get the order of protection she seeks.^{xxxviii} This can involve withholding essential information from the court, and putting a “spin” on her story.^{xxxix} In addition to the ethical issues, this practice disempowers the victim by increasing her distrust of the court system, and by making her think that what actually happened to her isn’t important enough, on its own, to warrant the granting of an order of protection.^{xl}

No crystal ball and mutual orders. Many judges see orders of protection as minefields. They weren’t present at the time of the alleged abuse, yet they are called upon to render decisions that can turn people’s lives upside down. As a result, they will sometimes enter mutual orders of protection.^{xli} This is even done on occasion when the defendant hasn’t filed a counter-petition.^{xlii} While ordering both parties to stay away from each other may seem like a good solution, it makes it difficult for the police to enforce the orders, as they do not know from the orders who the actual batterer is.^{xliii} Their solution is either to arrest no one or to arrest both parties, regardless of fault.^{xliv}

Employment consequences. Section 922(h) prohibits those under an order of protection from receiving, possessing or transporting any firearm or ammunition through their employment.^{xlv} One would expect this ban to apply to people who work directly in fields that involve firearms, such as gun manufacturing plants,

shooting ranges and retail firearms stores.^{xlvi} “But what about a professional truck driver whose employer needs sealed crates of weapons delivered to a customer? What about an employee of a large retail store (such as K-Mart or Walmart) that happens to have a sporting section that sells hunting equipment – albeit in a section of the store where the employee is not assigned? And what about a server at an establishment that keeps a firearm behind the bar?”^{xlvii}

B. Inconsistency Between Federal and State Laws

To their credit, many states have passed legislation that prohibits convicted batterers from possessing firearms.^{xlviii} Unfortunately, “many of the state laws have significant gaps and create inconsistencies between state and federal law.”^{xlix} Further, some state legislation reflects local resistance to taking guns away from people.^l

Even with appropriate legislation and diligent enforcement, local courts and law enforcement struggle with implementing procedures for “surrendering or confiscating weapons, storing them, and returning them.”^{li} It has been suggested that the best practice, until all the state legislation is corrected, is for the states to enforce the federal law on domestic violence and firearms.^{lii}

C. Enforcement Problems

Even when an order of protection is issued, it does the domestic violence no good if it is not enforced. In *Town of Castle Rock, Colorado v. Gonzales*, Jessica Gonzales had a permanent restraining order against her estranged husband.^{liii} The husband, in violation of terms of the order, took the children from the house.^{liv} Gonzales repeatedly called the police for help.^{lv} They refused to enforce the order.^{lvi}

Beginning in the afternoon and continuing until after midnight, she pleaded with the police to help.^{lvii} They refused.^{lviii} At 3:20 am, the husband opened fire with a weapon at the police station.^{lix} He was killed when the police returned fire.^{lx} In his car, were the dead bodies of the three missing children.^{lxi}

This is but one of many heart-wrenching cases that illustrate the violence present in our society. Is it futile to even attempt to regulate guns in America? We have 200 to 250 million firearms in private circulation.^{lxii} And how can gun bans be enforced when “[s]ome towns are even *requiring* households to possess a gun and ammunition for home protection.”^{lxiii} Many people refuse to register their weapons, which makes it very difficult to determine if a person under a domestic violence order has, indeed, turned in all of his weapons.^{lxiv}

However, although there are enough guns for every adult to have one, most people in America do not own guns.^{lxv} In fact, three-quarters of all American adults do not own a gun.^{lxvi} This means that the people who do own guns tend to own more than one.^{lxvii} And given the substantial cost of gun violence to society – estimated at \$1 million per gunshot injury - programs to curtail their illegal use would be a worthwhile investment to society.^{lxviii}

Although there are several roadblocks to effective enforcement of Domestic violence gun bans,^{lxix} some defendants make it easy. Consider the case of one defendant who was arrested and convicted of violating 18 U.S.C. 922(g)(8) after he accidentally shot himself with his own assault rifle, after “several orders of protection had been issued against the defendant by various females.”^{lxx}

D. Some Judges Cross Out Weapons Language, Trivialize the Issue of

Domestic Violence and Value Hunting Over Victim Safety

An attorney at the Pennsylvania Coalition Against Domestic Violence reported that some judges cross out the federal law firearm relinquishment notice on domestic violence order forms.^{lxxi} “They don’t believe the deferral law is a good law. They don’t want people’s guns taken away from them so they are doing sneaky things,” she explained.^{lxxii} This tends to be a strong sentiment in states where hunting is popular.^{lxxiii} There have been efforts to stop this behavior, but despite “authoritative, emphatic and thorough appellate education, the judicial practice of crossing out mandatory firearms restrictions continues.”^{lxxiv}

Defendants who rely on the language being crossed out by the judge may have a rude awakening. According to a judge in Florida, “[C]rossing out the firearm prohibition on a preprinted form or failing to check or initial the box reciting the prohibition will not exempt an otherwise qualifying order from qualifying status.”^{lxxv}

Judges have been known to amend their own domestic violence orders, even where there has been a history of violations of the domestic violence order, in order for a defendant to go hunting.^{lxxvi} In *Weissenburger*, the judge amended his order, not because the underlying order of protection was incorrect or overturned, but for the defendant to take his son hunting.^{lxxvii} “[T]he Iowa Supreme Court struck the district court’s alteration, concluding that the lower court was without authority to authorize Joseph to possess firearms in violation of federal law.”^{lxxviii}

A police officer who admitted in court to assaulting his wife, was convicted as a wife batterer and was thus prohibited by 18 U.S.C. § 922(g)(9) from possessing

firearms.^{lxxxix} A judge set aside the conviction, despite the fact that the defendant admitted to the abuse, claiming that the conviction would create a “manifest injustice” in that it might cause the defendant to lose his job as a police officer if he could not legally carry a gun.^{lxxx}

A rural Missouri judge listened to the testimony of a severely battered woman that her husband had thrown her to the ground, threatened to kill her, held her down and beat her.^{lxxxix} Under oath, the man admitted to the abuse.^{lxxxii} Instead of granting the victim’s petition for an order of protection, he told her to change the locks on her doors to keep herself safe.^{lxxxiii} “Later that day in open court, the same judge cited the approach of quail hunting season in open court as one reason not to issue another protective order.”^{lxxxiv}

Another judge said to a petitioner, who testified that her husband had threatened her with a gun, “I don’t believe anything that you’re saying.” He said, “The reason I don’t believe it is because I don’t believe that anything like this could happen to me.”^{lxxxv} If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I would take that kind of abuse from them. Therefore, since I would not let that happen to me, I can’t believe that it happened to you.”^{lxxxvi}

A particularly disturbing example of the failure of some judges to take seriously the issue of domestic violence was reported in the 1990 Report of the Florida Supreme Court Gender Bias Study Commission.^{lxxxvii} “Upon learning that a husband had poured lighter fluid on his wife and set her afire, one Palm Beach judge

in open court sang, '[y]ou light up my wife' to the tune of the song, 'You Light Up My Life.'" ^{lxxxviii}

E. Orders of Protection Misused by Advocates and by Alleged Domestic Violence Victims

While there are many valid and compelling reasons to support gun bans on people who are the subject of domestic violence orders of protection, there are legitimate arguments against automatic, mandatory bans. ^{lxxxix} Orders of protection have been granted, based upon completely frivolous allegations.^{xc}

Because a woman in New Mexico claimed that David Letterman's presence on television harassed her, the court entered a restraining order against him, even though Letterman had never met the woman.^{xcⁱ} Letterman was placed on a national register of domestic abusers and was prohibited from contact with the alleged victim.^{xcⁱⁱ} Under federal law, he was required to surrender any firearms he might own.^{xcⁱⁱⁱ} He could have been convicted of federal weapons violations and gone to prison if he had possessed a weapon while this order was in effect.^{xc^{iv}} Although the court eventually dismissed its order, this case serves as an example of the outrageous fact patterns on which some courts have based domestic violence orders.^{xc^v}

Some states allow for the issuance of an order of protection when there is no physical violence involved. They allow basing an order of protection on "lewdness, terroristic threats, and harassment."^{xc^{vi}} State statutes can contain a lengthy list of available remedies, which may be tempting to the plaintiff whose goal is to make her soon-to-be "ex" miserable.^{xc^{vii}} "In perhaps no area of the law is the temptation for

abuse quite as great as it is in domestic-violence actions. A plaintiff willing to exaggerate past incidents or even commit perjury can have access to a responsive support group, a sympathetic court, and a litany of immediate relief.”^{xcviii}

Conservative estimates place the rate of intentional misuse of the domestic violence order of protection system at around five percent of all protections order issued. ^{xcix} “But even that low estimate (which, like most statistics, is likely based on supposition) means that approximately 100,000 defendants nationwide have their liberties unjustly restricted by restraining orders every year.”^c Some estimate that forty to fifty percent of all restraining orders are requested “purely as a legal maneuver.”^{ci} Orders of protection “are increasingly being used in family law cases to help one side jockey for an advantage in child custody.” ^{cii} A research study of false allegations of abuse and neglect with separated parents found the rates of intentionally false allegations to be three times higher in custody cases than in cases where there was no ongoing custody or access dispute. The study found that while “... 4% of intentionally false allegations [of child abuse or neglect] documented in the CIS-98 ... [w]ithin the subsample of cases involving custody and access disputes, the rate of intentionally false allegations is higher, 12%...” ^{ciii}

In a hotly contested custody battle, what is to stop a person from obtaining an order of protection, then setting up an ambush on the other party by federal agents? When a man is an avid hunter or target shooter, his soon-to-be ex wife can hotline the federal authorities as to where they can find him when he goes hunting or to the practice range. The feds get an easy arrest and the husband gets convicted

and imprisoned for up to ten years. End of custody battle.

F. Should Law Enforcement and Military Be Exempt?

The Lautenberg Amendment raises a question with regard to the 700,000 federal, state and local law enforcement officers and 1.2 million Americans serving in the military: What will happen to them if they can no longer own guns?^{civ} The real question is whether public government officials who commit domestic violence should be treated differently than private citizens.^{cv}

Many in the general public do not believe the police or military should be exempt from the law.^{cvi} The rationale is that if someone uses unnecessary violence against a spouse, they might do the same thing against the public.^{cvii} “As such, those that dedicate their lives to enforcing the law should be subject to it as well.”^{cviii}

In fact, some argue that those in the military and those in law enforcement have more reason to be held to the law than the general public.^{cix} Research has shown domestic violence to be significantly more prevalent in police populations and in the armed forces than it is in the general population.^{cx} Exempting military personnel and police officers from the law holds them to a different, lower standard than ordinary citizens.^{cxii} “Such a double standard is particularly unacceptable because it allows those charged with enforcing the law impermissible latitude in violating the law.”^{cxii}

V. Conclusion

Weapons bans in domestic violence cases spark heated, passionate debate from multiple perspectives. In fairness, all reasonable viewpoints should be heard.

As Americans, we fiercely guard our personal freedoms. These freedoms include the right to be free from harm as well as the right to bear arms. When these freedoms conflict, how shall the situation be resolved?

Lawful citizens should be allowed their Second Amendment rights. When people violate the law by committing domestic abuse, they lose some of their rights.^{cxiii} A person's enjoyment of hunting does not trump another person's right to personal safety.^{cxiv}

Although it has flaws, our legal system is still one of the best in the world. In order to prevent the deterioration of our legal system, we must not allow it to be misused. Judges do not have the authority to ignore or evade the law.^{cxv} People going through divorce should not make a mockery of our courts by obtaining protection orders based upon exaggerated or fabricated allegations. Lawyers and advocates should not assist people in obtaining undeserved orders based on motives of vindictiveness or personal gain.^{cxvi}

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xv Judge Amy Karan, Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination. The Juxtaposition of Federal and Florida Laws*, 79 Fla. Bar. J. 79 (2005).

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xliv *Id.* at 1061 – 1062.

xlv *Id.*

xlvi Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?* 40 Seton Hall L. Rev. 639 at 658 - 659 (2010).

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