

---

## ABUSE & DISCRETION

---

---

### “BULLET-PROOFING” NORTH CAROLINA’S DOMESTIC VIOLENCE PROTECTIVE ORDER STATUTES BY REMOVING JUDICIAL DISCRETION FROM GUN REMOVAL PROVISIONS

---

KERRI L. SIGLER

#### INTRODUCTION

“The truth is that [it] cuts across all racial, economic, social, and sexual preference backgrounds. The problem is more accurately phrased as an epidemic, affecting nearly one-third to one-half of all marriages.”<sup>1</sup> No, the problem is not divorce; it’s domestic violence.<sup>2</sup> And while the problem cuts across all other boundaries evenly, it does not cut evenly across the boundary of gender. In the United States, ninety-five percent of domestic violence victims are women, amounting to four million victims each year.<sup>3</sup> In fact, more women seek medical attention for injuries inflicted by a spouse than for injuries caused by car accidents, rapes, and muggings *combined*.<sup>4</sup> When guns are introduced into this equation, the results turn deadly and the statistics become nothing less than staggering. For example, introducing a gun

---

<sup>1</sup> Sharon L. Gold, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 937 (2002-2003).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 8 (1999).

into a domestic violence situation increases the likelihood that the female victim will be murdered more than tenfold.<sup>5</sup>

In an attempt to reduce these grim statistics, both Congress and the North Carolina Legislature have passed measures that allow judges, when issuing protective orders, to dispossess defendants of their firearms.<sup>6</sup> However, both the federal and state measures leave the ultimate decision of whether to dispossess a defendant, and thus whether to fully protect victims from becoming one of the aforementioned statistics, in the discretion of the judge issuing the order. In other words, neither the federal nor the North Carolina statute mandates gun-removal upon the issuance of a protective order, but instead makes such removal dependent on certain necessary findings. The decision is therefore largely discretionary.

This Note explores the interplay between domestic violence gun-removal provisions and judicial discretion, ultimately concluding that this is one area where the exercise of judicial discretion should be removed from the statutory equation because such discretion does more harm than good. Eliminating discretion, combined with judicial education and other recommended solutions, may help “bullet-proof” domestic violence protective orders and protect more women from becoming grim statistics themselves.

#### GUNS & DOMESTIC VIOLENCE

According to the late Senator Paul Wellstone (D-MN), “[O]ften, the only difference between a battered woman and a dead woman is the presence of a gun.”<sup>7</sup> The deadliness of combining guns and domestic violence may seem obvious, but the actual statistics are staggering. In general, between 30-50% of female homicide victims in the United States are killed by intimate partners,<sup>8</sup> with 1,000-1,600 women dying that way each year.<sup>9</sup> “While all forms of domestic violence are potentially lethal, studies show that guns and domestic violence are a

---

<sup>5</sup> See Linda E. Saltzman et al., *Weapon Involvement and Inquiry Outcomes in Family and Intimate Assaults*, 267 JAMA 3043 (1992).

<sup>6</sup> See, e.g., N.C. GEN. STAT. §§ 50B-3.1 *et seq.*; 18 U.S.C. § 922(g)(8)-(9).

<sup>7</sup> 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

<sup>8</sup> See JAMES ALAN FOX & MARIANNE W. ZAWITZ, *HOMICIDE TRENDS IN THE UNITED STATES* (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf>.

<sup>9</sup> Margaret Zahn, *Intimate Partner Homicide*, 250 NAT'L INST. OF JUST. J. 14, 16 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250.pdf>.

particularly deadly combination.”<sup>10</sup> The involvement of a gun in an incident of domestic violence makes it twelve times more likely that the encounter will end in homicide.<sup>11</sup> The mere presence of firearms during an incident of domestic violence makes death five times more likely.<sup>12</sup> Women who were threatened or assaulted with a gun in the past are twenty times more likely to be murdered.<sup>13</sup>

Even where the outcome is not homicide, the likelihood of injury increases,<sup>14</sup> and armed offenders often brandish a gun without firing in order to more effectively terrorize their victims.<sup>15</sup> For example, in *United States v. Bostic*, the Fourth Circuit told the story of a defendant subject to a protective order for the attempted rape of his ex-wife in front of their young son.<sup>16</sup> The defendant’s weapons had not been seized pursuant to the order.<sup>17</sup> During the defendant’s next visitation with his son pursuant to the custody arrangement of the protective order, the defendant lured his ex-wife to his home on the false assertion the child was sick, and thereafter terrorized them both for hours with a 20 gauge shotgun.<sup>18</sup> The victims in *Bostic* ultimately escaped,<sup>19</sup> but the presence of the gun lived up to the notion that, “in domestic violence attacks, a gun is a great intimidator – the ultimate power tool in the arsenal of a batterer.”<sup>20</sup>

A bitter irony exists in the fact that these tendencies toward deadly violence, which lead to murder more often than not, increase most markedly when the battered woman attempts to leave or seeks outside

---

<sup>10</sup> Jennifer A. Vainik, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women’s Lives*, 91 MINN. L. REV. 1113, 1117 (2007).

<sup>11</sup> See Saltzman, *supra* note 5.

<sup>12</sup> See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089, 1090-91 (2003).

<sup>13</sup> Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT’L INST. OF JUST. J. 14, 16 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250.pdf>.

<sup>14</sup> See generally Kathryn Ann Farr, *Battered Women Who Were “Being Killed and Survived It”: Straight Talk From Survivors*, 17 VIOLENCE & VICTIMS 267 (2002).

<sup>15</sup> Deborah Azrael & David Hemenway, *‘In the Safety of Your Own Home’: Results from a National Survey of Gun Use at Home*, 50 SOC. SCI. & MED. 285, 290 (2000).

<sup>16</sup> *United States v. Bostic*, 168 F.3d 718, 720 (1999).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

<sup>20</sup> Melanie L. Mecka, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607, 608 (1998) (internal quotations omitted).

assistance.<sup>21</sup> Researchers relate this trend to the loss of control experienced by the abuser over his victim.<sup>22</sup> One commentator noted that the abuser links his identity to that power and control; when a victim attempts to leave or to seek help, this threatens the abuser's identity and dramatically increases the risk of violence.<sup>23</sup>

Victims at this stage often seek the help of law enforcement or the judiciary, although those solutions are inherently imperfect.<sup>24</sup> Despite arrests, protective orders, and participation in treatment programs, recidivism rates remain high among batterers.<sup>25</sup> “[D]omestic violence is rarely a one-time event, and without effective intervention, it tends to increase in frequency and severity over time.”<sup>26</sup> As one author notes:

A woman who comes to court today with a black eye is likely to return a few months later with a permanent bald spot caused by her husband pulling a handful of hair out of her head, or with a few teeth knocked out with a hammer. A batterer who enters the criminal justice system later in the abusive dynamic is more likely to commit a felony than a misdemeanor, or to reach the point where he commits one of the murder-suicides that are relatively common in these cases.<sup>27</sup>

One North Carolina judge warns the women recipients of protective orders in his courtroom that such orders are not “bullet-proof vests” and do not necessarily equate to the woman being safe thereafter.<sup>28</sup> One might argue, however, that a protective order proves slightly more “bullet-proof” where it dispossesses the defendant of his firearms. While both federal and state legislation has been enacted to that end, the issue of whether either goes far enough to protect battered women remains, as does the issue of whether removing judicial discretion from the gun removal provisions of protective orders would help advance the cause of keeping battered women safe.

---

<sup>21</sup> See Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before the Court has Made a Finding of Abuse*, 23 VT. L. REV. 349, 354 (1998).

<sup>22</sup> *Id.* at 353.

<sup>23</sup> Gold, *supra* note 1, at 940.

<sup>24</sup> *Id.* at 949.

<sup>25</sup> Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 3-4 (2005).

<sup>26</sup> Epstein, *supra* note 4, at 7.

<sup>27</sup> *Id.*

<sup>28</sup> See Interview with Dist. Court Judge, in Randolph County, N.C. (March 30, 2009) (on file with author) (*name withheld for confidentiality*).

## A BRIEF HISTORY OF DOMESTIC VIOLENCE &amp; LAW

For centuries, both the American and European legal systems largely ignored the issue of domestic violence.<sup>29</sup> In medieval Europe, it was legal for a husband to beat his wife if she wronged him, provided he neither killed nor maimed her.<sup>30</sup> In America, early colonial courts allowed a husband to abuse his wife in cases of misbehavior without fear of “vexatious prosecutions” or “mutual discredit and shame.”<sup>31</sup> Domestic violence was at best considered a private affair untouchable by the law, and at worst considered the rightful response of a man toward the “disobedient chattel” otherwise known as his wife.<sup>32</sup>

Only in the late nineteenth century did some of these views begin to change.<sup>33</sup> However, the predominant legal view well into the twentieth century reflected the approach of medieval England, where physical violence that stopped short of maiming and murder was still untouchable by the courts. The North Carolina Supreme Court summarized this view in 1874, holding “[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”<sup>34</sup>

It was the domestic violence movement of the mid-twentieth century that finally prompted changes in the law.<sup>35</sup> All 50 states now have civil protection order statutes, and all 50 states offer emergency *ex parte* relief so that victims receive court-ordered protection during the unstable period between the time of filing a lawsuit and trial.<sup>36</sup> In addition, 34 states, including North Carolina, have adopted criminal contempt laws to help enforce protective orders.<sup>37</sup>

---

<sup>29</sup> Epstein, *supra* note 4, at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 9-10.

<sup>33</sup> *Id.* at 10 (“It was not until the late nineteenth century that states finally began to move away from actually condoning a husband’s use of physical force to discipline his wife.”).

<sup>34</sup> *State v. Oliver*, 70 N.C. 60, 61-62 (1874).

<sup>35</sup> Epstein, *supra* note 4, at 11 (“Over the past generation, the United States has moved away from an era when no term for [domestic] abuse existed in the national lexicon to one of substantial public awareness of the problem, a growing perception that it is unacceptable, and increasing political will to intervene.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 12.

In short, laws concerning domestic violence have made great strides during the past sixty years.<sup>38</sup> Yet, while the legal system at long last agrees that it is not justifiable for a man to beat—or to kill—his wife, there still exists disagreement over whether an abuser should be allowed to keep the gun which he is statistically quite likely to use. Fortunately, enormous strides have also been made regarding that issue, and they begin with federal gun removal provisions.

#### FEDERAL GUN REMOVAL PROVISIONS

As part of the Violence Against Women Act of 1994, Congress amended the Gun Control Act of 1968 to address the substantial risks posed by the combination of domestic violence and guns.<sup>39</sup> The new provision, 18 U.S.C. § 922(d)(8), applies in the civil context<sup>40</sup> and prohibits possession of a firearm or ammunition by anyone who “is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner.”<sup>41</sup>

While this provision is mandatory where the presiding judge deems all statutory preconditions satisfied, victims’ advocates argue that “the administration of the federal gun bans problematically allows for judicial discretion.”<sup>42</sup> In other words, gun removal is not an automatic, but results only when the judge finds certain discretionary criteria. For example, a judge must find that the defendant represents a “credible threat,” yet the meaning of that term is left up to the judge to

---

<sup>38</sup> *Id.*

<sup>39</sup> Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAMS., CHILD. & CTS. 3, 3-4 (2005).

<sup>40</sup> *Cf.* 18 U.S.C. § 922(g)(9) (2010) (applying to criminal domestic violence by preventing firearm possession for anyone who “has been convicted in any court of a misdemeanor crime of domestic violence”).

<sup>41</sup> 18 U.S.C. § 922(d)(8) (2010) (“It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that: (A) Was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and (B) (i) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (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.”).

<sup>42</sup> Vainik, *supra* note 10, at 1141.

decide.<sup>43</sup> The issue of whether that discretion should remain is discussed more fully below.

NORTH CAROLINA'S  
DOMESTIC VIOLENCE & GUN REMOVAL PROVISIONS

North Carolina General Statutes sections 50B-1 *et seq.* provide for both temporary *ex parte* and one-year protective orders to be issued generally where a person once or currently in a “personal relationship” with the plaintiff “attempt[s] to cause bodily injury, or intentionally caus[es] bodily injury” to the plaintiff or the plaintiff’s minor child or children.<sup>44</sup> The phrase “personal relationship” casts a broad net, encompassing not only those individuals currently or formerly married, living together, dating, or having a child in common, but also other relationships such as parent and child and current or former household members.<sup>45</sup>

These domestic violence and protective order statutes allow for gun removal under specific situations.<sup>46</sup> Generally, the court may, in its discretion, “prohibit a party from purchasing a firearm for a fixed time” as a part of the relief granted pursuant to a protective order.<sup>47</sup> The general remedies do not, however, provide for the dispossession of the defendant’s currently owned firearms, or for the revocation of any permits to carry them.<sup>48</sup> Section 50B-3.1(a), however, provides that the court *must* order a defendant who is subject to an *ex parte* or emergency order to *surrender* firearms, permits, and ammunition to the sheriff if the court finds any of the following factors:

- (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
- (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.
- (3) Threats to commit suicide by the defendant.
- (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.<sup>49</sup>

The court is further required to inquire as to whether the defendant possesses firearms and other weapons in both *ex parte* and ten-day hear-

---

<sup>43</sup> 18 U.S.C. § 922(g)(8)(B)-(C)(ii) (2005).

<sup>44</sup> N.C. GEN. STAT. § 50B-1(a)(1) (2009).

<sup>45</sup> *Id.* § 50B-1(b)(1)-(6).

<sup>46</sup> *Id.* § 50B-3.1(a)(1)-(4).

<sup>47</sup> *Id.* § 50B-3(a)(11).

<sup>48</sup> *See id.* § 50B-3.

<sup>49</sup> *Id.* § 50B-3.1(a)(1)-(4).

ings, although no instructions direct a court's course of action following such inquiry.<sup>50</sup>

In these regards, North Carolina's gun removal provisions are discretionary. They do not activate automatically upon issuance of a protective order, but only where the court, in its discretion, finds one of the factors listed above.<sup>51</sup> The amount and kind of discretion exercised by North Carolina judges regarding Chapter 50B gun removal necessarily varies from judge to judge, but each is vested with statutory discretion to determine on his or her own whether removal is required in any given case.<sup>52</sup>

In spite of great strides at both the federal and state levels regarding domestic violence protection laws, such discretion in regards to gun removal arguably makes the orders less protective.<sup>53</sup> Thus emerges the debate regarding the extent of judicial discretion in protective orders and, for present purposes, to what extent it should apply to gun removal provisions of those orders. As Ruggero J. Aldisert puts it, "Knowing simply that one is invested with discretion does not tell much. The crucial inquiry, necessarily, is the extent of the discretionary power conferred."<sup>54</sup> It is with this crucial inquiry, the extent of discretion conferred, that both victims' advocates and this Note take issue.

---

<sup>50</sup> *Id.* § 50B-3.1(b)-(c).

<sup>51</sup> *See id.*, *supra* note 49.

<sup>52</sup> Interview with Dist. Court Judge, *supra* note 28 (When asked if he followed N.C. GEN. STAT. § 50B-3.1(b) and (c), which require the court to ask the defendant whether he owns firearms, Judge replied that he did not, but rather, accepted what the parties tell him, in spite of the statute's non-discretionary language.); N.C. GEN. STAT. § 50B-3.1(b) reads in relevant part that in an *ex parte* or emergency hearing, "the court *shall* inquire of the plaintiff . . . the presence of, ownership of, or otherwise access to firearms by the defendant. . ." (emphasis added); N.C. GEN. STAT. § 50B-3.1(c) reads in relevant part that at the ten-day hearing, the court, "*shall* inquire of the defendant the presence of, ownership of, or otherwise access to firearms by the defendant . . ." (emphasis added).

<sup>53</sup> Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 167 (1993) ("The effectiveness of protection orders depends on the willingness of the judicial and law enforcement officials to issue and enforce them to the extent authorized by statute. Unless the reform statutes are fully implemented, they cannot provide the protection to battered women that the legislature envisioned.")

<sup>54</sup> RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 705 (2d ed. 1996).



## JUDICIAL DISCRETION

According to Aldisert, judges today define judicial discretion as “the power to choose between two or more courses of action, each of which is thought of as permissible,”<sup>55</sup> while others in the legal world define the term as “the power to expand or curtail ruling case law, or to fashion new precepts to meet new situations.”<sup>56</sup> Still, others argue that discretion is inevitable when authoritative legal rules give little guidance.<sup>57</sup> In a sense, discretion gives judges the ability to decide a question one way or another without fear of a wrong answer.<sup>58</sup>

Professor Maurice Rosenberg’s analysis breaks judicial discretion into two categories: primary and secondary.<sup>59</sup> Under the former, a judge retains wide discretion and analyzes each case independently.<sup>60</sup> When exercising primary discretion, “[a] court can do no wrong, legally speaking, for there is no officially right or wrong answer.”<sup>61</sup> For example, “when a statute declares that a decree or order in respect to a particular matter (such as award of counsel fees) may be made ‘in the discretion of the court’ and this language is construed as applying to each court in the appellate hierarchy, we have primary discretion.”<sup>62</sup> Secondary discretion, on the other hand, “comes into full play when the rules of review accord the lower court’s decision an unusual amount of insulation from appellate revision . . . [i]t gives the trial judge a right to be wrong without incurring reversal.”<sup>63</sup> In sum, “a decision maker with discretion has power to decide either way, without fear that the decision will be nullified or reversed, unless that discretion is ‘abused.’”<sup>64</sup>

---

<sup>55</sup> *Id.* at 704.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 543.

<sup>58</sup> Maurice Rosenberg, *Judicial Discretion of the Trial Court*, 22 SYRACUSE L. REV. 635, 636-37 (1971).

<sup>59</sup> *Id.* at 637.

<sup>60</sup> *Id.* at 637-638 (“When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process . . . . [The] decision is intended to pivot on the circumstances of the particular case, and each court along the route is free to reach an independent conclusion as to the result called for by its own sound exercise of discretion.”).

<sup>61</sup> *Id.* at 637.

<sup>62</sup> *Id.* at 638.

<sup>63</sup> *Id.*

<sup>64</sup> ALDISERT, *supra* note 54, at 545 (quoting Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 244 (1990)).

Proponents of judicial discretion argue for the necessity of flexibility and individualization of cases.<sup>65</sup> For example, Roscoe Pound argued that “in proceedings for custody of children, where compelling consideration[s] cannot be reduced to rules, . . . [the] determination must be left, to no small extent, to the disciplined but personal feeling of the judge for what justice demands.”<sup>66</sup>

Opponents, however, point out that it makes people restless to invest a single judge with the final say in important cases.<sup>67</sup> Rosenberg claims this restlessness has made discretion “a four-letter word in many legal circles.”<sup>68</sup> Lord Camden, he tells us, called it “the law of tyrants.”<sup>69</sup> Opponents argue that judicial discretion “promote[s] a government of men, not laws” and assert that the best system is one in which the law gives as little discretion as possible to any given judge.<sup>70</sup>

#### ABUSE & DISCRETION

Putting purely academic criticisms aside, one finds equally vehement opponents of judicial discretion in the real-life world of domestic violence. Recalling that judicial discretion is “power to decide either way, without fear that the decision will be nullified or reversed, unless the discretion is ‘abused,’”<sup>71</sup> the question arises: what happens when the topic *is* abuse? Opponents of judicial discretion in the domestic violence context argue that “[i]n cases of domestic violence, it is questionable whether judicial discretion achieves fairness.”<sup>72</sup>

When judges act as fact finders . . . they have much the same discretion as jurors to decide the case for either the plaintiff or defendant with little concern for legal rules . . . . Thus . . . the primary determinant of the judicial decision is not the legal rule structure but the “personality of the judge” or the “judicial intuition,” that is, the whole set of characteristics

---

<sup>65</sup> See Rosenberg, *supra* note 58, at 642.

<sup>66</sup> *Id.* at 642-643 (quoting Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 929 (1960)) (brackets in original).

<sup>67</sup> *Id.* at 642.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (quoting *State v. Cummings*, 36 Mo. 263, 278-279 (1866) (“Lord Camden, one of the greatest and purest English judges, said, ‘that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion; in the worst, it is every vice, folly and passion to which human nature can be liable.’”)).

<sup>70</sup> *Id.*

<sup>71</sup> ALDISERT, *supra* note 64.

<sup>72</sup> Vainik, *supra* note 10, at 1141.

that lead the judge to perceive the world, including the plaintiffs, the defendants, and the witnesses, in a particular way.<sup>73</sup>

In the context of domestic violence, judicial discretion opens the door to bias based on preconceived, stereotypical gender notions and beliefs.<sup>74</sup> Some argue that a large number of judges possess minimal knowledge of the circumstances surrounding domestic violence at first.<sup>75</sup> Allowing for judicial discretion, therefore, arguably allows more room for these preconceived notions to determine the ultimate holding.<sup>76</sup> Opponents argue that many judges downplay potential risks that might affect victims in a family abuse situation due to a belief that such problems may be rectified solely by counseling.<sup>77</sup> Any such determinative biases, opponents argue, perpetuates a larger cycle of violence.<sup>78</sup> Such a lack of understanding by judges might also lead to inadequate civil protection orders.<sup>79</sup>

Illustrative of the opponents' point of view is a story related by renowned author Deborah Epstein. Epstein writes of her experience in Washington D.C. Superior Court where she heard a victim testify that her husband repeatedly punched her in the left eye and saw that victim produce pictorial evidence of her injuries.<sup>80</sup> Epstein also heard the defendant testify that his wife had simply run into a door.<sup>81</sup> The judge's response was this:

Ma'am, I credit your testimony, and am convinced that your husband assaulted you in violation of the law. As a result, I am authorized to award you a civil protection order, which could order him to stay away from you and stop hurting you. But I'm not going to do that today. Because you have children together, you're going to have to find some way to cooperate with each other to raise them. So I want you to go home and try to work things out in private. And I suggest that you go see a movie I saw

---

<sup>73</sup> Yablon, *supra* note 64, at 237 (discussing Jerome Frank, *What the Courts Do in Fact*, 26 ILL. L. REV. 645 (1931)).

<sup>74</sup> May, *supra* note 25, at 23 (quoting The Missouri Task Force on Gender and Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 583 (1993)).

<sup>75</sup> Epstein, *supra* note 4, at 39.

<sup>76</sup> May, *supra* note 25, at 25 ("Judicial refusal to apply state domestic violence laws properly is due, at least in part, to individual judges' ingrained biases against battered women.").

<sup>77</sup> Epstein, *supra* note 4, at 42 (internal quotation and citation omitted).

<sup>78</sup> May, *supra* note 25, at 28 ("[I]f local judges have a reputation for not taking the issue of domestic violence seriously, other women may be dissuaded altogether from seeking help through the justice system, and abusers will not be deterred from committing abuse.").

<sup>79</sup> Epstein, *supra* note 4, at 43.

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.*

recently, called “Mrs. Doubtfire,” where Robin Williams and his wife decide to separate, but still manage to find a creative way to work together when it came to their children.<sup>82</sup>

Responses like the one above issued by the judiciary lend credence to the contention that those responsible for applying and enforcing the law have lagged far behind.<sup>83</sup> Epstein suggests that “[a] law is only as good as the system designed to deliver on its promises, and the failure of the courts to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence.”<sup>84</sup>

#### ABUSE, DISCRETION & GUNS

In Senator Mark Lautenberg’s (D-NJ) opinion, “There is no reason for someone who beats their wives [sic] or abuses their children to own a gun. When you combine wife-beaters and guns, the end result is more death.”<sup>85</sup> However, thanks to built-in judicial discretion at both the state and federal level, judges are finding plenty of reasons why an abusive spouse should have or keep a gun. Opponents of judicial discretion regarding gun removal point out that, on both the state and federal level, some defendants are disarmed while other similarly situated defendants are not.<sup>86</sup> Correspondingly, many victims are protected while other similarly situated victims are not.<sup>87</sup> These unpredictable outcomes undercut the ability of the state and the federal governments to administer gun removal programs that the public will view as a legitimate and just exercise of governmental power.<sup>88</sup>

For instance, when asked whether he always follows the statutory requirement to ask a plaintiff at *ex parte* emergency protective order hearings and the defendant at 10-day hearings, whether the defendant owns or possesses firearms, a North Carolina domestic violence court judge replied that he did not,<sup>89</sup> but rather went with whatever issues the parties raised.<sup>90</sup> Essentially, if neither party mentioned the presence of guns, then despite the statutory mandate, no such inquiry would be made.<sup>91</sup> This approach ignores the well-documented diffi-

---

<sup>82</sup> *Id.* at 6-7.

<sup>83</sup> *See id.* at 13.

<sup>84</sup> *Id.*

<sup>85</sup> 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

<sup>86</sup> Vainik, *supra* note 10, at 1141.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Interview with Dist. Court Judge, *supra* note 28.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

culty most domestic violence plaintiffs—the majority of which are *pro se*—have in expressing exactly what happened while standing in the unfamiliar and often highly intimidating surroundings of a courtroom.<sup>92</sup> On the other hand, a day spent in the domestic violence courtroom of a Guilford County judge yielded exactly the opposite results and each party was asked in each case whether the defendant possessed or owned firearms.<sup>93</sup>

Opponents of judicial discretion tie these varying outcomes to the aforementioned bias of some judges. Others conclude that judges are adjudicating in a time of relaxed gun control.<sup>94</sup> The idea that a judge's decision will prohibit an individual from possessing firearms may seem excessive to them.<sup>95</sup> Consequently, victims are forced into more dangerous situations, the cycle of abuse continues, and the victims suffer significantly increased levels of psychological and physical harm.<sup>96</sup>

Additional criticisms have been raised regarding the interplay of state and federal gun removal statutes, where more inconsistencies exist. Because the federal statutes are only triggered when the state courts make specific findings, the possibility exists for trial judges to craft a state protective order in such a way that the federal statute cannot be triggered.<sup>97</sup> For example:

Substantial anecdotal evidence suggests that some judges are attempting to evade the federal law or are directly refusing to comply with it, particularly section 922(g)(8), through their direct involvement in setting the terms of a protection order. Because the order must satisfy certain requirements to qualify as a predicate for a firearm prohibition under the code, some judges have refused to make the specific findings that would meet these requirements. Others have . . . written on the protection order that the federal law does not apply, or have failed to check a box on the order noting a firearm prohibition.<sup>98</sup>

There are many reasons for judges to exercise this kind of discretion one way or the other. One reason may be the request of the plain-

---

<sup>92</sup> See Kit Kinports & Karla Fischer, *supra* note 53, at 204 (stating that many judges, “expect[ ] the petitioner to have her ducks in a row and [are] not tolerant of the confusion and low self-esteem typical of the battered woman. She must know and be able to say what she needs and why she needs it in a clear manner.”).

<sup>93</sup> Interview with Judge Angela Foster, Dist. Court Judge, Guilford County Court, in Greensboro, N.C. (April 9, 2009) (on file with author).

<sup>94</sup> May, *supra* note 25, at 28.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Vainik, *supra* note 10, at 1141-43; see also Sack, *supra* note 40, at 8-9.

<sup>98</sup> Sack, *supra* note 39, at 8.

tiff herself. Author and advocate Maria Kelly tells of an emergency protective order she sought for a client and how the judge, in his discretion, took the opposite route described above and refused to issue the order unless the client turned over all of her husband's weapons to the police.<sup>99</sup> "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."<sup>100</sup> In another example, author Lisa D. May tells of a Minnesota judge who expunged the domestic violence conviction of a batterer who admitted to assaulting his wife in open court and was thereafter convicted.<sup>101</sup> The defendant, a police officer, was subject to the federal firearms ban based on the domestic violence conviction, yet his job required him to carry a firearm for work.<sup>102</sup>

According to May:

The Hennepin County judge set aside [the defendant's] adjudicated conviction, stating that because the federal law would force him to relinquish his gun and likely his job, the conviction created a 'manifest injustice.' That local judge single-handedly overrode federal legislation, and [the defendant] was reissued his firearm and restored to his gun-carrying position . . . .<sup>103</sup>

In deciding whether to protect a defendant's employment that requires him or her to carry guns, judges may deny valid requests for protective orders by effectively creating their own law.<sup>104</sup> May also notes that a Missouri judge "cited the approach of quail hunting season in open court as one reason not to issue [a] protective order."<sup>105</sup> Reacting to these unfortunate displays of judicial discretion in the domestic violence context, May writes:

Although it is impossible to know how often judges issue decisions in favor of domestic violence perpetrators because of the federal gun restrictions, the practice of the Minnesota and Missouri judges apparently is not exceptional. Judges are inappropriately denying orders of protection . . . thereby allowing batterers to continue owning, possessing, transferring, and using firearms despite the federal statutes that specifically prohibit them from doing so.<sup>106</sup>

---

<sup>99</sup> Kelly, *supra* note 21, at 349.

<sup>100</sup> *Id.*

<sup>101</sup> May, *supra* note 25, at 1.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1.

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 2-3.

Situations like those cited above are a far cry from the kind of judicial discretion written about in academic settings, far removed from the real-world inner-workings of domestic violence courts, and equally distant from the kind of judicial discretion envisioned by those of Chief Justice John Marshall's ilk.<sup>107</sup> Marshall, writing for the majority in *Osborn v. Bank*, stated:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.<sup>108</sup>

“In the realm of domestic violence law, both scholars and the public tend to overlook the very premise upon which the judicial system is based: judges do not have the discretion to ignore or circumvent applicable laws.”<sup>109</sup> Some correctly point out that actions such as ignoring statutory mandates and effectively re-writing applicable laws to suit the state's hunting schedule, are not even acts of discretion. Rather, they represent flat refusals to follow the law and are an abuse of discretion.<sup>110</sup> On that basis, the decision should be appealable even under the high standard for overturning a decision on an abuse of discretion standard.

However, in the domestic violence context, the kind of discretion exercised is both primary and secondary under Rosenberg's analysis: primary in that, for all practical purposes, the court can choose no “wrong” answer because the interpretation and application of domestic violence statutes is so inherently discretionary; and secondary, even if a “wrong” answer is chosen, review is usually limited and unlikely given that most plaintiffs are *pro se* and those represented by legal services will not usually be assisted on appeal.<sup>111</sup> Victims frequently lack representation, which inevitably leads to judges not being held responsible for their incorrect assertions or understandings of the law.<sup>112</sup> At

---

<sup>107</sup> See, e.g., *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824) (demonstrating Chief Justice Marshall's views on judicial discretion).

<sup>108</sup> *Id.*

<sup>109</sup> May, *supra* note 25, at 32.

<sup>110</sup> See *id.* at 2-3.

<sup>111</sup> See Rosenberg, *supra* note 58, at 636-37.

<sup>112</sup> See May, *supra* note 25, at 33.

the intersection of judicial discretion, *pro se* victims, and the lofty standards of a limited review process lies the simple truth that “laws are no more effective than the judges who interpret, apply, and enforce them. Judges are a critical link in the chain of protection for battered women, yet they are the weakest link because they are largely unaccountable for their decisions.”<sup>113</sup>

Some argue, however, that applying the laws accurately has as much to do with statutory interpretation as with proper exercise of judicial discretion. For example, a North Carolina District Court Judge, referring to North Carolina’s gun removal provisions, points out that the language is not as clear as it may initially seem.<sup>114</sup> The judge asks, “What does ‘threaten to seriously injure’ mean? Does ‘I’m gonna beat your ass’ constitute a threat to seriously injure?”<sup>115</sup> Yet, with interpretation comes discretion. A judge faced with dispossessing a defendant of his firearms for having uttered the aforementioned phrase must make a highly discretionary call in which way he chooses to interpret the statutory language: pro-dispossession or not. In terms of whether gun removal should be discretionary, questions like these work both ways. On the one hand, they favor discretion to allow the judge to discern between domestic violence and domestic disputes, where, in the latter instance, gun removal would not seem just or in keeping with legislative intent. On the other hand, such questions also favor removing judicial discretion since, without it, the judge need only decide whether an act of domestic violence giving rise to a protective order occurred (a highly discretionary call in and of itself), and if so, then the guns would be automatically removed. There would be far less opportunity for a judge’s own personal bias, the approach of the local hunting season, or the remedial power of movies like Mrs. Doubtfire, to substitute for the rule of law, particularly in an area with limited potential for appeal and a high probability for homicidal results when the order is botched.

---

<sup>113</sup> Lynn Hecht Schafran, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1068-69 (1995).

<sup>114</sup> Interview with Dist. Court Judge, *supra* note 28.

<sup>115</sup> *Id.* (The judge also pointed out that “a pattern of prior conduct” regarding threats to use a deadly weapon against the plaintiff begs the question of how recent such patterns must be, asking whether having used such a weapon once several years ago would be enough to satisfy that particular gun-removal provision.).



SOLUTIONS:  
EDUCATION, INTEGRATION & NOTATION

Authors on the subject of domestic violence offer many solutions to the particular problem inherent at the intersection of domestic violence and guns. One lauded solution is judicial education. Lynn Schafran, former Director of the National Judicial Program to Promote Equality for Women and Men in the Courts, suggests that it is imperative that domestic violence information be covered in repeated judicial training.<sup>116</sup> Judges must be educated with up-to-date information regarding violence against women. Such education and advanced knowledge will help the courts overcome historical biases against victims of domestic violence.<sup>117</sup> Providing education for judges presiding over domestic violence cases—education into both understanding the cycle of domestic violence and the grim statistics surrounding it—will “increase their compassion toward and understanding of the surrounding issues and equip them to ensure victims’ safety.”<sup>118</sup> Arguably, judicial education will also lead to consistency and improved trust in the judicial system regarding domestic violence.

[I]f judicial education results in the correct application of the laws, some level of consistency is reached on a systematic level. This prevents victims’ frustration with the judiciary’s apparent arbitrariness, ensures their safety, and encourages them to use the judicial system to escape violent relationships.<sup>119</sup>

In addition to general education about domestic violence, scholars also urge specific judicial education on firearms and domestic violence,<sup>120</sup> pointing out that:

[t]he importance of training judges in domestic violence issues has become a familiar mantra, because the judicial role is so central to any domestic violence justice initiative. After strenuous efforts across the country over several years, the knowledge, sensitivity, and effectiveness of judges who handle domestic violence cases has improved. The intersection of domestic violence and firearm possession, however, appears to be one in which significant confusion or resistance remains on the part of judges.<sup>121</sup>

---

<sup>116</sup> Schafran, *supra* note 113, at 1072.

<sup>117</sup> May, *supra* note 25, at 35 (quoting Judith Armatta, *Getting Beyond the Law’s Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 826 (Fall 1997)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Sack, *supra* note 39, at 21.

<sup>121</sup> *Id.*

Advocates of judicial education correctly observe that “[l]egal reform does not end with the passing of legislation; it cannot be obtained without the judiciary’s support. Therefore, judicial education and accountability are the keys to ensuring that the statutes are triggered and applied when they are properly warranted.”<sup>122</sup> The one obvious caveat is that such education must be made mandatory lest its potential effectiveness be lost. As one commentator explains,

Court rules for judicial education should require participation in domestic violence education. One problem in delivering judicial education in the current system is that most domestic violence training programs are voluntary; judges may not be required to receive any judicial education at all, or they may have complete choice as to which courses among the state’s offerings they will attend.<sup>123</sup>

Other solutions include specialized or integrated domestic violence courts handling only domestic violence cases.<sup>124</sup> Such courts, where used, “have been widely applauded for facilitating court access, coordinating community and legal services for victims and children, managing treatment for batterers, and ensuring sensitivity and expertise of judges and courtroom personnel.”<sup>125</sup> While such courts would arguably facilitate initiatives such as gun removal more effectively than courts of general jurisdiction, they are also expensive and, as such, difficult to implement on a nationwide scale.<sup>126</sup> “The systems are costly everywhere and entirely impractical in rural areas” where resources are even more scarce.<sup>127</sup>

Still a third option is “requiring judges to record all portions of a hearing and make written findings, which would provide a full record upon which appeals could be based.”<sup>128</sup> This option, of course, runs into the familiar hurdle of domestic violence victims lacking the resources to appeal even the worst decisions.<sup>129</sup>

---

<sup>122</sup> May, *supra* note 25, at 35.

<sup>123</sup> Schafran, *supra* note 113, at 1075.

<sup>124</sup> See Sack, *supra* note 39, at 21-22; see e.g., May, *supra* note 25, at 33; Epstein, *supra* note 4, at 44-45.

<sup>125</sup> May, *supra* note 25, at 33.

<sup>126</sup> *Id.* at 33.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

SOLUTIONS:  
BULLET-PROOFING

Each of the above solutions, especially judicial education, has the potential to help alleviate the inconsistencies that result from judicial discretion in domestic violence cases. Yet none is arguably as simple, cost-effective, or as “bullet-proof” as simply removing discretion from the equation when it comes to gun removal. Statistically, the choice of whether a batterer should remain armed is a no-brainer. Stories too numerous to list testify as to the gruesome and tragic results of the affirmative choice, and yet judges around the country make that choice every day, imperiling lives when they do. Those staggering statistics are either unknown to or generally ignored by the judiciary, and women’s lives are put at risk based on criteria more often having to do with a judge’s own bias than with the dangers present in the case.

Realizing that discretion is a necessary judicial tool and much, if not all, of the decision-making process in domestic violence cases—where the facts are fuzzy and the evidence slim—must inherently involve some level of discretion, such discretion should end where the issue of gun removal begins. Ordering the surrender of firearms to the sheriff’s control should no longer be an optional box to be checked, but rather should be a mandatory condition of all protective orders; written clearly and conspicuously onto the front of every order, without exception. Some argue this solution seems extreme. But does the loss of a man’s hunting rifles trump the loss of a woman’s life? I argue that it does not; that the defendant retains his opportunity to be heard and to defend himself, and that should he lose in that defense, he should also lose the means by which he becomes twenty times more likely to murder the woman seeking protection from him. Given the statistics, there is simply no reason for the discretion of a judge to imperil the life of a plaintiff and, as such, that discretion should not exist. A protective order will never truly be “bullet-proof,” but removing judicial discretion is a good step in that direction.

CONCLUSION

What some authors call “hunching” or “judicial intuition” rules the day in domestic violence court. At times, it has to: all a judge has are two conflicting stories of an event that occurred a month prior and no other evidence to back up either side. In an arena where most of the parties are *pro se*, there is no one to argue the law either for or

against. As a result, it frequently goes ignored altogether and judicial discretion takes its place.

While one may argue discretion is necessary to decide whether to grant a protective order, the rationale breaks down considerably regarding what to do about a defendant's firearms once the decision to issue a protective order is made. Given the statistics behind domestic violence and firearms, the idea that there ever exists a legitimate reason to allow an abuser to remain armed seems rather absurd. Motivation for legislation at both the state and federal level suggests that no such reason exists, yet both North Carolina and federal law leave the ultimate issue of whether to take a gun away from an abuser to the trial judge. Given the low likelihood of appeal and the even lower likelihood of a decision being overturned on appeal, the judge's exercise of discretion in this matter is essentially unfettered. Judicial discretion, described above as a "four-letter word" in the general sense, is simply terrifying in the context of protective order gun removal provisions.

Removing this discretion and making gun removal a mandatory consequence of protective orders will not solve the problem of domestic violence, though it would be a positive first step toward getting a lagging judiciary up to speed with legislative progress in that area. More importantly, removing discretion from protective order gun removal provisions could make the protective orders received by tens of thousands of women each year a little more "bullet-proof" and thus mean the difference between life and death.