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Claire McNamara

Seattle University School of Law

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Finally, Actually Saying “No”: A Call for Reform of Gun Rights Legislation and Policies to Protect Domestic Violence Survivors

Claire McNamara*

There will be many, many times in the course of your . . . lives where you will be encouraged—in shockingly plain ways—to take the easy way, to go along with the group in contradiction to your own principles. You will one day be standing in the shoes of Faust But the safety of the world, in some sense, depends on your saying “no” to inhumane ideas. . . . [D]efiance of the mob, in the service of that which is right, is one of the highest expressions of courage I know.

- Representative Gabrielle Giffords¹

INTRODUCTION

On July 21, 2008, Redmond, Washington, resident Melissa Batten obtained a temporary protection order through King County against her estranged husband, Joseph Batten.² Prior to the issuance of the order, Joseph

* Claire McNamara is proud to be in her final year of law school at Seattle University as this article goes to press. She is thankful for all of her friends and family for their incredible support.

¹ Gabrielle Giffords served in the House of Representatives from 2007 until 2012. I served as a volunteer for her first campaign in 2006 in our shared hometown, Tucson, Arizona. Representative Giffords was critically wounded during a mass shooting near a Tucson supermarket at a campaign event. Representative Giffords subsequently resigned from her congressional seat in order to undergo extensive rehabilitation therapy, but now advocates publicly for sensible gun control reform via the Americans for Responsible Solutions Organization. Representative Giffords spoke the words above at my graduation from Scripps College, our mutual undergraduate institution. Ms. Giffords is an inspiration to me. This article is dedicated to her. Gabrielle Giffords, Representative, United States Congress, Scripps College Commencement Address (May 17, 2009), *available at* <http://www.scrippscollege.edu/commencement/speeches/gabrielle-giffords-93>.

² Peyton Whitley, *Slain Woman Had Protection Order*, SEATTLE TIMES, Aug. 1, 2008, http://seattletimes.com/html/localnews/2008085333_murdersuicide01m.html.

called Melissa over 30 times in two days and warned her never to hang up; he broke into her place of work at Microsoft and was caught by security guards; and he brandished a gun at her after he found out she was having an affair and threatened to kill himself.³ The order directed Joseph not to come within 100 yards of Melissa and was served on Joseph on July 24.⁴ Five days later, Joseph confronted Melissa in the parking lot of the apartment where she lived with a friend. He shot her before shooting himself in the head, killing them both.⁵

In her petition for a protective order, Melissa had included the fact that Joseph owned a loaded gun he had pointed at her and himself during an argument.⁶ A federal statute existed at the time that directed judges to order the surrender of firearms when issuing domestic violence protection orders.⁷ However, while the court ordered that Joseph surrender his guns and refrain from purchasing more, it did not enforce this order. Melissa's friend eventually convinced Joseph to relinquish the guns he owned.⁸ However, after he relinquished those guns and a few days after he was served with the protective order, Joseph bought a gun at a gun show, which he used to kill himself and his wife.⁹ Stories like these are common and all share a distinct, consistent pattern: despite a domestic violence survivor's explicit concern about a perpetrator's gun ownership, perpetrators are seldom made to surrender their firearms by law enforcement: even if a court issued such a

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Michael Luo, *In Some States, Gun Rights Trump Orders of Protection*, N.Y. TIMES, Mar. 17, 2013, http://www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html?_r=0.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

surrender order, it may not be enforced or a perpetrator may obtain another weapon.¹⁰

This article hopes to highlight the discrepancy between the accuracy with which we can now predict the escalation of domestic violence and the current legislative and procedural failings to protect survivors prior to this escalation. Specifically, despite the enactment of the relevant federal law 992(g) and a recent Washington State statute, Revised Code of Washington 9.41.040—both meant to protect domestic violence survivors from gun crimes—better legislation and administrative procedures are needed to more fully protect survivors of domestic violence. Despite concerns about Second Amendment rights, gun control must be enhanced because the presence of guns clearly escalates domestic violence and leads to homicide.

First, I will address the ongoing prevalence of domestic violence firearm homicides, nationally and in Washington State; the issues that may impact survivor’s access to and efforts to pursue help; how our current response models may further the power differential between perpetrators and survivors; and the factors from which we can now predict when abuse can escalate to homicide. Second, I will address the current federal law, 922(g),¹¹ as well as the recently passed Washington State House Bill 1840,

¹⁰ Throughout this article, I will refer to domestic violence “survivors.” Frequently, those that experience domestic violence are referred to as “victims.” “Victims” may be the proper legal term and may highlight the pain inflicted on those who experience domestic violence. However, survivor is more indicative of the resilience, competence, and forward-looking efforts I seek to support in this article.

¹¹ 18 U.S.C. § 922(g) (1996) states the following:

- (g) It shall be unlawful for any person—
 - (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
 - (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
 - (5) who, being an alien—
 - (A) is illegally or unlawfully in the United States; or

which modifies Revised Code of Washington (RCW) 9.41.010,¹² neither of which completely address the procedural gaps through which domestic violence homicides may and do occur. I will address the stringent qualifications inherent in section 992(g) that may inhibit its effectiveness, the general lack of prosecutions under the federal law, the loopholes through which those who should be restricted still obtain weapons, and the procedural time gap between the issuance of an order and enforcement under the statute during which homicides may and do occur. Following, I will compare Washington State legislation to 922(g), as well as analyze the areas where the new state legislation still allows for firearm procurement loopholes for domestic violence perpetrators. Third, I will explore the

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(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 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; and

(C)

(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; or

(9) 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.

¹² H.B. 1840, 63rd Leg., Reg. Sess. (Wash. 2014).

merits and potential problems of a community-oriented model response system, based out of Massachusetts, which has been successful in preventing high-risk cases from ending in homicide.

In order to bolster the efforts and legislative intent behind 922(g) and RCW 9.41.010, a number of procedural changes are needed. In terms of communication, these changes include creating a nexus of communication amongst relevant agencies and government officials and providing ongoing and mandatory judicial education about RCW 9.41.040 and domestic violence. Procedurally, changes should also include streamlining the process for accepting, storing, and returning surrendered weapons; creating additional municipal processes at the jailing and probation stage to ensure compliance; and ensuring such orders are entered into the state database immediately. Finally, representatives should consider legislation that would allow on-the-scene police officers to confiscate firearms when they hold a reasonable belief domestic violence has occurred and a weapon may be present.

I. DOMESTIC VIOLENCE: THE LANDSCAPE AS WE KNOW IT NOW

A. United States and Washington State Experiences: Prevalence of Domestic Violence

While legislators, judges, and advocates may disagree about the best methods for addressing domestic violence, the statistics of its ongoing prevalence are staggering. The Justice Department estimates one in every four women is a survivor of physical domestic violence at some point in her life and roughly one man and three women are killed by their partners each day in the United States.¹³ In 2012, in King County alone, 14 domestic

¹³ Rachel Louise Snyder, *A Raised Hand: Can a New Approach Curb Domestic Violence?*, NEW YORKER, July 22, 2013, http://www.newyorker.com/reporting/2013/07/22/130722fa_fact_snyder.

violence fatalities occurred,¹⁴ while in Washington State, 54 people died.¹⁵ Additionally, one study found 58 percent of male perpetrators committed physical violence against new partners following the end of a previously violent relationship.¹⁶ From this last fact, addressing domestic violence clearly involves more than immediate removal of a survivor from an abusive home or relationship as perpetrators continue the pattern of violence and involvement in survivors' lives.

Despite these large numbers, domestic violence fatalities do not seem as publicized as other national and international violent offenses, such as war crimes and mass shootings. As one *New Yorker* article noted, while the war took the lives of 3,200 American soldiers between 2000 and 2003, domestic homicide killed 10,600 people during that period.¹⁷ The same article also noted that its domestic violence fatality statistic is likely to be an underestimate since domestic violence often goes unreported and since the source of this information, the FBI's Supplementary Homicide Report, collects information from *voluntary* reporting from local police departments.¹⁸ If the sheer loss of human life was not reason enough to prompt action, domestic violence harms society in other tangible, measurable ways. In terms of what domestic violence costs society at large, taxpayers, businesses, and survivors suffer losses expressed in medical costs, lost earnings, and support of public programs related to prevention

¹⁴ WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, 2012 DOMESTIC VIOLENCE FATALITIES IN WASHINGTON STATE (2012), available at <http://fatalityreview.files.wordpress.com/2014/01/2012-washington-dv-fatalities.pdf>.

¹⁵ This figure includes suicides of abusers, as well as the murder of family, friends, and children of survivors by abusers. *Id.*

¹⁶ Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 269 (2008).

¹⁷ Snyder, *supra* note 13, at 5.

¹⁸ *Id.*

and assistance—as well as the incalculable pain, suffering, and reduced life quality experienced by many survivors.¹⁹

In 1996, Washington State Senator Patty Murray said that “the gun is the key ingredient most likely to turn a domestic violence incident into a homicide,”²⁰ and it appears she was correct.²¹ According to federal records, nearly half of the women killed each year die in intimate partner homicides, and more than half of these women are killed with a gun.²² For women in domestic violence situations, the risk of homicide increases by 800 percent where the abuser has a gun.²³ According to Mayors Against Illegal Guns, a national coalition of over 1,000 mayors from 46 states, over the past 25 years, more domestic violence homicides in the United States have been committed with guns than with all other weapons combined.²⁴ Their website also notes that women in the United States are 11 times more likely to be murdered with a firearm than are women in other high-income countries because of ease of gun access in the United States as compared to other countries.²⁵

In Washington State, since 1997, abusers used firearms in 55 percent of all domestic violence homicides.²⁶ At least 26 state-level domestic violence

¹⁹ See generally HARVEY WALLACE & CLIFF ROBERSON, FAMILY VIOLENCE: LEGAL, MEDICAL AND SOCIAL PERSPECTIVES (2011), available at http://www.pearsonhighered.com/assets/hip/us/hip_us_pearsonhighered/samplechapter/0205679706.pdf.

²⁰ 142 CONG. REC. S10,379 (daily ed. Sept. 12, 1996).

²¹ Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 528 (2003) (stating firearms increase the likelihood of domestic violence causing the victim’s death and noting that, in Atlanta, family and intimate assaults were 12 times more likely to result in death if a firearm was present).

²² Luo, *supra* note 6, at 2.

²³ Jacquelyn C. Campbell et al., *Risk Factors for Femicide Within Physically Abusive Intimate Relationships: Results from a Multi-Site Case Control Study*, 93 AM. J. OF PUB HEALTH 1089, 1089–92 (2003).

²⁴ *New Ad and Research Shows How Weak Gun Laws Turn Domestic Abuse into Murder*, MAYORS AGAINST ILLEGAL GUNS, (Apr. 3, 2013), <http://www.mayorsagainstillegalguns.org/html/media-center/pr016-13.shtml>.

²⁵ *Id.*

²⁶ See generally JAKE FAWCETT, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, UP TO US: LESSONS LEARNED AND GOALS FOR CHANGE AFTER THIRTEEN YEARS OF THE

fatality reviews have been conducted since the late nineties. After over 20 years of data collection, domestic violence fatality rates remain constant and an overwhelming majority of those deaths involve guns.²⁷ Restricting or removing gun access in these situations may not prevent every death, but what we know is enough to prompt better and more comprehensive strategies.

B. Bad to Worse: Nature of Domestic Violence and Documented Escalation Patterns

The nature of domestic violence requires more anticipatory action to prevent these homicides. Rachel Louise Snyder, reporter for the *New Yorker* notes that “deep cultural misunderstanding[s]” about domestic violence exist.²⁸ Such misunderstanding include the ideas that domestic violence survivors will always flee from a truly threatening scenario, that in some cases they incite abuse, or that no problem exists if a woman does not file a restraining order.²⁹ However, many people can now readily acknowledge that an abuse survivor may face a plethora of impediments to leaving or fleeing from their abuser. According to the Washington State Coalition Against Domestic Violence (WSCADV), these factors include the following:

the availability of safe and affordable housing; judicial decisions regarding custody and protective orders; access to civil legal representation; the quality of law enforcement investigations into the crimes committed against them; the degree to which criminal sentences were appropriate to the crime and strongly enforced; the

WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW (2010), available at http://www.ndvfri.org/reports/washington/Washington_Statewide_AnnualReport_2010.pdf; Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 3 (2005).

²⁷ EVERYTOWN FOR GUN SAFETY, GUN LAWS AND VIOLENCE AGAINST WOMEN (Feb. 2015), available at <http://everytown.org/issue/domestic-violence/>.

²⁸ Snyder, *supra* note 13, at 5.

²⁹ *Id.*

availability of help and information in their first language; access to advocacy and safety planning; and the capacity of friends and family to respond supportively.³⁰

Additionally, Snyder and others repeatedly documented that a situation involving domestic abuse can often escalate quickly to a homicide.

While some may assume survivors are no longer in danger if they do not seek assistance or fail to renew a restraining order,³¹ in reality a survivor may be in such a denigrated state that they are immobilized from seeking help, are denied help because of poor performance in court, are afraid seeking some form of protection may incite further abuse, or in many cases may have already sought help without result.³²

A fatality review by the WSCADV noted some domestic violence survivors may fail to garner sympathy and support in court for several reasons. For example, they may use drugs or alcohol, engage in prostitution, have affairs, exhibit poor homemaking or parenting efforts, interact distrustfully with the police, or engage in petty crimes to alleviate the strains of poverty.³³ Additionally, survivors may “come across as messed up[,]”³⁴ when in reality they may be addressing post-traumatic stress disorder, anxiety, depression, suicidality, and other psychological challenges, which may be exacerbated or coupled with fear of confronting an abuser in court.³⁵ Survivors may also appear functionally disorganized,

³⁰ KELLY STARR, MARGARET HOBART, & JAKE FAWCETT, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, FINDINGS AND RECOMMENDATIONS FROM THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW (2004), available at http://www.ndvfri.org/reports/washington/Washington_Statewide_AnnualReport_2004.pdf.

³¹ *Id.*

³² See STARR, HOBART, & FAWCETT, *supra* note 30.

³³ MARGARET HOBART, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, “TELL THE WORLD WHAT HAPPENED TO ME”: FINDINGS AND RECOMMENDATIONS FROM THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 7 (2002), available at <http://fatalityreview.files.wordpress.com/2013/11/2002-dvfr-report.pdf>.

³⁴ Snyder, *supra* note 13, at 5. As noted by David Adams, co-founder of a nationwide counseling and education center called Emerge, this may be for the simple reason that “domestic violence affects survivors a lot more than it affects batterers.” *Id.*

³⁵ Bolotin, *supra* note 16, at 5, 290; see also Snyder, *supra* note 13, at 5.

lack emotional control, or be especially vulnerable and suggestible immediately after violence has occurred.³⁶ In cases where the survivor does not testify or changes their mind and chooses to testify on their abuser's behalf, the jury, understandably, may doubt the survivor's fear.³⁷ Some juries may also doubt the threats survivors face and may excuse any punishments, thus necessitating court proceedings.³⁸ These proceedings, in turn, exacerbate the power and control dynamics of a domestic violence situation.³⁹

In contrast, abusive partners are commonly perceived as "more likeable"⁴⁰ and may attempt to manipulate listeners, may readily deny abusive behavior, and may exhibit confidence such that they present themselves better in court than the survivors do.⁴¹

One theory as to the root of domestic violence, "the exchange theory," indicates persons act according to a system of rewards and punishments, which in the context of domestic violence indicates that an increased likelihood of family violence exists where a lack of social controls over potential violence occurs.⁴² As one researcher put it, "people hit family members because they can."⁴³ "The privacy of the family unit and the

³⁶ WALLACE & ROBERSON, *supra* note 19, at 6.

³⁷ See generally JENNIFER G. LONG, NAT'L DISTRICT ATT'Y ASS'N, INTRODUCING EXPERT TESTIMONY TO EXPLAIN SURVIVOR BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (2007), available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

³⁸ Additional court proceedings may be necessary in the event a jury acquits a perpetrator, but the survivor needs ongoing protection or may need to bring additional claims if the violence repeats. See generally ROY CARSON, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, POST-ARREST MODEL RESPONSE FOR THE SUPERVISION OF DOMESTIC VIOLENCE OFFENDERS (2003), available at http://wscadv2.org/docs/Post_Arrest_Model_Response_Manual.pdf.

³⁹ *Id.*

⁴⁰ Snyder, *supra* note 13, at 5 (Mr. Adams stated this may be for the simple reason that "domestic violence affects survivors a lot more than it affects batterers.").

⁴¹ See PETER G. JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 47 (2003).

⁴² WALLACE & ROBERSON, *supra* note 19, at 6.

⁴³ *Id.* at 12.

subsequent low risk of intervention decrease the cost of violence, thereby allowing it to occur.”⁴⁴ Thus, the very dynamics of domestic violence survivors and perpetrators may be indicative of the type of efforts needed to bolster a survivor’s strength and force in court.

Studies over the past 20 years have also revealed signs of when an abusive situation may escalate to homicide. The WSCADV has noted that homicides frequently occur when survivors are trying to leave their abusers.⁴⁵ Professor Jacquelyn Campbell at Johns Hopkins University School of Nursing is considered the “country’s leading expert on domestic homicide.”⁴⁶ Seeking to establish a more concrete set of predictive factors for domestic violence homicides, Professor Campbell interviewed 2,000 domestic violence survivors in the 1980s in Dayton, Detroit, and Rochester.⁴⁷ She also looked through homicide files from local police to document any pattern in the crimes of batterers and the actions of survivors preceding the crimes.⁴⁸ She concluded that a previous incident of domestic violence was the largest singular indicator of domestic homicide.⁴⁹ Half of the women killed by partners previously sought assistance from police or another branch of the criminal justice system at least one time.⁵⁰ She also found the danger and violence tend to develop on a relatively consistent timeline.⁵¹ For example, if there is a major change at home, such as a new job or pregnancy, or when a survivor tries to leave an abuser, the danger spikes and remains high for around three months, drops for the next nine months, and then drops “significantly” after a year.⁵² Professor Campbell noted risk factors predictive of extreme danger, including: threats to kill,

⁴⁴ *Id.* at 6.

⁴⁵ STARR, HOBART & FAWCETT, *supra* note 30, at 7.

⁴⁶ Snyder, *supra* note 13 at 5.

⁴⁷ *Id.* at 34, 36.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 36–37.

past incidents of choking, substance abuse, record of violence, forced sex acts, and gun ownership.⁵³ A model response program in Massachusetts using Campbell's risk evaluation classification will be addressed in Section IV of this article.

Despite public awareness of these predictive factors, in the absence of more stringent monitoring of compliance with protective orders and firearm access restrictions, survivors are placed in a difficult position of carrying the burden of reporting violence.⁵⁴ Survivors are also left to weigh the likelihood that abusers may increase dangerous behaviors pre-trial, or in the face of an order, to limit survivor participation in court proceedings.⁵⁵

C. Existing State and National Shelter Response Model

Domestic violence is a unique crime of violence because—unlike a drive-by shooting, attempted murder, or other isolated attack—the abuser may remain a threat to the survivor over a long period of time, especially if children are involved.⁵⁶ One problem with current response models is that much of the obligation to alleviate the situation falls on the survivor instead of the abuser.⁵⁷ Currently, protection via shelters and the issuance of protection orders is the primary national response model for domestic violence.⁵⁸ However, as noted by Snyder's *New Yorker* article, moving into

⁵³ *Id.* at 37.

⁵⁴ Roy Carson, *Post-Arrest Model Response: For the Supervision of Domestic Violence Offenders*, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE 31–32, <http://www.wscadv.org/resourcesPublications.cfm?ald=50378CED-C298-58F6-016DCA71A1672922> (last visited Oct. 10, 2014).

⁵⁵ *Id.* at 27–28.

⁵⁶ See generally CARSON, *supra* note 38, at 11, 18–19.

⁵⁷ Snyder, *supra* note 13, at 36.

⁵⁸ See *id.* See also *What Can I Do to be Safe?*, DOMESTICVIOLENCE.ORG, <http://www.domesticviolence.org/what-can-i-do-to-be-safe/> (last visited Oct. 6, 2014); *Getting Help*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (2005–2014), <http://www.ncadv.org/protectyourself/GettingHelp.php> (last visited Oct. 6, 2014) (indicating the primary advice of most assistance-based organizations and the recommendation most often offered to survivors is a shelter option).

a shelter, even temporarily, can be very disruptive for a family.⁵⁹ A move to a shelter may keep survivors and children away from work and school, and may restrict their ability to contact family, friends, and employers.⁶⁰

A 2008 study in Washington State examined shelter resources and systems.⁶¹ In terms of shelter usage, the study indicated residents stayed for a minimum of one to a maximum of 360 days, with 16 percent of study participants staying 10 days or fewer and 80 percent staying 60 days or fewer.⁶² In terms of services offered in Washington State, 89 percent of Washington shelters offered civil court advocacy services and 85 percent offered criminal court advocacy.⁶³ 22 percent of survivors had previously stayed in a shelter in addition to the visit recorded in the 2008 study, with the dates of previous visits ranging from over a year to a few months prior.⁶⁴ This indicates that many women experienced repeat incidents of domestic violence driving them from their homes.⁶⁵ The study also gathered qualitative feedback from survivors to query their alternatives if the shelter did not exist.⁶⁶ Devastatingly, many women responded that they believed they would have killed themselves, been killed by their abusers, remained in abusive homes until they had gathered enough resources to leave, become homeless and dealt with serious mental health consequences such as severe depression, or remained indefinitely for the sake of their children.⁶⁷

While shelters provide services and assist many survivors and their children each year, shelters cannot meet the current national need for

⁵⁹ Snyder, *supra* note 13, at 36.

⁶⁰ *Id.*

⁶¹ Eleanor Lyon et. al., *Domestic Violence Shelters: Survivor's Experiences*, THE NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE 1 (2008), <http://www.wscadv.org/resourcesPublications.cfm?aId=3EBF759D-C29B-57E0-88AE7E81BA010A86>.

⁶² *Id.* at 24.

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 13.

⁶⁵ *Id.*

⁶⁶ *Id.* at 16–17.

⁶⁷ *Id.*

services and do not address long-term needs of survivors. In 2012, the National Network to End Domestic Violence completed a 24-hour survey of 86 percent of identified local domestic violence programs in the United States.⁶⁸ The study found 10,471 unmet requests for services over the course of one day, including requests for “emergency shelter, housing, transportation, childcare and legal representation,” because of insufficient resources.⁶⁹ In this study, 65 percent of the unmet requests involved housing, including 6,818 unmet emergency shelter and transitional housing requests.⁷⁰ This comprehensive study speaks to the reality that survivors and children often face homelessness and displacement.

In addition to inadequate resources, survivors have inadequate protections. For example, the security offered by protection orders is not always a realistic or ideal option. Frequently, survivors do not obtain the order, whether due to lack of judicial training, the judge's discretion, or both.⁷¹ One study found domestic abusers violate restraining orders 40 percent of the time.⁷² These weaknesses of protection orders suggest that the system is largely predicated on “survivor blaming”—the assumption that a survivor must take on the responsibility of avoiding attack. Because domestic violence survivors are primarily women and children,⁷³ some patriarchy theorists have suggested that laws and customs addressing this issue maintain a difference in power between men and women.⁷⁴ This power differential, theorists say, continues to place women in unsafe and

⁶⁸ See generally NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2012: A 24 HOUR CENSUS OF DOMESTIC VIOLENCE SHELTERS AND SERVICES (2013), http://nnedv.org/downloads/Census/DVCounts2012/DVCounts12_NatlReport_Color.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Snyder, *supra* note 13, at 34–35, 38–39. See also, Michelle Fugate et. al., *Barriers to Domestic Violence Help Seeking: Implications for Intervention*, VIOLENCE AGAINST WOMEN, 11 (2005).

⁷² *Id.* at 40.

⁷³ WALLACE & ROBERSON, *supra* note 19, at 4.

⁷⁴ *Id.* at 15.

subordinate positions without empowering assistance.⁷⁵ Indeed, WSCADV guarded against this tendency to subordinate women in the wording of its Post-Arrest Model Response for the Supervision of Domestic Violence Offenders, which indicates:

A survivor of domestic violence is almost always the best judge of her own safety. It is better to validate her concerns for safety by acknowledging this, so she will continue to take steps to protect herself, rather than giving her the impression that the criminal justice system is a cure all and can protect her.⁷⁶

This statement accurately acknowledges that a survivor is the best appraiser of her own situation and highlights the limited protection the criminal justice system can provide. However, it also reveals a systemic bias towards survivor-driven burdens of violence avoidance. In order to alleviate this burden on survivors, federal and Washington State legislation has been enacted to attempt to proactively protect survivors from gun violence.⁷⁷ Although these legislative efforts have likely decreased some gun violence by domestic violence perpetrators, they could be more comprehensive and their administration could be further bolstered to ensure better protection for survivors.

II. THE FEDERAL GUN CONTROL BILL U.S.C. §922(G): RESTRICTIONS LACKING BITE

In 1994, over the objections of pro-gun lobbyists, Congress passed U.S.C. § 922(g), a new section of the Gun Control Act of 1968.⁷⁸ This new legislation was meant to restrict access and procurement of firearms by perpetrators of domestic violence.⁷⁹ The statute provides:

⁷⁵ *Cf. id.*

⁷⁶ CARSON, *supra* note 38, at 8.

⁷⁷ See 18 U.S.C. § 922 (g); H.B. 1840, 63rd Leg., Reg. Sess. (Wash. 2014).

⁷⁸ Luo, *supra* note 6 (citing Violent Crime Control and Law Enforcement Act of 1994, Pub.L. 103–322 (1994)).

⁷⁹ *Id.*

- (g) 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 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; and
 - (C)(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; or
 - (9) 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.⁸⁰

This statute thus restricts possession of a gun by those convicted of misdemeanor crimes involving domestic violence. A violation is punishable by a fine up to \$250,000 or a prison term of up to 10 years.⁸¹ However, effectuation of the statute’s legislative intent has been prohibited by gaps inherent in the language and by implementation issues including: (1) a narrow range of qualifying crimes; (2) a general lack of prosecutions; (3) little prevention of new firearm purchases within the licensing system; (4) a lack of prevention of new firearm purchases outside the licensing system; (5) detrimental processing time gaps; and (6) use of judicial discretion to avoid implementation.

⁸⁰ 18 U.S.C. §§ 922(g)(8)–922(g)(9).

⁸¹ 18 U.S.C. § 924(a)(2).

First, crimes that qualify under the bill must meet a stringent set of qualifications prior to the termination of firearm access. To begin, the defendant either must be represented by an attorney, or must have intelligently and knowingly waived the right to counsel.⁸² Next, a perpetrator charged with a misdemeanor will only lose access to guns if they either used or attempted to use a deadly weapon or physical force, or threatened to do so.⁸³ The action must also be perpetrated by a person who has lived or is living with the survivor as a spouse, parent, or guardian, or who has a child with the survivor.⁸⁴ Finally, if the alleged perpetrator was entitled to a jury trial but did not have their case tried as such, the offense will not qualify unless the defendant knowingly and intelligently waived their right to a jury.⁸⁵ The perpetrator must thus have had an opportunity to participate in the hearing when an order was issued as well as actual notice of the hearing. The restriction on firearm access also lasts only as long as the protective order issued. A misdemeanor is usually punishable by confinement somewhere other than prison, fine, or penalty, and is a less serious crime than a felony.⁸⁶ Some could argue that because misdemeanors are typically less violent or serious crimes, gun control bills that restrict citizenship and civil rights to own firearms are excessive and improper.⁸⁷

Second, in addition to these restrictive qualifications for a misdemeanor offense, U.S.C. 922(g) often fails to protect survivors from gun-related domestic violence and homicide due to its lack of enforcement. In Tom Liniger’s article, *A Better Way to Disarm Batterers*, he comprehensively documents the bill’s tepid enforcement since its origination.⁸⁸ The first year

⁸² 18 U.S.C. § 921(a)(33)(B)(i)(I).

⁸³ 18 U.S.C. § 921(a)(33)(A).

⁸⁴ *Id.*

⁸⁵ 18 U.S.C. § 921(a)(33)(B)(i)(II).

⁸⁶ *Misdemeanor*, BLACK’S LAW DICTIONARY (9th ed. 2009).

⁸⁷ E. Tammy Kim, *Supreme Court Limits Gun Ownership for Domestic Violence Offenders*, ALJAZEERA, (March 27, 2014), available at <http://america.aljazeera.com/articles/2014/3/27/supreme-court-limits-gun-ownership-for-domestic-violence-offenders.html>.

⁸⁸ Liniger, *supra* note 21, at 530–31.

the bill took effect, no prosecutions were filed and only three were filed the next year.⁸⁹ In 2001, only 68 cases were filed under section 922(g)(8) nationally,⁹⁰ while in Washington State alone 43 domestic violence survivors were killed with guns between 2000 and 2002.⁹¹ Liniger also emphasized that lack of enforcement is not due to a lack of defendants: in 2002, Judge Richard Posner of the Seventh Circuit estimated that around 40,000 people violated section 922(g)(8), while federal prosecutors have not prosecuted more than one case per district in 94 districts between 1994 and 2002.⁹² The lack of prosecutions immediately following the bill's passage could be attributable to a lack of judicial education about the new law or to prosecutorial reliance on more well-known or harsher state statutes. Either way, the statistics cited above—as well as more recent studies revealing only 50 such cases filed by prosecutors in 2012⁹³—indicate that 922(g) is rarely enforced and may thus be lacking bite to combat firearm-assisted domestic violence homicides and suicides. While one 2010 study noted a 19 percent reduction in intimate partner homicides,⁹⁴ possibly attributable to the statute, domestic violence is most likely to escalate to a homicide with the involvement of a firearm, and women and men continue to die as a result in large numbers across the country.⁹⁵

Third, in addition to the lack of utilization of 922(g), the law does little to prohibit procurement of new firearms once an alleged abuser has surrendered their own. The statute only applies to guns and ammunition that

⁸⁹ *Id.*

⁹⁰ *Id.* at 531.

⁹¹ HOBART, *supra* note 33, at 32.

⁹² Liniger, *supra* note 21, at 531.

⁹³ Luo, *supra* note 6 (citing a *Times* analysis of federal records kept by Syracuse University's Transactional Records Access Clearinghouse's records).

⁹⁴ *Id.* (citing to a 2010 study conducted by Injury Prevention).

⁹⁵ Everytown for Gun Safety, *Guns and Violence Against Women: America's Uniquely Lethal Domestic Violence Problem*, EVERYTOWN.ORG, 4 (June 4, 2014), <http://3gbwir1ummda16xrhf4do9d21bsx.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Guns-and-Violence-Against-Women-Everytown-for-Gun-Safety.pdf>.

have crossed state lines in accordance with the federal statute’s authorization under the commerce clause.⁹⁶ Even when federal jurisdiction is easily established, guns can be easily accessed through extralegal means and it does not strain the imagination to consider how many weapons may have identifying origin marks scratched out. Indeed, stories like that of Melissa Batten from Redmond, whose husband bought a gun at a gun show shortly after Melissa entered a protection order against him, illustrate this reality of off-market gun procurement vividly.⁹⁷

Fourth, despite the expressed legislative intent of 922(g) to prohibit *every* person with a domestic violence protective order against them from procuring a gun,⁹⁸ abusers can still purchase weapons both within and outside of the federal licensing system. According to a study conducted by the Federal Attorney General’s office in July of 2002, for every one person prosecuted under 922(g)(9), 10 more were able to procure new weapons from federally licensed sellers.⁹⁹ This figure indicated an incredible enforcement gap within the first several years of the statute’s implementation and did not even include any non-federally documented gun purchases by abusers at gun shows, online, or via a black market system.¹⁰⁰

A more recent survey conducted by Mayors Against Illegal Guns indicates that about 40 percent of US gun exchanges occur at gun shows or online through private sellers without federal licenses who do not conduct federal checks for protective orders, or for misdemeanor or felony domestic

⁹⁶ Lininger, *supra* note 21, at 536.

⁹⁷ See Whitley, *supra* note 2.

⁹⁸ 139 Cong. Rec. S16, 288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) (“Restraining orders are issued for the express reason that a woman sincerely believes and a court agrees that she is in imminent danger of being harmed, attacked or killed. It therefore is nothing short of insanity for Federal law to allow such dangerous persons to possess a gun.”).

⁹⁹ Lininger, *supra* note 21, at 532 (noting that at least 3,000 persons subject to the gun ban under 922(g)(9) bought new guns from federally licensed dealers between 1998 and 2001).

¹⁰⁰ *Id.*

violence charges.¹⁰¹ Their research indicates around 6.6 million firearms are exchanged in the United States every year without a background check of the buyer.¹⁰² Requiring background checks is essential in order to effectuate any gun control legislation and has been effective in restricting gun access in some cases.¹⁰³ For example, the National Instant Criminal Background Check System blocked over two million attempted gun purchases since 1998, and according to a national FBI study 38 percent fewer women were killed by their domestic partners in states that mandated background checks for every handgun purchase.¹⁰⁴ Finally, due to a 2002 amendment, the gun ownership prohibition in 922(g) does not apply to government officials, police, or military personnel or agents procuring and using the guns within the scope of their duties.¹⁰⁵ The federal statute fails to fulfill the legislative intent of keeping firearms out of the hands of *all* domestic abusers because it does not establish more stringent rules for the exchange of firearms throughout the country and it excludes some public officials from its application.

Fifth, while 922(g) may have been well intentioned in terms of protecting women from their abusers, the built-in notice requirement also creates a procedural time gap during which homicides may occur.¹⁰⁶ The National Rifle Association (NRA) and other gun-rights group lobbyists have consistently argued that because the right to firearms is secured by the Second Amendment, guns should not be taken away for anything less than felony convictions and certainly not before an alleged abuser has had notice of a protection order that becomes a full injunction.¹⁰⁷ However, as noted

¹⁰¹ EVERYTOWN FOR GUN SAFETY, *supra* note 27, at 2 n. 10.

¹⁰² *Id.*

¹⁰³ *Id.* at 3; U.S. DEP'T OF JUST., F.B.I., ICPSR33527-V1, SUPPLEMENTARY HOMICIDE REPORT (2010), available at <http://bit.ly/V1GvFe> (excluding New York due to incomplete data).

¹⁰⁴ EVERYTOWN FOR GUN SAFETY, *supra* note 27, at 3; F.B.I., *supra* note 103.

¹⁰⁵ 18 U.S.C. § 925(a)(1) (2002).

¹⁰⁶ Lininger, *supra* note 21, at 566–67.

¹⁰⁷ Luo, *supra* note 6.

above, violence typically escalates in an intimate partner setting following some sort of substantial change—such as a partner leaving and seeking a court order against an abuser—and even the action of seeking a restraining order can prompt retaliatory violence.¹⁰⁸ In Washington State alone, five deaths have occurred in the last 10 years less than one month after a survivor was granted a protection order.¹⁰⁹

The federal statute includes procedural restrictions that may leave a time gap during which abuse may occur. 922(g) requires that a perpetrator receive notice of a proceeding for a protection order and participate or waive participation in the hearing so that the allegation of abuse can be contested. Additionally, the Fifth Circuit Court of Appeals ruled in *United States v. Spruill* that the statute does not apply to judge-approved stipulated restraining orders not subject to a hearing.¹¹⁰ Unfortunately, these restrictions, while potentially important to the due process rights of a respondent, disregard the importance of ex parte emergency orders, which are necessary to protect petitioners during the most crucial time period when researchers like Professor Campbell have concluded violence is most likely to escalate to homicide.¹¹¹

Sixth, and perhaps most disturbingly, there are some indicators that state judges have limited the effectiveness of 922(g) by using their discretion to avoid enforcing the federal law. Anecdotal and qualitative evidence suggests that some judges neglect to set the necessary terms of a protection order or to make the predicate findings necessary to prohibit firearm possession under 922(g).¹¹² Some judges simply do not check the box on protection orders noting the federal prohibition, while others actively cross

¹⁰⁸ Lininger, *supra* note 21, at 566–67.

¹⁰⁹ Luo, *supra* note 6.

¹¹⁰ *United States v. Spruill*, 292 F.3d 207, 217–19 (5th Cir. 2002).

¹¹¹ Snyder, *supra* note 13.

¹¹² Sack, *supra* note 26, at 8.

out the language that prohibits possessing weapons while the orders are active.¹¹³

Because of these procedural and discretionary gaps in the implementation of 922(g), the statute lacks the force necessary to truly protect abuse survivors from escalating danger. However, state law and enforcement may be more effective than federal law, in general, in addressing survivors' needs as local law enforcement and judges may have more ready access than their federal counterparts to the existing convictions and past orders against their community members, as well as, perhaps, an enhanced ability to enforce surrender of firearms.

III. WASHINGTON STATE LEGISLATION ADDRESSING DOMESTIC GUN VIOLENCE

In Washington State, the justice system has grappled with the enforcement of 922(g) as well as state statutes to prevent abusers from obtaining and owning firearms. Despite the introduction of U.S.C. 922(g) in 1994, from January 1997 to August 2002, nearly 60 percent of the 209 domestic violence homicides in Washington involved guns,¹¹⁴ and, in 2012 alone, more than 50 people facing protection orders issued since 2011 were arrested for unlawfully aiming, discharging, or possessing a gun.¹¹⁵ The following section will address the intersection of the Washington legislation and the federal law, judges' issuances of temporary restraining orders in conjunction with the laws' mandates, issues arising from murkiness of language, the Washington statute's intent, and critiques of its potential to help survivors in the future.

Currently, in furtherance of 922(g) and Washington State law, judges issuing temporary restraining orders (TRO's) or other civil protection orders must find the respondent poses a "serious and imminent threat to public

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Luo, *supra* note 6.

health.”¹¹⁶ Additionally, unlike 922(g), RCW 9.41.800 allows for some surrender of firearms without notice, providing:

2(d)(3) The court may order temporary surrender of a firearm or other dangerous weapon without notice to the other party if it finds, on the basis of the moving affidavit or other evidence, that irreparable injury could result if an order is not issued until the time for response has elapsed.

Washington State law also goes beyond 922(g)’s force or threatened force requirements and prohibits those convicted of domestic violence misdemeanors—such as stalking, coercion, assault, and no-contact order violations—from possessing guns.¹¹⁷ Although this language seems plainly inclusive of reports by survivors of current and past abuses, like judges applied the federal statute, Washington judges often do not find such conditions exist to prompt surrender or prohibition of ownership of a firearm pursuant to RCW 9.41.800. Michael Luo’s *New York Times* article noted the limited application of current Washington State law:

Under current WA State law judges issuing protective orders are required to order the surrender of firearms only in very specific situations, like a determination of “clear and convincing evidence” that the person has used the weapon in a felony or has committed another offense that by law would disqualify him from having a firearm. Otherwise judges have the discretion to issue a surrender order under a variety of circumstances, including a finding that there is a threat of “irreparable injury.”¹¹⁸

This discretion could also vary based on the community of a given county.¹¹⁹ The legislature sought to expand domestic violence survivor

¹¹⁶ WASH. REV. CODE § 9.41.800 (2014).

¹¹⁷ WASH. REV. CODE § 9.41.800 (2014).

¹¹⁸ Luo, *supra* note 6.

¹¹⁹ Telephone Interview with Pamela Crone, Seattle University School of Law Distinguished Policy Advocate in Residence, Lobbyist for Legal Voice and Washington State Coalition Against Domestic Violence (Dec. 3, 2013) (noting some advocates have

protection by creating more stringent firearm prohibitions in light of protective orders but these bills failed in 2004, in 2010, and in the 2013 special session.¹²⁰

On March 10, 2014, the legislature passed House Bill 1840 and sent it to the governor for her signature.¹²¹ The legislation amends RCW 9.41.040¹²² with the intent of expanding protection against domestic violence involving firearms.¹²³ House Bill 1840 mimics the language of U.S.C. § 922(g) in that it will require surrender of licenses to carry firearms, dangerous weapons, and concealed weapons by parties subject to certain sexual assault protection orders as well as those with protection, no-contact, and restraining orders directing them to refrain from “harassing, stalking . . . , threatening . . . , or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury[.]”¹²⁴

Washington House Bill 1840 (codified as RCW 9.41.040) has some items in common with 922(g) and several departures. Like 922(g), restrictions under RCW 9.41.040 will only be applied once a respondent has had notice and an opportunity to appear for a hearing.¹²⁵ Going beyond the language of 922(g), RCW 9.41.040 requires that the respondent pose a “credible threat to the physical safety of an intimate partner or an intimate partner’s child.”¹²⁶ Intimate partner is defined in the legislation as a current or former spouse or domestic partner, a person with whom the restrained party has a

noticed judge surrender orders may vary based on the gun ownership rates in the counties where they are seated).

¹²⁰ *Id.*

¹²¹ *HB 1840—2013-14*, WASHINGTON STATE LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1840&year=2013> (last visited March 12, 2014).

¹²² WASH. REV. CODE § 9.41.040 is Washington State’s unlawful possession of a firearm statute regulating ownership, right to possess, and restoration of possession rights if terminated.

¹²³ Telephone Interview with Pamela Crone, *supra* note 119.

¹²⁴ Engrossed Substitute House Bill, S.H.B. 1840, 63rd Leg., Reg. Sess. (Wash. Feb. 22, 2013).

¹²⁵ *Id.*

¹²⁶ *Id.*

child in common, or a person with whom the restrained party lived or is living in a dating relationship.¹²⁷ Because the Washington State legislation has a more expansive definition of an intimate partner, as well as of domestic violence, judges may be even more reticent to enforce the legislation since it may apply to such a wide range of instances and judges may prioritize protecting gun rights as opposed to enforcing the broadest interpretation of the legislation.

As part of the court issued order, the legislation notes the court must also “require the party to surrender any firearm or other dangerous weapon”; “prohibit the party from obtaining or possessing a firearm or other dangerous weapon”; “require the party to surrender a concealed pistol license”; and “prohibit the party from obtaining or possessing a concealed pistol license.”¹²⁸ The legislation also requires a restrained person to comply with surrender within five judicial days and for the court’s Administrative Office to develop a pattern form to document compliance with a surrender order.¹²⁹ This recently created form could implicate the Fifth Amendment rights of criminal defendants, as well as subjects of civil protection orders, as it requires them to swear they do not possess firearms.¹³⁰ The form could be restructured to avoid Fifth Amendment infringement if the form instead included a promise not to possess guns rather than including an affirmation of current possession status. Finally, the legislation requires law enforcement agencies to develop policies and procedures regarding the “acceptance, storage, and return of weapons required to be surrendered.”¹³¹

RCW 9.41.040 seeks to protect survivors of domestic abuse during a peak danger time prior to a court conviction. RCW 9.41.040, as written, is a

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Domestic Violence No Contact Order, WPF Nc 02.0100 (Dec. 2014), https://www.courts.wa.gov/forms/documents/NC%2002.0100_DVNCO.doc.

¹³¹ Engrossed Substitute House Bill, S.H.B. 1840, 63rd Leg., Reg. Sess. (Wash. Feb. 22, 2013).

more stringent evaluative model than U.S.C. 922(g) that includes the notice and hearing requirement already in the federal statute, while also adding a “credible threat” burden of proof for the survivor. The new law’s sponsor, Representative Roger Goodman, has indicated that this credible threat requirement means a survivor must show they are likely to be harmed again, and a judge must file a protective order as well as a separate ruling deeming the alleged perpetrator a “credible threat.”¹³² Judges in Washington State already have the authority to do what RCW 9.41.040 proposes: to issue surrender orders in conjunction with other protective and injunctive orders against abusers.¹³³ Advocates at the WSCADV acknowledge this to be the case, but note they are hopeful the legislation not only will reinforce 922(g), but also will close the gap between the federal law and state enforcement.¹³⁴

The misdemeanors and protection orders implicated by 922(g) are usually those issued based on state law.¹³⁵ Thus, one criticism of 922(g) is that it left open the question of whether state courts have the responsibility or authority to take firearms and track abusers in violation of the federal law. Additionally, as previously noted, state and federal prosecutors and judges often choose not to enforce the federal statute.¹³⁶ Therefore, RCW 9.41.040 could represent an effort by state officials and domestic violence survivor advocates to compel further compliance with 922(g) whilst remaining within the bounds of the Washington State constitution.

Like U.S.C. 922(g), RCW 9.41.040 may ultimately do little to protect some survivors from gun violence and potential homicides. The amendment to RCW 9.41.040 will be ineffectual going forward unless actual concrete

¹³² Alison Morrow, *Gun Bill a First in State History if Passed*, KING 5, Feb. 26, 2014, <http://www.king5.com/news/local/Gun-bill-a-first-in-state-history-if-passed-247416421.html>.

¹³³ Engrossed Substitute House Bill, S.H.B. 1840, 63rd Leg., Reg. Sess. (Wash. Feb. 22, 2013); 18 U.S.C. §§922(g)(8).

¹³⁴ Telephone Interview with Pamela Crone, *supra* note 119.

¹³⁵ Sack, *supra* note 26, at 7–8.

¹³⁶ *Id.*

plans for the surrender, storage, and return of firearms are created. Ongoing judicial education about applying the legislation in the courtroom is also needed. Finally, additional support from advocates and other state agencies is crucial to ensure that survivors in high-risk situations do not slip through the cracks because they do not file for protective orders, because surrender orders issued under the new law are not enforced, or because dangers persist beyond the duration of the protective orders. Without a comprehensive state and agency action plan to enforce RCW 9.41.040, the new law may just be an echo of 922(g).

IV. THE DOMESTIC VIOLENCE HIGH RISK-TEAM: A SUCCESSFUL COMPREHENSIVE MODEL

Other parts of the nation have implemented models that Washington State could follow. One program in Amesbury, Massachusetts, is serving as a hopeful model for the country as to what can be done on a city level in conjunction with state and federal legislative and judicial efforts.

In 2005, the chief operating officer of the Jeanne Geiger Crisis Center in Amesbury created the Domestic Violence High Risk Team based on Professor Jacquelyn Campbell’s domestic violence escalation risk prediction model.¹³⁷ The crisis center is funded through its own fundraising efforts, private foundations, and federal and state grants.¹³⁸ The center coordinates with local police departments, hospitals, state legislatures, and courts to prevent domestic violence homicides.¹³⁹ The program was allotted federal grants to adapt its model to other communities and was championed by Vice President Joe Biden, who said in 2010, “We need to replace what we have been doing, and replicate this kind of success.”¹⁴⁰

¹³⁷ Snyder, *supra* note 13, at 35–37. As noted in previous sections, Professor Campbell is a Professor at Johns Hopkins University School of Nursing and is a nationally recognized expert on domestic homicide.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The team system originated after the death of Amesbury resident Dorothy Giunta-Cotter.¹⁴¹ Dorothy suffered abuse at the hands of her husband William for almost 20 years when he violated a restraining order 10 days after its issuance and shot her at close range in their former home just moments before police could stop him.¹⁴² Dorothy previously went to the police about William's abuse, and the crisis center supported her to find long-term shelter options and to obtain a restraining order.¹⁴³ However, Kelly Dunne, the crisis center's chief operating officer, and her team realized that, while every law enforcement agency and crisis management resource had fully performed their existing duties, the system as a whole failed to protect Dorothy when she left the shelter system and attempted to return to the home from which William was supposed to be restrained.¹⁴⁴

Following Dorothy's death, Dunne met with district attorneys, probation and parole officers, perpetrators' intervention group counselors, and hospital representatives.¹⁴⁵ Dunne discovered each department was acting in isolation: even though the police knew about William's history, the judge and the hospitals were ignorant about William's history of abuse, and the same judge and prosecuting attorney were unaware of the restraining order against William.¹⁴⁶ Using Professor Campbell's high-risk analysis and setting up the crisis center as a coordinating office between the before-isolated response departments, Dunne set up the High Risk Team to evaluate the clients' cases on an as-needed basis.¹⁴⁷ When a situation warrants a higher rating along Campbell's scale, either because the abusive spouse is acting erratically or because of a shift in the overall situation, the

¹⁴¹ *Id.*

¹⁴² *Id.* at 34–35.

¹⁴³ *Id.* at 34–36.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 39.

team begins to monitor the situation with more attention and in conjunction with the police and justice authorities.¹⁴⁸

Another helpful tool employed by the Massachusetts courts is a dangerousness hearing, which sets bail following a restraining order violation prior to bringing criminal charges.¹⁴⁹ This gives judges the space to specifically analyze the evidence of a threat level and allows defendants with clean records to be held pre-trial if deemed a danger to the survivor or the overall community.¹⁵⁰ Although some argue such prospective punishment is a denial of due process because the defendants are not given the same rights as someone accused of a crime at trial, Massachusetts courts held that the ongoing threat posed by perpetrators restricting survivors from finding new homes, finding new jobs, and seeking counseling prior to trial outweighed the procedural arguments against holding defendants.¹⁵¹ Additionally, due process may be served via the court’s review of a situation, finding of abuse, and issuance of a gun-ownership-restricting Temporary Restraining Order. Offenders may be held in jail or psychiatric wards depending on their behavior and whether or not there have been threats of suicide.¹⁵²

Furthermore, Dunne’s model utilizes batterer’s intervention groups to gain as much information as different confidentiality policies will allow about whether batterers are complying with their program requirements and are making any changes so the survivor can make more informed decisions about their own next steps.¹⁵³ Dunne coordinates with district attorneys, probation officers, parole officers, hospitals, and police department officials to discuss what information each department can share about the survivor or

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 38.

¹⁵⁰ *Id.* at 37.

¹⁵¹ *Id.* at 38; *See also* *Mendoza v. Commonwealth*, 423 Mass. 771, 778–84 (1996), (stating that preventative detention does not always violate due process considerations).

¹⁵² *Id.*

¹⁵³ *Id.*

batterer without violating each office's confidentiality policies.¹⁵⁴ While only five percent of the crisis center's cases are considered "high risk," once designated as such, response plans are immediately put in place.¹⁵⁵ Such plans can include advocating to ensure charges are not dropped or encouraging added time to any sentence by combining other charges, such as illegal drug use; requesting police drive-bys and home visits at the abuser's home to evaluate for "unusual behavior"; ensuring any weapons are surrendered following the issuance of a protective order; changing or suspending child visitation rights; and assisting survivors with finding housing, finding legal assistance, rehearsing emergency plans, and changing their daily routines.¹⁵⁶ In sum, the program acknowledges the unique reality of the ongoing presence of an abuser and attempts to provide the survivor with support so they are not constantly afraid. Thus, the net benefit is the shift of the burden of being monitored and surveilled from the survivor, who is normally constantly looking over their shoulder, to the perpetrator.¹⁵⁷

The effect of the Amesbury Domestic Violence Response Team, now called the Jeanne Geiger Crisis Center, is striking.¹⁵⁸ Prior to the formation of the team, a domestic violence homicide occurred almost every year in Amesbury since 2002.¹⁵⁹ Since the team formed in 2005, not a single case ended in homicide and of the 106 high-risk cases in the center's most recent 2013 report, only eight women had to enter the shelter system.¹⁶⁰ Dunne and

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 39.

¹⁵⁶ *Id.*

¹⁵⁷ Amanda Marcotte, *Massachusetts' Simple Solution for Preventing Domestic Homicide*, SLATE, (July 15, 2013), http://www.slate.com/blogs/xx_factor/2013/07/15/massachusetts_figured_out_a_simple_solution_to_prevent_domestic_homicide.html.

¹⁵⁸ Jeanne Geiger, *Crisis Center*, DOMESTIC VIOLENCE HIGH RISK TEAM NETWORK, <http://www.jeannegeigercrisiscenter.org/dvhrtn.html?pg=04> (last visited Feb. 8, 2015).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

her team have trained over 5,000 people from 30 states in the model and have been contacted by over a dozen other states.¹⁶¹

Although a critique of the Amesbury Domestic Violence Response Team Model does not appear to exist yet, the program’s potential weaknesses can be extrapolated from the reality of the complex interplay of domestic violence identification and response systems. First, the program does not prevent perpetrators from accessing off-market or gun show firearms, as this purchasing loophole must be dealt with through state and federal legislation, as well as through effective local law enforcement and gun seller compliance.¹⁶² Second, the program does not address state and federal funding cuts to programs providing emergency housing and services to survivors that are still needed and are operating beyond capacity. Whether or not these programs begin coordinating with other law enforcement and support agencies per the Amesbury Model, their longevity is still in question.¹⁶³ Third, the model does not address differences in mandatory state arrest laws that determine whether an officer can arrest at a scene if they have probable cause of a domestic violence crime, which can involve simple assault or assault with a weapon.¹⁶⁴ Because models may vary, if an arrest is not made, the Amesbury model may not be triggered to coordinate with other programs. Fourth, while the model emphasizes monitoring of perpetrators, there is neither enough funding nor enough officers in the country to follow all potential high-risk perpetrators all the time, and thus the model does not fully address the reality that arrest neither necessarily deters future violence nor cures ineffective batterer’s rehabilitation programs.¹⁶⁵

¹⁶¹ *Id.*

¹⁶² *See generally Id.*

¹⁶³ Barbara Mantel, *Domestic Violence: Are Federal Programs Helping to Curb Abuse?*, CQ RESEARCHER, <http://photo.pds.org:5012/cqresearcher/document.php?id=cqresrrr2013111500> (last visited Mar. 15, 2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Fifth, many survivors do not report to police, to crisis hotlines, or to support programs, but do seek emergency medical care, and the program can neither address the immediate need to train health care providers to screen for domestic violence, nor direct health care providers to build time in for screenings when they may not have the time or funding to elongate facility visits to even do such screenings.¹⁶⁶ Although the Affordable Care Act of 2010 mandates that health insurance plans cover screening and counseling services for domestic violence survivors, the vast majority of domestic violence survivors go to emergency rooms for care, where they are the least likely to be identified and screened for domestic violence.¹⁶⁷ The Amesbury Model assumes the existence and willingness of legal and support agencies to coordinate and train their practitioners on domestic violence screening and response mechanisms. Until more evaluations are available on the feasibility and efficacy of the model in other cities and states, it may be hasty to assume the Amesbury Model is a cure-all for the national issue of domestic violence homicides.

Additionally, not every state or city will have the resources or willingness of every assistance program to coordinate as did the Amesbury community in Dunne's model, and the prevalence and nuance of domestic violence situations are such that, even if put in place in every city in the United States, homicides could still occur. It may be challenging to imagine a comprehensive action plan capable of monitoring offender's actions while evaluating the danger level of any given domestic violence situation in order to prevent homicides. Additionally, it appears that any request for additional funding for a state program could now be the kiss of death for new legislation.¹⁶⁸ However, the effectiveness of the program cannot be denied. At its base, the program seems to require only that each department use its resources fully while engaging with a centralized communication

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Telephone Interview with Pamela Crone, *supra* note 119.

point, which supports survivors and keeps them informed. However, Dunne’s model represents a departure from the potentially isolating shelter system that asks survivors to wait and react to the abuser’s next move rather than actively planning for the present and their future.

V. PRESCRIPTIVE RECOMMENDATIONS FOR FUTURE GUN VIOLENCE PROTECTIONS

The heightened risk of extreme violence and homicides during transition periods, especially after survivors seek protective orders or leave their abusers, is now well documented. One study found over a third of abused women were re-assaulted after separating from abusive partners,¹⁶⁹ and evidence of retaliatory violence following survivors’ petitions for protective orders abounds.¹⁷⁰ The current shelter response system, advocate support network, and state and federal legislation all seek to support and empower survivors, but frequently fall short of doing so in the crucial moments prior to domestic violence gun homicides.

In order for RCW 9.41.040 to effectuate actual violence prevention in Washington State, I recommend several action items. First, advocates and law enforcement officials should campaign for a more expansive state policy to address survivor protection from gun violence, including a comprehensive coalition strategy as is modeled in Amesbury, Massachusetts. Second, judges should attend mandatory training on enforcement procedures for RCW 9.41.040 and should be equipped with a succinct evaluation model to take back to the bench. Third, the court must ensure prosecutors and law enforcement officials are utilizing the legislation and setting up streamlined surrender, storage, and return policies for firearms, while also monitoring respondents for any additional weapons

¹⁶⁹ Cf. Mary A. Kernic et al., *Children in the Crossfire*, 11 VIOLENCE AGAINST WOMEN 991, 992 (2005) (reviewing social science and advocate literature on post-separation violence).

¹⁷⁰ Lininger, *supra* note 21, at 566–67.

acquisitions to ensure there is no reversion to the current discretionary model of 922(g) in which prosecutors, judges, and law enforcement are largely underutilizing the statute.

Fourth, there should be more stringent background check and data system management requirements so that individuals with past domestic violence-related orders and individuals on probation cannot obtain weapons, and so that those served with surrender orders are immediately marked in the system so they cannot acquire weapons, especially weapons requiring federal licenses. Finally, consideration should be given to future legislation that would allow on-the-scene police officers to confiscate firearms when they hold a reasonable belief that domestic violence has occurred and that a weapon may be present.

A. Creation of a Nexus of Communication

In addition to the procedural efforts mandated in RCW 9.41.040, Washington State officials and domestic violence advocates should be trained on the Amesbury High Risk Team model. Additionally, each city in Washington should designate a communication nexus similar to the crisis center in Amesbury to coordinate various state, health, and advocacy departments to communicate about domestic violence cases, especially those with documented high-risk factors. Cross-department coordination about the needs of survivors and the movements and risk levels of the perpetrators would likely decrease murders, as occurred in Amesbury.

B. Fostering Mandatory Judicial Education About Implementation of RCW 9.41.040 and Domestic Violence Generally

Advocates, while excited about the passage of RCW 9.41.040, acknowledge that the new law may do little without ongoing judicial education and buy-in.¹⁷¹ While a judge is required by the law to evaluate

¹⁷¹ Interview with Pamela Crone, *supra* note 119.

whether a credible threat to the physical safety of the survivor or the survivor's child exists and whether the issuance of a protective order is appropriate,¹⁷² the judge must also stay abreast of the factors that indicate a high risk of escalated violence and homicide. The WSCADV created an excellent Post-Arrest Model Response for the Supervision of Domestic Violence Offenders that offers tips for judges, attorneys, police, and advocates to evaluate proper response support for survivors.¹⁷³ The guide, however, is 78 pages long, and judges are unlikely to have the time or inclination to review this or any similarly lengthy document prior to conducting an evaluation for a protection order and/or surrender order.

Thus, while RCW 9.41.040 is being implemented, ongoing judicial education should be facilitated about the norms and realities of domestic violence and about elements to consider when granting orders. Those involved with the WSCADV and other groups such as the Gender and Justice Commission could facilitate education on this matter. Judicial training on new legislation is often optional, but due to the life or death nature of domestic violence situations, such training should be mandatory.¹⁷⁴ As part of their training, judges should be given a one to two page checklist of items to evaluate when determining the applicability of protection and surrender orders. Such items could include:

1. Police report documentation of homicide and/or suicide threats and asking the defendant if he or she has made or fantasized about such threats;

¹⁷² Sen. B. Rep., S.B.H. 1840, 63rd Leg., Reg. Sess. (Wash. Apr. 2, 2013).

¹⁷³ Roy Carson, *Post-Arrest Model Response for the Supervision of Domestic Violence Offenders*, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE, <http://www.wsca-dv.org/resourcesPublications.cfm?ald=50378CED-C298-58F6-016DCA71A1672922> (last visited Oct. 7, 2014).

¹⁷⁴ Interview with Pamela Crone, *supra* note 119 (noting it is very difficult to mandate judicial trainings but that such action may be necessary to encourage consistent application of the law).

2. Database records of criminal history for patterns of past domestic violence behaviors or past protection, no-contact or restraining orders, and violations of such orders;
3. Whether the defendant has access to weapons;
4. Whether the survivor is afraid or has sustained serious injuries from abuse;
5. Whether there are children in the home, whether the children have been witness to the violence and whether the defendant has access to his survivor(s);
6. Whether the defendant has a record of mental illness, sexual abuse, substance abuse or a history of cruelty towards animals or destruction of property;
7. Whether the defendant is minimizing abusive behavior despite presented information of coercive, controlling or manipulative behavior.¹⁷⁵

C. Streamlined Surrender, Storage, and Return Policy for Firearms and Ongoing Monitoring

In addition to judicial education and succinct case evaluation tools, a streamlined and expedited firearm surrender program will prevent future gun violence. In 2003, the King County Sheriff's Office created a streamlined firearm surrender program through which deputies would determine if and when a protection order was in effect, and would then directly go and remove weapons as soon as such orders were found to be active.¹⁷⁶ If no order was found, deputies could still record information about weapons available to defendants charged with domestic violence crimes so prosecutors and judges would have such information if

¹⁷⁵ CARSON, *supra* note 38, at 20–22 (adapted from the model judicial checklist to determine release conditions and set bail).

¹⁷⁶ Sack, *supra* note 26, at 19–20.

considering whether to mandate surrender or bail conditions for defendants later on.¹⁷⁷

Additionally, as of 2005, Seattle’s Municipal Court created a process through which the probation unit would screen those jailed on a misdemeanor charge, note those arrested for domestic violence charges, check for existing protection orders, and ask about firearm ownership, which officers then would report to the court commissioners who can order weapons to be surrendered on the defendant’s release.¹⁷⁸ Although, it is unclear whether King County and the Seattle Municipal Court have continued these programs in their full effect in the face of recent city budget strain. Integrated processes like these should be consistently applied across the state in order to fully and expediently comply with the new statute.

D. Necessity of Immediate and Consistent Database Management

Some advocates note there may be gaps in enforcement measures in terms of database management to ensure those with surrender or protection orders cannot obtain new federally licensed firearms.¹⁷⁹ Immediate database updates following the issuance of an order will help ensure that defendants cannot obtain federally licensed weapons. Washington State should join national efforts to cut down on the black market and internet sales of weapons to individuals without background checks.

Fortunately, in November 2014 Washington voters passed Initiative 594 to strengthen background checks for gun purchases.¹⁸⁰ Initiative 594 amends sections of RCW 9.41 and adds a new section to RCW 82.08 to prohibit individuals from buying guns privately without a background

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Professor Sara Ainsworth, Seattle University School of Law Visiting Assistant Professor, Washington State Gender & Justice Commission, Washington State Coalition Against Domestic Violence Board Member, in Seattle (Nov. 7, 2013).

¹⁸⁰ Chris McGreal, *Washington State Approves Background Checks In Win For Gun Control Advocates*, THE GUARDIAN (Nov. 5, 2014), www.theguardian.com/us-news/2014/nov/05/gun-control-victory-washington-state-voters-background-checks.

check.¹⁸¹ The law applies whether an individual wants to purchase at gun shows, through private sale, from a friend, or through classified ads.¹⁸² The new required background checks will evaluate whether the potential gun purchaser has been diagnosed with severe mental health problems, is a convicted felon, or has a history of domestic violence.¹⁸³ Although Washington will continue to have to establish a system to track how many guns are sold illegally, this legislation, if properly enforced, could go a long way to prevent improper and potentially dangerous firearm sales.

E. Future Legislation Empowering Police Officers to Confiscate Weapons and Constitutional Concerns

In New Jersey, officers may search and seize weapons without a warrant where an officer has a probable cause to believe that domestic violence has occurred and where the officer observes or believes a weapon is present and has a reasonable belief it would put the survivor at risk of serious bodily injury.¹⁸⁴ Similarly, at least 24 states have some form of a mandatory arrest law that either mandates that police officers arrest an alleged perpetrator at the scene where they have probable cause to believe a crime of domestic violence has occurred, or where, if probable cause exists, arrest is the preferred action.¹⁸⁵ In light of the fact that survivors do not all seek protection orders, or may change their minds and begin to protect their abusers in court once they get before a judge, such measures as the New Jersey law or permissive arrest laws where there is a suspicion based on probable cause of domestic violence (especially including a probable suspicion of the presence of a firearm) are arguably not too extreme to keep

¹⁸¹ Initiative to the Legislature No. 594, 2 (Jan. 7, 2015), available at <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Initiatives/Initiatives/INITIATIVE%20594.pdf>.

¹⁸² *Id.* at 7.

¹⁸³ *Id.* at 2.

¹⁸⁴ Sack, *supra* note 26, at 14.

¹⁸⁵ Mantel, *supra* note 163.

survivors safe from domestic homicides involving guns.¹⁸⁶ A new, stronger bill with some bite could thus include further regulation of black market and gun show gun sales, a dangerousness hearing where survivors have brought petitions for protective orders to court to evaluate the need for weapons surrender, and allowance of confiscation of weapons by officers who reasonably suspect domestic violence and the potential for serious bodily injury to a survivor of possible abuse.

There may, however, be some constitutional, and particularly Second Amendment concerns with respect to enhanced gun restriction legislation. The Court in *District of Columbia v. Heller* in 2008 stated that the Second Amendment protects a law-abiding and responsible citizen’s right to possess an operable handgun in the home for self-defense.¹⁸⁷ However, this ruling also acknowledged that the “right secured by the Second Amendment is not unlimited.”¹⁸⁸ The *Heller* Court noted that its opinion did not invalidate all prohibitions on possession of firearms, and listed examples of allowable restrictions: restrictions on specific types of firearms, restrictions on possession by felons or the mentally ill, and restrictions upon places where firearms can be carried (such as government or school buildings).¹⁸⁹ Restrictions on access to firearms, enhanced regulation of firearm sales, and arrests with probable cause of domestic violence should be included amongst the exceptions acknowledged by the Supreme Court in *Heller*.

In 1993, Senator Wellstone made the following statement in favor of 922(g) on the Congressional floor:

[I]f someone has not been responsible enough so that he, or sometimes it could be she, has a record of violence against a spouse or a child,

¹⁸⁶ See generally HOBART, *supra* note 33.

¹⁸⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁸⁸ *Id.* at 626.

¹⁸⁹ *Id.* at 626–28.

then we have no responsibility whatsoever to enable that person to go out and buy a gun or, for that matter, own a gun.¹⁹⁰

In 2001, the Fifth Circuit in *United States v Emerson* precipitated the Supreme Court's acknowledgment of the Second Amendment's limits in *Heller* by stating:

[a]lthough . . . the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.¹⁹¹

The *Emerson* court found 922(g)(8) was a permissible intrusion on Second Amendment rights.¹⁹² Gun ownership and the right to due process under the law are long-cherished US rights upon which we should not intrude without serious trepidation. However, given the ongoing prevalence of domestic violence homicides nationally, as well as the reality that these deaths are exponentially more likely to occur where a firearm is present or can be procured, we must prioritize human life above gun ownership.

CONCLUSION

Constitutional law protects every person's right to bear arms and to receive due process under the law. Those accused of acts of domestic violence should be given every due process consideration allotted by our Constitution. Of course, surrender of firearms may not prevent domestic violence attacks or homicides, and not every claim of domestic violence will be substantiated. However, one national study found only 1.3 percent

¹⁹⁰ 139 Cong. Rec. S15, 500 (daily ed. Nov. 10, 1993) (statement of Sen. Wellstone).

¹⁹¹ *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

¹⁹² *Id.*

of female-initiated allegations of abuse were intentionally false,¹⁹³ and the reality of retaliatory assaults following separation, life shifts, or petitions for protective orders is too deadly to ignore any longer.

The implementation of 922(g) and its congressional record indicate a national prioritization of survivor’s rights and safety over the rights of US citizens to own and procure new firearms. However, without proper enforcement and community coordination, laws like U.S.C. 922(g) and RCW 9.41.040 may be rendered merely symbolic. The fact that (thanks to social science and advocate research) we can now evaluate high-risk scenarios and predict the circumstances that escalate domestic violence means we need to address those scenarios and prevent those homicides. A protective order creating a 100-foot safety zone cannot stop a bullet, nor can a database entry of past protective orders or gun ownership that no one looks at. Using the resources and departments already at our disposal, Washington State can serve as a model for domestic violence firearm surrender enforcement. We just have to start acting now.

¹⁹³ Nicholas Bala & John Schuman, *Allegations of Sexual Abuse When Parents Have Separated*, 17 CAN. FAM. LAW Q. 191, 196 (2000).