

# THIS TIME I'LL BE BULLETPROOF: USING EX PARTE FIREARM PROHIBITIONS TO COMBAT INTIMATE-PARTNER VIOLENCE

By Aaron Edward Brown\*

*Domestic violence is a serious public health problem. According to the Centers for Disease Control and Prevention ("CDC"), intimate-partner violence affects an estimated 5.5 million people every year in the United States. The CDC also projects that around one in four adult women and one in seven adult men will experience severe physical violence from an intimate partner in their lifetime. But more concerning than just severe physical violence is the large number of victims who are killed each year by their intimate partner. Currently, about 1,100 victims are killed each year by an intimate partner. Although the United States' rates of intimate-partner violence are similar to other high-income, industrialized countries, our per-capita rate of intimate-partner homicides vastly exceeds all of our peer countries. This disparity is at least partially attributable to the fact that well over fifty percent of all intimate-partner homicides in the United States are committed with a firearm, which is an exceedingly lethal weapon in the hands of an abuser.*

*This article is a comprehensive review of one of the main types of regulations used to combat intimate-partner violence: ex parte order for protection ("OFP") firearm prohibitions. Ex parte OFP firearm prohibitions act to curb firearm access by temporarily prohibiting ownership, possession, and purchase of firearms after a victim of domestic violence files a petition seeking an order for protection. In some states, ex parte OFP firearm prohibitions can also allow for mandatory relinquishment or confiscation of firearms after a judicial officer has issued an ex parte OFP. Ex parte OFP firearm prohibitions have the potential to be particularly transformative because their targeted*

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*function is to address the immediate safety of a victim of domestic violence before a formal hearing can take place to address the merits of the victim's claims. This type of immediate intervention can be a life-saving measure as we now know that the single most dangerous moment for a victim of domestic violence is the point at which he or she leaves his or her abuser.*

*This article details the various types of ex parte firearm prohibitions and their distinguishing provisions and discusses other closely related gun-violence prevention laws. It concludes by discussing different types of solutions that would expand ex parte OFP firearm prohibitions, including a federal-level ex parte OFP firearm prohibition and a model ex parte firearm statute that can be enacted on the state level.*

## TABLE OF CONTENTS

Introduction .....	162
I. A History of the Relationship between Gun Violence and Domestic Violence .....	166
II. The Efficacy of Domestic Violence-Related Firearm Restrictions Generally and Ex Parte Prohibitions Specifically .....	171
A. The types of ex parte OFP firearm prohibitions .....	183
B. Enabling provisions .....	184
C. Surrendering or Confiscation .....	186
D. Miscellaneous Provisions.....	188
III. The Constitutionality of Ex Parte Firearm Prohibitions	191
A. Procedural Due Process.....	196
IV. Ex Parte Firearm Prohibition Statutory Framework .....	199
A. Toward an <i>Ex Parte</i> OFP Firearm Prohibition Model Statute .....	203
B. The Federal <i>Ex Parte</i> Firearm Prohibition .....	203
C. A State-By-State <i>Ex Parte</i> OFP Firearm Prohibition ...	206
D. The Model Statute .....	210
Conclusion.....	215

## INTRODUCTION

“All too often, the only difference between a battered woman and a dead woman is the presence of a gun.”<sup>1</sup>  
– Senator Paul Wellstone (D-MN)

“I love you, I love you” were the last words Raymond Dye said to his estranged wife, Barbara, after shooting her several times in the chest with his .357 revolver.<sup>2</sup> Raymond Dye then took out a different pistol, turned it on himself, and pulled the trigger.<sup>3</sup>

This gruesome murder-suicide shocked the town of Elgin, Oklahoma and left those in the 1,400-person community—and across the country—wondering why these horrific domestic-violence homicides occur with a seemingly unimpeded frequency.<sup>4</sup> As the years pass and the toll mounts, many, including Barbara Dye’s mother, are left wondering, “[I]s there nothing [we] can do?”<sup>5</sup>

Before her death, Barbara Dye had filed for an *ex parte* order for protection (“OFP”)<sup>6</sup> on the same day she filed for divorce.<sup>7</sup> In her order for protection<sup>8</sup> petition to the court, she wrote that her husband had threatened to kill her,<sup>9</sup> and she feared he would “have a violent

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1. 140 Cong. Rec. 14,998 (1994) (statement of Sen. Wellstone).

2. Brianna Bailey, *Oklahoma’s Protective Orders Do Little to Protect Abuse Victims From Guns*, NEWSOK (Apr. 23, 2017), <http://m.newsok.com/oklahomas-protective-orders-do-little-to-protect-abuse-victims-from-guns/article/5546314> [<https://perma.cc/FHH2-V87F>].

3. *Id.*

4. Ron Jackson, *Murder-Suicide Leaves Elgin Residents in Shock*, NEWSOK (July 21, 2010), <http://newsok.com/article/3478169> [<https://perma.cc/KQ44-AJUD>].

5. 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> (on file with the Columbia Human Rights Law Review).

6. An *ex parte* order is issued without notice to the respondent (i.e., these orders are granted on an emergency basis and are issued solely based on the petitioning party’s allegations in a petition). In Oklahoma, emergency orders of protection last until an evidentiary hearing is held. *See* Okla. Stat. tit. 22 § 60.3 (2018).

7. Jackson, *supra* note 4.

8. The terminology for civil domestic abuse prevention orders varies from state to state. For example, in Oklahoma they are *protective orders*, in Minnesota they are *orders for protection*, in Connecticut they are *civil protection orders*, and in Washington they are *domestic violence orders for protection*. For simplicity’s sake, I will refer to them as orders for protection or OFPs.

9. Jackson, *supra* note 4.

reaction when he receiv[ed] divorce papers.”<sup>10</sup> It was no secret that Raymond Dye had a “fiery personality” along with an arsenal of guns stashed at his home, in his car, and on his person at all times.<sup>11</sup>

Fearing that her husband might make good on his threat, Barbara Dye left Oklahoma for Texas to hide from him and let the situation cool down.<sup>12</sup> She returned to Oklahoma eleven days later to attend divorce proceedings.<sup>13</sup> On the day he murdered her, Raymond Dye found Barbara Dye in a bank parking lot, where he blocked her with his truck and proceeded to kill her in broad daylight.<sup>14</sup>

For many domestic violence victims and those who have worked with them, this story is not surprising.<sup>15</sup> It is well documented

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10. *Id.*

11. Jackson, *supra* note 4; Bailey, *supra* note 2.

12. Luo, *supra* note 5.

13. *Id.*

14. *Id.*

15. For example, over the past four years, the exact situation Barbara Dye found herself in has played out with the same results across the country. Other women have also been killed by their significant others, even though they had restraining orders, including: Jasmine Leonard of Ohio (Drew Simon, *Woman Dies Two Months After Being Shot*, DAYTON DAILY NEWS (June 11, 2014), <http://www.daytondailynews.com/news/crime-law/woman-dies-two-months-after-being-shot/5SURKdDtWOvguPSvuFso6L/> [<https://perma.cc/QMC6-HRKD>]); Leann Schuldie of Idaho (Alison Gene Smith, *Slain Woman Filed Protection Order*, MAGICVALLEY.COM (Nov. 18, 2014), [http://magicvalley.com/news/local/crime-and-courts/slain-woman-filed-protection-order/article\\_7fec4988-6d5d-566d-900e-e0eb6fbff522.html](http://magicvalley.com/news/local/crime-and-courts/slain-woman-filed-protection-order/article_7fec4988-6d5d-566d-900e-e0eb6fbff522.html) [<https://perma.cc/8TKF-NCJT>]); Lori Gellatly of Connecticut (Amanda Cuda, *Gellatly Death Highlights Gaps in the System*, CONNECTICUT POST (May 11, 2014), <http://www.ctpost.com/local/article/Gellatly-death-highlights-gaps-in-system-5469075.php> [<https://perma.cc/N279-LHM2>]); Stephanie Goodloe of Washington D.C. (Peter Hermann, *Ex-Boyfriend Charged with Killing Coordinator of Church Youth Ministry*, WASH. POST (June 20, 2016), [https://www.washingtonpost.com/local/public-safety/ex-boyfriend-charged-with-killing-coordinator-of-church-youth-ministry/2016/06/20/b4ce2b16-36fe-11e6-8f7c-d4c723a2becb\\_story.html?utm\\_term=.e2b3e5dd2807](https://www.washingtonpost.com/local/public-safety/ex-boyfriend-charged-with-killing-coordinator-of-church-youth-ministry/2016/06/20/b4ce2b16-36fe-11e6-8f7c-d4c723a2becb_story.html?utm_term=.e2b3e5dd2807) [<https://perma.cc/T8YW-97P8>]); Kimberly Meador of Virginia (Eleanor Roy, *Two Dead in Huddleston; Woman Had Obtained Protective Order Over the Weekend*, THE NEWS & ADVANCE (Sept. 6, 2016), [http://www.newsadvance.com/news/local/two-dead-in-huddleston-woman-had-obtained-protective-order-over/article\\_81c729ca-636c-5ceb-889e-89a583160d7e.html](http://www.newsadvance.com/news/local/two-dead-in-huddleston-woman-had-obtained-protective-order-over/article_81c729ca-636c-5ceb-889e-89a583160d7e.html) [<https://perma.cc/9RQX-69WB>]); Teresa Robertson of Oklahoma (Harrison Grimwood, *Woman Reportedly Killed by Husband, Officer Fatally Shoots Him in Osage County Town*, TULSA WORLD (Feb. 24, 2017), [http://www.tulsaworld.com/news/crimewatch/woman-reportedly-killed-by-husband-officer-fatally-shoots-him-in/article\\_1449d4e7-8e18-5886-879b-438de1152c94.html](http://www.tulsaworld.com/news/crimewatch/woman-reportedly-killed-by-husband-officer-fatally-shoots-him-in/article_1449d4e7-8e18-5886-879b-438de1152c94.html) [<https://perma.cc/233A-97PN>]); Lexus Williams of

that the most dangerous time for a victim of domestic violence is the period when she leaves or is in the process of leaving her abuser.<sup>16</sup> The danger increases exponentially when many of the red flags Barbara Dye experienced are present, such as extreme jealousy and obsessive behavior, rage and/or depression over separation, suicidal ideation, strangulation, and previous death threats including threats involving the use of a firearm.<sup>17</sup>

Regrettably, in a majority of states and under federal law, protection for victims in Barbara Dye's situation is inadequate.<sup>18</sup> This lack of protection manifests itself because in many states, even with an *ex parte* OFP, a victim's abuser is not precluded from possessing,

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Tennessee (Kevin Trager, *Gellatin Murder Victim Had Restraining Order Against Husband*, WSMV.COM (Apr. 18, 2018), <http://www.wsmv.com/story/37883733/gallatin-murder-victim-had-restraining-order-against-husband> [<https://perma.cc/8UNZ-MVEA>]); Maygen Sears of Indiana (Tori Fater, *Evansville Police: Fatal Shootings Sunday Were Apparent Murder-Suicide*, COURIER & PRESS (Feb. 13, 2018, 11:30 AM), <https://www.courierpress.com/story/news/crime/2018/02/12/auto-psies-scheduled-sunday-shooting-victims/329377002/> [<https://perma.cc/JJ9V-FT3G>]); Lisa Peoples of Tennessee (*Women Killed Same Day She Received Order of Protection Against Husband*, WMC ACTION NEWS 5 (Apr. 4, 2017, 1:29 AM), <http://www.wmcactionnews5.com/story/35061686/woman-shot-in-hickory-hill-suspect-on-the-run> [<https://perma.cc/J4DM-2BV9>]); Heather Mouton of Louisiana (Lester Duhé, *Crowley PD: Husband Arrested in Wife's Shooting Death*, KLFY.COM (May 30, 2018), <https://www.klfy.com/news/local/crowley-pd-husband-arrested-in-wife-s-shooting-death/1199631295> [<https://perma.cc/3Y7Z-D8C5>]).

16. See *Restraining Orders*, Dane County District Attorney's Office, [https://www.countyofdane.com/da/restraining\\_order.aspx](https://www.countyofdane.com/da/restraining_order.aspx) [<https://perma.cc/C9ZG-KK87>] (last visited Oct. 7, 2018) ("According to the Department of Justice crime statistics, 85% of battered women are killed by an abusive partner when trying to leave the relationship."); see also Jerry Mitchell, *Most Dangerous Time for Battered Women? When They Leave*, CLARION-LEDGER, <http://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552/> [<https://perma.cc/KKG5-EADC>] (quoting the executive director for the Mississippi Coalition Against Domestic Violence's explanation that "[W]omen in abusive relationships are about 500 many times more at risk when they leave.").

17. Amy Karan & Lauren Lazarus, *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78 FLA. B. J. 39, 55–56 (2004).

18. This lack of adequate protection occurs even if a victim files a petition specifically alleging that their intimate partner said they will kill them with a gun. See, e.g., Bailey, *supra* note 2 (describing how Raymond Dye was allowed to keep his firearm, with which he eventually murdered his wife, even after she filed a protective order against him).

purchasing, or owning firearms.<sup>19</sup> This lack of protection is not universal, though. Starting in the early 1990s, around the time Congress passed the Violence Against Women Act (VAWA), about twenty states have explicitly recognized that leaving accused abusers with the ability to murder or maim their victim during the separation period is no longer acceptable. These states have worked to cut off accused abusers' opportunities for violence by prohibiting firearm access once they have been served with an *ex parte* OFP.<sup>20</sup> These prohibitions can take several forms, including mandated relinquishment<sup>21</sup> or confiscation.<sup>22</sup> But regardless of the ultimate form, all the *ex parte* OFP firearm prohibitions make it illegal to possess, purchase, control, or own a firearm almost immediately<sup>23</sup> after a person is served with an *ex parte* OFP.

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19. Under federal law, an evidentiary hearing and notice (among other things) are required before the federal firearm ban will activate. *See* 18 U.S.C. § 922(g)(8) (2012); *see also* United States v. Banks, 339 F.3d 267, 272 (5th Cir. 2003) (holding that the defendant could be prosecuted under 18 U.S.C. § 922(g)(8) because a hearing at which the defendant could present evidence did occur). About thirteen different states do not have their own firearm ban for any OFP (whether *ex parte* or permanent) and many other states that do have state-specific firearm prohibitions only allow them to activate at the same stage as the federal ban. *See Domestic Violence & Firearms*, Giffords Law Ctr. To Prevent Gun Violence, <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> [https://perma.cc/3VSL-M6HQ].

20. *See* ARIZ. REV. STAT. ANN. § 13-3624(D)(4) (West 2018); CAL. FAM. CODE § 6389(a) (West 2013); State of California Opinion No. 01-211, 84 Ops. Cal. Atty. Gen. 117 (2001); CONN. GEN. STAT. § 46b-15(b) (2018); DEL. CODE ANN. tit. 10, §§ 1045(a)(8), (11) (West, Westlaw through 81 Laws 2018, chs. 200-453); HAW. REV. STAT. § 134-7(f) (2018); 750 ILL. COMP. STAT. 60/217(3)(i), 60/214(b)(14.15) (2018); ME. STAT. tit. 19-A, § 4006(2-A) (2017); MD. CODE ANN., Family Law § 4-505(a)(2)(viii) (West 2018); MASS. GEN. LAWS ch. 209A, § 3B (2018); MICH. COMP. LAWS § 600.2950(1)(e) (2018); MONT. CODE ANN. § 40-15-201(2)(f) (2018); NEV. REV. STAT. § 33.0305(1) (2018); N.H. REV. STAT. ANN. § 173-B:4(I) (2014); N.J. STAT. ANN. § 2C:25-28(j) (West, Westlaw through L. 2018, c. 125); N.Y. FAM. CT. ACT LAW § 842-a (McKinney 2018); N.C. GEN. STAT. § 50B-3.1(a), (d) (2013); N.D. CENT. CODE ANN. § 14-07.1-03(2)(d) (2008); 23 PA. CONS. STAT. § 6108(a)(7) (2018); 8 R.I. GEN. LAWS § 8-8.1-3(a)(4) (2018); UTAH CODE ANN. § 78B-7-106(f) (West 2018); WASH. REV. CODE § 26.50.070(1)(f) (2018); W. VA. CODE § 48-27-40(a) (2018).

21. *See, e.g.*, MASS. GEN. LAWS ch. 209A, § 3B (2018).

22. *See, e.g.*, CAL. FAM. CODE § 6389 (West 2018).

23. Many state *ex parte* OFPs merely criminalize firearm possession. *See, e.g.*, ARIZ. REV. STAT. § 13-3624(D)(4) (providing that “[i]f the court finds that the defendant may inflict bodily injury or death on the plaintiff, the defendant may be prohibited from possessing or purchasing a firearm for the duration of the order.”).

In support of the author's argument that *ex parte* OFP firearm prohibitions are necessary and permissible to curb domestic violence homicides, this article has been divided into six parts. Part I provides an overview of the lethal relationship between domestic violence and guns. Part II discusses the efficacy of *ex parte* OFP firearm prohibitions and the various nuances of state laws. Part III analyzes the constitutionality of *ex parte* firearm prohibitions under the U.S. Constitution's due process clause. Part IV discusses possible ways to go about protecting potential victims from domestic violence-related separation violence through state-level residual clauses, federal law, and state-level statutes. It also proposes a model *ex parte* firearm prohibition for state use. Lastly, the article concludes by reiterating the importance of preventing gun violence as it relates to victims of domestic violence.

#### I. A HISTORY OF THE RELATIONSHIP BETWEEN GUN VIOLENCE AND DOMESTIC VIOLENCE

"In other countries, brutish husbands put wives in hospitals; in America, they put them in graves."<sup>24</sup>  
– Nicholas Kristof

No other high-income, industrialized country in the world has a problem with gun violence against women (or gun violence against people) quite like that of the United States.<sup>25</sup> In 2015, 55 percent of the women who were murdered in the United States in single victim-single perpetrator scenarios in which the weapon could be identified were killed with a firearm.<sup>26</sup> That same year, in murders where victims knew their offenders, 64 percent of perpetrators were the victims' intimate partners.<sup>27</sup> The percentage of women killed by gun violence

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24. Nicholas Kristof, Opinion, *Husbands Are Deadlier Than Terrorists*, N.Y. TIMES, (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/opinion/sunday/husbands-are-deadlier-than-terrorists.html> [<https://perma.cc/S5MG-DNEG>].

25. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries*, AM. J. MED. 266 (2010) (indicating that in 2010, the United States accounted for 90% of all women killed by guns when included with 22 other industrialized countries).

26. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA 3 (Sept. 2017), <http://www.vpc.org/studies/wmmw2017.pdf> [<https://perma.cc/2DDR-EPXU>] [hereinafter WHEN MEN MURDER WOMEN 2015].

27. "Intimate partner" in this statistic refers only to current spouses, common law spouses, ex-spouses, or couples in a current relationship. It does not,

and the percentage of intimate partners who are perpetrators has remained approximately the same for the past five years in single victim-single perpetrator homicides.<sup>28</sup>

In 2015, domestic violence victims in single victim-single perpetrator scenarios were murdered at a rate of 1.12 per 100,000 persons.<sup>29</sup> This rate is substantially higher than other comparable industrialized countries such as Canada,<sup>30</sup> England and Wales,<sup>31</sup>

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for example, include ex-boyfriends. If this statistic did include all the relationships that are typically associated with domestic violence, then the number would be higher. *See id.*

28. See VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2014 HOMICIDE DATA 3 (Sept. 2016), <http://www.vpc.org/studies/wmmw2016.pdf> [<https://perma.cc/25CR-RRDG>] [hereinafter WHEN MEN MURDER WOMEN 2014] (54% by firearm and 63% by intimate partner); VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2013 HOMICIDE DATA 3 (Sept. 2015), <http://www.vpc.org/studies/wmmw2015.pdf> [<https://perma.cc/9TFL-45FY>] (53% by firearm and 61% by intimate partner); VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2012 HOMICIDE DATA 3 (Sept. 2014), <http://www.vpc.org/studies/wmmw2014.pdf> [<https://perma.cc/3EGC-UU5V>] (52% by firearm and 62% by intimate partner); VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA 3 (Sept. 2013), <http://www.vpc.org/studies/wmmw2013.pdf> [<https://perma.cc/Q47X-8LAG>] (51% by firearm and 61% by intimate partner).

29. See WHEN MEN MURDER WOMEN 2015, *supra* note 26, at 4.

30. In Canada, the rate of intimate partner homicides was 0.27 per 100,000 persons. Marta Burczykca, *Section 3: Police-Reported Intimate Partner Violence*, STATS. CANADA (Feb. 21, 2017), <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14698/03-eng.htm> [<https://perma.cc/C5U9-LAGR>].

31. From 2009–2016, 598 females were killed by their intimate partner. Helen Pidd, *Men Killed 900 Women in Six Years in England and Wales, Figures Show*, THE GUARDIAN (Dec. 6, 2016), <https://www.theguardian.com/society/2016/dec/07/men-killed-900-women-six-years-england-wales-figures-show> [<https://perma.cc/VR75-HDLD>]. These homicides averaged about 100 intimate partner homicides per year. Kate Moss, *Shocking Domestic Abuse Statistics Don't Show the Real Picture: It's Even Worse*, THE GUARDIAN (Dec. 14, 2016), <https://www.theguardian.com/commentisfree/2016/dec/14/domestic-abuse-statistics-ons-worse-education> [<https://perma.cc/4RDC-E4GS>]. During mid-2015 England and Wales had a total population of about 57,885,400. Emily Shrobbree, *Statistical Bulletin: Population Estimates for UK, England and Wales, Scotland, and Northern Ireland: Mid 2015*, OFF. FOR NAT'L STATS. (June 23, 2016), <https://www.ons.gov.uk/people-populationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2015> [<https://perma.cc/4QT5-LQNJ>]. A leading weapon used in these homicides was a sharp instrument, and this weapon type killed around 290 of the 600 of the victims. Helen Pidd, *Men Killed 900 Women in Six Years in England and Wales, Figures Show*, THE GUARDIAN (Dec. 6, 2016),

Germany,<sup>32</sup> Australia,<sup>33</sup> and Sweden.<sup>34</sup> If one considers only firearm deaths, these percentages are even more disproportionate: domestic violence-related firearm homicides in the United States occurred at a rate of 0.36 deaths per 100,000 persons in 2015 for single victim-single perpetrator homicides.<sup>35</sup> This homicide rate is, again, in stark contrast

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<https://www.theguardian.com/society/2016/dec/07/men-killed-900-women-six-years-england-wales-figures-show> [<https://perma.cc/VR75-HDLD>]. Thus, the approximate IPH rate per 100,000 in England and Wales for 2015 was 0.096, and the rate killed with a sharp instrument such as a knife was 0.046 per 100,000 persons.

32. In Germany, 331 women were killed either intentionally or unintentionally by their intimate partners in 2015. *See Domestic Violence Affects over 100,000 Women in Germany*, DEUTSCHE WELLE, (Nov. 22, 2016), <http://p.dw.com/p/2T4hu> [<https://perma.cc/A9WK-UJL4>]. Across the study's research a total of 127,457 people were targets of murder, bodily harm, rape, sexual assault, threats and stalking, and 18% of these 127,457 people were male victims. *Id.* If we assume that around 18% is also the number of male victims who are killed by an intimate partner, then the number of intimate partner homicides in 2015 would be around 390 people. *Id.* With Germany's estimated population of 81.69 million people, *see id.*, this would produce a rate of 0.47 homicides per 100,000 people.

33. In Australia, all groups, regardless of race or gender, committed homicides at a rate of less than 7 per 100,000 in 2013-14. *See Victims and Offenders, 2009-10 to 2013-14*, CRIME STATISTICS AUSTRALIA, [http://www.crimstats.aic.gov.au/NHMP/2\\_victims-offenders/](http://www.crimstats.aic.gov.au/NHMP/2_victims-offenders/) [<https://perma.cc/434B-PJ4Q>].

34. Sweden has a firearm-homicide rate of about 0.17 per 100,000 people. *See NILS DUQUEST & MAARTEN VAN ALSTEIN, FLEMISH PEACE INST., FIREARMS AND VIOLENT DEATHS IN EUROPE 26* (June 2015), [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/firearms\\_and\\_violent\\_deaths\\_in\\_europe\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/firearms_and_violent_deaths_in_europe_web.pdf) [<https://perma.cc/Y62W-7WM3>] [hereinafter *Firearms Deaths in Europe*].

35. *See WHEN MEN MURDER WOMEN 2015, supra* note 26, at 2-3 (derived from multiplying the rate women murdered by men in single victim/single offender incidents, 1.12, by the percentage of women that knew their assailant, 93%, by the number of victims who were wives or intimate acquaintances of their killers, 64%, by the number of all female homicides committed by a firearm).

to Canada,<sup>36</sup> England and Wales,<sup>37</sup> Germany,<sup>38</sup> Australia,<sup>39</sup> Sweden,<sup>40</sup> and other comparable industrialized countries.<sup>41</sup> The drastically

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36. While the numbers are not precise, a study pegged the rate from 2007–2009 at about 0.12–0.09 for female domestic firearm homicides per 100,000 people and about 0.03–0.01 for male domestic firearm homicides per 100,000 people. See Samara McPhedran & Gary Mauser, *Lethal Firearm-Related Violence Against Canadian Women: Did Tightening Gun Laws Have an Impact on Women's Health and Safety?*, 28 VIOLENCE AND VICTIMS 876, 879 (2013), <https://research-repository.griffith.edu.au/bitstream/handle/10072/57640/McPhedranPUB111.pdf> [<https://perma.cc/FC62-DTVD>].

37. While there are no specific statistics for intimate partner homicides with firearms, in 2017 there were only thirty-two victims murdered with a firearm. See OFF. FOR NAT'L STATS., HOMICIDE IN ENGLAND AND WALES: YEAR ENDING MARCH 2017 (Feb. 8, 2018), <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2017/pdf> [<https://perma.cc/9WK8-QG7P>]. Assuming all of these victims are victims of domestic violence—which is unlikely—then the rate of IPH with a firearm would be about eight percent. The true rate is probably closer to one or two percent.

38. Domestic violence-related firearm homicide rates are not available; Germany's firearm homicide rate was 0.07 per 100,000 people in 2012, which makes it one of the lowest firearm homicide rates in the world, and its domestic violence-related firearm homicide rate likely tracks closely with this number. See Firearms Deaths in Europe, *supra* note 34, at 26.

39. While there are no specific numbers for intimate partner homicides with firearms, it was the fourth most used weapon in 2013 for homicides overall, behind knives, other weapons, and no weapons (i.e., hitting/kicking). Terry Goldsworthy, *Three Charts on: Australia's Declining Homicides Rates*, CONVERSATION (June 20, 2017, 9:30 pm), <http://theconversation.com/three-charts-on-australias-declining-homicide-rates-79654> [<https://perma.cc/W9KB-E8KN>].

40. Sweden's firearm-related homicide rate in 2012 was 0.17 per 100,000 people. See Firearms Deaths in Europe, *supra* note 34, at 26. From 2003–2006, it was projected that about 45% of Sweden's homicide that used firearms were committed against victims of domestic violence. *Id.* at 30. Transposing those numbers to the 2012 firearm-related homicide rate would give Sweden a domestic violence-related firearm homicide rate of around 0.0765 per 100,000 people. *Id.* at 26, 30.

41. See German Lopez, *America's Domestic Violence Problem Is a Big Part of its Gun Problem*, VOX (Nov. 6, 2017, 2:30 PM), <https://www.vox.com/policy-and-politics/2017/11/6/16612410/domestic-gun-violence-mass-shootings> [<https://perma.cc/RVH3-WFMT>] (noting the following homicide by firearm rates per 1 million people: United States (29.7), Switzerland (7.7), Belgium (6.8), Luxembourg (6.2), Ireland (4.8), Finland (4.5), Sweden (4.1), Netherlands (3.3), Denmark (2.7), Austria (2.2)); see also Erin Grinshten & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 AM. J. MED. 266, 268 (2016), [http://www.amjmed.com/article/S0002-9343\(15\)01030-X/fulltext](http://www.amjmed.com/article/S0002-9343(15)01030-X/fulltext) (on file with the Columbia Human Rights Law Review) [hereinafter *Firearm Death Rate*]

reduced level of domestic violence-related firearm homicides in our peer countries could be the result of several considerations, but one notable factor is that firearms are generally much more lethal than other categories of weapons.<sup>42</sup>

Research has established that the increased availability of guns correlates positively with the occurrence of homicides generally and domestic violence-related homicides specifically.<sup>43</sup> But even in the United States, a great disparity exists among states with regard to domestic violence-related homicides per capita.<sup>44</sup> Again, this disparity could be the result of several factors, but in the realm of domestic violence-related homicides and domestic violence-related homicides involving firearms, a variable that strongly correlates with variations in state-by-state homicide levels is the number of domestic violence-related firearm restrictions.<sup>45</sup> This association necessitates a

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*Study*] (noting the U.S. has a female firearm homicide rate of 1.1 per 100,000 while our high-income, peer countries have a female firearm homicide rate of 0.01 per 100,000; in terms of the total homicide rate, the U.S. female homicide rate is 2.2 per 100,000 and other the average for our high-income peer countries is 0.6 per 100,000).

42. See *Firearm Death Rate Study*, *supra* note 41, at 271 tbl.4.

43. See DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 61–62 (2004); Miller, et al., *State-level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001–2003*, 64 SOC. SCI. & MED., 656, 660–61 (2007); Siegel, et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981–2010*, 103 AM. J. PUB. HEALTH 2098, 2102–03 (2013); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (finding 8-fold increase in intimate partner femicide risk associated with abusers' access to firearms).

44. For example, in 2015, Alaska (0.96), South Carolina (0.87), Arkansas (0.84), Mississippi (0.81), and Nevada (0.79) all had high firearm-related intimate partner homicide rates per 100,000 people relative to Delaware (0.15), Massachusetts (0.10), Rhode Island (0.10), Hawaii (0.00), and South Dakota (0.00). Carolina Diez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536 app. tbl. 2 (2017) [hereinafter *IPV-Related Firearm Laws and Homicide Study*]. It is important to note that South Dakota and Alaska are subject to potential huge changes year-by-year because of their incredibly low populations. See generally Margarete Sandelowski, *Sample Size in Qualitative Research*, 18 RES. NURSING & HEALTH 179, 179–3 (1995) (discussing the reliability and advisability of using small sample sizes).

45. See, *IPV-Related Firearm Laws and Homicide Study*, *supra* note 44, at 531.

discussion on the efficacy of firearm restrictions generally, *ex parte* OFP firearm prohibitions specifically, and how the different types of *ex parte* OFP firearm prohibitions affect the benefit of any given *ex parte* OFP firearm prohibition.

## II. THE EFFICACY OF DOMESTIC VIOLENCE-RELATED FIREARM RESTRICTIONS GENERALLY AND EX PARTE PROHIBITIONS SPECIFICALLY

As noted above, far and away the most dangerous time for a victim of domestic violence is when they leave their abuser.<sup>46</sup> In fact, the likelihood that the victim will be killed by their abuser jumps 75 percent when the victim tries to leave their abuser.<sup>47</sup> This increased threat, along with many other factors, suggests the inevitable answer of perhaps the most toxic question a victim of domestic violence can be asked, “Why didn’t you just leave?”<sup>48</sup> For many, including Barbara Dye, they likely take their abuser’s threats of murder seriously.<sup>49</sup> Perhaps even more compellingly, they take their abuser’s threats of violence against their children and close family members even more seriously.<sup>50</sup> Some will also realize that economic realities make leaving

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46. Elizabeth M. Schneider et al., *Domestic Violence and the Law: Theory and Practice* 54 (2d ed. 2008); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 869 (2009) (“[D]ata show that the time when a victim decides to break free of a violent relationship is the most dangerous time; this is the time when the majority of domestic violence homicides take place.”); Filomena Gehart, *Domestic Violence Victims a Nuisance to Cities*, 43 PEPP. L. REV. 1101, 1124 (2016).

47. Leah Barbour, *MSU Expert Reveals Intimate Partner Violence Misconceptions, Solutions*, MISS. ST. U. (Oct. 27, 2014), <http://www.msstate.edu/newsroom/article/2014/10/msu-expert-reveals-intimate-partner-violence-misconceptions-solutions> [<https://perma.cc/2MJN-LWDH>] (finding that a victim tries to leave their abuser, “that person’s chances of being murdered increase by 75 percent”).

48. See Jana Kasperkevic, *Private Violence: Up to 75% of Abused Women Who are Murdered are Killed After They Leave Their Partners*, THE GUARDIAN (Oct. 20, 2004, 4:00 PM), <https://www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice> [<https://perma.cc/PZ5Y-R7YR>].

49. Luo, *supra* note 5 (noting that Barbara Dye fled the state for some time after filing her petition for dissolution and *ex parte* OFP petition).

50. See Melissa Jeltsen, *The Day Domestic Violence Came To Church*, HUFFPOST, (Nov. 18, 2017, 7:01 AM), [https://www.huffingtonpost.com/entry/domestic-violence-texas-church-massacre\\_us\\_5a0cac92e4b0c0b2f2f77a69](https://www.huffingtonpost.com/entry/domestic-violence-texas-church-massacre_us_5a0cac92e4b0c0b2f2f77a69) [<https://>

their abuser incredibly difficult.<sup>51</sup> Or perhaps, following the normal progressions of the cycle of abuse, the abuser will promise to reform, or, even more sinisterly, gaslight the victim into believing there are no other options for safety.<sup>52</sup> In short, the relevant question in our societal debate on domestic violence should not be “why is the victim staying?” Instead, we must ask “how we can make it safe for victims of domestic violence to leave?” To answer that question, we must start at the beginning and establish how to protect victims at the most dangerous moment (i.e., the moment of separation). Unfortunately, inadequate protection from separation violence is a problem which manifests itself on both the state and federal levels.

Currently, just over twenty states provide an explicit option that allows a district court to criminalize the possession of firearms or direct the surrender or confiscation of an alleged abuser’s firearms under an *ex parte* order for protection.<sup>53</sup> On the other hand, under the 1994 amendment to the 1968 Gun Control Act, federal law subjects every qualified person<sup>54</sup> to a firearm prohibition once a final OFP is entered, assuming that the order allows for the correct procedural steps and the OFP contains the required finding/prohibition under 18 U.S.C. § 922(g)(8) (2018).<sup>55</sup> Before the official enactment of 18 U.S.C.

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perma.cc/H254-2NYC] (noting that the Sutherland Springs Mass Murderer threatened his second wife’s family and told his second wife “that he was going to get them”).

51. Bryce Covert, *To Leave Their Abusers, Domestic Violence Survivors Need Economic Security*, THE NATION (Sept. 12, 2014), <https://www.thenation.com/article/how-vawa-can-make-it-easier-women-leave-their-abusers> [<https://perma.cc/4MLM-9UHU>]; Dara Richardson-Heron, *Here’s the Number One Reason Victims of Domestic Violence Stay*, HUFFPOST (July 14, 2015, 5:09 P.M.), [https://www.huffingtonpost.com/entry/economic-empowerment-is-c\\_b\\_7792540](https://www.huffingtonpost.com/entry/economic-empowerment-is-c_b_7792540) [<https://perma.cc/CLY8-UM3P>].

52. See Suzanne Degges-White, *Intimate Partner Abuse: Walk Away Before the Cycle Starts*, PSYCHOL. TODAY (Feb. 27, 2015), <https://www.psychologytoday.com/blog/lifetime-connections/201502/intimate-partner-abuse-walk-away-the-cycle-starts> [<https://perma.cc/MF55-B2DP>] (describing the three stages in the cycle of intimate partner violence and abuse).

53. See generally *supra* note 20 (listing statutes that have worked to cut off accused abusers’ access to firearms).

54. See 18 U.S.C. § 921(a)(32) (2012) (defining an “intimate partner” as a spouse or former spouse, or a person with whom the victim has had a child, or a person who cohabitates or has cohabitated with the subject of the order).

55. Almost every final OFP issued in the United States prohibits firearms as a matter of course. See 18 U.S.C. § 922(g)(8) (to activate the firearm prohibition,

§ 922(g)(8), Senator Paul Wellstone offered an amendment that would have allowed the federal firearm prohibition to restrain firearm access upon the issuance of any order that involved “the use, attempted use, or threatened use of physical force against a person described in subparagraph (A), [and] to maintain a minimum distance from the person so described.”<sup>56</sup> Had Congress included this amendment in the passage of the Violence Against Women Act, it would have operated as an *ex parte* OFP firearm prohibition. Unfortunately, the amendment did not become part of the final version of the Violence Against Women Act.<sup>57</sup>

An analysis of 18 U.S.C. § 922(g)(8) makes clear why additional state-level firearm restrictions, including *ex parte* prohibitions, would further reduce gun violence in the United States. For starters, the federal prohibition is under-inclusive because it does not cover non-spouse intimate partners who have neither resided nor had a child with the subject of the order.<sup>58</sup> Such a narrow definition is problematic because it fails to capture a large segment of abusers who should be subjected to the firearm prohibition based on their conduct but who are exempted based on a dated conception of domestic violence. In the early 1980s, the number of intimate-partner homicides committed by spouses was 69.1% of all domestic violence-related homicides.<sup>59</sup> This

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and by extension preclude a person from legally purchasing, possessing, or transporting firearms, the court order must: (1) be issued after a hearing “which [the subject] received actual notice” and “had an opportunity to participate”; (2) by its terms restrains the subject from “harassing, stalking, or threatening an intimate partner or child of an intimate partner, or engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child”; and (3) include a finding that the restrained party “represents a credible threat to the physical safety of their intimate partner or child”; or “its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would be reasonably expected to cause bodily injury”).

56. Domestic Violence Firearm Prevention Act, S. 1570, 103rd Cong. § 3 (1993). The person described in subparagraph (A) is “a spouse, former spouse, domestic partner, child, or former child of the person.” *Id.*

57. S. 1570 — 103rd Congress: Domestic Violence Firearm Prevention Act, GOVTRACK (Oct. 20, 1993), <https://www.govtrack.us/congress/bills/103/s1570> [<https://perma.cc/H2JV-YMBX>] (“This bill was introduced on October 20, 1993, in a previous session of Congress, but was not enacted.”).

58. 18 U.S.C. § 921(a)(32) (2012).

59. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008, at 19 (2011).

number decreased steadily to about 46.7% in 2008.<sup>60</sup> Taking its place has been the rise of intimate-partner homicides committed by a boyfriend or girlfriend, which rose to 48.6% in 2008 from 26.8% in 1980.<sup>61</sup> This statistic will likely increase in the future as Americans are not only waiting longer to marry but are also marrying less frequently than in previous decades.<sup>62</sup> Besides section 922(g)(8)'s under-inclusiveness, the federal statute also suffers from under-enforcement, several notable loopholes, and weak restrictions. For example, the statute does not mandate surrender of firearms and simply criminalizes ownership, possession, and the purchase of firearms.

As to law enforcement, several judges and commentators have commented over the years on the glaring lack of enforcement under 922(g)(8).<sup>63</sup> Writing in a dissent, Judge Richard Posner estimated that tens of thousands of people every year are precluded from purchasing or possessing firearms under section 922(g)(8) because a qualifying restraining order was issued against them.<sup>64</sup> Yet in the four-year period from the law's enactment to the writing of his dissent, he noted that he could find only about ten instances across the nation in which a federal district attorney's office had prosecuted someone for a violation of 922(g)(8).<sup>65</sup> In the intervening years, from 2008 to 2017, the number of prosecutions for section 922(g)(8) violations has averaged about 25.8 prosecutions per year.<sup>66</sup> This number represents not only a meager portion of the 8,000-plus weapons prosecutions in 2017 but also

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60. *Id.*

61. *Id.*

62. Kim Parker & Renee Stepler, *As U.S. Marriage Hovers at 50%, Education Gap in Marital Status Widens*, PEW RES. CTR. (Sept. 14, 2017), <http://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens> [<https://perma.cc/7UYZ-A694>].

63. See *United States v. Wilson*, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting); *United States v. Spruill*, 61 F. Supp. 2d 587, 589 (W.D.Tex. 1999) (§ 922(g)(8) is "rarely enforced"), *rev'd*, 292 F.3d 207 (5th Cir. 2002); see also Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 531–32 (2003).

64. See *Wilson*, 159 F.3d at 294 (noting that 100,000 restraining orders had been issued every year against domestic abusers, and that forty percent of U.S. households owned guns at the time).

65. *Id.*

66. See *Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC REPORTS, <http://trac.syr.edu/tracreports/crim/492/> [<https://perma.cc/K9LL-4CXP>].

a minuscule fraction of the estimated number of persons who currently own a gun and are subject to qualifying order for protection.<sup>67</sup>

The provision 18 U.S.C. § 922(g)(8) also suffers from the lack of a mechanism for pre-enforcement surrendering of firearms. The statute prohibits only the possession, ownership, and purchase of firearms, but makes no mention of how an individual subjected to the disabling statute might surrender their firearms.<sup>68</sup> Commentators have termed this loophole the “relinquishment gap.”<sup>69</sup> In response to the relinquishment loophole, many states have passed states laws that have clarified this process by providing precise instructions for the surrender or confiscation of firearms that are illegal for the individual subject of the OFP to possess.<sup>70</sup>

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67. In 2005, the FBI estimated that about 600,000 to 700,000 permanent OFPs are entered into the National Crime Information Center annually. But the number of final OFPs is likely larger for two reasons: 1) OFP filings have increased since 2005, and 2) many states either do not report their final OFPs or have incomplete reporting of their final OFPs. *See Restraining Orders Issued and in Effect in the U.S.*, Communicating with Prisoners, <http://www.acrosswalls.org/statistics/restraining-orders/> [<https://perma.cc/K8AQ-9VDH>]. Even so, if we take the 600,000 number and multiply it by the percentage of households that have at least one firearm in their home—approximately 31%, *see Despite Mass Shootings, Number of Households Owning Guns is on the Decline*, CBS NEWS (Mar. 1, 2018, 2:05 P.M.), <https://www.cbsnews.com/news/despite-mass-shootings-number-of-households-owning-guns-is-on-the-decline> [<https://perma.cc/92V7-42SN>—then the total number of *new* households with a person violating § 822(g)(8) would putatively be about 186,000 people. This number is exponentially larger than the average 25.8 federal prosecutions we have seen in recent years, even taking prosecutorial discretion into account. *See Federal Weapons*, *supra* note 68.

68. *See* Katie Zezima, *States move to restrict domestic abusers from carrying guns*, WASH. POST (Sept. 21, 2017), [https://www.washingtonpost.com/national/2017/09/21/states-move-to-restrict-domestic-abusers-from-carrying-guns/?utm\\_term=.fce499362e02](https://www.washingtonpost.com/national/2017/09/21/states-move-to-restrict-domestic-abusers-from-carrying-guns/?utm_term=.fce499362e02) (on file with the Columbia Human Rights Law Review) (describing some legislators’ characterization of the federal firearm disabling statute as “the honor system” because it provides no mechanism for turning over firearms).

69. *See* LAW CTR. TO PREVENT GUN VIOLENCE, KEEPING ILLEGAL GUNS OUT OF DANGEROUS HANDS: AMERICA’S DEADLY RELINQUISHMENT GAP 8 (Sept. 2016), <https://lawcenter.giffords.org/wp-content/uploads/2016/09/Keeping-Guns-Out-of-Dangerous-Hands.pdf> [<https://perma.cc/3XF5-53QZ>].

70. *See id.* at 14–15 (noting that at least 36 states have passed some form of legislation that curtails firearm possession, and that at least 25 of these states have some form of a procedure in place for firearm relinquishment).

The federal firearm disabling provision in section 922(g)(8) also fails to block all prohibited purchasers.<sup>71</sup> Federal law requires a background check through the National Instant Background Check System (NICS) for only certain sellers.<sup>72</sup> For example, all federally licensed arms dealers must conduct background checks during sales, but those persons who are “not engaged in the principal business of selling guns” are not required to conduct background checks before privately transferring guns.<sup>73</sup> Supporters of keeping the private-transfer loophole<sup>74</sup> argue that background checks on private transfers are unnecessary because private sellers do not sell to individuals whom they know are prohibited persons under federal law.<sup>75</sup> Opponents of a

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71. Matthew Miller, et al., *Firearm Acquisition Without Background Checks*, 166 ANNALS INT. MED. 233, 233 (Feb. 21, 2017) <http://annals.org/aim/fullarticle/2595892/firearm-acquisition-without-background-checks-results-national-survey> (on file with the Columbia Human Rights Law Review) [hereinafter Firearm Acquisition Study] (concluding that 22% of current U.S. gun owners who acquired a firearm within the past 2 years did so without a background check); *What Works to Reduce Gun Deaths*, THE ECONOMIST (Mar. 22, 2018), <https://www.economist.com/news/united-states/21739193-washington-dithers-and-argues-some-states-show-way-what-works-reduce-gun-deaths> (on file with the Columbia Human Rights Law Review) (noting that a recent survey of 1,613 gun-owners found that 42 percent had acquired their most recent weapon without a background check).

72. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as 18 U.S.C. § 922 (1993)).

73. 18 U.S.C. § 923(a) (2012) (providing that no person shall engage in the business of dealing in firearms until receiving a license to do so); 18 U.S.C. § 922(a)(1) (providing that it is illegal to engage in the business of dealing in firearms unless you are a licensee); *see also* 18 U.S.C. § 921(a)(11)(A) (defining “dealer” as anyone engaged in the business of selling firearms); 18 U.S.C. § 921(a)(21)(C) (defining “engaged in the business” as a dealer who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms). A dealer does not include someone who makes occasional sales, exchanges, purchases, and so forth, and, as such, a non-dealer is not subject to the background check requirement. *See* 18 U.S.C. § 921(a)(21)(C).

74. More commonly known as the “gun-show loophole” or the “private-sale loophole.” *See* Matt DeLong, *What You Need to Know About Minnesota’s Gun Laws*, STAR TRIB. (Mar. 2, 2018, 1:43 P.M.), <http://www.startribune.com/what-you-need-to-know-about-minnesota-s-gun-laws/474903103/> (on file with the Columbia Human Rights Law Review).

75. AWR Hawkins, *Report: Federal Agents Try to Show Ease of Illegal Online Gun Purchases, Fail in All 72 Attempts*, BREITBART (Jan. 7, 2018), <http://www.breitbart.com/big-government/2018/01/07/report-federal-agents-try-show-ease-illegal-online-gun-purchases-fail-72-attempts-2-years/> [<https://perma.cc/8K39-BQ4E>];

potential universal background check hinge their argument on research such as the recent study by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) where undercover agents of the ATF tried purchasing seventy-two firearms online over a two-and-a-half-year period, each time disclosing to the seller—before completing the transaction—that they were “prohibited” from purchasing firearms under federal law.<sup>76</sup> The ATF agents disclosed their “prohibited status” because federal law criminalizes the sale of a firearm to a prohibited person under section 922(d) if that sale or disposal was “to any person knowing or having reasonable cause to believe” that the potential buyer was a prohibited person.<sup>77</sup> Thus, without “knowing or having reasonable cause to believe” that a potential buyer is subject to the section 922(g) disabling statute, sellers would not face criminal liability under federal law—even if they sold a firearm to a prohibited person.<sup>78</sup> Although the intent requirement makes sense from a criminalization standpoint, the argument that a stricter background regime is unnecessary lacks merit because one would have to assume that all prohibited persons would act as our nation’s ATF agents did by revealing their prohibited status before the unchecked transaction was finalized. Such an assumption is naïve. In fact, many instances support the contrary, as purchasers—who were not subject to background checks because they purchased their firearms through unlicensed sellers—have murdered victims and committed other firearm-related offenses even though they would have been precluded from purchasing a firearm had they been required to go through a background check.<sup>79</sup>

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Brooke Singman, *Dem-ordered Study to Expose Illegal Online Gun Sales Backfires*, FOX NEWS (Jan. 8, 2018), <http://www.foxnews.com/politics/2018/01/08/dem-ordered-study-to-expose-illegal-online-gun-sales-backfires.html> [https://perma.cc/8ZN9-P93J]; *Study to Expose Illegal Online Gun Sales Backfires*, PATRIOT GUN NEWS (Jan. 19, 2018), <http://patriotgunnews.com/2018/01/19/study-to-expose-illegal-online-gun-sales-backfires/> [https://perma.cc/EZ6E-6YB5].

76. U.S. Gov’t Accountability Off., GAO-18-24, *Internet Firearm Sales: ATF Enforcement Efforts and Outcomes of GAO Covert Testing* (Nov. 2017), <https://www.gao.gov/products/GAO-18-24> [https://perma.cc/KL35-DZLS].

77. 18 U.S.C. § 922(d) (2012).

78. *Id.* at § 922(g).

79. *See, e.g.,* Myra Sanchick & Katherine Vittes et al., *Legal Status and Source of Offenders’ Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 INJ. PREVENTION 26, 29 (2013) (stating that nearly 96% of inmates in 13 states who were convicted of firearm-related offenses obtained their firearms through an unlicensed private seller); Ashley Luthern, *How Did a Gun Sold in Wisconsin End up Being Used to Kill a Chicago Cop?*, MILWAUKEE J. SENTINEL

Despite the limitations and loopholes of 18 U.S.C. § 922(g)(8), the statute has achieved some success. Since its enactment as part of the Violence Against Women Act, there has been a swift decline in the number of intimate-partner homicides per capita.<sup>80</sup> Various individuals from across the political spectrum have argued about whether such measures are responsible for that decline,<sup>81</sup> but several achievements of the statute are undeniable.

First, domestic violence-related firearm prohibitions (under 18 U.S.C. § 922(g)(8) and 18 U.S.C. § 922(g)(9)) have blocked the sale of an estimated 314,000 purchases of firearms from 1994 to 2012.<sup>82</sup> This figure also does not account for the people who have willingly, if reluctantly, relinquished their firearms in order to comply with 18 U.S.C. §§ 922(g)(8) and (g)(9).<sup>83</sup> Second, the Violence Against Women Act has provided grants to law enforcement as well as hundreds of domestic violence shelters, advocacy groups, and so forth.<sup>84</sup> Many of

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(Mar. 1, 2018, 4:37 PM), <https://www.jsonline.com/story/news/crime/2018/03/01/how-did-gun-sold-wisconsin-end-up-being-used-kill-chicago-cop/385027002/> [<https://perma.cc/X4RQ-V3BM>] (detailing how a Chicago police officer was killed with a gun purchased on Armslist by another person and eventually sold to a four-time felon who was precluded from purchasing a firearm if subjected to a background check); Myra Sanchick & Meghan Dwyer, *Full Report from Azana Salon & Spa Mass Shooting Released*, FOX6NOW.COM (Mar. 1, 2013), <http://fox6now.com/2013/03/01/full-report-from-azana-salon-spa-mass-shooting-released/> [<https://perma.cc/Q9CQ-XBRY>] (detailing how the domestic violence-related Azana Salon & Spa mass shooter was able to purchase a firearm on Armslist).

80. In 1991, the intimate partner homicide rate for the United States was 1.18 victims per 100,000 people. That rate has dropped by almost half to 0.67 victims per 100,000 people in 2015. See, IPV-Related Firearm Laws and Homicide Study, *supra* note 44, at 539.

81. See Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), <http://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/> [<https://perma.cc/5UFP-9CJV>].

82. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, SPECIAL REPORT: EXPANDING BRADY BACKGROUND CHECKS TO INTERNET GUN SALES IN OREGON 5 (2015), <http://www.bradycampaign.org/sites/default/files/Brady-Oregon-report.pdf> [<https://perma.cc/E65G-QT2E>].

83. Martin Kaste, *What It Takes to Get Guns out of the Wrong Hands*, KUOW (Jan. 26, 2018), <http://kuow.org/post/what-it-takes-get-guns-out-wrong-hands> [<https://perma.cc/KZS2-TJBB>] (noting that in 2016 in King County, Washington “56 percent of the people who received the orders simply ignored them. And of those who did respond, a suspiciously small number actually surrendered any guns.”).

84. Tara Aday, *The Effectiveness of The Violence Against Women Act (VAWA) in Creating System-Level Change*, 11 SPNHA REV. 5, 8–11 (2015).

these groups work on the ground level by providing various types of assistance to survivors or representing survivors of domestic violence, human trafficking, and sexual assault.<sup>85</sup> In fact, between July 2013 and June 2015, the Violence Against Women Act's discretionary grant program funded more than 2,000 grant requests that provided more than one million services to victims and their families.<sup>86</sup> Many signs point to the Violence Against Women Act's implementation as significantly reducing intimate-partner violence and homicides,<sup>87</sup> as well as a significant cost savings for health care and law enforcement services.<sup>88</sup>

In sum, while the firearm prohibitions for domestic abusers, and the Violence Against Women Act as a whole, have had at least some degree of success in disarming some potentially high-risk individuals, the federal firearm prohibitions still leave much to be desired. That is why before the initial passage of the Violence Against Women Act and continuing to the present, states have continued to pass firearm prohibitions aimed at reducing domestic violence-related attacks and homicides.

Recently, a study published in the *Annals of Internal Medicine* detailed an in-depth analysis of intimate partner violence-related firearm laws and intimate partner homicide rates in the United States

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85. In total, the Office on Violence Against Women (OVW) administers twenty-four grant programs with the total grant amount going over 6 billion dollars. *Id.* at 11. See also U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, 2016 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 61 (2016), <https://www.justice.gov/ovw/page/file/933886/download> [<https://perma.cc/2TSS-G5FH>] [hereinafter 2016 BIENNIAL REPORT].

86. 2016 BIENNIAL REPORT, *supra* note 85, at 61.

87. Aday, *supra* note 84, at 14 (noting that between 1993 and 2007, the intimate partner homicide rate for females decreased by 35 percent for females and 46 percent for males, and the victimization rate decreased from 9.8 per 1,000 persons to 3.6 per 1,000 persons from 1994 to 2010); Monica Modi et al., *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN'S HEALTH 253, 254–55 (2014).

88. Aday, *supra* note 84, at 15 (noting that a conservative estimate projects that it costs \$15.50 to serve one victim, but results in \$47.00 of averted costs for the health care system and law enforcement); Kathryn Andersen Clark, et al., *A Cost-Benefit Analysis of the Violence Against Women Act of 1994*, 8 VIOLENCE AGAINST WOMEN 417, 423–24 (2002).

from 1991 to 2015.<sup>89</sup> Generally, the study found that “state laws restricting firearm possession by persons deemed to be at risk for perpetrating intimate-partner abuse may save lives.”<sup>90</sup> It also determined that “[l]aws requiring at-risk persons to surrender firearms already in their possession were associated with a lower rate of intimate partner homicides (“IPH”).”<sup>91</sup> Specifically, the study found that state laws that prohibit persons subject to orders for protection from not only possessing firearms but also requiring them to surrender all firearms in their possession were linked to 9.7 percent lower intimate-partner homicide rate and a 14 percent lower firearm-related intimate-partner homicide rate.<sup>92</sup> The study considered six typical forms of firearm-related prohibition statutes to juxtapose against states’ intimate-partner homicide rates from 1991 to 2015.<sup>93</sup> These six prohibitions were: 1) prohibitions of firearm possession by persons convicted of domestic violence-related misdemeanors;<sup>94</sup> 2) mandatory surrender of firearms possessed by persons convicted of domestic violence-related misdemeanors; 3) prohibition of firearm possession by persons subject to an order for protection; 4) mandatory surrender by persons subject to an order for protection; 5) required removal of firearms from the scene of a domestic violence incident; and 6) prohibition of firearm possession by person convicted of stalking.<sup>95</sup> Although none of these six types of firearm regulations specifically dealt with *ex parte* firearm prohibitions, the study as a whole confirms that firearm restrictions directed toward high-risk individuals decreases the number of intimate-partner homicides.<sup>96</sup> All told, the statistical model created by the authors of the study projected that, in

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89. See IPV-Related Firearm Laws and Homicide Study, *supra* note 44, at 536.

90. *Id.*

91. *Id.*

92. *Id.* The study also found that laws that didn’t explicitly require relinquishment were linked to a non-statistically significant 6.6% reduction in intimate partner homicides.

93. See *id.* at App. tbls.2–3.

94. Essentially the state version of the Lautenberg amendment. See 18 U.S.C. § 922(g)(9) (2012) (prohibits any person convicted of a misdemeanor crime of domestic violence from possessing a firearm shipped in or received from interstate commerce).

95. IPV-Related Firearm Laws and Homicide Study, *supra* note 44, at Appx. tbl.x 3.

96. *Id.*

2015 alone, there were about seventy-five fewer deaths in states with more stringent domestic violence-related firearm laws, and that, had all fifty states adopted the more stringent domestic violence-related firearm laws, there would have been about 120 fewer deaths in 2015.<sup>97</sup>

Another recent study took a broader look at the relationship between several different types of firearm restrictions and homicide rates by analyzing such regulations as *ex parte* prohibitions, the inclusion of dating partners in the definition of “intimate partner,” and universal background checks.<sup>98</sup> Based on data from forty-five states,<sup>99</sup> the study found that generally, state-level regulations “restricting firearms from a broader population of individuals who commit domestic violence are more effective than more narrow laws” at reducing intimate-partner homicides.<sup>100</sup> The study found that OFPs directed at dating partners were linked to a 10 percent reduction in intimate-partner homicides;<sup>101</sup> inclusion of an *ex parte* firearm restriction was linked to a 12 percent reduction in intimate-partner homicides and a 16 percent reduction in firearm-related intimate-partner homicides;<sup>102</sup> and mandatory relinquishments or confiscations of firearms by those subjected to a domestic violence-related firearm prohibition were linked to a reduction of 22 percent in intimate-partner homicides.<sup>103</sup> The study also noted general regulations such as

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97. *Id.* at 541.

98. April M. Zeoli et al., *Analysis of the Strength of Legal Firearm Restrictions for Perpetrators of Domestic Violence and Their Association with Intimate Partner Homicide*, 187 AM. J. EPIDEMIOLOGY 1449, 1449 (2017) [hereinafter *Gun Restrictions and Homicide Study*].

99. The study left out Florida, Kansas, Kentucky, Montana, and Nebraska because these states failed to report several years of homicide data. *See id.* at 1450.

100. *See id.* at 1453.

101. *Id.* at 1449.

102. *Id.* at 1453.

103. *Broader Gun Restrictions Lead to Fewer Intimate Partner Homicides*, SCIENCE DAILY (Nov. 29, 2017), <https://www.sciencedaily.com/releases/2017/11/171129090415.htm> [<https://perma.cc/2H4R-C2GA>].

permits-to-purchase<sup>104</sup> and universal backgrounds checks<sup>105</sup> also reduce homicides generally and may be linked to a reduction of intimate partner homicides because prohibited persons are discouraged from trying to purchase firearms illegally. The provisions increase the likelihood that prohibited individuals will be blocked because both laws operate as a background check on all types of purchases as opposed to just those purchasing firearms from federally licensed firearm dealers.<sup>106</sup>

In sum, several studies support the conclusion that domestic violence-related firearm restrictions generally lower the number of intimate-partner homicides. Much has been said about specific restrictions such as the Lautenberg Amendment<sup>107</sup> and its state-level equivalents, as well as firearm-relinquishment statutes<sup>108</sup> and the

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104. To have a right to purchase a firearm, an individual must fill out a permit-to-purchase application. Permit-to-purchase laws differ greatly in some states, requiring them for types of firearms and not others. *See, e.g.*, NEV. REV. STAT. § 69-2403 (2018) (requiring a permit to purchase a handgun). The time frames these permits to purchase are active differ considerably, with Massachusetts's permit lasting ten days and Illinois's permit lasting ten years. *Cf.* MASS. GEN. LAWS ch. 140, § 131A (2018) (limiting the validity of permit-to-purchase firearms to ten days), *with* 430 ILL. COMP. STAT. 65/7 (2018) (limiting the validity of permit-to-purchase firearms to years from the date of issuance).

105. Universal background checks (UBCs) require all transactions—not just those done through federally licensed firearm dealers—to undergo a background check to ensure the purchaser is not a prohibited person under state or federal law.

106. Gun Restrictions and Homicide Study, *supra* note 98, at 1450. *See also* Firearm Acquisition Study, *supra* note 71, at 233 (estimating that 22% of gun owners who obtained a firearm in the last two years did so without being subjected to a background check).

107. *See, e.g.*, Alison Nathan, *At The Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 847–48 (2000) (discussing the constitutionality of the Lautenberg Amendment); Bethany A. Corbin, *Goodbye Earl: Domestic Abusers And Guns In The Wake of United States v. Castleman—Can The Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 118–19 (2015) (discussing the Lautenberg Amendment's physical-force requirement).

108. *See generally, e.g.*, Emily J. Sack, *Confronting The Issue of Gun Seizure In Domestic Violence Cases*, 6 J. CTR. FOR FAMILIES, CHILD. & CTS. 3 (2005) (considering federal and state firearm laws relating to domestic violence, and recommending more effective policies to state judges and law enforcement officials); Laura Lee Gildengorin, *Smoke And Mirrors: How Current Firearm Relinquishment Laws Fail To Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807 (2016) (examining federal and state approaches to gun relinquishment laws pertaining to domestic violence offenders, and offering reform strategies to bolster success).

expansion of the definition of “intimate partner.”<sup>109</sup> But there has been less discussion about the types, effectiveness, and constitutionality of the *ex parte* OFP prohibitions on firearms.

#### A. The types of *ex parte* OFP firearm prohibitions

As noted above, about twenty states currently have explicit *ex parte* prohibitions in their domestic violence statutes.<sup>110</sup> Of these states, many have noticeable nuances and characteristics that make them more or less effective at preventing a reactionary domestic violence related homicide with a firearm. For example, Montana has the most limited *ex parte* prohibition statute of them all, which allows an order to issue only under one narrow condition,<sup>111</sup> while Massachusetts is much broader and allows *ex parte* prohibition in most circumstances.<sup>112</sup> Some important defining characteristics are 1) the different enabling provisions that permit a court to prohibit firearms;<sup>113</sup> 2) whether the firearm prohibitions constitute a ban on possession of firearms and/or allows for a surrender procedure or law

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109. See Kimberly Lawson, *How Closing the ‘Boyfriend Loophole’ in Gun Laws Could Save Lives*, VICE (Nov. 7, 2017, 4:06 PM), [https://broadly.vice.com/en\\_us/article/xwa5da/how-closing-the-boyfriend-loophole-in-gun-laws-could-save-lives](https://broadly.vice.com/en_us/article/xwa5da/how-closing-the-boyfriend-loophole-in-gun-laws-could-save-lives) [http://perma.cc/MR3G-EJQN]; see also Morgan Brinlee, *What Is The Boyfriend Loophole? Domestic Abusers Aren’t Totally Barred From Buying Guns*, BUSTLE (Mar. 3, 2018), <https://www.bustle.com/p/what-is-the-boyfriend-loophole-domestic-abusers-arent-totally-barred-from-buying-guns-8392775> [https://perma.cc/6PG7-LRVP].

110. See *supra* note 20 and accompanying text. As of February 2018, five states had broader “red flag” statutes, which allow for other people to seek an *ex parte* gun-violence protection order. These statutes operate to allow the petitioner to contact law enforcement and ask for your guns to be taken away because they believe that you pose an imminent threat to yourself and others. Although these statutes are distinct from *ex parte* domestic violence firearm prohibitions, in several ways, they do operate in a similar fashion. They will also likely become incredibly popular in the coming years as an effective way to combat lone-wolf style mass shootings. See Lenny Bernstein, *Five States Allow Guns to be Seized Before Someone Can Commit Violence*, WASH. POST (Feb. 16, 2018), [https://www.washingtonpost.com/national/health-science/five-states-allow-guns-to-be-seized-before-someone-can-commit-violence/2018/02/16/78ee4cc8-128c-11e8-9570-29c9830535e5\\_story.html?noredirect=on&utm\\_term=.941e7c8cb678](https://www.washingtonpost.com/national/health-science/five-states-allow-guns-to-be-seized-before-someone-can-commit-violence/2018/02/16/78ee4cc8-128c-11e8-9570-29c9830535e5_story.html?noredirect=on&utm_term=.941e7c8cb678) (on file with the Columbia Human Rights Law Review).

111. See *infra* note 120 and accompanying text.

112. See MASS. GEN. LAWS ch. 209A (2018).

113. See *infra* Section II B and accompanying text.

enforcement confiscation;<sup>114</sup> and 3) other miscellaneous provisions and considerations including the number of days that elapse before an evidentiary hearing must be held, the types and numbers of weapons that the *ex parte* OFP covers, and storage requirements for parties who can possess the firearms during the period for which the *ex parte* OFP is active.<sup>115</sup>

#### B. Enabling provisions

Of the states that explicitly allow courts to prohibit firearm possession of alleged abusers who are subject to an *ex parte* OFP, many have different enabling conditions. When one of these conditions is met, the court will either be required to order a firearm prohibition or will have the discretion to order a prohibition. The enabling conditions vary from state to state, with some having narrow enabling conditions and others having broad enabling conditions.

In states such as Massachusetts, the enabling conditions are broad:

Upon issuance of a temporary or emergency order under section four or five of this chapter, the court shall, *if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse*, order the immediate suspension and surrender of any license to carry firearms and or firearms identification card which the defendant may hold and order the defendant to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses in accordance with the provisions of this chapter and any license to carry firearms or firearms identification cards which the defendant may hold shall be surrendered to the appropriate law enforcement officials . . . .<sup>116</sup>

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114. See *infra* Section II C and accompanying text.

115. For timing of an evidentiary hearing, see *infra* notes 144–148 and accompanying text; for types and numbers of firearms see *infra* notes 142–143 and accompanying text; for storage requirements see *infra* notes 149–156 and accompanying text.

116. MASS. GEN. LAWS ch. 209A, § 3B (2018) (emphasis added).

The enabling condition for firearm prohibitions in Massachusetts is “a substantial likelihood of immediate danger of abuse,”<sup>117</sup> the same standard used to determine whether the court may issue an *ex parte* order for protection generally.<sup>118</sup> The principal distinction between the two statutes is that the issuance of the firearm prohibition is mandatory, but the *ex parte* order is discretionary.<sup>119</sup>

By contrast, Montana’s *ex parte* firearm prohibition statute contains only one narrow enabling condition.<sup>120</sup> A judge at the *ex parte* stage has the discretion to prohibit an alleged abuser from “possessing or using *the firearm used in the assault*.”<sup>121</sup> This provision is silent on whether a judge may block firearm access for an alleged abuser who threatened great bodily harm, death, or suicide or caused great bodily injury, provided the threats or injuries were not done with a firearm.<sup>122</sup> Moreover, even if a firearm was used in an instance of domestic violence, the statute appears to prohibit possession of the specific firearm that was used and not other firearms the alleged abuser may possess.<sup>123</sup>

Lastly, several states specifically define offending conduct that subjects a person to an *ex parte* firearm prohibition.<sup>124</sup> For example, in North Carolina a district court judge must order the surrender of all “firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms” in the ownership of the alleged abuser if any of the following enabling conditions exist:

- (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.

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117. *Id.*

118. *Id.* at § 4.

119. *See* MASS. GEN. LAWS ch. 209A, § 3B; *cf.* MASS. GEN. LAWS ch. 209A, § 4.

120. *See* MONT. CODE ANN. § 40-15-201(2)(f) (West 2018).

121. *Id.* (emphasis added).

122. *See id.*

123. *Id.*

124. *See, e.g.,* N.C. GEN. STAT. § 50B-3.1(a)(1)–(4) (2013) (outlining the factors that require a court to order a defendant’s surrender of his or her firearms).

- (3) Threats to commit suicide by the defendant.
- (4) Serious injuries<sup>125</sup> inflicted upon the aggrieved party or minor child by the defendant.<sup>126</sup>

North Carolina's options for enabling conditions are expansive and cover most acts of domestic violence. But the statute does not cover all acts. It would not cover, for example, an act of domestic violence that occurred without a weapon, did not cause serious injury<sup>127</sup> (or threaten serious injury or death), and did not involve a threat of suicide. A good example of non-qualifying acts of domestic violence might be acts that cause only bodily harm or mental anguish.

### C. Surrendering or Confiscation

Every state's *ex parte* firearm prohibition statute broadly falls into two categories as far as consequences after service of the order. Generally, every state punishes the possession, care, custody, or control of firearms after service of the *ex parte* order by law enforcement.<sup>128</sup> But the statutes will fall into one of two categories if they go beyond simply prohibiting the purchase, possession, etc. of firearms. The first category requires respondents to surrender their

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125. "Serious injury" is not defined in North Carolina's Domestic Abuse Act. See N.C. GEN. STAT. § 50b-1 (2015). The Supreme Court of North Carolina also "has not defined 'serious injury' for purposes of assault prosecutions, other than stating that '[t]he injury must be serious but it must fall short of causing death.'" *State v. Ramseur*, 450 S.E.2d 467, 471 (N.C. Ct. App. 1994) (quoting *State v. Jones*, 128 S.E.2d 1, 3 (N.C. Ct. App. 1962)). Serious injuries "must be determined according to the particular facts of each case." *Jones*, 128 S.E.2d at 3. In the assault context, evidence the victim had suffered swollen, black eyes; bruises on her neck, arm, back, and inner thighs; redness on her vagina; and was in pain all over was sufficient for a jury to find that she had suffered serious injuries. *State v. Brunson*, 636 S.E.2d 202, 206 (N.C. Ct. App. 2006), *per curiam aff'd*, 653 S.E.2d 144 (N.C. Ct. App. 2007).

126. N.C. GEN. STAT. § 50B-3.1(a)(1)-(4).

127. As noted in *supra* note 125, serious injury is a case-by-case determination but is presumably less than a "bodily injury," another term used by North Carolina's domestic violence statutes. *Id.*

128. See, e.g., 8 R.I. GEN. LAWS § 8-8.1-3(a)(4) (2018) (imposing penalties for not complying with statute's demand); CAL. FAM. CODE § 6389(a) (West 2013). In fact, all the statutes in *supra* note 20 explicitly prohibit possession, purchase, etc. assuming the enabling conditions are met.

firearms,<sup>129</sup> or allows the alleged abuser a brief period<sup>130</sup> during which they can dispose of the firearms by surrendering them to law enforcement or transferring them to a third party.<sup>131</sup> Commonly, an alleged abuser or the individual or entity receiving the firearms are then required to file an affidavit or other affirmation with the court that the firearms are out of the respondent's possession.<sup>132</sup> The second and less-common procedure is seizure by the local law enforcement agency during the service of the *ex parte* OFP.<sup>133</sup> The state statutes that allow for law-enforcement confiscations typically do so by allowing police to confiscate firearms in plain sight,<sup>134</sup> or after a consensual search,<sup>135</sup> or by allowing the respondent to surrender the firearms immediately after being served with the *ex parte* OFP.<sup>136</sup> Several state statutes also allow law enforcement to apply for a search warrant to

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129. *See, e.g.*, MD. CODE ANN., Fam. Law § 4-505(a)(2)(viii) (West 2018) (allowing the judge to order the respondent to surrender all firearms in their control or possession when certain types of abuse occurred); N.D. CENT. CODE § 14-07.1-03(2)(d) (2008) (allowing judges to order the surrender of firearms if there is probable cause that the respondent is likely to “use, display, or threaten to use” the firearm during future violent acts); 23 PA. CONS. STAT. § 6108(a)(7) (2018) (allowing for the removal of a respondent's weapons if respondent had used or threatened to use the weapons); 8 R.I. GEN. LAWS § 8-8.1-3(a)(4) (allowing the complainant to request that the respondent surrender all firearms); WASH. REV. CODE § 26.50.070(1)(f) (2018) (allowing a court to require the respondent to surrender any firearm if the respondent has “used, displayed, or threatened to use a firearm in a felony” or poses a “serious and imminent threat” to the safety of the public or any individual).

130. Usually the window is about 24 hours. *See, e.g.*, 8 R.I. GEN. LAWS § 8-8.1-3(a)(4).

131. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1045(a)(8) (West 2018) (requiring temporary transfer of firearms to peace officer or federally-licensed firearm dealer); ME. STAT. tit. 19-A, § 4006(2-A) (2017); N.Y. FAM. CT. ACT § 842-a(5)(a). They also typically must file a third-party affidavit.

132. *See, e.g.*, ME. STAT. tit. 19-A, § 4006(2-A) (requiring respondent to submit to the court a written statement after giving the firearms to a third party); N.Y. Fam. Ct. Act § 842-a(5)(b) (McKinney 2018) (instructing that the party receiving the firearms notify the court of the surrender).

133. *See, e.g.*, N.J. STAT. ANN. § 2C:25-28(j) (West 2018) (requiring law enforcement to go to the scene of domestic violence or any other location where the judge has reasonable cause to believe any firearm or other weapon belonging to the defendant is located).

134. HAW. REV. STAT. § 134-7(f) (2018).

135. *Id.*

136. *See* MASS. GEN. LAWS ch. 209A, § 3B (2018); N.J. STAT. ANN. § 2C:25-28(j).

seize firearms and ammunition if they cannot find firearms that they believe exist in the respondent's possession.<sup>137</sup> Lastly, some states will immediately punish restrained parties if they refuse to surrender their firearms during service of the *ex parte* OFP.<sup>138</sup>

If a statute engages in neither of the above-described procedures, it simply criminalizes the possession, ownership, and control of the firearms, much like § 922(g)(8) does with final OFPs.<sup>139</sup> Because of this criminalization, the alleged abuser should be added to the databases that the NICS references and blocked from purchasing firearms through any federally licensed arms dealer.<sup>140</sup>

#### D. Miscellaneous Provisions

Aside from the important provisions discussed above, there are also several more minor provisions between various states and those respective states' *ex parte* domestic violence firearm prohibitions.

First, many of the state statutes that explicitly allow for *ex parte* firearm prohibitions also distinguish whether the specific firearm

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137. See, e.g., HAW. REV. STAT. § 134-7(f) (allowing police officers to apply for a search warrant when they cannot locate firearms and ammunition they have reason to believe belong to the respondent); see also N.J. STAT. ANN. § 2C:25-28(j) (accord).

138. See, e.g., CAL. FAM. CODE § 6389(a), (c)(2) (West 2013) (requiring immediate surrender to law enforcement or surrender within 24 hours if the law enforcement agent makes no request; failure to do so violates the protective order and is punishable under California's Penal Code § 29825); HAW. REV. STAT. § 134-7(f) (punishing restrained party with a misdemeanor if one of their guns is registered and the location is known to the restrained party but they refuse to provide its location to the police); MASS. GEN. LAWS ch. 209A, § 3B (specifying that any violation of a firearm surrender requirement is punishable with up to five thousand dollars and two and one-half years in a correctional facility); N.C. GEN. STAT. § 50B-3.1(d), (i) (2013) (requiring immediate surrender unless good cause is shown, in which case respondent can have up to 24 hours to surrender; however, the statute also punishes failure to surrender immediately, failure to disclose all material information about any of the firearms, and providing false information regarding the firearms).

139. See ARIZ. REV. STAT. ANN. § 13-3624(D)(4) (West 2018); 750 ILL. COMP. STAT. 60/214(b)(14.5), 60/217(a)(3)(i) (2018); MICH. COMP. LAWS § 600.2950(1)(e) (2018); UTAH CODE ANN. § 78B-7-106(2) (West 2018); W. VA. CODE § 48-27-403(a) (2018).

140. All federally licensed arms dealers must conduct background checks under federal law. See *supra* note 77. But not all states are equal in their prompt, full reporting to the FBI. See *infra* note 228.

that is used in an act of domestic violence is subject to a statute's prohibition, or whether all firearms owned, possessed, or in the control of the respondent should be subject to the firearm prohibition. As of a now, every state, except Montana, with an *ex parte* domestic violence firearm prohibition criminalizes the possession of all firearms.<sup>141</sup> Recognizing that firearms are only one method of harm, some states also prohibit possession of other dangerous weapons.<sup>142</sup>

Second, state *ex parte* OFP statutes, along with their *ex parte* domestic violence firearm prohibitions, typically have a timing component to ensure that the procedure satisfies due process.<sup>143</sup> The interim period between when the *ex parte* order is served by police, and thus becomes active, to when an evidentiary hearing is held to allow the alleged abuser a chance to contest the basis for the *ex parte* OFP differs from state to state.<sup>144</sup> Some states, such as New Hampshire, require a hearing within a few days after issuance of the *ex parte* domestic abuse firearm OFP.<sup>145</sup> Other states require a hearing to be held within several weeks after service of the *ex parte* firearm prohibition.<sup>146</sup> All statutory timing procedures appear to comply with procedural due process. But restricting an alleged abuser's rights for a long time without a hearing risks rendering the prohibition violative of an alleged abuser's due process rights.

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141. See *supra* note 20, all statutes save for Montana's.

142. See, e.g., ME. STAT. tit. 19-A, § 4006(2-A) (2017) (banning the possession of bows, crossbows, and other dangerous weapons); N.H. REV. STAT. ANN. § 173-B:4(I) (2014) (allows court to prohibit defendant from purchasing, receiving, or possessing any deadly weapons).

143. As discussed in Part III, an evidentiary hearing must be provided within a certain amount of time after the government has infringed upon a right.

144. See, e.g., MASS. GEN. LAWS ch. 209A, § 3B (2018) (granting defendants the opportunity to contest orders within ten court business days of submitting their request to contest); MONT. CODE ANN. § 40-15-201(4) (2018) (permitting courts to issue an immediate temporary order of protection for up to twenty days without granting prior notice to the respondent); 8 R.I. GEN. LAWS § 8-8.1-3(b) (2018) (requiring that hearings be held within fifteen days of surrendering to allow defendants to contest order).

145. N.H. STAT. § 173-B:4(I) (requiring courts to hold hearings between three and five days if defendants request a hearing to contest order).

146. See, e.g., ME. STAT. tit. 19-A, § 4006(1) (requiring that hearings be held within twenty-one days from the filing of a complaint for plaintiff to prove the allegation of abuse); MONT. CODE ANN. § 40-15-201(4) (permitting courts to issue an immediate temporary order of protection for up to twenty days without requiring prior notice to the respondent).

Third, some states provide for storage of surrendered or confiscated firearms,<sup>147</sup> while other states provide no procedure post-seizure.<sup>148</sup> These procedures are critical because they could provide an incentive for the relinquishment of firearms. The statute specifically governs how law enforcement or a third party receives and stores firearms that the alleged abuser is prohibited from owning or possessing.<sup>149</sup> Many states specify that parties can relinquish their firearms to a third party<sup>150</sup> other than law enforcement,<sup>151</sup> but they may need to file a statement with information about the third party.<sup>152</sup> Once the firearm is surrendered to a third party, courts typically require confirmation from the alleged abuser within a short time frame.<sup>153</sup> After the order has either elapsed or been dismissed, and assuming the respondent is not subject to any other disabling statutes, the firearms are returned to the alleged abuser.<sup>154</sup> It is important that

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147. See, e.g., N.C. GEN. STAT. § 50B-3.1(e)-(f) (2013) (providing that the sheriff will store the firearms or find a licensed firearms dealer to do so); MASS. GEN. LAWS ch. 209A, § 3B (granting law enforcement officials the discretion to store, transfer, or otherwise dispose of surrendered weapons).

148. See, e.g., NEV. REV. STAT. § 33.030(1) (2018) (omitting any procedure for storing firearms); MONT. CODE ANN. § 40-15-201(2)(f) (2018) (failing to specify how prohibited firearms will be stored or disposed).

149. See, e.g., 8 R.I. GEN. LAWS § 8-8.1-3(4)(i)(A-B) (providing procedure for surrendering firearms to law enforcement or a licensed firearms dealer and for selling or transferring ownership of the firearm while the protective order is in effect); N.D. CENT. CODE ANN. § 14-07.1-03 (2016) (requiring respondent to surrender firearms for safekeeping to either the sheriff, the sheriff's designee, the chief of police, or the chief of police's designee).

150. Some states, like Delaware, only allow the third party to be a licensed firearm dealer, whereas others states like Maine allow third parties generally. See DEL. CODE ANN. tit. 10, § 1045(a)(8) (West, Westlaw through 81 Laws 2018, chs. 200-453); cf. ME. STAT. tit. 19-A, § 4006(2-A) (2017).

151. N.D. CENT. CODE ANN. § 14-07.1-03 (2016) (providing for the relinquishment to occur with either the sheriff, the sheriff's designee, the chief of police, or the chief of police's designee).

152. See, e.g., ME. STAT. tit. 19-A, § 4006(2-A) (2017) (requiring the defendant to file a written statement that contains the name and address of the individual holding the weapons and a description of all weapons held by that individual if the weapons are relinquished to an individual other than a law enforcement officer).

153. *Id.*

154. See generally *Aloi v. Nassau Cty. Sheriff's Dept.*, 800 Misc. 3d 873 (N.Y. Sup. Ct.) (2005) (ordering the release of 26 firearms after the family court withdrew the § 842-a order to seize the weapons).

these firearms are returned promptly when an *ex parte* order is dismissed.

### III. THE CONSTITUTIONALITY OF EX PARTE FIREARM PROHIBITIONS

“Take the guns first, go through due process second . . .”<sup>155</sup>

– Donald Trump

Donald Trump created tremendous outrage amongst gun rights activists when he made the above statement during a meeting with legislators from both parties.<sup>156</sup> But in this instance, President Trump is right: we must take the guns first and then provide an avenue to deliver procedural due process to the accused. Various commentators,<sup>157</sup> NRA lobbyists,<sup>158</sup> journalists<sup>159</sup>, and politicians<sup>160</sup> by

155. Brett Samuels, *Trump: 'Take the Guns First, Go Through Due Process Second'*, THE HILL (Feb. 28, 2018), <http://thehill.com/homenews/administration/376097-trump-take-the-guns-first-go-through-due-process-second> [<https://perma.cc/DUC2-29NY>].

156. David Jackson et al., *Trump Says Take Guns First and Worry About 'Due Process Second' in White House Gun Meeting*, USA TODAY (Feb. 28, 2018), <https://www.usatoday.com/story/news/politics/2018/02/28/trump-says-take-guns-first-and-worry-due-process-second-white-house-gun-meeting/381145002> [<https://perma.cc/9ZE7-M9GY>].

157. See, e.g., Carolyn B. Ramsey, *Firearms In The Family*, 78 OHIO ST. L.J. 1257, 1323 (2017) (noting that “a move to sweeping, mandatory prohibitions—especially pursuant to emergency proceedings in which the respondent had no opportunity to participate—might raise Second Amendment and Due Process issues, as well as concerns about the ineffectiveness of gun confiscation and the denial of victim autonomy.”).

158. See, e.g., Luo, *supra* note 5 (noting that an NRA lobbyist testified that an *ex parte* OFP firearm prohibition statute in Washington state would give “extraordinarily broad authority to strip firearm rights”).

159. See, e.g., Awr Hawkins, *Republican State Sen. Pushing Gun Confiscation Law in Oregon*, BREITBART (Apr. 18, 2017), <http://www.breitbart.com/big-government/2017/04/18/republican-state-sen-pushing-gun-confiscation-law-in-oregon/> [<https://perma.cc/HJX2-RQVN>] (arguing that it violates Second Amendment rights because the evidentiary standard falls below what is normally required when taking away a fundamental right).

160. See, e.g., Mark Pazniokas, *Victim's family asks for vote on domestic violence bill*, THE CT MIRROR (May 30, 2015), <https://ctmirror.org/2015/05/30/victims-family-asks-for-vote-on-domestic-violence-bill> [<https://perma.cc/WUV8-X5UV>] (noting Connecticut's Republican Minority House Leader Themis Klarides' remarks that as for *ex parte* OFP firearm prohibitions “[t]here are people who are going to do bad things. It's our job to minimize that as much as possible, but you

turns issued strong rebukes and argued about the constitutionality of *ex parte* firearm prohibitions generally. Their arguments are premised on the idea that, because the right to bear arms is a constitutionally protected right, a firearm can never be taken from its owner and possession cannot be criminalized without a pre-seizure hearing before a judge where the alleged abuser has an opportunity to present a defense. But this is not a due process requirement for the temporary deprivation of a constitutional right, and, if it were, then it would likely invalidate every state's process for issuing any *ex parte* OFP, even if the *ex parte* OFP did not contain a firearm-related restriction.

The foremost constitutional challenge to an *ex parte* firearm prohibition is under procedural due process. Procedural due process restricts the government's ability to deprive individuals of "liberty" or "property" interests under the Due Process Clause of the Fifth or Fourteenth Amendments.<sup>161</sup> Because procedural due process requires a meaningful opportunity to be heard, it generally requires the defendant to be given notice and an opportunity to be heard before being deprived of a liberty or property interest by the government.<sup>162</sup>

But the Supreme Court has made exceptions for deprivations that are temporary in nature.<sup>163</sup> In *Mathews v. Eldridge*, the Supreme Court directed lower courts to consider "[1] the private interest affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and [3] the Government's interest, including the administrative burden that additional procedural

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trample on certain constitutional rights that we believe in, i.e., due process, to fix a problem that unfortunately is not really fixable."); see also Jennifer Mascia, *The Compromises That Got One State's Republicans to Increase Gun Protections for Domestic Violence Victims*, THE TRACE (June 1, 2016), <https://www.thetrace.org/2016/06/connecticut-domestic-violence-gun-law-republican/> [https://perma.cc/7L8W-42J8] (detailing how Themis Klarides then helped push the *ex parte* OFP firearm prohibition through after getting the Democratic caucus to 1) shorten the time that a firearm is prohibited before an evidentiary hearing and 2) provide a quicker timetable for the return of firearms after an *ex parte* order has been dismissed).

161. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

162. *Id.* at 333, 348; see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process.").

163. *Mathews*, 424 U.S. at 349.

requirements would impose.”<sup>164</sup> Under this analysis, a person challenging the *ex parte* firearm prohibition asserts that the “private interest” affected by the government intrusion is the Second Amendment’s right to keep and bear arms.<sup>165</sup>

But before diving into a procedural due process analysis, it is important to discuss how courts across the country have analyzed Second Amendment challenges under the substantive due process clause. A court considers several factors in Second Amendment challenges. First, there must be a threshold determination of whether the proposed restriction falls into the group of valid “longstanding prohibitions on the possession of firearms” identified in *Heller v. District of Columbia*.<sup>166</sup> These types of restrictions are presumptively valid because they address persons who are not at the core of the Second Amendment’s protection, i.e., “law-abiding, responsible citizens.”<sup>167</sup> If the restriction is a longstanding prohibition, such as the felon-in-possession restriction under § 922(g)(1), then it is valid and the inquiry ends.<sup>168</sup>

In the domestic violence context, the Eleventh Circuit Court of Appeals has concluded that 18 U.S.C. § 922(g)(9), which prohibits firearm possession, purchase and ownership by individuals who have been convicted of a misdemeanor crime of domestic violence, also falls under the “longstanding prohibitions on the possession of firearms” because § 922(g)(9) was essentially meant to remedy a dangerous

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164. *James Daniel Good Real Prop.*, 510 U.S. at 53 (citing *Mathews*, 424 U.S. at 335).

165. In 2008, the Supreme Court held that the Second Amendment confers an individual, fundamental right to keep and bear arms without regard to military service. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). *McDonald v. City of Chicago* makes this right applicable to the states through the Fourteenth Amendment Due Process Clause. 561 U.S. 742, 777–80 (2010).

166. See *Stimmel v. Sessions*, 879 F.3d 198, 203 (6th Cir. 2018) (quoting *Heller*, 554 U.S. at 626–27); see also *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (explaining the Supreme Court has implied that “longstanding prohibitions on the possession of firearms” presumptively survive Second Amendment scrutiny).

167. *Stimmel*, 879 F.3d at 203.

168. See, e.g., *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (concluding that felon-in-possession violation was a valid, longstanding prohibition on the possession of firearm).

loophole in the longstanding felon-in-possession firearm prohibition.<sup>169</sup> But whether § 922(g)(9) is part of the longstanding prohibition identified in *Heller's* dictum<sup>170</sup>—along with the § 922(g)(8) firearm prohibition on a final order for protection and a state's *ex parte* firearm prohibition—is an open question because these restrictions are not included in the explicit list approved in *Heller*.<sup>171</sup>

Assuming that an order for protection firearm prohibition and, by extension, *ex parte* firearm prohibitions are not a part of the implicit class of “longstanding prohibitions on the possession of firearms,” a court would then need to analyze the regulation through the appropriate form of means-end scrutiny.<sup>172</sup> The appropriate form of means-end scrutiny has traditionally been intermediate scrutiny, but some federal courts have applied strict scrutiny to Second Amendment challenges.<sup>173</sup> Because a majority of circuits have applied intermediate scrutiny to both firearm regulations generally and domestic violence-related firearm regulation specifically, I have chosen to analyze the *ex parte* firearm prohibition under intermediate scrutiny.<sup>174</sup>

In applying intermediate means-end scrutiny, it is the government's responsibility to establish a “reasonable fit between the challenged statute and a substantial governmental objective.”<sup>175</sup> In situations dealing with firearm restrictions that restrict domestic abusers, the government cites public safety in the form of reducing

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169. *White*, 593 F.3d 1199, 1205–06; *see also* *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (“Nothing suggests that the *Heller* dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence.”).

170. *See White*, 593 F.3d at 1205 (*Heller* identifies such things as firearm possession by felons, the mentally ill, etc. as “longstanding prohibitions”).

171. In fact, the *Heller* majority acknowledges that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” 554 U.S. at 627 n. 26.

172. *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018).

173. *See, e.g., United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to § 922(g)(8)); *accord United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010); *but see Tyler v. Hillsdale Cty. Sherriff's Dep't*, 775 F.3d 308, 314–15, 328 (6th Cir. 2014) *vacated on reh'g en banc*, 837 F.3d 678 (6th Cir. 2016) (applying strict scrutiny to a federal statute that prohibited people who had previously been at a mental institution from possessing firearms).

174. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016). *See also infra* notes 182–183 (citing more cases that have applied intermediate scrutiny).

175. *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012).

domestic gun violence as the substantial government interest.<sup>176</sup> Next, the government must demonstrate that the restriction has a reasonable fit to the challenged statute.<sup>177</sup> Courts usually determine fit by looking at how narrowly drawn the firearm restriction is and the evidence offered by the government to support its reasonable fit connection.<sup>178</sup> Demonstrating reasonable fit has been demonstrated in the past by relying on the bountiful supply of social-science data—much like the data used in Part I of this article—to show that domestic violence remains a devastating problem for our society, and gun-violence prevention legislation reduces intimate partner homicides.<sup>179</sup>

Intermediate means-end scrutiny has been employed in determining the constitutionality of several analogous firearm regulations such as 18 U.S.C. § 922(g)(8)<sup>180</sup> and § 922(g)(9).<sup>181</sup> Both have been upheld numerous times under this type of scrutiny.<sup>182</sup> There is no reason to believe that *ex-parte* OFP firearm prohibitions would not be upheld under the same analysis, but the more relevant and likely constitutional challenge would be a challenge brought under the

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176. *Id.* (finding that the legislative history of § 922(g)(8) suggests that its passage was in response to congressional concern about the dangers posed by armed domestic abuses and the overreliance of pre-1994 laws on judicial and prosecutorial discretion) (citing Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 538–44 (2003)).

177. *Id.* at 228.

178. *Id.* at 228–29.

179. *See* *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011) (outlining the government's assertion that domestic violence—and, specifically, the interplay between the presence of firearms and domestic violence—are serious problems in the United States).

180. *See, e.g.,* *Chapman*, 666 F.3d at 225–31 (applying two-part test and intermediate scrutiny); *United States v. Reese*, 627 F.3d 792, 800–05 (10th Cir. 2010) (using a two-step analysis under intermediate scrutiny).

181. Most courts have applied intermediate scrutiny to § 922(g)(9). *See, e.g.,* *United States v. Carter*, 752 F.3d 8, 13 (1st Cir. 2014) (applying *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), which adopted an intermediate scrutiny standard); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“[t]he government bears the burden of justifying its regulation in the context of heightened scrutiny review”); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (adopting an intermediate scrutiny standard to find § 922(g)(9) “valid only if substantially related to an important government objective”).

182. *See, e.g.,* *Chapman*, 666 F.3d at 231 (upholding subsections of § 922(g)(8) as applied to the defendant); *Skoien*, 614 F.3d at 642 (finding “substantial relationship” between § 922(g)(9) and the government objective).

procedural due process clause.<sup>183</sup> Thus, the next inquiry is a procedural due process analysis under *Mathews*.<sup>184</sup>

#### A. Procedural Due Process

As explained earlier, the test for determining whether a regulation complies with procedural due process is set forth in *Mathews v. Eldridge*. *Mathews* requires courts to consider three things: “[(1)] the private interest affected by the official action; [(2)] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and [(3)] the government’s interest, including the administrative burden that additional procedural requirements would impose.”<sup>185</sup> Moreover, under a *Mathews* analysis, “the degree of potential deprivation that may be created by a particular decision is a factor to be considered when assessing the validity” of a given process.<sup>186</sup> A critical factor for courts to specifically examine is “the possible length of wrongful deprivation.”<sup>187</sup>

As set forth above, the private interests of firearm ownership and property ownership are affected by official action embodied in the regulatory statutes.<sup>188</sup> Since it seems indisputable that firearm ownership is a private interest—and *ex parte* OFP firearm prohibitions by nature act to take this private interest away—this factor will always weigh in favor of the firearm owner. However, if the firearm owner was under a valid “longstanding prohibition[] on the possession of firearms,”<sup>189</sup> they would have no interest in firearm ownership.

As to the second factor, the length of deprivation, any given *ex parte* firearm prohibition case is of extremely short duration.<sup>190</sup> Most,

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183. See, e.g., *Chapman*, 666 F.3d at 230 (noting that § 922(g)(8) satisfies the fundamental requirements of procedural due process).

184. See text accompanying notes 163–166 *supra*.

185. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

186. *Mathews*, 424 U.S. at 341.

187. *Id.* (citation omitted).

188. See text accompanying note 164 *supra*.

189. *Heller*, 544 U.S. at 570, 626 (2008).

190. Generally, the *ex parte* order will last between three days and three weeks. Compare N.H. REV. STAT. ANN. § 173-B:4(I) (2014) (hearing must occur between three and five days after written request) and ME. STAT. tit. 19-A § 4006(1) (2017) (hearing must occur within 21 days of complaint filing).

if not all, of the *ex parte* OFP statutes require an evidentiary hearing to take place sometime between three to twenty-one days after the original *ex parte* order is issued.<sup>191</sup> Moreover, the length of this deprivation is the same as in cases involving *ex parte* orders that do not explicitly allow for firearms to be taken, because almost all the individual *ex parte* OFP statutes across the country can disable other rights—aside from firearm possession—that the alleged abuser would have but for the OFP.<sup>192</sup>

In addition to the timing aspect of the second factor, the risk of “an erroneous deprivation” is also low.<sup>193</sup> The risk for erroneous deprivation is low because all states require a court to make certain findings before issuing an OFP.<sup>194</sup> Although the specific language of the statutes differs in form, in substance they all require a district court to use discretion and issue an order granting *ex parte* relief only when there is an imminent danger of continuing violence.<sup>195</sup> Some of the statutes are narrower and require the use or threatened use of a firearm before a judge can issue an *ex parte* order that prohibits firearm possession by the respondent.<sup>196</sup> But regardless of whether the provision falls into either the broader or narrower category, the complaint or allegations must show some type of threat of imminent harm. Thus, it is unlikely that the temporary deprivation would be erroneous.

Admittedly, mistakes can be made, and false complaints can be filed, creating a slight chance of an erroneous deprivation. But this chance of erroneous deprivation has existed since the creation of the first OFP statutes, because the nature of domestic violence often requires immediate action.<sup>197</sup> Many courts that have heard challenges

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191. See *id.* and accompanying text.

192. For example, OFPs can temporarily modify custody, exclude the use of property such as a car or house, and prevent communication between the respondent and the respondent’s intimate partner and the respondent’s children.

193. *Mathews v. Eldridge*, 424 U.S. 319, 319, 335 (1976).

194. See, e.g., MASS. GEN. LAWS ch. 209A, § 3B (2018) (requiring plaintiff to demonstrate “a substantial likelihood of immediate danger of abuse”).

195. Compare *id.* (“a substantial likelihood of immediate danger of abuse”) and N.D. CENT. CODE § 14-07.1-03(1) (2008) (“an immediate and present danger of domestic violence”), with MD. CODE ANN., FAM. LAW § 4-505(a)(1) (West 2018) (“reasonable grounds to believe that a person eligible for relief has been abused”).

196. See MONT. CODE ANN. § 40-15-201(1) (2018).

197. David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the*

to other *ex parte* OFP statute provisions have also concluded that because the duration is so short and the risk of an erroneous deprivation so low, the second *Matthews* factor weighs in favor of finding *ex parte* OFP statutes constitutional.<sup>198</sup> This is equally true for *ex parte* firearm provisions. Because the duration is so short, and the risk of erroneous deprivation is so low, the potential for an erroneous deprivation of an alleged abuser's Second Amendment right is minimal. Accordingly, the second factor weighs in favor of the constitutionality of *ex parte* OFP firearm prohibitions.

Lastly, the court must consider the government's interest. The government's interest in domestic violence-related firearm prohibitions and the issuance of orders for protection is the protection of domestic violence victims and the prevention of domestic violence-related homicides. As Part I of this article discusses, more than half of all domestic violence related homicides are committed with guns.<sup>199</sup> Additionally, many of these homicides occur within the separation period.<sup>200</sup> *Ex parte* firearm prohibitions seek to curb the potential use of firearms just after separation or an act of violence. In light of this interest, factor three of the *Matthews* test also weighs in favor of *ex parte* firearm prohibitions.

Because *ex parte* OFPs that allow for firearm prohibition should be found *constitutional*, the next section discusses the author's ideal *ex parte* firearm prohibition statutes for enactment at the state level.

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*Process*, 18 KAN. J.L. & PUB. POL'Y 83, 83-7 (2008) (explaining the history of, advantages of, and problems with *ex parte* OFP statutes).

198. See *Blazel v. Bradley*, 698 F. Supp. 756, 762 (W.D. Wis. 1988) (upholding an *ex parte* OFP statute because "the short duration of the deprivation . . . does not eliminate the basic requirement of due process protections" while noting that such an order can cause two types of deprivations—a property interest deprivation and a cognizable liberty interest deprivation); accord *Baker v. Baker*, 494 N.W.2d 282, 288 (Minn. 1992); accord *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 231 (Mo. 1982); accord *H.E.S. v. J.C.S.*, 815 A.2d 405, 413-14 (N.J. 2003); accord *Marquette v. Marquette*, 686 P.2d 990, 995-96 (Okla. Civ. App. 1984); accord *Boyle v. Boyle*, 12 Pa. D. & C.3d 767, 779 (C.P. 1979).

199. See *supra* Part I.

200. See *supra* note 46 (explaining that this is the most dangerous period for a victim of domestic violence).

## IV. EX PARTE FIREARM PROHIBITION STATUTORY FRAMEWORK

“This is not the time to do what’s easy, it’s the time to do what’s right.”<sup>201</sup>

– Governor Phil Scott (R-Vt.)

This section puts forth a model statutory framework for states that are considering expanding their domestic violence statutes to include *ex parte* firearm prohibitions. The first part of this section analyzes *ex parte* residual clauses, which exist in some version or another in about 90% of all *ex parte* domestic violence statutes around the country. The second part of this section discusses the pros and cons of the various provisions that were discussed in Part II.

Currently, domestic violence victims in about 20 states can request an *ex parte* OFP that includes a prohibition on the respondent’s ability to purchase, possess, or own firearms.<sup>202</sup> An additional twenty states without explicit *ex parte* firearm prohibition provisions have residual clauses, which allow judges to grant other relief not specifically enumerated.<sup>203</sup> In fact, only about nine states either have

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201. He made this comment on April 11, 2018, while signing a set of new gun restrictions into law. Nick Wing, *Vermont Governor Signs Gun Control Bills Into Law*, HUFFPOST (Apr. 12, 2018), [https://www.huffingtonpost.com/entry/vermont-gun-laws-phil-scott\\_us\\_5ace6696e4b06487677650c2](https://www.huffingtonpost.com/entry/vermont-gun-laws-phil-scott_us_5ace6696e4b06487677650c2) [https://perma.cc/3AYX-QYTM].

202. For a list of those state statutes, see *supra* note 20.

203. Typically, residual clauses are framed as follows: “If it appears to the court that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction *ex parte*, pending a full hearing, and may grant such relief as the court deems proper . . . .” FLA. STAT. § 741.30(5)(a) (2018). Around 17 states have no explicit *ex parte* OFP firearm prohibition but do have a residual clause broad enough to include firearm-related relief if requested by the petitioner or advocate: ALA. CODE § 30-5-7 (2016); ARK. CODE ANN. § 9-15-206 (2015); FLA. STAT. § 741.30(5)(a); GA. CODE ANN. § 19-13-3(b) (2018); IDAHO CODE § 39-6308(1) (2018); IOWA CODE § 236.5(1)(b)(2) (2018); KY. REV. STAT. ANN. § 403.730 (2)(a) (West 2018) (In *United States v. Calor*, 172 F. Supp. 2d 900 (E.D. Ky. 2001), *aff’d*, 340 F.3d 428, *reh’g and suggestion for reh’g en banc denied*, 172 F. Supp. 2d 900 (6th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004), (the taking of the defendant’s high-velocity semi-automatic assault-style bushmaster upon serving the OFP was found to be constitutional)); MINN. STAT. §518B.01, subdiv. 7 (2018); MISS. CODE ANN. §§ 93-21-13, 93-21-15 (2018); NEV. REV. STAT. § 33.03005(1) (2018); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (West 2017); OKLA. STAT. tit. 22, § 60.3(A) (2019); OR. REV. STAT. § 107.718(1) (2018) (Oregon lacks an explicit procedure for domestic-violence victims to obtain an *ex parte* firearm prohibition as a part of their *ex parte* OFP but they are one of six states that have gun-violence restraining orders (aka

no residual clause<sup>204</sup> or seem to explicitly prohibit firearm prohibition relief at the *ex parte* phase because of their structure.<sup>205</sup>

Although use of a residual clause to order firearm prohibition relief is not ideal because it lacks defined procedures or rules to explain the process, a residual clause nonetheless provides an option when the facts of a particular instance of domestic violence make firearm restraint a necessity. But with this approach, the petitioner must persuade the judicial officer to provide a type of firearm prohibition and an appropriate process.<sup>206</sup>

Additionally, because of the specific structure of some domestic abuse statutes, there is an argument that *ex parte* firearm prohibitions can be implicitly denied because the statute's structure provides for a traditional firearm prohibition only after the opportunity for a full evidentiary hearing.<sup>207</sup> Although this implicit-denial argument is not present in statutes that do not provide any firearm prohibition upon

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red flag laws), which allow a large class of people to take firearms away from some respondents on a similar basis to an OFP); TENN. CODE ANN. § 36-3-606(a) (2018); TEX. FAM. CODE ANN. § 83.001(b) (West 2018); VA. CODE ANN. § 16.1-253.1 (2018); WY. STAT. ANN. § 35-21-105(a)(vi) (2018).

204. Seven states have no explicit *ex parte* OFP firearm restrictions and no residual clause under which other types of unremunerated relief might be granted: COLO. REV. STAT. § 13-14-103 (2018); KAN. STAT. ANN. § 60-3105(a) (2018); MO. REV. STAT. § 455.045 (2018); N.M. STAT. ANN. § 40-13-3.2(C) (2018); S.C. CODE ANN. § 20-4-60(A) (2018); S.D. CODIFIED LAWS § 25-10-6 (2018); VT. STAT. ANN. tit.15, § 1104 (2018). One commentator suggested that firearms in Vermont can be seized *ex parte*, yet the emergency relief has no residual clause language, and, in fact, says that relief under the *ex parte* statute “shall be limited” to the explicitly enumerated provisions. See Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before The Court Has Made A Finding of Abuse*, 23 VT. L. REV. 349, 364 (1998).

205. Two states simply prohibit *ex parte* firearm prohibitions: ALASKA STAT. § 18.66.110 (2017) (allowing only very specific relief); IND. CODE § 34-26-5-9(b) (2018) (maintaining a residual clause but also explicitly requiring notice and a hearing before a judicial officer may grant firearm-related relief, see *id.*, § 34-26-5-9(c)(4)).

206. See *supra* notes 128–40, 146–54 and accompanying text explaining firearm surrender and storage issues.

207. See, e.g., MINN. STAT. §518B.01, subdiv. 7(c) (2018) (permitting a hearing “upon request”); *id.* subdiv. 11(b) (requiring respondents to “prove by a preponderance of the evidence” that a material change in circumstance permits the court to vacate or modify its firearm prohibition); see also *id.* subdiv. 6(a) (permitting the court to provide relief “upon notice and hearing”).

issuance of the final order,<sup>208</sup> the implicit-denial argument does present a problem for states with a well-defined firearm prohibition under state law for OFPs issued after the opportunity for an evidentiary hearing but no explicit *ex parte* OFP firearm prohibition statute. Minnesota's Domestic Abuse Act provides an example of a state with an incredibly detailed firearm prohibition statute that explicitly applies to firearm prohibitions after an evidentiary hearing but is silent as to *ex parte* firearm prohibitions.<sup>209</sup>

Under the Minnesota Domestic Abuse Act, "Where an application under this section alleges an immediate and present danger of domestic abuse, the court may grant an *ex parte* order for protection and granting relief as the court deems proper."<sup>210</sup> Subdivision 7 explains that there are seven specific enumerated actions a court can order, in addition to relief "the court deems proper[.]"<sup>211</sup> In subdivision 6, the act sets forth all the different types of relief the court can grant "upon notice and hearing."<sup>212</sup> The available relief is extensive and includes temporary support, treatment and counseling services, restitution, etc.<sup>213</sup> But in addition, subdivision (6)(g) provides that any order:

[G]ranted [any] relief shall prohibit the abusing party from possessing firearms for the length of the order is in effect if the order (1) restrains the abusing party from harassing, stalking, or threatening the petitioner or restrains the abusing party from engaging in other conduct that would place the petitioner in reasonable fear of bodily injury, and (2) includes a finding that the abusing party represents a credible threat to the physical safety of the petitioner or prohibits the abusing party from using, attempting to use, or

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208. Many states that do not provide firearm prohibitions under state statutes likely do not do so, in part, because under federal law almost every single final OFP entered complies with the procedure set forth under 18 U.S.C. § 922(g)(8) (2012). Because of this fact, it is already illegal for a respondent with a final OFP to possess firearms under federal law.

209. See MINN. STAT. § 518B.01.

210. *Id.* subdiv. 7(a).

211. *Id.* subdiv. 6(a).

212. *Id.* subdiv. 6.

213. *Id.* subdiv. 6(a)(5), (7), (11).

threatening to use physical force against the petitioner.<sup>214</sup>

The specific language of subdivision (6)(g) of the Minnesota Domestic Abuse Act tracks very closely to the language of the federal domestic violence firearm prohibition in 18 U.S.C. § 922(g)(8); in fact, the language is essentially identical.<sup>215</sup> Arguably, because Minnesota places firearm-related relief in the section detailing possible relief after a hearing, *ex parte* firearm-related relief cannot be granted, under the concept of *expressio unius est exclusio alterius*.<sup>216</sup> But it is wrong to conclude that Minnesota statutory framework prevents a Minnesota judicial officer from granting an *ex parte* OFP firearm prohibition.

Under Minnesota's firearm disabling statute, all alleged abusers subject to orders described in § 922(g)(8) are precluded from possession or ownership of a firearm, not only under federal law, but also under Minnesota law. In other words, the State of Minnesota mandates as a matter of course that every person subject to an order for protection is precluded from owning, purchasing, or possessing firearms. The state firearm disabling statute was enacted as a matter of public policy based on the belief that people who have engaged in domestic violence—and been adjudicated as such—present too great a risk to society and to their victims to engage in their otherwise constitutionally protected right to bear arms. The statute's structure does not preclude *ex parte* firearm prohibition but rather makes a policy decision that the class of people who have been adjudicated domestic abusers present a continuing threat to society and their victims.

For that reason, the structure codifies the federal rule, which was enacted in 1994, and allows Minnesota state prosecutors to prosecute persons who violate Minnesota's version of the federal firearm prohibition contained in § 922(g)(8). Because the firearm prohibition attaches upon issuance of every qualifying OFP, the structure as a whole does not mandate that firearm prohibitions occur after an evidentiary hearing or the option of an evidentiary hearing,

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214. *Id.* subdiv. 6(g).

215. Compare 18 U.S.C. § 922(g)(8), with MINN. STAT. § 518B.01, subdiv. 6(g).

216. Under this argument, one could postulate that because a certain type of firearm relief is expressly permitted for OFPs after an evidentiary hearing, that means that relief was meant to exclude *ex parte* OFPs.

but rather models the federal statute. In other words, the public policy decision to ban firearm possession by all adjudicated domestic abusers who pose a threat to their intimate partners after a final order is issued does not prohibit *ex parte* relief. Instead, the state version of the federal firearm prohibition in § 922(g)(8) guarantees that this class of people will be precluded from firearm possession. The fact that Minnesota codified the federal rule in state law does not rob judges of the discretion to order necessary *ex parte* firearm relief via subdivision 7 the Minnesota Domestic Abuse Act when the facts and circumstances of the request necessitate ordering such relief.

#### A. Toward an *Ex Parte* OFP Firearm Prohibition Model Statute

In addition to employing the residual theory to permit potential relief in states without explicit *ex parte* firearm prohibition relief, there are better options for ensuring domestic violence victim safety going forward. The first option is to enact a domestic violence OFP firearm prohibition at the federal level. The second option is for states to enact a version of the *ex parte* domestic violence firearm prohibition into their respective state statutes. I will proceed in this section to explain the advantages and disadvantages of each solution and to describe a model statute best tailored to protect victims from potentially fatal separation violence.

#### B. The Federal *Ex Parte* Firearm Prohibition

As mentioned earlier, the United States Congress has attempted several times to pass an *ex parte* OFP firearm prohibition. One of these attempts occurred at the inception of the Violence Against Women Act.<sup>217</sup> A more recent example of the *ex parte* firearm prohibition being introduced at the federal level occurred after a horrific murder-suicide in Connecticut.<sup>218</sup> The bill, introduced by

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217. See *supra* notes 56–60 and accompanying text (discussing Paul Wellstone’s attempt to include *ex parte* prohibitions into the Violence Against Women Act).

218. The Lori Jackson Domestic Violence Survivor Protection Act was introduced in June 2014 by Senator Richard Blumenthal (D-Conn.). See Lori Jackson Domestic Violence Survivor Protection Act, S. 2483, 113th Cong. (2014). For more about Lori Jackson’s story see Cuda, *supra* note 15.

Richard Blumenthal,<sup>219</sup> would have closed the so-called “boyfriend loophole”<sup>220</sup> and amended the text of § 922(g)(8)<sup>221</sup> to include a provision barring the possession, control, or purchase of any firearm after an *ex parte* OFP is issued as long as an evidentiary hearing is provided by the order within the time frame required by the state.<sup>222</sup>

Senator Blumenthal’s bill had seven other sponsors during its introduction,<sup>223</sup> and represented a relatively easy and straightforward way to reduce domestic violence-related homicides by closing the “boyfriend loophole” and adding *ex parte* firearm prohibitions to § 922(g)(8), but it has languished in the Senate since its Judiciary Committee hearing in July 2014.<sup>224</sup> This unfortunate reality highlights some problems with manufacturing progress at the federal level.

First, in a divisive political environment, this bill’s passage (or any version of an *ex parte* firearm prohibition) by both chambers is improbable.<sup>225</sup> Second, because of our federalist form of government and what the federal government can realistically do in these situations, passing an *ex parte* firearm prohibition at the federal level represents the weakest type of prohibition: one that simply

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219. See *supra* note 218. See also, Protecting Domestic Violence and Stalking Victims Act, H.R. 4906, 113th Cong. (2014) (Representative Lois Capps’s related bill in the House of Representatives, which, *inter alia*, would have allowed for *ex parte* firearm probations).

220. See *supra* notes 58–61 and accompanying text.

221. S. 2483. The bill also amended 18 U.S.C. § 922(d)(8) (2012) to criminalize the knowing sale of firearms to individuals precluded by an *ex parte* OFP as described in the amended section of § 922(g)(8). *Id.*

222. *Id.*

223. Richard Durbin (D-Ill.), Patricia Murray (D-Wash.), Barbara Boxer (D-Cal.), Chris Murphy (D-Conn.), Ed Markey (D-Mass.), Mazie Hirono (D-Haw.), and Elizabeth Warren (D-Mass.) also introduced the bill along with Richard Blumenthal. *Id.*

224. See S. 2483 – 113<sup>th</sup> Congress: Lori Jackson Domestic Violence Survivor Protection Act, Congress.Gov, <https://www.congress.gov/bill/113th-congress/senate-bill/2483/all-actions-without-amendments> [<https://perma.cc/4G9Z-SUF6>] (reflecting that the latest action on this bill was hearings held by the Senate Judiciary Committee in 2014).

225. This gridlock is still present even though President Trump has said some encouraging things about gun-violence prevention. See, e.g., Tessa Berenson, *Here’s Where President Trump Stands on 5 Gun Control Ideas*, TIME (Mar. 12, 2018), <http://time.com/5195469/donald-trump-gun-control-white-house> [<https://perma.cc/YY99-THJ4>] (providing an overview of President Trump’s stance on gun control, including his plan to strengthen background checks and ban bump stocks).

criminalizes possession, purchase, and control instead of mandating some type of surrender or confiscation policy perhaps more suited to state and local control.<sup>226</sup> Third, this type of criminalization prohibition becomes even more ineffective without fear of prosecution for violating the law. As discussed earlier, another reason the current form of § 922(g)(8) needs to be supplemented by state laws—as it pertains to orders for protection entered after an evidentiary hearing—is because § 922(g)(8) is under-enforced at the federal level.<sup>227</sup>

Despite this, a federal law that explicitly criminalizes the possession, purchase, and ownership of firearms during the *ex parte* phase would help accomplish several important things. First, it would allow qualifying individuals to be added to the databases the NICS system pulls from states without a similar *ex parte* firearm prohibition.<sup>228</sup> Second, it would at least provide opportunities to prosecute violators in states without equivalent prohibitions, and cause others to surrender their firearms willingly out of fear of prosecution.<sup>229</sup> And third, it would provide an enforcement mechanism during the separation period in states that do not have *ex parte* OFP firearm prohibitions.

Federal legislation, of course, is not the only option. Indeed, a federal *ex parte* OFP firearm prohibition, like the one proposed by Senator Blumenthal, is important and would have a positive impact. However, a state-by-state approach would be more effective in reducing the number of domestic violence-related homicides because the mechanisms are more appropriate at the local level, enforcement is more immediate, and questions of surrender and storage of firearms for the interim period between an *ex parte* OFP and a full evidentiary hearing are more easily accomplished at the state level.

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226. As discussed earlier, *see supra* notes 63–70 and accompanying text, this type of prohibition helps only incrementally because only a small percentage of the population subject to this type of prohibition will be willing to abide by it. But that being said, there are ways the federal government could incentivize states into passing surrender or confiscation protocols.

227. *See supra* notes 63–70 and accompanying text (explaining that the firearm prohibitions in § 922(g)(8) are under-enforced).

228. *See NICS & Reporting Procedures*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/> [<https://perma.cc/8CFU-SXSV>] (explaining that state reporting to NICS is voluntary and some states are much more comprehensive in their reporting than others).

229. *See, e.g.*, Kaste, *supra* note 83 (discussing collaborative efforts in Seattle between police and prosecutors to improve enforcement of gun surrender orders).

### C. A State-By-State *Ex Parte* OFP Firearm Prohibition

In developing a state statute that is most effective in protecting victims of domestic violence, it is important to consider several aspects. Many of the important considerations have been discussed in Part II and are the basis for a proposed statute.

The first consideration is deciding what type of enabling conditions would activate an *ex parte* firearm prohibition. As discussed earlier, Massachusetts and Montana currently represent opposite ends of the prohibition spectrum, while states like North Carolina present a more measured approach for imposition of an *ex parte* firearm prohibition. It is the author's opinion that statutes like Montana's are so narrow that they fail to address many instances of danger,<sup>230</sup> while statutes like Massachusetts's may be too broad because they essentially provide for an *ex parte* taking in virtually all instances.<sup>231</sup> The ideal approach for reaching critical support in state legislatures is to target conduct that suggests the alleged abuser is at high risk to act violently with a firearm. This approach can be accomplished by using specific enabling factors that suggest a high potential for violence.

The next consideration is whether the statute will simply criminalize possession of firearms during the duration of the *ex parte* OFP or require some sort of surrender or confiscation protocol. The preferred method is development of a surrender or confiscation protocol because simply criminalizing firearm ownership and precluding the individual from purchasing firearms through federally licensed firearm dealers does not address some dangerous loopholes by which an alleged abuser may still keep or procure firearms. First, it allows otherwise prohibited individuals to use the private-transfer loophole, which enables people who are "not engaged in the principal business of firearm sales" to sell firearms without conducting background checks.<sup>232</sup> Moreover, under the Gun Control Act, the private seller will not have any criminal liability for the sale to a prohibited person as long as they didn't know (or have reason to know) the person they were

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230. See MONT. CODE ANN. § 40-15-201(2)(f) (2018) (allowing a judge the discretion to prohibit a respondent from "possessing or using the firearm used in the assault" with an *ex parte* OFP).

231. See MASS. GEN. LAWS ch. 209A, § 3B (2018) (requiring the district court to issue a firearm prohibition if the plaintiff "demonstrates a substantial likelihood of immediate danger of abuse").

232. See *supra* note 79.

selling to was a prohibited person.<sup>233</sup> Second, with no procedure in place to conduct any sort of relinquishment or surrender, many people simply will elect not to relinquish or surrender.<sup>234</sup> In fact, just prohibiting the behavior without providing a somewhat simplified surrender mechanism generally reduces much of the incentive to follow through for the alleged abuser, and makes compliance monitoring more difficult, as well. Thus, simply prohibiting possession and the ability to purchase, like under 18 U.S.C. § 922(g)(8), results in rare enforcement instead of a proactive surrender. In this instance, it is a much better policy to be proactive and mandate compliance instead of relying on a small number of prosecutions or even the underlying threat of criminal prosecution.

For these reasons, development of a surrender protocol is more advisable. States take different approaches on surrender protocols.<sup>235</sup> In places like New Jersey, Hawaii, and Massachusetts, law enforcement agencies can seize the alleged abuser's firearms.<sup>236</sup> For example, in New Jersey, if an *ex parte* OFP provides for a surrender of firearms, then a law enforcement officer has to accompany the alleged abuser, or can proceed without the alleged abuser if necessary, to

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233. See 18 U.S.C. § 922(d)(8) (2012) (prohibiting the sale of a firearm to someone who is subject to a court order restraining that person from stalking, threatening, or harassing an intimate partner, but only when seller knows or reasonably believes that person has such status).

234. For example, in the state of Minnesota (which does have a surrender requirement after the issuance of a final OFP), it was determined that only about 4% of respondents in roughly 3,000 OFP firearm surrender cases had complied with the statutes by filing a firearm relinquishment affidavit within three days of the order's issuance. A.J. Lagoe & Steven Eckert, *KARE 11 Investigates: MN Abusers Keep Their Guns Despite Laws, Court Orders*, KARE 11 (Feb. 28, 2018, 12:43 P.M.), <http://www.kare11.com/article/news/investigations/kare-11-investigates-mn-abusers-keep-their-guns-despite-laws-court-orders/89-523749182> [https://perma.cc/XPA3-VZRZ]. The concern is even with Minnesota's minimal procedure in place—which at least allows police and the court system the opportunity to follow up with noncompliance—the number of respondents complying with simple prohibition statutes are likely the same or even lower.

235. See *supra* text accompanying notes 124–40 (explaining that in addition to punishing the possession, care, custody, or control of firearms after service of an *ex parte* order, states may also require respondents to surrender firearms or permit local law enforcement to seize firearms).

236. N.J. STAT. ANN. § 2C:25-28(j) (West 2018); MASS. GEN. LAWS ch. 209A, § 3B (2018); and HAW. REV. STAT. § 134-7(f) (2018).

secure the firearms.<sup>237</sup> The law enforcement officer can also be empowered to get a firearm search warrant and go to “any other location where the judge has reasonable cause to believe any firearm or other weapon belonging to the defendant is located.”<sup>238</sup> As a part of this process, the judge must “state with specificity the reasons for and scope of any search and seizure authorized by the order.”<sup>239</sup>

Provisions which require direct intervention by police in the surrender of a respondent’s firearms have appeared to lower the number of per capita domestic violence murders. According to an analysis of 2014 data done by the Violence Policy Center, New Jersey, Hawaii, and Massachusetts all rank in the bottom third for domestic violence-related homicides that involved one female victim and one male attacker.<sup>240</sup> Because the traditional surrender model employed in a majority of states, as well as the lack of enforcement and oversight in traditional firearm criminalization provisions, is generally ineffective, the model *ex parte* OFP firearm prohibition provision includes a law enforcement-facilitated surrender provision. This is best accomplished through issuance of a search warrant with the *ex parte* OFP if the victim has mentioned the existence of alleged abuser’s firearms or threats of violence as a specific concern. If the alleged abuser refuses to relinquish their firearms, the search warrant would empower the law enforcement agency to conduct a search and to seize all of the respondent’s firearms at that time.<sup>241</sup>

The third consideration is the breadth of weapons covered by the prohibition. Many states broadly prohibit the possession or ownership of all firearms.<sup>242</sup> Other states prohibit all firearms as well

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237. N.J. STAT. ANN. § 2C:25-28(j).

238. *Id.*

239. *Id.*

240. See WHEN MEN MURDER WOMEN 2014, *supra* note 28, at 9 appx. 1 (ranking New Jersey as the 36<sup>th</sup> lowest, Massachusetts as tied for the 44<sup>th</sup> lowest, and Hawaii as the 48<sup>th</sup> lowest). This characterization of domestic violence-related homicide is incomplete, as domestic violence homicides can be committed against either males or females and by either males or females. In addition, they can also involve more than just one victim. But it does encapsulate the most common domestic violence-related type of homicide.

241. See, e.g., N.J. STAT. ANN. § 2C:25-28(j) (permitting law enforcement to search for and seize any firearm or other weapon at any location at the direction of a judge with reasonable cause to believe where the weapon or firearm is located).

242. See, e.g., N.C. GEN. STAT. § 50B-3.1(a)(1)–(4) (2018) (enumerating four individual conditions under which a judge must order firearm surrender).

as many other types of dangerous weapons including knives, bows, etc.<sup>243</sup> Because firearms are without question the most dangerous weapon in terms of their lethality to humans, a prohibition on them is the most critical.<sup>244</sup> The important aspect of weapon prohibition is that a person who has met the enabling conditions for seizure or surrender should not be able to possess any firearms, even if those firearms were not used in establishing the enabling conditions.

The fourth consideration is the time frame in which the evidentiary hearing must be held in order to comply with procedural due process. As to the timing component, state statutes currently require that evidentiary hearings take place after a short period of time.<sup>245</sup> States should be able to use their current timing scheme, as most require an evidentiary hearing to occur, at the latest, within thirty days. The only potential concern for timing from a due process standpoint is statutes that allow for *ex parte* OFPs—especially with provisions such as firearm prohibitions—to remain active indefinitely until further order.<sup>246</sup>

The fifth and final consideration is storage and return. Because police intervention to secure firearms is advisable, it is important to have an explicit storage and return policy. Local law enforcement should be able to charge reasonable fees. Additionally, the firearms should stay in law-enforcement custody until the *ex parte* order for protection is dismissed, or the final OFP's term has lapsed. It is also important to ensure a quick and efficient process for the return of firearms when an *ex parte* OFP is dismissed.

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243. See, e.g., ME. STAT. tit. 19-A, § 4006(2-A) (2017) (banning the possession of bows, crossbows, and other dangerous weapons).

244. The extreme lethality of firearms is true whether you are referencing homicides or suicides. One study, analyzing over 1,000 suicides and over 1,600 attempted suicides in Allegheny County, Pennsylvania, found that 92 percent of suicides committed with guns were lethal. While the next most lethal means were Carbon Monoxide poisoning (78 percent), hanging (77 percent), and drowning (66 percent) were the next most lethal forms. See DENNIS A. HENIGAN, LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY 24 (1<sup>st</sup> ed. 2009). As for felonies which involve threatened or actual bodily injury, the involvement of a gun is pegged at about 20 percent. *Id.* at 23. When one considers just homicides, that number increases to 70 percent. *Id.* at 23.

245. See *supra* note 190–191.

246. See, e.g., N.J. STAT. ANN. § 2C:25-28(i) (West 2018) (allowing *ex parte* OFPs to remain in effect until a judge of the Family Part issues a further order).

#### D. The Model Statute

The proposed model statute is as follows:

- (a) Surrender of firearms and other dangerous weapons—Upon issuance of an *ex parte* order under this Chapter, the court shall order the defendant to surrender to local law enforcement all firearms, ammunition, permits to purchase firearms, permits to carry firearms, and other dangerous weapons that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors are present and the petitioner requests<sup>247</sup> that the respondent's firearms, ammunition, permits to purchase firearms, permits to carry concealed firearms, and other dangerous weapons be seized:<sup>248</sup>
- (1) The use or threatened use of a dangerous weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons;<sup>249</sup>
  - (2) Threats to seriously injure or kill the petitioner or minor child by the defendant;<sup>250</sup>
  - (3) Threats to commit suicide by the defendant;<sup>251</sup>

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247. Because civil orders for protection are primarily based on empowering victims of domestic violence in allowing them to retain a measure of control over the remedies they seek and how these remedies will protect them going forward, it is important—in the author's opinion—to take the victim's wishes into account in regards to seizing the respondent's firearms.

248. See generally N.C. GEN. STAT. § 50B-3.1(a) (2018) (outlining the procedure for the surrender and return of firearms pursuant to the chapter's domestic violence provision); 8 R.I. GEN. LAWS § 8-8.1-3(a)(4) (2018) (outlining the procedure for a domestic assault victim's complaint requesting the surrender and return of firearms); N.H. REV. STAT. ANN. § 173-B:4 (I)(a)(9) (2014) (outlining the protections afforded to victims of domestic violence).

249. N.C. GEN. STAT. § 50B-3.1(a)(1).

250. *Id.* (a)(2).

251. *Id.* (a)(3). See David Matthau, *After NJ Murder-Suicide: A Look at Stopping Domestic Violence Early On*, NEW JERSEY 101.5 (Jul. 7, 2016, 6:11 P.M.), <http://nj1015.com/after-nj-murder-suicide-a-look-at-stopping-domestic-violence->

- (4) Serious injuries inflicted by the respondent upon the petitioner or a minor child.<sup>252</sup>
- (b) Weapon identification—The petitioner should attempt to identify all firearms, ammunition, or dangerous weapons and the location of those firearms or dangerous weapons that are either in the presence of, ownership of, control of, or are accessible to the respondent, as well as permits to purchase or permits to carry that are in the respondent's name.<sup>253</sup>
- (c) Evidentiary hearing required—Upon the granting of the *ex parte* order for protection containing a firearm prohibition under this Section, the court shall hold an evidentiary hearing within 14 days, of which the respondent must have actual notice.<sup>254</sup> If, at the time of the evidentiary hearing, the court dismisses the petitioner for order for protection, the firearm prohibition shall be lifted and the firearms surrendered shall be returned to the respondent in accordance with subsection (g), provided that the respondent is not otherwise precluded from receiving the firearms under federal, state, or local law.<sup>255</sup>
- (d) Surrender—Upon personal service of the *ex parte* order prohibiting firearms under this Section, the respondent shall be notified that the respondent is prohibited from having any firearms, ammunition, permits to purchase, and permits to carry firearms, as well as any other weapons identified in the *ex parte* order, in his care, custody, possession, ownership, or control and must immediately surrender the prohibited items to custody of the

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before-the-worst-happens/ [https://perma.cc/768A-KTJX] (noting that threats of suicide demonstrate a high risk for domestic violence).

252. N.C. GEN. STAT. § 50B-3.1 (a)(4).

253. The declaration on the petition will provide the places to be searched and the items to be seized under the firearm seizure search warrant.

254. See generally N.C. GEN. STAT. § 50B-3.1(c) (2018) (outlining notice and hearing procedures governing the surrender of firearms).

255. See *infra* Model Statute (g).

local law enforcement for safekeeping. When issuing the *ex parte* order for protection firearm prohibition, the district court has the discretion to issue a firearm seizure warrant for firearms, ammunition, permits to purchase, and permits to carry firearms including but not limited to the firearms identified by the petitioner in subsection (b). If the district court issues a firearm seizure warrant with an *ex parte* order for protection, it must specify the reason for the warrant and the places to be searched, which may include any place the district court has reasonable cause to believe respondent's firearms or other prohibited weapons or licenses may be located. While serving the *ex parte* order for protection, law enforcement may also take custody of all firearms, ammunition, and dangerous weapons that are in plain sight, discovered pursuant to a consensual search, or voluntarily surrendered by the respondent.<sup>256</sup> If there is a valid reason that the firearms, ammunition, permits to purchase, permits to carry firearms, or other dangerous weapons cannot be surrendered at the time of service of the *ex parte* order, then local law enforcement may either accompany the respondent to the location at which such objects can be secured, or may elect to provide the respondent 24 hours to surrender the prohibited items to the local law enforcement agency.<sup>257</sup>

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256. HAW. REV. STAT. § 134-7(f) (2018).

257. N.C. GEN. STAT. § 50B-3.1(d) (setting forth a specific surrender procedure); N.J. STAT. ANN. § 2C:25-28(j) (accord). There are also several other ways in which a state could attempt a surrender procedure. First, they could change the procedure to require law enforcement to apply for a limited-scope firearm seizure warrant after the respondent refuses to turn over his firearms (or it is suspected that he is lying about possession). *See, e.g.*, HAW. REV. STAT. § 134-7(f) (requiring application of limited-scope firearm seizure warrant). Second, states could consider a 24-hour relinquishment period in which the respondent must turn over the firearms to the law enforcement agency, or they could include federally licensed firearm dealers or other third parties as eligible to receive firearms. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1045(a)(8) (2018) (allowing 24 hours to relinquish firearms); ME. REV. STAT. tit. 19-A, § 4006(2-A) (2017) (accord); N.Y. FAM. CT. ACT § 842-a(5)(a) (McKinney 2018) (accord). A state could also consider utilizing versions of these two above options and the option contained in the model statute

- (e) Firearm storage—The local law enforcement agency may charge the respondent a reasonable fee for the storage and safekeeping of any firearms, ammunition, or other weapons. The local law enforcement agency shall exercise due care to preserve the quality and function of the firearms, ammunition, or other weapons. The local law enforcement agency is expressly forbidden from releasing any of the prohibited items under its control without an order from the issuing court that dismisses the *ex parte* order for protection, or dismisses the final order for protection, should one be entered.<sup>258</sup>
- (f) Motion for return by third-party owner—A third-party owner of firearms, ammunition, permits, or other weapons who is the rightful owner of one or more of the surrendered items, and is otherwise legally eligible to possess such items, may petition for return to said third party any of the items taken into the local law enforcement agency's custody pursuant to the order issued under this chapter. Upon receipt of the petition, the court shall schedule a hearing, and shall return the items to the third party unless that third party is either disqualified from receiving them or cannot satisfy their burden in establishing ownership over the item.<sup>259</sup>
- (g) Return of firearms upon *ex parte* OFP dismissal— Upon the order dismissing the *ex parte* order for protection, the court shall issue a return order for the respondent's firearms. The law enforcement agency with possession of the respondent's firearms, licenses, and other weapons must release these items upon the presentation of the court's return order within one week, unless the

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to create a program that decides on the surrender protocol based on the allegations of the petitioner and how those allegations stack up to a lethality screening.

258. N.C. GEN. STAT. § 50B-3.1(d).

259. N.C. GEN. STAT. § 50B-3.1(g).

respondent is otherwise precluded from possession said weapons, licenses, and ammunition under federal, state, or local law.<sup>260</sup>

- (h) Violations—It is a felony-level offense for any person subject to an *ex parte* order for protection firearm prohibition under this section to:
- (1) Fail to surrender all firearms, ammunition, permits to purchase firearms, and permits to carry concealed firearms, or other dangerous weapon identified by the petitioner in subsection (b), as ordered by the court;<sup>261</sup>
  - (2) Fail to disclose all relevant information pertaining to the possession of firearms, ammunition, and permits to purchase and permits to carry concealed firearms, or other dangerous weapons identified by the petitioner in subsection (b), as requested by the court;<sup>262</sup> or
  - (3) Provide materially false information to the court or law enforcement pertaining to any of these items.<sup>263</sup>
- (i) Residual Clause—The district court is empowered to grant additional relief relating to the respondent's possession or surrender of firearms, ammunition, or other dangerous weapons that it considers necessary for the preservation of life and liberty of the petitioner or the petitioner's family.

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260. *Id.* § 50B-3.1(e).

261. *Id.* § 50B-3.1(i)(1).

262. *Id.* § 50B-3.1(i)(2).

263. *Id.* § 50B-3.1(i)(3).

## CONCLUSION

Reducing our country's rate of domestic violence-related homicides ought to be a non-partisan issue. Although the regulation of firearms is generally seen through the liberal-conservative prism, three-fourths of the country's population consistently agrees that certain people present too great a risk to be allowed to have access to a firearm<sup>264</sup> and almost two-thirds of the population supports or strongly supports "banning people who have been issued temporary restraining orders for domestic violence, but have not been convicted of a crime, from possessing guns for the duration of the order."<sup>265</sup> Among these various groups of high-risk people, we have repeatedly seen that domestic abusers are among the prohibited people presenting the greatest risk.<sup>266</sup> Domestic violence also presents a cognizable risk to

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264. See, e.g., Johns Hopkins Bloomberg School of Public Health, *Large Majority of Americans—Including Gun Owners—Support Stronger Gun Policies*, SCIENCE DAILY (Jun. 3, 2015), [www.sciencedaily.com/releases/2015/06/150603123948.htm](http://www.sciencedaily.com/releases/2015/06/150603123948.htm) [<https://perma.cc/ZKS7-MSB7>] (stating that 73 percent of gun owners support a 10-year ban on a person convicted of a serious crime as a juvenile; 75 percent support a 10-year ban on someone who brandishes a gun in a threatening manner and not in self-defense, and 76 percent support a 10-year ban for people convicted of domestic violence); Chris Jackson & Mallory Newall, *Ipsos/NPR Poll: Majority of Americans Support Policies Aimed to Keep Guns out of Hands of Dangerous Individuals*, IPSOS (Feb. 28, 2018), <https://www.ipsos.com/en-us/news-polls/npr-ipsos-poll-majority-americans-support-policies-aimed-keep-guns-out-hands-dangerous-individuals> [<https://perma.cc/2VWD-EELD>] (finding that three-quarters of Americans support stricter gun laws and that nearly all Americans support requiring background checks for all gun buyers).

265. See Katie Jagel, *Poll Results: Domestic Violence and Gun Control*, FRONT PAGE (Jul. 26, 2014, 10:03 A.M.), <https://today.yougov.com/news/2014/07/26/poll-results-domestic-violence-and-gun-control/> [<https://perma.cc/Y6HB-TZAJ>] (finding that 64 strongly or somewhat supported the ban and 24% strongly or somewhat disagreed with the ban); see also *New Gun Laws More of a Priority to Most Americans than Protecting Gun Rights*, WASH. POST (Apr. 20, 2018), [https://www.washingtonpost.com/politics/polling/new-gun-laws-priority-americans-protecting/2018/04/20/da19e2bc-4489-11e8-b2dc-b0a403e4720a\\_page.html](https://www.washingtonpost.com/politics/polling/new-gun-laws-priority-americans-protecting/2018/04/20/da19e2bc-4489-11e8-b2dc-b0a403e4720a_page.html) [<https://perma.cc/7NWQ-JC7A>] (reporting that 85% of people polled support red-flag laws, which are similar in function as *ex parte* OFP firearm prohibitions).

266. Ashley Welch, *Link Seen Between Domestic Violence and Mass Killings*, CBS NEWS (Nov. 8, 2017, 12:09 PM), <https://www.cbsnews.com/news/link-between-domestic-violence-mass-killings/> [<https://perma.cc/4RP3-DPXH>] (reporting that in a 2017 analysis of FBI data, over a five-year period, 54 percent of mass shootings were related to domestic violence or family violence); Melissa Jeltsen, *We're Missing The Big Picture on Mass Shootings*, HUFFPOST (Aug. 25, 2015, 1:44 PM), <https://www.huffpost.com/entry/we-re-missing-the-big-picture-on-mass-shootings>

law enforcement agents who seek to intervene.<sup>267</sup> Although to date our political system has been unable to pass any sort of meaningful gun-violence prevention legislation on the federal level for at least the last decade,<sup>268</sup> states have been able to pass varying degrees and types of firearm regulation.<sup>269</sup> In support of the idea that *ex parte* OFP firearm

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[www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women\\_us\\_55d3806ce4b07addcb44542a](http://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women_us_55d3806ce4b07addcb44542a) [<https://perma.cc/7UX3-VYDT>] (reporting that “64 percent of mass shooting victims were women and children. That’s startling, since women typically make up only 15 percent of total gun violence homicide victims, and children only 7 percent.”).

267. See Natalie Schreyer, *Domestic Abusers: Dangerous for Women—and Lethal for Cops*, USA TODAY (Apr. 9, 2018, 7:30 AM), <https://www.usatoday.com/story/news/nation/2018/04/09/domestic-abusers-dangerous-women-and-lethal-cops/479241002/> [<https://perma.cc/VHD8-KYCM>] (noting that in 2017 “more officers were shot responding to domestic violence than any other type of firearm-related fatality” and that from 1988 to 2016, “136 officers were killed while responding to domestic disturbances”); see also Michael Lariviere, *A 17-Year Police Veteran on Why Domestic Violence Calls Pose the Greatest Danger for Cops*, TRACE (Aug. 4, 2016), <https://www.thetrace.org/2016/08/domestic-violence-police-risk-danger/> [<https://perma.cc/X4SM-3GW5>] (reporting that “[d]omestic violence calls are the most dangerous for responding officers”).

268. In 2007, the United States Congress did pass the NICS Improvement Amendments Act of 2007, which—among other things—required federal agencies to keep timely records on individuals who would be disabled from purchasing a firearm under federal law. Kate Irby, *The Last New Gun Law Passed by Congress Had NRA Support*, MCCLATCHY DC BUREAU (July 5, 2016, 12:01 PM), <http://www.mcclatchydc.com/news/politics-government/congress/article87695892.html> [<https://perma.cc/Q9KQ-KN4G>]. Not including this NICS improvement, you would have to go back to the Violent Crime Control and Law Enforcement Act (1994) to find the passage of comprehensive gun control legislation on the federal level. Mark Z. Barabak, *It’s Been a Generation Since Congress Passed a Gun Control Law. Will Young Protesters Change That?*, L.A. TIMES (Feb. 22, 2018), <http://www.latimes.com/politics/la-na-pol-school-shootings-guns-20180222-story.html> (on file with the Columbia Human Rights Law Review).

269. See Mike Mosedale, *In Rare Bipartisan Gun Vote, House Passes Domestic Violence Bill*, MINN. LAWYER (Apr. 30, 2014), <https://minnlawyer.com/2014/04/30/in-rare-bipartisan-gun-vote-house-passes-domestic-violence-bill/> (on file with the Columbia Human Rights Law Review) (noting that the Minnesota legislature passed the 2014 Domestic Violence Firearm Act in the Minnesota House of Representatives with a final vote tally of 111–15); Mascia, *supra* note 161 (detailing how Connecticut’s Republican Minority House Leader helped push through an *ex parte* OFP firearm prohibition after getting the democratic caucus to make some modifications to the bill); Patricia Mazzei, *Florida Gun Control Bill Passed by House, Defying N.R.A.*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/florida-shooting-gunman-indicted.html> (on file with the Columbia Human Rights Law Review) (noting that Florida’s recent gun control bill,

prohibitions are largely bipartisan, we need look no further than the roughly twenty states that have succeeded in passing an explicit *ex parte* firearm prohibition. Many of these states are in regions that are more likely to protect firearm rights<sup>270</sup> and are traditionally considered conservative such as West Virginia,<sup>271</sup> Nebraska,<sup>272</sup> North Dakota,<sup>273</sup> and Montana.<sup>274</sup> Many of the other states that have passed *ex parte* OFP firearm prohibitions are in areas that are more likely to support gun regulation<sup>275</sup> and are considered liberal such as California,<sup>276</sup> Massachusetts,<sup>277</sup> Hawaii,<sup>278</sup> and New Jersey.<sup>279</sup> Suffice it to say, states not only have the power to enact *ex parte* OFP firearm prohibitions, but they are in the best position to do so given that implementation and enforcement are more effectively done at the state and local level. Each state has the power to enact *ex parte* OFP firearm

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which imposes a three day waiting period, increases the minimum age to purchase from 18–21, bans bump stocks, and allows schools to arm certain school personnel, passed the house by a vote of 67–50); *GOP Vermont Governor Signs Significant Gun Restrictions into Law*, CBS NEWS (Apr. 11, 2018), <https://www.msn.com/en-us/news/us/gop-vermont-governor-signs-significant-gun-restrictions-into-law/ar-AvMnSE?OCID=ansmsnnews11> (on file with the Columbia Human Rights Law Review) (describing how Vermont’s Republican governor signed a gun control bill into law that “raised the age to buy firearms, banned high-capacity magazines and made it easier to take guns from people who pose a threat”).

270. *Public Views About Guns*, PEW RES. CTR. (June 22, 2017), <http://www.people-press.org/2017/06/22/public-views-about-guns/#region> [<https://perma.cc/35MX-8W6P>].

271. *See, e.g.*, Frank Newport, *Wyoming, North Dakota, and Mississippi Most Conservative*, GALLUP, <https://news.gallup.com/poll/203204/wyoming-north-dakota-mississippi-conservative.aspx> [<https://perma.cc/H989-3QUG>] (noting that in 2016 West Virginia identified as the 22nd most conservative state).

272. *See, e.g., id.* (noting that in 2016 Nebraska identified as the 23<sup>rd</sup> most conservative state).

273. *See, e.g., id.* (noting that in 2016 North Dakota identified as the 2<sup>nd</sup> most conservative state).

274. *See, e.g., id.* (noting that in 2016 Montana identified as the 9<sup>th</sup> most conservative state).

275. *Public Views About Guns*, *supra* note 270.

276. *See, e.g.*, Newport, *supra* note 271 (noting that in 2016 California identified as the 7<sup>th</sup> most liberal state).

277. *See, e.g., id.* (noting that in 2016 Massachusetts identified as the 2<sup>nd</sup> most liberal state).

278. *See, e.g., id.* (noting that in 2016 Hawaii identified as the 10<sup>th</sup> most liberal state).

279. *See, e.g., id.* (noting that in 2016 New Jersey identified as the 12<sup>th</sup> most liberal state).

prohibitions and they should do so because these prohibitions are bipartisan and empirical evidence provides support for the proposition that the prohibitions will prevent future violence and domestic violence-related homicides.<sup>280</sup>

For decades the United States has been a world leader in gun violence against domestic violence victims among our peer countries.<sup>281</sup> This dubious distinction has driven states to enact laws aimed at preventing domestic violence-related gun violence. But this call to action has also led to a relatively large disparity between states in terms of both domestic violence-related homicides and those caused by firearms.<sup>282</sup> At least one research study as recent as last year suggests that if every state passed an *ex parte* OFP firearm prohibition statute, the number of intimate-partner gun-related homicides could be reduced by around ten percent.<sup>283</sup> Although the Center for Disease Control is seemingly prohibited from meaningful gun-violence prevention research, repealing the Dickey Amendment could lead to more studies that evaluate the effectiveness of *ex parte* firearm prohibitions.<sup>284</sup> Ultimately, if we want to protect intimate partners from gun violence, then we as a society must not only enforce our current firearm restrictions but also enact new regulations that go

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280. A good way of going about this process is to take notes from Connecticut's passage of their *ex parte* OFP firearm prohibition in 2016. After several years of Republican-led filibusters to an *ex parte* firearm prohibition, both sides negotiated a fair compromise where much of the original prohibition's language remained in place, but several procedural aspects were fine-tuned to make the process less burdensome for respondents who had *ex parte* OFPs against them dismissed. See Mascia, *supra* note 161.

281. See *supra* Part I.

282. *Id.*

283. See Gun Restrictions and Homicide Study, *supra* note 101, at 1449.

284. See Department of Health and Human Services Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 244 (1996). Recently the main proponent of the Dickey Amendment, Jay Dickey, co-authored an op-ed in which he stated his belief that "scientific research should be conducted into preventing firearm injuries and that ways to prevent firearm deaths can be found without encroaching on the rights of legitimate gun owners." See Jay Dickey & Mark Rosenberg, Opinion, *We Won't Know the Cause of Gun Violence Until We Look for It*, WASH. POST (Jul. 27, 2012), [http://www.washingtonpost.com/opinions/we-wont-know-the-cause-of-gun-violence-until-we-look-for-it/2012/07/27/gJQAPfenEX\\_story.html](http://www.washingtonpost.com/opinions/we-wont-know-the-cause-of-gun-violence-until-we-look-for-it/2012/07/27/gJQAPfenEX_story.html) [https://perma.cc/8VM2-ST9S]; see also Steve Inskeep, *Ex-Rep. Dickey Regrets Restrictive Law On Gun Violence Research*, NPR (Oct. 9, 2015), <https://www.npr.org/2015/10/09/447098666/ex-rep-dickey-regrets-restrictive-law-on-gun-violence-research> [https://perma.cc/8R5N-SWZK] (noting that the amendment's intent was not to stop all research related to the public health crisis of firearm violence).

further in protecting these soon-to-be victims. The *ex parte* OFP firearm prohibition is a relatively noncontroversial way to help ensure safety *in likely the most dangerous period* a potential victim will ever face.