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# Adding Bite: A Response to *State Ex Rel. McDougall v. Strohson* (*Cantrell*, Real Party in Interest)

Michael S. Wawro

# Adding Bite: A Response to *State ex rel. McDougall v. Strohson* (*Cantrell*, Real Party in Interest)*

## I. INTRODUCTION

An estimated 18-36% of women are abused by a male partner at some point in their lives.[1] In 1994 nearly 30% of the women murdered were killed by a boyfriend or husband.[2] The surgeon general has stated that every five years domestic violence claims as many lives as did the Vietnam War.[3] Recidivism adds to the severity of domestic violence. Studies show that 47% of battered women report three or more assaults per year.[4] Congress has taken active steps in recent legislative sessions to alleviate domestic violence, effectively nationalizing the crime with the Violence Against Women Act and increasing funding to both shelters and the criminal justice system.[5]

Adding to the brutality and repetitive nature of domestic violence, the presence of firearms in the abusive home spells disaster. In 1994, the FBI documented that guns were utilized in 7 out of 10 murders in the United States.[6] In testimony before the Subcommittee on Crime in the United States House of Representatives, Donna F. Edwards, Executive Director of the National Network to End Domestic Violence stated:

> The presence of a firearm in the home poses a significant risk to battered women and their children. In a 1992 study of family and intimate assaults reported in the Journal of the American Medical Association, researchers found that firearms were

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1. *Domestic Violence Fact Sheet*, April 1995 (NOW Legal Defense Fund)(citing Judith Avis, *Where are All the Family Therapists? Abuse and Violence Within Families and Family Therapy's Response*, 18 J. OF MARITAL AND FAMILY THERAPY 225, 227 (July 1992)). *See also* Ellen Schuerman, *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. L. REV. 355 (1992). Schuerman states: "Up to 60% of all married women suffer physical abuse at the hands of their spouses at some time during marriage." *Id* at 355.

2. *Domestic Violence Fact Sheet*, *supra* note 1.

3. Schuerman, *supra* note 1, at 355 (citing Diane Klein, *Domestic Violence Isn't Tame - It's a Wild, Ugly Crime*, L.A. TIMES, Feb. 9, 1992, at E1 (quoting United States Surgeon General Antonia Novella)).

4. *Guns and the Domestic Violence Change to Ownership Ban Before the Subcommittee on Crime of the House of Representatives Judiciary Committee*, 1997 WL 96523 (F.D.C.H) (1997)[hereinafter *Edward's Testimony*](testimony of Donna F. Edwards, Executive Director, National Network to End Domestic Violence).

5. *Id.* at *2.

6. *Id.*

> three times more likely to result in deaths than assaults involving knives or other cutting instruments and 23.4 times more likely to result in death than family and intimate assaults involving other weapons or bodily force. Overall, family and intimate assaults involving firearms are 12 times more likely to result in death than all non-firearm family and intimate assaults.[7]

With the passage of 18 U.S.C.A. § 922(g)(9), popularly known as the Lautenberg Amendment, the Domestic Violence Offender Gun Ban addition to the Brady Bill addressed the lethal mixture of firearms and domestic abuse.[8] Effectively, the Domestic Violence Offender Gun Ban disallows any person convicted of a misdemeanor domestic violence charge from purchasing or owning a firearm.[9] While this legislation has been lauded as a major step forward towards protecting the victims of domestic violence, its ramifications have stirred considerable controversy in the areas of law enforcement, the military, and jury entitlement, the last of which is the focus of this article.[10]

This note explores *State ex rel. McDougall v. Strohson* (*Cantrell*, Real Party in Interest)[11] which addresses an application of the Domestic Violence Offender Gun Ban and suggests that the Arizona Supreme Court should do away with the cumbersome and inconsistent results of the *Rothweiler* test for determining jury entitlement and instead, fall into line with the federal standard as laid out in *Blanton v. City of North Las Ve-*

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7. *Id.* at 3, (citing L.E. Saltzman et al., *Weapon Involvement and Injury, Outcomes in Family and Intimate Assaults*, 267 JAMA 22 (1992)). *See also* A. Kellerman et al., *Gun Ownership As A Risk Factor For Homicide In the Home*, 329 NEW ENG. J. MED. 1084 (1993) In a study of three counties in Tennessee, Washington, and Ohio, researchers found that the risk of homicide is markedly increased in homes where a person has previously been hit or hurt in a family fight. In 31.8 of the cases there were reports that someone in the house had previously been hit or hurt. *Id.* at 1084.

8. Omnibus Consolidated Appropriations Act of 1997, 18 U.S.C.A. § 922(g)(9) (West 1997) (referred to as Domestic Violence Offender Gun Ban). It reads:

> (g) It shall be unlawful for any person—
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

*Id.*

9. 18 U.S.C.A. § 922(g)(9).

10. *Statement on Signing the Omnibus Consolidated Appropriations Act*, 1997, 32 WEEKLY COMP. PRES. DOC. 1935 (Oct. 7, 1996). President Clinton was pleased with the passage of the Domestic Violence Offenders Gun Ban, which he supported, in his signing of the law, he stated: "As I had urged, the bill also extends the Brady Bill to ensure that those who commit domestic violence cannot purchase guns." *Id.* at 1936. *See also* Proclamation No. 6927, 61 Fed. Reg. 52,677 (1996).

11. 945 P.2d 1251 (Ariz. 1997).

*gas*.[12] In its decision, the Arizona Supreme Court, while attempting to enable some of the most significant consequences ever proposed for domestic violence perpetrators, did so in a matter that belittles both the issues of domestic violence and firearms ownership.

Part II of this Note gives a brief background of the Lautenberg Amendment, domestic violence laws in Arizona and the right to a jury. Part III provides a short synopsis of *State ex rel. McDougall v. Strohson* (*Cantrell*, Real Party in Interest) and explains the Arizona Supreme Court's reasoning in this case. Part IV looks at the interesting marriage of federal and state jurisprudence in the ruling and examines the confusing and inconsistent results of applying the *Rothweiler* standard while looking at some of the possible underlying motives that continue to fuel the application of this test. This note concludes that while *McDougall* seemingly attempted to add bite to domestic violence prosecutions, it did so in such a manner that treaded over the importance of the right to a jury trial, degraded the issue of domestic violence and effectively disabled the Ban from being applied to cases in Arizona.

## II. BACKGROUND

### *A. Two Approaches to Combating Domestic Violence*

Two distinct schools of thought to addressing the epidemic of domestic violence have been developed in the past several years. The first approach, the "hard" approach, posits that domestic violence is a serious crime that deserves harsh consequences. The second approach, the "soft" approach, argues that the greatest benefit is gained through maximizing conviction rates.

The hard approach maximizes penalties and treatment for domestic violence abusers. Federal laws, such as the Domestic Violence Handgun Ban, send a message to would be abusers that harsh consequences will result from spouse battering. Yet, gains in sentencing severity tend to give up ground to efficiency. The harsher the sentence, the stronger the need for a jury trial and the harder to get the conviction. In times of limited resources in prosecutors' offices, this means fewer abusers brought to justice in the courtroom.

The soft approach gives up severity in exchange for higher conviction rates. Lowering domestic violence crimes to misdemeanors has allowed local prosecutors to participate in a quicker, more efficient non-jury set-

12. 489 U.S. 538 (1989).

ting, leading to higher conviction rates which address the needs of an increased number of victims in their communities. Arizona's designation of domestic violence assault as a Class I misdemeanor is a good example of this school of thought.

While the debate continues over which approach is more effective in curbing domestic violence, both have had success. The issues raised in this casenote are the problems that occur when a court attempts to combine these two polar approaches.

### *B. The Lautenberg Amendment*

The Omnibus Consolidated Appropriations Act of 1997, HR 3610, was approved on September 30, 1996.[13] Partially due to the late date of its consideration in the session, the Lautenberg Amendment flew through both houses of Congress without hearings and with relatively little controversy.

The Domestic Violence Offender Gun Ban (the "Ban"), which wound it's way through Congress to passage without much fanfare, has become a political hotspot since its passage. Because it does not contain any exceptions, specifically for military personnel or law enforcement officers, unlike other provisions in the Brady Bill, the Ban has created significant controversy.[14] Due to considerable backlash and pressure from police organizations, several proposals have arisen during the last Congressional term to limit the Domestic Violence Offender Gun Ban, including allowing exceptions for police officers and military personnel and limiting the retroactivity of the Ban.[15] Women's groups and domestic violence lobbies are trying to prevent these limitations, arguing that abusers should not be allowed to hide behind the badge or their uniform.[16]

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13. *See Statement on Signing the Omnibus Consolidated Appropriations Act, supra* note 10.

14. *See generally, Spousal Abuse Conviction Could Disarm Police*, AZ REPUBLIC, Dec. 6, 1996, at A30.

15. *See generally* Bruce T. Smith, *Disarming the Soldier*, 44 FED. LAW. 16 (May 1997).

16. *See generally Guns and Domestic Violence Change to Ownership Ban: Hearings on The Domestic Violence Offender Gun Ban of 1996 & H.R. 26/445 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 1997 W.L. 109068 (F.D.C.H.) (1997) [hereinafter *Smith Testimony*](written testimony of Rita Smith, Executive Director, and Pamela Coukos, Public Policy Director of the National Coalition Against Domestic Violence). *See also Edwards Testimony, supra* note 4. Edwards states:

> In testimony before the Select Committee on Children, Youth and Families during the 102nd Congress, Dr. Leanor B. Johnson (Family Studies, Arizona State University) stated that 40 percent of police officers reported that in the last six months prior to the survey they had behaved violently towards their spouse or children. In another survey, approximately 41 percent of police officers reported marital conflicts involving physical aggression during a

Very recently, one of these challenges made its way through the court system with a decision in the United States Court of Appeals, District of Columbia Circuit. In *Fraternal Order of Police v. United States*,[17] the court found that although a special focus on domestic violence was rational, the Ban's sole treatment of misdemeanors violated equal protection principles.

> We think the most appropriate remedy is consequently to hold that § 925 is unconstitutional insofar as it purports to withhold the public interest exception from those convicted of domestic violence misdemeanors. The government may not bar such people from possessing firearms in the public interest while it imposes a lesser restriction in those convicted of crimes that differ in only being more serious. Of course we do not decide whether a broader revocation of the public interest exception—for example, from all those convicted of any crime of domestic violence—would be constitutional.[18]

Whether this case goes any further or whether Congress decides to include the exception in the Ban or exclude it for all domestic violence perpetrators remains to be seen. The hard approach would suggest that the public interest exception be done away with altogether.

While the continuing vitality of the Ban may be in question, its practicality is also debatable.[19] The National Instant Criminal Background Check System (NICBS), which compiles the database used for other aspects of the Brady Bill, is years away from being able to catalog or flag those misdemeanor cases needed to effectuate the Ban. In testimony from Gerry Wethington, on behalf of SEARCH, The National Consortium for

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conflict during the previous year. These overall rates of violence are considerably higher than those reported for a random sample of civilians and somewhat higher than military samples." *Id.* at 3.

17. 152 F.3d 998 (D.C. Cir. 1998).

18. *Id.* at 1004.

19. *Guns and Domestic Violence Change to Ownership Ban Before the Subcommittee on Crime of the House Committee on the Judiciary*, 1997 WL 128153 (F.D.C.H) (1997) [hereinafter *Loesch Statement*](statement of David R. Loesch, Deputy Assistant Director, Federal Bureau of Investigation). Mr. Loesch states:

> "With the enactment of the Omnibus Consolidated Appropriations Act, a portion of our record flagging system lost its value. Since certain misdemeanor convictions now prohibit persons from possessing a firearm, the users can no longer ignore the records flagged as having. . .only a misdemeanor conviction. . . In most cases, one cannot ascertain by looking at the record which arrests are for domestic violence crimes. Further, there is no automated way the FBI can go back into the records and identify such arrests or convictions." *Id.* at 3.

Justice Information and Statistics, it was estimated that it would take several years and hundreds of millions of dollars before the system would become equipped for the Ban to become fully viable.[20] Until that time, if the Ban survives legislative and possible judicial challenges, it will only be enforceable as hit and miss at best.

Setting aside it's application difficulties, the Ban may also face constitutionality problems due to recent decisions concerning other portions of the Brady Bill. In *U.S. v. Lopez* [21] the Court struck down a provision creating gun free school zones under the commerce power because of the non-commercial nature of the regulation. Since the scope and effect of *Lopez* has not yet been determined, it has yet to be seen whether nationalization of the crime of domestic violence under the Violence Against Women Act (VAWA) will remain constitutionally valid.[22] Although not likely to be struck down, if VAWA is abolished, it seems that a similar constitutional question could also be raised concerning the Ban.[23] Whether the Ban independently violates Due Process by indefinitely suspending gun ownership rights for a crime specifically categorized as a misdemeanor and possibly without the benefit of a jury is another possibility for a constitutional challenge.

In spite of the looming challenges, the Ban still constitutes an excellent example of the hard, get tough on domestic violence trend in legislation. One author recently noted that:

> The Act has brought Domestic Violence, once an unspoken crime, to the forefront of legislation. However, critics exclaim that the Act is wrought with obstacles. Besides the problems with retroactivity and the application to officers of the law and military, this Amendment has some unavoidable loopholes and unintended consequences which might prevent the act from being fully successful. However, not all laws are flawless, and sometimes they do not work out their glitches until they are enforced for awhile.[24]

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20. *Guns and Domestic Violence Change to Ownership Ban Before the Subcommittee on Crime of the House Committee on the Judiciary*, 1997 WL 96522 (F.D.C.H.) (1997) [hereinafter *Wethington Testimony*](testimony of Gerry Wethington, Director, Information Systems, Missouri Highway Patrol on behalf of SEARCH, The National Consortium for Justice Information and Statistics).

21. 514 U.S. 549 (1995).

22. Violent Crime Control and Law Enforcement Act of 1994, tit. IV, Pub. L. No. 103-322, 194 U.S.C.C.A.N. (108 Stat.) 1796, 1902 (codified in various titles of U.S.C.).

23. For a very good article regarding the constitutionality of VAWA, *see* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876 (1996).

24. Melanie L. Mecka, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L. REV. 607, 638 (1998).

Mecca continues:

> For maximum effectiveness, the federal and state legislators need to vigorously promote the Act, the judiciary needs to rule on the Act with a heavy hand, and the local and state law enforcement agencies need to put their differences about the Act aside and make sure the Act is enforced at all scenes of domestic violence if the Lautenberg Act is going to reduce the number of domestic homicides.[25]

### *C. Domestic Violence Law in Arizona*

Domestic violence is defined in the Arizona Revised Statutes as:

> . . . any act which is a dangerous crime against children . . . or an offense defined in § 13-1201 through 13-1204 . . . if the relationship between the victim and the defendant is one of marriage or former marriage or of person of the opposite sex or having resided in the same household, if the victim and defendant or the defendant's spouse are related to each other by consanguinity or affinity to the second degree, if the victim and defendant have a child in common or if the victim or the defendant is pregnant by the other party.[26]

Under this definition, domestic violence is a procedural designation of A.R.S. § 13-1201-04, and not a separate punishable offense.[27] Therefore, Domestic Violence is included in the Arizona Criminal Code as Assault, which is a misdemeanor, and can also be applied to a number of other crimes to designate them as domestic violence as well.[28] In the *McDougall* case, Dale Cantrell was charged with a Class I misdemeanor designated as domestic violence.[29]

Arizona law has a number of provisions to combat the ills of domestic violence in addition to the easier conviction standard under the misdemeanor label. A.R.S. § 13-3601 provides for mandatory arrest of domestic violence perpetrators and also exempts self defense from being considered an act of domestic violence. A.R.S. § 13-3601.1 mandates counseling for domestic violence offenders. Orders of protection are available

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25. *Id.* at 637.
26. ARIZ. REV. STAT. § 13-3601 (1997).
27. State v. Schackart, 737 P.2d 398 (Ariz. Ct. App. 1987).
28. ARIZ. REV. STAT. § 13-1203 (1997).
29. State *ex rel.* McDougall v. Strohson (Cantrell, Real Party in Interest), 945 P.2d 1251, 1251 (Ariz. 1997).

for domestic violence victims as well.[30] The Order of Protection can be granted ex parte in any court of the State or after a hearing. An Emergency Order of Protection may be issued in situations, such as weekends and holidays, when the court is not available.[31] These Emergency Orders can be authorized over the telephone by a judicial officer to the law enforcement officer on the scene. The Emergency Order, unless continued by the court, is then valid until the close of the next day of judicial business.[32] Lastly, Arizona also allows for Injunctions Against Harassment.[33] Although these orders are also widely used in other contexts, such as landlord/tenant, they are valuable in the field of domestic violence because they do not require any specific relationship between the parties. Although not within the scope of this Note, Arizona also provides a well-equipped, advanced network of social services throughout the state, including shelters and counseling, for victims of domestic violence.

Although the Orders of Protection address firearm usage by the defendant, these Orders are limited in their temporal scope, the inclusion of the firearm restriction is voluntary by the petitioner asking for the order, and many victims of domestic violence, for whatever reason, do not seek Orders of Protection at all. Therefore, although Arizona has a number of progressive measures addressing domestic violence, the Ban with its mandatory application, reaches farther than any Arizona statute in preventing further, lethal abuse to battered women by firearms.

### *D. The Right to a Jury Trial in Criminal Cases*

The problem that the Arizona Supreme Court created with its decision in *McDougall* centers around the right to a jury trial in criminal cases. The Sixth Amendment right to a jury in criminal cases is one of the most fundamental rights embodied in the Bill of Rights, and a distinctive element of the American judicial process. "So important was the right to criminal jury trial that it was one of the few rights enumerated in the Constitution as originally proposed. In addition, the right to criminal jury trial

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30. ARIZ. REV. STAT. § 13-3602 (1997). The Order of Protection may: 1) Enjoin the defendant from committing an act of domestic violence; 2) Grant exclusive use and possession of the parties' residence if physical harm otherwise may result; 3) Restrain the defendant from coming near the residence, place of employment, or school of the plaintiff or other designated persons; 4) Prohibit the defendant from possessing a firearm or require the transfer of a firearm to an appropriate law enforcement agency, upon a finding that the defendant may inflict on the plaintiff serious bodily injury or death; 5) Require the defendant to participate in counseling or other appropriate programs; 6) Include any other relief necessary. *Id.*

31. ARIZ. REV. STAT. § 13-3624 (1997).

32. ARIZ. REV. STAT. § 13-3624 (1997).

33. ARIZ. REV. STAT. § 12-1809 (1997).

was the only right provided in all state constitutions drafted between 1776 and 1787."[34]

Jury trials are however, not guaranteed in all criminal cases. In 1989, the Supreme Court in *Blanton* established what has become the modern petty offense exception to a jury trial.[35] In a federal setting, according to Murphy, if a maximum authorized term of incarceration for a charge is not over six months, the defendant has a burden to show that the statutory penalties are severe enough to warrant a jury trial. A three prong test determines whether a jury trial is granted: 1) the degree of dangerousness or moral gravity inherent in the offense; 2) the historical treatment of the offense; and 3) the severity of the of the penalties attached to the offense.[36] Generally, in determining these factors, the court has focused on the length of the sentence or as to how the non-incarcerating punishment equates to jail time.[37] Recently, the court has found that multiple petty offenses, even if the conglomerate effect of the sentences exceeds six months, are not afforded jury trials.[38]

The Domestic Violence Offender Gun Ban poses an intriguing scenario to the petty offense exception doctrine. Originally construed as felonies, local domestic violence statutes carried punishments that easily qualified them for jury trial. When dropped to misdemeanors, the new domestic violence statutes lost their jury entitlement under the length of incarceration prong. No juries meant quicker and increased convictions of abusers. Now, with the stiff consequences of the Ban attached to misdemeanors, the question raised is, whether losing the right to bear arms is a severe enough penalty to merit a jury trial for domestic violence misdemeanors regardless of the petty offense exception doctrine? Although this question has not yet been addressed, the continuing vitality of the law may depend on its answer. In the absence of a definitive statement, the Bureau of Alcohol, Tobacco and Firearms, charged with enforcing the act, has stated its' policy as no conviction under the Ban unless it is reached by a jury.[39]

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34. Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997).

35. Blanton v. City of North Las Vegas, 489 U.S. 538 (1996).

36. *See* Murphy, *supra* note 32, at 134.

37. *Id.*

38. *See id.* (citing Lewis v. United States, 116 S. Ct. 2163 (1996)).

39. Mecka, *supra note* 24, at 638 *citing Federal Gun Law Expands*, LAS VEGAS REV. J., Dec. 10, 1996, at 3B.

## III. STATE EX REL. MCDOUGALL V. STROHSON (CANTRELL, REAL PARTY IN INTEREST)

### *A. Facts*

Dale Cantrell was charged with simple assault designated as a domestic violence offense. The charge alleged abuse of a sixteen year old male who was the son of Cantrell's girlfriend. Cantrell did not challenge the domestic violence designation of the charge and acknowledged that misdemeanor assaults were not historically given juries, but instead asked for a jury trial on the grounds that if convicted, he would lose his right to own or purchase firearms under the recently passed Domestic Violence Offender Gun Ban and that this consequence was significant enough to warrant a jury trial. The Hon. Macolm Strohson, Magistrate of the Phoenix Municipal Court, agreed with this position and granted Cantrell a jury trial. The State, through the Phoenix City Attorney, with no opportunity to otherwise appeal this criminal action, sought special relief from the Arizona Supreme Court. The court granted the special action and sat en banc in its decision.

### *B. Reasoning*

#### *1. Special action jurisdiction*

*McDougall* begins by setting forth the reasons for which the Arizona Supreme Court granted jurisdiction in this special action. First, because of the nature of the criminal trial process, the State had no other "equally plain, speedy, and adequate remedy by appeal."[40] Second, citing domestic violence statistics for the State, the court determined that resolution of this matter would have statewide impact.[41] Third, the issue presented was one of pure law and did not require the court to act as a fact finder.[42] Lastly, jury entitlement is an issue accorded special action in the Arizona Supreme Court.[43]

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40. State *ex rel.* McDougall v. Strohson (Cantrell, Real Party in Interest), 945 P.2d 1251 (Ariz. 1997).

41. *Id.*

42. *Id.*

43. *Id.*

*2. Development of Arizona law to date*

Although not to be the result in this case, the court declared that Arizona has historically given greater access to jury trials than the federal government. Under Federal case law, a crime punishable by less than six months incarceration is not entitled to a jury trial.[44] Although exceptions apply where other significant consequences occur that might allow a jury trial, the court discounted these exceptions as "rarely, if ever. . . applied."[45]

In contrast to the federal standard, Arizona utilizes a three prong test developed in *Rothweiler v. Superior Court*[46] which takes into consideration the length of the incarceration as highly important, but also examines the "moral quality of the act charged" and "its relationship to common law crimes."[47] Under this test, slightly modified by the *Dolny* case, Arizona has granted jury trials to DUI's while the federal courts have not.[48] In the realm of shoplifting, the court determined the crime was one of moral turpitude and because of its relationship to the common law of larceny, also granted a jury trial.[49] Most recently the court granted a jury trial for charges of possession of marijuana and expanded its view on moral turpitude to conclude that the consequence of decreased employment opportunities justified a jury trial.[50]

After laying this background, the court in *McDougall* first reasoned that the Domestic Violence Offender Gun Ban would only effect employment in limited areas, not rising to the same level of diminished employment opportunities as a marijuana conviction.[51] Next, the court examined its history once again, and treating the domestic violence charge identically as other misdemeanor assault charges, determined that it has never extended the right of a jury trial to these sort of cases. The common law equivalent to misdemeanor assault was simple battery and did not rise to the level of moral turpitude.[52]

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44. *Id.* at 1252.
45. *Id.*
46. 410 P.2d 479 (Ariz. 1966).
47. *See McDougall*, 945 P.2d at 1252; State v. Dolny, 778 P.2d 1193 (Ariz. 1989).
48. *Rothweiler*, 410 P.2d at 486.
49. State v. Superior Ct., 589 P.2d 48 (Ariz. Ct. App. 1978).
50. *Id.*
51. *See McDougall*, 945 P.2d at 1253.
52. Bruce v. State, 614 P.2d 813, 815 (Ariz. 1980).

*3. Arizona Domestic Violence Laws*

The court next determined whether the special "domestic violence" designation given by the Arizona legislature in the criminal statutes created a distinction from traditional misdemeanor assault. While the court recognized that the addition of domestic violence to the statute created procedural changes, it relied on earlier court of appeals decisions that refused to distinguish it as a separate substantive offense.[53] Since domestic violence is not a different substantive offense than misdemeanor assault, the above mentioned analysis for both relation to common law crime and moral quality remain the same and it is not afforded any special right to jury entitlement.

*4. The Federal Statute, 18 U.S.C. § 922(g)*

While there was some question of whether the law can even be applied in this case, the court assumed for the purposes of resolving this issue, that if convicted of the misdemeanor assault charge, the federal firearm prohibition would apply to the defendant.[54]

*5. Application of Arizona Law to this Case*

The most important section of the court's reasoning starts by immediately rejecting the notion of substituting the *Rothweiler* test for that of the federal standard. The court then proceeds to delineate its rejection of a jury trial in this case under the *Rothweiler* test.

Looking to the most important part of the analysis, the potential punishment, the court recognized that Arizona courts have "traditionally only looked to Arizona Law."[55] In determining the other two prongs of the *Rothweiler* test, moral quality and the relationship to common law crimes as well, the courts have never looked to the collateral consequences of laws passed by other jurisdictions.[56] The reasoning behind this is largely pragmatic. State and local courts should not be subjected to determining the applications and complexities of foreign jurisdictions. The court then went on to reason that since it would be impossible to know when defendants would or would not be subject to federal law, a jury trial would become compelled whenever requested, constituting a huge burden upon the courts.

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53. State v. Simy, 772 P.2d 1145, 1147 (Ariz. Ct. App. 1989).
54. *See McDougall*, 945 P.2d at 1255.
55. *Id.* at 1256.
56. *Id.*

Lastly, the court very briefly addressed the concern of firearms ownership, yet markedly never mentioned the Second Amendment. Very carefully limited in the defendant's proposed activities of hunting and self protection, the court determined that "while admittedly important to some people, [firearm possession] does not present the type of universal consequence we have found in cases invoking a right to jury trial."[57] The court then cited that some petty offenders can have restricted gun rights on probation.[58] Since jury trials are not given for these petty offenses, the legislature implicitly determined that possessing a firearm is not a serious enough consequence to justify a jury trial.

### 6. *The Special Concurrence*

In response to the concurrence, which advocated that the court accept the federal standard for jury entitlement in lieu of the *Rothweiler* test, the court looked to legislative intent. The concurrence, in the reasoning of the court, made references that the legislature intended the court to fall into line with federal jury entitlement standards. The court found that the legislature never had such an intent, and even given numerous opportunities to do so, it instead decided to codify the holding as to DUI cases in reference to *Rothweiler*.[59]

## IV. ANALYSIS

### A. *An Interesting Marriage of Federal and State Jurisprudence*

The Arizona criminal statutes have no punishment that extends as far as the Domestic Violence Offender Gun Ban. If the court had utilized the federal standard and taken notice of the Ban, there is a possibility that a serious consequence exception allowing a jury trial would have been granted in *McDougall*. The court avoided a head on collision with the consequences of the federal law by ignoring it, by instituting the *Rothweiler* standard and by refusing to look elsewhere to determine the prongs of this test except Arizona statutes. By taking the soft approach to domestic violence, the court justified the rejection of a jury trial by defining the domestic violence charge as a simple misdemeanor assault under Arizona law. Yet, by doing so, the court belittled domestic violence and trampled the issue of jury entitlement.

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57. *Id.* at 1257.
58. *Id.*
59. *Id.* at 1258.

Even though *McDougall* resulted in an important attempt of the court to empower the hard approach Domestic Violence Offender Gun Ban for domestic violence perpetrators, it may not be as effective as it seems on first blush. The court, in its opinion, assumed that the federal statute would apply to the defendant. This may not, in actual application, be true. In his brief to the Supreme Court, Ronald Ozer, Assistant Phoenix City Prosecutor, argued that the Ban would apply without a jury trial.[60] This view is consistent with the federal standard of granting jury trials only with sentences of six months or more, absent a statutory requirement to the contrary. Yet, Gerry Wethington, on behalf of SEARCH, referring to 18 U.S.C. § 921, noted in his testimony before Congress, that one of the problems of implementing the Ban will be that it will not be effective on those convicted without a jury because of such a statutory mandate requiring a jury.[61] As stated earlier, the ATF will not enforce the Ban without a jury trial.[62] In an attempt to facilitate this statute by ignoring it and not requiring a jury trial, the court may have precluded that its potential application in Arizona.

### *B. A Statement About Domestic Violence*

After reading the court's explanation of why it accepted this special action and its citations of the high number of domestic violence cases in the State, one is led to believe that the court is genuinely concerned with the issue of domestic violence and that this concern is a factor in its decision. This may be true, since, in effect, the court facilitated a strong anti-domestic violence statute in its ruling. Yet, upon closer examination, it seems apparent that the court was more interested in protecting its overcrowded dockets than the battered women of the State.

Using the *Rothweiler* analysis, the court must not only look at the length of the sentence, but also at the moral turpitude of the crime and its association to the common law. After giving multiple instances of where

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60. Ronald Ozer, Petition for Special Action and Request for Stay, March 11, 1997(unpublished petition before the Arizona Supreme Court) (on file with author).

61. *See Wethington Testimony, supra* note 17. 18 U.S.C. § 921 reads:

> " (B)(i) A person shall not be considered to have been convicted of such an offense [misdemeanor crime of domestic violence] for purposes of this chapter, unless...
>
> (aa) the case was tried by a jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise." *Id.*

It has not been determined, nor was it determined in the current case, whether this would apply to the Domestic Violence Offender Gun Ban, or whether it would render the Ban ineffective under the current Arizona Scheme. If so, the Court may wish to reconsider granting a jury trial if it wishes to enable the Ban.

62. *See supra* note 39.

it used these two prongs to grant a jury trial, the court distinguished this case and put domestic violence on a level with other misdemeanor assaults. This is a mistake which dangerously degrades the importance of domestic violence.

While domestic violence may or may not be a different substantive crime than misdemeanor assault, the motives for its inclusion with this misdemeanor must be examined. While many domestic violence incidents easily reach the level and intensity of felonies, victims are significantly less willing to testify in domestic cases than in other felony assault cases because of their close association with the abuser and/or a very real fear of retaliation. Because of these difficulties in getting convictions, historically many domestic violence claims were either dropped or plead to misdemeanors.[63] Including domestic violence with misdemeanor assaults was a means to raise conviction levels in hopes of further protecting the abused women.[64] The realization that these "misdemeanor" domestic violence crimes still contained far deadlier characteristics was the very reason for the passage of the Domestic Violence Offender Gun Ban. Rita Smith, the Executive Director of the National Coalition Against Domestic Violence, stated in her testimony before the House Subcommittee on Crime that:

> A . . . misconception is the argument that all acts of domestic violence should be charged as felonies. In most states, domestic violence is considered largely a misdemeanor offense, although *injuries to all battered women are at least as serious as those incurred in 90% of all violent crimes classified as felonies.* As many others have explained, domestic violence convictions are very difficult to obtain, and felonies are often plea-bargained down to misdemeanor charges . . .. Battered women who do not want to be forced to endure a criminal trial may welcome a plea bargain if it adequately protects their safety and financial status.[65]

By not recognizing the severity of the offense regardless of its criminal classification, the Court in this case has put a badge of inferiority on one of the most foul crimes in our society.

Since *Rothweiler*, many issues have come before the court which have been considered for jury entitlement. Mentioned earlier, DUI's, marijuana possession and shoplifting were all adjudged to merit a jury trial.

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63. *Smith Testimony, supra* note 15, at 4, (citing Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REVIEW 383, 386-87 (1994)).

64. *Id.*

65. *Id.* (Emphasis added).

Jury trials are also granted for leaving the scene of an accident and false reporting to a law enforcement officer.[66] Looking back to the statistics in the beginning of the case, it seems that the numbers were not so shocking to the court in terms of abuse, but to the docket. That many cases going to jury trial would surely be difficult to an already overburdened court system in one of the fastest growing areas in the nation. What results, is one of the hidden problems of the *Rothweiler* test. While the test stays unchanged, the times do not. A hidden fourth practical prong of the test could be said to be the ability of the courts to handle the load that entitling any particular category to jury trials would create. Thirty years ago, when *Rothweiler* was decided, the answer to that question was much different than it is today. When a past category took a spot as jury entitled, it lessened the practical docket space that the court had to allocate in the future. As the docket tightened over time and as populations and cases skyrocketed in the past 30 years, the court is now forced to make decisions like the one here, relegating the crime of beating one's wife below smoking a joint.

### *C. The Right to Bear Arms*

Even though the Second Amendment is a Constitutional right that would not automatically have bearing in a state case such as this one, the right to bear arms has historically been an important right in the State of Arizona. The constitutionality of the Domestic Violence Offender Gun Ban in general, or, in the context of jury entitlement, would have to be decided in the Supreme Court of the United States. It is the language, albeit dicta, that the Arizona Supreme Court used in describing the interest of gun ownership which may be as alarming to those concerned with gun ownership rights as the court's treatment of domestic violence in this case. In its brief treatment of this issue the court stated:

> [W]e believe that to hunt or possess a firearm for self-protection, while admittedly very important to some people, does not present the type of universal grave consequence we have found in cases invoking a right to jury trial. Many people would be completely unaffected by such a consequence.[67]

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66. Fredrickson v. Superior Ct., 219 Ariz. Adv. Rep. 32 (1996); Mungarro v. Riley, 826 P.2d 1215 (Ariz. Ct. App. 1991).

67. State *ex rel.* McDougall v. Strohson (Cantrell, Real Party in Interest), 945 P.2d 1251, 1255 (Ariz. 1997).

Carefully couched in the specific categories of self-protection and hunting, the court may be making a very limited statement to what it sees as a limited group of people instead of a general statement about the importance of the right to bear arms. This also could be a result of the same minimization that the court used with domestic violence, trying to downplay the importance of the issue in order to reject the proposal for a jury.

### *D. Applying Federal Standards to Jury Entitlement*

To date, the court's so called "greater access to jury trials" has resulted in confusion and ultimately a slap in the face to victims of domestic violence. The concurrence suggests that the court adopt the federal standard for determining jury entitlement. This change would be positive for several reasons. First of all, it would apply a predictable standard which would allow litigants to more efficiently and effectively prepare for trial. Secondly, the higher federal standards for jury entitlement would allow the Arizona court system to decrease it's docket size, therefore enabling the court to give due consideration to issues when requests for exceptions to the six month rule are raised. Incidental to the court's acceptance of this position would be the ability to review past decisions regarding jury entitlement, allowing the court to re-prioritize in relation to the Arizona court system's most current practical capacity. Finally then, the court could consider the issues of domestic violence and even gun rights, in the manner which befits its importance. A decision could then be made regarding jury entitlement which addressed the importance of domestic violence prevention in our community.

## V. CONCLUSION

In times of ever increasing dockets, the case by case, or more accurately, category by category approach of the court in granting jury trials has resulted in confusing results. In an ever increasing effort towards efficiency, there is the very real danger, as evidenced in this case, that the court will relegate more and more important issues to non-jury status while less important offenses retain their jury status. Following the federal guidelines would allow the court, in one fell swoop, to institute efficiency and predictability, while allowing it to re-examine those special exceptions that should be granted a jury trial without fear of dangerously backlogging the docket.

Because Arizona does not follow the federal standard for jury entitlement, it remains to be seen whether a misdemeanor domestic violence charge, where the possible penalty is an absolute restriction on the right

to bear arms, would constitute a harsh enough punishment to warrant a jury trial under the federal standard. Indications suggest that the enforcers of the Ban believe that a jury trial is necessary, but the courts may have to determine this in the future.

However future court decisions are made, in Arizona, a jury trial is not needed to effectuate the Domestic Violence Offender Gun Ban. Practical reasoning says that society's most heinous crimes are felonies, and the lesser crimes are misdemeanors. Felonies receive harsher punishments, misdemeanors are punished more lightly. Felonies receive jury trials, misdemeanors do not. Congress and state governments, such as Arizona, have taken two different roads in addressing domestic violence. When the States decided higher conviction rates outweighed the benefits of sending the message about the seriousness of domestic violence as a felony and dropped it to a misdemeanor, Congress responded by underlining the seriousness of domestic violence by passing the Ban, specifically applying it to misdemeanors. Therefore, the misdemeanor prong made prosecution easier, and the punishment retained the crime's seriousness.

Sadly enough, the baby that got thrown out with the bathwater in this strange union of misdemenor and harsh punishment was the issue of jury entitlement. By focusing on the misdemeanor nature of the crime of domestic violence and not addressing the punishment prong, the Arizona Supreme Court failed to recognize the existing balance in public policy concerning domestic violence and opted for the side which, when viewed alone, sends a message weakening the seriousness of domestic violence. If a determination is subsequently made that a jury trial is necessary to effectuate the Ban, then the Arizona Supreme Court has not only sent out a negative message concerning the seriousness of domestic violence in our community, but will have precluded the punishment which was designed to send the message that domestic violence will not be tolerated and that victims will be protected.

*Michael S. Wawro*