# JUDGES GOING ROGUE:

# CONSTITUTIONAL IMPLICATIONS WHEN MANDATORY FIREARM RESTRICTIONS ARE REMOVED FROM DOMESTIC VIOLENCE RESTRAINING ORDERS

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## INTRODUCTION

Domestic violence coupled with firearms is a volatile, and too often a lethal, confluence of events.[1] To help address this potentially deadly condition, Congress and many state legislatures, including California's, have placed restrictions upon the access and ownership of firearms for people who have a

1. JOHNS HOPKINS CTR. FOR GUN POL'Y AND RESEARCH, REMOVING GUNS FROM DOMESTIC VIOLENCE OFFENDERS: AN ANALYSIS OF STATE LEVEL POLICES TO PREVENT FUTURE ABUSE 4 (2009), *available at* http://www.jhsph.edu/bin/u/p/Gun%20Removal%207%20Oct%2009.pdf [hereinafter CTR. FOR GUN POL'Y AND RESEARCH].

domestic violence restraining order levied against them.[2] Too often, because of a personal disagreement with the political underpinnings and constitutional implications of these policies, trial court judges have attempted to obviate the mandatory firearm restriction language in the California statute and, in particular, the state preprinted domestic violence form, CR-160.[3] Since a majority of California's domestic violence protective orders (DVPOs) are fashioned to restrain male batterers, most often protecting a female victim, such judicial malfeasance disproportionally affects the safety of women.[4] Female victims of domestic violence who have obtained such arguably defective restraining orders face additional obstacles when seeking redress based on their constitutional rights—and their survivors face similar obstacles when the defects result in deadly violence—as a consequence of the United States Supreme Court's decision in *Castle Rock v. Gonzales*.[5] This article assesses whether the *Castle Rock* analysis, involving a similar but importantly different domestic violence restraining order context, will similarly preclude women harmed by wrongful judicial removal of firearm restrictions from obtaining constitutionally based relief.

This article does three things. First, it analyzes the legislative intent and the need for domestic violence restraining order firearm restrictions. It also highlights the disparity between women and men protected by the legislative regime. Second, it examines both trial court attempts to vacate state-mandated firearm restrictions and reviewing court reactions to these attempts. Finally, it identifies bases for women who obtain protective orders to utilize their constitutional rights to procedural and substantive due process to obtain redress for the wrongful judicial action of removing firearms restrictions.

Part I demonstrates why firearm restrictions are necessary to provide protection to the victims of domestic violence. Additionally, it demonstrates the disproportionately adverse impact that removal of firearms restrictions from DVPOs has on women. Part II documents the absence of any judicial discretion that might support removal of mandatory firearm restrictions from domestic violence restraining orders. It also shows that removing such restrictions traduces the legislatures' efforts to provide protection to women from domestic violence. Part III explores the language of relevant California statutes to show a clear, unambiguous legislative intent to mandate firearm restrictions in domestic violence restraining orders. It reveals that the statutes remove any judicial discretion through repeated use of the language of command.

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2. *See, e.g.*, 18 U.S.C. § 922(g)(8)-(9) (2006); CAL. FAM. CODE § 6389 (West 2004).

3. *See* TASK FORCE ON LOCAL CRIM. JUSTICE RESPONSE TO DOMESTIC VIOLENCE, KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY 19-26 (2005), *available at* http://cdm15025.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/p266301coll9&CISOPTR=155&filename=156.pdf [hereinafter TASK FORCE].

4. Susan B. Sorenson & Haikang Shen, *Restraining Order in California: A Look at Statewide Data*, 11 VIOLENCE AGAINST WOMEN 912, 920 (2005), *available at* http://www.sp2.upenn.edu/ortner/docs/sorenson_doc2.pdf.

5. 545 U.S. 748 (2005).

Next, Part IV examines Wisconsin's statutory language regarding domestic violence restraining orders. It argues that the language reflects the same legislative intent as California's—to create an unambiguous mandate that such orders contain firearm restrictions. Lastly, Part V examines a singularly important means by which women who obtain DVPOs seek to enforce such orders, namely through claims that judicial removal of firearm restrictions is a violation of their constitutional rights to due process, both procedural and substantive. This final Part identifies a new constitutional justification for both legislative and litigational action to effectuate these constitutional rights—that is, a procedural due process liberty interest in protection from gun violence.

## I. BECAUSE FIREARM VIOLENCE DISPROPORTIONALLY AFFECTS WOMEN, FIREARM RESTRICTIONS ARE A COMMON AND NECESSARY CONDITION IN A DOMESTIC VIOLENCE PROTECTIVE ORDER

The increase in lethal domestic violence produced by firearms has been meticulously studied and documented on local, state, and national levels.[6] Domestic violence, a subset of which is often referred to as Intimate Partner Violence (IPV), disproportionally affects women and is far too common.[7] It is also extraordinarily complex. Acknowledging the frequency and complexities, law enforcement and state legislatures have looked for consistent risk factors and characteristics that exacerbate this abusive dynamic.[8] National statistical data are horrifically disturbing and sobering:

- In 2005, 1,510 IPV homicides were committed, more than half of which involved firearms.[9]
- In 2007, 2,340 IPV homicides were committed, 70 percent of which were female.[10]
- More female intimate partners are killed by firearms than by all other means combined.[11]
- Access to firearms yields a more than five-fold increase in the risk of IPV homicide.[12]

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6. *See, e.g.*, Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003).

7. CTR. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: UNDERSTANDING INTIMATE PARTNER VIOLENCE (2011), *available at* http://www.cdc.gov/ViolencePrevention/pdf/IPV_factsheet-a.pdf (hereinafter CTR. FOR DISEASE CONTROL).

8. *See* Campbell et al., *supra* note 6, at 1090, 1092.

9. CTR. FOR GUN POL'Y AND RESEARCH, *supra* note 1, at 4.

10. CTR. FOR DISEASE CONTROL, *supra* note 7.

11. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 26 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

12. Campbell et al., *supra* note 6, at 1092.

- Women are more than twice as likely to be murdered by a male intimate with a gun as to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.[13]
- In recent years, intimate partners killed approximately 33 percent of female murder victims and 4 percent of male victims.[14]
- Of females killed with a firearm, approximately two thirds were killed by their intimate partners.[15]
- The number of females shot and killed by their husbands or intimate partners was more than four times higher than the total number murdered by male strangers using all weapons combined in 2008.[16]
- In a 2009 survey of women residing in domestic violence shelters in California, 65 percent of them, prior to seeking shelter, lived in homes with guns where their abuser used a firearm to scare, threaten, or harm them.[17]
- A study published in the May 2008 edition of the *American Journal of Public Health* demonstrated that the number of intimate partner murder victims by firearms and the number of active California domestic violence restraining orders had statistical overlap, leading the researchers to conclude that "[a]pparently at least some portion of restrained persons continued to have guns and to use them against their partners."[18]

Confronted with an increase of IPV in domestic situations,[19] the California State Legislature followed the federal government's lead in enacting mandatory firearm restrictions, including similar mandatory restrictive language.[20] California also imposed mandatory entry of the order into a statewide

13. Sorenson & Shen, *supra* note 4, at 915.

14. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE 1993-2001 (2003), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1001.

15. FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON GUNS AND DOMESTIC VIOLENCE, http://www.endabuse.org/userfiles/file/Children_and_Families/Guns.pdf (last visited Nov. 5, 2011).

16. VIOLENCE POL'Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2008 HOMICIDE DATA: FEMALES MURDERED BY MALES IN SINGLE VICTIM/SINGLE OFFENDER INCIDENTS 7 (2010).

17. CTR. FOR GUN POL'Y AND RESEARCH, *supra* note 1, at 4.

18. Katherine A. Vittes & Susan B. Sorenson, *Keeping Guns Out of the Hands of Abusers: Handgun Purchases and Restraining Orders*, 98 AM. J. PUB. HEALTH 828, 830 (2008).

19. CAL. SENATE OFFICE OF RESEARCH, CALIFORNIA'S RESPONSE TO DOMESTIC VIOLENCE 6 (2003), *available at* http://www.publichealth.lacounty.gov/mch/reports/DomesticViolence03.pdf.

20. STATE OF CAL., LEGIS. COUNSEL'S DIGEST ON S. 218 (1999), *available at* http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0201-0250/sb_218_bill_19990121_introduced.html; *see* CAL. FAM. CODE § 6389 (West 2004).

database[21] for law enforcement[22] and the courts to access. In 1998, the legislature amended the statutory protective order scheme of Family Code § 6389 to include and clarify the definitions of "domestic violence" and "abuse" in an attempt to squelch nonviolent yet harassing conduct.[23] Unfortunately, not all state legislatures have directed courts to keep firearms out of the hands of abusive partners, leaving a patchwork of "shall" and "may" firearm restriction jurisdictions.[24] Failing to achieve uniformity between a mandatory federal statute and a permissive state statute has created judicial confusion and consternation.[25]

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21. TASK FORCE, *supra* note 3, at 19 ("Each county is required to develop a procedure to transmit domestic violence restraining order information to DVROS through the California Law Enforcement Telecommunications System (CLETS). CLETS allows all law enforcement agencies, DOJ, the courts, prosecutors, probation, and certain other local and state agencies to communicate in a secure fashion in order to access DOJ databases.").

22. CAL. FAM. CODE § 6380 (West 2004).

23. *Id.*

24. CTR. FOR GUN POL'Y AND RESEARCH, *supra* note 1, at 11-28. The "shall" remove states are California, Hawaii, Illinois, Massachusetts, North Carolina, Tennessee, and Wisconsin; the "may" remove states are Alaska, Arizona, Delaware, District of Columbia, Indiana, Maine, New Jersey, North Dakota, Pennsylvania, and Rhode Island; and the "may and shall" combination states are Maryland, New Hampshire, New York, and Washington. *Id.*

25. Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. RVW., Summer 2002, at 38, *available at* http://aja.ncsc.dni.us/courtrv/cr39-2/CR39-2MitchellCarbon.pdf ("Perhaps the most common misunderstanding about the relationship between the federal and state firearm prohibitions arises when the two sets of laws address similar situations but differ significantly in their approach. For instance, we have seen that under the federal Gun Control Act (18 U.S.C. § 922(g)(8)), a person subject to a domestic violence protection order meeting specific statutory criteria is not permitted to possess a firearm while the order is in effect. By contrast, many states impose such a ban only if the issuing court exercises its discretion to prohibit firearm possession as part of the order's terms and conditions. In such a state, the question arises whether a respondent legally can possess a firearm when the order does not include a state-law firearm prohibition yet otherwise satisfies the federal Gun Control Act requirements. In more formal legal terms, some judges wonder whether the federal law, under the Supremacy Clause of the U.S. Constitution, preempts or super[s]edes the state law. In fact, this is neither a situation that triggers the Supremacy Clause nor one that enables the state court judge to abrogate the federal firearm laws. Rather, both sets of laws remain in full force and both apply to this situation. The respondent would not be subject to a state-law firearm prohibition, because the judge opted not to invoke her authority to prohibit gun possession, but the respondent nonetheless would be subject to federal prosecution under the federal gun law, because the federal prohibition is independent of state law. This analysis holds true for all of the federal firearm statutes discussed above. Confusion also arises over a state court judge's role in the *enforcement* of the 18 U.S.C. section 922(g)(8) prohibition when it is a state court order of protection that triggers the federal law. Especially in states where the protection order form provides a space for the issuing judge to indicate whether the federal prohibitions apply, some judges misunderstand their role. For instance, some judges are under the misimpression that they can "over-ride" the operation of 18 U.S.C. section 922(g)(8) simply by not checking the appropriate space on a protection order form, or by including language in the order to the effect that the federal law does not apply against the respondent. In fact, section 922(g)(8) does not rely upon state law definitions or standards to determine whether

Nationwide studies have shown that proper application of firearm restrictions has produced an 8 percent decrease in the rate of IPV homicide.[26] But before a restriction can bestow its positive affects, it needs to be properly recorded and the restrained party must be served with proper and clear notice. To ensure process of service and uniform application, the California Legislature, along with the State Judicial Council, has standardized the domestic violence restraining order form, which explicitly requires that the restrained party not own or possess a firearm.[27] Despite this attempt for comity, many protective orders are being improperly executed, lacking the required firearm restriction.[28]

The California Attorney General was made aware of the judicial practice of vacating mandatory firearm conditions in a 2005 report.[29] The report uncovered a number of reasons why protective orders failed to contain the mandatory language.[30] It found that "[j]udges had crossed off firearm

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a person is prohibited from possessing a firearm. Rather, the question of whether a protection order issued by a state court triggers the section 922(g)(8) prohibition is determined solely by reference to the specific requirements of the *federal* statute. In practice, this means that the particular findings and terms of the order must be assessed against the federal requirements enumerated in section 922(g)(8), and inquiry must be made into whether the federal notice and hearing requirements were satisfied. Thus, an otherwise qualifying protection order will still trigger the federal prohibition even if the issuing judge rules that the respondent is entitled to possess a firearm under state law, or if the judge fails to note on the order that the federal prohibition would apply (for example, by failing to mark a box on the form that indicates application of the federal prohibition).").

26. *See, e.g.*, Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN'S HEALTH 93, 93 (2010).

27. *See* JUDICIAL COUNCIL OF CAL., FORM CR-160 (2009), *available at* http://www.courtinfo.ca.gov/forms/documents/cr160.pdf [hereinafter JUDICIAL COUNCIL OF CAL., FORM CR-160]; JUDICIAL COUNCIL OF CAL., FORM CR-162 (2009), *available at* http://www.courtinfo.ca.gov/forms/documents/cr162.pdf. There are three internal indications that CR-162 was not intended to be altered: (1) the preprinted language on the bottom left quadrant of the first page states, "Form Adopted for Mandatory Use Judicial Council of California CR-160 [Rev. Jan. 1, 2009] Approved by the Department of Justice"; (2) when accessed from the state court's web site, the document can only be downloaded in a "secured" format and is unable to be electronically altered; and (3) the only two sections that appear entirely in bold font on the document—§ 7 on the first page and § 3 on the second page—address and explain the mandatory firearm restriction and dispossession.

28. TASK FORCE, *supra* note 3, at 35.

29. *See id.*

30. *Id*. at 37 ("[T]he most common explanations were: (1) Judges had crossed off firearm prohibitions from the Judicial Council's orders. We confirmed the existence of this practice in interviews in two counties and from testimony at a regional hearing about judges in three counties; (2) Restraining orders without firearm prohibitions, that were unrelated to domestic violence, had been entered incorrectly into DVROS under the OAH category; (3) The agencies that entered CPOs into DVROS sometimes misinterpreted the form (CR-160). The form contains two checkboxes, one of which is to be used to indicate whether the batterer had 24 or 48 hours to relinquish firearms. If neither box was checked, however, the agency sometimes misinterpreted the lack of a check mark to mean that the order carried no firearm prohibition; and (4) The agencies that entered orders into DVROS had been trained

prohibitions from the Judicial Council's orders."[31] The report "confirmed the existence of this practice in interviews in two counties and from testimony at a regional hearing about judges in three counties."[32]

The report's initial review revealed thousands of defective orders, with many California counties reporting more than 18 percent of their orders as failing to contain the restrictive language.[33] Mono County reported that over half of its protective orders failed to contain the firearm prohibition.[34] Overall, of the 76,787 active protective orders in 2004, 4,215 of them were defective.[35] The more rural counties with populations less than 100,000, which tend to be socially and politically conservative, had a defective rate of 11.5 percent—more than twice the rate of the more populated areas.[36] Two months after the California Department of Justice sent law enforcement agencies a notifying letter containing a clear directive to properly record and enter protective orders into the Domestic Violence Restraining Order System (DVROS),[37] the overall defective rate dropped to 2.6 percent.[38] However, at 4.5 percent, the rural counties retained a defective rate almost twice as high.[39]

## II. TRIAL COURTS DO NOT HAVE THE AUTHORITY TO VACATE STATUTORILY MANDATED FIREARM RESTRICTIONS

A judge's knowing or even inadvertent alteration of a statutorily mandated provision in a domestic violence restraining order should be understood as a usurpation of legislative power, an impermissible judicial act containing no legal authority, and a possible violation of the claimant's constitutional rights. When a trial court judge takes the liberty of unilaterally changing the material firearm provision in a statutorily mandated form, he or she is subverting the will and power of the state legislature. This is an impermissible violation of the separation of powers that should be considered a null and void judicial act.

Some judges, typically presiding in California's more conservative counties, politically disagree with the firearm limitations placed upon restrained individuals.[40] Some may feel that they have the authority to weaken or abrogate

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to enter Elder and Dependent Adult Abuse orders into DVROS as OAH. Prior to July 2004, these orders had no firearm prohibitions.").

31. *Id.*

32. *Id.*

33. *Id.* at 38.

34. *Id.* Counties like Mono (52.4%), Lake (33.0%), Colusa (26.7%), Lassen (22.1%), and Modoc (20.8%) reported that large percentages of DVPOs failed to contain the proper firearm restriction. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 37.

38. *Id.*

39. *Id.*

40. Courts have continued to find grounds upon which to allow the retention of firearms. *See, e.g.*, Ritchie v. Konrad, 10 Cal. Rptr. 3d 387, 390 (Ct. App. 2004) (discussing the trial court's vacation of the firearm restriction). A common argument is that the firearm

this limitation under the theory of judicial prerogative or discretion. But appellate review is clear: they do not have that authority.[41] As California's appellate courts have stressed, "it is for the Legislature, not this court, to revisit the wisdom of this consequence."[42]

In *Ritchie v. Konrad*, the trial court granted a petition to continue a protective order, but in doing so vacated the firearm restriction that precluded the restrained party from owning or possessing a gun.[43] In 1998, Ms. Ritchie ended a physically abusive relationship with her fiancé, Mr. Konrad.[44] After the separation, Konrad continued to call, e-mail, and harass Ritchie.[45] This abusive relationship continued for months until 1999, when Ms. Ritchie obtained a three-year DVPO against her physically abusive and estranged former fiancé.[46] During the term of the restraining order, Mr. Konrad made no attempt to contact Ms. Ritchie. In the interim, both parties married other individuals and moved 275 miles apart—one to Henderson, Nevada, and the other to Los Angeles, California.[47] After the expiration of the three-year term, Ms. Ritchie petitioned the court to convert the expiring order into a permanent restraining order, pursuant to California Family Code § 6345.[48] Finding no clear criteria or test for the imposition under Family Code § 6345, the trial court stated,

> Counsel, I'm gonna—the way I think I've got to read this statute is that I think you're entitled to have the renewal unless there is some reason blocking you, and the only detriment that I see is the firearm restriction, which I'm going to vacate, and I'm going to continue the order on a permanent basis.[49]

On appeal, the Second Appellate District, Division Seven, closely reviewed both the criteria for application of a permanent order under Family Code § 6345 and also the trial court's authority to remove the firearms restriction. In the holding, the court tersely announced, "[n]othing in 6389, subdivision (a) or elsewhere suggests the court is empowered to disable or modify the firearm prohibition[that] section 6389, subdivision (a) *automatically* activates when a court imposes or renews any of the enumerated forms of

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restriction impairs an individual's right and enjoyment of hunting. *See, e.g.*, Weissenburger v. Iowa Dist. Ct. for Warren Cnty, 740 N.W.2d 431, 433 (Iowa 2007). Anecdotal evidence suggests some defendants are likely to claim that father-son hunting trips are family pastime events and any firearm restrictions would damage the father-son relationship.

41. Ritchie v. Konrad, 10 Cal. Rptr. 3d at 400.
42. *Id.* at 405.
43. *Id.* at 387.
44. *Id.* at 389.
45. *Id.*
46. *Id*.
47. *Id.*
48. *Id.* at 389-90.
49. *Id.* at 390.

protective orders."[50] The respondent pointed to language in the statute that gave the court discretion in terminating or shortening the term, arguing that it also had discretion to vary its conditions.[51] Again the court was abundantly clear in declaring,

> None of these sections hint the trial court possesses any discretion to avoid imposing these mandatory requirements or to provide any relief at any time during the duration of the underlying protective order. For example, section 6389, subdivision (b) orders the Judicial Council to include a "notice on all forms requesting a protective order that, . . . the respondent *shall be ordered to relinquish* possession . . . of any firearms." Section 6389, subdivision (c) then instructs the trial court what it must do if the restrained party is present in the courtroom. In that event, the court "*shall order* . . . [that party] to relinquish any firearm in that person's immediate possession." Section 6389, subdivision (g) provides the "restraining order requiring a person to relinquish a firearm . . . *shall prohibit* the person from possessing or controlling any firearm for the duration of the order." This same subdivision then sets forth the procedures for returning any such firearm "within five days after the expiration of the relinquishment order." The firearm is *not* to be returned, however, if "another successive restraining order is used against the respondent." The only grant of discretion appears in section 6389, subdivision (h). It is limited to a special class of restrained parties, those who use a firearm as a necessary part of their employment. Even then the trial court's discretion is sharply circumscribed. The court must first find the "particular firearm is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm is unnecessary." Having made that finding, the trial court must issue an order mandating "the firearm shall be in the physical possession of the respondent only during scheduled work hours and during travel to and from his or her place of employment."[52]

Despite this authoritative, emphatic, and thorough appellate education, the judicial practice of crossing out mandatory firearm restrictions continues.[53]

50. *Id.* at 401.
51. *Id.*
52. *Id.* at 402.
53. TASK FORCE, *supra* note 3, at 33.

### *A. There Is Ample Authority Directing Trial Court Judges that They Are Bound in the Imposition of Mandatory Firearm Restrictions in Domestic Violence Protective Orders*

One can speculate that frequent exercise of discretion by a trial court judge may explain how clearly mandatory statutory language could somehow appear optional. At least one appellate court confronted this misapprehension directly. In *Weissenburger v. Iowa District Court for Warren County*, the Iowa Supreme Court felt it appropriate to remind its district court judges of the implications of the term "mandatory."[54] Jackie Weissenburger had previously obtained a state civil domestic abuse no-contact order prohibiting her former spouse, Joseph, contact.[55] Joseph violated the civil no-contact order, pled guilty to third degree harassment, and ultimately had a five-year criminal no-contact order imposed.[56]

Months later, after faithful compliance, Joseph petitioned the court to terminate or amend the order's terms to permit him to possess firearms for the expressed purpose of hunting with his son.[57] While the court refused to terminate the order, it did amend the order by striking the prohibition.[58] After accepting Jackie's writ of certiorari, the Iowa Supreme Court struck the district court's alteration, concluding that the lower court was without the authority to authorize Joseph to possess firearms in violation of federal law.[59] Fortunately, the petitioner in *Weissenburger* was not injured despite the district court's aberrant actions.[60]

### *B. Any Judicial Malfeasance When Imposing a Domestic Violence Protective Order Disproportionally Affects Women, Thwarting the Full Protective Umbrella of the Criminal Justice System*

Although both males and females can be victims of domestic violence, and such violence can occur in male on male and female on female situations, the adverse impact of wrongful judicial removal of firearm restrictions from DVPOs falls largely upon women.[61] A comprehensive statistical analysis of California's DVPO was conducted in 2005.[62] The study showed that 72.2 percent of California orders restrained a male subject and protected a female target.[63] It also showed that 19.3 percent of orders restrained and protected

54. 740 N.W.2d 431, 436 (Iowa 2007).
55. *Id.* at 433; *see* IOWA CODE § 236.5(2)(c) (2008).
56. *Weissenburger*, 740 N.W.2d at 433; *see* IOWA CODE § 901.5(7A) (2003).
57. *Weissenburger*, 740 N.W.2d at 433.
58. *Id.*
59. *Id.* at 436.
60. *Id.* at 433, 436.
61. Sorenson & Shen, *supra* note 4, at 920.
62. *See id.*
63. *Id.* at 920.

individuals of the same sex, 7.9 percent of which were women.[64] Combining these two categories, over 80 percent of restraining orders aim to protect a female target.

When a trial court makes a practice of improperly adjudicating restraining order restrictions, a female is four times more likely than a man to be negatively affected by a faulty order.[65] Since the involvement of firearms demonstrably increases the likelihood of death to affected victims,[66] female victims of domestic violence who have been denied proper statutory protections have impermissibly been left exposed to deadly violence. A domestic violence victim should have standing to challenge this intentional collapse and failure of the judicial system.

## III. THE LANGUAGE OF CALIFORNIA'S DOMESTIC VIOLENCE PROTECTIVE ORDER FIREARM RESTRICTION IS CLEAR AND UNAMBIGUOUS AND SHOULD BE ENFORCED TO ITS FULLEST MEASURE

### *A. While the State Legislature Has the Authority and Ability to Permit Judicial Discretion, it also Has the Ability to Impose Mandatory Protective Provisions*

A fundamental tenet of the California State Legislature's function is to enact legislation that helps protect the health, welfare, and safety of its citizenry.[67] California has made clear legislative findings that domestic violence is a dangerous and potentially lethal situation, particularly when aggravated by the presence of firearms.[68] The legislature has enacted restrictions on firearms in an attempt to reduce or eliminate intimate partner homicides.[69]

While trial court judges are generally vested with considerable latitude and discretion as to admissibility of evidence, re-litigating properly obtained protective order conditions are not within their purview. Family Code § 6389 is unequivocally clear: once an order has been found to be justified, the defendant is to be restrained and the statutory restrictions therein are to be fully imposed.[70]

64. *Id.*
65. *See id.*
66. Campbell et al., *supra* note 6, at 1092.
67. CAL. CONST. art. IV, § 8(d).
68. *See* CAL. SENATE OFFICE OF RESEARCH, *supra* note 19, at 36.
69. *See id.* at 35.
70. CAL. FAM. CODE § 6389 (West 2004).

### *B. California Family Code § 6389 Uses the Directive Term "Shall" Twenty-Seven Times, and Nothing in the Statute Vests the Trial Court with Discretion in its Application*

California Family Code § 6389 creates a mandatory firearm restriction when imposing a restraining order.[71] Statutory language is generally given its plain meaning[72] and construed within the context of the statutory scheme.[73] Unlike the permissive language used in the Colorado statute in *Town of Castle Rock, Colorado v. Gonzales*,[74] the language crafted by the California legislature is clear and unambiguous. Where the U.S. Supreme Court understood the Colorado statute to require police to use only "every reasonable means" to enforce the terms and conditions of the restraining order,[75] the California statute does not use any permissive or other ambiguous language:

> A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm while that protective order is in effect. . . .[76]
>
> The restraining order requiring a person to relinquish a firearm pursuant to subdivision (c) shall state on its face that the respondent is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect and that the firearm shall be relinquished to the local law enforcement agency for that jurisdiction or sold to a licensed gun dealer, and that proof of surrender or sale shall be filed with the court within a specified period of receipt of the order.[77]

California Family Code § 6389 contains the term "shall" twenty-seven times,[78] emphatically directing the justice system to get the guns out of the

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71. *Id.*

72. United States v. Santos, 553 U.S. 507, 511 (2008); Muscarello v. United States, 524 U.S. 125, 127-128 (1998); Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting); McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting); Scarborough v. United States, 431 U.S. 563, 578 (1977) (Stewart, J., dissenting).

73. Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its term. . . . Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.").

74. 545 U.S. 748 (2005); *see* COLO. REV. STAT. ANN. § 18-6-803.5 (West 2004).

75. *Castle Rock*, 545 U.S. at 763-64; *see* § 18-6-803.5(6)(a).

76. CAL. FAM. CODE § 6389(a) (West 2004).

77. § 6389(f).

78. *See* § 6389. The statute is given below in its entirety:

> CAL. FAM. CODE § 6389. Firearm ownership, possession, purchase, or receipt; relinquishment order; use immunity; storage fee; order content; exemption; sale; penalty.

(a) A person subject to a protective order, as defined in Section 6218, *shall* not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect. Every person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm or ammunition while the protective order is in effect is punishable pursuant to subdivision (g) of Section 12021 of the Penal Code.

(b) On all forms providing notice that a protective order has been requested or granted, the Judicial Council *shall* include a notice that, upon service of the order, the respondent *shall* be ordered to relinquish possession or control of any firearms and not to purchase or receive or attempt to purchase or receive any firearms for a period not to exceed the duration of the restraining order.

(c) (1) Upon issuance of a protective order, as defined in Section 6218, the court *shall* order the respondent to relinquish any firearm in the respondent's immediate possession or control or subject to the respondent's immediate possession or control.

(2) The relinquishment ordered pursuant to paragraph (1) *shall* occur by immediately surrendering the firearm in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the protective order. Alternatively, if no request is made by a law enforcement officer, the relinquishment *shall* occur within 24 hours of being served with the order, by either surrendering the firearm in a safe manner to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer, as specified in Section 12071 of the Penal Code. The law enforcement officer or licensed gun dealer taking possession of the firearm pursuant to this subdivision *shall* issue a receipt to the person relinquishing the firearm at the time of relinquishment. A person ordered to relinquish any firearm pursuant to this subdivision *shall* file with the court that issued the protective order, within 48 hours after being served with the order, the receipt showing the firearm was surrendered to a local law enforcement agency or sold to a licensed gun dealer. Failure to timely file a receipt *shall* constitute a violation of the protective order.

(3) The forms for protective orders adopted by the Judicial Council and approved by the Department of Justice *shall* require the petitioner to describe the number, types, and locations of any firearms presently known by the petitioner to be possessed or controlled by the respondent.

(4) It is recommended that every law enforcement agency in the state develop, adopt, and implement written policies and standards for law enforcement officers who request immediate relinquishment of firearms.

(d) If the respondent declines to relinquish possession of any firearm based on the assertion of the right against self-incrimination, as provided by the Fifth Amendment to the United States Constitution and Section 15 of Article I of the California Constitution, the court may grant use immunity for the act of relinquishing the firearm required under this section.

(e) A local law enforcement agency may charge the respondent a fee for the storage of any firearm pursuant to this section. This fee *shall* not exceed the actual cost incurred by the local law enforcement agency for the storage of the firearm. For purposes of this subdivision, "actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer as defined in Section 12071 of the Penal Code or to the respondent.

(f) The restraining order requiring a person to relinquish a firearm pursuant to subdivision (c) *shall* state on its face that the respondent is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect and that the firearm *shall* be relinquished to the local law enforcement agency for that jurisdiction or sold to a licensed gun dealer, and that proof of surrender or sale *shall* be filed with the court within a specified period of receipt of the order. The order *shall* also state on its face the expiration date for relinquishment. Nothing in this section *shall* limit a respondent's right under existing law to petition the court at a later date for modification of the order.

(g) The restraining order requiring a person to relinquish a firearm pursuant to subdivision (c) *shall* prohibit the person from possessing or controlling any firearm for the duration of the order. At the expiration of the order, the local law enforcement agency *shall* return possession of any surrendered firearm to the respondent, within five days after the expiration of the relinquishment order, unless the local law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is prohibited from possessing a firearm because the respondent is in any prohibited class for the possession of firearms, as defined in Sections 12021 and 12021.1 of the Penal Code and Sections 8100 and 8103 of the Welfare and Institutions Code, or (3) another successive restraining order is issued against the respondent under this section. If the local law enforcement agency determines that the respondent is the legal owner of any firearm deposited with the local law enforcement agency and is prohibited from possessing any firearm, the respondent *shall* be entitled to sell or transfer the firearm to a licensed dealer as defined in Section 12071 of the Penal Code. If the firearm has been stolen, the firearm *shall* be restored to the lawful owner upon his or her identification of the firearm and proof of ownership.

(h) The court may, as part of the relinquishment order, grant an exemption from the relinquishment requirements of this section for a particular firearm if the respondent can show that a particular firearm is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm is unnecessary. If an exemption is granted pursuant to this subdivision, the order *shall* provide that the firearm *shall* be in the physical possession of the respondent only during scheduled work hours and during travel to and from his or her place of employment. In any case involving a peace officer who as a condition of employment and whose personal safety depends on the ability to carry a firearm, a court may allow the peace officer to continue to carry a firearm, either on duty or off duty, if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. Prior to making this finding, the court *shall* require a mandatory psychological evaluation of the peace officer and may require the peace officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence.

(i) During the period of the relinquishment order, a respondent is entitled to make one sale of all firearms that are in the possession of a local law enforcement agency pursuant to this section. A licensed gun dealer, who presents a local law enforcement agency with a bill of sale indicating that all firearms owned by the respondent that are in the possession of the local law enforcement agency have been sold by the respondent to the licensed gun dealer, *shall* be given possession of those firearms, at the location where a respondent's firearms are stored, within five days of presenting the local law enforcement agency with a bill of sale.

hands of domestic abusers. The legislature went so far as to include a personal obligation to dispossess firearms.[79] The personal obligation to dispossess requires the restrained parties to turn in their firearms even if an order fails to demand firearm relinquishment.[80] The legislature even suggested granting immunity for those who would be afraid of criminal implications of firearm possession.[81] Section 6389(d) suggests that if a defendant is fearful of possible self-incrimination implications of admitting to firearm possession, the court should consider granting immunity.[82] The legislative intent is abundantly evident: firearms must be kept out of the hands of abusers.

Understanding the heavy burden firearm restrictions place on certain segments of the community, California's legislature has provided special exceptions to the mandatory condition.[83] The trial court, however, must make specific findings that are read into the record before authorizing the exception.[84] Failure to make such findings available for challenge on appeal should be understood as another failure to provide the protected their rights of due process.

## IV. THE MATERIAL PROVISIONS IN WISCONSIN'S DOMESTIC VIOLENCE PROTECTIVE ORDERS ARE SIGNIFICANTLY SIMILAR TO CALIFORNIA'S STATUTORY LANGUAGE AND SHOULD ALSO BE UNDERSTOOD TO CREATE A CLEAR, UNAMBIGUOUS DIRECTIVE TO INCLUDE FIREARM RESTRICTIONS

Many states, including Wisconsin, have codified domestic violence restraining order statutes that either require or authorize the removal of firearms.[85] Wisconsin's mandatory restrictions, however, are not

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> (j) The disposition of any unclaimed property under this section *shall* be made pursuant to Section 1413 of the Penal Code.
>
> (k) The return of a firearm to any person pursuant to subdivision (g) *shall* not be subject to the requirements of subdivision (d) of Section 12072 of the Penal Code.
>
> (l) If the respondent notifies the court that he or she owns a firearm that is not in his or her immediate possession, the court may limit the order to exclude that firearm if the judge is satisfied the respondent is unable to gain access to that firearm while the protective order is in effect.
>
> (m) Any respondent to a protective order who violates any order issued pursuant to this section *shall* be punished under the provisions of subdivision (g) of Section 12021 of the Penal Code.

*Id.* (emphasis added).

79. § 6389(c).

80. *Id.*

81. § 6389(d).

82. *Id.*

83. § 6389(h).

84. *Id.*

85. *See* ALASKA STAT. § 18.66.100(c)(7) (2010); ARIZ. REV. STAT. ANN. § 13-3602(G)(4) (2010); CAL. PENAL CODE §§ 136.2 (West 1999), 12021(g)(3) (West 2009); CAL.

comprehensively included in all available types of protective orders.[86] This non-inclusive statutory scheme provides the potential for obstinate judges to steer at-risk applicants or to favor orders that provide a lower level of protection in that they fail to contain firearm restrictions—especially because restraining order applicants are not required to seek independent legal advice before petitioning the court for a protective order.[87]

The Wisconsin State Legislature has demonstrated an awareness of the dangers firearms can play in domestic violence circumstances,[88] requiring confiscation of firearms when domestic violence and child abuse injunctions are granted.[89] But by not including a mandatory restriction in all protective orders,[90] the legislature leaves the most vulnerable of the community at risk. Assuming that the legislature eventually amends its codes to require comprehensive firearm restrictions in *all* forms of protective orders, and assuming it includes the same or similar language as it is currently using in its domestic violence and child abuse statutes, analysis of these analogous statutes is required to discern the level of rights bestowed and if they provide sufficient constitutional grounds to challenge malfeasance of incorrect recordation.

Although a somewhat less comprehensive legislative scheme, Wisconsin's domestic protection order firearm relinquishment statute uses language significantly similar to its California counterpart.[91] While the Wisconsin statute

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FAM. CODE § 6389(c)(1) (West 2004); CAL. CIV. PROC. CODE §§ 527.6(k), 527.9 (West 2011); DEL. CODE ANN. tit. 10, §§ 1043(e), 1045(a)(8) (1999); FLA. STAT. ANN. §§ 741.31(4)(a)(8) (West 2010); HAW. REV. STAT. ANN. § 134-7(f) (LexisNexis 2006); 725 ILL. COMP. STAT. 5/112A-14(b)(14.5) (West 2006), 750 ILL. COMP. STAT. 60/214(b)(14.5) (West 2009); IND. CODE ANN. §§ 34-26-5-2, 34-26-5-9(c)(4), (f) (LexisNexis 2009); MD. CODE ANN., FAM. LAW §§ 4-501, 4-506(d)(12) (LexisNexis 2006); MASS. ANN. LAWS ch. 209A, §§ 3B, 3C (LexisNexis 2011); 2007 Nev. Stat. 318, § 2-3, 5, Nev. Rev. Stat. § 33.202; N.H. REV. STAT. ANN. §§ 173-B:4, 173-B:5 (LexisNexis 2010); N.J. STAT. ANN. §§ 2C: 25-28(j), 2C: 25-29(b)(16) (West 2005); N.Y. CRIM. PROC. LAW §§ 530.11, 530.12, 530.14 (McKinney 2009); N.Y. FAM. CT. ACT §§ 822, 828(3), 842-a (McKinney 2010); N.C. GEN. STAT. ANN. § 50B-3.1 (LexisNexis 2009); N.D. CENT. CODE §§ 14-07.1-02, 14-07.1-13 (LexisNexis 2009); 23 PA. CONS. STAT. ANN. §§ 6107, 6108-6108.3 (West 2010); R.I. GEN. LAWS § 15-15-3 (LexisNexis 2003); S.D. CODIFIED LAWS § 25-10-24 (2004); WIS. STAT. § 813.12(4)(4m) (2009-10).

86. OFFICE OF CRIME VICTIM SERVS., WIS. DEP'T OF JUSTICE, RESTRAINING ORDERS, http://www.doj.state.wi.us/cvs/Victims_Rights/restraining_orders.asp (last visited Oct. 22, 2011).

87. *Id.*

88. *See* DANIEL F. RITSCHE, WIS. LEGIS. REFERENCE BUREAU, REGULATION OF FIREARMS IN WISCONSIN 1 (2000), *available at* http://legis.wisconsin.gov/lrb/pubs/wb/00wb11.pdf.

89. *See* WIS. STAT. §§ 813.12(4m)(a), 813.122(5m)(a) (2007-08).

90. *See* WIS. STAT. § 813.125(4m)(a) (2007-08).

91. *See* WIS. STAT. § 813.12(4m). The relevant portions of WIS. STAT. § 813.12(4m) are given below:

WIS. STAT. § 813.12. Domestic abuse restraining orders and injunctions.

. . . .

(4m) Notice of restriction on firearm possession; surrender of firearms.

(a) An injunction issued under sub. (4) *shall* do all of the following:

1. Inform the respondent named in the petition of the requirements and penalties under s. 941.29.

2. Except as provided in par. (ag), require the respondent to surrender any firearms that he or she owns or has in his or her possession to the sheriff of the county in which the action under this section was commenced, to the sheriff of the county in which the respondent resides or to another person designated by the respondent and approved by the judge or circuit court commissioner. The judge or circuit court commissioner *shall* approve the person designated by the respondent unless the judge or circuit court commissioner finds that the person is inappropriate and places the reasons for the finding on the record. If a firearm is surrendered to a person designated by the respondent and approved by the judge or circuit court commissioner, the judge or circuit court commissioner *shall* inform the person to whom the firearm is surrendered of the requirements and penalties under s. 941. 29(4).

(ag) If the respondent is a peace officer, an injunction issued under sub. (4) may not require the respondent to surrender a firearm that he or she is required, as a condition of employment, to possess whether or not he or she is on duty.

(am)1. When a respondent surrenders a firearm under par. (a)2. to a sheriff, the sheriff who is receiving the firearm *shall* prepare a receipt for each firearm surrendered to him or her. The receipt *shall* include the manufacturer, model, and serial number of the firearm surrendered to the sheriff and *shall* be signed by the respondent and by the sheriff to whom the firearm is surrendered.

2. The sheriff *shall* keep the original of a receipt prepared under subd. 1. and *shall* provide an exact copy of the receipt to the respondent. When the firearm covered by the receipt is returned to the respondent under par. (b), the sheriff *shall* surrender to the respondent the original receipt and all of his or her copies of the receipt.

3. A receipt prepared under subd. 1. is conclusive proof that the respondent owns the firearm for purposes of returning the firearm covered by the receipt to the respondent under par. (b).

4. The sheriff may not enter any information contained on a receipt prepared under subd. 1. into any computerized or direct electronic data transfer system in order to store the information or disseminate or provide access to the information.

(aw) A sheriff may store a firearm surrendered to him or her under par. (a)2. in a warehouse that is operated by a public warehouse keeper licensed under ch. 99. If a sheriff stores a firearm at a warehouse under this paragraph, the respondent *shall* pay the costs charged by the warehouse for storing the firearm.

(b) A firearm surrendered under par. (a)2. may not be returned to the respondent until a judge or circuit court commissioner determines all of the following:

1. That the injunction issued under sub. (4) has been vacated or has expired and not been extended.

2. That the person is not prohibited from possessing a firearm under any state or federal law or by the order of any federal court or state court, other than an order from which the judge or circuit court commissioner is competent to grant relief.

uses the term "shall" only fourteen times,[92] a reasonable interpretation of the legislature's intent is as clear as California's. In both instances, the statutes clearly obligate courts to require the respondent to surrender his or her firearms. The California statute states, "[t]he court shall order the respondent to relinquish any firearm in respondent's immediate possession or control, or subject to the respondent's immediate possession or control."[93] Similarly, the Wisconsin law states, "[a]n injunction . . . shall . . . require the respondent to surrender any firearms that he or she owns or has in his or her possession."[94] In either state, the use of the term "shall" evinces the legislative intent that the provisions be considered mandatory and not subject to judicial discretion. However, while it is initially mandatory that the court require the respondent to surrender his firearms, the California court may have a broader discretion at a later date.[95] After listing the steps respondent must take to relinquish his or her firearms, the California statute goes on to state that "[n]othing in this section shall limit a respondent's right under existing law to petition the court at a later date for modification of the order."[96]

Both states have parallel processes of relinquishment.[97] Wisconsin requires that the respondent surrender all firearms to the sheriff, or another court-approved individual.[98] In California, in addition to surrendering the property to law enforcement, the respondent can also relinquish the firearm by selling it to a licensed dealer.[99] Both states require the respondent to get a receipt from the law enforcement officer or firearm dealer who takes possession of the gun.[100] California requires the respondent to file a copy of the receipt with the court in order to prove that the respondent is in compliance with the order.[101] The requirement that the receipt be filed with the court provides an opportunity to track which respondents have fulfilled their

> (c) If a respondent surrenders a firearm under par. (a)2. that is owned by a person other than the respondent, the person who owns the firearm may apply for its return to the circuit court for the county in which the person to whom the firearm was surrendered is located. The court *shall* order such notice as it considers adequate to be given to all persons who have or may have an interest in the firearm and *shall* hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it *shall* order the firearm returned. If the court returns a firearm under this paragraph, the court *shall* inform the person to whom the firearm is returned of the requirements and penalties under s. 941.29(4).

*Id.* (emphasis added).

92. *Id.*
93. CAL. FAM.CODE § 6389(c)(1) (West 2004).
94. WIS. STAT. § 813.12(4m)(a)(2).
95. *See* CAL. FAM. CODE § 6389(c)(1).
96. *Id*.
97. *See* CAL. FAM. CODE § 6389(c)(2); WIS. STAT. § 813.12(4m)(a)(2).
98. *See* WIS. STAT. § 813.12(4m)(a)(2).
99. CAL. FAM. CODE § 6389(c)(2).
100. *See* WIS. STAT. § 813.12(4m)(am)1.; CAL. FAM. CODE § 6389(c)(2).
101. CAL. FAM. CODE § 6389(c)(2).

obligations under the order.[102] Those individuals who have not filed their receipts by the due date are in violation of the protection order and subject to punishment.[103]

The courts are given discretion with regard to the statutes' stated exceptions. Both laws provide a limited exception to relinquishment if ownership is a condition of the restrained person's employment.[104] The Wisconsin statute limits this exception to peace officers, stating, "[i]f respondent is a peace officer, an injunction . . . may not require the respondent to surrender a firearm that he or she is required, as a condition of employment, to possess whether or not he or she is on duty."[105] The California statute is not limited to peace officers, and it is much more restrictive in its terms.[106] The court "may" grant an exception if "respondent can show that a particular firearm is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm is unnecessary."[107] The respondent is further limited to carrying the weapon "during scheduled work hours and during travel to and from his or her place of employment."[108] A California court "may" also exempt a firearm where the respondent owns the firearm and demonstrates that he cannot access it for the duration of the protective order.[109] Given the use of the word "may" rather than "shall" in these instances, the Wisconsin and California legislatures intended to afford some degree of judicial discretion only in these limited instances.

Finally, both statutes address the circumstances under which the firearm is to be returned to the respondent once the protective order is no longer in effect.[110] The California statute allows local law enforcement to return the property within five days of the expiration of the protective order unless the law enforcement agency discovers that the firearm is stolen, that the respondent is forbidden by another statute from possessing the firearm, or that another restraining order is issued against the respondent.[111] Accordingly, the determination of whether the respondent is entitled to his property lies with law

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102. *Id.*

103. *Id.*

104. *See* WIS. STAT. § 813.12(4m)(ag); CAL. FAM. CODE § 6389(h).

105. WIS. STAT. § 813.12(4m)(ag).

106. CAL. FAM. CODE § 6389(h).

107. *Id.*

108. *Id.* "[A] court may allow the peace officer to continue to carry a firearm, either on duty or off duty, if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. Prior to the making of this finding, the court shall require a mandatory psychological evaluation of the peace officer and may require the peace officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence." *Id.*

109. § 6389(l).

110. *See* CAL. FAM. CODE § 6389(g); WIS. STAT. § 813.12(4m)(am).

111. CAL. FAM. CODE § 6389(g).

enforcement rather than the court.[112] The Wisconsin statute vests this decision with a judge or circuit court commissioner, who "may not" return the property until they have determined that

> The injunction . . . has been vacated or has expired and not been extended [and t]hat the person is not prohibited from possessing a firearm under any state or federal law or by the order of any federal court or state court, other than an order from which the judge or circuit commissioner is competent to grant relief.[113]

The fact that Wisconsin's legislature specifically provided that firearms would not be returned to the respondent until the protective order was no longer in effect shows the legislature's intent to remove this specific danger from the volatile domestic violence equation. Allowing judges to thwart the legislature's intent by omitting mandatory language would completely eviscerate the intent of the legislature. Just as the California statutory construction was clear, so too is Wisconsin's: firearms must be kept out of the hands of abusers.

## V. VICTIMS WHOSE DOMESTIC VIOLENCE PROTECTIVE ORDERS HAVE BEEN IMPERMISSIBLY STRIPPED OF MANDATORY FIREARM RESTRICTIONS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS

This Part examines use of the constitutional doctrines arising from the Due Process Clauses of the U.S. Constitution as mechanisms of enforcement of DVPOs. In a related context, the federal courts have rebuffed victims' claims based on both procedural and substantive due process grounds.[114] As this article has demonstrated beyond reasonable dispute in Parts II, III, and IV, it is wrongful and unlawful for a judge to remove statutory language from a DVPO that prohibits the subject of the order from possessing firearms. Such a pronouncement is small comfort to the women who obtained such an order and thereafter suffered injury or death to themselves or their family.

What legal action is available to those victims to obtain redress and, perhaps more importantly, reduce the likelihood that illegal judicial action will recur? It must be accepted for analytical purposes that the relevant precedents are presently unlikely to be overturned, and will be applied to constitutional challenges to judges' illegal removal of mandatory firearms restrictions. Nonetheless, this Part concludes that such illegal action is sufficiently different factually, with concomitantly altered constitutional policy implications, so that existing case law should not preclude a ruling that removal of the firearm restrictions violates the constitutional rights of the victims.[115] The question

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112. *Id.*

113. WIS. STAT. § 813.12(4m)(b).

114. Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 768 (2005).

115. The constitutional issues generated by a legislature's attempt to protect the overwhelmingly female victims of domestic violence from additional and more serious harm via firearms used by their abusers center on the two aspects of the Due Process Clauses, the

explored is whether the beneficiary of a domestic violence order can identify any constitutionally protected interest in actually obtaining the no-gun language that the statutes purport to require.

A major potential obstacle to claims based on procedural due process arises from *Town of Castle Rock, Colorado v. Gonzales*.[116] In *Castle Rock*, the U.S. Supreme Court addressed the issue of whether Colorado state law gives an individual a property interest in the enforcement of a restraining order.[117] Jessica Gonzales obtained a temporary restraining order against her estranged husband.[118] The order required him to stay away from her, the couple's three daughters, and the family home.[119] When the restraining order was made permanent, the husband was allowed to see the children on alternate weekends, for two weeks during the summer, and, if reasonable notice was given in advance, midweek dinners.[120] However, one afternoon, as the children were playing in the front yard, her husband unexpectedly took the three children away from the house.[121]

When Gonzales contacted Castle Rock police to request that they enforce the restraining order, they said there was nothing they could do.[122] Gonzales then received a call from her husband saying that he had taken the children to an amusement park.[123] She called the police back, telling them where her husband was and asking that they go to the park and check for her husband's car in the parking lot or otherwise put out a bulletin to be on the lookout for him.[124] The police again refused.[125] At both 10:10 p.m. and 12:50 a.m., she contacted the police to report the incident and request help, but none was given.[126] The husband drove to the police station at 3:20 a.m. and opened fire with a handgun he purchased that evening.[127] He was killed when the police

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somewhat redundantly designated rules of procedural due process, and the oxymoronically designated substantive due process doctrine. In the broadest sense, the question is one of enforceability—can the beneficiary of a domestic violence injunction utilize constitutional arguments to require that judges obey the seemingly mandatory statutory requirement that their orders include language barring the subjects of the orders from possessing firearms? This Article does not examine how such constitutional arguments would be effectuated—that is, the specific manner or form in which particular remedies would be sought via litigation. The authors are aware that civil action against a judge would be difficult to assert because of the principle of absolute judicial immunity. *See* Stump v. Sparkman, 435 U.S. 349 (1978).

116. 545 U.S. 748.
117. *Id.* at 750-51.
118. *Id.* at 751.
119. *Id.*
120. *Id.* at 752.
121. *Id.* at 753.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 753-54.
127. *Id.* at 754.

officers returned fire.[128] In his car, police found the dead bodies of the three missing children.[129]

Colorado Revised Statute § 18-6-803.5(3) addresses the duty of a police officer or department to enforce restraining orders:

> (a) . . . A peace officer shall use every *reasonable* means to enforce a protection order. (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that: (I) The restrained person has violated or attempted to violate any provision of a protection order; and (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order. (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate.[130]

Gonzales brought suit under 42 U.S.C. § 1983, asserting that Castle Rock police had a policy of not responding to requests to enforce restraining orders and that failure to provide such protection violated the Due Process Clause.[131] The district court held that there was neither a violation of procedural due process nor a violation of substantive due process, and therefore granted Castle Rock's motion to dismiss for failure to state a claim upon which relief can be granted.[132] While the Court of Appeals agreed with the district court in rejecting the substantive due process claim, it found that there were sufficient facts in dispute to require a trial on the procedural due process claim.[133] The intermediate court found that "respondent had a 'protected property interest in the enforcement of the terms of her restraining order' and that the town had deprived her of due process because 'the police never "heard" nor seriously entertained her request to enforce and protect her interests in the restraining order.'"[134] They pointed to the Colorado statute and its legislative history to conclude that it was the intent of the legislature to change the apparent policy of the police in not enforcing restraining orders, since this policy makes the order itself completely valueless.[135] A seven-member majority of the Supreme

128. *Id.*
129. *Id.*
130. COLO. REV. STAT. ANN. § 18-6-803.5. (West 2010) (emphasis added).
131. *Castle Rock*, 545 U.S. at 754.
132. *Id.*
133. *Id.* at 754-55
134. *Id.* at 755 (citation omitted).
135. *Id.* at 759-60.

Court held that Gonzales did not have a property interest in her restraining order.[136]

### *A. Statutory Mandates to Include Firearm Restrictions Create a Property Interest Protected by Procedural Due Process*

*Castle Rock* has received significant criticism in the scholarly literature.[137] It is not the intention of this article to duplicate previous discussions. The goal is to examine the reasoning of the *Castle Rock* opinion from an analytical and slightly more theoretical perspective in order to assess whether the same decision would or should be reached as to the gun-restriction language. In doing so, this article may have uncovered a new direction for both litigational and legislative efforts to reduce domestic violence in this context.

Justice Scalia's opinion is a fascinating and complex exegesis on an aspect of constitutional "property" that is outside the mine run of procedural due process fact scenarios. First, he identifies a principle that precludes the claimed interest (enforcement of a domestic violence restraining order) from being constitutionally protected.[138] Then, as though a line he has drawn in the constitutional sand has been crossed, he steps back to another justification for denying constitutional protection, even if the preceding principle was not given the effect he identified. Seeking to impose an analytical structure on this intellectual bait-and-switch, the remainder of this Part identifies the following elements in the flow of argument:

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136. *Id.* at 768.

137. *See, e.g.*, Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47 (2006); Christopher J. Roederer, *Another Case in Lochner's Legacy, the Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order is a "Sham," "Nullity," and "Cruel Deception*," 54 DRAKE L. REV. 321 (2006); Kathleen K. Curtis, Comment, *The Supreme Court's Attack on Domestic Violence Legislation – Discretion, Entitlement, and Due Process in Town of Castle Rock v. Gonzales*, 32 WM. MITCHELL L. REV. 1181 (2006); Veronica J. Joice, Comment, *A Restraining Order and a Handgun: North Carolina's Attempt to "Empower" Victims of Domestic Violence,* 50 HOW. L.J. 289 (2006); Robert Kline, Case Comment, *Constitutional Law: Is there a Protected Interest in Protection (or are Court Orders Merely Suggestions)?*, 58 FLA. L. REV. 459 (2006); Corinne L. McCann, Note, *What Can States Do to Maintain Victims' Security, Deter Aggressor's Repeated Abuse, and Motivate Police Departments to Pursue Criminals in the Domestic Violence Context?*, 30 SETON HALL LEGIS. J. 509 (2006); Nicole M. Quester, Note, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in* Town of Castle Rock v. Gonzales *Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391 (2007); Mackenzie Williams, Case Note, *Constitutional Law – When States Break Promises: Defining Property Interests in the Procedural Due Process Context*, Town of Castle Rock v. Gonzales, *125 S. Ct. 2796*, 6 WYO. L. REV. 657 (2006); *see generally* Jennifer Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113 (2007) (examining the topic of firearms in connection with domestic violence).

138. *Castle Rock*, 545 U.S. at 756-64.

i. There was no entitlement because Colorado law did not impose a mandatory duty on the police to enforce the restraining order.[139]

1. Apparently mandatory statutory language was vitiated by tradition of police discretion.[140]

ii. Even if state law imposed a mandatory duty on police, there was no entitlement because the state legislature did not intend to create an entitlement benefitting the protected person.[141]

1. The statutory scheme for issuing and enforcing domestic violence restraining orders served other public purposes.[142]

2. Legislative intent to create a personal entitlement in the protected person is not present because the statutory language does not explicitly provide it.[143]

iii. Even if a personal entitlement were created by the statutory scheme, this "entitlement" does not constitute a property interest for purposes of procedural due process.[144]

1. A requirement that police "enforce the restraining order" is too vague and uncertain to be an entitlement or property interest.[145]

2. An entitlement that police "arrest or . . . seek an arrest warrant" cannot be a property interest because it is only an entitlement to a process.[146]

3. An entitlement that police enforce the restraining order does not resemble traditional notions of property because the benefit is incidental and it has no ascertainable monetary value.[147]

Each of these justifications for the *Castle Rock* decision is either inapplicable or operates differently in the firearms restriction context, so an opposite constitutional outcome should be reached.

### *B. Statutory Provisions Requiring Firearm Restrictions in Domestic Violence Protective Orders Create a Mandatory Duty on Judges to Retain Those Restrictions*

In order for an individual to have a claim for a due process violation in a deprived property interest, the person must "have a legitimate claim of entitlement to it."[148] The *Castle Rock* majority reasoned that there is no protected property interest if government officials have the discretion to grant or deny the benefit based on the circumstances, and that the police officers in

139. *Id.*
140. *Id.* at 760-62.
141. *Id.* at 764-66.
142. *Id.* at 765.
143. *Id.* at 765-66.
144. *Id.* at 766-68.
145. *Id.* at 760, 763-64.
146. *Id.* at 764.
147. *Id.* at 766-67.
148. *Id.* at 756.

*Castle Rock* had such discretion.[149] The Court identified two relevant aspects of police discretion in this context. The first is a well-established tradition of police discretion that had long coexisted with apparently mandatory arrest statutes.[150] As demonstrated in Parts II and III of this article, the relevant language of California's DVPO statute creates a mandatory duty on the part of judges to include firearm restriction language in such orders.[151] The only published decision of the California courts unequivocally denies that a judge has any discretion to omit the firearms restriction from the wording of the order.[152] It cannot therefore be said that any well-established tradition of judicial discretion operates as to retention of the statutory language banning the subject of a domestic violence restraining order from possession of firearms.

Second, police have inherent discretion as to the appropriate law enforcement actions based on the circumstances of a particular violation of law.[153] As to this element of its rationale, the *Castle Rock* majority appeared to contemplate either a very trivial violation of the restraining order or some compelling immediate reason why the police could not take action to arrest.[154] Such considerations are completely absent from the circumstance where a judge has decided to issue a domestic violence restraining order. The judge would not have agreed to issue an injunction if the threat to the protected person were trivial, and the only conceivable exigency is where the person subject to the order has an employment-related need to possess firearms, which is already accounted for via a statutory exception.[155]

Because no judicial analogue of the police discretion relied upon by the *Castle Rock* majority is applicable to removal of mandatory firearm restrictions from a domestic violence restraining order, enforcement of a constitutionally protected property interest should not run afoul of the principle that an entitlement cannot exist where government officials have discretion to grant or deny it.

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149. *Id.* at 756, 760-62.

150. *Id.* at 760-61.

151. It is worth noting that Justice Scalia's opinion in *Castle Rock* refused to grant any deference to the Tenth Circuit's interpretation of Colorado law on the issue of the mandatory nature of the relevant statutory language in that case. 545 U.S. 748, 756-57. Yet Justice Scalia did not himself cite any Colorado authority in reasoning that police retain discretion even in the face of an apparently mandatory statutory command, relying on more general principles derived from federal judicial decisions. *Id.* at 760-61. The dissent makes a similar point. *See id.* at 775 (Stevens, J., dissenting). Whether analogous federal judicial discretion principles exist that could overcome the seemingly unambiguous declarations of the California Court of Appeal in *Ritchie v. Konrad* is beyond the scope of this paper.

152. Ritchie v. Konrad, 10 Cal. Rptr. 3d 387, 400 (Ct. App. 2004).

153. *Castle Rock*, 545 U.S. at 761-62.

154. *Id.* ("It is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.").

155. *See* CAL. FAM. CODE § 6389(h) (West 2004).

### *C. Legislatures Enacting Mandatory Firearms Restrictions in Domestic Violence Protective Orders Intend to Create an Entitlement Benefitting the Protected Person*

The *Castle Rock* majority held that the statutory scheme for issuing and enforcing domestic violence restraining orders served other public purposes.[156] As to this consideration, the Court focused on the broad purpose of criminal laws:

> Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. . . . The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.'[157]

The difference between, first, police arresting the subject of a domestic violence restraining order for its violation and, second, a judge excising mandatory gun restriction language from such an order is very significant. Although it must be acknowledged that a restriction on gun possession by the subject of the order will have some benefit to society at large, it is the very specific focus of the statutory language to reduce the risk of gun violence to the protected person.

Justice Scalia went on to justify his conclusion that legislative intent to create a personal entitlement in the protected person was not present because the statutory language does not explicitly provide it. He noted that "[i]f she was given a statutory entitlement, we would expect to see some indication of that in the statute itself."[158] The opinion added, "[p]erhaps most importantly, the statute spoke directly to the protected person's power to 'initiate contempt proceedings against the restrained person if the order [was] issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order [was] issued in a criminal action.'"[159] The majority felt that "[t]he protected person's express power to 'initiate' civil contempt proceedings contrasts tellingly with the mere ability to 'request' initiation of criminal contempt proceedings—and even more dramatically with the complete silence about any power to 'request' (much less demand) that an arrest be made."[160]

Lack of an explicit legislative intention to create a personal entitlement appears to cut equally against finding a protected property interest in retention of the statutory language restricting gun possession. However, the implication the

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156. *Castle Rock*, 545 U.S. at 764-65.

157. *Id.* at 765 (alteration in original) (quoting 4 W. Blackstone, Commentaries on the Laws of England 5 (1769)).

158. *Id.*

159. *Id.* at 766 (citation omitted).

160. *Id.*

Supreme Court drew from the Colorado statute does not operate as powerfully in the context of the gun-restriction language. There is simply no reason why the California Legislature, for example, would need to involve the protected person in requesting or initiating insertion of language that is both required by statute and preprinted on the official form used by the judge to issue the restraining order.

### *D. Mandatory Firearm Restrictions in Domestic Violence Protective Orders Are Specific Enough to Constitute an Entitlement*

The *Castle Rock* court opined that a requirement that police "enforce the restraining order"[161] is too vague and uncertain to be an entitlement or property interest.[162] It identified the problematic vagueness as follows:

> Respondent does not specify the precise means of enforcement that the Colorado restraining-order statute assertedly mandated—whether her interest lay in having police arrest her husband, having them seek a warrant for his arrest, or having them "use every reasonable means, up to and including arrest, to enforce the order's terms."[163]

One cannot "be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague."[164]

The *Castle Rock* majority's objections based on the vagueness of the challenger's formulation of the interest for which she sought constitutional protection were included in its discussion of the mandatory nature of the Colorado statute's command to the police.[165] Thus, this aspect of the Court's analysis may not represent any distinct analytical element of the definition of a protected property interest under procedural due process. In characterizing the relief sought as either an arrest, arrest warrant, or enforcing the terms of the protective order, the Court noted that "indeterminacy is not the hallmark of a duty that is mandatory."[166] This consideration, taken alone, would not preclude constitutional protection in the context this article addresses, since the inclusion of the statutorily mandated language barring the subject of the protective order from possessing or owning firearms is quite specific.

### *E. A Victim's Interest in Having Mandatory Firearms Restrictions Retained in the Domestic Violence Protective Order Is Not Merely a "Process"*

Even if the problem of the vagueness of relief sought were ameliorated, the *Castle Rock* majority identified a more fundamental flaw in the plaintiff's

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161. *See id.* at 751.
162. *Id.* at 763-64.
163. *Id.* at 763 (citation omitted).
164. *Id.*
165. *Id.* at 763-64.
166. *Id.* at 763.

claims.[167] Justice Scalia argued that an entitlement that police "arrest or . . . seek an arrest warrant" cannot be a property interest because it is only an entitlement to a process.[168] In response to the dissent's claim that the plaintiff's entitlement was sufficiently specific because it was for the police to "either make an arrest or (if that is impractical) seek an arrest warrant,"[169] the majority rejected this formulation as a protected property interest:

> After the warrant is sought, it remains within the discretion of a judge whether to grant it, and after it is granted, it remains within the discretion of the police whether and when to execute it. Respondent would have been assured nothing but the seeking of a warrant. This is not the sort of 'entitlement' out of which a property interest is created.[170]

The discretion the Court again identifies as precluding the finding of a protected property interest is completely lacking from the context of mandatory firearm restriction language. When the decision is made to remove the required language from the order, the judge has already determined that the restraining order should issue, and has no further discretion to eliminate the mandatory language.[171] Where the interest the plaintiff seeks to vindicate is itself produced by government action, it is difficult to understand how process can be separated from outcome in the absence of the discretion the *Castle Rock* majority found so problematic. The retention of the mandatory statutory language cannot reasonably be characterized as a procedure, as it is a substantive component of the judicial order the protected person seeks to obtain.

### *F. Protected Property Interests Under Procedural Due Process Should Not Be Limited to "Traditional" Notions of Property*

The *Castle Rock* decision held that an entitlement that police enforce the restraining order does not resemble traditional notions of property because the benefit is incidental and has no ascertainable monetary value.[172] The first element of this criticism arose from the majority's conclusion that the interest claimed by the plaintiff would arise incidentally, not out of some new species of government benefit or service, but out of a function that government actors have always performed—arresting people when they have probable cause.[173] In what appears to be statutory interpretation on a somewhat general level, the majority concluded that the Colorado legislature did not have as a purpose (or

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167. *Id.* at 764.
168. *Id.*
169. *Id.*
170. *Id.*
171. *See* CAL. FAM. CODE § 6389(a) (West 2004).
172. *Castle Rock*, 545 U.S. at 766-67.
173. *Id.* at 767.

at least as the sole purpose) the creation of a protected interest specifically benefitting those who seek protective orders:

> Even if the statute could be said to have made enforcement of restraining orders "mandatory" because of the domestic-violence context of the underlying statute, that would notnecessarily mean that state law gave*respondent*an entitlement to*enforcement*of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people.[174]

Interests that have long been regarded as qualifying property interests under procedural due process would fail if the same analysis were applied to them. The property interest in a driver's license recognized in *Bell v. Burson* is illustrative.[175] The purpose of licensing statutes of this nature is not primarily (and certainly not solely) to benefit the person who claims due process protection—that is, to enable the holder of the license to drive. It is manifest that drivers licensing statutes seek to protect the community—other drivers, passengers, pedestrians, and property owners bordering the roadway—from persons not competent to drive safely. In any case, mandatory statutory language restricting firearm possession by the subject of a domestic violence restraining order is explicitly intended to protect the person who obtained the order.

*Castle Rock* also justified its conclusion that the asserted entitlement could not be a cognizable property interest because it was indirect, inasmuch as the complained-of governmental action (the restraining order) directly affected the person restrained and only incidentally benefited the victim who had sought the order.[176] Justice Scalia wrote,

> In this case . . . "[t]he simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to" respondent's reliance on cases that found government-provided services to be entitlements.[177]

This analysis is as confusing as the "primary or sole intended benefit" concept. The Supreme Court held in *Vitek v. Jones* that a state rule permitting the transfer of an incarcerated prisoner to a state mental hospital when a physician certifies that the prisoner is mentally ill created a liberty interest in

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174. *Id.* at 764-65 (emphasis added).

175. Bell v. Burson, 402 U.S. 535, 539 (1971).

176. *Castle Rock*, 545 U.S. at 766-67.

177. *Id.* at 767-68 (quoting O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 788 (1980)).

such a prisoner that justified constitutional scrutiny of the process by which the prisoner was so designated.[178] But the state did not enact such a rule primarily or directly to benefit the prisoner, and the operation and impact of the rule is on the prison authorities, who are constrained in their power to transfer the prisoner. While this example arises in the context of a protected liberty interest rather than a property interest, the principle of direct versus incident state intent to benefit should operate similarly in either situation.[179] A test requiring that state law be primarily or solely, as well as directly (rather than incidentally), of benefit to the person claiming a protected interest significantly narrows the range of interests the Due Process Clause would protect.

The *Castle Rock* majority may have been announcing a requirement for a protected property interest that the state legislature creating it both (1) utilize language sufficiently explicit to indicate that the class of persons claiming the property interest is intended to receive a property interest, and (2) not be animated, or primarily animated, by other legitimate public purposes. One the other hand, Justice Scalia may merely have been throwing in the rhetorical kitchen sink as justification for his conclusions. If the former were true, Blackstone's commentary[180] would equally detract from a procedural due process claim based on elision of statutory language restricting gun possession. There is certainly no language in California Family Code § 6389 that would support an argument that it was solely and explicitly intended to grant the party seeking the order the specific interest to compel (or even request) the judge to include the no-gun provisions in that order.

The notion that prohibiting gun possession by the subject of a domestic violence restraining order who has previously threatened or engaged in violence against the protected person only incidentally affects her is ludicrous. *O'Bannon* involved government authority to decertify nursing homes from being qualified to receive federal payments.[181] The mandatory firearm restriction is certainly intended to control the behavior of the violent subject of the restraining order—but the implications are much weaker here. A law authorizing a government agency to oversee federal funding of nursing homes may be primarily directed at insuring that those providers maintain proper standards of care,[182] but the very purpose of controlling the target of the restraining order is to reduce the danger of firearm use against the protected

178. Vitek v. Jones, 445 U.S. 480, 487-88 (1980).

179. *Vitek* also identified a constitutionally derived liberty interest triggered by adverse social consequences to the individual, unjustified intrusions on personal security, and compelled treatment in the form of mandatory behavior modification programs. *Id.* at 491-92.

180. "The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.'" *Castle Rock*, 545 U.S. at 765 (quoting 4 *W.* Blackstone, Commentaries on the Laws of England 5 (1769)) .

181. O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 775 (1980).

182. Id. at 786-87.

person. This seems to be much too close a connection to be deemed "indirect" or "incidental," as the high court majority characterized more general statutory enforcement mechanisms.[183]

The *Castle Rock* majority's focus on monetary value as a necessary characteristic of a protected property interest was a new development in this area of constitutional law. As the dissent in *Castle Rock* pointed out[184] and the majority acknowledged,[185] no Supreme Court decision had ever articulated such a requirement for a protected property interest. Citing a Thomas Merrill article for the proposition that lack of ascertainable monetary value was an implicit requirement for a protected property interest,[186] the *Castle Rock* majority said of the interest claimed by the plaintiff that "[s]uch a right would not, of course, resemble any traditional conception of property."[187]

Thomas Merrill offered three justifications for concluding that the federal courts have implicitly required ascertainable monetary value for property interests under procedural due process.[188] First, "nearly all" the property interests recognized by the decided cases had monetary value.[189] Second, monetary value would distinguish due process property interests from due process liberty interests.[190] Finally, monetary value would distinguish property interests from all other interests that had "value" of some sort, thus tying the constitutional definition to the "ordinary understanding" of property.[191]

It is beyond the scope of this article to explore in detail what analytical elements are necessary or useful to define "ascertainable monetary value." However, it takes only a moment's reflection to recognize that the law is accustomed to assigning monetary value to things that would not traditionally be considered property, such as the pain and suffering experienced by tort victims, loss of consortium, and damage to reputation. One suspects, although the Court did not define its terminology, that "ascertainable monetary value" means "having some measureable economic value that could be realized in money."[192] One reason for so thinking is that a person in the circumstances of the plaintiff in *Castle Rock* would certainly be able to identify a sum of money

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183. *Castle Rock*, 545 U.S. at 767-68.

184. *Id.* at 791 n.19 (Stevens, J., dissenting) ("Our cases, of course, have never recognized any requirement that a property interest possess '"some ascertainable monetary value."') (citation omitted).

185. *Id.* at 766 ("Although that alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not 'have some ascertainable monetary value,' as even our '*Roth*-type property-as-entitlement' cases have *implicitly* required.") (emphasis added) (citation omitted).

186. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000).

187. *Castle Rock*, 545 U.S. at 766.

188. Merril, *supra* note 186, at 964-65.

189. *Id.* at 964.

190. *Id.* at 964-65.

191. *Id.* at 965.

192. *See Castle Rock*, 545 U.S. at 766.

that she would be willing to pay to have avoided the murder of her two children. Justice Scalia would no doubt dismiss such an argument for monetary value with a snide witticism, but the notion that an interest has greater value than could possibly be measured in money should not be a basis for refusing constitutional protection for it.

Comparing the interest of the plaintiff in *Castle Rock* with the interest that is the topic of this article within the narrow lens of "ascertainable monetary value" used by Justice Scalia,[193] there is little that distinguishes the two. Having rejected the dissent's analogy that "protection" from the subject of the order could be the subject of a private services contract for which money would be paid, in part because the protected person could not initiate an arrest,[194] the same criticism would apply to statutory no-gun possession language—only a judge, not a private person, can insert language into a judicial order.

### *G. A Victim's Interest in Retaining Mandatory Firearms Restrictions in a Domestic Violence Protective Order Should Be Recognized as a Liberty Interest Under Procedural Due Process*

If the Justices wish to retain originalist theoretical purity by connecting the procedural due process definition of property to traditional or ordinary understandings of property, this same objection would disqualify from being a property interest an interest in retaining the statutorily mandated language restricting gun possession by the subject of a domestic violence restraining order, since such an interest arguably has no commercially realizable value in money. But Merrill's analysis suggests a new theoretical direction for this domestic violence context.

Merrill asserted that the U.S. Supreme Court defines "liberty" interests as being created by the Constitution and "property" interests by state law.[195] But Merrill also claimed that the Court has identified a new form of liberty interest created by state law: "[p]ositive liberty interests typically involve freedoms from restraint or punishment that the state is otherwise free to inflict, although the concept may have broader extensions."[196] The new liberty interests Merrill addressed arose in cases involving the liberty interests of incarcerated prisoners.[197] But there is no reason a state should not have the power to create a liberty interest in its citizens to be free from domestic violence or from the increased danger of domestic violence involving firearms. As the *Vitek* court stated, "[w]e have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment."[198] It could be argued that Colorado, California, and

193. *Id.*

194. *Id.* at 766, n.12.

195. Merrill, *supra* note 186, at 919-20.

196. *Id.* at 964.

197. *Id.* at 965-66 (citing Sandin v. Conner, 515 U.S. 472, 482-83 (1995), Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63 (1989)).

198. Vitek v. Jones, 445 U.S. 480, 488 (1980).

Wisconsin have already done precisely that. It is the suggestion of this article that future litigants and those seeking legislative action include this argument in their efforts.[199]

*H. The Sole Attempt to Distinguish Castle Rock Resulted in Judicial Rejection*

In the single decision that deals with a similar procedural due process issue, the court was not receptive to an attempt to distinguish *Castle Rock* in the context of domestic violence orders.[200] In *Neal v. Lee County*, Tamera Neal went to the sheriff's department to report that her ex-boyfriend had been stalking her.[201] A department employee erroneously told her that she would need to go to back to her own county of residence, rather than the county of residence of her ex-boyfriend, to file the charges.[202] While Neal was driving back to the sheriff's department in the county of her residence, her ex-boyfriend blocked her vehicle with his, exited his vehicle, and shot her five times.[203] Plaintiffs, wrongful death beneficiaries, asserted that the employee's action deprived Neal of a constitutionally protected property interest due to the Mississippi Protection From Domestic Abuse Law,[204] which contains mandatory language like that in the *Castle Rock* statute.[205] Apparently responding to plaintiffs' attempt to distinguish *Castle Rock*, the district court noted,

> [T]he Mississippi statute is distinguishable from the Colorado statute in that Colorado's is an arrest statute whereas Mississippi's is a protection statute. The court is confident that the Castle Rock Court would find this difference of no consequence, however, as that Court also addressed the "entitlement" argument from the victim's perspective. The Court found that a person cannot "be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague." The Castle Rock plaintiff, like the plaintiff in the present case, did not specify the means of enforcement that the statute at issue allegedly mandated. In Castle Rock, it was unclear "whether [the plaintiff's alleged] interest lay in having police arrest her

199. *See* Allison Cambria, Note, *Defying a Dead End: The Ramifications of* Town of Castle Rock v. Gonzales *on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155 (2006) (offering other suggestions for improving protection of domestic violence victims); Lynn Combs, Note, *Between a Rock and a Hard Place: The Legacy of* Castle Rock v. Gonzales, 58 HASTINGS L. J. 387 (2006) (same); Mandeep Talwar, Note, *Improving the Enforcement of Restraining Orders after* Castle Rock v. Gonzales, 45 FAM. CT. REV. 322 (2007) (same).

200. *See* Neal v. Lee County, No. 1:08CV262-B-D, 2010 WL 582437 (N.D. Miss. Feb. 12, 2010).

201. *Id.* at *1.

202. *Id.*

203. *Id.*

204. *Id.* at *1-2.

205. *Id.* at * 3.

> husband, having them seek a warrant for his arrest, or having them 'use every reasonable means, up to and including arrest, to enforce the order's terms." Likewise, the plaintiff in this case has failed to specify the nature of her entitlement. . . . "Such indeterminacy is not the hallmark of a duty that is mandatory."[206]

### *I. Illegal Removal of Firearm Restrictions Violates Principles of Substantive Due Process*

A person predisposed to be violent through incidents of domestic abuse surrenders his Second Amendment right to bear arms.[207] A judge's removal or omission of mandatory firearm restrictions in a domestic violence restraining order might justify a claim that the state has failed to protect the victim from a harm created by the state itself, to which *Castle Rock* would not apply.[208] Claims based on substantive due process do not turn on the "entitlement"-based definition of "property" under procedural due process.[209] Therefore, the claim may be decided more favorably to domestic violence victims. While *DeShaney v. Winnebago County Department of Social Services* held that the state has no duty to protect individuals against the acts of private actors, the opinion suggested that an exception to that rule existed when state actors play a part in creating the danger confronted by the victim or increased the victim's vulnerability to those risks.[210] A state-created danger comprises four elements:

> (1) "the harm ultimately caused was foreseeable and fairly direct;"
> (2) a state actor acted with a degree of culpability that shocks the conscience;
> (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.[211]

An argument can be fashioned that each of these elements is satisfied where a judge refuses to insert or excises statutorily mandated language banning gun possession in a DVPO and where the subject of the order

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206. *Id.* at *4 (citation omitted).
207. United States v. Emerson, 270 F.3d 203, 261 (2001).
208. *See* Caldwell v. City of Louisville, 200 F. App'x 430, 435 (6th Cir. 2006).
209. *Id.* at 434.
210. DeShaney v. Winnebago Cnty Dep't of Soc. Servs., 489 U.S. 189, 195, 201-02 (1989).
211. Bright v. Westmoreland Cnty, 443 F.3d 276, 281 (2006) (citations omitted).

subsequently commits an act of gun violence against the beneficiary of the order. This argument has four parts. First, use of a firearm to commit an act of violence in this context is readily foreseeable, because the threat of violence is a central justification for issuance of the protective order. For the same reason, a preexisting threat of violence, use of a firearm by the subject of the order is a fairly direct result of the court's failure to prohibit firearm possession by that person. Second, the judge's conduct in excising the statutorily required language shocks the conscience when viewed in light of the acute danger faced by the abuse victim, and given the clear statutory mandate to preclude firearm possession or ownership.

Third, while it can be argued that gun possession by a person who has engaged in violent behavior poses a threat to the public, the protected person foreseeably risks a much higher and more focused risk of potential harm because of the dynamics between domestic abusers and their victims. Similarly, victims of domestic violence are a discrete class of persons subjected to increased risk by judicial failure to prohibit gun possession by the abusers. Finally, the judge's decision to excise the relevant statutory language from the protective order is an affirmative use of judicial authority that renders the protected person more vulnerable to the danger of gun violence than if the judge had chosen to insert or leave that language.

Because the substantive due process claim raised by the plaintiff in *Castle Rock* was not at issue before the Supreme Court,[212] examination of the Court of Appeals decision is necessary to provide a basis for comparison to the subject of this article. The Court of Appeals dismissed the plaintiff's substantive due process claim:

> In order to satisfy the first requirement and show that the defendant created the danger or increased the plaintiff's vulnerability to it, a plaintiff must show affirmative conduct on the part of the defendant, "that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." If this element is not shown, the substantive due process claim must fail. In assessing this factor, it is important to distinguish between affirmative conduct that creates or enhances a danger and a failure to act that merely does not decrease or eliminate a pre-existing danger. This distinction, while subtle, is critical under *DeShaney* and its progeny.[213]

The Tenth Circuit focused on the fact that there was no affirmative act by police. The wrong complained of was a failure to take action when the plaintiff reported her concerns that the subject of the domestic violence restraining order

212. Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 754-55 (2005).

213. Gonzales v. City of Castle Rock, 307 F.3d 1258, 1263 (10th Cir. 2002), *rev'd* 545 U.S. 748 (2005) (citation omitted).

had not returned her children.[214] Thus, the danger was "created" by the actions of the subject of the order, not by the police.[215] The court contrasted a case finding a state-created danger where a social worker had acted affirmatively by recommending that a parent be given legal custody of a child despite the defendant's knowledge of evidence and allegations that the parent had previously abused the child.[216]

In California, at least, judges are taking affirmative action, because domestic violence orders contain the statutorily mandated restrictions on gun possession in pre-printed language on a form, which the judges line out.[217] Because the subject of the order has demonstrated previous violence against the protected person, allowing the subject of the order to possess firearms certainly makes the protected person more vulnerable to the danger of violence by significantly increasing the risk of death. Just as the social worker does not create the danger of the abusive parent, but increases the danger by acting affirmatively to return the child to that parent's custody, a judge acting affirmatively to line out language restricting firearm possession increases a preexisting danger of firearm violence by the subject of the order. Challenges to this type of judicial wrongdoing should therefore be able to rely on the state-created-danger doctrine as well as the liberty-based procedural due process arguments discussed above.

## CONCLUSION

While some state legislatures have taken a more lenient approach to firearm restrictions, both California and Wisconsin have taken important legislative steps to further domestic violence prevention. In an attempt to stem the tide of violence against women, California altered its firearm restriction statute from a "may" to a "shall" statute. This ensures that domestic violence batterers will not have a legal right to own or possess a gun. This change was designed to give greater protection to victims of domestic violence and to prevent uneven application of the relevant statutory provision in specific contexts.

Part II demonstrated that significant judicial wrongdoing is taking place, often concentrated in specific geographic areas, when judges issuing domestic violence restraining orders excise mandatory restrictions on the possession of firearms by the subjects of the orders. As demonstrated in Parts III and IV, this judicial action is completely unjustified, in direct contravention of statutory language (included on the preprinted forms themselves), and unambiguously violative of state law as reflected in appellate decisions. This judicial wrongdoing has a disproportionate impact on women because women obtain

214. *Id.*
215. *Id.*
216. *Id.* (citing Currier v. Doran, 242 F.3d 905 (10th Cir. 2001)).
217. TASK FORCE, *supra* note 3, at 37.

four fifths of all domestic violence orders issued (in California) and are disproportionately victims of firearm violence when it occurs.

This article's analysis also shows that, even applying existing Supreme Court precedent, both the questionable "logic" of *Castle Rock* as to procedural due process rights and settled law as to substantive due process (the "state-created danger" doctrine), a woman re-victimized by a judge via removal of mandatory firearms restrictions from her domestic violence restraining order should be able to establish that her constitutional rights are violated by such judicial wrongdoing. This article has identified a potentially valuable new mode of argument in the procedural due process area, characterizing the protected woman's interest as a "liberty" in addition to (or rather than) a "property" interest, to obviate the conservative Supreme Court majority, which is apparently intent on defining "property" interests by assessing their monetary value.

Lawyers representing women seeking domestic violence restraining orders must be aware of the danger of judicial removal of the mandatory firearms restrictions and of the illegality and unconstitutionality of such wrongdoing, so that they might effectively counter the removal at the trial court level. It is unlikely that resources exist to seek appellate review in any significant number of cases involving removal of firearms restrictions from DVPOs. Indeed, *any* appellate review would be meaningless if the woman seeking protection was killed or seriously injured by firearm violence during the years-long period such appellate review would take.

Where statutory law has not advanced as it has in California and Wisconsin, advocates for increased protection for victims of domestic violence should also be informed of the issues and principles addressed in this article, so that proposed legislation can take account of the threat of judicial wrongdoing and avoid the purported ambiguities upon which the *Castle Rock* majority seized to reach the unpalatable outcome in its domestic violence context. Again, the "liberty" interest argument of this article's procedural due process analysis should be a central component of legislative advocacy, permitting state legislatures to explicitly create an interest that will justify federal constitutional protection under that doctrine.