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Criminal Procedure / Alternatives to Jail Time: Overcrowding and Nonviolent Driving Offenders

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Alternatives to Jail Time: Overcrowding and Nonviolent Driving Offenders

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Code Sections Affected

Vehicle Code § 14601.9 (new).
AB 1311 (Romero); 1999 STAT. Ch. 122

I. INTRODUCTION

Between 1980 and 1994, the U.S. adult jail population rose from 163,994 to 490,442, a 199% increase.[1] These increases in the jail population have contributed to an unfortunate overcrowding problem.[2] In mid-1998, the nation's jails were operating at 97% of their rated capacity, holding an estimated 664,847 individuals.[3] For lack of a better solution, some jurisdictions have been releasing inmates early or simply not booking misdemeanor suspects into jail.[4] Solutions to overcrowding have included "double-bunking"[5] prisoners, expanding existing facilities, and building new facilities, but counties continue to look for alternatives.[6] In response to the overcrowding problem, the California Legislature enacted Chapter 122 to establish a pilot program to provide an alternative to jail time for certain nonviolent offenders.[7]

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1. JOHN IRWIN & JAMES AUSTIN, IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE 3 (1997).

2. David Parrish, *Jails Are Overcrowded, But County Coffers Aren't*, ORANGE COUNTY REG., Mar. 28, 1998, at A6, *available in* 1998 WL 2620639.

3. DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1998 1 (1999).

4. Parrish, *supra* note 2, at A6.

5. "Double-bunking" means that twice as many bunks are installed in the existing number of cells, effectively housing twice as many prisoners in the same amount of space. Pamela Martineau, *Judge Will Allow Double-Bunking at Downtown Jail*, SACRAMENTO BEE, Aug. 21, 1998, at B1. This is achieved at a lower cost than constructing entirely new facilities. *Id.*

6. Parrish, *supra* note 2, at A6; *see also* Martineau, *supra* note 5, at B1 (discussing alternatives for dealing with overcrowding and potential benefits from double-bunking prisoners).

7. CAL. VEH. CODE § 14601.9 (enacted by Chapter 122); *see infra* text accompanying note 28 (limiting application of Chapter 122 to non-injury, non-DUI driving offenses involving suspended or revoked drivers' licenses).

II. BACKGROUND

A. California's Overcrowding Problem

In California, the jail population increased by 118% between 1981 and 1994.[8] At the same time, correctional spending increased by 323%.[9] Despite this increase in spending, the jurisdiction with the highest average daily jail population, Los Angeles County, was still at 100% capacity at midyear 1998.[10] Nationwide, of the twenty-five largest jail jurisdictions in mid-1998, seven were in California, and all of them were occupied at more than 90% capacity.[11] Orange County jails had the highest occupancy rate by far, at 145% of capacity.[12] Of these twenty-five jurisdictions, California's San Bernardino and Orange Counties reported the largest increases in population.[13]

B. Public Attitudes Toward Alternative Punishments

According to opinion polls, a majority of Americans list crime as a major concern, think that offenders should be punished, and believe that punishments should generally be more harsh than they currently are.[14] However, people are willing to consider other factors, such as overcrowding and incarceration costs,

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8. *See* IRWIN & AUSTIN, *supra* note 1, at 150 (stating that the California jail population increased from 34,064 to 74,269 between 1981 and 1994).

9. *Id.* Since 1990, operation costs of state correctional systems have been more than $5 billion annually. *Id.*

10. GILLIARD, *supra* note 3, at 8. Since at least 1988, with the exception of midyear 1996, Los Angeles County has been the jurisdiction with the highest average daily jail population. *See* GILLIARD, *supra* note 3, at 8 (showing the average daily jail population of the Los Angeles County jail jurisdiction for the years 1996 to 1998); DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995 12 (1996) (showing the average daily jail population of the Los Angeles County jail jurisdiction for the years 1993 to 1995); CRAIG A. PERKINS ET AL., U.S. DEP'T OF JUSTICE, JAILS AND JAIL INMATES 1993-94 7 (1995) (showing the average daily jail population of the Los Angeles County jail jurisdiction for the years 1988 to 1994).

11. GILLIARD, *supra* note 3, at 8. "Percentage of occupation" is the ratio of all inmates to total capacity. The other California jurisdictions among the twenty-five largest were San Diego County (10th, 104% capacity), Orange County (12th, 145% capacity), San Bernardino County (13th, 114% capacity), Santa Clara County (14th, 123% capacity), Alameda County (17th, 91% capacity), and Sacramento County (21st, 94% capacity). *Id.* These seven California jail jurisdictions together hold approximately eight percent of the nation's jail inmates. *Id.*

12. *Id.*

13. *Id.* Between midyear 1997 and 1998, San Bernardino County's jail population increased by 37.5%, and Orange County's increased by 13.3%. *Id.* The average daily population of these two jurisdictions has been increasing steadily since at least 1988. *See* GILLIARD, *supra* note 3, at 8 (showing the average daily jail population of the Orange County and San Bernardino County jail jurisdictions for the years 1996 to 1998); GILLIARD & BECK, *supra* note 10, at 12 (showing the average daily jail population of the Orange County and San Bernardino County jail jurisdictions for the years 1993 to 1995); PERKINS ET AL., *supra* note 10, at 7 (showing the average daily jail population of the Orange County and San Bernardino County jail jurisdictions for the years 1988 to 1994).

14. Jody L. Sundt, *Is There Room for Change? A Review of Public Attitudes Toward Crime Control and Alternatives to Incarceration*, 23 S. ILL. U. L.J. 519, 520 (1999).

when forming opinions about appropriate types of punishment.[15] The public certainly feels that violent offenders should go to prison, but it is willing to concede that perhaps nonviolent offenders could be punished in an alternative, more community-based manner.[16] Jurisdictions are turning to alternative punishments in increasing numbers,[17] and a majority of people polled in one study viewed alternative programs such as intensive supervision, probation and electronic monitoring (EM)[18] as effective ways to protect the community while still relieving overcrowding.[19] In California, a 1991 survey found a vast majority of respondents preferring that the State utilize more restrictive punishments than probation, but less expensive methods than sending offenders to prison.[20]

C. Treatment of Certain Misdemeanor Traffic Offenders Under Existing Law

Generally, local jail facilities confine individuals before or after adjudication, usually holding inmates with sentences of up to one year.[21] In California, every misdemeanor offender has the right to a jury trial, which can be costly to the state.[22] These costs have prompted the Legislature to consider diverting some misdemeanor offenders from the court system.[23] Prior to Chapter 122, county district attorneys were prohibited from establishing any diversion programs for drivers charged with misdemeanor driving offenses.[24] Existing law prohibits people from driving when their driver's licenses have been suspended or revoked.[25] Penalties for violations not

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15. *Id.* at 524.

16. *Id.* at 525.

17. GILLIARD, *supra* note 3, at 5. In 1995, 34,869 of the 541,913 persons under jail supervision were located outside a jail facility. *Id.* In 1996, 72,977 of 591,469 persons were under outside supervision, while 1997 figures show that 70,239 out of 637,319 persons were under outside supervision, and 1998's statistics reveal that 72,385 out of 664,847 were under outside supervision. *Id.*

18. *See infra* note 49 and accompanying text (explaining the use of an EM system).

19. Sundt, *supra* note 14, at 526-27.

20. *Id.* at 527.

21. GILLIARD, *supra* note 3, at 5.

22. CAL. CONST. art. I, § 16; *see* Mills v. Mun. Ct., 10 Cal. 3d 288, 299, 515 P.2d 273, 281 (1973) (comparing the federal right to a jury trial with the right to a jury trial in California).

23. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1311, at 3-4 (May 11, 1999) (opining that courts and prosecutors would find prosecuting crimes against people and property to be a better use of judicial resources).

24. CAL. PENAL CODE § 1001.51(c)(6) (West 1985) (prohibiting diversion of any "driving offense punishable as a misdemeanor pursuant to the Vehicle Code"). Chapter 122 is applicable only to violations of California Vehicle Code sections 14601, 14601.1, and 14601.3. CAL. VEH. CODE § 14601.9(a) (enacted by Chapter 122); *see also infra* notes 25-26 (detailing the provisions of Vehicle Code sections pertaining to driving with a suspended or revoked license, which include these three).

25. *See* CAL. VEH. CODE § 14601 (West Supp. 2000) (prohibiting driving with a driver's license suspended or revoked for negligent or reckless driving); *id.* § 14601.1 (West Supp. 2000) (prohibiting a driver from driving when her driver's license is suspended or revoked for reasons other than those listed in sections 14601, 14601.2, and 14601.5); *id.* § 14601.2 (West Supp. 2000) (prohibiting a driver from driving when his driver's license is suspended or revoked for driving under the influence of an alcoholic beverage or any drug); *id.* § 14601.3 (West Supp. 2000) (designating drivers as "habitual traffic offenders" if they amass a certain number of convictions or

resulting in bodily injury consist of jail time, fines, or a combination of both, and are assessed according to the circumstances under which the arrest was made or the license revoked.[26]

III. CHAPTER 122

Chapter 122 allows district attorneys of certain counties[27] to establish an alternative program for persons who are found guilty of non-DUI, non-injury driving offenses involving suspended or revoked drivers' licenses, or for persons pleading guilty or no contest to such offenses.[28] Under the new law, the district attorneys of these counties may now enter into written agreements with offenders for participation in the program in lieu of jail sentences.[29] The court, in its discretion, may order the offender to comply with the agreement.[30] These agreements require the offender to complete the elements of the program within sixty days, or within the term of the maximum jail sentence allowed under the

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accidents by driving while their driver's license is suspended or revoked); *id.* § 14601.4 (West Supp. 2000) (mandating imprisonment for a driver who causes bodily injury while driving when her driver's license has been suspended or revoked); *id.* § 14601.5 (West Supp. 2000) (prohibiting a driver from driving when his driver's license has been suspended or revoked for refusal to take a blood-alcohol test or for having a blood-alcohol concentration in excess of the legal limit).

26. *See id.* § 14601 (West Supp. 2000) (imposing for a first conviction a fine of $300 to $1000 and imprisonment in the county jail for five days to six months, and a fine of between $500 and $2000 and imprisonment in the county jail for ten days to one year for a conviction occurring within five years of a conviction for a prior similar offense); *id.* § 14601.1 (West Supp. 2000) (imposing a fine of between $300 and $1000 or imprisonment in the county jail for up to six months, or both a fine and imprisonment, for the first conviction, and a fine of $500 to $2000 and imprisonment in the county jail for five days to one year for a conviction occurring within five years of a conviction for a prior similar offense); *id.* § 14601.2 (West Supp. 2000) (imposing a fine of $300 to $1000 and imprisonment in the county jail for ten days to six months for the first conviction, and a fine of $500 to $2000 and imprisonment in the county jail for thirty days to one year for a conviction occurring within five years of a conviction for a prior similar offense); *id.* § 14601.3 (West Supp. 2000) (imposing a fine of $1000 and imprisonment in the county jail for thirty days for the first conviction, and a fine of $2000 and imprisonment in the county jail for 180 days to one year for a conviction occurring within seven years of a conviction as a "habitual traffic offender"); *id.* § 14601.5 (West Supp. 2000) (imposing a fine of $300 to $1000 instead of or in addition to imprisonment in the county jail for up to six months for the first conviction, and a fine of $500 to $2000 and imprisonment in the county jail for ten days to one year for a conviction occurring within five years of a conviction for a prior similar offense); *see also supra* note 25 (indicating the conditions under which these penalties may be imposed for driving with a suspended or revoked driver's license).

27. The counties that may participate in the Chapter 122 pilot program are Alameda, Kern, Los Angeles, Orange, Placer, Sacramento, San Joaquin, San Luis Obispo, and Santa Barbara. CAL. VEH. CODE § 14601.9(a) (enacted by Chapter 122).

28. *See id.* (including only persons convicted of violations of Vehicle Code sections 14601, 14601.1, or 14601.3 for participation in the program); *see also supra* note 25 (relating the activities that these code sections prohibit).

29. *Id.* § 14601.9(b) (enacted by Chapter 122).

30. *Id.*

section violated, whichever is longer.[31] The court may still impose a fine upon any person who is ordered to participate in the program.[32]

The Chapter 122 program consists of two major elements: (1) a home-detention program requiring the use of an EM system;[33] and (2) one or more classes conducted through the district attorney.[34] The court may allow a person to perform certain activities, such as attending school or work, while enrolled in the home-detention program.[35] The classes are to provide information on the following: (1) the requirements imposed by certain Vehicle Code sections, including the penalties imposed for violation of these laws;[36] (2) transportation alternatives available to persons who do not have a valid driver's license;[37] and (3) the procedures for regaining the right to drive.[38]

Fees for the program may be recovered from offenders who participate,[39] subject to modification or waiver by the district attorney, based on the offender's financial position.[40] Nevertheless, inability to pay the fees is not a ground for denial of participation in the program.[41]

Every district attorney of every county that participates in the program must submit a report to the California Legislature by December 31, 2003, regarding that county's participation in the program.[42] The pilot program created by the new law is to remain in effect until January 1, 2004.[43]

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31. *Id.*

32. *Id.* § 14601.9(d) (enacted by Chapter 122).

33. The home-detention program and electronic monitoring program must comply with California Penal Code section 1203.016, which specifies the requirements for any home-detention program used in lieu of a jail sentence. CAL. PENAL CODE § 1203.016 (West Supp. 2000). Those participating in a home-detention program are required to remain in their homes during specified hours that are determined by an administrator. *Id.* § 1203.016(b)(1) (West Supp. 2000). Electronic monitoring is used to verify compliance with the program. *Id.* § 1203.016(b)(3) (West Supp. 2000). If the monitoring devices malfunction, or if a violation of the detention provisions occurs, the participant must agree that she may be taken into custody without further action by the court. *Id.* § 1203.016(b)(4) (West Supp. 2000).

34. CAL. VEH. CODE § 14601.9(b)(2) (enacted by Chapter 122).

35. *Id.* § 14601.9(b)(1) (enacted by Chapter 122).

36. *Id.* § 14601.9(b)(2)(A) (enacted by Chapter 122). The Vehicle Code provisions involved are sections 14601, 14601.1, and 14601.3. *Id.* § 14601.9(a) (enacted by Chapter 122); *see supra* note 25 (detailing the prohibitions contained in California Vehicle Code sections 14601 and 14601.1 to 14601.5); *supra* note 26 (listing the penalties applicable to those Vehicle Code sections).

37. CAL. VEH. CODE § 14601.9(b)(2)(B) (enacted by Chapter 122).

38. *Id.* § 14601.9(b)(2)(C) (enacted by Chapter 122).

39. Fees are based on a schedule approved by the district attorney or the board of supervisors, or the designee of the district attorney. *Id.* § 14601.9(e) (enacted by Chapter 122).

40. *Id.*

41. *Id.*

42. *Id.* § 14601.9(f) (enacted by Chapter 122).

43. *Id.* § 14601.9(g) (enacted by Chapter 122).

IV. ANALYSIS OF THE NEW LAW

Chapter 122 is intended to divert offenders from the formal court system into home-detention/EM systems, in response to fiscal concerns raised by prosecutors and courts on behalf of taxpayers.[44] While cost is a concern, the public also wants to be sure that offenders are punished for their crimes, and that the community is safe.[45] Most reports from existing home-detention/EM programs indicate that the programs are generally successful at achieving these goals.[46] This success, coupled with the public's belief that such programs promote responsibility among offenders, has led to increasing public support for home-detention/EM programs.[47]

A. *Effectiveness of Electronic Monitoring*

EM technology is relatively new.[48] In an EM program, an offender wears an electronic transmitter to verify her whereabouts.[49] In Chapter 122's program, as in many programs, EM is coupled with home-detention.[50] The use of EM is on the rise; by 1995, twenty-nine states, the District of Columbia, and the federal government were using EM for individuals on probation or parole.[51] By midyear 1998, over 10,000 persons of the approximately 72,000 persons supervised outside a jail facility were in EM programs.[52]

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44. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1311, at 3-4 (May 11, 1999) (stating that "prosecutors and courts may justifiably prefer to use scarce courtroom resources" for more serious offenses).

45. Sundt, *supra* note 14, at 520.

46. Mark E. Burns, Comment, *Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards*, 18 J. CONTEMP. L. 75, 86-87 (1992). Increased interest in EM has been prompted by various concerns, including a lack of faith in traditional solutions and a desire to reduce recidivism rates in view of increasing crime rates, overcrowding, and lack of funding for new facilities. *Id.* at 80-81.

47. *Id.* at 86-87. The idea of responsibility is inherent in the fact that if an offender is participating in a home-detention/EM program, he is participating in society and, for instance, can still work, thus keeping his family off of welfare. *Id.*

48. *See Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1895 (1998) (reporting that the first use of an EM system was inspired by a Spiderman comic strip in 1979, but no EM program was implemented until 1984). *See generally* Burns, *supra* note 46, at 78-92 (recounting the history of EM, its uses, and its advantages and disadvantages).

49. *See Spiderman's Net: An Electric Alternate to Prison*, TIME, Oct. 14, 1985, at 93 (providing descriptions of then-existing EM systems and their potential uses); Robert N. Altman & Robert E. Murray, *Home Confinement: A 90's Approach to Community Supervision*, FED. PROBATION, Mar. 1997, at 30-32 (detailing the operation of an EM system and providing figures for cost evaluation).

50. CAL. VEH. CODE § 14601.9(b)(1) (enacted by Chapter 122); *see supra* note 33 (discussing the general provisions of any home-detention system used in lieu of a jail sentence under California law).

51. *Developments in the Law—Alternatives to Incarceration*, *supra* note 48, at 1895-96.

52. GILLIARD, *supra* note 3, at 5. This number increased from 6,788 in EM programs in 1995 to 10,827 in 1998. *Id.*

The costs and benefits of EM programs are difficult to assess due to conflicting reports.[53] Implementing a home-detention/EM system is generally less costly than putting the offender in jail, and many in the corrections industry believe that the public is protected just as well under such a program as if the offender were in a jail.[54] Opponents of such systems are mainly concerned about opening the door to more intrusive surveillance methods, such as implanting devices in participants' bodies, installing video cameras in participants' homes, or other methods that would raise potential privacy issues.[55] Other opponents are concerned that offenders will receive a harsher punishment with EM than they would normally receive if they were released on parole.[56] This is less of a concern with Chapter 122 than it is with other EM programs, because the offenders who participate in the pilot program would be subject to a jail sentence and fine, rather than parole.[57] Still others disagree with those in the corrections industry, believing that imposing punishments such as EM does not send the right message; they believe that incarceration is most appropriate to emphasize disapproval of criminal acts.[58]

B. Chapter 122, Overcrowding, and Public Opinion

Alternative methods of punishment are an experiment in corrections, prompted by rising costs and overcrowding.[59] The Legislature has been careful to limit the offenders who may participate in the pilot program to persons whose offenses are relatively minor.[60] If these offenders would not be punished enough under the current system,[61] Chapter 122 improves the situation by ensuring that such criminals receive punishment comparable to those provided by law. The new law

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53. *See* Kevin E. Courtright et al., *The Cost-Effectiveness of Using House Arrest with Electronic Monitoring for Drunk Drivers*, FED. PROBATION, Sept. 1997, at 19, 19 (reporting that some studies have found EM programs coupled with house arrest to be cost-effective, other studies have found them to be too expensive or not effective in reducing overcrowding, and still other reports have found inequities in imposing EM punishments instead of the normal sentences that would have been imposed).

54. Burns, *supra* note 46, at 87.

55. *Id.* at 88. At least one state, Maryland, has installed cameras in some homes as part of its monitoring program for drunk drivers. *Id.* Burns also discusses the applicability of the Fourth and Fourteenth Amendments to EM and the few cases that have dealt with EM issues. *Id.* at 93-98.

56. *Id.* at 92. While some opponents have expressed the opinion that EM is not an effective punishment, most have focused on invasions of the individual rights of the offender. *Id.* at 88-92.

57. *See supra* note 26 and accompanying text (noting that the offenses of participants in the Chapter 122 program are generally subject to jail time and fines, not probation, and further specifying that the program is of similar duration to that of any jail sentence that would be served by these offenders).

58. Burns, *supra* note 46, at 91.

59. *Id.* at 92.

60. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1311, at 4 (June 22, 1999) (characterizing offenders eligible for the pilot program as "low profile"). The importance of prohibiting people from driving with suspended or revoked drivers' licenses is obvious. Non-injury, non-DUI violators of these provisions are a comparatively less-serious subset of offenders.

61. *See supra* text accompanying note 4 (noting that overcrowding has resulted in releasing prisoners early).

does not seem likely to decrease overcrowding very much, for the program is designed to punish a subset of new offenders who would not otherwise receive the punishment that they should, rather than to take people out of jail and punish them in an alternate manner. Granted, stemming the flow of new misdemeanor offenders will help decrease the jail population to some degree, but the effect is likely to be small.

In spite of a potentially negligible effect, however, the pilot program reflects a commitment to punishing offenders who have violated the law. The public has recognized the need for alternatives, and is willing to forgo incarceration for less serious crimes, provided that offenders are subject to supervision by the system.[62] Chapter 122 is an appropriate response, mandating supervision for offenders and allowing the State to save court costs while imposing necessary punishments and ensuring safety for the community.[63]

V. CONCLUSION

Whether Chapter 122 will relieve the overcrowding problem that plagues California's jail system is unclear.[64] What the new law does seem to do is provide an avenue for saving court time and punishing misdemeanor offenders effectively.[65] While the targeted traffic offenders currently are not punished to the extent that they would be in a system with adequate resources,[66] Chapter 122 ensures that these offenders will at least be subject to some form of punishment[67]—a punishment more strict than probation, which many Californians believe is too lenient a punishment for these individuals.[68] In this sense, Chapter 122's program is not so much a complete solution to overcrowding itself as it is a first step toward solving the problem of ineffective punishment of offenders. The number of misdemeanor offenders not clogging California jails because of Chapter 122's program may only

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62. *See supra* Part II.B (summarizing public attitudes toward alternative punishments).

63. By nature, home-detention/EM programs involve more supervision than does typical probation. *See supra* note 33 (detailing the requirements for any home-detention program used in lieu of a jail sentence); *see also supra* text accompanying note 54 (indicating that EM programs are less costly than jail); *cf. supra* note 46 and accompanying text (concluding that most home-detention/EM programs are successful at meeting the dual goals of punishment and community safety).

64. *See* GILLIARD, *supra* note 3, at 8 (noting that seven of the twenty-five largest jail jurisdictions at midyear 1998 were in California); *see also* IRWIN & AUSTIN, *supra* note 1, at 149-50 (discussing the rise in California's prison and jail populations).

65. *See supra* notes 21-23 and accompanying text (noting that trials can be costly to the State, and further recognizing a desire to divert less serious offenses from the court system).

66. *See supra* text accompanying notes 4-6 (indicating that the overcrowding problems have led to jurisdictions releasing people early or not booking some suspects into jail).

67. *See supra* notes 27-32 and accompanying text (explaining that qualified offenders may enter into agreements to participate in an EM program in lieu of a jail sentence, in addition to paying any fine that the court may impose).

68. *See supra* text accompanying note 20 (demonstrating Californians' desires for punishments more strict than probation).

result in jails that are merely crowded or overcrowded, instead of grossly overcrowded.[69] Accordingly, Chapter 122 should be viewed merely as a provisional remedy—a "quick fix" to be used until such time that Californians can find and implement a more permanent solution.

69. *See supra* notes 8-13 and accompanying text (explaining the extent of the overcrowding problem in various California jail jurisdictions).

Triggered: Targeting Domestic Violence Offenders in California

Cynthia D. Cook

Code Sections Affected

Code of Civil Procedure § 185 (amended); Family Code §§ 6304, 6346, 6380.5, 6389 (amended); Health and Safety Code § 124250 (amended); Penal Code §§ 11163.6 (new), 166, 273d, 273.5, 273.6, 836, 1328, 11163.3, 12021, 12028.5 (amended), 273.55, 273.56 (repealed).
SB 218 (Solis); 1999 STAT. Ch. 662

TABLE OF CONTENTS

I. INTRODUCTION

It happens too often: when a gun is readily available in a household already fraught with domestic violence, the chances of death for either partner are greatly increased.[1] Even when one partner has sought refuge in the law by obtaining a protective restraining order, the continuum of violence is not always effectively stopped.[2]

Determining a need for further protection of victims of domestic abuse in 1993, the California Legislature passed the Domestic Violence Prevention Act (DPVA).[3] This series of statutes created a framework that solidified domestic violence victims' rights and allowed victims to obtain a restraining order issued by a court.[4] The restraining order furnishes victims a legal remedy prior to or without any criminal conviction of the abuser.[5] It also provides victims of domestic abuse a way to isolate themselves from their abusers while resolving their domestic situations.[6]

Chapter 662 attempts to strengthen and augment the existing protections of domestic violence laws.[7] This omnibus bill[8] eliminates much of the discretion that the judiciary and police may exercise, thereby strengthening their respective roles as an effective deterrence to continuing patterns of domestic violence.[9] While the new law is primarily reactive in nature in that it increases sentencing requirements

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1. Catherine F. Klien & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 807-11 (1993); Children's Memorial Hospital, *Handguns and Family Violence* (visited June 2, 1999) <http://www.childmmc.edu/help/famviol.htm> (copy on file with the *McGeorge Law Review*).

2. *See, e.g.*, Carol Masciola, *Restraining Orders Didn't Stop Slayings*, ORANGE COUNTY REG., Feb. 3, 1999, at A1 (detailing the attack by Richard Willsey on his estranged wife Nancy and her new boyfriend after she had obtained a restraining order against Willsey); *see also, e.g.*, Dianne Anderson, *Domestic Violence and Child Abuse Go Hand in Hand: The Death of Little Louis Stewart*, PRECINCT RPTR., July 30, 1998, at A1 (describing the death of two-and-a-half-year old Louis Stewart at the hands of his father, Harold). In retaliation for the restraining order placed against him, Harold had locked himself and little Louis in a car, poured flammable liquid throughout, and lit a blaze while the mother of the child watched in horror. *Id.*

3. *See* CAL. FAM. CODE § 6200 (West 1994) (establishing that the division shall be entitled the Domestic Violence Prevention Act).

4. *Id.* § 6220.

5. *Id.* § 6520(a) (West Supp. 1999); *see id.* (providing that issuance of a protective order requires that the alleged victim be in "immediate and present danger of domestic violence" by the alleged abuser).

6. *Id.* § 6220.

7. *See infra* Part III (explaining the effects of Chapter 662 on the existing constructs of domestic violence laws); *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 13 (Apr. 14, 1999) (stating that the author's purpose in writing the bill was to "strengthen and create various domestic violence laws related to gun prohibition, enforcement of out-of-state restraining orders, counseling and sentencing requirements, and domestic violence review teams").

8. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 2 (Apr. 7, 1999) (deeming Chapter 662 an "omnibus bill"); *see also* BLACK'S LAW DICTIONARY 1087 (6th ed. 1990) (defining an "omnibus bill" as " [a] legislative bill including in one act various separate and distinct matters, and frequently one joining a number of different subjects in one measure . . . .").

9. *See infra* Part III (noting the specific focus Chapter 662 takes in constricting the discretion given to police officers and judges handling domestic violence offenses).

and focuses on the law's enforcement after domestic abuse has taken place, it also seeks to prevent further domestic abuse by continuing funding programs for women escaping abusive partners and by removing firearms from abusers subject to restraining orders.[10] Chapter 662 is anticipated to substantially impact the ever-increasing problem of domestic violence in California—if it can first overcome potential challenges of constitutionality and judicial support.[11]

II. LEGAL BACKGROUND

A. *Domestic Violence Protective Orders*

In 1993, the DVPA consolidated several bodies of law that were duplicated elsewhere in California law.[12] The purpose was to "prevent the recurrence of acts of violence . . . and to provide for separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution."[13] Under the DVPA, protective orders can be issued either as part of a judgment, after notice and hearing, or ex parte, without the presence of the alleged abuser.[14] A victim of domestic violence can seek an ex parte protective order restraining the abusive party from general contact, a residence, or specified behavior.[15]

Protective orders issued under section 6218 of the Family Code could trigger additional restrictions on the alleged abuser's right to possess firearms.[16] Prior to Chapter 662, section 6389 of the Family Code authorized the courts to restrict ownership or possession of a firearm by the alleged abuser for the duration of the

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10. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 1-2 (Apr. 7, 1999) (documenting the key provisions of Chapter 662 and the purposes behind them); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 5 (July 13, 1999) (expressing that "[d]omestic violence is the second leading cause of injury to women of all ages[;] . . . SB 218 seeks to help protect women from the unnecessary and inexcusable injury and death produced by domestic violence").

11. *See infra* Part IV (considering the possible challenges Chapter 662 faces in light of the Second Amendment, and addressing disgruntled judicial officers upset about the lack of discretion in handling domestic violence cases).

12. *See* CAL. FAM. CODE § 6200 (West 1994) (commenting on the enactment of the DVPA and its roots in different bodies of law).

13. *Id.* § 6220.

14. *Id.* § 6218 (West 1994).

15. *See id.* (providing three types of orders available to victims of domestic abuse); *id.* § 6320 (West 1994) (proclaiming the court's authority to issue an "ex parte order enjoining a party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, contacting repeatedly by mail with the intent to harass, or disturbing the peace of the other party"); *id.* § 6321(a) (West 1994) (allowing the court to issue ex parte orders banning an abuser from a shared residence or residence of the victim, regardless of any claim the abuser might have of title to the dwelling); *id.* § 6322 (West 1994) (empowering courts to prohibit a specified behavior of the restrained party under an ex parte order).

16. *See* 1994 Cal. Stat. ch. 871, sec. 5, at 1 (enacting CAL. FAM. CODE § 6389(a)) (providing that "[a] person subject to a protective order, as defined in Section 6218, may not own or possess a firearm while that protective order is in effect when prohibited by an order issued pursuant to this section").

protective order.[17] To ensure that the alleged abuser complied, the court could issue a relinquishment order mandating that the party surrender any firearms he or she owned or possessed to a local police station.[18] This surrender would occur at the hearing for the protective order, when a court, by a preponderance of evidence, determined that the defendant had a likelihood of committing acts of future violence against the victim.[19] Even where a finding of likely future acts of violence existed, an exemption to this provision was sanctioned for a party who could demonstrate that the possession of a firearm was necessary for his or her continued employment.[20] Ultimately, unless clear and convincing evidence existed that the offender would act violently in the future, courts remained reluctant to confiscate guns from domestic violence offenders.[21]

Because protective orders are often issued ex parte, another requirement in the DVPA anticipates that courts will make every effort to insure that the party subject to the protective order understands the provisions therein.[22] However, the law requires courts to publish all written proceedings, such as court transcripts and protective orders, in English.[23] Difficulties can arise in cases in which English is not the first language of the restrained person and that party does not have a clear understanding of the contents of the restraining order.[24]

To aid in the enforcement of protective orders, the DVPA includes provisions detailing the process for registering orders with law enforcement agencies.[25] After the court issues a protective order, the details and provisions of the order are

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17. CAL. FAM. CODE § 6389(g) (West Supp. 1999). *But see id.* (allowing the court to shorten the length of time a gun restriction could be in effect). While the statute provided for a gun restriction to be in place for the duration of a protective order, the court retained the discretion to create a shorter time frame for the gun restriction than the protective order.

18. *Id.* § 6389(c). *But see id.* § 6389(c), (i) (permitting a party subject to the protective order to sell a firearm to a licensed gun dealer as an alternative to surrendering the gun to the police).

19. *Id.* § 6389(c).

20. *Id.* § 6389(h).

21. *See, e.g.*, Letter from Estelle Chun, Director of Legal Services, Asian Pacific American Legal Center of Southern California, to Senator Hilda L. Solis (Apr. 2, 1999) [hereinafter Chun Letter] (copy on file with the *McGeorge Law Review*) (detailing an occasion on which the Asian Pacific American Legal Center attempted to get a restraining order for a client with a provision for the relinquishment of firearms by the accused offender). The judge granted the restraining order only after deleting the relinquishment request. *Id.*

22. *See* CAL. FAM. CODE § 6304 (amended by Chapter 662) (dictating that the court will inform the offender of the provisions of the protective order, including any requirements of firearm relinquishment and penalties for violations of the order); *see, e.g., id.* § 6384(a) (West Supp. 1999) (asserting that personal service of a protective order is not necessary where both parties are present at the hearing and have received actual notice of the provisions of the order). Thus, personal service of protective orders is necessary where the order was issued by the court ex parte. *Id.* § 6389(g).

23. *See* CAL. CIV. PROC. CODE § 185 (amended by Chapter 662) (clarifying that "[e]very written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other" language).

24. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 5 (Apr. 7, 1999) (stating that the intent of Chapter 662 is to make a comprehensible copy of the protective order accessible to the subject of the order).

25. CAL. FAM. CODE §§ 6380, 6380.5, 6381 (West Supp. 1999).

entered into the California Law Enforcement Telecommunications System (CLETS) and become part of the Domestic Violence Protective Order Registry.[26] The protective order becomes enforceable when the proper law enforcement authorities have received a copy of it, an officer is shown a physical copy, or an officer gains information of the order's existence through the Domestic Violence Restraining Order Registry.[27] Whether or not the order is properly registered with CLETS, the order is enforceable anywhere within the State.[28]

Protective orders issued by out-of-state courts can be entered into the Domestic Violence Restraining Order Registry at the request of the victim.[29] Valid out-of-state protective orders are "accorded full faith and credit by the courts of this state, and shall be enforced . . . as if [they] had been issued in this state."[30] Absent from the language of this section is an answer to the question of whether the out-of-state order is intended to be enforced in accordance with the terms as written by the out-of-state court or whether the order is to be enforced as if it had been written and issued by a California court.[31]

Finally, a knowing and willful violation of a court order is punishable as a misdemeanor with the possible sentence of one year in jail, a fine of $1,000, or both.[32] The same penalty applies for possession or ownership of a gun if a relinquishment order is violated.[33]

B. Police Enforcement of Domestic Violence Laws

After the issuance of a protective order, the effectiveness of that order largely depends on enforcement by the police.[34] Police officers currently have broad discretion when enforcing protective orders.[35] Officers called to the scene of domestic violence have the authority to confiscate any firearms viewed in plain sight or discovered during a consensual search of the premises.[36] However, this authority is limited to that which is necessary to protect themselves or others from

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26. *Id.* § 6380(a).
27. *Id.* § 6381(b).
28. *Id.* § 6381(a).
29. 1998 Cal. Legis. Serv. ch. 702, sec. 2, at 19 (amending CAL. FAM. CODE § 6380.5(b)).
30. 1998 Cal. Legis. Serv. ch. 702, sec. 2, at 19 (amending Cal. FAM. CODE § 6380.5(c)).
31. *Id.*
32. 1979 Cal. Stat. ch. 795, sec. 12, at 2713 (enacting CAL. PENAL CODE § 273.6).
33. 1994 Cal. Legis. Serv. ch. 871, sec. 2 (enacting CAL. FAM. CODE § 6389(m)).
34. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 218, at 5-6 (May 21, 1999) (illustrating how SB 218 diminishes some of the discretion officers have in their approach to domestic violence calls, "providing more uniform enforcement throughout California").
35. *Id.*
36. *See* 1984 Cal. Stat. ch. 901, sec. 1, at 340-41 (enacting CAL. PENAL CODE § 12028.5(b)) (allowing an officer to take temporary custody of a firearm if necessary for the protection of the peace officer or other persons present).

further violence.[37] Thus, if a domestic abuser appears calm and rational at the time the officers arrive, or threatens to harm a person not present at the scene, officers may not be compelled to confiscate a weapon visible in plain sight.[38]

Additionally, because violations of protective orders are punishable as a misdemeanor, officers responding to a violation of a protective order are authorized to arrest the subject only if they have probable cause to believe that a knowing and willful violation occurred.[39] While officers are trained to inform victims of their right to place an abuser under citizen's arrest,[40] often victims of domestic abuse are too intimidated to follow through with a citizen's arrest.[41] Thus, many domestic calls to which police officers respond result in unresolved issues and a potential for future violence.[42]

C. Penalties for Repeat Domestic Violence Offenders

Penalties for repeat domestic violence offenses combine relatively light jail sentences with questionable counseling programs offered in conjunction with probation. A domestic violence offender who abuses his spouse twice within seven years qualifies for a sentence of ninety-six hours of jail time and participation in a batterer's treatment program.[43] Additionally, if he has two or more prior convictions of domestic violence within a seven-year period, the next offense requires a

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37. *Id.*

38. *See* Letter from Marci Fukuroda, Attorney, California Women's Law Center, to Senator Hilda L. Solis, at 1 (Mar. 4, 1999) [hereinafter Fukuroda Letter] (copy on file with the *McGeorge Law Review*) (claiming that:

> [d]uring the week of February 22nd, the Law Center received calls from two women who reported that law enforcement officers failed to remove guns found in plain sight at the scene of a domestic violence incident. Thus, when the officers left the home, the abuser was not only more enraged by the interference, but was also armed);

see, e.g., Renee Esfandiary & Krista Newkirk, *Interview with the Honorable John E. Klock of the Alexandria Circuit Court Defending Mandatory Arrest*, 3 WM. & MARY J. WOMEN & L. 241, 241 (1997) (observing what Alexandria Circuit Judge John Klock feels is the reason for mandatory arrest policies and stronger domestic violence laws; "many times the police officers may have felt that perhaps the case was resolved when he or she was at the scene, when in actuality the conflict was not resolved. This led to more violence. . . ").

39. *See* 1993 Cal. Stat. ch. 995, sec. 1, at 5668 (enacting CAL. PENAL CODE § 836(c)(1)).

40. *See id.* (prompting officers at the scene of a domestic violence call to inform the alleged victim of his or her right to make a citizen's arrest, and discussing methods to safely carry out the arrest).

41. *See* Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. Rev. 643, 674-75 (1997) (explaining that "asking a victim in front of her abuser whether she wants to make a citizen's arrest places her in a very difficult situation. Even if she wants her abuser arrested, she may be too afraid to say so in front of him").

42. *See* Fukuroda Letter, *supra* note 38, at 1 (stressing the hazards to domestic violence victims where officers arrive at the scene, interrupt an abusive situation, but leave without resolving the conflict).

43. *See* 1977 Cal. Stat. ch. 912, sec. 3, at 2786 (enacting CAL. PENAL CODE § 273.5(f)-(g); 1994 Cal. Legis. Serv. ch. 873, sec. 1 (enacting CAL. PENAL CODE § 273.55); 1979 Cal. Stat. ch. 795, sec. 12, at 2713 (enacting CAL. PENAL CODE § 273.56).

minimum sentence of thirty days in jail.[44] The court has discretion to waive the sentence and grant probation if it finds good cause for an exception.[45]

The creation of the batterer's treatment programs stems from the elimination of "diversion programs" in 1996, as an alternative for domestic violence offenders.[46] However, counseling programs, deemed batterer's programs, became a popular addition to probation sentencing options.[47] The difficulty with these batterer's programs is that no criteria exists that the programs must fulfill.[48] Thus, a problem remains with the variability of the programs.[49] The number of hours spent, the type of counseling exercises available, and the qualifications of the counselors running the programs are not monitored or standardized.[50] Therefore, while some batterer programs may be effective forms of treatment, others may simply be a meeting place for domestic abusers.[51]

D. Preventative Measures and Support for Domestic Violence Victims

In addition to punishing domestic violence offenders, the State also recognizes the importance of providing abuse victims with support. Shelter, advocacy, and distribution of information concerning domestic violence are powerful tools used to help domestic violence victims escape abusive situations.[52] A system of battered women shelters was created to furnish a safe environment, support, and legal services for women escaping violent relationships.[53] Programs offered up to eighteen months of support services, including housing, job assistance, and counseling.[54] An advisory council researched and provided expert insight into the issue of domestic violence and possible ways to gather the funds necessary to

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44. *See* 1977 Cal. Stat. ch 912, sec. 3, at 2786 (enacting CAL. PENAL CODE § 273.5).

45. *Id.*

46. CAL. PENAL CODE § 1203.097 (West 1995); *see also* Melissa Hooper, *When Domestic Violence Diversion Is No Longer an Option: What to Do with the Female Offenders*, 11 BERKELEY WOMEN'S L.J. 168, 170-72 (1996) (observing that diversion programs, created to rehabilitate domestic violence offenders, were discontinued after a determination that they were ineffective).

47. *See* 1993 Cal. Stat. ch. 219, sec. 154, at 1662 (enacting CAL. FAM. CODE § 6343) (allowing courts to prescribe batterer's treatment programs for defendants as part of probation after sentencing).

48. *See id.* (lacking details or specifications that treatment programs for domestic violence offenders must meet).

49. *See* Hooper, *supra* note 46, at 170 (claiming that variability and lack of uniformity in the diversion programs was a problem because the hours, topics covered, and goals of the programs were not standardized).

50. *Id.*

51. *Id.*

52. *See infra* note 53 and accompanying text (explaining that California has established a network of legal assistance, temporary shelter, job counseling, and emotional support groups for women attempting to escape a violent domestic relationship).

53. *See* CAL. HEALTH & SAFETY CODE § 124250 (West Supp. 2000) (creating a system of shelters to provide legal and emotional support as well as a safe place to stay for women and children escaping an abusive environment).

54. *Id.*

support the programs to which women turn when escaping an abusive environment.[55] However, authority for the advisory council expired on January 1, 1998.[56]

Finally, efforts to increase information about the epidemic of domestic violence in California have led to the creation of domestic violence death review teams.[57] These domestic violence death review teams are necessary where domestic abuse culminates in a homicide and/or suicide. Counties may establish interagency death review teams for the purpose of research and data gathering, but strict confidentiality requirements hinder the sharing of information between the teams.[58] These requirements can prevent death review teams from sharing valuable information with each other, such as "medical records, child abuse reports, [and] juvenile court proceedings."[59]

III. CHAPTER 662

Because domestic violence laws are inadequate to stem the rising epidemic of domestic violence in California, Chapter 662 arms the judicial system and other government agencies with more effective tools to punish abusers and aid domestic violence victims.[60]

A. Domestic Violence Protective Orders Under Chapter 662

Under Chapter 662, when a section 6218 domestic violence protective order is issued, courts are now required to give notice to the subject of the order that any possession, ownership, purchase, or receipt of a firearm violates the terms of the protective order.[61] This makes ownership and possession of a firearm illegal, along with the purchase or receipt of a firearm, while the party is subject to a restraining order.[62] Subsequently, all parties subject to a domestic violence protective order are

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55. *See* 1997 Cal. Legis. Serv. ch. 97, sec. 7, at 3 (enacting CAL. HEALTH & SAFETY CODE § 124251) (developing an agency responsible for providing assistance and expertise in providing shelter and support for battered women).

56. *Id.*

57. *See* 1995 Cal. Stat. ch. 710, sec. 1 (enacting CAL. PENAL CODE § 11163.3) (establishing interagency domestic violence death review teams).

58. *Id.*

59. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 12-13 (Apr. 13, 1999).

60. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 5 (Apr. 6, 1999) (stating the sponsor's attempt to improve currently insufficient protection to the domestic violence victims after protective orders are obtained); Letter from May Mitchell, Legal Program Manager, Haven Women's Center of Stanislaus, to Senator Hilda L. Solis, at 1 (Mar. 29, 1999) [hereinafter Mitchell Letter] (copy on file with the *McGeorge Law Review*) (proclaiming strong support for the bill's numerous provisions aimed at strengthening domestic violence laws).

61. CAL. FAM. CODE § 6304 (amended by Chapter 662).

62. *Id.*

required to relinquish all firearms in their possession or control.[63] The court is no longer required to find a likelihood of future acts of violence.[64] This provision is mandatory and no longer at the discretion of the court.[65]

While all judicial proceedings will continue to be conducted, and all written documents will continue to be promulgated in English, Chapter 662 addresses the need for non-English-speaking parties to understand the provisions to which they are subject under court orders.[66] Courts are permitted to provide unofficial translations of protective orders in languages other than English, where deemed necessary.[67] The Judicial Council will also make translations of protective order forms in languages other than English available to all courts by July 1, 2001 if appropriate.[68]

Chapter 662 goes further to clarify the intended enforcement of out-of-state protective orders.[69] Language in Chapter 662 now elaborates that enforcement of out-of-state orders shall comply with the terms *as written* in the protective order of the originating state.[70] Therefore, the new gun prohibition accompanying a California domestic violence protective order will not apply to out-of-state orders unless a relinquishment provision is incorporated into the terms of that order from that sister state.[71]

B. Police Enforcement Under Chapter 662

Along with bolstering the judicial enforcement of protective orders against domestic violence offenders, police officers are now obligated to arrest subjects on misdemeanor charges for violating protective orders, even if the violation does not

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63. *Id.* § 6389(b) (amended by Chapter 662).

64. *See id.* § 6389(c) (amended by Chapter 662) (deleting the need for a finding by a preponderance of evidence that the alleged abuser is a threat to the alleged victim).

65. *See id.* (abolishing the court's authority to shorten or extend the duration of the relinquishment order); *id.* § 6389(b) (amended by Chapter 662) (using definitive language to require the issuance of a relinquishment order in conjunction with a domestic violence protective order).

66. *See* CAL. CIV. PROC. CODE § 185(b) (amended by Chapter 662) (declaring that court orders and forms will be made available by the Judicial Council in languages other than English); *id.* § 185(a) (amended by Chapter 662) (allowing unofficial translations of court orders to be distributed in other languages); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 5 (Apr. 6, 1999) (explaining the author's intent to provide a comprehensible copy of court proceedings for a party subject to a protective order). *But see* Chun Letter, *supra* note 21, at 1 (arguing that Chapter 662 "must include funding and mandated language in order to be effective). Otherwise, many family law court judges may find this merely a nuisance, ignoring the potential benefits of offering court orders in languages other than English. *Id.*

67. CAL. CIV. PROC. CODE § 185(a) (amended by Chapter 662).

68. *Id.* § 185(b).

69. *See* CAL. FAM. CODE § 6380.5(c) (amended by Chapter 662) (supporting the enforcement of out-of-state protective orders and the "terms, as written" as if it is a California protective order); *supra notes* 30-31 and accompanying text (illustrating how existing law was not clear as to the terms of such enforcement).

70. CAL. FAM. CODE § 6380.5(c) (amended by Chapter 662).

71. Telephone Interview with Giannina Perez, Legislative Aide to Senator Hilda Solis, Sacramento, Cal. (Aug. 3, 1999) (notes on file with the *McGeorge Law Review*).

occur in the officer's presence.[72] The officer still must ascertain whether he or she has probable cause to believe that the subject knows of the order and acted in violation of the order, but the officer no longer has to witness the misdemeanor take place to effectuate an arrest.[73] Furthermore, officers responding to a domestic violence call shall take into temporary custody any firearms viewed in plain sight or found during a consensual search of the premises.[74]

C. Increased Penalties for Repeat Domestic Violence Offenders

To bolster the punitive repercussions of repeat acts of domestic violence, Chapter 662 increases sentencing and probation requirements for domestic violence offenders having more than one conviction.[75] A domestic violence offender who commits a second offense within seven years of his or her first offense will face a minimum of fifteen days in jail rather than the ninety-six hours imposed prior to Chapter 662.[76] Upon a third offense within seven years, the minimum jail time increases to sixty days.[77] This is double the previous mandatory term of thirty days.[78]

Chapter 662 also sets a new standard for court-prescribed batterer's treatment programs.[79] All such programs must now meet approval by the probation department or be a substantive equivalent to the programs approved by the

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72. CAL. PENAL CODE § 836 (amended by Chapter 662).

73. *Id.*

74. *See* CAL. PENAL CODE § 12028.5(b) (amended by Chapter 662) (requiring that officers at the scene of a domestic violence call that involves threat of physical assault or death remove any firearms found in plain view or upon a consensual search of the premises. This does not require a determination by the officers that there is a future threat of violence in order to confiscate the firearm.); Rick Orlov, *Tougher Domestic Violence Laws Urged; State Legislator Suggests Gun Restrictions, More Enforcement of Restraining Orders*, L.A. DAILY NEWS, Feb. 5, 1999, at N10 (rendering a simplified view of the bill as granting the police power to "remove any guns found in a house when they respond to a domestic violence case").

75. *See* CAL. PENAL CODE § 273.5(g) (amended by Chapter 662) (increasing minimum sentencing requirements for repeat domestic violence offenses); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 11 (Apr. 14, 1999) (asserting that Chapter 662 "would retain current imprisonment terms, but would restructure and recast these mandatory minimum jail penalties").

76. CAL. PENAL CODE § 273.5(g).

77. *Id.*

78. *Compare* 1999 Cal. Legis. Serv. ch. 662, sec. 10-11, at 18 (repealing CAL. PENAL CODE §§ 273.55, 273.56) (providing for a minimum jail sentence of 96 hours for a repeat offender with one prior conviction within seven years. A minimum jail sentence of 30 days is imposed when there are two or more prior convictions within a seven year period.), *with* CAL. PENAL CODE § 273.5(g) (amended by Chapter 662) (incorporating the basic elements of sections 273.55 and 273.56 into this new, stronger sentencing requirement, thereby, repealing the old statutes).

79. *See* CAL. FAM. CODE § 6343(a) (amended by Chapter 662) (specifying that if an offender is referred to a batterer's treatment program as part of probation, the program must be approved by the probation department according to the provisions of California Penal Code section 1203.097); CAL. PENAL CODE § 1203.097(c) (West Supp. 2000) (establishing requirements for batterer's treatment programs that include goals for any such program, educational programming available, a mandate that the defendant participate in same-gender group counseling sessions, and strategies to make the defendant take responsibility for abusive behavior).

probation department.[80] Chapter 662 also calls for the courts to issue a referral list of services and programs available to domestic violence offenders.[81]

D. Additional Support for Domestic Violence Victims

Under Chapter 662, the Maternal and Child Health Branch of the State Department of Health Services remains responsible for providing grants to a network of support systems for victims of domestic abuse.[82] The existing sunset provision was removed, and an advisory council to the Department of Health Services will continue to aid the agency in the distribution and determination of grants.[83] Furthermore, Chapter 662 extends the length of time that victims of domestic violence can utilize programs and services offered by the Department of Health Services.[84]

Finally, in an effort to compile better research on domestic violence and its societal impacts, Chapter 662 rids the law of confidentiality restrictions between agencies and death review teams regarding deaths occurring from suspected domestic violence.[85]

IV. POTENTIAL DIFFICULTIES WITH CHAPTER 662

A. Second Amendment Issues

1. An Introduction to the Federal/State Incorporation Dichotomy

Ongoing debate exists as to the scope of the Second Amendment guarantee, but to-date, the Supreme Court has made no clear determination as to whether the Second Amendment applies to the states.[86] Currently, the Ninth Circuit refuses to

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80. CAL. FAM. CODE § 6346(a).

81. *Id.* § 6343(b) (amended by Chapter 662).

82. *See* CAL. HEALTH & SAFETY CODE § 124250(b) (amended by Chapter 662) (declaring that the "Maternal and Child Health Branch shall administer a comprehensive shelter-based services grant program to battered women's shelters pursuant to this section").

83. *See id.* § 124250(d) (amended by Chapter 662) (reinstating the advisory council to the Department of Health and Services).

84. *See id.* § 124250(c)(2) (amended by Chapter 662) (continuing grants to programs that offer up to 24 months of housing, counseling, case management, job assistance, and education in parenting and budgeting for battered women). This extends the amount of time women have to stay in the programs from the prior 18 month limit to 24 months. *Id.*

85. *See* CAL. PENAL CODE § 11163.3(f)-(g) (amended by Chapter 662); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 9 (Apr. 6, 1999) (clarifying that decreasing confidentiality restrictions on members of death review teams will effectively "foster the free flow of information between members of the review team and their respective agencies").

86. United States v. Spruill, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999).

recognize the incorporation of the Second Amendment against states.[87] In *Fresno Rifle and Pistol Club v. Van De Kamp*[88], the court cited the Supreme Court holdings in *United States v. Cruikshank*[89] and *United States v. Presser*[90] as precedent for limiting application of the Second Amendment to actions of the federal Congress.[91] In addition, the *Fresno Rifle* court cited *Miller v. Texas*[92] as support for *Cruikshank*, noting its statement "'that the restrictions of [the Second Amendment] operate only upon the Federal power.'"[93] However, all three of the subsequent cases "predate the first Supreme Court decision incorporating a provision of the Bill of Rights through the Fourteenth Amendment."[94] Because the question of the Second Amendment's application to state law through the Fourteenth Amendment has never been squarely addressed by the Court, this remains an open question.[95]

2. *Possible Consequences of State Incorporation*

Due to the continued debate over the scope and application of the Second Amendment, a consideration of the possible consequences to Chapter 662 firearm provisions should the Supreme Court determine that Second Amendment guarantees are applicable against the states is warranted. If the Supreme Court were to determine that the Second Amendment is applicable to the states, a Second Amendment analysis of Chapter 662 would then turn on whether the Second Amendment is read to guarantee an individual the right to bear arms, or whether the guarantee is a collective one ensuring states' ability to maintain a militia.[96] Such an analysis depends upon arguments surrounding federal law, because state law is currently shielded by the ongoing incorporation debate.[97]

In 1994, the federal government sought to strengthen federal laws against domestic violence.[98] Under the Commerce Clause,[99] Congress passed 18 U.S.C.A. § 922, which addresses federal firearm regulations.[100] One provision in the federal

87. Hickman v. Block, 81 F.3d 98, 103 n.10 (1996); Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 731 (1992).

88. 965 F.2d 723 (1992).

89. 92 U.S. 542 (1876).

90. 116 U.S. 252 (1886).

91. *Fresno Rifle*, 965 F.2d at 729-30.

92. 153 U.S. 535 (1894).

93. *Fresno Rifle*, 965 F.2d at 730 (quoting United States v. Miller, 153 U.S. 535, 538 (1894)).

94. *Fresno Rifle*, 965 F.2d at 730.

95. *Id.*

96. *See infra* Part IV.A (analyzing the legality of a similar federal provision that has given context to the ongoing argument over the scope of the Second Amendment).

97. *Supra* notes 86-95 and accompanying text.

98. *See Spruill*, 61 F. Supp. 2d at 591 ("The statute in question in this case is aimed at preventing the family violence that seems epidemic in this country.").

99. *See* U.S. CONST. art. 1, § 8, cl. 3. (establishing the Congressional power to "regulate Commerce . . . among the several States . . . .").

100. 18 U.S.C.A. § 922 (West Supp. 1999).

statute provides restrictions against gun possession and transportation by persons subject to protective orders.[101] Any state court order issued after a hearing with notice and opportunity to participate given to the party subject to the order triggers the federal statute.[102] The protective order must indicate either that: (1) a court made a finding that the party subject to the order posed a reasonable threat of future violence; or (2) that the order contains terms specifically prohibiting threats or physical force against an intimate partner or child.[103] Thus, while this statute restricts the person's ability to possess and transport firearms, the purpose behind this section is to enforce more stringently the domestic violence laws.[104]

Individuals subject to protective orders under state law are subject to prosecution for violating 18 U.S.C.A. § 922(g)(8) ("§ 988(g)(8)"). In the course of those proceedings, the constitutionality of the federal statute has been raised based on potential violations of the Second and Fifth Amendments. The results of these cases could be telling if Chapter 662 faces similar challenges.[105]

In *United States v. Emerson*,[106] Emerson was subject to a temporary restraining order, frequently used in Texas divorce proceedings to protect financial assets of the marriage prior to dissolution, but was not informed that the order would trigger a federal law prohibiting possession of a gun while the order was in effect.[107] Emerson claimed that § 922 (g)(8) violated his Second Amendment right to bear arms.[108] The court reasoned that "[o]nly if the Second Amendment guarantees Emerson a personal right to bear arms can he claim a constitutional violation."[109]

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101. *See id.* § 922(g)(8)-(9) (West Supp. 1999) (making it unlawful for any person subject to a court order that:

> ((A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or the child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship, or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.)

102. *Id.*

103. *Id.*

104. *See supra* note 98 and accompanying text (indicating the intent of Congress in passing 18 U.S.C.A. § 922(g)(8)).

105. *See Emerson*, 46 F. Supp. 2d 598, 598 (exemplifying an argument that could potentially be brought to challenge California's Chapter 662).

106. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

107. *Id.* at 599.

108. *Id.*

109. *Id.*

Thus, the court analyzed the validity of an individual's right to bear arms under the Second Amendment.[110]

Based on a lengthy dissection of the debate over the Second Amendment, the *Emerson* court concluded that the great number of courts finding the Second Amendment to guarantee a collective right to the states had erred.[111] With a substantial focus on the text of the Second Amendment, historical construction, and the Framers' intentions, the court found that the Second Amendment of the Constitution "guarantees a personal right to bear arms" rather than a "collective right."[112] Focusing first on the text of the Second Amendment,[113] the court concluded that in a plain language reading, the subordinate clause preceding the actual right was expressing the reason for the right, and not qualifying it.[114] Secondly, in a historical context, the court argued that the framers intended to model the Bill of Rights after the English Bill of Rights to recognize every citizen's individual right to bear arms.[115] Additionally, the court claimed that the very inclusion of the Second Amendment in the Bill of Rights indicated the Framers' intent to create an individual right.[116] "After all, the Bill of Rights is not a bill of states' rights, but a bill of rights retained by the people."[117] The court further acknowledged that many courts have concluded differently,[118] thus creating substantial persuasive opinions that the Second Amendment confers only a "collective right" upon the states.[119] However, it also recognized that a conclusive Supreme Court decision determining the implications of Second Amendment guarantees to individual citizens has yet to be promulgated.[120] Due primarily to the historical and textual analysis, along with the court's expressed desire to "zealously guard" the rights of the Second Amendment as it would any other "individual liberty enshrined in the Bill of Rights," the court held that the Second Amendment

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110. *See id.* at 600-10 (weighing the arguments from "state's rights" proponents with those of the "collective rights" advocates, breaking its analysis down into sections of textual analysis, historical factors, structural analysis, prior judicial interpretations, and prudential concerns.)

111. *See id.* at 610 (opining that "[t]he rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights").

112. *See id.* at 600 (differentiating between the two different schools of thought on the Second Amendment). *But see id.* at 607 (noting that "several other federal courts have held that the Second Amendment does not establish an individual right to keep and bear arms, but rather a 'collective' right, or a right held by the states").

113. *See* U.S. CONST. amend. II ("A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

114. *See id.* at 600-01 ("The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the existence of the militia.").

115. *Id.* at 607.

116. *Id.*

117. David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 98 BYU L. REV. 55, 60 (1998).

118. *Emerson*, 46 F. Supp. 2d at 608.

119. *Id.*

120. *Id.*

did indeed confer upon Emerson an individual right to bear arms.[121] Thus, Emerson's challenge to 18 U.S.C.A. § 922 (g)(8) was valid, because the statute had deprived him of his right as an individual to possess a firearm that had been shipped or transported via interstate commerce.[122]

Several months later, a federal district court in *United States v. Spruill*[123] directly countered the *Emerson* holding and upheld the constitutionality of § 922 (g)(8).[124] While the *Spruill* court admitted the nonexistence of a Fifth Circuit ruling concerning a Second Amendment challenge to § 922(g)(8), it also observed that five other circuits provide persuasive authority defining the Second Amendment as a collective right rather than an individual right.[125]

Further, the only relatively current Supreme Court decision on the scope of the Second Amendment was issued in 1939.[126] In *United States v. Miller*,[127] the Supreme Court stirred much of the current debate by holding that the federal government could require registration of certain types of firearms, but stopped short of permitting the federal government to ban individual possession of all weapons.[128] Thus, based on *Miller*, the majority of federal circuits have held consistently that "the Second Amendment does not prohibit the... government from imposing some restrictions on private gun ownership."[129] Hence, where *Emerson* parted with the majority path and found the Second Amendment to confer an individual right to bear arms,[130] *Spruill* and other circuit courts have remained steadfast in limiting the Second Amendment to a collective right enjoyed by the states.

Chapter 662's firearms provisions were mirrored after those in § 922 (g)(8).[131] However, at this time, the majority of jurisdictions define the Second Amendment

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121. *Id.* at 610.

122. *See id.* at 610 (holding that "18 U.S.C. § 922(g)(8) is unconstitutional because it allows a state court divorce proceeding, without particularized finding of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights").

123. 61 F. Supp. 2d 587 (W.D. Tex. 1999).

124. *Id.* at 591.

125. Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999); Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106-07; Cases v. United States, 131 F.2d 916, 920-23 (1st Cir. 1942). *See also* Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996) (holding that state action on the part of California in denying Mr. Hickman the firearm permit he desired was not violative of the Second Amendment because the Second Amendment "is a right held by the states, and does not protect the possession of a weapon by a private citizen"). This is an important case because any challenges of Chapter 662 on the basis of Second Amendment rights would likely be heard in the Ninth Circuit Court of Appeals.

126. United States v. Miller, 307 U.S. 174, 175 (1939).

127. 307 U.S. 174, 175 (1939).

128. *Spruill*, 61 F. Supp. 2d at 590-91.

129. *Id.* at 591.

130. *See supra* notes 111-12 and accompanying text (explaining the holding in *Emerson* as parting with the majority view of Second Amendment rights).

131. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 5 (July 13, 1999) (clarifying that Chapter 662's firearms provisions were tailored to incorporate the stricter provisions of federal law).

in the limited context of conferring a state-held right.[132] More specifically to California, the Ninth Circuit Court of Appeals has already aligned itself with the majority in upholding the Second Amendment as a "collective right."[133] While the majority view probably will remain a valid precedent in California, a potential still exists for a Supreme Court decision to change the current trend in Second Amendment analysis.[134] Until that time, Chapter 662, like § 922(g)(8),will likely remain a valid constitutional restraint the state may place on its citizen's right to bear arms.

B. A Due Process Challenge to Chapter 662

As does § 922(g)(8), Chapter 662 removes any requirement that a court find by a preponderance of evidence that a person subject to a restraining order is a threat to his or her intimate partner or children.[135] Some may argue that the new California law violates the Fourteenth Amendment Due Process Clause because the provision is automatic in nature and a protective order can be issued in the absence of the person subject to the order.[136] Thus, a person subject to a protective order in California could lose her right to possess, own, or purchase a firearm without a court ever having determined that she poses a threat to the party seeking the protective order.[137]

Chapter 662 may be overbroad, as all that is "required for prosecution [under the [new law] is a boilerplate order with no particularized findings."[138] However, unlike the federal law, Chapter 662 does specify that only protective orders procured under the Family Code enjoining general contact with the victim, disallowing specific behavior, or excluding the abusive party from a certain dwelling, will attach the firearm relinquishment provision.[139] This does not encompass protective orders such as the one in *Emerson* that was issued automatically upon the initiation of dissolution proceedings to protect marital assets.[140] Thus, a California court's issuance of a protective order under Chapter 662

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132. *See supra* note 125 and accompanying text (providing a list of several circuit courts applying the "collective right" theory).

133. Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996).

134. *See* United States v. Spruill, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999) ("Someday there will undoubtedly be a clear cut opinion from the Supreme Court on the Second Amendment. Without more at this time, however, the Court chooses to follow the majority path . . . .").

135. *See* CAL. FAM. CODE §§ 6389(a), 6304 (amended by Chapter 662).

136. *Id.* § 6389(a), (c) (amended by Chapter 662). *See generally Emerson*, 46 F. Supp. 2d at 598, 611-12 (making an identical argument that the automatic nature of § 922 (g)(8) violates Due Process requirements).

137. *See* CAL. FAM. CODE § 6389(a) (amended by Chapter 662) (requiring the relinquishment of firearms by any person subject to a protective order, regardless of whether the court makes a finding of future threat or not).

138. *Emerson*, 46 F. Supp. 2d at 611.

139. *See* CAL. FAM. CODE § 6389(a) (amended by Chapter 662).

140. *See Emerson*, 46 F. Supp. 2d at 599 (discussing the type of protective order to which Emerson was subject).

could be read as requiring a "particularized finding" of abuse, even if not a finding of potential for future acts of violence, which might be enough to satisfy any constitutional challenge.[141]

C. *The Impact of Diminishing Judicial and Police Discretion*

Chapter 662 also diminishes the discretion of police officers and courts in domestic violence cases.[142] The California Judge's Association voiced concern about requiring batterer's treatment programs to be authorized by the probation department.[143] Similarly, mandating relinquishment of firearms, rather than leaving the matter to judicial discretion, removes the ability of judges to decide the matter on a case-by-case basis.[144]

Recently, however, "the National Institute of Justice found that most judges have outdated, and even improper, views concerning domestic violence."[145] This is pertinent because "[the] effectiveness of protection orders is also determined largely by whether they are consistently enforced."[146] Thus, to aid in the full enforcement of protective orders, Chapter 662 could have called for more judicial education on domestic violence and given sitting judges the insight they need to wield their judicial discretion. Instead, however, its drafters chose to remove some of the discretion judges previously employed.

More worrisome, perhaps, is this same argument as it relates to police officers in the field. On the one hand, Chapter 662, by mandating the removal of firearms found at a domestic violence scene, addresses situations wherein police officers may misjudge the status of hostilities between the parties.[147] On the other hand, Chapter 662 does not address scenarios wherein the gun found may belong to the

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141. *See id.* at 610-11 (finding that "[i]f the statute only criminalized gun possession based upon a court order with particularized finding of the likelihood of violence, then the statute would not be so offensive, because there would be a reasonable nexus between gun possession and the threat of violence"). The court did not require a "particularized finding of the likelihood" of future acts of violence, only a likelihood of violence. *Id.* A likelihood of violence might arguably be shown in evidence of prior acts of domestic abuse.

142. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 6 (Apr. 7, 1999) (noting the concern of the California Judge's Association that the language of the bill limits a judge's discretion to refer a restrained party to a batterer's treatment program); *id.* at 8 (indicating the need for continued discretion on the part of police officers to respond to a domestic violence call without necessarily arresting anyone).

143. *Id.* at 6.

144. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 218, at 16 (Apr. 14, 1999).

145. Klien, *supra* note 1, at 811. "Prior to receiving training, many judges believe that domestic violence consists of verbal harassment or a rare shove, and that domestic violence was a 'relationship problem' amenable to marriage counseling .... Unfortunately, judicial education on domestic violence has only reached a relatively small number of judges across the country." *Id.*

146. *Id.* at 813.

147. *See* Esfandiary & Newkirk, *supra* note 38 (supporting why mandatory arrests where instituted in domestic violence cases in Virginia).

victim.[148] Instead, it would mandate the removal of any firearm by police, regardless of ownership, if found in plain sight or during a consensual search.[149] Thus, this provision might lead to officers removing a means of defense from the victim, rather than confiscating a weapon of attack from the abuser.[150]

Finally, Chapter 662 creates a provision similar to Virginia's well-established mandatory arrest policy.[151] Officers on a domestic violence call who have cause to believe a suspect has notice of a protective order are required to make a warrantless arrest of the subject, whether or not the violation of the protective order occurred in the officers' presence.[152] This may reduce the officers' discretion as to how to handle domestic violence calls, but the benefit is a uniform enforcement of protective orders and less need to second-guess the intent of the suspect, risking the safety of the victim. A second plausible benefit of mandatory arrests is that such arrests would promote prosecution and stricter enforcement of protective orders at all levels of the judicial system,[153] thus fulfilling the intended destiny of Chapter 662 by adding strength and teeth to the enforcement of domestic violence protective orders.[154]

V. CONCLUSION

At the heart of Chapter 662 is a clear intent to strengthen laws designed to eliminate family violence in California.[155] Because domestic violence is such a difficult crime to eliminate, Chapter 662 attempts to effect change in numerous areas of law.[156] Chapter 662 provides continued resources to battered women trying to escape a violent environment, prevents abusers from possessing firearms, supplies more comprehensive and comprehensible information to persons subject

148. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 9 (Apr. 7 1999) (remarking that there is potential for an officer required to take temporary custody of a gun in plain sight, or seen during a consensual search, to confiscate a gun that actually belongs to the victim, rather than the abuser).

149. CAL. PENAL CODE § 12028.5(a)(3)(b) (amended by Chapter 662).

150. *But see* Children's Memorial Hospital, *supra* note 1 (warning that the "presence of a gun in a battering relationship appears to increase the chance of death for both partners."). The statistic provided substantiates the argument that confiscation of firearms as the scene of domestic violence is a positive change in the law regardless of ownership of the weapon. *Id.*

151. *See* Esfandiary & Newkirk, *supra* note 38 (interviewing Alexandria Circuit Judge John Klock about Virginia's mandatory arrest policy that has been in use for ten years).

152. CAL. PENAL CODE § 836(c)(1) (amended by Chapter 662).

153. *See, e.g.*, Esfandiary & Newkirk, *supra* note 38 (pointing to Judge Klock's experience with mandatory arrests and noting that he promotes a "no-drop policy with regards to prosecution").

154. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 218, at 2 (Apr. 7, 1999) (reporting that the intent behind Chapter 662 is to fortify existing domestic violence laws).

155. *Id.*

156. *See supra* Part III (outlining the substantive changes Chapter 662 makes in numerous current California statutes).

to court orders, and lengthens minimum jail sentences for repeat offenders.[157] All of these changes are positive steps forward.

However, depending on future Supreme Court decisions regarding incorporation of the Second Amendment into the Fourteenth Amendment, Chapter 662 might face possible challenges due to its similarity to § 922(g)(8),[158] which at least one court has found to be unconstitutional.[159] With any luck, the Supreme Court will provide clarification soon as to the scope of the Second Amendment and end the ongoing debate. Until then, Chapter 662 likely will remain unscathed by any Second Amendment challenges.

157. *See supra* Part III (detailing the changes made to the California Family, Penal and Heath and Welfare Codes).

158. *See supra* Part IV.A (delineating the possible Second Amendment issues if the Second Amendment is incorporated into the Fourteenth Amendment by future court decisions and providing, as an example, a recent challenge to the similar federal statute).

159. *See supra* notes 106-10 (explaining the recent challenge to federal statute § 922(g)(8) and subsequent decision by the *Emerson* court to interpret the Second Amendment as granting an individual the right to bear arms).