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## Domestic Violence and Enforcement of Protection from Abuse Orders: Simple Fixes to Help Prevent Intra-Family Homicide

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# DOMESTIC VIOLENCE AND ENFORCEMENT OF PROTECTION FROM ABUSE ORDERS: SIMPLE FIXES TO HELP PREVENT INTRA-FAMILY HOMICIDE

*Nicole R. Bissonnette*

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## DOMESTIC VIOLENCE AND ENFORCEMENT OF PROTECTION FROM ABUSE ORDERS: SIMPLE FIXES TO HELP PREVENT INTRA-FAMILY HOMICIDE

Nicole R. Bissonnette\*

### I. INTRODUCTION

Domestic violence has long been recognized as a pressing law enforcement and societal concern, and both federal and state governments have continued to pursue strategies to address the issue. Beyond the criminal threatening, assaults, batteries, and other physical atrocities that victims face, domestic violence provides an added horror—“obliterating personhood, suspending identity and nullifying any notion of personal autonomy.”<sup>1</sup> To address these concerns, legislatures created Protection from Abuse Orders (hereinafter PFAs), to protect those that have been subject to abuse from trusted family members or dating partners. Unfortunately, victims then place their trust in the system, which often fails to deter future violence and provides minimal consequences for those who violate a PFA.

Though existing laws do not go far enough to protect domestic violence victims, they have evolved considerably over the past four decades. Prior to the 1970s, women across the country were typically only eligible for protective orders once they had begun divorce proceedings.<sup>2</sup> Since 1980, PFAs have been available to Maine’s domestic violence victims regardless of their marriage or divorce status.<sup>3</sup> State-by-state systems provide much-needed protections for victims, more than half of whom have been injured during the incident that precipitated the issuance of the PFA,<sup>4</sup> and 68% of whom have been victimized by prior violence.<sup>5</sup>

The Maine Legislature created its version of PFAs to protect these victims, in part because it recognized that, among the many negative effects domestic abuse

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1. G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 659 (1998).

2. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 233 (3rd ed. 2003) (citing Molly Chaudhuri & Kathleen Daly, *Do restraining orders help? Battered women’s experience with male violence and legal process*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 227 (Eve S. Buzawa & Carl G. Buzawa eds., 1992)).

3. *Crime in Maine* 2010, STATE OF ME. DEP’T OF PUB. SAFETY, 7 (Sept. 15, 2011), [http://www.maine.gov/dps/cim/crime\\_in\\_maine/2010pdf/Crime%202010.pdf](http://www.maine.gov/dps/cim/crime_in_maine/2010pdf/Crime%202010.pdf).

4. BUZAWA & BUZAWA, *supra* note 2, at 234-35 (citing Adele Harrell & Barbara Smith, *Effects of restraining orders on domestic violence victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214 (Eve S. Buzawa & Carl G. Buzawa eds., 1996)).

5. *Id.* at 234 (citing Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205 (1999)).

can have on children and families, it can sometimes end in intra-family homicide.<sup>6</sup> The Legislature created PFAs to avoid such tragic ends, with the goal of providing victims with “expeditious and effective protection against further abuse” so that they may live a peaceful, secure life that is free from abuse.<sup>7</sup> Maine’s PFA laws have evolved to allow judges to issue orders prohibiting an abuser from having direct or indirect contact with the named victim(s);<sup>8</sup> from threatening, assaulting, harassing or otherwise attacking those victims;<sup>9</sup> and from possessing “a firearm or other dangerous weapon for the duration of the order.”<sup>10</sup>

Although Maine’s statute lists these prohibitions, it lacks the enforcement tools to protect victims against violence associated with guns and other weapons, which is a major factor in Maine’s domestic violence deaths. On average, Maine experiences 20.1 murders and non-negligent manslaughters a year,<sup>11</sup> which is lower than the national average.<sup>12</sup> However, the murder rate in Maine nearly doubled between 2000 and 2010.<sup>13</sup> According to Maine statistics, 36% of murder victims in 2010 were relationship partners<sup>14</sup> or children of their assailants,<sup>15</sup> and 75% of all murders were committed with a firearm, knife or other dangerous weapon.<sup>16</sup> When the murders of 2011 are included in these statistics, the percentage of murders associated with domestic violence jumps to approximately 44%.<sup>17</sup>

Even with these statistics, the existing laws allow little in the way of pro-active prevention, instead focusing on punishments for post-issuance violations of the PFA’s listed provisions. Under the current system, the only pro-active provisions are that police and the courts put the abuser on general notice about potential

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6. 19-A M.R.S.A. § 4001(1) (2012).

7. *Id.* § 4001(2).

8. *Id.* § 4007(1)(D).

9. *Id.* § 4007(1)(A).

10. *Id.* § 4007(1)(A-1).

11. Maine’s annual average is 1.53 murders and non-negligent manslaughters per 100,000 population. Federal Bureau of Investigation, *Crime - National or State Level, State-by-state and national crime estimates by year(s)*, UNIFORM CRIME REPORTING STATS., <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (select Maine, Number of Violent Crimes, and years 2000-2009; then follow “Get Table” hyperlink) (data based on 10-year average (2000-2009)).

12. The national average is 5.52 murders and non-negligent manslaughters per 100,000 population. *Id.* (select United States-Total, Number of Violent Crimes, and years 2000-2009; then follow “Get Table” hyperlink)

13. 15 people were the victims of murder or non-negligent manslaughter in Maine in 2000; 31 people were victims in 2008; 26 people were victims in 2009; and 24 were victims in 2010. See FBI, *supra* note 11.

14. STATE OF ME. DEP’T OF PUB. SAFETY, *supra* note 3, at 25 (combining statistics for those listed as wife, girlfriend, or boyfriend). There were no instances of husbands murdered by their wives in 2010. *Id.*

15. *Id.* (combining statistics for “son” and “child in care”).

16. *Id.* at 24 (combining statistics for “Firearm,” Knife/Cutting Instrument,” and “Other Dangerous Weapon”).

17. *Working Together to End Domestic Violence Homicide in Maine*, ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, 10 (Apr. 2012), [http://www.maine.gov/ag/dynld/documents/Working\\_Together\\_to\\_End\\_Domestic\\_Violence\\_04-11-12.pdf](http://www.maine.gov/ag/dynld/documents/Working_Together_to_End_Domestic_Violence_04-11-12.pdf). During this period, forty-eight homicides were committed in Maine, twenty-one of which were domestic violence homicides. *Id.*

punishments for violating a PFA, and that they enter PFA information into the FBI's National Instant Criminal Background Check System (NICS)<sup>18</sup> to prevent gun purchases from authorized dealers. However, the laws do not provide mechanisms to prevent private gun sales to individuals subject to a PFA, nor do they ensure that weapons already in the abuser's possession are removed from his<sup>19</sup> control.

The purpose of this Comment is to evaluate the existing PFA system and assess methods of improving outcomes while avoiding prohibitive fiscal impacts. The process, structure and failings of the existing system will be illustrated by the tragic deaths of Amy Lake and her two children, who were murdered by Steven Lake, despite the PFA in effect at the time. Part II of this Comment outlines the background of Amy Lake's case, and Part III explains the existing process for obtaining a PFA in Maine, which Amy used prior to her death. Part IV looks at the federal laws that could have come into play in this case, but which are often not triggered in the system. Part V then looks at past proposals for changes to the Maine law and why they failed, and Part VI looks at related laws in other states. After reviewing the current systems, Part VII of this Comment will evaluate and recommend changes to improve the Maine system with minimal fiscal impact to the state.

## II. STORY OF A PFA FAILURE: AMY LAKE

From the outside, Amy and Steven Lake had a good marriage. The couple met as children, married in 1995,<sup>20</sup> and raised their two children (Monica, born Jan. 4, 1999; and Coty, born Aug. 24, 1997).<sup>21</sup> Unfortunately, the marriage was anything but ideal. On June 14, 2010,<sup>22</sup> Amy's marriage to Steven nearly killed her. On that night, Steven trapped Amy, Monica (age 11) and Coty (age 12) in a bedroom at the

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18. 28 C.F.R. § 25.1 (2011).

19. For stylistic ease, the victim will be referred to using feminine pronouns and the abuser using masculine pronouns, but abuse occurs at the hands of both men and women, against victims of both genders. Though the terms domestic violence and intimate partner violence are gender-neutral, the injury rate for women is six times higher than for men. BUZAWA & BUZAWA, *supra* note 2, at 13 (citing Murray A. Straus & Richard J. Gelles, *How Violent are American Families: Estimates from the National Family Violence Resurvey and Other Studies*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS IN 8,145 FAMILIES* 95 (Murray A. Straus, Richard J. Gelles, & Christine Smith, eds., 1990).

20. Nick McCrea, *Report Details Dexter Family Murder-Suicide, Calls for New Way of Handling of Domestic Violence Cases*, SUN JOURNAL (Nov. 28, 2011), <http://www.sunjournal.com/news/approved/0001/11/30/report-details-dexter-family-murder-suicide-calls-for-new-way-of-handling-domestic>.

21. Obituary for Amy, Coty and Monica Lake, CROSBY & NEAL FUNERAL HOMES AND CREMATION SERVICES, [http://www.crosbyneal.com/fh/obituaries/obituary.cfm?o\\_id=1185398&fh\\_id=10464](http://www.crosbyneal.com/fh/obituaries/obituary.cfm?o_id=1185398&fh_id=10464) (last visited Apr. 23, 2012).

22. Ronald Allanach et al., *Psychological Autopsy of June 13, 2011, Dexter, Maine Domestic Violence Homicides and Suicide: Final Report* 39 (Nov. 28, 2011), <http://pinetreewatchdog.org/files/2011/12/Dexter-DVH-Psychological-Autopsy-Final-Report-112811-111.pdf>.

family's home, held them at gunpoint, and threatened to kill them.<sup>23</sup> Amy told people that she escaped death by "talking to Steven a mile a minute in order to distract him from his intentions."<sup>24</sup>

By all accounts, Amy Lake then did everything "right." After she and her children were free, she called a counselor, who notified police and had Steven arrested.<sup>25</sup> Steven faced four charges, including criminal threatening with a dangerous weapon and domestic violence criminal threatening.<sup>26</sup> Even though he had used a gun when threatening to kill his wife and children, he was let out on \$2,000 cash bail shortly after his arrest.<sup>27</sup>

After reporting the incident to police, Amy alerted friends and family and obtained a PFA<sup>28</sup> against her estranged husband. Even knowing the PFA was in place, Amy's friends and family worried about her and the children, so they checked in with her frequently. The local police department was also diligent. They put out alerts to surrounding police agencies to keep an eye out for Steven Lake's vehicle, made frequent patrols of the road on which Amy lived, and completed welfare checks to ensure her safety.<sup>29</sup> A police officer who lived on the same street even kept an eye out when he was off duty.<sup>30</sup> The police went above and beyond what was required by the PFA, but it still ended with the deaths of Amy and her children.

The safety net Amy created for herself is the reason why, shortly after she failed to arrive for work, a friend called the police and an officer immediately went to the house she shared with her two children.<sup>31</sup> Tragically, as the police officer approached Amy's home, Steven Lake shot and killed Amy and their two children, Monica, age 12, and Coty, age 13, before killing himself.<sup>32</sup>

Though police departments and citizen groups have tried a myriad of methods to prevent such murders, existing Maine law was not able to save Amy and her children that day. And Amy is not alone. Maine's Domestic Abuse Homicide Review Panel looked at seventeen of the domestic violence murders that occurred between 2006 and 2008<sup>33</sup> and found that 56 percent involved firearms.<sup>34</sup> Twenty-

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23. Diana Bowley, *Police: Man Shot Wife, 2 Children Before Killing Himself*, BANGOR DAILY NEWS (June 13, 2011), <http://bangordailynews.com/2011/06/13/news/dexter-home-surrounded-by-police-after-reports-of-several-shots-fired>.

24. Allanach, *supra* note 22, at 34.

25. *Id.*, at 35.

26. Bowley, *supra* note 23.

27. Allanach, *supra* note 22, at 35.

28. Christopher Cousins, *Friends Shocked by Shooting: 'Everyone Knew Something Bad Was Going to Happen'*, BANGOR DAILY NEWS (June 13, 2011), <http://bangordailynews.com/2011/06/13/news/family-friends-shocked-by-tragedy-in-dexter/>.

29. Diana Bowley, *Police: Lake Carried Two Guns, Knife to Scene of Slayings*, BANGOR DAILY NEWS (June 16, 2011), <http://bangordailynews.com/2011/06/16/news/piscataquis/police-lake-carried-two-guns-knife-to-scene-of-slayings>.

30. *Id.*

31. Bowley, *supra* note 23.

32. *Id.*

33. ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, "HE WANTS TO SEE ME DEAD" 10 (2010), *available at* <http://www.maine.gov/ag/dynld/documents/8th%20Report%20of%20the%20Maine%20Domestic%20Abuse%20Homicide%20Review%20Panel.pdf>.

one additional domestic violence homicides occurred between January 2010 and April 2012.<sup>35</sup>

### III. THE MAINE SYSTEM IN PRACTICE

Protection from Abuse orders are put in place to help avoid tragic deaths like those of Amy Lake and her children. PFAs were created as a civil action to allow victims to protect themselves from their abusers—whether or not there had previously been police involvement. A PFA, sometimes called a restraining order, is a court order that prohibits a person from “harassing, threatening, and sometimes merely contacting or approaching” a family member or dating partner.<sup>36</sup> Violating these orders can result in contempt fines or criminal penalties.<sup>37</sup> There are two primary types of protective orders in Maine: temporary orders and permanent orders.

To obtain either of these orders of protection, a victim must file a complaint<sup>38</sup> with the district court for the area in which she or her abuser resides.<sup>39</sup> If the local district court is closed, an order can be requested from another district court or the superior court.<sup>40</sup> In whichever of these courts processes her petition, she must file a complaint that provides details about the defendant’s abusive behavior or threats. Once the complaint is filed, it is first considered for a temporary order.<sup>41</sup> Regardless of whether the temporary order is issued, if the plaintiff wishes to pursue the case, the defendant is notified of a formal hearing, at which the court

34. *Id.* at 12.

35. ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *supra* note 17, at 5. Those killed in Maine include Renee Sandora, 27, shot and killed by her estranged husband in front of her four children, John Balentine, *Murder Charges Filed in New Gloucester Deaths*, CURRENT PUBLISHING (July 28, 2011, 12:01 PM), [http://www.keepmecurrent.com/news/article\\_2ec880be-b933-11e0-aed1-001cc4c03286.html](http://www.keepmecurrent.com/news/article_2ec880be-b933-11e0-aed1-001cc4c03286.html); Sarah Gordon, 30, shot and killed by her husband, The Associated Press, *Police Say Fatal Shootings in Winslow a Case of Murder-Suicide*, BANGOR DAILY NEWS (June 6, 2011, 10:01 PM), <http://bangordailynews.com/2011/06/06/news/police-investigating-winslow-shooting/>; and Richard Jeskey, 53, beaten and strangled by his wife in the bathtub of his home, Judy Harrison, *Bangor Police: Dead Man Was Found Naked in Bathtub with Trauma to Groin, Upper Torso, Face*, BANGOR DAILY NEWS (June 23, 2011, 5:06 PM), <http://bangordailynews.com/2011/06/23/news/bangor/dead-man-found-naked-in-bathtub-with-trauma-to-groin-torso-face/>.

36. BLACK’S LAW DICTIONARY 1428-29 (9th ed. 2009) (definition of “restraining order”).

37. 19-A M.R.S.A. § 4011 (2012). “Punitive Sanctions. The court may impose a punitive sanction that is proportionate to the conduct constituting the contempt. In a summary proceeding the court may impose a punitive sanction that consists of either imprisonment for a definite period not to exceed 30 days or a fine of a specified amount not to exceed \$ 5000 or a combination of imprisonment and fine.” M.R. Civ. P. 66(3).

38. *Id.* § 4005(1). Under the PFA statute, the complaint must allege that a family or household member or a dating partner has abused the plaintiff or a minor child for whom the plaintiff is responsible. *Id.*

39. *Id.* §§ 4003, 4005. If a victim has left her residence to avoid the alleged abuse, she may file her complaint in either the district court that serves her previous residence or the district court that serves her new residence. *Id.* § 4003.

40. *Id.* § 4006(3). This is considered “Emergency Relief” under the Maine statute. If a temporary order is issued under this provision, the paperwork must be immediately forwarded to the home District Court for filing. *Id.* § 4006(3)(B).

41. *Id.* § 4006(2).

will determine if a permanent PFA will be issued.<sup>42</sup>

### A. Temporary Orders

A temporary order provides limited protections for the victim during the time between filing a complaint and the hearing for a permanent order.<sup>43</sup> A court may enter such an order if it is necessary to “achieve the government’s interest in protecting victims of family violence from further abuse, . . . ensure prompt action where there is an immediate threat of danger, and . . . provide governmental control by ensuring that judges grant such orders only where there is an immediate danger of such abuse.”<sup>44</sup> In Maine, the petition is reviewed by a judge in an *ex parte* proceeding, after which she may issue a temporary order if there is an immediate and present danger of abuse, shown “on good cause.” The court may issue the temporary order shortly after the complaint is filed,<sup>45</sup> which gives the victim near-immediate protection. However, the criminal consequences of the order are only in effect once the defendant has received notice of the order.<sup>46</sup>

Whereas temporary orders are issued outside of the defendant’s presence, and without his participation in the proceeding, the court’s ability to curtail his rights is limited. For example, the court can temporarily award parental rights and responsibilities related to minor children,<sup>47</sup> but those directives are only in force for the duration of the temporary order.<sup>48</sup>

Similarly, the court can order the accused abuser not to possess firearms or other dangerous weapons.<sup>49</sup> This prohibition can only be made for the duration of the order, however, and only if certain conditions are met.<sup>50</sup> For example, it can be made if the complaint demonstrates that a weapon was involved in the alleged abuse or that the defendant has previously violated an order of protection.<sup>51</sup> It can also be made if there was previous abuse that resulted in an injury, the abuse occurred in public, or there is a heightened risk of immediate harm to the plaintiff or the minor child, as demonstrated by the defendant’s threats of homicide or

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42. *Id.* §§ 4006(1), 4007(1).

43. “[A]n early study conducted before the enhanced enforcement typical of modern statutes . . . suggested that TROs, when used in isolation and without the full commitment by the prosecutors, courts, and police, were ineffective.” BUZAWA & BUZAWA, *supra* note 2, at 242 (citing Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 13 (Claudine SchWeber & Clarice Feinman eds., 1985)).

44. BLACK’S LAW DICTIONARY, *supra* note 36 (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)) (definition of “restraining order”).

45. 19-A M.R.S.A. § 4006(2).

46. *Id.* § 4011(1).

47. *Id.* § 4006(5). Among the provisions in such an interim order, the court can prohibit the defendant from threatening the plaintiff, from entering the place where the plaintiff resides, or from having any direct or indirect contact with the plaintiff. *Id.* § 4006(5)(A)-(5)(F). This can be used to prevent an alleged abuser from having contact with his children during the duration of the temporary order, regardless of previous family matters rulings or agreements.

48. *Id.* § 4006(2).

49. *Id.* § 4006(2-A)(A), (B).

50. *Id.*

51. *Id.*



stalking behavior.<sup>52</sup> In addition, if a weapons prohibition is written into the temporary order, the court must “specify the type of weapon the defendant is prohibited from possessing.”<sup>53</sup>

### B. Permanent Orders

Whether or not the court finds that there is sufficient support for a temporary order, a plaintiff may pursue a permanent PFA. This is done via a formal hearing at which both parties have the opportunity to participate.<sup>54</sup> If a permanent PFA is issued, it can provide essentially the same protections as a temporary order but for a longer period.<sup>55</sup> Permanent PFAs are issued for a “fixed period not to exceed 2 years,”<sup>56</sup> but can be extended indefinitely, so long as the threat continues to exist.<sup>57</sup>

The hearing required before a permanent PFA is issued must be held within 21 days from the date the complaint was filed.<sup>58</sup> If the defendant does not show up for the hearing after sufficient notice, a permanent PFA can be issued by default.<sup>59</sup> If both parties are present, a judge will listen to testimony from both parties and receive other evidence into the record.<sup>60</sup> If, at the conclusion of the hearing, the court finds by a preponderance of the evidence<sup>61</sup> that the abuse occurred, the court may issue a permanent PFA or approve a consent agreement.<sup>62</sup>

To meet the preponderance of the evidence standard, the plaintiff must prove that there was abuse between family or household members or dating partners.<sup>63</sup> The plaintiff can meet this standard by detailing any of a number of types of abuse. She could show that the defendant attempted to cause or did cause “bodily injury or offensive physical contact,”<sup>64</sup> or that the defendant attempted to place or did place her “in fear of bodily injury through any course of conduct.”<sup>65</sup> She could also show

52. *Id.*

53. *Id.* § 4006(2-A).

54. *Id.* § 4007(1).

55. *See id.* §§ 4006-4007.

56. *Id.* § 4007(2).

57. *Id.* In order to have the PFA extended beyond the initial two-year cap, the plaintiff must make a motion to extend the order. The court can then extend the order “for such additional time as it determines necessary to protect the plaintiff or minor child from abuse.” *Id.*

58. *Id.* § 4006(1). If the temporary, emergency or interim relief was denied, the court must hold the permanent PFA hearing “as soon as practicable within the 21-day period.” *Id.*

59. STATE OF ME. JUDICIAL BRANCH, A GUIDE TO PROTECTION FROM ABUSE AND HARASSMENT ACTIONS 15, (6th ed. 2010), available at [http://www.courts.state.me.us/reports\\_pubs/pubs/hanbooks\\_guides/pa\\_ph/pa-ph2010.pdf](http://www.courts.state.me.us/reports_pubs/pubs/hanbooks_guides/pa_ph/pa-ph2010.pdf).

60. *Id.*

61. 19-A M.R.S.A. § 4006(1).

62. *Id.* § 4007(1). Consent orders can provide victims with many of the same benefits of a PFA, but often lack a finding of abuse, because the omission is necessary to obtain the defendant’s agreement to an order without a trial. *Id.* Without the finding of abuse, the victim may not be protected by federal gun prohibitions. *See infra* Part IV.

63. *See* 19-A M.R.S.A. §§ 4001(2), 4006(1). The statute also applies to minor children of a family or household member or dating partner, *id.* § 4002(1), and to sexual assault victims, regardless of whether “the conduct was perpetrated by a family or household member or dating partner” or was prosecuted, *id.* § 4005.

64. *Id.* § 4002(1)(A).

65. *Id.* § 4002(1)(B).

that the defendant used force or a threat of force to compel her to engage in conduct from which she had a right or privilege to abstain, or that he knowingly and substantially restricted her movements without her consent.<sup>66</sup> Simply communicating threats of violence “dangerous to human life” or stalking the plaintiff is sufficient to meet the statute’s standard.<sup>67</sup>

If the plaintiff meets this burden, a “permanent” PFA will be issued for a “fixed period not to exceed two years,”<sup>68</sup> though the court can extend an order for “such additional time as it determines necessary to protect the plaintiff or minor child from abuse.”<sup>69</sup> If the burden is met, the court can issue a permanent PFA with provisions requiring the defendant to relinquish dangerous weapons,<sup>70</sup> whereas a temporary order allows for the prohibitions only under certain circumstances.<sup>71</sup>

If a permanent PFA is issued, the court can direct the defendant to refrain from: contacting (either directly or indirectly), threatening, or abusing those covered by the PFA (i.e., plaintiff and/or children),<sup>72</sup> going to the plaintiff’s residence;<sup>73</sup> and/or “possess[ing] a firearm or other dangerous weapon for the duration of the order,”<sup>74</sup> among other conditions.<sup>75</sup>

### C. General Requirements

In order for the prohibitions included in either a temporary or permanent PFA to be considered effective and to put the defendant at risk of criminal charges, the defendant must have actual notice of the order.<sup>76</sup> This is typically done by having the defendant served with the order by a law enforcement agency, the Department of Corrections (if the defendant is in custody), or a court security officer (if the defendant is in the courthouse).<sup>77</sup>

Once the defendant has notice of the order, the protections can be enforced by the plaintiff,<sup>78</sup> or can be aggravating factors for another offense.<sup>79</sup> For example,

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66. *Id.* § 4002(1)(C)-(D).

67. *Id.* § 4002(1)(E)-(F).

68. *Id.* § 4007(2).

69. *Id.*

70. *Id.* § 4007(1-A).

71. *Id.* § 4006(2-A).

72. *Id.* § 4007(1)(A), (D).

73. *Id.* § 4007(1)(B).

74. *Id.* § 4007(1)(A-1).

75. The statute also allows the court to split personal property, *id.* § 4007(1)(F), order the termination of a life insurance policy held by defendant insuring the life of the plaintiff, *id.* § 4007(1)(F-1), and award some or all temporary parental rights and responsibilities or contact privileges for the parties’ shared minor children, *id.* § 4007(1)(G). The court can further require that the defendant get counseling, *id.* § 4007(1)(H), pay temporary support to the plaintiff or the State if there would otherwise be an obligation to do so (i.e., the plaintiff is dependent on the Defendant), *id.* § 4007(1)(I), (J), pay compensatory damages for “losses suffered as a direct result of the abuse,” *id.* § 4007(1)(K), and pay court costs, *id.* § 4007(1)(L). The court can also set out the rights to family pets, *id.* § 4007(1)(N), and any other orders the court deems necessary, *id.* § 4007(1)(M).

76. *Id.* § 4011.

77. *Id.* §§ 4006(6), § 4007(6).

78. Once the order is in place, the plaintiff can ask police to arrest the defendant for what would otherwise be non-criminal infractions, such as calling the defendant. *See id.* § 4011. The phone call

Amy Lake's PFA against Steven Lake contained a provision that prohibited him from possessing firearms.<sup>80</sup> Had Amy Lake been aware of the fact that Steven still possessed weapons, she could have asked the police to arrest him before he came to her house that fateful day, even if he had not approached her in the interim.

When Steven Lake received notice of the weapons prohibition, regardless of whether it was a result of a temporary or permanent order, he was required to turn over his firearms and any other dangerous weapons to law enforcement or another individual within 24 hours.<sup>81</sup> If the weapons were turned over to an individual rather than to law enforcement, Steven Lake would have been required to file a written statement with the court or local law enforcement agency within 24 hours that listed the name and address of the person holding the weapons, and a description of all of the weapons being held.<sup>82</sup> The person or entity to which he turned over the weapons would then have been required to hold on to the weapons for the duration of the order.<sup>83</sup> Though there is some evidence that Steven Lake did turn over his guns to a family member, an inventory of the firearms was never taken, so it is unclear whether he turned over the gun that he later used to kill Amy and her children.<sup>84</sup>

#### D. Risks and Failures

When tragedies like the Lake murders happen, the question becomes whether the risk of harsh punishment could have created an incentive for the abuser to turn over his weapons before the situation had gotten to the point where he had become homicidal. To make this general deterrence aim successful, abusers must not have access to their victims nor to potential weapons, and the risk of punishment associated with breaking the law must outweigh the abuser's urge to commit the conduct.<sup>85</sup> Additionally, the risk of punishment must be known to the abuser in order to have a substantial deterrent effect, and the punishments must be enforced.<sup>86</sup>

The risk of criminal and civil consequences for abusers who violate PFAs lies at the crux of having an effective PFA system.<sup>87</sup> This emphasis on criminal and

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could result in criminal charges if the PFA contained a no-contact provision, of which the defendant was made aware by being served with the order. *Id.* § 4011(1).

79. For example, a violation of a PFA can be an aggravating factor in a subsequent domestic violence charge, and/or would be an accompanying charge as a result of the incident. *See id.* § 4011(4) (2011); 17-A M.R.S.A. § 207-A(1)(B)(2) (Supp. 2011); 17-A M.R.S.A. § 209-A(1)(B)(2) (Supp. 2011).

80. Bowley, *supra* note 29.

81. 19-A M.R.S.A. §§ 4006(2-A), 4007(1-A).

82. *Id.* §§ 4006(2-A), 4007(1-A).

83. *Id.* §§ 4006(2-A), 4007(1-A).

84. Allanach, *supra* note 22, at 33.

85. *See* JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 7 (1974) ("General prevention may depend on the mere frightening or deterrent effect of punishment—the risk of discovery and punishment outweighing the temptation to commit crime.").

86. *See id.* at 34-35 ("While the effects of special prevention [deterrence, reformation and incapacitation] depend upon how the law is implemented in each individual case, general prevention occurs as a result of interplay between the provision of the law and its enforcement in specific cases.").

87. The risk of punishment, rather than the severity of the punishment, may be the deterrent. For illustrative purposes, in 1927, Norway increased punishment for sex offenses in an attempt to prevent

civil penalties as deterrents is underscored by language included on PFAs that clearly and conspicuously outlines those consequences,<sup>88</sup> such as the risk of being charged with a Class D crime or civil contempt.<sup>89</sup> Civil contempt penalties may arise for violations of financial or counseling requirements of the order or for interfering with personal property or pets,<sup>90</sup> whereas Class D criminal penalties may arise for violations against the person.<sup>91</sup> For example, if Steven Lake had taken a family pet, in violation of a PFA, he could have been charged with civil contempt, in addition to a potential theft charge.<sup>92</sup> Had Steven Lake grabbed Amy's arm while the PFA was in effect, he could have been charged with a Class D crime for violating the PFA, and/or a Class C domestic violence assault.<sup>93</sup>

Unfortunately, vague threats of criminal and civil consequences may be all that is available to prevent an abuser from continuing to victimize his family or household member or former relationship partner. The existing law does not provide a means for police to proactively enforce the orders; they must wait for a violation before acting.<sup>94</sup>

For example, though the Maine statute allows the court to issue a search warrant for law enforcement officers to search and seize weapons that they have probable cause to believe have not been relinquished by the defendant,<sup>95</sup> the law does not require that police departments take affirmative action to remove the weapons from a person's possession.<sup>96</sup> The abuser is not even required to relinquish the weapons to law enforcement voluntarily<sup>97</sup> because he has the option of turning the weapons over to any individual (i.e., the person does not have to have any connection to law enforcement).<sup>98</sup> The statute does not set out what qualifies the non-law-enforcement individual to hold these guns, nor what the requirements are of this person (e.g., whether the individual would be subject to any criminal or civil liability if he fails to prevent or report the prohibited person

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crime. *Id.* at 23. Instead of causing the crime rate to decline, there was a "notable rise" in the number of sex offenses. *Id.* Incidence rates went from an average of 136 sex crimes per year before the increased penalty, to 229 sex crimes per year after the increased penalty—a 68% increase, which may or may not be attributable to heightened awareness. *Id.* The "example hardly tells us much about the general-preventative effect of threat of punishment, but it does show how careful we must be in drawing conclusions from the ordinary crime statistics." *Id.*

88. This is required by 19-A M.R.S.A. § 4007(3).

89. *Id.* § 4011(1), (2).

90. *Id.* §§ 4011(2), 4007(1)(H)-(N).

91. *Id.* § 4011(1). This parsing of consequences depending on the type of PFA violation is a result of a law enacted by the 125th Legislature in May 2011. L.D. 708, Exception (125th Legis. 2011), available at

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0539&item=3&snum=125>.

92. 19-A M.R.S.A. § 4011(2).

93. *Id.* § 4011(1); 17-A M.R.S.A. § 207-A(1)(B) (2011).

94. See generally 19-A M.R.S.A. § 4011.

95. *Id.* §§ 4006(2-A), 4007(1-A).

96. A person may relinquish his weapons to a non-law-enforcement individual, so long as he files a notice to the court or the local law enforcement agency designated in the order within 24 hours of relinquishing his weapons. *Id.* § 4007(1-A).

97. See *id.*

98. *Id.*

from reclaiming the gun while the order is still in effect).<sup>99</sup>

Additionally, there is currently no mechanism to track compliance with the notification or relinquishment requirements.<sup>100</sup> Once a defendant is issued the temporary or permanent PFA with a weapons prohibition, he is told to turn over guns—but there is no system in place to check whether the guns have actually been turned over to law enforcement or to another individual.<sup>101</sup> In Steven Lake’s case, for example, at least some of his weapons were eventually turned over to his own family members.<sup>102</sup> There was never an accounting of the weapons to ensure that all were collected, nor an assertion that the weapons were secured beyond Steven’s reach, which may explain why Steven had possession of the gun he later used to kill Amy and her children.<sup>103</sup>

Beyond accounting for collected weapons, issues also arise with the relatively soft punishments given out for violations of PFAs. When the 125th Legislature lowered the penalties for violating fiscal or property prohibitions to a civil contempt charge,<sup>104</sup> they weakened the effectiveness of the deterrence aspects of PFA laws. Likewise, low bail amounts for violating PFAs do not deter bad behavior because they allow abusers to get back on the street quickly, where they are free to continue harassing and intimidating their victims. Earlier this year, the Chief Justice of the Maine Supreme Judicial Court announced a rule change, which prevents bail commissioners from setting bail in domestic violence-related cases until they have access to the defendant’s criminal history.<sup>105</sup> Under the new court system rule, if the defendant’s criminal history is not readily available to the bail commissioner, the defendant may be required to remain in jail until he can appear before a judge, which could take up to forty-eight hours (not including weekends and holidays).<sup>106</sup> The Legislature subsequently passed a law that would require judges to deny bail to some repeat domestic violence offenders, unless the judge

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99. The statute states that the defendant must relinquish his weapons to a “law enforcement officer or other individual for the duration of the order,” but does not include qualifications for the “other individual.” *See id.* § 4006(2-A).

100. *See id.* The statute states merely that the defendant must notify the court or local law enforcement by filing “a written statement that contains the name and address of the individual holding the weapons and a description of all weapons” he or she holds. *Id.* It contains no language or direction for the court or law enforcement agency seeking to track compliance with the orders, nor a means of communicating compliance between the two entities. *See id.*

101. This is evidenced by the fact that there were two guns in Steven Lake’s possession after the PFA was issued, though they were (at least temporarily) turned over to Amy Lake’s family. Allanach, *supra* note 22, at 33. The weapons were later transferred from Amy’s family to Steven’s parents, but there was no evidence that an inventory was taken or that all weapons had been accounted for. *Id.*

102. *Id.*

103. According to the Psychological Autopsy performed in this case, “[n]o chain of custody was ever established by [law enforcement] and no record of such custody exists with either [law enforcement] or the District Attorney.” *Id.*

104. *See* L.D. 708 (125th Legis. 2011), available at <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0539&item=3&snum=125>.

105. Judy Harrison, *Maine’s Chief Justice Changes Bail Rules for Domestic Violence Suspects*, BANGOR DAILY NEWS (Feb. 09, 2012), <http://bangordailynews.com/2012/02/09/news/state/chief-justice-announces-effort-to-curb-domestic-violence/>.

106. *Id.*

makes certain findings on the record.<sup>107</sup>

The quick bail issue is perhaps the most apparent way that the PFA system failed Amy Lake. On November 11, 2010, just a few months after holding Amy and her children at gunpoint and threatening their lives,<sup>108</sup> Steven Lake was charged with violating the PFA by allegedly having contact with Amy.<sup>109</sup> Though he faced these new charges, Steven Lake was again released on \$2,000 cash bail.<sup>110</sup> Had the new court procedures and law been in effect in November 2010, Steven Lake may have been held without bail due to his past history of domestic violence and his violation of an existing PFA, thus preventing him from having the freedom of movement that allowed him to obtain a weapon and kill Amy and her children in their home.

#### IV. FEDERAL LAW

The federal government has weighed in on the need for issuance and enforcement of PFAs by recognizing the link between domestic abuse and gun violence. Congress has adopted legislation that creates criminal penalties to back up state gun prohibitions and make it harder for abusers to purchase guns.<sup>111</sup> According to the U.S. Attorneys' Criminal Resource Manual, these laws "represent[] Congress's recognition that 'anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.'"<sup>112</sup>

This "unacceptable risk" was addressed in the Domestic Violence Gun Ban authored by Senator Frank R. Lautenberg (D-NJ)<sup>113</sup> in 1996.<sup>114</sup> The ban, known as the Lautenberg Amendment, prohibits anyone convicted of a domestic violence crime from purchasing a firearm.<sup>115</sup> Subsequent changes have also prohibited an

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107. See An Act To Protect Victims of Domestic Violence, L.D. 1867 (125th Legis. 2012), available at <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1381&item=3&snum=125>. The bill amended 15 M.R.S.A. §1097(2-A) to state that if the underlying crime involves domestic violence and the new conduct involves "domestic violence or contact with a victim or witness in the underlying case, the judge or justice shall issue an order denying bail," unless he or she makes certain required findings on the record. *Id.* The amendment also requires a judge or justice to deny bail if preconviction bail has previously been revoked, *id.*, due to probable cause of a subsequent crime or the defendant's failure to appear or to follow conditions of release, see 15 M.R.S.A. §1096 (2003 & Supp. 2011).

108. See Bowley, *supra* note 23.

109. See Cousins, *supra* note 28; Bowley, *supra* note 23.

110. Allanach, *supra* note 22, at 23.

111. See 18 U.S.C.A. § 922(g)(8), (9) (2006).

112. Office of the United States Attorneys, *Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL 1117, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01117.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm) (last visited Sept. 14, 2012) (quoting CONG. REC. S11878 (daily ed. Sept. 30, 1996)).

113. OFFICE OF SENATOR FRANK R. LAUTENBERG, *THE DOMESTIC VIOLENCE GUN BAN TEN YEARS LATER: LIVES SAVED, ABUSERS DENIED 2* (2006), available at <http://lautenberg.senate.gov/documents/domestic/THE%20DOMESTIC%20VIOLENCE%20GUN%20BAN.pdf>.

114. The amendment was added to the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>.

115. See *id.*

abuser who is subject to a court-issued PFA where the victim was an intimate partner or the child of an intimate partner,<sup>116</sup> or an abuser who has been convicted of a misdemeanor crime of domestic violence, from purchasing or *possessing* a firearm,<sup>117</sup> and have made it unlawful for anyone to sell or otherwise dispose of a firearm or ammunition to someone with this history.<sup>118,119</sup>

#### A. Procedural Requirements

The federal firearm prohibitions are limited, however, by procedural requirements to ensure the alleged abuser has an opportunity to defend against the claim. He must have had actual notice of and opportunity to participate in a hearing,<sup>120</sup> and the court must find that he poses a “credible threat to the physical safety” of an intimate partner or child.<sup>121</sup> In addition, the court order must explicitly prohibit “the use, attempted use, or threatened use of physical force against [the plaintiff] that would reasonably be expected to cause bodily injury.”<sup>122</sup> Because Steven Lake was subject to a permanent PFA,<sup>123</sup> against which he had the opportunity to defend himself,<sup>124</sup> and that PFA explicitly prohibited the conduct outlined in the federal statute,<sup>125</sup> he was subject to the federal prohibition against owning or possessing a firearm.

116. “Intimate partner” is defined by the statute as being “the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.” 18 U.S.C.A. § 921 (a)(32) (2006). Note that this definition does not include former dating partners, against whom PFAs can be obtained under the Maine statute. 19-A M.R.S.A. § 4002(1) (2012).

117. 18 U.S.C.A. §§ 922(g)(8), (9).

118. *See id.* § 922(d)(8).

It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is subject to a court order that 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 another conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child . . . .

*Id.* Exceptions to this rule are outlined in *Id.* § 922(d)(8)(A), (B).

119. A “misdemeanor crime of domestic violence is defined as a tribal,” state or federal misdemeanor that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim,” *id.* § 921(a)(33)(A), so long as that person was represented by counsel or knowingly and intelligently waived that right, and had the opportunity for a jury trial and/or waived that right (when otherwise applicable), and the conviction has not been expunged or set aside, or the person has not been pardoned or had civil rights restored, “unless the pardon, expungement, or restoration . . . expressly provides that the person may not ship, transport, possess, or receive firearms,” *id.* § 921(a)(33)(B).

120. *Id.* § 922(g)(8)(A).

121. *Id.* § 922(g)(8)(C)(i).

122. *Id.* § 922(g)(8)(C)(ii).

123. *See* Allanach, *supra* note 22, at 32.

124. A permanent PFA can only be issued if a defendant had an opportunity to defend himself. *See supra*, Part III(b).

125. *See* Allanach, *supra* note 22, at 32.

*B. Prohibition Against Possessing or Attempting to Purchase Firearms*

Having been found to be a person prohibited from possessing firearms under the federal statute, Steven Lake's information would have been entered into the National Instant Background Check System (NICS). As of October 31, 2011, the NICS had 89,357 active records related to misdemeanor convictions for crimes of domestic violence, and 2,281 records related to PFAs.<sup>126</sup> Of the more than 137 million criminal background checks requested through October 31, 2011,<sup>127</sup> nearly 95,000 were denied on account of a misdemeanor conviction for a crime of domestic violence, and more than 38,000 were denied due to the existence of a PFA against the potential weapons purchaser.<sup>128</sup>

If NICS had signaled that Steven Lake attempted to purchase a firearm while subject to the PFA or had federal authorities been made aware that Steven had not turned over all of his firearms after the PFA was in effect, he could have been prosecuted for violating the federal prohibitions against purchasing or possessing a firearm.<sup>129</sup> Though the NICS would not have saved Amy, since there is no indication that Steven Lake attempted to purchase a gun after the PFA was put into effect,<sup>130</sup> he clearly was in possession of the gun later used in the murders, and could have been prosecuted for possession.

For example, the U.S. Court of Appeals for the First Circuit upheld an abuser's federal conviction for making a false statement to a firearms dealer about being subject to a PFA.<sup>131</sup> Wayne R. Whitney was convicted under the federal statute that prohibits "knowingly mak[ing] a false statement in connection with the purchase of a firearm"<sup>132</sup> after he answered "No" to a question on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) form that asked whether he was under a court order restraining him from harassing a child or an intimate partner.<sup>133</sup>

*C. Punishments*

Violations of the federal law can leave abusers open to harsh punishments,<sup>134</sup>

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126. FBI, UPDATE TO THE ACTIVE RECORDS IN THE NICS INDEX (Oct. 31, 2011), available at <http://www.fbi.gov/about-us/cjis/nics/reports/110711nics-index.pdf>.

127. FBI, TOTAL NICS BACKGROUND CHECKS (Oct. 31, 2011), available at <http://www.fbi.gov/about-us/cjis/nics/reports/110711totalnicsbackgroundchecks.pdf>.

128. FBI, FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES (2011) available at <http://www.fbi.gov/about-us/cjis/nics/reports/110711denials.pdf>. Convictions for misdemeanor crimes of domestic violence were the #2 reason for NICS denials, with 94,736 denials (10.74%) between the program's outset in 1998 and Oct. 31, 2011. *Id.* Subjects of PFAs were the #5 reason for NICS denials, accounting for 38,477 of the program's denials (4.36%) through Oct. 31, 2011. *Id.*

129. 18 U.S.C.A. §§ 922(g)(8), 924(a)(2) (2006).

130. See Allanach, *supra* note 22, at 33 (indicating that the guns used were in Steven's possession when they were removed by Amy's family members).

131. *United States v. Whitney*, 524 F.3d 134 (1st Cir. 2008).

132. *Id.* at 137-38 (quoting 18 U.S.C.A. § 922(a)(6)).

133. *Id.* at 136.

134. Some scholars believe that "deterrence depends not simply on the risk of being punished, but also on the nature and magnitude of punishment." ANDENAES, *supra* note 85, at 24.



such as steep fines and stiff imprisonment terms.<sup>135</sup> If federal authorities pursued the case, Steven might have been held in custody while awaiting trial or he might have been convicted and imprisoned before June 13, 2011. If he had been convicted under federal law, which provides for a penalty of up to ten years' imprisonment,<sup>136</sup> he obviously would not have been able to murder Amy and her children.

#### D. Communication Between State and Federal Agencies

Though Maine's PFAs do include language stating that possessing a weapon in violation of the order may be prohibited under federal law,<sup>137</sup> there is no indication about what the possible federal criminal consequences might be, nor instructions on how the alleged abuser should go about relinquishing his firearms. Furthermore, the Maine statute fails to describe how, or if, federal authorities would be notified for enforcement purposes if relinquishment requirements are not met.<sup>138</sup> It also fails to create a reporting mechanism to alert federal authorities when individuals fail to turn over their firearms, so that federal authorities could use their comparatively substantial resources to pursue federal gun law violators.<sup>139</sup> If Amy Lake or others suspected Steven of retaining possession of a firearm, they might have notified local police, but they likely would not have known to notify federal authorities because victims are not necessarily instructed about this option, nor is there a requirement that local authorities notify federal authorities about a possible violation.

#### V. PAST PROPOSALS TO IMPROVE MAINE'S PFA SYSTEM

Gaps in the system have regularly been a focus of legislative efforts in the years since Maine's adoption of its first PFA statute in 1980.<sup>140</sup> Though the Legislature has had moderate success in these endeavors, efforts to improve the effectiveness of the system often encounter difficulties associated with the financial

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135. See 18 U.S.C.A. § 924(a)(2). "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 [18 U.S.C.A. § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both." *Id.*

136. *Id.*

137.

Possession of a firearm or ammunition while this order is in effect may be prohibited under federal and/or state law if any one or more of the following boxes have been checked: 4 [*The defendant presents a credible threat to the physical safety of the plaintiff/minor child(ren).*], A-1 [*The defendant is prohibited from threatening, assaulting, molesting, attacking, harassing or otherwise abusing the plaintiff and any minor child(ren) residing in the household.*], A-2 [*The defendant is prohibited from the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury against the plaintiff or a minor child residing in the household.*], or F [*The defendant is prohibited from possession of a firearm or other dangerous weapon.*].

STATE OF ME. JUDICIAL BRANCH, PA-009, ORDER FOR PROTECTION FROM ABUSE (SEPT. 2011) (emphasis added).

138. See *supra* notes 101-103 and accompanying text.

139. *Id.*

140. See STATE OF ME. DEP'T OF PUB. SAFETY, *supra* note 3.

impact of proposed changes.

For example, upon the recommendation of the Maine Domestic Abuse Homicide Review Panel,<sup>141</sup> a bill was introduced during the first session of the 125th Legislature<sup>142</sup> to address the issue of gun seizures pursuant to PFAs. The bill, LD 386, would have amended the relevant laws<sup>143</sup> to require that firearms be seized by law enforcement when a person was arrested for a domestic abuse crime, that any bail conditions include a prohibition against possession of firearms or weapons, and that law enforcement agencies adopt a written policy for seizing and safely storing firearms collected in a domestic violence arrest.<sup>144</sup>

Had this bill been in effect when Amy Lake obtained her PFA or when Steven Lake was arrested for violating that order a few months later, police would have had a procedure to follow to gather Steven's weapons, ensure they were all accounted for, and secure them in a location to which Steven would not have had easy access. Had law enforcement had the means to search for and secure Steven's weapons, he may not have been able to obtain another weapon with which to kill Amy and her two children.

Unfortunately, the bill failed to garner the required votes to make it out of committee,<sup>145</sup> in part because the accompanying fiscal impact note stated that there would be a minor cost increase to the General Fund as a result of what the Legislature predicted would be larger caseloads.<sup>146</sup> The fiscal note mentioned that the cost would be incurred because there were no provisions for corresponding increases in fines or fees.<sup>147</sup> A similar bill offered during the previous session, based on the recommendations of the Working Group Concerning Domestic Violence and Firearms, was also indefinitely postponed.<sup>148</sup>

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141. In its 8th Report, the panel recommended that the Legislature create a central depository for weapons seized pursuant to PFAs served in the state. MAINE DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *supra* note 33, at 20.

142. The 125th Legislature convened on Dec. 1, 2010 and adjourned on May 31, 2012. Me. House of Representatives, *125th Maine Legislature*, MAINE.GOV, <http://www.maine.gov/legis/house/> (last visited Oct. 18, 2012).

143. *See infra* note 146. Relevant laws include 15 M.R.S.A. § 1023(4-A) (Supp. 2011) and 25 M.R.S.A. § 2803-B(2)-(3) (Supp. 2011).

144. An Act To Implement the Recommendations of the Working Group Concerning Domestic Violence and Firearms, L.D. 386 (125th Legis. 2011), *available at* <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0312&item=1&snum=125>. The proposed amendment to 15 M.R.S.A. § 1023(4-A) was, in part: "Firearms; bail condition upon arrest for certain crimes of domestic violence. If a law enforcement officer has seized firearms pursuant to this subchapter...the bail commissioner shall require, as a condition of bail, that all firearms in the possession of the person arrested be relinquished to a law enforcement officer and that the person refrain from possessing a firearm or other specified dangerous weapons until further order of a court. Upon request of the defendant, a bail condition imposed pursuant to this subsection must be heard by the court as expeditiously as possible." *Id.*

145. State of Maine Legislature, Summary of LD 386, (June 7, 2011) *available at* <http://www.mainelegislature.org/LawMakerWeb/summary.asp?ID=280039492>.

146. L.D. 386, Fiscal Note (125th Legis. 2011), *available at* [http://www.mainelegislature.org/legis/bills/bills\\_125th/fiscalpdfs/FN038602.pdf](http://www.mainelegislature.org/legis/bills/bills_125th/fiscalpdfs/FN038602.pdf).

147. *Id.*

148. LD 1817, SP 725, *Text and Status, 124th Legislature, Second Regular Session*, MAINE LEGISLATURE, [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?snum=124&paper=SP0725&PID=1456](http://www.mainelegislature.org/legis/bills/display_ps.asp?snum=124&paper=SP0725&PID=1456) (last

Other recent efforts to address domestic violence in the Legislature have met similar ends. A bill that would have directed the Commissioner of Public Safety to develop and distribute a protocol for handling cases of domestic violence for law enforcement agencies was voted Ought Not to Pass out of committee.<sup>149</sup> Though the bill did not direct the Commissioner to include any particular mechanisms in the protocol, completing this initial effort would have provided a uniform standard for law enforcement agencies dealing with domestic violence cases.<sup>150</sup> It would, however, have had an impact on the resources of the Department of Public Safety (i.e., additional resources would have been needed to create and distribute the report), which may have contributed to the committee vote of Ought Not to Pass.

Though domestic violence laws have faced passage hurdles in recent years, a few of the Legislature's previous efforts have successfully passed, despite their fiscal impacts. For example, the 121st Legislature<sup>151</sup> passed a law that ensures someone convicted of a domestic violence-related Class D or Class E crime would serve at least one year of the standard two-year probationary period, even if he completed a certified batterers' intervention program earlier in his probation.<sup>152</sup>

Likewise, the 122nd Legislature<sup>153</sup> passed a law that requires the Department of Public Safety to "make every reasonable effort to notify" a PFA recipient and her local law enforcement agency when the victim's abuser attempts to purchase a firearm from a firearms dealer required to participate in the NICS program.<sup>154</sup> Had

visited Oct. 18, 2012). For the text of the bill, see An Act To Implement the Recommendations of the Working Group Concerning Domestic Violence and Firearms, L.D. 1817 (124th Legis. 2010), available at: [http://www.mainelegislature.org/legis/bills/bills\\_124th/billpdfs/SP072501.pdf](http://www.mainelegislature.org/legis/bills/bills_124th/billpdfs/SP072501.pdf).

149. LD 908, SP 261, Text and Status, 120th Legislature, First Regular Session, MAINE LEGISLATURE,

[http://www.mainelegislature.org/legis/bills/display\\_ps.asp?snun=120&paper=SP0261&PID=1456](http://www.mainelegislature.org/legis/bills/display_ps.asp?snun=120&paper=SP0261&PID=1456) (last visited Oct. 18, 2012). For the text of the bill, see Resolve, to Establish Clear Guidelines for Protecting the Safety of Victims of Domestic Violence, L.D. 908 (120th Legis. 2001), available at [http://www.mainelegislature.org/legis/bills/bills\\_120th/billtexts/LD090801-1.asp](http://www.mainelegislature.org/legis/bills/bills_120th/billtexts/LD090801-1.asp).

150. *Id.*

151. The 121st Legislature convened in 2002 and adjourned in 2004. *A Historical Perspective*, MAINE LEGISLATURE, <http://www.maine.gov/legis/house/history.htm> (last visited Oct. 21, 2012).

152. An Act to Clarify Sentencing for Persons Convicted of Class D and Class E Crimes Involving Domestic Violence, L.D. 1266 (121st Legis. 2003), available at:

[http://mainelegislature.org/legis/bills/bills\\_121st/chapters/PUBLIC154-1.asp](http://mainelegislature.org/legis/bills/bills_121st/chapters/PUBLIC154-1.asp). The old language of 17-A M.R.S.A. § 1202(1-B) reads: "[T]he period of probation for a person convicted of a Class D or Class E crime involving domestic violence must be 2 years, except that the term of probation must be terminated at the time the probationer completes a certified batterers' intervention program ... unless there is another condition of probation that has yet to be met." *Id.* The new language of § 1202(1-B) reads: "[T]he period of probation... is 2 years, except that the term of probation terminates when the probationer has served at least one year of probation, has completed a certified batterers' intervention program ... and has met all other conditions of probation." *Id.* The fiscal impact was a "minor cost increase." L.D. 1266, Fiscal Impact Note (121st Legis. 2003), available at: [http://mainelegislature.org/legis/bills/bills\\_121st/fiscalnotes/FN126601.htm](http://mainelegislature.org/legis/bills/bills_121st/fiscalnotes/FN126601.htm).

153. The 122nd Legislature convened in 2004 and adjourned in 2006. *A Historical Perspective*, MAINE LEGISLATURE, <http://www.maine.gov/legis/house/history.htm> (last visited Oct. 21, 2012).

154. An Act To Provide Protection for Victims of Domestic Violence, L.D. 2116 (122nd Legis. 2006), available at [http://www.mainelegislature.org/legis/bills/bills\\_122nd/chappdfs/PUBLIC671.pdf](http://www.mainelegislature.org/legis/bills/bills_122nd/chappdfs/PUBLIC671.pdf). The fiscal impact statement noted minor cost increases to both the General Fund and the Highway Fund. L.D. 2116, Fiscal Impact Note (122nd Legis. 2006), available at: [http://www.mainelegislature.org/legis/bills/bills\\_122nd/fiscalnotes/FN211601.htm](http://www.mainelegislature.org/legis/bills/bills_122nd/fiscalnotes/FN211601.htm).

Steven Lake attempted to purchase a gun from a firearms dealer (as opposed to a private seller not subject to NICS), the Department of Public Safety would have notified Amy and her local police department. Unfortunately, however, this would have been unlikely to have helped Amy's situation, since police were already on high alert that Steven posed a mortal threat to Amy.

The 123rd Legislature<sup>155</sup> attempted to raise an alert about the unique character of domestic violence offenses by passing a law that established special designations for domestic violence assault,<sup>156</sup> domestic violence criminal threatening,<sup>157</sup> domestic violence terrorizing,<sup>158</sup> domestic violence stalking,<sup>159</sup> and domestic violence reckless conduct.<sup>160</sup> Each of these crimes is now designated as a Class D or conditional Class C crime.<sup>161</sup> This designation links into the federal law because convictions under these statutes satisfy the federal law's provision that a person convicted of a domestic violence crime is prohibited from purchasing or possessing a firearm.<sup>162</sup>

Though the legislature has created additional procedures and protections for PFA recipients, gaps in the system remain. Those gaps allowed Steven Lake to be out on the streets in June 2011, and they allowed him to retain possession of the gun he used to kill Amy and her two children.

## VI. OTHER STATES' ATTEMPTS TO FIX THE SYSTEM

Though Maine's domestic homicide rates are relatively low, more can be done to prevent these deaths. By reviewing steps taken by other states, statutory adjustments can be made to further Maine's objective of preventing these heinous crimes. Reviewing and evaluating the laws passed in other states can help Maine craft legislation that will be both fiscally responsible and effective in curbing further domestic violence and domestic violence homicides.

### A. New Hampshire

As in Maine, New Hampshire law prohibits a person subject to a PFA from

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155. The 123rd Legislature convened in 2006 and adjourned in 2008. *A Historical Perspective*, MAINE LEGISLATURE, <http://www.maine.gov/legis/house/history.htm> (last visited Oct. 21, 2012).

156. Now incorporated in 17-A M.R.S.A. § 207-A (Supp. 2011).

157. Now incorporated in *id.* § 209-A.

158. Now incorporated in *id.* § 210-B.

159. Now incorporated in *id.* § 210-C.

160. Now incorporated in *id.* § 211-A.

161. An Act To Protect Families and Enhance Public Safety by Making Domestic Violence a Crime, L.D. 1627 (123d Legis. 2007), *available at*:

[http://www.mainelegislature.org/legis/bills/bills\\_123rd/chappdfs/PUBLIC436.pdf](http://www.mainelegislature.org/legis/bills/bills_123rd/chappdfs/PUBLIC436.pdf). The fiscal impact to the Attorney General's office was deemed to be minimal, with additional costs able to be absorbed within the existing budget, but there were anticipated increases to the Department of Corrections and the Judiciary brought on by the new crimes and the resources required to facilitate the associated sentences.

*See* L.D. 1627, Fiscal Note (123d Legis. 2007), *available at*

[http://www.mainelegislature.org/legis/bills/bills\\_123rd/fiscalnotes/FN162701.htm](http://www.mainelegislature.org/legis/bills/bills_123rd/fiscalnotes/FN162701.htm). "The average cost to the state for each sentence is \$70,308 based on the average length of stay of one year, 10 months.

Sentences for a Class D crime must be served in a County Jail. The average cost to a county for each Class D sentence is \$6,795 based on an average length of stay of 62 days." *Id.*

162. *See supra* Part IV.

“purchasing, receiving, or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order.”<sup>163</sup> New Hampshire law also allows the court to issue a search warrant “authorizing a peace officer to seize any deadly weapons specified in the protective order and any and all firearms and ammunition, if there is probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the premises or curtilage of the defendant.”<sup>164</sup>

Had the Lakes lived in New Hampshire, the police could have searched Steven’s property until they seized all of his firearms and ammunition, and any other deadly weapons listed in the PFA. As in Maine,<sup>165</sup> however, New Hampshire has no requirement that police departments seek or carry out such search warrants.<sup>166</sup> Paired with the NICS program that would have prevented him from purchasing a new gun from a firearms dealer, the New Hampshire law would likely have had the same effect as Maine’s laws on Steven’s ability to access the firearm he used to kill Amy and her children.

### B. New Jersey

In a similar effort to crack down on domestic violence, New Jersey has taken aim at those who are applying for bail after a domestic violence arrest. Like New Hampshire, New Jersey state law allows courts to order law enforcement to carry out a search and seizure warrant if the judge reviewing the defendant’s request for bail has reasonable cause to believe that a weapon is still within the defendant’s possession.<sup>167</sup> Had the Lakes lived in New Jersey, the police could have searched Steven Lake’s property when the PFA was issued, as well as at any time they suspected he might have acquired a weapon. This is particularly valuable when guns can be purchased from private sellers, who are not required to check the NICS system.<sup>168</sup>

### C. North Carolina

When judges in North Carolina order a defendant to turn over his firearms, he must give the sheriff all “firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in [his] care, custody,

163. N.H. REV. STAT. ANN. § 173-B:5(II) (2002 & Supp. 2011).

164. *Id.*

165. *See supra* Part III(d).

166. “The court *may* subsequently issue a search warrant . . .” N.H. REV. STAT. ANN. § 173-B:5(II) (emphasis added).

167. N.J. STAT. ANN. § 2C:25-26 (a) (West 2012). “When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, the court authorizing the release may as a condition of release issue an order . . . prohibiting the defendant from possessing any firearm or other weapon . . . and ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order.” *Id.*

168. The Brady Act created the NICS program and mandated its use by Federal Firearms Licensees (FFLs) (professional gun sellers). FEDERAL BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NCIS): FEDERAL FIREARM LICENSEE MANUAL 2 (2011), available at <http://www.fbi.gov/about-us/cjis/nics/federal-firearms-licensees/ffl-manual>.

possession, ownership, or control.”<sup>169</sup> If a defendant is not able to immediately turn over the weapons (e.g., if he had to retrieve them from storage or he was served at the courthouse when he did not have his weapons with him), the sheriff designates a specific place and time within the following twenty-four hours at which the defendant has to turn over his weapons.<sup>170</sup> The additional costs associated with storing the weapons at the sheriff’s office or with licensed firearms dealers<sup>171</sup> are defrayed through a fee that sheriffs can assess to defendants for storing the prohibited items.<sup>172</sup> The collected fees are used to cover the costs of storing the weapons and for other purposes associated with the protection order statute.<sup>173</sup> Weapons will not be returned at the expiration of a protective order if a defendant has failed to pay the assessed storage fees, and the weapons can be sold by the sheriff to cover those fees.<sup>174</sup>

Had the Lakes lived in North Carolina, Steven would have been required to turn over his weapons to the sheriff rather than to a friend or family member,<sup>175</sup> which would have prevented him from gaining access to the weapons while Amy’s PFA was still in effect.<sup>176</sup> If Steven did not turn over his weapons at the time and place designated by the sheriff,<sup>177</sup> the sheriff’s office would immediately have been aware that he was violating the order, and could have taken action before Steven had a chance to kill Amy and her children.

#### D. Florida

Rather than having a unified PFA system as exists in Maine, Florida has a number of injunction types that address different areas of relationship abuse, though the procedures to obtain the injunctions remain the same.<sup>178</sup> The state categorizes and separates protections depending on the abuse type, with separate statutes creating an injunction against domestic violence where the parties were family or household members;<sup>179</sup> injunctions for protection against repeat violence, dating violence, and sexual violence;<sup>180</sup> and a newly-adopted injunction against

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169. N.C. GEN. STAT. § 50B-3.1(a) (2011).

170. *Id.* § 50B-3.1(d).

171. *Id.*

172. *Id.* § 50B-3.1(d)(2).

173. *Id.* “The fees shall be used by the sheriff to pay the cost of administering this section and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only.” *Id.*

174. *Id.* § 50B-3.1(h). After the weapons are sold and the sheriff has deducted the fees associated with the sale; the defendant can request that the balance of funds be returned to him. *Id.* The sheriff can also dispose of weapons that cannot be returned to the defendant upon the expiration of the order (e.g., he is a felon who is precluded from possession a weapon), *id.*, or for which the defendant has not made a motion for their return within 90 days of the order’s expiration, *id.* § 50B-3.1(f).

175. *See id.* § 50B-3.1(d).

176. *See id.* § 50B-3.1(f).

177. *See id.* § 50B-3.1(d).

178. *See* FLA. FAM. LAW R. P. 12.610.

179. FLA. STAT. § 741.30(1)(e) (2012).

180. *Id.* § 784.046(2). Within one statute provision, separate causes of action were created for each of these abuse types. *See id.*

stalking.<sup>181</sup> The rules and forms for issuing one of these injunctions do not include specific language about gun relinquishment, but individual counties can add in explicit prohibition and relinquishment language.<sup>182</sup> However, the state has adopted a statute that mirrors the language of the federal gun prohibition,<sup>183</sup> which means the prohibition is automatically included and tied to a state-level offense if the statutory criteria are met.

Florida has made moderate improvements to its injunction-against-abuse system related to bond determinations. For example, Florida's Fifteenth Judicial Circuit Court established a system that requires an individual who has violated a domestic violence injunction to be held until he has gone before a judge at a first appearance hearing.<sup>184</sup> The prohibition against releasing violators on bond does not extend beyond that first appearance, however.<sup>185</sup>

Though Amy's marriage to Steven would have satisfied the requirements for the initial bond prohibition, thereby leaving Steven in jail until his first appearance in court, it is unlikely that he would have had bond denied pending trial. This short-term fix combined with the limited scope of Florida's gun prohibition and enforcement, would likely have resulted in the same tragic ending had Amy lived in Florida.

## VII. BIG IDEA, BIG PROBLEMS

Since the inception of PFAs, stakeholders have made many attempts to increase the efficacy of PFAs and the frequency of safe outcomes for victims. A path that has been explored frequently, with little success, has been civil liability.

For decades, victims have filed lawsuits against law enforcement under various claims arising from failure to protect against domestic violence and failure to enforce PFAs to prevent harm. Some scholars have argued that the international community's acknowledgement of domestic violence as a human rights abuse

181. An Act Relating to Stalking, ch. 2012-153, 2012 Fla. Laws 1 (codified as amended in FLA. STAT. § 784.0485 (2012)).

182. In Florida, “[i]ndividual counties can, with Supreme Court approval, insert local provisions into the... [f]orms.” Judge Amy Karan and Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination the Juxtaposition of Federal and Florida Laws*, 79 FLA. BAR J. 79, 81 (2005). For example, “the temporary ex parte and final orders of protection in Miami-Dade County contain a local directive requiring respondents to surrender any firearms and ammunition in their possession within 24 hours after service. Further, the respondent must file a receipt with the court.” *Id.*

183. See FLA. STAT. § 790.233(1) (2012). “A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is currently in force and effect, restraining that person from committing acts of domestic violence, as issued under [FLA. STAT. §] 741.30 . . .” *Id.*

184. See *In re: Schedule of Bonds and Procedures Relating to Pre-first Appearance Release*, Fla. Admin. Order No. 4.202-11/10 (15th Jud. Cir. Nov. 16, 2010). This prohibition against issuing bonds to domestic violence injunction violators is, by the named injunction's parameters, only related to injunctions brought by family or household members. FLA. STAT. § 741.30(1)(e) (2012). The same protection is not given to other abuse-related injunction types (e.g., dating violence, sexual violence, etc.). Fla. Admin. Order No. 4.202-11/10. R45. See also FLA. STAT. § 907.041(4)(b) (2012) (generally, “[n]o person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing”); *id.* § 907.041(4)(a)(18) (defining an act of domestic crime as a “dangerous crime”).

185. Fla. Admin. Order 4.202-9/08, *supra* note 184.

paves the way for civil litigation.<sup>186</sup> However, whether these lawsuits have been filed against municipalities or individual actors, courts have repeatedly turned away those seeking civil liability.

For example, in 1987, the U.S. District Court for the District of South Carolina, Charleston Division, held that a municipality was entitled to qualified immunity against a lawsuit made by victims of a domestic violence shooting.<sup>187</sup> Janice Turner had a history of victimization at the hands of her ex-husband, Vernon Fair,<sup>188</sup> so she called police several times during a two-day period to report his continued homicidal threats.<sup>189</sup> Despite these calls, police were never dispatched to her home.<sup>190</sup> On the second day she was denied help, Fair came to Turner's home and shot her several times, and then attempted to shoot her son, Moshe Brown.<sup>191</sup> Turner and Brown sued the city and various law enforcement officials for failing to respond to Turner's calls for help and thus failing to protect the plaintiffs from a known harm.<sup>192</sup> The District Court issued summary judgment, finding that the defendants were entitled to qualified immunity because "there simply is 'no constitutional right to be protected by the state against ... criminals or madmen' and in corollary, there is no 'constitutional duty [on the state] to provide such protection.'"<sup>193</sup>

Nearly two decades later, a different U.S. District Court<sup>194</sup> held that a PFA "did not create a legitimate entitlement to its enforcement" that could support a Due Process claim brought by a family member of two victims of domestic violence homicide.<sup>195</sup> Plaintiff Joan Starr brought suit against various law enforcement officials, claiming that they violated the constitutional rights of her daughter Raienhna Bechtel and grandson Jacob Bechtel<sup>196</sup> when the defendants returned confiscated firearms to Raienhna's ex-husband, Michael Harvey Bechtel, who then used the firearms to murder Raienhna, Jacob and two others.<sup>197</sup> Though Raienhna had obtained a PFA against Michael, his weapons were turned over to police, and his name was entered in the Pennsylvania's Protection from Abuse Database as being someone who could not possess a gun, police returned the guns

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186. See Miccio, *supra* note 1, at 645.

By addressing domestic violence as human rights violations, the international community expanded the traditional concept of vicarious liability to cover acts by private individuals who are not agents nor acting with apparent authority. Therefore, under international law, although agency may not exist, where systemic failure to prosecute, prevent or protect is demonstrated, liability for private conduct is imputed to the state.

*Id.* at 660.

187. *Turner v. City of North Charleston*, 675 F.Supp. 314, 320 (D.S.C. 1987).

188. See *id.* at 317. Fair's history of abuse of Turner included an attack with a butcher knife, an abduction, a rape, and multiple assaults. *Id.*

189. *Id.* at 317-18.

190. *Id.*

191. *Id.* at 318.

192. *Id.* Police were aware of Fair's past abuse of Turner. *Id.*

193. *Id.* at 316, 320 (quoting *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983)).

194. U.S. District Court for the Middle District of Pennsylvania.

195. *Starr v. Price*, 385 F.Supp.2d 502, 512 (M.D. Pa. 2005).

196. *Id.* at 504.

197. *Id.* at 504-05.



to him at his request.<sup>198</sup> Though the court noted that a state actor can be liable in certain circumstances,<sup>199</sup> it held that since the PFA alone did not create an enforcement entitlement, the plaintiff did not have a sufficient claim under the Due Process Clause.<sup>200</sup>

The issue of civil liability for failure to enforce PFAs and other protective orders came before the Supreme Court in 2005 in *Castle Rock v. Gonzales*.<sup>201</sup> In that case, the plaintiff had a restraining order against her ex-husband, when he came to her home and picked up their three children (ages 10, 9, and 7) without her permission.<sup>202</sup> Armed with the restraining order, the plaintiff asked for police assistance to retrieve her children nine separate times, but police did not respond.<sup>203</sup> During the intervening hours, the plaintiff's ex-husband murdered the three children before committing suicide by opening fire in a police station with a semiautomatic handgun.<sup>204</sup> The plaintiff then sought civil damages against the city for violating her Due Process rights when they failed to enforce the restraining order, which contributed to the death of her children.<sup>205</sup> The Supreme Court held that a constitutionally-protected property interest was not created by the restraining order, so civil liability under the Due Process Clause could not stand.<sup>206</sup>

Similarly, a U.S. District Court held that the plaintiff could not put forth a civil action against the City of Philadelphia for the violation of decedent's Due Process rights, after police failed to seize a firearm that was in the possession of an abuser when they served a PFA against him.<sup>207</sup> After being served with the PFA, Ramon Mills allegedly threatened the life of his girlfriend and her brother while police officers were present,<sup>208</sup> but they did not seize the weapon in his possession.<sup>209</sup> The officers argued that they would have confiscated the weapon had the PFA required them to do so,<sup>210</sup> but the order stated merely that the defendant should relinquish the weapons to the sheriff.<sup>211</sup> The court found that the PFA placed the obligation on Mills to surrender any guns, rather than on the police to actively seize them.<sup>212</sup>

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198. *Id.* at 505.

199.

A state actor is liable if: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create a situation that otherwise would not have existed for the third party's crime to occur."

*Id.* at 508 (quoting *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d. Cir. 1996)).

200. *Id.* at 512.

201. 545 U.S. 748 (2005).

202. *Id.* at 752-53.

203. D. KELLY WEISBERG & SUSAN F. APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS, 319-21 (4th ed. 2010).

204. *Castle Rock*, 545 U.S. at 754.

205. *Id.*

206. *Id.* at 768.

207. *Estate of Brewington v. Lombardo*, No. 05-6016, 2010 U.S. Dist. LEXIS 116917 (E. D. Pa. Nov. 3, 2010).

208. *Id.* at \*3.

209. *Id.* at \*2.

210. *Id.* at \*9.

211. *Id.* at \*12.

212. *Id.*

The courts have repeatedly knocked down attempts to bring civil liability claims against municipalities and other state actors for issues arising out of failures to enforce PFAs, in large part because they do not believe that PFAs create a special relationship that requires a heightened standard of protection from law enforcement.<sup>213</sup> Though civil liability may not be feasible, advocates for stronger PFA laws may have more success raising awareness and compliance using criminal sanctions for defendants' noncompliance, because the courts have repeatedly upheld punishments under criminal statutes.

#### VIII. SIMPLE FIXES FOR MAINE'S PFA SYSTEM

Maine can improve its domestic violence victim protection efforts by implementing cost-effective processes to close the gaps in the existing system and by working with federal agencies that have the financial resources to investigate noncompliance with weapons prohibitions. Maine should adopt statutory provisions that require weapons be turned over to law enforcement or licensed firearms dealers rather than to lay individuals, edit the PFA form language to put abusers and victims on notice as to whether the federal gun prohibition is triggered by the PFA in their case, create a database to track compliance with the turnover of weapons, and require law enforcement to notify federal authorities when a defendant has failed to turn over weapons within 24 hours. The Maine Legislature should also investigate the feasibility of enacting provisions that allow judges to require high-risk defendants to wear Global Positioning System (GPS) tracking devices as a condition of bail if they violate an existing PFA.

Though the Legislature's various commissioned panels have made additional recommendations in recent years, the fiscal impact designations have proven to be a strong force against passage. With the state's budget facing overruns by the Department of Health and Human Services and the Indigent Legal Defense Fund,<sup>214</sup> the Legislature is keenly aware of the costs of newly-proposed programs. This scrutiny brings heightened attention to the fiscal impacts of proposed solutions to improve PFA enforcement. To understand how Maine law can be adapted to better integrate with federal laws aimed at preventing domestic violence, while incurring a low economic impact on the state budget, it is necessary to evaluate the effectiveness and costs of each recommended provision.

##### *A. Require Weapons to be Turned over to Police or Licensed Firearms Dealers*

State laws should be changed to require that defendants subject to a PFA-related gun prohibition turn over the designated weapons to law enforcement or licensed firearms dealers, rather than having the option of turning over the weapons

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213. See, e.g., *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189-90 (1989) (holding that such special relationships exist only when an individual is in state custody).

214. See Jessica Hall, *Maine May See Rating Downgrade*, MORNING SENTINEL (May 19, 2012), <http://www.onlinesentinel.com/news/Maine-may-see-rating-downgrade.html?pageType=mobile&id=1> (citing an \$80 million shortfall in the state Health and Human Services Department budget); Patty B. Wight, *Maine Legal Aid Fund Running Out of Money*, MPBN (May 30, 2012), <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/22056/Default.aspx>.

to another individual.<sup>215</sup> Currently, there exist no qualifications for private individuals who agree to house a defendant's weapons, nor are there any penalties for returning the weapons to the prohibited individual while the PFA is still in effect.<sup>216</sup> This lack of accountability for laypersons holding a defendant's weapons, increases the possibility that an abuser will regain access to his weapons while the PFA is still in effect, whether because the lay person no longer wishes to be responsible for them, or the because the defendant lies and states that the PFA is no longer in effect. This risk is diminished considerably if the weapons are turned over to law enforcement or to licensed firearms dealers, because both groups have access to NICS<sup>217</sup> and can therefore determine if a PFA has been dropped before the defendant is able to retrieve his weapons.<sup>218</sup>

This approach certainly triggers budgetary concerns, as has been raised in the past.<sup>219</sup> To make this suggested change viable, the Legislature should enact a provision that requires defendants subject to a weapons prohibition to pay a small fee to cover the costs associated with having law enforcement or licensed firearms dealers store the weapons. This approach has successfully been used in North Carolina, where sheriffs can assess a storage fee and sell the weapons to cover those fees if they go unpaid.<sup>220</sup> Making it possible for licensed firearms dealers to house the weapons would be especially valuable in more rural areas of the state, which may have small sheriff's offices that do not have the facilities in which to house the weapons. By balancing the financial costs associated with law enforcement or firearms dealers housing relinquished weapons, with a storage fee assessed to the weapons owner, Maine can add one more hurdle between homicidal abusers and their victims, without significantly impacting the State's budget.

#### *B. Highlight the Applicability of the Federal Gun Prohibition*

PFA forms should be edited to include a box notifying the parties if the federal gun prohibition is triggered by the terms of the state order. The bottom of the current PFA form currently includes a warning that the federal gun prohibition *may* be triggered,<sup>221</sup> but does not provide a summary of potential consequences, nor a definitive statement to help parties understand whether the risk of federal charges applies to their particular case, despite the fact that the federal statutes are clear about what is required for a state-issued PFA to garner the federal consequences of a gun violation.<sup>222</sup> Confusion can also be caused by the federal law's applicability being limited to only a few relationship types, which are more narrowly defined than in the State's PFA statute.<sup>223</sup>

A box should be added to Maine's PFA form that (if checked) definitively

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215. See 19-A M.R.S.A. § 4006(2-A) (2012) (giving defendants the option to turn over weapons to law enforcement "or other individual").

216. See *supra* Part III(d).

217. See *supra* Part IV(b).

218. The risk still exists, however, because human error is possible.

219. See *supra* Part V.

220. See *supra* Part VI(c).

221. ORDER FOR PROTECTION FROM ABUSE, *supra* note 137.

222. See *supra* Part IV.

223. See *supra* note 117 and accompanying text.

notifies the parties that the requirements have been met for the federal prohibition to take effect. This box would have to be checked in all instances in which the federal statute is triggered, and could not be left to the judge's discretion.<sup>224</sup> With this clarified direction, defendants would thus be put on notice about the applicability of federal law, and victims would have a better understanding of which law enforcement agencies they could or should contact in the event of a breach.<sup>225</sup>

Adding a definitive statement about the applicability of federal law to the case at hand would prevent ambiguity and confusion surrounding whether the defendant's weapons must be relinquished under the federal statute even if it is not required under state law.<sup>226</sup> This clarification would also cut back on enforcement efforts that would otherwise be expended to ensure defendants who are unaware of or confused about the federal prohibition are compliant with the orders. Court forms are regularly adjusted by the State judiciary branch, so it is unlikely that there would be a fiscal impact associated with making this change to the PFA form. This simple form change should be adopted to prevent confusion about the applicability of the federal gun prohibition to Maine's PFA cases.

### C. Track Compliance with PFA-related Relinquishment Orders

The Legislature should create a state-wide tracking system to ensure that abusers have complied with PFA weapons relinquishment orders by turning over their weapons to law enforcement or licensed firearms dealers.<sup>227</sup> Under the current system, there is no mechanism for determining whether a defendant has complied with the weapons relinquishment order,<sup>228</sup> which arguably undermines the efficacy of the prohibition altogether.

In order to make the existing weapons relinquishment provision effective, the State must find a way to ensure its enforcement. This can be accomplished either via the creation of a dedicated state-wide database to track compliance, or by adding a component to the systems already used to share information about PFAs

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224. When viewing the current PFA form, parties may mistakenly believe that the federal prohibition does not apply simply because the state court judge did not check off a box for a state weapons prohibition. However, other terms on the form may satisfy the requirements for the federal prohibition to take effect, even if a weapons prohibition has not been ordered under state law. *See supra* Part IV(a). Furthermore, because the federal prohibition is automatic when the requirements are met, state court judges do not have discretion to waive that prohibition. *See supra* Part IV. To ensure that the parties understand the risks and remedies available to them, this confusion must be addressed.

225. Victims who are made aware of the applicability of the federal prohibition will be more likely to reach out to federal authorities when there is a breach, rather than relying solely on local authorities for enforcement, which is particularly important because federal authorities have greater resources to investigate their concerns.

226. For example, if two defendants are issued identical PFAs that do not include a state weapons relinquishment order, one defendant may be subject to the federal ban while the other may not (e.g., if the first defendant was a former spouse of his victim and the second defendant was only a former dating partner of his victim). *See supra* note 117 and accompanying text.

227. Though existing law allows a defendant to provide documentation that he has turned over his weapons to any individual, this Comment recommends that weapons should be turned over solely to law enforcement or to a licensed firearms dealer. *See supra* Part VIII(a).

228. *See supra* Part III(d).

with law enforcement. In either case, a notation should be placed on PFAs with relinquishment orders. If a defendant turns over his weapons to a licensed firearms dealer, the dealer would be required to immediately notify law enforcement, who would log the relinquishment into the system.<sup>229</sup> If a defendant did not turn over his weapons to either law enforcement or to a licensed weapons dealer within the required twenty-four hour time period, the adopted mechanism would send a notification to the courts and law enforcement automatically,<sup>230</sup> so further action could be taken.<sup>231</sup>

The creation of such a database would likely have a short-term fiscal impact related to the programming adjustments that would need to be made to the existing system, or to the creation of a new database. Once the system is in place, however, the maintenance costs would be aligned with the costs of maintaining the rest of the system. The costs for this program could be offset by assessing fines to those individuals who do not relinquish their weapons within the required 24-hour period.

Having a statewide database that allows courts and law enforcement officials to track compliance with weapons relinquishment orders would address the gap between the Legislature's intention to protect victims,<sup>232</sup> and the realities of defendants' reluctance to abide by these orders. The Legislature should take steps to adapt existing systems to provide a state-wide database to enforce the relinquishment orders that are a critical aspect of a PFA's ability to protect victims of domestic abuse.

#### *D. Notify Federal Authorities When Weapons Are Not Relinquished*

The Legislature should include a mechanism in the state-wide tracking system<sup>233</sup> whereby federal authorities are automatically notified when a defendant subject to the federal prohibition is suspected of being in possession of weapons. This could be triggered automatically in the system if the defendant has failed to relinquish his weapons within twenty-four hours of being served with a PFA.<sup>234</sup> There is currently no mechanism by which federal authorities are notified when a defendant is noncompliant with the federal gun prohibition tied to a PFA.<sup>235</sup>

Notifying federal authorities in cases where the federal prohibition applies allows the federal government to use its vast resources to pursue the defendant,<sup>236</sup>

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229. Law enforcement officers would also be required to update the system if weapons were turned over to them directly.

230. Though the specifications of the existing judicial records system are not public knowledge, many database programs have the ability to create reports or send automatic notifications when certain criteria are met. *See, e.g.*, QuickBase, INTUIT, <http://quickbase.intuit.com/> (last visited Aug. 27, 2012); Microsoft Access, MICROSOFT, <http://office.microsoft.com/en-us/access/> (last visited Aug. 27, 2012).

231. Further action may include a police visit to the defendant's home to remind him of the order, the issuance of a search warrant by the court, notification to federal authorities for investigation, etc.

232. *See supra* notes 6-7 and accompanying text.

233. *See supra* Part VIII(c) (arguing for a state-wide tracking system).

234. *See supra* Part VIII(c) (discussing how such an automatic mechanism could be generated).

235. *See supra* Part IV(d).

236. The United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has "unique responsibilities dedicated to protecting the public, reducing violent crime, and enforcing the Federal

which local law enforcement may have more difficulty doing due to budgetary constraints. The fiscal impact of these notifications would be related to the programming needs to ensure the correct cases are identified in the state-wide database and to create the notification mechanism. Whereas the federal prohibition can take effect even without a relinquishment order, the state-wide database would need to include a field for the identification of cases that meet the federal requirements for the weapons prohibition.<sup>237</sup>

In order for the threat of federal prosecution to serve its deterrence goal, there must be a mechanism to carry out that threat when defendants violate the gun prohibition. The State should create a mechanism within the suggested state-wide compliance database that automatically notifies federal authorities of the suspected violations.

#### *E. Study the Impacts of GPS Tracking*

Defendants who have knowingly violated a PFA have demonstrated their disregard for the PFA system and their determination to further abuse their victims. The associated, heightened risk that these defendants pose must be addressed during the criminal prosecution of the PFA violation. Court systems and policy advocates have attempted to address the risk these repeat offenders pose through technology, most notably through the use of Global Positioning System (GPS) devices. As this technology evolves and as the risks of impermissibly impinging on the rights of defendants decreases,<sup>238</sup> the State should continue to investigate the limited use of GPS tracking devices for the highest risk abusers.

In its April 2012 assessment, Maine's Domestic Abuse Homicide Review Panel nodded to these technology trends in its recommendation that "the feasibility of pre-trial and post-conviction electronic monitoring of domestic violence offenders in cases involving high risk" be studied.<sup>239</sup> In its evaluation, Maine will likely look to states like Massachusetts, Oklahoma and Indiana, which have enacted laws permitting the use of GPS tracking devices for use with domestic violence offenders.<sup>240</sup>

In the states with GPS tracking statutes, a judge can order a domestic violence offender to wear a GPS tracking device if he has either violated a PFA or has committed a crime of domestic violence.<sup>241</sup> Some states require that the defendant

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firearms laws and regulations." Violent Crime Bureau, *Firearms*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <http://www.atf.gov/firearms/> (last visited Aug. 25, 2012).

237. The notification piece could be tied into the field added to the PFA form where the applicability of the federal law would be identified. *See supra* Part VIII(b).

238. *See* Shelley M. Santry, *Can You Find Me Now? Amanda's Bill: A Case Study in the Use of GPS in Tracking Pretrial Domestic Violence Offenders*, 29 QUINNIPIAC L. REV. 1101, 1110-16 (2011) (discussing the constitutionality of such GPS tracking).

239. ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *supra* note 17, at 15.

240. *See* MASS. ANN. LAWS ch. 209A, § 7 (Westlaw through Chapter 291 of the 2012 2d Annual Session); OKLA. STAT. tit. 22 § 60.17 (Westlaw through Second Regular Session of the 53rd Legislature 2012); IND. CODE ANN. § 35-33-8-11 (Westlaw through 2012 legislation).

241. Indiana judges are free to order the use of a GPS tracking device as one of the defendant's bail conditions if he has been charged with a domestic violence crime, IND. CODE ANN. § 35-33-8-11(a); Oklahoma judges can include the requirement in any emergency protective or restraining order issued when an existing PFA has been violated by the defendant, OKLA. STAT. ANN. tit. 22 § 60.17; and

be deemed high-risk before a judge can order him to wear a GPS device,<sup>242</sup> which some scholars have argued is best tied to lethality indicators that may arise during a comprehensive dangerousness assessment.<sup>243</sup> Using these lethality indicators and conducting risk assessments as a prerequisite to ordering the use of a GPS device would limit the scope of the tracking program to the highest-risk defendants.

Though the device brings with it the ability for victims and police to be notified when abusers enter an exclusion zone,<sup>244</sup> delays in transmitting the information caused by poor cell phone service<sup>245</sup> can create a false sense of security for victims.<sup>246</sup> This would be of particular concern for rural areas of Maine, where cell phone service may not be as accessible. The costs associated with such a program are also a concern given the economic pressures on Maine's government to rein in spending. The Indiana, Oklahoma, and Massachusetts laws allow judges to push the estimated ten-dollar-a-day cost<sup>247</sup> onto defendants,<sup>248</sup> but that raises concerns about disproportional impact on indigent defendants and the possibility of violating equal protection.<sup>249</sup>

The questionable reliability of these devices, along with the expected fiscal impact and constitutional concerns, should give Legislators pause when considering this as method of addressing Maine's domestic violence issues.

## IX. CONCLUSION

Domestic violence has been a growing concern over the past few decades, and gun seizure processes have been at the heart of the debate. Maine's Domestic Abuse Homicide Review Panel has expressed its belief that Maine's current system for dealing with gun prohibitions and weapons relinquishment orders requires "vigilant examination" due to the prevalence of the use of deadly weapons in domestic violence homicides.<sup>250</sup> Though domestic violence affects both men and women, it disproportionately affects women in a way that the United Nations

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Massachusetts judges can order a defendant to wear a GPS device if he has violated PFA issued within the state or in another jurisdiction, MASS. ANN. LAWS ch. 209A, § 7.

242. See OKLA. STAT. ANN. tit. 22 § 60.17 (stating that the court must find that the defendant "has a history that demonstrates an intent to commit violence against the victim, including, but not limited to, prior conviction for an offense under the Protection from Domestic Abuse Act or any other violent offense, or any other evidence that shows by a preponderance of the evidence that the defendant is likely to commit violence against the victim"). In Kentucky, the court may require a defendant to wear a GPS device if there has been a "substantial violation" of a domestic violence order previously entered by the court." Santry, *supra* note 238, at 1109 (citing KY. REV. STAT. ANN. § 403.761(3) (West 1992) (amended 2010)).

243. See Diane L. Rosenfeld, *Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R.-C.L. L. REV. 257, 263 (2008). Examples of lethality indicators include homicidal or suicidal threats, attempted strangulations, weapons ownership, and other examples of past violence. *Id.*

244. See MASS. ANN. LAWS ch. 209A, § 7.

245. Santry, *supra* note 238.

246. *Id.* at 1118-22.

247. Rosenfeld, *supra* note 243, at 261.

248. See MASS. ANN. LAWS ch. 209A, § 7; OKLA. STAT. ANN. tit. 22 § 60.17; IND. CODE ANN. § 35-33-8-11(b).

249. Santry, *supra* note 238, at 1115.

250. ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, *supra* note 17, at 14.

recognized “negatively impacts women’s equality, . . . [and] constitutes a violation of international human rights law.”<sup>251</sup> Maine should remain vigilant in its attempts to improve the system, and should pursue cost-effective mechanisms to increase the effectiveness of Maine’s PFA system.

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251. Miccio, *supra* note 1, at 655 (referencing World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, Kenya, July 15-26, 1985, *Nairobi Forward-Looking Strategies for the Advancement of Women*, U.N. Doc. A/CONF.116/28/Rev.1 (July 26, 1985)).