

UCLA

UCLA Criminal Justice Law Review

Title

So Far, So Good: Enforcing California's Gun Violence Restraining Orders Before and After Bruen

Permalink

<https://escholarship.org/uc/item/6bs7g8rn>

Journal

UCLA Criminal Justice Law Review, 7(1)

Author

Gee, Harvey

Publication Date

2023

DOI

10.5070/CJ87162083

Copyright Information

Copyright 2023 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

SO FAR, SO GOOD: Enforcing California's Gun Violence Restraining Orders Before and After *Bruen*

Harvey Gee¹

ABSTRACT

Much has been written about the gun control debate, mass shootings, and gun violence in high crime neighborhoods, but less attention has been paid to efforts to prevent shootings altogether. A gun violence restraining order (“GVRO”) is a tailored, individualized way to deter homicide, suicides, and even mass shootings by providing a tool for law enforcement to intervene when harm appears imminent, without having to wait for injury, lethality, or criminal actions. A GVRO is a “red flag” law which permits removal of firearms from an individual and allows the police to petition a state court to order the temporary removal of firearms from a person who may present a danger to themselves or others.

GVROs are a moderate and effective tool for preventing violence. A court decides whether to issue a GVRO based on statements or actions by the gun owner in question. Evidence might include threats of violence by the individual toward themselves and others, a violation of a domestic violence restraining order, or the recent acquisition of a significant number of firearms.

This Article explores the application and enforcement of GVROs in California and offers an evaluation of their effectiveness thus far. It then argues that GVROs are constitutionally permissible under the new standard announced in *New York State Rifle & Pistol Assn., Inc. v. Bruen*. In *Bruen*, the U.S. Supreme Court held that a century-old New York gun safety law, which required a license to carry concealed weapons in public places, was unconstitutional. Further, the Court adopted a new test that

1. Attorney, San Jose City Attorney's Office. He previously served as an attorney with the Office of the Federal Public Defender in Las Vegas and Pittsburgh, the Federal Defenders of the Middle District of Georgia, and the Office of the Colorado State Public Defender. B.A., Sonoma State University; J.D., St. Mary's School of Law; LL.M., The George Washington Law School. The views expressed are solely those of the author, and do not reflect the opinions of past or present employers. The author thanks his CJLR editors including Hannah Cooperman, Felix Murphy, Justin VanLigten.

says a modern gun law must have an analogue in American legislative text, history, and tradition.

This Article blends statutory and legal analyses of GVROs in California and includes a rare discussion of the practical and administrative aspects of how attorneys proceed in bringing forth a GVRO against a respondent. It stands apart from the extant legal literature which has largely addressed the goals and feasibility of red flag laws generally, or has focused on red flag laws in states other than California. Thus far, the analytical scope of the research surrounding GVROs has been defined and maintained by medical and public health academics within medical journals. These studies lean heavily towards case summaries, discussing study design and/or collecting statistics. This Article bridges their results with best legal practices and caselaw analyses to broaden the conversation about the need for GVROs.

Table of Contents

INTRODUCTION	157
I. CALIFORNIA GUN VIOLENCE RESTRAINING ORDERS AS DEFINED AND IMPLEMENTED.....	160
A. <i>Gun Violence Restraining Orders Begin</i>	160
B. <i>Gun Violence Restraining Orders Are Working Effectively</i> ...	163
C. <i>Emerging Empirical Research Evaluating Gun Violence Restraining Orders</i>	165
D. <i>Racial Justice and Gun Violence Restraining Orders</i>	166
II. NEW YORK STATE RIFLE & PISTOL ASSN., INC. v. BRUEN	167
A. <i>Bruen Analysis</i>	168
B. <i>Gun Violence Restraining Orders in the Modern Era</i>	172
III. PRACTICAL CONSIDERATIONS FOR PRACTITIONERS	173
A. <i>Deferred Prosecutions in Gun Violence Restraining Order Cases</i>	174
B. <i>Gun Violence Restraining Orders Against Juveniles: An Emerging Trend</i>	176
CONCLUSION	180

Introduction

While much has been written about the gun control debate, the frequency of mass shootings, and gun violence in high-crime neighborhoods, less attention has been paid to recently passed state laws designed to prevent gun shootings before they happen.² An increasing number of states have been passing what are known as “emergency gun violence protection laws” to curb gun violence in recent years. A gun violence restraining order (GVRO), California’s version of an extreme risk protection order or “Red Flag law,” is a tailored, individualized tool to deter homicide, suicides, and even mass shootings.³ It allows law enforcement to intervene when harm appears imminent, without having to wait for an injury, a fatality, or criminal acts to occur.

More specifically, a GVRO is a “red flag” law which permits removal of firearms from an individual by petitioning a state court to order the temporary removal of firearms from a person who may present a danger to themselves or others.⁴ GVROs are designed for situations where the waiting period for a full court appearance could undermine the effectiveness of the order. Presently, nineteen states and the District of Columbia have laws that allow for the removal of firearms from individuals who pose an imminent risk of harming themselves or others.⁵ Red flag laws satisfy procedural due process requirements and receive more bipartisan support than other forms of gun control legislation because of their

2. See e.g., THOMAS ABT, *BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS* 2–4 (2019); Jacob D. Charles, *Securing Gun Rights By Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581 (2022); Dru Stevenson & Jenna R. Shorter, *Revisiting Gun Control and Tort Liability*, 54 IND. L. REV. 365 (2021); Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559 (2016); German Lopez, *America’s Gun Problem* NY TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/26/briefing/guns-america-shooting-deaths.html> [https://perma.cc/RSB6-NFET]; Amanda Taub, *In the U.S., Backlash to Civil Rights Era Made Guns a Political Third Rail*, NY TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/world/americas/2nd-amendment-gun-laws.html> [https://perma.cc/FSZ3-GPP3].
3. See Lisa Howard, *California’s “Red Flag” Law Utilized for 58 Threatened Mass Shootings*, UC DAVIS (June 8, 2022), <https://www.ucdavis.edu/news/californias-red-flag-law-utilized-58-threatened-mass-shootings> [https://perma.cc/7484-YVR6].
4. See e.g., IAN AYRES & FREDERICK E. VARS, *WEAPON OF CHOICE; FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS* 104 (2020); Clay Calvert & Ashton Hampton, *Raising First Amendment Red Flags About Red Flag Laws: Safety, Speech and the Second Amendment*, 30 GEO. MASON U. CIV. RTS. L.J. 351, 353 (2020); Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Law and Due Process*, 106 VA. L. REV. 1285, 1293–95 (2020); Coleman Gay, *“Red Flag” Laws: How Law Enforcement’s Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1493–94 (2020).
5. Blocher & Charles, *supra* note 4, at 1296 (California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia).

targeted nature and ability to balance the interest of gun owners against the effects of gun violence.⁶ This was apparent when Congress passed a significant Gun Safety bill this summer, signed by President Biden, giving millions of dollars to mental health programs and school safety crisis intervention programs, as well as providing resources to states to support red flag laws.⁷

This Article explores the application and enforcement of GVROs in California and offers an evaluation of their effectiveness thus far. It then argues that GVROs are constitutionally permissible under the new standard announced in the 2022 Supreme Court decision, *New York State Rifle & Pistol Assn., Inc. v. Bruen* (*Bruen*).⁸ *Bruen* held that a century-old New York gun safety law, which required a license to carry concealed weapons in public places, was unconstitutional.⁹ Further, the Court

-
6. See Patrik Johnsson & Noah Robertson, *If Uvalde Inspires Gun Control, 'Red Flag' Laws Are Most Likely*, CHRISTIAN SCI. MONITOR (May 27, 2022), <https://www.csmonitor.com/USA/2022/0527/If-Uvalde-inspires-gun-control-red-flag-laws-are-most-likely> [<https://perma.cc/XVN3-SLFX>]; Mark Gollum, *'Red Flag' Laws to Prevent Mass Shootings Could Be on the U.S. Political Table. But Do They Work?*, CBC NEWS (May 27, 2022), <https://www.cbc.ca/news/world/red-flag-laws-shooting-texas-buffalo-guns-1.6467169> [<https://perma.cc/39EE-JNZR>]; Amber Phillips, *What Are Red-Flag Laws?*, WASH. POST (June 14, 2022), <https://www.washingtonpost.com/politics/2022/06/14/what-is-a-red-flag-law> [<https://perma.cc/8TUG-BW5J>].
 7. See Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Gun Bill Into Law, Ending Years of Stalemate*, NY TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/politics/gun-control-bill-biden.html> [<https://perma.cc/4KY7-HAMK>]; Emily Cochrane & Annie Karni, *Senators Reach Bipartisan Deal on Gun Safety*, NY TIMES (June 12, 2022), <https://www.nytimes.com/2022/06/12/us/politics/senator-gun-safety-deal.html> [<https://perma.cc/B3HC-CKU3>]; Emily Cochrane & Katie Edmondson, *Senators Grasp for a Bipartisan Gun Deal, Facing Long Odds*, NY TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/26/us/politics/senate-guns-bipartisan-deal.html> [<https://perma.cc/H766-4N3G>].
 8. 142 S. Ct. 2111 (2022).
 9. See e.g., Andrew R. Morral et al., *State Gun Regulations Are a Messy Patchwork. The Supreme Court's Bruen Decision Won't Help*, THE RAND BLOG (Aug. 22, 2022), <https://www.rand.org/blog/2022/08/state-gun-regulations-are-a-messy-patchwork-the-supreme.html> [<https://perma.cc/T3Q2-JUWL>]; William Baude, *Of Course the Supreme Court Needs to Use History. The Question is How* (Aug. 8, 2022), <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen> [<https://perma.cc/7E5S-499Z>]; Lisa Vicens & Samuel Levander, *The Bruen Majority Ignores Decision's Empirical Effects*, SCOTUSBLOG (July 8, 2022), <https://www.scotusblog.com/2022/07/the-bruen-majority-ignores-decisions-empirical-effects> [<https://perma.cc/273D-43KX>]; Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen's Originalist Distortions*, SCOTUSBLOG (June 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions> [<https://perma.cc/85DK-7BN6>]; Theresa Inacker, *From constitutional orphan to treasured heirloom: The Second Amendment is no longer a second-class right*, SCOTUSBLOG (July 11, 2022), <https://www.scotusblog.com/2022/07/from-constitutional-orphan-to-treasured-heirloom-the-second-amendment-is-no-longer-a-second-class-right> [<https://perma.cc/PK45-2RCJ>]; Esther Sanchez-Gomez, *The right to fear, in public: Our town square after Bruen*,

requires a modern gun law to have an analogue in American legislative text, history, and tradition.¹⁰

This Article blends statutory and legal analyses of GVROs in California and includes a rare discussion of the practical and administrative aspects of how attorneys proceed in bringing forth a GVRO against a respondent. It stands apart from the extant legal literature which has largely addressed the goals and feasibility of red flag laws generally or has focused on red flag laws in states other than California.¹¹ In writings where GVROs are analyzed in-depth, the analytical scope of the research has been defined and maintained by medical and public health academics within medical journals. These studies lean heavily towards case summaries, discussing study design and collecting statistics. This Article bridges their results with best legal practices and caselaw analyses to broaden the conversation about the need for GVROs to further broaden the conversation about the need for GVROs.

Part I explains the origins of California's GVRO law, describing the fine details of the law and its effectiveness. Part II also surveys the emerging empirical research evaluating GVROs and discusses the need for extreme risk laws to be racially equitable. Part II analyzes *Bruen* and considers the implications of the ruling on GVROs. Part IV discusses practical considerations for practitioners working on GVRO cases, including the viability of deferred prosecutions and issues presented when seeking and enforcing GVROs against juveniles.¹²

SCOTUSBLOG (June 29, 2022), <https://www.scotusblog.com/2022/06/the-right-to-fear-in-public-our-town-square-after-bruen> [<https://perma.cc/JM6E-G82V>].

10. *Bruen*, 142 S. Ct. at 2126.
11. See e.g., David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39 (2021); John R. Richardson, *Red Flag Laws and Procedural Due Process: Analyzing Proposed Utah Legislation*, 2021 UTAH L. REV. 743 (2021); Rachel Delafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 868 (2021); Shannon Hautzinger, *Red Flag Laws: Popularity, Effectiveness, and Why Arizona Should Set Its Right on Enacting One*, 53 ARIZ. ST. L.J. 907 (2021); Caitlin M. Johnson, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1524–1525 (2021); Kelly Roskam & Vicka Chaplin, *The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate*, 36 DEV. IN MENTAL HEALTH L. 1 (2017).
12. Most Californians are unaware of GVROs, so it is not surprising that they also do not realize that GVROs can be issue against juveniles. Juveniles are already prohibited from owning or purchasing firearms, yet juveniles can still possess a rifle or shotgun in California under certain conditions and supervision including for hunting purposes (Cal. Pen. Code § 27510 (Deering 2023).) A GVRO is an appropriate civil remedy that protects the public without imposing criminal consequences on a child. As awareness grows of GVROs, there may be more GVROs issued against juveniles.

I. California Gun Violence Restraining Orders As Defined and Implemented

This Part examines the origins of California's GVRO law, explains how the GVRO process works, and analyzes recent statistical information from the early implementation of GVROs in California. Also, because implicit racial bias can influence the GVRO process, safeguards should be in place so that they are enforced fairly and equally to avoid racial injustice.

A. Gun Violence Restraining Orders Begin

On May 23, 2014, Elliot Rodger, who, in a series of YouTube videos, had expressed feelings of romantic alienation and rejection, killed six people in Isla Vista, California. Although Elliot's parents called Santa Barbara County Sheriff's deputies about their son's behavior prior to the killings, there was insufficient probable cause to obtain a search warrant. Had law enforcement gone to the family's home, they could have found firearms and hundreds of rounds of ammunition.¹³ This tragedy inspired California legislators to adopt the use of GVROs months later so that law enforcement or close family can take preventative action against someone who is at imminent risk of being a danger to themselves or others.¹⁴

The GVRO process became law in California when then-Governor Jerry Brown signed Assembly Bill 1014 on September 30, 2014.¹⁵ The law was amended in 2019 to expand the pool of individuals who may petition a court for such an order.¹⁶ In addition to law enforcement officers and immediate family members, the list of potential petitioners includes: an employer of the subject individual, a coworker of the subject individual, and an employee or teacher of secondary or postsecondary school that the subject individual has attended in the last six months. GVROS could involve allegations of domestic violence, criminal threat, assault with a firearm, suicide attempt, rape, attempted murder, strong arm robbery,

13. Roskam & Chaplin, *supra* note 11, at 8.

14. Roskam & Chaplin, *supra* note 11, at 8; THE COALITION TO STOP GUN VIOLENCE & THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, A WORKING GUIDE TOWARDS MORE RACIALLY EQUITABLE EXTREME RISK LAWS 4 (April 2021), <https://www.csgv.org/wp-content/uploads/2021/04/Working-Guide-Towards-More-Racially-Equitable-Extreme-Risk-laws.pdf>.

Before the bill was introduced, Educational Fund to Stop Gun Violence and the Consortium held forums across the state to engage relevant stakeholders, seek feedback on the policy, and speak with individuals who expressed concern. Stakeholders included law enforcement, mental health groups, medical groups, public health professionals, and policymakers. EFSGV and the Consortium have held similar forums in states across the country. *Id.* at 4.

15. As codified in Penal Code Section 18100 et seq. the GVRO statutory scheme allows both law enforcement and immediate family members to seek *ex parte* orders that require the enjoined individual to surrender his or her firearms, ammunition, and magazines. CAL. PEN. CODE § 18100 et. Seq. (Deering 2023); see Charles G. Bakaly IV, *Flag the Shooter*, L.A. LAWYER, Feb. 2020, at 16–20.

16. CAL. PEN. CODE § 18150 (Deering 2023).

possession of assault weapons, shooting in a dwelling, elder abuse, suspicious circumstances, narcotic sales, disturbing the peace, petty shoplifting, vandalism, battery, and residential burglary without force.

The criteria for issuing a GVRO is straightforward. A court decides whether to issue a GVRO based on statements or actions by the gun owner. Evidence might include threats of violence by the individual toward themselves and others, a violation of a domestic violence restraining order, or recent acquisition of a significant number of firearms. Consider a few factual scenarios where a GVRO would be appropriate: (1) the police are sent to respondent's apartment where neighbors overhear the respondent making irrational statements and heard him threatening them; (2) the respondent broke into his girlfriend's apartment and attempted to rape her; (3) office coworkers are concerned about another employee because he owns guns and has exhibited unwarranted aggressive and odd behavior; (4) a current or former employee making criminal threats against the workplace; and (5) an ex-partner calling and texting with aggressive and threatening messages.

In California, a GVRO lasts between one and five years, and the person subject to the order is given the opportunity to request a hearing to terminate the order. Refusal to comply with the order is punishable as a criminal offense. After a set time, the guns are returned to the person from whom they were seized. A Petitioner seeking a GVRO can rely on written declarations by police officers or live testimony. The plain language of the statute allows the court to consider written evidence and creates a statutory exception for hearsay. In drafting the analysis of both mandatory factors and discretionary factors for the court to consider in support of GVROs, the Legislature empowered, and arguably required, a court to consider hearsay and documentary evidence. Pursuant to Penal Code Section 18175(a), in determining whether to issue a GVRO, the court shall consider evidence of the facts identified in Penal Code Section 18155(b)(1) and may consider any other evidence of an increased risk for violence, including but not limited to, evidence of the facts identified in Penal Code Section 18155(b)(2).

Penal Code Section 18155 provides that the court may require the petitioner and any witness to submit a written affidavit signed under oath in lieu of examining the petitioner and any witness the petitioner may produce. Pursuant to the statute, in determining whether grounds for a GVRO exist, the court shall consider all evidence of a recent threat of violence by the subject of the petition directed toward another, in addition to¹⁷ any other evidence of an increased risk for violence, such as documentary evidence (e.g. police reports.).¹⁸

California's GVRO law provides that the Judicial Council of California "shall prescribe the form of the petitions and orders and any other documents, and shall promulgate any rules of court necessary to

17. CAL. PEN. CODE § 18155(b)(1)(A) (Deering 2023).

18. CAL. PEN. CODE § 18155(b)(2)(F) (Deering 2023).

implement [GVROs].”¹⁹ While the Judicial Council’s interpretation of the permissible scope of a restraining order is not binding, it is highly persuasive.²⁰ Form GV-130, adopted by the Judicial Council for post-hearing orders, provides for the court to make findings “as stated in the Petition and supporting documents, which are incorporated [in the Petition] by reference,” without any reference to oral testimony.²¹ The supporting documents submitted with the petition for an *ex parte* GVRO are typically written declarations, signed under penalty of perjury.²²

Hearsay was arguably admissible in GVRO cases. For the first few years after the implementation of GVROs, courts interpreted the language in the GVRO statute to allow and even mandate the consideration of hearsay, as well as any testimony that is relevant.²³ Recently in *San Diego Police Dept. v. Geoffrey S.*,²⁴ the Fourth District held that hearsay evidence is admissible at a hearing on a GVRO under Penal Code section 18175. In that case, the San Diego Police Department submitted an Officer declaration and hearsay police reports in support of the GVRO petition. That was enough. The Court held that Penal Code section 18175 calls for the admission of “any evidence,” including hearsay evidence. He reasoned that *Kaiser Foundation Hospitals v. Wilson*’s was applicable: hearsay evidence is admissible at a hearing on a petition for work violence restraining order (“WVRO”) and other panels have approved of the use of hearsay to support a civil harassment restraining order (“CHRO”). Justice Buchannan wrote:

Just as the WVRO statute at issue in *Kaiser* permits ‘any testimony that is relevant’ . . . , the GVRO statute permits a court to consider ‘any other evidence of an increased risk for violence’ . . . —and does so ‘without limitation’ and ‘without qualification.’ . . . For purposes of resolving the hearsay issue, we perceive no meaningful distinction between the WVRO phrase ‘any testimony that is relevant’ . . . and the GVRO phrase ‘any other evidence of an increased risk for violence.’”²⁵

19. CAL. PEN. CODE § 18105 (Deering 2023).

20. See *In re M B.*, 201 Cal. App. 4th 1057, 1063 (2011); *Sara M. v. Superior Court*, 36 Cal. 4th 998, 1011–12 (2005).

21. Gun Violence Restraining Order After Hearing or Consent to Gun Violence (form GV-130), <https://www.courts.ca.gov/documents/gv130.pdf>.

22. CAL. PEN. CODE § 18155(a)(2) (Deering 2023).

23. For the first few years after the implementation of GVROs, courts interpreted the language in the GVRO statute to allow and even mandate the consideration of hearsay, as well as any testimony that is relevant. See *Kaiser Foundation Hospitals v. Wilson*, 201 Cal. App. 4th 550, 557 (2011) (Workplace Violence Restraining Order may be based on affidavits or declarations due to statutory language of C.C.P. 527.8 that the trial court “shall receive any testimony that is relevant”).

24. 86 Cal. App. 5th 550, 569 (2022).

25. *Id.* at 570.

But Justice William Dato dissented and wrote that the Evidence Code “succinctly states the generally applicable rule, ‘Except as provided by law, hearsay evidence is inadmissible.’”²⁶

Last, a petitioner bringing forth a GVRO must show that less restrictive alternatives are inadequate or inappropriate. Gun violence and domestic violence are issues of significant public policy concern, and the California Legislature has sought various remedies to quickly respond to critical incidents outside the sluggish formalities and unpredictability of the civil motion context. Like most protective and restraining order hearings, GVRO hearings are intended to be expeditious and procedurally truncated in order to provide quick relief and protection when “red flags” pop up. GVROs fill the gap where other remedies are unavailable or inadequate.²⁷ This includes addressing critical incidents where there is insufficient probable cause to arrest a person or seize firearms, that fail to meet the guidelines for a criminal filing, or that do not meet the criteria for a mental health hold under Welfare & Institutions Code section 5150.²⁸

B. Gun Violence Restraining Orders Are Working Effectively

As the awareness of and use of GVROs by the police has increased, so has their issuance rate. For example, San Diego County issued 267 GVROs in 2019, versus five in 2016. The San Diego City Attorney’s Office in mid-2017 proactively worked with police and judges to create an integrated process for GVRO implementation.²⁹ Between 2017 and

26. *Id.* at 581 (Dato, J., dissenting).

27. Professors Ian Ayres and Frederick E. Vars do not believe red flag laws go far enough and favor voluntary self-restriction laws like Donna’s Law, a voluntary self-registry prohibition to gun sales for individuals choosing to create self-defense against suicide. *See* AYRES & VARS, *supra* note 4, at 2–3. These scholars perceive such laws as a form of “choice-enhancing” gun control that allows people to protect themselves and which receive bipartisan support in red states. *Id.* at 1–3. Ayres and Vars advocate for replacing the discretionary judgment of risk of present red flag laws with an objective trigger such as evidence of increased risk of dangerousness. *Id.* at 104, 112. They claim that a symptom-based approach has a better potential to prevent gun violence who are never diagnosed or treated for mental illness:

While medicine focuses on characteristic that are symptoms of diseases, here we are focused on evidentiary characteristics that are symptoms of dangerousness. We propose that courts in adjudicating red flag petitions . . . rely on evidence-based symptoms of dangerousness as central evidentiary criteria. More specifically, we propose that a court finding that an individual has exhibited either paranoid delusions or threatening hallucinations should by itself be sufficient for a court to issue a gun removal order.

Id. at 103, 111.

28. CAL. PEN. CODE § 18155 (b)(1)(A) (Deering 2023); CAL. PEN. CODE § 18155 (b)(2)(F) (Deering 2023).

29. *See* City News Service, *San Diego County Noted as Major Driver in Gun Violence Restraining Order Use*, FOX 5 NEWS (July 1, 2020), <https://fox5sandiego.com/news/local-news/san-diego-county-noted-as-major-driver-in-gun-violence-restraining-order-use> [<https://perma.cc/WL7H-QPQB>].

2019, San Diego County accounted for over 30 percent of GVROs in the state.³⁰ San Diego's City Attorney Mara Elliott applies an aggressive strategy of filing charges and obtaining GVROs, since, as she stated, "GVROs are a powerful tool for protecting the public from predictable violence."³¹ Her sentiments are backed up by facts. Since January 2018, these efforts by the San Diego Police Department and the City Attorney Office have led to more than 550 such restraining orders (not all respondents were registered gun owners or possessed guns) and more than 1,000 total seized firearms from persons including stalkers, disgruntled employees, and potential school shooters.³² California Attorney General Rob Bonta also voiced his support: "San Diego serves as a model of how cities and counties can use California's red flag laws to prevent gun violence."³³

Support for GVROs is gaining steam. This past summer, the California Governor's Office of Emergency Services announced \$1.1 million in new community partnerships to expand outreach and education about GVROs.³⁴ Governor Gavin Newsom referred to the need to protect families, schools, and communities from the risk of gun violence and stated

-
30. See *id.*; City News Service, *Bonta Calls San Diego's Gun Violence Restraining Order Program a Model for Other Cities*, FOX 5 NEWS (July 13, 2021), <https://fox5sandiego.com/news/local-news/bonta-calls-san-diegos-gun-violence-restraining-order-program-a-model-for-other-cities> [<https://perma.cc/S9WN-8WJC>].
 31. See Press Release, San Diego City Attorney, *Man Who Shot City Worker Had Weapons Stockpile* (Sept. 14, 1998), <https://www.sandiego.gov/department-document/man-who-shot-city-worker-had-weapons-stockpile> [<https://perma.cc/6F82-XMUK>].
 32. See Devin Whatley, *City Attorney Takes Victory Lap on GVROs*, VOICE OF SAN DIEGO (July 16, 2021), <https://voiceofsandiego.org/2021/07/16/city-attorney-takes-victory-lap-on-gvros> [<https://perma.cc/U7KC-7UG3>]. Police officers can confiscate firearms that are in plain sight (or seek a search warrant). After the guns are confiscated, the police department will hold the firearms in storage. If there are still outstanding guns that have not been turned over to the police, the respondent must turn over firearms to police and complete a Proof of Firearms, Ammunition, and Magazines Turned In, Sold or Stored (form GV-800), <https://www.courts.ca.gov/documents/gv800.pdf>. Pending cases do not result in firearms being returned because of case continuances and criminal cases.
 33. See Press Release, Cal. Off. of the Att'y General, *Attorney General Bonta Meets with San Diego City Officials, Highlights Success of the City's Gun Violence Restraining Order Program* (July 13, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-meets-san-diego-city-officials-highlights-success-city%E2%80%99s> [<https://perma.cc/F92F-W4HX>]. The general public is largely unaware of GVROs and the process of how to obtain one. To address this need, police departments should update their websites to include GVRO information, including what factors the court considers when issuing a GVRO, and links to the commonly used GVRO forms created by the California Judicial Council.
 34. Press Release, Off. of Governor Gavin Newsom, *California Announces New Details On Efforts to Promote Nation Leading Red Flag Law*, Off. of Governor Gavin Newsom (July 14, 2022), <https://www.gov.ca.gov/2022/07/14/california-announces-new-details-on-efforts-to-promote-nation-leading-red-flag-laws> [<https://perma.cc/3N7B-W8DJ>].

that “[W]e’re connecting with communities across our state to share life-saving tools with the families and people who need them most.”³⁵

C. *Emerging Empirical Research Evaluating Gun Violence Restraining Orders*

Coinciding with the increased use of GVROs has been erudite empirical research conducted within a public health paradigm about the efficiency of GVROs. First, Veronica Pear examined the early hiccups in the slow roll out of California’s GVRO regime and pointed out that implementation was hampered by insufficient funding which led to ad hoc policies, procedures, and inconsistent practices.³⁶ Pear has since suggested more research about GVROs is needed to fully understand the law’s impact and more training should be made available to officers, city attorneys, and civil court judges about their specific roles and responsibilities.³⁷

In another assessment of GVROs from 2016 to 2019, Scholar Rocca Pallin and her research team tracked a substantial increase in the use of GVROs in California from 2016 to 2019.³⁸ Pallin’s study provided the first aggregate, statewide description of individuals subject to GVROs, and petitioners. Most respondents during the study period were white men, the mean age was 41.8 years, and the vast majority of the GVROs issued were brought by law enforcement officers.³⁹ Pallin’s study suggested that the increase in GVROs may reflect a growing awareness of GVROs, as training and media coverage continue.⁴⁰

Third, a study published last fall from the University of California, Davis Violence Prevention Research Program found that the law has been hampered by a lack of funding to support local implementation efforts.⁴¹ Other key findings and concerns include: the need to synchronize efforts across law enforcement agencies, city and district attorneys, and judicial officers in sharing responsibilities and improving efficiency in implementing GVROs; addressing the potential risk of harm to the respondent and petitioner; considering the direct and indirect costs of GVROs; and recognizing the existence of cultural barriers or implicit bias within police departments that affect their decisions about whether or not to seek a GVRO.⁴²

35. *Id.*

36. See Veronica A. Pear et al., *Implementation and Perceived Effectiveness of Gun Violence Restraining Orders in California: A Qualitative Evaluation*, PLOS ONE (Oct. 19, 2021).

37. See Veronica A. Pear, et al., *Firearm Violence Following the Implementation of California’s Gun Violence*, JAMA NETWORK OPEN (Apr. 5, 2022).

38. See Rocco Pallin et al., *Assessment of Extreme Risk Protection Order Use in California From 2016 to 2019*, JAMA NETWORK OPEN (June 18, 2022).

39. *Id.*

40. *Id.*

41. Pear et al., *supra* note 36.

42. *See id.*

Fourth, this past summer, Dr. Garen Wintemute and his research team described the circumstances that give rise to the GVROs issued in California from 2016 to 2018.⁴³ Their report showed that GVROs were most often used by law enforcement; 80 percent of the GVROs involved risk of harm to others; about 40.6 percent of those issued a GVRO were suicidal or posed a threat of self-harm; the most common violence-related risk factor was substance abuse; 18.3 percent of the respondents had legal representation at their hearing; and GVROs were primarily used to prevent other-directed harm, including mass shootings.⁴⁴

D. Racial Justice and Gun Violence Restraining Orders

As with any meaningful discussion of criminal legal issues in America, the implementation and enforcement of GVROs intersect with race. Anticipating this, the Educational Fund to Stop Gun Violence (EFSGV) and the Coalition to Stop Gun Violence (CSGV), held statewide forums even before GVROs were adopted into law. Both organizations engaged relevant stakeholders, sought feedback on the policy, and conducted outreach. Among the stakeholders were law enforcement, mental health groups, medical groups, public health professionals, and policymakers.⁴⁵ Moving forward, and with the historical racial biases inherent in the criminal legal system that target underrepresented communities in mind, both organizations want emergency risk bills to meaningfully engage key stakeholders, including people from communities most impacted by gun violence, and gun owners themselves, before a bill is introduced or signed into law.⁴⁶

Collectively, CSGV and EFSGV offer key recommendations to stakeholders by creating a policy impact assessment that keeps a watchful eye on the legislation's unintended consequences or potential disproportionate impact on communities of color. Dr. Jeffrey Swanson raises the possibility that implicit racial bias can influence extreme risk protection orders (ERPOs) such as GVROs and suggests that studies should address the issue of racial disparities. In particular, Dr. Swanson wants safeguards in place so that EPROs are enforced fairly and equally to avoid disparities along racial lines.⁴⁷

CSGV and EFSGV suggest once an extreme risk law comes into existence, it is best practice to organize a multidisciplinary working groups at all government levels to “raise awareness of the policy, develop an implementation strategy, address process questions, and create a

43. See Veronica A. Pear et al., *Gun Violence Restraining Orders in California, 2016–2018: Case Details and Respondent Mortality*, INJURY PREVENTION (June 1, 2022), at 5–6.

44. *Id.*

45. THE COALITION TO STOP GUN VIOLENCE & THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, *supra* note 14.

46. *Id.* at 2.

47. See Jeffrey W. Swanson, *The Color of Risk Protection Orders: Gun Violence, Gun Law, and Racial Justice*, INJURY EPIDEMIOLOGY (Aug. 10, 2020).

space for ongoing problem-solving as ERPO is being implemented.”⁴⁸ In addition, there should be ongoing training to law enforcement about the “safe, impartial, effective, and equitable use and administration of ERPOS.”⁴⁹ With these concerns in mind, along with the public health research completed thus far, the remainder of this Article builds on this work and connects their findings to best practices and legal analyses of the facts of cases.

II. New York State Rifle & Pistol Assn., Inc. v. Bruen

At the highest levels of politics, government, and law, the efforts for more gun control in the United States have been met with political resistance. Last Term, in *Bruen*, the U.S. Supreme Court rejected the two-step framework that the Second Circuit had applied for analyzing Second Amendment challenges, which combined history with a means-end scrutiny. The Court held that precedent did not support the two-step approach, because past methodology centered on constitutional text and history.⁵⁰

Consequently, pro-gun advocates may soon cite *Bruen* to argue that GVRO laws are unconstitutional because they do not have a historical analogue, and, therefore, GVRO provisions violate the Second Amendment.⁵¹ Yet, California's GVROs satisfy the *Bruen* test because they are consistent with the longstanding American tradition of disarming

48. THE COALITION TO STOP GUN VIOLENCE & THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, *supra* note 14. at 7.

49. *Id.*

50. See *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

51. Perhaps it is just a matter of time before a *Bruen* challenge will be brought against GVROs. A panel of Fifth Circuit judges applied a results oriented analysis of history and found that domestic violence did not have an analog that is well established in America, and therefore declared a court order forbidding a person who has threatened an intimate partner or child, from owning a gun, to be unconstitutional. See *U.S. v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 5114 (5th Cir. Feb. 2, 2023). Following the decision, Attorney General Merrick B. Garland released this statement:

Nearly 30 years ago, Congress determined that a person who is subject to a court order that restrains him or her from threatening an intimate partner or child cannot lawfully possess a firearm. Whether analyzed through the lens of Supreme Court precedent, or of the text, history and tradition of the Second Amendment, that statute is constitutional. Accordingly, the Department will seek further review of the Fifth Circuit's contrary decision.

Press Release, Dep't of Justice Off. of Pub. Affairs, Statement from Attorney General Merrick B. Garland Regarding United States v. Rahimi (Feb. 2, 2023), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-regarding-united-states-v-rahimi> [<https://perma.cc/WLZ4-XYVC>].

Other laws are likely to face new legal challenges under *Bruen*, including zoning restriction barring shooting ranges, licensing and training laws, Tierney Sneed, How the Supreme Court Put Gun Control Laws in Jeopardy Nationwide, CNN (Oct. 10, 2022), <https://www.cnn.com/2022/10/09/politics/gun-control-second-amendment-supreme-court-bruen-fallout/index.html> [<https://perma.cc/DK9L-P33G>].

violent and dangerous persons. Just as the historical restriction against dangerous person was not considered a significant burden, GVROs are not either.

A. *Bruen* Analysis

Justice Thomas wrote the majority opinion which emphasized the Second Amendment's plain text protection of the right to bear arms.⁵² Thus, to justify a firearm regulation, the government must show that the regulation is "consistent with this Nation's historical tradition of firearm regulation."⁵³ The Court ultimately held that New York's concealed-carry licensure restrictions did not meet this standard, and that New York's proper cause licensure requirement was not sufficiently rooted in an American tradition to pass constitutional muster.⁵⁴

Bruen was the first significant Second Amendment decision from the Court since *District of Columbia v. Heller*.⁵⁵ In *Heller*, the Court held that the Second Amendment protects an individual's right to possess a handgun for traditionally lawful purposes disconnected with service in a militia, such as the self-defense of one's home.⁵⁶ Acknowledging that "the right to bear arms" is not a right without limits, the Court held that gun restrictions in "sensitive places"—such as areas outside of one's home, like schools, churches, or other public places—remained permissible.⁵⁷ In *McDonald v. Chicago*,⁵⁸ the Court found that the right of an individual to "keep and bear arms" as protected under the Second Amendment, is incorporated by the Due Process Clause of the Fourteenth Amendment and is therefore enforceable against the states.⁵⁹

The petitioners in *Bruen* were two members of the New York State Rifle & Pistol Association, each of whom applied for a license to carry a firearm on a concealed basis in New York for self-defense purposes. Under the challenged New York law, a resident could obtain an unrestricted license to have and carry a concealed firearm outside their home or business for self-defense only if they could establish, among other things, that "proper cause" for the license existed.⁶⁰ New York courts defined proper cause as requiring the applicant to "demonstrate a special need for self-protection distinguishable from that of the general community."⁶¹ Once that showing was made, an applicant would receive a license

52. See *Bruen* 142 S. Ct. at 2126.

53. *Id.*

54. *Id.* at 2139.

55. 554 U.S. 570 (2008). See also Adam Liptak, *Justices Set to Weigh in On the Scope of Gun Rights*, NY TIMES, (June 27, 2022).

56. *Heller*, 554 U.S. at 635.

57. *Id.* at 626.

58. 561 U.S. 742 (2010).

59. *Id.* at 786.

60. See *Bruen*, 142 S. Ct. at 2123.

61. *Id.*

for public carry, which allowed the applicant to carry a firearm for a limited purpose.

Essentially, under the *Bruen* test, a historical analog should be from the relevant time period from around 1791—when the Second Amendment was ratified—to about 1868—when the Fourteenth Amendment was ratified. To determine whether the challenged gun law is relevantly similar under the Second Amendment, *Heller* and *McDonald* point out at least two metrics: how and why the regulation burdens the right to bear arms.⁶² Though the Court emphasized the importance of the context of the intent of the law and its enactment, it also suggested that the finding of the existence of the same law hundreds of years ago is not necessary. Instead, “analogical reasoning requires only that the government identify a well-established and representative history *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors it still may be analogous enough to pass constitutional muster.”⁶³ Notwithstanding that reasoning, Second Amendment scholar Joseph Blocher criticizes the Court for failing to articulate a coherent approach to accessing what is an appropriate historical analogy:

What is problematic about *Bruen* is its reliance on an unguided form of historical-analogical reasoning that invites the kind of judicial discretion that proponents of constitutional originalism and formation regularly decry.⁶⁴

Notably, *Bruen* does not invalidate firearm licensing generally. It confirms the constitutionality of prohibitions on carrying firearms in sensitive places like schools, government buildings, and polling places, and it leaves in place the many important gun violence prevention laws that states around the country have enacted in recent years.⁶⁵ Indeed, the decision makes clear, as Justice Kavanaugh highlights in his concurring opinion, that “properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.”⁶⁶ Justice Alito’s concurrence, similarly, notes:

Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns.⁶⁷

To be sure, the historical tradition of disarming violent and dangerous persons is consistent with the founding-era understanding of the

62. *After the Highland Park Attack: Protecting Our Communities from Mass Shootings: Hearing Before the Senate Judiciary Committee*, 117th Cong. 7 (2022) (written testimony of Joseph Blocher, Lanty L. Smith Professor of Law, Duke University Law School).

63. *Bruen*, 142 S. Ct at 2133.

64. Blocher, *supra* note 62, at 2.

65. *Bruen*, 142 S. Ct at 2162 (Kavanaugh, J., concurring) (citations omitted).

66. *Id.*

67. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) (citations omitted).

right to keep and bear arms. A review of the history and traditions from England, the colonial and founding periods, and the Nineteenth century reveals one controlling principal: violent or otherwise dangerous persons could permissibly be disarmed.⁶⁸ As one scholar notes, the proposals from the ratifying conventions of Massachusetts, New Hampshire, and Pennsylvania allowed the disarming of dangerous persons.⁶⁹ “[E]very arms prohibition throughout American history to that point had been based—justified or not—on perceived dangerousness. And the noncriminal basis—‘real danger of public injury’—was self-evidently based on dangerousness.”⁷⁰

Protecting public safety was always of paramount importance. As then-Judge Barrett explained in a dissent from Seventh Circuit decision upholding the federal firearm ban as applied to a nonviolent felon convicted of mail fraud, “History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But the power extends only to people who are *dangerous*” and “[i]n 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.”⁷¹

The Majority in *Bruen* echoed these principals in its analysis, as its discussion included a long journey through the Anglo-American history of public carry.⁷² It included an examination of the common law, statutory prohibitions, and surety statutes through a variety of historical and legal sources.⁷³ First, the Court found that in the century leading up to the Second Amendment, and in the first decade after its enactment, there was a historical basis to conclude that the Second Amendment prohibited bearing arms in a way that spread terror or fear.⁷⁴ With regard to common law offenses, during the Colonial and Founding periods, the offenses of terror or fray to the people continued to carry limitations on the right to carry arms, but did not create a burden on the general right to carry.⁷⁵ As for statutory prohibitions, the Court determined that state courts held a consensus view that dangerous people were to be prohibited from carrying guns.⁷⁶ Likewise, in the mid-nineteenth century, the fact that many states

68. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 272 (2020).

69. *Id.* at 260.

70. *Id.* at 267.

71. See *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis added).

72. See *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2138–57.

73. *Bruen*, 142 S. Ct. at 2142–45.

74. *Id.* at 2145–46.

75. *Id.* at 2153–55.

76. *Id.* at 2155.

adopted surety statutes that targeted those only intending to do harm is further evidence that such restrictions were not a significant burden.⁷⁷

Second, the Court considered evidence of the public discourse during Reconstruction to determine that there were limits on the right to carry firearms, and that those limits were consistent with the right of the public to peaceably carry a gun for self-defense:

For instance, when General D. E. Sickles issued a decree in 1866 preempting South Carolina's Black Codes—which prohibited firearm possession by blacks—he stated: ‘The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons And no disorderly person, vagrant, or disturber of the peace shall be allowed to bear arms.’⁷⁸

Third, in the same passage, the Court reported that the editors of the *Loyal Georgian*, a prominent black-owned newspaper, confirmed that dangerous people can be disarmed, “[a]ny person, white or black, may be disarmed if convicted of making an improper or dangerous use of weapons.”⁷⁹ As for Reconstruction era state regulations, the Court notes that there was little innovation from prior laws that were in place in early nineteenth century. For example, South Carolina authorized the arrest of “all who go armed offensively, to the terror of the people.”⁸⁰ South Carolina's proclamation parroted earlier laws in states such as Virginia and Tennessee that codified the same offense.⁸¹

Similarly, in *United States v. Boyd*,⁸² the Third Circuit stated, “presumptively dangerous persons. . . have been historically excluded from the Second Amendment protections.” There, a criminal defendant challenged his conviction for possessing firearms while subject to a domestic violence protective order and the constitutionality of the criminal statute that was applied to him.⁸³ The court held that the defendant failed to distinguish himself from a class of presumptively dangerous persons historically not entitled to the Second Amendment's protections.⁸⁴ “The primal fear of dangerous person with guns is backed by longstanding historical support ‘demonstrat[ing] that legislatures have the power to prohibit dangerous people from possessing guns,’ including ‘dangerous people who have not been convicted of felonies.’”⁸⁵

77. *Id.* at 2156.

78. *Id.* at 2152.

79. *Id.*

80. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2152 (citing 1870 S. C. Acts p. 403, no. 288 § 4).

81. *Id.* at 2152 (citing to 1870 S. C. Acts p. 403, no. 288 § 4).

82. *United States v. Boyd*, 999 F.3d 171, 185 (3rd Cir. 2021).

83. *Id.* at 175.

84. *Id.* at 185.

85. *Id.* at 186.

Taken as a whole, this sampling of prohibitions against dangerous persons shows that the right to keep and bear arms had limits when it came to dangerous peoples, or people who could terrorize others. Importantly, these same historical prohibitions provide the necessary justification for the use of GVROs today because they share the common goal of prohibiting dangerous persons from having guns. Just like the historical prohibitions which created no significant burden on the right to bear arms, GVROs also pose no significant burden upon the enumerated right to bear arms.⁸⁶

B. *Gun Violence Restraining Orders in the Modern Era*

In the modern era, GVROs fit squarely within the historical tradition of prohibiting dangerous people from possessing guns. Sadly, as mass shootings have become commonplace, the need to prevent dangerous individuals from possessing guns has never been greater. As Justice Breyer noted in dissent in *Bruen*:

The dangers posed by firearms can take many forms. Newspapers report mass shootings occurring at an entertainment district in Philadelphia, Pennsylvania (3 dead and 11 injured); an elementary school in Uvalde, Texas (21 dead); a supermarket in Buffalo, New York (10 dead and 3 injured); a series of spas in Atlanta, Georgia (8 dead); a busy street in an entertainment district in Dayton, Ohio (9 dead and 17 injured); a nightclub in Orlando, Florida (50 dead and 53 injured); a church in Charleston, South Carolina (9 dead); a movie theater in Aurora, Colorado (12 dead and 50 injured); an elementary school in Newtown, Connecticut (26 dead); and many, many more.⁸⁷

Just as legislatures have historically prohibited dangerous people from possessing guns, the California legislature adopted GVROs in 2014 to limit dangerous people from accessing guns.⁸⁸ To appreciate how and

86. GVROs also help prevent suicides since guns are used in more than half of suicides. This was especially apparent during the pandemic, as the San Diego City Attorney's Office reported that they filed 43 GVROs against potential suicidal individuals from March to August 31 of 2020—more than double the number from the previous year. See Press Release, San Diego City Att'y, *Gun-Related Suicide Threats Spike During Pandemic*, Sept. 18, 2020, <https://www.sandiego.gov/sites/default/files/nr200918a.pdf> [<https://perma.cc/DV7V-V6QC>]; see also SpeakForSafety, *California's Gun Violence Restraining Order: A Prevention Tool to Support Veterans* <https://speakforsafety.org/wp-content/uploads/2018/02/SpeakForSaftey-Handout-GVROsAndVeterans-2020.pdf> [<https://perma.cc/EG7S-TY4D>] (discussing the suicidal ideation expressed by military veterans). There may be some evidence of a historical analogue for suicides since some of the thirteen American colonies maintained the English criminalization of suicide, some colonies decriminalizing suicide, and suicides were a social phenomenon for non-white indigenous groups and slaves in North Americans. See Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S. U. L. REV. 150, 170–71 (2018).

87. *Bruen*, 142 S. Ct. at 2165 (Breyer, J., dissenting) (citations omitted).

88. Dean Hansell & Marina Melikyan, *Issuing a Gun Violence Restraining Order in California*, DAILY J., Aug. 21, 2019, <https://www.dailyjournal.com/mcle/506-issuing-a-gun-violence-restraining-order-in-california> [<https://perma.cc/506-issuing-a-gun-violence-restraining-order-in-california>].

why GVROs are relevantly similar to the historical tradition of prohibiting dangerous people from possessing guns, a consideration of contemporary evidence about their purpose and effectiveness is essential. As described earlier in Part I, a GVRO orders the temporary removal of firearms from a person who may present a danger to themselves or others. GVROs, like other red flag laws, are designed to prevent dangerous people from having access to firearms. GVROs are a tailored, individualized way to deter homicide, suicides and even mass shootings by providing a tool for law enforcement to intervene when harm appears imminent, without having to wait for injury, lethality, or criminal actions to occur.⁸⁹

III. Practical Considerations for Practitioners

Noticeably absent from the growing literature on GVROs is any discussion about how GVROs are administered and prosecuted after their issuance. For example, in a city attorney's office, a police officer can send a city attorney an emergency GVRO with a copy of police reports and criminal background check showing convictions, arrests, mental health holds, number of registered guns, gun prohibitions, and restraining orders. The attorney can review the entire report and decide whether to open a GVRO by informing the GVRO team. At this time, the attorney can also decide that the office is not pursuing a GVRO if there is a five-year or lifetime gun ban already in place, or if the evidence is weak, or otherwise inclined not to pursue a GVRO for other reasons. If the attorney opens a GVRO, the attorney will notify the assigned internal police officer to give attorneys or paralegals access to their body-worn camera, photos, and audios.⁹⁰ Once the court receives the GVRO, they try to schedule a hearing within 21 days (pre-Covid).⁹¹

cc/5GYR-R34K].

89. See e.g., Kelly Roskam, et al., *The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate*, 36 DEV. MENTAL HEALTH L. 1, 22 (2017) [research indicates that the GVRO is an effective tool for suicide prevention]; Caroline Shen, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L. Q. 683, 685 (2019) [arguing for the crucial need for extreme risk protection orders].
90. Absent this evidence, a written affidavit in the form of an officer declaration is sufficient. In fact, the supporting documents submitted with the petition for an ex parte GVRO are typically written declarations, signed under penalty of perjury. CAL. PEN. CODE § 18155(a)(2). "The Code of Civil Procedure also allows a court to consider, in lieu of an affidavit, certain written declarations. To qualify as an alternative to an affidavit, a declaration must be signed and recite that the person making it certifies it to be true under penalty of perjury." *Sweetwater Union High School District v. Gilbane Building Company*, 6 Cal.5th 931, 942–43 (2019).
91. Since the pandemic, many courts have been scheduling hearings within 60 days. One of the key challenges in handling GVROs is the quick turnaround time to get an officer declaration filed. As a practical matter, the City Attorney or County Counsel has less than three weeks to draft a declaration, get the officer to sign off on it, and file it with the court and serve the respondent. The City Attorney's Office will typically attach a redacted copy of the police report, and

In preparation for the hearing, the attorney will review the police report and discovery and decide which officer has the best report to use as the foundation for an officer declaration. Then the attorney will ask a legal analyst to prepare an officer declaration for filing with the court.⁹² When the facts of the case warrant it, and there is time, the City Attorney has the option to enter into a stipulation for a gun ban for 1–5 years. The advantage to the respondent is that they avoid adjudication, and the ban can begin from the date the emergency GVRO was issued, rather than after the final court hearing date.

In preparation for the hearing, the attorney brings along a request and order on motion to continue for the court to fill out if there is a need to issue a continuance, and the GV-030 for the court to complete if a hearing takes place and to enter its judgment.⁹³ The court will issue a gun ban for 1–5 years, that the respondent can appeal annually. At the hearing in court, the attorney appears in person representing the police department and respondents usually proceed *pro se*. Typically, the attorney argues that a GVRO is necessary because there is clear and convincing evidence that the respondent is a danger to himself or to others. The court will analyze whether there was sufficient evidence to support the issuance of a GVRO under the clear and convincing standard, “The GVRO statute does not require a high probability that the subject *will cause* gun violence; it only requires a high probability that the subject poses a “significant danger” of committing gun violence.”⁹⁴ After the hearing, the court files the Order After Hearing GV-030 form and then serves the respondent.

A. *Deferred Prosecutions in Gun Violence Restraining Order Cases*

Noticeably, there has also been little written about any preliminary research findings obtained on the feasibility of the idea of implementing the civil equivalent of a “deferred prosecution” in GVRO case. This Subpart examines the feasibility of the idea of implementing the civil equivalent of a “deferred prosecution” in GVRO cases where the facts warrant the least restrictive means of preventing a person from having a gun without seeking a GVRO. There are no cases directly discussing a deferred prosecution or stipulation to continue a hearing for one year in a GVRO case, yet persuasive authority exists that can be used to convince the court to defer a GVRO hearing, with the temporary Gun Violence Emergency Restraining Order (GVERO) still in effect. Essentially, the

photos of the guns and any injury sustained by the victim(s). The City Attorney will feel the most pressure when we experience difficulties in contacting officers, or getting the officers to return their signed declarations in time for the GVRO hearing.

92. Ideally, declarations should be filed before the hearing. Sometimes the attorneys have had to serve declarations on the day of the hearing.
93. There is no relevant legal authority that address these points. These observations refer to internal office policies and best practices.
94. *San Diego Police Dep't v. Geoffrey S.*, 86 Cal. App. 5th 550, 576 (2022).

court may be persuaded to find that the use of a deferred hearing in a GVRO case is analytically and practically similar to the use of a deferred prosecution in a criminal case.

In a deferred prosecution, the defendant agrees to complete certain terms, and in exchange the State agrees that upon successful completion of the terms of the agreement they will dismiss the action against the defendant. Arguably that same rehabilitative spirit can be emulated by offering a deferred hearing in a GVRO case involving a respondent who has no criminal history and no record of gun ownership.⁹⁵ A deferred hearing reserves the option of pursuing a GVRO hearing later, based on respondent's conduct in the intervening year. Using this option in cases—where a GVRO is warranted but the evidence is not particularly strong—fosters rehabilitation and protects public safety. The rest of this Subpart will discuss the nature of deferred prosecution agreements and some possible terms that could be used within them as a matter of best practice.

Case law is instructive on how to avoid pitfalls in drafting a deferred prosecution agreement.⁹⁶ Deferred prosecution agreements are similar to plea agreements in that both are considered “contractual in nature and must be measured by contract law standards.”⁹⁷ The rationale for applying contract law to plea agreements is premised on “the notion that the negotiated guilty plea represents a bargained-for *quid pro quo*.”⁹⁸ By analogy, contract law would also apply to deferred prosecutions in GVRO cases.⁹⁹ As such, lawyers should carefully set forth the terms of the agreement. Any stipulation made on the record at a hearing or in writing should be explicitly stated. The decision of whether the respondent does anything to trigger GVRO proceedings should be up to the City to decide in its sole discretion. This is possible because prosecutors have discretion in determining whom to prosecute and what charges to file.¹⁰⁰

Stipulations should state that cause for proceeding with the GVRO in the event that the respondent does something within the one-year time frame after the stipulation is entered would constitute cause for the city

95. There is no relevant legal authority that address these points. These observations refer to internal office policies and best practices.

96. “A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process.” *People v. Freitas*, 179 Cal. App. 4th 747, 750 (2009). A probation condition that imposes limitations upon constitutional rights must be narrowly tailored to achieve legitimate purposes. *In re Sheena K.*, 40 Cal.4th 875, 890 (2007); *People v. Olguin*, 45 Cal. 4th 375, 384 (2008); *People v. Kim*, 193 Cal. App. 4th 836, 843 (2011).

97. *United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir. 1986).

98. *United States v. Escamilla*, 975 F.2d 569, 571 (9th Cir. 1992).

99. *See generally*, Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31 (2018).

100. *People v. Birks*, 19 Cal. 4th 108, 134 (1998); *see, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) (subject only to constitutional restraints, prosecutors retain broad discretion in deciding whom to prosecute).

to pursue the case. Sufficient cause to proceed with the hearing would be meaningful contact with the police, including a recent threat of violence or act of violence, by the respondent directed toward another; a recent threat of violence or act of violence, by the respondent toward himself or herself; violation of protective orders; the unlawful and reckless use, display, or brandishing of a firearm; history of use, attempted use, or threatened use of physical force by the respondent, and a prior felony arrest.¹⁰¹ These are clear and unambiguous terms.¹⁰²

There is insightful authority in cases involving deferred adjudications. In contrast to a deferred prosecution, a deferred adjudication is typically used by courts as an alternative sentence for individuals accused of a first-time, non-violent drug offense, or other low-level misdemeanor. In these cases, a pretrial or similar hearing is continued for a period of months while the defendant completes his or her diversion terms. Since a deferred adjudication functions like a type of probation, unambiguous terms must be used in proposed GVRO stipulations. “A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process.”¹⁰³ A probation condition that imposes limitations upon constitutional rights must be narrowly tailored to achieve legitimate purposes.¹⁰⁴

Furthermore, as with an alleged violation of a plea agreement or a condition of probation in a criminal matter, respondent would have a duty to report in a GVPO stipulation. Here, the stipulation should avoid requiring respondent to report “any contacts with police.” This is too broad and could lead a reasonable person to think that they must report casual, random interactions with law enforcement officers. Instead the type of law enforcement contact that must be reported are those in which respondent is questioned by law enforcement officers and is required to give identifying information, as when he has been a witness or suspect in a criminal matter.¹⁰⁵ An investigator should run his standard check (including police reports mentioning respondent) on a regular basis, and any meaningful police contact (further incidents of threats or violence) would be enough to bring a new GVRO and proceed with a hearing.

B. *Gun Violence Restraining Orders Against Juveniles: An Emerging Trend*

Columbine. Sandy Hook. Virginia Tech. Marjory Stoneman Douglas. These are but a few of a staggering number of American

101. CAL. PENAL CODE § 18155 (West 2016).

102. *People v. Moore*, 211 Cal. App. 4th 1179, 1182 (2012) (holding that probation condition prohibiting defendant from owning, possessing, or using dangerous or deadly weapons was not unconstitutionally vague).

103. *People v. Freitas*, 179 Cal. App. 4th 747, 750 (2009).

104. *In re Sheena K.*, 40 Cal. 4th 875, 890 (2007); *People v. Olguin*, 45 Cal. 4th 375, 384 (2008); *People v. Kim*, 193 Cal. App. 4th 836, 843 (2011).

105. *People v. Brand*, 59 Cal. App. 5th 861, 871 (2021).

schools where fatal mass shootings have occurred. Seared into the national consciousness, their names evoke panoply of strong emotions: grief for innocent students and school staff killed or wounded; sympathy for those who loved them; and fear of future tragedies at more schools.¹⁰⁶

In a pioneering study, Dr. Garen Wintemute of the Violence Prevention Research Program,¹⁰⁷ presents strong evidence, including two cases involving juveniles threatening school violence, that GVROs can help prevent mass shootings.¹⁰⁸ Unfortunately, the report's case summary touches only the surface of a larger issue: the measurable increase of juveniles posting threats of gun violence at schools on social media in the past year. This Subpart broadens this dialogue by examining the issue of GVROs and juveniles in cases where a juvenile makes a criminal threat by posting a short video on social media.

A juvenile, like an adult, poses a significant danger of causing personal injury to himself or another by having in his custody or control any firearm ammunition or magazine.¹⁰⁹ In *In Re A.G.*,¹¹⁰ the court upheld the juvenile court's determination that a minor high school student made criminal threats as defined under California Penal Code section 422 when he posted a photo of a realistic looking replica gun on his Snapchat account.¹¹¹ The photo bore the caption, "Everybody go to school tomorrow. I'm taking gum."¹¹² A high school senior saw the image through a group chat on Snapchat and became worried because she knew school shootings happened regularly.¹¹³ This student, who knew A.G. as a fellow student, was later alerted that he had posted a second story, which consisted of a black screen captioned: "Everyone, it wasn't real. I was xanned out."¹¹⁴ The police investigation confirmed that A.G. did not have a real gun.¹¹⁵ A.G. testified that he meant the story to be a joke

106. *In re A.G.*, 58 Cal. App. 5th 647, 650 (2020).

107. The Violence Prevention Research Program is located in the Department of Emergency Medicine, at University of California, Davis School of Medicine.

108. See Garen J. Wintemute et. al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, 171 ANNALS OF INTERNAL MED. 655, 657 (2019), <https://www.acpjournals.org/doi/10.7326/M19-2162> [<https://perma.cc/2XKX-LW5T>].

109. CAL. PENAL CODE § 18155 (West 2016).

110. *In re A.G.*, 58 Cal. App. 5th at 650.

111. The definition of a threat under California Penal Code section 422:

"[S]ection 422 requires that the communication must be sufficient 'on its face and under the circumstances in which it is made' to constitute a criminal threat. This means that the communication and the surrounding circumstances are to be considered together. 'Thus, it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422.'" *In re Ryan D.*, 100 Cal. App. 4th 854, 860 (2002).

112. *In re A.G.*, 58 Cal. App. 5th at 650.

113. *In re A.G.*, 58 Cal. App. 5th at 651.

114. *Id.*

115. *Id.* at 652.

and did not intend it to be a threat. He said his friends understood his sense of humor.¹¹⁶

In analyzing these issues, the court stated that the statement that the minor would “bring gum” could be interpreted by a reader to mean gun.¹¹⁷ The court further reasoned that A.G. also had the means to commit a school shooting because the image showed what appeared to be a real gun.¹¹⁸ However, the court held that the respondent’s subjective intent is irrelevant. As the court noted, “[T]here is nothing funny about threatening to take a gun to school in any event.”¹¹⁹

A broader understanding is possible. The GVRO statute defines “recent” as used in this subdivision to mean “within the six months prior to the date the petition was filed.”¹²⁰ The GVRO statute does not define “threat,” however, many courts have analyzed the meaning of a “true threat.” The U.S. Supreme Court stated in *Virginia v. Black*¹²¹ that “true threats” “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹²²

The California Supreme Court analyzed, interpreted, and applied *Black*’s definition of “true threats,” in *People v. Lowery*.¹²³ In *Lowery*, the Court considered a criminal statute that included no specific requirement that the defendant act with a specific intent to intimidate the particular victim and did not even require that the threat be communicated to the victim.¹²⁴ The defendant contended that such a statute violated the First Amendment.¹²⁵ The Court held that the statute was valid, construing it to apply “only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, ‘a serious expression of an intent to commit an act of unlawful violence,’ rather than an expression of jest or frustration.”¹²⁶

The *Lowery* court’s interpretation of “true threats” is consistent with the Ninth Circuit’s application in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.¹²⁷ The *Planned Parenthood* court stated that the Ninth Circuit’s well-established standard for “true threats” is a simple objective reasonableness test: “Whether a particular statement may properly be considered to be

116. *Id.* at 653.

117. *Id.* at 657.

118. *Id.* at 650.

119. *In re A.G.*, 58 Cal. App. 5th at 651.

120. CAL. PENAL CODE § 18155(b)(3) (West 2016).

121. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

122. *Id.* (emphasis added).

123. *People v. Lowery*, 52 Cal. 4th 419, 422 (2011).

124. *Id.* at 426.

125. *Id.*

126. *Lowery*, 52 Cal. 4th. 427 (quoting *Black*, 538 U.S. at 35).

127. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1074 (9th Cir. 2002).

a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”¹²⁸ Thus, under the “true threats” analysis, respondent’s subjective intent is not a factor. All told Section 422 and precedent are strong authority for getting a GVRO against a juvenile during this time of increased online threats by juveniles, who are more likely to post criminal threats such as a school shooting because they use social media more than adults.¹²⁹

Any serious discussion of juveniles and criminal threats must touch on threats of school shootings. In fact, fears of school shootings have lead authorities to arrest juveniles for making threats of bringing guns to school and killing students. In a hypothetical case where a juvenile is contesting a GVRO, a juvenile respondent may also argue that a city-imposed GVRO on a minor for advocating for firearms use and the Second Amendment in the absence of a true threat of violence is a First Amendment violation. On this issue, respondent may argue that his online comments amount to a true threat of violence because it was a joke and a satirical post. Respondent could contend that no reasonable person could view respondent’s post as anything other than a joke, farcical, or satirical. However, such an argument is unlikely to succeed because satire is a genre of literature, art, or entertainment that uses irony sarcasm or ridicule to expose and criticize people’s follies. It often employs humor to make its point.¹³⁰

Next, there are additional considerations for GVRO cases involving juveniles who alleged that they had been joking when faced with an allegation of making a criminal threat, and whose parent was a firearms owner. For example in this particularly instructive case:

A school administrator reported to the police that a 14-year-old male student with a history of racist comments at school had posted videos on Instagram of himself using firearms, favorable comments

128. *Id.* at 1074.

129. See, e.g., Laura Lane, *Bloomington Teen Accused of Threatening School Shooting in Snapchat Video*, THE HERALD-TIMES (Apr. 1, 2022), <https://www.heraldtimesonline.com/story/news/crime/2022/04/01/school-shooting-threat-snapchat-bloomington-high-police-arrest-teen/7245748001> [<https://perma.cc/AB27-3NMX>]; Kennedy McKinney, *Teen Arrested for Gun in Video: “I’m Tired of Being Stereotyped As a School Shooter”*, 12 NEWS (Nov. 4, 2022, 10:54 AM), <https://cbs12.com/news/local/bellevue-high-school-student-makes-threat-social-media-gun-shooting-16-year-old> [<https://perma.cc/D9JH-WAEC>]; Lawrencia Grose, *Three Teens Arrested for Posting Fake School Threats on Snapchat*, NEWS CHANNEL 3 (Jan. 14, 2003, 4:07 PM), <https://wreg.com/news/local/three-teens-arrested-for-posting-fake-school-threats-on-snapchat> [<https://perma.cc/MF3N-ZFNC>]; Emily A. Vogels, et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022> [<https://perma.cc/J6ES-YYMS>].

130. See Matt Jacobs, *What is Satire? Satire Examples in Literature and Movies: Our Ultimate Guide*, FILMMAKING LIFESTYLE, <https://filmlifestyle.com/what-is-satire> [<https://perma.cc/YLD4-APRE>].

about school violence and shootings, racist comments, and suggestions of animal cruelty. A related investigation had determined that the student used school computers to research firearms and search on terms such as “white power.” His father owned a 9-mm semi-automatic pistol and a .30-caliber rifle. The student was taken into custody for an emergency psychiatric evaluation and claimed that he had been joking. A GVRO was obtained, and the father’s firearms were turned in to a licensed retailer the day the order was served. A 1-year order after hearing was subsequently issued.¹³¹

That case shows that a GVRO can be brought where clear and convincing evidence exists to believe that respondent poses an immediate and present danger of causing personal injury to himself and others. In California, a juvenile is already prohibited from owning or purchasing firearms. However, with no GVRO in place, juveniles can still possess a rifle or shotgun in California under certain conditions and supervision, including for hunting purposes.¹³² A GVRO for five years will prohibit his or her parents from giving access to firearms, which is necessary because the juvenile poses a danger of causing injury to himself or another if allowed such access. The accessibility of GVROs is more essential than ever given the Ninth Circuit’s ruling in *Jones v. Bonta*,¹³³ invalidating California’s laws prohibiting the sale of semiautomatic rules to young adults, citizens between the ages of eighteen and twenty years old, and prohibiting the sale of long guns to young adults without a hunting license. *Jones* was a big defeat for gun control proponents who seek progressive policies to tackle gun violence in California.

Conclusion

In sum, the goals of California GVROs are worthwhile, and the early evaluations of their effectiveness show that a GVRO works to achieve the temporary removal of firearms from a person who may present a danger to themselves or others. GVROs, like other red flag laws, are designed to prevent dangerous people from having access to firearms. GVROs also pass constitutional muster under *Bruen* because they fit squarely within the historical tradition of prohibiting dangerous people from possessing guns. There are many practical considerations for attorneys who handle GVROs, including ensuring that GVROs are racially equitable in their application, determining the viability of a potential deferred prosecution, and being aware of the challenges presented in the enforcement of GVROs against juveniles. This Article provides such

131. See Garen Wintemute, et al., *supra* note 109, at 657.

132. CAL. PENAL CODE § 27510 (West 2022); See also *17 Facts About Gun Violence And School Shootings*, SANDY HOOK PROMISE (2022), <https://www.sandyhookpromise.org/gun-violence/16-facts-about-gun-violence-and-school-shootings> [https://perma.cc/K9L7-CNJQ] (noting that 39 percent of parents *wrongly believe* children do not know where a gun is stored, and the majority of school mass shooters get their guns from family members).

133. *Jones v. Bonta*, 34 F.4th 704, 717–19 (9th Cir. 2022).

attorneys blueprints from both civil and criminal law to both equitably and efficiently utilize GVROs for the best interest of their communities. Lastly, the evidence shows GVROs seem to be working in California, one of the most populous state in the country with the most restrictive gun ownership laws. Thus, similar laws could be equally or more effective in the remaining 31 states that do not currently have red flag laws designed to prevent gun shootings before they happen.

