



'Red Flag' laws and their awful consequences

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Since the horrific murders in Parkland, just minutes from my hometown in South Florida, our country has seen a renewed push for more restrictive gun laws. Assault weapon bans, restrictions on the storage of firearms, and pushes for every type of gun law appear at both the federal and state level. While most of these propositions have fizzled out, red flag laws—those allowing police to pre-emptively confiscate a person's firearms—have exhibited the most staying power.

The orders resulting from these laws are known as “gun violence restraining orders.” While these laws certainly have a reasonable basis, the way such laws have been implemented in many states poses serious legal, and prudential concerns.

The Constitutional guarantee of due process is the most commonly cited concern in the implementation of red flag laws. Most of these laws reflect a view of due process shown by Donald Trump in 2018 when he quipped, “take the guns first, go through due process second.” The problem here is the first word of “due process:” legal process is “due” before the government takes someone's “life, liberty, or property,” not after.

In 2018, five states had laws that fit the bill of a typical “red flag law.” With Hawaii's governor signing Act 150 in early July, that number has rose to 17 states and the District of Columbia. Nearly all GVROs provide for the removal of a person's firearms without ever giving them notice. In many of these schemes, including California's, a confiscation order may be issued against someone completely unaware of any accusations underlying the order, first learning of the petition when the police arrive to seize their firearms.

The process of issuing a GVRO in most states starts with someone petitioning the court for it. States vary on who can bring these petitions. In some states, only direct family members and dating partners can petition the court for a GVRO. In others, though, this list is expanded to former dating partners, co-workers, friends, et al.

The problem here is that the petition speeds through the court, often without giving the subject person actual notice or an opportunity to defend against the accusation. The bare minimum should be for a hearing ahead of the issuance of a GVRO, with the subject present.

This type of framework, while it may enable people close to a troubled person some opportunity to diffuse a potentially dangerous situation, sets up a system of perverse incentives. The term “red flag” is something of a misnomer, too, as the “suspicious” activity that can be the basis of a

petition includes the simple act of buying a gun, or just being interested in weapons. This turns constitutionally protected First and Second Amendment activity into the basis of a seizure of property. Where the orders are granted with relaxed evidentiary burdens, and the petitions can be brought by an ex-boyfriend or girlfriend, GVROs can become an instrument for malicious individuals to harass and endanger. This concern is far from baseless, as the forensic psychology journal “Behavioral Science & the Law” observed that about a third of GVROs were issued against innocent people.

When a confiscation order is issued “ex parte” (without the subject person present or even informed), due process is but one of many serious issues. Confrontations between police and unknowing individual’s subject to seizure can be tense interactions for both parties. This has already claimed at least one life, when officers shot a 61-year-old man to death last year while serving a confiscation order. In a country plagued with needless violence as a result of no-knock raids and a heavily militarized police, the potential benefits of red flag laws pale in comparison to the certain damage they will bring to community relationships with police.

In addition to worsening police relationships and violating due process, GVROs, as they stand, disproportionately harm the poor. Imagine police officers arriving at your door to seize your car, because it had been independently determined, without any opportunity for you to plead your case, that you were no longer safe to drive. Your only recourse is now to hire an expensive lawyer to fight for the return of your property. That’s exactly what happens after a GVRO is issued.

This, in addition to the fact that the poor are most likely to be the victims of violent crime, and thus the most in need of a firearm for self-defense, makes GVROs less of an obvious solution than they might seem. Far from stopping preventable murders, these laws bring up more red flags than they solve.

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