

# RED FLAG LAWS RAISE RED FLAGS OF THEIR OWN

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## I. INTRODUCTION

This article analyzes “red flag” laws. These laws permit the confiscation of property and the deprivation of the right to keep and bear arms without due process, if the petitioner can convince the court that the defendant may otherwise commit violence.<sup>3</sup> Part II describes red flag laws generally, with some examples. It includes an analysis of the short history of this species of law, followed by a rundown on the present state of the issue. Part III describes the potential for abuse inherent in these laws, which has generated passionate opposition. Part IV explores the relative efficacy of these laws, as well as the metric problems posed by their study. Part V discusses the future of this type of policy as it appears to us. Part VI offers a brief conclusion.

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<sup>3</sup> Joseph Blocher & David D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

## II. WHAT IS A RED FLAG LAW?

“Red flag” laws, often called “Extreme Risk Protection Orders” and “Gun Violence Restraining Orders” (hereinafter referred to collectively as “red flag laws”), are mechanisms that allow a statutorily-defined class of people to petition a court to seize the arms of an individual they believe to be dangerous.<sup>4</sup> The shape of this process varies by jurisdiction, but the general progression goes something like this: Person X believes Person Y may be dangerous, and Person Y possesses or has access to arms.<sup>5</sup> Person X reports these concerns either directly to the court or to the police, who then report the matter to the court.<sup>6</sup>

What comes next is usually the first of two hearings: the preliminary hearing. At the preliminary hearing, which might occur *ex parte* and without Person Y’s knowledge,<sup>7</sup> the concerns of X are brought before a judge, who determines whether to issue a gun confiscation order based on the one-sided evidence X presents. If the order is issued, it is generally effective immediately. At this point, Y receives his first notice of the procedure when he is ordered or forced to surrender his arms,<sup>8</sup> possibly by way of a SWAT team serving a no-knock warrant. Some time later, the final hearing will occur, of which Y will be informed and provided his first opportunity to be heard.<sup>9</sup> At that hearing, the judge will decide whether the prohibitive order should be entered for a longer period.<sup>10</sup>

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<sup>4</sup> *See generally id.*

<sup>5</sup> *Id.*

<sup>6</sup> A meaningful distinction, to be sure!

<sup>7</sup> *See* WASH. REV. CODE ANN. § 7.94.50 (West 2016).

<sup>8</sup> *See* OR. REV. STAT. ANN. § 166.537 (West 2018).

<sup>9</sup> *See* DEL. CODE ANN. tit. 10, § 7704 (West 2019).

<sup>10</sup> *Id.*

*A. Present State of the Issue*

Connecticut adopted the first red flag law in 1999.<sup>11</sup> Indiana followed next, in 2005.<sup>12</sup> California then adopted a similar law in 2014,<sup>13</sup> creating the framework that other states would emulate.

It was not until 2018 that these laws gained momentum.<sup>14</sup> As of August 2020, nineteen states and the District of Columbia had enacted some form of red flag law.<sup>15</sup> In the 115th Congress (2017-2018), Senators Richard Blumenthal (D - CT) and Lindsey Graham (R - SC) introduced the first federal bill on the topic, the “Federal Extreme Risk Protection Order Act of 2018.”<sup>16</sup> Senator Marco Rubio introduced a similar bill in 2019,<sup>17</sup> but neither bill passed the Senate.<sup>18</sup>

Red flag laws came to the front and center of the public eye in mid-2019. After a horrific mass-shooting, the public push to “do something” in response landed, for one reason or another, on red flag laws.<sup>19</sup> This was likely

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<sup>11</sup> CONN. GEN. STAT. ANN. § 99-212 (West 1999).

<sup>12</sup> IND. CODE ANN. §§ 35-47-14-1 to -9, 35-47-15-1 to -5 (West 2006).

<sup>13</sup> Assemb. B. 1014, 2014 Legis. Serv., Reg. Sess. (Cal. 2014).

<sup>14</sup> CAL. PENAL CODE §§ 18125, 18150 (West 2019-2020); COLO. REV. STAT. §§ 13-14.5-103 (West 2019); CONN. GEN. STAT. §§ 29-38C (West 2013); DEL. CODE ANN. TIT. 10 §§ 7703-7704 (West 2018-2019); D.C. CODE ANN. §§ 7-2510.02-04 (West 2019); FLA. STAT. ANN. § 790.401 (West 2018); HAW. REV. STAT. ANN. §§ 134-64(f) (West 2020); 430 ILL. COMP. STAT. ANN. 67/35(c), 67/40(c) (West 2019); IND. CODE ANN. § 35-47-14-2 (West 2020); MD. CODE ANN. PUB. SAFETY §§ 5-602 (West 2018); MASS. ANN. ch. 140 §§ 131R (West 2018); 2019 Assemb. B. 291, 2019 Leg., 80<sup>th</sup> Reg. Sess. (N.V. 2019); N.J. STAT. ANN. §§ 2C:58-23-24 (West 2019); S.B. 5, 54<sup>th</sup> Leg., 2d Sess. (N.M. 2020); N.Y. C.P.L.R. Law §§ 6341-43 (McKinney 2019); OR. REV. STAT. ANN. §§ 166.527 (West 2018); TIT. 8, R.I. GEN. LAWS ANN. §§ 8-8.3-1 *et. seq.* (West 2018); VT. STAT. ANN. tit. 13, §§ 4053-54 (West 2018); VA. CODE ANN. §§ 19.2-152.13, *et seq.* (West 2020); WASH. REV. CODE ANN. §§ 7.94.030 (West 2019).

<sup>15</sup> *Id.*

<sup>16</sup> Federal Extreme Risk Protection Order Act of 2018, S. 2521, 115th Cong. § 932 (2018).

<sup>17</sup> Extreme Risk Protection Order and Violence Prevention Act of 2019, S. 7, 116th Cong. § 3042 (2019).

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.,* Ruchard A. Oppel Jr., *Red Flag Laws Can Save Lives. Shootings in El Paso and Dayton May Expand Them*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/us/red-f;ag-gun-laws-facts.html>.

because many people perceived red flag laws as moderate gun control, and the suggested (imperfect) connection to “mental health reform.” In any event, red flag laws found bipartisan support in 2019, albeit with passionate detractors.<sup>20</sup>

### *B. Procedure for Petitions and Hearings*

Because so many states have enacted some form of red flag law, the policies vary in several meaningful ways.<sup>21</sup> The general procedure is summarized below.

#### *1. Who Can Bring a Petition?*

The exact method as to who can petition the court for an order to be issued against another varies by jurisdiction. In some states, family or household members can submit a petition.<sup>22</sup> In others, it is restricted to law

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<sup>20</sup> See Thomas Massie & John Lott Jr., ‘Red Flag’ Laws Are the Wrong Solution to Mass Shootings, NAT’L REV. (Aug. 12, 2019), <https://bit.ly/2ZgfjYa>.

<sup>21</sup> *Who Can Have a Gun – Extreme Risk Protection Orders*, GIFFORDS LAW CENTER, [https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#footnote\\_8\\_5623](https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#footnote_8_5623).

<sup>22</sup> See CAL. PENAL CODE § 18150 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); DEL. CODE ANN. tit. 10, § 7704 (West 2018). “Petitioner” defined as “[a] family member of the respondent.” DEL. CODE ANN. tit. 10, § 7701(4) (2018); D.C. CODE § 7-2510.02 (2019) (Petitioner defined as “[r]elated to the respondent by blood, adoption, guardianship, marriage, domestic partnership, having a child in common, cohabitating, or maintaining a romantic, dating, or sexual relationship. . . .”); D.C. CODE § 7-2510.01(2)(A) (2019); HAW. REV. STAT. § 134-64 (2020) (“Petitioner” defined to include “family or household member of the respondent. . . .”); 430 ILL. COMP. STAT 67/35 (2019) (Petitioner defined as “a family member of the respondent. . . .” and “family member of the respondent” defined as “a spouse, parent, child, or step-child of the respondent, any other person related by blood or present marriage to the respondent, or a person who shares a common dwelling with the respondent.”); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019) (“Petitioner” defined to include spouse, cohabitant, person related by blood, marriage or adoption, individual who has a common child, current dating or intimate partner, or current or former legal guardian.); MASS. GEN. LAWS ch. 140, § 121R (2018) (“Petitioner” defined to include “family or household member.”); Assemb. B. 291, 80th Reg. Sess. Sec. 11(2) (Nev. 2019); N.J. STAT. ANN. § 2C:58-21 (West 2019) (Petitioner defined to include a family or household member); N.Y. C.P.L.R. § 6341. (CONSOL. 2019) (“Petitioner” defined to include a “family or household member.”); N.Y. C.P.L.R. Law § 6340 (McKinney 2019); OR. REV. STAT. § 166.527 (2018); WASH. REV. CODE. § 7.94.030 (2019).

enforcement or other state officials.<sup>23</sup> And there are some in which a much wider net of individuals, including mental health professionals, educators, school administrators, former roommates, or even co-workers are able to submit a petition.<sup>24</sup>

## 2. *What Happens After a Petition is Brought?*

The manner in which an order is issued also varies by jurisdiction. While *ex parte* orders are generally disfavored in our justice system, most states allow a temporary red flag order to be issued *ex parte* and often without the defendant's notice.<sup>25</sup> Arguably fairer laws allow for *ex parte* orders in only extreme circumstances, and ensure that most defendants receive notice, an opportunity to be heard in person, and an opportunity to confront their accuser.<sup>26</sup> Nonetheless, some laws are worded in a way that suggests the *ex parte* hearing is expected to be the rule rather than the exception.

Generally, “final” orders—that is, orders entered after a full, rather than temporary, hearing—last up to a year.<sup>27</sup> Most states also allow the

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<sup>23</sup> See FLA. STAT. ANN. § 790.401(1)(a) (West 2018); R.I. GEN. LAWS ANN. § 8-8.3-1(8) (West 2018) (“Petitioner means a law enforcement agency. . . .”); VT. STAT. ANN. tit. 13, § 4053 (2018).

<sup>24</sup> D.C. CODE § 7-2510.01 (2019) (“Petitioner” defined to include a “mental health professional.”); 2019 HAW. REV. STAT. ANN. § 134-61 (West 2019) (“Petitioner” defined to include “medical professional, educator, or colleague.”); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019) (“Petitioner” defined to include a “physician, psychologist, clinical social worker, licensed clinical professional counselor, clinical nurse specialist in psychiatric and mental health nursing, psychiatric nurse practitioner, licensed clinical marriage or family therapist, or health officer or designee of a health officer who has examined the individual. . . .”); N.Y. C.P.L.R. Law § 6340 (McKinney 2019) (“Petitioner” defined to include “a school administrator” or their designee, including a “school teacher, school guidance counselor, school psychologist, school social worker, school nurse, or other school personnel required to hold a teaching or administrative license or certificate, and full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate.”).

<sup>25</sup> See, e.g., VT. STAT. ANN. tit. 13, § 4054 (2018).

<sup>26</sup> See, e.g., *id.* (requiring “specific facts supporting the allegations in the motion, including the imminent danger posed by the respondent” for an *ex parte* hearing).

<sup>27</sup> See Assemb. B. 1014, Ch. 872, 2014 Legis. Serv., Reg. Sess. (Cal. 2014); HAW. REV. STAT. ANN. § 134-64(i) (West 2020); CONN. GEN. STAT. ANN. § 99-212 (West 1999); OR. REV. STAT. ANN. § 166.527(10) (West 2018); R.I. GEN. LAWS ANN. §§ 8-8.3-5(a) (West

restricted party to request a hearing to terminate the order early,<sup>28</sup> and most states allow the petitioner to request that the order be extended once the initial period has concluded.<sup>29</sup>

The standards of proof required to obtain an order vary by state as well.<sup>30</sup> In *ex parte* proceedings, twelve states and the District of Columbia require that a petitioner show only “probable,” “good,” or “reasonable” cause for an order to attach.<sup>31</sup> Four states require a preponderance of the evidence.<sup>32</sup> These weak evidentiary standards demand relatively little proof and are especially easy to satisfy when the opposing parties are not present

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2018); N.Y. C.P.L.R. Law § 6343(3)(c) (MCKINNEY 2019); S.B. 5, Section 8, 54th Leg., 2d Sess. (N.M. 2020); D.C. CODE ANN. §§ 7-2510.02-03(6)(i) (West 2019); FLA. STAT. ANN. § 790.401(6) (West 2018); *compare* 430 ILL. COMP. STAT. ANN. 67/40(a) (2019) (stating a petitioner may request 6-month order); VA. CODE ANN. § 19.2-152.14 (C) (2020) (stating order can last up to maximum of 180 days).

<sup>28</sup> See 430 ILL. COMP. STAT. ANN. 67/40(k) (2019); Assemb. B. 1014, Ch. 872, 2014 Legis. Serv., Reg. Sess. (Cal. 2014); OR. REV. STAT. ANN. § 166.527(9)(a) (West 2018); R.I. GEN. LAWS ANN. §§ 8-8.3-7(a) (West 2018); N.Y. C.P.L.R. Law § 6343(6) (MCKINNEY 2019); MASS. ANN. LAW ch. 140 § 131S(d) (West 2018); S.B. 5, Section 8(D), 54th Leg., 2d Sess. (N.M. 2020); D.C. CODE ANN. §§ 7-2510.02-03(5)(C) (West 2019); FLA. STAT. ANN. § 790.401(6)(a) (West 2019); *compare* CONN. GEN. STAT. ANN. § 29-38c (West 2016) (stating no ability to request to terminate order early); HAW. REV. STAT. ANN. § 134-64(i) (West 2020) (stating no ability to request to terminate order early).

<sup>29</sup> See Assemb. B. 1014, Ch. 872, 2014 Legis. Serv., Reg. Sess. (Cal. 2014); R.I. GEN. LAWS ANN. §§ 8-8.3-7(a) (West 2018); MASS. ANN. LAW ch. 140 § 131S(d) (West 2018); S.B. 5, Section 8(E), 54th Leg., 2d Sess. (N.M. 2020); D.C. CODE ANN. §§ 7-2510.02-04 (West 2019); FLA. STAT. § 790.401(6)(4)(c) (West 2018); *compare* CONN. GEN. STAT. ANN. § 29-38c (West 2016) (lacking a renewal process); IND. CODE ANN. §§ 35-47-14-1 to -9, 35-47-15-1 to -5 (West 2006) (lacking a required renewal process) N.J. STAT. ANN. §§ 2C:58-23-24 (West 2019); N.J. STAT. ANN. §§ 2C:58-21-26 (West 2019) (lacking a required renewal process).

<sup>30</sup> CAL. PENAL CODE §§ 18125, 18150 (West 2019-2020); D.C. CODE ANN. §§ 7-2510.02-04 (West 2019); FLA. STAT. § 790.401 (West 2018); HAW. REV. STAT. ANN. § 134-64(f) (West 2020); 430 ILL. COMP. STAT. ANN. 67/35(c), 67/40(c) (2019); MD. CODE ANN. PUB. SAFETY § 5-602 (West 2019); MASS. ANN. LAW ch. 140 § 131R (West 2018); N.J. STAT. ANN. §§ 2C:58-23-24 (West 2019); S.B. 5, 54<sup>th</sup> Leg., 2d Sess. (N.M. 2020); N.Y. C.P.L.R. Law §§ 6341-43 (MCKINNEY 2019); R.I. GEN. LAWS §§ 8-8.3-1 *et. seq.* (West 2018); VA. CODE ANN. § 19.2-152.13, *et seq.* (2020); WASH. REV. CODE ANN. § 7.94.030 (West 2016).

<sup>31</sup> *Id.*

<sup>32</sup> See 2019 Haw. Sess. Laws S.B. 1466; MASS. GEN. LAWS ANN. Chp. 140 § 131S (West 2020); N.J. STAT. ANN. § 2C:58-26 (West 2020); WASH. REV. CODE ANN. § 7.94.090 (West 2020).

to defend themselves.<sup>33</sup> Malleable, easily cleared burdens of proof are inconsistent with the “extreme risk” the laws’ titles often purport to require.<sup>34</sup> Moreover, despite being presented as an emergency solution to imminent crime, some of the laws do not even require imminence.<sup>35</sup> In contrast, civil protection orders often do.<sup>36</sup>

Whether, when, if, and to whom firearms are relinquished depends on the state. Some states require that firearms, ammunition, and magazines be surrendered to law enforcement or a licensed dealer.<sup>37</sup> Other states allow a person to relinquish the firearms to another individual, provided that person is not prohibited from possessing firearms and ammunition or is a Federal Firearms Licensee.<sup>38</sup> Several states require that any license to carry a

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<sup>33</sup> See *Preponderance of Evidence*, LAW LIBRARY – AM. LAW AND LEGAL INFORMATION, [law.jrank.org/pages/9341/Preponderance-Evidence.html](http://law.jrank.org/pages/9341/Preponderance-Evidence.html) (last visited Dec. 30, 2020).

<sup>34</sup> See Jacob Sullum, ‘Red Flag’ Laws Leave Gun Owners Defenseless, REASON, (Aug. 7, 2019) <https://reason.com/2019/08/07/red-flag-laws-leave-gun-owners-defenseless/> (“Florida nevertheless allows judges to consider any evidence they deem relevant, and its ‘significant danger’ test is inherently vague, notwithstanding its ‘clear and convincing’ standard of proof. Some states are even looser, requiring only ‘a preponderance of the evidence,’ meaning any likelihood greater than 50 percent that the respondent poses a ‘significant risk.’”).

<sup>35</sup> See, e.g., N.Y. C.P.L.R. § 6342(a) (McKinney 2018); D.C. CODE ANN. §§ 7-2510.02-04 (West 2019).

<sup>36</sup> See *Domestic Violence Civil Protection Orders (CPO); Statutory Summary Chart*, AMERICAN BAR ASSOCIATION, (Mar. 2014) [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Charts/migrated\\_charts/2014\\_Domestic\\_Violence\\_Arrest\\_Policy\\_Chart..pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/migrated_charts/2014_Domestic_Violence_Arrest_Policy_Chart..pdf).

<sup>37</sup> CAL. PENAL CODE § 18120 (West 2014); COLO. REV. STAT. ANN. § 13-14.5-108 (West 2019), CONN. GEN. STAT. ANN. § 29-38c (West 2016) (Law Enforcement serves a search warrant to remove firearms.); 10 Del. Laws §§ 7703, 7704; D.C. CODE ANN. § 7-2510.07 (West 2019), FLA. STAT. § 790.401(7) (West 2018), S.B. 1466, 30<sup>th</sup> Leg., Reg. Sess. (HI 2019); 430 ILL. COMP. STAT 67/35(g)(2) (West 2019); IND. CODE ANN. § 35-47-14-2 (West 2020); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2018); MASS. GEN. LAWS ANN. 140 § 131S (West 2018), N.J. STAT. ANN. § 2C:58-26 (2018); New York (N.Y. C.P.L.R. § 6342 (McKinney), Oregon (OR. REV. STAT. ANN. § 166.537), R.I. Gen. Laws § 8-8.3-4 (West 2018), Vermont (VT. STAT. ANN. tit. 13, § 4059 (West 2018); (WASH. REV. CODE ANN. § 7.94.090 (West 2016).

<sup>38</sup> CAL. PENAL CODE § 18120 (West 2014); COLO. REV. STAT. ANN. § 13-14.5-108 (West 2019); CONN. GEN. STAT. ANN. § 29-38c (West 2016);, 10 Del. Laws §§ 7703, 7704; N.J. STAT. ANN. § 2C:58-26 (2018); OR. REV. STAT. ANN. § 166.537; VT. STAT. ANN. tit. 13, § 4059 (West 2018).

concealed firearm be relinquished at the same time.<sup>39</sup> In Colorado, the accused person's concealed carry license is automatically revoked as soon as a temporary order is issued.<sup>40</sup>

Ex parte orders can last anywhere from two to fifty-one days.<sup>41</sup> The ex parte order will then automatically expire unless a hearing is held, at which time a final order may be issued.<sup>42</sup> In five states and the District of Columbia, the evidentiary standard to obtain a final order is the weak preponderance of the evidence standard.<sup>43</sup> Oregon demands the highest standard of proof: clear and convincing evidence.<sup>44</sup> While most final orders may last up to one year—an excessive duration for an emergency order—some last six months.<sup>45</sup> However, a final order obtained in New Jersey lasts indefinitely, unless the defendant proves he no longer poses a threat.<sup>46</sup>

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<sup>39</sup> COLO. REV. STAT. § 13-14.5-108(1)(b); D.C. CODE ANN. § 7-2510.07(b); FLA. STAT. § 790.401(7); MASS. GEN. LAWS ANN. 140 § 131S; OR. REV. STAT. ANN. § 166.537; WASH. REV. CODE ANN. § 7.94.090.

<sup>40</sup> See, e.g., COLO. REV. STAT. § 13-14.5-110(3) (exacerbating the due process concern, as the license itself is an interest that may be forfeited through an ex parte order).

<sup>41</sup> Maryland's ex parte orders remain in effect for one to two days, shorter than any other state. MD. CODE ANN., PUB. SAFETY § 5-603(e)(1) (West 2020). On the other end of the spectrum, after an ex parte order is issued in Oregon, the defendant is allowed thirty days to request a hearing to contest the order, and the hearing must be held within twenty-one days from the request. OR. REV. STAT. ANN. § 166.527(9) (West 2020).

<sup>42</sup> The exception is Oregon, which automatically extends the order if the defendant does not request a hearing within thirty days after the ex parte order is issued. OR. REV. STAT. ANN. § 166.527(9) (West 2020).

<sup>43</sup> HAW. REV. STAT. ANN. § 134-65(c) (West 2019); MASS. GEN. LAWS ANN. 140 § 131S (2020); N.J. STAT. ANN. § 2C:58-26(b) (West 2020); S.B. 5, 54<sup>th</sup> Legis. Sess. 2d Sess. (N.M. 2020); WASH. REV. CODE ANN. § 7.94.090 (2020); D.C. CODE ANN. § 7-2510.07 (2020); *Preponderance of the Evidence*, LEGAL INFORMATION INSTITUTE [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence) (last visited Dec. 29, 2020) (“Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.”).

<sup>44</sup> OR. REV. STAT. ANN. § 166.527(6)(a) (West 2020).

<sup>45</sup> 430 ILL. COMP. STAT. ANN. 67/35 (West 2018); 67/40(a); VT. STAT. ANN. tit. 13, § 4055(b) (2018); VA. CODE ANN. § 19.2-152.14, *et seq.* (West 2020).

<sup>46</sup> N.J. STAT. ANN. § 2C:58-25 (West 2019).



### III. POTENTIAL FOR ABUSE

As enacted thus far, these laws cause people who have not committed any crime to be deprived of their property and ability to defend themselves without due process. And despite being conflated with mental health reform, red flag laws do not improve access to mental health care or address the important issues of untreated or under-treated mental illness.<sup>47</sup> Indeed, red flag laws may even deter those who might otherwise seek mental health treatment or counseling but are worried about forfeiting their rights.<sup>48</sup>

Red flag laws pose serious due process concerns under every implementation to date.<sup>49</sup> The Fifth and Fourteenth Amendments of the

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<sup>47</sup> Jon Schuppe, *Red Flag Laws Often Have Bipartisan Support. But Do They Stop Mass Shootings?*, NBC NEWS (Aug. 7, 2019, 6:50 AM), <https://nbcnews.to/2KvpzWY> (Proponents often present red flag laws as mental health bills. For example, Ohio Governor Mike DeWine claimed his red flag bill would “get them the mental health treatment that they need, get them whatever help that they need.”); *see also* Isaiah Seibert, *Want to Prevent Gun Violence? Some States Turn to ‘Red Flag’ Laws*, N.C. HEALTH NEWS, (Aug. 13, 2019), <https://www.northcarolinahealthnews.org/2019/08/13/want-to-prevent-gun-violence-some-states-turn-to-red-flag-laws/> (Indiana state representative Wendy McNamara explained, “we want to make sure that we find help for these individuals. . . .”); Jennifer Kovaleski & Blair Miller, *Colorado Lawmakers Introduce New ‘Red Flag’ Gun Violence and Mental Health Measure*, THE DENVER CHANNEL (Feb. 14, 2019, 7:28 PM), <https://www.thedenverchannel.com/news/360/colorado-lawmakers-introduce-new-red-flag-gun-violence-and-mental-health-measure> (Sheriff Tony Spurlock, a leading proponent of Colorado’s law, argued that the law “will help save lives and support mental health. . . .”); Massie & Lott, *supra* note 20 (“[R]ed-flag laws are not specifically about mental illness. Indeed, only one state law even mentions the term.”).

<sup>48</sup> *See, e.g.* Shelby Arnold, et al., *Keeping Guns Away from Potentially Dangerous People*, 49 AM. PSYCHOL. ASS’N 27 (2018) (“These laws may also overstate the relationship between gun violence and mental illness, which propagates stigma and may discourage people from seeking mental health treatment.”).

<sup>49</sup> *See* CAL. PENAL CODE § 18125 (West 2019) (reasonable cause); D.C. Code Ann. § 7-2510.04 (West 2019) (probable cause); FLA. STAT. ANN. § 790.401(4)(c) (West 2019) (reasonable cause); 430 ILL. COMP. STAT. ANN. 67/35(f) (West 2018) (probable cause); MD. CODE ANN., PUB. SAFETY § 5-603(a)(4) (2019) (probable cause); MASS. GEN. LAWS ANN. ch.140 § 131T(a) (West 2018) (reasonable cause); N.J. STAT. ANN. § 2C:58-23(e) (West 2019) (good cause); N.Y. C.P.L.R. § 6342 (MCKINNEY 2019) (probable cause); R.I. GEN. LAWS ANN. § 8-8.3-4(a) (West 2016) (probable cause), WASH. REV. CODE ANN. § 7.94.050(3) (West 2018) (reasonable cause). *Cf.* VT. STAT. ANN. tit. 13 § 4053 (West 2018) (clear and convincing evidence).

United States Constitution proscribe the deprivation of “life, liberty, or property without due process of law.”<sup>50</sup> By depriving individuals of their property and rights without having been formally charged, arraigned, or convicted of a crime, red flag laws violate these constitutional rights.

In so far as orders are issued *ex parte*, red flag laws invert the presumption of due process. This deprives the accused person of the opportunity to defend oneself or cross-examine the accuser. The ACLU of Rhode Island expressed concern over a proposed red flag law due to “the breadth of [the] legislation, its impact on civil liberties, and the precedent it sets for the use of coercive measures against individuals not because they are alleged to have committed any crime, but because somebody believes they might, someday, commit one.”<sup>51</sup>

Put another way, this “Minority Report”<sup>52</sup> type of legislation purports to predict crime before it occurs, then attaches a court order stripping people of their rights and compels them to forfeit—or have law enforcement seize—their property (guns, ammunition, gun parts, etc.). Failing to abide by these court orders generally results in serious criminal liability.<sup>53</sup>

Anyone subject to such an order is typically not provided the right to an appointed attorney,<sup>54</sup> and must engage in a lengthy, expensive, and

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<sup>50</sup> U.S. CONST. amends. V, XIV.

<sup>51</sup> *An Analysis of 18-H 7688 and 18-S 2492, Relating to Extreme Risk Protective Orders*, ACLU OF R.I., [http://riaclu.org/images/uploads/180302\\_analysis\\_RedFlagsLegislation.pdf](http://riaclu.org/images/uploads/180302_analysis_RedFlagsLegislation.pdf) (last visited Dec. 29, 2020).

<sup>52</sup> MINORITY REPORT (20th Century Fox 2002); *see also* *Minority Report*, ROTTEN TOMATOES, [https://www.rottentomatoes.com/m/minority\\_report](https://www.rottentomatoes.com/m/minority_report) (last visited Dec. 29, 2020) (“[A]n action-detective thriller set in Washington D.C. in 2054, where police utilize a psychic technology to arrest and convict murderers before they commit their crime. . . . [T]he head of this Precrime unit . . . is himself accused of the future murder of a man he has never met.”).

<sup>53</sup> *E.g.*, 430 Ill. Comp. Stat. 67/65 (2019) (a Class A misdemeanor); COLO. REV. STAT. § 13-14.5-111 (2019) (a class 2 misdemeanor); WASH. REV. CODE ANN. § 7.94.120 (2016) (the first two violations are gross misdemeanors that extend the firearms prohibition an additional five years each, and the third conviction is a class C felony).

<sup>54</sup> COLO. REV. STAT. § 13-14.5-104(1) (2019) (Colorado is currently the only jurisdiction that provides defendants with court-appointed representation).

onerous processes to defend their rights.<sup>55</sup> Thus, a person falsely accused likely faces a best-case-scenario of having their firearms confiscated and spending hundreds of dollars in legal fees.<sup>56</sup> Even then, someone may face difficulty in having their property returned once it is ordered returned.<sup>57</sup>

Many red flag laws lack provisions requiring the return of seized property following the expiration of an order.<sup>58</sup> Individuals who seek the return of their rightfully-owned property must take independent and expensive legal action to have their property returned.<sup>59</sup> Making matters worse, legal action is often fruitless, as governments have not always been required to return firearms to their lawful owners.<sup>60</sup> This makes red flag laws especially harmful to financially-disadvantaged individuals who are the most likely targets of criminal violence<sup>61</sup> and abuse from the government.<sup>62</sup> Far from protecting potential victims, red flag laws manufacture a new class of victims and have the dangerous potential to disarm those most likely to need an effective mechanism of self-defense.

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<sup>55</sup> *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the U.S. S. Judiciary Full Committee*, 116th Cong. 21 (2019) (Written testimony of David B. Kopel, Member, S. Comm. on the Judiciary).

<sup>56</sup> *Id.*

<sup>57</sup> See George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 BEHAV. SCI. & THE L. 308 (2015) (finding that gun owners in Indiana waited, on average, more than nine months before a court decided whether police could keep their firearms).

<sup>58</sup> *Id.* at 310-11.

<sup>59</sup> Because there is no mandatory return of seized property, individuals seeking their property back must formally petition the state for the return of their property, often requiring independent counsel to be successful. See *Walters v. Wolf*, 660 F.3d 307, 310 (8th Cir. 2011) (discussing requirements of Court Orders before the return of seized property). See also Parker, *supra* note 57 (discussing the petition process for the return of seized firearms).

<sup>60</sup> See *City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) (finding no constitutional violation when city seized and refused to return arms to citizen with Second Amendment rights intact); *Walters*, 660 F.3d at 307 (finding a due process violation but no Second Amendment violation).

<sup>61</sup> Jim Norman, *Young, Poor, Urban Dwellers Most Likely to Be Crime Victims*, GALLUP (Nov. 6, 2015), <https://news.gallup.com/poll/186539/young-poor-urban-dwellers-likely-crime-victims.aspx>.

<sup>62</sup> See *Criminalization of Race and Poverty*, INST. FOR POL'Y STUD., <https://ipsdc.org/criminalization-of-race-and-poverty/> (last visited Dec. 20, 2020).

Additionally, many red flag laws provide no means to prevent individuals from maliciously accusing others.<sup>63</sup> Because red flag laws are rooted in third-party enforcement, there is an inherent potential for abuse by third parties. Primary concerns are fraudulent, malicious, or reckless petitions. Against a backdrop of “swatting,”<sup>64</sup> and combined with the lax standards of proof, red flag laws threaten ordinary Americans with potentially deadly encounters with police.<sup>65</sup> The laws, as presently written, invite domestic terrorists to weaponize the court system to strip the rights of their enemies or political opponents.<sup>66</sup> The potential for abuse is exacerbated by a distinct lack of statutory civil remedies for victims of abuse and penalties for those who bring fraudulent, malicious, or reckless petitions.

#### IV. HOW EFFECTIVE ARE RED FLAG LAWS?

There is no conclusive evidence that red flag laws are effective in deterring violence.<sup>67</sup> Given their “pre-crime” nature, it is extremely difficult to quantify what, if any, effect the laws have on deterring or preventing

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<sup>63</sup> Some states, like Colorado, provide no civil remedy for victims who were maliciously accused. Other states, like Maryland, do. *See* MD. CODE ANN. PUB. SAFETY § 5-602(d) (West 2020).

<sup>64</sup> Emma Marshak, *Online Harassment: A Legislative Solution*, 54 HARV. J. ON LEGIS. 503, 521 (2017) (“Swatting, or the act of calling SWAT teams to respond to a fake emergency at the victim’s house, is a tactic often used to harass journalists, academics, domestic violence survivors and celebrities.”).

<sup>65</sup> The enforcement of red flag laws have already claimed human life. In Maryland, law enforcement arrived at 61-year-old Gary Willis’s home at 5:17 a.m. to confiscate his firearms. Taken by surprise, Willis answered the door with his firearm in his hand. After a brief argument over the firearm, an officer fatally shot Willis. *Maryland Officers Serving Red Flag Gun Removal Order Fatally Shoot Armed Man*, CBS NEWS (Nov. 6, 2018), <https://cbsn.ws/2zJ2sTw>.

<sup>66</sup> This potential is summed up in a tweet by President Trump. “Would Chris Cuomo be given a Red Flag for his recent rant? Filthy language and a total loss of control. He shouldn’t be allowed to have any weapon. He’s nuts!” Donald Trump (@realDonaldTrump), TWITTER (Aug. 13, 2019), <https://bit.ly/2PgiAGS>.

<sup>67</sup> *See* Jon Miltimore, *7 Reasons to Oppose Red Flag Gun Laws*, FEE.org (Aug. 10, 2019), <https://fee.org/articles/7-reasons-to-oppose-red-flag-guns-laws/> quoting Sheryl Gay Stolberg, ‘Red Flag’ Gun Control Bills Pick Up Momentum With G.O.P. in Congress, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/politics/congress-gun-control.html> (“‘The evidence,’ *The New York Times* recently reported, ‘for whether extreme risk protection orders work to prevent gun violence is inconclusive, according to a study by the RAND Corporation on the effectiveness of gun safety measures.’”).

violence. Moreover, in some instances, the laws are not even utilized or lie dormant for a period of time before being put into action.<sup>68</sup>

#### V. WHAT IS THE FUTURE OF RED FLAG LAWS?

In recent years, new red flag laws have been introduced and ultimately passed in several states, often following either a public tragedy or a partisan shift.<sup>69</sup> The perception of red flag laws as a “moderate” form of gun control—compared to confiscatory arms prohibitions—may be one reason jurisdictions turn to them as a means to “do something.” Still, there is no real evidence that the laws have any significant prophylactic value, despite posing significant due process concerns.<sup>70</sup> Most claims that red flag laws are effective focus on the number or percentage of orders issued.<sup>71</sup> But this has no clear relation to the prevention of harm. It may just reveal an unwillingness of judges to take the chance of denying a petition, which may be especially true when brought by law enforcement.

Whether new laws sail through or are passed bitterly, what is certain is that repealing extant law is incredibly difficult. And marriage to new and unproven policy is problematic. Thus, sunset provisions, which enable legislatures to look back and assess the efficacy of laws, are sensible.<sup>72</sup>

Despite the novelty of red flag laws, they have to-date failed to include a sunset provision. Given the perilous nature of establishing a system designed to eliminate constitutional rights through *ex parte* proceedings, a sunset provision would be prudent in case the system is ineffective and abused, as many suspect it will be.

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<sup>68</sup> See Peter Jamison & Peter Hermann, *Some US Lawmakers Want a ‘Red Flag’ Law. But States Have Had Mixed Results*, WASH. POST. (Aug. 8, 2019), <https://wapo.st/2HfHcJq> (“California’s law went nearly unused for two years after its passage in 2016. Not a single request for a gun to be removed has been filed under the D.C. measure, which took effect at the beginning of this year.”).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Sunset Law*, BLACK’S LAW DICTIONARY (9th ed. 2009).

## VI. CONCLUSION

Red flag laws are riddled with constitutionally unsound principles, as well as practical issues. The laws deprive individuals of their rights to due process of law before their rights are eliminated and property seized, which should offend anyone who values the Constitution and what it stands for.

Because laws tend to be permanent, future red flag laws should take care to learn from the many mistakes caused by previous policies. On balance, any effect of the medicine is likely not worth its deeply bitter taste nor the pernicious effect on our Due Process rights.