

ELDERLY GUN OWNERSHIP AND THE WAVE OF STATE RED FLAG LAWS: AN UNINTENDED CONSEQUENCE THAT COULD HELP MANY

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There is rising concern among health professionals and in legal circles to address gun ownership for older adults who display signs of cognitive decline, including dementia. However, elderly gun ownership remains underexamined, partly because incidents of gun violence among the elderly tend to occur in domestic settings and are much less visible than shootings in public areas. In contrast, there is widespread attention to curb mass gun violence through state legislation. Specifically, red flag laws, also known as Extreme Risk Protection Orders, have doubled in 2018 with thirteen states enacting red flag laws and over thirty states having introduced or planning to introduce this legislation. Although red flag laws were not intended to address elderly gun ownership, they uniquely apply where other gun control laws fall short, as red flag laws provide the legal process to temporarily remove access to guns for persons believed to be at an elevated risk of harming themselves or others.

This Article surveys the thirteen states that have enacted red flag laws and analyzes key legislative elements across these states. The state laws have notable variations, including authorized persons who can petition a court for a protection order, standard of proof requirements, and the length of time an order is in effect. These variations have implications for elderly gun owners and their families, particularly in how they relate to the climbing rates of cognitive decline, suicide in late life, and elder abuse. The current wave of red flag laws across the country offer an opportunity to provide greater awareness around elderly gun ownership and prevent crises from becoming tragedies.

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I. Introduction

The shooters often acted during bouts of confusion, paranoia, delusion or aggression—common symptoms of dementia. They killed people closest to them—caretaker, wife, son or daughter . . . Many killed themselves.¹

A Kaiser Health News investigation, quoted above, uncovered over 100 cases from across the United States of elderly gun owners diagnosed with dementia who used guns to kill themselves or others.² The investigation illustrated why elderly gun ownership is gaining recognition as a national public health concern, with examples of loved ones stating, “It crossed my mind that maybe I should’ve taken the guns . . . It’ll be a guilt that I’ll never ever get away from.”³ These sentiments reflect the difficulties family members face in determining whether, how, and when to limit or remove access to guns when the owners are displaying signs of cognitive decline, including poor memory, thinking, and judgement.⁴ Health professionals are similarly at a loss as to how to address elderly gun ownership.⁵ Medical associations are increasingly encouraging providers to inquire about access to guns, but the American Academy of Neurology’s guidelines do not delineate actions to take if a patient has guns in the home and if they become unfit to handle a gun.⁶

This Article surveys the range of red flag laws, starting with key legislative elements across the thirteen states that have enacted red flag laws. The state laws have notable differences in three areas that have specific implications for elderly gun ownership: (1) authorized persons who can petition a court for a protection order, (2) standard of proof

1. Jonel Aleccia & Melissa Bailey, *Unlocked and Loaded: Families Confront Dementia and Guns*, KAISER HEALTH NEWS (June 25, 2018), [hereinafter Aleccia & Bailey], <https://khn.org/news/dementia-and-gun-safety-when-should-aging-americans-retire-their-weapons/>.

2. *Id.*

3. *Id.* (quoting Melissa Helmandollar, whose father killed his wife while hallucinating because he thought he was firing at intruders rather than his wife).

4. Brian Mertens & Susan B. Sorenson, *Current Considerations About the Elderly and Firearms*, 102 AM. J. PUB. HEALTH 39, 39 (2012).

5. Melissa Bailey, *Doctors Need to Talk to Families About Guns and Dementia*, N.Y. TIMES (Oct. 9, 2018), [hereinafter Bailey], <https://www.nytimes.com/2018/10/09/well/live/doctors-need-to-talk-to-families-about-guns-and-dementia.html>.

6. *Id.* (explaining that the American Academy of Neurology’s guidelines suggest physicians ask about access to guns during a safety screen, but do not provide advice as to what to do if a patient has guns. Physicians do not raise the issue because they are unsure of what to tell patients about gun ownership, and gun safety was a primary reason why physicians do not raise the issue).

requirements, and (3) the length of time an order is in effect. The recent development of red flag laws across the country provides an opportunity for states to compare their approaches and observe how these laws are being applied to older adults.

The Article proceeds as follows. Section II provides a background on the development of red flag laws and how they compare with other gun control laws. Section III analyzes key elements in red flag legislation and variations across states that have passed these laws. Section V discusses the strengths and limitations of red flag laws, and provides recommendations for state legislatures to incorporate safeguards specific to gun violence among older adults. Section VI concludes.

II. Background

Red flag laws, also referred to as Extreme Risk Protection Orders (“ERPO”), allow law enforcement—and in eight states, family or household members—to file a petition for a court order to temporarily remove a person’s access to guns when they show “red flags” by exhibiting dangerous behavior.⁷ These laws are often referenced in the media and by legislators as a response to curb mass shootings, as evidenced by the number of states with red flag laws having doubled since the mass school shooting in Parkland, Texas on February 14, 2018.⁸

A 2018 study found that the red flag laws in Connecticut and Indiana have been particularly effective in preventing gun violence among older adults who may be at risk of harming themselves.⁹ Specifically, the study found a 13.7% reduction in suicides with a gun in Connecticut since 2007, and that Indiana’s red flag law was associated with 7.5% fewer suicides following the law’s passage in 2005.¹⁰ Suicide prevention, elder abuse protection, and cognitive decline are distinct and

7. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#key-elements> (last visited Feb. 5, 2019) [hereinafter *Extreme Risk Protection Orders*] (noting in Maryland, under MD. CODE ANN. PUB. SAFETY § 5-601(e)(2) (LexisNexis 2018), certain categories of health professionals are included as an authorized group to file a petition, in addition to law enforcement and family or household members).

8. *Id.*

9. Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 PSYCHIATRIC SERVS. ADVANCE 855, 855 (2018).

10. *Id.*

important issues to consider in legislation that impact elderly gun ownership.

Suicide later in life is an increasing issue across America,¹¹ which federal agencies actively track and report on.¹² The Centers for Disease Control and Prevention ("CDC") found that older adults commit suicide at a disproportionately higher rate compared to the general population.¹³ In particular, men age sixty-five and older are more likely to commit suicide than Americans in all other age groups, and three-quarters of suicidal elderly men use a gun.¹⁴ These numbers are expected to increase with the rise in life expectancy,¹⁵ and by 2030 nearly one in five U.S. residents will be over the age of sixty-five.¹⁶ For these reasons, some health professionals are taking an increasingly active role in asking patients about access to guns as part of standard doctor visits.¹⁷ For example, Dr. Colleen Christmas, a geriatric primary care doctor at Johns Hopkins School of Medicine, asks every incoming patient about access to guns.¹⁸ In Dr. Christmas's opinion, "[o]ne of the biggest mistakes that doctors [can] make is not thinking about gun[s]," because guns are the most common method of suicide among seniors.¹⁹

Suicide rates for older adults and reports of elder abuse are climbing²⁰ at a time when federal laws to improve the rights, safety, and well-being of America's senior population are also rising. The Elder Abuse Prevention and Prosecution Act ("EAPPA") swiftly passed with support from both political parties on October 18, 2017, recognizing that

11. See Kimberly Van Orden & Yeats Conwell, *Suicides Later in Life*, 13 CURRENT PSYCHIATRY REP. 234, 235 (2011).

12. See Jiaquan Xu et al., U.S. DEP'T OF HEALTH AND HUMAN SERVS., DEATHS: FINAL DATA FOR 2016, 67 NAT'L VITAL STAT. REP. 1 (July 26, 2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_05.pdf.

13. See *Fatal Injury Data*, CDC, <https://www.cdc.gov/injury/wisqars/fatal.html> (last visited Jan. 18, 2019) [hereinafter CDC].

14. See *id.*

15. See Aleccia & Bailey, *supra* note 1.

16. Grayson K. Vincent & Victoria A. Velkoff, *The Next Four Decades, The Older Population in the United States: 2010 to 2050*, U.S. CENSUS BUREAU 1 (May 2010), <https://www.census.gov/content/dam/Census/library/publications/2010/demo/p25-1138.pdf>.

17. See Bailey, *supra* note 5.

18. *Id.*

19. *Id.*

20. See CDC, *supra* note 13; Jeff Sessions, U.S. Attorney Gen., Opening Remarks at the Department of Justice's World Elder Abuse Awareness Day Event (June 15, 2018), [hereinafter Sessions], <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-opening-remarks-department-justice-world-elder>.

older adults who are abused are three times more likely to die earlier than older adults of the same age who have not been abused, and that up to half of older adults with dementia experience abuse.²¹ Elder abuse includes physical abuse, neglect, and financial exploitation.²² Former Attorney General Jeff Sessions referred to the EAPPA as kicking off the “largest elder fraud enforcement action in American history;”²³ and he bemoaned the estimated three billion dollars stolen or defrauded annually from seniors.²⁴ Unfortunately, the EAPPA does not address the increased mortality among victims of elder abuse and their access to guns.

The current federal and state gun control laws fall short regarding the ability to temporarily remove access to guns for individuals with an elevated risk of harming themselves or others. Under federal law, a person must be seriously mentally ill or committed to a mental institution for there to be a prohibition on purchasing or possessing guns.²⁵ Most states mirror the federal law and prohibit seriously mentally ill individuals from possessing guns.²⁶ There are currently no federal laws that specifically prohibit the purchase or possession of guns by persons diagnosed with dementia,²⁷ but Hawaii and Texas prohibit gun possession by individuals diagnosed with dementia.²⁸

The social and political momentum across the country to pass red flag laws, and to avoid mass shootings, is historic and on the rise.²⁹ However, these state laws have significant variations in application and target population³⁰ because perpetrators of mass shootings are not the sole group impacted by these laws. Red flag laws have survived legal challenges under the Second Amendment thus far, but the more recent

21. Elder Abuse Prevention and Prosecution Act 2017, 34 U.S.C. § 21711 (2018); S. Rep. No. 115-9, at 2 (2017).

22. *Id.* at § 21701.

23. See Aleccia & Bailey, *supra* note 1; see also Sessions, *supra* note 20.

24. *Id.*

25. 18 U.S.C. § 922(d)(4) (2018); see 27 C.F.R. § 478.11 (2014).

26. See generally *Extreme Risk Protection Orders*, *supra* note 7.

27. See Aleccia & Bailey, *supra* note 1.

28. See HAW. REV. STAT. ANN. § 134-7(c)(3) (West 2016); TEX. GOV'T CODE ANN. § 411.172(e)(S)(C) (West 2017); Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 ELDER L.J. 51, 54 (2017) [hereinafter Vars].

29. Nicole Gaudiano, *'Red flag' laws that allow for temporary restrictions on access to guns gain momentum across nation*, USA TODAY (Mar. 25, 2018), <https://www.usatoday.com/story/news/politics/2018/03/25/red-flag-laws-allow-temporary-restrictions-access-guns-gain-momentum-across-nation/454395002/>.

30. *Id.* (citing the different laws in Connecticut, Indiana, and Florida versus California, Washington, and Oregon).

laws passed in 2018 differ from the initial laws in Connecticut and Indiana, and in some ways are broader.³¹ The focus of this Article is not the constitutionality of these laws, but rather their distinct ability to offer a legal mechanism to temporarily remove access to guns and how to effectively apply these laws to an older population.

Under the current gun control laws, if family members, health professionals, or law enforcement have concerns about an elderly gun owner who may pose a serious threat to himself or others, they have limited options outside red flag laws. Common forms of state gun control laws focus on prohibition or restrictions from purchasing guns, including ten-day waiting periods and universal background checks.³² These laws are not generally applicable to protecting an elderly person identified as at-risk, because an elderly gun owner would likely pass these restrictions. Many have been responsible gun owners for most of their lives and it is unlikely they have been diagnosed with a serious mental illness or committed to a mental institution.³³

III. State Red Flag Laws

The main provision present in the thirteen states' red flag laws is to place a six-month to one-year prohibition for persons believed to be of immediate and present danger to oneself or others from having custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive a gun.³⁴ The notable variations in these laws, in terms of their implications for elderly gun ownership, focus on how they define petitioners or authorized persons who can file for a protection order.³⁵ This definition varies from strictly law enforcement

31. *Hope v. State*, 163 Conn. App. 36, 43 (2016); *Redington v. Indiana*, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013).

32. Michael Price, *Gun waiting periods could save hundreds of lives a year, study says*, SCIENCE (Oct. 16, 2017), <https://www.sciencemag.org/news/2017/10/gun-waiting-periods-could-save-hundred-lives-year-study-says> (explaining that seventeen states still use waiting periods and computerized background checks).

33. Vars, *supra* note 28, at 58; Marion E. Betz et al., *Firearms and Dementia: Clinical Considerations*, 169 ANNALS INTERNAL MED. 47, 47 (2018) [hereinafter Betz et al.].

34. Nick Wing, *With New Illinois Gun Law, 'Red Flag' States Have More Than Doubled Since Parkland*, HUFFPOST (July 16, 2018), https://www.huffingtonpost.com/entry/illinois-gun-laws-red-flag_US_5b11a669e4b010565aabfc12 ("With the addition of Illinois, 13 states now have some sort of 'red flag' law on the books.").

35. See Leslie Shapiro et al., *How strictly are guns regulated where you live?*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/?utm_term=.fQ39ebd3c20c ("Of the seven types of regulations we looked at, no single restriction has been enacted in all 50 states.").

to also including family or household members. The broadest definition in Maryland even extends to allow for certain categories of health professionals as well as the other groups to be able to file for a protection order.³⁶ The other important differences in the laws concern standard of proof requirements and the length of time an order is in effect. Most states allow for a lower standard of proof for an emergency ERPO, which may be issued by a court without providing notice of a hearing to the respondent.³⁷ These orders typically last for a short period of time ranging from ten to thirty days.³⁸ A higher standard of proof, typically clear and convincing evidence, is required for final ERPOs that are in effect for six months to a year.³⁹

Table 1 is organized by the year the listed states passed their legislation. Connecticut and Indiana were the first states to pass these types of laws in 1999 and 2005, respectively.⁴⁰ Both states limit the definition of “petitioners” to include law enforcement or the State’s Attorney only.⁴¹ California was the first state in 2014 to expand the definition of petitioners to include law enforcement, and family or household members.⁴² In 2017, Washington voters passed its red flag law via a ballot initiative, and Oregon followed shortly after.⁴³ Following the mass school shooting in Parkland, Florida on February 14, 2018, the remaining eight states quickly introduced and passed red flag laws:⁴⁴ Florida in March 2018; Vermont and Maryland in April 2018; and Rhode Island, New Jersey, and Delaware in June 2018.⁴⁵ Massachusetts and Illinois were the latest states to pass red flag laws in July 2018.⁴⁶ Currently, over a quarter of states have enacted such laws.⁴⁷

The majority of states with red flag laws allow family and household members to file a petition for an ERPO (Table 1). These eight states

36. MD. CODE ANN., PUB. SAFETY § 5-601 (West 2018).

37. See generally *Extreme Risk Protection Orders*, *supra* note 7.

38. *Id.*

39. *Id.*

40. CONN. GEN. STAT. § 29-38c(d) (2019); IND. CODE § 35-47-14-4 (2018); H.R. 585, 132d Leg., 1st Spec. Sess. (Oh. 2017).

41. THE EDUC. FUND TO STOP GUN VIOLENCE, *Extreme Risk Laws: A Toolkit for Developing Life-Saving Policy in Your State*, GIFFORDS L. CTR. 7 (2018), <https://giffords.org/wp-content/uploads/2018/08/Extreme-Risk-Laws-Toolkit.pdf>.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

also criminalized knowingly filing a false or intentionally harassing petition as a preventive measure against individuals who might potentially abuse the broader law.⁴⁸ Florida and Rhode Island passed their legislation in response to the Parkland school shooting, but they followed Connecticut and Indiana's approach by limiting petitioners to law enforcement personnel.⁴⁹ Vermont's statute is similarly narrow in its definition of petitioners by limiting it solely to the State's Attorney or the office of the Attorney General.⁵⁰ Maryland has the only red flag law that defines "petitioner" beyond law enforcement and family or household members.⁵¹ The law specifically includes certain groups of health professionals authorized as petitioners, including: "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," as well as any "health officer or designee of a health officer who has examined the individual."⁵²

Maryland's red flag law is also distinct with its standard of proof requirement: the judge may enter a final ERPO to prohibit the respondent from possessing a gun if the judge finds that there is clear and convincing evidence to believe that the respondent poses an immediate and present danger of causing personal injury to the respondent, the *petitioner*, or another by possessing a gun.⁵³ Other state red flag laws do not specifically identify the petitioner.⁵⁴ California is distinct in that the law requires the petitioner to show that less restrictive alternatives to the protection order have been tried prior to filing for an ERPO.⁵⁵ The red flag laws in Washington and Massachusetts differ from the other statutes in that they use a preponderance of evidence standard of proof,

48. See, e.g., CAL. PENAL CODE § 18200 (West 2018); 81 DEL. LAWS 223 (2018); 430 ILL. COMP. STAT. 67/5 (2019); MD. CODE ANN., CRIM. LAW § 5-602(d) (West 2018); MASS. GEN. LAWS ch. 140 § 131V; OR. REV. STAT. ANN. § 166.543(3) (2018); WASH. REV. CODE § 7.94.120(1) (2018).

49. FLA. STAT. § 790.401(1)(a) (2018); R.I. GEN. LAWS § 8-8.3-1 (2018).

50. VT. STAT. ANN., tit. 13, § 4053 (2018).

51. MD. CODE ANN. PUB. SAFETY § 5-601(e)(2) (West 2018).

52. *Id.* at § 5-601(e)(2)(i).

53. MD. CODE ANN. PUB. SAFETY § 5-605(c)(1)(ii) (West 2018).

54. See, e.g., R.I. GEN. LAWS § 8-8.3-1(8) (2018) ("‘Petitioner’ means a law enforcement agency that petitions for an order pursuant to this chapter.").

55. CAL. PENAL CODE § 18175(b)(2) (West 2018) ("A gun violence restraining order is necessary to prevent personal injury . . . less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition.").

instead of a clear and convincing evidence standard.⁵⁶ Washington's law includes a requirement that the petitioner demonstrate that the "respondent poses a significant danger," while Massachusetts's law requires that the "respondent poses a risk."⁵⁷ The red flag laws in these two states present a notable divergence in the standard of proof for the amount of evidence required for a final ERPO.

All thirteen red flag laws apply a lower evidentiary requirement for an emergency order, where reasonable cause is sufficient for a judge to enter a temporary ERPO.⁵⁸ Emergency or temporary ERPOs may be issued without providing notice of a hearing to the respondent, but they are typically only effective for a short period of time during which the court will set a date for a full hearing.⁵⁹ The states that allow emergency ERPOs limit their effectiveness to under fourteen days.⁶⁰ However, Maryland's law specifies that a temporary risk protection order is effective "not more than seven days after service of the order," but the judge may extend the order up to six months if it is deemed necessary for protection or for other good cause.⁶¹ After a court issues an emergency ERPO, it holds a subsequent hearing for the respondent to present evidence.⁶² If the petitioner meets the standard of proof required in that particular state, then the final ERPO is effective for typically one year, or six months in Illinois and Vermont.⁶³ All of the state red flag laws allow respondents to request a hearing to modify or terminate an order during the effective period and provide respondents an opportunity to show that they are no longer a danger to themselves or others.⁶⁴

56. MASS. GEN. LAWS ANN. ch. 140, § 131S(c) (2018); WASH. REV. CODE § 7.94.040(2) (2018).

57. *Id.*

58. MD. CODE ANN., PUB. SAFETY § 5-604(a)(1) (West 2018).

59. See *Extreme Risk Protection Orders*, *supra* note 7.

60. Illinois, Vermont, Rhode Island, Florida, and Washington allow emergency ERPOs to be effective for up to fourteen days, but New Jersey and Massachusetts are up to ten days. FLA. STAT. ANN. § 790.401(3)(a) (2018); 430 ILL. COMP. STAT. 67/25 (West 2019); MASS. GEN. LAWS ANN. ch. 140, § 131T(a) (2018); N.J. STAT. ANN. § 2C:58-24(a), 2C:58-23(h) (West 2019); R.I. GEN. LAWS § 8-8.3-4 (West 2018); VT. STAT. ANN. tit. 13, § 4054(c)(1) (2018); WASH. REV. CODE § 7.94.050(5) (2018). Red flag laws in Connecticut and Indiana do not include emergency ERPOs but allow for warrants (CONN. GEN. STAT. ANN. § 29-38c(d) (2019)) and in Indiana's case warrantless seizure of guns if there is probable cause (IND. CODE § 35-47-14-3(b) (2018)).

61. MD. CODE ANN., PUB. SAFETY § 5-604(c)(1-2) (West 2018).

62. See *Extreme Risk Protection Orders*, *supra* note 7.

63. *Id.*

64. See *infra* Table 1.

Red flag laws were not intended to address issues specific to the elderly, but they are nevertheless being applied to elderly gun owners. The red flag laws across states vary in the three key areas of authorized petitioners, standard of proof, and length of time for an emergency and final order, and have significant implications for elderly gun ownership. The following section reviews and recommends features of the current red flag laws that have the potential to provide an important public health benefit for protecting the safety of elderly gun owners, their families, caregivers, and the community, as well as preventative steps to consider prior to filing an ERPO.

NUMBER 1

ELDERLY GUN OWNERSHIP

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TABLE 1: STATE RED FLAG LAWS, 2018

STATE, YEAR OF LEGISLATION	PETITIONER: AUTHORIZED GROUPS WHO CAN FILE A PETITION FOR A PROTECTION ORDER	STANDARD OF PROOF	LENGTH OF TIME EMERGENCY/FINAL / ONE YEAR
CONNECTICUT, 1999	- LAW ENFORCEMENT	CLEAR AND CONVINCING EVIDENCE THAT THE INDIVIDUAL POSES A RISK OF IMMINENT PERSONAL INJURY TO SELF OR OTHERS.	14 DAYS (WARRANT) / ONE YEAR
INDIANA, 2005	- LAW ENFORCEMENT	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT IS DANGEROUS.	14 DAYS (WARRANT) / ONE YEAR
CALIFORNIA, 2014	- LAW ENFORCEMENT - IMMEDIATE FAMILY MEMBER	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT POSES SIGNIFICANT DANGER TO SELF OR OTHERS AND LESS RESTRICTIVE ALTERNATIVES HAVE BEEN TRIED.	21 DAYS / ONE YEAR
WASHINGTON, 2017	- LAW ENFORCEMENT - FAMILY OR HOUSEHOLD MEMBERS	PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT POSSES A SIGNIFICANT DANGER OF CAUSING PERSONAL INJURY TO SELF OR OTHERS.	14 DAYS / ONE YEAR
OREGON, 2017	- LAW ENFORCEMENT - FAMILY OR HOUSEHOLD MEMBERS	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT IS A RISK IN THE NEAR FUTURE, INCLUDING IMMINENT RISK OF SUICIDE OR OF CAUSING PERSONAL INJURY TO OTHERS.	21 DAYS / ONE YEAR
FLORIDA, 2018	- LAW ENFORCEMENT	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT DOES NOT POSE A SIGNIFICANT DANGER TO SELF OR OTHERS.	14 DAYS / ONE YEAR
VERMONT, 2018	- STATE'S ATTORNEY OR THE OFFICE OF THE ATTORNEY GENERAL	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT IS AN EXTREME RISK OF HARM TO SELF OR OTHERS, INCLUDING IN ACTIONS TO OTHERS IN HIS OR HER CARE.	14 DAYS / SIX MONTHS
MARYLAND, 2018	- LAW ENFORCEMENT - FAMILY OR HOUSEHOLD MEMBERS - HEALTH PROFESSIONALS	CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT POSSES A DANGER OF CAUSING PERSONAL INJURY TO SELF, THE PETITIONER, OR ANOTHER.	7 DAYS EXTEND TO SIX MONTHS / ONE YEAR
RHODE ISLAND, 2018	- LAW ENFORCEMENT	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT DOES NOT POSE A SIGNIFICANT DANGER OF CAUSING IMMINENT INJURY TO SELF OR OTHERS.	14 DAYS / ONE YEAR
NEW JERSEY, 2018	- LAW ENFORCEMENT - FAMILY OR HOUSEHOLD MEMBERS	CLEAR AND CONVINCING EVIDENCE THAT THE INDIVIDUAL POSSES A RISK OF PERSONAL INJURY TO SELF OR OTHERS.	10 DAYS / ONE YEAR
DELAWARE, 2018	- LAW ENFORCEMENT - FAMILY MEMBER	CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT IS A RISK TO SELF OR OTHERS.	15 DAYS EXTEND TO 45 DAYS / ONE YEAR
MASSACHUSETTS, 2018	- LAW ENFORCEMENT - FAMILY OR HOUSEHOLD MEMBERS	PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT POSSES A RISK OF CAUSING INJURY TO SELF OR OTHERS.	10 DAYS / ONE YEAR
ILLINOIS, 2018	- LAW ENFORCEMENT - FAMILY MEMBERS	CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT POSSES A SIGNIFICANT DANGER OF PERSONAL INJURY TO HIMSELF, HERSELF, OR ANOTHER.	14 DAYS / SIX MONTHS

IV. Benefits and Limitations of State Red Flag Laws for Elderly Gun Owners

With the increase of red flag laws, a question arises: could the recent red flag laws offer guidance to address the potentially dangerous intersection between the elderly and guns? Aside from these laws, there is no clear legal process to restrict access to guns, even temporarily, for someone who is displaying dangerous behavior but is not diagnosed as mentally ill.⁶⁵ However, there are serious limitations to consider with elderly gun ownership and there are lessons to be learned from how different states are implementing red flag laws.

There are three key limitations in relying on red flag laws to address elderly gun owners who may become a danger to oneself or others. First, red flag laws are referred to as Extreme Risk Protection Orders for a reason: the court is only brought in to seize weapons once a serious threat or harm has occurred.⁶⁶ An ERPO is an inherently retroactive and aggressive response, which could further alienate elderly gun owners from their families and loved ones. Second, there are clinical considerations regarding the difficulty in detecting and diagnosing cognitive mental decline, particularly dementia, which indicates that red flag laws could be challenging to enforce for older adults.⁶⁷ Belated diagnosis of dementia is common and it is not well understood when a person may become agitated or violent, although there have been recent attempts to improve earlier diagnosis.⁶⁸ Finally, elder abuse is underreported and there is the potential for misuse of a red flag law to an already victimized individual.⁶⁹

Along with issues specific to older adults, such as cognitive decline, suicide later in life, and elder abuse, there has also been a shift over the last three decades of promoting aging in place over a private nursing home or long-term care facility.⁷⁰ This shift means access to guns in the home for an elderly person is greater than the prior generation, and potential harm to caregivers and family members is more invisible than it would be in an institutional setting. The ability to age in place and receive care at home is a desired goal for the majority of

65. See *Extreme Risk Protection Orders*, *supra* note 7.

66. *Id.*

67. Vars, *supra* note 28, at 60.

68. Betz et al., *supra* note 33, at 47.

69. Vars, *supra* note 28, at 53.

70. See Tara Sklar & Rachel Zuraw, *Preparing to Age in Place: The Role of Medicaid Waivers in Elder Abuse Prevention*, 26 ANNALS HEALTH L. (forthcoming 2019).

elderly Americans and for policymakers looking for cost-effective ways to deliver long-term care.⁷¹ Projections from the Centers for Medicare and Medicaid on long-term care predict that an increasing number of older adults will age in place in the years to come.⁷² The aging-in-place trend is significant in the context of red flag laws and elderly gun ownership because the elderly are at a greater risk for social isolation with fewer opportunities for interaction beyond their caregivers and family members.⁷³ This greater risk has important implications for the three key elements of the red flag laws regarding authorized persons who can petition to file for a protection order, the standard of proof requirements, and length of time the order is in effect.

V. Recommendation

There is a pressing need for legal and practical guidance that supports elderly people maintaining independence and autonomy, including gun ownership, while also balancing concerns for safety. The red flag laws in Maryland and California offer elements that embody these goals. For example, a benefit of states passing red flag laws is that it encourages family members and health professionals to have a conversation about aging and the escalated risk of violence with access to guns. Maryland is currently the only state that includes health professionals on the list of authorized persons who can petition a court for an Extreme Protection Order.⁷⁴ The red flag laws that limit petitioners to law enforcement only, or in Vermont's statute the State's Attorney or the office of the Attorney General,⁷⁵ may be too restrictive for families and household members of elderly gun owners because they are much

71. See, e.g., Wendy Fox-Grace & Jenna Walls, *State Studies Find Home and Community-Based Services to be Cost-Effective*, AM. ASS'N RETIRED PERSONS (2013) http://www.aarp.org/content/dam/aarp/research/public_policy_institute/lrc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-lrc.pdf.

72. U.S. DEP'T OF HEALTH & HUMAN SERVS., 2016 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID, CTR. FOR MEDICARE & MEDICAID SERVICES (2016), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/MedicaidReport2016.pdf>.

73. See, e.g., *Elder Abuse Facts*, NAT'L COUNCIL ON AGING, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> (last visited Feb. 5, 2019).

74. MD. CODE ANN., PUB. SAFETY § 5-601(E)(2)(i) (West 2018).

75. VT. STAT. ANN. tit. 13, § 4.053 (2018).

closer to observing a pattern of violent behavior, rather than law enforcement personnel.⁷⁶ Among the thirteen states with red flag laws, California is distinct in that the law requires the petitioner to show that less restrictive alternatives to the restraining order have been tried prior to filing for an ERPO.⁷⁷ The Maryland and California red flag laws each include elements that could help address the limitations noted above with ERPOs. The active involvement of healthcare professionals and implementation of laws that require less restrictive measures be tried first are examples of steps that could curtail the need to file for an ERPO, while still allowing those closest to the elderly person to have that option if needed.

The change in the standard of proof used—a preponderance of the evidence standard instead of a clear and convincing standard—by Washington and Massachusetts is an important consideration in light of red flag laws.⁷⁸ In particular, Massachusetts's red flag law is one to watch and compare in terms of the number of ERPOs filed and the demographics of the respondents in analyzing whether the evidentiary standard makes a dramatic difference for elderly gun owners. All of the state red flag laws allow for an emergency ERPO or temporary seizure of guns, with variations in the period of time these orders are in effect.⁷⁹ The Maryland and Delaware red flag laws offer an approach that may be more apt for elderly gun ownership because there is a brief period under seven and fifteen days, respectively, but then an option to extend the ERPO prior to undergoing a full hearing.⁸⁰ The flexibility built into these laws may help families and elderly gun owners resolve an emergency situation and adjust before undergoing the process for a longer term ERPO, which may be less needed with appropriate time to find additional support for issues regarding cognitive decline or suicide concerns.

Another important aspect of preventative approaches, but prior to filing an ERPO, is for elderly gun owners and their family members to have open discussions about the future use of guns as the owners age. This type of communication could be similar to conversations an

76. *Id.*

77. CAL. PENAL CODE § 18175(b)(2) (West 2018).

78. MASS. GEN. LAWS ch. 140, § 131S(c) (2018); WASH. REV. CODE § 7.94.040(2) (2018).

79. See sources cited *supra* note 60.

80. DEL. CODE ANN. tit. 10, § 7703(f) (2018); MD. CODE ANN., PUB. SAFETY § 5-604(c)(1-2) (West 2018).

elderly person may have with family members about advance health care planning or estate planning. An increasingly common option is to establish a “gun trust,” which would institute a clear plan as to how guns should be treated in cases where the owner moves into institutional care, becomes incapacitated, or passes away.⁸¹ These discussions and resulting documents could mitigate the potential pain and confusion associated with elderly gun possession by preceding a serious threat or harm.

Advance planning discussions also necessitate a better understanding of the personal reasons elderly gun owners wish to continue to maintain control over their guns, particularly if the elderly gun owner is declining in thinking, memory, or judgment. A frequent response may be the desire to protect oneself. The availability of less precarious methods, such as enhanced security in the home via cameras and high-quality door locks are possibilities that offer safety without the use of guns. These discussions could also include secure storage for guns where they are locked securely in a safe or cabinet with ammunition kept in a separate location as a way to support overall safety.

VI. Conclusion

The protection of older Americans’ rights, safety, and well-being is an area of rare bipartisan support at the state and federal levels, and there is strong political momentum given the current passage of red flag laws. The recent development of states passing red flag laws to curb mass gun violence is gaining traction and, although not intended, these laws have the potential to reduce gun violence among older adults.

This Article reviewed the current red flag laws, which govern over a quarter of the states in the country. It identified key legislative elements, notable variations between these state laws and discussed specific features for red flag laws to incorporate issues specific to elderly gun ownership. Until there is federal action, states will likely continue to draft and pass red flag laws or similar variations. A better understanding of the benefits and limitations of red flag laws when applied to elderly gun ownership, along with alternative approaches, can support a more effective evidence-based strategy for future laws at the state and national levels.

81. See Aleccia & Bailey, *supra* note 1.

