

## FIREARMS, EXTREME RISK, AND LEGAL DESIGN: “RED FLAG” LAWS AND DUE PROCESS

*Joseph Blocher\** & *Jacob D. Charles\*\**

*Extreme risk protection order (“ERPO”) laws—often called “red flag” laws—permit the denial of firearms to individuals who a judge has determined present an imminent risk of harm to themselves or others. Following a wave of adoptions in the wake of the Parkland murders, such orders are now authorized by law in nineteen states and the District of Columbia and under consideration in many others. Advocates argue that they provide a tailored, individualized way to deter homicide, suicide, and even mass shootings by providing a tool for law enforcement or others to intervene when harm appears imminent, without having to wait for injury, lethality, or criminal actions to occur. But the laws have also garnered criticism and have become a primary target of the Second Amendment sanctuary movement.*

*As a matter of constitutional law, the most serious questions about ERPO laws involve not the right to keep and bear arms but due process. Such orders—like domestic violence restraining orders, to which they are often compared—can initially be issued ex parte, and critics often allege that this feature (and others including the burden of proof) raises constitutional problems.*

*This Article provides a comprehensive analysis of the applicable due process standards and identifies the primary issues of concern. It concludes that, despite some variation, current ERPOs generally satisfy the relevant standards. It also notes those features that are likely to give rise to the strongest challenges. The analysis both builds on and*

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\* Lanty L. Smith '67 Professor of Law, Duke University School of Law.

\*\* Lecturing Fellow & Executive Director, Center for Firearms Law, Duke University School of Law.

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*suggests lessons for other areas of regulation where laws are designed so as to lessen extreme risk.*

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#### INTRODUCTION

What process is due when people who pose an extreme risk of harm to themselves or others are temporarily deprived of a constitutional right? What design choices can legislators make to ensure that such deprivations provide constitutionally adequate protections?

Although such questions have arisen in many different contexts, including domestic violence restraining orders and civil commitments, they are now front and center for what is arguably the most important current development in firearms regulation: the spread of “extreme risk” or “red flag” laws that permit courts to order that firearms be temporarily removed from individuals who pose an imminent risk of harm to themselves or others. Advocates see these laws as an effective, targeted way to save lives while respecting the Second Amendment.<sup>1</sup> Critics allege that they amount to “pre-crime” punishment and that they violate not only

<sup>1</sup> See *infra* Section I.A.

the right to keep and bear arms but also the due process guarantee.<sup>2</sup> In fact, opposition to extreme risk laws has helped fuel the “Second Amendment sanctuary” movement, by which some local governments have pledged their refusal to enforce state and federal gun laws.<sup>3</sup>

Behind the political claims lies an enormously important and difficult set of questions regarding the ways in which the law can be constitutionally designed to account for risky-but-not-criminal behavior. Judges and scholars have long recognized that laws regulating on the basis of future risk raise a different and in many ways harder set of questions than those that, for example, punish prior behavior.<sup>4</sup> On the one hand, the law often restricts behavior on the basis of predictions. Even basic cost-benefit analysis—which is foundational to the regulatory state<sup>5</sup>—is largely forward-looking. Regulation of risk, in short, is nothing new.<sup>6</sup>

But when such regulation intersects with constitutional rights and interests in the absence of a criminal conviction or its equivalent, harder questions arise about the necessary procedures and evidentiary burdens. Intuitively, restraining a person who has harmed others is different from restraining someone who is only at risk of doing so. There is no bright line: civil commitments, restraining orders, and the like all impose

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<sup>2</sup> See *infra* note 159 and accompanying text (“pre-crime” comparison); *infra* notes 81–88 and accompanying text (Second Amendment critique); *infra* notes 29–30 (due process critique).

<sup>3</sup> Noah Shepardson, *America’s Second Amendment Sanctuary Movement Is Alive and Well*, Reason (Nov. 21, 2019, 4:00 PM), <https://reason.com/2019/11/21/americas-second-amendment-sanctuary-movement-is-alive-and-well/> [<https://perma.cc/XKV7-ADF4>]; see also Scott Pelley, *A Look at Red Flag Laws and the Battle Over One in Colorado*, 60 Minutes, CBS News (Nov. 17, 2019), <https://www.cbsnews.com/news/red-flag-gun-laws-a-standoff-in-colorado-60-minutes-2019-11-17/> [<https://perma.cc/GF5D-BSH2>] (examining Second Amendment sanctuaries in Colorado).

<sup>4</sup> Both categories, of course, may well be based on prior behavior—in the former set, that behavior is evidence of future risk; in the latter, it is the basis for retribution or some other governmental interest.

<sup>5</sup> See Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 9–10 (2008) (noting that the use of cost-benefit analysis has been a contentious issue in regulatory policy making for decades); Cass R. Sunstein, *The Cost-Benefit Revolution* 3–4, 6–7 (2018) (describing how successive Presidents since Ronald Reagan have required that regulations promulgated during their administrations be justified on a cost-benefit basis).

<sup>6</sup> Nor, for that matter, is the notion that regulation often involves trading off one risk against another: denying a firearm to a particular person might lower the risk that he will misuse it, while raising the risk that he will be unable to defend himself in a time of need. For an influential analysis of the tradeoff question, see *Risk Versus Risk: Tradeoffs in Protecting Health and the Environment* 3–5 (John D. Graham & Jonathan Baert Wiener eds., 1995).

significant restraints in an effort to prevent future harms and are not categorically unconstitutional. Scholars have explored those related contexts<sup>7</sup> but have only recently devoted attention to these questions in the context of extreme risk laws,<sup>8</sup> and this Article is the first to provide an in-depth examination of the due process issues they raise. (These are often called “red flag” laws, though that label might convey a stigma, so we will use the increasingly common “extreme risk” label.<sup>9</sup>)

In the past two years alone, a dozen states have adopted or expanded such laws. Although the details vary, their form is similar: law

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<sup>7</sup> For a sampling of the literature regarding involuntary commitments for mental illness, see David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 *Colum. L. Rev.* 897, 899–900 (1975) (asking “[i]s confinement on the basis of ‘dangerousness’ alone constitutional?” and providing a skeptical answer); Veronica J. Manahan, *When Our System of Involuntary Civil Commitment Fails Individuals with Mental Illness: Russell Weston and the Case for Effective Monitoring and Medication Delivery Mechanisms*, 28 *Law & Psych. Rev.* 1, 32 (2004) (“Civil liberty concerns, as evidenced by the extensive due process protections afforded to those facing involuntary commitment, and the state’s interest in protecting all of its citizens, are fundamentally at odds.”); Alexander Tsesis, *Due Process in Civil Commitments*, 68 *Wash. & Lee L. Rev.* 253, 300–01 (2011) (arguing that civil commitment should require a beyond-a-reasonable-doubt standard of proof).

Scholars have also explored due process protections as they apply to domestic violence restraining orders (“DVROs”) and similar legal restrictions. See, e.g., Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 *Wis. L. Rev.* 429, 484 (arguing that sexual assault protection orders—which are different from DVROs—“should employ the lower preponderance-of-the-evidence standard to ensure that victims have an effective mechanism to seek prospective relief and governments have an effective tool in combating the sexual assault epidemic” and stating “[h]owever, procedural due process may require a more nuanced approach with respect to the types of evidentiary showings necessary to meet this standard and with the types of prospective relief available to petitioners”).

<sup>8</sup> Timothy Zick, *The Constitutional Case for “Red Flag” Laws*, *Jurist* (Dec. 6, 2019, 8:39 PM), <https://www.jurist.org/commentary/2019/12/timothy-zick-red-flag-laws/> [<https://perm.a.cc/G3TS-L53G>]. Other scholars have looked at the due process implications of other types of similar statutory mechanisms, like DVROs with specific firearm prohibitions, Aaron Edward Brown, *This Time I’ll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 *Colum. Hum. Rts. L. Rev.* 159, 196–98 (2019) (arguing that domestic violence ex parte orders for protection that prohibit firearm possession can survive due process challenges), or laws designed to disarm those in the throes of severe mental health crises, Fredrick E. Vars, *Symptom-Based Gun Control*, 46 *Conn. L. Rev.* 1633, 1646–47 (2014) (arguing that a law allowing temporary firearm removal from individuals suffering delusions or hallucinations would not violate due process). None, so far, has assessed the new spate of extreme risk laws passed predominantly in the last two years.

<sup>9</sup> See *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Ronald Honberg, Senior Policy Advisor, National Alliance on Mental Illness) (describing the risk that “red flag” language can stigmatize individuals with mental illness).

enforcement officers or sometimes family members or other professionals can petition a court for an extreme risk protection order (“ERPO”)<sup>10</sup> that would require a person to surrender his or her firearms and refrain from acquiring new ones. After receiving the petition, the court can enter a short-term, *ex parte* ERPO if the petitioner carries his or her burden of proof (which can range from showing “good cause” to “clear and convincing” evidence<sup>11</sup>). After a full, adversary hearing—at which petitioner again bears the burden of proof—the court can enter a lengthier, but still temporary, ERPO.<sup>12</sup>

Politically and empirically, it is easy to see why such laws are increasingly popular. They provide tailored, individualized risk assessments, rather than regulating people’s access to firearms based on their membership in broad classes like felons or the mentally ill.<sup>13</sup> And although scholars are just beginning to evaluate the effectiveness of these new laws, early studies have shown encouraging results.<sup>14</sup> This all points to ERPOs being an increasingly important part of the debate about gun rights and regulation going forward.

Of course, there are critics. Some argue that extreme risk laws violate the right to keep and bear arms.<sup>15</sup> These critics challenge the very notion of a law that allows disarming individuals who have not committed any crime. *District of Columbia v. Heller*, after all, said the Second Amendment “elevates *above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>16</sup>

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<sup>10</sup> In California, the order is known as a “gun violence restraining order” or “GVRO.” Cal. Penal Code § 18100 (Deering Supp. 2020).

<sup>11</sup> See *infra* notes 302–09 and accompanying text; see also *infra* Section II.B (discussing constitutional principles for establishing burden of proof and how they should apply in the ERPO context).

<sup>12</sup> See *infra* note 309 and accompanying text.

<sup>13</sup> See *infra* Subsection I.B.1.

<sup>14</sup> See *infra* notes 70–82 and accompanying text. That extreme risk laws might be effective does not make them a panacea, nor should they distract from other forms of effective gun regulation. See Joseph Pomianowski & Ling Liang Dong, Red Flag Laws Are Red Herrings of Gun Control, *Wired* (Sept. 9, 2019, 9:00 AM), <https://www.wired.com/story/red-flag-laws-are-red-herrings-of-gun-control/> [<https://perma.cc/PSN8-B2UK>].

<sup>15</sup> Ivan Pereira, Lawmaker Introduces ‘Anti-Red Flag’ Bill in Georgia To Combat Gun Control Proposals, *ABC News* (Jan. 15, 2020, 12:52 PM), <https://abcnews.go.com/-US/lawmaker-introduces-anti-red-flag-bill-georgia-combat/story?id=68299434> [<https://perma.cc/7V9S-7CMX>] (describing legislation introduced in Georgia to forbid extreme risk laws that bears the title “Anti-Red Flag—Second Amendment Conservation Act”).

<sup>16</sup> 554 U.S. 570, 635 (2008) (emphasis added).

The focus on the right to keep and bear arms is unsurprising, given the magnetic pull of the Second Amendment in nearly any political or legal discussion of gun regulation; the tendency is often to evaluate any proposed rule related to firearms for its conformity with that right in particular.<sup>17</sup> But a myopic focus on the Second Amendment unnecessarily flattens the gun debate and minimizes different—and often stronger—constitutional claims.<sup>18</sup> More generally, it demonstrates the importance of firearms law and scholarship which consider how gun rights intersect with other constitutional rights, including those emanating from the First,<sup>19</sup> Fourth,<sup>20</sup> and Fourteenth<sup>21</sup> Amendments.<sup>22</sup>

In this increasingly rich and diverse area of constitutional law, scholarship, and rhetoric, due process has a particularly notable role to play. Consider the debate over “No Fly No Buy,” which would have forbidden gun purchases by those on the federal terror watch list. The

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<sup>17</sup> See generally Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. Rev. 813 (2014) (arguing that the invocation of the Second Amendment in debates over proposed gun control laws has defeated many of these measures).

<sup>18</sup> A federal court in California, for example, blocked on First Amendment grounds a Los Angeles law that would have required city contractors to disclose ties to the NRA. As the NRA put it, the “First Amendment Defends the Second.” See *First Amendment Defends the Second*, NRA-ILA (Dec. 16, 2019), <https://www.nraila.org/articles/20191216/first-amendment-defends-the-second> [<https://perma.cc/L5TF-6PVS>].

<sup>19</sup> See, e.g., Timothy Zick, *Arming Public Protests*, 104 Iowa L. Rev. 223, 236–37 (2018) (considering, inter alia, the First Amendment rights of speech and assembly and their interaction with the Second Amendment); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 Duke L.J. 175, 179, 211–13 (2018) (same).

<sup>20</sup> See, e.g., Jeffrey Bellin, *The Right To Remain Armed*, 93 Wash. U. L. Rev. 1, 4–5 (2015) (considering implications for search and seizure).

<sup>21</sup> See, e.g., Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. Rev. 1521, 1538 (2010) (illustrating and analyzing the difficulties of limiting “the people” to non-citizens).

<sup>22</sup> Not only do these other rights and interests intersect with the Second Amendment in important ways, but the courts have also borrowed from many of these frameworks when fleshing out the contours of the right to keep and bear arms. See Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. Rev. (forthcoming 2021) (manuscript at 1–2) (on file with the *Virginia Law Review*) (describing how courts and commentators have borrowed from other constitutional rights domains in creating a framework for the Second Amendment).

proposal had broad<sup>23</sup> and bipartisan<sup>24</sup> political support. Some critics predictably argued that it violated the Second Amendment,<sup>25</sup> but as a matter of doctrine the more serious objections had to do with due process.<sup>26</sup> Partly as a result, the proposal ultimately died in the Senate.<sup>27</sup>

A similar dynamic seems to be at work with ERPOs, except that the consequences are far more important, since such laws have been widely adopted.<sup>28</sup> Although the Second Amendment continues to draw much of the attention, the more substantive and pressing concern is whether ERPOs violate gun owners' due process rights. When the Senate held a hearing in 2019 about possibly providing federal incentives for state extreme risk laws, due process concerns were front and center.<sup>29</sup> Indeed, in some areas of the states that have adopted extreme risk laws, local officials have vowed not to implement them. One Colorado sheriff put the critique bluntly: "This is the only bill I know of that allows law enforcement officers to take somebody's property without due process."<sup>30</sup>

But, of course, that assumes the answer to the central question: *do* extreme risk laws provide due process? If so, then "due process" objections should be recognized for what they are: political rhetoric,

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<sup>23</sup> See, e.g., Press Release, Quinnipiac Univ., Overwhelming Support for No-Fly, No-Buy Gun Law, Quinnipiac University National Poll Finds; Support for Background Checks Tops 90 Percent Again (June 30, 2016), <https://poll.qu.edu/national/release-detail?ReleaseID=2364> [<https://perma.cc/C74J-XGWG>].

<sup>24</sup> David M. Herszenhorn, Bipartisan Senate Group Proposes 'No Fly, No Buy' Gun Measure, N.Y. Times (June 21, 2016), <https://www.nytimes.com/2016/06/22/us/politics/senate-gun-control-no-fly-list-terrorism.html> [<https://perma.cc/4J99-TKVT>].

<sup>25</sup> See, e.g., Chris W. Cox, Gun Laws Don't Deter Terrorists: Opposing View, USA Today (June 14, 2016, 1:01 AM), <https://www.usatoday.com/story/opinion/2016/06/13/gun-laws-deter-terrorists-opposing-view/85844946/> [<https://perma.cc/Q6S7-9C52>].

<sup>26</sup> See Hina Shamsi & Christopher Anders, The Use of Error-Prone and Unfair Watchlists Is Not the Way To Regulate Guns in America, ACLU (June 20, 2016, 2:45 PM), <https://www.aclu.org/blog/washington-markup/use-error-prone-and-unfair-watchlists-not-way-regulate-guns-america> [<https://perma.cc/YA9S-NYBS>]; see also Joseph Greenlee, No Fly, No Buy (And No Due Process), Federalist Soc'y (Feb. 17, 2016), <http://www.fed-soc.org/blog/detail/no-fly-no-buy-and-no-due-process> [<https://perma.cc/V4U6-7ERV>].

<sup>27</sup> Lisa Mascaro & Jill Ornitz, Senate Rejects New Gun Sales Restrictions, L.A. Times, June 21, 2016, at A8.

<sup>28</sup> See *infra* Section I.A (describing the spread of extreme risk laws).

<sup>29</sup> Marianne Levine, Senate GOP Open to States Allowing Narrow Gun Restriction, Politico (Mar. 26, 2019, 1:05 PM), <https://www.politico.com/story/2019/03/26/senate-republicans-state-gun-law-reform-1237446> [<https://perma.cc/F32F-F6EQ>].

<sup>30</sup> Governor Polis Signs ERPO Into Law, Delta Cnty. Indep. (Apr. 17, 2019), <https://www.deltacountyindependent.com/governor-polis-signs-erpo-into-law-cms-15033> [<https://perma.cc/S2N7-NW6M>].

rather than doctrinal claims.<sup>31</sup> If not, then no amount of political or empirical support will suffice, and this promising new avenue of gun regulation will be shut down by the courts.

This Article examines that question. Part I explains the spread and substance of current extreme risk laws. The wave of new extreme risk laws has encountered opposition from those who claim, often with little attention to the details of the different statutory regimes and the variety among them, that they violate due process. Part II lays out the relevant requirements of due process and applies that framework to the extreme risk context. Such an analysis can, we hope, be useful to lawmakers, litigants, judges, and scholars interested in designing or evaluating the constitutionality of extreme risk laws. Although we do not undertake an exhaustive or individualized assessment of various state laws, we conclude that the basic structure of existing extreme risk laws satisfies the requirements of due process.

The point of the analysis, however, is not to provide a blanket constitutional defense of extreme risk laws. The goal instead is to identify and explore an engaging set of constitutional issues raised by a new wave of firearm regulations. Those issues, in turn, are relevant to our understanding of how the Constitution intersects with risk regulation, and what options society has to protect itself from potential harms.

#### I. EXTREME RISK LAWS: REFRAMING GUN REGULATION

To understand the constitutional stakes of extreme risk laws, it is important to begin with a basic understanding of why and how they have been adopted and what design choices legislators face in drafting them. This Part therefore provides a brief overview of the policy and legal issues and highlights two features that arguably represent a paradigm shift for gun regulation: first, the fact that they involve individualized assessments, and second, the fact that they can apply even to the “law-abiding, responsible citizens” that *District of Columbia v. Heller* suggests are the

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<sup>31</sup> To be clear, we do not suppose that there is a bright line between “constitutional” and “political” claims—constitutional law and argument often occur outside the courts, and in fact the Second Amendment provides an especially robust and interesting example in that regard. See Jacob D. Charles, *The Right To Keep and Bear Arms Outside the Second Amendment* 7 (Feb. 23, 2020) (unpublished manuscript) (on file with the *Virginia Law Review*).

core class of people covered by the Second Amendment.<sup>32</sup> These features have important implications for the due process analysis in Part II.

### *A. The Spread of Extreme Risk Laws*

Debates about gun rights and regulation have commanded an immense amount of political and legal attention over the past few years, and the spread of extreme risk laws at the state level has been one of the most important developments in gun law and policy during that period. Such laws are designed to fill gaps in the existing regulatory infrastructure, and to provide targeted, evidence-based interventions before gun risks translate into gun harms.

Laws have long forbidden particular classes of persons to purchase or possess guns—those who have committed a serious crime or been adjudicated mentally ill, for example.<sup>33</sup> But such laws, like any categorical regulation, may be both overbroad and underinclusive with regard to the concrete risks of gun violence.<sup>34</sup> Mental illness, to take one obvious example, is a poor proxy for future violent behavior, making that class undeniably overbroad.<sup>35</sup> Indeed, despite the intense public focus on mental illness as a cause of mass shootings, the link is much more attenuated than is commonly assumed.<sup>36</sup> On the other hand, a person with a newly-manifesting mental health crisis might present a heightened risk

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<sup>32</sup> See *infra* Subsection I.B.2 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

<sup>33</sup> See generally 18 U.S.C. § 922(g) (2018) (listing classes of prohibited persons).

<sup>34</sup> Some such prohibitions are sometimes justified on grounds other than risk, such as denying weapons to those deemed “unvirtuous.” See, e.g., *Binderup v. Att’y Gen.*, 836 F.3d 336, 348 (3d Cir. 2016) (en banc) (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)) (“[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens.’”); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 491–92 (2004).

<sup>35</sup> See, e.g., Jeffrey Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 *Hosp. & Cmty. Psychiatry: J. Am. Psychiatric Ass’n* 761, 769 (1990); Consortium for Risk-Based Firearms Policy, *Guns, Public Health and Mental Illness: An Evidence-Based Approach for Federal Policy* 4–6 (2013), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/\\_archive-2019/\\_pdfs/GPHMI-Federal.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_archive-2019/_pdfs/GPHMI-Federal.pdf) [<https://perma.cc/8W4G-XMKZ>].

<sup>36</sup> James L. Knoll IV & George D. Annas, *Mass Shootings and Mental Illness*, in *Gun Violence and Mental Illness* 81, 81 (Liza H. Gold & Robert I. Simon eds., 2016).

of gun violence despite never having been adjudicated mentally ill, making the class underinclusive as well.<sup>37</sup>

Extreme risk laws provide a way for guns to be quickly and temporarily taken away from a person who does not necessarily fit into a prohibited class, but is at risk of harming himself or others. As the name indicates, therefore, their focus is on individualized *risk* itself, not rough status proxies for risk.<sup>38</sup> Although extreme risk laws vary in their particulars (who can petition, standards of evidence, and length of deprivation), and the particulars have important constitutional implications—as Part II addresses in more detail—the basic model is similar to that of domestic violence restraining orders (“DVROs”), which are available in all fifty states.<sup>39</sup> Although the substance and process varies from state to state, DVROs allow people victimized by domestic violence to petition a court for an order that, among other things, can prohibit the respondent from possessing a firearm.<sup>40</sup>

Extreme risk laws have spread with striking speed. As of 2017, only five states had anything on the books that might be described as an extreme risk law.<sup>41</sup> Connecticut adopted the first in 1999, following a

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<sup>37</sup> See, e.g., Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 *Conn. L. Rev.* 1609, 1618 (2014) (reporting that under Connecticut’s extreme risk law, “the majority of gun owners who were served warrants had no history of psychiatric treatment”); Vars, *supra* note 8, at 1648–49 (proposing a legal mechanism to disarm those actively experiencing delusions or hallucinations to stop individuals like Navy Yard shooter Aaron Alexis, who did not have a prior disqualifying mental health adjudication).

<sup>38</sup> See *infra* Section I.B.

<sup>39</sup> See generally A.B.A. Comm’n on Domestic & Sexual Violence, *Domestic Violence Civil Protection Orders (CPOs)* (Aug. 2016), [https://www.americanbar.org/content/dam/aba/-administrative/domestic\\_violence1/Charts/migrated\\_charts/2016%20CPO%20Availability%20Chart.pdf](https://www.americanbar.org/content/dam/aba/-administrative/domestic_violence1/Charts/migrated_charts/2016%20CPO%20Availability%20Chart.pdf) [<https://perma.cc/W3ED-VLXQ>] (providing a basic overview of domestic violence civil protection orders in all fifty states, the District of Columbia, and the territories).

<sup>40</sup> *Id.* (demonstrating how DVROs vary by state). The point here is only to suggest some general structural similarities; there are also important distinctions between the two. DVROs can only be sought by family members or those with similar types of relationships, for example, while ERPOs can also be sought by law enforcement. DVROs provide a wider range of protections, including no-contact provisions, while ERPOs respond to a wider range of risks, including self-harm. Educ. Fund to Stop Gun Violence, *Extreme Risk Protection Orders vs. Domestic Violence Restraining Orders* (July 2018), <http://efsgv.org/wp-content/uploads/2018/07/ERPO-DVRO-Comparison-July-2018-FINAL-1.pdf> [<https://perma.cc/2EA3-BH8B>].

<sup>41</sup> Timothy Williams, *What Are ‘Red Flag’ Gun Laws, and How Do They Work?*, *N.Y. Times* (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html> [<https://perma.cc/CH2J-PYSF>].

workplace mass shooting at a state lottery facility.<sup>42</sup> The Connecticut law allows law enforcement officers to temporarily remove firearms from a person if the police have probable cause to believe “that . . . a person poses a risk of imminent personal injury to himself or herself or to other individuals.”<sup>43</sup> Indiana adopted a similar law in 2006, allowing police to temporarily seize guns from a “dangerous individual” pending a judicial hearing.<sup>44</sup> State courts in Connecticut and Indiana have rejected constitutional challenges thus far.<sup>45</sup>

The Indiana and Connecticut laws are different from the other extreme risk laws discussed here—and are often classified as “firearm removal” laws instead—because they provide only for removal of firearms from dangerous people who already have them. More recent extreme risk protection laws apply even to people who have not yet acquired (but might be seeking) a firearm. Despite that difference, the Connecticut and Indiana laws are generally regarded as having provided the model for the second wave of extreme risk laws.

That wave began to swell in 2014, when California adopted an extreme risk law in the wake of a mass shooting in Santa Barbara.<sup>46</sup> California’s law,<sup>47</sup> like many that would follow it, differed from the Connecticut and Indiana laws in at least two key respects. First, it allows family members—not just law enforcement officers or state officials—to file petitions.<sup>48</sup> Second, if those petitions are granted by judges, they typically result in not only the removal of existing firearms but also a prohibition

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<sup>42</sup> Norko & Baranoski, *supra* note 37, at 1615.

<sup>43</sup> Conn. Gen. Stat. § 29-38c (2019).

<sup>44</sup> Ind. Code Ann. § 35-47-14-1-3, 5 (LexisNexis 2009).

<sup>45</sup> See *infra* notes 87–89 and accompanying text.

<sup>46</sup> Like many mass shooters, the perpetrator planned his shooting ahead of time, and those close to him noted warning signs. Joseph Serna, Elliot Rodger Meticulously Planned Isla Vista Rampage, Report Says, L.A. Times (Feb. 19, 2015), <http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-isla-vista-rampage-investigation-20150219-story.html> [<https://perma.cc/23DQ-ZL6Y>].

<sup>47</sup> Cal. Penal Code §§ 18100, 18122 (Deering Supp. 2020).

<sup>48</sup> See Cal. Penal Code §§ 18150(a)(2), 18170(b) (Deering Supp. 2020). As of September 1, 2020, the category of petitioners under the California law will expand further to include—with some limitations—employers and teachers. See 2019 Cal. Stat. 6119 (repealing and replacing Cal. Pen. Code § 18150).

on purchasing them in the future.<sup>49</sup> Washington followed suit in 2016,<sup>50</sup> as did Oregon in 2017.<sup>51</sup>

Then came the mass murders at Marjory Stoneman Douglas High School in Parkland, Florida, on February 14, 2018, and the massive and ongoing political debate that followed. Increased adoption of extreme risk laws has been one of the most concrete legislative results of that debate.<sup>52</sup> As of August 2020, nineteen states and the District of Columbia had adopted some version of an extreme risk law.<sup>53</sup> Polls suggest that the laws are quite popular,<sup>54</sup> including with gun owners,<sup>55</sup> and President Trump has expressed some support.<sup>56</sup> Indeed, some gun rights advocates claim that “[w]hat makes red flag laws even more dangerous is the bipartisan support they currently boast.”<sup>57</sup> Even the NRA expressed support for

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<sup>49</sup> Cal. Penal Code § 18120(a) (Deering Supp. 2020). This difference is less significant since, in 2019, Indiana passed a further law to prohibit purchase of firearms by persons “found to be dangerous by a circuit or superior court having jurisdiction over the person following a hearing under” the state’s risk law. See Ind. Code Ann. § 35-47-4-6.5 (LexisNexis Supp. 2019).

<sup>50</sup> Wash. Rev. Code § 7.94.010 (2019).

<sup>51</sup> Or. Rev. Stat. Ann. §§ 166.525, 166.527 (West Supp. 2019).

<sup>52</sup> Adhiti Bandlamudi, *The Complicated Politics of Passing a Red Flag Law*, WUNC (Aug. 9, 2019), <https://gunsandamerica.org/story/19/08/09/the-complicated-politics-of-passing-a-red-flag-law/> [<https://perma.cc/YKK8-9TBV>].

<sup>53</sup> Giffords L. Ctr. to Prevent Gun Violence, *Extreme Risk Protection Orders*, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> [<https://perma.cc/NG3Z-XNLQ>] (last visited March 26, 2020) [hereinafter Giffords, ERPO].

<sup>54</sup> Washington Post-ABC News Poll April 8–11, 2018, Wash. Post, <https://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll-april-8-11-2018/2301> [<https://perma.cc/E8ZJ-TLXA>] (last visited Aug. 4, 2020); Emily Guskin & Scott Clement, *Has Parkland Changed Americans’ Views on Guns?*, Wash. Post (April 20, 2018, 6:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/20/has-parkland-changed-americans-views-on-guns/> [<https://perma.cc/JZ47-HQZR>].

<sup>55</sup> Glob. Strategy Grp. & Everytown for Gun Safety, *Voters Call for Background Checks, Strong Red Flag Bill* (Sept. 6, 2019), <https://everytown.org/documents/2019/09/global-strategy-group-and-everytown-for-gun-safety.pdf/> [<https://perma.cc/UP2D-Q6UM>] (poll conducted on behalf of Everytown for Gun Safety, a gun violence prevention group, reporting that 85% of respondents favored federal extreme risk legislation, including 78% of gun owners).

<sup>56</sup> President Donald J. Trump Is Committed To Making Our Schools Safer, White House (Dec. 18, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-making-schools-safer/> [<https://perma.cc/F7BY-PB4E>].

<sup>57</sup> José Niño, *Red Flag Laws: The Latest Anti-Gun Scheme*, Mises Inst. (July 27, 2018) <https://mises.org/power-market/red-flag-laws-latest-anti-gun-scheme> [<https://perma.cc/JKD3-3Z5L>].

extreme risk laws in the immediate aftermath of Parkland,<sup>58</sup> though some argue that the group has actually worked to undermine them, for example by demanding procedural requirements (like a prohibition on ex parte removals) that would make the laws either ineffective or impractical.<sup>59</sup>

Despite this consistently positive trajectory of adoption, the degree to which extreme risk laws are enforced varies widely, both across states and across time. In the aggregate, it seems that extreme risk laws are being used with increasing frequency, albeit more in some states or counties than others.<sup>60</sup> As with any law, differences in enforcement have serious implications for effectiveness,<sup>61</sup> but we largely hold aside those implementation questions here, except to the degree that they bear on the constitutional calculus.

At the federal level, extreme risk laws are becoming a major part of the gun regulation debate, but they have not yet resulted in any legislation. (This alone should not be surprising, since Congress has not passed significant gun regulation since the mid-1990s.) As noted above, federal law already limits the ability of certain classes of people to purchase and in some case possess firearms, but those limitations do not reach the same categories as extreme risk laws.<sup>62</sup> For example, federal law does limit the

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<sup>58</sup> Nicole Gaudiano, *Under Pressure, NRA Voices Support for Gun Violence Restraining Orders*, USA Today (Mar. 19, 2018, 3:25 PM), <https://www.usatoday.com/story/-news/politics/2018/03/19/under-pressure-nra-voices-support-gun-violence-restraining-orders/433716002/> [https://perma.cc/2SHE-WKZA]; NRA-ILA's Chris W. Cox Releases Statement on School Safety Report, NRA-ILA (Dec. 18, 2018), <https://www.nra-ila.org/articles/20181218/nra-ilas-chris-w-cox-releases-statement-on-school-safety-report> [https://perma.cc/W4PZ-FFMA].

<sup>59</sup> Alex Yablon, *First, the NRA Watered Down a Red Flag Bill. Then It Mobilized To Kill It.*, Trace (July 12, 2018), <https://www.thetrace.org/2018/07/red-flag-laws-pennsylvania-nra-stephens> [https://perma.cc/Z7YC-YA53].

<sup>60</sup> Jonathan Levinson, *2 Years In, Oregon's Red Flag Law Paints A Picture Of Crisis*, OPB (Dec. 17, 2019, 6:00 AM), <https://www.opb.org/news/article/oregon-red-flag-law-two-year-firearms-protection-order/> [https://perma.cc/PGH8-E4MU] (noting variation within Oregon about ERPO petitions, with a third of counties seeing no petitions almost two years after adoption).

<sup>61</sup> 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.* 855, 855, 858 (2018), <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201700250> [https://perma.cc/L8Q4-6WFZ] (noting that increased enforcement of Connecticut's firearms removal law was associated with a fourteen percent reduction in firearm suicides).

<sup>62</sup> Whether the subjects of these laws should be understood as lacking Second Amendment rights or simply be subject to governmental prohibition—whether their rights are “void” or “voidable”—is an interesting conceptual question. See Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 *Law*

ability of those with mental illness to purchase or possess weapons, but only if such a person has been committed to a mental institution, adjudicated mentally ill, or found not guilty by reason of insanity.<sup>63</sup> Federal law also criminalizes the possession of guns by certain categories of people who present a particular risk to others, but again the classification tends to turn on the result of a category-based adjudication, like a conviction for a felony or crime of violence.<sup>64</sup>

Since 2018, a few prominent bills regarding extreme risk laws have been introduced in Congress. One set of proposals would add people subject to extreme risk orders to the list of people already prohibited from possessing guns (felons, “mental defective[s],” and so on).<sup>65</sup> Others would create a federal extreme risk law.<sup>66</sup> Another and more prominent set of proposals would incentivize states to adopt their own extreme risk laws by providing federal support.<sup>67</sup> Such proposals seem to have gained some traction with Democrats and some Republicans,<sup>68</sup> though they vary greatly in their stringency with regard to which kinds of state laws they would reward and incentivize. For purposes of this Article, what matters

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& *Contemp. Probs.* 53, 53–54 (2020) (citing *Kanter v. Barr*, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting)).

<sup>63</sup> See 18 U.S.C. § 922(d)(4) (2012); see also 27 C.F.R. § 478.11 (2019) (defining “[a]djudicated as a mental defective” and “[c]ommitted to a mental institution”).

<sup>64</sup> 18 U.S.C. § 922(g) (2012). To be clear, not all of the federal prohibitions require a conviction, but the procedural protections are significant. Section 922(g)(8), for example, applies to restrain a “person from harassing, stalking, or threatening an intimate partner . . . or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.” *Id.* § 922(g)(8)(B). Such an order can only be entered following a hearing in which the respondent had actual notice and a chance to participate, and must be predicated on a finding that “[1] represents a credible threat to the physical safety of such intimate partner or child; or . . . [2] by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against” the protected persons. *Id.* § 922(g)(8)(C)(i)–(ii).

<sup>65</sup> See, e.g., *Extreme Risk Protection Order Act of 2019*, S. 506, 116th Cong. (2019); Michael A. Foster, Cong. Rsch. Serv., *IF11205, Firearm “Red Flag” Laws in the 116th Congress* (2019), <https://fas.org/sgp/crs/misc/IF11205.pdf> [<https://perma.cc/G5KW-Y9SA>].

<sup>66</sup> *Federal Extreme Risk Protection Order Act of 2018*, S. 2521, 115th Cong. (2018).

<sup>67</sup> See, e.g., Victor Garcia, *Senator Graham Pushes Back on Critics of ‘Red Flag’ Legislation: ‘The Second Amendment Is Not a Suicide Pact,’* Fox News (Aug. 12, 2019), <https://www.foxnews.com/media/senator-graham-pushes-back-on-critics-of-red-flag-legislation-the-second-amendment-is-not-a-suicide-pact> [<https://perma.cc/4CNA-KKTM>]; Alex Leary, *Rubio, Nelson Pitch Idea To Encourage States To Adopt ‘Gun Violence Restraining Orders,’* Tampa Bay Times (Mar. 7, 2018), <http://www.tampabay.com/florida-politics/buzz/2018/03/07/rubio-nelson-pitch-idea-to-encourage-states-to-adopt-gun-violence-restraining-orders/> [<https://perma.cc/A42B-8PG4>].

<sup>68</sup> Leary, *supra* note 67.

most is that the conditions themselves tend to track the due process concerns discussed in more detail below: standards of proof, time limits, and the like.<sup>69</sup>

Because extreme risk laws are a relatively new phenomenon, empirical research about their effectiveness is not complete. Still, the early returns are promising. Although it is impossible to identify with certainty a single reason why shootings (including both suicides and homicides) do *not* happen, it is easy to imagine how extreme risk laws could contribute to safety. For one thing, they are crafted so as to apply only to people who have exhibited warning signs of harmful behavior. Studies indicate that those signs are present in many cases of both suicide<sup>70</sup> and homicide, including mass shootings.<sup>71</sup> Perhaps most importantly, the majority of suicides in the United States are effectuated with firearms.<sup>72</sup> Given that the availability of a gun is a strong predictor of whether suicidal ideation will result in death by suicide<sup>73</sup>—roughly ninety percent of suicide attempts involving firearms result in death,<sup>74</sup> whereas most people who survive their first attempt will *not* ultimately die by suicide<sup>75</sup>—it stands to reason that removing firearms from a person in a suicidal crisis will lower their risk of death.

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<sup>69</sup> Foster, *supra* note 65 (“Though varying in the details, several bills . . . would establish grant programs to aid in implementation of red flag laws, conditioning the receipt of such grants . . . on adoption of laws that meet certain requirements (e.g., standards of proof for extreme risk protection orders and time limits on such orders).”).

<sup>70</sup> See, e.g., Matthew K. Nock et al., *Suicide and Suicidal Behavior*, 30 *Epidemiologic Revs.* 133, 144–45 (2008).

<sup>71</sup> James Silver, Andre Simons & Sarah Craun, U.S. Dep’t of Just., FBI, *A Study of the Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, at 18 (June 2018), <https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view> [<https://perma.cc/6BFK-H92Z>] (reporting patterns of concerning behaviors by shooters prior to attacks); U.S. Secret Serv. Nat’l Threat Assessment Ctr., *Mass Attacks in Public Spaces—2018*, at 12 (July 2019), [http://www.secretservice.gov/data/press/reports/USSS\\_FY2019\\_MAPS.pdf](http://www.secretservice.gov/data/press/reports/USSS_FY2019_MAPS.pdf) [<https://perma.cc/4R4Z-GG7Z>].

<sup>72</sup> Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 *Law & Contemp. Probs.* 179, 183 (2017).

<sup>73</sup> Andrew Anglemyer, Tara Horvath & George Rutherford, *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis*, 160 *Annals Internal Med.* 101, 105 (2014).

<sup>74</sup> Matthew Miller, Deborah Azrael & Catherine Barber, *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 *Ann. Rev. Pub. Health* 393, 397 (2012).

<sup>75</sup> See David Owens, Judith Horrocks & Allan House, *Fatal and Non-Fatal Repetition of Self-Harm: Systematic Review*, 181 *Brit. J. Psychiatry* 193, 193–99 (2002).

Given the recency of extreme risk laws' adoption, research and evidence about their effectiveness remains more limited than, for example, the robust literature regarding public carrying of arms.<sup>76</sup> But some studies have already reported encouraging results, especially with regard to the prevention of suicides. In perhaps the most prominent study, scholars analyzed the effectiveness of Connecticut's "risk warrant" law between October 1999 and June 2013. The authors concluded that one suicide was averted for every ten or eleven guns seized.<sup>77</sup>

Two years after the Connecticut study, another study analyzed the Connecticut and Indiana laws (being the oldest extreme risk laws, they are the most natural candidates for empirical analysis; other laws might eventually be subject to the same scrutiny), and found that Indiana's firearm seizure law "was associated with a 7.5% reduction in firearm suicides in the ten years following its enactment," while "[e]nactment of Connecticut's law was associated with a 1.6% reduction in firearm suicides immediately after its passage and a 13.7% reduction in firearm suicides in the post-Virginia Tech period, when enforcement of the law substantially increased."<sup>78</sup>

A third study focused on the link between extreme risk orders and mass shootings, detailing twenty-one California cases in which orders were issued, including some involving threatened workplace shootings.<sup>79</sup> In none of those cases did any shooting occur, suggesting perhaps the ways in which extreme risk orders can be used to prevent not only suicides but

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<sup>76</sup> Compare John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (1998) (arguing that greater firearm ownership leads to reductions in crime), with Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 *Stan. L. Rev.* 1193, 1201 (2003) (critiquing Lott's hypothesis directly); see also Abhay Aneja, John J. Donohue III & Alexandria Zhang, *The Impact of Right To Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18294, 2012) (examining the results of right to carry laws).

<sup>77</sup> Swanson et al., *supra* note 72, at 203.

<sup>78</sup> Kivisto & Phalen, *supra* note 61, at 855.

<sup>79</sup> Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Series*, 171 *Annals Internal Med.* 655, 655–56 (2019), <https://annals.org/aim/fullarticle/2748711/extreme-risk-protection-orders-intended-prevent-mass-shootings-case-series> [<https://perma.cc/AJB4-6PDK>].

also mass homicides.<sup>80</sup> Not all commentators are convinced, however,<sup>81</sup> and the effectiveness of the laws will surely continue to depend on how often they are enforced—some face “significant barriers” as a matter of policing.<sup>82</sup> Undoubtedly, as with the empirical debates about publicly carrying,<sup>83</sup> the scholarly conversation is just beginning.

The importance and even relevance of that debate is intertwined with the constitutional objections to extreme risk laws. While a showing of effectiveness might help the laws survive constitutional challenge (for example by demonstrating appropriate “tailoring” for purposes of heightened scrutiny), their utility as a policy matter is not enough to resolve constitutional challenges emanating from the Second Amendment and Due Process Clause.

Unsurprisingly, extreme risk laws are opposed by some gun rights advocates on the basis that they would violate the Second Amendment. Indeed, in some places this opposition has helped spark the adoption of “Second Amendment sanctuary” resolutions by which local governments pledge opposition to gun regulations like extreme risk laws and background checks.<sup>84</sup> As a matter of doctrine, however, Second Amendment challenges to extreme risk laws have not fared well. There have been few such challenges, and they have been unsuccessful.<sup>85</sup> Admittedly, however, there is a lack of in-depth case law on the issue.

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<sup>80</sup> Id. at 656 (“Orders after hearings were issued in 14 of 15 cases in which they were requested. No mass shootings, other homicides, or suicides by persons subject to GVRs were identified.”).

<sup>81</sup> John R. Lott, Jr., & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* 3–4 (Dec. 28, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3316573](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316573) [<https://perma.cc/7M3X-6NLX>].

<sup>82</sup> Swanson et al., *supra* note 72, at 196 (noting, in the Connecticut context, that “mismatch between available police staffing resources in most departments and the statutory requirement that two officers appear as co-affiants before a judge to obtain the risk warrant” and “the problem of gun storage”); id. at 189 (noting that “very few gun removals were carried out during the first eight years after the [Connecticut] law went into effect—about twenty per year, on average, from 1999 through 2006,” but that the number increased “about fivefold—to about 100 cases per year” after the Virginia Tech mass shooting in 2007).

<sup>83</sup> *Supra* note 76 and sources cited therein.

<sup>84</sup> Nick Penzenstadler, *NRA Helps Sheriffs Fight Gun Laws in Second Amendment ‘Sanctuaries,’* USA Today (May 20, 2019, 3:14 PM), <https://www.usatoday.com/story/news/investigations/2019/05/20/new-gun-laws-spark-secret-messaging-recalls/3744676002/> [<https://perma.cc/L6U4-8B54>].

<sup>85</sup> In general, Second Amendment claims have not fared well. See generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right To Keep and Bear Arms After Heller*, 67 *Duke L.J.* 1433, 1472 (2018) (noting, based on review of more than 1,100 Second Amendment challenges, a success rate of roughly 9%).

In *Hope v. State*,<sup>86</sup> a Connecticut appellate court considered a Second Amendment challenge to the Connecticut firearm removal law described above. The court rejected the challenge:

[The law] does not implicate the [S]econd [A]mendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms. The statute is an example of the longstanding “presumptively lawful regulatory measures” articulated in *District of Columbia v. Heller*.<sup>87</sup>

Similarly, in *Redington v. State*, the Indiana Court of Appeals held that Indiana’s firearms removal law did not violate the state constitutional right to keep and bear arms, because it applied only to those shown, by clear and convincing evidence, to “present a risk of personal injury to either themselves or other individuals.”<sup>88</sup> As a result, it did not “place a material burden” on the “core” right of law-abiding citizens to bear arms in self-defense.<sup>89</sup>

Although this Article is not focused on Second Amendment challenges, it is worth noting that regulating the risk of firearm misuse at the individual level is not a wholly new phenomenon. The practice of imposing peace bonds on those who threatened harm was well-established at common law, including in England centuries before the American Revolution.<sup>90</sup> Indeed, although such laws have largely fallen

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<sup>86</sup> 133 A.3d 519 (Conn. App. Ct. 2016).

<sup>87</sup> *Id.* at 524–25.

<sup>88</sup> 992 N.E.2d 823, 834–35 (Ind. Ct. App. 2013).

<sup>89</sup> *Id.* at 835.

<sup>90</sup> See 5 William Blackstone, Commentaries \*251 (“[P]reventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges and securities for keeping the peace, or for their good behaviour.”); Joel B. Samaha, The Recognizance in Elizabethan Law Enforcement, 25 Am. J. Legal Hist. 189, 195 (1981) (describing the peace bond process and explaining that, to initiate the process, “[t]he person in fear of harm appeared before a Justice of the Peace and swore under oath that he was in danger of life or limb and therefore, that he ought to have surety of the peace by the person who created the danger”); see also Sidney Childress, Peace Bonds—Ancient Anachronisms or Viable Crime Prevention Devices?, 21 Am. J. Crim. L. 407, 416–21 (1994) (describing the origin and history of peace bonds).

into desuetude, versions of them still exist in many states today.<sup>91</sup> These types of laws could be used against those who pose a particular threat with firearms.<sup>92</sup>

Extreme risk laws also potentially raise Fourth Amendment concerns.<sup>93</sup> For example, a warrant to search for or seize firearms issued with an ERPO implicates the Fourth Amendment's requirement that such warrants issue only upon probable cause.<sup>94</sup> New Jersey's extreme risk law is currently being challenged on Fourth Amendment grounds because it

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<sup>91</sup> 12 Am. Jur. 2d *Breach of Peace & Disorderly Conduct* § 38 (2019) (footnotes omitted) (“Statutory enactments in most jurisdictions reflect the common-law principle that as a matter of preventive justice a person may under certain circumstances be ordered by a court to give security against future breach of the peace by him or her, and that he or she may be imprisoned for not complying with such an order. Peace bond statutes serve a salutary purpose and are an effective and proper deterrent to violence, either actually perpetrated or immediately threatened.”); see also *Commonwealth v. Miller*, 305 A.2d 346, 348 (Pa. 1973) (stating that Pennsylvania’s Surety of the Peace Act “provides preventive justice and requires persons of whom there is probable cause to suspect future violent behavior to give full assurance to the public against the anticipated offenses”); *id.* at 350 (Nix, J., concurring) (describing the Act as fulfilling “the need in our law of a provision that will enable a court to take prompt and effective action to deter a threatened or imminent wrong”). Pennsylvania repealed the law at issue in *Miller* in 1978. Act of Apr. 28, 1978, Pub. L. No. 1978-53, 1978 Pa. Laws 202, 232.

<sup>92</sup> Saul Cornell, *The Right To Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 *Law & Contemp. Probs.* 11, 24 (2017) (“Rather than encourage individuals to arm themselves in response to such threats [of armed violence], English law required individuals to seek out a magistrate, justice of the peace, or constable and have the aggressor disarmed and placed under a peace bond.”); C. Kevin Marshall, *Why Can’t Martha Stewart Have A Gun?*, 32 *Harv. J.L. & Pub. Pol’y* 695, 717 (2009) (noting, in the context of historical firearm prohibitions, that “[o]ne means of conserving the peace, apart from prosecuting those who breached it, was to order persons who posed particular risks to provide sureties of the peace”).

<sup>93</sup> Michael Hammond, *Kafkaesque ‘Red Flag Laws’ Strip Gun Owners of Their Constitutional Rights*, USA Today (Apr. 19, 2018, 2:30 PM), <https://www.usatoday.com/story/opinion/2018/04/19/red-flag-laws-strip-gun-rights-violate-constitution-column/52622-1002/> [<https://perma.cc/ZR4E-LRGZ>] (“At their core, [extreme risk laws] allow the police to convene a Kafkaesque secret proceeding, in which an American can be stripped of his or her gun rights and Fourth Amendment rights, even though gun owners are barred from participating in the hearings or arguing their side of the dispute.”).

<sup>94</sup> *State v. Hemenway*, 216 A.3d 118, 121, 128, 134 (N.J. 2019) (holding that New Jersey’s domestic violence restraining order law, which permitted issuance of a warrant to search for firearms upon a showing only of “good cause,” violated the Fourth Amendment). In response to this ruling, New Jersey’s Attorney General issued a directive to law enforcement and prosecutors tasked with enforcing the state’s extreme risk law—which uses the same standard as in the domestic violence law—to “establish and request that the search warrant associated with an ERPO application be issued by the court under the standard of probable cause.” See Gurbir S. Grewal, *Att’y Gen., Att’y Gen. Law Enf’t Directive No. 2019-2*, at 5 (Aug. 15, 2019).

authorizes issuance of a search warrant upon a showing of “good cause.”<sup>95</sup> And beyond the specific ERPO challenges, the presence of firearms raises a host of Fourth Amendment issues that are beyond the scope of this Article.<sup>96</sup>

These constitutional issues are important and consequential, but in our view, the more serious challenges to extreme risk laws are those involving due process.<sup>97</sup> Answering those challenges requires a more detailed understanding of how the laws work and what the Constitution requires. This Part explores the former; Part II will address the latter.

### *B. A New Paradigm for Gun Regulation?*

Extreme risk laws are novel not only in terms of the recency of their adoption but also in the way that they frame the issue of gun regulation. Person-based firearm restrictions have traditionally been conceptualized and justified as a means of denying guns to *classes* of persons thought to pose a particular risk to themselves or to others. Extreme risk laws, because they are triggered by individualized determinations about risk, represent an effort to regulate at the retail, rather than wholesale, level—focusing on particularized situations rather than broad groups. Moreover, extreme risk laws bring to the foreground an implicit but foundational division between thinking about gun regulation as punishment—a frame captured by the emphasis on “law-abiding citizens”<sup>98</sup>—and thinking about gun regulation as risk management.

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<sup>95</sup> Michael Hill, *New Jersey’s Red Flag Law Gets Challenged in Federal Court*, NJ Spotlight (Nov. 21, 2019), <https://www.njspotlight.com/2019/11/new-jerseys-red-flag-law-gets-challenged-in-federal-court/> [<https://perma.cc/7K35-4DKV>] (describing the Fourth Amendment challenge).

<sup>96</sup> See, e.g., *Commonwealth v. Hicks*, 208 A.3d 916, 947 (Pa. 2019), cert. denied sub nom. *Pennsylvania v. Hicks*, 140 S. Ct. 645 (2019) (holding that mere possession of a concealed firearm in public does not suffice to justify a *Terry* stop); Bellin, *supra* note 20, at 5 (“As gun carrying becomes both lawful and common, even in major cities, police lose the ability to invoke public gun possession as a Fourth-Amendment-satisfying basis for investigation.”).

<sup>97</sup> Even advocacy organizations have emphasized the importance of incorporating due process protections. See, e.g., Educ. Fund to Stop Gun Violence et al., *Extreme Risk Laws: A Toolkit for Developing Life-Saving Policy in Your State* 14 (n.d.), <https://live-giffords-org.pantheonsite.io/wp-content/uploads/2018/08/Extreme-Risk-Laws-Toolkit.pdf> [<https://perma.cc/57T3-292F>] (arguing that laws should be “reflective of a state’s existing processes for protective orders with due process protections” and should include an “[o]pportunity for respondent[s] to petition for early termination”).

<sup>98</sup> See *infra* Subsection I.B.2.

Both of these characteristics have important implications for the due process analysis below, but they are also important to consider on their own terms. To the degree that extreme risk laws present a new paradigm of gun regulation—one focused on individualized determinations rather than proxies, and risk rather than punishment—they may offer a new way forward in an often-stalled gun debate.

### *1. Retail Gun Regulation*

State and federal laws prohibit certain classes of persons from buying or possessing arms. Federal law covers felons, those adjudicated mentally ill, fugitives from justice, habitual users of illegal drugs, and others.<sup>99</sup> Such laws have been overwhelmingly upheld against constitutional challenges.<sup>100</sup> The felon prohibitor, in particular, has been the subject of hundreds of post-*Heller* Second Amendment challenges (nearly a quarter of all such challenges), roughly ninety-nine percent of which have failed.<sup>101</sup> Although this is not the place to interrogate the constitutionality of any particular class-based prohibition in detail, the legal battles over those prohibitions can help shed light on what is so novel and interesting about extreme risk laws.

Class-based prohibitions have been evaluated and justified through a variety of different lenses. Some believe that such prohibitions are constitutional based on their historical lineage,<sup>102</sup> or the notion that the prohibited persons (felons, at least) are “unvirtuous.”<sup>103</sup> But perhaps the most straightforward and intuitive way to understand them is as representing a determination about risk of harm—the categories of persons prohibited by law from owning arms are those who likely pose a heightened danger to themselves or others. On this view, the classifications are proxies for what really matters: risk.

But, of course, proxies are only that. Many people with felony convictions—and certainly most people with mental illness—will probably never harm another person, and might not even present much of

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<sup>99</sup> See generally 18 U.S.C. § 922(g) (2012) (making it unlawful for felons, fugitives, drug addicts, and the mentally ill to possess a firearm).

<sup>100</sup> See Ruben & Blocher, *supra* note 85, at 1481 (noting a four percent success rate of Second Amendment challenges to laws prohibiting arms possession by particular classes of people).

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) (“[T]he longstanding limitations mentioned by the Court in *Heller* are exceptions to the right to bear arms.”).

<sup>103</sup> See *supra* note 34 and sources cited therein.

a heightened risk of doing so. As the title of an oft-cited law review article puts it: “Why Can’t Martha Stewart Have a Gun?”<sup>104</sup> Of course, the fact that a proxy is imperfect does not mean it is impermissible—it is the very nature of a rule to be overbroad and underinclusive, after all,<sup>105</sup> and nearly every legal prohibition reaches conduct that might not be directly harmful in any particular instance. Most speeding drivers don’t hurt anyone, but that doesn’t make speed limits irrational.

When such overbreadth impinges on constitutional interests, including the right to keep and bear arms, law has ways to relieve the pressure. One is through specified mechanisms for restoration of gun rights.<sup>106</sup> As a matter of constitutional law, however, the push for tailoring manifests in as-applied challenges—those seeking to carve out a particular individual from a class-based prohibition. A felon with a distant, non-violent conviction, for example,<sup>107</sup> or a person with a single mental health episode long ago,<sup>108</sup> might argue that a class-based prohibition is unconstitutional as applied in his or her particular case.

The connection to extreme risk laws is clear; the notion is that legal burdens should be properly tailored to the individual. ERPOs, too, rely on individualized determinations, albeit in the opposite direction. While as-applied challenges carve people out of legal prohibitions, extreme risk laws temporarily impose them, but for the same reason—a mismatch between the reasons for existing legal prohibitions (lessening risk) and their application in a particular case. When a class-based proxy is particularly inappropriate (like for the dangerousness of a non-violent felon with an old conviction), perhaps it should be disregarded. Conversely, when class-based proxies *fail* to reach those that they should—a dangerous person *without* a disqualifying felony, for

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<sup>104</sup> Marshall, *supra* note 92.

<sup>105</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1695 (1976) (“The use of rules, as opposed to standards, to deter immoral or antisocial conduct means that sometimes perfectly innocent behavior will be punished, and that sometimes plainly guilty behavior will escape sanction.”).

<sup>106</sup> See David T. Hardy, *Losing and Regaining Firearm Rights: A Guide for the Legal Practitioner*, 16 T.M. Cooley J. Prac. & Clinical L. 133 (2014); Michael Luo, *Felons Finding It Easy To Regain Gun Rights*, N.Y. Times (Nov. 13, 2011), <https://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html> [<https://perma.cc/RMD2-YMX6>].

<sup>107</sup> *Binderup v. Att’y Gen.*, 836 F.3d 336, 343, 356 (3d Cir. 2016).

<sup>108</sup> *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 681 (6th Cir. 2016) (en banc).

example—extreme risk laws provide a solution.<sup>109</sup> The two phenomena are therefore interlocking and interrelated ways of policing and managing the line between prohibited and non-prohibited persons.

Since this policing machinery is put into motion by an extreme risk petition, one important design choice is who gets to file such petitions in the first place. As a matter of legal design, the considerations at this stage are in some sense straightforward. Granting a petition (i.e., issuing an extreme risk order) depends on obtaining accurate and timely information about truly risky behaviors. That might push in favor of a large class of potential petitioners, so as to maximize information. But because the consequences of an order are serious (deprivation of a firearm, even for a temporary period), there are countervailing reasons to limit the class of petitioners, so as to lower the risk of false positives and harassment. In order for an extreme risk law to be effective, then, the category of available petitioners should include people with the best information about risks and incentives to accurately report it.

Perhaps the most obvious category of potential petitioners are law enforcement officers, whose very job involves identifying and responding to risks. It is far beyond the scope of this Article to fully account for the ways in which law enforcement can or should respond to firearm threats, but it is worth noting that the mere presence of a gun—even in places that statutorily guarantee the right to carry one publicly without a license—can generally support a stop-and-frisk.<sup>110</sup> Extreme risk laws extend that power one step further (by forbidding the person from having a gun in the first place), but they also involve a further procedural step: a judge must approve the order, which of course is not required for a frisk. The consequences and process are both elevated.

In practice, there does not seem to be much disagreement about whether extreme risk laws should permit petitions from law enforcement

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<sup>109</sup> The individualized nature of ERPO proceedings makes it hard to credit the critique that they are based on “groupings.” See, e.g., Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, *Wall St. J.* (Aug. 6, 2019), <https://www.wsj.com/articles/a-yellow-light-for-red-flag-laws-11565132144?mod=searchresults&page=1&pos=5> [<https://perma.cc/CV9S-VJWA>] (“Research shows that any group of people identified as future violent criminals will contain many more who won’t be violent (false positives) than who will (true positives). More true positives mean more false ones. Such groupings also fail to identify many future violent criminals (false negatives).”). That is an argument against the usual class-based prohibitors, not against ERPOs—if anything, it is a strong argument *for* them.

<sup>110</sup> See *United States v. Robinson*, 846 F.3d 694, 711–12 (4th Cir. 2017) (en banc) (Harris, J., dissenting). But the Supreme Court has nonetheless declined to make a blanket “firearm exception” to the requirements for a stop and frisk. *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

officers—every existing law does so.<sup>111</sup> In a handful of states with particularly strict laws, *only* law enforcement officers can file petitions.<sup>112</sup> It is worth noting that special procedural concerns can potentially arise in these proceedings. The subjects of petitions might well be unrepresented (since the proceedings are civil, the State need not, as a constitutional matter, provide counsel), and could potentially misunderstand the procedures and consequences of an ERPO (including potential criminal sanctions for non-compliance). Where such problems are present—and we are unaware of any studies on point—due process rights might very well be implicated.

A second category of possible petitioners—permitted in fourteen states and the District of Columbia—is immediate family members and others sharing a household with the subject of the order.<sup>113</sup> As compared to law enforcement officers, family or household members generally have informational advantages, since they are presumably well-positioned to observe warning signs such as suicidal ideation, threats to others, and the like—behaviors that might not yet have resulted in any kind of formal legal intervention or determination, but could be predictive of future harm. As a matter of incentives, it also seems reasonable to begin with an assumption—though of course it will not always be the case—that family members genuinely care for the health and well-being of other family members and will only report seriously risky behaviors. Indeed, the law in various ways does tend to presume a relationship of trust and mutual obligation within a family.<sup>114</sup> And an ERPO is a much less intrusive option than other possibilities like civil commitment or arrest.

At the same time, those same family members might have strong incentives to *underreport* risk, for fear of the consequences to the gun

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<sup>111</sup> Giffords, ERPO, *supra* note 53.

<sup>112</sup> See, e.g., Fla. Stat. § 790.401 (2019); 8 R.I. Gen. Laws §§ 8-8.3-1, 8-8.3-3 (Supp. 2019); Vt. Stat. Ann. tit. 13, § 4053 (2018); see also Conn. Gen. Stat. § 29-38c (2019) (providing that a complaint may be filed by two law enforcement officers or one state’s attorney or assistant state’s attorney).

<sup>113</sup> Shannon Frattaroli et al., Assessment of Physician Self-Reported Knowledge and Use of Maryland’s Extreme Risk Protection Order Law, JAMA Network Open, Dec. 20, 2019, at 1, 1 (“Such laws allow specified groups (law enforcement in all states, and family in 14 states and the District of Columbia) to petition a court when an individual is behaving dangerously . . .”).

<sup>114</sup> Cf. Jacqueline J. Glover, Should Families Make Health Care Decisions?, 53 Md. L. Rev. 1158, 1162 (1994) (noting, in the course of arguing in favor of “family decision” laws in the health care context, that “[t]here is a rich tradition that is supported in current law and policy that families are primary care providers and have wide-reaching obligations to do so”).

owner<sup>115</sup> or to themselves. This can lead to serious complications for enforcement. In *Coral Gables Police Department v. Tamayo*, for example, a woman reported to the police that her husband was a serious threat.<sup>116</sup> The police petitioned for an ERPO, but on the witness stand she denied that she had claimed him to be a threat. After the hearing, she said she recanted because she was afraid of the consequences, according to the law enforcement officers present, but the court nonetheless denied the order.<sup>117</sup> The police department filed an appeal challenging the denial, but the court of appeals affirmed.<sup>118</sup>

In certain toxic family environments—those involving serious distrust or abuse, for example—it is possible that false claims might be filed in an effort to harass or even disarm those who do not present any legitimate threat. Opponents of gun laws frequently raise this concern,<sup>119</sup> though it is hard to say empirically whether and how it has played out in practice. Some extreme risk laws attempt to address it by specifically including civil or criminal penalties for those who knowingly file petitions based on false information.<sup>120</sup> And, as noted below,<sup>121</sup> the risk of false positives seems far outweighed by the risk of false negatives.

The expansion of petitioner categories beyond immediate family and household members is controversial. Some states permit mental health providers,<sup>122</sup> school administrators,<sup>123</sup> medical professionals, co-workers, and educators<sup>124</sup> to petition for an extreme risk order. As with law

<sup>115</sup> See, e.g., Nicole Darrah, Florida Mom Insists Her Son Who Allegedly Threatened Mass Shooting Is ‘Just a Little Kid’ Making Jokes, Fox News (Aug. 21, 2019), <https://www.foxnews.com/us/florida-mom-son-mass-shooting-just-a-little-kid> [https://perma.cc/E9TL-7WJJ].

<sup>116</sup> Initial Brief of Coral Gables Police Department at 5–9, *Coral Gables Police Dep’t v. Tamayo*, 283 So. 3d 404 (Fla. Dist. Ct. App. 2019) (per curiam) (No. 18-2275) (describing claims made to police).

<sup>117</sup> Id. at 12–17 (describing hearing testimony and post-hearing statements).

<sup>118</sup> *Tamayo*, 283 So. 3d 404.

<sup>119</sup> See, e.g., Allison Graves, Did Florida Police Seize a Man’s Gun Without Due Process? No, PolitiFact (Apr. 4, 2018), <https://www.politifact.com/florida/statements/2018/apr/04/free-thought-project/did-florida-police-seize-mans-gun-out-due-process/> [https://perma.cc/6QX6-UEC3]; Hammond, *supra* note 93; Niño, *supra* note 57.

<sup>120</sup> See, e.g., Cal. Penal Code § 18200 (Deering Supp. 2020); Mass. Gen. Laws ch. 140, § 131V (2018); Or. Rev. Stat. Ann. § 166.543(3) (West 2019); Wash. Rev. Code § 7.94.120(1) (2019).

<sup>121</sup> See *infra* text accompanying note 137.

<sup>122</sup> See, e.g., Md. Code Ann., Pub. Safety § 5-601(E)(2) (LexisNexis 2019).

<sup>123</sup> See N.Y. C.P.L.R. § 6340 (Consol. Supp. 2020). New York seems to be unique in this regard.

<sup>124</sup> See, e.g., Haw. Rev. Stat. Ann. § 134-61 (LexisNexis 2019).

enforcement and family members, these are categories of people who might be in a position to observe and respond to risks, including those that might presage a mass shooting in a school or workplace. But the broader the category of petitioners, the stronger the concerns about misidentification and abuse. When the California legislature attempted to amend its law to allow high school and college employees and co-workers to file petitions, then-Governor Jerry Brown vetoed the measure,<sup>125</sup> though Governor Gavin Newsom later signed the expansion into law.<sup>126</sup>

Who *actually* petitions is an important but separate question from who has a right to do so. In California, at least as of 2017, petitions seem to come mostly from law enforcement officers. Of the nearly two hundred gun violence restraining orders issued, only a dozen were initiated by petitions from family members.<sup>127</sup> In Maryland, by contrast, more than half of the more than three hundred gun removal petitions filed in the first three months of the law's passage were filed by family members.<sup>128</sup> It seems plausible that, as the general public becomes more aware of extreme risk laws—which, again, are a very new development—their use by family members (where permitted) will increase.

The question of who can petition for an extreme risk order also intersects in interesting ways with broader currents of theory, politics, and doctrine surrounding the right to keep and bear arms. Some accounts of the right are heavily suffused with what might be called—to borrow from First Amendment theory<sup>129</sup>—a pathological perspective, in the sense that many gun owners feel that the right should be calibrated to protect against

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<sup>125</sup> Melody Gutierrez, Jerry Brown Vetoes California Bill To Expand Gun Restraining Orders, S.F. Chron. (Sept. 26, 2018), <https://www.sfchronicle.com/politics/article/Jerry-Brown-vetoes-California-bill-to-expand-gun-13261282.php> [<https://perma.cc/7PTK-74BZ>].

<sup>126</sup> Don Thompson, California Adopts Broadest US Rules for Seizing Guns, Associated Press (Oct. 11, 2019), <https://apnews.com/3ca4e1f867f2490c98b042358f8bf3b3> [<https://perma.cc/L2PZ-TRJA>].

<sup>127</sup> Melody Gutierrez, California Starts Slowly on Seizing Unstable People's Guns, but That Could Change, S.F. Chron. (May 11, 2018), <https://www.sfchronicle.com/politics/article/California-starts-slow-on-seizing-unstable-12906043.php> [<https://perma.cc/6Y3K-MNXX>].

<sup>128</sup> Ovetta Wiggins, Red-Flag Law in Maryland Led to Gun Seizures from 148 People in First Three Months, Wash. Post (Jan. 15, 2019), [https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081\\_story.html](https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081_story.html) [<https://perma.cc/XU8L-LS6Z>].

<sup>129</sup> See Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 449–50 (1985).

the worst possible eventuality: tyranny and oppression.<sup>130</sup> From this perspective, the right to keep and bear arms is truly, as the title of the NRA's official journal claims, "the '1st Freedom,'"<sup>131</sup> and the one "the others lean on the most," as NRA Vice President Wayne LaPierre has put it.<sup>132</sup> For those holding such a view, any governmental efforts to regulate guns are likely to trigger a sense of persecution and fear, feeding the kind of apocalyptic rhetoric that is all too familiar in the gun debate.<sup>133</sup> Standard efforts to regulate guns through legislation tend to raise the specter of disarming law-abiding citizens, rather than focusing on those who present a risk to others. Extreme risk laws seem responsive to that concern, since they apply only to particular individuals and depend on a specific petition reviewed by a judge.

And yet extreme risk laws also add a new wrinkle, at least for some, because the object of fear is not necessarily the government, but "[a]nti-gun family members, friends, or acquaintances [who] can levy dubious accusations to justify the confiscation of law-abiding gun owners' guns,"<sup>134</sup> notwithstanding the aforementioned penalties for misuse. A leader of one gun rights organization has claimed that "the target is frequently an abused victim who is most in need of the wherewithal to protect against an abuser."<sup>135</sup> The tyrannical figure here is no longer a faceless bureaucrat, member of the beltway elite, or anti-gun judge, but one's own friends and family.<sup>136</sup> Of course, those people are also among the ones most at risk.

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<sup>130</sup> See Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 *Ind. L.J.* 939 (2011) (providing examples and analyzing whether and how such a view could be manifested in doctrinal rules).

<sup>131</sup> *America's 1st Freedom*, <https://www.americas1stfreedom.org/> [<https://perma.cc/2EG8-G3DW>] (last visited July 11, 2020).

<sup>132</sup> Wayne LaPierre, *Guns, Freedom, and Terrorism* 29 (2003).

<sup>133</sup> See, e.g., Blocher, *supra* note 17, at 826–27 (providing examples of this rhetoric).

<sup>134</sup> Niño, *supra* note 57.

<sup>135</sup> Hammond, *supra* note 93. We are not aware of any evidence to support this claim. There is, however, evidence to suggest that victims of abuse are at even higher risk when firearms are accessible. Aaron J. Kivisto, et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 *Am. J. Preventative Med.* 311, 312 (2019) (concluding that the presence of a gun makes it five times more likely that a woman will be killed by an abusive partner).

<sup>136</sup> Some accounts of the anti-tyranny theory of the Second Amendment describe private violence and oppression as a form of tyranny. See, e.g., Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 1256–57 (2d ed. 2018) (arguing that "[a]lthough 'tyranny' is typically thought of as being perpetrated by governments against their people, this is, arguably, not the only context in which the unrestrained abuse of

Although some critics allege that such orders are frequently abused, it is difficult to find concrete evidence supporting this claim, and the legal processes and personal incentives already provide substantial protection against false reporting. Given the incentives, it seems likely that there will be far more false negatives (guns not removed from a situation of extreme risk) than false positives (guns wrongly removed thanks to false or misleading testimony). Even people with valid claims may be substantially deterred by the prospect of going to court to convince a judge that a family member is engaged in risky behavior. If the situation in a gun-owning household has deteriorated to the point that one family member is prepared to falsely accuse another of having engaged in risky behaviors (rather than, for example, simply throwing the guns away or hiding them), then it seems all the *more* likely that the risk of gun violence is especially heightened. And even then, many ERPO laws already provide for legal sanction in cases of false reporting,<sup>137</sup> to say nothing of other potential tort liability. In short, if the question is which risk—false accusations or gun violence—presents the greater prospect of harm, the answer seems clear.

In any event, these are largely questions of policy and politics, and our focus here is on constitutionality. On that front, the tradeoff between preventing harms of firearm misuse and protecting the rights of gun owners is relevant only inasmuch as it factors into constitutional analysis—for example in resolving a Second Amendment or Due Process Clause challenge.

One final implication of the proxy-based approach to class restrictions is worth noting. Under federal law, the classes of persons prohibited from owning arms are basically adjudicated statuses—one cannot become a felon, or fugitive, or even mentally ill within the meaning of the statute without a court procedure to which basic due process protection applies. The tradeoff, then, is a thorough process the result of which is a poor proxy. As recent debates about “No Fly No Buy” and the rights of college students accused of sexual assault show, these due process concerns

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power is properly considered tyranny” and including “individual-on-individual tyranny” as one of the “categories of oppression with which the framers of the Second and Fourteenth Amendments were especially concerned”).

<sup>137</sup> See *supra* statutes cited in note 120.

continue to animate scholarship and case law about how to balance important competing interests.<sup>138</sup>

## 2. Beyond “Law-Abiding, Responsible Citizens”: Risk-Based Gun Regulation

In the closing paragraphs of his majority opinion in *Heller*, Justice Scalia rejected Justice Breyer’s argument that the constitutionality of gun regulations should be evaluated with attention to contemporary costs and benefits:

Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home.<sup>139</sup>

This short passage invokes two interrelated themes: the reliance on history to determine the “scope” of the Second Amendment (including “the People” who can claim its protections), and the suggestion that the right is limited to “law-abiding, responsible citizens.”<sup>140</sup> Extreme risk laws represent a challenge to this general paradigm.

Second Amendment law and scholarship is, in many ways, backward-looking. This is in part a natural implication of *Heller*, which blessed as constitutional a number of “longstanding prohibitions,” including restrictions on possession of firearms by felons and those adjudicated as mentally ill.<sup>141</sup> The apparent suggestion that those prohibitions are

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<sup>138</sup> See supra notes 23–24 and accompanying text (describing the debate over No Fly No Buy); H. Hunter Bruton, Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented,” 27 Cornell J.L. & Pub. Pol’y 145, 147 (2017) (exploring “tradeoffs involved in requiring or rejecting cross-examination” in sexual assault hearings).

<sup>139</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (second emphasis added).

<sup>140</sup> *Id.* at 644 (Stevens, J., dissenting) (citation omitted) (“[W]hen it finally drills down on the substantive meaning of the Second Amendment, the [majority] limits the protected class to ‘law-abiding, responsible citizens.’”).

<sup>141</sup> *Id.* at 626 (majority opinion) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . .”).

constitutional *because* of their lineage has inspired efforts to excavate their history—to understand how and why, for example, certain categories of criminals were prohibited from having firearms.<sup>142</sup> The historical approach faces serious complications, which we cannot fully examine here. Federal law denies firearms to those convicted of domestic violence, for example, and that law has been—to our knowledge—universally upheld.<sup>143</sup> But a narrow search for specifically analogous historical predicates might call that law into question,<sup>144</sup> especially considering that the law was egregiously slow to criminalize intimate-partner violence against women.<sup>145</sup> Courts and commentators often sidestep those challenges by deriving broad principles from specific historical examples—a tradition of denying firearms to the unvirtuous or the dangerous, for example.<sup>146</sup>

Perhaps the central animating theme is the focus on “law-abiding citizens” who want to use their arms for traditionally lawful purposes. This is evident in doctrine. As noted above, the *Heller* majority announced that the Second Amendment “surely elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home.”<sup>147</sup> And even the category of “dangerous and unusual” weapons that are subject to legal prohibition is defined in contradistinction to those weapons “typically possessed by law-abiding citizens for lawful purposes.”<sup>148</sup>

But the “law-abiding” frame is even more prominent in political rhetoric about guns. Gun rights advocates regularly voice concern that

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<sup>142</sup> See, e.g., Marshall, *supra* note 92, at 717.

<sup>143</sup> See, e.g., Stimmel v. Sessions, 879 F.3d 198, 201 (6th Cir. 2018); *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); *United States v. Chovan*, 735 F.3d 1127, 1139–41 (9th Cir. 2013).

<sup>144</sup> Carolyn B. Ramsey, *Firearms in the Family*, 78 *Ohio State L.J.* 1257, 1301 (2017) (“Historical support for the exclusion of domestic violence offenders from Second Amendment protection appears rather thin.”).

<sup>145</sup> See Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2121–42 (1996).

<sup>146</sup> See, e.g., *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (“Although persons restricted by § 922(g)(8) need not have been convicted of an offense involving domestic violence, this statute—like prohibitions on the possession of firearms by violent felons and the mentally ill—is focused on a threat presented by a specific category of presumptively dangerous individuals.”).

<sup>147</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); see also *id.* at 644 (Stevens, J., dissenting) (“[W]hen it finally drills down on the substantive meaning of the Second Amendment, the [majority] limits the protected class to ‘law-abiding, responsible citizens.’”).

<sup>148</sup> *Id.* at 625 (majority opinion).

gun regulations will disarm or otherwise burden law-abiding citizens rather than the criminals who will never comply with gun regulations anyway.<sup>149</sup> The “law-abiding citizens” frame carries within it a lot of freighted meanings, of course, which helps account for its political power and value.<sup>150</sup>

ERPOs provide a useful means to unpack the assumptions and complications of this framing, because a person subject to an ERPO might be *both* law-abiding and “responsible.” On the one hand, that might be thought to raise constitutional concerns. But on closer examination, it shows why the “law-abiding, responsible” frame is simply inapt for answering hard questions about the constitutionality of gun laws.

It is clear that the “law-abiding” line is not sufficient to account for the range of existing class-based prohibitions. Age-based restrictions, for example, are of course not predicated on violations of the law, nor are those that apply to people who have been civilly committed due to mental illness. The most intuitive underlying concern for those prohibitions is a risk of danger,<sup>151</sup> and courts have overwhelmingly upheld them.<sup>152</sup> Extreme risk laws fit naturally into the same kind of category. The frame is safety rather than punishment; *ex ante* rather than *ex post*.

One possible response is that this is what Justice Scalia meant by emphasizing the word “responsible”—even if law-abiding, minors as a class are too irresponsible to be trusted with firearms in the same way as adults.<sup>153</sup> That principle could help explain the constitutional treatment of minors and perhaps other persons who are “law-abiding” and yet can be

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<sup>149</sup> See, e.g., Cox, *supra* note 25.

<sup>150</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *Harv. L. Rev.* 191, 239 (2008).

<sup>151</sup> See, e.g., *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (holding that the federal ban on juvenile handgun possession is “part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public”).

<sup>152</sup> See also *Horsley v. Trame*, 808 F.3d 1126, 1133–34 (7th Cir. 2015) (upholding Illinois statute requiring written consent of parent or guardian for persons under age twenty-one to own a firearm); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 208–09 (5th Cir. 2012) (upholding law restricting ability of persons under age twenty-one to purchase firearms from certain sources).

<sup>153</sup> See Amit Vora, *Defending an Under-21 Firearm Ban Under the Second Amendment Two Step*, 71 *Stan. L. Rev. Online* 1, 2 (2018) (arguing that the above-cited decisions present “historical evidence that, according to the Framers, only those with adequate ‘civic virtue’ are worthy of wielding lethal weapons, and one’s capacity for virtue grows with age”).

denied firearms: *Heller*'s specific carve-out for the "mentally ill" is a prime example.<sup>154</sup>

The difficult question is what it means to be "responsible" in a legally relevant sense. This question has not yet received sustained attention in the context of gun rights and regulation, but of course it has long been fundamental to other areas of law. In torts, to take perhaps the most obvious example, judges and scholars have long connected responsibility—in the sense of legal duty or liability—and risk.<sup>155</sup> Might ERPOs be understood, at least in part, through a similar lens?

In some sense, the answer is obvious: The basis of an extreme risk order is, of course, a showing of risk. This basic feature has important consequences for both how such laws are received politically and how they are treated constitutionally. As noted above, standard gun regulations—including those that are both popular and constitutional—deny guns to people who have, for example, committed a felony or been adjudicated mentally ill. Even those skeptical of gun regulation tend not to object to these laws (except perhaps as applied in particular cases<sup>156</sup>). The acts and adjudication accompanying such designations are generally considered sufficient proof that the person is either too dangerous or too unvirtuous to possess a firearm.<sup>157</sup>

Some, however, believe that extreme risk laws present a different problem, since they are based solely on predictions about future violence.<sup>158</sup> Critics often invoke the movie *Minority Report*, in which a "PreCrime" department arrests people based on psychic predictions about

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<sup>154</sup> District of Columbia v. *Heller*, 554 U.S. 570, 626 (2008).

<sup>155</sup> See, e.g., Jules Coleman, *Risks and Wrongs* (1992); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499, 499 (1961); Stephen G. Gilles, *Causation and Responsibility After Coase*, Calabresi and Coleman, 16 *Q.L.R.* 255, 255 (1996) (arguing for "a conception of causation as risk-creation and a conception of responsibility as risk-avoidability").

<sup>156</sup> See, e.g., *Binderup v. Att'y Gen.*, 836 F.3d 336, 348 (3d Cir. 2016) (en banc) (permitting as-applied challenges to felon prohibitor in limited circumstances); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686, 690 (6th Cir. 2016) (en banc) (permitting as-applied challenges to mental illness prohibitor in limited circumstances).

<sup>157</sup> Charles, *supra* note 62, at 17.

<sup>158</sup> See, e.g., Dershowitz, *supra* note 109. But see David French, *Red-Flag Laws—Yes, We Limit Liberty When There's Evidence of a Threat*, *Nat'l Rev.* (Aug. 7, 2019), <https://www.nationalreview.com/corner/red-flag-laws-yes-we-limit-liberty-when-theres-evidence-of-a-threat/> [<https://perma.cc/YT2R-VLJB>] (noting and critiquing this point).

their likelihood of committing crimes.<sup>159</sup> The suggestion is that gun owners should not be “punished” for things they have not yet done.

But both of those premises are flawed: the analogy to crime is inapposite, and the suggestion that extreme risk laws are based on mindreading is misleading. Although the consequence (denial of access to a firearm) might be significant, extreme risk laws are a *civil* proceeding designed to protect both the gun owner and those close to him or her. So long as it is complied with, the order carries no criminal sanctions, and there is no situation in which “gun owners are presumed to be guilty and must then prove their innocence.”<sup>160</sup> Of course, constitutional protections apply in the civil context as well as the criminal context, but the relevant protections have to do with due process rather than constitutional criminal procedure rights.<sup>161</sup> The rhetoric of criminal law is unhelpful in understanding or resolving those civil due process issues.

So, too, is it unhelpful to compare extreme risk procedures to a kind of mindreading. Extreme risk laws focus on risky *behaviors*, not imputed mental states.<sup>162</sup> And there is nothing unique or unconstitutional about that. The law regularly imposes restrictions on people who have not committed crimes, based in part on the risk that they might do so in the future. Domestic violence restraining orders, for example, are granted based on a showing of risk—one need not wait until a crime has been committed (or, for that matter, adjudicated).<sup>163</sup> A person who does

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<sup>159</sup> Minority Report (DreamWorks 2002). The movie is based on a short story by Philip K. Dick. See Philip K. Dick, *The Minority Report*, in *The Philip K. Dick Reader* 323, 324 (1997).

<sup>160</sup> Niño, *supra* note 57. Some critics of extreme risk laws have wrongly suggested that the burden is on the gun owner. See, e.g., Mica Soellner, Wisconsin Assembly Speaker’s New Take on Red-Flag Gun Laws Still Misses Target, *PolitiFact* (Dec. 6, 2019), <https://www.politifact.com/wisconsin/statements/2019/dec/06/robin-vos/wisconsin-assembly-speakers-new-take-red-flag-gun-/> [<https://perma.cc/M4VR-FH6E>]. For a discussion of the burden of proof, which always rests with the petitioner, see *infra* Subsection II.B.2.

<sup>161</sup> See, e.g., Tony Lovasco, ‘Red Flag Laws’ Violate More Than Just Gun Rights, *Hill* (Aug. 12, 2019), <https://thehill.com/blogs/congress-blog/politics/457058-red-flag-laws-violate-more-than-just-gun-rights> [<https://perma.cc/XG9X-9G7U>] (listing, *inter alia*, the Confrontation Clause and the protection against unreasonable search and seizures as among the rights that are “explicitly violated under red flag laws”).

<sup>162</sup> Florida’s law, to take one example, points to a list of fifteen factors like acts or threats of violence, violation of prior orders, domestic violence convictions, abuse of controlled substances, and the like. See Fla. Stat. § 790.401(3)(c) (2019).

<sup>163</sup> For example, in Wisconsin, a temporary restraining order or injunction may be issued where the petition alleges facts sufficient to show “[t]hat the respondent engaged in, or based on prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner.” Wis. Stat. § 813.12(5)(a) (2017–18).

commit a crime can be subject to post-sentencing confinement based on “clear and convincing evidence” (not evidence beyond a reasonable doubt) that he or she is mentally ill and dangerous.<sup>164</sup> The fact that these kinds of orders are constitutional shows that constitutional interests can be restricted even without a criminal proceeding.

To return to the question, then: ERPOs fit uncomfortably with the frame that “law-abiding” persons are immune to gun regulation, but that shows the weakness of the frame, which cannot account even for basic (and constitutional) limitations on minors and the mentally ill. The addition of the “responsible” frame helps—not because of a normative judgment about moral desert, but by connecting responsibility and risk. That is something that the law does in many different contexts, but foregrounding it in the context of gun regulation (as separated from law-abidingness) may represent something of a paradigm shift for the gun debate.

It also presents a new set of constitutional concerns and questions rooted not in historical analogy—the typical focus of the gun debate—but in due process. If risk is to be the basis for disarmament, what does the Constitution require in terms of how that risk is shown? It is to that question we now turn.

## II. DUE PROCESS AND EXTREME RISK LAWS

Part I canvassed the framework for extreme risk laws. Such laws vary from state to state, and each state provides different methods and mechanisms for seeking, sustaining, and enforcing such laws. The laws aim to balance the need to keep dangerous persons away from firearms with the recognition that firearm ownership and possession are fundamental property and liberty interests. This Part focuses on the constitutional questions that extreme risk procedures raise, and in particular on whether those laws comply with the requirements of the Due Process Clause.

It is important to be clear at the outset about the scope of inquiry. The question is not whether the government can ever take firearms away, but what the government needs to do and show before it can.<sup>165</sup> As the

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<sup>164</sup> See, e.g., 18 U.S.C. § 4248(d) (2018) (permitting civil commitment based on diagnosis of mental condition).

<sup>165</sup> To be sure, there are some gun rights advocates who simply believe guns are an untouchable constitutional entitlement not subject to divestment at all. See, e.g., Rachel Malone, *There Isn't Enough Due Process To Make Red Flag Laws Tolerable*, Gun Owners of

Supreme Court has said, “[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”<sup>166</sup> The rules that courts impose on government actors seek to balance the individual and governmental interests in light of the risks of an erroneous deprivation. Those rules have to be flexible: there is no formulaic answer to what due process demands before the government may seize property or infringe a liberty interest.<sup>167</sup> At its core, due process requires notice and a hearing, and it requires the government to provide certain protections during the hearing to guard against wrongful deprivations. This Part examines the two issues most salient to extreme risk laws: (1) the rules governing deprivation prior to a full hearing, and (2) the burden of proof the State imposes on the petitioner before granting an ERPO. We conclude that extreme risk laws can meet both of these demands.

#### A. Constitutional Requirements for Pre-Hearing Deprivations

The fundamental requirements of due process are notice and an opportunity to be heard.<sup>168</sup> In normal cases, these must occur before the government deprives an individual of constitutionally protected liberty or

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Am. (Aug. 16, 2019), <https://gunowners.org/there-isnt-enough-due-process-to-make-red-flag-laws-tolerable/> [<https://perma.cc/YY9W-UHX2>] (“No matter how much *procedural* due process you add in (i.e., give notice, let the accused have an attorney, hear charges against him, and defend himself in court), red flag laws still lacks [sic] *substantial* due process (i.e. it’s wrong to have guns taken away based on a future prediction).”). But, as the Supreme Court has held, “substantive due process” concerns with regulatory and not punitive government action can yield to important and compelling interests. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987) (upholding pretrial detention of those charged with certain crimes and noting that the Court has “repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest”). This Article does not address any potential *substantive* due process arguments about extreme risk laws; those are likely coterminous with the merits of any Second Amendment challenge.

<sup>166</sup> *Carey v. Phipus*, 435 U.S. 247, 259 (1978).

<sup>167</sup> *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 894–95 (1961) (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”); John V. Orth, *Due Process of Law: A Brief History* 5 (2003) (“One of the most frequently asked questions in American constitutional history has been, what is required by the constitutional guarantee of ‘due process of law?’”).

<sup>168</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (citations omitted)); see also Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 *Yale L. & Pol’y Rev.* 1, 12 (2006) (“The default rule is that notice and a hearing must be provided *before* the government takes adverse action, except in exigent circumstances.”).

property.<sup>169</sup> “Due process, however, does not always require prior process.”<sup>170</sup> The Supreme Court has long recognized “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”<sup>171</sup> The Court has described these “extraordinary situations” in various ways,<sup>172</sup> but it has grouped them into two categories: (1) occasions “where a State must act quickly” and (2) those “where it would be impractical to provide predeprivation process.”<sup>173</sup> The first category is exemplified in laws motivated by urgent concerns over public health and safety;<sup>174</sup> the second by situations in which a government official negligently or carelessly deprives a person of his or her property, precluding any practical way to have provided a prior hearing.<sup>175</sup> Extreme risk laws implicate the first category, on which the rest of this Section focuses.

<sup>169</sup> Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 329 (1993) (remarking that “[f]air predeprivation procedures, which reduce the likelihood of erroneous deprivations of liberty and property, constitute one form of protection” of the Due Process Clause).

<sup>170</sup> *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (upholding Virginia law permitting removal of a child from the parents’ custody before a hearing when necessary to prevent imminent harm).

<sup>171</sup> *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); see also *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”).

<sup>172</sup> See, e.g., *Roth*, 408 U.S. at 570 n.7 (“rare and extraordinary situations”); *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972) (“truly unusual” situations); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (“emergency situations”); cf. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988) (“An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.”).

<sup>173</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); see also *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986) (stating that “either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State’s action at some time after the initial taking, can satisfy the requirements of procedural due process”).

<sup>174</sup> See, e.g., Rhonda Wasserman, *Procedural Due Process: A Reference Guide to the United States Constitution* 70 (2004) (“[T]he Court has permitted a deprivation of property without a prior opportunity to be heard when necessary to protect public health or safety.”).

<sup>175</sup> In this second situation, the government can still comply with due process even though no pre-deprivation hearing was held so long as it provides adequate post-deprivation remedies. See *Parratt*, 451 U.S. at 539 (describing this alternative); see also Susan Bandes, *Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L. Rev. 101, 108 (1986) (“[T]he random and unauthorized act by a state employee is the gravamen of the *Parratt* doctrine.”).

*1. Supreme Court Guidelines for Seizures Prior to a Full Hearing*

In *Fuentes v. Shevin*,<sup>176</sup> the Court identified three factors necessary to justify a deprivation before a full hearing takes place.<sup>177</sup> First, in each case the seizure must be “directly necessary to secure an important governmental or general public interest.”<sup>178</sup> Next, there must be “a special need for very prompt action.”<sup>179</sup> And finally, in prior cases approving such seizures, “the State ha[d] kept strict control over its monopoly of legitimate force; the person initiating the seizure ha[d] been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.”<sup>180</sup> As commentators have noted, the cases *Fuentes* cited that justified seizures prior to a hearing “involved immediate, irreparable, grave and widespread harm.”<sup>181</sup>

Applying these factors, the *Fuentes* Court struck down state laws that permitted a creditor to institute an ex parte replevin action and gain possession of a debtor’s property prior to notice and a hearing.<sup>182</sup> In the Court’s view, the interests in play were mostly private, there was no special need for quick action, and, perhaps most importantly, no government official made even “a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.”<sup>183</sup> In other words, the challenged laws allowed a private party’s mere filing to trigger state-enforced deprivation of a property right. That mechanism did not comply with due process.

Four years after *Fuentes*, the Supreme Court systematized its procedural due process jurisprudence, after commentators bemoaned the confusion generated by the due process boom of the early 1970s.<sup>184</sup> In *Mathews v. Eldridge*,<sup>185</sup> the Court held that a pre-deprivation hearing was not required before the government terminated a recipient’s disability

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<sup>176</sup> 407 U.S. 67 (1972).

<sup>177</sup> *Id.* at 90–92.

<sup>178</sup> *Id.* at 91.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023, 1028 (1973).

<sup>182</sup> *Fuentes*, 407 U.S. at 96.

<sup>183</sup> *Id.* at 80.

<sup>184</sup> See, e.g., Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1276–77 (1975).

<sup>185</sup> 424 U.S. 319 (1976).

benefits. It announced three factors courts must consider to determine what process is due and when:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>186</sup>

Like the *Fuentes* factors, the *Eldridge* balancing test derived principles from the Court's prior case law upholding seizures with no pre-deprivation hearing and justifying future deprivations under certain conditions. That case law is more extensive than one might suppose. In fact, the Court has permitted the government to deprive an individual of a constitutionally protected interest without a pre-deprivation hearing in all of the following situations<sup>187</sup>:

- seizing and destroying rotten food;<sup>188</sup>
- issuing rent orders in defense area housing;<sup>189</sup>

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<sup>186</sup> *Id.* at 335.

<sup>187</sup> Scholars have observed how courts have limited these exceptional situations to those involving a need for quick government intervention. See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325, 1399 (1991) (describing the general due process rule and stating that “[s]ometimes, however, notice and opportunity to be heard can be postponed until after the seizure is effected,” but noting that “such a relaxation of the ordinary rule requires an ‘extraordinary situation’ and a ‘special need for very prompt action’” (quoting *Fuentes*, 407 U.S. at 90–91)); Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable “Interests,” and Procedural Due Process*, 62 *N.C. L. Rev.* 57, 77 (1983) (describing the requirement for quick action before such pre-hearing deprivations can occur); *Quasi in Rem Jurisdiction and Due Process Requirements*, *supra* note 181, at 1026 (“The Court has carefully limited the scope of the ‘extraordinary situations’ exception under which the notice and hearing required by due process may be postponed until after seizure of property.”).

Some have even criticized items on the canonical list because they do not seem sufficiently like emergency situations. E.g., Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 *Hous. L. Rev.* 1145, 1181 (2004) (“The lumping of taxation together with other extraordinary situations, however, is not persuasive: although collecting taxes is crucial to the nation’s well-being, the need for speed that might justify the absence of a predeprivation hearing seems much more pronounced when considering government actions to destroy contaminated food or mislabeled drugs.”).

<sup>188</sup> *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 319–20 (1908).

<sup>189</sup> *Bowles v. Willingham*, 321 U.S. 503, 505 (1944).

- placing a savings and loan association into conservatorship;<sup>190</sup>
- confiscating mislabeled drugs;<sup>191</sup>
- ordering the sequestration of a debtor's personal property;<sup>192</sup>
- seizing movable property prior to a forfeiture action;<sup>193</sup>
- terminating disability benefits;<sup>194</sup>
- suspending a driver's license upon multiple infractions prior to a full hearing;<sup>195</sup>
- imposing corporal punishment on junior high students;<sup>196</sup>
- suspending a driver's license for refusal to take a breathalyzer;<sup>197</sup>
- suspending a horse trainer's license;<sup>198</sup>
- ordering an immediate halt to mining operations;<sup>199</sup>
- suspending an indicted official of a federally insured bank before any hearing;<sup>200</sup> and
- suspending a tenured public employee without pay.<sup>201</sup>

Consistent with the *Eldridge* factors, “[u]nderlying these decisions upholding deprivation of property prior to a hearing was a determination that the need for speedy government action to protect the public interest outweighed any private interest in obtaining the [full] trappings of due process prior to the property infringement.”<sup>202</sup> Thus, in each of these cases, the Court has considered the government's interest important enough to justify even “substantial” burdens on affected persons.<sup>203</sup>

<sup>190</sup> *Fahey v. Mallonee*, 332 U.S. 245, 247 (1947).

<sup>191</sup> *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 600 (1950).

<sup>192</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619–620 (1974).

<sup>193</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 664 (1974).

<sup>194</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335, 349 (1976).

<sup>195</sup> *Dixon v. Love*, 431 U.S. 105, 110, 113 (1977).

<sup>196</sup> *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

<sup>197</sup> *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

<sup>198</sup> *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

<sup>199</sup> *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 304–05 (1981).

<sup>200</sup> *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 232 (1988).

<sup>201</sup> *Gilbert v. Homar*, 520 U.S. 924, 931, 933–34 (1997).

<sup>202</sup> *Reed & Gill*, supra note 187, at 77; see also *Quasi in Rem Jurisdiction and Due Process Requirements*, supra note 181, at 1028 (“The explicit situations actually sanctioned by the Supreme Court for postponing notice and hearing have all exhibited threats to important government or public interests.”).

<sup>203</sup> *Barry*, 443 U.S. at 64 (“Unquestionably, the magnitude of a trainer's interest in avoiding suspension is substantial; but the State also has an important interest in assuring the integrity of the racing carried on under its auspices.”).

*Hodel v. Virginia Surface Mining & Reclamation Ass'n* is exemplary.<sup>204</sup> There, the Court entertained a pre-enforcement challenge to the Surface Mining Control and Reclamation Act of 1977 (“the Act”) on a variety of constitutional grounds. The plaintiffs challenged on due process grounds the provisions of the Act that required the Interior Secretary to order the immediate cessation of mining operations if the Secretary concluded that an operation “creates an [imminent] danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.”<sup>205</sup> If an aggrieved mine operator complained about this interference with its property, the Secretary had to respond within five days, and the Act provided for administrative review of the Secretary’s decision.<sup>206</sup> In addition, a cessation order expired thirty days after issuance unless the Secretary held a public hearing.<sup>207</sup>

In reviewing this scheme, the Supreme Court first noted the general rule about pre-deprivation hearings, but emphasized that it “has often acknowledged . . . that summary administrative action may be justified in emergency situations,” such as for the protection of public health and safety.<sup>208</sup> And those exact concerns motivated the Act’s immediate-cessation provisions, which the Court observed were passed in the wake of a tragic mining disaster in West Virginia that caused 124 deaths and left 4,000 people homeless.<sup>209</sup> In other words, the Act’s provisions allowing for immediate cessation were “precisely the type of emergency situation in which this Court has found summary administrative action justified.”<sup>210</sup>

Notwithstanding this recognition, the plaintiffs had argued that the Act failed to set forth a clear set of “objective criteria” by which the Secretary could issue a cessation order. The Court rejected that argument, finding that the statutory definitions of “imminent danger to the health and safety of the public” were sufficient.<sup>211</sup> And the fact that some of the Secretary’s orders were overturned on review showed not that the Act’s criteria were

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<sup>204</sup> 452 U.S. 264.

<sup>205</sup> *Id.* at 298 (quoting 30 U.S.C. § 1271(a)(2) (1976)).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 299 n.42.

<sup>208</sup> *Id.* at 299–300.

<sup>209</sup> *Id.* at 300 n.44.

<sup>210</sup> *Id.* at 301.

<sup>211</sup> *Id.* (citation omitted).

flawed, but that its review procedure worked.<sup>212</sup> “The possibility of administrative error inheres in any regulatory program; statutory programs authorizing emergency administrative action prior to a hearing are no exception.”<sup>213</sup>

Applying this framework, lower courts have routinely upheld seizures prior to a hearing, even in cases involving extremely weighty—indeed fundamental—private interests, when the government’s interests in protecting public health and safety are at their zenith. Three examples are particularly illuminating because of the nature of the fundamental private interests at stake: (1) removing a child from a parent’s care and custody, (2) confining a person in psychiatric care against their will, and (3) imposing restraints on a person’s right to contact or be around another person or live in one’s own home, most often in the domestic violence context.

First, courts have upheld statutes that permit *ex parte* orders authorizing government officials to remove minors from a parent’s custody and control when “immediate removal is necessary to avoid imminent danger to the child’s life or health.”<sup>214</sup> Although custody and control of one’s children is “an interest far more precious than any property right,”<sup>215</sup> the “*ex parte* order authorizing temporary custody with [the State] is permitted because of its short duration and the requirement of further action by the State before custody can be continued.”<sup>216</sup> As one court put it, this situation justifies immediate action under the *Fuentes* factors because the State’s interest is so compelling and the children’s needs

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<sup>212</sup> *Id.* at 302.

<sup>213</sup> *Id.*

<sup>214</sup> *F.K. v. Iowa Dist. Ct. for Polk Cnty.*, 630 N.W.2d 801, 804 (Iowa 2001).

<sup>215</sup> *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982); see also *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994) (“There are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate.”); *F.K.*, 630 N.W.2d at 808 (acknowledging, in the course of upholding a statute permitting *ex parte* pre-deprivation removal, that “[t]he United States Supreme Court has consistently recognized that a parent’s ‘care, custody, and control’ of a child is a fundamental liberty interest given the greatest possible protection” (citation omitted)); *In re Carmelo G.*, 896 N.W.2d 902, 907–08 (Neb. 2017) (“The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.”).

<sup>216</sup> *In re Carmelo G.*, 896 N.W.2d at 908; see also *Miller v. City of Philadelphia*, 954 F. Supp. 1056, 1061 (E.D. Pa. 1997), *aff’d*, 174 F.3d 368 (3d Cir. 1999) (“In most child custody cases, *ex parte* judicial proceedings satisfy due process because the government has a strong interest in protecting children from immediate abuse, and pre-deprivation process would insufficiently protect that interest.”).

require quick intervention.<sup>217</sup> Still, “only an imminent danger to a child’s life or health can justify removal of the child without notice and a hearing first.”<sup>218</sup>

Similarly, courts have upheld statutes allowing civil commitment orders after *ex parte* judicial determinations.<sup>219</sup> These statutes temporarily take away a person’s liberty, forcibly confining a person against their will. They often permit this detainer “when any person appears to be mentally ill and an imminent danger to others or to himself or gravely disabled.”<sup>220</sup> Because of the exceedingly important liberty interests at stake, courts have carefully delimited the timeframe and reasons for which the temporary, emergency commitments can last before a hearing is

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<sup>217</sup> *Newton v. Burgin*, 363 F. Supp. 782, 787 (W.D.N.C. 1973), *aff’d*, 414 U.S. 1139 (1974). The *Newton* court acknowledged that the third *Fuentes* factor was not met because individuals, and not government officials, could institute petitions, but it held that the due process approach must be flexible to meet the needs in the present situation.

<sup>218</sup> Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 *Fam. Ct. Rev.* 457, 458 (2003); see also *Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003) (“Consequently, courts have recognized that a state may constitutionally remove children threatened with imminent harm when it is justified by emergency circumstances.”). Indeed, in this context, courts have allowed state officials to remove children faced with imminent harm without even securing judicial authorization through anything akin to an *ex parte* proceeding. See Alyson Oswald, *They Took My Child! An Examination of the Circuit Split Over Emergency Removal of Children from Parental Custody*, 53 *Cath. U. L. Rev.* 1161, 1193 (2004) (describing cases and concluding that “[r]emoving a child from parental custody without judicial authorization, under emergency circumstances, does not violate parents’ procedural due process rights”); see also generally Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 *Ohio State L.J.* 913 (2004) (tracing the history of emergency removal of children and arguing for its constitutionality).

<sup>219</sup> See, e.g., *In re Daniel G.*, 320 P.3d 262, 273 (Alaska 2014); see also *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980) (“Although the state may have a compelling interest in temporary *ex parte* detention of persons dangerous to themselves or others, such detention is justified only for the amount of time necessary to prepare for a probable cause hearing before a neutral judge.”); *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (“[W]here a person said to be mentally ill and dangerous is involuntarily detained, he must be given a hearing within a reasonable time to test whether the detention is based upon probable cause to believe that confinement is necessary under constitutionally proper standards for commitment.”). Some states even allow for temporary holds for forty-eight or seventy-two hours *without* a court order. Leslie C. Hedman et al., *State Laws on Emergency Holds for Mental Health Stabilization*, 67 *Psychiatric Servs.* 529, 530 (2016) (identifying eight states that allow for emergency holds with no court order).

<sup>220</sup> *Curnow v. Yarbrough*, 676 P.2d 1177, 1181 (Colo. 1984); see also *Civil Commitment of the Mentally Ill*, 87 *Harv. L. Rev.* 1190, 1205 (1974) (“Recent statutory enactments appear to indicate a trend toward restricting involuntary civil commitment to the dangerous mentally ill and toward limiting the type and increasing the severity of harm necessary to support a finding of dangerousness.”).

required.<sup>221</sup> But they have recognized that quick ex parte procedures withstand due process concerns.<sup>222</sup>

Courts have even considered how such emergency civil commitment orders can affect firearm rights under federal law. In *United States v. Rehlander*,<sup>223</sup> for example, the defendants challenged their convictions under 18 U.S.C. § 922(g)(4), which forbids anyone who has been “committed to a mental institution” from possessing firearms.<sup>224</sup> The defendants had previously been involuntarily committed under Maine’s emergency commitment procedures after ex parte proceedings. They did not contest the constitutional sufficiency of that process, but argued that it would violate their due process rights to *permanently* deprive them of their Second Amendment right based on such a finding.<sup>225</sup> The First Circuit agreed, and thus read the federal law to exclude such ex parte commitments.<sup>226</sup> It noted, however, that “[t]his would be a different case if [S]ection 922 addressed ex parte hospitalizations and provided for a *temporary* suspension of the right to bear arms pending further proceedings.”<sup>227</sup> In other words, the court recognized that suspension of firearm rights after an ex parte hearing would not violate due process so long as the suspension was temporary.

Lastly, courts have upheld ex parte restraining orders that can considerably curtail a restrained person’s movement, behavior, and authority—including parental custody or visitation or even firearm

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<sup>221</sup> See, e.g., *Civil Commitment of the Mentally Ill*, supra note 220, at 1265 (“In emergency detention, the short range goals are either to protect the individual from serious harm or to prevent him from inflicting immediate injury on others, and to confine him until a more permanent disposition of his case can be made.” (footnotes omitted)).

<sup>222</sup> See Richard C. Boldt, *Emergency Detention and Involuntary Hospitalization: Assessing the Front End of the Civil Commitment Process*, 10 *Drexel L. Rev.* 1, 13 (2017) (describing cases permitting postponement of a hearing when “immediate action may be necessary to prevent imminent harm to the restrained individual”). Here, as in the child removal context, courts have allowed such emergency detentions without even requiring any judicial authorization. *Id.* at 17 (recounting how courts have recognized that in this context “the state’s interest in protecting the safety of severely mentally ill individuals and the general public is sufficiently weighty to displace any entitlement to a preliminary judicial review of the grounds for an emergency psychiatric admission”).

<sup>223</sup> 666 F.3d 45 (1st Cir. 2012).

<sup>224</sup> *Id.* at 46 (quoting 18 U.S.C. §922(g)(4) (2006)).

<sup>225</sup> *Id.* at 47.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 49.

possession.<sup>228</sup> These orders provide a useful comparison because many states have partially modeled their extreme risk laws on domestic violence restraining orders.<sup>229</sup> Most states permit temporary domestic violence restraining orders to be issued *ex parte* upon sufficient proof that the person poses a serious risk of harm.<sup>230</sup> And courts have recognized the unique factors that justify short-term *ex parte* deprivations prior to a hearing:

The existence of exigent circumstances justifies dispensing with the requirement of holding a hearing before the *ex parte* TRO is granted. The availability of a prompt post-deprivation hearing (by way of a show cause hearing), combined with the fact that the petitioner retains the burden of proof during the hearing, ensures that the respondent's interests are adequately protected.<sup>231</sup>

In *Kampf v. Kampf*, for example, the Michigan Court of Appeals considered a husband's due process challenge to his wife's procurement of an *ex parte* order restraining him from contacting her, entering the property where she lived or worked, threatening to injure her, or possessing firearms.<sup>232</sup> The court rejected his challenge. So long as the

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<sup>228</sup> See, e.g., *Kampf v. Kampf*, 603 N.W.2d 295, 296 (Mich. Ct. App. 1999) (restrained husband argued the statute permitting an *ex parte* procedure was "unconstitutional because it deprives him of his property rights and limits his right to liberty by subjecting him to the possibility of arrest and prosecution without notice or procedural safeguards"); *Blazel v. Bradley*, 698 F. Supp. 756, 768 (W.D. Wis. 1988) (upholding Wisconsin statute allowing for *ex parte* petitions only when it "is construed to require a showing of imminent harm"). To be clear, ERPOs are not a substitute for DVROs, which—as noted in the text—cover not only firearm possession but also other matters like no contact provisions, counseling provisions, and other protections. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *Hofstra L. Rev.* 801, 810 (1993) ("Currently, all fifty states plus the District of Columbia and Puerto Rico make civil protection orders available to victims of domestic violence.").

<sup>229</sup> See, e.g., Giffords, ERPO, *supra* note 53 (noting that the ERPO process in most states "typically mirror[s] the domestic violence restraining order processes in their respective states").

<sup>230</sup> David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 *Kan. J.L. & Pub. Pol'y* 83, 84 (2008) (recognizing that under almost all state domestic violence statutes "a victim of domestic violence may obtain an *emergency* *ex parte* order of limited duration" that "grant[s] various forms of relief, such as a prohibition of contact with the victim, exclusion from a shared residence, a prohibition of removing possessions from the residence, and physical care and custody of the parties' children").

<sup>231</sup> *Hamilton ex rel. Lethem v. Lethem*, 270 P.3d 1024, 1033 (Haw. 2012) (citations omitted).

<sup>232</sup> *Kampf*, 603 N.W.2d at 297.

statute requires prompt post-order notice and an opportunity to be heard, “[t]here is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice.”<sup>233</sup>

And just like in the civil commitment context, courts have also analyzed how these domestic violence orders can affect firearms rights. In *State v. Poole*, the defendant challenged his indictment for violating an *ex parte* restraining order that required him to surrender his firearms.<sup>234</sup> The court noted that the right to keep and bear arms is fundamental but held that the risk of erroneous deprivation was mitigated by the short deprivation period (six days between the order and the hearing) as well as the requirement that the trial court find that a danger of domestic violence “clearly appear[ed]” from specific facts.<sup>235</sup> Moreover, the State’s interest in protecting domestic violence victims was “clear,”<sup>236</sup> and could not be effectively vindicated without *ex parte* hearings.<sup>237</sup>

In short, the Due Process Clause protects against erroneous or wrongful deprivations of constitutionally protected liberty or property interests. But it does not erect insurmountable barriers. Though the situations justifying seizures prior to a full hearing are indeed “extraordinary,” those situations occur when the government needs to act swiftly to ensure public safety.

To be sure, in those extraordinary situations justifying seizure before a hearing, courts are quick to emphasize that due process requires a “prompt post-deprivation hearing.”<sup>238</sup> Yet “there is no obvious bright line dictating when a postseizure hearing must occur,”<sup>239</sup> and the flexibility demanded

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<sup>233</sup> *Id.* at 299; see also *Brown*, *supra* note 8, at 192 (arguing that a firearm prohibition attached to an *ex parte* order for protection does not violate procedural due process so long as the deprivation is temporary).

<sup>234</sup> *State v. Poole*, 745 S.E.2d 26, 28 (N.C. Ct. App. 2013).

<sup>235</sup> *Id.* at 36.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 37 (“Additional procedural safeguards, such as requiring a fully contested hearing before forbidding someone subject to an *ex parte* order from possessing firearms, would prevent the State from protecting victims of domestic violence at a time that those protections are most required. There is no way to protect victims of domestic violence that would provide a predeprivation hearing during the crucial period between service of the *ex parte* order and the ten-day hearing.”).

<sup>238</sup> See, e.g., *Hamilton ex rel. Lethem v. Lethem*, 270 P.3d 1024, 1033 (Haw. 2012).

<sup>239</sup> *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 562 (1983).

by the due process inquiry requires a fact-bound determination of the interests and values at stake in a particular situation.<sup>240</sup> Sometimes even lengthy delays satisfy due process if the government's interest is strong enough.<sup>241</sup> As one commentator has noted, "when the government deprives a person of a protected interest under exigent circumstances, that preliminary decision is made hastily. Afterwards, the government may need some time to gather facts to determine whether it should even seek to make the deprivation permanent."<sup>242</sup> In precisely these situations, "[t]he magnitude of the public interest in a correct decision counsels strongly against any constitutional imperative that might require overly hasty decisionmaking."<sup>243</sup>

Finally, it is important to underscore that the cases upholding child custody, civil commitment, and restraining orders do not concern criminal proceedings, although criminal proceedings might proceed alongside them. In other words, the government can, in many situations and for numerous reasons, deprive fundamental property and liberty interests without adjudicating a person guilty of violating the criminal law.<sup>244</sup> The

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<sup>240</sup> *Gilbert v. Homar*, 520 U.S. 924, 924 (1997) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). The Supreme Court has instructed courts to look at several different factors in assessing the delay: (1) "the importance of the private interest and the harm to this interest occasioned by delay;" (2) "the justification offered by the Government for delay and its relation to the underlying governmental interest;" and (3) "the likelihood that the interim decision may have been mistaken." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988).

<sup>241</sup> *Mallen*, 486 U.S. at 242–43 (upholding a ninety-day delay).

<sup>242</sup> Wasserman, *supra* note 174, at 76–77.

<sup>243</sup> *Mallen*, 486 U.S. at 244.

<sup>244</sup> There are a variety of reasons *why* officials may seek to use a civil process instead of a criminal one. Mary Cheh describes some of those reasons in the context of civil protection orders, which carry over fairly well to the extreme risk context:

First, the very process of getting a civil protection order serves notice on the offender that her conduct is in question, that the courts are involved, and that serious consequences may ensue if she keeps up her present behavior. This by itself may deter future abuse [or threatening behavior]. A CPO also can be an alternative to prosecution where, although criminal conduct plainly may be involved, the matter presents difficult proof problems, the victim is tentative about prosecution, or other facts—such as higher prosecution priorities—render prosecution impracticable or unlikely.

Second, a civil protection order can be sought, indeed may have to be sought, by the victim. In jurisdictions where the prosecutor is unwilling to proceed against a batterer and where private citizens are prevented from initiating criminal actions, this option offers a self-help alternative. Third, once a civil protection order is entered, violation thereof triggers arrest. Fourth, the use of a civil protection order permits the court, in fashioning the precise terms of the order, to proscribe conduct—under pain of criminal punishment—that in itself is not a crime. For example, some civil protection orders

common objection that extreme risk laws are improper attempts at “[s]topping ‘future crimes’” is thus fundamentally misplaced.<sup>245</sup> The government has the power to act swiftly to protect public safety without invoking the machinery of its criminal justice system, so long as it comports with the Due Process Clause in doing so.

## *2. Extreme Risk Laws’ Ex Parte Procedures Fit Comfortably in the Due Process Framework*

One of the biggest flashpoints in the debate over extreme risk laws is the possibility that property can be seized before the gun owner receives notice or an opportunity to contest the order. All existing extreme risk laws authorize this kind of initial, ex parte order, though such orders have different burdens, procedures, and consequences than those issued after a notice and full hearing.

Supporters argue that these ex parte proceedings are essential to address crisis situations in which a gun owner poses an immediate risk of harm to himself or others and yet is unavailable (perhaps because unwilling) to appear in court.<sup>246</sup> The availability of a prompt post-deprivation hearing means that the ex parte orders are only temporary and of a relatively short duration. Opponents argue that ex parte orders are particularly “Kafkaesque,” an endorsement of “the concept of stripping Americans of their constitutional rights in secret proceedings where they have no voice.”<sup>247</sup> As one critic put it: “Someone can go to a judge,

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direct the abuser to vacate her home, have no contact with the victim, or stay off certain property.

Cheh, *supra* note 187, at 1405–06 (footnotes omitted). In addition to these reasons, states may also wish to use other processes to avoid adding to the problems of mass incarceration.

<sup>245</sup> Thomas Massie & John R. Lott Jr., ‘Red Flag’ Laws Are the Wrong Solution to Mass Shootings, *Nat’l Rev.* (Aug. 12, 2019, 4:08 PM), <https://www.nationalreview.com/2019/08/red-flag-laws-are-the-wrong-solution-to-mass-shootings/> [https://perma.cc/B6J2-5SS]. For a critique, see French, *supra* note 158 (“There is no ‘pre-crime’ conviction in American law. You won’t face life in prison for homicidal ideation, but you might face an injunction. . . . In some circumstances you should lose access to firearms for a limited period of time. This is a reasonable response to *evidence* of a threat.”).

<sup>246</sup> Yablon, *supra* note 59 (explaining the position of a GOP state representative from Pennsylvania, who adopted every NRA-suggested edit to his extreme risk bill except the one doing away with ex parte orders).

<sup>247</sup> Hammond, *supra* note 93; see also Niño, *supra* note 57 (arguing that “due process rights are turned upside down, as gun owners are presumed to be guilty and must then prove their innocence”).

declare you dangerous, and you won't get a chance to defend yourself in court."<sup>248</sup>

But the real issue is not *whether* a gun owner will “get a chance to defend [himself] in court” but *when*.<sup>249</sup> And as the prior discussion demonstrated, the Supreme Court has permitted these types of ex parte orders in similar situations involving fundamental interests when necessity requires quick action.

In keeping with the due process principles discussed above, existing extreme risk laws tie the availability of ex parte relief to the types of harms the Supreme Court and many other courts have recognized as allowing deprivations prior to a full hearing. In *Fuentes* terms, the immediate seizure is “directly necessary to secure an important governmental or general public interest”;<sup>250</sup> there is “a special need for very prompt action” in this context;<sup>251</sup> and no seizure can occur without approval of “a government official responsible for determining, under the standards of a narrowly drawn statute, that it [i]s necessary and justified in the particular instance.”<sup>252</sup> Another way to flesh this out is by looking to the three factors *Eldridge* introduced: the individual interest, the risk of error, and the government interest.<sup>253</sup>

Under the first *Eldridge* factor, the private interest in firearms possession is undeniably important. Like the interests of parents in their children and individuals in their freedom from confinement and freedom of movement, gun possession is a fundamental constitutional right.

Still, the “hardship imposed upon”<sup>254</sup> a gun owner by a temporary deprivation should not be overstated. It is exceedingly unlikely that a short-term ERPO will deprive a person of the ability to effectuate the “core” Second Amendment interest in armed self-defense. Firearm use in self-defense is rare,<sup>255</sup> and it would be striking were such a need to arise in the (up to) fourteen-day period that most ex parte ERPOs cover.

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<sup>248</sup> Bandlamudi, *supra* note 52 (quoting Paul Valone of Grass Roots North Carolina, a gun rights advocacy group).

<sup>249</sup> *Id.*

<sup>250</sup> *Fuentes v. Shevin*, 407 U.S. 67, 90–92 (1972).

<sup>251</sup> *Id.* at 91.

<sup>252</sup> *Id.*

<sup>253</sup> See *supra* notes 185–86 and accompanying text.

<sup>254</sup> *Mathews v. Eldridge*, 424 U.S. 319, 342 (1976).

<sup>255</sup> Philip J. Cook & Kristin A. Goss, *The Gun Debate: What Everyone Needs to Know* 21 (2014) (“[T]here is one defensive gun use per year against an intruder for every 3,500 homes that keep guns.”).

Especially when a person is in the grips of a mental health crisis, or otherwise presenting a risk to herself or others, the odds of a successful self-defense action seem far lower than the odds of gun misuse. As Fred Vars notes, “A person suffering from delusions or hallucinations cannot be trusted to use a firearm defensively in an objectively reasonable fashion.”<sup>256</sup> Thus, although the private interest factor points in favor of the gun owner, that factor should not be given undue weight.<sup>257</sup>

Under the second factor, the risks of an erroneous deprivation in the context of a mistaken ex parte order are not entirely clear. Some evidence suggests that not all ex parte orders turn into full, final ERPOs. A 2015 study of Indiana’s gun seizure law, focusing on 404 petitions filed between 2006 and 2013, found that “seized firearms were retained by the court at the initial hearing in 63% of cases; this retention was closely linked to the defendant’s failure to appear at the hearing.”<sup>258</sup> Whether there is a causal link, such that participation is important to avoid error, is harder to say. A study of Connecticut’s law noted that of the 764 risk warrants served between 1999 and 2013, firearms were returned to the owner after the adversary hearing in only twenty cases, though researchers noted that data was missing for approximately seventy percent of the final outcomes.<sup>259</sup>

More fundamentally, it is not entirely clear how one would measure whether initial ex parte orders are “erroneous.” Some have argued that the ex parte orders have a high “error rate” because, as observed above, the ERPO is not always maintained after the full hearing.<sup>260</sup> But if the ERPO

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<sup>256</sup> Vars, *supra* note 8, at 1650.

<sup>257</sup> This point becomes especially clear when comparing the potential harm to a gun owner, from a temporary removal to the sometimes severe and long-term harms possible in other situations where courts have sanctioned seizures prior to a hearing. See, e.g., Chill, *supra* note 218, at 459 (detailing the “range and extent of harm” from unnecessary removals of children from their families, including psychological and financial harm, the potential for abuse in foster homes, and additional stresses on an overworked system).

<sup>258</sup> George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013*, 33 *Behav. Sci. & L.* 308, 308 (2015).

<sup>259</sup> Norko & Baranoski, *supra* note 37, at 1618–19.

<sup>260</sup> See *Red Flag Laws: Examining Guidelines for State Action: Hearing before the S. Comm. on the Judiciary*, 116th Cong. 5 n.1 (2019) (statement of David B. Kopel), <https://www.judiciary.senate.gov/imo/media/doc/Kopel%20Testimony1.pdf> [<https://perma.cc/46CW-78CF>] (stating that “[a]bout a third of gun confiscation orders are wrongly issued against innocent people” based in part on a misreading of Norko and Baranoski’s article). Compare this statement with other research. Swanson et al., *supra* note 72, at 193 (“Among cases with known outcomes at hearing, results were as follows: guns held by police, sixty percent; guns ordered destroyed or forfeited, fourteen percent; guns returned directly to the

is not continued after the full hearing, perhaps it is because a true emergency has abated. In that case, the *ex parte* order would have been both necessary (and therefore properly issued) and a significantly lesser burden than if a longer, more permanent ERPO was entered at the initial stage. And, as Richard Fallon has observed, due process analysis has taken on “a strikingly managerial aspect,” in which “[a]ttention centers . . . on whether decisionmaking structures are adequate to achieve, on average, a socially tolerable level of accuracy in the application of law to fact.”<sup>261</sup> Even if there will be erroneous decisions that result in wrongly issued ERPOs in some number of cases, the focus is on whether the framework creates a system that minimizes those instances to an acceptable level.<sup>262</sup>

In this context, the “social disutility”<sup>263</sup> of an incorrectly *denied* ERPO will almost certainly outweigh that of an incorrectly *granted* one. A temporary, fourteen-day deprivation of firearm rights is unlikely to result in any physical harm or lasting damage, even if the court was wrong about the risk. But if a court miscalculates and fails to grant an ERPO where one is necessary, then permanent, irrevocable, and devastating consequences can follow.<sup>264</sup>

Finally, under the third factor, the governmental and public interests are undeniable, and are tied to the speed of the hearing. The situations in which the Supreme Court has allowed the practice are precisely analogous to the extreme risk context—where “quick action” is necessary to thwart serious potential harm.<sup>265</sup> Existing extreme risk laws only allow for emergency, *ex parte* relief if the petitioner can plead and prove that such quick action is necessary. In Delaware, for example, only law

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subject, ten percent; guns transferred to another individual known to the subject and legally eligible to possess guns, eight percent; other, eight percent.”); cf. also *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 302 (1981) (remarking that erroneous decisions do not undermine a law, because “[t]he relevant inquiry is not whether a cessation order should have been issued in a particular case, but whether the statutory procedure itself is incapable of affording due process”).

<sup>261</sup> Fallon, *supra* note 169, at 311.

<sup>262</sup> See Brown, *supra* note 8, at 197 (“Admittedly, mistakes can be made, and false complaints can be filed, creating a slight chance of an erroneous deprivation. But this chance of erroneous deprivation has existed since the creation of the first OFP statutes, because the nature of domestic violence often requires immediate action.”).

<sup>263</sup> *In re Winship*, 397 U.S. 358, 371 (1970).

<sup>264</sup> See, e.g., *Wintemute et al.*, *supra* note 79.

<sup>265</sup> *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986).

enforcement can initiate an emergency process to obtain an ERPO, and they must allege (and prove) that the “respondent poses an immediate and present danger of causing physical injury to [him]self or others by controlling, purchasing, owning, possessing, controlling, purchasing, having access to, or receiving a firearm.”<sup>266</sup> Similarly, in Oregon, the petitioner must prove that “the respondent presents a risk in the near future, including an imminent risk, of suicide or of causing physical injury to another person.”<sup>267</sup> All other state laws permitting emergency relief are similar.

In sum, the factors that have led courts to uphold civil commitment, child custody removal, and restraining orders with no pre-deprivation hearing support the practice of issuing ex parte ERPOs. But, just like in those contexts, the person deprived of property is entitled to a prompt post-deprivation hearing. Accordingly, the duration of ex parte orders in extreme risk laws is limited. Only three states allow ex parte orders to stay in place for more than two weeks.<sup>268</sup> The rest are up to fourteen days or less.<sup>269</sup> By comparison, some states impose waiting periods on some kinds of firearm purchases;<sup>270</sup> to our knowledge, none have been struck down as unconstitutional.<sup>271</sup>

The interest in having one’s firearms is significant, but the justification for delay and the confirmation of judicial authorization all point to the reasonableness of a short span of mere weeks before the final hearing. Because there is such an overriding interest in getting the question right—it could have profound and devastating effects—the ability of either the State or a private petitioner to gather and marshal the evidence necessary to make its case “counsels strongly against any constitutional imperative

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<sup>266</sup> Del. Code Ann. tit. 10, § 7703 (1974).

<sup>267</sup> Or. Rev. Stat. Ann. § 166.527(6)(a) (West Supp. 2019).

<sup>268</sup> Those three states are California, Delaware, and Oregon. For a helpful chart, see Giffords Law Ctr. to Prevent Gun Violence, ERPO Procedures By State [https://lawcenter.giffords.org/wp-content/uploads/2020/02/ERPO\\_Table\\_2-26-20.pdf](https://lawcenter.giffords.org/wp-content/uploads/2020/02/ERPO_Table_2-26-20.pdf) [<https://perma.cc/BK2W-U6S7>] (last visited March 26, 2020).

<sup>269</sup> Id.

<sup>270</sup> Brian Burns, *Holding Fire: Why Long Waiting Periods To Buy a Gun Violate the Second Amendment*, 7 *Charleston L. Rev.* 379, 399–400 (2013) (noting laws in eleven states).

<sup>271</sup> See, e.g., *Silvester v. Harris*, 843 F.3d 816, 819 (9th Cir. 2016) (upholding California’s ten-day waiting period for subsequent purchase). For an argument against the constitutionality of even one-day periods, see Burns, *supra* note 270, at 410 (arguing that “longer waiting periods—those extending beyond twenty-four hours—should be struck down as unconstitutional”).

that might require overly hasty decisionmaking.”<sup>272</sup> Especially because a judicial officer makes the initial determination with the burden of proof on the petitioner, there is a lower likelihood of mistaken deprivations than in many other contexts.<sup>273</sup>

### *B. The Standard of Proof*

Another crucial question for the due process analysis is what burden must be carried before a person is deprived of a legally protected interest—what the standard of proof is, in other words. The government cannot simply permit individuals or public officials to enter court, claim a right to relief, and then transfer or confiscate property without putting the claimant’s demand to the test.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.<sup>274</sup>

It also serves a symbolic function: “to indicate the relative importance attached to the ultimate decision.”<sup>275</sup> Justice Harlan described how the burden of proof “reflect[s] an assessment of the comparative social disutility of each” type of error—false positives and false negatives.<sup>276</sup> Where we draw the line depends on the values at stake on both sides of the ledger.

The focus of extreme risk laws is, as the name suggests, *risk*—that is, they permit guns to be taken away upon a sufficient showing, from an appropriate source, that a particular person is at risk of harming himself or others. The constitutional (and for that matter political) questions depend in large part on how that showing is structured, which in turn generally depends on what kind of order is being sought. In California, for example, a temporary emergency order can be issued if there is “reasonable cause to believe” that the subject presents an “immediate and

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<sup>272</sup> Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 244 (1988).

<sup>273</sup> See supra notes 258–60 and accompanying text.

<sup>274</sup> Addington v. Texas, 441 U.S. 418, 423 (1979) (citation and internal quotation marks omitted).

<sup>275</sup> Id.

<sup>276</sup> In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

present danger” and that an emergency order is necessary,<sup>277</sup> while an ex parte order depends on a “substantial likelihood” of “a significant danger, in the near future,”<sup>278</sup> and a final (and lengthier) order depends on “clear and convincing evidence” of “a significant danger.”<sup>279</sup> These varying standards of proof make it important to be precise about what kind of order is at issue.

### *1. Principles for Establishing the Burden of Proof*

Questions about the appropriate burden of proof arise both at the stage of the temporary ex parte deprivation and when the full evidentiary hearing occurs. At the initial stage, the Supreme Court has held that a law satisfies due process when it requires the plaintiff to “satisfactorily establish[] probable cause to believe” that the statutory criteria for deprivation are satisfied.<sup>280</sup> It has said, in the context of revoking a driver’s license, that “due process require[s] only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee.”<sup>281</sup> In other cases, it has described the burden at this initial stage as requiring only “a substantial assurance that the deprivation is not baseless or unwarranted.”<sup>282</sup> That, as the phrase suggests, is a fairly low standard.<sup>283</sup>

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<sup>277</sup> Cal. Penal Code §§ 18125, 18145 (Deering Supp. 2020).

<sup>278</sup> Id. § 18150(b).

<sup>279</sup> Id. § 18175.

<sup>280</sup> *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

<sup>281</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (describing the holding in *Bell v. Burson*, 402 U.S. 535, 540 (1971)).

<sup>282</sup> *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988); see also *Marentette v. City of Canandaigua*, 351 F. Supp. 3d 410, 427–28 (W.D.N.Y. 2019) (“[T]he substantial evidence standard appears to be appropriately suited to serve as a preliminary check against baseless administrative charges by ensuring that the record contains ‘reasonable grounds’ to support the charges at issue.”).

<sup>283</sup> Indeed, the standard can be met even without an independent, neutral arbiter reviewing the evidence. See *Spiegel v. Ryan*, 946 F.2d 1435, 1440 (9th Cir. 1991) (rejecting requirement for independent review and holding that an agency’s order imposing deprivation prior to a hearing met the *Mallen* standard based on “a combination of factors: the [agency] was required to meet specific statutory requirements before issuing the order, the decision to issue the order was made by the head of the agency expert in these matters, and his decision was supported by detailed findings of [the defendant’s] misconduct following a long investigation by the [agency’s] examiners, the results of which were submitted to the district court under penalty of perjury”); *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 349 (4th Cir. 1994) (upholding statute permitting child removal for up to seventy-two hours before even ex parte judicial review could be obtained and stating that “[e]specially given the enormity of the potential consequences of an erroneous *return* of a child to an abusive family, we cannot say that the

Once the full evidentiary hearing occurs, the burden continues to rest with the person seeking to continue the deprivation. What that final burden should be is a function of the *Eldridge* calculus, under which the court considers the private and public interests and the risk of error.<sup>284</sup> The Supreme Court has also employed a special focus in answering burden-of-proof questions, looking to factors such as “the nature of the private interest at stake; the standard of proof applied by a majority of states in that kind of case; the role of the state in the litigation; and the nature of the issues to be decided in the proceeding.”<sup>285</sup>

When the individual interest is extremely strong, and the deprivation is potentially permanent or indefinite, the Supreme Court has required a heightened standard. The Court has, for instance, unanimously concluded that due process requires a heightened standard before an individual can be indefinitely confined in a mental hospital against their wishes. In *Addington v. Texas*,<sup>286</sup> the Court noted the continuum between the preponderance-of-the-evidence standard, used in ordinary civil cases where only money is at issue, and the beyond-a-reasonable-doubt standard, used in criminal cases, where “the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”<sup>287</sup> In between those two is the clear-and-convincing standard, used for allegations of quasi-criminal wrongdoing (e.g., fraud) or when “particularly important individual interests” are at stake.<sup>288</sup>

In *Addington*, the Court settled on the intermediate standard—clear and convincing evidence.<sup>289</sup> The individual interests were substantial,<sup>290</sup> and “[a]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder.”<sup>291</sup> That could lead to erroneous results that weigh in favor of a heightened standard. But the highest, beyond-a-reasonable-

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requirements of procedural due process demand more where a removal is effected shortly before or during a weekend”); cf. *Bd. of Governors of Fed. Rsrv. Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 1002 (5th Cir. 1994) (holding that the trial court ruling that the plaintiff had presented “a prima facie showing” of its right to relief satisfied *Mallen*).

<sup>284</sup> See supra notes 185–86 and accompanying text.

<sup>285</sup> Wasserman, supra note 174, at 103–04.

<sup>286</sup> 441 U.S. 418 (1979).

<sup>287</sup> *Id.* at 423.

<sup>288</sup> *Id.* at 424.

<sup>289</sup> *Id.* at 431–33.

<sup>290</sup> *Id.* at 425–26.

<sup>291</sup> *Id.* at 426.

doubt standard was not warranted for at least three reasons: (1) the State was not acting punitively, to punish the mentally ill, (2) that standard has historically been confined to criminal contexts, and (3) the question at issue in commitment contexts is not the same sort of straightforward factual question at issue in criminal cases.<sup>292</sup> On this last point, the Court underscored the difficult assessment required here:

Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.<sup>293</sup>

As a result, the intermediate standard best protected the competing interests.

Likewise, the Court has mandated this heightened standard when dealing with other significant private interests that can be deprived permanently. In *Santosky v. Kramer*,<sup>294</sup> it stated that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”<sup>295</sup> There again, however, the Court recognized the sensitive and nuanced judgments that made requiring the beyond-a-reasonable-doubt standard unwise.<sup>296</sup> And it noted how the majority of states considered the intermediate, clear-and-convincing standard the most appropriate.<sup>297</sup> Similarly, in *Woodby v. INS*,<sup>298</sup> the Court held that in deportation proceedings, the government must “establish the facts supporting deportability by clear, unequivocal, and convincing evidence.”<sup>299</sup>

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<sup>292</sup> Id. at 427–29.

<sup>293</sup> Id. at 429.

<sup>294</sup> 455 U.S. 745 (1982).

<sup>295</sup> Id. at 747–48.

<sup>296</sup> Id. at 769 (“Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress.”).

<sup>297</sup> Id.

<sup>298</sup> 385 U.S. 276 (1966).

<sup>299</sup> Id. at 277.

## 2. *The Burden of Proof in the Extreme Risk Context*

The foregoing cases show that the Court has required heightened standards of proof when important interests can be completely deprived. But the Court has rejected calls to impose the highest burden in the civil context, even for liberty interests the Court has described as the most central and compelling.<sup>300</sup> The question, then, is how the mix of government and private interests affects the standard that should govern at both stages of the inquiry of the ERPO process.

At the *ex parte* stage, a low standard that recognizes the potentially catastrophic consequences of a wrong decision in failing to grant a warranted ERPO makes the most sense. The imposition on the gun owner is very short, and the requirement for judicial authorization minimizes many of the possible harms. Nonetheless, as commentators note in the domestic violence context, the potential for abuse makes it “incumbent upon courts to treat orders of protection as they would any other request for *ex parte* relief and ensure that relief be granted only when necessary to prevent the risk of immediate and irreparable injury.”<sup>301</sup>

In current state laws, the most common standard of proof for *ex parte* orders is reasonable, probable, or good cause of an imminent risk.<sup>302</sup> In four other states, the standard is preponderance of the evidence,<sup>303</sup> and in one (Oregon), the evidence must be clear and convincing.<sup>304</sup> All of these statutes require the decision to be made by a judicial officer.<sup>305</sup> They mirror the *ex parte* requirements in many domestic violence restraining order statutes and other similar contexts.<sup>306</sup> The convergence of states on

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<sup>300</sup> *Addington v. Texas*, 441 U.S. 418, 431 (1979) (“We conclude that it is unnecessary to require states to apply the strict, criminal standard.”); *Santosky*, 455 U.S. at 769–70 (holding that the beyond-a-reasonable-doubt standard is not required for termination of parental rights).

<sup>301</sup> Taylor et al., *supra* note 230, at 117.

<sup>302</sup> Giffords, ERPO, *supra* note 53 (listing eleven states and the District of Columbia employing this standard).

<sup>303</sup> *Id.* (listing Colorado, Delaware, Nevada, and Vermont).

<sup>304</sup> *Id.* This likely has to do with the fact that in Oregon, an *ex parte* order automatically becomes final if not challenged by the respondent. Or. Rev. Stat. Ann. § 166.527(7)(f) (West Supp. 2019) (specifying in the notice to a respondent that “[i]f you do not request a hearing, the extreme risk protection order against you will be in effect for one year unless terminated by the court”).

<sup>305</sup> Zick, *supra* note 8 (explaining that state extreme risk laws “expressly require a judicial order before removal of firearms”).

<sup>306</sup> See, e.g., Taylor et al., *supra* note 230, at 118–33 (cataloguing state domestic violence restraining order laws and showing standards for *ex parte* orders); N.C. Gen. Stat. § 122C-261(b) (2019) (prescribing, in the civil commitment context, the “reasonable grounds”

a fairly low standard of reasonable, probable, or good cause factors into the conclusion that such a standard is permissible. These laws probably satisfy the competing interests and implement the due process concerns for fairness and flexibility at the *ex parte* stage, where courts have only required substantial assurance that the decision was not unfounded or arbitrary.<sup>307</sup> As the Supreme Court itself has upheld statutes requiring just “probable cause” at this stage, these procedures are likely adequate to pass constitutional muster.<sup>308</sup>

As to the full ERPO, if the deprivation were permanent—and it is worth emphasizing that it is not<sup>309</sup>—there is almost no question that the considerations from *Addington*, *Santosky*, and *Woodby* would require use of the clear-and-convincing standard. The fact that the deprivation is only temporary—usually six months to a year, and subject to rescission—may mitigate the concerns from those cases.

It is also abundantly clear that the beyond-a-reasonable-doubt standard is not required. An ERPO is not a criminal disposition, and the Supreme Court has not extended that burden of proof outside the criminal (or criminal-like juvenile adjudication) context. And all of the reasons the Court adduced in *Addington* and *Santosky* to reject such a demanding standard apply equally here as well. As there, the conclusion as to whether an ERPO is warranted “turns on the *meaning* of the facts,” not simply whether those facts exist.<sup>310</sup> That makes it extremely unlikely that a petitioner could meet the heavy burden demanded in a criminal prosecution. Even the NRA does not argue for a reasonable doubt threshold: “An order should only be granted when a judge makes the

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standard to authorize law enforcement to take a dangerously mentally ill person into custody for evaluation).

<sup>307</sup> See *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988); see also *Marentette v. City of Canandaigua*, 351 F. Supp. 3d 410, 427–28 (W.D.N.Y. 2019) (“[T]he substantial evidence standard appears to be appropriately suited to serve as a preliminary check against baseless administrative charges by ensuring that the record contains ‘reasonable grounds’ to support the charges at issue.”).

<sup>308</sup> See *supra* notes 280–81.

<sup>309</sup> Some criticisms are predicated on the misunderstanding that ERPOs are permanent, when in fact even a “final” order is time-limited. See, e.g., Dershowitz, *supra* note 109 (“Red-flag laws would be worth trying as a remedy for gun violence if they remained limited to temporary gun confiscation pending a timely due-process review.”).

<sup>310</sup> *Addington v. Texas*, 441 U.S. 418, 429 (1979).

determination, by clear and convincing evidence, that the person poses a significant risk of danger to themselves or others.”<sup>311</sup>

Beyond this fact, however, there are hard questions about the constitutional minimum floor for the longer-term “final” orders. On the one hand, the constitutional right to firearm possession is undeniably fundamental. On the other, an erroneous denial can lead to no less catastrophic consequences at this stage than at the *ex parte* one. There are also questions not just about what the Constitution requires, but about best practices for ensuring adequate protection for compelling interests on both sides of the equation.<sup>312</sup> The goal of this Article is not to bless or condemn particular state statutes or adjudicate their varying burdens of proof. But this Article does identify some considerations beyond the compelling private interests that courts will likely consider when confronting challenges to these laws.

First, courts will look to the standard of proof applied by most other states. In twelve of the existing extreme risk laws, the standard of proof for orders after the adversary hearing is clear and convincing evidence, and it is preponderance of the evidence in five states and the District of Columbia.<sup>313</sup> Courts might also look to the analogous domestic violence context, where many states permit entry of final orders of protection or restraining orders if the plaintiff presents “reasonable grounds”<sup>314</sup> to support a claim or prove the case by a “preponderance of the evidence.”<sup>315</sup> As more states adopt extreme risk laws, the burdens they employ will inform the constitutional calculus.

Second, courts will consider the role of the State in the proceeding. In some extreme risk laws, petitions are filed and orders are sought by

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<sup>311</sup> Emergency Risk Protection Orders (ERPOs), NRA-ILA (Jan. 8, 2019), <https://www.nra-ila.org/get-the-facts/emergency-risk-protection-orders-erpos/> [https://perma.cc/6P2R-CJ9S].

<sup>312</sup> For example, Colorado’s extreme risk law provides the right to counsel for ERPO respondents, even though the Supreme Court has not held that the Constitution mandates the right to an attorney in civil cases. Colo. Rev. Stat. § 13-14.5-103(6)(g) (2019) (stating that a respondent must be informed that “[a]n attorney will be appointed to represent you, or you may seek the advice of your own attorney at your own expense as to any matter connected with this order”).

<sup>313</sup> Giffords, ERPO, *supra* note 53.

<sup>314</sup> See, e.g., Wis. Stat. § 813.12(4)(a)3 (2017–18); see also Fla. Stat. § 741.30(6)(a) (2019) (“Upon notice and hearing, when it appears to the court that the petitioner is either the victim of domestic violence as defined by s. 741.28 or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court may grant such relief as the court deems proper, including an injunction . . .”).

<sup>315</sup> See, e.g., 23 Pa. Stat. and Cons. Stat. Ann. § 6107(a) (West 2019).

government officials.<sup>316</sup> In others, private individuals who stand in some special relationship to the respondent are allowed to petition without prior intervention from the State.<sup>317</sup> Where the State is the actor involved, courts may require other procedural safeguards to balance the power, such as appointment of counsel (as Colorado's extreme risk law provides)<sup>318</sup> or other levers of support to ensure the respondent's rights are adequately protected. Or they might mandate that the State meet a higher burden of proof than an ordinary private litigant seeking money damages in a civil suit.

Finally, courts will look to the nature of the proceedings, including the possibilities for error. Like hearings over the danger a child faces from allegedly abusive parents or the danger a mentally ill individual poses to himself or others, extreme risk proceedings turn on complex and nuanced judgments about concepts for which we lack perfectly predictive scientific evidence. As noted above, this notion points away from a demanding burden of proof that would make it impossible to vindicate the government's compelling interest in public safety. And the possibility of an erroneous deprivation—while real and important—is no less substantial than the risk of an erroneous denial that leads to injury or death.<sup>319</sup>

#### CONCLUSION

Thus far, no court has declared an extreme risk law unconstitutional on any grounds.<sup>320</sup> But the debates about extreme risk laws are likely just beginning, in legislatures, in scholarly discourse, and in courts. And those debates will be largely driven—both as a matter of policy and constitutional law—by considerations of what due process requires. Some experts, for example, have argued that “state red flag laws are generally consistent with procedural fairness” because they impose the burden on the petitioner, guarantee judicial oversight, and provide a prompt hearing

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<sup>316</sup> E.g., Conn. Gen. Stat. § 29-38c(a) (2019).

<sup>317</sup> E.g., Md. Code Ann., Pub. Safety § 5-601(e)(2) (LexisNexis 2018).

<sup>318</sup> Colo. Rev. Stat. § 13-14.5-103(6)(g) (2019) (detailing the requirements for a temporary order, including notice to the respondent that for the hearing “[a]n attorney will be appointed to represent you, or you may seek the advice of your own attorney at your own expense as to any matter connected with this order”).

<sup>319</sup> See supra note 264 and accompanying text.

<sup>320</sup> See Foster, supra note 65; see also Caroline Shen, Note, A Triggered Nation: An Argument for Extreme Risk Protection Orders, 46 *Hastings Const. L.Q.* 683, 692–711 (2019) (canvassing relevant case law from across federal circuits).

that focuses on risk.<sup>321</sup> Courts considering challenges to extreme risk laws so far have upheld them against Second Amendment and other claims,<sup>322</sup> and a Florida appeals court also recently rejected a due process claim. In *Davis v. Gilchrist County Sheriff's Office*,<sup>323</sup> the man who had a risk protection order entered against him claimed, among other things, that Florida's entire extreme risk statute was unconstitutional. Although the court characterized part of his challenge as a "substantive due process" challenge, it spoke in terms that sound also in procedural due process when upholding the law:

The statute . . . requires a hearing within fourteen days of a[] [risk protection order] petition being filed, thus affording a respondent due process and a prompt opportunity to resist a final order. Moreover, the statute incorporates an added due process safeguard by requiring proponents to meet the heightened "clear and convincing" burden of proof standard. Furthermore, the duration of the RPO may not exceed twelve months, and the statute contains a mechanism whereby the respondent can request early termination of the order. Finally, the statute clearly requires the listed factors be considered within a specific context—the threat of gun violence.<sup>324</sup>

Because of these protections, the court rejected the constitutional challenge.<sup>325</sup>

As extreme risk laws continue to spread, further constitutional challenges will undoubtedly follow. Our goal in this Article has been to illustrate the fundamental questions of due process that will be central to those challenges—and thus to the future of gun rights and regulation.

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<sup>321</sup> Zick, *supra* note 8.

<sup>322</sup> See, e.g., *Hope v. State*, 133 A.3d 519, 524–25 (Conn. App. Ct. 2016); *Redington v. State*, 992 N.E.2d 823, 830–39 (Ind. Ct. App. 2013).

<sup>323</sup> 280 So. 3d 524 (Fla. Dist. Ct. App. 2019).

<sup>324</sup> *Id.* at 533 (citations omitted).

<sup>325</sup> *Id.*