Extreme Risk Protection Orders to Reduce Firearm Violence

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Many states have adopted risk-based, preemptive gun removal laws to reduce gun violence. In this column, the authors describe the general structure of these laws, consider arguments for and against them, and briefly review the evidence regarding their impact. As psychiatrists in a state that recently implemented such a law, the authors consider the possible impact of the law on their practice and the well-being of their patients and the public, including the possibility that they and other Oregon psychiatrists could be held liable for failing to address the topic of gun seizure with a patient's family.

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In recent years, states have implemented extreme risk protection orders (ERPOs) with increasing frequency. ERPOs offer the possibility of gun violence prevention by providing a mechanism for temporary, risk-based, and preemptive removal of firearms from dangerous individuals. Alternatively known as gun violence restraining orders, risk protection orders, risk warrants, and red flag laws, these laws generally have been implemented in the wake of mass shootings, which unfortunately have become commonplace in the United States. The Parkland school shooting on February 13, 2018, seemed to politically galvanize the public in ways that previous similar tragedies had not, and since then the number of states implementing these laws has doubled.

The topic of gun removal is contentious and politically charged. Central arguments in favor of these laws include research that indicates that access to firearms increases the risk of suicide, the notion that those closest to an individual often see warning signs or changes in behavior that indicate increased risk of violent or self-harm behaviors, and law enforcement's limited options for intervention if an at-risk individual refuses treatment, cannot be civilly committed, and has not committed an illegal act. Opponents counter that these laws infringe upon Second Amendment rights and call for the confiscation of property by police without due process and without accusation or commission of a crime. Critics also question whether, as persons without mental health credentials or specialized training in this domain, court officials should have the ability to make a judgment about an individual's risk of harm to him or herself or others.

At the time of writing, 13 states had enacted ERPO laws (1). Because most of these laws are new, their overall impact is unknown. ERPO laws in Connecticut, which has the longest-standing ERPO law, and Indiana have been the most closely studied. However, California's law creating a process for obtaining a gun violence restraining order did not go into effect until January 2016. Similarly, ERPO laws in Washington and Oregon went into effect in December 2016 and January 2018, respectively. The remaining states with such laws did not pass legislation until 2018.

As more states implement or propose ERPO laws, the frequency of debates over the constitutionality and effectiveness of these laws will increase. In 2016, the constitutionality of the Connecticut law was upheld by a state court (2), but it remains to be seen what collective evidence emerges regarding the impact of these laws. Research that clearly outlines the effects of these laws is needed to inform legislators in other states about the potential benefits to public health. Additionally, research can inform courts about the degree to which these laws further government interests regarding the welfare of society and allow courts to weigh these potential benefits against the perceived curtailment of Second Amendment rights.

General Structure of ERPO Laws

The legal procedure of gun removal varies from state to state; however, all ERPO laws share a basic framework. In all states with ERPOs, the process for gun removal can be initiated by law enforcement, and in a subset of states the process can be initiated by a family member (the definition of a family member varies by state) or a state's attorney. Most states exclude mental health professionals as initiators of ERPOs; however, Maryland's law, which went into effect in October 2018, allows some classes of mental health professionals to act as petitioners (3). The initiation of the gun removal process requires a low burden of proof, described

by different states as probable cause, reasonable cause, or substantial likelihood. The petitioner is required to demonstrate that an individual poses a risk to him- or herself or others and is in possession of a firearm. In determining whether to remove an individual's guns, a court will consider the factors outlined in the law. Some states make the presence of mental illness a central factor, whereas other states disallow the consideration of mental illness from the court's determination. Other factors, such as criminal history, history of domestic violence, and history of drug or alcohol abuse are also considered by the courts, which make their decisions on an *ex parte* basis (involving only one party, i.e., the petitioner).

In certain states, if the initial burden is met, the court issues a warrant permitting firearm removal. The warrant permits law enforcement to search for guns and seize any guns and ammunition they find at the residence of the individual subject to the warrant. In other states, the individual is served with an order directing him or her to surrender firearms to law enforcement within a certain time period. In all states, once a warrant is executed or an order issued, law enforcement will determine whether to leave the person alone following removal of the weapons or whether he or she should be transported to an emergency room (if there is concern about a mental health crisis) or arrested (if there is evidence of a crime). In all states, following execution of the warrant or issuance of an order, the subject cannot purchase or possess firearms for a certain length of time, at least until a hearing takes place, which typically must occur within 14 to 30 days. During this hearing, a court must determine whether the individual should be barred from possessing or purchasing firearms for an extended time (typically 180 days to a year). The petitioner must demonstrate, by either a preponderance of the evidence or clear and convincing evidence (depending on the state), that the respondent remains a threat. If this burden is not met, the warrant or order is terminated. If this burden is met, the firearm prohibition can be extended.

Evidence of ERPO Efficacy

Research regarding the impact of ERPO laws is limited. Connecticut's statute has been studied most closely. Norko and Baranoski (4) reviewed gun removal data from October 1, 1999, to July 31, 2013. Removal of firearms in their study was not significantly related to preexisting mental disorder diagnoses; the typical respondent was in a crisis triggered by a major life stress. The most common demographic profile was a man from a town rather than a city, 30 to 60 years old, facing a stressor related to health, finances, death in the family, or the end of a relationship. Most people subject to gun seizure required further evaluation at a hospital.

Swanson and colleagues (5) studied the impact of Connecticut's law on suicide. Examining the characteristics of individuals whose guns were removed, they compared the data with statewide arrest records, service utilization records in Connecticut's public behavioral health system, and death records. The authors estimated that for every 10 to 20 gun removals in Connecticut, one suicide was averted.

Parker (6) examined the data on Indiana's firearm seizure law from 2006 to 2013. He found that the law had rarely been used outside the state's most populated and urban county (Marion County) during this time. In Marion County, police removed people's weapons most commonly because of a risk of suicide. The seized firearms were retained by the court at the initial hearing in most cases. For those who sought the return of their guns, Parker opined that the firearm seizure law functioned as a months-long cooling-off period.

Kivisto and Phalen (7) recently published a study evaluating the effects of Connecticut's and Indiana's firearm seizure laws on firearm and nonfirearm suicide rates. They found that Indiana's firearm seizure law was associated with a 7.5% reduction in firearm suicides in the 10 years following its enactment. Enactment of Connecticut's law was associated with a 1.6% reduction in firearm suicides after its passage and a 13.7% reduction in firearm suicides in the post–Virginia Tech period, when the state significantly increased enforcement of the law. They also found that Indiana demonstrated an aggregate decrease in suicides, whereas Connecticut's estimated reduction in firearm suicides was offset by increased nonfirearm suicides.

Oregon's ERPO Law

Gun removal laws became of interest to us after Oregon's own law came into effect at the beginning of 2018. The passage of Oregon Senate Bill 719 created a process for obtaining an ERPO; however, the law was not without controversy, passing narrowly in the Oregon House of Representatives by a 31–28 margin, mostly along partisan lines (8).

As psychiatrists in Oregon, we were curious about how the new ERPO law would affect mental health providers and our clientele. Oregon's law, like similar laws of most other states, excludes clinicians as potential ERPO petitioners. Oregon's law also specifically states that "the court may not include in the findings any mental health diagnosis or any connection between the risk presented by the respondent and mental illness" in determining whether an ERPO should be issued (9).

Despite the intentional omission of mental health clinicians and diagnoses from the Oregon statute's provisions, the reality is that mental health providers routinely interface with individuals who make statements about using a firearm to inflict injury to themselves or others. Given that the available evidence suggests ERPOs may prevent suicides, we believe that the existence of Oregon's law implies that health care providers may at some point have to decide whether to advise a patient's family member or law enforcement to apply for an ERPO for their patient. In exploring this issue, the authors have received feedback from law enforcement professionals in Oregon indicating that they would welcome and investigate reports from mental health professionals regarding potentially dangerous individuals with firearms.

In determining whether to advise law enforcement or a patient's family member regarding an ERPO, it is important to consider a mental health professional's duty to warn and protect. Oregon's duty to warn statute is permissive; it states, "information obtained in the course of diagnosis, evaluation or treatment of an individual that, in the professional judgment of the health care services provider, indicates a clear and immediate danger to others or to society may be reported to the appropriate authority" (10). Does the existence of Oregon's ERPO law expand mental health providers' potential liability for acts of firearm violence committed by their patients? It is not difficult to imagine the following scenario: a patient commits suicide or homicide by firearm; the mental health provider was aware that the patient was experiencing a decline in his or her health and was in possession of a firearm; and civil action against the provider ensues, with the victims claiming that the provider should have advised either law enforcement or family members about the possibility of an ERPO petition.

From a medical-legal perspective, invoking an ERPO law might be seen as a prudent, and perhaps even expected, intervention for suicidal patients with firearms. It might even be viewed as an extension of *Tarasoff*-like duties in cases of potential gun violence against others. The fact that mental health clinicians have been omitted as petitioners for ERPOs in Oregon does not, in our opinion, diminish potential liability in cases in which an ERPO was not recommended. In other words, now that there exists a legal mechanism for the removal of firearms (i.e., means restriction to prevent violent acts), mental health providers implicitly could be obligated to recommend an ERPO or at least inform family or law enforcement if they believe an ERPO petition might be warranted.

In addition to alerting family members of at-risk individuals about the ERPO process, mental health professionals also may serve an educational role in relation to law enforcement. Because the ERPO laws in many states are just going into effect, there may be many law enforcement officials unfamiliar with the ERPO process.

Conclusions

Recent gun violence has spurred the passage of ERPO laws in many states. These laws vary from state to state, and mental health providers should determine how their state's laws apply to their practices, if at all. In the particular instance of Oregon, we believe that mental health providers must assess, on a case-by-case basis, whether to advise families and law enforcement about the possibility of initiating an ERPO. In doing so, the clinician must weigh the patient's level of risk for gun violence against other considerations, such as patient confidentiality and Second Amendment rights. In some cases, advising others about initiating an ERPO may be the clinically correct decision—and could save lives.

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