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Red flag laws can protect communities but need consistent enforcement, training and public awareness



Police at the scene of the May 14 mass shooting at a Tops Friendly Market in Buffalo, where 10 people were killed. Credit: TNS/John Normile

By Geraldine Hart and Gail Prudenti

Guest essay

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This guest essay reflects the views of Geraldine Hart, former Suffolk County police commissioner and director of public safety at Hofstra University, and Gail Prudenti, former chief administrative judge of New York State and dean of the Center for Children, Families and the Law at the Maurice A. Deane School of Law at Hofstra University.

The Supreme Court's ruling striking down New York's restriction on carrying concealed weapons in public heightens the need for a consistent, universal remedy to help keep firearms out of the hands of dangerous individuals.

Extreme risk protection orders, or ERPOs — better known as "red flag" laws — empower a limited group of people, such as law enforcement officers, household members and school staff, to petition the court for an order to temporarily confiscate guns from individuals deemed a danger to themselves or others and bar them from obtaining a firearm.

These laws can be an effective measure to safeguard our communities. And if appropriate due process protections are included, they can do so without disturbing the Second Amendment, according to several legal decisions.

However, fewer than half the states have such laws, and even in states like New York that do, use of the law is haphazard and erratic. Congress, under pressure to do something after the recent spate of mass shootings, passed a bill last month to incentivize states to enact red flag laws. But that legislation does little or nothing to encourage consistent standards about who can file a red flag petition, under what circumstances, and what due process protections are included. It's time for consistency.

New York has had a red flag law on the books since 2019 permitting teachers, school administrators and others to seek court intervention.



But the law is only effective if someone files a petition. And while the standards for granting that petition are clear and unambiguous, use of the law has been anything but consistent, with some counties issuing dozens of orders and others of similar size issuing very few.

For example, the Suffolk County Police Department has confiscated more than 160 guns since the law went into effect and, just as importantly, has taken the lead in educating police departments, schools and communities on the availability and requirements of the law. Regrettably, in most other counties, red flag petitions are rarely filed, and confusion abounds over when it is even appropriate to seek such a court order, or how to do so.

Consider the case of Payton Gendron, the 18-year-old white supremacist accused of shooting 13 people and killing 10, all of them Black, in a Buffalo supermarket.

Less than a year before the massacre, Gendron wrote a high school essay saying he intended to commit a murder-suicide after graduation. His family, the school, mental health experts and the police were all aware of the essay, and the State Police brought Gendron in for a psychiatric evaluation. However, Gendron said he was only kidding so, under New York's law, his threat was too general and vague to warrant red-flagging. Consequently, he was apparently able to legally purchase the AR-15 with which he allegedly committed mass murder.

On May 18, Gov. Kathy Hochul responded with an executive order requiring the State Police to file for an ERPO whenever they have probable cause to believe that an individual is a threat, similar to the way doctors and teachers must alert authorities to potential child abuse. The governor also expanded the list of those permitted to file a petition to include health care professionals. Since then, there has been a surge of ERPOs filed by the State Police.



FBI agents work the scene of the July 4 mass shooting in downtown Highland Park, Illinois. Credit: AFP via Getty Images/Max Herman

On the surface, that seems like a positive development. Unfortunately, the lack of consistent standards and procedures to safeguard constitutional rights has forced judges to dismiss many of the cases.



Only a few days ago, Highland Park in Illinois became the scene of the latest in a long line of mass shootings — and the latest to call into question the administration of a state's red flag law. We know most individuals who intend to commit mass shootings telegraph their intentions to those around them. More needs to be done to ensure that family members, school officials and others who have firsthand knowledge of someone exhibiting these concerning behaviors have the ability to petition for an extreme risk order that will prevent someone from not only possessing but purchasing guns.

To be sure, red flag laws are not a cure-all. They require the active participation of the public to make sure those engaged in concerning behavior, online or otherwise, are brought to the attention of law enforcement. They won't magically put an end to mass shootings. But they will prevent some of them. Used effectively and responsibly, red flag laws are a vital tool in protecting our communities and our children — and one of the few remedies that generally garners support across the political spectrum. And courts have found such laws consistent with Second Amendment rights.

It's time for a dialogue and consensus on the application of the red flag law, as well as a coordinated public outreach effort and standardized training to ensure the proper, effective and consistent use of the law. With the recent Supreme Court decision, it's important that we begin that discussion right now.