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Beware of “mental illness” gun prohibitions

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How do we make sure that individuals with mental illness do not touch a gun?" Florida Gov. Rick Scott asked yesterday, responding to the shooting that killed 17 people at a Broward County high school on Wednesday. The question, reminiscent of NRA Executive Vice President Wayne LaPierre's demand for "an active national database of the mentally ill" after the Sandy Hook massacre in 2012, is woefully misbegotten, casting an unmanageably wide net into the wrong ocean.

Survey data indicate that half of all Americans will qualify for a psychiatric diagnosis at some point in their lives, while a quarter of them do in any given year. Does Rick Scott or Wayne LaPierre think the government should strip 160 million people, or even just 80 million, of their Second Amendment rights because their mental illnesses might predispose them to commit mass murder?

Federal law currently stops far short of disarming all "individuals with mental illness," disqualifying from gun ownership only those who have undergone forcible psychiatric treatment, which is supposed to be based on a legal finding that they pose a danger to themselves or others. That rule is already unreasonably broad, since it means that someone who poses no threat to other people—someone who, say, is committed for treatment because his relatives think he might be suicidal—is not allowed to exercise his constitutional right to armed self-defense, even decades later. Yet the rule was not broad enough to stop Nikolas Cruz, the man charged with carrying out the attack on the Florida high school, from legally purchasing the rifle he used.

Cruz was treated for depression, and he was, according to former neighbors and fellow students, weird, troubled, angry, and sometimes scary. But he did not have a psychiatric record that disqualified him from buying a gun. So the question, for those who have given the matter a little more thought than Rick Scott did, is whether Cruz could have been thwarted by a policy that goes further than the current rule but not as far as disarming one-half or one-quarter of the population.

One possibility touted by gun control advocates is a law like the one California enacted in 2014, which allows a police officer or an "immediate family member" to seek a "gun violence restraining order" that prohibits an individual from possessing firearms and authorizes police to seize any he currently owns. Such an order can initially be obtained without any notice or adversarial process, and it can be extended based on standards that invite abuse, especially since "immediate family members" include not just spouses, children, siblings, and parents but also domestic partners, current or former roommates, step-parents, parents-in-law, grandparents, step-grandparents, step-siblings, siblings-in-law, stepchildren, children-in-law, and grandchildren.

If the applicant is a cop, he must have "reasonable cause" to believe "the subject of the petition poses an immediate and present danger of causing personal injury" to himself or someone else. If the applicant is a relative or roommate, he must show there is a "substantial likelihood" that "the subject of the petition poses a significant danger, in the near future, of personal injury" to himself or someone else. Either standard suffices to take away someone's right to arms for three weeks, after which he has an opportunity for a hearing where the petitioner has to show by "clear and convincing evidence" that he "poses a significant danger of personal injury" to himself or others. If the judge decides that test has been met, he issues a one-year restraining order than can be renewed annually.

In 2016 Washington voters approved a broader version of California's law. Initiative 1491 added "dating partners," baby mamas (or papas), former legal guardians, and all relatives, including aunts, uncles, and cousins, to the list of people who can seek what it calls an "extreme risk protection order." The Washington law also

extended the deadline for a former roommate (which could be an ex-spouse or ex-lover) seeking an order from six months after moving out to a year, and it loosened the criteria for both an initial order (which can be issued based on a "reasonable fear" that "the respondent poses a significant danger of causing personal injury to self or others") and a one-year order (which requires showing "by a preponderance of the evidence that the respondent poses a significant danger of causing personal injury to self or others").

Both laws leave a lot of leeway to unjustifiably deprive people of their constitutional rights, whether out of malice or out of sincere but mistaken concern. They give judges license to do what they probably will be inclined to do when confronted by a worried or frightened petitioner: err on the side of what seems to be caution by issuing the order, even if the respondent in all likelihood poses no real threat to himself or anyone else. And once someone loses his Second Amendment rights, that fact makes a decision about whether to lift an order or let it expire even easier. Why take the chance of letting a possibly dangerous person own guns? Hence someone can lose his right to keep and bear arms indefinitely based on little more than the misplaced fears of people close to him or the false testimony of a vengeful ex-girlfriend, brother-in-law, or third cousin.

Connecticut and Indiana have somewhat similar laws, although they do not allow such a long list of people to seek orders. In Connecticut, the process can be initiated by two police officers or one prosecutor, while Indiana allows a judge to grant a gun confiscation order based on the request of a single law enforcement officer.

Gun controllers argue that such a law could have prevented Cruz from buying or keeping a gun. "Florida should absolutely enact one ASAP," Kris Brown, co-president of the Brady Campaign to Prevent Gun Violence, told Reuters. "If one had been in place in this case, we do believe it would have had the potential to save lives."

But even if Florida had one of these laws, it's not clear that anyone would have sought an order to disarm Cruz. At the time of the attack, both of his adoptive parents were dead, and he was living with the family of a friend. The friend's parents knowingly allowed him to bring his rifle with him, although they stipulated that it be kept in a locked safe. If they were not alarmed enough by Cruz's behavior to stop him from keeping a rifle in his room, it seems quite unlikely that they would have gone to court in an effort to disarm him. And although Cruz's mother reportedly called police to help her deal with him on more than one occasion, those officers do not seem to have viewed him as a serious threat.

Neither California nor Washington requires a psychiatric diagnosis for a gun confiscation order, which suggests that the focus on mental illness may be misplaced. The real issue, according to these laws, is dangerousness. But it is asking a lot of judges to predict who will use guns to commit crimes when the vast majority of people whose cases they consider will not. Psychiatrists are terrible at that sort of prophecy, and it's doubtful that judges are any better.