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The Gun Violence Restraining Order — Responding to a Libertarian Critique

By DAVID FRENCH | February 21, 2018 5:01 PM



An employee demonstrates gun safety to clients at the Los Angeles gun club. (Lucy Nicholson/Reuters)

Over at *Reason*, Jacob Sullum has written a thoughtful critique of [my piece last week](#) asking conservatives to consider gun violence restraining orders (GVROs) as a tool to combat spree killings. As I outlined in my piece, a GVRO empowers a person in a close relationship with a gun-owner to seek a court order that allows

police to temporarily seize guns when there is evidence that the gun-owner is a danger to himself or others.

A good GVRO statute should clearly protect the gun-owner's due process rights by, among other things, establishing a high burden of proof (clear and convincing evidence, preferably), allowing the gun-owner to contest the claims against him, and confining the universe of people who can seek a GVRO to people in defined relationships with the gun-owner.

The piece has generated an enormous response, most of it positive. GVROs, unlike most gun-control measures, are not only narrowly targeted (and thus avoid the collective punishment of gun-control measures such as assault-weapons bans or bans on high-capacity magazines), they arguably could have prevented a number of mass shootings, including the Parkland, Fla., school massacre.

Sullum, however, **takes aim at the concept** — on three main grounds. First, he contests the notion that a GVRO could have stopped the Parkland attack. Second, he argues that the state GVRO statutes that actually exist don't properly safeguard due process, and third, he believes even a properly drawn GVRO law will be too vulnerable to abuse. Let's take each argument in turn.

We obviously can't know if a GVRO law would have prevented the Parkland shooting. Counterfactuals are impossible to adjudicate. However, in this case there is a compelling piece of evidence that a proper GVRO could have saved lives. The **FBI statement** confessing its failure to properly follow protocol in response to a tip about the Parkland shooter contained this haunting paragraph:

On January 5, 2018, a person close to Nikolas Cruz contacted the FBI's Public Access Line (PAL) tipline to report concerns about him. The caller provided information about Cruz's gun ownership, desire to kill people, erratic behavior, and disturbing social media posts, as well as the potential of him conducting a school shooting.

If the person “close to Cruz” was close enough fit within the GVRO law, he (or she) had exactly the kind of information that could have secured a restraining order, and he wouldn’t have had to rely on a federal bureaucracy to take action. He could have stated his case directly in front of a local judge. He would have been far more empowered to intervene.

Sullum’s second major point — where he notes the deficiencies in various state GVRO laws — is sound. They do not sufficiently protect due process, offering fewer protections than I proposed. GVRO statutes need conservative and libertarian input to limit and control for the most obvious avenues for abuse. Not only do they need conservative and libertarian input, they require study. California’s law has been in place since 2016. We should examine carefully the circumstances where it’s been used. We should study other states’ experiences as well. Real-world experience ultimately can and should inform both our hopes and our fears.

Finally, Sullum expresses reservations about well-crafted GVROs, writing:

Even if David French gets to write the law, there is much potential for abuse by malicious or mistaken petitioners, abetted by judges who will be inclined to err on the side of what they believe to be caution by revoking the Second Amendment rights of possibly dangerous people. And whatever the standard of proof, it relates not to the actual commission of a crime that has already occurred but to the possibility that the respondent might commit a crime (or commit suicide) in the future. Under these laws, people can lose the constitutional right to armed self-defense if a judge thinks they probably pose a “significant danger” to themselves or others. Conjoining those probabilities means the vast majority of people covered by these orders would never have used a gun to harm anyone.

Here’s where we part company. A properly drawn statute will require admissible evidence — that means sworn statements, pictures of text messages, Instagram photos — combined with an opportunity to contest the charges. Further, it will impose a burden of proof well above “probably.” And it’s hardly unusual for

courts to adjudicate and control for risks of potential future harm. They do so all the time when determining whether to confine the mentally ill or to issue restraining orders against estranged partners or spouses. This is well-trodden judicial ground.

Moreover, GVROs are *less* restrictive of a person's rights than the common orders mentioned above. A person subject to a GVRO isn't involuntarily confined. They can still see their children. They can still go to school. They can still live with their spouse. And unless the petitioner can keep producing clear and convincing evidence of a significant risk, the order will lapse. In fact, even in California the **vast majority of GVROs are not extended**.

Every single legal proceeding ever devised is subject to abuse. Smart legislators limit the potential harm with clear evidentiary standards, clear standards of proof, and rights of appeal. A properly drafted GVRO would contain all those elements. It's time to put the laboratories of democracy to work. Let's see a well-drafted GVRO, and let's study its effect. Given the number of mass shooters who've exhibited warning signs, it's one of the few proposed reforms that could actually stop a killer before he walks, armed, through that schoolhouse door.

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DAVID FRENCH — David French is a senior writer for *National Review*, a senior fellow at the National Review Institute, and a veteran of Operation Iraqi Freedom.

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