



Tragedy in Lewiston

Analysis and reaction from the Sportsman's Alliance of Maine Institute for Legislative Action (SAM-ILA)

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PART 3 – YELLOW FLAG VS. RED FLAG

The Maine Experience

The Yellow Flag vs. Red Flag Debate

by David Trahan, SAM-ILA Executive Director

In the few days following the Lewiston shooting, press outlets from around the country arrived in Maine to report on the events of October 25, 2023. The headlines were swift, and before much was known, the stories started to run criticizing whether Maine's Yellow Flag law was weak and cumbersome. Gun control activists asserted that this tragedy proves we need Red Flag laws. Bizarre, given no facts were available yet to confirm what had happened or what systems may have failed.

It might surprise you to learn there is no such thing as a "Yellow Flag" law. It is another made-up term to create a predetermined image that some in the press and gun control activists want the public to believe that Maine's Protective Custody Statute and Weapons Restrictions Order processes compromise your safety. Odd, both have been around for decades. What we did in Maine in 2018 was reject the traditional "Red Flag" approach. A year later, we reformed our existing Protective Custody statute and streamlined the Weapons Restrictions Order process to give law enforcement better tools when dealing with individuals suspected of being in a

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mental health crisis and deemed a threat to themselves or others.

The word "Yellow" in the context of a stop light means "in the middle". It makes no difference whether it is true or not, what gun control activists and their professional consultants have done is create a political image of an impotent, ineffectual law, which is, in fact, a lie. Their goal is to create an environment in which every shooting or suicide can be blamed on "weak" gun laws. At the same time, those who legislated these improvements, i.e. SAM-ILA, Governors Lepage and Mills, and nearly the entire Maine Legislature, can be accused of having blood on their hands for not passing a more extreme gun control measure like "Red Flag," and other favorites of the national gun control groups.

Because SAM is seen as the most powerful advocate for gun rights in the state and that we negotiated the 2019 law, we are the easiest to blame. By default we became the target for hate and frustration after October 25. Gun control advocates will then just sit back and wait for the next tragedy and use the press to direct the public's pain and grief on their adversaries—a perverse strategy to weaken their opposition.

After the Lewiston shooting, the press stories and messaging from gun control extremists all had the same theme: if we just had "Red Flag" law, the shooting could have been prevented. I received countless hate mail messages and even death threats alleging I and SAM were responsible for the shooting, and the blood of the dead and wounded was on our hands because SAM did not support stricter gun control. Threatening my family, and others affiliated with SAM in the name of politics is a very dangerous game. This scorched earth win at all costs—strategy reflects the worst kind of sleazy politics, and it has no place in civilized political discourse.

How Maine's "Yellow Flag" Legislation Came About

The following historical timeline tells a story of remarkable political courage and collaboration, and is the product of this state's most brilliant legal minds coming together to build a better law and a safer state.

On March 23, 2018, Senator Mark Dion, D-Portland sent out a press release stating he had six Republican and four Democrat co-sponsors who were in support of Red Flag

legislation. Among firearm rights supporters, this was the equivalent of being dowsed in ice water. A chill reverberated across the state and gun control groups rejoiced. That a gun control bill of this nature would pass with both parties in support was significant. Full disclosure: the SAM-ILA has always strongly opposed Red Flag legislation because of its lack of due process for firearm

owners. That was true in 2018. Our commitment to due process has not changed.

First, what is Red Flag?

Twenty-two states have "Red Flag" laws or what are called Extreme Risk Protection Orders that allow family members and significant others to petition the court to confiscate firearms from individuals they

believe, (with the court's concurrence) to be a possible threat of violence in the future. The most significant complaint from firearms rights organizations is the lack of due process for the accused person.

First, a court order to take a person's existing firearms and their right to purchase a firearm in the future can be approved by a court, *ex parte* (i.e., without the knowledge of the accused and without the ability to defend oneself). In addition, there need be no accusation of a crime, no mandatory legal representation, and no proof necessary that a crime may be committed soon. Red Flag legislation may also authorize a search warrant without Probable Cause. Sound un-American? It is. This process is the modern day "Scarlet Letter" for anyone owning firearms.

And what if a government official, or anti-gun group petitions an activist judge to declare that a certain class of firearms poses an ongoing public threat? Could a Red Flag law be used to confiscate these firearms from thousands of law-abiding citizens? Under the "prove you are innocent" stance of a Red Flag law, this scenario is not so far-fetched.

After a tenacious floor fight, Senator Dion's Red Flag law passed the Legislature and landed on Governor Paul LePage's desk in 2018. With strong support from groups like SAM, Governor LePage vetoed the bill. Thankfully, the Legislature sustained the veto. Red Flag legislation was dead in Maine, at least for this legislative session. But the fight had just begun.

In the ensuing 2018 elections, Democrats won majorities in both chambers of the Maine Legislature and Janet Mills (D) won the Governorship. On March 19, 2019, Senator Rebecca Millett (D), a well-known gun control activist, reintroduced a much more extreme Red Flag law. Worse, at the same time, Republican President Donald Trump was sending mixed messages of support for a national Red Flag law.

The political headwinds were against us. During the 2019 Legislative session, Democrats and some Republicans were lining up to support "Red Flag" and we had what appeared to be only limited minority Republican support.

The public hearing room was packed, and SAM testified in opposition to Sen. Millett's Red Flag bill. When the dust

cleared, something dramatic happened. Behind the scenes, former Maine Attorney General and now Governor Janet Mills indicated she was uncomfortable with Sen. Millett's bill, particularly as it pertained to "due process" for the accused.

What came next was astonishing. Former Attorney General and current Chair of the Senate Judiciary Committee, Mike Carpenter, switched from supporting Red Flag to negotiating a different bill to reform Maine's Protective Custody and Extreme Risk Protection Order systems. Red Flag was dead!

Gov. Mills invited the SAM-ILA to enter discussions on a different path forward, one that addressed concerns around "due process" and other issues we had with the bill. Mills convened a bipartisan negotiating team that in addition to SAM-ILA

(David Trahan and Thomas Tyler), included Senators Mike Carpenter and Lisa Kiem, and attorneys Derek Langhauser and John Chapman.

What emerged from these negotiations became Maine's Protective Custody and Weapon Restriction Order statute, our so-called Yellow Flag law. This legislation which became law in October 2019, is far superior to "Red Flag" because it is more effective at protecting innocent people while honoring our nation's values of due process and personal liberty. Furthermore, this law makes it more difficult to falsely accuse someone of being mentally unsound and hence, a public safety risk by directly involving law enforcement officials in the petitioning process with the court.

How Maine's new Protective Custody and Weapons Restriction Order law is intended to work

- A complainant contacts police concerned that a subject, often a family member, is behaving erratically and may be in danger of harming himself or others. This initial contact with police may also be initiated by an emergency services call (911), by a member of the public, a school official, or by direct observation of the police in a public setting.
 - The police investigate the complaint to determine the veracity of the complaint, and to ascertain whether the subject is showing signs of diminished mental capacity, and/ or criminal behavior.
 - Using probable cause criteria, the officer may arrest and criminally charge the subject, or place the subject in protective custody for up to 18 hours to better ascertain the subject's mental state or release the subject without restrictions.
 - If the subject is placed in protective custody, the officer expedites a mental evaluation by a qualified medical professional.
 - If the medical professional confirms the subject is suffering from a mental condition which poses a threat to himself or others, the police official petitions the court to enact a Weapons Restrictions Order (WRO) in which the subject's weapons will be confiscated for up to two weeks.
 - A hearing is then scheduled to determine whether further action is justified, such as extending the WRO.
- During this entire process, the subject has legal representation and if he cannot afford it, counsel is appointed by the court. In every step of the process, the highest levels of due process and legal standards are applied.
- This process is far superior to "Red Flag" because it focuses on an individual's actions when triggering government intervention, not the opinions and future predictions of family and others, sometimes a disgruntled acquaintance. It places the burden on the government (in the full light day), not *ex parte*, (without your knowledge) whether to take a person's liberty. Maine's so-called Yellow Flag law relies on profes-

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Legal Standards Definitions for Red and So-called Yellow Flag

Meaning of Clear and Convincing Evidence-Maine Law

“Under the clear and convincing evidence” standard, the party presenting the evidence must demonstrate that it is highly probable or reasonably certain that their version of the facts is true. This

standard is considered to be more stringent than the preponderance of the evidence standard but less stringent than the beyond a reasonable doubt standard.”

Source: <https://www.legalmatch.com/law-library/article/clear-and-convincing-evidence-standard.html>

Meaning of Preponderance-of-the-Evidence-Red Flag

“A preponderance of evidence” means that a party has shown that its version of facts, causes, damages, or fault is more likely than not the correct version, as in personal injury and breach of contract suits. This standard is the easiest to meet and applies to all civil cases unless otherwise provided by law.

The concept of “preponderance of the evidence” can be visu-

alized as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. If the scale tips ever so slightly to one side or the other, the weightier side will prevail. If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail.”

Source: <https://courts.uslegal.com/burden-of-proof/preponderance-of-the-evidence/>

Probable Cause for the Purposes of Protective Custody-Maine Law

§3862. Protective Custody

1. Law enforcement officer's power. If a law enforcement officer has probable cause to believe that a person may be mentally ill and that due to that condition the person poses a likelihood of serious harm as defined in section 3801, subsection 4-A, paragraph A, B or C, or if a law enforcement officer knows that a person has an advance health care directive authorizing mental health treatment and the officer has probable cause to believe that the person lacks capacity, the law enforcement officer:

- A. May take the person into protective custody; and [PL 1983, c. 459, §7 (NEW).]
- B. If the law enforcement officer does take the person into protective custody, shall deliver the person immediately for examination by a medical practitioner as provided in section 3862-A or 3863 or, for a person taken into protective custody who has an advance health care directive

authorizing mental health treatment, for examination as provided in Title 18-C, section 5-803, subsection 4 to determine the individual's capacity and the existence of conditions specified in the advance health care directive for the directive to be effective. [PL 2019, c. 411, Pt. C, §5 (AMD); PL 2019, c. 411, Pt. D, §3 (AFF).]

When formulating probable cause, the law enforcement officer may rely upon information provided by a 3rd-party informant if the officer confirms that the informant has reason to believe, based upon the informant's recent personal observations of or conversations with a person, that the person may be mentally ill and that due to that condition the person poses a likelihood of serious harm as defined in section 3801, subsection 4-A, paragraph A, B or C.

[PL 2021, c. 377, §1 (AMD).]

Source: <https://legislature.maine.gov/statutes/34-B/title34-Bsec3862.html>

Probable Cause for the Purposes of Arrest

Probable cause is a requirement found in the Fourth Amendment that must usually be met before police make an arrest, conduct a search, or receive a warrant. Courts usually find probable cause when there is a reasonable basis for believing that

a crime may have been committed (for an arrest) or when evidence of the crime is present in the place to be searched (for a search).

Source: https://www.law.cornell.edu/wex/probable_cause#:~:text=Courts%20usually%20find%20probable%20cause,a%20warrantless%20search%20or%20seizure.

sionals to determine next steps and relies on the suspected person's actions to determine whether to order a temporary loss of liberty.

It is critical in these cases for police to have timely access to qualified mental health care professionals who can deliver consistent, unbiased opinions regarding the subject's mental state. Beginning in October 2022, a health care company called SPURWINK has fulfilled this role statewide. Subjects placed in protective custody are typically evaluated using ZOOM conferencing.

Since the passage of Maine's so-called Yellow Flag law in late 2019, police have logged 145 incidents [as of December 26, 2023] in which people in some form of mental health crisis were considered for placement in protective custody and/or weapons removal. This new police and public safety tool saw limited use in 2020 (14 incidents), 2021 (7 incidents) and 2022 (7 incidents). After SPURWINK became the mental health provider in these cases in late 2022, use of Yellow Flag increased dramatically. In 2023, prior to the October 25th mass shooting, police logged 54 Yellow Flag cases, or 5.4 per month. After the Lewiston tragedy, 63 Yellow Flag incidents were logged statewide, or 31.5 per month. What follows is a representative sampling of these 145 incidents.

- **August 7, 2020** *Scarborough PD:* Mother reported son on drugs and alcohol, threatening suicide with knife or "suicide by cop."
- **October 21, 2021** *Waterville PD:* Man, 21, held gun to head in presence of two friends, threatening to kill himself. Taken into custody after brief standoff.
- **March 21, 2022** *State Police:* Lyman man, 91, with paranoid delusions of men he claims he can see sent electronically into his house to harm him; high risk of harm to self or others; 13 firearms removed from residence.
- **January 4, 2023** *Franklin SO:* 58-yr-old highly intoxicated man w/past suicidal ideation, attempted suicide by taking medication, called behavioral health for help. Police took him into protective custody. Seized several handguns, rifles, and shotguns.
- **February 16, 2023** *Knox SO:* 54-yr-old man highly depressed, history

of suicidal ideation, threatening to kill himself with gun; held gun to his head. Order resulted in seizure of six guns and a crossbow.

- **May 13, 2023** *Lincoln County SO:* 53-yr-old man suffering from PTSD; intoxicated; threatening suicide with firearm and saying he will make wife watch. Wife hid ammo, left, and called police.
- **November 7, 2023** *Androscoggin SO:* 44-yr-old man concerned he will be the next mass shooter. Drinking heavily in the context of financial stress and infidelity. History of removing firearms when depressed and suicidal.
- **November 18, 2023** *Hampden PD:* 32-yr-old man made verbal and written suicidal statements; agreed to [get] help and removal of weapons.
- **December 1, 2023** *Sanford PD:* 29-yr-old man threatened to go on "murderous rampage"; multiple 911 calls of man with knife; shot in leg by citizen fearful for himself and family; [Subject] claimed to be a vampire, licking own blood in ambulance.
- **December 15, 2023** *Cumberland County SO:* 31-yr-old man assaulted brother and sister-in-law; believes government planted "bug" in his ear; patrols property with rifle and ballistic vest; believes birds are talking to him and construction workers are planting bugs in his house.

Note that individual entries do not necessarily reveal the final disposition of these cases.

Since the Lewiston shooting, gun control activists and their friends in the press who so stridently criticized Maine's Yellow Flag law have now gone silent. As the use of this law received scrutiny, it is becoming obvious Maine's Protective Custody and WRO law protects the public, is easy for police to implement, and it helps people in crisis,

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while upholding the values of Due Process protected in the Constitution.

To get a snapshot comparison of how Maine's law stacks up against Red Flag, just look to our close neighbor. Massachusetts has just under 7 million people and has had a traditional Red Flag law for five years. According to CBS News, Boston, November 2, 2023, Massachusetts' Red Flag, "has only been used 57 times in five years. Of those 57 times, 38 emergency orders have been issued." Another way to look at it is that the court has rejected the petitions, or the petitions have been misused, 34% of the time.

The reason Maine's law is superior to Red Flag is that it focuses on intervention based on a person's actions, not someone's opinion that something might happen. The words "Protective Custody" emphasize the point. The Maine system is designed to help the person in crisis while at the same time, protecting the public. Our system uses the highest level of due process standards which have been around since the founding of our nation. Furthermore, it employs a health assessment by a competent mental health professional to act as a starting point for getting a person in mental crisis the mental health care he or she needs.

These 145 cases represent someone's, sibling, parent, uncle, or friend. Most represent a tragedy averted. There is no way to know how many suicides, police shootings or crimes have been prevented by Maine's Yellow Flag law, but what I can say is 145 people needed help and support and nearly all are now alive and better off because of it.

SPORTSMAN'S ALLIANCE OF MAINE – INSTITUTE FOR LEGISLATIVE ACTION – "SAM-ILA"

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