

## **IS IT BETTER TO BE SAFE OR FREE? THAT'S THE GUN CONTROL ISSUE**

**by Jeffrey Snyder**

From the perspective of the Second Amendment, the problem with 28 years of federal gun control legislation certainly is that they infringe the right to keep and bear arms, and therefore deserve to be struck down. But there is another perspective from which it may be said that the problem with laws like the gun-free school zone act, Brady, and the assault weapon ban has nothing to do with guns.

From this other perspective, gun laws are only a part of a general class of laws that all share a certain fundamental characteristic, that all spring from a common purpose and desire. If we truly wish to stop legislation like Brady, we must grasp the underlying impulse from which this legislation springs. Unless we understand and reject that impulse, and the principle behind this type of legislation, the impulse will remain a wellspring for thousands of new laws.

Gun control laws of the last 28 years all share the following fundamental characteristic: They outlaw or restrict an activity that is not inherently wrong in order to prevent harm before it occurs.

### **MAKING CRIMINALS**

Stated simply, the laws create crimes in order to stop crimes.

English common law distinguished between crimes that were *malum in se*, or morally wrong in themselves, like rape, murder or robbery, and crimes that were *malum prohibitum*, wrong because prohibited by a legislative pronouncement.

There is nothing inherently wrong, or evil, with purchasing a firearm across state lines, entering a post office while carrying a firearm, purchasing a firearm without first enduring a background check, or owning an "assault weapon" or magazines capable of holding more than 10 rounds. These activities in and of themselves harm no one; the deed in itself is not immoral.

And so that there's no quibbling here, let's be clear about this: Ethically speaking, there is nothing wrong with a convicted felon purchasing a firearm, regard less of whether he has an intention of using it in the commission of a crime. The act of acquiring and owning a firearm harms no one. Until the very moment he commits his crime, the felon is free, like each of us, to choose good over evil.

The purchase of a handgun across state lines, or without a background check, has been made *malum prohibitum*, declared wrong. This is said to be a means of preventing the wrong people from obtaining firearms and to keep firearms out of certain places. To prevent harm before it occurs.

Law-abiding citizens, such as firearm dealers, are now subject to the risk of becoming criminals, not because their conduct or activity harms any one, but solely to prevent other persons from perpetrating criminal misdeeds.

Yes, the concept of prevention sounds appealing. Why wait only to punish people after the fact, when the murder or rape has already been committed? Then it's too late?

What could possibly be wrong with preventing persons from selling firearms to convicted felons? Why should society knowingly take a risk that convicted felons might have reformed? What could possibly be wrong with taking steps to prevent crime before it occurs, with saving lives?

## **PURSUIT OF SAFETY**

Perhaps the pursuit of safety through prevention seems reasonable, even though one perhaps recognizes that there is a certain madness in the notion of creating new crimes to eliminate others. But listen to what we're saying: we agree to restrict liberty to purchase safety.

Perhaps we believe, as Sarah Brady likes to say, that "If it saves even one life..."

How touching. But if we propose to make this bargain, let us look squarely at what it means to criminalize otherwise innocent activities as a means of preventing crime before it occurs.

First, recognize that only laws that criminalize behavior *malum in se* and impose restrictions on liberty (punishment) after the fact, when it is too late, accord with the presumption of innocence -- the principle that government honors the liberty of its citizens until their deeds convict them.

Laws that criminalize innocent behavior in order to prevent crimes before they occur effectively presume guilt. Brady, for example, in seeking to prevent harm before it occurs, effectively presumes that all handgun purchasers are madmen or felons, and all firearm dealers are engaged in criminally abetting the commission of a crime with a firearm, unless the purchaser's innocence is proven by an absence of damning records in the hands of the authorities.

Second, laws that criminalize conduct not wrong in itself to prevent crime before it occurs make the behavior of criminals the measure of the rights and scope of liberty that the law will permit to the innocent. Assault weapons are dangerous in the hands of criminals, therefore, no one shall have them.

Such laws tell the law-abiding that their rights and liberties depend not on their own conduct, but on the conduct of the lawless. That the law will permit the innocent to have only such rights and liberties as criminals will allow.

## **FEAR OF CRIME**

A law which restricts the liberty of the innocent because of the behavior of the guilty, that rests on the principle that the conduct of criminals dictates the scope of liberty for the rest of society, in no sense "fights" crime.

For society has permitted its fear of crime, and craving for safety, to turn the force of law against the innocent and law-abiding. Far from fighting crime, the criminalization of otherwise innocent activities represents a society in retreat from crime. This is a society desperately accommodating itself to crime.

A society that is, instead, outraged over crime would boldly direct its energies against criminals. A righteously indignant society would angrily resolve to surrender no ground, forfeit no liberties to the lawless.

For society does not control crime, ever, by forcing the law-abiding to accommodate themselves to the expected behavior of criminals. Society controls crime by forcing criminals to accommodate themselves to the expected behavior of the law-abiding.

Third, laws that criminalize innocent behavior in order to prevent harm before it occurs make a mockery of, and trivialize, laws that criminalize behavior that is truly wrong.

## **SELECTIVE LAWS**

Guns are banned in post offices and school zones. Why this partiality to post offices and schools? Are we protecting hallowed places from being defiled? Is it okay to shoot up a gas station or a library, but not a post office?

The selectivity in the law is inherently insupportable. It is apparent that the law is merely a political, manipulative ploy, purely symbolic.

What do such laws say? That murder is wrong, but it is really, really wrong and we really, really mean it! in schools and post offices?

In its implicit suggestion that murder is "more wrong" in some places than in others, the law undermines the seriousness of murder and reveals, in fact, that we do not take "mere murder" seriously.

## **PRESUMED INNOCENCE**

Faced with the dire fact of murder and crime, we retreat into symbolism. Yet to one who believes that by relinquishing a little liberty, and bearing some slight inconveniences, we might truly purchase greater safety, the foregoing may be regarded as so much libertarian gibberish, and less than convincing.

Yes, a rigid adherence to the presumption of innocence grants maximum scope to individual liberty. But, the critics might bray, too much emphasis is placed on individual freedom.

We do not live alone, we live in society. The actions of some members, such as gun dealers, regardless of whether they are evil or wrong in themselves have consequences that adversely affect others.

There is no reason that some persons in a good position to thwart criminal endeavors should not be compelled to join in the fight against crime, to prevent crime before it occurs to make our society a safer place.

The problem with this "interconnectedness of all things" argument is that it has no logical or natural stopping place: it can be used to justify absolutely anything!

Once the principle of punishing only activities that are actually wrong is abandoned, we have no star to guide us.

## **THE DRUG ANALOGY**

Consider: the use of drugs for pleasure (rather than for therapeutic reasons) is wrong, according to our society. To prevent this, we have completely banned the purchase and sale of drugs except as prescribed by a physician.

Alas, this has not been sufficient; drug use continues at unacceptable levels. Accordingly, bankers, car dealers and anyone who receives payment in cash exceeding \$10,000 must report the fact to the authorities, so that the authorities may trace "drug money."

Landlords who rent property where drug dealing occurs risk loss of their property to the government for failing to prevent the very activity that the government could not. A landlord should know what happens on his premises and take action to evict the dealers.

Oh, but why stop here? Surely the grocery store managers in drug infested neighborhoods know who the druggies are. Why not prohibit them from selling food to these scum? Are we serious about ostracizing these people and condemning their behavior, or not? If just one life is saved...

The "interconnectedness of all things" argument has no objection, no principle that would say, "Thus far, and no further!"

Why just landlords and bankers? Why not grocery store clerks? Aren't they all part of the Great Drug Chain?

## **GOOD FIRST STEP**

So here let us note the fourth characteristic of laws that criminalize innocent conduct in order to prevent crime before it occurs. To the extent that they "work," they do not so much actually prevent the crime from occurring -- they locate the battle -- ground for our next prevention efforts.

Each prevention effort is thus "a good first step." The problem is that each step is only a first step: the goal endlessly recedes before us.

This is easy to see with gun control legislation. Brady prevents criminals from buying guns from legitimate dealers. Next we must shut down unregulated sales at flea markets and gun shows. Next we must require homeowners to keep their guns in vaults so criminals cannot steal them.

Once these efforts have succeeded -- so that the gun market for criminals is converted into an illegal, underground market, like the market for illegal drugs -- we will need to tighten import restrictions to shut down the borders.

Eventually, we will need to regulate sales of metalworking tools by Sears, and implicate everyone in the Great Gun Chain. Soon it will be a crime to own a hacksaw.

By now it should be evident what the project of these laws is: to so arrange the material conditions of life that those disposed to act upon their evil intentions will have no means of realizing their designs.

Matters must be so arranged that, though criminals will want to use guns, they just won't be able to get them. People will want drugs, they just won't be able to buy them. Crazy people will want to blow up buildings, they just won't be able to. Thus will the world be made a safer place.

## **RESPONSIBILITY**

And now we come to the critical point, the self-destructive contradiction inherent in laws that criminalize innocent conduct to prevent crime before it occurs: their goal is to make responsibility irrelevant.

It doesn't matter if criminals want to commit murder with guns; we will arrange things so that they simply cannot. Pass Brady and a few other well-crafted laws, vigorously enforce them, and it won't matter whether people act responsibly or not. Their irresponsible intentions will be rendered impotent and irrelevant.

Query: how does the law have the moral authority to hold people responsible for their behavior if the law is engaged in a project whose operative presumption is that responsibility and irresponsibility can be made irrelevant?

How do criminals -- how does anyone -- learn that they are responsible for their actions, if the law is engaged in a mighty project to render it irrelevant whether one does or does not want to act responsibly?

And if we think that laws designed to prevent crime before it occurs can indeed make the world a safer place, we should ask ourselves this: How, exactly, is the world made a safer place by making self-control and responsibility irrelevant?

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