



THE CASE FOR GUN RIGHTS

By Jonathan S. Goldstein

What is the problem with the dialogue around firearms today?
There is no dialogue.

And there is no dialogue because there is no framework for a productive discussion between pro-gun advocates and gun control advocates. The two sides on this issue don't really even know how to talk to each other.

How do we establish a framework for discussion?

I believe we must first ask two questions. What do lawful gun owners want? What do gun control advocates want?

I've spent some time talking to a few people on the other side of this issue from me – I'm avowedly pro-gun – and I've learned a good bit about what they claim to want.

There are certainly differences, but in many ways, both sides appear to want the very same thing: to keep guns out of the wrong hands and encourage all gun owners and gun handlers to obey the law.

Knowing this, how to start a dialogue?

First, we have to divide into three buckets people who come into contact with guns – the law abiding; the mentally ill; and, criminals and the people with whom they surround themselves.

As we enforce our existing gun laws and consider enacting new ones, we have to ask ourselves, are we aiming at the second two buckets – the mentally ill and criminals – or will the proposed enforcement disproportionately affect the law abiding?

I believe the recent Toomey bill failed in the Senate not because the National Rifle Association has some sinister hold on our elected officials, but because many senators correctly perceived that the bill was too squarely aimed at the law abiding and insufficiently focused on the mentally ill and criminals.

Second, we have to agree that we have enough laws to prosecute most every criminal and that those laws are under enforced.

For example, I recently examined several sets of data on straw purchase prosecutions in Pennsylvania. A straw purchase occurs when a person who is not prohibited from purchasing a firearm uses or attempts to use his or her clean identity to pass a background check and purchase a firearm for someone who is prohibited from possessing a firearm. Pursuant to 18 Pa.C.S. § 6111(g)(4) it is a third-degree felony under Pennsylvania law to make a straw purchase.

Why prosecute straw purchases? A November 2001 Bureau of Justice Statistics study tells us that in 1997, 78.8 percent of incarcerated criminals surveyed told researchers that they obtained their guns from a "friend or family or street/illegal source." These are classic straw purchases.

The Pennsylvania Commission on Sentencing, an agency of the General Assembly, tracks prosecution and conviction data for all crimes committed in Pennsylvania. On its website (<http://pcsdata.psu.edu>) one can extract the statute by statute prosecution rates and sentencing outcomes on any crime in Pennsylvania, including straw purchases.

In March 2008, Mark Fazlollah wrote the article "Pa. a Favored Source for Gun Traffickers" in *The Philadelphia Inquirer* where he lamented "most of the state's 67 county prosecutors didn't file any cases against alleged straw buyers in 2006 or 2007." I looked at the pre-Fazlollah data on straw purchases using 2004 as a baseline year. I compared 2004 to the most current year available, 2011.

In 2004, before Fazlollah's article, there were 84 total prosecutions for straw purchases in the 67 counties statewide, or an average of 1.25 per county. In 2011, there were 136 total across the commonwealth, or an average of 2 per county.

I recently participated in a statewide panel on firearms policy.

Law enforcement representatives and gun control advocates on the panel spent much of their time advocating for additional laws to prosecute straw purchasers. Straw purchases are already a felony in Pennsylvania and under federal law. Yet, from the baseline year to last year, statewide prosecutions only increased by 52.

When confronted with these facts, my co-panelists offered the excuse that prosecuting straw purchases is hard work. Well, yes. And it's high time we did that hard work and used our existing laws to stop easy to identify people who we already know are breaking those laws by making straw purchases.

We have to collectively acknowledge that when criminals commit crimes with guns the solution is not more laws to make the already illegal...even more illegal. This is particularly true when enforcement of existing laws is not nearly as vigorous as it should be. If tweaks to our laws are needed, they can probably be accomplished with sentencing enhancements.

Fail to report a lost or stolen firearm? If you're convicted of straw purchasing or firearms trafficking, the failure to report can easily become a sentencing enhancement if it can be proved to a trier of fact that the straw purchases were facilitated by a failure to report a lost or stolen firearm.

What do gun owners want in return?

First, we want our government at all levels to respect the presumed lawfulness of our activities and to respect the statutory limits placed on government by the General Assembly.

Philadelphia and other cities must stop harassing lawful gun owners with new, patently illegal laws. Philadelphia just passed an ordinance enabling the City's Parks & Recreation Department to regulate the possession of firearms in city parks. The law is pre-empted by 18 Pa.C.S. § 6120. Legislators in Philadelphia know this because they've already been sued – and lost – several times over other pre-empted city ordinances.

Similarly, law enforcement across the state must stop using the licenses

to carry firearms application process to harass lawful applicants and must adhere to the technical requirements of the background check laws. Many counties don't respect the uniformity of the commonwealth's background check laws. They have introduced additional requirements beyond those statutorily permitted such as fingerprinting all applicants. Others use the application for a license to carry firearms (often erroneously called a concealed carry permit) as a ticket to subject the applicant to chilling public scorn with phone calls to an employer or to neighbors as part of an (impermissibly) expanded background check. Philadelphia even went so far as

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to reveal on a publicly available website the names of applicants appealing the denial of a license to carry firearms. This is patently illegal under 18 Pa.C.S. § 6111(i) and several other attorneys and I have filed a class action on behalf of affected applicants.

Also, several commonwealth agencies continue to promulgate unlawful firearms regulations in contravention of the General Assembly's express statute instructing them not to do so: 18 Pa.C.S. § 6109(m.3)(2).

Firearms rights are civil rights. Units of government that pass illegal laws and that harass lawful gun owners must

be called to account. It's time to put a stop to it.

Second, we want greater certainty of what we can expect from law enforcement, regulators and agencies and we want even handed treatment.

For example, in Pennsylvania, a person who appears to be in mental distress can be brought by police to a county-designated medical center for a mental health examination. By law, within two hours of arrival, a potentially distressed individual must be examined by a mental health professional. If at the conclusion of that examination the person is kept for observation, his firearms rights are immediately suspended and the Pennsylvania State Police are notified within seven days that he is a "prohibited person" who is unable to purchase or possess firearms.

Even if the patient is then released after a 72-hour observation period, the right to possess or purchase firearms remains suspended until it is restored, at the applicant's expense, by a Common Pleas court. This restoration process often involves waiting several months, then retaining a mental health expert and an attorney for the Common Pleas proceeding. It can cost thousands of dollars. If we can take away gun rights administratively, lawful gun owners need a path to restore those rights administratively without ruinous personal expense.

Equally troubling, Philadelphia regularly seizes firearms from owners whose only crime is lawfully carrying pursuant to a duly granted license to carry firearms. In too many cases, those from whom firearms are seized are never arrested or are never charged with a crime that is prosecuted. They are simply divested of their property and told to sue the city if they want it back. The officers who take these firearms, and the police supervisors who encourage it with the full knowledge of the police commissioner, know that most firearms cost less than \$1,000 and that it will take many times that amount in legal fees to effect a return of a firearm through the courts. They take property with impunity knowing most victims

won't challenge the illegal seizure. This is an outrage that wouldn't be tolerated if the seized materials were Bibles or reporter's notes or political pamphlets. Why should we tolerate it with other constitutionally protected property?

Third, we want vague statutes clarified.

For example, the definition of a "vehicle" at 18 Pa.C.S. 501 includes a bicycle, a kick scooter, a wheelchair, a stair lift, a forklift, a Segway and a wheel barrel. To carry a firearm in a "vehicle" requires a license to carry a firearm. This definition of a vehicle is overbroad and too readily exposes an unsuspecting gun owner to criminal charges.

In the same vein, there remains much controversy over whether the license to carry a firearm allows a license holder to carry a firearm on the grounds of a school despite a clear statute permitting carry onto school grounds for "other lawful purpose." If carry pursuant to a commonwealth license duly granted for self-defense after a comprehensive background check isn't a "lawful

purpose," what is? Nevertheless, district attorneys around the commonwealth continue to ignore plain language and threaten to prosecute license holders. Many of these same district attorneys threaten to prosecute for defiant trespass license holders who miss a small sign or enter a building at an entrance without signage and are subsequently found to be carrying a firearm in a building with "no firearms" signage.

Most troubling, courts in at least one Pennsylvania county treat ex-parte temporary protection from abuse orders as in force when issued, not when served. Such orders require divestiture of firearms within 24 hours under the threat of criminal contempt. Certainly everyone acknowledges that where there is the possibility of domestic violence, there's no place for firearms until the matter can be sorted out. Equally certain, however, is that our system of governance requires due process. It does not seem balanced that law-abiding gun owners can run afoul of a court order without even knowing of the existence of the order. Picture the

spouse who is traveling out of town or who is hospitalized when an ex-parte temporary PFA comes into effect.

These and other uncertainties in the law must be clarified. Gun owners working hard to comply with the law shouldn't have to live with the constant threat of prosecution for vague offenses or uneven application of the law. Instead, our statutes and regulations should serve as a clear guide to help principled gun owners comply with the law.

In short, if we treat law abiding gun owners as the respect-worthy citizens that we are – mainstream people exercising a constitutionally protected civil right – we can find common ground to keep guns away from inappropriate people and demonstrate to any observer that compliance with the law is worth the trouble. ■

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