Toward Responsible Gun Ownership and Use:

A Modest Proposal for a Path Forward in the Great American Gun War

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Among the unexpected (and potentially valuable) consequences of the horrific tragedy of Newtown is to re-open a serious discussion about guns in America. In the past, that discussion has been a polemical, political dialogue in which both important facts, and important values, were lost in the shouting. I know because about 20 years ago I spent several years exploring the question of whether a politically and administratively feasible change in our current gun policies could have an important impact on levels of violence in the society, at a relatively low cost in terms of both dollars, and the use of governmental authority to regulate private activity. I stopped doing this work because it seemed practically useless to me. There was no room for a considered deliberation of the issue. Now that this space is re-opened, I am emboldened to present a summary of what I concluded, and to make an unorthodox proposal for how the country might move forward to a policy that fostered responsible gun ownership and use, and minimized the risk that guns would be used in irresponsible, reckless, and criminal ways.

Basically, one can view guns as one example of what could be described as a “dangerous and abuseable commodity.” I would include alcohol, many psychoactive drugs, nuclear power plants, automobiles and toasters in this same category. What ties these very different commodities together is one very important property: each has significant social value in appropriate use, and each carries great risks in inappropriate uses. Given this, public policy has to find a way to simultaneously protect (even expand) the valuable uses, and minimize (or eliminate) the bad uses.

Generally speaking, one can accomplish this complex goal in three ways. First, one can try to affect the physical supply of the commodity – both their quantity and their character. For example, one can try to eliminate guns to prevent the harms, but only at the cost of also eliminating the good uses (and discomfiting those who have enjoyed the good uses). Or, one can distinguish between guns that seem to be more valuable in appropriate uses (such as single shot hunting rifles) and those whose value is greatest in inappropriate uses (such as assault weapons), and seek to reduce the supply of the relatively bad guns while leaving the supply of good guns as it is.

Second, one can try to influence the uses of guns. For example, one can make certain uses of guns illegal, and others permissible. Laws currently make criminal uses of guns in murders, rapes, robberies, assaults, resisting arrest, etc. illegal and often attach extra penalties to the underlying crime if they are committed with weapons. In the past, carrying concealed weapons in public was largely prohibited, but in some places those laws have been replaced with laws that allow carrying (usually with some kind of permit, which we will get to later.) Laws have given explicit permission to use guns for purposes of self-defense, but the kind of justification that individuals needed to be authorized to use their guns for this purpose has varied over time and across jurisdictions. Again, the point here is to make policies that attack bad uses of guns, and that protect good uses of guns.

Third, one can try to influence who is allowed to own and use guns. These could usually be called licensing laws that grant the privilege of owning a gun, or perhaps using it in a particular way, to individuals who are thought to be responsible and reliable in their use of guns. Such laws are usually supported by laws designed to prevent unlicensed individuals from gaining access to weapons, and to expose individuals who own guns illegally to punishment of some kind. Again, the point is to protect good uses of guns by allowing those who can be trusted with the weapons to have them, and to prevent those who cannot be trusted from getting their hands on the weapons.

One can use this framework to do a quick review of different proposals commonly considered in what has been described as “the Great American Gun War.” Take, first, the idea of controlling the size and character of the national inventory of guns through such methods as bans on gun ownership, or buy- back programs, or restrictions on the sale of all guns or certain kinds that are considered noxious, or even the sale of ammunition in general, or of particular types. Basically, there are \_\_ fundamental problems with such solutions. First, we have to reckon with the simple fact that there are already millions of guns in private hands; that the weapons do not deteriorate quickly; and that the existing stock can be converted into a flow from safe to unsafe hands very easily. That means that those proposals that seek to shape the stock of weapons by stopping new manufacturing and purchases will have to wait a long time before an effect is achieved. Prices of used guns may well rise, but availability at some cost will continue to be supported by the existing stock for many years. If we are determined to reduce the existing stock of guns as well as the new flow, then we have to, in effect, figure out how to put the toothpaste back in the tube. Buy-back programs, or programs that offer nothing more than convenient disposal of unwanted guns, can in fact get some of the toothpaste back in the tube. But most of the guns remain spilled across the wider population available for sale, for theft, or use. One can also try to reduce either the flow or the stock of particular dangerous weapons, and there may be much to commend this, but, again, it is easier to control the flow than the stock, and if one cannot control the stock, one may not have as big an impact on availability that one would need to reduce the probably of gun violence committed with these weapons.

Take, next, the idea of trying to control uses of guns. The key point here is that the use of guns in crimes is already heavily penalized. The important issue is whether and how we ought to regulate the carrying of guns in public locations. For many years, there was widespread agreement that carrying guns, and particularly carrying concealed guns, was a practice that supported criminal offenders more than ordinary law-abiding citizens, and that we could reasonably make the practice illegal. It was not only that anti-carrying laws would make it less likely that accidental or impulsive crimes would occur, but also that it would give the police an extra opportunity to prevent determined crimes before they occurred by giving them some control over offenders who carried guns often for their own protection as well as to commit crimes. The social consensus around this position seems to have eroded a bit recently. But the evidence we now have about the value of enforcing gun carrying laws in concerted efforts to reduce urban violence suggest that such law enforcement is both constitutionally and administratively feasible, and effective in reducing gun violence in cities. Our federal system allows there to be different policies for gun carrying in rural, suburban, and urban areas, so we don’t have to all agree about this policy. But it does seem to make sense to keep these laws, and improve our enforcement of them in densely populated urban areas; or to make the carrying of guns into particular locations such as schools, shopping malls, or bars illegal nearly everywhere. After all, even in the old West individuals were required to hang up their guns once they went into a bar – at least as Hollywood shows us our history.

Take, finally, the idea of trying to control who has the right to own and use guns. This, of course, is among the most sensitive issues in the debate since it is tied to the important constitutional question of whether the right to own guns is enshrined in the 2nd Amendment of the Constitution. I confess to being among those who were startled by the Supreme Court’s recent finding that the right own guns was an individual right unconditioned by the specific public purpose of “being able to maintain a \_\_\_\_\_\_\_\_\_\_\_” (which would, presumably, have limited the right to ownership among those who were to be recruited to a militia). But I am perfectly prepared to accept the idea both that there are legitimate uses of gun ownership in the society, and that public policy should not interfere with such legitimate uses to the degree possible. The difficulty with imagining that there is an ultimate right granted to all individuals to own handguns is that this policy would allow all individuals in the society whether mentally ill, or with prior criminal records to own guns.

In practice, of course, our gun control policy has not gone that far. It has wanted to limit the right to own guns to particular classes of individuals who could be trusted with the guns, and to deny that right to those who could not be trusted. Under current law, the restricted individuals include felons, the mentally ill, and illegal aliens. Our system is essentially one that says that individuals have a right to own a gun unless they have done something to show that they cannot be trusted to obey the laws regulating gun use.

As a logical matter, it is possible to imagine a system based on a different principle: namely, that one has a right to own a gun only if that person can show some combination of need, competence, and good character. The justification would be that this is a right that if exercised badly could have very bad consequences for others in the society, and therefore, that the state has an interest in making sure that those who have the right are fit to have it. We use some justification like this in voter registration laws which specifically distribute to particular individuals the general right to vote in a democracy. We also use some justification like this in deciding who will be allowed to drive an automobile. (There, we also require the individual to buy automobile insurance so that those affected by bad or negligent uses of the right can be compensated for their loss!) So, rights are never wholly unrestricted. And the important question about guns even after we have decided that there is right to own guns is whether and how that right ought to be qualified; and more specifically, whether we ought to shift from a world where the presumption of the right extends to everyone unless they do something bad, or whether we should say that the right is available to anyone who can show the appropriate combination of need, competence, and good character in the exercise of the right.

As a practical matter, shifting from a system in which individuals have a right to own (some kinds of) guns (to be used in particular ways) unless for some reason (including but not limited to the abuse of the particular right) they are deemed unfit and undeserving of the right, to one in which the right to own guns is limited to those who have demonstrated good character, competence, and need for the right has been political, bureaucratic, and technical. No one can say how we ought to distinguish those who are likely to be responsible users of the right to own guns from those who are likely to be irresponsible users if they have not committed a crime, or been mentally ill, or crossed the border illegally.

What seems to me particularly interesting, however, is that one of the key actors in the gun debate has consistently insisted on the existence of this important distinction. The National Rifle Association has consistently wanted to make a sharp distinction between those whom they describe as responsible gun owners, and those they describe as criminals. They have sought to protect extensive rights for the responsible gun owners, and to expose irresponsible gun owners to the rigors of the criminal law. And it seems as though they believe they can tell the difference between these two different groups.

If that is true, there is a clear opportunity for an important private/public partnership to be developed between the government of the United States and the National Rifle Association. The government could ask the NRA to use its capacities to distinguish responsible gun owners from those who are irresponsible by asking them to take responsibility for developing and applying the appropriate criteria for granting rights to own guns to particular individuals in the government. It could also ask the NRA to help ensure the continued responsibility of those granted the right by providing required training in the safe and appropriate uses of guns, and the obligations that fall on responsible gun owners to keep their guns out of the hands of those considered irresponsible. Of course, the government would have to exercise some limited control over the development and use of these standards to ensure that they were fair and unbiased. But beyond that, the government could draw on NRA expertise to help them out. Such work would enable the NRA to become the representative of the responsible gun owners in the country, and to help ensure that those gun owners acted according to the principles of responsible gun ownership.

Of course, there is much to be done after we have qualified all gun owners as qualified to own guns. But getting the rank and file of the NRA engaged in the effort to promote responsible gun ownership, and only such ownership, we might change both the politics of the current debate, the substance of our current policies, and their effectiveness in protecting good uses while limiting bad uses of guns.