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Firing Line:  
Clinton's  
Crime Bill

*By David B. Kopel*



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# On the Firing Line: Clinton's Crime Bill

By David B. Kopel

President Clinton was elected partly because he sold himself as a "New Democrat" who was "tough on crime." Almost everyone in this room considers himself or herself to be "tough on crime." As a former New York prosecutor, I certainly share that viewpoint. So is there anything that we can find to like in the proposed Clinton crime bill? While the bill has a few virtues, it is on the whole dangerous to public safety, both in the short and the long term.

**Prior Restraint on Self-Defense.** Let's start with the Brady Bill. Other than professional employees of the gun control lobby and New York City Mayor David Dinkins, I don't know anyone who seriously thinks this proposal is going to have a major impact on crime. I doubt that even President Clinton expects it to have much of an effect. Accordingly, the fact that the Brady Bill stands as the centerpiece of the Clinton crime bill is one indication that the bill is more about politics than about crime control.

Here's how the Brady Bill works, in its present draft. When a person wishes to buy a handgun from a gun dealer, the dealer sends a notification to the local police. The local police have the option of conducting a background check of any type on the buyer, but there is no requirement for any background. After five government working days have elapsed, the dealer may sell the handgun if the police have not vetoed the sale.

As a practical matter of course, the dealer won't release the gun until he receives positive authorization from the police, even if the authorization takes months to come through. The risk of tort liability is simply too high. As a result, we can expect to see situations similar to that in New Jersey, where the statutory thirty-day waiting period currently lasts for several months, or New York City, where the statutory six-month waiting period lasts nearly a year.

If, rather than failing to act, the police simply veto the sale, the buyer has no legal recourse. If the sale was vetoed because the buyer was incorrectly mistaken for a person with the same last name who has a criminal record, or the sale was vetoed because the police chief doesn't like racial minorities, or because the police chief doesn't like anybody owning handguns, there is no legal recourse. There is no appeal from the police decision, and lawsuits based on the police decision are specifically forbidden. In Maryland, where an appeals process exists, the police are overruled on 78 percent of appeals.<sup>1</sup>

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1 Testimony of Sergeant R.G. Peppersack, Maryland State Police Commander, Firearms Licensing Section, before the Subcommittee on the Constitution, June 16, 1987.

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This practice of Handgun Control, Incorporated—of repeatedly placing such clauses in legislation which appears relatively mild on the surface—suggests that the group has more on its hidden agenda than moderate controls on handguns. In New Jersey, for example, the ban on so-called assault weapons even outlawed BB guns.

The real point of the Brady Bill is not that it has anything to do with crime control. Rather, it is accurately described by proponents and opponents alike as “the first step” toward much more restrictive gun controls. In a recent issue of the *New York Times*, Mrs. Brady explained that she expects the Brady Bill to pave the way for a need-based gun licensing system. By federal law, every transfer of every gun of any type, including the gift of an old .22 single-shot rifle from father-in-law to son-in-law, would be permitted only if the local police determined that the recipient needed the particular gun. Based on the policies that Handgun Control, Inc. has supported in cities such as Washington and New York, if the police administration decided that nobody needed a gun for protection, or that nobody needed a handgun for any purpose, or that nobody needed a shotgun which could hold more than two shells, the police would have absolute discretion to prohibit the gun transfer.

That gun prohibition advocates would support that Brady Bill component of the President’s crime bill is not surprising. What is more disturbing is the support that the bill often receives from conservatives. For example, William F. Buckley suggests that the Brady Bill be enacted as a national gesture of our concern about violent crime. But of course one of the reasons we have so much violent crime is that our political culture has tolerated and our politicians have readily indulged in empty, symbolic gestures, rather than genuine crime control.

Some conservatives suggest that the Brady Bill be enacted because the public wants it, or because police lobbyists want it, as if police or public sentiment could ever justify the infringement of constitutional rights. And besides, the only polls that show support for the Brady Bill are those that don’t compare the Brady Bill with the NRA alternative. When people compare the Brady Bill (a waiting period with no background check) to the NRA alternative (a mandatory computerized check at the point of purchase), the public overwhelmingly prefers the NRA instant check.

And to those who say they support the Brady Bill because it can’t hurt, let me tell you a story. Armed with a knife, Charles A. Grant, Jr., sexually assaulted a 33-year-old woman on a Virginia beach one Tuesday in 1991. The assault was videotaped by a tourist who, not having a permit to carry a concealed handgun for protection, could do nothing to help except record the crime.

Wednesday, Charles Grant raped a twelve-year-old girl.

News broadcasts of the videotape of Grant’s Tuesday assault frightened many people in the nearby Nags Head community.

A young woman named Sonya Miller had been wanting a handgun for a while, and on that Wednesday, her father bought her a .38 special revolver. He gave her the revolver that evening.

At about 9 p.m., Miss Miller went to the post office to pick up her mail. As she stepped into the dimly lit parking lot near the post office, Charles Grant saw her, and she saw Charles Grant. They both screamed. Grant told the young woman he would not hurt her, but when she attempted to get into her car, Grant lunged at the door. He stuck a .25 caliber pistol in her face, began climbing into the car’s back seat, and said “I’m going to kill you.”

“No,” she replied, “I’m going to kill you.” Sonya Miller picked up the revolver she had acquired less than fifteen minutes before. When she pulled the hammer back, he dropped his gun and fled. Miss Miller drove home; her father called the sheriff’s office; and Charles Grant was apprehended.

Regarding the handgun Miss Miller had just acquired, "It's the only thing that saved her life," her father observed.<sup>2</sup> To enact the Brady Bill is to sign the death warrant for the next Sonya Miller. How many innocent people should die so that President Clinton is able to brag that he "beat" the NRA?<sup>3</sup>

**Federal Death Penalty.** How about the rest of the crime bill? Well, President Clinton is probably right that there is some role for a federal death penalty—especially if adequate funding for defense counsel, and reasonable habeas corpus rules ensure that only guilty people are executed. But, as Representative John Conyers points out, it is foolish for politicians to posture about how tough on crime they are by listing the number of offenses for which they have created a federal death penalty. Senator Biden's 1992 crime bill found over fifty offenses meriting a federal death penalty, including murder of a federal meat inspector. I would suggest that our streets will not become safer simply because a tough message is sent to those hardened thugs who prey on Department of Agriculture employees.

And the moral educational purpose that the death penalty serves—to highlight the sanctity of human life by emphasizing society's horror at the unjustified taking of an innocent life—is undermined by the application of the death penalty to any offense other than homicide. Thus, the proposal of presidential candidate Paul Tsongas, which was echoed in the 1992 Biden crime bill, to impose the death penalty for possession of large quantities of drugs is morally reprehensible. Assisting another person in engaging in a vice, or in making a foolish medical choice, or in altering their own state of consciousness is not on the same moral plane as homicide. To persons who believe otherwise, consider the possibility that if the mere release of allegedly pernicious drugs into the stream of commerce becomes a capital offense, how long will it be until corporate officers who, through the chain of command, are already deemed criminally responsible for the release of actual poisons into rivers and the air, become the next targets for an omnivorous federal death penalty. The claim that particular water pollution didn't actually kill anyone may be deemed no more an excuse than the claim that a particular crop of hemp never killed anyone.

So in proposing a relatively sensible federal death penalty, and resisting the urge for excessive piling on of inappropriate capital offenses, the Clinton crime bill deserves a cheer—especially if the Administration has the gumption to resist a piling on process as the bill moves through Congress.

**A Standing Army.** But no cheers are due for the proposal for federal funding for 50,000 new police officers. First of all, the economy is just beginning to suffer from the largest tax increase in human history in order, supposedly, to reduce the massive federal deficit. This is no time to begin adding even more federal programs.

Second, there is no hard evidence that police density makes that much a difference in crime. In 1973, the Kansas City police conducted a year-long experiment. Unbeknownst to the public, all patrol cars and foot patrols were pulled out of one area in the city, and placed in an adjacent, similar area. The police only entered the first area in response to specific calls for assistance, while the second area enjoyed a doubling of the police presence. And after a year, the crime rate in both areas was unchanged.

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2 Elizabeth Thiel, "Gift of a Gun Warded Off Attack, Father Says," *Virginia-Pilot*, April 12, 1991, p. D1.

3 For more on waiting periods, see David B. Kopel, *Why Gun Waiting Periods Threaten Public Safety* (Golden, Colorado: Independence Institute, September 1993).

More fundamentally, federal funding of local police will inevitably bring local police under federal control. Major federal funding of highway construction was commenced with the best of intentions during the Eisenhower presidency, with no strings attached other than highway quality standardization. But in a few decades, the states had grown addicted to federal highway dollars, and those dollars have led to congressional micromanagement of state drinking ages and of state driver's license revocation policies. Federal funding of education is well on the way to destroying local control of public and private education. To pretend that federal funding of policing will have any result other than to gradually bring local police forces under the command of a federal police "czar" is unrealistic.

The alternative Republican crime bill is superior to the Clinton proposal in that it pays for new spending by cutting spending elsewhere.<sup>4</sup> But again, spending cuts ought to go to deficit reduction, not new spending. And the Republican alternative runs the same risk of the Clinton bill, of tying local law enforcement to a federal tether.

And the federalization of local police, combined with Vice President Gore's proposal to consolidate all federal law enforcement under a single command brings us to violation of the spirit, at least, of the Second Amendment.

The Second Amendment isn't about duck hunting, nor about shooting lone criminals, although both activities were considered morally laudable. The Second Amendment at its core is about fear of a criminal federal government in general, and fear of a federal standing army in particular. Uniformed, professional, heavily armed employees of the central government in Washington—these were the people that the authors of the Constitution wisely feared would be more loyal to centralized authority than to the communities of America. And it was fear of this mercenary presence which wisely led the authors of our Constitution to believe that law enforcement should be under local control, where the checks and balances of community control would be strongest, and—unlike the Mongol divisions of the Chinese Red army who massacred the Chinese students at Tienanmen Square—locally controlled law enforcement would be less likely to turn its guns on its own community.

Thus, the issue on some of the more experimental aspects of the Clinton crime package, such as the national police corps, the community grants to local governments, the use of national service to fund police officers, and the funding of boot camps for first-time offenders, is not whether they will work. The fifty states are fully capable of conducting their own experiments with innovative crime control policies. And such experimentation is likely to be more fruitful when the states are spending their own money. The question for federal funding of these programs is whether they will erode local control and augment federal control. And why do we need 475 million federal dollars to pay for school security guards? Or to pay for drug education programs? Can't local school boards make their own decisions, with their own tax dollars? And by the way, since the people elected Bill Clinton President, rather than Josef Stalin, isn't it time to do away with federal funding for so-called drug education programs that encourage children to turn their parents into the police?

"Troops to cops" sounds like a nice idea—training retiring military veterans to take police jobs. But do we really want the police to become even more like the military—to focus on capturing an area and destroying an enemy, to rely heavily on high-tech assaults, with no regard for

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4 H.R. 2872, introduced August 4, 1993. The cuts include a 5 percent across-the-board cut in federal administrative overhead, and a cap on administrative overhead expenses in federal university research grants at 90 percent of current levels.

the rights of persons being attacked (understandable in a military context), and only scant regard for the safety of bystanders?

Already we live in a world where federal agencies feel free to assault on specious charges a peaceful community which happens to have eccentric religious beliefs and a lot of firearms. Already we live in a world where National Guard soldiers point their machine guns at teenage girls, while the United States Army, without probable cause, searches farms for illegal hemp, a product which George Washington grew on his own farm. Will America really be freer and safer by taking more giant steps towards a federal standing army involved in domestic law enforcement?

Let me suggest some elements that ought to have been included in a genuine criminal justice reform bill, reforms that would leave America both safer and freer:

**Step One: Forfeiture reform.** Consider Representative Henry Hyde's H.R. 2417, the Civil Asset Forfeiture Reform Act. The act protects the fundamental right to private property and restores the presumption of innocence through the following measures:

- ✓ **Placing the burden of proof on the government.** The government would be required to prove guilt, rather than the property owner being required to prove innocence.
- ✓ **Providing for the appointment of legal counsel for indigent persons whose property has been seized.** The billions of dollars in revenue generated by forfeiture programs provide more than enough resources to pay for counsel.
- ✓ **Protecting from forfeiture the property of persons** who have taken reasonable steps to ensure that the property would not be used in crime.
- ✓ **Eliminating the requirement that persons opposing a forfeiture put up a 10 percent bond of the property's value.** Under current practices, the government takes the property, and then makes the owner put up a bond for the property's value, if he or she wants to appeal the case while the government retains the property.
- ✓ **Extending the time allowed for forfeiture challenges from ten days after seizure to sixty days.**
- ✓ **Authorizing property owners to sue the government for negligence damage** to the property while the property was in government custody; and
- ✓ **Allowing the property to be returned to the property owner** pending a final resolution of the case, as long as adequate arrangements are made for the security of the property.

Indeed, the Hyde forfeiture ought to be followed up with additional forfeiture reforms. A proportionality requirement should be introduced, so that a \$10 million piece of property is not subject to forfeiture over a dollar's worth of hemp. And most important, we need to reform the forfeiture laws so that property is only subject to forfeiture if there is an attendant criminal conviction. The requirement for a criminal conviction has been evaded by the legal fiction that a forfeiture proceeding is an action against the property, rather than the owner. Simply put, legal fictions and the administrative convenience of law enforcement agencies should not be allowed to trump our nation's traditional commitment to private property as the foundation of a free society.

**Step Two: State Authority.** As a beginning toward returning control over criminal justice to the states, reduce the budgets of the Bureau of Alcohol, Tobacco and Firearms and the Drug Enforcement Agency by 80 percent. Much of what these agencies do has nothing to do with any legitimate federal role in law enforcement. Arresting persons who sell small quantities of drugs or who sell firearms without a license is well within the competence of state and local law en-

forcement agencies. Federal agencies should focus exclusively on genuinely federal issues, such as the importation or interstate distribution of illegal commodities.

Belief in the need to trim the federal role is not confined to libertarians and conservatives who thought that President Reagan's affirmation of the Tenth Amendment was the best part of his first inaugural address. The National Sheriffs' Association and the American Correctional Association ask us to "Halt the growing trend towards federalization of state crimes. Federal criminal jurisdiction should not be expanded into areas of traditional state authority unless state, local and federal officials agree that there is a clear and compelling need for an increased federal presence."<sup>5</sup>

It is time that we recognized that a one-size-fits-all federal approach is not working on most federal programs, including crime control. Mississippi doesn't need to have the same kinds of drug or alcohol laws as does Wisconsin, and Colorado ought to be able to watch the success or failure of the programs in Wisconsin and Mississippi, and then choose its own unique approach. Washington should get out of the business of trying to impose laws drafted in Washington as state statutes, and Washington should get out of the business of enforcing laws which are primarily a state and local concern. Why should Washington, rather than a state legislature, decide what requirements a licensed gun dealer should have? Why should Washington decide what kind of licensing system should be imposed on machine gun owners? Can't New Jersey and Arizona answer these questions differently, and why should Washington take away their Tenth Amendment right to do so?

The Tenth Amendment critique of federal criminal justice is not dependent on suspicion of the substance of underlying criminal laws. Carjacking is obviously a heinous crime, and carjackers deserve severe punishment, including the death penalty when the carjacking results in a felony murder. But what business does Congress have passing a federal carjacking statute? Carjackings are not perpetrated by interstate conspiracies of automobile smugglers. Nor are state and local prosecutors reluctant to prosecute and vigorously punish these thugs. Likewise, turning rape into a federal offense by redefining it as a civil rights violation improperly insults state and local law enforcement by presuming that existing rape laws are not vigorously enforced.

Conservatives who want to use federal funds to push states toward remaking their state criminal justice system in a conservative image, with more mandatory minimums, pre-trial detention, and truth-in-sentencing, might perhaps consider what will happen when the tools of federal coercion begin to be used to require the states, increasingly dependent on federal criminal justice dollars, to enforce the leftist criminal agenda: Mandatory minimums for paperwork violations of environmental laws. Harsh forfeitures imposed on persons who dare to possess an unregistered shotgun. Re-education programs for the politically incorrect whose dissent from the radical feminist and critical race theory agenda is labeled "hate speech."

In this regard, applause is due to the Fifth Circuit Court of Appeals, which a few days ago declared unconstitutional the federal "Gun-free School Zones Act." By that 1990 law, it is a federal felony for you to park your car across the street from your house, take your unloaded hunting rifle out of your car trunk, and carry the rifle into your home, if you happen to be within a thousand feet of a school. Certainly state and local government ought to be able to restrict the carrying of weapons onto school property. But again, the restrictions appropriate in New York City are not appropriate for Bozeman, Montana. The federal Court of Appeals recognized as

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5 "30 Organizations Call for Shift in Criminal Justice Policy," *Criminal Justice Newsletter*, July 15, 1993, pp. 3, 4.



much, by declaring that federal control of this issue was an unreasonable intrusion into a traditional area of state and local control.

**Warrant reform.** If we can get the federal government out of regulating areas of state and local concern, such as who can possess firearms components, then we will begin saving lives by reducing the scope of operations of agencies such as the Bureau of Alcohol, Tobacco and Firearms. The fiasco and mass-murder in Waco highlight the need to prevent the fraudulent procurement of warrants for hypertechnical violations of BATF interpretations of federal gun laws.<sup>6</sup> In this regard, the warrant requirement for gun law violations, and perhaps for other federal crimes as well, should be protected through the following reforms:

Require that a warrant application be reviewed by a United States Attorney before being presented to a judge or magistrate. This will allow the Department of Justice to perform its proper function of reviewing the legality of federal agency actions.

- ✓ **Allow** use of hearsay evidence only if the actual witness is unavailable.
- ✓ **Require** that probable cause be established for each element of the alleged offense.
- ✓ **Establish** a reasonable time limit, such as thirty days, between the date of an alleged offense and the date of a search warrant. This will prevent Waco-type situations, where a February 1993 raid was launched for offenses which had allegedly occurred in early 1992.
- ✓ **Require** that an application for a warrant fully inform the magistrate or judge of contradictory or possibly exculpatory evidence.
- ✓ **Establish** the presumption that once a warrant is served, the warrant and accompanying application should almost never be sealed from public disclosure, except when necessary to protect the safety of persons identified in the warrant application.
- ✓ **Require** specific judicial authorization for use of extraordinary use of force in serving a warrant, including no-knock entry.

These changes would not impair the ability of responsible law enforcement agencies to obtain warrants, but they would prevent at least some irresponsible and abusive federal actions.

**Mandatory Minimums.** Finally, it is time for Congress to consider seriously the bill by California Democrat Representative Don Edwards to repeal all federal mandatory minimums, especially regarding non-violent crimes. Nearly 70 percent of federal prison space is used to house drug offenders, many of them first offenders serving five-, ten-, or twenty-year mandatory minimums. A free-market economist can tell you why this policy hasn't created a dent in the supply of illegal drugs. Federal prison space should prioritize the long-term incarceration of violent offenders. Violent convicts should be allocated sufficient prison space to ensure that they stay off the streets until they are too old and lacking in high-level testosterone to commit further violent crime. Only once the violent criminals are taken off the streets for good should whatever prison space is left over be used for non-violent prisoners.<sup>7</sup>

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6 See Daniel Wattenberg, "Gunning for Koresh," *American Spectator*, August 1993, pp. 31-40. See also Dr. Paul Blackman (NRA/ILA), "Affidavit to Kill," paper prepared for the Annual Meeting of the American Society of Criminology, Phoenix, Arizona, Oct. 30, 1993, and selected for publication in *Journal on Firearms and Public Policy*, vol. 5 (1994)(forthcoming). The warrant reform ideas presented in this lecture are taken from Dr. Blackman's paper.

7 The speaker is currently preparing a major study on sentencing policy for the Cato Institute.

It is notable and commendable that the prison-building programs in the Republican alternative crime bill are focused on increasing prison space for repeat violent offenders.

In conclusion, I would urge that the conservatives of the 1990s take heed from some of the failures of the 1960s. The liberals of the 1960s were motivated by legitimate concerns for economic and social justice, as the conservatives and President Clinton are today motivated by genuine concerns over criminal justice. But these laudable concerns should not obscure the fundamental principle that our federal government is one of limited, enumerated powers, and has no general "police power" to legislate at large. Many criminal justice programs that can appropriately be proposed by the Governor of Arkansas are not appropriately proposed by the President of the United States. The Tenth Amendment to the United States Constitution, as well as the practical experience of decades of failed federal efforts to control matters of state and local concern, perhaps suggest that it is time to begin reducing, rather than expanding, the role of the federal government in many areas, including criminal justice.

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