

Are Gun Control Laws Discriminatory?

Creating economic barriers to gun ownership isn't the solution

BY MARKUS FUNK ILLUSTRATION BY RICK BARNES

Talk with a serious gun-control advocate about methods used to make gun ownership more difficult, and you may hear an argument that runs something like this: "Well, if we increase the prices of guns and bullets, those people will not be able to afford them; after all, those people are the ones who commit the greatest percentage of crimes." Who is this person referring to when he/she says "those people"? The answer is clear -- minorities and the poor. Since substituting "blacks" for "those people" clearly renders the statement racist and patronizing (not to mention unconstitutional), gun control advocates, intent on making gun-ownership more costly, have devised a variety of legislative means to camouflage their true motivations. Such legislation merely represents a continuation of gun-control advocates' long-standing affair with racial and socioeconomic discrimination.

WHAT ARE MELTING-POINT LAWS?

In 1990, an estimated daily average of 25 people were murdered with handguns, 33 women were raped at gunpoint, 575 people were the victims of armed robberies, and 1,116 people were assaulted with a gun in the United States. One of the methods that some states have opted for in an attempt to bridle such illegal firearm violence is the use of "melting-point laws." The Illinois, South Carolina, Hawaii and Minnesota legislatures have adopted rigid melting-point schemes which are designed to remove so-called "Saturday Night Specials" from the market; they basically do this by outlawing the sale of all handguns which melt at set temperatures ranging from 800 to 1000 degrees Fahrenheit, or which don't have a certain tensile strength (resistance of the metal to longitudinal stress).

The net effect on the handgun market is hard to determine precisely. However, in South Carolina, the melting-point laws have thus far resulted in bans on approximately ten percent of the available handguns. While the criminological soundness of such laws is open to question, one issue over which there can be no dispute is that the handguns which fail to meet the melting-point requirements are made of cheaper materials and are the least expensive. While there are manufacturers that produce handguns which both meet the melting-point standards and are less expensive than the premium makes, the sub-group of guns banned by the melting-point laws is the most affordable, and therefore the most accessible, segment of the handgun market. Melting-point laws take less expensive guns off the market, and while there is no shortage of expensive guns, most poor citizens cannot afford to buy them and must make due with what they can afford -- namely, Saturday Night Specials.

A handgun can often inspire a feeling of security and safety in a person living in a crime-ridden segment of society, and inexpensive

handguns can provide affordable and reliable protection to lower income individuals. Moreover, it is precisely these lower income individuals who are the most frequent victims of crime. As Florida State Criminology Professor and author Gary Kleck puts it, "Gun ownership costs more money than simple measures such as locking doors, having neighbors watch one's house, or avoidance behaviors such as not going out at night, but it costs less than buying and maintaining a dog, paying a security guard, or buying a burglar alarm system. Consequently, it is a self-protection measure available to many low-income people who cannot afford more expensive alternatives."

The gun control laws of some states deny ownership to the very people--those who live in crime-ridden neighborhoods--who may feel most secure by having one in the house.

Although handgun violence undeniably is a serious problem in American society, preventing those who by law have the right to own a handgun from doing so on the basis of socioeconomic considerations simply cannot be the solution. Both the Constitution, as it is interpreted, and the history of the United States grant the citizens the right to own a handgun. All of the states and several territories of the United States, as well as the federal government itself, recognize the sale of

firearms as lawful activity. We are, therefore, forced to consider the troubling prospect that melting-point laws and similar legislative efforts, such as Senator Moynihan's proposed bullet-tax, are instituted with the intention of increasing gun-prices and purposefully reducing the poor citizens' access to handguns, removing from them a self-defense option open to wealthier citizens. And while this prospect may be troubling, it is certainly not unprecedented in the history of the United States.

AMERICAN GUN CONTROL: A HISTORY OF DISCRIMINATION

One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, can't be trusted with firearms. Keeping arms away from blacks has always been a concern of white legislators; in fact, the first ever mention of blacks in Virginia's laws was a 1644 provision barring free blacks from owning firearms, and early firearm laws were often enacted for the sole purpose of preventing immigrants, blacks, and even agrarian agitators, from owning guns.

Evidently, the intention of these lawmakers was to restrict the availability of arms to both free blacks and slaves to the extent that the restrictions were consistent with the regional ideas of safety. As U.S. Supreme Court Chief Justice Tanney, writing for the majority in the infamous 1857 Dred Scott decision, put it, "[if blacks were] entitled to the privileges and immunities of citizens, ...it would give

persons of the Negro race, who were recognized as citizens in [all of the states] of the union, the right... to keep and bear arms wherever they wanted... inevitably producing discontent and insubordination among them, and endangering the peace and safety of the state...."

Reflecting this attitude, Tennessee was the state that first attempted to utilize creative draftsmanship to prevent gun ownership by blacks in the 1870's. Tennessee barred any sale of handguns except the "Army and Navy" guns which were already owned by ex-Confederate soldiers. Since the poor freedmen could not afford these expensive firearms, the "Army and Navy Law" can be considered the predecessor of today's melting-point laws.

Following the Civil War, several southern legislatures adopted comprehensive regulations which were known as the "Black Codes," because, fearful of race war and retribution, the mere sight of a black person with a gun was terrifying to whites. These codes denied the newly freed men many of the rights that were enjoyed by whites. In 1867, the Special Report of the Anti-Slavery Conference noted that under the Black Codes, blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." By way of example, the Mississippi Black Code contained the following provision: "Be it enacted... [t]hat no freedman, free Negro or mulatto, not in the military... and not licensed to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition... and all such arms or ammunition shall be forfeited to the former...."

Legislative intent to disarm blacks can also be found in the voiding of a 1941 conviction of a white man, where a Florida Supreme Court Justice stated that "The [gun-control act] was passed for the purpose of disarming the Negro laborers . . . [it was] never intended to be applied to the white population."

But blacks aren't the only ones whom legislators wanted to disarm; in the nineteenth century, southern states also placed restrictions on gun-ownership for certain "undesirable" whites. For example, the 1911 Sullivan Laws were passed to keep guns out of the hands of immigrants (chiefly Italians--in the first three years of the Sullivan Laws, roughly 70 percent of those arrested had Italian surnames). Why single out foreigners? The answer can perhaps be found in the popular press of the time. The New York *Tribune*, for example, grumbled about pistols found "chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities," and the New York *Times* pointed out the affinity of "low-browed foreigners" for handguns.

The more things change, the more they stay the same --today's melting-point laws arguably reflect the old American prejudice that lower classes and minorities cannot be trusted with weapons. While the legislative bias which originated in the South may have changed in form, legislation like the melting-point laws evidences that it apparently still exists. But pro-gun groups are not the only ones to acknowledge this unfortunate reality. The gun control advocate and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control blacks," and Barry Bruce-Briggs, writing in *The Public Interest*, stated in no uncertain terms that "it is difficult to escape the conclusion that the Saturday Night Special is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence. The reference is to 'Niggertown Saturday Night.'"

THE SOCIAL CONTRACT, AND CHOICES FOR SELF DEFENSE

Liberal theorists' differing political interpretations of the right to self-preservation notwithstanding, it seems axiomatic that the government was (and is) instituted primarily to secure individuals from threats to their personal safety. Social contract theory is based on the notion that individuals agree to give up certain natural rights to liberty

in return for political rights, so as to better protect their interest in self-preservation and personal prosperity through benefits which only the state can provide.

In creating a national government of enumerated powers subject to numerous express limitations, the Constitution specifies the exchange of rights and powers that are made. The primary question, therefore, becomes whether the government has shown that it has been able to sufficiently protect the citizens from crime so as to make the possession of firearms for self-defense unnecessary. Given nationwide crime rates, it seems clear that the government cannot show that it is able to protect the citizenry from criminals, and, thus, social contract theory indicates that the government cannot justify taking away the citizen's right to defend themselves in the way they see fit.

Combining the fundamental right to self-preservation with the basic postulate of liberal theory, which states that people surrender their natural rights only to the extent that they are recompensed with more effective political rights, leads to the conclusion that every gun control law must be justified in terms of the law's contribution to the personal security of the citizenry. Victims must be able to defend themselves against criminals as soon as crime strikes, and the ability

to defend oneself is much more critical in poor and minority neighborhoods which are ravaged by crime and do not have adequate police protection. Since the courts have consistently ruled that the police have no duty to protect the individual citizen, and that there is, as the Supreme Court put it, "no constitutional right to be protected by the state against being murdered by criminals or madmen," citizens, regrettably, are put in the position of having to defend themselves. While the deterrent effect of the police surely wards off many would-be criminals (particularly in areas where police patrol more--i.e., affluent areas), the many citizens who

need *personal* protection are forced to face the reality that the police do not and cannot function as bodyguards for ordinary people. Therefore, individuals must remain responsible for their own protection, with the police providing only an auxiliary general deterrent.

Legislation such as the melting-point laws are intended to prevent the poor from possessing a firearm even though the poor are disproportionately victims of crime. What compounds this situation is the fact that the poorer areas of cities (where most of the crime occurs) rarely get the same police protection that the more affluent areas get (where the least crime occurs). Therefore, any gun control which takes cheaper guns off the market, and thereby prevents the poor from obtaining a handgun, is arguably doubly unfair. Like it or not, gun ownership is legal in most parts of the country, and as long as we find racial and socioeconomic discrimination by our lawmakers offensive (and have a constitution which makes it illegal), there can be no place for laws whose primary effect is to deprive the poor of their legal right to choose the same means of protection available to those who can more easily afford it.

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[this piece is based on a law review article by the author discussing the same general issues titled *Gun Control and Economic Discrimination: The Melting-Point Case-In-Point*, 85 *Journal of Criminal Law & Criminology* 764, Northwestern U. 1995 (reprinted with minor changes in 8 *Journal on Firearms and Public Policy* 39 (1996)).]

Historically, United States gun control laws have insinuated that the poor, especially the non-white poor, cannot be trusted with firearms.