

THE BATTLE OVER GUN CONTROL

DON B. KATES, JR.

In April of this year, Congress passed the Firearms Owners Protection Act. This act, the first federal gun law to pass in eighteen years, actually reduces the restrictions of gun Control Act. The often fierce debate that accompanied the passage of this legislation, though, demonstrated once again the political struggle over gun control in this country.

Most Americans think that controlling weapons is just plain sensible. Opinion polls show that most gun owners are actually of one mind with the general public in favoring it. For example, both gun owners and the public, by and large, favor such steps as the registration and licensing of guns and the banning of gun ownership to felons, juveniles, and the mentally impaired. Advocates of reasonable gun control approach guns pragmatically rather than ethically, viewing them as widely desired but nevertheless dangerous things which are sensible to control. Curtailing criminal misuse of guns is, of course, a prime concern of this pro-control thinking.

But the cause of reasonable gun control has been hampered in recent years by the presence among gun control advocates of a vocal minority motivated not by pragmatic concerns -- that gun control will reduce crime, for example - but by a moral vision that reviles guns and their owners. This antigun lobby sees the handgun simply as an abomination, and the desire to possess one for the protection of home and family, or for any other reason, as immoral, reactionary, and paranoid.¹ It supports the banning not just controlling - of handguns and, hence, has refused to support a loosening of even the most excessive handgun regulations.

The reaction of gun owners to such opposition has been predictable. Feeling offended, and perhaps even threatened by antigun rhetoric, the gun lobby has opposed even the most moderate controls. To understand the difference this anti-gun position has made, as opposed to the reaction a merely "pro-control" view would elicit, it is useful to remember that gun owners have not always opposed gun control. Most of our present gun laws, in fact, come from the Uniform Revolver Act which the NRA drafted and promoted early in this century. As late as 1957, legislation to bar military surplus imports was sponsored in the Senate by NRA life member John F. Kennedy. (Ironically, his purpose was not to prevent crime but to protect the domestic arms industry centered in the New England.)

In focusing on the baleful effect of antigun rhetoric, I am not denying that gun owners are often equally intemperate. But though their intemperance is notoriously counterproductive, it hurts the gun lobby far less than antigun vituperation hurts the cause of reasonable gun control. For the strident opposition to gun ownership that characterizes the antigun lobby foredooms the cooperation that is essential if better controls are to be enacted and obeyed. A situation has developed, then, in which no matter how reasonable in the abstract a gun control proposal might

seem, gun owners think it will end up being administered from an antigun perspective.

Arbitrary Administration

The history of American gun law and its enforcement unfortunately lends credence to the paranoia gun owners feel as a beleaguered minority. The Sullivan Law as administered in New York City is a case in point. Enacted in 1911, it made New York the first state to require a permit for a handgun on one's own premises (to this date, only a few states require such a permit). Support for its passage came not from liberal reformers interested in limiting crime - their focus at the time was liquor, not guns (indeed such liberals as Teddy Roosevelt, his niece Eleanor, and Drew Pearson carried guns for their own protection) - but from business and the then - conservative American Bar Association which associated handguns with foreign-born anarchists, labor agitators, and criminals. Articles, not just editorials, in conservative papers like the New York Times spoke of "low-browed foreigners" prowling gun shops for bargains; handguns reposing "chiefly in the pockets of ignorant and quarrelsome immigrants of lawbreaking propensities"; and "the practice of going armed . . . among citizens of foreign birth."

Though permit denial was at first concentrated in the Italian and Jewish areas, over the years it became the unacknowledged mechanism for banning handguns to the general population. New York decided in 1957, for example, that target shooting was no longer a legitimate reason for handgun ownership; permits would henceforth be issued only to businessmen, security guards, and a select few wanting guns for their own protection, by the early 1970s. This policy of progressively limiting permits given to ordinary citizens had reduced premises permits to less than one-seventh the number issued in London (although New York City was estimated to have one to two million unpermitted handguns). When New York appellate courts held that applicants could only be rejected if found unfit, New York City simply ignored the rulings. When the gun lobby obtained injunctions forcing the city to comply, it did, but only after establishing a two-year wait to obtain the gun-permit form. Finally, when the New York legislature reaffirmed the court decision and ordered that permit approvals or denials be made within six months, the city imposed an enormous processing fee, making application and renewal economically feasible only for the well-to-do.

"Carry" permits and the perquisites of privilege

The most desired handgun permit is not the premises permit but the "carry," which allows the holder to have a gun wherever he goes. Even states that do not require permits to keep a handgun at home tend to limit carry permits severely. But New York City's policy of limiting handgun ownership seems to apply only to ordinary citizens, not to those influential enough to qualify for the carry permit. By the 1970s, although only about 550 premises permits were issued each year, 25,000 carry permits were issued in New York City. Though the lists of permit holders in the city are legally public record, New York suppressed them until 1980, when a journalist obtained a court order demanding they be given to him. A subsequent newspaper article described the permit holders as "entertainers, publishers, media stars, [and] politicians of all stripes." Among the nationally prominent people on that and later lists (on a list leaked in 1977) were David, John, Laurence, and Winthrop Rockefeller, Leland Dupont, Henry Cabot Lodge, Robert Goulet, Sid Caesar, Donald Trump, William Buckley, Michael Korda, Arthur Godfrey, and Lyman Bloomingdale. Ironically, also named in news articles as permit holders have been such prominent gun control advocates as John Lindsay, Nelson Rockefeller, and Arthur Sulzberger, publisher of the New York Times. Dr. Joyce Brothers, who says gun ownership indicates male sexual dysfunction, was not listed; her husband was.

Of course such prominent people may face dangers to which ordinary citizen is not exposed. For instance, the only carry permit issued in San Francisco in 1990 went to then Supervisor Diane Feinstein after her house was machine-gunned by the New World Liberation Front. But does such special danger justify such singular privilege? Contrast Feinstein's situation to that of an ordinary San Franciscan. He is an elderly Chicano whom the San Francisco Examiner reports has held on to his grocery by outshooting fifteen armed robbers; nearby stores have closed because thugs have either bankrupted them or have casually executed their unresisting proprietors. Permit or not, this grocer has to carry a gun to and from his store. But in San Francisco, permits are available only to politicians and the very wealthy whose lifestyles exempt them from the common crimes against which a gun may have utility. Yet since personal firearms can do little to protect against the special dangers prominent people face, it seems, then, that handgun permits are available only to those who need them least.

That Feinstein received the only carry permit in the city should (and in any other context would) have outraged those most concerned with equality before the law. If permits are to be issued to those with influence who may fear for their safety, they should be available to the ordinary citizen also threatened by some kind of criminal violence.

Condoning permit abuse

Of course, the fact that a few prominent antigun spokesmen may be hypocritical does not nullify the need for permit Laws. Carrying a gun for protection does, in fact, occasion far more difficult decisions about its use than keeping a gun at home. Felonious endangerment and necessity to shoot are reasonably clear when a burglar or rapist breaks into occupied premises. Street incidents in contrast, may require training and knowledge to evaluate when to shoot.² The solution to discrimination in permit administration, then, is not to abandon the law, but to correct abuses of it. Unfortunately, in this case, the forces that normally defend Americans from government abuse are suffused with the sentiments which prompted the abuses in the first place.

Arbitrary and discriminatory administration is seen as acceptable in the antigun view. If common citizens who want a handgun to protect home and family are held to be sexually aberrant, paranoid, trigger-happy rednecks whom it is imperative to disarm, almost any means that does so is likely to seem justified. The National Coalition to Ban Handguns (NCBH) actually touts New York City as a model for gun control everywhere. (For obvious reasons, the NCBH does not discuss the issue of discriminatory administration.) When such a discussion was forced on the NCBH's principal spokesman, his response was significant: He blithely replied that there is no problem so long as permits are confined to people like Times publisher Sulzberger (whom he described familiarly as "Punch") who are obviously not criminals.

Apparently, the NCBH is not concerned with a discriminatory administration that grants a gun permit to "Punch" Sulzberger but denying one to those who may have legitimate concerns for their safety: grocers in Spanish Harlem; welfare recipients whom robbers target, knowing when their checks come and where they cash them: the elderly trapped in deteriorating neighborhoods (like the Manhattan couple who in 1976 hanged themselves in despair over repeatedly losing their pension checks and furnishings to robbers). But even if, as the NCBH argues, guns do not provide protection from violent crime, common citizens in a violent society have at least as much right to one as do the prominent and wealthy. Moreover, the speculations and anecdotal local data long cited to show the uselessness of handguns is now contradicted by solid national data. According to this data, handgun-armed citizens actually thwart about as many crimes annually as handgun-armed criminals succeed in committing. Citizens acting in legitimate self-defense kill about three times more assailants and robbers than do police.³ Furthermore, prison surveys show many criminals, fearing armed victims more than the police, are diverted into non-confrontational crime.

The only article of the anti-gun faith supported by modern research is that the handgun is rarely used against burglars -- not because it is inherently ineffective but because burglars usually strike unoccupied premises. Yet it turns out that a burglar's chances of being caught, prosecuted, and actually serving time are even less than that of his meeting an armed citizen. Gun ownership, it seems, is a greater deterrent to crime. Other antigun activists have not always practiced the NCBH's prudent silence about gun permit abuses: some even endorse these abuses outright. The premier antigun writer, Carl Bakal, approvingly cites such examples as denial of a New York permit to a "rifle instructor with a spotless record" because a relative "had been in trouble with the police." A former St. Louis alderman described gun law administration in that city (under Missouri permit requirements) as the automatic rejection of applications from non-

voters, homosexuals, and women lacking written permission from their husbands. He offered no defense of this discrimination as policy, approving only of the result -- that the applicants were denied handgun ownership, as he thinks all ordinary citizens should be.

Discriminatory punishment

Some states have no system under which one can even apply for a permit to carry a protective firearm. While this avoids Sullivan Law - type formal discrimination, enforcement is so arbitrary that violation becomes certain. When a physician has been maimed or murdered by frantic drug addicts who, think he must be carrying drugs, for example, his colleagues, are unlikely to be deterred from carrying a handgun because, they lack a permit: nor are judges, many of whom carry guns themselves because of threats from criminals, likely to jail them, even if they are prosecuted.

The NCBH, though, has the antidote for such "soft judges": legislatively mandate a year in prison for citizens caught carrying a gun, even if they are doing so in necessary self-defense and lack a permit only because these are unavailable to ordinary citizens. Massachusetts, which pioneered such legislation, recently sent a man to prison for carrying a handgun with which he had shot a coworker when knifed by him in a subway station. (The man had begun carrying the gun only after he received threats from the coworker.) In affirming the sentence, the state's high court wrote:

We are not unaware that some may say that the defendant is to be punished for acting reasonably in the face of a serious and real threat. [The defendant did not merely arm himself out of some fear of crime in general.] It was founded on an earlier assault by Michael with a knife and became a real and direct danger when Michael attacked the defendant with a knife at the [subway station]. We are also advised from the record that the defendant is a hardworking family man without a criminal record, who was respected by his fellow employees (Michael excepted). Michael, on the other hand, appeared to have lacked the same redeeming qualities. He was a convicted felon who had serious charges pending against him at the time of the defendants trial (quite apart from the charge of assaulting the defendant). It is possible that the defendant is alive today only because he carried a gun that day for protection. Before, [the legislature mandated the one-year minimum sentence.] such special circumstances involving the accused should be reflected reasonably in the sentencing or dispositional aspect of the proceeding. That option is no longer open to the judicial branch of government.

Leniency may be even less forthcoming (to the disadvantaged and minorities) despite their greater need for protection. In a case that received national publicity several years ago, a black woman, upon entering her housing project, found that a man had broken through a thin wall, raped her roommate, and thrown her out of the fifteenth-story window. The woman, brandishing a handgun, managed to frighten the assailant away. The police arrived too late to capture him, but they did arrest her for carrying the handgun.

Judges find that the vast majority of defendants charged with carrying a gun illegally (in states without carry permits or where permits are denied to citizens without political influence) have no criminal record. They are secretaries, shopkeepers, the poor, the elderly, many of whom carry guns because they have been raped or mugged with the police arriving too late to protect them. A judge in Chicago's "gun court" writing in a local legal publication, notes that his readers:

Would not go into ghetto areas except in broad daylight under the most optimum conditions - surely not at night, alone, or on foot, but some people have no choice. To live or work or have some need to be on this frontier, imposes a fear which is tempered by possession of a gun.

Antigun advocates do not grasp (not even for the purpose of refuting it) the idea that banning handguns might burden the poor and minorities, those most subject to crime. Consider the following from the NCBH's "20 Questions and Answers on Gun Control":

Q. Does the banning of handguns discriminate against minority members of our society?

A. No. Handguns would be illegal in the hands of the total populace, including all racial and religious groups, the rich and the poor alike.

Yes--and to sleep under bridges is forbidden equally to the rich and the poor alike.

The gun laws of '68

In the wake of the assassinations of Martin Luther King and Robert Kennedy, the Congress hastily passed -- over bitter NRA opposition -- the Gun Control Act of 1968. This act created a maze of regulatory laws, violations which were to be considered not misdemeanors but felonies -- and for which neither good intent nor lack of knowledge could be used in defense. That this act has had little or no crime-reductive value is conceded by all sides in the gun debate. But the repeated and varied injustices to which it has given rise have confirmed gun owners in their belief in the malignant intent and effect of gun control.

In one typical case a man and wife who owned a gun store were convicted of an "illegal" sale at a gun show although they had all the various licenses and had obtained all the necessary purchase-record information. Unbeknown to them, the unintended effect of an obscure regulation precluded licensees from selling at gun shows -- although unlicensed private citizens could do so without keeping records at all. Required to convict them, the trial court imposed a sentence of only one day -- on probation; the court of appeals, in affirming, took the unusual step recommending a presidential pardon. Nevertheless the couple lost their business, because felons cannot possess guns. This type of injustice is what the recently passed Firearms Owners Protection Act sought to correct.

A further flaw in the 1968 act is its failure to define who actually is a gun dealer. Obviously a gun store owner is a dealer, but so also are many people who would not normally

think of themselves as such -- and who find themselves subject to felony penalties if they fail to obtain the proper licenses or to keep the required records. A sporting goods importer, for example, ran into trouble with the law when he bought sixteen thousand starter pistols -- despite his desperate attempts to cancel the order when he found out that they were convertible to firearms. A police officer who on retirement sells to fellow officers the eight handguns he accumulated in his over-thirty years of service is liable for prosecution. So is an executor who never personally owned a gun but tried to obtain full value for the estate by selling the deceased's collection (comprising all rifles used by the various powers in World War I) as a collection rather than breaking it up and selling the guns individually to gun stores at perhaps 50 percent of their value. Each of these people is, without knowledge or intent, guilty of multiple felonies under the 1968 federal act. Further exacerbating this injustice is the fact that, even if these people had known enough to consult the agency which administers the act, they would have probably been told that they were not dealers and would not need licensure as such. A combination of frequent changes in administrative policy, ineptitude in implementing them, and the act's complexity and ambiguity has resulted in cases where citizens were misadvised that they could engage in activities for which they were later convicted. Such convictions are routinely upheld: Agencies cannot authorize violations of a statute by misinterpreting it.

Given how complex and poorly written the 1968 act is, agency misinterpretations are understandable. But that does not explain the fact that those in the agency responsible for search and seizure and enforcement practices have, in the words of antigun journalist Robert Sherrill, "shown less awareness of the Constitution than any other group of law enforcement officials at any level of government, with the possible exception of Mississippi sheriffs." After subsequent extensive senate hearings, Sherrill's views were reiterated (somewhat less pungently) in a 1982 Senate Judiciary Committee report:

[The testimony] reveals conduct by an official law enforcement agency of the federal government that borders on the criminal. . . . Based upon these hearings, it is apparent that the enforcement made possible by current firearms laws are so constitutionally, legally and practically reprehensible. . . . [The agency] has primarily devoted its firearms enforcement efforts to the apprehension . . . of individuals who lack all criminal intent and knowledge. . . . Since existing law permit [such prosecution], numerous collectors have been ruined by a felony record carrying a potential sentence of five years in a federal prison. Even in cases where the collectors secured acquittal, or [where charges were dropped] agents . . . have generally confiscated the entire collection of the potential defendant.

The American Civil Liberties Union, if it simply displayed its normal fidelity to constitutional rights, could dispel the beleaguered - minority paranoia that gun owners suffer. The ACLU could, for example, sue on behalf of gun owners whose civil liberties are violated and recognize that the Second Amendment guarantees a constitutional right to bear arms.⁴ Instead the ACLU characterizes the Second Amendment as guaranteeing not an individual right to arms, but only a state right. Furthermore, the ACLU shuns litigation against discriminatory abuses in state permit laws or the federal gun agency's violations of civil liberties.⁵

The ACLU was, in fact, a founding member of the NCBH, which strongly opposed

holding any hearings on agency abuse. When hearings were held, the NCBH denied throughout them that there were any civil liberties violations. Instead the NCBH denounced NRA's megalomania about the "so-called rights of gun owners . . ." Regrettably, the evidence these hearings provide of massive agency misconduct has been completely ignored by the antigun civil liberties establishment. Instead antigun organizations put forth an all-out effort to defeat the corrective legislation which has just passed Congress, despite the fact that the abuses to be corrected served no gun control purpose but only injured individual owners. In the light of such indifference from the civil liberties establishment to government abuses of gun owner rights, is it any wonder that gun owners militantly oppose any additions to government power that might also be used unreasonably against them?

Antigun advocacy--a symbolic crusade?

Why do antigun organizations and spokesmen play into the gun lobby's hands by making statements that inevitably cement millions of gun owners into fanatic opposition to control? Perhaps their motivations resemble those of the temperance crusaders earlier in this century, as explained in sociologist Joseph Gusfield's *Symbolic Crusade: Status Politics and the American Temperance Movement*. Gusfield suggests that what Prohibition advocates were seeking was not so much to change human behavior but to legally enshrine their own morality while condemning that of their opponents.

That this is the case can be seen in the systematic avoidance by handgun ban advocates of the key criminological issue: enforceability. Learned diatribes against the constitutional sanctity or defensive value of handguns abound -- but never addressed is the issue of how handguns are to be confiscated from the forty to fifty million owners who disagree. Enforcement problems will dwarf those of Prohibition's. Handguns, unlike liquor, are reusable, and their continued use does not involve the visibility and risk of perpetual illegal purchase. A ban would not even prevent handgun proliferation: witness the extent of drug smuggling. Moreover, handguns could be resold more cheaply on the black market than they are now legally.

Any machine shop and many home workshops can produce, at a fraction of the cost of legal handguns, modern guns in cheap metal versions which could suffice for the purposes of self-defense or of committing crime.

These facts are known to anyone who bothers to research enforceability. Yet it is no exaggeration to say that neither these nor other enforcement issues are ever analyzed in even scholarly arguments for handgun prohibition. (One ten-thousand word article -- which is atypical in that it at least notices the issue -- devotes but a single sentence to the need for "strict enforcement.") How can people who other situations trumpet enforceability obstacles advocate banning handguns without ever even addressing the enforcement issue? I submit that it is only because a handgun ban is to them purely symbolic moral legislation rather than a serious criminological program.

Whether law ought to ratify a purely symbolic moral position held by most of the population is a debatable issue. But in our context it is irrelevant, for most Americans do not share the antigun belief in the innate depravity of gun ownership. The irony is that attempts

nevertheless to reify that belief into law blight the chances for the kind of pragmatic gun control most Americans, including most gun owners, would support.

FOOTNOTES

1. The tone of anti-gun opposition to gun owners themselves can be seen by surveying the titles of typical anti-gun articles: “Sex Education Belongs in the Gun Store,” “Bulletbrains and Guns That Don’t Kill,” “The NRA Can’t Wash the Blood Off Its Tired Old Cliches,” “Handgun Nuts Are Just That – Really Nuts,” “Neurotic Attachment to Guns,” and so on.
2. Unfortunately, neither in New York, San Francisco, nor virtually anywhere else are carry permits conditioned on in-depth testing of when to shoot. Only a few jurisdictions test marksmanship at all.
3. Gary Kleck, “Policy Lessons From Recent Gun Control Research,” *Law and Contemporary Problems*, Vol. 49, No. 1 (Winter 1986).
4. One may deride the NRA’s reading of the Second Amendment as a guarantee against any form of gun control conceivable. But that it guarantees responsible adults the right to possess handguns for home defense is established by: its background in classical liberal thought and common law; the plainly expressed views of the Founding Fathers; its legislative history; and its uniform treatment in legal commentaries from 1791 until recent times.
5. The ACLU has, however, recently filed an amicus brief in the Supreme Court urging invalidation of a provision of the 1968 act under which no one who has ever been committed to a mental asylum may obtain permission to have a gun.