***This appeared in the Kansas Journal of Law & Public Policy*, 4:2 [Winter, 1995]. The printed form has different footnote numbering, and a few of the modern sources have been changed from electronic archives to printed versions of the same documents. (There may have been a very few minor changes in wording.) You should consider the printed version to be canonical. When I get some time, I will revise this to conform to the printed version.**

The Racist Roots of Gun Control

The historical record provides compelling evidence that racism underlies gun control laws - and not in any subtle way. Throughout much of American history, gun control was openly stated as a method for keeping blacks and Hispanics "in their place," and to quiet the racial fears of whites.

Racist arms laws predate the establishment of the United States. This is not surprising, for blacks in the New World were often slaves, and revolts against slave owners often degenerated into less selective forms of racial warfare. The perception that free blacks were sympathetic to the plight of their enslaved brothers, and the "dangerous" example that blacks could actually handle freedom often led New World governments to disarm *all* blacks, both slave and free.

Starting in 1751, the French Black Code required Louisiana colonists to stop any blacks, and if necessary, beat "any black carrying any potential weapon, such as a cane." If a black refused to stop on demand, and was on horseback, the colonist was authorized to "shoot to kill." [Thomas N. Ingersoll, "Free Blacks in a Slave Society: New Orleans, 1718-1812", *William and Mary Quarterly* , 48:2 [April, 1991], 178-79.] Because of fear of Indian attack, and the importance of hunting to the colonial economy, slave possession of firearms was at times a necessity in Louisiana. But the colonists had to balance their fear of the Indians against their fear of their slaves. As a result, French Louisiana passed laws that allowed slaves and free blacks to possess firearms only under very controlled conditions. [Daniel H. Usner, Jr., *Indians, Settlers, & Slaves in a Frontier Exchange Economy: The Lower Mississippi Valley Before 1783* , (Chapel Hill, N.C.: University of North Carolina Press, 1992), 139, 165, 187.] Similarly, in the sixteenth century the colony of New Spain, terrified of black slave revolts, prohibited *all* blacks, free and slave, from carrying arms. [Michael C. Meyer and William L. Sherman, *The Course of Mexican History* , 4th ed., (New York, Oxford University Press: 1991), 216.]

Often the relationship between racism and gun control was direct and obvious. On other occasions, the connection was more complex. One example of this complex relationship between economic struggle, slavery, and possession of arms can be found in seventeenth century Virginia. The aristocratic power structure of colonial Virginia found itself confronting a political challenge from lower class whites. These poor whites resented how the men who controlled the government used that power to concentrate wealth into a small number of hands. These wealthy feeders at the government trough would have disarmed poor whites if they could, but the threat of both Indian and pirate attack made this impractical; for all white men "were armed and had to be armed…" Instead, blacks, who had occupied a poorly defined status between indentured servant and slave, were reduced to hereditary chattel slavery, so that poor whites could be economically advantaged, without the upper class having to give up its privileges. [Edmund S. Morgan, "Slavery and Freedom: The American Paradox," in Stanley N. Katz, John M. Murrin,

and Douglas Greenberg, ed., *Colonial America: Essays in Politics and Social Development* , 4th ed., (New York: McGraw-Hill, Inc, 1993), 280.]

In the Haitian Revolution of the 1790s, the slave population successfully threw off their French masters, but as the Revolution degenerated into a race war, existing fears increased in the French Louisiana colony, and among whites in the American slave states. When the first U. S. official arrived in New Orleans in 1803 to take charge of this new American possession, the planters sought to have the existing free black militia disarmed, and otherwise exclude "free blacks from positions in which they were required to bear arms," including such non-military functions as slave-catching crews. The New Orleans city government also stopped whites from teaching fencing to free blacks, and then, when free blacks sought to teach fencing, similarly prohibited their efforts as well. [Ingersoll, 192-200. Benjamin Quarles, *The Negro in the Making of America* , 3rd ed., (New York, Macmillan Publishing: 1987), 81.]

Restrictions on slave possession of arms in the North American English colonies go back a very long way as well. Arms restrictions on free blacks in slave states, while present, at least allowed the possibility of obtaining a license to possess a gun in one's home, or with enough good reason, even to carry a gun. (Whites were not similarly restricted.) Existing arms restrictions on free blacks increased dramatically after Nat Turner's Rebellion in 1831, a revolt that caused the South to become increasingly irrational in its fears. [Stanley Elkins, *Slavery* , (Chicago, University of Chicago Press: 1968), 220.] Virginia's response to Turner's Rebellion prohibited free blacks "to keep or carry any firelock of any kind, any military weapon, or any powder or lead…" The existing law under which free blacks were occasionally licensed to possess or carry arms was also repealed, making arms possession completely illegal for free blacks. [Eric Foner, ed., *Nat Turner* , (Englewood Cliffs, N.J., Prentice-Hall: 1971), 115.] But even before this action by the Virginia Legislature, in the aftermath of Turner's Rebellion, the discovery that a free black family possessed lead shot for use as scale weights, without powder or weapon in which to fire it, was considered sufficient reason for a frenzied mob to discuss summary execution of the owner. [Harriet Jacobs [Linda Brant], *Incidents in the Life of a Slave Girl* , (Boston: 1861), in Henry Louis Gates, Jr., ed., *The Classic Slave Narratives* , (New York, Penguin Books: 1987), 395-6.]

To illustrate how extreme this fear of armed blacks had become, *dogs* were considered weapons. Maryland prohibited free blacks from owning dogs without a license, and authorizing any white to kill an unlicensed dog owned by a free black. Mississippi went further, and prohibited *any* ownership of a dog by a black person, without even a provision for licensed ownership. [Theodore Brantner Wilson, *The Black Codes of the South*, (University of Alabama Press: 1965), 26-30.]

One example of the increasing fear of armed blacks is the 1834 Tennessee Constitution. Article XI, §26 of the 1796 Tennessee Constitution read: "That the freemen of this State have a right to keep and to bear arms for their common defence." [Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* , (Washington, Government Printing Office: 1909; reprinted Grosse Pointe, Mich., Scholarly Press: n.d.), 6:3424.] The 1834 Constitution was revised to: "That the free *white* men of this State have a right to keep and to

bear arms for their common defence," [Thorpe, 6:3428.] [emphasis added] It is not clear what else could have motivated this change, other than Turner's bloody insurrection. The year before the new Constitution was adopted, the Tennessee Supreme Court had recognized the right to bear arms as an individual guarantee, but there is no evidence that this decision caused the change. [*Simpson* v. *State* , 5 Yerg. 356 (Tenn. 1833).]

Other decisions during the antebellum period were unambiguous about the importance of race. In *State* v. *Huntly* (1843), the North Carolina Supreme Court had recognized that there was a right to carry arms guaranteed under the North Carolina Constitution, as long as such arms were carried in a manner not likely to frighten people. [*State* v. *Huntly* , 3 Iredell 418, 422, 423 (N.C. 1843).] The following year, the North Carolina Supreme Court made one of those decisions whose full significance would not appear until after the Civil War and passage of the Fourteenth Amendment. An 1840 statute provided:

> That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor from the Court of Pleas and Quarter Sessions of his or her county, within one year preceding the wearing, keeping or carrying therefor, he or she shall be guilty of a misdemeanor, and may be indicted therefor. [*State* v. *Newsom* , 5 Iredell 181, 27 N.C. 250 (1844).]

Elijah Newsom, "a free person of color," was indicted in Cumberland County in June of 1843 for carrying a shotgun without a license - at the very time the North Carolina Supreme Court was deciding *Huntly*. Newsom was convicted by a jury; but the trial judge directed a not guilty verdict, and the state appealed to the North Carolina Supreme Court. Newsom's attorney argued that the statute requiring free blacks to obtain a license to "keep and bear arms" was in violation of both the Second Amendment to the U.S. Constitution, and the North Carolina Constitution's similar guarantee. [*State* v. *Newsom* , 5 Iredell 181, 27 N.C. 250, 251 (1844).] The North Carolina Supreme Court refused to accept that the Second Amendment was a limitation on state laws, but had to deal with the problem of the state constitutional guarantees, which had been used in the *Huntly* decision the year before.

The 17th article of the 1776 North Carolina Constitution declared:

> That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power. [Thorpe, 5:2788.]

The Court asserted that: "We cannot see that the act of 1840 is in conflict with it... The defendant is not indicted for carrying arms in defence of the State, nor does the act of 1840 prohibit him from so doing." [*State* v. *Newsom* , 5 Iredell 181, 27 N.C. 250, 254 (1844).] But in *Huntly*, the Court had acknowledged that the seemingly restrictive language "for the defence of the State" included an individual right. [*State* v. *Huntly* , 3 Iredell 418, 422 (N.C. 1843).] The Court then attempted to justify the necessity of this law:

> Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. Self preservation is the first law of nations, as it is of individuals. [*State* v. *Newsom* , 5 Iredell 181, 27 N.C. 250, 254 (1844).]

The North Carolina Supreme Court also sought to repudiate the idea that North Carolina Constitution's Bill of Rights protected free blacks by pointing out that it excluded free blacks from voting, and therefore free blacks were not citizens. But unlike a number of other state constitutions with right to keep and bear arms provisions that limited this right only to *citizens*, [Early state constitutions limiting the right to bear arms to citizens: Connecticut (1818), Kentucky (1792 & 1799), Maine (1819), Mississippi (1817), Pennsylvania (1790 - but not the 1776 constitution), Republic of Texas (1838), State of Texas (1845).] Article 17 guaranteed this right to the *people* - and try as hard as they might, it was difficult to argue that a "free person of color," in the words of the Court, was not one of "the people."

It is one of the great ironies that, in much the same way that the North Carolina Supreme Court recognized a right to bear arms in 1843 - then a year later declared that free blacks were not included - the Georgia Supreme Court did likewise before the close of the decade. The Georgia Supreme Court found in *Nunn* v. *State* (1846) that a statute prohibiting the sale of concealable handguns, sword-canes, and daggers violated the Second Amendment:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all of this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!* And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation! [*Nunn* v. *State* , 1 Ga. 243, 250, 251 (1846).] [emphasis in original]

Finally, after this paean to liberty - in a state where much of the population remained enslaved, forbidden by law to possess arms of any sort - the Court defined the valid limits of laws restricting the bearing of arms:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*... [*Nunn* v. *State* , 1 Ga. 243, 250, 251 (1846).]

"Citizen"? Within a single page, the Court had gone from "right of the whole people, old and young, men, women and boys" to the much more narrowly restrictive right of a "citizen." The motivation for this sudden narrowing of the right - that blacks were not citizens - appeared two years later.

The decision *Cooper and Worsham* v. *Savannah* (1848) was not, principally, a right to keep and bear arms case. In 1839, the city of Savannah, Georgia, in an admitted effort "to prevent the increase of free persons of color in our city," had established a $100 per year tax on free blacks moving into Savannah from other parts of Georgia. Samuel Cooper and Hamilton Worsham, two "free persons of color," were convicted of failing to pay the tax, and were jailed. [*Cooper and Worsham* v. *Savannah* , 4 Ga. 68, 69 (1848).] On appeal, counsel for Cooper and Worsham argued that the ordinance establishing the tax was deficient in a number of technical areas; the assertion of most interest to us is, "In Georgia, free persons of color have constitutional rights..." Cooper and Worsham's counsel argued that these rights included writ of habeas corpus, right to own real estate, to be "subject to taxation," "[t]hey may sue and be sued," and cited a number of precedents under Georgia law in defense of their position. [*Cooper and Worsham* v. *Savannah* , 4 Ga. 68, 70, 71 (1848).]

Justice Warner delivered the Court's opinion, one portion of which showed the fundamental relationship between citizenship, arms, and elections, and why gun control laws were an essential part of defining blacks as "non-citizens": "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." [*Cooper and Worsham* v. *Savannah* , 4 Ga. 68, 72 (1848).] The Georgia Supreme Court did agree that the ordinance jailing Cooper and Worsham for non-payment was illegal, and ordered their release, but the comments of the Court made it clear that their brave words in *Nunn* v. *State* (1846) about "the right of the people," really only meant *white* people.

Finally, in the infamous *Dred Scott* decision, the U.S. Supreme Court showed that it shared this understanding that citizenship excluded blacks, and because of the relationship between citizenship and the carrying of arms:

> It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.* And all of this would be done in the face of the subject race of the same color, both free and slaves, inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. [*Dred Scott* v. *Sandford* , 60 U.S. 393, 417 (1857).] [emphasis added]

While settled parts of the South were in great fear of armed blacks, on the frontier, the concerns about Indian attack often forced relaxation of these rules. The 1798 Kentucky Comprehensive

Act allowed slaves and free blacks on frontier plantations "to keep and use guns, powder, shot, and weapons, offensive and defensive." Unlike whites, however, free blacks or slaves required a license to carry weapons. [Juliet E. K. Walker, *Free Frank: A Black Pioneer on the Antebellum Frontier* , (Lexington, Ky., University Press of Kentucky: 1983), 21. This is an inspiring biography of a slave who, through hard work moonlighting in the production of saltpeter (a basic ingredient of black powder) and land surveying, saved enough money to buy his wife, himself, and eventually all of his children and grandchildren out of slavery - while fighting against oppressive laws and vigorous racism. Most impressive of all, is that he did it without ever learning to read or write.]

The need for blacks to carry arms for self-defense included not only the problem of criminal attacks that any white person might worry about, but the additional hazard that free blacks were in danger of being kidnapped and sold into slavery. [Walker, 73.] A number of states, including Ohio, Indiana, Illinois, Michigan, and Wisconsin, passed laws specifically to prohibit kidnapping of free blacks, out of concern that the federal Fugitive Slave Laws would be used as cover for re-enslavement. [Stephen Middleton, *The Black Laws in the Old Northwest: A Documentary History* , (Westport, Conn., Greenwood Press: 1993), 27-32, 227-40, 309-14, 353-7, 403-4.]

The end of slavery in 1865 did not eliminate the problems of racist gun control laws; the various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or Bowie knives; these are sufficiently well-known that any reasonably complete history of the Reconstruction period mentions them. These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed. [Michael Les Benedict, *The Fruits of Victory: Alternatives to Restoring the Union, 1865-1877* , (New York, J.B. Lippincott Co.: 1975), 87. Francis L. Broderick, *Reconstruction and the American Negro*, 1865-1900 , (London, Macmillan Co.: 1969), 21. Dan T. Carter, *When The War Was Over: The Failure of Self-Reconstruction in the South, 1865-1867* , (Baton Rouge, Louisiana State University Press: 1985), 219-21. Eric Foner, Reconstruction , (New York, Harper & Row: 1988), 258-9.] Republicans in Congress apparently believed that it would be difficult for night riders to provoke the correct level of terror in freedmen who were returning fire.

It appears that the Fourteenth Amendment's requirement to treat blacks and whites equally before the law led to the adoption of restrictive firearms laws in the South that were equal in the letter of the law, but unequally enforced. It is clear that the vagrancy statutes adopted at the same time as these arms control laws, in 1866, were intended to be used against blacks, even though the language was race-neutral. [Foner, *Reconstruction*, 200-1.]

The former states of the Confederacy, many of which had recognized the right to carry arms openly before the Civil War, after the passage of the Fourteenth Amendment developed a greater willingness to qualify that right. One especially absurd example, and one that includes strong evidence of the racist intentions behind gun control laws, is Texas. In *Cockrum* v. *State* (Tex. 1859), the Texas Supreme Court had recognized that there was a right to carry defensive arms, and that this right was protected under both the Second Amendment, and section 13 of the Texas Bill of Rights. The outer limit of the state's authority (in this case, attempting to discourage the carrying of Bowie knives), was that it could provide an enhanced penalty for manslaughters committed with Bowie knives, but could not prohibit their carry. [*Cockrum* v. *State* , 24 Tex.

394, 401, 402, 403 (1859).] Yet, by 1872, in *English* v. *State*, the Texas Supreme Court denied that there was any right to carry any weapon for self-defense under either the state or federal constitutions - and made no attempt to explain or justify why the *Cockrum* decision was no longer valid. [*English* v. *State* , 35 Tex. 473, 475 (1872).]

What caused the dramatic change? The following excerpt from the *English* decision reveals how racism permeated legal thinking:

> The law under consideration has been attacked upon the ground that it was contrary to public policy, and deprived the people of the necessary means of self-defense; that it was an innovation upon the customs and habits of the people, to which they would not peaceably submit... We will not say to what extent the early customs and habits of the people of this state should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators. *A portion of our system of laws, as well as our public morality, is derived from a people the most peculiar perhaps of any other in the history and derivation of its own system.* Spain, at different periods of the world, was dominated over by the Carthagenians, the Romans, the Vandals, the Snovi, the Allani, the Visigoths, and Arabs; and to this day there are found in the Spanish codes traces of the laws and customs of each of these nations blended together in *a system by no means to be compared with the sound philosophy and pure morality of the common law.* [*English* v. *State* , 35 Tex. 473, 479, 480 (1872).] [emphasis added]

Throughout the South during the post-war period, the existing precedents that recognized a right to open carry under state constitutional provisions and the Second Amendment were being narrowed, or simply ignored. The apparent goal of such laws was to intimidate the freedmen into an economically subservient position. By making the freedmen defenseless, employers could be more confident that intimidation would keep their hired hands "in line."

Nor was the intent that led to these laws lost on judges in the North. In 1920, the Ohio Supreme Court upheld the conviction of a Mexican for concealed carry of a handgun-while asleep in his own bed. Justice Wanamaker's scathing dissent criticized the precedents cited by the majority in defense of this absurdity:

> I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The southern states have very largely furnished the precedents. *It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.* [*State* v. *Nieto* , 101 Ohio St. 409, 430, 130 N.E. 663 (1920).] [emphasis added]

There are other examples of remarkable honesty from the state supreme courts on this subject, of which the finest is probably Florida Supreme Court Justice Buford's concurring opinion in

Watson v. *Stone* (Fla. 1941), in which a conviction for carrying a handgun without a permit was overturned, because the handgun was in the glove compartment of a car:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. [*Watson* v. *Stone* , 4 So.2d 700, 703 (Fla. 1941).]

There is a shortage of such forthright statements of racist intent behind modern gun control laws. But has the racist intent disappeared, or simply been recast into a more acceptable form? Robert Sherrill - at one time a correspondent for *The Nation* and a supporter of restrictive gun control laws - argued in his book *The Saturday Night Special* that fear of armed blacks was the major provocation of the Gun Control Act of 1968:

> The Gun Control Act of 1968 was passed not to control guns to but control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter, the result was that they did neither. Indeed, this law, the first gun-control law passed by Congress in thirty years, was one of the grand jokes of our time. [Robert Sherrill, *The Saturday Night Special* , (New York, Charterhouse: 1973), 280-91.]

Sherrill failed to provide "smoking gun" evidence for his claim, but there is no shortage of evidence of the level of fear that gripped white America in the late 1960s. The California Legislature adopted a major new arms law in 1967, for the first time prohibiting the open carry of firearms in cities. [Assembly Office of Research, *Smoking Gun: The Case For Concealed Weapon Permit Reform* , (Sacramento, State of California: 1986), 6.] This law was pushed over the top by the Black Panthers demonstrating against it - by walking into the Assembly Chamber carrying "pistols, rifles, [and] at least one sawed-off shotgun." ["Capitol Is Invaded", *Sacramento Bee* , May 2, 1967, A1, A10.] This of course pushed the law through, in spite of significant opposition from conservative Republicans such as State Senator John G. Schmitz. ["Bill Barring Loaded Weapons In Public Clears Senate 29-7", *Sacramento Bee* , July 27, 1967, A6.]

Another piece of evidence that corroborates Sherrill's belief that both liberals and conservatives intended the Gun Control Act of 1968 as race control more than gun control has recently been found. There are strong similarities between the Gun Control Act of 1968 and the 1938 weapons law adopted by Nazi Germany. [Jim Simkin and Aaron Zelman, *"Gun Control": Gateway to Tyranny* , (Milwaukee, Wisc., Jews for the Preservation of Firearms Ownership: 1992), is a highly polemical work, but it does provide the full text (in both German and English) of the various weapons laws and regulations adopted by the Weimar Republic and the Nazis from 1928 to 1938.] This is no coincidence; one of the principal authors of the Gun Control Act of 1968

was Sen. Thomas Dodd of Connecticut. After World War II, Dodd was assistant to the chief prosecutor at the Nuremberg war crime trials. [Sherrill, 67.] Shortly before the Gun Control Act of 1968 was written, Dodd asked the Library of Congress to translate the 1938 German weapons law into English - and Dodd supplied the German text to be translated. [Jews for the Preservation of Firearms Ownership, "The War on Gun Ownership Still Goes On!", *Guns & Ammo* , [May 1993], 30-31.] Dodd was not a Nazi; he had a reputation as an aggressive federal prosecutor of civil rights violations, and it seems unlikely that any sort of American Holocaust was intended. Nonetheless, it would not be surprising if Dodd found it convenient to adapt a law that had already proven its efficacy at disarming a minority group.

Today is not 1968, so when proponents of restrictive gun control insist that their motivations are color-blind, there is a possibility that they are telling the truth. Nonetheless, there are some rather interesting questions that should be asked today. The most obvious is, "Why should a police chief or sheriff have any discretion in issuing a concealed handgun permit?" Here in California, even the state legislature's research arm-hardly a nest of pro-gunners-has admitted that the vast majority of permits to carry concealed handguns in California are issued to white males. [Assembly Office of Research, 5.] Even if overt racism is not an issue, an official may simply have more empathy with an applicant of a similar cultural background, and consequently be more able to relate to the applicant's concerns. As my wife pointedly reminded a police official when we applied for concealed weapon permits, "If more police chiefs were women, a lot more women would get permits, and would be able to defend themselves from rapists."

Another reminder of how racism and gun control remain intertwined is the warrantless searches of private residences for guns in Chicago housing projects in early 1994. (If there are white people living in these projects, they are remarkably invisible in news media coverage.) While these warrantless searches were finally blocked by a judge, the popular press were remarkably neutral in their coverage of the Clinton Administration's advocacy of such an obvious violation of the Fourth Amendment's protections against unreasonable searches. President Clinton, after his warrantless search policy was struck down, explained his goals:

> Finally, we're going to work with residents in high-crime areas to permit the full range of searches that the Constitution does allow -- in common areas, in vacant apartments and in circumstances where residents are in immediate danger. We'll encourage more weapons frisks of suspicious persons, and we'll ask tenant associations to put clauses in their leases allowing searches when crime conditions make it necessary. ["Radio Address By The President To The Nation", Saturday, April 16, 1994, ftp'ed from whitehouse.gov.]

The "frisks of suspicious persons" are a longstanding tradition used against black Americans. Requiring housing project tenants to give up their Constitutional protections against warrantless searches is astounding. Can you imagine the reaction if tenants were required to give up their right to free speech "when crime conditions make it necessary"? It is hard to imagine the government attempting something similar in a white suburb - at least, until the courts first find it Constitutional in a black ghetto.

The case might be made that the government attempted to make the tenants safe by unconstitutional means - that the intentions were good, even if the methods were wrong. But even for this "special case" of housing projects, there are profound inconsistencies in the policy. Secretary of Housing and Urban Development Henry Cisneros, in a press conference on February 4, 1994, attempted to justify the warrantless searches as protecting the tenants of these crime-ridden projects. But by Cisneros' own admission, "Crime statistics show that public housing residents are not to blame for the reign of terror." Large majorities of those arrested in housing projects were nonresidents. It is therefore all the more amazing that the *residents*, who would presumably have much to fear from these armed nonresident criminals, are the ones that the Clinton Administration seeks to disarm. ["Press Briefing by the Vice President, Secretary Henry Cisneros, Secretary Lloyd Bentsen, Attorney General Janet Reno and Director of Drug Policy Lee Brown", February 4, 1994, ftp'ed from whitehouse.gov.]

If we examine these Clinton Administration policies as a pragmatic response to crime, we must ask: why disarm the likely *victims* of the criminals? But if we consider these inexplicable policies as the latest symptom of racist attitudes about violence, then these policies make much more sense.

Gun control advocates today are not so foolish as to promote openly racist laws, and so the question might be asked: "What is the relevance of racist gun control laws of the past?" My concern is that the motivations for disarming blacks in the past are really not so different from the motivations for disarming law-abiding citizens today. In the last century, the rhetoric in support of such laws was that "they" were too violent, too untrustworthy, to be allowed weapons. Today, the same elitist rhetoric regards law-abiding Americans in the same way, as child-like creatures in need of guidance from the government. In the last century, while never openly admitted, one of the goals of disarming blacks was to make them more willing to accept various forms of economic oppression, including the sharecropping system, in which free blacks were reduced to an economic state not dramatically superior to the conditions of slavery.

Even today, with open racism unacceptable in the mainstream of American politics, gun control still looks suspiciously concerned with issues of race. The Crime Bill of 1994, passed after a bruising fight in Congress, was opposed by an unlikely coalition in the House: most Republicans, some conservative Democrats, and many black Democrats. The primary concern of the two first factions appears to have been the assault weapon ban. Black Democrats were concerned that the death penalty provisions would disproportionately execute blacks.

The assault weapon ban provisions of the Crime Bill certainly reflected a widespread fear of armed inner-city blacks, with much of the rhetoric devoted to the dangers of these guns in the hands of "gang members" and other code phrases for poor blacks. But as a number of careful studies have found, "assault weapons" are seldom criminally misused. [Gary Kleck, *Point Blank: Guns and Violence in America*, (New York: Aldine de Gruyter, 1991), 75.] A *Wall Street Journal* editorial chided Congress for passage of a ban that, under the most charitable assumptions, would reduce murder and other violent crimes by tiny fractions of 1%. The Trenton, New Jersey assistant chief of police testified before Congress that his officers were more likely to confront an escaped tiger than a criminal with an assault weapon. ["What Is an

Assault Weapon?", *Wall Street Journal* , August 25, 1994, A12.] Crime control wasn't the motivation for the assault weapon ban.

Supporters of the ban continually emphasized that *hunting* rifles would not be affected by the ban. Was this a subtle way of saying that the sort of guns owned by *white* Americans would not be affected? Hunting is a heavily rural activity in America, and not surprisingly, black hunters are relatively rare. Similarly, an argument advanced by some pro-ban members of the Congress (notably Senator Campbell of Colorado) was that the law only affected new manufacturing - existing owners could keep their guns. If the similar 1986 ban on new machine gun manufacturing is any indication, the net effect of such an assault weapon ban will be to dramatically increase the price of existing weapons, further removing them from the financial reach of the poor, who are disproportionately black.

What are the policy implications of restrictive gun control today? Increasingly, it isn't aimed just at black people, or at the poor, but at the middle class. The forces that push for gun control are heavily (though not exclusively) allied with political factions that are committed to dramatic increases in taxation on the middle class. While it would be hyperbole to compare higher taxes on the middle class to the suffering and deprivation of sharecropping or slavery, the analogy of disarming those whom you wish to economically disadvantage has a certain worrisome validity to it.

Another point to consider is that under the American legal system, certain classifications of governmental discrimination are considered constitutionally suspect, and these "suspect classifications" (usually considered to be race and religion) come to a court hearing under a strong presumption of invalidity (*.e.g*, a law that made distinctions based on race, even if the distinction was nominally race-neutral in its effect). The reason these are "suspect classifications" is because of the long history of governmental discrimination based on them, and because laws based on these classifications often impinge on fundamental rights. [Thomas G. Walker, "Suspect Classifications", *Oxford Companion to the Supreme Court of the United States* , (New York, Oxford University Press: 1992), 848.]

In much the same way, gun control has historically been a tool of racism, and associated with racist attitudes about black violence. Similarly, many gun control laws impinge on that most fundamental of rights: self-defense. Racism is so intimately tied to the history of gun control in America that we should regard gun control aimed at law-abiding people as a "suspect idea," and require that the courts use the same demanding standards when reviewing the constitutionality of a gun control law, that they would use with respect to a law that discriminates based on race.

Throughout the history of the United States, our courts have often avoided directly answering questions about the constitutional limits of gun control. As we have seen, this was sometimes done by insisting that "right of the people" didn't include black people. Another strategy popular in the slave states was to claim that as long as *open* carry of a firearm was legal, then the state could prohibit or regulate *concealed* carry of a firearm.

Yet another strategy was to dispute what "arms" were protected. The New York courts upheld the Sullivan Act, that licensed the possession of handguns at home, on the basis that handguns

were not a Constitutionally protected arm - unlike a rifle or a shotgun. Such decisions have usually insisted that only "arms of the soldier" were protected by the Second Amendment, or the state constitution's equivalent provision.

From *U.S.* v. *Cruikshank* (1876) (a decision that emasculated the Ku Klux Klan Act), the U.S. Supreme Court has claimed that the Second Amendment is a limitation on the federal government only, not on the state governments. This argument has been accepted by most (but not all) state supreme courts. [Generally, see Clayton E. Cramer, *For The Defense of Themselves And The State: The Original Intent & Judicial Interpretation of the Right To Keep And Bear Arms* , (Westport, Conn.: Praeger Publishing, 1994).]

These sort of question-begging approaches will not be available to the U.S. Supreme Court in the cases that will come before it shortly. The assault weapon ban in the 1994 Crime Bill prohibits new manufacture of a category of weapons that is more clearly protected by original intent and existing precedents than any other category of common privately owned arm: arms with a primarily military function and appearance. Unlike Morton Grove's handgun ban, or California's Roberti-Roos Assault Weapons Control Act, this law is federal, not state. Fourteenth Amendment incorporation is not necessary for the Crime Bill's ban to be contrary to the Second Amendment.

Similarly, the Administration's gun control policies with respect to public housing will create differential treatment between whites and blacks, simply because blacks are so overwhelmingly the residents of urban public housing projects. Will the Supreme Court apply the same reasoning to the Second Amendment that they have with the First Amendment? Or will they continue a tradition of winking at the Second Amendment, because the underlying policy of gun control is based on racist assumptions?

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