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Chapter 17

Firearms Policy and Status

This is online Chapter 17 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsregulation.org. These chapters are:

17. *This chapter.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Arms Rights, Arms Duties, and Arms Control in the United Kingdom. Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century. The development of the technology of firearms, accessories, and other personal arms developed from early modern England to the present.*

Firearms policy debates involve the special concerns of diverse groups in American society. This Chapter examines disparate views about the costs and benefits of firearms in the context of race (Part A), gender (Part B), age and disability (Part C), sexual orientation (Part D), categories of prohibited persons, such as mental illness, marijuana users, and military service (Part E), and Indian tribes (Part F).

Previous chapters have primarily focused on judicial decisions, and legislative and historical material. The content here is different. For the first five groups in the above list, their views are presented through amicus briefs, most of them pro/con briefs from *District of Columbia v. Heller*. Pedagogically, the briefs are the opportunity to study how policy advocates serve as genuine "friends of the court," by presenting the Supreme Court with specialized expertise and information. As you will see, there is quite a diversity of writing styles in high-quality amicus briefs. The complete briefs are available at Scotusblog's *Heller* Case Page. For beginning lawyers with an interest in public affairs, helping with an amicus brief is an excellent and educational pro bono project.

Readers interested in past and present arms issues involving lawful or unlawful aliens will find the topic covered extensively in the printed textbook. *See* Chs. 8.A, 13.D.

A. FIREARMS POLICY AND THE BLACK COMMUNITY

This section presents diverging views about the costs and utilities of firearms from the perspective of different representatives of the Black community. It proceeds in three parts. Part 1 presents two examples from amicus briefs filed in *Heller*. Part 2 presents divergent views from an amicus brief filed by Black Public Defenders et al. in *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, No. 20-843 (U.S. filed Dec. 17, 2020), which is pending in the United States Supreme Court at the time this chapter is being prepared. Part 3 presents an annotated review of Carol Anderson's book *The Second: Race and Guns in a Fatally Unequal America*.

1. Divergent Views on Race and Firearms Policy Presented by Amici in Heller

Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Petitioner

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . In densely populated urban centers like the District of Columbia . . . gun violence deprives many residents of an equal opportunity to live, much less succeed.

SUMMARY OF ARGUMENT

. . . Although the type, use, cultural significance and regulations on the purchase, possession, and use of firearms vary from community to community, handguns — because they are portable and easy to conceal — are uniquely lethal

instruments, which are involved in the vast majority of firearm violence in America. Handgun violence in the District exacts a particularly high toll on the District's African-American residents. Multiple municipalities, including the District, have placed significant restrictions on the possession and use of handguns, while permitting the registration of other weapons such as shotguns and rifles. . . .

ARGUMENT . . .

B. The Clear and Established Understanding of the Second Amendment Should Not Be Disturbed

2. Abandoning the Clear and Established Understanding of the Second Amendment Unduly Limits the Ability of States and Municipalities Struggling to Address the Problem of Gun Violence, a Problem of Particular Interest to This Nation's African-American Community

Legislatures enact firearm regulations to reduce crime and save lives threatened by the vexing problem of gun violence. African Americans, especially those who are young, are at a much greater risk of sustaining injuries or dying from gunshot wounds. The number of African-American children and teenagers killed by gunfire since 1979 is more than ten times the number of African-American citizens of all ages lynched throughout American history. *See* Children's Defense Fund, *Protect Children, Not Guns* 1 (2007). . . . Firearm homicide is the leading cause of death for fifteen to thirty-four year-old African Americans. *See* The Centers for Disease Control and Prevention & Prevention, *Leading Causes of Death Reports (1999-2004).* Although African Americans comprise only thirteen percent of the United States population, African Americans suffered almost twenty-five percent of all firearm deaths and fifty-three percent of all firearm homicides during the years 1999 to 2004. *See* Centers for Disease Control & Prevention, *Injury Mortality Reports (1999-2004)* [hereinafter CDC, *Injury Mortality Reports*].

With respect to handguns specifically, African Americans again suffer disproportionately. From 1987 to 1992, African-American males were victims of handgun crimes at a rate of 14.2 per 1,000 persons compared to a rate of 3.7 per 1,000 for white males. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Crime Data Brief, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft* (Apr. 1994). . . . During the same period, African-American women were victims of gun violence at a rate nearly four times higher than white women. *See id.* Overall, African-American males between sixteen and nineteen years old had the highest rate of handgun crime victimization, at a rate of forty per 1,000 persons, or four times that of their white counterparts. *See id.*

Gun violence also adds significant direct and indirect costs to America's criminal justice and health care systems, while reducing the nation's overall life expectancy. *See generally* Philip Cook & Jens Ludwig, *Gun Violence: The Real Costs* (Oxford Univ. Press 2002) (estimating medical expenditures relating to gun violence, with costs borne by the American public because many gun victims are uninsured and cannot pay for their medical care); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 Annals of Internal Med. 483 (1999) (noting that the American public paid about eighty-five percent of the medical costs relating to gun violence); Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs* (2005).

Although African Americans suffer from a disproportionate share of gun violence nationally, these disparities are significantly larger in the District. In 2004 alone, all but two of the 137 firearm homicide victims in the District were African-American, most of them between the ages of fifteen and twenty-nine years old. *See* CDC, *Injury Mortality Reports (2004)*, *supra*[.] African Americans make up approximately sixty percent of the District's population, but comprise ninety-four percent of its homicide victims. *See* D.C. Dep't of Health, Center for Policy, Planning, and Epidemiology, State Center for Health Statistics, Research and Analysis Division, *Homicide in the District of Columbia, 1995-2004*, at 5 (Feb. 1, 2007). Between 1999 and 2004, African Americans in the District died from firearm use at a rate 10.6 times higher than did whites, and suffered from firearm homicide at a rate 16.7 times higher than did whites. *See* CDC, *Injury Mortality Reports (1999-2004)*, *supra*. The vast majority of these deaths were the result of handgun violence. *See* Nat'l Public Radio (NPR), *D.C. Mayor Addresses Blow to Handgun Ban* (Mar. 13, 2007).

Given the prevalence of gun violence in the District and the devastating impact on its residents, the District Council had sound reasons to conclude that its handgun regulations would constitute a wise policy. Ultimately, the overall effectiveness of the District's handgun prohibition is not relevant to the Court, given the applicable legal standard as discussed above. However, we submit that, although the District's prohibition may not be a complete solution, especially because the absence of regional regulations permits guns to continue to flow into the District from neighboring jurisdictions, local efforts to reduce the number of handguns on the District's streets should be considered one piece of a larger solution. Indeed, the enactment of the handgun ban in the District thirty years ago was accompanied by an abrupt decline in firearm-caused homicides in the District, but not elsewhere in the Metropolitan area. . . . These trends underscore the importance of the District's efforts and certainly do not counsel in favor of an unwarranted jurisprudential break that could drastically limit or foreclose such efforts. This Court's settled precedents provide the necessary latitude for the District to best protect its citizens by making the policy decision that fewer handguns, not more, promote public health and safety. . . .

3. Abandoning the Clear and Established Understanding of the Second Amendment Would Not Address Racial Discrimination in the Administration of Criminal Justice in General or the Administration of Firearm Restrictions in Particular

Concerns about this nation's past or present-day problems with racial discrimination do not provide a basis for invalidating the District's handgun regulations. The solution to discriminatory enforcement of firearm laws is not to reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private purposes, but rather to employ, as necessary, this Court's traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (administration of a criminal law may be "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of enforcement and prosecution amounts to "a practical

denial" of equal protection of the laws) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)); *see also Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of the grand jury violates Equal Protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of race as a factor in the exercise of peremptory challenges). To the extent the history surrounding the adoption of early gun control laws, or even the Second Amendment itself, is tainted by racial discrimination, *see* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998) (arguing that a major function of the "well regulated militia" of the Second Amendment during colonial and post-revolutionary times was the maintenance of slavery in the South and the suppression of slave rebellion); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991) (tracing the discriminatory intent of early firearms restrictions), then the Fourteenth Amendment is the appropriate vehicle for that bias to be ferreted out and eliminated.

Contrary to the assertions of some, the modern firearm regulations at issue in this case should not be confused with the Black Codes, other discriminatory laws that the Fourteenth Amendment invalidated, or more recent cases where Fourteenth Amendment protections have been implicated. The Fourteenth Amendment's protections rightly extend in the face of a colorable assertion that the District's firearm regulations (or those of any other jurisdiction) are racially discriminatory in origin or application, but such a showing has not been made here or even alleged by Respondents.

Brief for Congress of Racial Equality as Amicus Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations, which is primarily interested in the welfare of the black community, and the protection of the civil rights of all citizens.

SUMMARY OF ARGUMENT

The history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other "undesirable" groups. Robert Cottrol and Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity-The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert Cottrol and Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L.J. 309-361 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67. Gun control laws were often specifically enacted to disarm and facilitate repressive action against these groups. *Id.*

More recently, facially neutral gun control laws have been enacted for the alleged purpose of controlling crime. Often, however, the actual purpose or the actual effect of such laws has been to discriminate or oppress certain groups. *Id.*; *Ex Parte Lavinder*, 88 W. Va. 713, 108 S.E. 428 (1921) (striking down martial law regulation inhibiting possession and carrying of arms). As Justice Buford of the Florida Supreme Court noted in his concurring opinion narrowly construing a Florida gun control statute:

> 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. . . . The statute was never intended to be applied to the white population and in practice has never been so applied. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.

Watson v. Stone, 4 So. 2d 700, 703 (1941) (Buford, J., concurring).

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. Present day enforcement of gun laws frequently targets minorities and the poor, and often results in illegal searches and seizures.

ARGUMENT

I. Gun Control Measures Have Been and Are Used to Disarm and Oppress Blacks and Other Minorities . . .

E. Gun Control in the Twentieth Century . . .

Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals, or labor agitators. In 1934, Hawaii, and in 1930, Oregon, passed gun control statutes in response to labor organizing efforts in the Port of Honolulu and the Oregon lumber mills.

In its opening statement, in the NAACP's lawsuit against the firearms industry, the NAACP admitted the importance of the constitutional right:

> Certainly the NAACP of all organizations in this country understands and respects the constitutional right to bear arms. Upon the NAACP's founding in 1909 in New York City, soon thereafter it took up its first criminal law case [i]n Ossien, Michigan, where a black male, Mr. Sweet, was charged with killing a white supremacist along with several accomplices. The court, to rule out Mr. Sweet and his family to be pushed out of their home in Michigan, it was in that case that the presiding judge, to uphold Mr. Sweet's right to be with his family, coined the popular phrase "a man's home is his castle."

NAACP et al. v. Acusport, Inc. et al., Trial Tr. at 103. (The incident actually occurred in Detroit—not "Ossien"—Michigan in 1926. The NAACP and Clarence Darrow came to the defense of Dr. Ossian Sweet who had fatally shot a person in a white mob which was attacking his home because Dr. Sweet had moved into an all-white neighborhood. Furthermore, the phrase "a man's home is his castle," while certainly relevant to the Sweet case, first appears in an English 1499 case.)

After World War I, a generation of young blacks, often led by veterans familiar with firearms and willing to fight for the equal treatment that they had received in other lands, began to assert their civil rights. In response, the Klan again became a major force in the South in the 1910s and 1920s. Often public authorities stood by while murders, beatings, and lynchings were openly perpetrated upon helpless black citizens. And once again, gun control laws made sure that the victims of the Klan's violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the often specially deputized Klansmen in the safety of their monopoly of arms. [Don Kates, *Toward a History of Handgun Prohibition in the United States*, in Restricting Handguns: The Liberal Skeptics Speak Out 19. (D. Kates ed. 1979).]

The Klan was also present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon. Between 1913 and 1934, these states enacted either handgun permit laws or laws barring alien handgun possession. The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreign born; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities. *Id.* at 19-20.

II. Current Gun Control Efforts: A Legacy of Racism

Behind current gun control efforts often lurks the remnant of an old prejudice, that the lower classes and minorities, especially blacks, are not to be trusted with firearms. Today, the thought remains among gun control advocates; if the poor or blacks are allowed to have firearms, they will commit crimes with them. Even noted gun control activists have admitted this. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." Robert Sherrill, *The Saturday Night Special* 280 (1972). "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 'nigger-town Saturday night.'" Barry Bruce-Briggs, *The Great American Gun War*, The Public Interest, Fall 1976, at 37.

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor, and other minorities. In many jurisdictions which require a discretionary gun permit, licensing authorities have wide discretion in issuing a permit, and those jurisdictions unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals and groups experience no difficulty in the granting of a permit. Hardy and Chotiner,

"The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: The Liberal Skeptics Speak Out*, *supra*, at 209-10; William Tonso, *Gun Control: White Man's Law*, Reason, Dec. 1985, at 24. In St. Louis,

> permits are automatically denied . . . to wives who don't have their husband's permission, homosexuals, and non-voters. . . . As one of my students recently learned, a personal "interview" is now required for every St. Louis application. After many delays, he finally got to see the sheriff who looked at him only long enough to see that he wasn't black, yelled "he's alright" to the permit secretary, and left.

Don Kates, *On Reducing Violence or Liberty*, 1976 Civ. Liberties Rev. 44, 56.

New York's infamous Sullivan Law, originally enacted to disarm Southern and Eastern European immigrants who were considered racially inferior and religiously and ideologically suspect, continues to be enforced in a racist and elitist fashion "as the police seldom grant hand gun permits to any but the wealthy or politically influential." Tonso, *supra*, at 24.

> New York City permits are issued only to the very wealthy, the politically powerful, and the socially elite. Permits are also issued to: private guard services employed by the very wealthy, the banks, and the great corporations; to ward heelers[1] and political influence peddlers; . . .

Kates, "Introduction," in *Restricting Handguns: The Liberal Skeptics Speak Out*, *supra*, at 5.

A. By Prohibiting the Possession of Firearms, the State Discriminates Against Minority and Poor Citizens

The obvious effect of gun prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families. That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.

African Americans, especially poor blacks, are disproportionately the victims of crime, and the situation for households headed by black women is particularly difficult. In 1977, more than half of black families had a woman head of household. A 1983 report by the U.S. Department of Labor states that:

> among families maintained by a woman, the poverty rate for blacks was 51%, compared with 24% for their white counterparts in 1977. . . . Families maintained by a woman with no husband present have compromised an increasing proportion of both black families and white families in poverty; however, families maintained by a woman have become an overwhelming majority only among poor black families. . . . About 60% of the 7.7 million blacks below the poverty line in 1977 were living in families maintained by a black woman.

U.S. Dept. of Labor, *Time of Change: 1983 Handbook on Women Workers*, 118 Bull. 298 (1983).

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1. [A "ward heeler" is a political operative who works for a political machine or party boss in a ward or other local area.—Eds.]

The problems of these women are far more than merely economic. National figures indicate that a black female in the median female age range of 25-34 is about twice as likely to be robbed or raped as her white counterpart. She is also three times as likely to be the victim of an aggravated assault. *Id.* at 90. *See* United States Census Bureau, *U.S. Statistical Abstract* (1983). A 1991 DOJ study concluded that "[b]lack women were significantly more likely to be raped than white women." Caroline Wolf Harlow, U.S. Dept. of Justice, *Female Victims of Violent Crime* 8 (1991). "Blacks are eight times more likely to be victims of homicide and two and one-half times more likely to be rape victims. For robbery, the black victimization rate is three times that for whites. . . ." Paula McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environments*, 5 Law & Pol'y Q. 299, 301 (1983).

The need for the ability to defend oneself, family, and property is much more critical in the poor and minority neighborhoods ravaged by crime and without adequate police protection. *Id.*; Don Kates, *Handgun Control: Prohibition Revisited*, Inquiry, Dec. 1977, at 21. However, citizens have no right to demand or even expect police protection. Courts have consistently ruled "that there is no constitutional right to be protected by the state against being murdered by criminals or madmen."*Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, courts have ruled that the police have no duty to protect the individual citizen. *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S. Ct. 998, 1004 (1989); *South v. Maryland*, 59 U.S. 396 (1855); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. App. 1983) (en banc); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc); *Ashburn v. Anne Arundel County*, 360 Md. 617 (1986).

The fundamental civil rights regarding the enjoyment of life, liberty and property, the right of self-defense and the right to keep and bear arms, are merely empty promises if a legislature is allowed to restrict the means by which one can protect oneself and one's family. This constitutional deprivation discriminates against the poor and minority citizen who is more exposed to the acts of criminal violence and who is less protected by the state.

Reducing gun ownership among law-abiding citizens may significantly reduce the proven deterrent effect of widespread civilian gun ownership on criminals, particularly in regard to such crimes as residential burglaries and commercial robberies. Of course, this effect will be most widely felt among the poor and minority citizens who live in crime-ridden areas without adequate police protection.

B. The Enforcement of Gun Prohibitions Spur Increased Civil Liberties Violations, Especially in Regard to Minorities and the Poor

Constitutional protections, other than those afforded by the right to keep and bear arms, have been and are threatened by the enforcement of restrictive firearms laws. The enforcement of present firearms controls account for a large number of citizen and police interactions, particularly in those jurisdictions in which the purchase or possession of certain firearms are prohibited. Between 1989 and 1998, arrests for weapons carrying and possession numbered between 136,049 and 224,395 annually. FBI Uniform Crime Reports, *Crime in the United States Annual Reports (1989-1998)* Table: Total Arrests, Distribution by Age.

The most common and, perhaps, the primary means of enforcing present firearms laws are illegal searches by the police. A former Ohio prosecutor has stated that in his opinion 50% to 75% of all weapon arrests resulted from questionable, if

not clearly illegal, searches. *Federal Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Judiciary Committee*, 94th Cong. 1589 (1975) [hereinafter House Hearings]. A study of Detroit criminal cases found that 85% of concealed weapons carrying cases that were dismissed, were dismissed due to the illegality of the search. This number far exceeded even the 57% percent for narcotics dismissals, in which illegal searches are frequent. Note, *Some Observations on the Disposition of CCW Cases in Detroit*, 74 Mich. L. Rev. 614, 620-21 (1976). A study of Chicago criminal cases found that motions to suppress for illegal evidence were filed in 36% of all weapons charges; 62% of such motions were granted by the court. Critique, *On the Limitations of Empirical Evaluation of the Exclusionary Rule*, 69 N.W. U. L. Rev. 740, 750 (1974). A Chicago judge presiding over a court devoted solely to gun law violations has stated:

> The primary area of contest in most gun cases is in the area of search and seizure. . . . Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America. . . . More than half these contested cases begin with the motion to suppress . . . these arguments dispose of more contested matters than any other.

House Hearings, *supra*, at 508 (testimony of Judge D. Shields).

These suppression hearing figures represent only a tiny fraction of the actual number of illegal searches that take place in the enforcement of current gun laws, as they do not include the statistics for illegal searches that do not produce a firearm or in which the citizen is not charged with an offense. The ACLU has noted that the St. Louis police department, in the mid-1970s, made more than 25,000 illegal searches "on the theory that any black, driving a late model car has an illegal gun." However, these searches produced only 117 firearms. Kates, *Handgun Control: Prohibition Revisited*, *supra*, at 23.

In light of these facts, many of the proponents of gun control have commented on the need to restrict other constitutionally-guaranteed rights in order to enforce gun control or prohibition laws. A federal appellate judge urged the abandonment of the exclusionary rule in order to better enforce gun control laws. Malcolm Wilkey, *Why Suppress Valid Evidence?*, Wall Street J., Oct. 7, 1977, at 14. A police inspector called for a "reinterpretation" of the Fourth Amendment to allow police to assault strategically located streets, round up pedestrians en masse, and herd them through portable, airport-type gun detection machines. Detroit Free Press, Jan. 26, 1977, at 4. Prominent gun control advocates have flatly stated that "there can be no right to privacy in regard to armament." Norville Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 69 (1970).

Florida v. J.L. involved a defendant who had been stopped, searched, and arrested by Miami police after an anonymous telephone caller claimed that one of three black males fitting the defendant's description was in possession of a firearm. Amongst other arguments, the State asked the Court to carve out a gun exception to the Fourth Amendment. The Supreme Court unanimously declined to create such an exception to the Fourth Amendment. *Florida v. J.L.*, 120 S. Ct. 1375 (2000).

Statistics and past history show that many millions of otherwise law-abiding Americans would not heed any gun ban. One should consider America's past experience with liquor prohibition. Furthermore, in many urban neighborhoods,

especially those of poor blacks and other minorities, the possession of a firearm for self-defense is often viewed as a necessity in light of inadequate police protection.

Federal and state authorities in 1975 estimated that there were two million illegal handguns among the population of New York City. Selwyn Raab, *2 Million Illegal Pistols Believed Within the City*, N.Y. Times, Mar. 2, 1975, at 1 (estimate by BATF); N.Y. Post, Oct. 7, 1975, at 5, col. 3 (estimate by Manhattan District Attorney). In a 1975 national poll, some 92% of the respondents estimated that 50% or more of handgun owners would defy a confiscation law. 121 Cong. Rec. S189, 1 (daily ed. Dec. 19, 1975).

Even registration laws, as opposed to outright bans, measure a high percentage of non-compliance among the citizenry. In regard to Illinois' firearm owner registration law, Chicago Police estimated the rate of non-compliance at over two thirds, while statewide non-compliance was estimated at three fourths. In 1976, Cleveland city authorities estimated the rate of compliance with Cleveland's handgun registration law at less than 12%. Kates, *supra*, *Handgun Control: Prohibition Revisited*, at 20 n.1. In regard to citizens' compliance with Cleveland's "assault gun" ban, a Cleveland Police Lieutenant stated: "To the best of our knowledge, no assault weapon was voluntarily turned over to the Cleveland Police Department. . . . [C]onsidering the value that these weapons have, it certainly was doubtful individuals would willingly relinquish one." Associated Press, *Cleveland Reports No Assault Guns Turned In*, Gun Week, Aug. 10, 1990, at 2.

In response to New Jersey's "assault weapon" ban, as of the required registration date, only 88 of the 300,000 or more affected weapons in New Jersey had been registered, none had been surrendered to the police and only 7 had been rendered inoperable. Masters, *Assault Gun Compliance Law*, Asbury Park Press, Dec. 1, 1990, at 1. As of November 28, 1990, only 5,150 guns of the estimated 300,000 semiautomatic firearms banned by the May 1989 California "Assault Gun" law had been registered as required. Jill Walker, *Few Californians Register Assault Guns*, Washington Post, Nov. 29, 1990, at A27.

These results suggest that the majority of otherwise law-abiding citizens will not obey a gun prohibition law; much less criminals, who will disregard such laws anyway. It is ludicrous to believe that those who will rob, rape and murder will turn in their firearms or any other weapons they may possess to the police, or that they would be deterred from possessing them or using them by the addition of yet another gun control law to the more than twenty thousand gun laws that are already on the books in the U.S. James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 244 (1983).

A serious attempt to enforce a gun prohibition would require an immense number of searches of residential premises. Furthermore, the bulk of these intrusions will, no doubt, be directed against racial minorities, whose possession of arms the enforcing authorities may view as far more dangerous than illegal arms possession by other groups.

> As civil liberties attorney Kates has observed, when laws are difficult to enforce, "enforcement becomes progressively haphazard until at last the laws are used only against those who are unpopular with the police." Of course minorities, especially minorities who don't "know their place,"

> aren't likely to be popular with the police, and those very minorities, in the face of police indifference or perhaps even antagonism, may be the most inclined to look to guns for protection—guns that they can't acquire legally and that place them in jeopardy if possessed illegally. While the intent of such laws may not be racist, their effect most certainly is.

Tonso, *supra*, at 25. . . .

NOTES & QUESTIONS

1. Do you find the NAACP's or CORE's arguments more convincing?

2. Imagine you are a legislator and have just reviewed the arguments and empirical claims in these two briefs. What questions would you ask representatives of CORE and the NAACP?

3. Do the two briefs reveal any common ground?

4. As a matter of policy, which view seems to offer the most practical pathway to public safety? What about individual safety? Are public safety measures and individual safety measures compatible?

5. The *Heller* (Ch.11.A) and *McDonald* (Ch.11.B) decisions affirm a right of legal gun ownership for people who are not disqualified by reason of criminal activity or mental incapacity and who satisfy reasonable local and state requirements. What is the threat posed by legal handguns in the possession of such people?

6. Michael de Leeuw, who headed the NAACP's amicus submission in *Heller*, argues that the modern civil rights agenda should include weakening *Heller* so as to permit local governments to ban handguns. Such exceptions would permit revival of Washington, D.C.'s overturned gun ban, which de Leeuw argues should be respected as an exercise of Black community autonomy. *See* Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 Harv. BlackLetter L.J. 133 (2009). Professor Nicholas Johnson takes a different view, arguing that (1) stringent gun control requires a level of trust in the competence and benevolence of government that is difficult to square with the Black experience in America; (2) historically, armed self-defense in the face of state failure has been a crucial private resource for Blacks; (3) as a matter of practice and philosophy, Blacks from the leadership to the grass roots have supported armed self-defense by maintaining a distinction between counterproductive political violence and indispensable self-defense against imminent threats; and (4) isolated gun bans cannot work in a nation already saturated with guns. *See* Nicholas J. Johnson, *Firearms and the Black Community: An Assessment of the Modern Orthodoxy*, 45 Conn. L. Rev. 1491 (2013).

2. *Divergent Views on Race and Firearms Policy Presented by Amici in* New York State Rifle and Pistol Ass'n v. Bruen *and Responsive Commentary.*

The briefings in *Heller* and *McDonald* addressed municipal gun ban legislation through the lens of race. Following *Heller* and *McDonald*, lower courts have ruled on a variety of challenges to various gun laws including permit requirements for owing

firearms and carrying them in public. Those laws also can be critiqued through the lens of race. As demonstrated by the Amicus Brief of the Black Attorneys of Legal Aid et al., the regulations challenged in *New York State Rifle and Pistol Ass'n v. Bruen*, No. 20-843 (U.S. filed Dec. 17, 2020), present a good opportunity to evaluate an expensive and demanding discretionary permitting scheme from the perspective of race. The brief makes the case for racial equity in the administration of New York's permitting scheme.

Brief for Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae Supporting Petitioners

New York State Rifle & Pistol Ass'n, v. Bruen, No. 20-843 (U.S. July 20, 2021)

I. NEW YORK'S LICENSING REGIME CRIMINALIZES THE EXERCISE OF THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

New York violates our clients' rights to keep and bear arms by arresting, jailing, and prosecuting them for possessing a firearm—anywhere—unless they have applied to and survived the state's expensive and onerous discretionary licensing process. New York's appellate courts believe that structure to be constitutional, *Heller* and *McDonald* notwithstanding. *See, e.g., People v. Tucker*, 117 N.Y.S.3d 401 (N.Y. App. Div. 2020).

When someone in New York City is prosecuted for exercising their right to keep and bear arms—either at home or outside—they are almost always charged with second-degree criminal possession of a weapon, a "violent felony" punishable by 3.5 to 15 years in prison. N.Y. Penal Law §§ 265.03; 70.02(1)(b). That statute criminalizes possessing a loaded firearm outside of the home or possessing a loaded firearm anywhere with the intent to use it unlawfully. N.Y. Penal Law §§ 265.03(3), 265.03(1)(b). It is a more severe charge than possession of an unloaded firearm, which is a lower level, "non-violent" felony. N.Y. Penal Law § 265.01- B(1).

Second-degree criminal possession of a weapon applies to virtually all firearm possession cases—both at home and outside—because of broad provisions within the Penal Law. First, the Penal Law considers a firearm "loaded" if a person possesses it "at the same time" they possess ammunition, regardless of whether the firearm is, in fact, loaded. N.Y. Penal Law § 265.00(15); *People v. Gordian*, 952 N.Y.S.2d 46, 47 (N.Y. App. Div. 2012) (finding it "legally irrelevant" whether cartridges were in a firearm at the time of the arrest). As a result, New York prosecutors rarely charge firearm-possession cases as a lower level offense alleging an "unloaded" firearm. Second, the Penal Law dictates that unlicensed "possession" of a firearm is, on its own, "presumptive evidence of intent to use the same unlawfully against another." N.Y. Penal Law § 265.15(4). As a result, unlicensed possession, on its own, is legally sufficient evidence to establish the heightened violent felony of second-degree criminal possession of a weapon. *People v. Galindo*, 17 N.E.3d 1121, 1124 (N.Y. 2014). Together, these two provisions allow New York prosecutors to charge almost every firearm possession case as the violent felony of second-degree criminal possession of a weapon.

It is a defense to a pure possession charge if one has a firearm license, but securing such a license is no easy feat—especially for those who are indigent. For example, the New York City Police Department ("NYPD") maintains control of firearm licensing in New York City. It requires that applicants submit more than $400 in fees, pricing out indigent people, like those living in the most impoverished Congressional district in the country, which is in the Bronx. It administratively adjudicates, on its own, the "moral character" of applicants, and it retains ultimate and broad discretion in determining to whom to grant or deny licenses.

New York's firearm licensing requirement originated with the 1911 Sullivan Law. That law made it unlawful to possess any firearm, anywhere, without a license, and gave local police broad discretion to decide who could obtain one. 1911 Laws of N.Y., ch. 195, § 1, at 443. The bill was one of the "early Northern controls" that was passed in response to post Reconstruction "concerns about organized labor, the huge number of immigrants, and race riots in which some blacks defended themselves with firearms." David B. Kopel, *The Great Gun Control War of the Twentieth Century—And its Lessons for Gun Laws Today*, 39 Fordham Urb. L.J. 1527, 1529 (2012). It also responded to years of hysteria over violence that the media and the establishment attributed to racial and ethnic minorities—particularly Black people and Italian immigrants. In a 1909 New York Times interview, Police Chief Douglas I. McKay, who was overseeing the working-class men brought up from New York City to build the Catskill Aqueduct, summarized the views of law enforcement at the time:

> Another thing that we consider essential to the safety of the [upstate] residents is to prevent the workmen from carrying concealed weapons. This is a strong habit with both negroes and Italians.

Along the Line with the Aqueduct Police, N.Y. Times (Apr. 4, 1909). A few years later, Chief McKay became Deputy Police Commissioner, and then Police Commissioner, of the NYPD, the authority in charge of the Sullivan Law's discretionary licensing in New York City. *See Kline Ousts Waldo*, N.Y. Times (Jan. 1, 1914). Meanwhile, the Times implored the police to begin "frisking" hundreds of people in the city—a practice that, at the time, it believed was "less common, perhaps, than it ought to be." *The Rossi Pistol Case*, N.Y. Times (Sept. 29, 1911).

Throughout the twentieth century, racial fear continued to drive New York's firearm regulation scheme, which consciously excluded people of color in continued violation of the Fourteenth Amendment. This was particularly glaring in the wake of movements calling for racial equality and Black liberation in the 1960s, when New York concurrently implemented increasingly restrictive firearm policies. *See, e.g.*, Thomas Buckley, *12,000 Rifle Cartridges Seized from Harlem Gun Club Officers*, N.Y. Times (May 13, 1964); Martin Tolchin, *Police Say Thousands in Bedford-Stuyvesant Possess Guns*, N.Y. Times (July 28, 1964); Emanuel Perlmutter, *Wider State Control Over Pistols Sought*, N.Y. Times (Nov. 23, 1964). During the summer of 1967, major firearm retailers such as Sears suspended the sale of firearms "in 11 racially troubled neighborhoods," a policy that then New York City Mayor John Lindsay attempted to codify into law. Homer Bigart, *Sears Suspends Gun Sales Here*, N.Y. Times (Aug. 8, 1967); Will Lissner, *Mayor Asks Curb on Sale of Rifles Under a City Law*, N.Y. Times (Aug. 21, 1967); Charles G. Bennett, *Mayor Asks Curb of Guns in Riots*, N.Y. Times (Apr. 23, 1968).

In the 1970s, New York's officials focused on the proliferation of "Saturday Night Specials," cheap handguns that were associated with Black communities. Robert Sherrill, *The Saturday Night Special and Other Hardware*, N.Y. Times (Oct. 10, 1971). The term itself has racist origins; it evolved from the racist phrase "[n****r]-town Saturday night." B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 37, 50 (1976). Meanwhile, police officers were secretly accepting bribes from prominent businesspeople to help them secure firearm permits. Marcia Chambers, *Nadjari Studying Pistol Licensing*, N.Y. Times (Jan. 28, 1975).

Today, the NYPD's licensing process favors former NYPD officers. It explicitly waives their license application fee. See N.Y. Penal Law § 400.00(14). And upon leaving the force, the NYPD also issues its officers a special certification so they can more easily obtain a firearm license—what the NYPD's licensing division calls a "Good Guy letter." See Murray Weiss, *NYPD 'Good Guy' Note Let Suspect Pack Heat*, N.Y. Post (May 18, 2006) ("The letter—which is given virtually automatically to all retiring full-duty cops—is . . . basically all a former cop needs to get a permit as a civilian.").

The result of this system is that the NYPD unilaterally decides whose firearm possession is an unlicensed crime and whose is a licensed right. It thus "leaves the right to keep and bear arms up to the discretion" of local police. See *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (criticizing a statute for leaving the right up to the discretion of federal, state, and local prosecutors). And because the licensing requirement empowers the NYPD to make these decisions, there are disparities in the results. In 1969, for instance, working-class Black and Hispanic families marched through their Bronx neighborhoods, calling for the NYPD to grant them firearm licenses so they could protect their families. In response, the NYPD scoffed, telling them that "[i]t's the policy of this department not to give out permits for people who want to protect themselves." *40 in Bronx Seek Gun Permits*, N.Y. Times (Sept. 26, 1969). Yet the NYPD routinely grants licenses to well-guarded and well-resourced celebrities, like Howard Stern and Robert De Niro. Brad Hamilton, *NYC's '1 Percent' Totally 'Gun'-Ho*, N.Y. Post (Apr. 22, 2012).

New York City also aggressively sends its police onto the streets with a strict directive: take firearms away from minority men and deter them from carrying. As former Mayor Michael Bloomberg explained when justifying the practice:

> 95% of your murders, murderers and murder victims, fit one M.O. You can just take the description and Xerox it and pass it out to all the cops. They are male minorities 15 to 25. . . . [T]he way you should get the guns out of the kids' hands is throw them against the wall and frisk them.

Bobby Allyn, '*Throw Them Against the Wall and Frisk Them*', NPR (Feb. 11, 2020). Stop-and-frisk continued after Mayor Bloomberg's term ended. Between 2014 and 2017—despite allegedly ending the practice after a federal court found it to be unconstitutional—New York City conducted 92,383 stops and 60,583 frisks of people on the street. Christopher Dunn et al., *Stop and-Frisk in the de Blasio Era*, NYCLU, 1, 14 (Mar. 14, 2019). During that time, 81% of stops were of Black or Latino people, as were 84% of frisks. *Id.* at 9, 17. Black and Latino men between the ages of 14 and 24 accounted for 38% of the stops, even though they only made up 5% of the city's population. *Id.* at 2. Still, Black and Latino people were "less likely to be found with a weapon" than others. *Id.*

Stop-and-frisk, motivated by New York's furor to criminalize its people's firearm possession, is a driving reason why, in New York City, "[f]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J. dissenting).

Further downstream, the penal consequences of New York's licensing requirements are reflected in today's data from the criminal legal system. In 2020, while Black people made up 18% of New York's population, they accounted for 78% of the state's felony gun possession cases. Non-Latino white people, who made up 70% of New York's population, accounted for only 7% of such prosecutions. Black people were also more likely to have monetary bail set, as opposed to release on their own recognizance or under supervision, even when comparing individuals with no criminal record. When looking at only N.Y. Penal Law § 265.03(3)—which alleges only possession of a loaded firearm—80% of people in New York who are arraigned are Black while 5% are non-Hispanic white. Furthermore, according to NYPD arrest data, in 2020, 96% of arrests made for gun possession under N.Y. Penal Law § 265.03(3) in New York City were of Black or Latino people. This percentage has been above 90% for 13 consecutive years.

II. OUR CLIENTS ARE PROSECUTED FOR EXERCISING THEIR SECOND AMENDMENT RIGHTS.

Below, we illustrate representative cases of what we see every day to show this Court the real-life consequences of New York's firearm licensing requirements on ordinary people. In New York City alone, prosecutors charge thousands of people with unlicensed firearm possession every year. The Bronx District Attorney's Office—in lockstep with other New York district attorneys—explicitly defines "the least restrictive disposition for carrying a loaded gun in the Bronx as two years in prison and two years of post release supervision." Our clients' conduct would not be a crime in states that already properly recognize the Second Amendment.

The stories we include here are but a small sample of the devastation we witness. *First*, we include cases where New York's licensing requirement undermined a person's right to keep and bear arms outside of the home. *Second*, we also include cases where New York's licensing requirement undermined a person's right to keep and bear firearms within the home. Notably, our cases where clients are charged with home possession illustrate that New York uses its license requirement to "resist[] this Court's decisions in *Heller* and *McDonald*"—decisions that clearly intended to protect the right to keep and bear a firearm in the home.

a. Our Clients Are Prosecuted for Exercising Their Second Amendment Rights Outside of the Home

We routinely see people charged with a violent felony for simply possessing a firearm outside of the home, a crime only because they had not gotten a license beforehand.

i. Ms. Jasmine Phillips, a Texan Who Lawfully Owned a Gun There, Was Prosecuted for Unlicensed Possession While Visiting Family in New York.

Ms. Jasmine Phillips is a combat-decorated military veteran who served in Iraq. She had never been convicted of a crime. She legally possessed a pistol in Texas for self-defense. After she and her husband separated, her husband moved to New York. To have their children spend some time with their father, Ms. Phillips and her children drove to New York.

While Ms. Phillips was parked in her car in New York, police officers surrounded the vehicle. One officer knocked on the passenger side window. Another opened the driver side car door, put her in a chokehold, dragged her out of the car, threw her on the pavement, flipped her over, and handcuffed her. She heard officers search the car and find her pistol. The prosecution later justified these acts because of a "tip."

"The arrest was traumatizing," she recounts. "Being separated from my two baby boys, who were three and four years old, broke my heart." After the arrest, she was held at the precinct, and then the courthouse, without food, water, a phone call, or even access to a bathroom. After hours and hours of pre-arraignment detention and processing, she finally saw a judge. Like virtually everyone else accused of possessing a firearm, she was charged with violating N.Y. Penal Law § 265.03(3), a violent felony.

The judge set high monetary bail. "I felt completely hopeless," she says. "I thought about my kids, wracked with guilt and worry about what they were going through—were they scared? Confused? I was taken away from them so suddenly. I was crushed. I also thought about my job and the home I was renting, realizing that I was going to lose both. I felt broken."

Ms. Phillips was jailed on Rikers Island for weeks before she made bail. Because of her arrest, the Administration for Children Services ("ACS") 19 intervened and filed a child-neglect proceeding against her. "I lost everything: my job, my car, my home, and my kids." She couldn't see her children again for a full year, missing her son's fifth birthday. She recalls:

> Through my attorneys, I petitioned the family court to allow ACS to let me see my child, but ACS was too slow to respond. I spent my son's fifth birthday in an Airbnb, alone, surrounded by the gifts that I had bought for him. When I was finally allowed to see my children while I was in New York, ACS required that I meet with them during supervised visits in an ACS facility. It was so humiliating to have someone stand there while I tried to have some semblance of a normal, loving interaction with my kids. During one visit, my older son told me that he loved going to school. I was absolutely devastated. No one had told me that he had started pre-K. I missed his first day of school. I missed the chance to ask how his first day of school went. I can never undo that.

After extensive advocacy, Ms. Phillips' case was diverted and eventually dismissed. Still, the case had lasting effects: a Texas judge ruled against her in a child-custody case because of her "felony arrest." For Ms. Phillips, that was "the lowest moment of [her] life and the most hopeless [she] ever felt." "There are no words to fully reach the depth of that emotion I was feeling," she explains.

But the effects of the case did not stop there, either. ACS failed to properly close Ms. Phillips' case and, four years after the arrest, they called the local sheriff in Texas to do a "welfare check." She was not at home when the police came by, but her landlord was. The police repeated inaccurate information about the dismissed case, provided by ACS, and the landlord then terminated the lease. In addition, to this day, Ms. Phillips reports that her younger son continues to suffer severe separation anxiety.

. . .

In sum, Ms. Phillips' arrest for gun possession outside of the home continues to affect her, her family, and their lives today.

ii. Mr. Benjamin Prosser Was Prosecuted for Carrying a Gun for Self-Defense After He Was the Victim of Multiple Violent Stranger Assaults and Street Robberies.

Mr. Benjamin Prosser is a young man who graduated from high school with honors. He was distinguished by a national foundation. And because of New York's carry licensing requirement, he is now a "violent felon," solely because he carried a firearm for self-defense without a license.

At the police precinct after his arrest, Mr. Prosser confessed to possessing the gun for self-defense. He had repeatedly been the victim of violent stranger assaults and robberies on the street. When he started a job that required that he travel two hours for work every day, he decided to carry a firearm. He did not possess it with any intent to engage in violence, but his experiences taught him that he needed a weapon to be safe.

In response, the prosecution charged him, like so many others, with N.Y. Penal Law § 265.03(3), a violent felony. After lengthy plea negotiations, the prosecution offered him a "deal" to a probation sentence on a plea to a lesser charge—also a violent felony—because he had previously been a victim of violence. Afraid of the 3.5-to-15-year mandatory sentencing range on the top count, Mr. Prosser accepted the offer. See generally Richard A. Oppel Jr., Sentencing Shift Gives New Leverage to Prosecutors, N.Y. Times (Sept. 25, 2011).

Because of New York's carry licensing requirement, Mr. Prosser's once-bright future will forever be marked with the scarlet letter of "violent felon." He is barred from serving on a jury. N.Y. Jud. Law § 510(3). He is prohibited by federal law from possessing a firearm, 18 U.S.C. § 922(g), and is forever ineligible for a firearm license under New York's law, N.Y. Penal Law § 400.00(1)(c). And he will face the worst kind of "'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." *See Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

Mr. Prosser is grateful not to be incarcerated. However, he is also deeply disheartened, struggling with the idea of being another nameless casualty in a licensing system that was designed to preclude him from exercising his rights.

iii. Mr. Sam Little, Who Had Survived a Face Slashing and Lost Multiple Friends to Gun Violence, Was Prosecuted After Carrying a Gun to Defend Himself and His Young Son

Mr. Sam Little is a loving father in his 30s who was balancing school, a job, and parenting. He was enrolled in college, and he planned to get his associate's degree

in child psychology. He dreamed of eventually working with children with disabilities or in group homes. That dream stemmed from his own experience as a single father, raising a son with neurological and physical disabilities.

Like many young people in New York City, Mr. Little had repeatedly witnessed and been victimized by violence. He had friends who had been shot and murdered, and he himself had been shot—both when he was a teenager and then several years later. Once, Mr. Little was slashed across the face with a knife. He still bears the scar.

One night, Mr. Little left his home to go a friend's birthday party, which was in the same neighborhood where he had previously been slashed. To ensure his safety, Mr. Little brought a firearm. As a father, he felt that he owed it to his son to maintain his safety: who would take care of his son if something happened to him?

While walking down the sidewalk, police jumped out of a car, stopping and immediately frisking him. Police found the gun and arrested him. Prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony.

Overcome with the stress of an open felony case, Mr. Little dropped out of his classes and did not obtain his associate's degree. Although he had recently been offered a new job with the Department of Education, the open case made him ineligible to take the position.

Mr. Little was eventually convicted of attempted second-degree criminal possession of a weapon. He served eight months in jail. Mr. Little served his sentence at the Vernon C. Bain Center—colloquially called "the Boat"—a floating jail in the East River. See Jon Schuppe, Prisoners in New York City Jails Sound Alarm as Coronavirus Spreads: "I Fear for My Life," NBC News (Mar. 30, 2020) (describing the Boat as "like a slave ship," where men are laid "back-to-back" with others and then later bunked only three feet apart). In addition to the trauma of incarceration, he describes his experience there as "absolutely devastating" to his relationship with his son. While he was incarcerated, he did not want his son to undergo invasive searches or witness him in a jail, so during that period, he did not see his son at all. "These were eight months that I will never be able to get back. Eight months where I could have raised my son and taught him things. Eight months of missed holidays like Thanksgiving and his grandmother's birthday."

After he was released, the conviction derailed his dreams for an education and employment. Due to this conviction, he will never be able to work for the Department of Education. He has only been able to gain employment through post-conviction programs.

Despite these challenges, Mr. Little continues to provide for his family and contribute to his community by volunteering for extracurriculars with children. He is grateful for what he does have: family who support him and a stable place to continue living. However, he reminds us that many people who have been incarcerated have few support systems and are not as fortunate. He hopes that New Yorkers in the future will never have to experience the trauma and hardship he endured simply for exercising their right to keep and bear arms in self-defense.

b. Our Clients Are Prosecuted for Exercising Their Second Amendment Rights at Home, Despite *Heller* and *McDonald*.

We also regularly witness New York undermining the core of *Heller* and *McDonald* by prosecuting people for gun possession in the home. New York's licensing

requirement is the mechanism that allows the state to do so. The following stories illustrate this problem, and the need for this Court to answer the question presented in a way that will clearly protect the Second Amendment for all the people.

i. Ms. Sophia Johnson, a Survivor of Domestic Violence and Sexual Assault, Was Prosecuted for Possessing a Firearm in Her Home.

When Ms. Sophia Johnson lived in the Midwest, she legally purchased a firearm for her and her daughter's safety. As a single parent and a survivor of domestic violence and sexual assault, she found that possessing a gun in her home, even unloaded and in a lockbox, gave her peace of mind.

She eventually moved to New York, and she brought her gun with her. Unaware of New York's stringent laws, Ms. Johnson thought it was enough that her gun was legally purchased and registered in the state of purchase.

A few years later, she found herself in an abusive relationship. When she tried to leave, her abuser stole some of her belongings, including the gun. Ms. Johnson had never interacted with the police before, and she trusted them, so she did what she thought was right: she immediately reported the gun missing to the police. She cooperated with the police and even signed a search warrant.

Police found the gun—and then arrested her. The prosecution charged her with a felony for owning the gun. They prosecuted her using her own statement to the police, where she affirmed that the gun was hers and that she had bought it out-of-state for her own protection.

Ms. Johnson spent a night incarcerated in the criminal courthouse. The felony case hung over her head for a year and a half. *See Barker v. Wingo*, 407 U.S. 514, 537 (1972) (White, J., concurring) (noting that open cases "disrupt [one's] employment, drain [their] financial resources, curtail [their] associations, subject [them] to public obloquy, and create anxiety in [them], [their] family and [their] friends").

The open case depleted her. It stalled her education and her plans for a master's degree. It caused her constant stress and anxiety about the possibility of becoming a convicted criminal and losing her job. *See id.* She recalls that she could not sleep, always thinking about who would support her daughter if she went to prison.

ii. Mr. Gary Smith Was Prosecuted for Possessing a "Loaded Gun" in His Home Because He Had a Gun and Ammunition Under His Bed.

Mr. Gary Smith is an elderly man who worked his whole life as a city employee. He retired after he was diagnosed with cancer. After several rounds of chemotherapy, his cancer was finally in remission.

A few weeks after his last treatment, while his friend was staying at his house, police barged through Mr. Smith's front gate. They demanded that the friend "consent" to a search of Mr. Smith's apartment or they would "bust the door down." His friend—more terrified than she had ever been in her life—acquiesced. When Mr. Smith returned to the apartment, the officers arrested him. They had found a small handgun inside a closed pouch under his bed. They alleged they found ammunition in a separate pouch, also under the bed.

The police processed Mr. Smith for court. He awaited arraignment for over twenty-four hours. He remembers sitting in the arraignment cell, worried about

his health, anxious that it would not be able to withstand the obviously filthy conditions. *See* Molly Crane-Newman, *NYC Courthouses Are in Decrepit and 'Historically Unsanitary' Condition, Photos Show*, N.Y. Daily News (July 11, 2021) ("Multiple courthouse workers said the sections that prisoners are moved through are notoriously disgusting.").

At his arraignment, Mr. Smith was charged with violating both N.Y. Penal Law § 265.03(1)(b) and N.Y. Penal Law § 265.03(3)—each a violent felony. As a result, he faced a mandatory sentence of 3.5 to 15 years in prison. The prosecutors accused him of possessing a loaded firearm with intent to use it unlawfully because New York presumes that intent from unlicensed possession alone. N.Y. Penal Law § 265.15(4). New York's law considered the firearm "loaded" because the ammunition was in the same area as the firearm. N.Y. Penal Law § 265.00(15). And the "home" exception in N.Y. Penal Law § 265.03(3)—which is virtually always rendered academic because the law presumes that any unlicensed possession is already legally sufficient to establish a violation of § 265.03(1)(b)—did not apply to him because he had previously been convicted of a class A misdemeanor for jumping a subway turnstile.

After extensive negotiation and the defense's investigation of the unlawful police entry into the home, the prosecution agreed it could not sustain its burden at the suppression hearing and dismissed the case. Still, the psychological effects of the case have lasted. Regarding his friend, Mr. Smith says, "She's just not the same anymore."

iii. Mr. Andre Thomas Was Charged with Possessing His Roommate's Gun After Police Found It in Their Shared Kitchen.

New York's Penal Law provisions are so broad that they even affect people who are merely proximate to those who exercise their Second Amendment rights. Mr. Andre Thomas is one such example.

Mr. Thomas had recently moved to a new home to be closer to his mother, for whom he was caring after she had a stroke. At the break of dawn, Mr. Thomas awoke to the sound of his door being violently smashed in. At first, he thought he was being attacked. Then he realized his attackers were the police. The police charged into his kitchen, tearing his home apart along the way. They found a safe in the kitchen, broke it open, and discovered a firearm inside. This was not Mr. Thomas' gun, but his roommate's—an old friend he was trying to help by renting him a room at an affordable price.

Police arrested Mr. Thomas for the gun and prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony. At arraignment, the judge set monetary bail. In New York, monetary bail is usually synonymous with extended pretrial detention: like thousands of people in New York City, neither Mr. Thomas nor his ill mother could afford the amount set. *See, e.g.*, Bernadette Rabuy & Daniel Kopf, Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time, Prison Policy Initiative (May 10, 2016). He was sent to Rikers Island.

Mr. Thomas had grown up in the foster care system, but he had never experienced the trauma that he did at Rikers. He did not have a criminal record, and the criminal legal system was alien to him. His mother was heartbroken when she saw him in a jumpsuit. Helplessly incarcerated, he soon became depressed. He had a

felony firearm charge hanging over his head. He worried he would lose his home, and if released, would have to live on the streets. And he worried his mother might succumb to her illness before he would ever be released.

Eventually, a friend bailed Mr. Thomas out, but escaping the trauma of Rikers was only the beginning. Because of the gun possession charge, Mr. Thomas lost his security guard license and his job of over four years as a security guard supervisor.

Even after his release, his mental health continued to decline: he became increasingly paranoid and fearful of another breach into his home. Every time the elevator doors opened on his floor—just like they did right before the raid—he felt waves of crushing anxiety wash over him. He could not sleep or eat. He turned inward and stopped talking much to other people. When he did sleep, he dreamt of the police breaking into his home and of being at Rikers again. He rapidly lost weight. Eventually, an insightful judge pressured the prosecutors to dismiss the case. But the damage was already done.

Today, Mr. Thomas is still trying to recover. He has a new job, he has gained his weight back, and he is trying to follow his mother's advice and maintain his trusting and good heart. But he cannot shake feeling resentful towards the legal system and jaded about the police. When reflecting on what happened, Mr. Thomas repeats: "It wasn't fair. It just wasn't fair."

* * *

The Second Amendment is a right held by all the people. *McDonald*, 561 U.S. at 773. However, we regularly see New York charging those who exercise their Second Amendment rights with a "violent felony" offense. Our experience illustrates that New York effectively deprives its people of the Second Amendment right by requiring that they successfully obtain a license from the police before exercising it. As a result, we urge this Court to enforce the Second Amendment by issuing a clear and durable rule. The Court should hold that Petitioners' denials violated the Second Amendment because New York cannot condition Second Amendment rights on a person first obtaining a license.

In asking that the Court resolve the question presented in this way, we are mindful that the right to keep and bear arms has "controversial public safety implications." *McDonald*, 561 U.S. at 783. "As surely as water is wet, as where there is smoke there is fire," there are those who will "take[] for granted" that criminalizing gun possession "is the antidote to killing." *See Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, No. 20-1495, 2021 WL 2584408, at *14 (4th Cir. June 24, 2021) (Gregory, C.J., concurring) (criticizing the logic of policing and prosecution as the only tool for preventing violence). It is tempting, "if the only tool you have is a hammer, to treat everything as if it were a nail." *Id.* (internal quotation marks and citations omitted).

But what these stories and our experience illustrate is that New York's licensing requirements—which cause criminal penalties for unlicensed possession—themselves have controversial public safety implications. It is not safe to be approached by police on suspicion that you possess a gun without a license. *See, e.g.*, Michael Cooper, *Officers in the Bronx Fire 41 Shots, And an Unarmed Man Is Killed*,

N.Y. Times (Feb. 5, 1999) (reporting the murder of Amadou Diallo). It is not safe to have a search warrant executed on your home. *See, e.g.*, Richard A. Oppel et al., *What to Know About Breonna Taylor's Death*, N.Y. Times (Apr. 26, 2021). It is not safe to be caged pretrial at Rikers Island. *See, e.g.*, Michael Schwirtz et al., *Rikers Deemed Too Dangerous for Transferred Inmates*, N.Y. Times (May 5, 2017). It is not safe to lose your job. Margaret W. Linn et al., *Effects of Unemployment on Mental and Physical Health*, 75 Am. J. Pub. Health 502 (1985). It is not safe to lose your children. Bruce Golding, *Lawsuit Says NYC Has One of the Worst Foster Care Systems in US*, N.Y. Post (July 8, 2015). It is not safe to be sentenced to prison. Jean Casella et al., *New York's State Prisons Are Brutal and Deadly. That's Something We Can Change*, Gothamist (Feb. 21, 2019). And it is not safe to forever be branded as a "criminal," or worse, as a "violent felon." *See Strieff*, 136 S. Ct. at 2069-70 (Sotomayor, J., dissenting) (describing the "civil death" that accompanies criminal convictions). In sum, New York's licensing requirements are not safe.

And these licensing requirements also violate the Constitution. They allow New York to deny Second Amendment rights to thousands of people, and to instead police and criminalize them for exercising those rights. Such a policy is the type that "the enshrinement of constitutional rights necessarily takes. . . . off the table." *Heller*, 554 U.S. at 636.

The Court must not "stand by idly" while New York denies its people the right to keep and bear arms, "particularly when their very lives may depend on it." *Peruta v. California*, 137 S. Ct. 1995, 2000 (2017) (Thomas, J., dissenting from the denial of certiorari). It must create a rule that will in fact protect the Second Amendment rights of "all" the people. *See McDonald*, 561 U.S. at 773. Achieving that goal requires that the Court answer the question presented by holding for the Petitioners and reasoning that New York's licensing regime violates the right to keep and bear arms.

COMMENT

Writing for the *Nation* magazine, commentator Elie Mystal argues that it is possible to agree with the Black Legal Aid Attorneys brief in its condemnation of racial bias in the New York system, but still disagree with the goal of liberalizing New York's gun laws. Elie Mystal, *Why Are Public Defenders Backing a Major Assault on Gun Control? In The Name of Black Gun Owners, A Coalition of Progressive Attorneys Has Thrown Its Weight Behind an Explosive Attempt to Eviscerate Gun Regulations*, The Nation (July 26, 2021).

Mystal concedes that the public defenders make an "excellent case" that the challenged New York law unconstitutionally deprives poor people of a constitutional right and gives police an excuse to "harass and incarcerate" otherwise law-abiding minorities for conduct that "white people routinely get away with."

Mystal rejects the idea that private gun ownership is a constitutional right. But granting the current reality, he argues that "gating access to that right behind a $400 fee and an enormous time sink is not something we do for other constitutional

principles." Indeed, Mystal acknowledges that the Black Public Defenders arguments about New York's gun laws are the same ones he has made against drug laws: "Law enforcement over-punishes Black and Latinx gun owners, and uses the mere suspicion that gun laws are being violated to instigate stops, frisks, harassment, brutality, and murder." Mystal decries the results of putting the NYPD in charge of judging the proper cause requirement for a permit, noting that the NYPD has "scoffed" at the idea of Black and Brown citizens being licensed to carry firearms, but has taken a far less restrictive view with celebrities, the well-connected, and former cops.

While he finds many of the arguments in the brief compelling, Mystal disagrees with the Public Defenders' conclusion that the remedy should be to "do away" with the permitting system:

> It is, frankly, ass-backwards to reform the regulations on when Black and brown people can have a gun *without first* reforming when cops are allowed to shoot Black and brown people suspected of having a gun. Right now, in this country, it is functionally impossible to convict a cop who shoots an armed Black person. It doesn't matter what that person was doing, doesn't matter whether the person had a gun license.

Mystal thinks that guns offer a false promise of security. He cites a recent study he says indicates that a loosening of permit laws leads to increased Black homicide rates, not lower ones. "The solution," says Mystal, "self-evidently, is not more guns but fewer," along with providing both the opportunities that "make crime less lucrative" and the "early intervention needed to keep crime from escalating and mental health problems from spiraling."

Note that Mystal and the Black Legal Aid Attorneys view the same facts, make many of the same arguments, but come to different ultimate conclusions. How do you explain this broad agreement about the inputs but ultimate disagreement about the conclusion? As you consider this question, it may be helpful to review the material in Chapter 1. For a critique of the viability of implementing the sorts of supply controls that Mystal urges as the better solution than equal access to firearms, consider Nicholas Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 Wake Forest L. Rev. 837 (2008).

3. Divergent Views on Race and Firearms Policy from a Long-Term Historical Perspective

The disagreement about how race impacts assessments of firearms policy that is evident surrounding *Heller* and *Bruen* extends to the broader debate about the right to arms and firearms policy. This is illustrated again in the overlapping work and divergent conclusions of Professor Carol Anderson and Professor Nicholas Johnson. Professor Anderson's book *The Second: Race and Guns in a Fatally Unequal America* offers a broad critique of the right to arms from the perspective of race. Professor Johnson's review of *The Second*, excerpted below, explains that he and Anderson have examined much of the same material, but come to very different views about the currency and utility of the right to arms for Blacks in modern America.

Nicholas J. Johnson

Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America*

Reason Magazine 2021) (Jan. 2022) (book review)

Carol Anderson's book, *The Second: Race and Guns in a Fatally Unequal America*, is a bold addition to the literature surrounding the intersection of the right to arms and race.

Anderson makes damning claims that the Second Amendment is rooted in the goal of suppressing slave insurrection and is thus uniquely and irredeemably compromised by American racism. Yes, racism infects other constitutional provisions. Bias in administration of the Fourth Amendment is legend. But for the Second Amendment, Anderson claims, the affliction is uniquely fatal. "The Second Amendment is so inherently structurally flawed, so based on Black exclusion and debasement, that, unlike the other amendments, it can never be a pathway to civil and human rights for 47.5 million African Americans."

Even the end of slavery, Anderson argues, "was not transformative because the core of white supremacy was not chattel slavery but anti-blackness. . . . And this is the foundational root of the Second Amendment." This racist lineage also condemns the modern right to arms. "The current-day veneration of the Second Amendment," she says, "is frankly akin to holding the three-fifths clause sacrosanct. They were both designed to deny African Americans humanity and rights while carrying the aura of constitutional legitimacy."

These claims are sufficiently provocative that I expected a full-frontal attack on contrary ideas that I have developed in my own scholarship. Moving to the footnotes I was surprised to find my own work liberally cited.

It turns out that Anderson and I have worked through much of the same material but reached dramatically different conclusions about the utility, legitimacy and importance of the right to arms generally and for Black folk particularly. My commentary here will focus on some of the things that I think account for that difference, with the aim of advancing the conversation about race and the right to arms

Anderson presents the Second Amendment as a proxy for the much more textured American right to arms. This allows her to focus on a narrow slice of the eighteenth-century federal constitution story and extrapolate forward to argue that the broader American right to arms is irretrievably infected by racism. The initial concern here is what she omits — namely the lessons from the American revolution, including British attempts to disarm colonists as the rebellion came to a boil. Those conflicts provided plenty of incentives for the framing generation to think about and embrace a robust private right to arms, separate from concerns about slavery.

The Second also does not acknowledge the right to arms dynamic in the places where most government action on guns has always occurred, places with actual police powers — the states. The first federal gun control law did not appear until the 1920s. Gun regulation prior to that point was a function of state and local law.

The Second does not engage the independent protections of the right to arms established in 44 of 50 state constitutions. Integrating that information seriously compromises the claim that the American right to arms was all about slavery. Anderson slices the history of the federal right to facilitate a damning dismissal of

the Second Amendment as rooted in slave control. But the broader right to arms enshrined in the state constitutions defies that technique.

Many of the state arms guarantees were first enacted in the twentieth century. Wisconsin's 1998 constitutional amendment was a direct response to municipal efforts to ban handguns. Another cohort consists of twentieth century amendments designed to underscore the individual nature of earlier provisions. Louisiana, Missouri, and Kansas strengthened their guarantees in the twenty-first century. For Kansas, the effect was to reinstitute an original individual right that had been nullified by judicial interpretation. *See Salina v. Kansas* (Ch. 7). These had nothing to do with slave control. Fourteen arms guarantees appear in states that were admitted to the Union after the Civil War. These also were not motivated by the fear of slave insurrections. For an evaluation of the state arms provisions (as of 2005), see Nicholas Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brooklyn L. Rev. 715 (2005).[2]

Drawing from mid nineteenth century conflicts, Anderson argues that, armed self-defense for black people" is "ephemeral and white-dependent." She uses an episode of failed self-defense in Cincinnati to assert "the irrelevance of being armed or unarmed, because the key variable in the way that the Second Amendment operates is not guns but anti-blackness."

This assessment rests on an overly glib view of the self-defense dynamic. Effective self-defense presents at least one and sometimes two core problems. First, it requires the victim to prevail physically against a deadly threat. Second, it *might* require navigation of a subsequent process to have the violence deemed legitimate by some government authority.

No doubt racism can and has infected after the fact government determinations of legitimacy. By contrast, the efficacy of the initial physical act of self-defense is far less contingent on racist variables. Armed self-defenders will survive threats or not depending on the physical circumstances they encounter. Contrary to Anderson's claim, it is indeed the gun (not race) and the other physical factors of the conflict that dictate the initial effectiveness of self-defense.

Many armed self-defenders will avoid the racist *ex post* assessments of legitimacy altogether. The empirical assessments of Defensive Gun Uses (DGUs) in the modern era illustrate the point. In the vast majority of DGUs (a number that multiple surveys say is in the millions and dissenting sources say is between 100k and 650k) no shots are fired. Many of these DGUs are not reported to authorities. Rather the self-defender simply escapes the threat after brandishing or pointing. Encounters involving actual shooting are a thin slice of total DGUs. And deadly shootings are a fraction of that thin slice.

Even in cases where black self-defenders actually shoot someone, the violence is likely to be intraracial. While interracial violence strikes the most fear, the threats to modern self-defenders of all races are mostly from members of their own race. For Blacks, much of this self-defense activity will occur in jurisdictions with large Black populations, where the mayors, police chiefs and much of the law enforcement bureaucracy are Black. Government determinations of legitimacy of Black self-defense claims in these places would seem less "white dependent" than Anderson's example from Cincinnati.

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2. [For a current list, see Chapter 10 App'x.—Eds.]

Modern examples are suggestive. Several years ago, I had an assistant gather media reports of defensive gun uses. That work included stories reported at this link. These reports include Black people for whom the right to self-defense seemed to work. These examples hint at the complexity of the self-defense calculation. That complexity helps explain the millions of lawful Black gun owners who have a manifestly different view about armed self-defense than Anderson urges in *The Second*. This divergence suggests not only that racism impacts different Black people differently, but also that many other factors beyond race — e.g., gender, age, disability, relationship status, living situation, geographical location, occupation — may affect decisions about owning and carrying guns for self-defense.

The Second *gives relatively short shrift to the monumentally important and transformative right to arms conversation surrounding the Fourteenth Amendment.* The post-civil war effort to extend the right to arms as a limitation on the states was a direct response to racist gun control in the former confederacy. The debate surrounding Fourteenth Amendment demonstrates an explicit aim to extend the right to arms along with other federal constitutional guarantees to Black people. And there is rich evidence that Freedmen considered the right to arms to be a crucial private resource.

Anderson concludes that the right to arms as developed in the post war period was still structurally infected by racism, and was as a practical matter ultimately useless to Blacks. Even if Blacks used guns to survive racist attacks, she argues, racist whites ultimately controlled the legitimacy of Black self-defense claims.

The rebuttal to this claim is in the words and actions of black folk who actually lived through the nightmares. Contrary to Anderson's claims the history of the freedom movement spills over with black folk using arms to fight off deadly threats and embracing arms as a crucial private resource in the face of state failure, neglect and overt hostility.

The considerable body of thought and writing from black people who lived through the terror that Anderson recounts is conspicuously absent from The Second. That body of work overwhelmingly embraces armed self-defense and seems entirely at odds with Anderson's prescription that Blacks abjure armed self-defense.

Fighters in the freedom movement developed a considered philosophy and practice of arms rooted in the sort of critique that Ida B. Wells presented in support of her famous advice about the utility of the Winchester Rifle.

> Of the many inhuman outrages of this present year, the only case where the proposed lynching did not occur, was where the men armed themselves in Jacksonville, Fla., and Paducah, Ky, and prevented it. The only times an Afro-American who was assaulted got away has been when he had a gun and used it in self-defense.
>
> The lesson this teaches and which every Afro-American should ponder well, is that a Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give. When the white man who is always the aggressor knows he runs as great risk of biting the dust every time his Afro-American victim does, he will have greater respect for Afro-American life. The more the Afro-American yields and cringes and begs, the more he has to do so, the more he is insulted, outraged and lynched.

Ida B. Wells, Southern Horrors: Lynch Law in All Its Phases (1892).

W.E.B. DuBois not only described armed self-defense as a practical deterrent, he pressed it as a moral imperative. As editor of the NAACP flagship *Crisis* magazine, DuBois argued that even failed acts of self-defense established a cultural norm of resistance that discouraged attacks on the race. *See* Nicholas James Johnson, *Private Arms and Civil Unrest: Lessons from the Black Freedom Movement*, Law and Liberty Research Paper No. 20-09 (Nov. 1, 2020).

The NAACP cut its teeth as an organization, defending blacks who used guns in self-defense, and to different degrees vindicated men like Pink Franklin, Steve Green and Ossian Sweet. The Sweet case is particularly evocative. NAACP hired Clarence Darrow who won an acquittal. Sweet went on a hero's tour of NAACP branches and the resulting fundraising seeded the storied NAACP legal defense fund. *See* Nicholas Johnson, Negroes and the Gun: The Black Tradition of Arms (2014).

The list of freedom fighters who used guns, carried guns, were protected by guns and philosophically embraced and advocated armed self-defense as an important resource for blacks could fill volumes. (Like these: Nicholas J. Johnson, Negroes and the Gun: The Black Tradition of Arms (2014); Charles E. Cobb, Jr., This Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible (2015); Akinyele Omowale Umoja, We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement (2014)). Some of the familiar names include Fredrick Douglass, Henry Highland Garnett, T. Thomas Fortune, Bishop Henry Turner, Edwin McCabe, Roy Wilkins, Walter White, James Weldon Johnson, Medgar Evers, Rosa Parks, Roy Innis, Fred Shuttlesworth, Daisy Bates, A. Philip Randolph, Marcus Garvey, John Hope Franklin, TRM Howard, Fannie Lou Hamer, Hartman Turnbow, Winson Hudson, E.W. Steptoe, Vernon Dahmer, Robert Williams, James Farmer, Bob Hicks, and yes, Martin Luther King. *See* Negroes and the Gun (and Chapter 9.A).

Much of my critique here is about things that Anderson omitted. These sorts of framing decisions influence everyone's work. Disagreements about framing can be large scale—like my criticism about the state arms provisions—or small scale, which is the nature of my next quibble.

The Second deploys the notorious *Dred Scott* decision to advance the theme that racist decision-making in early America renders the Second Amendment uniquely and fatally compromised. *Dred Scott* infamously ruled that even free blacks were not citizens and had no rights that a white man is bound to respect. Among other arguments, Chief Justice Taney offered a parade of horribles of potential black citizenship—things like the right to arms that Blacks simply could not be allowed to exercise.

Dred Scott is an important marker in the right to arms story. I and others have used it as an example of the early understanding that the constitutional right to arms was individual in nature. Anderson deploys it to argue that the racism infecting the Second Amendment is so uniquely pernicious that we moderns (or some of us) should eschew the right to arms. She writes:

> If Blacks were citizens, he [Taney] wrote they would have the right to "enter every other state whenever they pleased. . . . hold meetings on political affairs, *or worse*, [italics mine] to 'keep and carry arms where ever they went.'"

This treatment subtly bolsters the claim that the concern about armed blacks stands out as *especially* troubling to nineteenth century racists like Chief Justice Taney. But the quotation presented, is not what Taney wrote. Taney does not highlight the right to arms by saying "*or worse.*" Taney simply lists the right to arms as one of the privileges and immunities of citizenship after freedom of travel, speech and assembly.

Initially I thought this might just be the sort of editing snafu that horrifies all scholars and that coincidentally aids the claim that the Second Amendment was peculiarly infected by American racism. A closer look revealed that the quote, which the text attributes to Taney, is footnoted to Kellie Jackson's book *Force and Freedom*. The phrase "or worse" is sourced to Jackson. The punctuation and footnoting accurately present the passage as a quote from *Force and Freedom*, with a subquote to *Dred Scott*.[3]

The ostensible misquote of *Dred Scott* stood out to me because I am familiar with the passage. Most readers will breeze through this paragraph nodding yes, subtly influenced by the damning illustration that the Second Amendment is uniquely infected by early American racism. The reality, it is not quite as damning as the treatment suggests.

My ultimate disagreement with the broad proposition of The Second is twofold. The first is methodological. The book is not structured to prove the core proposition that the Second Amendment, unlike other constitutional rights, is fatally infected by racism. Why for example is the Second Amendment more infected by racism than administration of the Fourth Amendment, where racist bias is legendary and ongoing? Answering that question requires a detailed, critical analysis of both provisions. One cannot answer it simply by talking about the Second Amendment in isolation.

My second broad disagreement surrounds the conclusion that Blacks today should view the Second Amendment with the same disdain as the three-fifths clause. I am unconvinced that the sordid history of racist government infringement of the right to arms is reason for blacks to abjure the right rather than insist upon it.

As a practical matter my criticisms of *The Second* are less important than the things about which Anderson and I agree. The history that fuels our overlapping work is fodder for decision-making by people who will make their own choices about the salience of the American right to arms.

Of course, those decisions are only partly a function of history. They are also bets about future risks, and calculations about whether and how to plan for those risks. Some people will bet on themselves. Others, despite the history of government malevolence described in *The Second*, will rely on the idea that government makes self-help unnecessary. The right to arms ensures that Americans have a choice.

NOTES AND QUESTIONS

1. As you consider what might account for the sorts of differences between Black lawyers, scholars, and commentators that are illustrated in the questions above, it may be useful to view the webinar discussion Race and Guns, available at this link: https://www.youtube.com/watch?v=YCDMpZ8_m70.

3. Anderson at 83.

B. GENDER

Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioner

District of Columbia v. Heller, 554 U.S. 570 (2008)

SUMMARY OF ARGUMENT

Domestic violence is a pervasive societal problem that affects a significant number of women and children each year. Correctly recognized as a national crisis, domestic violence accounts for a significant portion of all violence against women and children. The effect of such violence on the lives of its victims shocks the conscience. Domestic violence victims are battered and killed. They are terrorized and traumatized. They are unable to function as normal citizens because they live under the constant threat of harassment, injury, and violence. And these are just the more obvious effects. Other wounds exist beneath the surface—injuries that are not so easily recognizable as a bruise or a broken bone, but that affect victims' lives just the same. For example, victims often miss work due to their injuries, and must struggle with the prospect of losing their jobs, resulting in significant financial and emotional burdens. Lacking safe outlets for escape or legal recourse, these victims persevere.

One particularly ominous statistic stands out in its relevance here: domestic violence accounts for between one-third and almost one-half of the female murders in the United States. These murders are most often committed by intimate partners with handguns. And while murder is the most serious crime that an abuser with a gun can commit, it is not the only crime; short of murder, batterers also use handguns to threaten, intimidate, and coerce victims. Handguns empower batterers and provide them with deadly capabilities, exacerbating an already pervasive problem.

This crisis has not gone unaddressed; Congress and numerous states have attempted to limit the access that batterers have to handguns. Chief among the Congressional statutes is 18 U.S.C. 9 §22(g)(9), which addresses the lethal and widespread connection between domestic violence and access to firearms by prohibiting those convicted of domestic violence crimes from possessing guns. Many states also have laws addressing the nexus between domestic violence and firearms. For example, faced with a record of handgun violence in its urban environment, including domestic gun violence, the District of Columbia ("the District") enacted comprehensive legislation regulating handgun possession. . . . The D.C. Council had ample empirical justifications for determining that such laws were the best method for reducing gun violence in the District. Important government interests support statutes and regulations intended to reduce the number of domestic violence incidents that turn deadly; such statutes should be given substantial deference. . . .

ARGUMENT

Women are killed by intimate partners—husbands, lovers, ex-husbands, or ex-lovers—more often than by any other category of killer. It is the leading cause

of death for African-American women aged 15-45 and the seventh leading cause of premature death for U.S. women overall. Intimate partner homicides make up 40 to 50 percent of all murders of women in the United States, [and that number excludes ex-lovers, which account for as much as 11 percent of intimate partner homicides of women]. . . . When a gun [is] in the house, an abused woman [is] 6 times more likely than other abused women to be killed. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal, Nov. 2003, at 15, 16, 18 [hereinafter *Risk Factors*].

I. Domestic Violence Is a Serious Crime That Leaves Millions of Women and Children Nationwide Scarred Both Physically and Emotionally

. . . Experts in the field of domestic violence have come to understand domestic violence as a pattern of coercive controls broader than the acts recognized by the legal definition, including a range of emotional, psychological, and financial tactics and harms batterers perpetrate against victims. Regardless of the definition applied, domestic violence is a profound social problem with far-reaching consequences throughout the United States. Between 2001 and 2005, intimate partner violence constituted, on average, 22% of violent crime against women. In the United States, intimate partner violence results each year in almost two million injuries and over half a million hospital emergency room visits. About 22% of women, and seven percent of men, report having been physically assaulted by an intimate partner. According to one study of crimes reported by police in 18 states and the District, family violence accounted for 33% of all violent crimes; 53% of those crimes were between spouses.

Domestic violence has severe and devastating effects. Injuries such as broken bones, bruises, burns, and death, are physical manifestations of its consequences. But there are also emotional and societal impacts. Domestic violence is characterized by a pattern of terror, domination, and control—it thus obstructs victims' efforts to escape abuse and achieve safety. Victims of domestic violence often have difficulty establishing independent lives due to poor credit, rental, and employment histories resulting from their abuse. Similarly, victims often miss work due to their injuries and can ultimately lose their jobs as a result of the violence against them. Moreover, the injuries that domestic violence causes go beyond the immediate injury. Chronic domestic violence is associated with poor health, and can manifest itself as stress-related mental and physical health problems for as long as a year after the abuse.

Above all, incidents of abuse often turn deadly. American women who die by homicide are most often killed by their intimate partners—according to various studies, at least one-third, Callie Marie Rennison, Bureau of Justice Stat., *Intimate Partner Violence, 1993-2001*, NCJ 197838, at 1 (Feb. 2003) and perhaps up to one-half of female murder victims, are killed by an intimate partner. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal, Nov. 2003, at 18. A study based on the Federal Bureau of Investigation's Supplementary Homicide Report found that female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger. Violence Policy Center, *When Men Murder Women: An Analysis of 2005 Homicide Data*, at 3 (Sept. 2007) [hereinafter *When Men Murder Women*]. Of murder victims who knew their offenders, 62% were killed by their husband or intimate acquaintance. *Id.*

Although victims bear the primary physical and emotional brunt of domestic violence, society pays an economic price. Victims require significant medical attention. The Centers for Disease Control and Prevention reports that the health-related costs of domestic violence approach $4.1 billion every year. Gun-related injuries account for a large portion of that cost. Combined increased healthcare costs and lost productivity cost the United States over $5.8 billion each year. Domestic violence also accounts for a substantial portion of criminal justice system activity. For example, according to a study assessing the economic impact of domestic violence in Tennessee, the state of Tennessee spends about $49.9 million annually in domestic violence court processing fees. . . .

II. Firearms Exacerbate an Already Deadly Crisis

Domestic violence perpetrators use firearms in their attacks with alarming frequency. Of every 1,000 U.S. women, 16 have been threatened with a gun, and seven have had a gun used against them by an intimate partner. *See* [Kathleen A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to Be Issued When Applications Mention Firearms?*, 30 Evaluation Rev. 266, 277 (2006)] (one in six victims of domestic violence who filed for a restraining order at the Los Angeles County Bar Association's Barrister's Domestic Violence Project clinic between May 2003 and January 2004 reported being threatened or harmed by a firearm). "American women who are killed by their intimate partners are more likely to be killed with guns than by all other methods combined. In fact, each year from 1980 to 2000, 60% to 70% of batterers who killed their female intimate partners used firearms to do so." Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005) (noting also that "[f]our percent to 5% of women who have experienced nonlethal intimate partner violence . . . have reported that partners threatened them with guns at some point in their lives"). *See* [Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 232 (2006)] ("Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.") (citation omitted); Susan B. Sorenson, *Taking Guns From Batterers*, 30 Evaluation Rev. 361, 362 (2006) (between 1976 to 2002, women in the United States were 2.2 times more likely to die of a gunshot wound inflicted by a male intimate partner than from any form of assault by a stranger); *When Men Murder Women*, *supra*, at 3 (in 2005, "more female homicides were committed with firearms (52 percent) than with any other weapon"); Vittes & Sorenson, *supra*, at 267 (55% of intimate partner homicides in 2002 were committed with a firearm).

Thus, every year, 700-800 women are shot and killed by their spouses or intimate partners, and handguns are the weapon of choice. For example, according to the Violence Policy Center, "[i]n 2000, in homicides where the weapon was known, 50 percent (1,342 of 2,701) of female homicide victims were killed with a firearm. Of those female firearm homicides, 1,009 women (75 percent) were killed with a handgun." The number remains relatively consistent. In 2004, 72% of women killed by firearms were killed by handguns. *When Men Murder Women*, *supra*, at 3.

The mere presence of or access to a firearm increases fatality rates in instances of abuse. A person intent on committing violence will naturally reach for the

deadliest weapon available. Accordingly, the presence of a gun in an already violent home acts as a catalyst, increasing the likelihood that domestic violence will result in severe injury or death. *See, e.g.*, [Kathryn E. Moracco et al., *Preventing Firearm Violence Among Victims of Intimate Partner Violence: An Evaluation of a New North Carolina Law* 1 (2006)]; Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1090 (2003) (the intimate partner's access to a gun is strongly associated with intimate partner homicide). Estimates of the increased likelihood of death when a firearm is present vary. *Compare When Men Murder Women*, *supra*, at 2 (three times more likely), *with Risk Factors*, *supra*, at 16 (six times more likely). When domestic violence incidents involve a firearm, the victim is 12 times more likely to die as compared to incidents not involving a firearm. Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 Evaluation Rev. 296, 297 (2006).

Even when he does not actually fire his weapon, a batterer may use a gun as a tool to "threaten, intimidate, and coerce." Vittes & Sorenson, *supra*, at 267. For example, batterers make threats with their firearm by pointing it at the victim; cleaning it; shooting it outside; threatening to harm people, pets, or others about whom the victim cares; or threatening suicide. Such threats do not leave physical marks, but they can result in emotional problems, such as post-traumatic stress disorder. Thus, a firearm is a constant lethal threat, and its presence may inhibit a victim of abuse from seeking help or from attempting to leave the relationship.

The statistics reveal a stark reality—guns exacerbate the already pervasive problem of domestic violence. The use of firearms intensifies the severity of the violence and increases the likelihood that domestic violence victims will be killed by their intimate partners.

Brief for 126 Women State Legislators and Academics as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

SUMMARY OF ARGUMENT

This case provides the Court an opportunity to advance the ability of women to free themselves from being subject to another's ill will and to counter the commonly-held prejudice that women are "easier targets" simply because of their gender characteristics. Violence against women in the United States is endemic, often deadly, and most frequently committed by men superior in physical strength to their female victims.

The District's current prohibition against handguns and immediately serviceable firearms in the home effectively eliminates a woman's ability to defend her very life and those of her children against violent attack. Women are simply less likely to be able to thwart violence using means currently permitted under D.C. law. Women are generally less physically strong, making it less likely that most physical confrontations will end favorably for women. Women with access to immediately disabling means, however, have been proven to benefit from the equalization of

strength differential a handgun provides. Women's ability to own such serviceable firearms is indeed of even greater importance given the holdings of both federal and state courts that there is no individual right to police protection.

Washington, D.C.'s current firearms regulations are facially gender-neutral, and according to Petitioners, were intended to decrease the incidents of firearms violence equally among both men and women. . . . What the District's current firearms laws do is manifest "gross indifference" to the self-defense needs of women. Effectively banning the possession of handguns ignores biological differences between men and women, and in fact allows gender-inspired violence free rein. . . .

ARGUMENT

I. The Time Has Long Passed When Social Conditions Mandated That All Women Equally Depend Upon the Protection of Men for Their Physical Security

For centuries the concept of women's self-defense was as nonexistent as the idea that women were to, and could, provide their own means of financial support. That women themselves could possibly have some responsibility for their own fates was not only not a topic for debate, but would have been deemed a foolish absurdity.

A. The Defense of Women as Men's Sole Prerogative and Responsibility

Such paternalism reflected widely-accepted views of men's physical prowess vis-à-vis women generally and the roles women were expected to play in society. Few women expected to leave the confines of their families before marriage. . . .

B. Changing Demographics Heighten the Need for Many Women to Provide Their Own Physical Security

Throughout history, family and household demographics reinforced the expectation that men would be available to provide protection to women and children. Extended families were the norm across all cultural backgrounds, providing women the immediately available support of fathers, brothers, and husbands. In 1900, only 5% of households in the United States consisted of people living alone, while nearly half the population lived in households of six or more individuals.

Widespread demographic changes now make it far less likely that women will live in households with an adult male present to provide the traditionally-expected protection. In 2000, slightly more than 25 percent of individuals lived in households consisting only of themselves. Between 1970 and 2000, the proportion of women aged 20 to 24 who had never married increased from 36 to 73 percent; for women aged 30 to 34, that proportion tripled from 6 to 22 percent. While these statistics do not reflect the increasing percentage of women who choose to cohabit without marriage, it should be noted that these percentages of women living alone are likely higher in metropolitan areas of the Northeast and Mid-Atlantic.

These statistics do not emphasize the rapidly increasing number of single mothers in the District. According to a 2005 survey, there are over 46,000 single mothers living within Washington, D.C. Of those single mothers, almost half live in poverty. These women are the most immediate and often sole source of protection

of their children against abusive ex-husbands, ex-boyfriends, or unknown criminals who prey on the District's most vulnerable households. Many do not have the resources to choose neighborhoods in which their children face few threats or to install expensive monitoring systems and alarms. Moreover, many will not have the knowledge or social network to access those violence prevention services available. An inexpensive handgun, properly stored to prevent access to children, could therefore very well be the sole means available for these women to protect themselves and their children. *See also* Brief of *Amici Curiae* International Law Enforcement Educators and Trainers Association, *et al.*, in Support of Respondent ("Int'l L. Enf. Educ. & Trainers Assoc. Br.") at section II.D. (discussing the increasingly rare incidents of gun accidents).

In addition to young women and those who are single mothers, there is an increasing number of elderly women who live alone and feel highly vulnerable to violent crime. Greater improvements in female than in male mortality rates have increased the percentage of women aged 65 and older who live alone. From 1960 to 2000, women aged 65 and over accounted for a single digit percentage of the total population but more than 30 percent of households consisting of only one person. This population of older women living alone will only increase as baby boomers age and fewer children are capable of caring for aging parents. Some 40 percent of elderly and mid-life women have below-median incomes, leaving them with little or no choice of neighborhoods and expensive security measures. Edward R. Roybal, *The Quality of Life for Older Women: Older Women Living Alone*, H.R. Rep. No. 100-693, at 1 (2d Sess. 1989). . . .

II. Equal Protection in Washington, D.C. Now Means That Women Are Equally Free to Defend Themselves from Physical Assault Without the Most Effective Means to Truly Equalize Gender-Based Physical Differences

. . . Violence against women is predominately gender-based, most often perpetrated by men against the women in their lives. Men who react with violence against women in the domestic sphere often seek to reassert their control over those whom the men believe should be held as subordinates. Since 1976, approximately 30% of all U.S. female murder victims have been killed by their male, intimate partners. . . .

A. Violence Against Women in the District of Columbia and the District's Response

In 2005, the Metropolitan Police Department (MPD) received over 11,000 calls reporting a domestic violence crime or about 30 calls per day. There were 51 murders attributed to domestic violence between 2001 and 2004, counting only those cases in which the so-called victim-offender relation could be proven. These statistics of course cannot convey the number of women who live in perpetual fear that an abuser will return and escalate the violence already experienced. As to those women who are able to report domestic violence-related crimes or who choose to do so, the MPD is often simply unable to take any proactive measures to protect their safety. In 2004, the MPD's Civil Protection and Temporary Protection Unit was able to locate and serve only 49.6% of those against whom a protection order had been issued.

Such statistics are even more alarming when it is understood that domestic batterers who ultimately take the lives of women are repeat offenders, most likely those with both a criminal background and repeated assaults against the women they eventually murder. Murray A. Straus, Ph.D., *Domestic Violence and Homicide Antecedents*, 62 Bull. N.Y. Acad. Med. 457 (No. 5 June 1986). These are not men who inexplicably react violently one day and then never again present a threat. One study found that a history of domestic violence was present in 95.8% of the intra-family homicides studied. In 2004, the District's Police Department reported that of the 7,449 homes from which domestic violence was reported, almost 13% had three or more calls that year alone. These numbers cannot account for the violence that is never reported, or for which only some incidents are reported.

Women who eventually face life-threatening dangers from a domestic abuser or stalker are therefore well aware of the specific threat presented. In fact, Petitioners' *Amici* may well be correct in their claim that "female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger" and that "[o]f murder victims who their knew their offenders, 62% were killed by their husband or intimate acquaintance." Brief of *Amici Curiae* National Network to End Domestic Violence, *et al.*, in Support of Petitioners at 23 ("Pets' Network Br."). Such knowledge of an individualized threat should allow women to more easily prepare the best defenses they can employ, using their ability to weigh the threat against their ability to protect themselves should the threat ever become one of serious bodily injury or death. Current D.C. gun restrictions on handguns and serviceable firearms in the home simply eliminate that option for women altogether.

Those women who are attacked by strangers or whose children are in danger should also be provided the option of choosing a firearm if they would feel safer having one in their home. Other women who live alone, particularly the elderly who are more likely to be of lower incomes, may not have choices as to where they must live, nor the ability to relocate if stalked. These women too should be able to weigh the threat of an unknown assailant against their ability to defend themselves should they ever be attacked in the privacy of their own homes.

Without the freedom to have a readily available firearm in the home, a woman is at a tremendous disadvantage when attempting to deter or stop an assailant should her attacker allow her no other option. Reflecting upon one of the most notorious tragedies of domestic abuse turned murder, Andrea Dworkin stated directly the stakes involved:

> Though the legal system has mostly consoled and protected batterers, when a woman is being beaten, it's the batterer who has to be stopped; as Malcolm X used to say, "by any means necessary"—a principle women, all women, had better learn. A woman has a right to her own bed, a home she can't be thrown out of, and for her body not to be ransacked and broken into. She has a right to safe refuge, to expect her family and friends to stop the batterer—by law or force—before she's dead. She has a constitutional right to a gun and a legal right to kill if she believes she's going to be killed. And a batterer's repeated assaults should lawfully be taken as intent to kill.

Andrea Dworkin, In Memory of Nicole Brown Simpson, in Life and Death: Unapologetic Writings on the Continuing War Against Women 41, 50 (Free Press 1997).

It must be added, however, that it is not just the physical cost of violence against women that must be considered. A woman who feels helpless in her own home is simply not an autonomous individual, controlling her own fate and able to "participate fully in political life." While possessing a handgun or a serviceable long gun in the home will of course not erase all incidents of sex-based violence against women, denying women the right to choose such an option for themselves does nothing but prevent the independent governance women must be afforded.

Self-defense classes, particularly those involving training women to use handguns, often help to provide women the sense of self-worth necessary for them to feel equals in civil society. *See* Martha McCaughey, Real Knockouts: The Physical Feminism of Women's Self-Defense (N.Y. Univ. Press 1997). Women who take such classes no longer see themselves as powerless potential victims, but as individuals who may demand that their rights be respected. There is some evidence that men recognize this transformation and alter their conduct toward those women. As one study noted, "[t]he knowledge that one can defend oneself—and that the self is valuable enough to merit defending—changes everything." Jocelyn A. Hollander, *"I Can Take Care of Myself": The Impact of Self-Defense Training on Women's Lives*, 10 Violence Against Women 205, at 226-27 (2004). Therefore, even if women are never placed in a position to defend themselves with a firearm or their own bodies, there are less material but no less compelling justifications for allowing them that ability. *E.g.*, Mary Zeiss Stange, *From Domestic Terrorism to Armed Revolution: Women's Right to Self-Defense as an Essential Human Right*, 2 J. L. Econ. & Pol'y 385-91 (2006).

B. The Benefits of Handguns for Women Facing Grave Threat

For years women were advised not to fight back and to attempt to sympathize with their attackers while looking for the first opportunity to escape. Well-meaning women's advocates counseled that such passivity would result in fewer and less serious injuries than if a woman attempted to defend herself and angered the perpetrator. More recent, empirical studies indicate, however, that owning a firearm is one of the best means a woman can have for preventing crime against her. The National Crime Victimization Survey ("NCVS") indicates that allowing a woman to have a gun has a "much greater effect" on her ability to defend herself against crime than providing that same gun to a man. In fact, the NCVS and researchers have concluded that women who offer no resistance are 2.5 times more likely to be seriously injured than women who resist their attackers with a gun. While the overall injury rate for both men and women was 30.2%, only 12.8% of those using a firearm for self-protection were injured. Subjective data from the 1994 NCVS reveals that 65 percent of victims felt that self-defense improved their situation, while only 9 percent thought that fighting back caused them greater harm.

Given relative size disparities, men who threaten women and children can easily cause serious bodily injury or death using another type of weapon or no weapon at all. Between 1990 and 2005, 10% of wives and 14% of girlfriends who fell victim to homicide were murdered by men using only the men's "force" and no weapon of any type. It should also be noted that a violent man turning a gun on a woman or child announces his intent to do them harm. A woman using a gun in self-defense does so rarely with the intent to cause death to her attacker. Instead, a woman in such a situation has the intent only to sufficiently stop the assault and to gain control of the situation in order to summon assistance. This simple brandishing of a

weapon often results in the assailant choosing to discontinue the crime without a shot having been fired. *See also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Crimin. 150 (1995); Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 Law and Contemporary Problems 35, 44 (No. 1 Winter 1986) (noting that only a small minority, 8.3% of defensive gun uses, resulted in the assailant's injury or death).

The value of widespread handgun ownership lies not only in the individual instances in which a violent criminal is thwarted while attempting to harm someone, but in the general deterrent effects created by criminals' knowledge of firearms ownership among potential victims. Women alarmed by a series of savage rapes in Orlando, Florida in 1966 rushed local gun stores to arm themselves in self-defense. In a widely publicized campaign, the Orlando Police Department trained approximately 3,000 in firearms safety. According to the FBI Uniform Crime Report for 1967, the city then experienced over an 88% reduction in rapes, while rape throughout Florida continued to increase by 5% and nationwide by 7%. Similar crime reduction efforts involving well-publicized firearms ownership in other U.S. cities saw comparable reductions in the rates of armed robbery and residential burglaries. *See also* Don B. Kates, Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 Am. J. of Crim. L. 113, 153-56 (1991) (describing the deterrent effects handguns create for crimes requiring direct confrontation with a victim such as rape and robbery and for non-confrontational crime such as car theft and the burglary of unoccupied locations); Int'l L. Enf. Educ. & Trainers Assoc. Br. at sections I.B., I.G. (discussing the crime deterrence value of victim armament).

Violent criminals who may view women as easy targets find their jobs far less taxing in communities such as Washington, D.C. Researchers conducting the [National] Institute of Justice Felon Survey confirm the common-sense notion that those wishing to do harm often think closely before confronting an individual who may be armed. According to this survey, some 56% of the felons agreed that "[a] criminal is not going to mess around with a victim he knows is armed with a gun." Over 80% agreed that "[a] smart criminal always tries to find out if his potential victim is armed," while 57% admitted that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police." Some 39% said they personally had been deterred from committing at least one crime because they believed the intended victim was armed, and 8% said they had done so "many" times. Almost three-quarters stated that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime." James D. Wright and Peter H. Rossi, 145 *Armed and Considered Dangerous, a Survey of Felons and Their Firearms* (Aldine de Gruyter, 1986). Some 34% said they had been "scared off, shot at, wounded, or captured by an armed victim" at some point in their criminal careers, while almost 70% had at least one acquaintance who had a similar previous experience. *Id.* at 154-55.

Stalkers and abusive boyfriends, spouses, or ex-spouses may be even more significantly deterred than the hardened, career felons participating in this survey. Under current Washington, D.C. gun regulations, stalkers and violent intimate partners may be confident that their female victims have not armed themselves since the threats or violence began. Many of these men have already been emboldened by women's failure to report such threats and previous violence, or by the

oftentimes inadequate resources available to help such women. Allowing women the option to purchase a serviceable handgun will not deter all stalkers and abusive intimate partners willing to sacrifice their own lives. However, the fact that men inclined toward violence will know that women have that choice and may well have exercised it will no doubt inhibit those less willing to pay that price.

The District would like to restrict women's choice of firearm to those it gauges most appropriate rather than to allow rational women the ability to decide whether a handgun is more suited to their needs. Petitioner's Brief cites two articles from firearms magazines in which a shotgun is mentioned as appropriate for home defense. . . . An assembled shotgun is certainly better than nothing and could provide deterrence benefits provided it is accessible to a woman. However, most women are best served by a handgun, lighter in weight, lighter in recoil, far less unwieldy for women with shorter arm spans, and far more easily carried around the home than a shotgun or rifle. Moreover, women who are holding a handgun are able to phone for assistance, while any type of long gun requires two hands to keep the firearm pointed at an assailant. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at section III. The fact that two articles in firearms magazines suggest a long gun for home defense should not impinge upon the constitutional right for a woman to select the firearm she feels most meets her needs.

Petitioner's *Amici* claims that allowing firearms in the home will only increase women's risk of being murdered. In fact, Petitioners' *Amici Curiae* opens its argument by stating that, when a gun is in the home, an abused woman is "6 times more likely" to be killed than other abused women. Pets' Network Br. at 20. However, this statistic has some verifiable basis only when particular adjustments for other risk factors are weighed. Most importantly, any validity that statistic holds is only for battered women who live with abusers who have guns. The odds for an abused woman living apart from her abuser, when she herself has a firearm, are only 0.22, far below the 2.0 level required for statistical significance. The presence of a firearm is simply negligible compared to obvious forewarnings such as the man's previous rape of the woman, previous threats with a weapon, and threats to kill the woman. Moreover, the "most important demographic risk factor for acts of intimate partner femicide" is the male's unemployment. Jacquelyn C. Campbell, Ph.D., RN, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1090-92 (No. 7 July 2003). Programs that help women leave an already terribly violent situation and that decrease unemployment should therefore be keys to the abatement of femicide, not laws that serve only to disarm potential victims.

It must also be noted that allowing women handguns will not increase the type of random, violent crime that causes such uneasiness among District residents. Women are far less likely to commit murder than are men. Despite being roughly half of the U.S. population, women comprised only 10% of murder offenders in 2006 and 2004, only 7% in 2005. Even more important to note are the circumstances under which women kill. Some estimates indicate that between 85% and 90% of women who commit homicides do so against men who have battered them for years. Allison Bass, *Women Far Less Likely to Kill than Men; No One Sure Why*, Boston Globe, February 24, 1992, at 27. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at Section II.A. One 1992 study by the Georgia Department of Corrections reported that of the 235 women serving jail time for murder or manslaughter in

Georgia, 102 were deemed domestic killings. Almost half those women claimed that their male partners had regularly beaten them. The vast majority of those who claimed previous beatings had repeatedly reported the domestic violence to law enforcement. Kathleen O'Shea, *Women on Death Row* in *Women Prisoners: A Forgotten Population* 85 (Beverly Fletcher *et al.* eds., Praeger, 1993). *See also* Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, *in* 3 Advances in Applied Soc. Psych. 61 (Michael Saks & Leonard Saxe, eds., 1986) (including FBI data that 4.8% of all U.S. homicides are women who have killed an intimate partner in self-defense.) While these deaths are of course tragic, their occurrences do not indicate that women with access to handguns will commit the random acts of violence law-abiding residents most fear.

Men and women with a history of aggression, domestic violence, and mental disturbance are already prohibited from possessing firearms under both federal and District of Columbia law. Federal law bars possession to any individual who has been convicted of a "crime punishable by imprisonment for a term exceeding one year," who is an "unlawful user of or addicted to any controlled substance," who has been "adjudicated as a mental defective or who has been committed to a mental institution," who is under an active restraining order, or who has been "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. 9 §§22(g)(1), (3), (4), (8), (9)[.] Washington, D.C. law contains similar provisions, but adds as prohibited persons chronic alcoholics and those who have been "adjudicated negligent in a firearm mishap causing death or serious injury to another human being." D.C. Code 7 §§-2502.03(a)(5), (a)(8). Rigorous enforcement of existing law should therefore minimize the risk that both men and women with histories of violence, mental instability, or negligence with a firearm will have a firearm in their homes.

C. Women May Not Depend upon the District's Law Enforcement Services

The situation now in Washington, D.C. is that women can no longer depend upon the men in their lives to provide protection against violent crime, nor do women themselves have access to handguns that equalize the inherent biological differences between a woman victim and her most likely male attacker. The traditional emphasis of men's duty to protect women not only increases this defenselessness, but in fact has proved of less worth as increasingly more women live alone. Women in the District have therefore been compelled to rely upon the protections of a government-provided police force.

Courts have found that such reliance is unfounded. *See* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001). Despite women's expectations, courts across the nation have ruled that the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Soc. Servs.*, 489 U.S. 189, 194 (1989). Women simply have no legal right to law enforcement protection unless they are able to prove special and highly narrow circumstances. Just how special and highly narrow those circumstances are were proven in this Court's *Castle Rock v. Gonzales* decision. 545 U.S. 748 (2005). In *Castle Rock*, the Court found that a temporary restraining order, a mandatory arrest statute passed with the clear legislative intent

of ensuring enforcement of domestic abuse restraining orders, and Jessica Gonzalez's repeated pleas for help were insufficient for her to demand protection. *Castle Rock* therefore left open the question of just what a woman and a well-meaning legislature would have to do to create such a right to expect police protection from a known and specific threat.

There is no case that better illustrates both how little individual citizens may demand of their local police forces and the utility of a serviceable firearm than Washington, D.C.'s own *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981). One morning two men broke down the door and climbed to the second floor of a home where a mother and her four-year-old daughter were sleeping. The men raped and sodomized the mother. Her screams awoke two women living upstairs, who phoned 911 and were assured that help would soon arrive. The neighbors then waited upon an adjoining roof while one policeman simply drove past the residence and another departed after receiving no response to his knock on the door. Believing the two men had fled, the women climbed back into the home and again heard their neighbor's screams. Again they called the police. This second call was never even dispatched to officers.

After hearing no further screams, the two women trusted that police had indeed arrived and called down to their neighbor. Then alerted to the presence of two other victims nearby, the men proceeded to rape, beat, and compel all three women to sodomize each other for the next fourteen hours. Upon their seeking some compensation from the District for its indifference, the women were reminded that a government providing law enforcement services "assumes a duty only to the public at large and not to individual members of the community."*Id.* at 4. The District thus simultaneously makes it impossible for women to protect themselves with a firearm while refusing to accept responsibility for their protection.

III. Gender Characteristics Should at Least Be Considered Before Barring Law-Abiding Women Handguns, the Most Suitable Means for Their Self-Protection

Women are at a severe disadvantage when confronting a likely stronger male assailant. In general, women simply do not have the upper body strength and testosterone-driven speed to effectively defend themselves without help. A firearm, particularly an easily manipulable handgun, equalizes this strength differential and thereby provides women the best chance they have of thwarting an attacker. Even more statistically likely, a firearm in the hands of a threatened woman offers the deterrence empty hands and an often unavailing 911 call do not. *E.g.*, Int'l L. Enf. Educ. & Trainers Assoc. Br. at section I.E. (noting that in 2003, Washington, D.C.'s average police response time for the highest-priority emergency calls was almost 8 and a half minutes). Even in cases in which a 911 response would be effective, an attacker in control of the situation will not allow a woman to pick up the phone to make that call.

Women have made such advances in equality under the law that it is altogether too easy to disregard the innate gender-based biological inequality when it comes to self-defense. Television provides countless examples of strong women standing toe-to-toe against male evildoers and emerging with only minor cuts and bruises. Our invariably gorgeous heroines manage to successfully defend themselves without so

much as smudging their make-up or breaking a heel off their stilettos. Women with children are commonly depicted imploring their children to be silent until a caravan of police cars arrives with sirens blaring to finally arrest the assailant. Such images do not conform with most people's experiences and do nothing to decrease the level of violence actual women often suffer.

Advocates of women's reproductive choice commonly argue that pregnancy disproportionately affects women due to their innate gender-based characteristics. Thus, they argue, courts failing to recognize the right to terminate a pregnancy therefore discriminate against women and bar their ability to participate as equal and full members of civil society. While choices about pregnancy no doubt impact a woman's ability to determine the course of part of her life, it is not clear why such a right should be due greater protection than a woman's ability to defend her very existence. A woman who is murdered, a woman who is so badly injured that she may never recover emotionally and/or physically, and a woman who feels constantly helpless faces even greater barriers to her ability to function as an equal member of society.

Amicae therefore contend that depriving women of the right to possess a handgun in the privacy of their own homes reflects at best an insensitivity to women's unique needs created by their inherent gender characteristics. A handgun simply is the best means of self-defense for those who generally lack the upper body strength to successfully wield a shotgun or other long gun. To therefore deny half the population a handgun, as the District and the Office of the Solicitor General urge, evinces the "blindness or indifference" to women that only perpetuates women's vulnerability to physical subordination. . . .

NOTES & QUESTIONS

1. Although there is considerable overlap between the two assessments of the risks and dangers faced by women in our society, the briefs take very different views about how to combat those dangers. What explains the different assessments? Do these competing assessments simply reflect different estimates about the risks and utilities of firearms? If so, can this disagreement be resolved empirically?

2. Assume that the empirical case was convincing one way or the other. Is there a difference between measurements of the past and expectations about future events? Do you generally find empirical evidence convincing when making decisions about the future?

3. Assume you are a woman living in a high-crime neighborhood and are considering obtaining a firearm for self-protection. How much of your decision will be based on data about the risks and utilities of firearms? What other factors might influence your decision? What are the factors that *should* influence a personal decision to obtain a firearm? Are those the same factors that should influence public officials who set firearms policy?

4. Robin West argues that the failure of state and social institutions to protect women justifies the right to abortion. "To whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally to be shielded from the most dire or simply the most damaging consequences of that failure. . . . We must have the right to opt out of an unjust patriarchal world

that visits unequal but unparalleled harms upon women . . . with unwanted pregnancies." Robin L. West, *The Nature of the Right to an Abortion*, 45 Hastings L.J. 961, 964, 965 (1994). Does that argument also support a woman's claim of right to own a firearm for self-defense?

5. There is no doubt that an abused woman is at substantially greater risk if her abuser has a gun, as pointed out in the National Network brief. However, as noted in the Women State Legislators and Academics brief, research shows no statistically significant heightened risk to an abuse victim who both lives apart from her abuser and has her own gun. Living with armed abuser results in 7.59 odds ratio for increased risk of femicide, an odds ratio so high as to almost certainly be statistically valid. (In other words, a woman who lives with an armed abuser is about 750 percent more likely to be murdered than is a woman who lives with an unarmed abuser.) Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 Am. J. Pub. Health 1089, 1090-92 (2003).

6. The brief of the Women State Legislators and Academics disclaims the position that *only* women should have a constitutional right to a handgun. However, could you construct an argument for such a position, using the data in the two briefs above? Laws that discriminate on the basis of sex are generally subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment. (This review sometimes comes close to strict scrutiny in practice. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (striking down a state military college's single-sex admissions policy, and holding that an "exceedingly persuasive justification" was required before "gender-based government action" could be upheld).) If *Heller* had not recognized a right of individuals to own handguns, would it be constitutional for a city or state to enact a law prohibiting men, but not women, from owning handguns? Are there any circumstances today where gender-based firearms legislation might be upheld against Second Amendment challenge, Fourteenth Amendment challenge, or both? Where might it be appropriate?

7. Does *Heller* represent a masculine or paternalistic view of guns and home defense? Jennifer Carlson and Kristin A. Goss argue that

> [t]his centering of the Second Amendment on the home and the family provides a ripe context for men to stake their status as men. Contemporary gun culture often follows a familial prerogative that locates men's rights and obligations to own, carry, and use guns in their social roles as fathers and husbands. This citizen-protector model of gun-oriented masculinity makes the political personal: Men's obligations, rights, and duties associated with firearms are focused on their respective households and, to a lesser extent, on their communities. As men, particularly but not exclusively white conservative men, face socioeconomic insecurity and political and social threat, guns provide a means to a version of masculinity marked by dutiful protection and justified violence. As the New Right emphasizes a narrative about the state's inadequacy in the public sphere and its illegitimacy in the private sphere, guns provide a space for men to practice and affirm their role in community and family protection.

Jennifer Carlson & Kristin A. Goss, *Gendering the Second Amendment*, 80 Law & Contemp. Probs. 103, 124-25 (2017); *see also* Jennifer Carlson, Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline (2015) (study of Michigan

concealed carry licensees, arguing that adult males embrace the protector role when statewide economic decline prevents them from fulfilling the provider role); C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 Wm. & Mary J. Women & L. 477 (2017) (arguing that "a peculiarly American conception of masculinity underpins the judicial construction of the Second Amendment's core purpose as guaranteeing the right to armed defense of one's self and one's home"); *cf.* George A. Mocsary, *Are There Guns in Mayberry?*, Libr. L. & Liberty (Oct. 17, 2016) (reviewing Carlson, Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline *supra*). Do you agree?

8. For a discussion of the Second Amendment through the lens of "social justice feminism," see Verna L. Williams, *Guns, Sex, and Race: The Second Amendment Through a Feminist Lens*, 83 Tenn. L. Rev. 983 (2016) (arguing that congressional and judicial protection of arms rights reinforces "white patriarchy").

9. Wicca is a modern religion based in part on nature religions of the past. It has a strongly feminist orientation. For analysis of Wiccan attitudes and practices involving arms, see A.M. Wilson, *Witches and Guns: The Intersection between Wicca and the Second Amendment*, 12 J.L. & Soc. Deviance 43 (2016).

C. AGE AND PHYSICAL DISABILITY

People who are physically weaker than average may have heightened concerns about their physical security. The two briefs that follow reflect that concern but take different views about the effectiveness of gun control and the utility of private firearms.

Brief for American Academy of Pediatrics et al. as Amici Curiae Supporting the Petition for Writ of Certiorari

District of Columbia v. Heller, 554 U.S. 570 (2008)

ARGUMENT

I. Handguns Pose a Unique Danger to Children and Youth

Handguns pose a danger to all citizens. Handguns are more likely than any other type of gun to be used in interpersonal violence and crime, as well as self-directed injury. Firearm & Inj. Ctr. at Penn, *Firearm Injury in the U.S.*, at 7 (Oct. 2006). Indeed, handguns are used in nearly 70 percent of firearm suicides and 75 percent of firearm homicides in the United States. *See* Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78 Am. J. Pub. Health 824 (1988); Stephen W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996). Handguns account for 77 percent of all traced guns used in crime. Firearm & Inj. Ctr. at Penn, *supra*, at 8.

Handguns, however, pose a particular risk to children and adolescents. When a gun is carried outside the home by a high school-aged youth, it is most likely to be a semiautomatic handgun (50 percent) and next most likely to be a revolver

(30 percent). Josh Sugarmann, Every Handgun Is Aimed at You: The Case for Banning Handguns 113 (2001) (citing Joseph F. Sheley & James D. Wright, Nat'l Inst. of Justice, High School Youths, Weapons, and Violence: A National Survey 6 (1998)). Further, there is no way to make guns "safe" for children — gun safety programs have little effect in reducing firearms death and injury. *Id.* at 125. Death and injury to America's children and youth is undeniably linked to the presence and availability of handguns, as discussed further below.

A. The District of Columbia Handgun Law Is a Reasonable Restriction Because Handguns Make Suicide More Likely and Suicide-Attempts More Injurious to Children and Adolescents

Access to firearms, and handguns in particular, increases the risk that children will die in a firearm-related suicide. In 1997, 1,262 children committed suicide using a firearm, and 63 percent of all suicides in adolescents 15 through 19 years of age were committed with a firearm. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, [*Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888,] 889-90 Fig. 1 [(Apr. 2000)]. In 1996, handguns were involved in 70 percent of teenage suicides in which a firearm was used. *Id.* at 889.

Case studies reveal that suicide by firearm is strongly associated with the presence of a gun in the home of the victim. *See generally* David A. Brent et al., *Firearms and Adolescent Suicide*, 147 Am. J. of Diseases of Child. 1066 (1993); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467 (1992). In fact, the risk of suicide is five times greater in households with guns. Brent, *supra*, at 1068. A study on adolescent suicide and firearms found that while 87.8 percent of suicide victims who lived in a home with a gun died by firearms, only 18.8 percent of suicide victims that did not have a gun died by firearms. *Id.* Even more telling is that homes with handguns have a risk of suicide almost twice as high as that in homes containing only long guns. Kellermann, *supra*, at 470.

Moreover, statistics reveal that restrictions on access to handguns in the District of Columbia significantly reduced the incidence of suicide by firearms and resulted in a substantial reduction in the number of deaths by suicide. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1617 (1991). A study by the Institute of Criminal Justice and Criminology at the University of Maryland showed a decline of 23 percent in the number of suicides by firearms in the District of Columbia from 1968 to 1987. *Id.* at 1616 tbl. 1. Tellingly, the number of non-firearm-related suicides in the District of Columbia during that same time frame did not decline; nor did the number of firearm-related suicides in neighboring communities that were not subject to a similar ban on handguns. *Id.* at 1617-18. Additionally, the reduction in the number of suicides by firearms in the District during this time did not result in a corresponding increase in the incidents of suicides by other means. *See id.* at 1619. Thus, researchers concluded from the study that "restrictions on access to guns in the District of Columbia prevented an average of 47 deaths each year after the law was implemented." *Id.*

In addition, between 2000 and 2002, no child under the age of 16 died from suicide by firearm in the District of Columbia. In contrast, states without handgun bans (and less restrictive guns laws generally), such as Alaska, Montana and Idaho, led the country with 14, 15, and 15, respectively, firearm suicide deaths, respectively, in the same population in the same time period. Violence Pol'y Ctr., Press Release,

New Study Shows District of Columbia's Tough Gun Laws Work to Prevent Youth Suicide—No Child 16 Years of Age or Younger in DC Was the Victim of Firearm Suicide According to Most Recent Federal Data (July 12, 2005). Given that in 2003, the third leading cause of death nationwide among youth aged ten to twenty-four was suicide and that the risk of suicide is five times greater in homes with guns, invalidation of the law will almost certainly increase the number of children that die from a suicide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Vital Statistics Sys., Nat'l Ctr. for Health Statistics, *10 Leading Causes of Death by Age Group, United States–2003.*

B. The District of Columbia's Handgun Law Is a Reasonable Restriction Because Handguns Increase the Likelihood and Deadliness of Accidents Involving Children

The increased accessibility to handguns that will result if the District of Columbia handgun ban is struck down will increase the number of children who will be harmed in accidents involving firearms. Studies have shown that fewer than half of United States families with both firearms and children secure firearms separate from ammunition. *See, e.g.*, Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. of Pub. Health 588, 590-91 (2000). This practice is especially troubling because children as young as three are able to pull the trigger of most handguns. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *supra*, at 890. Approximately 70 percent of all unintentional firearm injuries and deaths are a result of handguns. *Id.* at 888.

Unintentional firearm death disproportionately affects children: In 2004, firearms accounted for 27 percent of the unintentional deaths in 2004 among youth aged 10-19, while accounting for only 22 percent of unintentional deaths among the population as a whole. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database. Additionally, each year nearly 90 children are killed and approximately 1,400 are treated in hospital emergency rooms for unintentional firearm-related injuries. SAFE KIDS USA, Press Release, *Unintentional Shooting Prompts SAFE KIDS to Issue Warning About Dangers of Guns in the Home* (2003). Most of these deaths occur in or around the home, and most involve guns that are loaded and accessible to children. *Id.*

The more guns a jurisdiction has, the more likely children in that jurisdiction will die from a firearm accident. In a study of accidental firearm deaths that occurred between 1979 and 1999, children aged four and under were 17 times more likely to die from a gun accident in the four states with the most guns versus the four states with the fewest guns. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 333 Accident Analysis & Prevention 477, 481 Table 3 (2001). Thus, if the decision to strike the handgun ban in the District of Columbia is not reversed, the number of children who will die or be injured by handguns accidentally will increase significantly.

C. The District of Columbia Handgun Law Is a Reasonable Restriction Because Firearms and Especially Handguns Increase Homicide and Nonfatal Assault Rates Among America's Youth

Firearm-related homicides and assaults affect children, adolescents, and young adults in staggering measure. Between 1987 and 1992, adolescents aged 16

to 19 had the highest rate of handgun crime victimization, nearly three times the average rate. Michael R. Rand, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ 147003 (Apr. 1994, rev. Sept. 2002). Between 1993 and 1997, those aged 19 and younger accounted for 20 percent of firearm homicide victims and 29 percent of victims of nonfatal firearm injury from assault. Marianne W. Zavitz & Kevin J. Strom, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearm Injury and Death from Crime, 1993-1997*, at 3, NCJ 182993 (Oct. 2000). For the period 1993-2001, of the average 847,000 violent victimizations committed with firearms each year, 87 percent were committed with handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *Nat'l Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, at 3, NCJ 194820 (Sept. 2003). In 2005, 25 percent of the nation's 10,100 firearm homicide victims were under the age of 22. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States, 2005*, at Table 8 (Murder Victims by Age by Weapon, 2005) (2006). Handguns were responsible for 75 percent of those homicides. *Id.* at Table 7 (Murder Victims by Weapon, 2001-2005). Indeed, the number of juvenile handgun homicides is directly correlated to the overall number of juvenile homicides. Sugarmann, *supra*, at 116 Fig. 7-7.

Moreover, nationally, children and young adults are killed by firearms more frequently than almost any other cause of death. In 2004, firearm homicide was the second leading cause of injury death for persons 10 to 24 years of age, second only to motor vehicle crashes. Brady Campaign Publication, *Firearm Facts* (Apr. 2007). Incredibly, in that same year, firearm homicide—not car accidents—was the leading cause of death for African American males between the ages of 15 and 34. *Id.* Children and youth are murdered with handguns more often than all other weapons combined. Violence Pol'y Ctr., *Kids in the Line of Fire: Children, Handguns, and Homicide*. And, for every child killed by a gun, four are wounded. Diane [sic] Degette, *When the Unthinkable Becomes Routine*, 77 Denv. U. L. Rev. 615, 615 n.5 (2000).

Finally, firearms (particularly handguns) represent the leading weapon utilized by both children and adults in the commission of homicide. *See* Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in the 80's*, N.Y. Times, Dec. 10, 1998, at 29. Between 1985 and 2002, the firearm homicide death rate increased 36 percent for teens aged 15 to 19 nationwide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database. Not coincidentally, in each year after 1985, handguns have been the most used homicide weapon by juveniles (those age 17 and under) nationwide. Alfred Blumstein, *Youth, Guns, and Violent Crime*, 12 The Future of Children 39, at Fig. 5 (2002). Scholars note that the dramatic increases in the rate of homicide committed by juveniles are attributable largely to the increases in homicides in which a firearm is used. Alan Lizotte, *Guns & Violence: Patterns of Illegal Gun Carrying Among Young Urban Males*, 31 Val. U. L. Rev. 375, 375 (1998). University of California, Berkeley law professor Frank Zimring has observed, "the most important reason for the sharp escalation in homicide [among offenders 13 to 17] was an escalating volume of fatal attacks with firearms." Franklin E. Zimring, American Youth Violence 35-36 (1998).

Handgun bans alleviate the problem of firearm homicide. Researchers at the Institute of Criminal Justice and Criminology at the University of Maryland found that gun-related homicides in the District of Columbia dropped 25 percent after

the enactment of the ban. Loftin et al., *supra*, at 1616 Table 1. In addition, the relatively low incidence of gun-related violence in America's schools proves that gun bans work. Thanks to the absolute prohibition of guns on the nation's elementary and secondary school campuses, fewer than one percent of school-aged homicide victims are killed on or around school grounds or on the way to and from school. Jill F. DeVoe et al., U.S. Dep't of Justice, Bureau of Justice Statistics and U.S. Dep't of Education, Nat'l Ctr. for Ed. Statistics, *Indicators of School Crime and Safety: 2004*, at iii, NCES 2005-002/NCJ 205290 (2005). In each year between 1992 and 2000, children and youth aged five to 19 were at least 70 times more likely to be murdered away from school than at school. *Id.* at 1. College campuses also reflect similarly lower rates for on-campus as compared to off-campus violence, Katrina Baum & Patsy Klaus, U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Victimization of College Students 1995-2002*, at 1, NCJ 206836 (2005).

II. The District's Handgun Law Is a Reasonable Restriction Because of the Economic, Societal, and Psychological Costs of Handgun Violence upon Children

As discussed above, handguns are directly responsible for increasing the number of deaths and injuries to children and families from violent crime, suicide and accidents. The most serious harm resulting from youth violence is caused by firearms; most firearm-related injuries, in turn, involve handguns.

The economic, societal and psychological costs of youth violence also are well established. According to Centers for Disease Control and Prevention statistics, the consequences of youth violence include:

> Direct and indirect costs of youth violence (e.g., medical, lost productivity, quality of life) in excess of $158 billion every year. . . .
>
> In a nationwide survey of high school students, about six percent reported not going to school on one or more days in the 30 days preceding the survey because they felt unsafe at school or on their way to and from school. . . .
>
> In addition to causing injury and death, youth violence affects communities by increasing the cost of health care, reducing productivity, decreasing property values, and disrupting social services. . . .

The public bears the majority of these costs. A recent study found that, in 2000, the average cost for each: (i) homicide was $4,906 in medical costs, and $1.3 million in lost productivity; (ii) non-fatal assault resulting in hospitalization was $24,353 in medical costs and $57,209 in lost productivity; (iii) suicide was $2,596 in medical costs and $1 million lost productivity; and (iv) non-fatal self inflicted injury was $7,234 in medical costs and $9,726 in lost productivity. Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal Violence and Self-Directed Violence*, 32 Am. J. of Preventive Med. 474 (2007). . . .

Economic costs provide, at best, an incomplete measure of the toll of violence and injuries caused by handguns. Children, like all victims of violence, are more likely to experience a broad range of mental and physical health problems not reflected in these estimates from post-traumatic stress disorder to depression, cardiovascular disease, and diabetes. *See generally* Corso et al., *supra;* Carole Goguen,

The Effects of Community Violence on Children and Adolescents, U.S. Dep't of Veterans Affairs, Nat'l Ctr. for Posttraumatic Stress Disorder.

Brief for Southeastern Legal Foundation, Inc. et al. as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

. . . Advocating on behalf of women, the elderly and the physically disabled, the *amici* herein argue the actions of the District of Columbia have harmed the members of society most physically vulnerable to criminal attack. . . .

ARGUMENT

I. The Brief's Structure . . .

One anomaly uncovered in approaching this issue from the viewpoint of women, the elderly and the physically disabled is that not all of these groups are equally represented in the literature. Studies referencing women are more prevalent. However, what is apparent from the anecdotal examples presented with this brief are the groups' members' characteristics for this discussion overlap to a great degree. Arguments asserted on behalf of women can be made, by analogy, on behalf of the members of the other two groups. This reinforces the main theme that all three groups' members occupy a physically inferior position relative to their potential attackers and benefit from defensive use of handguns.

II. Empirical Research Illustrates the Use of the Individual Right of Armed Self-Defense Embodied in the Second Amendment for the Benefit of Women, the Elderly and the Physically Disabled

A. Empirical Research Supports the Common Sense Argument That the Use of Handguns Protects Women, the Elderly and the Physically Disabled from Greater Physical Threat

It is well-recognized that the disparity in size and strength between men and women generally provides men with an advantage during physical combat. In her note *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, Inge Anna Larish supported this general statement with the following:

> On average women are weaker than men of comparable height. Muscles form a lower proportion of female body weight than of male body weight (36% and 43%, respectively). Kenneth F. Dyer, *Challenging the Men: The Social Biology of Female Sporting Achievement* 71-72 (1982). Women can develop arm muscles only 75% to 85% the strength of men's muscles. Generally, actual differences in average strength tend to be greater because women do not exercise their upper bodies adequately to develop their potential strength while men are more likely to engage in vigorous exercise to develop strength closer to their potential. *Id.* Men also have more power available for explosive events than women. *Id.* at 74.

> Women are on average smaller than men. The average height of men in the United States ranges from 5′ 7.4″ to 5′ 9.7″ and from 163 to 178 pounds; the average height for women ranges from 5′ 2.2″ to 5′ 4.3″ and from 134 to 150 pounds. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 108 (107th ed. 1987).

Larish, Inge Anna, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. Ill. L. Rev. 467, 494, fn. 213 (1996).

In light of the differences, Larish concludes the possession of a gun not only serves to "equalize the differences between men . . . ," but also serves to "eliminate the disparity in physical power between the sexes." *Id.* Furthermore, she posits, *"The available information on civilian restriction of gun ownership indicates that one of the groups most harmed by restrictions on private gun ownership will be women." Id.* (emphasis added). Larish further states, "Analysts repeatedly find that guns are the surest and safest method of protection for those who are most vulnerable to 'vicious male predators.' Guns are thus the most effective self-defense tools for women, the elderly, the weak, the infirm and the physically handicapped."*Id.* 498 (citing Edgar A. Suter, *Guns in the Medical Literature—A Failure of Peer Review*, 83 J. Med. Ass'n Ga. 133, 140 (1994)). . . .

According to Dr. Kleck's findings, firearms are used defensively 2.2 to 2.5 million times a year, with *handguns accounting for 1.5 to 1.9 million of the instances.* Kleck and Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self Defense with a Gun*, J. Crim. L. and Criminology, Vol. 86, No. 1, 164 (1995) (emphasis added). Of the sample used to calculate the number of times a gun was used defensively during a year, women made up 46 percent. *Id.* at 178. Of the 2 million defensive gun uses each year, 8.2 percent involved sexual assault. This translates to approximately 205,000 occurrences each year. *Id.* at 185. In addition, overall, with a handgun, the odds in favor of reducing serious injury to the victim increase. Tark and Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, Criminology, Vol. 42, No. 4, 861-909, 902 (November 2004).

The empirical literature is unanimous in portraying defensive handgun use as effective, in the sense that gun-wielding victims are less likely to be injured, lose property, or otherwise have crimes completed against them than victims who either do nothing, resist or who resist without weapons. Kleck and Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, J. Research in Crime and Delinquency, Vol. 35, No. 2, 193, 194 (May 1998). . . .

B. The *Amici Curiae* Brief Filed by Violence Policy Center in Support of Appellants Incorrectly Characterizes the Value of the Handgun as an Effective Means of Self-Defense

On pages 29-31 of the brief submitted in this case by Violence Policy Center [hereinafter VPC], it argues that handgun use is the least effective method for self-defense and that shotguns and rifles are better suited for this purpose. Brief for Violence Policy Center, *et al.* as *Amici Curiae* Supporting Petitioners at 29-31, *District of Columbia, et al. v. Dick Anthony Heller*, No. 07-290 (January 11, 2008). VPC further states that this argument is supported by a "wealth of evidence."*Id.* at 30.

The problem with this contention is VPC fails to cite *any* evidence supporting its proposition. Moreover, for women, the elderly and the physically disabled, VPC's

"one-size-fits-all" approach ignores the physical requirements necessary to use shotguns or other long guns. Finally, the argument disregards the obvious: a handgun's compact nature lends itself to easier use by individuals with lesser physical ability, including but not limited to persons who are unable to brandish a shotgun when threatened.

VPC cites to "[f]irearms expert" Chris Bird, quoting from his book *The Concealed Handgun Manual, How to Choose, Carry and Shoot a Gun in Self Defense* in support of its assertion that the "handgun is the least effective firearm for self defense." The absurdity of pretending a book advocating the use of handguns *really* contains the opposite conclusion does not go unnoticed. The quote used by VPC, "a handgun 'is the least effective firearm for self defense' and in almost all situations 'shotguns and rifles are much more effective in stopping a [criminal],'" however will be examined. The quote is drawn from *Chapter 5, Choosing a Handgun: Semi-automatics and Revolvers* and reads in its entirety:

> Like many things in life, a handgun is a compromise. It is the least effective firearm for self-defense. Except at very close quarters — at arm's length — shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist intent on making you pay for his lack of social skills. A handgun is the hardest firearm to shoot accurately, and, even when you hit what you are shooting at, your target does not vaporize in a red mist like on television.

Id. at 114.

Contrary to VPC's assertion, Bird's point is not that handguns are ineffective, but their effectiveness depends on the ammunition's stopping power. He states in the same section:

> In choosing a handgun for self defense, remember that the gun has two functions. In some cases, presentation of the gun, coupled with a shouted order to "STOP, GO AWAY, BACK UP," will be enough, to diffuse the threat. It reminds the potential robber or rapist he has urgent business in another county. . . . While any handgun will do, a large gun with a hole in the business end as big as a howitzer reinforces the seriousness of your intentions.
>
> In cases where the threat is not enough, the gun is a delivery system for those little missiles, scarcely bigger than a cigarette filter, that rip and tear your attacker's anatomy. It is the bullet that stops the attack, not the gun. The size and weight of the bullet depend mostly on the caliber of the gun from which it is fired. So one of your first decisions on picking a gun is deciding on a caliber.

Id. at 115.

None of this material, nor the balance of Bird's book, supports VPC's assertion that handguns are ineffective to deter crime or as a means of self-defense.

Moreover, VPC fails to support its additional argument that handguns are hard to shoot accurately because when characterized correctly, the cited work by noted firearms instructor Massad Ayoob, *In the Gravest Extreme, The Role of the Firearm in Personal Protection*, is contrary to VPC's contention. First, the section of Ayoob's

book to which VPC refers has nothing to do with personal defense of the individual or the homeowner; instead, the quote comes from *Chapter 6, How and When to Use Firearms in Your Store. Id.* at 43. Thus, this section is concerned with the proficiency of handgun use to avoid "wild shots" in order to avoid endangering customers or other persons. *Id.* at 47. Individual defense of the person and deterrence are treated in other chapters. *Id.* at 51, 75.

Second, the "accuracy" argument ignores that a criminal encounter is not a target shoot or practice. Moreover, it ignores a handgun's deterrent effect. Ayoob corrects, qualifies and explains VPC's mischaracterization of his statements in his declaration. He attests that:

> The statements in question in the VPC brief glaringly ignore the well-established fact that the great majority of times when a private citizen draws a gun on a criminal suspect, the very presence of the gun suffices to end hostilities with no shots fired. This simple fact makes marksmanship skill under stress a moot point in the majority of instances when defensive firearms are brought into action by private citizens acting in defense of themselves or others.

See Declaration of Massad F. Ayoob *infra* p. App. 4.

Further, Ayoob observes, from a practical standpoint the use of a handgun, as opposed to a long gun, is superior in that long guns are more easily taken away during defensive use. He states:

> The VPC brief falsely attributes its imputation that rifles and shotguns are superior to handguns for defensive purposes, to me among others. Yet in going through "In the Gravest Extreme" carefully enough to cherry-pick the misleading out-of-context quotes, that brief pointedly ignores my flat statements on Page 100 of the book in question: "High powered rifles are not recommended for self-defense. . . . A major problem with any rifle or shotgun is that it is too awkward to get into action quickly, or to handle in close quarters. A burglar will find it much easier to get a 3 foot weapon away from you, than a pistol you can hold and fire with one hand." This is especially true with regard to any person who may be at a physical disadvantage when contrasted with the physical ability of their attacker, such as a woman, an elderly person or someone who is physically disabled.

Id. at pp. App. 4-5.

In addition, VPC's argument fails to acknowledge the logical proposition that one may dial 911 when holding a handgun, but it is difficult to do so with two hands occupied with a long gun. . . .

IV. Anecdotal Evidence and Declarations Illustrate the Critical Importance of the Individual Right of Armed Self-Defense Embodied in the Second Amendment for Women, the Elderly and the Physically Disabled

Although statistics and empirical data are critical to understanding the broad spectrum of what defensive gun use means to society, the actual flesh-and-blood people, who have had to defend themselves or their families with handguns or other firearms, stand behind the data.

A printed compilation of the instances when women, the elderly or physically disabled defensively used guns in the United States would be unwieldy (though compelling), so the efficacy of statistics is obvious. Behind the rows and columns of data analyzed as statistics, however, are the faces of real, frightened and vulnerable people who have reached for their handguns after hearing the sounds of intruders in the night. These individuals, discussed below, avoided injury or death because they resisted their attackers with handguns. But, sadly, the same may not have been true if their homes were in the District of Columbia.

A. Recent Anecdotes Effectively Illustrate the Importance of the Personal Right of Armed Self-Defense for Women, the Elderly and the Physically Disabled

The following includes instances where women, the elderly and the physically disabled defended themselves during home invasions as well as attacks outside the home. The attacks were perpetrated by younger, stronger assailants. Moreover, the victims in some instances protected not only themselves, but also loved ones.

The anecdotes are arranged in reverse chronological order and by type. The home invasions come first, followed by parking lot incidents.

1. Home Invasions

On January 25, 2008 in Atlanta, Georgia, an intruder assaulted a wheelchair-bound homeowner at the homeowner's front door. During the struggle, the homeowner was able to use his handgun to shoot the attacker.

In December 2007, there were numerous instances of home invasion attacks on women and the elderly. On December 14, 2007 in Lexington, Kentucky, two women were inside their home when they heard a man trying to break in. They dialed 911, keeping the dispatcher on the phone while they warned the man to stop. When he would not stop, one of the women shot him. Investigators ruled the shooting self-defense.

On December 8, 2007 at Hialeah Gardens, Florida, four armed men attacked a 74-year-old heart patient, Jorge Leonton, in his driveway. After he withdrew money from an ATM, the four followed him home and choked him after he got out of the car, demanding money. While being choked by one of the attackers, Leonton took out his gun, for which he had a concealed weapon permit, and told the attacker three times he had a heart condition, could not breathe and the assailant was killing him. When the attacker would not let go, Leonton shot him. The other three men fled. Leonton's wife said, "If he wouldn't have been armed, I think he would have been killed.". . .

In November 2007, there were several attacks against all groups' members. On November 27, 2007 in Carthage, Missouri, a 63-year-old grandmother brandishing a handgun caused two burglars to run away after they broke down her back door. Her grandchild was in the house at the time.

Two weeks earlier, on November 16, 2007 in Waynesville, Missouri, a disabled man chased one intruder away and took one prisoner for the police with his handgun. Before breaking into the disabled man's trailer, the two male assailants had broken into a local motel room where they had beaten two people with a baseball bat so severely that one had to be taken by "life flight" to the hospital. Later, the two intruders entered the trailer and confronted the disabled man and his wife. One intruder pulled a pellet gun, but the homeowner pulled a "real gun." The pellet gun-wielding intruder fled while the other was held until the police arrived.

Two days earlier, on November 14, 2007 in Hessville, Indiana, a woman who was being stalked had her door kicked in by a former date. Later, when he returned to her home, she called 911 and was told to lock herself in the bedroom. When she retreated to the bedroom, she found a pistol which had been given to her for protection. She hid in a closet, the stalker opened the door, she told him to stop, but when he advanced toward her, she fired three times. She struck the stalker in the abdomen and he died from his wounds.

On November 5, 2007 in Bartlett, Tennessee, Dorothy "Bobbi" Lovell's charges were dropped after a review of the evidence indicated self-defense in the shooting of her husband. Mrs. Lovell shot her husband with a .357-caliber magnum handgun after he held Mrs. Lovell and her 21-year-old son hostage, threatening their lives.

October 2007 was replete with the defensive use of handguns. On October 27, 2007 in Gainesville, Florida, a 28-year-old male tried to kick down the door of a home owned by Arthur Williams, a 75-year-old, legally blind, retired taxi dispatcher. The homeowner fired on the intruder, striking him in the neck. Local officials praised Williams for defending himself. On October 24, 2007 in Wichita, Kansas, a 76-year-old man shot his 52-year-old live-in girlfriend after she poured bleach on him, sprayed him with mace and beat him with a frying pan. The police called the use of the weapon self-defense. On October 15, 2007 in Kansas City, Missouri, a 69-year-old man thwarted a home invasion by firing a shot from his .40-caliber handgun at his bedroom door when he heard an intruder approaching after his front door had been pried open. The intruder fled without apparent injury.

In July 2007, there were several reported attacks against the elderly and the disabled. On July 30, 2007 in Limestone County, Alabama, a disabled man who collected aluminum cans to supplement his income confronted two men, ages 20 and 24, stealing his cans. He immediately called the sheriff's office. The men thought he had left, walked back onto the property and, when they discovered him in his truck, one of them came toward the homeowner and threatened him. The homeowner told him to stop. When he did not, the homeowner showed his gun and demanded the two men lie on the ground to wait for the sheriff. On July 27, 2007 in El Dorado, Arkansas, a 24-year-old intruder beat 93-year-old Mr. Hill with a soda can, striking him 50 times before he passed out. Covered with blood, the elderly man awoke and retrieved a .38-caliber handgun. The assailant charged at him, forcing Hill to shoot him in the throat. Police arrived and took both Hill and the intruder to the hospital. On July 4, 2007 in Hickory, North Carolina, a 79-year-old man shot a 23-year-old intruder in his bedroom. After the intruder broke into the house, the homeowner's wife escaped to the neighbors and the homeowner shot the intruder. The intruder was expected to survive.

On April 26, 2007 in Augusta, Georgia, an assailant awakened his 57-year-old neighbor, Theresa Wachowiak, putting a knife to her throat. She resisted and managed to grab her .357-caliber handgun, and she shot the intruder in the stomach. The intruder survived. . . .

2006 saw notable examples of defensive gun use. On December 2, 2006 in Zion, Illinois, a 55-year-old wife heard her kitchen doorjamb shatter. She grabbed her pistol and shot the intruder in the chest after he forced his way into her house. The intruder was wearing a black ski mask and gloves.

On October 18, 2006 in Santa Clarita, California, an intruder broke the lock on Nadine Teter's back door and barged into her home. She fled to her backyard with a gun, but he followed and charged at her. She shot him. The intruder fell, got back up and advanced again, requiring her to shoot him two more times. The attacker then jumped over a fence and ran away. He was later apprehended when the intruder's mother, who was driving the "get-away" car, flagged down law enforcement for medical attention. The intruder survived, and he and his mother were convicted in December 2007 of charges arising out of the attack. With regard to the use of the firearm, Teter said she thinks every woman should carry a gun. She also said:

> Never in a million years, did I think I would use (the gun) — never. And whatever higher power, whatever gave me the strength to pull that trigger. . . . You're looking at him or me. My life or his life. I was not going to get raped. I was not going to get murdered. There was no way — and I didn't.

On April 27, 2006 in Red Bank, Tennessee, at 1:30 A.M., a disabled man saw a masked man crawling through his bedroom window. After he was awakened by the window breaking, David McCutcheon, the disabled homeowner, reached for his .32-caliber revolver and fired four times, forcing the masked man to flee. The intruder was arrested.

2005 saw attacks on the elderly thwarted by defensive handgun use. On May 31, 2005 in Indialantic, Florida, Ms. Judith Kuntz, a 64-year-old widow armed with a .38-caliber revolver shot an intruder in the chest after he broke into her home. She fired at him as he entered her bedroom with a flashlight. She stated, "I'm doing fine under the circumstances. . . . I don't take any joy in somebody being dead. My self-preservation instinct took over." *See* Declaration of Judith Kuntz *infra* pp. App. 19-20. On March 30, 2005 in Kingsport, Tennessee, an 83-year-old woman wrestled with a home intruder. Although he left with her purse, she was able to fire her handgun at him during the struggle, causing him to flee.

Women and the elderly used handguns to stave off assailants in 2004. On March 22, 2004 in Springfield, Ohio, 49-year-old Melanie Yancey shot and killed a 21-year-old intruder when he and an accomplice broke into her home after kicking in her door. She sealed herself in her bedroom, but the two tried to break in. She then fired a shot at them from her .40-caliber handgun and they returned fire. When she heard them go into another unoccupied bedroom, she ran out of the room and fired at them as she ran out of the house. Later, one of the intruders was found lying on a nearby driveway.

On November 4, 2004 in Pensacola, Florida, a 77-year-old retired oil worker, James Workman, shot an intruder who entered the trailer where Workman and his wife, Kathryn, were at home. The intruder advanced toward the trailer despite a warning shot, and Workman struggled with the intruder inside the trailer, shooting him in the process.

2. Parking Lot Incidents

On December 27, 2007 in Orlando, Florida, a 65-year-old man fought off five thugs with a handgun. He was collecting money for parking at a church when a man, accompanied by four other men, put a gun to his head. The victim reached

inside his jacket as if to pull out money, but instead, pulled out a handgun and started firing. The men ran away. The elderly man reported he obtained a concealed weapon permit after he was previously attacked by eight teens who tried to rob him with a pipe.

On July 1, 2007 in Dallas, Texas, a 31-year-old man stopped Amor Kerboua, a 79-year-old man, in Kerboua's apartment parking lot. The man put a gun in Kerboua's face and demanded money. Thinking the attacker was joking, Kerboua pushed the gun away. Again, the man put the gun in his face and Kerboua handed him a cup containing $242.50. The assailant then told Kerboua he was going to kill him, pointing the gun at his stomach. Instead, Kerboua, who had a concealed weapon permit, drew his .38-caliber revolver and shot the assailant in the throat. The assailant fell, but maintained his gun aim at Kerboua, forcing Kerboua to fire two more times. The police determined Kerboua acted in self-defense. The assailant survived.

A. Nancy Hart and Minnie Lee Faulkner: Historical and Present Day Illustrations of How Firearms Deter Assailants . . .

2. Minnie Lee Faulkner: A Modern Illustration That the Use of a Firearm Deters an Attacker

. . . Mrs. Minnie Lee Faulkner, 88, lives alone in her home in Elbert County, Georgia near the Savannah River. Elbert County is still rural though settled early in the State's history. Faulkner purchased a handgun for personal defense and home protection after the death of her husband in 1993. Faulkner chose a handgun over a rifle or shotgun because it was small, maneuverable and easy to use for home defense by someone of her age, size and strength.

On October 10, 2004, Faulkner's doorbell rang at one o'clock in the morning. From the porch, a voice called, "Minnie Lee, I've got car trouble—open the door." Faulkner replied that she was not going to open the door, and the man on her porch started kicking the door. He split the door and Faulkner called 911.

Faulkner told the man that she had called 911 and he stopped kicking. With pistol in hand, Faulkner then peered out the window and she saw a young man's face with a clear complexion. Faulkner said in a stout voice, "I have my gun and I have it trained right on you." The intruder left. Later, when the front door was examined, it was determined that one more kick would have broken the door. Later that night, the intruder broke into a nearby trailer and attacked an elderly woman while she was in bed. Faulkner believes that the intruder would have tried to kill her had he entered.

Faulkner spoke with the local sheriff's office and was able to provide information for a composite drawing, identifying the intruder as the son of a deceased neighbor. Faulkner specifically noted his clear eyes and good complexion. Using this information and other evidence, the sheriff's office was able to apprehend the intruder. He was convicted of burglary and aggravated assault with intent to rape.

Faulkner was badly frightened by the attack. She believes that her handgun is her only protection, and she is glad she had it the night of the attack. She did not have to shoot the intruder because the mere presence of the weapon scared him away. Faulkner believes people have a right to have a gun for protection and self-defense.

Faulkner's experience poignantly illustrates why the individual right of self-defense through the use of a handgun is so vital to women, the elderly and the physically disabled. Faulkner is from the same county where Nancy Hart stood against the Tories during the War for Independence. As Hart used her intelligence, courage and the Tories' own rifles against them, Faulkner used her courage, fortitude and handgun against an intruder in the night. These women, though separated by two hundred thirty years, have in common the necessity of firearms to deter their bigger, stronger or more numerous assailants. Without firearms, both Nancy Hart and Minnie Lee Faulkner, living on the same land but separated by time, would have been victims. With firearms, they became more than equal to the imminent danger they faced. . . .

APPENDIX

DECLARATION OF JUDITH KUNTZ . . .

2. I am a 67-year-old widow and live in Indialantic, Florida.
3. I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my life. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home.
4. On May 31, 2005, I shot an intruder who unlawfully entered my home. I attempted to hide from the intruder in my bedroom, but the intruder proceeded to enter my bedroom while I was in it. I shot the intruder in order to protect myself and my property.
5. I am glad I had my handgun during the incident and that I was able to defend myself and my property, I believe people have a right to own and use a gun for personal defense. . . .

DECLARATION OF THERESA WACHOWIAK . . .

2. I am 57-years-old, and I live in Augusta, Georgia.
3. I own a .357-caliber handgun for personal defense. I believe my ownership of this gun and the use of it for personal defense saved my life. I defer to a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.
4. On April 26, 2007, an intruder gained entrance into my house, in the early morning hours, woke me up, and put a knife to my throat with the intent of doing me bodily harm. He was in my bed and unaware of the handgun I kept in my bed stand. I protested against his covering my mouth with his hand as he pressed his knife to my throat repeatedly, threatening to kill me as I was struggling to remove his hand. This interaction provided me an opportunity to keep his focus on my resistance while I secured my handgun with his being unaware of my other activities. I appeared to comply finally with his "being in control" and ceased struggling upon securing my weapon. I asked him what did he want. Simultaneously, he realized there

were dogs in the room and demanded I "get the dogs out." With him at my back and his knife still ready, we moved off of my bed to the bedroom door. When at the dog gate he demanded the dogs be removed from the room, I unfastened the dog gate and with him preoccupied with their imminent release I pivoted and shot him in the right side of his chest. I did not randomly exercise force, only sufficient force to remove him as a personal threat. He was still mobile and anxious to get away through the now opened dog gate. I called the police and secured medical help for him as I did not expect he could get very far. He did survive his single wound. I was saddened and shocked to find out that the man was a neighbor and a relative of a family I cared about and had known for decades.

5. I am glad I had my handgun that morning and was able to defend myself and my property. I would be no match in a physical contest of strength with my assailant and would have just been another sad statistic. My handgun was the tool I used to preserve my life. . . .

DECLARATION OF JAMES H. WORKMAN, JR. . . .

2. I am 80-years-old, a retired oil industry worker and I live with my wife Kathryn in Pensacola, Florida.
3. I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my wife Kathryn's life and mine. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.
4. On November 4, 2004, I shot an intruder who entered the trailer where my wife and I were staying. We were living in a trailer in front of our home that was damaged by Hurricane Ivan. When the intruder entered our yard at 2:20 A.M., I confronted him. Despite my firing a warning shot into the ground, the intruder advanced toward the trailer. I struggled with him inside the trailer, shooting him in the process.
5. I am glad I had my handgun that night and was able to defend my wife, myself and our property. I believe people have a right to own and use a gun for personal defense. . . .

NOTES & QUESTIONS

1. Were you surprised by the data about firearms suicide in the American Academy of Pediatrics brief? In general, suicide attempts with firearms are more likely to succeed than attempts involving most other common methods such as drowning, cutting, or asphyxiation. Suicide rates differ widely from state to state. The demographic group most likely to commit suicide, particularly with firearms, is elderly White men. While rural states such as Alaska and Montana tend to have high suicide rates, the District of Columbia has traditionally had one of the lowest suicide rates in the nation. Scholars are nearly unanimous that greater firearms prevalence is associated with greater percentage of suicides being committed with

firearms. Indeed, the "percent of suicide with guns" (PSG) is perhaps the best proxy for total gun ownership in a community. However, scholars disagree about whether firearms density increases the overall suicide rate, or merely changes the method, since some other forms of self-inflicted harm (e.g., hanging, jumping from a height) are nearly as lethal. *Compare* Harvard School of Public Health, *Firearm Access Is a Risk Factor for Suicide*, *with* Gary Kleck, *The Effect of Firearms in Suicide*, *in* Gun Studies: Interdisciplinary Approaches to Politics, Policy, and Practice 309 (Jennifer Carlson, Kristin A. Goss & Harel Shapira eds. 2019).

2. International data further complicate the picture. The age-standardized U.S. suicide rate in 2016 was 13.7 per 100,000 population (21.1 male and 6.4 female). The global average was 10.5. Since no country matches the gun density of the United States, there are many examples of nations that have fewer guns and a suicide rate that is higher than the United States, about the same as the United States, or lower. *See* World Health Organization, Suicide rates (per 100,000 population). If gun prevalence does make suicide more common among all or some groups, then how should this be taken into account in debates about gun policy? Is suicide as harmful or immoral as unlawful homicide? Are all suicides wrong? Are some worse than others? What public policy distinctions are appropriate in this area?

3. Does advocacy of firearms bans give sufficient attention to beneficial gun use like those described in the Southeastern Legal Foundation amicus brief?

4. What type of laws and regulatory system would eliminate the need for guns in cases like those described in the "Declarations" of Southeastern Legal Foundation brief?

5. Are the stories in the amicus "Declarations" examples of good results? Would disarming people like Judith Kuntz be an acceptable cost of strict gun laws with the expectation of a net benefit to the community overall?

6. Do these personal episodes affect your view of optimal firearms policy? Do they affect your view about whether to own a firearm? Does the answer to one question influence the other?

7. As detailed in the American Academy of Pediatrics amicus brief, an article in the *New England Journal of Medicine* concluded that the D.C. handgun ban had significantly reduced homicide and suicide. The conclusion was strongly disputed in an amicus brief of Criminologists and the Claremont Institute:

> Over the five pre-ban years the murder rate fell from 37 to 27 per 100,000 population. . . . In the five post-ban years the murder rate rose to 35. . . . Averaging the rates over the 40 years surrounding the bans yields a pre-ban DC rate (1960-76) of 24.6 murders. The average for the post-ban years is nearly double: 47.4 murders per 100,000 population. The year before the bans (1976), the District's murder rate was 27 per 100,000 population; after 15 years under the bans it had tripled to 80.22 per 100,000 (1991). . . .
>
> After the gun prohibitions, the District became known as the "murder capital" of America. Before the challenged prohibitions, the District's murder rate was declining, and by 1976 had fallen to the 15th highest among the 50 largest American cities. . . . After the ban, the District's murder rate fell below what it was in 1976 only one time. . . . In half of the post-ban years, the District was ranked the worst or the second-worst; in four years it was the fourth worst. . . .

Brief for Criminologists et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 554 U.S. 570, at 7-8 (2008).

The brief also quoted from a National Academies of Sciences meta-study that surveyed the social science literature on gun control. The National Academies decided that the evidence was not strong enough to support the hypothesis that gun control is beneficial, or the hypothesis that gun ownership is beneficial. Regarding the *New England Journal of Medicine* study of D.C., the National Academies concluded:

> Thus, if Baltimore is used as a control group rather than the suburban areas surrounding DC, the conclusion that the handgun law lowered homicide and suicide rates does not hold. Britt et al. (1996) also found that extending the sample frame an additional two years (1968-1989) eliminated any measured impact of the handgun ban in the District of Columbia. Furthermore, Jones (1981) discusses a number of contemporaneous policy interventions that took place around the time of the Washington, DC, gun ban, which further call into question a causal interpretation of the results. In summary, the District of Columbia handgun ban yields no conclusive evidence with respect to the impact of such bans on crime and violence. The nature of the intervention—limited to a single city, nonexperimental, and accompanied by other changes that could also affect handgun homicide—make it a weak experimental design. Given the sensitivity of the results to alternative specifications, it is difficult to draw any causal inferences.

Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), Firearms and Violence: A Critical Review 98 (2005).

For the academic debate on the NEJM study, see Chester L. Britt, Gary Kleck & David J. Bordua, *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996); David McDowall, Colin Loftin & Brian Wiersema, *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the DC Gun Law*, 30 Law & Soc'y Rev. 381 (1996); Chester L. Britt et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 Law & Soc'y Rev. 393 (1996).[4]

In *Heller*, a collection of 24 professors conducted a new study of the D.C. ban, and reported the results in an amicus brief. Brief for Academics as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 554 U.S. 570 (2008). That study compared the post-ban changes in D.C. homicide rates to the rate in the other 49 largest cities, to Maryland and Virginia, and to the United States as a whole. The data showed that D.C. grew substantially worse in comparison to all of them. *Id.* at 7-10.

Two criminology professors, including David McDowall, who had been a co-author of the NEJM study, filed their own amicus brief. Brief for Professors of Criminal Justice as Amici Curiae Supporting Petitioner, District of Columbia v. Heller,

4. The hyperlinks go to versions of the articles on ResearchGate, JSTOR, and Academia.edu. None of these are public Internet, but your institution may have access. JSTOR is comprehensive for the journals it covers, whereas ResearchGate and Academia.edu depend on scholars to upload individual articles. JSTOR is available to anyone who will pay; ResearchGate is reasonably open to students; and Academia.edu is professors-only.

554 U.S. 570 (2008). That brief argued that post-ban increases in D.C. homicide were the result of a national trend caused by the spread of crack cocaine. *Id.* at 9-11.

Justice Breyer's dissenting *Heller* opinion summarized the D.C. debate, and also the conflicting empirical evidence about gun ownership in general that had been offered by various amici. Because there was supporting evidence on each side, he concluded that the Court should defer to the D.C. City Council's empirical judgment. Do you agree with his position that as long as there is *some* social science research that supports a particular gun control law, then courts should not rule the law unconstitutional? Or should courts try to evaluate the evidence on each side? Should they attempt to evaluate the evidence at all? Does it matter whether the original legislative body, such as the D.C. City Council, carefully considered empirical evidence before enacting the law? Although exceptions can be found, legislative fact-finding often consists of little more than a collection of talking points and factoids assembled by lobbyists for one side or the other. The legislator who has actually read a study that he or she cites is unusual — rarer even than legislators who read the full text of bills before voting on them.

D. SEXUAL ORIENTATION

People with unconventional sexual orientations have a variety of concerns about unequal treatment in our society and under the law. In the firearms context, that concern manifests as a special worry about violence rooted in bigotry.

Brief for Pink Pistols et al. as Amici Curiae Supporting Respondent

District of Columbia v. Heller, 554 U.S. 570 (2008)

Pink Pistols is an unincorporated association established in 2000 to advocate on behalf of lesbian, gay, bisexual and transgendered (hereinafter LGBT) firearms owners, with specific emphasis on self-defense issues. There are 51 chapters in 33 states and 3 countries. Membership is open to any person, regardless of sexual orientation, who supports the rights of LGBT firearm owners. Pink Pistols is aware of the long history of hate crimes and violence directed at the LGBT community. More anti-gay hate crimes occur in the home than in any other location, and there are significant practical limitations on the ability of the police to protect individuals against such violence. Thus, the right to keep and bear arms for self-defense in one's home is of paramount importance to Pink Pistols and members of the LGBT community. . . .

ARGUMENT

I. The Second Amendment Guarantees LGBT Individuals the Right to Keep and Bear Arms to Protect Themselves in Their Homes

Almost five years ago this Court held that the Due Process Clause protects the right of gay men and lesbians to engage in consensual sexual acts within the privacy of their own homes, "without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The exercise of that right, or even the non-sexual act of

having a certain "appearance," however, continues to put members of the LGBT community at risk of anti-gay hate violence and even death. Since *Lawrence* was decided, at least 58 members of the LGBT community have been murdered and thousands of others have been assaulted, many in their own homes (the most common site of anti-gay hate crimes), because of their sexual orientation. The question now presented is whether LGBT individuals have a right to keep firearms in their homes to protect themselves from such violence. Because LGBT individuals cannot count on the police to protect them from such violence, their safety depends upon this Court's recognition of their right to possess firearms for self-protection in the home.

A. Recognition of an Individual Right to Keep and Bear Arms Is Literally a Matter of Life or Death for Members of the LGBT Community

The need for individual self-protection remains and is felt perhaps most pointedly by members of minority groups, such as the LGBT community. Minority and other marginalized groups are disproportionately targeted by violence, and have an enhanced need for personal protection. In 2005 alone, law enforcement agencies reported the occurrence of 7,163 hate crime incidents. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006). Members of the LGBT community are frequent targets of such violence. Indeed, for the years 1995-2005, law enforcement agencies reported more than 13,000 incidents of hate violence resulting from sexual-orientation bias. *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics (1995-2005). The individual stories of brutality underlying those statistics are horrific:

- On April 19, 2005, Adam Bishop was bludgeoned to death with a claw hammer in his home because he was gay. He was hit at least eighteen times in the head and then left face down in a bathtub with the shower running.
- On May 13, 1988, Claudia Brenner and Rebecca Wight were shot eight times—in the neck, the head and the back—and left for dead while hiking the Appalachian Trail, because they were lesbians. Rebecca died.
- On December 31, 1993, Brandon Teena, Lisa Lambert and Philip De Vine were murdered in a farmhouse in rural Richardson County, Nebraska in an act of anti-LGBT violence. Brandon and Lisa were both shot execution style, and Brandon was cut open with a knife.
- On the night of October 6-7, 1998, Matthew Shepard was pistol-whipped, tortured, tied to a fence in a remote area and left to die. He was discovered eighteen hours later, still tied to the fence and in a coma. Matthew suffered a fracture from the back of his head to the front of his right ear. He had severe brain stem damage and multiple lacerations on his head, face and neck. He died days later.
- On February 19, 1999, Billy Jack Gaither was set on fire after having his throat slit and being brutally beaten to death with an ax handle. In his initial police confession, Gaither's murderer explained "I had to 'cause he was a faggot."
- On November 19, 2006, Thalia Sandoval, a 27-year-old transgender Latina woman, was stabbed to death in her home in Antioch, California. The death was reported as a hate crime.

In fact, anti-gay violence is even more prevalent than the FBI statistics indicate. "Extensive empirical evidence shows that, for a number of reasons, anti-lesbian/gay violence is vastly under-reported and largely undocumented." LAMBDA Services Anti-Violence Project (March 7, 1995) at ii. The U.S. Department of Justice estimates that only 49% of violent crimes (rape, robbery, aggravated assault, and simple assault) are reported to the police. Many incidents of anti-lesbian/gay violence are not reported to police because victims fear secondary victimization, hostile police response, public disclosure of their sexual orientation, or physical abuse by police. Further, investigative bias and lack of police training also contribute to underreporting of anti-LGBT hate crimes. For these reasons, incidents of anti-gay violence reported by the FBI represent a small fraction of those reported to LGBT community antiviolence programs. During 1994, for example, "for every incident classified as anti-lesbian/gay by local law enforcement, community agencies classified 4.67 incidents as such." Similarly, while the FBI reported only 26 anti-gay homicides in the ten-year period 1995-2005, the National Coalition of Anti-Violence Programs reported three times that number in half that time (78 anti-gay homicides in the five year period 2002-2006). *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006). Studies have shown that approximately 25% of gay males have experienced an anti-gay physical assault. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard [Mary E. Swigorski et al. eds., 2001].

Hate crimes based on sexual orientation are the most violent bias crimes. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 2 ("Anti-LGBT crimes are characterized as the most violent bias crimes."). *See also* LAMBDA Services Anti-Violence Project (March 7, 1995) at 20 ("The reported [anti-gay] homicides were marked by an extraordinary and horrific level of violence with 49, or 70%, involving "overkill," including dismemberment, bodily and genital mutilation, multiple weapons, repeated blows from a blunt object, or numerous stab wounds."); Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 25 (Diane S. Foster ed., 1992) ("A striking feature . . . is their gruesome, often vicious nature.").

Anti-gay hate crimes are also the most likely to involve multiple assailants. LAMBDA Services Anti-Violence Project (March 7, 1995) at 7 ("[A]nti-lesbian/gay offenses involve a higher number of offenders per incident than other forms of hate crime."). In 1994 "[n]ationally, 38% of the incidents involved two or more perpetrators." *Id.* "One-quarter involved between two and three offenders, and 12% involved four or more offenders. Nationally, there were at least 1.47 offenders for each victim." *Id.*

While the District of Columbia's gun laws preclude LGBT residents from possessing in their homes firearms that can be used for self-protection, *see* D.C. Code 7 §-2507.02, the laws do not protect LGBT residents from gun violence. To the contrary, "when a weapon was involved [in an anti-gay attack] in the D.C. area, that weapon was three times more likely to be a gun" than elsewhere in the nation. Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997.* "Firearms accounted for 33% of all D.C.-area [anti-gay] assaults involving weapons, compared to 9% nationally." *Id.*

Laws, such as D.C. Code 7 §-2507.02, that prevent the use of firearms for self-protection in the home are of particular concern to members of the LGBT

community, because historically hate crimes based on sexual-orientation bias have most commonly occurred in the home or residence. *See, e.g.*, Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2002 Edition (2003) at 7 ("Incidents associated with a sexual-orientation bias (1,244) most often took place at homes or residences—30.8 percent. . . ."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2003 Edition (2004) at 8 ("Incidents involving bias against a sexual orientation also occurred most often in homes or residences—30.3 percent of the 1,239 incidents reported in 2003."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2001 Edition (2002) at 7 ("The data indicated that of the 1,393 hate crime incidents motivated by sexual-orientation bias, 33.4 percent of the incidents occurred at residences or homes."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006) at Table 10 (reporting more anti-gay incidents in a home or residence than in any other location). Thus, members of the LGBT community have an acute need for this Court to recognize their right to possess firearms to protect themselves from hate violence in their homes.

B. The Police Have No Duty to Protect and Do Not Adequately Protect LGBT Individuals from Hate Violence That Occurs in Their Homes

Members of the LGBT community often must rely upon themselves for protection against hate violence in their homes. Police are seldom able to respond quickly enough to prevent in-home crimes. Worse, as this Court has held, the police have no mandatory legal duty to provide protection to individuals. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760-61 (2005). To the contrary, police officers are granted discretion in determining when and where to exercise their authority:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.
>
> "In each and every state there are longstanding statutes that, by their terms, seem to preclude nonenforcement by the police. . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. . . ."
>
> . . . It is, the [*Chicago v. Morales*, 527 U.S. 41 (1999)] Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.". . .

Moreover, police have historically exercised their discretion in a manner that disfavored the protection of members of the LGBT community. *See* Lillian Faderman, Odd Girls Out and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 194-95 (Richard D. Mohr, et al., eds. 1991). In fact, in 1997 the National Coalition of Anti-Violence Programs reported that, in anti-gay violence "[t]he number of reported *offenders who were law enforcement officers* increased by 76% nationally, from 266 in 1996 to 468 in 1997." *See* Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997*. *See also* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence

in 1998 (April 6, 1999) at 24 ("[T]here were very dramatic increases in 1998 in reports of verbal and/or physical abuse by police in response to victim's attempts to report a bias crime. . . . [O]ne in five victims of an anti-gay bias incident in 1998 who attempted to report it to police were treated to more of the same. Almost one in 14 became victims of actual (and in some cases, further) physical abuse."). As a consequence, members of the LGBT community have a heightened need for this Court to recognize their individual right to possess firearms to protect themselves.

The triple-murder of Brandon Teena and two others in a rural farmhouse in 1993 starkly illustrates this need. Brandon, his girlfriend and a male friend were murdered in an anti-LGBT hate crime, after police failed to arrest the two men who had previously kidnapped, raped and assaulted Brandon:

> On December 31, 1993, John Lotter and Marvin Thomas Nissen murdered Brandon, Lisa Lambert and Philip De Vine in a farmhouse in rural Richardson County, Nebraska. These multiple murders occurred one week after Lotter and Nissen forcibly removed Brandon's pants and made Lana Tisdel, whom Brandon had been dating since moving to Falls City from Lincoln three weeks earlier, look to prove that her boyfriend was "really a woman." Later in the evening of this assault, Lotter and Nissen kidnapped, raped, and assaulted Brandon. Despite threats of reprisal should these crimes be reported, Brandon filed charges with the Falls City Police Department and the Richardson County Sheriff, however, Lotter and Nissen remained free. Lotter and Nissen have [since] both been convicted. . . .

Brandon, Lisa and Philip were home when their anti-gay attackers broke in and shot them execution-style. In D.C. they would have been prevented by law from possessing a firearm in the house that they could have used in self-defense to save their own lives. This Court should not adopt a reading of the Second Amendment that would leave LGBT individuals helpless targets for gay-bashers. *See United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) ("The right to defend oneself from a deadly attack is fundamental."); *United States v. Henry*, 865 F.2d 1260 (4th Cir. 1988) (same). . . .

Brief for The DC Project Foundation, Operation Blazing Sword — Pink Pistols, and Jews for the Preservation of Firearms Ownership as Amici Curiae Supporting Petitioner

New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 20, 2021)

ARGUMENT

I. Marginalized Groups' Interest in The Second Amendment Right to Bear Arms Is a Key Factor in Determining the Scope of That Right.

In *D.C. v. Heller*, this Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" and recognized that the "core lawful purpose" of this right is "self defense." 554 U.S. 570, 592, 630 (2008). Two years later, the Court held that states may not infringe

this right any more than the federal government. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010). Critically, the interests of marginalized groups played an essential role in defining the Second Amendment in both decisions.

Heller expressly focused on marginalized groups in embracing the need for practical and realistic Second Amendment protections. The Court observed that "[b]lacks were routinely disarmed by Southern States after the Civil War," leading "[t]hose who opposed these injustices [to] frequently state[ ] that they infringed blacks' constitutional right to keep and bear arms." 554 U.S. at 614. The newly freed slaves had "shown by their peaceful and orderly conduct that they [could] safely be trusted with fire-arms," and they needed these weapons "to defend their homes, families or themselves" from violence in the newly emancipated South. *Id.* at 615. This view "was apparently widely held" during this period, and although it did "not provide as much insight into [the Second Amendment's] original meaning as earlier sources," this "understanding of the origins and continuing significance of the Amendment [was still] instructive." *Id.* at 614.

Marginalized groups' interests were even more explicitly important in *McDonald*. In addition to expanding upon Heller's historical analysis, see 561 U.S. at 770-71, the Court emphasized the current importance of the Second Amendment right to the protection of minorities and women specifically, *id.* at 789-90. In addressing the dissent's concern that the Second Amendment "does not protect minorities or persons neglected by those holding political power," the Court explained:

> [P]etitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets. The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black. Amici supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Id. at 789-90 (footnotes omitted).

Heller's and *McDonald's* attention to minority rights accords with bedrock principles of constitutional law. The Founders adopted the Bill of Rights to prevent majorities from trampling the rights of minorities, a point this Court made clear in a seminal First Amendment opinion:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of majorities* and officials and to establish them as legal principles to be applied

> by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

To respect the Bill of Rights' fundamental purpose, this Court has long used suspicious scrutiny against any legislation that undermines explicit constitutional guarantees or targets "discrete and insular minorities." *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). That is, "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," or when it reflects "prejudice against discrete and insular minorities," the Court will engage in "a correspondingly more searching judicial inquiry." *Id.* New York's "proper cause" law warrants considerable skepticism in both respects. The Second Amendment is plainly "within a specific prohibition of the Constitution," as it is included within "the first ten Amendments," *id.*; and *Heller* confirms that it belongs on the list of "fundamental rights [that] may not be submitted to a vote," *Barnette*, 319 U.S. at 638:

> [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.

Heller, 554 U.S. at 636 (citation omitted); accord *McDonald*, 561 U.S. at 790.

Furthermore, as outlined below, the right to bear arms outside the home serves to "protect minorities and those lacking political clout" just as much as the right to keep arms within the home. *McDonald*, 561 U.S. at 790. Indeed, this right "is especially important for women and members of other groups that may be especially vulnerable to violent crime." *Id.* As in *McDonald*, because the "the safety of. . . . law-abiding members of the community [here] would be enhanced by the [carrying] of handguns [outside] the home for self-defense," "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* The protection of these rights warrants extension of the Second Amendment beyond the home.

II. Marginalized Groups Need Guns Outside the Home for Self-Protection.

As a practical matter, the right to carry a firearm outside the home for self-defense is an extraordinarily important right for the LGBT community, religious and racial minorities, and women. All of these groups face a heightened risk of violence outside the home and cannot rely on the police for protection. For them, the right to bear arms in public is nothing short of essential.

A. Members of the LGBT Community Are Disproportionately Victims of Violent Crime.

An estimated 5.6% of the population identifies as LGBT, with only 0.6% identifying as transgender. These people are disproportionately likely to be victims of both hate crimes and violence. The hate crime statistics against LGBT people are unsettling. In 2019, there were over 1,378 reported hate crimes committed against

lesbian, gay, and bisexual people and another 224 against the much smaller population of transgendered people. This constituted nearly 20% of all hate crimes for that year, a number consistent with previous years.

These figures reflect only a fraction of the true number of crimes against LGBT people, as "only about half of [LGBT] victimizations are reported to police." Violent crime numbers are worse. LGBT people are nearly four times more likely than non-LGBT people to be victims of such crimes in general. And homicides in particular are increasing. In 2017, the incidents of hate-related homicides against LGBT people rose to a staggering 52—one homicide per week—representing "an 86% increase in the single incident reports compared to 2016" and "the highest number ever recorded" in the 21 years this data has been collected. This number may be much higher. The Human Rights Campaign documented 44 murders of transgender people alone in 2020, to say nothing of the murder rate for lesbian, gay, bisexual, and other queer people.

Violence against the LGBT community, moreover, is not limited to the home. Quite the opposite. Seventy-one percent of anti-LGBT violent crime in 2017 occurred in places other than private residences. LGBT people were attacked on school and college campuses, in shelters, at work, and on the street. And 2017 was no outlier. Hate-related violence against LGBT people has routinely occurred in public spaces for years. This is consistent with statistics on hate crimes against LGBT people more generally, which show that around 70% of these crimes occur outside the home.

The streets that New York is supposed to protect are an especially unwelcoming place for LGBT people. Historically, this has been one of the most common locations for violence and hate crimes against them, with between 20 and 25% of hate crimes occurring there annually. Transgender women are particularly at risk. They are "nearly three times more likely to experience violence on the street compared to survivors who did not identify as transgender women." No wonder people in this group overwhelmingly fear for their safety. Public spaces are not safe for them. . . .

D. None of These Groups Can Rely on Law Enforcement for Protection.

Because they face such a heightened risk of violence, LGBT people, religious minorities, and women have a pronounced need for some form of protection outside their homes. New York likes to pretend that law enforcement can meet this need. This is a fantasy. The police simply cannot provide these groups the protection they so desperately require in public spaces. Law enforcement lacks the resources necessary to prevent crimes from occurring. Criminals rarely engage in violence when officers are already present at the scene, in a position where they can prevent the harm. And if a victim or bystander does manage to call 911 before then, the police usually cannot respond quickly enough. Even in New York City, with an officer on every corner, the average response time to a 911 call for a violent crime in progress—like robbery or assault with a deadly weapon—is still over seven minutes.

For other serious crimes—like automobile theft or simple assault—that number climbs to over nine minutes. A lot can happen in the time it takes the police to arrive on the scene. All too often, it is too little too late.

Even if police could respond quickly enough to stop most crimes before they happen, they have no legal duty to do so. This Court has long held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989). Accordingly, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the state against being murdered by criminals."). For this reason, law enforcement officials have no constitutional duty to protect individuals from the violent acts of third parties. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 766-68 (2005).

Instead, the police enjoy ample discretion in determining when and where to exercise their authority, even when a statute purports to require arrests:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes. In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police. However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. They clearly do not mean that a police officer may not lawfully decline to make an arrest. . . . It is. . . . simply common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

Id. at 760-61 (cleaned up).

The vast majority of police officers exercise this discretion admirably and to the best of their ability, often in dangerous situations and with little thanks from the public. Shamefully, however, a small minority of officers choose to exercise their discretion in a manner that harms marginalized groups. LGBT people, for example, experience significant levels of violence and discrimination at the hands of these bad apples, an injustice that has been well documented.

In one study, 48% of LGBT hate violence survivors who interacted with the police indicated that they "experienced police misconduct," including "unjustified arrest," "use of excessive force," "entrapment," and "police raid[s]." Worse, some "respondents reported that they had experienced verbal abuse, physical violence, and sexual violence perpetrated by police officers," with rogue officers accounting for "6% of known offenders" and a stunning 23% of "offenders who were personally unknown to the victim." Most disturbing of all, "[i]n three out of 52 or 6% of the hate violence homicides recorded in 2017, the victims were killed by police responding to incidents.". . .

As with hate crimes more generally, the reported instances represent only a fraction of the abuse that marginalized groups suffer at the hands of the few law enforcement officers who exploit their power. As explained in the context of violence against women:

> Cases of sex-related misconduct and crime have been described as hidden offenses that are likely to go unreported and, hence, difficult to document and study. Victims may not report instances of police sexual

> misconduct to authorities because they feel humiliated or they may fear retaliation. Victims may also encounter barriers to filing a complaint since that process can be unnecessarily difficult and/or intimidating. Researchers are also hard-pressed for data on cases that do get officially reported because of the reluctance of officers and organizations to expose cases of sex-related police misconduct to outside scrutiny. . . . [T]he obstacles to acquiring official data on the phenomenon cannot be overstated and. . . . it is almost impossible to obtain information without a court order or a covert and perhaps ethically problematic research design.

The same logic extends to police crimes against LGBT people and religious minorities.

Further, the nature of police work affords the small number of rogue officers opportunities "to engage in acts of sexual deviance and crimes against citizens." Officers "routinely operate alone and largely free from any direct supervision, either from administrators or fellow officers." They commonly encounter "citizens who are vulnerable, usually because they are victims, criminal suspects, or perceived as 'suspicious' and subject to the power and coercive authority granted to police." Compounding the problem, "[p]olice-citizen interactions often occur in the late-night hours that provide low public visibility and ample opportunities to those officers who are able and willing to take advantage of citizens." These acts of rogue officers provide further reason why marginalized groups cannot rely on the police for protection.

E. The Right to Bear Arms in Public Is a Necessary, Effective Tool That People in Marginalized Groups Can Use to Defend Themselves.

The ineffectiveness of the police in protecting the LGBT community, religious minorities, and women from violence makes the right to bear arms in public critically important for these groups to defend themselves against frequent attacks. And where honored, that right has proven effective.

Research has shown that the "[d]efensive use of guns by crime victims is a common occurrence." In fact, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million in the context of about 300,000 violent crimes involving firearms in 2008." Even the "radically lower estimate of only 108,000 annual defensive uses" per year still outweighs all firearm homicides in a given year.

The defensive use of firearms to ward off an attacker has also proven effective. Studies on "incidents in which a gun was 'used' by the crime victim in the sense of attacking or threatening an offender have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." Indeed, research consistently "indicate[s] that victims who resist by using guns or other weapons are less likely to be injured compared to victims who do not resist or to those who resist without weapons."

This benefit is particularly pronounced for women. The usually-male attackers often threaten women with weapons other than firearms, such as knives, blunt objects, or even just their fists. But a readily available firearm can help a woman even the odds against these larger, stronger assailants. In fact, studies show that women who do not resist an attacker are over twice as likely to sustain serious injuries than women who resist with a firearm. Other research has shown that, for

each additional woman carrying a concealed handgun, the women's murder rate declines between three and four times more than the male murder rate for each additional man carrying a firearm.

The statistics only tell part of the story. Again and again, members of marginalized groups have successfully defended themselves against aggressors through the use of a firearm.

Austin Fulk, a gay man from Arkansas, is one of many who owes his life to a firearm that someone was lawfully carrying in public. One night in 1987, he was chatting with another man in a parking lot when four gay bashers charged them with baseball bats and tire irons. Fulk's companion drew his pistol from under the seat of his car, brandished it at the attackers, and fired a single shot over their heads, causing them to flee and saving the would-be victims from serious harm.

Mr. Fulk is not alone. Headlines are replete with other stories of guns saving the lives of victims across the country. In Tennessee, a good guy with a gun stopped a criminal strangling a woman outside a fast food restaurant. In North Carolina, a woman shot a man who was charging at her with an axe before he could reach her. And in Texas, a woman shot one of five men after they surrounded her car and tried to rob her.

These are just a handful of the real-life stories in which a gun saved women and minorities from death or serious bodily injury in public. Calling 911 does not now and never will suffice. The only thing standing between these Americans and the people who would do them harm is a gun. Countless lives have been saved as a result.

III. New York's "Proper Cause" Law Denies Women, LGBT People, Religious Minorities, and People of Color Access to Guns Outside the Home.

Despite their effectiveness in stopping violence before it occurs, New York does not permit the average citizen to carry firearms in public. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). Instead, it requires citizens to obtain a license, which in turn requires "proper cause" to carry a firearm outside the home. *Id.* If the applicant wishes to obtain a license "without any restrictions," he must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Id.*

This is an extraordinarily high burden. It cannot be met based on "[a] generalized desire to carry a concealed weapon to protect one's person and property." *Id.* "Nor is living or being employed in a high crime area"—a problem that plagues many minority groups—sufficient to procure a license. *Id.* Indeed, "[e]ven the fact that one carries large amounts of cash. . . . in areas noted for criminal activity does not demonstrate per se a special need for self protection distinguishable from that of the general community of the person engaged in the same business or profession." *In re Bastiani*, 23 Misc. 3d 235, 236, 881 N.Y.S.2d 591, 592 (Co. Ct. 2008).

Rather, the "special need for self-protection" standard "require[s] a showing of extraordinary personal danger, documented by proof of recurrent threats to life or safety." *Kaplan v. Bratton*, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66, 68 (1998). This is consistent with other "proper cause" licensing regimes that exist across the country, which also impose heightened, individualized standards to justify carrying a firearm.

Critically, membership in a group that faces a disproportionate risk of violence *does not* meet this standard. In *Kachalsky*, for example, one of the plaintiffs

"attempted to show a special need for self protection by asserting that as a transgender female, she [was] more likely to be the victim of violence." 701 F.3d at 88. The licensing official nevertheless denied her application because the plaintiff "did not report any type of threat to her own safety anywhere." *Id.* (ellipsis omitted). To the official, "her status as a transgender" did not "put[ ] her at [a sufficient] risk of violence" to establish the "proper cause" necessary for a permit. *Id.*

The implications of this rule cannot be understated. As outlined above, transgender people likely face the greatest risk of violence in public compared to other members of the population. If they cannot meet the "special need for self-protection" standard, other LGBT people, religious minorities, and women certainly cannot either, despite the disproportionate risk of violence they all face when they leave their homes.

Without the tools of meaningful self-defense, there are no gay rights, there are no religious-minority rights, and there are no women's rights. By stripping these groups of their right to bear arms, New York has left millions of the most vulnerable citizens powerless to defend themselves against the all-too-common threats of violence they may face at any given moment.

Nothing but politics motivates this. New York has apparently decided that the supposed evil of allowing its citizens to carry guns for self-defense is worse than the loss of thousands of LGBT, Jewish, Muslim, and women's lives. The state's politicians may consider this an acceptable price to pay for the gun control lobby's favor. But the Constitution does not allow them to pay it because the right to bear arms belongs not to the rulers but to the people. *See Heller*, 554 U.S. at 636.

NOTES & QUESTIONS

1. Do the concerns about hate crimes inevitably lead to the position advocated by the Pink Pistols? Do these episodes just as easily support arguments for strict gun control or gun prohibition? Which response promises to be more effective for those concerned about being victims of hate crimes? If, as the Pink Pistols argue, there is a natural law right of self-defense (*see* Ch. 2.K, online Chs. 18, 21), should it matter whether other people think the exercise of the right is wise or not?

2. Do the arguments made by The Pink Pistols in its *Heller* brief differ from the arguments made by Operation Blazing Sword–Pink Pistols and others in their *NYSRPA* brief? If so, how? What has changed?

3. *Contrasting solutions.* The Pink Pistols advocate a response to hate crimes that depends on individual initiative. For example, after the mass murder at the Pulse nightclub in Orlando, Florida, in June 2016, firearms trainers around the nation reached out to offer free training to LGBT persons. *See* David Kopel, *The History of LGBT Gun-Rights Litigation*, Wash. Post, June 17, 2016. Indeed, one of the original six plaintiffs in the *Heller* case was Tom Palmer, who when walking with a male friend one day in San Jose, California, had drawn a handgun to deter a large gang of would-be gay bashers. *See* Spencer S. Hsu, *Self-Described "Peacenik" Challenged D.C. Gun Law and Won*, Wash. Post, Aug. 8, 2014; Tom G. Palmer, *In Wake of Orlando, Gays Should Arm Themselves: Otherwise, in Gun-Free Zones Like the Pulse Nightclub, We're Sitting Ducks to Maniacs and Terrorists*, N.Y. Daily News, June 13, 2016. In contrast, other LGBT advocates argue that the response to hate crimes should

be government-centric, based on tough criminal laws, gun control, and education. For example, George Takei (famous for playing Lt. Sulu in the original *Star Trek* TV series, 1966-69) has founded the group One Pulse for America, to advocate for gun control. What are the strengths and weaknesses of each approach? Are the private and public responses incompatible? Is either response, standing alone, sufficient?

4. Now that *Heller* has taken gun prohibition off the table, what would be your policy advice to groups concerned about hate crimes against the LGBT community?

5. Some leading advocates of gun control have urged victims to eschew self-defense. Pete Shields, the chair of Handgun Control, Inc. (now known as Brady) advised: "[P]ut up no defense—give them what they want." Pete Shields with John Greenya, Guns Don't Die—People Do 125 (1981). This advice assumed that robbery was the main goal of physical attacks, but a similar approach has sometimes been used by victims of hate crimes. For example, in Czarist Russia, Jews developed a tradition of not resisting mob violence. They learned from experience that an anti-Jewish pogrom was likely to be a temporary outburst of fury rather than a systematic destruction of an entire community. If the Jews allowed the attackers to kill a few victims, the attackers would usually be appeased and would depart. The Jewish attitude began to change in the latter nineteenth and early twentieth centuries, as the pogroms grew worse. Is Shields's advice helpful for victims of hate crimes?

6. Do the targets of hate crimes face different problems than people who are physically weak, such as the elderly, the disabled, or small-statured women?

7. The Pink Pistols brief also argued that the Second Amendment must be interpreted as an individual right of all Americans, rather than a right conditioned upon military service (the *Heller* dissenters' view), because at the time *Heller* was decided, openly gay and lesbian citizens were not permitted to serve in the military. That policy was reversed in 2011. For a historical summary of United States military LGBT policy, see Naval Institute Staff, Key Dates in U.S. Military LGBT Policy, The Naval History Blog (Mar. 26, 2018). *See also* Part E.3 (discussing the federal gun prohibition for persons dishonorably discharged from the military and its effect on LGBT individuals). What other persons might be denied the right to keep and bear arms if *Heller* were reversed and the dissenting view is adopted?

8. For the argument that the Supreme Court's gay-marriage decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), means that traditional and longstanding state restrictions on the right to keep and bear arms are no longer justifiable (at least if the right to arms is considered as fundamental as the right to same-sex marriage), see Marc A. Greendorfer, *After* Obergefell: *Dignity for the Second Amendment*, 35 Miss. C. L. Rev. 128 (2016).

E. CATEGORIES OF PROHIBITED PERSONS: MENTAL ILLNESS, MARIJUANA, AND THE MILITARY

1. Mental Illness

Heller says it should not be read to "cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill." 554 U.S. 570, 626 (2008). Federal law prohibits anyone adjudicated as a "mental defective" or committed to

a mental institution from possessing or purchasing firearms. 18 U.S.C. § 922(g)(4). Social science is very clear that most persons suffering from mental illness do not pose a danger to themselves or to others. The science is equally clear that persons with mental illness are at greater risk of criminal victimization. Evidence is mixed about whether persons with mental illness, as a class, are more likely to commit crimes, and, if so, what other factors affect the likelihood. Schizophrenia is clearly associated with a higher risk of perpetrating homicide—although the vast majority of people suffering from schizophrenia are peaceable and nonviolent. *See* David B. Kopel & Clayton E. Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 How. L.J. 715 (2015). *See generally* Clayton E. Cramer, My Brother Ron: A Personal and Social History of the Deinstitutionalization of the Mentally Ill (2012). Accordingly, a lifetime firearms ban based on an adjudication or commitment for mental illness may be overinclusive if the objective is to disarm people who are unusually dangerous.

The printed textbook excerpts *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 679 (6th Cir. 2016) (en banc) (Ch. 13.E). The facts in the case were clear: in 1986, a court had committed Mr. Tyler to a mental institution for up to 30 days, having found by clear and convincing evidence that he was mentally ill. He was successfully discharged; in 2011, he applied for a permit to buy a handgun and was denied. It was undisputed that Mr. Tyler was mentally healthy and had been so since 1986. It was also undisputed that Mr. Tyler was a prohibited person under the 1968 Gun Control Act, which covers anyone "who has been adjudicated has a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4). Mr. Tyler acknowledged that his due process rights had been respected at the committal hearing. The question before the Sixth Circuit was whether section 922(g)(4) could constitutionally operate as a lifetime ban for a person with a long-past mental illness.

The brief below addresses a different issue: whether a lifetime Second Amendment ban may be based on a short-term involuntary civil commitment with almost no due process, and no meaningful remedy for relief. In Pennsylvania, an emergency involuntary commitment for examination and treatment is allowed when a physician or state administrator has a reasonable belief that a person is severely mentally disabled and requires immediate treatment. The commitment can be effected without a formal hearing, court order, or judicial findings of fact. The commitment period may not exceed 120 hours. 50 P.S. § 7302.

Brief for Autistic Self Advocacy Network (ASAN) et al. as Amici Curiae Supporting Petition for Writ of Certiorari

Vencil v. Pennsylvania State Police, 137 S. Ct. 2298 (2017)

. . . [S]ignificant adverse collateral consequences befall an individual with a record of a Section 302 Commitment, including the permanent loss of Second Amendment rights. Fundamental precepts of due process require that individuals should have a full and fair opportunity to expunge their records where the evidence supporting their commitment was insufficient under Pennsylvania law. . . .

ARGUMENT

I. A Section 302 Commitment Has Profound Due Process Implications

A. An Individual Suffers Many Collateral Consequences Due to a Section 302 Commitment

The many severe and lasting consequences of a Section 302 Commitment include (but are by no means limited to) social stigma, reputational harm, diminished employment, permanent deprivation of certain civil rights, and loss of associational opportunities. If Petitioner and other individuals cannot obtain expungement of an improper Section 302 Commitment, they are faced with disclosing that involuntary commitment for most educational, employment, and associational opportunities for the remainder of their lives, subjecting them to a lifetime of discrimination, if not outright disqualification. . . .

[T]he Pennsylvania Supreme Court has allowed redress of such reputational injuries from a mental health commitment (through the destruction of mental health records) only after a commitment has been found to be unlawful. *Wolfe v. Beal*, 384 A.2d 1187 (Pa. 1978). An individual cannot obtain relief from permanent collateral consequences without a full and adequate Section 302 Commitment expungement proceeding, which would allow her the opportunity to demonstrate the commitment was unlawful. Pennsylvania law provides no other avenue of relief. . . .

[A] Section 302 Commitment can be issued with as little as a brief evaluation of an individual by a physician—any physician—with minimal explanation or reasoning to support the commitment. None of the additional due process protections that attach in other deprivation of rights contexts are observed in a Section 302 Commitment.

Now the Pennsylvania Supreme Court has held that an individual does not have the right to present evidence after a Section 302 Commitment that may impeach the certifying physician's initial limited evaluation, which must be upheld if supported by a preponderance of the evidence before the physician at the time. This allows an improper Section 302 Commitment to persist as a permanent black mark upon an individual's social standing and reputation, significantly impacting educational, employment, and other associational opportunities. By unfairly constraining the only available post-deprivation remedy for an improper commitment, the Pennsylvania Supreme Court has denied Petitioner due process of law.

B. There Is No Meaningful Pre-Commitment Process Nor Adequate Post-Commitment Relief for Collateral Consequences Caused by a Section 302 Commitment

As demonstrated by Petitioner's case, an individual is not provided even the most basic due process protections in advance of an involuntary temporary commitment under Section 302. Petitioner received no pre-deprivation notice of the potential consequences of the Section 302 Commitment; she received no right to review by a neutral arbiter; she received no opportunity to make an oral presentation; she was provided no means of presenting evidence; she received no opportunity to cross-examine witnesses and respond to evidence; she received no right to

counsel; she received no decision based upon a written record; and, perhaps most importantly, she received no pre-commitment review by a judicial officer. . . .

Even if the Commonwealth can satisfy this Court that exigent circumstances surrounding a Section 302 Commitment require denial of due process protections in advance of that commitment, the Commonwealth cannot justify the lack of adequate post-commitment relief. Petitioner's case demonstrates that the post-deprivation remedies available are inadequate to meet the constitutionally required minimums when severe and permanent collateral consequences attach as a result of the commitment. The Pennsylvania Supreme Court's holding constrains the statutory expungement process to provide only a scant review of a Section 302 Commitment, with complete deference to the original fact-finding physician's certification, under a preponderance of the evidence standard, and without the benefit of additional evidence. *See* Petition at p. 46. An individual seeking expungement of a Section 302 Commitment is left with only a dramatically one-sided and incomplete record upon which to dispute that the Commonwealth met its burden for a proper commitment.

Should the holding of the Pennsylvania Supreme Court be allowed to stand, individuals like Petitioner will not be afforded an adequate post-deprivation remedy for an improper commitment.

II. A Section 302 Commitment Permanently Deprives an Individual from Exercising the Fundamental and Individual Right to Keep and Bear Arms Guaranteed by the Second Amendment

A. The Second Amendment Enshrined a Fundamental Individual Right to Keep and Bear Arms

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) [Ch. 11.A], this Court confirmed that there was "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The Second Amendment is incorporated through the substantive Due Process Clause of the Fourteenth Amendment and restricts state as well as federal government action. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) [Ch. 11.B]. This Court has further declared that the rights protected by the Second Amendment are among those fundamental rights necessary to our system of ordered liberty. *See McDonald*, 561 U.S. at 778. The ability to keep and bear arms is a hallmark of uniquely American liberties.

The Pennsylvania Supreme Court cannot allow an individual liberty interest as important as the Second Amendment right to be cast aside without due process protections and expect to comport with this Court's holdings in *Heller* and *McDonald*. This would be like holding that an individual who has been subjected to a Section 302 Commitment cannot exercise free speech, or cannot be protected against unreasonable search and seizure. This Court specifically rejected the invitation "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees. . . ." *McDonald*, 561 U.S. at 780.

As it stands, the decision by the Pennsylvania Supreme Court significantly constrains Petitioner's procedural rights at an expungement hearing . . . and will effectuate a permanent unconstitutional deprivation of her Second Amendment rights.

B. A Section 302 Commitment Deprives an Individual of Second Amendment Rights

A Section 302 Commitment immediately and permanently disqualifies an individual from keeping and bearing arms under Pennsylvania law in accordance with 18 Pa. C.S. § 6105(c)(4), as well as under federal law, 18 U.S.C. § 922(g)(4). The Pennsylvania Supreme Court's determination that the only liberty interest affected by Petitioner's Section 302 Commitment was the temporary suspension of her physical freedom is plainly wrong in the face of this Court's holdings in both *Heller* and *McDonald*.

Moreover, the Pennsylvania Supreme Court failed to consider that a Section 302 Commitment has the same drastic impact on Second Amendment rights as does an involuntary commitment for a much longer period, or even a felony conviction. And that, unlike a Section 302 Commitment, these other disqualifying events provide an individual significantly more due process protections before and after deprivation.

For example, involuntary commitments under 50 P.S. § 7303 ("Section 303 Commitment") and 50 P.S. § 7304 ("Section 304 Commitment") for periods of up to twenty or ninety days, respectively, require additional pre-commitment procedures that include a hearing and a right to counsel, and in the case of a Section 304 Commitment, the determination must be supported by clear and convincing evidence. 50 P.S. § 7304(f). *Amici Curiae* do not agree that the aforementioned procedures are sufficient to satisfy due process, but present them as evidence that additional procedures are feasible in advance of a permanent deprivation of rights. Even though a Section 302 Commitment does not offer any such pre-deprivation protections, the consequential loss of Second. Amendment rights for a Section 302 Commitment is the same as that under a Section 303 Commitment or a Section 304 Commitment. Pennsylvania law authorizes the immediate and permanent deprivation of an individual's state firearms rights, 18 Pa. C.S. § 6105(a) and (c), as well as reporting of the commitment to the federal government, which immediately and permanently deprives an individual of federal firearms rights pursuant to 18 U.S.C. § 922(g)(4). The deprivation of Second Amendment rights also occurs upon a Section 303 or Section 304 Commitment, but only after a pre-commitment hearing involving additional due process protections.

Similarly, an individual who has been subjected to a Section 302 Commitment without such due process protections is subject to the same removal of firearms rights visited upon a convicted felon in accordance with Pennsylvania law, 18 Pa. C.S. § 6105(a) and (c), and federal law, 18 U.S.C. § 922(g)(1) and (g)(4). The critical difference, however, is that an individual convicted of a felony is afforded full due process protections *before* conviction and subsequent deprivation of Second Amendment rights. An individual committed under Section 302 is provided no meaningful pre-deprivation procedural protections.

Although there exists a mechanism for the ostensible restoration of firearms rights under state law, *see* 18 Pa. C.S. § 6105(f)(1), this "remedy" is wholly insufficient to satisfy due process because it does not restore firearms rights under federal law. See *In Re Keyes*, 83 A.3d 1016, 1026-1027 (Pa. Super. 2013). The Pennsylvania Supreme Court's constraints on an individual seeking expungement effectively eliminate any adequate post-deprivation remedy for the permanent loss of the right to keep and bear arms following a Section 302 Commitment.

A less grudging expungement process under 18 Pa. C.S. § 6111.1(g) is necessary because it is the only available avenue to restore an individual's Second Amendment rights that were forfeited without meaningful pre-deprivation due process protections, and for which no other adequate post-deprivation remedy exists. As the Petitioner demonstrates, the Supreme Court of Pennsylvania's decision reduces the expungement process to an illusory façade that does not provide an adequate remedy. . . .

NOTES & QUESTIONS

1. The Supreme Court denied the petition for writ of certiorari in *Vincil v. Pa. State Police* without comment. 137 S. Ct. 2298 (2017).

2. Should the name of everyone receiving mental health treatment be entered into the National Instant Criminal Background Check System (NICS)? If not, what types of mental illness should disqualify a person from having firearms? Should the mentally ill be deprived of firearms even if they do not pose a danger to themselves or others? Who should determine whether a person's mental illness is of the type or degree to keep them from possessing guns? For further examination of these issues, see Alyssa Dale O'Donnell, *Monsters, Myths, and Mental Illness: A Two-Step Approach to Reducing Gun Violence in the United States*, 25 S. Calif. Interdisc. L.J. 475 (2016).

3. The Gun Control Act, 18 U.S.C. § 922(g)(4), prohibits anyone adjudicated as a "mental defective" or committed to a mental institution from possessing or purchasing firearms. Is this too stringent of a standard to protect the public from mentally dangerous persons with firearms? How would you rewrite the statute to provide more protection without depriving the nondangerous mentally ill of their Second Amendment rights?

4. The scope of section 922(g)(4) is expansively interpreted by ATF regulation. According to this regulation, "adjudicated as a mental defective" means:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.
> (b) The term shall include—
> (1) A finding of insanity by a court in a criminal case; and
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

27 C.F.R. § 478.11.

"Committed to a mental institution" means: "A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution." *Id.*

5. To what extent should persons with dementia or other forms of mental illness be prevented from owning firearms? The federal criminalization of gun ownership applies to anyone adjudicated as a "mental defective" or who has been committed to a mental institution; the provision does not cover an elderly person with a cognitive disorder who has never been legally declared incompetent or involuntarily institutionalized. As described in the amicus brief above, some medical care providers can impose a lifetime firearms prohibition on an individual by ordering a short-term involuntary committal. Should medical care providers be given greater power to criminalize individuals' firearms possession? For further discussion, see Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 Elder L.J. 51 (2017) (arguing for voluntary surrender programs, and pointing out that "[m]any people with mild dementia can be responsible with firearms"); Abigail Forrester Jorandby, *Armed and Dangerous at 80: The Second Amendment, The Elderly, and a Nation of Aging Firearm Owners*, 29 J. Am. Acad. Matrim. Law. 85 (2016) (arguing for a variety of restrictions, including requiring guardians to seize firearms); Marshall B. Kapp, *The Physician's Responsibility Concerning Firearms and Older Patients*, 25-SPG Kan. J.L. & Pub. Pol'y 159 (2016) (opposing mandatory reporting by physicians, but favoring mandates for physicians to inquire about patient gun ownership and to counsel them about dangers).

6. *Social Security recipients.* In 2016, the Social Security Administration proposed a regulation that would require the transfer to NICS the names of mentally disabled persons who had a representative payee appointed to manage their Social Security disability benefits, thus felonizing their possession, acquisition, or use of firearms. For a comment opposing this rule, see Ilya Shapiro, Josh Blackman, E. Gregory Wallace & Randal John Meyer, *In the Matter of Implementation of the NICS Improvement Amendments Act of 2007*, Cato Institute (July 1, 2016). The SSA's final rule was overturned in February 2017 under the Congressional Review Act. Pub. L. No. 115-8; H.R.J. Res. 40, 115th Cong. (2017).

7. *Mandatory reporting.* Several people called the FBI or a local sheriff's office to warn authorities about the dangers of Nikolas Cruz, who later perpetrated a mass murder at Marjory Stoneman Douglas High School in Florida. Official follow-up was effectively nil. *See* Andrew Pollack & Max Eden, Why Meadow Died: The People and Policies That Created The Parkland Shooter and Endanger America's Students (2019); Richard A. Oppel Jr., Serge F. Kovaleski, Patricia Mazzei & Adam Goldman, *Tipster's Warning to F.B.I. on Florida Shooting Suspect: 'I Know He's Going to Explode'*, N.Y. Times, Feb. 23, 2018. The county sheriff, whose office had numerous contacts with the criminal, was later removed for "neglect of duty and incompetence." Anthony Man & Rafael Olmeda, *Gov. Ron DeSantis on Suspended Broward Sheriff: 'Scott Israel Continues to Live in Denial'*, South Florida Sun Sentinel, Apr. 5, 2019. But there were also "[m]ore than 30 people [who] knew about disturbing behavior by Nikolas Cruz, including displaying guns, threatening to murder his mother and killing animals, but never reported it until after he committed the massacre at Marjory Stoneman Douglas High School." David Fleshler & Brittany Wallman, *More than 30 People Didn't Report Disturbing Behavior by Nikolas Cruz Before Parkland Massacre*, South Florida Sun Sentinel, Nov. 13, 2018. Should reporting of such behavior be required by law?

8. *Gun confiscation orders.* Starting with Connecticut in 1999 and Indiana in 2005, several states have enacted laws to provide for the seizure of firearms from

people who are deemed to be a risk to themselves or others. Somewhat similar confiscation orders have a longer record as a part of domestic relations laws. The new laws are sometimes called "extreme risk protection orders," but that is a misnomer, because few such laws require a finding of an "extreme" risk. Another term is "red flag laws," although some persons consider this term to be stigmatizing to the mentally ill. The laws may also be called "gun violence prevention orders." The term "gun confiscation orders" is the most direct.

While laws vary, the general system is as follows: First, someone petitions a court for a temporary confiscation order. While Connecticut requires that the petitioners be either a state's attorney, or two police officers, and requires that they must have investigated the situation, some other states allow petitions from a wide variety of people—ranging from close or distant relatives to someone who once had a dating relationship with the individual. The petitioner's burden of proof at this ex parte hearing tends to be low. Some states require police to immediately confiscate all of an individual's firearms and ammunition. Others allow for the guns to be surrendered to the custody of a federal firearms licensee (e.g., a gun store, or a lawyer with an FFL who stores guns for clients in some situations), or to some other responsible person.

Within a few weeks, there will be a further hearing, for which the respondent will have the opportunity to appear, to present evidence, and be represented by counsel at his own expense (or in Colorado, the option to have court-appointed counsel, whether or not indigent). At the hearing, the court will consider whether to extend the order for a longer period, such as 180 or 364 days. At the second hearing, the burden of proof for petitioner is usually "clear and convincing evidence."

Some people would describe the system as consistent with President Trump's statement "take the guns first, go through due process second." Toluse Olorunnipa, Anna Edgerton & Greg Stohr, *President Trump's 'Take the Guns First' Remark Sparks Due Process Debate*, Time, Mar. 3, 2018. Others disagree, pointing to recent laws that immunize accusers from cross-examination, by allowing them to submit an affidavit rather than testify in court. They argue that this is never due process.

Procedures vary widely for termination or expiration of orders, and for the return of firearms once an order is no longer in effect.

Because the laws are relatively new, social science research is limited. We do know that in Connecticut, 32 percent of ex parte orders are terminated at the two-party hearing. Michael A. Norko & Madelon Baranoski, Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness, 6 Conn. L. Rev. 1609, 1619 (2014). The figure in Marion County, Indiana, is 29 percent. George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 Behav. Sci. & L. 308 (2015) (29 percent).

The only study to look at effects of gun seizure laws on crime rates found no statistically significant changes in "murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary." John R. Lott & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* (Dec. 28, 2018) (covering Connecticut Indiana, Washington, and California, and also finding no effect on suicide). Another study reported: "Whereas Indiana demonstrated an aggregate decrease in suicides, Connecticut's estimated reduction in firearm suicides was offset by increased nonfirearm suicides." Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 Psychiatric Serv. (June 1, 2018).

Another Connecticut study did not attempt to study suicide or crime rates but did contain many informative interviews with police officers and other persons responsible for implementing the law. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 Law & Contemp. Probs. 179 (2017). The study also produced an oft-quoted factoid: "[W]e estimated that approximately ten to twenty gun seizures were carried out for every averted suicide." *Id.* at 206. However, the methodology behind the factoid was plainly erroneous. It assumed that *every* form of self-inflicted injury (e.g., a teenager cutting his arm) was a suicide attempt. *Id.* at 201, n.86. The factoid is valid only if one assumes that a teenager who injures herself by repeatedly banging her head against the wall has the same lethal intentions as an elderly man who puts a revolver in his mouth.

Confiscation orders have been upheld in two appellate cases. In Connecticut, the plaintiff was a pro se individual who "had brought to the [lower-court] hearing two electronic devices wrapped in tin foil." *Hope v. State*, 163 Conn. App. 36, 40 (2016). The intermediate appellate court upheld the Connecticut statute against a Second Amendment challenge, because, at least for the particular plaintiff, the law "does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes."

An Indiana decision upheld the statute against a challenge based on the Indiana Constitution right to arms, because Indiana precedent allowed prohibiting "dangerous" persons from having arms. *Redington v. State*, 992 N.E.2d 823 (Ind. App. 2013). The court also rejected the argument that plaintiff was entitled to just compensation for the taking of his property. The court pointed out that the taking of dangerous property does not require compensation; for example, forfeiture laws allow uncompensated takings. *Id.* at 836-37. In 2015, Redington filed a petition for return of his 51 firearms. The hearing on the petition was held in January 2018. The State presented no evidence but instead asked the court to rely on the evidence from the 2012 hearing. The trial court denied the petition, but the intermediate appellate reversed, holding that "Redington met his burden of proving by a preponderance of the evidence that he is not dangerous by presenting the testimony of a psychiatrist that he does not present a risk in the future because there is no evidence he has a propensity for violent or emotionally unstable conduct." *Redington v. State*, 121 N.E.3d 1053, 1057 (Ind. App. 2019).

For further reading, see David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 Law & Psy. Rev (forthcoming 2021); Consortium for Risk-Based Firearm Policy, Guns, Public Health and Mental Illness: An Evidence-Based Approach for State Policy (2013) (addressing confiscation orders, short-term involuntary commitments, and other issues); U.S. Senate Judiciary Committee, Red Flag Laws: Examining Guidelines for State Action, Mar. 26, 2019; David B. Kopel, written testimony for Senate hearing.

2. Marijuana Users

Federal law prohibits the possession of a firearm by anyone "who is an unlawful user of or addicted to any controlled substance." 18 U.S.C. § 922(g)(3). Federal law also makes it unlawful to sell a firearm to any person if the seller knows or has reasonable cause to believe that such a person is an unlawful user of or addicted to

a controlled substance. 18 U.S.C. § 922 (d)(3). Marijuana is a controlled substance under federal law. 21 U.S.C. § 812. In September 2011 the ATF issued an open letter to all federal firearms licensees stating that persons who use marijuana are prohibited persons under section 922(g)(3), regardless of whether state law authorizes such use for medicinal purposes. *See* ATF, Open Letter to All Federal Firearms Licensees.

The Ninth Circuit in *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), held that prohibiting purchase of a firearm by the holder of a state marijuana registry card does not violate the Second Amendment. Applying intermediate scrutiny, the court concluded that it is reasonable to assume that a registry cardholder is much more likely to be a marijuana user than someone who does not hold a registry card and, in turn, is more likely to be involved with firearm violence. Similarly, in *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014), the court held that the government had presented sufficient social science evidence to show that illegal drug users, including marijuana users, were more likely to be violent.

NOTES & QUESTIONS

1. Should persons whose diseases or disabilities are treatable with medical marijuana be forced to choose between treatment and their Second Amendment rights? *See* Michael K. Goswami, *Guns or Ganja: Pick One and Only One*, 52 Ark. Law. 24 (Spring 2017).

2. For a comparison of three legal-reform movements—gun deregulation, same-sex marriage, and marijuana legalization—see Justin R. Long, *Guns, Gays, and Ganja*, 69 Ark. L. Rev. 453 (2016). What are some of the similarities and differences among these movements?

3. What about firearms and alcohol? Many states prohibit public carry of firearms while consuming alcohol or when visiting restaurants, bars, and other places where alcohol is served. Should persons who consume alcohol be prohibited from possessing or purchasing firearms? Are they less risky than persons who use mari juana? For research on alcohol and violence, see Kathryn Graham & Michael Livingston, *The Relationship Between Alcohol and Violence—Population, Contextual and Individual Research Approaches*, 30 Drug & Alcohol Rev. 453 (2011) (citing numerous studies).

4. The 1997 Treasury Decision from the Bureau of Alcohol, Tobacco and Firearms (ATF), determined that for purposes of enforcement, drug use "is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year." T.D. ATF-391 Definitions for the Categories of Persons Prohibited from Receiving Firearms

(Jun. 27, 1997), https://www.atf.gov/file/84311/download; *see also* 27 C.F.R. § 478.11 (2019). In 2019 ATF promulgated an expanded version of this definition, so that federal regulations now also include "persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year." 27 C.F.R. § 478.11 (2019).

5. Various individuals fall within the standards that ATF and courts have used to define "drug user." At least one commentator concludes that there is "wide spread underreporting" of these prohibited drug users to the National Instant Check System database. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211 (2020) ("The NICS system has only a tiny fraction of the drug users in their system as most of the drug courts, drug diversion programs, drug counselors, detox centers, methadone clinics, college and high school administrators (who suspend students for having drugs) and drug task forces do not bother reporting the individuals they process."); *see also* Beckei Goggins & Shauna Strickland, BJS Report: State Progress in Record Reporting for Firearm-Related Background Checks: Unlawful Drug Users (July 2017).

3. Military Personnel and Veterans

Surprisingly, persons who volunteer to serve in the United States armed forces subject themselves to certain risks of being forbidden to exercise Second Amendment arms rights.

a. Lifetime Prohibition for Dishonorable Discharge

One path to prohibition is to be dishonorably discharged from service. The Gun Control Act of 1968 prohibits firearms and ammunition possession by anyone "who has been discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(6). Neither in 1968 nor in the half-century thereafter has any empirical research been conducted on the prohibition.

As of December 31, 2018, there were 16,543 persons listed in the NICS database on the basis of a dishonorable discharge. FBI Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Check System (NICS) Section, Active Records in the NICS Indices as of December 31, 2018. About 5,000 of these were added after the November 2017 mass murder at a church in Sutherland Springs, Texas, when it was discovered that the Air Force had failed to report the perpetrator's dishonorable discharge to NICS. Sig Christenson, *After Killings, Pentagon Added Thousands of Dishonorable Discharge Cases to FBI Database*, San Antonio Express-News, Feb. 12, 2018.

Dishonorable discharges are imposed only after a general court martial. Except for desertion, the current reasons for dishonorable discharge overlap almost entirely with serious civilian felonies under state laws.

Only one federal circuit case has involved a serious challenge to the section 922(g)(6) prohibition. *United States v. Jimenez*, 895 F.3d 228 (2d Cir. 2018). The Second Circuit upheld the prohibition on Jimenez by analogizing his court martial convictions to civilian felony convictions: "those who, like Jimenez, have been

found guilty of felony-equivalent conduct by a military tribunal are not among those 'law-abiding and responsible' persons whose interests in possessing firearms are at the Amendment's core." *Id.* at 235. "There is no reason to think that Jimenez is more likely to handle a gun responsibly just because his conviction for dealing drugs and stolen military equipment (including firearms) occurred in a military tribunal rather than in state or federal court." *Id.* at 237.

In the past, homosexual behavior or orientation were grounds for military discharge. The typical practice was a "general" discharge for homosexual orientation, and an "undesirable" discharge for homosexual conduct. Earlier policies had sometimes imposed a dishonorable discharge for homosexual conduct. *See* Randy Shilts, Conduct Unbecoming: Gays & Lesbians in the U.S. Military, Vietnam to the Persian Gulf (1993). While less-than-honorable discharges can have major harmful effects on an individual's civilian employability, they do not affect gun rights, for which only a dishonorable discharge triggers a prohibition. In 2011, the Obama administration announced that the approximately 100,000 homosexual persons who had been discharged were eligible to petition to have their discharge status upgraded to "honorable." Dave Philipps, *Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges*, N.Y. Times, Sept. 5, 2015, at A1.

b. Disarming the Armed Forces

In early 1992, the Clinton administration finalized a regulation that had been initiated by the first Bush administration. It forbids gun possession by all Army and related civilian personnel at U.S. bases, except for military police. U.S. Dep't of Def., Dir. 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties 3 (Feb. 25, 1992). The directive was reissued by the Obama administration in 2011. U.S. Dep't of Def., Dir. 5210.56, Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities 1 (Apr. 1, 2011). The directive was criticized for facilitating the mass murder by an Islamist extremist at the army base in Fort Hood, Texas, in November 2009.

Many base regulations allow "privately owned firearms" (POF) on base only when registered and stored in a locked armory. For example, a soldier living in barracks could store her private rifle in an armory and check it out on a day off to go hunting. U.S. Dep't of Army, III Corps & Fort Hood Reg., Commanding General's Policy Letter #7 (Aug. 23, 2017).

In the past, some bases had required registration of all family guns for military personnel living in off-base government housing. Congress outlawed such registration in 2011 and ordered the destruction of all registration records. Ike Skelton National Defense Authorization Act for 2011, P.L. 111-383 ("Prohibition on Infringing on the Individual Right to Lawfully Acquire, Possess, Own, Carry, and Otherwise Use Privately Owned Firearms, Ammunition, and Other Weapons"). The law does not forbid investigation of private gun ownership in connection with a criminal investigation. *Id.* Likewise, medical personnel may make inquiries about gun ownership in connection with mental health concerns. National Defense Authorization Act for Fiscal Year 2013, P.L. 112-239 ("Rule of Construction Relating to Prohibition on Infringing on the Individual Right to Lawfully Acquire, Possess, Own, Carry, and Otherwise Use Privately Owned Firearms, Ammunition, and Other Weapons").

Arms-bearing prohibitions for military personnel and civilian employees of the military were criticized for violating the Second Amendment and endangering safety. *See, e.g.*, Major Justin S. Davis, *The Unarmed Army: Evolving Second Amendment Rights and Today's Military Member*, 17 Tex. Tech Admin. L.J. 27 (2015). In response, a 2015 law required the Secretary of Defense to establish a process by which commanders "may authorize" armed forces members "to carry an appropriate firearm on the installation, center, or facility if the commander determines that carrying such a firearm is necessary as a personal- or force-protection measure." National Defense Authorization Act For Fiscal Year 2016, P.L. 114-92, 129 Stat. 726 § 526("Establishment of Process by Which Members of the Armed Forces May Carry an Appropriate Firearm on a Military Installation"). This partially overrode the 1992 Bush/Clinton and 2011 Obama Defense Directives, by allowing (but not requiring) commanders to authorize individual personnel to bear arms while on-base.

However, the Secretary of Defense failed to comply with the deadline to establish a system for authorized carry, and so the next year's Defense appropriation partially withheld certain funding until the system was established. National Defense Authorization Act For Fiscal Year 2017, P.L. 114-328, 130 Stat. § 348 (2000) "Limitation on Availability of Funds for Office of the Under Secretary of Defense for Intelligence"). The funding threat was so effective that a few weeks before final passage of the appropriation bill, the Department of Defense issued a new directive. It replaces the 1992 and 2011 directives and specifies the procedures for issuance of concealed carry permission for personnel. Dep't of Defense Directive 5210.56, Arming and the Use of Force (Nov. 18, 2016).

After fatal shootings in 2019 at the Pearl Harbor naval base in Hawaii and the Pensacola Naval Air Station in Florida, the United States Marine Corps issued a new rule authorizing qualified law enforcement officers to bring privately-owned firearms on bases for personal protection. The authorized group includes military police, criminal investigators, and civilian police officers working at the bases. They must have concealed carry permits for the firearms.

c. Felonizing Gun Possession by Financially Incompetent Veterans

As discussed above, in Part E.1 Note 6, Congress repealed a Social Security Administration regulation that would have criminalized gun ownership by persons who were receiving disability benefits for a mental condition *and* who designated a personal representative to manage their relations with the Social Security Administration. The Veterans Administration (VA), however, goes much further in stripping Second Amendment rights of its beneficiaries.

The VA sometimes decides, on its own initiative, that a veteran beneficiary is financially incompetent, and so appoints a representative to manage the veteran's benefits. This may be appropriate a variety of situations. For example, a veteran might have severe dementia. Or an elderly widow who formerly relied on her spouse to manage all financial affairs may not be able to navigate through the VA's labyrinthine bureaucracy. Every time the VA appoints a personnel financial representative, the VA reports to NICS that the veteran has been adjudicated as a "mental defective." As a result, if the veteran does not immediately dispose of all her firearms and ammunition, she is a prohibited person, and guilty of a federal felony. Financial

incompetence is not in itself a mental illness, although it may sometimes be a consequence of such illness. The VA's practices, and Congress's torpor in reforming them, are criticized in Stacey-Rae Simcox, *Depriving Our Veterans of Their Constitutional Rights: An Analysis of the Department of Veterans Affairs' Practice of Stripping Veterans of Their Second Amendment Rights and Our Nation's Response*, 2019 Utah L. Rev. 1.

NOTES & QUESTIONS

1. When persons are in military service, their First Amendment rights may be subject to certain limitations, but they may not be extinguished. *See Parker v. Levy*, 417 U.S. 733, 758 (1974) (the "different character of the military community and of the military mission requires a different application of [First Amendment] protections"); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding requirement that petition circulators obtain permission of the base commander). Do First Amendment precedents provide useful analogies for the Second Amendment in a military context?

2. Almost all military personnel receive some training in how to kill. Personnel in combat specialties, such as infantry or artillery, receive extensive training in how to do so. In combat deployments, some do kill. Should public policy be especially vigilant in disarming persons who have shown a willingness to kill? Does the text of the Second Amendment offer any guidance?

3. Should a person who cannot balance a checkbook be allowed to own a firearm?

F. INDIAN TRIBES

The printed textbook examined the arms culture of American Indians, and gun control laws aimed at Indians, focusing mainly on the original colonies and states in the seventeenth and eighteenth centuries. As the textbook detailed, the distinctive American arms culture that we know today was a hybrid of the English and Indian arms cultures. Like states, Indian Nations have always been recognized as sovereigns within the American legal system—although, as with states, that sovereignty is not absolute, and may under some circumstances be overridden by the federal government.

At present, the Second Amendment is not applicable to Indian tribal nations. Self-governing Indian tribes have never formally enjoyed the protections of the Constitution. *See Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-03,[5] extended certain constitutional rights to Indian tribes, including rights protected by the First, Fourth, Fifth, Sixth, and Seventh Amendments, as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses; the right to keep and bear arms in the Second Amendment was omitted. The protections of ICRA have been considerably weakened

5. Section 1304, pertaining to crimes of domestic violence, was added in 2013.

with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which held that United States federal courts could not hear ICRA claims against Indian tribes except for habeas corpus petitions. The Court reasoned that such suits are barred by tribal sovereign immunity and that tribal courts are better equipped to decide civil rights complaints within tribal communities.

Within the jurisdiction of Indian land, gun rights and regulations are determined by tribal law. The following article excerpt describes some of these provisions.

Angela R. Riley

Indians and Guns

100 Geo. L.J. 1675 (2012)

. . .

B. INDIAN NATIONS AND GUNS

The right of Indian tribes to make their own laws and be governed by them predates the formation of America. Such rights, linked to a tribe's inherent sovereignty, have been recognized for centuries and are embodied in treaties, statutes, and case law. The anomalous position of Indian tribes within the federal system affords them the unique opportunity to self-govern in a localized manner in relation to guns. In the following subsections, I examine two areas where tribes have addressed the right to bear arms and guns more generally—in tribal constitutions and in tribal codes, respectively.

1. Tribal Constitutional Law and the Right to Bear Arms

Numerous tribes operate under written constitutions, which embody a wide range of tribal governance systems. Many of these constitutions reflect the particular historical context in which a tribe's constitution was developed. They commonly set forth, much like the U.S. Constitution, separation of powers and protection of individual rights. Some tribal constitutions directly reflect ICRA's influence, mirroring the individual-rights restrictions as seen in the federal statute.

In recent years, however, many tribes have undertaken constitutional reform, departing from the broadly implemented bureaucratic constitutions of the Indian Reorganization Act era.[6] Because of a spate of recent tribal constitutional reform projects, some of these individual rights provisions have recently been drafted or modified. Today, a rather small but growing number of tribal constitutions expressly provide that the Indian nation may not infringe on the individual right to bear arms. Practically speaking, such provisions bind the tribal government to the stated protection and would, accordingly, limit the tribe's ability to infringe the right, whether the suit is brought by an Indian or a non-Indian.

6. [The Indian Reorganization Act was enacted in 1934 and was known as the "Indian New Deal." The Act provided for greater tribal autonomy and self-government. 48 Stat. 984 (1934).—Eds.]

Of those tribes identified that have provisions securing the right to bear arms, some variation can be seen, as tribal constitutions reflect tribes' particular circumstances, history, and tradition. Of particular note is that none included an analog to the Second Amendment's prefatory clause regarding the formation of a militia. In contrast, in each tribal constitution dealing with the right to bear arms, the individual right is paramount. As such, these tribes convey a common respect for the individual right to bear arms as a limit on the actions of tribal governments.

Consider, for example, the current draft of the new Mille Lacs Band of Ojibwe's Constitution, which stipulates, "[t]he government of the Band shall not make or enforce any law or take any executive action . . . prohibiting the right of the People to keep and bear arms." A similar clause is contained in the Constitution of the Zuni Pueblo:

> Subject to the limitations prescribed by this constitution, all members of the Zuni Tribe shall have equal political rights and equal opportunities to share in tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to bear arms.

These can be contrasted with other tribes, whose constitutions are slightly more nuanced in the way the right is articulated. For example, the Little River Band of Ottawa Indians' Constitution states, "[t]he Little River Band in exercising the powers of self-government shall not . . . [m]ake or enforce any law unreasonably infringing the right of tribal members to keep and bear arms." The Constitution makes clear in its language that the right is not absolute but is subject to reasonable restriction. The Saint Regis Mohawk, likewise, include the clarification that the right to bear arms shall not be denied by the tribe "in exercising its powers of self-government" specifically.

. . .

[R]esearch reveals that most Indian tribes, in fact, do not expressly protect the right to bear arms in their constitutions.[328] Thus, practically speaking, tribes' extraconstitutional status means that those tribes that do not guarantee a right to bear arms are free to choose amongst a variety of gun control options. And even those that do contain an individual right guarantee will interpret their constitutional provisions according to tribal law and tradition, as they are not bound by federal law or federal court precedent. Accordingly, even if a tribe's constitution directly mirrored that of the United States, the Supreme Court's recent Second Amendment ruling—including, specifically, *Heller* and *McDonald*—would be inapplicable to tribal governments. Disputes over the scope of a right to bear arms in tribal court, then, could yield radically different results than similar cases adjudicated in the federal courts.

2. Tribal Gun Laws in Indian Country

Beyond constitutional guarantees, as seen in the following subsections, tribes may—and often do—regulate the ownership, possession, and use of guns in Indian country through both civil and criminal codes.

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328. However, an exhaustive search of published tribal court opinions does not turn up one case in which a tribal government attempted to ban guns on the reservation.

a. Criminal Codes. Perhaps not surprisingly, where tribes have criminal codes they almost always enumerate gun crimes. As previously explained, absent treaty provisions to the contrary, federal criminal laws of general applicability, including gun laws, are in effect in Indian country as they are anywhere. And, in fact, there are federal laws that might affect firearm ownership and possession in Indian country, particularly as they pertain to domestic violence convictions. But where gaps or issues of nonenforcement arise, reservation Indians will look to tribal governments to define the scope of gun regulation. As explained previously, non-Indians are not subject to tribal criminal law.

Virtually every tribe researched that has a criminal code has enacted some type of gun law. Criminal laws regarding guns in Indian country, as a general matter, map onto those seen in states and municipalities around the country. Laws banning or governing the carrying of concealed weapons are quite prevalent. Several tribes allow concealed carry where a permit has been issued by the tribe. Some tribes more tightly constrain gun ownership in general, limiting the places where weapons may be lawfully carried with no permit exceptions.

Tribes' most comprehensive gun laws are reflected in those pertaining to standard violent crimes. Because tribes retain jurisdiction over crimes by Indians and have exclusive jurisdiction over nonmajor crimes committed by Indians, tribal codes reflect the jurisdictional realities, with many codes omitting reference to crimes that would fall within the federal government's jurisdiction under the Major Crimes Act, such as murder. References to guns or weapons are most common in code provisions related to assault, robbery, intimidation, and stalking. Otherwise, tribal criminal codes are replete with gun restrictions, including laws governing ownership, carry, and use. Tribes such as the Fort Peck Assiniboine, the Eastern Band of Cherokee Indians, Oglala Sioux, the White Mountain Apache, the Chickasaw Nation, and numerous others, have comprehensive criminal gun laws.

Domestic violence, a notorious problem on Indian reservations, appears commonly in criminal codes as well, sometimes within the context of guns. Some tribes allow tribal police to take guns from the home in a domestic violence situation even if the gun was not used in the incident at issue. Others condition release of a defendant guilty of domestic violence on a guarantee of no future possession of firearms.

Tribes also employ carve outs to general gun regulations or prohibitions for activities that may be tribally distinct or connected to their, particular cultural and ceremonial practices. The Navajo Nation code, for example, includes an express exception to its general gun laws where the firearm is used in "any traditional Navajo religious practice, ceremony, or service." The San Ildefonso Pueblo Code similarly states an exception to its criminal gun code regarding "Negligent Use & Discharging of Firearms & Cannons" for those circumstances when such gun use is related to "any ceremony where traditions and customs are called for." And the Shoshone and Arapaho of the Wind River Indian Reservation set forth requirements regarding the hunting of "big game" on the reservation. The code includes preceremony permitting requirements unique to those who will be dancing in the tribes' Sundance Ceremony and using male elk or male deer in the ceremonies themselves.

Undoubtedly, the articulation of gun crimes is an essential tool for tribes in addressing public safety in Indian country and is, intuitively, at least one place where tribes may choose to legislate in regards to guns. At the most basic level, maintaining law and order, including imposing incarceration when necessary, is a key feature of sovereignty.

b. Civil Regulatory Codes. Numerous tribes have enacted comprehensive civil codes regarding guns. Unsurprisingly—given the rural nature of many reservations and the deep cultural links to a subsistence lifestyle many of these codes pertain to hunting and fishing. These codes typically set parameters for the taking of fish and game in ways similar to non-Indian country regulations. For example, such codes establish regulations regarding the types of guns that can be used in hunting, the maximum catch, and whether dogs can be used to aid in hunting. In some instances, they set forth exceptions to general criminal gun laws or articulate time, place, and manner restrictions. Such restrictions also address the use of firearms in demonstrations and regulations regarding the sale of guns on the reservation.

Other civil codes dealing with guns relate to restrictions in particular reservation locales, including casinos and tribal government buildings. Several address the issue of guns in and around schools. Curiously, some tribes also have in place regulations in the context of debtor-creditor law that guarantee debtors one firearm from being seized by a creditor.[7] Others govern the transportation of guns, addressing such questions of how and when guns can, for example, be transported on a snowmobile, or whether a gun can be shot across a public highway or from the window of a moving vehicle.

There are also tribally specific rules embodied in the codes, with the use of bows and arrows commonly addressed along with guns. In some cases, tribes set forth specific requirements for acquiring Band hunting licenses (as distinct from Indian hunting licenses generally), particular regulations governing hunting and trapping on tribal lands, and codes distinguishing between commercial and cultural hunting.

NOTES & QUESTIONS

1. Should the Indian Civil Rights Act of 1968 (ICRA) be amended to include the right to keep and bear arms?

2. *Indian citizenship.* Based on conditions in 1787 and 1866, the text of the U.S. Constitution distinguished between Indians living in American society and those who lived among the sovereign Indian nations. Apportionment for the House of Representatives excluded "Indians not taxed," since they were not part of the U.S. polity. U.S. Const. art. I, § 3; amend. XIV, § 2. Section 1 of the Fourteenth Amendment declares: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

7. [Thirteen states also have laws providing for some protections for firearms in bankruptcy, usually with limits on the total number or the total value. *See* Carol A. Pettit & Vastine D. Platte, Exemptions for Firearms in Bankruptcy, Cong. Res. Svc. (Feb. 15, 2013).—Eds.]

wherein they reside." The Supreme Court held that Section 1 did not confer citizenship on Indians born on tribal lands, even if they had left those lands; rather, they were citizens of their tribal nation. *Elk v. Wilkins*, 112 U.S. 94 (1884). But the Fourteenth Amendment is a floor, not a ceiling, on who may be a citizen; Congress may extend citizenship beyond the Fourteenth Amendment minimum. The 1887 General Allotment Act (Dawes Act) allocated certain Indian lands in severalty, in lots of 40, 80, or 160 acres. Indians who owned land were granted citizenship, but not voting rights. P.L. 49-119 (1887). Finally, all Indians were granted citizenship by the Indian Citizenship Act of 1924 (Snyder Act). P.L. 68-175 (1924) ("all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States"). Can a citizen be denied Second Amendment rights based on where she lives?

3. As Professor Riley explains elsewhere in her article, the legislative history of the 1968 Indian Civil Rights Act contains no explanation of why the Second Amendment was omitted. She finds the omission curious, given that 35 states had a constitutional right to arms, and in the previous decade, four states had amended their constitutions to regarding arms rights. Riley, *supra*, at 1704-10. Factors that might have contributed to the omission might include some of the same factors that led to the Gun Control Act of 1968: sharply rising violent crime in the previous several years; the rise of armed racial militant groups (most notably, the Black Panthers, but also including the American Indian Movement, which was founded in 1968); or the belief of some Congresspersons that the Second Amendment is not an individual right. Can you think of others?

4. *Carrying firearms on tribal lands.* A state-issued concealed handgun carry permit is not necessarily valid on tribal lands. For example, an Arizona permit is recognized by some tribes but not by others. Which Indian Tribes Recognize the Arizona Permit?, Arizona CCW Guide (Dec. 17, 2008). However, tribal courts have only limited authority to try non-Indians or Indians who are not resident on tribal land. *See Oliphant v. Suquamish Indian Tribe*, 425 U.S. 191 (1978).

5. Some tribes have procedures for issuing carry permits. Should such tribes consider entering into reciprocity agreements with other tribes and with states, so that a permit issued by the one could be used by travelers in the other's territory? Most but not all states have a system for recognizing carry permits issued by other states. Recognition of an out-of-state permit may hinge on reciprocity (states A and B agree to recognize each other's permits) or may be unilateral (the state simply recognizes all permits from other states, or all state permits that meet certain conditions). Should states recognize some or all Indian tribal carry permits? Should tribes do the same for state permits?

6. Violent crime against Indian women is very high, especially on Indian reservations and in tribal communities. For a discussion of this problem and how it might be addressed by expanding concealed carry laws in tribal jurisdictions, see Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 Kan. J.L. & Pub. Pol'y 236 (2017); Adam Crepelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 Lewis & Clark L. Rev. 1283 (2019).

7. *Treaties, agreements, and hunting rights.* Before 1873, U.S. government agreements with Indian nations were styled as "treaties," requiring a two-thirds vote by

the U.S. Senate for ratification, as with a treaty with a foreign nation. An 1871 statute forbade use of the treaty process. 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). Since 1871, "agreements" have been the mode for federal-Indian relations, requiring a simple majority vote for approval by the U.S. House and Senate. (The House's desire to get involved was a key motive for the 1871 act.) Although the 1871 statute might have been used to extinguish the validity of prior treaties, U.S. courts have been unwilling to cast aside the pre-1871 treaties; instead, they remain an important component of the rule of law by which the United States defines itself. Today, the United States government is the only nation in the world that has treaty relations with an interior citizen population. Since the 1960s, Indian litigants have often succeeded in asserting hunting or fishing rights that were guaranteed by treaties or agreements. *See* Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994); *see also* David B. Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 Denv. L. Rev. 329, 397 (2018) (Colorado Utes' hunting rights under the 1873 Brunot Agreement).

8. *Further reading:* Native American Rights Fund, Tribal Law Gateway (presenting tribal laws, organized by tribe). Handgun carry laws by tribe are excerpted at Tribal Laws and Concealed Carry, Handgunlaw.us (Apr. 1, 2019).

EXERCISE: SUBJECTIVITY IN FORMING POLICY VIEWS

The special concerns of the communities surveyed in this Chapter have generated views and policy prescriptions on both sides of the gun question. The competing views seem to turn on different assessments of the risks and utilities of firearms. But underneath different views about the strength and persuasiveness of various items of empirical evidence there are also intuitions and values that may be impervious to empirical refutation. Ask three people you know the following questions, or some of them. Once you have collected the responses, compare and discuss the results with your classmates.

1. Do you think that private ownership of firearms in America imposes more costs than benefits or more benefits than costs? Or is the answer uncertain?
2. What is the basis for your assessment of the risks and utilities of private firearms?
3. How much of your assessment is based on an individual sense of your own capabilities and temperament?
4. How much of your assessment is based on your sense of the capabilities and temperament of other people?
5. How much of your assessment is based on data you have seen about the risks and utilities of firearms in the general population? *See* Ch. 1.[8] What information specifically comes to mind?

8. When you are asking the questions, don't say "See Ch. 1." We include the chapter cross-references for your convenience in seeing data on the above questions. If your respondents' answers are wildly different from the actual data, then your respondents are quite typical.

6. How much of your assessment is based on having grown up in an environment where firearms were common or uncommon?
7. Approximately how many private firearms are there in the United States? *See* Ch. 1.B.
8. Approximately how many people die from gunshots in the United States each year? What percentages of gunshot deaths are from violent crime? From lawful self-defense? From suicide? From accidents? *See* Ch. 1.D-F.
9. Define "assault weapon." *See* Ch. 15.A.
10. Roughly what percentage of firearms homicides involve Black victims? Black perpetrators? *See* Ch. 1.H.
11. What percentage of firearms fatalities involve female victims? Female perpetrators? *See* Part B.
12. Roughly how many children (14 and under) are killed in firearms accidents each year? *See* Ch. 1.D and I.

EXERCISE: EMPIRICAL ASSESSMENTS, PERSONAL RISK ASSESSMENTS, AND PUBLIC POLICY

The gun debate often involves competing empirical claims about the costs and benefits of firearms. Consider how you use (or don't use) empirical evidence in everyday choices such as whether and where to drive, bicycle, or walk; what you eat and drink; and so on.

Now assume that you are married with two children, ages 4 and 2. You live in a town bordering a large city in the Northeast. You commute into the city from the train station that is two blocks from your house. Your spouse cares for the children at home. In the last year, your neighborhood has experienced one incident of vandalism (a swastika sprayed on a garage door) and one daytime home invasion, which included an armed robbery. Your town is facing budget constraints and has cut its police force by 15 percent. Your spouse wants to purchase a handgun for protection. You are familiar with guns and have a bolt-action deer rifle, inherited from your grandfather, stored in the attic. You and your spouse are both lawyers and always make important decisions after robust debate. What factors will affect your decision to buy a handgun or not? Does your assessment change if you are a same-sex couple? If you are an interracial couple? If your spouse has a physical disability?

Plagued by complaints about a rising crime rate and emerging gang activity, the mayor of your town has assigned his staff to develop a policy response. The mayor's chief of staff suggests an ordinance banning the sale and possession of all semi-automatic handguns but allowing possession and sale of revolvers. A junior staffer suggests that the mayor establish free firearms training courses at mobile firing ranges set up around town. What factors should influence the mayor's assessment of these proposals? What would you propose? What would you do as mayor?

Compare your decision making as mayor to your decision making as a spouse with a worried partner. Did you consider the same variables in each case? Did you weight them the same way? Is the decision making in the two contexts compatible? Incompatible? If the decision makers sincerely disagree, whose approach should be chosen?

CHAPTER 18
INTERNATIONAL LAW

This is online Chapter 18 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsreglation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *This chapter.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, and case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

This online chapter covers international-law principles and documents involving self-defense and firearms control. International law traditionally dealt with relations between nations but has expanded to cover interactions between states and individuals.[1]

1. The authors would like to thank Vincent Harinam (M.A. Criminology, U. Toronto 2017), who contributed substantially to this chapter.

Part A covers the leading international legal conventions on the right of self-defense or gun control: the Universal Declaration of Human Rights, the UN Programme of Action against the illicit trade in small arms, the Firearms Protocol and International Tracing Instrument, the Arms Trade Treaty, and the UN's International Small Arms Control Standards (ISACS). Part A also covers the work of various UN bodies, such as the Human Rights Council.

Part B focuses on major regional firearms agreements. These include the Inter-American Convention Against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; the European Firearms Directive; and the Nairobi Protocol.

Part C steps back from current issues to examine the foundations of international law and the individual and collective rights of self-defense. This Part presents the writings of Suarez, Grotius, Pufendorf, Vattel, and other founders of international law. From the sixteenth through eighteenth centuries, these geniuses created what we today call "classical international law."

Part D addresses the most important international law problem of the last century: genocide. To what extent, if any, does international law provide for forceful resistance to mass murder? For forceful resistance to other violations of human rights?

Finally, Part E presents arguments for whether and how international gun control should be implemented. The Part also examines how "norms entrepreneurs" use international law in service of gun control or gun rights.

First, some basic international law vocabulary is helpful for understanding the material in this chapter.

When an international agreement involves many parties, the agreement is typically called a *convention*. Defined most narrowly, a *treaty* is a type of bilateral agreement between nations. *Treaty* is also sometimes used in a broader sense, as in the U.S. Constitution. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const., art. II, § 2. The general rules of treaties and conventions are codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.[2]

Customary international law emerges from the behavior of nations. When nations consider a custom to be legally binding, then the custom can be said to be part of international law. The classic example of customary international law is ambassadorial immunity. Long before there were any treaties about how ambassadors should be treated, nations considered themselves to be legally obliged not to criminally prosecute ambassadors from foreign countries.

Closely related to customary international law are *norms*. In the international law context, a *norm* is an internationally accepted standard of conduct, even if that standard has not yet become a well-established custom. Ordinary customary law can always be changed; for example, a new convention might change the rules for ambassadorial immunity. *Peremptory norms*, however, are said to be always and

2. The U.S. has signed but not ratified the Vienna Convention. The State Department considers many of its provisions to constitute customary international law. U.S. State Dep't, Vienna Convention on the Law of Treaties.

everywhere binding and unchangeable. As Part C discusses, the Classical Founders of international law described Natural Law in similar terms. Since the late twentieth century, international policy entrepreneurs (discussed in Part E) have been attempting to argue that their favorite policies are peremptory norms of international law.

Mere custom is *not* in itself sufficient to create customary international law; the custom must be accompanied by *opinio juris sive necessitatis* ("an opinion of law or necessity," commonly shortened to *opinio juris*). In other words, a nation must be adhering to the custom because the nation believes that it is legally required to do so, or is compelled to by the nature of things, as denoted by "necessity."

Another source of international law is the set of general principles common to the domestic law of many nations. General principles of international law may be drawn from standards that are common to the major legal systems of the world.

International organizations play an important role in the development of international law. The United Nations is the most prominent international organization, but there are many others. The United Nations Charter establishes the International Court of Justice (a/k/a "the World Court") as the organization's primary judicial mechanism.

Article 38(1) of the Statute of the International Court of Justice provides a standard definition of the sources of international law: (a) international conventions; (b) customary international law; (c) "the general principles of law recognized by civilized nations"; and (d) "judicial decisions and the teachings of the most highly qualified publicists [legal scholars] of the various nations, as subsidiary means for the determination of rules of law." So, items (a), (b), and (c) are considered *formal sources*, while (d) lists *subsidiary sources*.

A. THE UNITED NATIONS

1. Universal Declaration of Human Rights

The 1948 Universal Declaration of Human Rights was most of all the work of Eleanor Roosevelt, America's first Ambassador to the United Nations.[3] She was also the first Chair of the United Nations Human Commission on Human Rights, serving from 1946 to 1950. She used her position as Chair to lead the creation of the Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948.

Ambassador Roosevelt explained that the Declaration is "not a treaty" and "does not purport to be a statement of law or legal obligations." 19 Dept. of State Bull. 751 (1948); *see also Sosa v. Alvarez Machain*, 542 U.S. 692, 734-35 (2004) (quoting Roosevelt). However, four countries have explicitly adopted the Declaration into their own constitutional law. The Constitution of the Principality of Andorra

3. She was the widow of President Franklin Roosevelt (d. 1945). During her time as First Lady (1933-45), first U.S. Ambassador to the UN (1947-53), and until her death in 1962, she was a very influential activist and author, the *beau ideal* of American liberalism.

art. 5; Mauritania Constitution, pmbl.; Constitucion de la Republica Portuguesa, art. 16(2); Constitution of Romania, art. 20.[4] In addition, some consider the Universal Declaration a source of customary international law norms.

The Universal Declaration's Preamble recognizes a right to resist tyranny:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. . . .

NOTES & QUESTIONS

1. The *travaux* (drafting history) of the Universal Declaration shows that the preamble was clearly intended to recognize a preexisting human right to revolution against tyranny. Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting & Intent 300-12 (1999). Since the Declaration treats the right of resistance as preexisting, what is the source of that right? When you read Part C, on classical international law, consider how the classical authors discerned the existence of such a right.

2. During negotiations, the resistance language was inserted at the insistence of Ambassador Roosevelt. The Soviet bloc, which was controlled by Josef Stalin, was opposed to any recognition of justified resistance to tyranny. Since Stalin purported to support human rights and self-government for all nations, why would he object to the right of resistance?

3. Does the "tyranny" mentioned in the Universal Declaration of Human Rights encompass the tyranny that Americans claimed to be resisting in the Revolutionary War against Great Britain? Chs. 3, 4. That the English resisted in their Glorious Revolution of 1688? Ch. 2.H.

4. As First Lady (1933-45) and until her death in 1962, Mrs. Roosevelt was well-known as a civil rights advocate and political liberal. She began carrying a revolver for protection in 1933 and continued to do so for the rest of her life, including when she traveled alone to dangerous parts of the American South, where she spoke out for civil rights. See Dave Kopel, Paul Gallant & Joanne Eisen, *Her Own Bodyguard*, Nat'l Rev. Online, Jan. 24, 2002.

5. Is the preamble to the Universal Declaration similar to paragraph two of the United States Declaration of Independence? Similar principles are found in France's 1789 Declaration of the Rights of Man, adopted in the early days of the French Revolution: "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression." National Assembly of France, Declaration of the Rights of Man art. 2 (Aug. 26, 1789). Or as a similar 1793 declaration put it: "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable

4. Constitutions of most nations can be found at Constitute. Online Chapter 19.A explores national constitutions in detail, covering topics such as rights to arms, rights to resist tyranny, and rights of self-defense.

of duties." National Assembly of France, Declaration of the Rights of Man and Citizen art. 35 (1793).

2. *Resolution on the Definition of Aggression*

The UN General Assembly (GA) has no ability in itself to create international law. While no GA resolution is law, a GA resolution may sometimes be considered a persuasive source of international norms. The 1974 GA Resolution on the Definition of Aggression seems to recognize a right to fight for self-determination, freedom, and independence:

> Nothing in this definition . . . could in any way prejudice the right to self-determination, freedom and independence . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support.

Resolution on the Definition of Aggression, GA Res. 3314 (XXIX), Annex, art. 7 (Dec. 14, 1974).

Another General Assembly resolution recognizes "man's basic human right to fight for the self-determination of his people." *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*, GA Res. 2787 (XXVI), Supp. No. 29, UN Doc. A/8543 (Dec. 6, 1971). A similar resolution recognizes peoples' "inherent right to struggle by all necessary means at their disposal against colonial powers and alien domination in exercise of their self-determination." *Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes*, GA Res. 3103 (XXVIII) (Dec. 12, 1973).

NOTES & QUESTIONS

1. Whose rights of forcible resistance are encompassed by the text of the above resolutions? Can you name some current situations where the above right does or does not apply?

2. According to the Resolution on the Definition of Aggression, is the right to resist limited to persons fighting colonial, racist, or alien regimes?

3. Other than one's sympathy for (or opposition to) particular resistance forces, are there any neutral rules for the legitimacy of forcible resistance?

4. Although the 1974 Resolution on the Definition of Aggression was written in general language, in practice at the UN the resolution was used rhetorically to justify violence in three particular situations: the war of Robert Mugabe's forces to overthrow the White government in Rhodesia (today, Zimbabwe), the war of the African National Congress to overthrow the apartheid government in South Africa, and the efforts by various nations and terrorist organizations to eradicate the state of Israel. The prior 1971 resolution mentioned these situations, as well as the revolts against Portuguese colonialism in Africa. Starting in the 1970s, and thereafter, Israel has been sui generis at the United Nations, the only member state

for which the General Assembly and other UN bodies consistently side with terrorists whose stated objective is the destruction of the member state and the extermination of the people therein. Reading the 1971-74 resolutions based on original intent shows that they would support only resistance against regimes allied with the West. On the other hand, a purely textualist reading would support forcible resistance against any regime that denies self-determination. This would encompass the many dictatorships whose UN delegations voted for the resolutions. Today, how should the resolutions be understood?

3. Programme of Action

In 1992, the United Nations Register of Conventional Arms was established. It called for nations voluntarily to submit to the UN annual reports on their imports and exports of conventional arms; it covered weapons such as battle tanks, combat aircraft, artillery over 75 mm, warships, and so on. Despite the wishes of some advocates, the register did not cover firearms, or other small arms and light weapons (SALW), such as grenades, portable anti-tank weapons, or small mortars. The register was not successful in achieving its objective of reducing armaments globally.

The attention of the United Nations first turned to gun control at a 1995 conference of the UN Office on Drugs and Crime, where the Japanese delegation introduced a resolution calling for strict international gun control. *Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, 29 April-8 May 1995, A/CONF.169/16, May 12, 1995. A series of regional conferences ensued over the next several years. Indisputably, there was (and is) a serious problem of international arms traffic that supplies warlords, organized crime, terrorists, and other bad actors with SALW.

An immediate concern was a large new supply of arms that were entering global markets. After World War II, the Soviet Union (Union of Soviet Socialist Republics) had taken over much of Eastern and Central Europe, imposing neocolonial rule through local Communist puppets. The military alliance of the U.S.S.R. and its satellites was called the Warsaw Pact.[5] The Warsaw Pact nations were a constant arms supply source for terrorists, dictatorships, and other criminals around the world—but only to the extent that they advanced communist interests. Following the collapse of European communism in 1989-90, the arsenals of some of the former communist nations entered the international black market on a massive scale, with no strategic filters.

Something similar took place after the end of World War I. The period of 1916-28 in China is known as the Warlord Era. Then, as in some previous times

5. Created in 1955 and dissolved in 1991, the Warsaw Pact comprised the Soviet Union and seven of its satellite regimes in Europe: Poland, East Germany, Hungary, Czechoslovakia, Bulgaria, Rumania, and Albania. Albania withdrew in 1968, because the Albanian regime favored China in the growing rivalry between the Soviet Union and communist China. Yugoslavia, under a communist dictatorship established in 1945 by Josip Broz Tito, never joined the Warsaw Pact.

in Chinese history, numerous warlords contended for power. When World War I ended in 1918 and armies demobilized, the armies had many more weapons than they needed for peacetime. In addition, the arsenals of the defeated nations, including Germany and Austro-Hungary, were seized by the victors. Meanwhile, arms makers who had been producing at high capacity for a global war suddenly found the demand for their products had shrunk. So Chinese warlords bought, and the rest of the world readily supplied, arms for the Chinese warlords. The arms came from the West, the Soviet Union, and Japan — notwithstanding the Arms Embargo Agreement that some of the supplying nations had agreed to on May 5, 1919. Anthony B. Chan, Arming the Chinese: The Western Armaments Trade in Warlord China, 1920-1928 (1982).

A new surge of arms into the global market began taking place in the early 1990s, with former Warsaw Pact arsenals being supplemented by production from state-controlled Chinese companies and various other vendors ready to sell anything to any Third World warlord, drug cartel, or other evildoer.

Meanwhile, in 1997, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Treaty) was established. It has been ratified by 164 UN member nations, and not adopted by 33 other members, including the United States, Russia, China, and India. A principal U.S. objection was the prohibition on the use of land mines on the South Korean border, to deter or impede invasion by North Korea. For an extensive history of the process, and the text of the convention, see Stuart Casey-Maslen, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Audiovisual Library of International Law (UN).

Many of the advocates involved in the Mine Ban Treaty next turned their attention to the UN's nascent gun control projects. Professor Kenneth Anderson described what happened next:

> I was director of the Human Rights Watch Arms Division, with a mandate to address the transfer of weapons into conflicts where they would be used in the violation of the laws of war, and small arms were the main concern. I was astonished at how quickly the entire question morphed from concern about the flood of weapons into African civil wars into how to use international law to do an end run around supposedly permissive gun ownership regimes in the US. . . .
>
> I dropped any personal support for the movement when it became clear, a long time ago, that it is about controlling domestic weapons equally in the US (or, today, even more so) as in Somalia or Congo.

Kenneth Anderson, *International Gun Control Efforts*?[6] For more on the origins of United Nations gun control, see Professor Harold Koh's essay in Part E.

In 2001, the UN convened a global gun control conference. The conference adopted the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA);[7] *see also* UN

6. OpinioJuris.org, July 19, 2008.
7. UN doc. A/CONF.192/15.

Office of Disarmament Affairs, Programme of Action on small arms and its International Tracing Instrument (clearinghouse for documents about PoA implementation).[8] The PoA sets out measures that are political commitments, but not legally binding. In general, the PoA urges states to cooperate in suppressing international illicit trade in small arms. In some nations, such as New Zealand, the PoA has been cited by domestic gun control advocates as obliging the enactment of new laws.

Since 2001, there have been meetings every two or three years to present views on the PoA. The most important of these were in 2006 and 2012. Efforts to make the PoA more restrictive or turn it into a binding convention were defeated because of opposition from the United States and several other nations.

However, in 2013, the UN General Assembly created the Arms Trade Treaty (ATT), which is discussed below. Unlike the PoA, the ATT is legally binding among ratifiers. In theory, the ATT is about conditioning the licit international trade in SALW, whereas the PoA is about suppressing the illicit trade.

Accordingly, the PoA process continues, with periodic UN conferences. The United Nations' manifold gun control programs, discussed below, have drawn their primary authority from the PoA.

NOTES & QUESTIONS

1. *Defining "small arms."* As part of the compromise that led to the adoption of the PoA, the document applies to "small arms and light weapons," but does not define them. The issue was deliberately left open. In military parlance, "light weapons" includes portable items such as mortars, bazookas, or rocket launchers, and excludes "heavy weapons" such as tanks or wheeled artillery. "Small arms" would include a soldier's firearms. Some advocates argue that "small arms" in the PoA should mean only fully automatic military weapons (such as the AK-47 or M-16 rifles). Others define the term more broadly, to include any military firearms (such as the pistol that an officer would wear as a sidearm), but not to include firearms that are rarely used by the military (e.g., most shotguns). Still others say that the term should include any firearm. As the PoA has been implemented since 2001 by the United Nations, and by any government that has cited the PoA as a justification for acting, the overwhelming approach has been to treat "small arms" as encompassing all firearms. If the UN finally decided that the PoA should define "small arms" and chose you to prepare the definition, what would you write? The 2005 International Tracing Instrument, discussed below, does define SALW, although this definition is not formally part of the PoA.

2. *Registration.* Whatever "small arms" are, the PoA calls for their registration. Nations implementing the PoA are urged:

> To ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction. These records should be organized and

8. "Program" is spelled "programme" because the UN, like most of the world, adheres to British rather than American spelling of the English language.

> maintained in such a way as to ensure that accurate information can be promptly retrieved and collated by competent national authorities.

PoA II.9.

What are the potential positives and negatives of central recording of groups and individuals who possess firearms? What might happen to political dissidents and freedom fighters in illegitimate regimes? How might registration help legitimate state actors attempting to combat organized crime groups and career criminals?

3. *UN Charter and self-defense.* The PoA preamble reaffirms "the inherent right to individual or collective self-defense in accordance with Article 51" of the United Nations Charter. PoA I.9. That article of the UN Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

UN Charter art. 51.

For years, autocracies that were targeted by arms embargos have claimed that the embargos violate article 51; they argue that the national self-defense right recognized in article 51 includes an implicit right to import arms. Is the implication reasonable? Can the text be read to recognize the right of individual persons to self-defense, or to acquire arms?

Part C examines the Classical view of international law, as it developed in the Middle Ages and thereafter. In the Classical view, the inherent right of national self-defense is derivative of the personal right of self-defense. Why do you think the PoA was careful to mention national self-defense, but not personal self-defense?

4. *Nonstate actors.* An important phrase that did not appear in the final version of the PoA is "nonstate actors." As originally drafted, the PoA would have forbidden all arms transfers to "nonstate actors." For example, the 2001 Statement by the PoA President, at the end of the UN's official summary, blamed the U.S. for a failure to control "private ownership" and to prevent sales to "non-State groups."

At the least, a "nonstate actors" ban would apply to domestic groups that the government does not want to have arms. As the U.S. delegation, led by John Bolton, pointed out, a nonstate actors ban would have outlawed arms sales to the American Revolutionaries (who at the start of the war did not have diplomatic recognition). *Cf.* Ch. 4.A.5, 4.B.7 (discussing American arms imports during the Revolution). A nonstate actors ban would also have prohibited arms supplies to anti-Nazi partisans during World War II, and to any modern rebel group attempting to overthrow a dictatorship.

The ban would also seem to forbid U.S. arms sales to Taiwan, since the UN asserts that Taiwan is merely a province of China. *See* Ted R. Bromund & Dean

Cheng, *Arms Trade Treaty Could Jeopardize U.S. Ability to Provide for Taiwan's Defense*.[9] Similarly, bans to any other group seeking to achieve or maintain independence from the territorial claims of a UN member would be illegal. This would include aid to the rebels in Syria and would have included aid to the Bosnians resisting Yugoslav genocide in the years before Bosnia's independence was widely recognized diplomatically (Part D). What are the best arguments for and against outlawing arms transfers to nonstate actors?

For further reading, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by "Non-State Actors": The Question of Sovereignty*, 8 Tex. Rev. L. & Pol. 373 (2004).

5. The PoA's title phrase "in All Its Aspects" is a hook by which gun control advocates argue that domestic possession of firearms is a proper subject of action for addressing "Illicit Trade." The PoA and its follow-up conferences express a preference for state control of small arms. Is this preference sound? Some commentators have argued that organized state violence is a greater problem, and has claimed far more lives, than individual violence. *See, e.g.*, Don B. Kates, *Genocide, Self Defense and the Right to Arms*, 29 Hamline L. Rev. 501 (2006); online Ch. 19.D.2. Should government have a monopoly on arms? Is there a compelling distinction between state and individual violence? Is the PoA, whose title refers to "illicit trade" a proper means for addressing private gun violence in the U.S.?

6. *Particular types of guns.* Within the PoA and other UN gun control efforts, there is much emphasis on polymer firearms (guns made with plastic components), modular firearms (guns with easily interchangeable parts and accessories; the semi-automatic AR-15 type rifle is one example), and 3-D printing of firearms. Report of the Secretary-General, The illicit trade in small arms and light weapons in all its aspects[10] [hereinafter *Illicit Trade*]. The technical facts of such arms are described in Chapter 15. Although plastic guns and 3-D printing are a very small part of the problem of illicit trafficking today, is there an advantage in getting ahead of the curve on these subjects? Does focusing on them detract from other issues that are more important at present but are politically inconvenient? Would China's proposal that 3-D printers must be licensed like firearms be helpful? Further reading: Mark A. Tallman, Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution (2020).

Another idea has been to place radio frequency identification (RFID) chips in all firearms, "to track and document which individual has used a specific weapon, when and for how long." *Illicit Trade*, at 15. What are the advantages and disadvantages of this idea?

7. *Ammunition.* Whether to include ammunition in global gun control was an issue at the 2006 and 2012 UN Programme of Action conferences mentioned above. At the ongoing conferences for the PoA and the ATT, international gun control advocates continue to work hard to try to add explicit mentions of ammunition.

Their first success was the 2018 Third Review Conference to the UN Programme of Action, in New York in June 2018. Allison Pytlak, *Editorial: Inside the theatre of the*

9. Heritage Foundation (June 8, 2012).

10. UN doc. A/71/438–A/CONF.192/BMS/2016/1, Oct. 4, 2016, at 13-14.

absurd—The final day of RevCon3.[11] The adopted language was simply "[t]o acknowledge that States that apply provisions of the Programme of Action to small arms and light weapons ammunition can exchange and, as appropriate, apply relevant experiences, lessons learned and best practices acquired within the framework of other relevant instruments to which a State is a Party, as well as relevant international standards, in strengthening their implementation of the Programme of Action." Report of the Third United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.[12] Although the statement seems banal, supporters hoped that the inclusion of the word "ammunition" in the document would be a starting point for enforceable ammunition controls. It was the first time that the UN had crossed the red line, drawn by U.S. delegation leader John Bolton in 2001, that the PoA must not involve itself with ammunition. Ted Bromund, *To Promote Gun Control, the UN Changes the Rules*.[13]

Separate from the ATT, but as part of the broader UN process, the UN Office for Disarmament Affairs has created International Ammunition Technical Guidelines. These specify how states should manage their ammunition stockpiles.

Would you recommend including ammunition in the definition of small arms? What are the benefits, harms, and practical challenges that affect your recommendation?

8. *Foreign aid*. Most smuggling of arms into conflict zones is carried out with the complicity of one of more neighboring states. Notwithstanding the high aspirations of the PoA and other UN gun control programs regarding registration and tracing, many governments around the world lack the competence to maintain a functional firearms registry or to trace guns. Thus, the international gun control programs have resulted in proposals for increased international assistance. For example, pursuant to the PoA, the Non-Aligned Movement (a group of 120 underdeveloped nations) has demanded that the U.S. intensify its gun control laws, and that underdeveloped nations be provided with "advanced radar systems," ostensibly to combat arms smuggling. *Ted. R. Bromund, U.S. Participation in the U.N.'s "Programme of Action" on Small Arms and Light Weapons Is Not in the National Interest* 3.[14]

Could mandatory technology transfers strengthen autocracies in underdeveloped countries? To what extent can a nation implement an agreement like the PoA without also improving its governance more broadly? What is the value of an international agreement that is signed in the knowledge that many of its signatories are unable to fulfill the terms?

9. *Microdisarmament*. Although the PoA and associated projects envision a massive reduction of gun ownership globally, the PoA has also been implemented by disarmament efforts concentrated on a single nation, or a region within a single nation. *See, e.g.*, South Eastern and Eastern Europe Clearinghouse for the Control

11. 10 Small Arms Monitor (no. 6, July 3, 2018).
12. A/CONF.192/2018/RC/3, Annex, ¶16.
13. Daily Signal, June 10, 2018.
14. Heritage Foundation, Issue Brief, No. 4238 | June 13, 2014.

of Small Arms and Light Weapons (SEESAC), Guide to Regional Micro-Disarmament Standards/Guidelines (RMDS/G) and SALW control measures (July 20, 2006).

The PoA urges nations:

> To develop and implement, where possible, effective disarmament, demobilization and reintegration programmes, including the effective collection, control, storage and destruction of small arms and light weapons, particularly in post-conflict situations, unless another form of disposition or use has been duly authorized and such weapons have been marked and the alternate form of disposition or use has been recorded, and to include, where applicable, specific provisions for these programmes in peace agreements.

PoA II.21.

Some microdisarmament programs involve efforts to reintegrate former guerrillas or gangsters into peaceful civilian life. Microdisarmament sometimes focuses on crime-ridden neighborhoods. Microdisarmament can also involve broad efforts to collect guns from the entire civilian population. For examination of UN disarmament programs in Cambodia, Bougainville, Albania, Panama, Guatemala, and Mali, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Micro-Disarmament: The Consequences for Public Safety and Human Rights*.[15]

Can you imagine circumstances in which the UN should not implement microdisarmament in a nation where the government desires it? What about the UN carrying out microdisarmament in a nation whose government does not want it?

10. According to the PoA, nations are supposed to submit voluntary biennial reports. However, many nations have failed to file reports every two years. Many reports that are submitted do barely more than check certain boxes on the reporting form; they provide little or no information in the data fields. Reporting is especially weak in regions where illicit traffic is especially bad, namely the Mid-East and Africa. *See* UN Office for Disarmament Affairs, Programme of Action on small arms and its International Tracing Instrument (follow links under "National Reports); Ted Bromund, *Declines in National Reporting Reveal Failure of U.N.'s Programme of Action on Small Arms*.[16]

11. Does the PoA empower any nation to do something it could not legally do through its own national laws? If not, what can the PoA achieve?

12. **CQ:** As you work through this chapter, consider the relationship between the PoA and other international instruments on small arms and light weapons. What is the legal relationship? To what extent are these instruments intermingled, asserted to be part of, or reliant upon, each other? What are the advantages and disadvantages of treating these instruments separately or as a comingled whole?

13. Further reading: Sarah Parker & Marcus Wilson, *A Diplomat's Guide to the UN Small Arms Process*, Small Arms Survey, June 2016 (urging importation of PoA norms into the Arms Trade Treaty and other international gun control programs); Ted Bromund, *U.S. Participation in the U.N.'s "Programme of Action" on Small Arms and*

15. 73 UMKC L. Rev. 969 (2005).

16. Heritage Foundation, Issue Brief, No. 4412 | May 28, 2015.

Light Weapons Is Not in the National Interest[17] (criticizing "The Cross-Contaminating Structure of the PoA," especially for domestic gun control).

4. Firearms Protocol and International Tracing Instrument

In 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime.[18] This was supplemented by the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition[19] (entered into force June 3, 2005) ("Firearms Protocol"). Under the Protocol, states that enter the protocol must criminalize illicit firearms manufacturing and trafficking, and also tampering with firearms markings. States must maintain records of firearms marking and transactions. States should also exchange information to mitigate illicit trade and manufacture.

Pursuant to the Protocol and the PoA, negotiations were held to set international standards for the marking of firearms. The negotiations led to the General Assembly's adoption of the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons.[20] The agreement, commonly known as the International Tracing Instrument (ITI), is not legally binding. It defines small arms this way:

> For the purposes of this instrument, "small arms and light weapons" will mean any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899:
>
> (a) "Small arms" are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.

International Tracing Instrument, ¶4. The Instrument's core rules for marking are contained in paragraph 8(a). The general requirement is for a "unique marking providing the name of the manufacturer, the country of manufacture and the serial number."

The ITI contains what might be called an enormous loophole, known as "the Chinese exception." Instead of marking with country/manufacturer/serial number, a marking can be merely "simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture." ITI, ¶8(a). Thus, China was allowed to continue to

17. Heritage Foundation, Issue Brief, No. 4238 | June 13, 2014.
18. GA res. 55/25.
19. GA res. 55/255.
20. A/60/88 (Dec. 8, 2005).

use only a simple national geometric mark on guns, with no manufacturer identification or serial number.

Various firearms manufacturers in China have enjoyed a thriving business supplying guns to African warlords, dictators, terrorists, and other bad actors. The International Tracing Instrument allows the continuation of this practice by providing plausible deniability. Chinese-made guns found in the possession of a warlord cannot be traced to any particular manufacturer. Even for guns traced to China, the absence of a serial number prevents any dating of the gun. This makes it much harder to prove whether a gun was sold to an African government decades earlier and leaked into unauthorized hands or whether it was recently manufactured for an arms broker, who, with the complicity of the Chinese government, specializes in trafficking to customers who are warlords.

NOTES & QUESTIONS

1. The ITI and the Firearms Protocol did not lead to any changes to U.S. laws on firearms, which have long required that guns have serial numbers (with the exception of homemade guns that are kept by the person who made them).

2. It is difficult to combat firearms smuggling without reliable tracing. It is impossible to have reliable tracing without reliable marking. Why have the PoA and the ITI not placed more emphasis on reliable marking, both as a political commitment and in practice?

5. UN Human Rights Council

In 2006, the UN Human Rights Council endorsed some principles for gun control, as detailed in a report for the Council. The report was prepared by University of Minnesota Law Professor Barbara Frey, who was the Council's Special Rapporteur (official expert) on small arms control. The Council has no legal authority, but its pronouncements may be considered by some to contribute to international norms.

The Frey Report

UN Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, U.N Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (prepared by Barbara Frey)

. . . 4. The human rights policy framework for this entire study is based upon the principle that States must strive to maximize human rights protection for the greatest number of people, both in their own societies and in the international community. In other words, to meet their obligations under international human rights law, States must enact and enforce laws and policies that provide the most human rights protection for the most people. In regard to small arms violations, this principle — the maximization of human rights protection — means that States

have negative responsibilities to prevent violations by State officials and affirmative responsibilities to increase public safety and reduce small arms violence by private actors.

5. Accordingly, States are required to take effective measures to reduce the demand for small arms by ensuring public safety through adequate law enforcement. State officials, including law enforcement officials, serve at the benefit of their communities and are under a duty to protect all persons by promoting the rule of law and preventing illegal acts. . . .

6. To maximize human rights protection, States are also required to take effective measures to minimize private sector violence by enforcing criminal sanctions against persons who use small arms to violate the law and, further, by preventing small arms from getting into the hands of those who are likely to misuse them. Finally, with regard to extraterritorial human rights considerations, States have a duty to prevent the transfer of small arms and light weapons across borders when those weapons are likely to be used to violate human rights or international humanitarian law. . . .

I. INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS TO PREVENT SMALL ARMS ABUSES BY NON-STATE ACTORS

9. Under human rights law, States must maximize protection of the right to life. This commitment entails both negative and positive obligations; States officials must refrain from violations committed with small arms and States must take steps to minimize armed violence between private actors. In the next sections, the present report will set forth the legal authority that is the foundation for the positive responsibilities of States — due diligence — to protect the human rights from private sector armed violence. The report then proposes the specific effective measures required under due diligence to maximize human rights protections in the context of that violence.

A. The Due Diligence Standard in Relation to Abuses by Private Actors

10. Under article 2, paragraph 1, of the International Covenant on Civil and Political Rights, States must respect and ensure human rights to all individuals. Ensuring human rights requires positive State action against reasonably foreseeable abuses by private actors. . . .

B. Effective Measures to Meet the Due Diligence Obligation

16. Minimum effective measures that States should adopt to prevent small arms violence, then, must go beyond mere criminalization of acts of armed violence. Under the principle of due diligence, it is reasonable for international human rights bodies to require States to enforce a minimum licensing requirement designed to keep small arms and light weapons out of the hands of persons who are likely to misuse them. Recognition of this principle is affirmed in the responses to the questionnaire of the Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons which indicate widespread State practice to license private ownership of small arms and ammunition. The criteria for licensing may vary from State to State, but most licensing procedures

consider the following: (a) minimum age of applicant; (b) past criminal record including any history of interfamilial violence; (c) proof of a legitimate purpose for obtaining a weapon; and (d) mental fitness. Other proposed criteria include knowledge of laws related to small arms, proof of training on the proper use of a firearm and proof of proper storage. Licences should be renewed regularly to prevent transfer to unauthorized persons. These licensing criteria are not insurmountable barriers to legitimate civilian possession. There is broad international consensus around the principle that the laws and procedures governing the possession of small arms by civilians should remain the fundamental prerogative of individual States. While regulation of civilian possession of firearms remains a contested issue in public debate — due in large part to the efforts of firearms manufacturers and the United States of America-based pro-gun organizations — there is in fact almost universal consensus on the need for reasonable minimum standards for national legislation to license civilian possession in order to promote public safety and protect human rights. This consensus is a factor to be considered by human rights mechanisms in weighing the affirmative responsibilities of States to prevent core human rights violations in cases involving private sector gun violence.

17. Other effective measures should also be considered by human rights bodies charged with overseeing State action to protect the right to life. These measures are similar to United Nations guidelines adopted to give meaningful protection to other core human rights obligations. They include:

(a) The prohibition of civilian possession of weapons designed for military use (automatic and semi-automatic assault rifles, machine guns and light weapons);
(b) Organization and promotion of amnesties to encourage the retiring of weapons from active use;
(c) Requirement of marking and tracing information by manufacturers . . .

II. THE PRINCIPLE OF SELF-DEFENCE WITH REGARD TO HUMAN RIGHTS VIOLATIONS COMMITTED WITH SMALL ARMS AND LIGHT WEAPONS

19. This report discusses and recognizes the principle of self-defence in human rights law and assesses its proper place in the establishment of human rights principles governing small arms and light weapons. Those opposing the State regulation of civilian possession of firearms claim that the principle of self-defence provides legal support for a "right" to possess small arms thus negating or substantially minimizing the duty of States to regulate possession. The present report concludes that the principle of self-defence has an important place in international human rights law, but that it does not provide an independent, legal supervening right to small arms possession, nor does it ameliorate the duty of States to use due diligence in regulating civilian possession.

A. Self-Defence as an Exemption to Criminal Responsibility, Not a Human Right

20. Self-defence is a widely recognized, yet legally proscribed, exception to the universal duty to respect the right to life of others. Self-defence is a basis for exemption from criminal responsibility that can be raised by any State agent or non-State

actor. Self-defence is sometimes designated as a "right". There is inadequate legal support for such an interpretation. Self-defence is more properly characterized as a means of protecting the right to life and, as such, a basis for avoiding responsibility for violating the rights of another.

21. No international human right of self-defence is expressly set forth in the primary sources of international law: treaties, customary law, or general principles. While the right to life is recognized in virtually every major international human rights treaty, the principle of self-defence is expressly recognized in only one, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), article 2. Self-defence, however, is not recognized as a right in the European Convention on Human Rights. According to one commentator, "The function of this provision is simply to remove from the scope of application of article 2(1) killings necessary to defend against unlawful violence. It does not provide a right that must be secured by the State".

22. Self-defence is broadly recognized in customary international law as a defence to criminal responsibility as shown by State practice. There is not evidence however that States have enacted self-defence as a freestanding right under their domestic laws, nor is there evidence of *opinio juris* that would compel States to recognize an independent, supervening right to self-defence that they must enforce in the context of their domestic jurisdictions as a supervening right.

23. Similarly, international criminal law sets forth self-defence as a basis for avoiding criminal responsibility, not as an independent right. The International Criminal Tribunal for the Former Yugoslavia noted the universal elements of the principle of self-defence. The International Criminal Tribunal for the Former Yugoslavia noted "that the 'principle of self-defence' enshrined in article 31, paragraph 1, of the Rome Statute of the International Criminal Court 'reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law'".[21] As the chapeau of article 31 makes clear, self-defence is identified as one of the "grounds for excluding criminal responsibility". The legal defence defined in article 31, paragraph (d) is for: conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Thus, international criminal law designates self-defence as a rule to be followed to determine criminal liability, and not as an independent right which States are required to enforce.

24. There is support in the jurisprudence of international human rights bodies for requiring States to recognize and evaluate a plea of self-defence as part of the due process rights of criminal defendants. Some members of the Human Rights Committee have even argued that article 6, paragraph 2, of the International Covenant on Civil and Political Rights requires national courts to consider the personal circumstances of a defendant when sentencing a person to death, including

21. [*Prosecutor v. Kordić & Ćerkez* [ICTY Trial Chamber], Case no. IT-95-14/2, Judgment of Feb. 26, 2001, ¶ 451.—Eds.]

possible claims of self-defence, based on the States Parties' duty to protect the right to life. Under common law jurisdictions, courts must take into account factual and personal circumstances in sentencing to the death penalty in homicide cases. Similarly, in civil law jurisdictions: "Various aggravating or extenuating circumstances such as self-defence, necessity, distress and mental capacity of the accused need to be considered in reaching criminal conviction/sentence in each case of homicide."

25. Again, the Committee's interpretation supports the requirement that States recognize self-defence in a criminal law context. Under this interpretation of international human rights law, the State could be required to exonerate a defendant for using firearms under extreme circumstances where it may be necessary and proportional to an imminent threat to life. Even so, none of these authorities enumerate an affirmative international legal obligation upon the State that would require the State to allow a defendant access to a gun.

B. Necessity and Proportionality Requirements for Claim of Self-Defence

26. International bodies and States universally define self-defence in terms of necessity and proportionality. Whether a particular claim to self-defence is successful is a fact-sensitive determination. When small arms and light weapons are used for self-defence, for instance, unless the action was necessary to save a life or lives and the use of force with small arms is proportionate to the threat of force, self-defence will not alleviate responsibility for violating another's right to life.

27. The use of small arms and light weapons by either State or non-State actors automatically raises the threshold for severity of the threat which must be shown in order to justify the use of small arms or light weapons in defence, as required by the principle of proportionality. Because of the lethal nature of these weapons and the *jus cogens* human rights obligations imposed upon all States and individuals to respect the right to life, small arms and light weapons may be used defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged.

28. The requirements for a justifiable use of force in self-defence by State officials are set forth in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In exceptional circumstances that necessitate the use of force to protect life, State officials may use firearms and claim self-defence or defence of others as a justification for their decision to use force. However, if possible to avoid the threat without resorting to force, the obligation to protect life includes the duty of law enforcement to utilize alternative non-violent and non-lethal methods of restraint and conflict resolution.

29. The severe consequences of firearm use therefore necessitate more detailed and stricter guidelines than other means of force. Even when firearm use does not result in death, the injuries caused by firearm shots can be paralyzing, painful, and may immobilize a person for a much longer period of time than would other methods of temporary immobilization. The training handbook for police on human rights practices and standards produced by the Office of the High Commissioner for Human Rights says that "firearms are to be used only in extreme circumstance". Any use of a firearm by a law enforcement official outside of the above-mentioned situational context will likely be incompatible with human rights norms. . . .

D. Self-Defence by States Against the Force of Other States

38. Finally, it is important to address briefly the claim that Article 51 of the Charter of the United Nations provides a legal right to self-defence to individuals. The ability of States to use force against another State in self-defence, through individual State action or collective action with other States, is recognized in Article 51 of the Charter. This article is applicable to the States Members of the United Nations who act in defence of armed attacks against their State sovereignty. Article 51 provides an exception to the general prohibition on threat or use of force in international law, as expressed in article 2, paragraph 4, of the Charter. International customary law also binds States who act in self-defence against other States to conform to the three elements of necessity, proportionality and immediacy of the threat.

39. The right of self-defence in international law is not directed toward the preservation of lives of individuals in the targeted country; it is concerned with the preservation of the State. Article 51 was not intended to apply to situations of self-defence for individual persons. Article 51 has never been discussed in either the Security Council or General Assembly as applicable, in any way, to individual persons. Antonio Cassese notes that the principle of self-defence claimed by individuals is often wrongly confused with self-defence under public international law, such as in Article 51. "The latter relates to conduct by States or State-like entities, whereas the former concerns actions by individuals against other individuals . . . confusion [between the two] is often made.". . .

UN Human Rights Council Prevention of Human Rights Violations Committed with Small Arms and Light Weapons

United Nations, A/HRC/Sub.1/58/L.24, Human Rights Council Sub-Commission on the Promotion and Protection of Human Rights Fifty-eighth session, Agenda item 6(d), 2006

Prevention of human rights violations committed with small arms and light weapons. . . .

Reaffirming the importance of the right to life as a fundamental principle of international human rights law, as confirmed in article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights and in the jurisprudence of the Human Rights Committee. . . .

1. Urges States to adopt laws and policies regarding the manufacture, possession, transfer and use of small arms that comply with principles of international human rights and international humanitarian law;

2. Also urges States to provide training on the use of firearms by armed forces and law enforcement personnel consistent with basic principles of international human rights and humanitarian law with special attention to the promotion and protection of human rights as a primary duty of all State officials;

3. Further urges States to take effective measures to minimize violence carried out by armed private actors, including using due diligence to prevent small arms from getting into the hands of those who are likely to misuse them; . . .

5. Welcomes the final report of the Special Rapporteur, Barbara Frey, on the prevention of human rights violations committed with small arms and light weapons (A/HRC/Sub.1/58/27), containing the draft principles on the prevention of human rights violations committed with small arms (A/HRC/Sub.1/58/27/Add.1);

6. Endorses the draft principles on the prevention of human rights violations committed with small arms and encourages their application and implementation by States, intergovernmental organizations and other relevant actors.

NOTES & QUESTIONS

1. According to the Frey Report, a state's failure to restrict self-defense is itself a human rights violation. The report states that a government has violated the human right to life to the extent that a state allows the defensive use of a firearm "unless the action was necessary to save a life or lives." Thus, firearms "may be used defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged." In other words, not only is a government not *obligated* to allow the use of deadly force to defend against rape, arson, carjacking, or armed robbery, any government that generally allows citizens to use lethal self-defense against these crimes *has itself violated human rights*—namely, the criminal's right to life.

Do you agree with the UN Human Rights Council and Professor Frey that it is a human rights violation for governments to allow the use of deadly force in self-defense in such circumstances? Practically, speaking, how would you administer a legal system based on the HRC's standards? For example, what criteria should be used to discern whether a rapist is simply intent on rape and not murder?

2. Relatedly, everywhere in the United States, law enforcement officials may use deadly force to prevent the commission of certain crimes (such as rape or sexual assault on a child) even when the law enforcement officer has no reason to believe that the victim might be killed or seriously injured. Do you agree with the Human Rights Council that such uses of force violate human rights?

3. The Human Rights Council's "draft principles" include detailed rules for gun control, among them that no one may possess a firearm without a permit, and the permit should enumerate "specific purposes" for which the gun could be used. Today, no U.S. jurisdiction is compliant with this standard. Most states do not require a permit to possess a handgun, and hardly any require a permit for a long gun. Anyone who may lawfully own a gun may keep it at home for self-defense, may take it to a target range, hunt with it (for which a hunting license is usually required), or use the gun for any other lawful purpose. In many states, a separate permit is necessary to carry the gun in public places for self-defense, especially if the gun is concealed. Ch. 14.

4. The Frey Report argues that nations have a right to self-defense, but individuals do not. A different view was expressed by the nineteenth-century French philosopher Frederic Bastiat, in his classic, *The Law*. He wrote that when "law" is used to protect criminals and to render victims defenseless, then true law has been destroyed:

> The law has been used to destroy its own objective: It has been applied to annihilating the justice that it was supposed to maintain; to limiting and destroying rights which its real purpose was to respect. The law has

> placed the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others. It has converted plunder into a right, defense into a crime, in order to punish lawful defense.

Whose view is better, Frey's or Bastiat's? Why?

5. The Bill of Rights to the United States Constitution protects individual rights by limiting government power. Does the Frey Report envision a different approach? Is the difference significant? Could the Frey approach be implemented in a manner that is consistent with the U.S. constitutional structure, which generally does not guarantee "positive rights" (things that the government must provide)?

It is a well-established rule that police and governments have no responsibility for protecting anyone in particular from crime. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) (government inaction in rescuing child who was known to be severely abused, and was later murdered); *Riss v. New York*, 240 N.E.2d 860 (N.Y. 1968) (stalker who attacked and disfigured his victim; dissent notes that Miss Riss was prevented from carrying a firearm in public by New York law). Would the Frey approach demand a different outcome in cases like *DeShaney* and *Riss*?

6. For subsequent statements from the Human Rights Council/Committee that nations have a human rights obligation to enact very strict gun control, see Human rights and the regulation of civilian acquisition, possession and use of firearms;[22] Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of person);[23] Human Rights Committee Concluding observations on the fourth periodic report of the United States of America.[24]

6. *Arms Trade Treaty*

While the 2001 Programme of Action is addressed to the *illicit* trade in SALW, the Arms Trade Treaty (ATT) aims to create a system of regulations for lawful trade. The ATT is particularly concerned with regulations to prevent the transfer to arms to human rights violators.

The UN General Assembly adopted the Arms Trade Treaty on April 2, 2013. Advocates of the ATT credited President Barack Obama as being decisive in its adoption, since the George W. Bush administration had opposed such a treaty. For the history of the creation of the ATT, see Ted R. Bromund, *The U.N. Arms Trade Treaty: A Process, Not an Event*, 25 J. Firearms & Pub. Pol'y 30 (2014).

Among ratifying nations, the ATT entered into force on December 24, 2014, having met its standard of having been ratified by at least 50 nations. As of 2020, 106 nations have ratified the ATT. The ATT text and extensive information about the ATT process are available at the website of the Secretariat of the Arms Trade Treaty.

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22. UN Doc. A/HRC/RES/29/10 (July 2, 2015).
23. UN Doc. CCPR/C/GC/35 ¶ 9 (Dec. 16, 2014).
24. UN Doc. CCPR/C/USA/CO/4 ¶ 10 (Apr. 23, 2014).

Although the ATT was created by a UN process, the ATT is now under the auspices of a secretariat that is independent of the UN. The Secretariat is located in Geneva, which has long been home to various arms control entities. Most relevant for the ATT's work, Geneva is home to the Small Arms Survey, the leading international gun-control think tank, hosted by Geneva's Graduate Institute of International and Development Studies.

U.S. Secretary of State John Kerry signed the ATT in September 2013. President Barack H. Obama, in his last month in office, transmitted the ATT to the U.S. Senate for advice and consent on December 9, 2016 (Senate Treaty Doc. 114-14). The ATT was referred to the Senate Committee on Foreign Relations. The Committee did not take up the ATT.

On April 20, 2019, President Donald J. Trump sent a message to the Senate requesting that the Treaty be returned. This was followed by a July 18, 2019, letter from the President to the UN Secretary-General announcing that the U.S. did not intend to become a party to the Arms Trade Treaty and had no legal obligations stemming from the Treaty. Depositary Notification from the UN Secretary-General, UN Doc. C.N.314.2019. Treaties-XXVI.8 (July 19, 2019). There is precedent for presidents unsigning treaties, but never before for a treaty that has been transmitted to the Senate. *See President Trump "Unsigns" Arms Trade Treaty After Requesting Its Return from the Senate*, 113 Am. J. Int'l L. 813 (2019). Accordingly, the ATT remains in the Senate until the Senate returns the Treaty to the President. Legislation has been introduced to return the Treaty, but the Senate has not acted on the resolution as of 2020. *See* S. Res. 204 (Rand Paul, R-Ky.).

Under the ATT, governments must create a "national control list" of arms and ammunition imports and exports. Governments are "encouraged" to keep information about the "make and model" of the imports, and the "end users." The national control list is to be delivered to the UN. The "national control list" is similar to a long-standing provision of U.S. law, known as the "United States Munitions List." Pursuant to the law, exports of various military items, including some but not all firearms, require prior authorization from the U.S. State Department's Directorate of Defense Trade Controls (DDTC), which keeps records of authorized exports. Arms Export Control Act, 22 U.S.C. §§ 2778, 2794(7); 22 C.F.R. part 121.

The ATT preamble declares the ATT to be "mindful of" the legitimate use of firearms for "recreational, cultural, historical, and sporting activities, where . . . permitted or protected by law." Defensive gun ownership is not acknowledged in the text.

A major objective of the ATT is to stop the export of arms to persons or governments who would use them to violate human rights. There is no dispute that previous UN arms embargoes have an unbroken record of failure. Previous embargo efforts had two major problems. First, only the Security Council has the legal authority to impose an embargo. But each of the five permanent members of the Security Council has veto power. So, the permanent members can and do block efforts to impose arms embargoes on allies. For example, China would veto any embargo on Zimbabwe, and the United States would do the same for Israel. Accordingly, ATT advocates favored creating a new entity that would have the power to impose embargoes and would do so according to objective standards.

Skeptics argued that new embargoes imposed by a new entity would still have the same problems as the embargoes that the UN did manage to enact: many

countries that nominally agree to an embargo violate the embargo. For example, Iran and China have shown that they will continue to supply arms to terrorists or to governments that violate human rights, regardless of what promises are made at the Security Council or in a treaty. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 Penn St. L. Rev. 891 (2010) (describing, *inter alia*, the South African government's violation of South African law in order to facilitate Chinese arms shipments to the Mugabe dictatorship in Zimbabwe).

Thus, skeptics argued, a new international treaty would in practice only limit arms supplying by the relatively small number of democracies that generally comply with international law. To ATT advocates, partial compliance was better than none at all, since clamping down on arms exports from Western industrial nations was a priority for the advocates.

The ATT forbids state parties to authorize three types of arms transfers. First, if the transfer would violate a UN Security Council arms embargo. ATT art. 6.1. Second, if the transfer would violate "relevant international obligations under international agreements to which it is a Party." *Id.* 6.2. This second category could encompass arms-specific treaties (e.g., country A signs a treaty with country B, by which each country agrees to stop supplying arms to rebels in the other country). Or the prohibition could be read very broadly. For example, adopting the view of the UN Human Rights Commission (Section A.5), it could be argued that any arms sale intended for US law enforcement or citizens violates the International Covenant on Civil and Political Rights; the Covenant protects the right to life, and any government that allows police or citizens to use lethal force against nonlethal felons (e.g., rapists) is violating the right to life.

Third, the ATT forbids arms sales if the authorizing government "has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party." ATT art. 6.3.

While all of Europe has ratified the Arms Trade Treaty, several major exporters have announced they will not join the ATT: India, Pakistan, Iran, and Russia. *See* ATT Secretariat, *Status of ATT Participation*. As for ratifying nations, the arms trade seems to have continued unabated. For example, the leading African advocate for the ATT was Kenya. Nevertheless, Kenya is used as a transit route for the delivery of weapons to South Sudan, whose government perpetrates many violations of human rights. ATT Monitor, Arms Transfers to South Sudan (Aug. 25, 2015).

In 2019, the United Kingdom's Court of Appeal overruled the High Court and held that the British government must reconsider its arms sales to Saudi Arabia because the British government, when authorizing the sales, had not considered Saudi Arabia's previous uses of small arms and light weapons to violate human rights. *The Queen (on the application of Campaign Against the Arms Trade) v. Secretary of State for International Trade*, [2019] EWCA 1020. The sales to the Saudis were for Saudi use in the war in Yemen, where Houthi rebels are using arms supplied by Iran.

Pursuant to the ATT, Conferences of State Parties have met to work on implementation. Details of the conferences are available at the UN Office of Disarmament Affairs, and from the ATT Secretariat. U.S. delegations participate in the conferences, albeit as nonvoting signatories, since the U.S. has not ratified the ATT.

The first Conference of States Parties (CSP) to the ATT was held in Cancun, Mexico, in August 2015. The CSP adopted a modified version of the UN's assessment scale for how much each nation should contribute to funding the UN's ATT operations. In general, many countries pay close to nothing, while a few countries (e.g., Japan, the United Kingdom) pay most of the expenses.

An ATT Secretariat was established with a mission of "collating best practices on the implementation and operation of the Treaty," and "identifying lessons learnt and need for adjustments in implementation."

The second CSP took place in Geneva in August 2016. The CSP adopted the Voluntary Trust Fund (VTF) to assist requesting States Parties with international funding to implement the ATT. As of 2018, the VTF, which is primarily funded by the European Union, had supported over two dozen projects in various countries. Saferworld, *Arms Trade Treaty Report Card for 2018: Must Try Harder* (Oct. 31, 2018). The majority of funding requests are for workshops and conferences. ATT Secretariat, Voluntary Trust Fund (VTF) (follow links for short descriptions of various projects).

Most nations that have ratified the ATT are not complying with the ATT's reporting requirements on arms exports. The CSP called on States Parties to meet their reporting duties. The third Conference of States Parties to the Arms Trade Treaty was held in Geneva in September 2017. The CSP discussed the links and synergies between the ATT and the UN's 2030 Agenda for Sustainable Development—in particular Goal 16, the promotion of peaceful and inclusive societies.

Like the second conference, the third conference expressed deep concern about widespread noncompliance with the ATT's transparency and reporting obligations and also the widespread nonpayment by states of their ATT financial obligations. A fourth conference was held in Tokyo in August 2018.

All ATT parties must submit an initial report, which includes information about their arms exports. As of 2016, there were 99 States Parties to the ATT, and only 47 had submitted an initial report and a current annual report. Reports are supposed to include arms imports; yet of the exports reported in the 2016 annual reports, fewer than 10 percent were matched even partially by a corresponding import report (1,923 transfers; 172 mirrored in part; of those 31 mirrored exactly). *See* ATT Monitor, The 2018 Report (Aug. 19, 2018); Ted Bromund, *The Failure of Conventional Arms Reporting Under the Arms Trade Treaty*, Heritage Found. (Aug. 24, 2017).

As for payments, an ATT Secretariat report in February 2019 indicated that 67 nations were partially or fully deficient in their dues over the previous four years, whereas 25 nations had paid their obligations. Of $3.8 million in assessed dues, over $1 million had not been paid. About half the revenue came from seven nations with cumulatively over $100,000 in contributions over the period: Japan ($279,000), the United States ($263,000), Germany, the United Kingdom, France, Italy, and China (a non-signatory, but still paying dues and participating in conferences). ATT Secretariat, Status of Contributions to ATT Budgets as at 08 February 2019.

In practice, the ATT functions as somewhat-relevant law only in Europe, supplemented by rhetorical support elsewhere, particularly from small island nations. Ted Bromund, *Beware: the United Nations Is Taking Aim at Ammo*, Heritage Found. (Feb. 1, 2018). In terms of reducing arms sales to human rights violators, effects have thus far been minimal or nil.

Under the ATT's terms, the ATT opened for amendments in late 2020.

NOTES & QUESTIONS

1. What measures would you recommend be taken to fix the ATT's problems of nonreporting and nonpayment of dues?

2. *Israel.* Among the nongovernmental organizations (NGOs) that supported the ATT, a top objective was an arms embargo against Israel. Control Arms, Arms Without Borders 12, 25 (2006) (criticizing U.S. arms sales to Israel). In your view, is Israel an especially notorious violator of human rights that should be prohibited from acquiring arms?

3. *Additional United Nations programs.* There are 20 UN bodies involved in small arms control. They are coordinated by the UN's Coordinating Action on Small Arms (CASA). They include the Office for Disarmament Affairs (ODA), United Nations Institute for Disarmament Research (UNIDIR) (a think tank), United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), Office on Drugs and Crime (ODC), Office of the United Nations High Commissioner for Human Rights (OHCHR), Counter-Terrorism Committee Executive Directorate (CTED), Department of Economic and Social Affairs (DESA), Department of Political Affairs (DPA), Department of Public Information (DPI), Department of Peacekeeping Operations (DPKO), International Civil Aviation Organization (ICAO), Office for the Coordination of Humanitarian Affairs (OCHA), Office of the Special Adviser on Africa (OSAA), Office of the Special Adviser on the Prevention of Genocide (OSAPG), Office of the Special Representative of the Secretary-General for Children and Armed Conflict (OSRSG/CAAC), Office of the Special Representative of the Secretary-General on Violence Against Children (OSRSG/VAC), United Nations Human Settlements Programme (UN-HABITAT), United Nations High Commissioner for Refugees (UNHCR), United Nations Mine Action Service (UNMAS), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), United Nations Environmental Programme (UNEP), and the World Health Organization (WHO).

4. The Arms Trade Treaty is about the "arms trade." According to the text, "the activities of the international trade comprise export, import, transit, transshipment and brokering, hereafter referred to as 'transfer'." ATT, art. 2.2. Relying on the potential breadth of the word "transfer," Mexico argues that the ATT should cover domestic trade, not just foreign trade. Is a U.S. hunter who takes a rifle to Canada for a hunting trip and later brings it home engaging in international trade by virtue of his transit? How about a gun dealer who sells a firearm that is later, without the dealer's knowledge, smuggled to Mexico? Is there any meaningful distinction between domestic and international trade?

5. Is it wrong to export arms to governments that violate human rights (e.g., South Korea in the 1950s, Iraq today) if the arms will be used to resist or

deter even worse violators of human rights (e.g., North Korea, ISIS)? What would be the human rights situation in Yemen if Iranian-backed forces defeated the Saudi-backed government and took over?

6. *Imperial relations.* The international gun control movement is heavily funded by European governments and Japan. According to one author, internationally led

> small arms control serves to reproduce imperial relations in a number of ways. It is characterized by four key analytical themes — the blurring of the distinction between state, non-state and civilian actors; the increasingly fuzzy line between conflict and crime; the pacific nature of development; and the desirability of a Weberian monopoly on violence — that are derived from an idealized reading of the European historical experience and applied to the contemporary South. This conceptual Eurocentrism is furthered by the exclusion of wider questions of the world military order and militarism through a geographical and technological selectivity and the absence of a single analytical frame, as well as North-South hierarchies in the institutional formation of policymaking. Overall, small arms control serves to reproduce the South as a site of benevolent Northern intervention . . .

Anna Stavrianakis, *Small Arms Control and the Reproduction of Imperial Relations*, 32 Contemp. Security Pol'y 193 (2011). Is the above critique fair? Hypothesizing that the critique is accurate, does it necessarily mean that promoting the European agenda on the global South is a bad idea?

7. Further resources: Conflict Armament Research (CAR) attempts to track the movement of illegal weapons in conflict zones. The leading advocate of international gun control is Control Arms, which has assimilated all other voices, sometimes willingly. For the ATT, Control Arms has created an ATT Monitor.

In the international gun policy control space, "pro-gun" NGOs are minor compared to "anti-gun" organizations. Among supporters of arms and self-defense rights, the most notable is Heritage Foundation scholar Ted R. Bromund, who writes frequently on the various international gun control programs, including details of conferences. His materials are available via his biography page at the Heritage Foundation, or by selecting an appropriate keyword on his personal website.

The Foreign Gun Control page on Professor Kopel's website includes links to numerous articles on international gun control and studies of particular nations.

7. *International Small Arms Control Standards*

The Programme of Action and the Arms Trade Treaty generated considerable media attention and political concern in the United States. Yet perhaps the most important UN gun control instrument is a document that is obscure to everyone except specialists: the International Small Arms Control Standards (ISACS). These are UN-created model standards for domestic gun control. Although formally voluntary, the UN describes them as the proper methods to implement the ATT and PoA.

The UN's numerous agencies involved in gun control adhere to ISACS. Indeed, ISACS are the glue that gun controllers are using to hold the ATT and the PoA together. While the PoA and ATT have a great deal of intentionally ambiguous language that can be interpreted in favor of domestic gun control, the PoA and ATT disappointed advocates who wanted clear and specific standards for domestic control. ISACS fill the gap, with a model for strict national gun control. ISACS have been adopted in most of Europe, as the foundation for the EU's European Firearms Directive (Section E.5). It will likely shape gun control around the world for years to come.

ISACS establish a floor, not a ceiling for gun control. So, for example, Luxembourg's prohibition on all citizen firearms ownership is compliant with ISACS. One ISACS standard covers "National regulation of civilian access to small arms and light weapons." ISACS 03.30 (June 11, 2015). According to the standard, citizens may not own firearms without a national license. Illegal aliens must be prohibited from possessing small arms. No one under 18 may be issued a license, although younger people may be allowed to use arms under supervision. Firearms not in use must be locked in a safe that can withstand a 15-minute attack using common household tools, and ammunition must be stored separately. Licenses should be conditioned on passing a safety knowledge test or an equivalent demonstration of knowledge.

In addition to the above, which apply to all firearms, ISACS provide a graduated system of controls for four broad categories of arms. The lowest regulation, Category 4, is for shotguns with a capacity of three or fewer rounds, and for manual action rimfire rifles. Licenses for Category 4 may be issued after recommendations from local community leaders or other responsible persons who know the applicant, plus consultation with local law enforcement.

Next, in Category 3, are semi-automatic rimfire rifles, manual action (bolt, lever, pump) centerfire rifles, and shotguns. Besides being stored in a safe, Category 3 arms should have enhanced security—for example, not only stored in a safe, but also be cable-locked with a cable that withstands a 15-minute attack with common household tools. (This is a very difficult standard, since a large bolt-cutter can slice almost any cable lock in a few seconds.) Ammunition purchases for Category 3 arms should be prohibited except for persons who have a license for the relevant arms. There should be numerical limits on how many such arms a person may possess. License applicants should be required to take a safety class, and not merely to provide proof of safety knowledge (as is allowed for Category 4). The minimum age for a license should be 21.

Category 2 is for all handguns of .45 caliber or less, semi-automatic centerfire rifles, and short-barreled rifles. All such firearms should be registered. Collecting ballistic information for all such firearms is preferred. (Some argue that collecting ballistic images of lawful firearms creates an overwhelming problem of false partial matches in the law enforcement ballistic databases of crime guns. *See* Sterling Burnett & David B. Kopel, *Ballistic Imaging: Not Ready for Prime Time*, National Center for Policy Analysis (2003).)

Finally, Category 1 is arms that must be prohibited. These are automatics, "high capacity magazines" (not defined), short-barreled shotguns, and handguns over .45 caliber.

NOTES & QUESTIONS

1. Would the ISACS gun control system be a good model for your state? For federal law? Would any elements violate the Second Amendment?
2. Are any provisions of ISACS too weak?

B. REGIONAL CONVENTIONS

With enthusiastic support from the United Nations, many parts of the world have created regional gun control conventions. Separately, there are also regional conventions on human rights. This section begins with the African Charter on Human and People's Rights. Then we examine the Nairobi Protocol, an East African gun control treaty.

The European Convention on Human Rights has been an especially influential human rights document. After examining the Convention, we then survey pan-European gun controls that have been created by the European Union.

The Western Hemisphere is covered by the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials. The Convention is commonly known by its Spanish acronym, CIFTA.

1. African Charter on Human and Peoples' Rights

> 1. All peoples . . . have the unquestionable and inalienable right to self-determination. . . .
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
> 3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

African Charter on Human and Peoples' Rights (entered into force 1986), art. 20, f.

NOTES & QUESTIONS

1. If all peoples have the right of self-determination, then are authoritarian African governments, such as those in Cameroon, Chad, and Rwanda, necessarily illegitimate?
2. Does the African Charter require some sort of international permission to revolt when it says that oppressed peoples have a right to resort only to "means recognized by the international community"? Is the Universal Declaration of Human Rights' (Section A.1) recognition of the right of resistance sufficient? What about the recognition of legitimate violent resistance in the UN Resolution on the Definition of Aggression (Section A.2)? If these are not sufficient, is some specific

authorization required? If so, from whom? The UN Security Council? The African Union?

3. If you were an African head of government, and were conscientious about your responsibilities under paragraph 3, how would you go about assisting other peoples in liberation from foreign domination? Would you address what some consider to be the problem of neocolonial domination of some African states by Western powers or by China?

4. Scholar and human rights attorney Fatsah Ouguerouz connects article 20 to the long-standing African tradition of armed resistance to oppression. He argues that the article 20 right applies to all forms of extreme oppression, not just oppression by colonial or racist regimes. In his view, any government that rules by force rather than consent is necessarily violating the right of self-determination. He suggests that oppressed peoples resort to armed revolt only when a national government has been condemned for oppression by the African Union and persists in its misconduct. Preferably, governments would abide by the spirit of article 20 by respecting self-determination, including for minority groups. Fatsah Ouguerouz, The African Charter on Human and People's Rights 227-69 (2003).

5. A similar provision is contained in the Arab Charter of Human Rights: "All peoples have the right to resist foreign occupation." Arab Charter of Human Rights, art. 2(4). More broadly, Islamic law recognizes a fundamental right of self-defense against persecution and oppression. Abdul Ghafur Hamid & Khin Maung Sein, *Islamic International Law and the Right of Self-Defense of States*, 2 J. East Asia & Int'l L. 67, 90-92 (2009). Should the above be construed to recognize the right of the people of Syria, Lebanon, and Israel (where Arabs are about 20 percent of the citizenry) to resist Iran's military operations against their nations?

2. Nairobi Protocol

The Nairobi Protocol is a gun control agreement among East African governments. Pursuant to the 2001 UN Programme of Action (Section A.3), the UN facilitated the Nairobi Protocol, as well as similar regional agreements in Southern Africa (Southern African Development Community, SADC) and in West Africa (Economic Community of West African States, ECOWAS). The terms of the three African protocols are generally similar.

The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa

Preamble

We, the Ministers of Foreign Affairs and other plenipotentiaries of Republic of Burundi, Democratic Republic of Congo, Republic of Djibouti, Federal Democratic Republic of Ethiopia, State of Eritrea, Republic of Kenya, Republic of Rwanda, Republic of Seychelles, Republic of the Sudan, United Republic of Tanzania, Republic of Uganda (Hereafter referred to as the States Parties); . . .

ARTICLE 3

Legislative Measures

(a) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its national law the following conduct, when committed intentionally:

(i) Illicit trafficking in small arms and light weapons.

(ii) Illicit manufacturing of small arms and light weapons.

(iii) Illicit possession and misuse of small arms and light weapons.

(iv) Falsifying or illicitly obliterating, removing or altering the markings on small arms and light weapons as required by this Protocol.

(b) States Parties that have not yet done so shall adopt the necessary legislative or other measures to sanction criminally, civilly or administratively under their national law the violation of arms embargoes mandated by the Security Council of the United Nations and/or regional organisations.

(c) States Parties undertake to incorporate in their national laws:

(i) the prohibition of unrestricted civilian possession of small arms;

(ii) the total prohibition of the civilian possession and use of all light weapons and automatic and semi-automatic rifles and machine guns;

(iii) the regulation and centralised registration of all civilian-owned small arms in their territories (without prejudice to Article 3 c (ii));

(iv) measures ensuring that proper controls be exercised over the manufacturing of small arms and light weapons;

(v) provisions promoting legal uniformity and minimum standards regarding the manufacture, control, possession, import, export, re-export, transit, transport and transfer of small arms and light weapons;

(vi) provisions ensuring the standardised marking and identification of small arms and light weapons;

(vii) provisions that adequately provide for the seizure, confiscation, and forfeiture to the State of all small arms and light weapons manufactured or conveyed in transit without or in contravention of licenses, permits, or written authority;

(viii) provisions for effective control of small arms and light weapons including the storage and usage thereof, competency testing of prospective small arms owners and restriction on owners' rights to relinquish control, use, and possession of small arms;

(ix) the monitoring and auditing of licenses held in a person's possession, and the restriction on the number of small arms that may be owned;

(x) provisions prohibiting the pawning and pledging of small arms and light weapons;

(xi) provisions prohibiting the misrepresentation or withholding of any information given with a view to obtain any license or permit;

(xii) provisions regulating brokering in the individual State Parties; and

(xiii) provisions promoting legal uniformity in the sphere of sentencing. . . .

Article 5

Control of Civilian Possession of Small Arms and Light Weapons

(a) States Parties undertake to consider a co-ordinated review of national procedures and criteria for issuing and withdrawing of small arms and light weapons licenses, and establishing and maintaining national databases of licensed small arms and light weapons, small arms and light weapons owners, and commercial small arms and light weapons traders within their territories.

(b) State Parties undertake to:

(i) introduce harmonised, heavy minimum sentences for small arms and light weapons crimes and the carrying of unlicensed small arms and light weapons;

(ii) register and ensure strict accountability and effective control of all small arms and light weapons owned by private security companies;

(iii) prohibit the civilian possession of semi-automatic and automatic rifles and machine guns and all light weapons. . . .

Article 17

Corruption

States Parties shall institute appropriate and effective measures for cooperation between law enforcement agencies to curb corruption associated with the illicit manufacturing of, trafficking in, illicit possession and use of small arms and light weapons. . . .

NOTES & QUESTIONS

1. Signatories to the Nairobi Protocol agree to comply with UN arms embargoes. As UN members, the signatory states were already supposed to comply with embargoes. Countries that are known to have violated the UN arms embargo on the eastern Democratic Republic of the Congo are Albania, Burundi, China, the Democratic Republic of the Congo, Rwanda, South Africa, Sudan, Uganda, and Zimbabwe, five of which are signers of the Nairobi Protocol. David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 Penn St. L. Rev. 891 (2010). Two of the other violators, Zimbabwe and South Africa, promised in a different regional treaty to obey UN arms embargoes. Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region, art. 5 § 2. Can anything be done to make arms embargoes effective when governments that promise to obey them do not?

2. The Nairobi Protocol mandates registration of all firearms. Is it a good idea that each of the governments that joined the Protocol knows where all guns within its borders are at all times? Which, if any, of the Nairobi Protocol governments have the administrative capacity to maintain an accurate registry?

3. The Protocol also mandates a ban on semi-automatic rifles. What effects would such a ban have, if successfully implemented? Are there issues in East Africa that make a ban on semi-automatic rifles more or less desirable than would be the case elsewhere?

4. Under the Nairobi Protocol, all automatic rifles must be banned. In the United States, there are only about 100,000 automatics in citizen hands, out of a

total U.S. gun supply of over 400 million guns. *See* Ch. 1.B. In Africa, automatics are a much larger fraction of the available gun supply. The typical gun that an African villager might purchase on the black market would be an AK-47 (or its descendants, such as the AK-74 or the AKM, or the dozens of variants manufactured in many other nations). The AK-47 can fire automatically or semi-automatically; a selector switch controls the mode of fire. The gun is very simple, with many fewer parts than its U.S. counterparts, the M16 and M4 rifles. The parts of the AK-47 do not fit together as tightly as do the parts of the M16, or most other Western guns. As a result, the AK-47 is not as accurate, especially at longer distances; but the AK-47 is renowned for its durability and imperviousness to harsh conditions, such as sandstorms. *See generally* Marco Vorobiev, AK-47: Survival and Evolution of the World's Most Prolific Gun (2018); Edward Clinton Ezell, The AK47 Story: Evolution of the Kalashnikov Weapons (1986). Semi-automatic-only variants of the AK are commonly owned in the U.S. But true, fully automatic, AK-type rifles are by far the most common firearms in the Third World, with tens of millions in circulation.

Do these facts affect your assessment of the Nairobi Protocol's prohibition against any civilian possession of automatic rifles? In what way?

5. According to the Protocol, there must be "heavy minimum sentences" for "the carrying of unlicensed small arms." Is this a good policy?

6. David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 Quinnipiac L. Rev. 385 (2008), examines human rights abuses in gun confiscation programs in Kenya and Uganda, and in South Africa's quasi-confiscatory licensing law. (Kenya is discussed further in Section E.2; Kenya and South Africa are both the subjects of case studies in online Chapter 19.C.) Given that before the Nairobi Protocol there were human rights abuses in gun control enforcement (e.g., burning villages down to collect guns), would the Protocol affect the prevalence of abuse?

7. The U.S. constitutional right to keep and bear arms, like much of the rest of the Constitution, is partly based on fear or distrust of government power, especially when that power is concentrated and unchecked. Prior to his presidency, Ronald Reagan summarized the concern, based on past and present experience:

> Lord Acton said power corrupts. Surely then, if this is true, the more power we give the government the more corrupt it will become. And if we give it the power to confiscate our arms we also give up the ultimate means to combat that corrupt power. In doing so we can only assure that we will eventually be totally subject to it. When dictators come to power, the first thing they do is take away the people's weapons. It makes it so much easier for the secret police to operate, it makes it so much easier to force the will of the ruler upon the ruled.
>
> Now I believe our nation's leaders are good and well-meaning people. I do not believe that they have any desire to impose a dictatorship upon us. But this does not mean that such will always be the case. A nation rent internally, as ours has been in recent years, is always ripe for a "man on a white horse." A deterrent to that man, or to any man seeking unlawful power, is the knowledge that those who oppose him are not helpless.
>
> The gun has been called the great equalizer, meaning that a small person with a gun is equal to a large person, but it is a great equalizer in

> another way, too. It insures that the people are the equal of their government whenever that government forgets that it is servant and not master of the governed. When the British forgot that they got a revolution. And, as a result, we Americans got a Constitution; a Constitution that, as those who wrote it were determined, would keep men free. If we give up part of that Constitution we give up part of our freedom and increase the chance that we will lose it all.
>
> I am not ready to take that risk. I believe that the right of the citizen to keep and bear arms must not be infringed if liberty in America is to survive.

Ronald Reagan, *Ronald Reagan on Gun Control*, Guns & Ammo, Sept. 1975. Do Reagan's views, and the ideology underlying the Second Amendment, have any relevance to Africa? Would Africa be better off or worse off with widespread gun ownership by ordinary citizens? Does it depend on the country? Do you think there are certain traditions or values that make the right to arms more workable in the United States than it would be in other countries? Does it make a difference whether particular African governments are more or less trustworthy than the U.S. government? Are Africans more capable, less capable, or equally as capable as Americans of responsible firearm ownership? Is a robust right to arms workable in African countries that, after long periods of colonial rule, have mostly been run by dictatorships?

Given Africa's history, is an individual right to arms for the purpose of resisting tyranny more or less important than in the United States or Europe? How does a nation's or region's political stability influence your answer? What are the pros and cons of such a right in Africa versus in the United States?

8. Is discussion of an individual right to arms even relevant to the concerns addressed by the Nairobi Protocol? Many of the guns at issue seem to be related to conflicts between governments, political factions, or warlords. Would an individual right to arms make things better or worse in this context? Is the better approach a *de jure* ban on all private guns (with recognition that some guns would be available on the black market to persons willing to break the law)? Who would enforce such a ban?

9. *Law enforcement corruption.* The Nairobi Protocol depends on law enforcement officers to enforce its provisions. However, law enforcement officials in Africa have long been recognized as corrupt, exploiting citizens and failing to uphold their respective laws. A 2014 survey of 28 sub-Saharan nations from Transparency International revealed that 22 percent of respondents admitted paying a bribe in the past year. *See* Transparency International, *Corruption in Africa: 75 Million People Pay Bribes* (Nov. 30, 2015). For a close look at police corruption, see Pauline M. Wambua, *Police Corruption in Africa Undermines Trust, but Support for Law Enforcement Remains Strong*, Afrobarometer Dispatch (Nov. 2, 2015). With regard to firearms, there have been well-documented cases of African law enforcement personnel "losing" their weapons. For example, according to a parliamentary committee, South African police lost over 20,000 firearms between 2004 and 2011. *See* BBC News, *South African Police Lost 20,000 Guns* (Mar. 9, 2011).

Nairobi Protocol Article 17 requires states to institute effective measures to prevent corruption that allows for illicit trade in small arms. Can regional firearms

treaties be successfully implemented if the parties to the treaty are unequal in their ability or willingness to properly implement it? Why or why not? In the case of Africa, how does the corruption of local law enforcement affect the implementation of the Nairobi Protocol?

10. Further reading: Small Arms Survey, Publications on Africa and Middle East.

3. European Convention on Human Rights (ECHR)

In 1953, the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force. It is commonly known as European Convention on Human Rights (ECHR). Enforcement is led by the Council of Europe and by the European Court of Human Rights, which is based in Strasbourg, France.

> Art. 2(1). Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> Art. 2(2). Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> Art. 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> . . .
>
> Art 5(1): Everyone has the right to liberty and security of person.

European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222.

NOTES & QUESTIONS

1. According to the ECHR, under what circumstances is use of lethal force in self-defense permissible?

2. If a government prohibited self-defense against deadly attack, would it be violating the right to life in Article 1 of the ECHR?

3. In a report adopted by the UN Subcommission on Human Rights, UN Special Rapporteur Barbara Frey wrote that under the ECHR, "[s]elf-defence is more properly characterized as a means of protecting the right to life and, as such, a basis for avoiding responsibility for violating the rights of another." Section A.3. Based on the text of the ECHR, has a person who kills in self-defense (or while lawfully quelling a riot or insurrection) violated the rights of another person?

4. Several national constitutions, mainly former British colonies, include language similar to article 2, regarding defense against unlawful violence. These are covered in online Chapter 19.A.2.

5. Examining self-defense law, one scholar observes that it does not require exact proportionality. Diego M. Luzón Peña, Aspectos Esenciales de la Legítima Defensa 561 (Julio César Faria ed., Buenos Aires 2d ed. 2006) (1978). This is the same point made by one of the founders of international law, Samuel von Pufendorf (Section C.4). For example, an attack with a knife may be repelled with a gun. However, extreme disproportion in response to a minimal aggression is forbidden. *Id.* For example, if a rude person on a subway intentionally pushes people out of the way, the victims may not use deadly force against the aggressor. Professor Luzón Peña argues that the European Convention on Human Rights implicitly contains a proportionality rule of government violence: the government may not use deadly force to protect state property (*bienes patrimoniales*—public property, such as parks, monuments, or government buildings). *Id.* at 562. Based on the text of the ECHR, is the inference plausible? Necessary?

6. Several other international human rights conventions guarantee a right to life, a right to personal security, or a right to property.

American Convention on Human Rights (1969):
- Art. 5(1): "Every person has the right to have his physical, mental, and moral integrity respected."
- Art. 7(1): "Every person has the right to personal liberty and security."
- Art. 21(1): "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."

Universal Declaration on Human Rights (1948):
- Art. 3: "Everyone has the right to life, liberty and security of person."
- Art. 17(1): "Everyone has the right to own property alone as well as in association with others."
- Art. 17(2): "No one shall be arbitrarily deprived of his property."

International Covenant on Civil and Political Rights (1976):
- Art. 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
- Art. 9(1): "Everyone has the right to liberty and security of person."

Would any of these conventions be violated if a government outlawed forcible self-defense against murderers, rapists, torturers, robbers, or other violent criminals?

4. European Firearms Directives

European political integration began in 1951 when six nations created the European Coal and Steel Community (ECSC). In 1957, the European Economic Community (EEC, usually known as the "Common Market") was established. The name changed to European Community (EC) in 1993, the year the European Union (EU) was created. In 2009, the EC was dissolved into the EU.

The 1985 Schengen Agreement aimed to gradually introduce a system allowing persons to travel between European nations with few or no checks at the borders. So today, you can drive from Madrid to Paris without having to undergo a border check when you enter France. In 1999, the Schengen system was incorporated into

the European Union. Today, the Schengen Area comprises 22 EU nations, except for the U.K. and Ireland, which exercised their legal right to opt out. Three non-EU nations—Iceland, Norway, and Switzerland—chose to join the Schengen Area. In 2016, some nations reintroduced border controls because of the migrant crisis, and in 2020 all did because of the COVID-19 pandemic.

The Schengen participants were concerned that the abolition of border checks for intra-European travel would allow citizens of nations with restrictive firearms laws to obtain arms when visiting nations with less restrictive laws. Accordingly, the Council of European Communities adopted Directive 91/477/EEC in 1991. This was supplemented by the EU's Directive 2008/51/EC in 2008. In European law, a directive is not self-executing. Instead, it orders European nations to adopt laws that meet certain minimum standards, while allowing nations to choose to be more stringent.

To travel internationally within the Schengen Area while possessing a firearm, an individual must obtain a European Firearms Pass. The pass must list the specific firearms that will be possessed while traveling. To obtain the pass, an individual must provide proof of the reasons for traveling with firearms—for example, an invitation to participate in a shooting competition.

Significantly, the Pass does *not* provide an exemption from complying with the laws of any country. So, if a person owns a legal rifle in country A, and wants to travel to country C, where the same rifle is also legal, the person may not travel via country B, which bans that type of rifle.

The Schengen directives further required nations to adopt gun licensing laws. Firearms were divided into four categories: Category A: These must be prohibited by national law. Category B: Licensees must have "good cause" and permission before acquisition. Category C: licensing and good cause, but not registration. Category D: licensing only.

In 2017, the European Council and European Parliament substantially revised the Directive. The new directive was officially published on May 17, 2017. EU 2017/853. EU member states were given 15 months to enact national legislation compliant with the Directive. The directive also applies to the non-EU states of Switzerland, Norway, Iceland, and Liechtenstein, because they are part of the Schengen Area. *Id.* at pmbl. (35)-(37). The Directive includes certain exemptions for Switzerland, due to its militia system. (Switzerland is discussed in online Chapter 19.C.2.)

Arms classifications under the Directive are:

Category A. Must be prohibited:

- Automatics.
- Semi-automatics that were converted to semi-automatic-only but had once been automatic.
- Handgun magazines over 20 rounds.
- Long gun magazines over 10 rounds.
- Long guns that can function when shorter than 60cm (23 5/8 inches). This covers many long guns with folding or telescoping stocks.

The Directive allows countries to authorize possession of converted semi-automatics and of magazines to sport shooters whose medical and psychological condition is evaluated, and who are active members of a shooting club and are

participating in a sport that uses the firearm. Lawful owners before June 13, 2017, may also be exempted.

Category B. Licensees must have "good cause" and be at least 18. Persons under 18 may use the arms when under supervision. Government permission is required in advance for each acquisition. Category B is for:

- All handguns except single-shot rimfire handguns longer than 11 1/8 inches (28 cm).
- Semi-automatic long guns with an ammunition capacity greater than three or with a detachable magazine.
- Repeating shotguns whose barrels are shorter than 23 5/8 inches (60 cm).

Category C. Licensees must have good cause and be at least 18. Specific prior authorization is not required for acquisition. Registration is required. Before 2017, a lower category, D, had existed for a few types of arms, such as single-shot shotguns. Category D was eliminated in 2017. Category C now covers everything that is not in A or B. This includes:

- Single-shot rimfire handguns longer than 11 1/8 inches.
- Single-shot rifles and shotguns.
- Repeating long guns with a capacity of no more than three rounds and barrel at least 23 5/8 inches (60 cm).

NOTES & QUESTIONS

1. The Schengen Area, with no border checks on internal travel, has some resemblances to the free travel within the United States, where a right to interstate travel has been recognized as implicit in the Constitution. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) ("We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."). Like the Schengen nations, the United States has had to grapple with the challenges of differing gun laws among various sovereign (or somewhat sovereign) jurisdictions. The federal Gun Control Act of 1968, for example, attempts to prevent the criminal flow of guns from less restrictive states to more restrictive states. *See* Ch. 9.C. If you were a citizen of a Schengen nation, would you give up your right to no-check international travel in the Schengen zone, in return for less restrictive gun laws in your home country? Would you be willing to make a similar trade in the United States, hypothesizing that states would be allowed to search vehicles crossing a state border?

2. Which provisions, if any, of the European Firearms Directive would, if enacted in the U.S., be contrary to the Second Amendment or the state constitutional arms rights? If the European Union asked you for advice, would you suggest revision of any provisions of the directive?

3. Further reading: Fighting Illicit Firearms Trafficking Routes and Actors at European Level Final Report of Project FIRE (Savona Ernesto U. & Mancuso Marina eds., 2017) (Transcrime Research Center at the Università Cattolica del Sacro Cuore, in Italy); Firearms United Network (news and critiques of EU gun controls).

a. Case Study: Czechoslovakia and the Czech Republic

In August 2017, the government of the Czech Republic, supported by the government of Poland, brought a lawsuit in the Court of Justice of the European Union asserting breach of four legal principles: 1. *Conferral of power.* The Directive was beyond the powers conferred on the European Union. 2. *Proportionality.* The EU "deliberately did not obtain sufficient information," and therefore "adopted manifestly disproportionate measures consisting in the prohibition of certain kinds of semi-automatic weapons which are not however used in the European Union for committing terrorist acts." 3. *Legal certainty.* "The newly delimited categories of prohibited weapons . . . are altogether unclear." 4. *Non-discrimination.* The Swiss exemption. *Czech Republic v. European Parliament and Council of the European Union*, No. C-482/17 R. Initially, the court denied the Czech Republic's request to enter an interim order (similar to a preliminary injunction). In the court's view, the Republic had not provided sufficient proof of "serious and irreparable damage." ECLI:EU:C:2018:119 (Feb. 28, 2018) (unpublished). On the merits, the Court later ruled in favor of the EU on all claims. *Czech Republic v Parliament and Council*, No. C-482/17 (Dec. 3, 2019).

The same year that the Czech Republic sued the European Union, the Czech Parliament considered adding a right to arms constitutional amendment:

> Citizens of the Czech Republic have the right to acquire, hold and carry weapons and ammunition for the fulfillment of the tasks mentioned in paragraph 2. This right may be restricted by law and other conditions of its exercise may be laid down by law if it is necessary to protect the rights and freedoms of others, public order and safety, life and health or the prevention of crime.

The reference to "paragraph 2" was to art. 3, ¶2 of the Czech Constitution: Appendix B: Constitutional Act of 22 April 1998 No. 110/1998 Sb., on the Security of the Czech Republic. According to paragraph 2: "State bodies, bodies of self-governing territorial units, and natural and legal persons are obliged to participate in safeguarding the Czech Republic's security. The extent of this obligation, as well as further details, shall be provided for by statute." The government's explanatory memorandum for the right to arms proposal stated that armed citizens can help to provide defense against terrorist attacks, especially against soft targets, such as malls or other places where large numbers of people gather and there is little professional security. Further, the right of self-defense would be a nullity without the right to possess and carry arms. Ministry of Interior, Proposal of Amendment of Constitutional Act No. 110/1998 Col., on Security of the Czech Republic (2016) (link is to an official government document set for the proposal; the linked documents, including the official text and the memorandum, are in Czech).

The proposed amendment passed the lower house overwhelmingly but fell short of the necessary three-fifths majority in the Senate. *Právo nosit zbraň pro zajištění bezpečnosti Česka Senát neschválil*, iDNES.cz, Dec. 6, 2017; *Lidé budou mít právo držet zbraň kvůli obraně státu, schválili poslanci*, iDNES.cz, June 28, 2017. Although not adopting the amendment, the Senate urged the government not to enact some provisions of the European Firearms Directive. *Senát odmítl některé části směrnice EU o regulaci zbraní. Žádá výjimky*, iDNES.cz, Dec. 6, 2017.

After the success of the Civic Democratic Party, which favored the amendment, in the 2018 elections, another arms rights proposal was introduced in the Senate in September 2019. Supported by 102,000 petition signers, the proposal would amend the Charter of Fundamental Rights and Freedom to expressly guarantee the right to use a weapon to defend one's own life or someone else's. Proponents argue that European nations that have banned the carrying of all defensive arms have become unsafe. *See Czech Republic May Enact Bill Protecting Right to Self-Defense with a Weapon*, Expats.cz, Sept. 17, 2019.

On July 21, 2021, the upper house of the Czech Parliament approved the constitutional amendment, and President Miloš Zeman signed the amendment into law. (The president cannot veto a constitutional bill.) The amendment prevents the right to bear arms from being restricted by common law and will strengthen the position of the Czech Republic in the debates on further EU regulations. *See The Right to Bear Arms in Self-Defense Is Embedded in the Czech Constitution*, Expats.cz, July 21, 2021.

On August 13, 2021, the new constitutional amendment was added to the Collection of Laws in Volume 131 under No. 295/2021 Coll. House Press 895, N. constitution. z. - Charter of Fundamental Rights and Freedoms. The text of the amendment in Czech is:

> V čl. 41 Listiny základních práv a svobod, vyhlášené usnesením předsednictva České národní rady č. 2/1993 Sb. jako součást ústavního pořádku České republiky, se doplňuje nový odstavec 3, který zní:
>
> (3) Právo bránit základní práva a svobody i se zbraní je zaručeno za podmínek, které stanoví zákon.

English translation:

> The following paragraph 3 is added to Article 41 of the Charter of Fundamental Rights and Freedoms, promulgated by Resolution No 2/1993 coll. of the Bureau of the Czech National Council as part of the Constitutional Order of the Czech Republic:7
>
> (3) The right to defend fundamental rights and freedoms with a weapon is guaranteed under the conditions laid down by law.;

The Czech Republic's interest in the right to arms perhaps stems from the nation's history of totalitarian rule—by Nazis from 1938 to 1945, and then by Communists from 1948 to 1989. Today, the Czech Republic and the Slovak Republic are separate nations, but from 1919 to 1993, they were the single nation of Czechoslovakia. The Republic of Czechoslovakia was created from territory of the former Austro-Hungarian Empire in 1918, following World War I. During the period between World War I and World War II, almost all of central and eastern Europe devolved into dictatorship. The notable exceptions were Czechoslovakia and Switzerland.

The Czechoslovak Republic retained the gun licensing system from Austro-Hungary. A person with a clean record could obtain a three-year permit to own firearms. Administered by local governments, the permits were renewable. The license records functioned as a gun owner registration system. Austrian Firearms Act, Zbrojnipatent of 1852, No. 223r.z.[25]

In Germany, the National Socialist German Workers ("Nazi") Party, led by Adolf Hitler, won a plurality in the 1933 elections.[26] Hitler was appointed Chancellor and moved rapidly to consolidate a totalitarian dictatorship. The former democratic government, known as the Weimar Republic, had instituted gun licensing and registration in 1928. In Hitler's hands, the registration lists were perfect for confiscating guns from all political opponents. The licensing system kept guns out of the hands of persons not considered politically reliable. As is the nature of a totalitarian regime, the Nazis worked to bring all aspects of civil society under state control. This included mandating that all gun and hunting clubs have a political officer appointed by the government. Many clubs disbanded rather than comply. *See* Stephen Halbrook, Gun Control in the Third Reich: Disarming the Jews and "Enemies of the State" (2013).

Hitler's aggressive foreign policy was met by appeasement on the part of the British and the French. In violation of the Versailles Treaty, he sent his army to occupy the Rhineland (an industrial region, bordering France, that was supposed to be demilitarized). Hitler ignored the Versailles limits on the size of the German army, and absorbed Austria in the 1938 *Anschlüss*.

His next target was Czechoslovakia. The republic had one of the best arms industries in the world and a very capable army. It also had defensible borders, in the mountainous regions next to Austria and Germany, and an extensive system of fortifications.

In the late summer of 1938, Hitler provoked an international crisis by demanding that Czechoslovakia surrender its border regions, which had a large German-speaking population. The Nazis called this region the *Sudetenland*. Czechoslovakia was ready to fight, and France was obliged to assist, by virtue of its 1925 mutual defense treaty with Czechoslovakia. But France would not fight unless Great Britain joined, and the British refused.

In the infamous Munich Agreement, the West forced Czechoslovakia to give Hitler everything he demanded. British Prime Minister Neville Chamberlin returned to Great Britain waving a written agreement with the German government and proclaimed, "Peace in our time."

The British public, less than a generation removed from the horrors of "The Great War" (World War I) overwhelmingly approved. But the appeasers were self-deluded.

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25. Summarized in Novak Karel, Vzoroo ve vecech honebniho prava, zbrojniho patentu a rybolovu Kempas 151-52 (Praha, 1934) (describing sections 17-40 of the Czechoslovakian Firearms Act.); Legislative Reference Service, Library of Congress study, July 5, 1968, in Federal Firearms Legislation, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 482 (1968).

26. *Nazi* was a shorthand for the party's formal name, *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP).

After taking the mountains and forts, Hitler invaded Czechoslovakia in March 1939. The government fled and told the people not to resist. As the Germans and Czechs both knew, the French would not honor the Franco-Czech mutual defense treaty. When the Germans arrived:

> Immediately a proclamation, bordered in red and bearing the German eagle and swastika which is now familiar to every Czech town and village, was posted . . . Under this proclamation no one was allowed in the streets after 8 p.m. . . .; all popular gatherings were forbidden; and weapons, munitions, and wireless sets were ordered to be surrendered immediately. Disobedience of these orders, the proclamation ended, would be severely punished under military law.

The Times (London), Mar. 16, 1939, at 16b. The second day of occupation brought house-to-house arms searches conducted by Nazi soldiers. *Berhaftungen in Prag*, Neue Zürcher Zeitung (Switz.), Mar. 17, 1939. During Nazi occupation, "The Gestapo raided homes to check for shortwave radios; these were outlawed so people couldn't listen to the BBC broadcasts from London." Charles Novacek, Border Crossings: Coming of Age in the Czech Resistance 61 (2012).

In Hitler's view, "The most foolish mistake we could possibly make would be to allow the subject races to possess arms. History shows that all conquerors who have allowed their subject races to carry arms have prepared their own downfall by so doing." Hitler's Secret Conversations 403 (Norman Cameron & R.H. Stevens trans. 1961). Registration lists (the gun licenses) were used for confiscation. Stephen Halbrook, interview with Milan Kubele, Uherský Brod, Czech Republic, March 16, 1994.

Suspecting that not all guns had been found, the Nazis, in August 1939, issued an order demanding the surrender of all arms within two weeks. N.Y. Times, Aug. 11, 1939, at 6. A September 1941 decree by Protector and Deputy Gestapo Chief Reinhard Heydrich announced the application of martial law against anyone who possessed arms or ammunition; anyone who learned of such possession and did not immediately report it was also guilty.[27] Legislative Reference Service, Library of Congress study of July 5, 1968, in *Federal Firearms Legislation*, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 487 (1968).

Under Nazi control, Czechoslovakia was split in two. The Czech area was titled the "Protectorate of Bohemia and Moravia." To the east, Slovakia become a separate nation; it is discussed below.

During the war, "the Czech resistance was handicapped by an almost total absence of arms and ammunition." Radomír Luža, *The Czech Resistance Movement, in* A History of the Czechoslovak Republic 1918-1948, at 350 (Victor S. Mamatey & Radomír Luža eds., 1973). Moreover, the non-*Sudetenland* Czech region was mainly flat, had little forestland, and was urbanized—difficult terrain for offensive guerilla activity. *Id.* at 350. The biggest success of the Czech resistance was a 1942 operation, in conjunction with British commandos, to assassinate the German military ruler Reinhard Heydrich, an exceptionally evil man. But the Germans inflicted heavy reprisals on the Czech people and rooted out the Czech resistance. *Id.*

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27. "Gestapo" was a short form for *Geheime Staatspolizei* (Secret State Police).

The resistance managed to reconstitute the next year — thanks in part to Soviet prisoners of war who escaped from German camps, were sheltered by the Czech people, and who led small guerilla bands. *Id.* at 356. But neither the Soviets nor the West would send arms to the Czech resistance, which was "[i]solated in the heart of the Reich, without caches of weapons." *Id.* at 358.

Arms finally were supplied in April 1945, as the Nazi regime neared collapse. Guerilla actions began in large numbers, and in early May, the Czech people rose up and seized control of their capital, Prague. With no support from the nearby Soviet and American armies, the Czechs fought the Germans for Prague, sustained heavy casualties, and eventually convinced the Germans to surrender on May 8. The next day, Stalin's Soviet army moved into Prague. *Id.* at 354-59.

The resistance took a very different course in Slovakia, to the east. Slovakia has long been less developed educationally and economically. When the Germans invaded in March 1939, they put the Czech areas under direct military rule, but Slovakia was treated as a friendly semi-autonomous nation. The new ruler, Father Tiso, was a Slovak priest who was sympathetic to fascism and the Germans, but who did exercise some autonomy.

When Hitler invaded Poland in September 1939, Slovakia was ordered to join in. A well-planned revolt broke out in Slovakia, Bohemia, and Moravia. Thousands of Slovak soldiers mutinied, but they were eventually suppressed. Neue Zürcher Zeitung (Switz.), Sept. 21, 1939; Anna Josko, *The Slovak Resistance Movement*, in A History of the Czechoslovak Republic, at 367-68.

Afterwards, for security, the remaining Slovak resistance operated in isolated cells. Josko, at 363. They carried out a number of successful sabotage operations in 1940-42. *Id.* at 368-69.

By 1943, partisan groups were active in the mountains of northern and central Slovakia. The partisans were comprised of political dissidents who had fled, Jews who did the same, army deserters, and escaped Soviet prisoners of war. *Id.* at 374-75.

But some of the partisans acted too quickly. As the Nazis were losing on the eastern front, Rumania's King Michael orchestrated a coup on August 23, 1944, removed the pro-Nazi regime, and replaced it with a pro-Soviet one. The Germans feared that Slovakia might also switch sides. When Slovak partisans killed 28 German officers who were returning from their military liaison service in Rumania, the Germans announced that direct military rule would be imposed on Slovakia. *Id.* at 376. Consequently, the Slovak underground had to commence its long-planned general uprising immediately, rather than wait for a more propitious time. The majority of the army joined the rebels. The Slovak National Uprising soon controlled about half the territory of Slovakia. But after hard fighting in September and October 1944, the Germans managed to defeat the uprising. Surviving resisters melted back into the mountains to resume partisan warfare. *Id.* at 374-84.

At the infamous 1944 Yalta Conference, President Franklin Roosevelt agreed to let Josef Stalin have all of eastern Europe and some of central Europe as a Soviet sphere of influence. Stalin promised to allow democracy within his new dominions. Initially, democratic coalition governments of national unity were set up in newly liberated Czechoslovakia, Poland, and Hungary. The coalition governments included communist parties as well as democratic ones. Czechoslovakia was

reunited; the new government did not dare object to Stalin annexing a portion of eastern Slovakia.

Over the next few years, Stalin worked to replace the free governments with puppet communist dictatorships. As Prime Minister Winston Churchill noted in a famous speech in March 1946, "an iron curtain has descended across the Continent. . . . The Communist parties, which were very small in all these Eastern States of Europe, have been raised to pre-eminence and power far beyond their numbers and are seeking everywhere to obtain totalitarian control. Police governments are prevailing in nearly every case, and so far, except in Czechoslovakia, there is no true democracy." Winston Churchill, *The Sinews of Peace*, Westminster College, Fulton, Missouri, Mar. 5, 1946.

Democracy in Czechoslovakia survived until the spring of 1948, when it was exterminated by what the Czechoslovak communists described as "the revolution from above." Paul E. Zinner, Communist Strategy and Tactics in Czechoslovakia, 1918-48, at 135 (1963).

When the coalition government was forming after the German surrender in May 1945, the Communists demanded, inter alia, the cabinet post of Ministry of the Interior, which was in charge of the police. Non-communists were purged from the police, and the police force converted into an armed instrument of the Communist Party. Adams Schmidt, Anatomy of a Satellite 136-37 (1952); Hubert Ripka, Czechoslovakia Enslaved, The Story of a Communist Coup D'Etat 152 (1950).

When World War II ended, the Czechoslovak government reclaimed the *Sudetenland* territories that had been seized by Hitler in 1938. To protect industrial installations from attacks by German-speakers who had supported the Nazis, armed "factory guards" were created, comprised of factory workers. But the German danger soon vanished, as the German population was forced to leave Czechoslovakia and settle in Germany proper. Nevertheless, the now-vanished danger of pro-Nazi Germans was used as a pretext for the factory guards to constitute an armed reserve, a "Worker's Militia." The Militia's true purpose was to be ready to assist a communist coup, while receiving arms from secret caches. Zinner, at 166-67; Schmidt, at 113, 139; Ripka, at 152, 167 (describing some communist caches discovered by the government), 259.

Within the police, the communists' main force was the Security Police (S.N.B.). This was supplemented by police "mobile detachments"—paramilitary forces. Ripka, at 152.

The police made all sorts of accusations that leaders of the democratic parties were foreign agents and were plotting a coup. Adams, at 116. Actually, the communists were the ones planning a coup, and they were willingly subservient minions of the Soviet tyrant, Stalin.

The crisis began to come to a head in February 1948. Illegal communist caches of arms for the Workers' Militia had been discovered. The communist-run Security Police announced the eight police divisional commanders in Prague would be fired and replaced by communists. Since divisional commanders were in charge of arms supply to police officers, the implication of the purge of the commanders was that arms would be distributed only to pro-communist police. Ripka, at 196.

Against strong communist opposition, the National Assembly annulled the police commander appointments and passed a resolution to create a special

committee to investigate the police. Zinner, at 199; Ripka, at 196-97. A newspaper essay, "We Will Not Permit a Police Regime," documented what communists had been doing to the police and exposed the abuses of the Ministry of Interior. *Id.* at 223 (*Svodobné Slovo* newspaper).

As a minister of the democratic government remembered, "The Communists knew that had touched the sore spot, and that our campaign against the police regime imposed by them could have profound repercussions on the elections, if these took place under normal circumstances. Hence their decision to prevent free elections by any means. Obviously they could succeed in this only by stifling by violence the democratic forces of the nation. . . ." *Id.* at 224.[28]

The communists mobilized their Workers' Militia and other paramilitaries. Quickly, Prague was occupied by armed communist forces, who began arresting political opponents. It was reminiscent of the first days of occupation by the Nazi secret police. *Id.* at 248-49.[29] The same tactics were used in Bratislava, the Slovak capital. *Id.* at 259.

In Czechia, the paper mills had been nationalized, and their pro-communist managers cut off paper supplies to opposition newspapers. Schmidt, at 117; Ripka, at 149, 264. In Slovakia, the pro-communist printers union refused to print the opposition press. Schmidt, at 117.

Students poured into the streets of Prague and demonstrated for two days in support of democracy. But they were soon "brutally repressed by the police." Ripka, at 268.

President Edvard Beneš could have called out the army, which had not yet been taken over by the communists. But no one was sure what the army would do. Ripka, at 280. In any case, if the Czechoslovak army had defended the republic, Stalin's Red Army stood ready to intervene on behalf of the communists. As in March 1939, President Beneš capitulated, and handed his country over to foreign totalitarians. The American ambassador had informed the Czechoslovak government that the U.S. would not intervene against a communist takeover. Schmidt, at 135.

Not knowing that Beneš had already acted, a group of nearly ten thousand students marched to the presidential residence to try to persuade him to stand firm. The Workers' Militia and the communist secret police (the SNB, Sbor národní bezpecˇnosti) arrived, but as they approached, the students began to sing the National Hymn. The police respectfully stopped and stood at attention. Once the song was over, the communist police commander gave the order to attack. Several students were shot, hundreds were wounded by clubs, and over a hundred were arrested. Ripka, at 294-95; Zinner, at 210.

Following the coup, the Workers' Militia were kept in Prague as a visible manifestation of the new dictatorship's power. Zinner, at 210. They used machine guns to break up a parade in St. Wenceslas Square (the heart of Prague) that had been organized by one of the democratic parties. Ripka, at 284.

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28. Ripka had been Minister for Foreign Trade under the democratic government, and also a member of the Constituent National Assembly of Czechoslovakia. During World War II, he was Secretary of State for the Czechoslovak government in exile.

29. The Nazi secret police were known as "S.S."—short for *Schutzstaffel* ("Protection Squadron").

The Social Democrat Party was Marxist in ideology, but the vast majority of its members were opposed to the coup. With the cooperation of traitors in the party, the Social Democrats were quickly eliminated. *Id.* at 275.

The *Svodobné Slovo* newspaper, which had published the expose of the communist police, was occupied by police from the Ministry of the Interior. *Id.* at 285.

Hubert Ripka recalled, "My heart bled at the sight of these poor people who saw themselves reduced to slavery for the second time in ten years, without having a chance to defend themselves without being able to cry out in despair." *Id.* at 297.

Soon, Czechoslovaks were forced to attend mass rallies in support of the new dictatorship. It was like during the Nazi occupation, as one student recalled: "The same promises, the same enthusiasm, which rang false, the same discipline of a crowd kept in awe of the machine guns." *Id.* at 320. Once again, listening to foreign radio was outlawed. *Id.* at 321. Concentration camps were established, judicial independence was eliminated, and arbitrary arrest and torture became the norm. *Id.* at 325-26. The Czechoslovak economy was converted to serve the Soviet Union. The same system under the Nazis had been called *Raubwirtschaft* (economy of brigandage). *Id.* at 328. The English word is *kleptocracy* (rule by thieves).

According to the *New York Times* reporter who covered Czechoslovakia during and before the coup, "It seems obvious from the preceding points that the anti-Communists should have organized a paramilitary force. Paramilitary forces are illegal almost by definition and are not a pretty thing, but the non-Communist political parties would have been justified in organizing such a force considering what the communists were doing." Schmidt, at 139.

Although the government had capitulated, popular resistance to the new totalitarian rulers began quickly. In May 1949, a truckload of armed resisters unsuccessfully tried to break into the Litomerice prison and liberate the political prisoners. Schmidt, at 436. The prison liberation was intended to be the signal for a national uprising, for which extensive preparations had been made. However, government spies had infiltrated the resisters and reported the plans. *Id.* at 436-37. Small partisan groups operated in the hills for at least the next two years, but all were eventually destroyed by the Workers' Militia, the police, or the army. *Id.* at 437.

Starting in 1949, a push began to bring the Czechoslovak Catholic church under communist government control. When the bishops defied the government, the government began arresting priests who supported the bishops. The arrests provoked riots in parts of Slovakia. "Peasants armed with clubs, scythes and pitchforks defied the police who arrived in these villages to arrest the priests." Although the peasants had some initial success in driving off the police, the peasants were eventually suppressed by the Workers' Militia. *Id.* at 438.

In 1968, reformers who had worked within the communist system began to allow more freedom of the press, speech, and travel, and to decentralize political authority. The "Prague Spring" reforms, led by Alexander Dubc˘ek, called their program "Socialism with a human face." In August 1968, the Soviet Union led a massive Warsaw Pact invasion of Czechoslovakia, which reimposed a police state. The invasion was an application of the "Brezhnev Doctrine"—the principle of the U.S.S.R.'s then-dictator Leonid Brezhnev that no nation that has become communist may ever adopt a different form of government.

While the invasion was in progress, Brezhnev worried that "various underground radio transmitters and arms caches have been discovered. Today for

instance submachine guns and other arms were found in a cellar of the Ministry of Agriculture." The Prague Spring and the Warsaw Pact Invasion of Czechoslovakia in 1968, at 462 (Gunter Bischof ed. 2010) (App'x 8, notes of Brezhnev conversation of Aug. 23, 1968). But the Czechoslovak army did not resist, heeding the Soviet warnings that if "even a single shot" were fired, the Soviets would "crush the resistance mercilessly." Mark Kramer, *The Prague Spring and the Soviet Invasion in Perspective, in* The Prague Spring, at 48.

In late 1988, the unpopular communist regimes of eastern Europe again faced mass demonstrations and widespread opposition. This time, the Soviet Union, now led by President Mikhail Gorbachev, chose not to intervene militarily. For one thing, the Soviet army was bogged down in an unwinnable war elsewhere, having invaded Afghanistan in 1979. The Soviet satellite regimes crumbled, promptly replaced by democracies—which have been maintained with varying degrees of success. On January 1, 1993, the Czech and Slovak regions amicably separated, becoming two nations: the Czech Republic and the Slovak Republic.

5. Inter-American Convention (CIFTA)

Founded in 1948, the Organization of American States (OAS) includes all independent nations of the Western Hemisphere. Cuba's participation was suspended from 1962 to 2009; although reinstated in 2009, Cuba has chosen not to participate. In 1997, President Clinton signed a gun control treaty that had been negotiated in the OAS, and he transmitted the treaty to the Senate. The Senate has neither ratified it nor held hearings on it.

The treaty is commonly known as "CIFTA," for its Spanish acronym, *Convención Interamericana contra la Fabricación y el Tráfico Ilícitos de Armas de Fuego, Municiones, Explosivos y Otros Materiales Relacionados.* The document is called a "convention" rather than "treaty," because "convention" is a term of art for a multilateral treaty created by a multinational organization. We cover CIFTA in more detail than the other regional treaties, since CIFTA would become the law of the United States if ratified by the Senate.

Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

THE STATES PARTIES, . . .

MINDFUL of the pertinent resolutions of the United Nations General Assembly on measures to eradicate the illicit transfer of conventional weapons and on the need for all states to guarantee their security, and of the efforts carried out in the framework of the Inter-American Drug Abuse Control Commission (CICAD); . . .

RECOGNIZING that states have developed different cultural and historical uses for firearms, and that the purpose of enhancing international cooperation to eradicate illicit transnational trafficking in firearms is not intended to discourage or diminish lawful leisure or recreational activities such as travel or tourism for sport shooting, hunting, and other forms of lawful ownership and use recognized by the States Parties;

RECALLING that States Parties have their respective domestic laws and regulations in the areas of firearms, ammunition, explosives, and other related materials, and recognizing that this Convention does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession, or trade of a wholly domestic character, and recognizing that States Parties will apply their respective laws and regulations in a manner consistent with this Convention;

REAFFIRMING the principles of sovereignty, nonintervention, and the juridical equality of states,

HAVE DECIDED TO ADOPT THIS INTER-AMERICAN CONVENTION AGAINST THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS, AMMUNITION, EXPLOSIVES, AND OTHER RELATED MATERIALS:

Article I

Definitions

For the purposes of this Convention, the following definitions shall apply:

1. "Illicit manufacturing": the manufacture or assembly of firearms, ammunition, explosives, and other related materials:

a. from components or parts illicitly trafficked; or

b. without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or

c. without marking the firearms that require marking at the time of manufacturing.

2. "Illicit trafficking": the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.

3. "Firearms":

a. any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or

b. any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.

4. "Ammunition": the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles that are used in any firearm.

5. "Explosives": any substance or article that is made, manufactured, or used to produce an explosion, detonation, or propulsive or pyrotechnic effect, except:

a. substances and articles that are not in and of themselves explosive; or

b. substances and articles listed in the Annex to this Convention.

6. "Other related materials": any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm. . . .

Article III

Sovereignty

1. States Parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of nonintervention in the domestic affairs of other states.

2. A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State Party by its domestic law.

Article IV

Legislative Measures

1. States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. Subject to the respective constitutional principles and basic concepts of the legal systems of the States Parties, the criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses.

Article V

Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense in question is committed in its territory.

2. Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory.

3. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal.

4. This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law. . . .

Article VII

Confiscation or Forfeiture

1. States Parties undertake to confiscate or forfeit firearms, ammunition, explosives, and other related materials that have been illicitly manufactured or trafficked.

2. States Parties shall adopt the necessary measures to ensure that all firearms, ammunition, explosives, and other related materials seized, confiscated,

or forfeited as the result of illicit manufacturing or trafficking do not fall into the hands of private individuals or businesses through auction, sale, or other disposal. . . .

Article IX

Export, Import, and Transit Licenses or Authorizations

1. States Parties shall establish or maintain an effective system of export, import, and international transit licenses or authorizations for transfers of firearms, ammunition, explosives, and other related materials.

2. States Parties shall not permit the transit of firearms, ammunition, explosives, and other related materials until the receiving State Party issues the corresponding license or authorization.

3. States Parties, before releasing shipments of firearms, ammunition, explosives, and other related materials for export, shall ensure that the importing and in-transit countries have issued the necessary licenses or authorizations.

4. The importing State Party shall inform the exporting State Party, upon request, of the receipt of dispatched shipments of firearms, ammunition, explosives, and other related materials. . . .

Article XI

Recordkeeping

States Parties shall assure the maintenance for a reasonable time of the information necessary to trace and identify illicitly manufactured and illicitly trafficked firearms to enable them to comply with their obligations under Articles XIII and XVII. . . .

Article XIII

Exchange of Information

1. States Parties shall exchange among themselves, in conformity with their respective domestic laws and applicable treaties, relevant information on matters such as:

a. authorized producers, dealers, importers, exporters, and, whenever possible, carriers of firearms, ammunition, explosives, and other related materials;

b. the means of concealment used in the illicit manufacturing of or trafficking in firearms, ammunition, explosives, and other related materials, and ways of detecting them;

c. routes customarily used by criminal organizations engaged in illicit trafficking in firearms, ammunition, explosives, and other related materials;

d. legislative experiences, practices, and measures to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials; and

e. techniques, practices, and legislation to combat money laundering related to illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. States Parties shall provide to and share with each other, as appropriate, relevant scientific and technological information useful to law enforcement, so as to enhance one another's ability to prevent, detect, and investigate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials and prosecute those involved therein.

3. States Parties shall cooperate in the tracing of firearms, ammunition, explosives, and other related materials which may have been illicitly manufactured or trafficked. Such cooperation shall include accurate and prompt responses to trace requests.

Article XIV

Cooperation

1. States Parties shall cooperate at the bilateral, regional, and international levels to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. States Parties shall identify a national body or a single point of contact to act as liaison among States Parties, as well as between them and the Consultative Committee established in Article XX, for purposes of cooperation and information exchange. . . .

Article XVII

Mutual Legal Assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance, in conformity with their domestic law and applicable treaties, by promptly and accurately processing and responding to requests from authorities which, in accordance with their domestic law, have the power to investigate or prosecute the illicit activities described in this Convention, in order to obtain evidence and take other necessary action to facilitate procedures and steps involved in such investigations or prosecutions.

2. For purposes of mutual legal assistance under this article, each Party may designate a central authority or may rely upon such central authorities as are provided for in any relevant treaties or other agreements. The central authorities shall be responsible for making and receiving requests for mutual legal assistance under this article, and shall communicate directly with each other for the purposes of this article. . . .

Article XIX

Extradition

1. This article shall apply to the offenses referred to in Article IV of this Convention.

2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty in force between or among the States Parties. The States Parties undertake to include such

offenses as extraditable offenses in every extradition treaty to be concluded between or among them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.

4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.

6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, the Requested State Party shall submit the case to its competent authorities for the purpose of prosecution under the criteria, laws, and procedures applied by the Requested State to those offenses when they are committed in its own territory. The Requested and Requesting States Parties may, in accordance with their domestic laws, agree otherwise in relation to any prosecution referred to in this paragraph. . . .

Article XXII

Signature

This Convention is open for signature by member states of the Organization of American States.

Article XXIII

Ratification

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article XXIV

Reservations

States Parties may, at the time of adoption, signature, or ratification, make reservations to this Convention, provided that said reservations are not incompatible with the object and purposes of the Convention and that they concern one or more specific provisions thereof.

Article XXV

Entry into Force

This Convention shall enter into force on the 30th day following the date of deposit of the second instrument of ratification. For each state ratifying the Convention after the deposit of the second instrument of ratification, the

Convention shall enter into force on the 30th day following deposit by such state of its instrument of ratification.

Article XXVI

Denunciation

1. This Convention shall remain in force indefinitely, but any State Party may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After six months from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State, but shall remain in force for the other States Parties.

2. The denunciation shall not affect any requests for information or assistance made during the time the Convention is in force for the denouncing State.

Annex

The term "explosives" does not include: compressed gases; flammable liquids; explosive actuated devices, such as air bags and fire extinguishers; propellant actuated devices, such as nail gun cartridges; consumer fireworks suitable for use by the public and designed primarily to produce visible or audible effects by combustion, that contain pyrotechnic compositions and that do not project or disperse dangerous fragments such as metal, glass, or brittle plastic; toy plastic or paper caps for toy pistols; toy propellant devices consisting of small paper or composition tubes or containers containing a small charge or slow burning propellant powder designed so that they will neither burst nor produce external flame except through the nozzle on functioning; and smoke candles, smoke-pots, smoke grenades, smoke signals, signal flares, hand signal devices, and Very signal cartridges designed to produce visible effects for signal purposes containing smoke compositions and no bursting charges.

NOTES & QUESTIONS

1. The CIFTA preamble says that the convention is "not intended to discourage or diminish lawful leisure or recreational activities such as travel or tourism for sport shooting, hunting, and other forms of lawful ownership." Why is there no mention of self-defense? Of resistance to tyranny? The constitutions of OAS members Mexico, Haiti, and Guatemala have a right to arms, with the former two specifically mentioning self-defense. The constitutions of 12 OAS nations expressly recognize self-defense. The constitutions of Argentina, Guatemala, Honduras, and Peru affirm citizens' right and duty to resist unconstitutional usurpations of government power. (National constitutions are in online Chapter 19.A.) Why is recognition of these rights missing from CIFTA?

2. *Firearms destruction*. CIFTA requires that any firearms confiscated from criminals (such as stolen guns) be destroyed, rather than returned to the owner or sold to a licensed firearms dealer. In the United States, it is common for police departments and sheriffs' offices to sell confiscated firearms to federally licensed firearms dealers (federal firearms licensees, or FFLs). The FFLs then resell the

guns to lawful purchasers. Should this practice be outlawed? Does your answer turn on an instinct about whether even small reductions in guns per capita would be socially beneficial? Review the material in Chapter 1 tracking the gun-crime rate and the number of private guns in the United States. Does that material support your intuitions?

3. *Ammunition handloading*. In the United States, millions of people manufacture their own ammunition. As noted in Chapter 3, Americans have long made their own ammunition, but today it is much easier because ammunition components, such as primers and gunpowder, are readily available at retail. Home workshop presses for "handloading" or "reloading" start with an empty, used ammunition shell, and then assemble a new primer, gunpowder, and bullet to create a fresh round of ammunition.

Competitive target shooters are often handloaders. They fire so much ammunition during practice (often tens of thousands of rounds per year) that they cannot afford to use only store-bought ammunition. More important, their custom crafted ammunition, geared precisely to their particular guns, will be more accurate than factory ammunition. Some hunters create custom ammunition tailored to their particular firearm and type of game. Many firearms safety trainers handload especially low-powered ammunition for use in teaching beginners. Another category of handloaders is hobbyists who simply enjoy making things themselves and saving money. The competitive shooter might manufacture more than a thousand rounds of ammunition in a month. The big game hunter might make only 50 or 100 per year.

Handloading is lawful in every U.S. state, and no state requires a specific permit for handloading. CIFTA declares (in art. I, § 1, and art. IV, § 1) that "manufacture or assembly" of ammunition may only take place if the government has issued a license. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) currently issues licenses to companies (or individuals) who manufacture ammunition that will be transferred to another person. Requiring licenses for handloading for personal use would require a major addition of new ATF personnel to process millions of manufacturing license applications. Would changing U.S. laws to comply with CIFTA be good policy?

4. *Manufacturing*. CIFTA not only requires that manufacture of firearms or ammunition be forbidden except under government license. Article I further mandates licensing for the manufacture of "other related materials." These are defined as "any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm." The definition straightforwardly includes all firearms spare parts. It also includes accessories that are attached to firearms, such as scopes, ammunition magazines, sights, recoil pads, bipods, and slings.

Current U.S. law requires a license to manufacture firearms commercially, and "firearm" is defined as the receiver (*see* Ch. 9.C.1; 27 CFR § 478.11 (receiver definition)). No federal license is needed for making other parts of the firearm, such as barrels or stocks, or other firearms accessories, such as scopes, slings, or the like.

The Convention literally requires federal licensing of the manufacturers and sellers of barrels, stocks, screws, springs, and everything else that may be used to make firearms. Likewise, the manufacture of all accessories—for example, scopes, sights, lasers, slings, bipods, and so on—would have to be licensed.

In the United States, the manufacture of an ordinary firearm or ammunition for personal use does not require a license, because the manufacturer licensing requirements apply only to persons who "engage in the business" by engaging in repeated transactions for profit. 18 U.S.C. § 923(a). *But see* 28 U.S.C. §§ 5821-5822 (requiring federal permission and a tax payment for the manufacture of certain firearms, such as machine guns and short-barreled rifles or shotguns, covered by the National Firearms Act). The Convention would require licensing for everyone.

Many, perhaps most, firearm owners tinker with their guns. They may replace a worn-out spring or install a better barrel. Or they may add accessories such as a scope, a laser aiming device, a recoil pad, or a sling. All of these activities would require a government license under CIFTA. The Article I definition of "Illicit manufacturing" is "the manufacture *or assembly* of firearms, ammunition, explosives, *and other related materials*" (emphasis added).

Even if putting an attachment on a firearm were not considered in itself to be "assembly," the addition of most components necessarily requires some assembly. For example, scope bases and rings consist of several pieces that must be assembled. Replacing one grip with another requires, at the least, the use of screws. And in some guns, like the AR-15, replacement of the grip, if done incorrectly, will cause the gun to malfunction. The grip on an AR holds in place a spring and plunger that control the safety selector switch. If the spring and plunger fall out when you remove the grip (they often do), installing a new grip would seemingly constitute assembly.

Because the definition of "manufacturing" is so broad, most gun owners would eventually be required to obtain a manufacturing license. CIFTA itself does not specifically require gun registration (although the CIFTA model legislation, discussed below, does require comprehensive registration). Under current U.S. federal laws, once a person has a manufacturing license, registration comes with it. Existing federal regulations for the manufacturers of firearms and ammunition require that manufacturers keep detailed records of what they manufacture, and these records must be available for government inspection.

Would it be a good idea if handloaders were required to keep records of every round they made, and gun owners had to keep a record of everything they "assembled" (e.g., putting a scope on a rifle)? These records would then presumably be open to warrantless ATF inspection. *See United States v. Biswell*, 406 U.S. 311 (1972) (Ch. 9.C.4.b) (discussing warrantless inspections of federal firearms licensees).

5. *Requirement to change U.S. law?* CIFTA mandates that "States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials. . . . [T]he criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses." Yet the Preamble of CIFTA says: "[T]his Convention does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession, or trade of a wholly domestic character." Mexico, however, has long taken the position that the domestic market is impossible to separate from the international market.

Does the Preamble negate the comprehensive licensing system that CIFTA demands? The exemptions are for "ownership, possession, or trade." There is no exemption for "manufacturing." As detailed above, "manufacturing" is defined broadly enough to include the home manufacture of ammunition, as well as repair of one's firearm, or assembling an accessory for attachment to one's firearm.

The nations that have ratified CIFTA so far have not fully implemented the literal requirements regarding firearms and related material manufacturing. It is hardly unusual for nations to make a show of ratifying a treaty but then do little to carry out the treaty's requirements.

6. *CIFTA as a basis for executive branch regulations.* If the CIFTA Convention received the advice and consent of the Senate, it would become the law of the land, on equal footing with congressional enactments and second only to the Constitution. Would the ATF then be empowered to write regulations implementing the Convention — without waiting for Congress to pass a new statute? Would any of the regulations necessary to implement CIFTA raise Second Amendment questions under *District of Columbia v. Heller*, 544 U.S. 570 (2008) (Ch. 11.A)?

A "self-executing" treaty is an independent source of authority for domestic regulations. Under traditional views of international law, CIFTA is not self-executing, because it anticipates that ratifying governments will have to enact future laws in order to comply.

On the other hand, CIFTA does not explicitly disclaim self-executing status. Harold Koh, former Legal Adviser to the U.S. Department of State, has challenged the doctrine of "so-called self-executing treaties" and argues that the Supreme Court decisions creating the doctrine are incorrect. In other words, Koh argues that all treaties should be presumed to be self-executing. *See* Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1111 & n.114 (2002); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 666 (1998); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2658 n.297 (legislatures "should ratify treaties with a presumption that they are self-executing"), 2360-61, 2383-84 (1991).

Would it be better if treaties ratified by the Senate automatically had the same force as federal statutes and automatically authorized relevant administrative agencies to promulgate regulations?

7. Would Senate ratification of CIFTA trump the 2005 Protection of Lawful Commerce in Arms Act (Ch. 9.E), which outlaws most lawsuits against firearm manufacturers and stores that comply with all gun controls and that sell properly functioning firearms?

Suppose that the Senate, when ratifying CIFTA, added specific reservations that CIFTA is not self-executing, that CIFTA authorizes no additional regulations, and that CIFTA does not authorize any new lawsuits. Could the U.S. executive branch properly ignore the reservations? Regarding a Senate reservation to another treaty, Koh wrote, "Many scholars question persuasively whether the United States declaration has either domestic or international legal effect." Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1828-29 n.24 (1998).

8. *Freedom of speech.* The anti-counseling provision in CIFTA article IV(2) is very broad. In some of the signatory foreign dictatorships, such as Venezuela or Cuba, it is illegal for a citizen of the country to say that fellow citizens should arm

themselves for defense against government violence. Presumably CIFTA's effect on speech within the tyrannized nation would be minimal, since the tyrants already repress speech without need to cite CIFTA. However, CIFTA's anti-counseling rules apply in any ratifying nation. So, for example, if the U.S. ratified, speech within the United States that urged the armed overthrow of the Venezuelan dictatorship would be illegal, whether that speech were made by a Venezuelan exile or by an American. Pursuant to CIFTA, the U.S. government would be required to extradite the speaker for prosecution in Venezuela. *See* Theodore Bromund, Ray Walser & David B. Kopel, *The OAS Firearms Convention is Incompatible with American Liberties*.[30]

9. *Freedom of association.* Some persons have urged that the National Rifle Association be prosecuted as a terrorist organization. Under CIFTA article IV, could the NRA be prosecuted if it urged people not to comply with CIFTA—for example, urging people to carry on with their traditional home gunsmithing without obtaining the license that CIFTA requires? Under the First Amendment, the traditional rule is that speech advocating the commission of a crime can only be prosecuted when there is danger of imminent lawless action—for example, urging an angry mob to attack a nearby individual. When circumstances allow for reflection rather than imminent action (e.g., when the communication is delivered via a book), prosecution is not permitted. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

10. *CIFTA model legislation.* The OAS had drafted model legislation for the implementation of CIFTA, including Model Legislation on the Marking and Tracing of Firearms (Apr. 19, 2007); Draft Model Legislation and Commentaries on Legislative Measures to Establish Criminal Offenses (May 9, 2008); Broker Regulations (Nov. 17-20, 2003). All are available at http://www.oas.org.

The CIFTA models criminalize any "unauthorized" acquisition of firearms or ammunition. Respecting the seizure of any "illicit" firearms or ammunition, the model legislation states that courts "shall issue, at any time, without prior notification or hearing, a freezing or seizure order." The recommended prison term for any unauthorized firearm or ammunition is from one to ten years.

"Arms brokers" are defined as anyone who "for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition." This is broad enough to include a hunting guide who arranges that the local gun store have suitable ammunition on hand for his clients.

Arms brokers must have a license from the national government. A broker must file annual reports with the government specifying exactly what arms and ammunition he brokered, and to whom. A broker's records are subject to government inspection without need for a warrant.

Pursuant to the CIFTA model, governments must register all guns and their owners: "The name and location of the owner and legal user of a firearm and each subsequent owner and legal user thereof, when possible." In addition, people who do not own a gun, but who use it (e.g., borrowing a friend's gun to go hunting), must also register: "The name and location of the owner and legal user of a firearm and each subsequent owner and legal user thereof, when possible."

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30. Heritage Foundation, Backgrounder. No. 2412, May 19, 2010.

Which elements of the CIFTA model laws would be appropriate for adoption in the United States?

11. *Asian cooperation.* Unlike the Western Hemisphere, Europe, or Africa, the continent of Asia has no regional gun control conventions. However, the Association of Southeast Asian Nations (ASEAN) does promote regional cooperation against illicit trade. Various forms of cooperation, and their limited efficacy to date, are examined in A.K. Fidelia Syahmin, *The International Cooperation to Eradicate Illicit Firearms Trafficking in Southeast Asian Region*, 2 Sriwijaya L. Rev. 183 (July 2018).

C. CLASSICAL INTERNATIONAL LAW

International law in some form can be found in ancient times, such as in the Roman Law concept of *jus gentium* (laws that are found among all peoples), or in the first true international legal code, the Rhodian Law, which was promulgated by the rulers of the island of Rhodes, in the eastern Mediterranean Sea. The Rhodian Law was the earliest maritime code, and was put into its final form between 600 and 800 A.D. The Rhodian Law extended far beyond the boundaries of the island of Rhodes and was the widely accepted international law for the thriving maritime trade of the eastern Mediterranean.[31]

But international law in the sense that we understand it today was created during the Age of Discovery and the Enlightenment, in what is now called the Classical Period in international law. At that time, influential scholars wrote treatises about the obligations of civilized nations, and these treatises were often accepted by national governments as authoritative statements of binding law. The treatises covered a variety of issues, such as rules for the treatment of ambassadors, and for maritime trade and navigation. The preeminent concern, however, was the law of war. These treatises prohibited making war against civilians, killing prisoners, and attacking without provocation for the purpose of conquest. The laws of war were derived by deduction from the principles of personal self-defense. For example, a person has the right to use force to defend herself against a violent attacker, but if she subdues the attacker and ties him up so that he is no longer a threat, then she may not kill the attacker. Similarly, once an enemy soldier is taken prisoner, he must not be killed.

The treatises were works of moral and political philosophy. Because they attempted to elucidate the laws that must necessarily apply to all nations, they started with natural law, which by definition is found everywhere. (See the Index entry on "Natural rights" for discussion of natural law in the printed textbook.) Starting from first principles, including the natural rights of self-defense, the treatises examined topics such as when forcible resistance to tyranny was legitimate,

31. Notably, the Rhodian Law recognized personal self-defense: "Sailors are fighting and *A* strikes *B* with a stone or log; *B* returns the blow; he did it from necessity. Even if *A* dies, if it is proved that he gave the first blow whether with a stone or log or axe, *B*, who struck and killed him, is to go harmless; for *A* suffered what he wished to inflict." Walter Ashburner, The Rhodian Sea Law 84 (Walter Ashburner ed., 2001).

or whether invading another country to liberate its people from a tyrant could be lawful.

All of the authors discussed below were very influential in their own time, and for centuries afterward. In Protestant Europe and its American colonies, the ideas of two leading Catholic authors, Vitoria and Suárez, were mainly known through restatement by Protestant writers, such as Grotius, Pufendorf, and Vattel. In the American Founding Era, Vattel was generally treated as the authoritative standard of international law. For example, after the French Revolution executed King Louis XVI, President Washington's administration had to decide whether the 1778 Franco-American treaty of friendship was still binding even after the change in France's government. Based on Vattel, the Washington administration concluded that the treaty was no longer binding, and so the administration proclaimed American neutrality in France's new war with Great Britain. Noah Feldman, The Three Lives of James Madison 373 (2017).

You may find that the attitudes expressed toward arms and to individual self-defense in these Classical international law materials differ markedly from the attitude implicit in some of materials excerpted in the other Parts of this Chapter.

The narrative below, describing the authors and their treatises, is based on David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. L. 43 (2008). Additional citations can be found therein. For some authors, we provide links to English translations of the works; these translations are not necessarily the same as the English translations used in the Kopel, Gallant, and Eisen article, so there may be small differences in wording.

1. Francisco de Vitoria

During the sixteenth century, the higher education system of Spain was the greatest in the world, and the greatest of the Spanish universities was the University of Salamanca. At Salamanca, as at other universities, the most prestigious professorship was head Professor of Theology—a position that included the full scope of ethics and philosophy.

When the Primary Chair in Theology at the University of Salamanca became open in 1526, Francisco de Vitoria (1486-1546) was selected to fill it. He was chosen, in accordance with the custom of the time, by a vote of the students. One of Vitoria's biographers observed, "It is no slight tribute to democracy that a small democratic, intellectual group should have chosen from among the intellectuals the one person best able to defend democracy for the entire world." James Brown Scott, The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations 73 (1934).

Like Thomas Aquinas (online Ch. 21.C.3.c), Vitoria came from the Dominican Order of monks, which governed itself through democratic, representative procedures established in the Order's written constitution. Between the destruction of the Roman Republic by Julius Caesar in the first century B.C. (online Ch. 21.B.2.b) and the founding of the Dominicans in the thirteenth century A.D., the Western world had very little experience with functional, enduring systems of democratic

government. The Dominican Order served as one of the incubators of democracy for the modern world.[32]

University lectures were open to the public, and Vitoria attracted huge audiences of students and laymen. He quickly became known as the best teacher in Spain. He was the founder of the School of Salamanca, a group of Spanish scholars who applied new insights to the Scholastic system of philosophy. (Scholasticism, a dialectical methodology for academic inquiry, had been developed centuries before by Thomas Aquinas and other scholars. *See* online Ch. 21.C.3.)

Vitoria had been educated in Paris and was part of a continent-wide community of Dominican intellectuals. Accordingly, Vitoria was an internationalist. One biographer summarized, "Vitoria was a liberal. He could not help being a liberal. He was an internationalist by inheritance. And because he was both, his international law is a liberal law of nations." Scott, at 280.

Francisco de Vitoria's classroom became "the cradle of international law." "Vitoria proclaimed the existence of an international law no longer limited to Christendom but applying to all States, without reference to geography, creed, or race." *Id.*

The Spanish conquest of the New World impelled the sixteenth century's scholarly inquiry into international law. Many Spaniards were concerned with whether the conquests were moral and legal. The debate led to Francisco de Vitoria's 1532 treatise, *De Indis* (On the Indians). The first two sections of the treatise rejected every argument that Christianity, or the desire to propagate the Christian faith, or even the express authority of the Pope, could justify the conquest of the Indians. Vitoria wrote that heretics, blasphemers, idolaters, and pagans—including those who were presented with Christianity and obstinately rejected it—retained all of their natural rights to their property and their sovereignty.

In section three, Vitoria examined other possible justifications for the conquest. He argued in favor of an unlimited right of free trade. If a Frenchman wanted to travel in Spain, or to pursue peaceful commerce there, the Spanish government had no right to stop him. Similarly, the Spanish had the right to engage in commerce in the New World. A Frenchman had the right to fish or to prospect for gold in Spain (but not on someone's private property), and the Spanish had similar rights in the New World. If the Indians attempted to prevent the Spanish from engaging in free trade, then the Spanish should peacefully attempt to reason with them. Only if the Indians used force would the Spanish be allowed to use force, "it being lawful to repel force with force."[33]

Vitoria also argued for a duty of humanitarian intervention, because "innocent folk there" were victimized by the Aztecs' "sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes." (Indeed, the Spanish conquest of Mexico was only possible because so many other Mexican

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32. The Catholic Benedictine Order, governed by the Rule of St. Benedict (sixth or seventh century A.D.), also had democratic elements, such as the election of the abbot by all the monks. Vitoria's name is sometimes spelled "Vittoria" or "Victoria."

33. For the Roman law principle that Vitoria quoted, see online Chapters 21.B.2.e, C.3.a, C.3.c, D.2.a; Edward Coke, Institutes of the Laws of England (Ch. 2.E Note 3); S.C. Const. pmbl. (1776) (Ch. 4.D.1).

tribes were tired of being used as the main protein source for the Aztecs, and so they allied with the Spanish in war against the Aztecs.) The principle of humanitarian intervention against human sacrifice and other atrocities was not limited to Spaniards and Aztecs; it was universally applicable.

Although Spanish title in the New World could be legitimately defended, according to Vitoria, Spain's subsequent abuses of the Indians could not. As Vitoria put it, "I fear measures were adopted in excess of what is allowed by human and divine law." He wrote on another occasion that the pillage of the Indians had been "despicable," and the Indians had the right to use defensive violence against the Spaniards who were robbing them.

Vitoria produced a follow-up treatise, commonly known as *On the Law of War*, examining the lawfulness of Spanish warfare in the New World, as measured by international legal standards of war. The treatise explained various reasons why personal and national self-defense are lawful. One reason is that a contrary rule would put the world in "utter misery, if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate upon them."

His "first proposition" was:

> Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force. Hence, any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.

From the first proposition about personal self-defense, Vitoria derived his second proposition: "Every state has authority to declare war and to make war" in self-defense. State self-defense is broader than personal self-defense, because personal self-defense is limited to immediate response to an attack, whereas a state may act to redress wrongs from the recent past.

The personal right to self-defense was used to derive humanitarian restrictions on war. Vitoria examined whether, in warfare between nations, it is lawful to deliberately kill innocent noncombatants. He explained such killings could not be just, "because it is certain that innocent folk may defend themselves against any who try to kill them." Because self-defense by innocents is just, the killing of innocents is unjust. "Hence it follows that even in war with Turks it is not allowable to kill children. This is clear because they are innocent. Aye, and the same holds with regard to the women of unbelievers."

Vitoria thus held that international law protected everyone, not just Christians, because the basic moral principles that underpinned international law applied globally. He was likewise at the forefront in insisting that the same moral rules that applied to ordinary individuals also applied to the great and the powerful, including governments. Vitoria was the world's most renowned scholar urging humanitarian limits on war. The moral principle he used to derive those humanitarian limits was the personal right of self-defense.

In other writings, Vitoria directly connected the right of self-defense to a right of defense against tyranny—either in a personal or in a political context. Thus, a child has a right of self-defense against his own father if the father tried to kill him. Analogously, a subject may defend himself against a murderous king; and people

may even defend themselves against an evil pope. Likewise, innocent Indians or Muslims may defend themselves against unjust attacks by Christians.

NOTES & QUESTIONS

1. Vitoria, like other classical authors, carefully examined the similarities and distinctions between "private war" (use of force by an individual) and "public war" (use of force by a government). In this Section C, observe the many situations where the rules for private war and public war are the same, and the exceptions where there is more latitude in one or the other.

2. In the years before the ratification of the Second Amendment in 1791, there are many documents that use "bear arms," or "bearing arms," or similar phrases in conjunction with "war" or similar words. In context, some of these documents are plainly about military combat, while others are more general. In interpreting the Second Amendment, some persons argue that any phrase such as "bear arms in war" must indicate that the Second Amendment's "bear arms" refers only to militia service, since militias fight wars. However, the militia-only argument overlooks the long-standing usage in Western thought, including by the scholars excerpted in Section C, of using "war" to include personal self-defense.

3. If Vitoria is correct that personal self-defense is the basis for the legitimacy of defensive state warfare, does a state that forbids personal self-defense forfeit its legitimacy to engage in warfare? A state that forbids the practical tools for self-defense?

4. Vitoria strongly believed in commerce as a human right and said that a Frenchman had a right to travel to Spain to engage in trade. Similarly, a Spaniard had a right to travel to the Aztec Empire in Mexico to engage in trade there. Do you agree that commerce is a human right? If it is, can the would-be traveler use force as a last resort against attempts to exclude him?

2. Francisco Suárez

Francisco Suárez (1548-1617) was appointed to a chair in philosophy at the University of Segovia at the age of 23. During his career, he taught at Salamanca, in Rome, and at the University of Coimbra (in Portugal). Suárez wrote 14 books on theological, metaphysical, and political subjects, and was widely recognized as a preeminent scholar of his age, and a founder of international law.

Self-defense is "the greatest of rights," wrote Suárez. It was a right that no government could abolish, because self-defense is part of natural law. The irrevocable right of self-defense has many important implications for civil liberty. A subject's right to resist a manifestly unjust law, such as a bill of attainder,[34] is based on the right of self-defense.

Similarly, as a last resort, an individual subject may kill a tyrant, because of the subject's inherent right of self-defense, by "the authority of God, Who has granted

34. A legislative act declaring a person guilty of treason or another crime without a trial. Prohibited by U.S. Const. art. I, § 9 cl. 3 (federal) & § 10 cl. 1 (state).

to every man, through the natural law, the right to defend himself and his state from the violence inflicted by such a tyrant."

Unlike some moderns, Suárez did not assume that "the state" was identical to "the government."[35] Rather, the state itself could exercise its right of "self-defence" to depose violently a tyrannical king, because of "natural law, which renders it licit to repel force with force." The principle that "the state" had the right to use force to remove a tyrannical government was consistent with Suárez's principle that a prince had just power only if the power was bestowed by the people.

Like the other founders of international law, Suárez paid particular attention to the laws of war. The legitimacy of state warfare is, according to Suárez, derivative of the personal right of self-defense, and the derivation shows why limits could be set on warfare. Armed self-defense against a person who is trying violently to take one's land is "not really aggression, but defence of one's legal possession." The same principle applies to national defense—along with the corollary (from Roman law (online Ch. 21.B.2) that the personal or national actions be "waged with a moderation of defence which is blameless" (that is, not grossly disproportionate to the attack)).

For the individual and for the state, defense against an aggressor is not only a right, but a duty—such as for a parent, who is obliged to defend her child:

> Secondly, I hold that defensive war not only is permitted, but sometimes is even commanded. This first part of this proposition . . . holds true not only for public officials, but also for private individuals, since all laws allow the repelling of force with force. The reason supporting it is that the right of self-defence is natural and necessary. Whence the second part of our proposition is easily proved. For self-defence may sometimes be prescribed [i.e., mandated], at least in accordance with the order of charity. . . . The same is true of the defence of the state, especially if such defence is an official duty. . . .

Francisco Suárez, De Triplici Virtute Theologica, Fide, Spe, et Charitate (1621) (On the Three Theological Virtues, Faith, Hope, and Charity), *in* 2 Selections from Three Works of Francisco Suárez, S.J. 802-03 (Gwladys L. Williams ed., 1944) (Disputation 13, § 1.4).

While Suárez (like Vitoria) was a member of a Catholic religious order, he was extremely influential on Protestant writers. The eminent British historian Lord Acton wrote that "the greater part of the political ideas" of John Milton and John Locke "may be found in the ponderous Latin of Jesuits who were subjects of the Spanish Crown . . ." such as Suárez. John Dalberg Acton, The History of Freedom

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35. The author of the first American dictionary of the English language agreed. "State" meant "[a] political body, or body politic; the whole body of people united under one government, whatever may be the form of government. . . . More usually the word signifies a political body governed by representatives. . . . In this sense, state has some times more immediate reference to government, sometimes to the people or community." 2 Noah Webster, An American Dictionary of the English Language 80 (1828); *see also District of Columbia v. Heller*, 554 U.S. 570, 597 ("the phrase 'security of a free State' and close variations seem to have been terms of art in eighteenth-century political discourse, meaning a 'free country' or free polity") (citing Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1, 5 (2007)).

and Other Essays 82 (1907). Suárez was also a major influence on Grotius, who is discussed next.

NOTES & QUESTIONS

1. Suárez's last book, *De Defensio Fidei Catholicae Adversus Anglicanae Sectae Errores* (Defense of the Catholic Faith against the Errors of the Anglican Sect), was published in 1613. It directly challenged the English King James I's assertion of divine right (Ch. 2.H.1). *De Defensio* was publicly burned in London in 1614. Suárez's advocacy of the right of revolution was so powerful that the Catholic Parliament in Paris burned the book the same year. Do governments have the legitimate power to suppress books arguing for a right of revolution? Does it depend on the government and other circumstances?

2. Modern Spanish law on self-defense is detailed in M. Luzón Peña, Aspectos Esenciales de la Legítima Defensa (Julis César Faria ed., Buenos Aires 2d ed. 2006) (1978). Self-defense is a justification, not a mere excuse, and is immune from any criminal or civil liability. In some situations, the defense of third persons may be a legal duty. *Id.* at 526-27; Código Penal (Criminal Code), art. 20, § 4 (anyone acting in defense of their own rights or of a third person; illegitimate aggression is presumed from illegal entrance into a dwelling; the means used for defense must be rational; defender must not have sufficiently provoked the attacker), 118 (no civil liability).

3. Hugo Grotius

The Dutch scholar Hugo Grotius (1583-1645) was a child prodigy who enrolled at the University of Leiden when he was 11 years old. Hailed as "the miracle of Holland," he wrote more than 50 books, and "may well have been the best-read man of his generation in Europe." David B. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 Emory Int'l L. Rev. 1, 4-6 (1996).

As the 2005 edition of his 1625 masterpiece *The Rights of War and Peace* puts it, the book has "commonly been seen as the classic work in modern public international law, laying the foundation for a universal code of law." Or as international legal scholar George B. Davis wrote in 1900, the book was "the first authoritative treatise upon the law of nations, as that term is now understood." George B. Davis, The Elements of International Law 15 (2d ed. 1900). "It was at once perceived to be a work of standard and permanent value, of the first authority upon the subject of which it treats," said Davis. A 1795 author explained, "in about sixty years from the time of publication, it was universally established in *Christendom* as the true fountain-head of the *European* Law of Nations." Robert Ward, An Enquiry into the Foundation of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius 621 (1795). In short, "it would be hard to imagine any work more central to the intellectual world of the Enlightenment," writes Richard Tuck, in his Introduction to the 2005 edition of Grotius. Richard Tuck, *Introduction* to 1 Hugo Grotius, The Rights of War and Peace at xi (Richard Tuck ed., Liberty Fund

2005) (reprint of 1737 English translation by John Morrice of the 1724 annotated French translation by Jean Barbeyrac) (1625).[36]

During the sixteenth century, there were 26 editions of the original Latin text, as well as translations into French, English, and Dutch. The next century saw 20 Latin editions, and multiple editions in French, English, Dutch, German, Russian, and Italian.

The purpose of *The Rights of War and Peace* was to civilize warfare, especially to protect noncombatants from attack. To do so, Grotius started with the right of personal defense. As Grotius observed, even human babies, like animals, have an instinct to defend themselves. Moreover, self-defense was essential to social harmony, for if people were prevented from using force against others who were attempting to take property by force, then "human Society and Commerce would necessarily be dissolved."

After listing numerous examples from Roman law and the Bible, in which personal self-defense and just war were approved, Grotius declared that "[b]y the Law of Nature then, which may also be called the Law of Nations," some forms of national warfare were lawful, as was personal warfare in self-defense. The rationale for both was succinctly expressed in the Roman maxim: "It is allowed to Repel Force by Force." Examples of personal and national use of force were woven together seamlessly, for the same moral principles applied to both.

Grotius classified "Private War" (justifiable individual self-defense) and "Public War" (justifiable government-led collective self-defense) as two types of the same thing. Regarding personal self-defense:

> We have before observed, that if a Man is assaulted in such a Manner, that his Life shall appear in inevitable Danger, he may not only make *War* upon, but very justly *destroy* the *Aggressor*; and from this Instance which every one must allow us, it appears that such a *private* War may be *just* and *lawful*. It is to be observed, that this *Right of Self-Defence*, arises directly and immediately from the Care of our own Preservation, which *Nature* recommends to every one. . . .

Relying on the Scholastic philosopher Thomas Aquinas (online Ch. 21.C.3.c), Grotius explained that defensive violence is based on the intention of self-preservation, not the purpose of killing another.

Self-defense is appropriate not just to preserve life, but also to prevent the loss of a limb or member, rape, and robbery: "I may shoot that Man who is making off with my Effects, if there's no other Method of my recovering them." To this discussion, Jean Barbeyrac — Grotius's most influential translator and annotator — added the footnote: "In Reality, the Care of defending one's Life is a Thing to which we are obliged, not a bare Permission." (The Barbeyrac edition was the standard in American colonies. See Chapter 2.K.4 for John Adams's lengthy verbatim reliance on Barbeyrac in a newspaper essay arguing for the American right of revolution. See Section C.4, discussing Samuel von Pufendorf, for more on Barbeyrac's influence.)

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36. The Liberty Fund's Online Library of Liberty offers many free, modern editions of classic works of liberty, including Grotius.

"What we have hitherto said, concerning the Right of defending our *Persons* and *Estates*, principally regards private Wars; but we may likewise apply it to publick Wars, with some Difference," Grotius explained. Grotius then noted various differences; for example, personal wars (that is, individual violence) are only for the purpose of self-defense, whereas public wars (those undertaken by a nation) could have the additional purposes "of revenging and punishing Injuries."

The Italian writer Alberico Gentili (1552-1608) had argued that a nation could attack another nation if the former feared the growing power of the latter. Diego Panizza, *Political Theory and Jurisprudence in Gentili's De Iure Belli: The Great Debate Between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius* 20 (NYU Institute for International Law and Justice, Working Paper No. 2005/15, 2005). Grotius called Gentili's doctrine "abhorrent to every principle of equity." Grotius's counter-argument was the national self-defense restrictions that come directly from the rules of personal self-defense.

Grotius also wrote that victorious warriors must not abuse the bodies of the dead. As Barbeyrac elaborated, there is no legitimate purpose in mutilating the dead, because "this is of no Use either for our Defence, the Support of our Rights, or in Word for any lawful End of War."

While Grotius approved only in rare circumstances of a people carrying out a revolution against an oppressive government, he did argue that other nations have a right and a moral obligation to invade and liberate nations from domestic tyranny. Barbeyrac's footnotes in these sections, and elsewhere in the book, argued for a much broader right of revolution.

Several years before writing *The Rights of War and Peace*, Grotius penned *The Free Sea* (*Mare Librum*), which was a foundational book of maritime law, and hence of international law. In *The Free Sea*, he argued that natural law is immutable, and cannot be overturned by governments. Suárez had made the same point explicitly, and the principle is implicit in most of the other Classical founders of international law.

NOTES & QUESTIONS

1. Do you agree with Grotius that a people would never enter into a social compact if the price were to surrender their right of resisting an unjust and violent government? If given the choice at the start of a new political system, would you give up that right? Under what conditions? Does it depend on how bad you perceive the alternative "state of nature" to be? What if during an agreed "trial period," the new social compact produced order and prosperity? What about the generations that come after you: should they also have a trial period?

2. Grotius allowed a nation to wage public war for "revenging and punishing Injuries," but individuals were forbidden to engage in private war for the same purposes. What are the best rationales for the distinction? How can a nation have rights greater than the collective rights of all the individuals who comprise the nation? If private war for revenge and punishment were lawful, what challenges would be presented to today's legal systems?

4. Samuel von Pufendorf

The Swedish scholar Samuel von Pufendorf (1632-94) was the first person appointed as a professor of the law of nations at the University of Heidelberg. The position was created explicitly to allow Pufendorf to teach Grotius's text. Pufendorf also served as a counselor to the King of Sweden and the King of Prussia. In 1672, he published the eight-volume magnum opus, *Of the Law of Nature and Nations*. It was instantly recognized as a work of tremendous importance and was published in many editions all over Europe. "[T]he two works [of Grotius and Pufendorf] together quickly became the equivalent of an encyclopedia of moral and political thought for Enlightenment Europe." Richard Tuck, *Introduction* to the 2005 edition of Grotius, *supra*.

Pufendorf advanced the theories of Grotius, while also incorporating ideas of later philosophers such as John Locke and Thomas Hobbes. Pufendorf was not the first to argue that international law applied beyond the relations of Christian nations with each other, but his overriding concern for the common human community made the theme especially important in his book. Pufendorf (born in the middle of Europe's devastating Thirty Years War, 1618-48) was, like Grotius, greatly interested in restraining warfare, but Pufendorf painted on a broader canvas. As he pondered how the global community might live together more peaceably, he also considered how individuals could live together successfully in society. Repeatedly he argued that the right, duty, and practice of self-defense—at the personal level and at the national level—are essential for the preservation of society, both locally and globally.

Pufendorf's treatise grew even more influential after the 1706-07 publication of a French translation by the French lawyer Jean Barbeyrac (1674-1744), which was supplemented by Barbeyrac's own copious notes and commentary. Barbeyrac, who was a professor of law at Groningen University, in the Netherlands, and a member of the Royal Academy of Sciences in Berlin, also produced an annotated French version of Grotius in 1724. Grotius and Pufendorf had already been translated into many languages in dozens of editions. Now, the Barbeyrac editions themselves were also translated all over Europe and soon became the most popular editions. Grotius and Pufendorf, as translated and annotated by Barbeyrac, remained the preeminent authorities on international law for centuries afterward.

Pufendorf followed Thomas Hobbes's theory that states are imbued with the same qualities as are individual persons and are governed by the same precepts of natural law. "Law of nature" was the term used when referring to individuals, and this same law, when applied to states, was called the "law of nations."

In contrast to the pessimistic spirit of Hobbes, Pufendorf thought that humans had a natural inclination toward peaceful cooperation: "Tis true, Man was created for the maintaining of Peace with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, do primarily tend towards the Constitution and Preservation of this universal safety and Quiet."

Self-defense is an essential foundation of society, for if people did not defend themselves, then it would be impossible for people to live together in a society. Not to use forceful defense when necessary would make "honest Men" into "a ready Prey to Villains." "So that, upon the whole to banish *Self-defence* though pursued by

Force, would be so far from promoting the Peace, that it would rather contribute to the Ruin and Destruction of Mankind."

Pufendorf denied "that the *Law of Nature*, which was instituted for a Man's Security in the World, should favor so absurd a Peace as must necessarily cause his present Destruction, and would in fine produce any Thing sooner than *Sociable* life." Likewise:

> But what Possibility is there of my living at Peace with him who hurts and injures me, since Nature has implanted in every Man's Breast so tender a concern for himself, and for what he possesses, that he cannot but apply all Means to resist and repel him, who either respect attempts to wrong him.

Pufendorf explained that there is much broader latitude for self-defense in a state of nature[37] than in civil society; preemptive self-defense is disfavored in society, but not in a state of nature.

However, Pufendorf continued, even civil society does not forbid imminent preemption in circumstances in which the victim has no opportunity to warn the authorities first: "For Example, if a Man is making towards me with a naked Sword and with full Signification of his intentions toward me, and I at the same time have a Gun in my Hand, I may fairly discharge it at him whilst he is at a distance. . . ." Similarly, a man armed with a long gun may shoot an attacker who was carrying a pistol, even though the attacker is not yet within range to use his pistol.

Making the same point as Justice Oliver Wendell Holmes, who in 1921 would write that "detached reflection is not required and cannot be demanded in the presence of an uplifted knife," *Brown v. United States*, 256 U.S. 335, 343 (1921) (Ch. 7.J.1), Pufendorf wrote that "it is scarce possible that a Man under so terrible Apprehension should be so exact in considering and discovering all Ways of Escape, as he who being set out of the danger can sedately deliberate on the Case." Thus, while a person should safely retreat rather than use deadly force, Pufendorf recognized that safe retreat is often impossible. Nor is there any requirement that a defender use arms that are not more powerful than the arms of the aggressor:

> As if the Aggressors were so generous, as constantly to give notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have the Leisure to furnish themselves in like manner for the Combat. Or if these Rencounters[38] we were to act on our Defence by the strict Rules of the common Sword Plays and Tryals of Skill, where the Champions and their Weapons are nicely match'd and measur'd for our better Diversion.

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37. A "state of nature" is *not* the same as "natural law." The "state of nature" is the philosophical term for the conditions that exist before people choose to enter into society together. "Natural law" is usually used by the Classical international law writers to mean a set of principles that are found in all human societies. (See Gratian's treatise in online Chapter 21.C.3.a for some examples.) Natural law includes certain natural rights, such as the right to the fruits of one's labor. In the Classical view, the reason why people choose to leave a state of nature, enter into society, and create a government, is that society and government are the organizations by which people can collectively protect their natural rights. This view is expressed in paragraph 2 of the U.S. Declaration of Independence (Ch. 4.B.5).

38. [An unexpected and hostile meeting.—Eds.]

Self-defense, using lethal force if necessary, is permissible against a nondeadly aggressor who would maim the victim, or who would inflict other less-than-lethal injuries.

> For what an age of Torments should I undergo, if another Man were allow'd perpetually to lay upon me only with moderate Blows, whose Malice I could not otherwise stop or repel, than by compassing his Death. Or if a Neighbour were continually to infest me with Incursions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For since the chief Aim of every human *Socialness* is the Safety of every Person, we ought not to fansy in it such Laws, as would make every good and honest Man of necessity miserable, as often as any wicked Varlet[39] should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men on so destructive a Bottom as the Necessity of enduring Wrongs.

Lethal force in self-defense is also permissible to prevent rape or assault, And likewise to prevent robbery: "[I]t is clearly evidence that the Security and Peace of Society and of Mankind could hardly subsist, if a Liberty were not granted to repel by the most violent Courses, those who come to pillage our Goods. . . ."

What if one person attacks another's *honor*—such as by boxing his ears, a degrading, but not physically dangerous, affront? Pufendorf acknowledged that in a state of nature there is a limitless right to redress any attack, but he insisted that in a civil society, the proper recourse in case of an insult or an attack on honor is to be found in resort to the courts, not in deadly force. It should be remembered that Pufendorf was writing at a time when the educated gentlemen of Europe often killed each other in duels because one man had insulted another's honor. Pufendorf's strict rule denying that deadly force could be used in defense of honor was one aspect of his broader view that self-defense was properly made for the repose, safety, and sociability of society.

Pufendorf also rejected the view that self-defense could be forbidden because it is a form of punishing criminals, and the prerogative of punishment belongs exclusively to the state. Pufendorf agreed that genuine punishment—for retribution, after a crime had been completed—was, in a civil society, exclusively a state function. "But Defence is a thing of more ancient date than any Civil Command. . . ." Accordingly, no state could legitimately forbid self-defense.

The chapter "Of the Right of War" began, with a detailed restatement of the natural right of personal self-defense. Then, following the methodology of the other Classical international law scholars, Pufendorf extrapolated from the fundamental principles of self-defense the broader rules of national warfare, including the requirement of Just Cause, prohibitions on attacks on noncombatants, prohibitions on the execution of prisoners, prohibition on wanton destruction of property, limitations on what spoils might be taken in war, and similar humanitarian restrictions.

Pufendorf had argued that a victim has a right to defend himself against an aggressor even if the aggressor might not have a fully formed malicious intent (such as

39. [A rascal.—Eds.]

if the aggressor were insane). Barbeyrac agreed and applied the example specifically to a prince, who through self-indulgence in his own violent fits of anger, or through excessive drink, formed a transient but passionate determination to take a subject's life. Barbeyrac held that "we have as much Right to defend ourselves against him, as if he acted in cold Blood." He suggested that the behavior of future rulers would be improved if subjects did not meekly submit to a ruler's murderous fits of temper.

More generally, Pufendorf described the right of resisting a tyrant as another application of the right of self-defense. If the ruler makes himself into a manifest danger to the people, then "a People may defend themselves against the unjust Violence of the Prince."

Pufendorf acknowledged the argument that, in a state, it might be illegal for anyone to call "that the Subjects have to take up Arms against the chief Magistrate; since no Mortal can pretend to have a Jurisdiction" over a sovereign. Pufendorf denied that self-defense — including collective self-defense against barbarous domestic tyranny — is dependent on either jurisdiction or a lawful call: "As if Defence were the Effect of Jurisdiction! Or, as if he who sets himself to keep off an unjust Violence, which threatens his Life, has any more need of a particular Call, than he who is about to fence against Hunger and Thirst with Meat and Drink!"

Pufendorf repeated with approval Grotius's analysis that a people would never enter into a social compact if the price were to surrender their right of resisting an unjust and violent government. It would be better to suffer the "Fighting and Contention" of a state of nature than to face "certain Death" because they had given up the right to "oppose by Arms the unjust Violence of their Superiors."

Barbeyrac added that if a government attempts to hinder people from the peaceful exercise of religion according to personal conscience, then "the People have as natural and unquestionable a Right to defend the Religion by Force of Arms . . . as to defend their Lives, their Estates, and Liberties. . . ."

Likewise, at the conclusion of Pufendorf's chapter on self-defense, Barbeyrac included a long note on a subject that he chided Pufendorf for omitting: John Locke's theory of the right to resistance against a government that usurps powers that had never been granted by the people — a theory with which Barbeyrac plainly agreed. Barbeyrac quoted at length, and with great approval, John Locke's explication that a tyrant is in a state of war with the people. (*See* Ch. 2.K.2.) He echoed the point made centuries earlier by Cicero, St. Augustine, and Philo of Alexandria that robbery is robbery, regardless of whether the perpetrator is a small gang leader with a few followers, or a tyrant with a standing army. (*See* online Ch. 21.B.2.c; C.1.e Note 3; C.2.e.)

The American revolutionaries considered Barbeyrac, Pufendorf, and Grotius part of a fabric of humanitarian philosophy that justified violent resistance to Great Britain as legitimate self-defense against the British government's efforts to destroy the orderly peace of free and civil society.

NOTES & QUESTIONS

1. Pufendorf warned that prohibiting self-defense would cause honest men to fall prey to villains. Does a robust legal doctrine of self-defense give rise to the same

risk, in different ways? For example, how are we to be certain who was the villain and who was the lawful self-defender if only one person survives?

Does the risk of false claims of self-defense suggest that the law should be skeptical of, or entirely reject, the concept of legal self-defense? It is not uncommon in our legal system for courts and juries to make decisions based on imperfect information—such as unrebutted, self-interested testimony of lone witnesses. Is it possible to ferret out truth about self-defense claims, even without eyewitnesses, using circumstantial evidence?

Consider the costs and benefits of a duty-to-retreat rule versus a no-retreat rule. Does the answer depend on whether you focus on the individual victim or society at large? Would you give victims the benefit of the doubt or hold them to a more exacting standard? For more, see Chapter 7.J.

2. Consider Barbeyrac's conclusion that the behavior of future rulers would be improved if subjects did not meekly submit to a despotic ruler's murderous fits of temper. Is this a deterrence argument? Deterrence of future violators is one of the traditional functions of punishment.

3. Pufendorf and Barbeyrac favor broad rights of legitimate violence in response to state tyranny. For example, citizens facing a tyrant's oppression may resist before oppression becomes complete; they need not wait for their chains to be affixed. Is there a stronger justification for violence against a state that has trampled a fundamental right, such as the free exercise of religion, or against a lone criminal who is perpetrating deadly violence? Why?

4. Do you agree that there is a distinction between self-defense and punishment? The Classical view would consider violence against an imminent threat to be a necessary preventative measure, and not to be punishment. Do you agree? Isn't a criminal who is shot in self-defense just as dead as a criminal who is executed after a trial and appeals with due process? How much does it matter that the convicted criminal is executed after a deliberate public process, with no claim that the execution is necessary to save a particular innocent life?

5. In Barbyrac's view, government suppression of free exercise of religion was a preeminent example of when the people were justified in using force to resist the government. In the West from the Middle Ages onward, there was much debate over whether Christians ever had a legitimate right to use force against the governments that ruled. For many people, suppression of one's own religion (e.g., Protestants being suppressed by a Catholic monarch, or Catholics being suppressed by a Protestant) proved that resistance was justified in some situations. Over time, more and more people understood the right of resistance to apply to any form of tyranny, and to imply a right to free exercise of religion for everyone. *See* online Ch. 21.C-D. David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Perspective (2018).

5. Emmerich de Vattel

Along with *Of the Law of Nature and Nations* by Pufendorf, *The Law of Nations* by the Swiss scholar Emmerich de Vattel was considered one of the two great books

founded on the work of Grotius. Vattel (1714-67) was notably influential on the American Founders, among others.

The full title of Vattel's book stated the connection between natural and international law: *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (1758).[40]

Vattel agreed with other scholars that the right of personal self-defense is the foundation of the national right to engage in defensive war. Self-defense is both a right and a duty: "Self-preservation is not only a natural right, but an obligation imposed by nature, and no man can entirely and absolutely renounce it."

The right of self-defense applies whenever the government does not protect an individual, and it includes a right to defend oneself against rape or robbery, not merely against attempted homicide:

> [O]n all these occasions where the public authority cannot lend us its assistance, we resume our original and natural right of self-defence. Thus a traveler may, without hesitation, kill the robber who attacks him on the highway; because it would, at that moment, be in vain for him to implore the protection of the laws and of the magistrate. Thus a chaste virgin would be praised for taking away the life of a brutal ravisher who attempted to force her to his desires.

Also: "A subject may repel the violence of a fellow-citizen when the magistrate's assistance is not at hand; and with much greater reason may he defend himself against the unexpected attacks of foreigners." In order to prevent dueling, Vattel urged enforcement of the custom that only military men and nobles should be allowed to wear swords in public.

Vattel wrote that the right of revolution against tyranny is also an extension of the right of self-defense; like an ordinary criminal, a tyrant "is no better than a public enemy against whom the nation may and ought to defend itself." A prince who kills innocent persons "is no longer to be considered in any other light than that of an unjust and outrageous enemy, against whom his people are allowed to defend themselves." (Compare this to the various sources in Chapters 2, 3, and online Chapter 21, arguing that there is no essential difference between a lone criminal and a criminal government.)

Vattel agreed with the consensus of Grotius, Pufendorf, and the Spanish humanitarians, that there is a right and duty of humanitarian intervention. Vattel formulated the duty in terms of self-defense: When a prince's tyranny gives "his subjects a legal right to resist him . . . in their own defence," then every other nation should legitimately come to the aid of the people, "for, when a people, from good reasons take up arms against an oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties." And, "[a]s to those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race, they are savage beasts, whom every brave man may justly exterminate from the face of the earth." United States Senator Henry Clay, in his famous 1818 oration "The Emancipation of South America," cited Vattel as authority for

40. In the original, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains.*

U.S. support for the South American wars of national liberation against Spanish colonialism.[41]

The personal right of self-defense also showed why a protectorate may renounce its allegiance to a sovereign that fails to provide protection. When Austria defaulted in its obligation to protect Lucerne, Austria lost its sovereignty over Lucerne, and so Lucerne allied with the Swiss cantons. Austria complained to the Holy Roman Emperor, but the people of Lucerne retorted "that they had used the natural right common to all men, by which everyone is permitted to endeavor to procure his own safety when he is abandoned by those who are obliged to grant him assistance."

Vattel pointed out that the town of Zug had been attacked and the duke of Austria had refused to defend it. (He was busy hunting with hawks and would not be interrupted.) Zurich, too, had been attacked, and the Holy Roman Emperor Charles IV had done nothing to protect it. Vattel concluded that both Zug and Zurich were justified in asserting their natural right to self-protection and in joining the Swiss confederation. Similar reasoning justified the decision of other Swiss cantons to separate themselves from the Austrians, who never defended them.

NOTES & QUESTIONS

1. Note Vattel's claim of equivalence between self-defense and resistance to tyranny. Are the circumstances that would justify violent resistance to tyranny more or less complicated than the circumstance that would justify self-defense? Consider, for example, Vattel's reference to the prince who kills innocents. What if an American official caused innocents to be killed while prosecuting the war on terror? What if some of those innocents were American citizens? Does it matter if the innocents were killed as primary targets, rather than being killed as part of an operation against a known terrorist (e.g., a bomb dropped on a terrorist leader's home, killing the terrorist as well as members of his family)? Consider Thomas Aquinas's theory of the principle of double effect—that self-defense is justified because it arises from the intention of preserving one's own life, not the intention of killing the attacker. *See* online Ch.21.C.3.

2. What do you think of Vattel's assertion that self-defense is not just a privilege or prerogative, but rather a *duty* that it is immoral to renounce? To whom is this duty owed? If a person decides to eschew violence and sacrifice her life instead of fighting back, isn't that solely her affair? Or does the community have a

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41. Here is an excerpt from Clay's speech:

> I maintain that an oppressed people are authorized, whenever they can, to rise and break their fetters. This was the great principle of the English Revolution. It was the great principle of our own. Vattel, if authority were wanting, expressly supports this right. We must pass sentence of condemnation upon the founders of our liberty, say that you were rebels, traitors, and that we are at this moment legislating without competent powers, before we can condemn the cause of Spanish America. . . . Spanish America for centuries has been doomed to the practical effects of an odious tyranny. If we were justified, she is more than justified.

Henry Clay, *The Emancipation of South America, in* 4 The World's Famous Orations 82-83 (1906).

claim on her decision? What would be the substance of the community's claim? Is this obligation necessarily owed to other people? Is it a duty owed to God? Under traditional Jewish law, self-defense and defense of others is a positive obligation. Christian views have been diverse, with many but not all Christians viewing self-defense as a duty, and more considering defense of others to be a duty. *See* online Ch. 21.C; David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017). For the influence of the duty-based view on the American Revolution, see Chapter 3.C.

6. *Jean-Jacques Burlamaqui*

Jean-Jacques Burlamaqui (1694-1748) was Professor of Natural Law at the Academy of Geneva. His treatise *The Principles of Natural and Politic Law* was translated into six languages (besides the original French) in 60 editions.

His vision of constitutionalism had a major influence on the American Founders. For example, Burlamaqui's understanding of checks and balances was much more sophisticated and practical than that of Montesquieu,[42] in part because Burlamaqui's theory contained the seed of judicial review. He was frequently quoted or paraphrased, sometimes with attribution and sometimes not, in political sermons during the pre-revolutionary era.

He was the first philosopher to articulate the quest for happiness as a natural human right, a principle which Thomas Jefferson later restated in the Declaration of Independence. Burlamaqui connected the right of pursuing happiness to the right to arms: all men have a "right of endeavoring to provide for their safety and happiness, and of employing force and arms against those who declare themselves their enemies." With variations in phrasing, the same principle is stated in most American state constitutions. *See* Ch. 4.D.11 (discussing Mass. Const. of 1780, pt. 1, art. I: "All men . . . have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 Tex. Rev. L. & Pol. 399 (2007).

The principle that legitimates self-defense also provides the appropriate boundaries: "necessity can authorise us to have recourse to force against an unjust aggressor, so this same necessity should be the rule and measure of the harm we do him. . . ."

National self-defense is simply an extension, with appropriate modifications, of the right and duty of personal self-defense. Defensive war, both personal and national, is essential to the preservation of peaceful society; "otherwise the human species would become the victims of robbery and licentiousness: for the right of making war is, properly speaking, the most powerful means of maintaining peace."

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42. Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, The Spirit of Laws (1748).

The right to collective self-defense against tyranny (a criminal government) is an application of the individual right of self-defense against a lone criminal: "when the people are reduced to the last extremity, there is no difference between tyranny and robbery. The one gives no more right than the other, and we may lawfully oppose force to violence." Thus, people have a right "to rise in arms" against "extreme abuse of sovereignty," such as tyranny.

Burlamaqui agreed with the Englishman Algernon Sidney (Ch. 2.K.3) that subjects are "not obliged to wait till the prince has entirely riveted their chains, and till he has put it out of their power to resist him." Rather, they may initiate an armed revolt "when they find that all his [the prince's] actions manifestly tend to oppress them, and that he is marching boldly on to the ruin of the state."

Burlamaqui acknowledged that if the people have the power to revolt, they might misuse it, but the risk would be much less than the risk of allowing tyranny to flourish: "In fine, though the subjects might abuse the liberty which we grant them, yet less inconveniency would arise from this, than from allowing all to the sovereign, so as to let a whole nation perish, rather than grant it the power of checking the iniquity of its governors."

Similarly, the fact that "every one has a natural right to take care of his preservation by all possible means" suggests that if "the state can no longer defend and protect the subjects, they . . . resume their original right of taking care of themselves, independently of the state, in the manner they think most proper." Thus, whenever a state fails to protect one of its subjects from criminal attack, the subject has a right of self-defense.

In an international law application, the same principle proves that a sovereign has no authority to "oblige one of his towns or provinces to submit to another government." Rather, the sovereign may, at most, withdraw his protection from the town or province, in which case the people of the town or province have a complete right of self-defense, and of independence if they can prevail in their self-defense.

Burlamaqui, like Vattel, supported a broad rule of humanitarian intervention to liberate the tyrannized people of another nation — provided that "the tyranny is risen to such a height, that the subjects themselves may lawfully take up arms, to shake off the yoke of the tyrant." This principle is an extension of personal assistance in self-defense, for "Every man, as such, has a right to claim the assistance of other men when he is really in necessity."

Burlamaqui acknowledged that the principle of humanitarian intervention is often misused. Nevertheless, the misuse of a good principle does not mean that the principle should be eliminated, any more than the misuse of weapons means that weapons should be prohibited: "the bad use of a thing, does not hinder it from being just. Pirates navigate the seas, and robbers wear swords, as well as other people."

NOTES & QUESTIONS

1. Under the Classical view, if a government purported to enact a law abolishing the right of self-defense (or constricting the right so that it becomes a practical nullity), that law would be considered void ab initio. Is the reasoning persuasive today?

2. The Classical view considered personal self-defense to be a fundamental human right, essential to the foundation of international law and order. Is that view still valid? If so, why do you think contemporary international law sources (such as many of those in this Chapter) reflect much less concern for individual self-defense than do the Classical sources?

3. In a case from the post-World War II war crimes trials of the Japanese military dictatorship, the court stated, "Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense." *In re Hirota & Others*, 15 Ann. Dig. & Rep. of Pub. Int'l L. Cas. 356, 364 (Int'l Mil. Trib. for the Far East 1948) (no. 118, Tokyo trial). Discussing the *Hirota* case, Professor Yoram Dinstein wrote, "This postulate [from *Hirota*] may have always been true in regard to domestic law, and it is currently accurate also in respect of international law. . . . [T]he right of self-defence will never be abolished in the relations between flesh-and-blood human beings. . . ." Yoram Dinstein, War, Aggression, and Self-Defense 181 (2d ed. 1994). Is Dinstein right? Would a statute purporting to abolish any right of self-defense be only a "pretend law"? *See* Ch. 4.B.5 Note 2.

4. The works of Classical international law discussed here are not binding authority, so their appeal will be purely persuasive. Do you find them so? Are some ideas more persuasive than others?

5. The Classical authors state repeatedly that the defensive claims of nations are grounded analytically on the right to individual self-defense. Do you think that individual self-defense is more fundamental than the national defense claim of states? Why? Which writers and documents featured in this chapter agree with you? What about individual defense against tyranny? How does deciding when defense against the state is legitimate differ from deciding whether defense against another individual is legitimate?

6. Consider Grotius's statement that self-defense is essential to social harmony, that without it, "human Society and Commerce would necessarily be dissolved." Pufendorf and Burlamaqui also agreed that human beings are by nature social, and that a right of self-defense is essential for society to exist. In the modern American gun debate, guns and self-defense are often extolled or derided as examples of the American ideal of rugged individualism. Grotius and Pufendorf provide a different perspective on self-defense, advancing it as a practical foundation of humans being able to live together in society. Do you find this convincing?

7. If the Classical view on the fundamental status of self-defense is correct, then does a right to firearm ownership follow as an incident of that right? *See* David B. Kopel, *The Universal Right of Self-Defense, and the Auxiliary Right to Defensive Arms*, in The Second Amendment and Gun Control: Freedom, Fear, and the American Constitution (Kevin Yuill & Joe Street eds., 2017). Does private gun ownership promote social harmony? Can you imagine a harmonious society where the state had an absolute monopoly on legitimate violence and all types of private self-defense were outlawed? Would you prefer that society to the modern United States? Are there any examples of such societies that you would consider good alternatives to the armed society of the United States today?

8. Vattel, Burlamaqui, and others argue that the self-defense rights of nations can be derived from principles of personal self-defense. Vattel also writes that personal self-defense is justified only against imminent threats where the state is

powerless to intervene. Does this rule of imminence place greater restrictions on individual self-defense than on national defense? If defense of nations is derivative of personal self-defense, can one justify intricately planned military offensives where there is no imminent threat, and negotiation or nonviolent sanctions are still available? Are all such offensives philosophically or morally repugnant? Are they automatically more suspect than private self-defense against imminent threats?

9. Burlamaqui acknowledged that if the people have the power to revolt, they might misuse it. However, he argued that this risk would be much less than the risk of allowing tyranny to flourish. Is he right? Does the answer depend on how much one values order?

Would you be willing to live with some degree of tyranny or oppression if the alternative were large-scale violence or civil war? Is it inevitable that different people have different estimates of the tipping point where violent resistance becomes necessary? Burlamaqui says that people need not wait until their chains are fully locked onto them. Should violent resistance to tyranny be the last option? Or will waiting too long make resistance impossible? How should a polity determine when that point has come? Consider the materials in Chapter 4, such as Patrick Henry's speech "The War Inevitable," and the Declaration of Independence, both of which argue that resistance is justified once the government makes it clear that tyranny is the objective and the peaceful petitions for liberty would be futile.

10. The Classical Founders of international law considered personal self-defense to be the most fundamental of all human rights. Some modern international agreements, such as the UN Programme of Action (Section A.3), the Nairobi Protocol (Section B.2), the Arms Trade Treaty (Section A.6), and CIFTA (Section B.5) do not acknowledge any personal right of self-defense. Why are some aspects of modern international agreements so different from the founding principles of international law?

11. Further reading: Shannon Brincat, *The Philosophy of Internationally Assisted Tyrannicide*, 34 Australian J. Leg. Philo. 151 (2009) (comparing and contrasting the pro-tyrannicide theories of Grotius, Vattel, and Alberico Gentili with modern international law); Shannon Brincat, *"Death to Tyrants": The Political Philosophy of Tyrannicide, Part I*, 4 J. Int'l Political Theory 212 (2008) (examining tyrannicide under medieval, natural law, liberal, and social contract theories).

D. RESISTANCE TO GENOCIDE

Does international law recognize the right of people to resist genocide? If there is such a right? Does that right overcome otherwise valid laws that prevent the acquisition or use of arms?

Classical international law, discussed in Section C, supports a general right to resist all forms of tyranny, but does not specifically address genocide. In this Section D, we consider genocide in light of the Convention on the Prevention and Punishment of the Crime of Genocide, the Universal Declaration of Human Rights, and other modern human rights documents. The two essays in this section discuss the implications of these documents. The first essay argues that modern international law recognizes a right to resist any genocide. The second essay counters

that resistance is lawful if the genocide is racial, but not if the genocide victims are selected on a nonracial basis.

Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948

102 Stat. 3045, 78 U.N.T.S. 277

Art. 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

David B. Kopel, Paul Gallant & Joanne D. Eisen

Is Resisting Genocide a Human Right?

81 Notre Dame L. Rev. 1275 (2006) (slightly modified for this text)

A. The Genocide Convention

. . . Neither the text of the Genocide Convention nor the drafting history provide guidance about the scope of the legal obligation to prevent genocide. However, international law is clear that the duty to prevent is real and is entirely distinct from the duty to punish. *See, e.g*, *Application of the Convention of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 443-44 (Sept. 13) (separate opinion of Judge Lauterpacht); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serb. & Mont.), 2001 I.C.J. 572 (Sept. 10).

The Genocide Convention prohibits more than the direct killing of humans. Other actions—if undertaken with genocidal intent—can constitute genocide. For example, rape would not normally be genocide, but if a political or military commander promoted the widespread rape of a civilian population—with the intent of preventing normal reproduction by that population—then the pattern of rape could constitute genocide. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment 2, ¶ 731 (Sept. 2, 1998).

Similarly, many governments do not provide their citizens with minimal food rations or medical care. Such omissions are not genocide. On the other hand, if a government eliminated food rations to a particular group but not to other groups, and the change in rations policy was undertaken with the intent of exterminating the particular group by starvation, then the government's termination of food aid could constitute genocide. *United States of America v. von Weizaecker* (The Ministries Case), 14 T.W.C. 314, 557-58 (1948).

Similarly, under normal conditions, governments have extensive authority over arms possession within their borders. But to the extent that a government enacted or applied arms control laws for the purpose of facilitating genocide, then the government's actions would constitute genocide.

Notably, the Genocide Convention abrogates the Head of State immunity which applies in most other international law. Genocide Convention, art. IV. . . .

Given that the Genocide Convention explicitly abrogates one of the most well established principles of general international law, it would hardly be surprising that the Convention also abrogates, by implication, some forms of ordinary internal state authority, such as the power to set standards for food rations, medical rations, or arms possession.

B. The Universal Declaration of Human Rights and Other Human Rights Instruments

Another international law source of the right to resist genocide is the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948. The Universal Declaration never explicitly mentions "genocide," but a right to resist genocide is an inescapable implication of the rights which the Declaration does affirm.

First, the Declaration affirms the right to life. Of course the right to life is recognized not just by the Universal Declaration, but also by several other international human rights instruments.

Second, the Declaration affirms the right to personal security. The right of self-defense is implicit in the right of personal security, and is explicitly recognized by, inter alia, the European Convention on Human Rights and by the International Criminal Court. Rome Statute of the International Criminal Court art. 31, July 17, 1998, 2187 United Nations T.S. 90.

The preamble of the Universal Declaration of Human Rights recognizes a right of rebellion as a last resort: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. . . ." The drafters' intent was explicitly to recognize the preexisting human right of resisting tyranny and oppression. Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting & Intent 307-12 (1999).

Finally, Article 8 of the Universal Declaration states that "[e]veryone has the right to an effective remedy." The Universal Declaration therefore comports with the long-established common law rule that there can be no right without a remedy. *Cf. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) ("'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts would be alert to adjust their remedies so as to grant the necessary relief.'" (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

Thus, the Declaration recognizes that when a government destroys human rights and all other remedies have failed, the people are "compelled to have recourse, as a last resort, to rebellion against tyranny and oppression." Because "[e]veryone has the right to an effective remedy," the people necessarily have the right to possess and use arms to resist tyranny, if arms use is the only remaining "effective remedy."

In international law, a "Declaration" does not directly have a binding legal effect, although it may be used as evidence of customary international law. . . .

C. Jus Cogens

Under international law, some laws are accorded the status of *jus cogens*, which means that in case of conflict, they override other laws. Vienna Convention on the Law of Treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

Many commentators agree that the duty to prevent genocide must be considered *jus cogens*.[221] Indeed, it would be difficult to articulate a more fundamental principle than the prevention of genocide. . . .

Accordingly, the legal duty to prevent genocide would be superior to whatever limits the UN Charter sets on military action that is not authorized by the Security Council. Similarly, the legal duty to prevent genocide would be superior to treaties or conventions restricting the transfer or possession of arms.

D. Application of the Genocide Convention Against Arms Control: The Case of Bosnia

The first legal analysis of the prevention duty came from the dissenting judges in a 1951 advisory opinion by the International Court of Justice, in which the Court made a nonbinding ruling on whether the "reservations" that some states attached to their ratification of the Genocide Convention were legally effective.[227] The dissenting judges' words have often been quoted by human rights activists: "[T]he enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."

The first contested case involving the scope of the duty to prevent genocide was *Bosnia v. Yugoslavia*, in which an opinion by Judge Lauterpacht squarely faced the duty to prevent issue. *Application of the Convention of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 407-48 (Sept. 13) (separate opinion of Judge Lauterpacht).

The Kingdom of Serbs, Croats, and Slovenes (later renamed the Kingdom of Yugoslavia) had been proclaimed in 1918, after the collapse of the Austro-Hungarian Empire at the end of the World War I. Until the country broke up in 1991, it was the largest nation on the Balkan peninsula.

Yugoslavia was turned into a Communist dictatorship in 1945 by Josip Broz Tito. When Tito died in 1980, his successors feared civil war, so a system was instituted according to which the collective leadership of government and party offices would be rotated annually. But the new government foundered, and in 1989, Serbian president Slobodan Milošević began re-imposing Serb and Communist hegemony. Slovenia and Croatia declared independence in June 1991.

Slovenia repelled the Yugoslav army in ten days, but fighting in Croatia continued until December, with the Yugoslav government retaining control of about a third of Croatia. Halfway through the Croat-Yugoslav war, the UN Security Council adopted Resolution 713, calling for "a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia" (meaning rump Yugoslavia, plus Croatia and Slovenia).

It was universally understood that the Serbs were in control of most of the Yugoslavian army's weaponry, and that the embargo therefore left them in a

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221. *See* Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. 6 (1987) (explaining that an international agreement that encourages, practices, or condones genocide is void under *jus cogens* principles).

227. Reservations of the Convention on the Punishment and Prevention of Genocide, Advisory Opinion, 1951 I.C.J. 15, 47 (May 28) (Guerrero, McNair, Read, & Hsu Mo, JJ., dissenting).

position of military superiority. Conversely, even though the embargo was regularly breached, it left non-Serbs vulnerable. The United Nations had, in effect, deprived the incipient countries of the right to self-defense, a right guaranteed under Article 51 of the UN Charter.

Macedonia seceded peacefully from Yugoslavia in early 1992, but Bosnia-Herzegovina's secession quickly led to a three-way civil war between Bosnian Muslims (Bosniacs), Serbs (who are Orthodox Christians), and Croats (who are Roman Catholic). It was generally recognized that the Bosnian Serbs received substantial military support from what remained of old Yugoslavia (consisting of Serbia and Montenegro, and under the control of Slobodan Milošević).

Security Council Resolution 713 now operated to make it illegal for the new Bosnian government to acquire arms to defend itself from Yugoslav aggression.

Bosnia sued Yugoslavia in the United Nations' International Court of Justice. In April 1993, the International Court of Justice ruled, with only one dissenter, that Yugoslavia was perpetrating genocide, and ordered it to stop. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325 (Sept. 13) (Requesting the Indication of Provisional Measures Order of Apr. 8).

A few months later, Bosnia brought forward additional legal claims. Among the new claims was a request to have the UN embargo declared illegal, as a violation of the Genocide Convention. The majority of the International Court of Justice voted only to reaffirm portions of the April 1993 order; they stated that the court had no jurisdiction over the Security Council's embargo. The majority's ruling was not implausible, since the Security Council was not a party to the case.

Several judges who had voted in favor of the majority opinion also wrote separate opinions. One of the judges, Judge Elihu Lauterpacht, wrote a separate opinion which was the first international court opinion to address the legal scope of the Genocide Convention's affirmative duty "to prevent" genocide.

Judge Lauterpacht cited the findings of a Special Rapporteur about the effect of the arms embargo and pointed to the "direct link . . . between the continuation of the arms embargo and the exposure of the Muslim population of Bosnia to genocidal activity at the hands of the Serbs." *Id.* at 438 (separate opinion of Judge Lauterpacht).

Normally, Security Council resolutions are unreviewable by the International Court of Justice. However, Judge Lauterpacht ruled that the prevention of genocide is *jus cogens*. *Id.* at 439-44. He concluded that the Security Council arms embargo became void once it made UN member-states "accessories to genocide." *Id.* at 501.

Formal repeal of the Security Council embargo was impossible, because Russia threatened to use its veto to prevent any action harmful to its client-state Serbia. However, Judge Lauterpacht's opinion stated that the UN embargo was already void as a matter of law, the moment it came into conflict with the Genocide Convention. Accordingly, Bosnia acted in accordance with international law when Bosnia subverted the United Nations arms embargo, by importing arms from Arab countries. The United States's Clinton Administration, which winked at the Bosnian arms smuggling, was compliant with international law, even though the administration was subverting a Security Council resolution that purported to set a binding international rule.

VI. INTERNATIONAL LAW IMPLICATIONS

Decisions of the International Court of Justice are binding only on the parties to the case. So even if Judge Lauterpacht had written the majority opinion, rather than a concurring opinion, the opinion would not, ipso facto, create a binding international standard of law. Nevertheless, Judge Lauterpacht's opinion brings together several principles that seem difficult to deny:

- The Genocide Convention imposes an affirmative duty to prevent genocide (or at least, not to prevent others from preventing genocide).
- The Genocide Convention is *jus cogens*. (If the Genocide Convention is not so important as to be *jus cogens*, then hardly anything else could be.)
- Numerous international standards affirm a right of self-defense, including a right to self-defense against criminal governments perpetrating genocide.
- In some cases, a state's compliance with an otherwise-valid gun control law may bring the state into violation of the Genocide Convention, if the gun control law facilitates genocide.
- Therefore, in case of conflict between the gun control law and the Genocide Convention, every state and the United Nations, including their courts, is obligated to obey the Genocide Convention.

To see that the final principle is an inescapable standard of international law, one only need state the converse, which is self-evidently immoral and abhorrent: "An international or national court must always enforce arms prohibition laws, even if enforcement makes the court complicit in genocide."

The majority of the United Nations International Court of Justice was, understandably, reluctant to confront the United Nations Security Council by declaring a Security Council resolution to be unlawful. In this Article, though, we are not primarily concerned with whether the International Court of Justice will develop the institutional strength to confront illegal actions of the Security Council. Rather, our focus is on the standard of conduct for all persons, including domestic and international judges, who are concerned with obeying international human rights law, especially the Genocide Convention.

Let us now examine some particular applications of the international human right of genocide victim self-defense.

A. Sudanese Gun Controls

Sudan's national gun control laws are invalid, insofar as they are enforced to prevent the genocide victims of Darfur from obtaining firearms for lawful defense against genocide. The antigenocide rule does not affect the validity of Sudanese gun laws as applied in areas of the country, such as northeast Sudan, where no genocide is taking place.[43]

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43. [As the published article details, the Islamist dictatorship of Sudan was perpetrating genocide against the Darfuri people of western Sudan. The means of genocide including depriving the Darfuri of arms, while supplying arms to the *Janjaweed* ("evil horsemen") — Arab horsemen who slaughtered the Darfuri. — Eds.]

The practical juridical effect of our finding about the enforcement of Sudanese gun laws in Darfur is limited. After all, Sudanese enforcement of national gun control laws in Darfur tends to proceed mainly by killing people, not by putting them on trial.

Moreover, even if a Sudanese court did try a gun law prosecution, it would not be realistic to expect the Sudanese court to rule, in effect, "Sudan's gun laws, while prima facie valid, cannot presently be enforced against the people of Darfur who are trying to defend themselves against the genocide sponsored by the Sudanese government." A regime that perpetrates genocide is unlikely to tolerate an independent judiciary that would interfere with the genocide.

Acknowledgement that enforcement of the Sudanese gun laws against the people of Darfur is a violation of the Genocide Convention could, perhaps, be of significance to non-Sudanese government officials. For example, if a Sudanese national smuggled arms to the Darfur victims, and then took refuge in another country, that country's executive or judicial officers might refuse to extradite the smuggler to Sudan. Notwithstanding an extradition treaty with Sudan, application of the extradition treaty, in the particular case of the antigenocide arms smuggler, would make the host country complicit in genocide.

B. The Sudanese Arms Embargo

[T]he UN Security Council has imposed an arms embargo which prohibits the transfer of arms to the government of Sudan, the Janjaweed Arab militias, and the resistance movement in Darfur (the SLA and the JEM). S.C. Res. 1591, UN Doc. S/RES/1591 (Mar. 29, 2005).

The application of the embargo to the Darfur resistance is a violation of the Genocide Convention, for the same reasons that Judge Lauterpacht stated that application of the Security Council arms embargo to Bosnia was a violation of the Genocide Convention: a facially neutral gun control that leaves genocide victims helpless against genocide perpetrators is a violation of the Genocide Convention; enforcement of such an embargo makes the enforcer complicit in genocide.

Accordingly, no state has a legal obligation to interfere with the delivery of arms to the people of Darfur. To hinder their acquisition of arms would be to assist the genocide being perpetrated in Darfur.

C. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms

In July 2005, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms became law, for the more than forty nations that have ratified the Protocol. (Section A.4) Briefly stated, the Protocol and its related International Tracing Instrument require that parties to the Protocol enact laws requiring that all firearms manufactured in the host country have a serial number and a manufacturer identification.[44] Further, ratifying countries must keep registration records

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44. [In December 2005, the Protocol was adopted by the UN General Assembly, and is commonly known as the International Tracing Instrument. *See* Section A.4.—Eds.]

of firearms sales and owners, for the purpose of combating international arms smuggling.

For the same reason that Sudanese gun laws and the Security Council embargo cannot be enforced against the victims in Darfur, neither can the Protocol. Thus, if a defendant were charged in a national or international court with violating the Protocol, he should be allowed to raise an affirmative defense showing that he was supplying arms to genocide victims.

The affirmative defense would be consistent with the spirit of the Preamble to the Protocol, which recognizes "the inherent right to individual or collective self-defence" and "the principle of equal rights and self-determination of peoples." In any case, the Protocol must yield to the Genocide Convention whenever the Protocol conflicts with the Convention. It is the prohibition of genocide, not the imposition of paperwork rules on arms transfer, that is the *jus cogens*, the expression of fundamental human rights.

D. Proposed Convention Prohibiting Transfer of Firearms to "Nonstate Actors"

In 2001, the United Nations held a conference on "small arms" which some activists hoped would produce an international treaty restricting the possession and transfer of firearms. . . . Among the most sought objectives of the treaty advocates is an international prohibition on the transfer of firearms to "non-state actors"—that is, to rebels, or to any non-government person. (discussed in Section A.3.) Should such an international treaty be created, it should include an explicit exemption to authorize supplying arms to genocide victims. Such an exception must exist, implicitly, because of the *jus cogens* status of the Genocide Convention. However, it would be clearer for the treaty to include an explicit exception. Indeed, any nation's delegation that refused to vote in favor of an exception for genocide victims would necessarily raise doubts about its own commitment to human rights.

E. The Nairobi Protocol

[The Nairobi Protocol, a gun control agreement among East African governments, is detailed in Section B.2.]

Of the signatories, only Eritrea (which won independence in 1991 in a revolutionary war against Ethiopia) has been democratic for at least half its existence as an independent nation.[45] The majority of signatories of the Nairobi Protocol have witnessed genocide in their nations within the last several decades, including the current genocides being perpetrated in the Democratic Republic of the Congo (i.e. Pygmies), Ethiopia, and Sudan. . . .

Regional antifirearms agreements, even if generally valid, cannot lawfully be enforced, if their enforcement would conflict with the Genocide Convention.

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45. [As of 2021, Eritrea is near-totalitarian.—Eds.]

Antonio Cassese

The Various Aspects of Self-Defence Under International Law

Background paper (Small Arms Survey 2003), excerpted in Small Arms Survey 2004, at 181 (2005)[46]

The right of self-defence under international law governs relations between states as opposed to groups and individuals. Pursuant to Article 51 of the Charter of the United Nations and Statute of the International Court of Justice (UN, 1945) and corresponding customary international law, states have a right to defend themselves against an "armed attack" if the UN Security Council fails to take effective action to stop it. Rebels, insurgents, and other organized armed groups do not have a right to use force against governmental authorities, except in three cases. Liberation movements can use force in order to resist the forcible denial of self-determination by (1) a colonial state, (2) an occupying power, or (3) a state refusing a racial group equal access to government. These situations, however, are not considered ones of "self-defence" under international law. Individuals who are not organized in groups have even less scope for the use of force under international law. Individuals have no legal right to use force to repel armed violence by oppressive states. This includes governments that commit acts of genocide or other serious human rights violations. Nor does international law grant individuals a right to defend themselves against other individuals. This right is provided for by states in their national legal systems as each state determines the conditions under which individuals can use force for these purposes. It is not surprising that states have refused to legitimize the resort to armed violence by individuals given the threat this would pose to their own authority. International law is made by states and tends to reflect their interests and concerns. The Universal Declaration of Human Rights nevertheless provides a moral endorsement of the violent reaction of individuals to political oppression or other forcible denial of fundamental human rights: "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

NOTES & QUESTIONS

1. Cassese's three exceptions in which the use of force for resistance is legally allowed derive from the UN General Assembly's 1974 Resolution on the Definition of Aggression (Section A.2). According to Article 7 of the Resolution:

> Nothing in this definition . . . could in any way prejudice the right of self-determination, freedom and independence . . . particularly peoples

46. Cassese wrote a background paper that was published in 2003 by the Small Arms Survey, a research organization based in Geneva, Switzerland, whose "objective is to reduce the illicit proliferation of small arms and light weapons and their impacts." Every year, the Small Arms Survey publishes a book about gun-control issues; the book is always titled "Small Arms Survey," along with a particular year. The book *Small Arms Survey 2004* was published in 2005.

> under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and seek and receive support.

Putting aside the fact that General Assembly resolutions are not international law, is Cassese's narrow reading of this Resolution correct? Does the Resolution recognize a right to use force only against colonial or racist regimes? Or against any regime that denies "the right of self-determination, freedom and independence"? What is the effect of the word "particularly" here?

2. Under Cassese's theory would any of the following have a legal right of forcible resistance?

- German Jews facing Hitler's genocide, taking into account that the Nazi government was not an "occupying power" and that the Jews were of the same racial group (Caucasian) as their persecutors, although they were of different ethnicity and religion? *Cf.* George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 Fordham L. Rev. 2113, 2160 n.420 (2008) ("One cannot legitimately argue that Jews being taken away by the Gestapo had no right to fight back then and there, especially given their ultimate destination."). Would Jews have a self-defense right only if one accepted the Nazi theory that Jews *are* a separate race?
- Cambodians under the Pol Pot regime? The Khmer Rouge communist regime of 1975 murdered over 1.5 million people, more than 20 percent of the population. The regime was extremely racist, and while it killed over a million Khmer people, it killed ethnic minorities (Chinese, Vietnamese, Lao, Thai, Muslim Chams, and others) at an even higher rate. *See* Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79, at 456-65 (3d ed. 2008).
- Victims of rape that is systematically encouraged by government, such as by allowing rape charges to be brought only if there are four male witnesses?
- Victims of the 1994 Rwandan genocide, who were of the same race but a different tribe than the genocidaires? Sudanese Darfuris, who are very dark-skinned, live in Africa, and are often called "Africans," and whose genocidaires have very dark skin, live in Africa, and are Arabs? Does the answer depend on whether the killers consider the Darfuris to be of a different race from themselves? Does the answer depend on the motivation of the genocidaires (whether they think they are killing people of a different race)? Or does the answer depend on whatever the scientists of the day say about whether genocidaires and their victims are of different races?

3. What are the differences between Cassese's view of international law and Classical international law?

4. For more on genocide and gun control, see David B. Kopel, Book Review, 15 N.Y.L. Sch. J. Int'l & Comp. L. 355 (1995) (reviewing Aaron Zelman et al., Lethal Laws (1994) (role of gun confiscation in various twentieth century genocides). Also see the material in Chapter 14.D.2. and D.3.

5. Consider Cassese's statement that international law does not grant individuals a right to defend themselves against other individuals. Instead, self-defense

may be allowed by national legal systems as each government determines the lawfulness of use of force. What principles justify the divergent treatment of individuals versus groups or governments? Do you think most Americans would agree with the proposition that individual self-defense is not a fundamental human right?

6. Is armed resistance to genocide a right recognized by international law? Should it be? Could legal recognition of such a right create dangerous or unintended consequences? Should members of a group facing genocide make decisions about forcible resistance based on international law? Should governments or individuals in other countries assist such resistance only if the assistance complies with international law?

7. Further reading: The United Nations and Genocide (Deborah Mayersen ed. 2018) (describing history of UN's torpor regarding genocide, and efforts at reform).

E. BRINGING INTERNATIONAL LAW HOME, OR A GLOBAL SECOND AMENDMENT?

1. The Case for Global Control

At the time that Harold Hongju Koh wrote the essay below, he was an eminent professor of international law at Yale. From 2009 to 2012, he served as Legal Advisor to the U.S. State Department. Thereafter, he returned to Yale.

Harold Hongju Koh

A World Drowning in Guns

71 Fordham L. Rev. 2333 (2003)

Let me start by describing the problem. Today there are an estimated 639 million documented small arms in the world. That is more than half-a-billion small arms: more than one for every twelve men, women, and children on the face of the earth. Significantly, all sources concede that this number undercounts the actual number by tens of millions. It does not include, for example, the millions of undocumented, privately held guns in such major countries as China, India, Pakistan, or France. . . .

While no universally accepted legal terminology exists, considerable agreement has begun to emerge that the term "small arms" includes, at a minimum, handguns, revolvers, pistols, automatic rifles, carbines, shotguns, and machine guns. "Light weapons," which are usually heavier, larger, and designed to be hand-carried by teams of people, embrace grenade launchers, light mortars, shoulder-fired missiles, rocket launchers, artillery guns, antiaircraft weapons, anti-tank guns, and related ammunition. . . .

But in 1993—only ten years ago—academic articles started to appear about the small arms trade, and academic conferences began to spotlight the topic. The

academics pushed to get the UN interested, particularly the UN Institute for Disarmament Research. Research NGOs in several supplying countries also took up this issue—including the Arms Division of Human Rights Watch, the Bonn International Center for Conversion, British American Security Information Council ("BASIC"), International Alert, and the Institute for Security Studies in South Africa. As often happens, once research NGOs get involved, activist NGOs begin to get involved as well. The international gun control lobby soon linked up with the domestic gun control lobbies in leading countries.

And then, as with the Landmines treaty,[47] transnational norm entrepreneurs entered the picture and started to create action networks. One of the leaders of this movement was my interlocutor, Oscar Arias, who gathered eighteen Nobel Prize Winners to create an International Code of Conduct with regard to arms transfers. Finally, the transnational activists developed their own network, the International Action Network on Small Arms ("IANSA"), which has become the biggest international network that has existed on any issue since the global landmines campaign. It is a group of over 300 NGOs, which currently include faith-based groups, educational groups, human rights groups, social development groups, public health and medical groups, democracy groups, justice groups, conflict-resolution groups, and anti-gun lobbies. . . .

But the regulation of small arms presents a far more difficult problem. For we are a long way from persuading governments to accept a flat ban on the trade of legal arms. Given that small arms will continue to be lawfully traded, what kind of enforceable norms can be developed in the relevant law-declaring forum? To be viable, a global regime should incorporate at least three elements.

First, a marking and tracing regime must be implemented. . . . The UN Resolution establishing the UN Register of Conventional Arms could be modified so that the United States, and the ninety other nations that annually submit relevant information to the Register, could be required to submit information about their small arms production. In addition, a number of countries have proposed complementary regional registers that would explicitly enumerate small arms in areas such as Africa, where small arms remain the primary weapons of war. In due course, a marking and tracing norm could be embedded in a treaty:[48] Article VI of the OAS Convention, for example, calls for marking at the time of manufacture, importation, and confiscation of firearms, grenades and other covered weapons, and Articles XI and XIII further require various forms of record-keeping and information exchange.[49]

Second, transparency and monitoring of these processes by international NGOs are critical. . . .

Third and most important, the horizontal process should produce a "transfer ban" that would prevent legal arms from being transferred either to illicit users or to recognized human rights violators. Although this would not be easy to do, under

47. [Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997) (entered into force in 1997).—Eds.]

48. [A marking regime was implemented by the 2005 International Tracing Instrument, detailed in Section A.4.—Eds.]

49. ["The OAS Convention" refers to the CIFTA convention, which the United States has signed but not ratified, excerpted in Section B.5.—Eds.]

our own US domestic arms law, there are already restrictions on making transfers or licenses to certain gross violators of human rights who have been so certified by, for example, the Bureau of Political-Military Affairs at the State Department, congressional staffs, and my own former bureau at the State Department, the Bureau of Democracy, Human Rights and Labor. . . .

[T]he OAS Convention provides the best model. The Inter-American Convention, inter alia, requires each state: to establish a national firearms control system and a register of manufacturers, traders, importers, and exporters of these commodities; to establish a national body to interact with other regional states and a regional organization advisory committee; to standardize national laws and procedures with member states of regional organizations; and to control effectively borders and ports. Other key provisions include requiring an effective licensing or authorization system for the import, export, and in-transit movement of firearms, an obligation to mark firearms indelibly at the time of manufacture and import to help track the sources of illicit guns, and requiring states to criminalize the illicit manufacturing of and illicit trafficking in firearms. . . .

More fundamentally, however, to fully effectuate the goals of the small arms regime, the United States must focus on supply-side solutions and destination controls. Supply-side controls mean destroying existing stockpiles of small weapons. Through bilateral and multilateral diplomacy, our government should start a process of promoting exchanges and destruction of existing small weapons caches. . . .

These weapons destruction measures, however, must be combined with supply-side control measures within the United States. . . . To address this concern, in 1996, President Clinton signed arms brokering legislation that amended the Arms Export Control Act to give the State Department greater authority to monitor and regulate the activities of arms brokers. Key provisions included the requirements that all brokers must register with the Department of State, must receive State Department authorization for their brokering activities, and must submit annual reports describing such activities. The United States is currently working to promote adoption of similar laws by other nations by incorporating such a provision into the international crime protocol being negotiated in Vienna.

Perhaps the strongest mode of internalization of supply-side controls would be through an enhanced search for technological solutions. One particularly intriguing idea is the idea of promoting production of smart or "perishable ammunition," e.g., AK-47 bullets that would degrade and become unusable over time. Ironically, by focusing exclusively on controlling the delivery mechanism — the guns themselves — the small arms activists may have overlooked a surer longer-term solution to the international firearms problem.

NOTES & QUESTIONS

1. Professor Koh admitted that "we are a long way from persuading governments to accept a flat ban on the trade of legal arms." He urged that the next steps be the creation of international arms registries; giving nongovernmental organizations power to monitor governmental compliance with international restrictions on arms transfers; and "stronger domestic regulation." Would these measures be helpful steps toward a later ban on the legal trade in arms?

2. What would be the advantages and disadvantages of "a flat ban on the trade of legal arms"? If you supported such a ban, what steps could you take towards persuading governments to adopt a flat ban? How would you counter the arguments of skeptics?

3. *American exceptionalism.* Writing in the *Stanford Law Review* about "the most problematic face of American exceptionalism," the type that Koh ranked highest in "order of ascending opprobrium," Koh complained that the United States did not "obey global norms." Among his examples was the American stance of "claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons." Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1486 (2003). Koh was referring to the American position at the 2001 UN Conference that produced the Programme of Action on Small Arms. As detailed in Section A.3, the administration drew a red line against express requirements for domestic gun control, and against proposed language that would ban arms transfers to "nonstate actors"—that is, to individuals, including rebel groups. Was the U.S. wrong to invoke the Second Amendment as a justification for its stance at the UN?

4. *Constitutional Charming Betsy Canon.* In the 1804 U.S. Supreme Court case *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804), Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." The *Charming Betsy* ship was originally owned by an American but was later sold in St. Thomas to a Dane who sent it on a commercial voyage to the French island of Guadeloupe. The issue before the Court was whether the ship was forfeitable under a congressional statute that forbade American trade with France. The Marshall Court construed the statute narrowly, so as not to run counter to international law, which allows trade by neutrals (such as Denmark).

In statutory construction, the *Charming Betsy* canon has been applied by American courts ever since. Professor Koh has argued for a "Constitutional Charming Betsy Canon." In other words, the U.S. Constitution should, when possible, be interpreted to comply with international law. *See* Vicki Jackson, Constitutional Engagement in a Transnational Era (2009) (arguing for use of international law in interpreting some constitutional provisions, but not the Second Amendment, which has the "specificity or distinctiveness . . . that makes transnational sources irrelevant"); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628 (2007) (describing use of international treaties to create the equivalent of a constitutional *Charming Betsy* canon in the courts of other nations); Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 Ohio St. L.J. 1339 (2006) (arguing against domestic application of *Charming Betsy*).

To elevate *Charming Betsy* to a canon of *constitutional* construction would mean that whenever there is ambiguity, the Constitution should be construed to match international law. Of course, almost every constitutional case that reaches the Supreme Court involves the resolution of some kind of ambiguity: What kind of punishment is "cruel and unusual"? What searches and seizures are "unreasonable"? Does the protection of "the freedom of speech" include political advertisements by the National Rifle Association or the Brady Campaign, if the ads are

paid by general membership dues?[50] What kind of "Arms" are encompassed in the Second Amendment, and what kinds of controls amount to the right's being "infringed"?

Should all ambiguities in the U.S. Constitution be resolved so that the Constitution is consistent with international law? Does the answer depend on what "international law" is?

2. *Norms Entrepreneurs for Gun Control and Gun Rights*

As explained at the beginning of this Chapter, one form of international law is *positive law*, which is created by written documents similar to a statute or a contract. Examples include treaties, conventions, bilateral agreements, and so on. Long before wide-ranging international treaties became common, international law was derived from *customary law*. Customary law arises from the common behavior of nations who believe that their actions are compelled by international law. For example, in the eighteenth century, civilized nations did not execute enemy soldiers who had been captured, nor did they arrest or imprison ambassadors from foreign nations, even if the ambassador were almost certainly guilty of crime. These customary practices were considered by the nations themselves to be legally mandatory, even though there were no applicable treaties about the laws of warfare or the immunities of diplomats. Thus, the term "customary law."

In an ordinary sense, customary law is defined by what nations actually do based on their beliefs about prevailing legal requirements. In this sense, customary international law is not particularly controversial. As detailed in Part A, "norms" are somewhat similar to customary law, but weaker. Sometimes, they are treated as international law.

In the article above, Professor Koh approvingly notes how "transnational norm entrepreneurs" and "transnational activists" have worked successfully in recent decades to expand dramatically what is meant by "international law." He lauds their efforts on the gun control front. As he explains, "Twenty-first-century international lawmaking has become a swirling interactive process whereby norms get 'uploaded' from one country into the international system and then 'downloaded' elsewhere into another country's laws or even a private actor's internal rules." Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 Geo. L.J. 725, 747 (2013). The norms creators sometimes have assistance from the United Nations. *See, e.g.*, Nadia Fischer, *Outcome of the United Nations Process: The Legal Character of the United Nations Programme of Action, in* Arms Control and Disarmament Law 165-66 (2002) (United Nations publication) (UN gun control documents are "norms" of international law).

The concern that foreign gun control norms may be "downloaded" into the U.S. legal system is precisely why some Second Amendment supporters oppose the

50. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), ruled that corporations (including the National Rifle Association and Brady) can use funds in their corporate treasuries to make independent expenditures in federal elections; that is, they can expend their own money to speak on behalf of a preferred candidate.

international gun control project. *See, e.g.*, Ted Bromund, *Why the U.S. Must Unsign the Arms Trade Treaty in 2018*, Heritage Found. (Feb. 22, 2018). For example, the UN Human Rights Council position that gun control is an international human right (Section A.5) might be used in judicial interpretation of U.S. firearms statutes and the Second Amendment. The same could be done with the 2001 UN Programme of Action (which the U.S. joined) or the Arms Trade Treaty (which the U.S., when it was an unratified signer, might have had an obligation not to undermine). *See* Part A. The same is true for CIFTA, the western hemisphere gun control treaty that is signed but not ratified.Section B.5.

A program of action for norms entrepreneurs who wish to undo the Second Amendment is detailed in Leila Nadya Sadat & Madaline M. George, The U.S. Gun Violence Crisis: Human Rights Perspectives and Remedies, 60 Wash. U. J.L. & Pol'y 1 (2019). The authors' plan is to:

1. Seek declarations from international bodies on the U.S. human rights obligations to prevent gun crime. *Id.* at 36-50.
2. Use these declarations to encourage U.S. interpretation of the Second Amendment to defer to international norms, as some Supreme Court Justices have already done for Eighth Amendment interpretation. *Id.* at 82-86.

The primary focus of the paper is the first step, gathering available international legal interpretations to demonstrate the failures of the U.S. to fulfill its duty to protect as a signatory state under various international treaties. By using only one page out of the entire paper to briefly touch on the Second Amendment jurisprudence, the authors are practicing what they preach in the second step, namely to move their discourse away from the "gun rights rubric."

The authors identify four international bodies for step one of the program:

1. The *UN Human Rights Council (HRC)* has the power to "investigate alleged human rights abuses anywhere in the world and accepts complaints . . . from NGO's and private individuals." *Id.* at 60. In the Universal Periodic Review (UPR) process, states are supposed to declare their actions to improve domestic human rights conditions and their fulfillment of "international legal obligations." *Id.* at 61. During the UPR, other countries can make recommendations, which have no force of law. Because of the Council's domination by dictatorships, and long-standing bias against the United States and Israel, the U.S. withdrew from the Council in June 2018 and currently has no duties to appear in any of the HRC meetings or to submit national reports.
2. The *UN Human Rights Committee* is distinct from the UN Human Rights Council. The latter is composed of representatives of states. The Human Rights Committee, in contrast, consists of 18 experts. The sole purpose of the Committee is to monitor compliance with the International Covenant on Civil and Political Rights (ICCPR) by nations that have ratified the Covenant. The Committee has the power to hold a hearing investigating the United States if another ICCPR signatory country files a complaint on alleged violations of the Covenant. A private party within the U.S. has no standing to file a complaint via the Committee. A national government

may bring a complaint against another nation only when the issue cannot be "satisfactorily resolved, and all domestic remedies are exhausted." *Id.* at 66. A signatory country is required to report its domestic human rights conditions to the Committee every four years for review. After reviewing the report submitted by a signatory country, the Committee will issue its Concluding Observations, which a further response from the state is expected to be made within a year. The Committee has no legal authority to compel a nation to take any specific legislative or legal actions.

3. The *Inter-American Commission on Human Rights* (IACHR) will accept cases from individual petitioners to bring a member state of the Organization of American States (OAS) before the Commission for a judgement. Petitioners "must have exhausted all legal remedies"and be unable to reach a "friendly settlement" with the member state on alleged violations of the OAS Charter and the American Declaration on Rights and Duties of Man. *Id.* at 102. Once the IACHR decides to take the case, it will ask the petitioner and the member state to submit briefs. The IACHR will also accept amicus briefs and may hold a public hearing. A decision of the IACHR will be issued to the member state, providing instructions "on how to comply with its obligations in the given matter." *Id.* The US does not recognize IACHR decisions as legally binding.

   A famous IACHR case on the U.S. came after the US Supreme Court's ruling in *Castle Rock v. Gonzales*, 545 U.S. 748 (2005). The Supreme Court ruled that a local government had no legal duty to protect three children who were the beneficiaries of a court-issued protective order against their father. The IACHR held that "the failure of the United States to adequately organize its state structure to protect them [Rebecca, Katherine, and Leslie Gonzales] from domestic violence not only was discriminatory, but also constituted a violation of their right to life under Article I and their right to special protection as girl-children under Article VII of the American Declaration." *Jessica Lenahan (Gonzales), et al.*, Report No. 80/11, Case 12.626, (2011), Inter-Am. Comm'n H.R., § VIII, ¶ 164. After finding the US failed to comply with IACHR recommendations, all IACHR could do is "reiterate its recommendations." *Id.* ¶ 215.
4. The *World Health Organization* (WHO) has the "authority to make recommendations to Members with respect to any matter within the competence of the Organization." Sadat & George, at 103. The WHO can also issue guidance on health-related issues, such as "responsible reporting on suicide." *Id.* Sadat and George see a "useful comparison"between the tobacco industry and the firearm industry. *Id.* at 104. With the U.S. implementation of "strict regulations on the [tobacco] industry," the outcome of the tobacco control is "a significant decline in the percentage of the population who smokes." *Id.* Since the WHO is an influential international organization and its last publication on gun violence is issued in 2001, the authors wish to see an issue of the WHO *Bulletin* being published in the future on "global gun violence concerns." *Id.*

Although norms entrepreneurs for gun control—such as Professors Koh, Sadat, and George, as well as activist organizations—have grown in influence over

the last several decades, norms entrepreneurship does not work only in one direction. In October 2005, the people of Brazil voted on a referendum to outlaw private gun ownership. Although the referendum was strongly supported by Brazil's President Luiz Inácio Lula da Silva, the prohibition proposal was crushed by a 64 to 36 percent vote. The vote had been strongly supported by the international gun prohibition coalition described in Professor Koh's article, and Brazilian prohibition activists received support from the United Nations. A win for prohibition in Brazil was supposed to set the stage for similar votes in other nations, and for the creation of a major international gun control treaty at the UN Programme of Action review conference in the Summer of 2006.

The Brazilian election had the opposite effect. NGO advocacy for prohibition was led by the group Viva Rio. Its leader, Rubem Fernandes, explained at a UN meeting what he had learned from the experience: "First lesson is, don't trust direct democracy." He also noted that the argument "I have a right to own a gun" became "a very profound matter" in the debate on the referendum. Rubem Fernandes, Lessons from the Brazilian Referendum, Remarks to the World Council of Churches (Jan. 17, 2006), *quoted in* Wayne Lapierre, The Global War on Your Guns 187 (2006);[51] *see also* Roxana Cavalcanti, *Edge of a barrel: Gun violence and the politics of gun control in Brazil*, Brit. Soc. of Criminol. Newsletter, No. 72, Summer, 11-14 (2013) (arguing that the referendum was defeated partly because of the Mensalão scandal, involving bribery of Brazilian legislators by the ruling Workers Party, which had helped lead the referendum campaign, and partly because the Brazilian public accepted NRA-derived rhetoric about distrust of government and the need for self-defense).

Perhaps the landslide rejection of the Brazilian gun ban referendum started the nation down a slippery slope. In 2018, presidential candidate Jair Bolsonaro was elected while promising to reform Brazil's onerous gun control laws, so that ordinary citizens can own and carry firearms for protection from Brazil's rampant violent crime. In January and May 2019, he used existing authority to issue executive decrees that temporarily revised the effects of a 2003 statute (Law no. 10.826) that had prohibited lawful gun acquisition by most Brazilians. *See* Tara John, *Brazil's Bolsonaro signs executive order easing gun rules*, CNN. May 8, 2019; Presidência da República, *Presidente assina decreto que altera regras para uso de armas*, May 7, 2019; Presidência da República, *Governo altera decreto de regras sobre o uso de armas*, May 22, 2019 (summarizing Decreto 9.785); Presidência da República, *Decreto regulamenta posse de armas de fogo no Brasil*, Jan. 15, 2019. Even before Bolsonaro's 2018 election victory on a right to arms platform, an article in *Foreign Policy* magazine pondered whether Brazil's referendum had broader implications:

> If you asked people in Bosnia, Botswana, or, for that matter, Brazil, what the Second Amendment of the US Constitution stands for, most of them

51. Fernandes was speaking at PrepCon 2006, a UN-sponsored preparatory conference for the major UN gun control conference that would take place in June-July 2006. Side Events, PrepCom 2006 (Preparatory Committee for the Conference to Review Progress in the Implementation of the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects), United Nations, Jan. 9-20, 2006.

> would probably have no idea. But the unexpected defeat of Brazil's proposed gun prohibition suggests that, when properly packaged, the "right to keep and bear arms" message strikes a chord with people of very different backgrounds, experiences, and cultures, even when that culture has historically been anti-gun.
>
> In fact, the Second Amendment may be a more readily exportable commodity than gun control advocates are willing to accept, especially in countries with fresh memories of dictatorship. When it is coupled with a public's fear of crime—a pressing concern in most of the developing world—the message is tailored for mass consumption.

David Morton, *Gunning for the World*, Foreign Policy, Jan./Feb. 2006.

Online Chapter 19.C.10, on Comparative Law, describes the situation in Kenya, where many pastoral tribes have been resisting government gun confiscation efforts for decades. An article in Kenya's leading newspaper urges the government to abandon the confiscation campaigns, and instead to follow the Second Amendment model:

> How can the Government ask us to surrender our guns when we know very well that there is no security for us? If we give out our firearms, say today, who will protect us when the neighbouring tribes strike? How about our stolen livestock? Who is going to return them to us?" Mr. Lengilikwai talks with bitterness.
>
> In the past, critics of liberalising access to firearms have argued that they would put ordinary people's lives in peril because even squabbles in the streets or the bedroom would be resolved by bullets. Incidentally, such incidents are few and far between in the Kerio Valley despite the easy accessibility of AK-47s as well as the relatively low levels of education and social sophistication. . . . If Kenya is to achieve long-lasting stability, it ought to borrow a leaf from the US, whose constitution gives the people the right to bear arms and form militias for their own defence should the armed forces fail them, as happened in Kenya after the December elections.

Paul Letiwa, *Why Herders Won't Surrender Their Firearms Just Yet*, Daily Nation, Apr. 30, 2008; *see also* Ng'ang'a Mbugua, *Law Should Be Changed to Free Guns*, Daily Nation (Apr. 25, 2008) (noting success of armed defense program of the people of the Kerio Valley).

NOTES & QUESTIONS

1. Suppose that the idea of a fundamental human right to keep and bear arms became popular globally. What consequences might ensue?

2. Recall the materials earlier in this chapter asserting that personal self-defense and collective resistance to tyranny are fundamental, natural, inherent human rights. Similar provisions are found in various national constitutions. *See* online Ch. 19.A. Should these rights be considered universal norms?

3. Self-defense from criminals or criminal governments does not always involve using firearms or other arms. But there are sometimes situations in which

no lesser force will suffice. Should the right to keep and bear arms be considered a necessary corollary to individual and collective rights of self-defense?

4. In the world of international arms entrepreneurship, the numbers and funding for prohibition advocates far exceeds those of arms rights advocates. As this chapter indicates, the former type of advocates has not yet achieved all it wanted, but it has helped create many international documents that advance its goals. If you were an advisor for each side, what suggestions would you give about future strategy and tactics?

5. *Hessbruegge's analysis of self-defense and international law.* An impressively thorough and thoughtful analysis of human rights and self-defense is Jan Arno Hessbruegge's book *Human Rights and Personal Self-Defense in International Law* (2017). Analyzing many of the materials presented in this Chapter, and in online Chapters 19 (comparative law) and 21 (antecedents of the Second Amendment), Hessbruegge finds that the right to self-defense is a natural and universal right. *Id.* at 17-89. However, he does not consider self-defense to be recognized as a human right in international law:

> The right of self-defense is a genuinely pre-society right that evolved in the *absence* of the state. It survived the formation of the state because no state will ever have *enough* power to perfectly protect individuals. Conversely, human rights evolved to in response to the overbearing *presence* of the state and serve primarily to ensure that states do not accumulate *too much power*. Unlike human rights, self-defense does not additionally incorporate a vision to transform the state. It can accommodate any type of state, including authoritarian states that fail to respect human rights. For these reasons, the right to personal self-defense can best be described as an individual right sui generis under international law.
>
> Even if it does not constitute a human right in its own right, the right to personal self-defense still links closely to international human rights law. Human rights shape the right to self-defense because they prohibit denying or unduly curtailing the right to personal self-defense. In this sense, the right to personal self-defense is derivative of human rights, even if it is not a human right itself.

Id. at 89.

Arguably, Hessbruegge's view that a right which precedes the existence of society cannot be an international law human right is too strict. After all, marriage, bearing children, and raising children are natural rights that long precede society. Today, such rights are certainly part of international human rights. *E.g.*, Universal Declaration of Human Rights art. 16 (1948) ("(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

Because Hessbruegge does believe that human rights law forbids suppression of self-defense, he arrives at conclusions that would be the same as if self-defense were denominated as a right in itself. For example, he writes that governments like Papua New Guinea or Iran, which refuse to entertain self-defense claims by female

victims or rape or other abuse by men, are violating natural law. Hessbruegge, at 239-42.

Similarly, a legal system (such as Iceland's) that requires a defendant to prove self-defense, rather than requiring the government to disprove it beyond a reasonable doubt, violates the presumption of innocence. *Id.* at 276-78.[52] The allowance for self-defense required by international human rights law also means that there is a right to use deadly force against at least some forms of manifestly unlawful government violence, including extrajudicial killings and torture. *Id.* at 299-312.

However, Hessbruegge disagrees with the argument, presented in section D, that the Genocide Convention and the inherent right of self-defense authorize the supplying of arms to a population that is the victim of an ongoing genocide. "Allowing the Bosnian side to arm itself might have limited the level of atrocities. However, such cases are the exception, not the rule. As a matter of general principle, preventing genocide and mass atrocities will typically require . . . sustained efforts to counter the proliferation of small arms." *Id.* at 288.

This is an empirical judgement. It is at least called into question by the fact that every genocidal regime in the last century and the present one has assiduously worked to disarm the intended victims beforehand. To the extent that such regimes have been unable to fully disarm victims, many lives have been saved, including in the Turkish genocide of the Armenians in World War I, and the German genocide of Jews in World War II. The issue is discussed further in Chapter 19.D.2.

Hessbruegge also examines the question of whether the right of self-defense implies a right to possess defensive firearms. His first argument against such a right is that having a gun is counterproductive for personal safety. The basis for the argument is a citation of several social science studies. *Id.* at 280-85. The full body of empirical evidence is not nearly so unanimous as Hessbruegge's discussion implies. Some of the empirical evidence from both sides is discussed in Chapter 1.

Even if, arguendo, gun ownership enhances individual safety, there should be no right to gun ownership because of the greater interest in the safety of society as a whole, Hessbruegge argues. As he points out, most people believe that it is alright to disarm convicted violent felons, even though ex-felons are at unusually high risk of being victimized by criminals. (The higher victimization rates for ex-felons are a consequence of ex-felons tending to live in poorer areas with high crime rates, tending to associate with criminals, and perhaps having lower impulse control and poor prudential judgement.) Hessbruegge extrapolates a broader principle from felon disarmament: although gun ownership might make gun owners safer, greater gun ownership makes society more dangerous in the long run. *Id.* at 282-83.

This, too, is an empirical judgement, and some empirical evidence is to the contrary. As the data in Chapter 1 indicate, rising gun density in the United States over the last three decades has coincided with a tremendous drop in gun crime. Online Chapter 19.B presents cross-national studies of gun ownership, and some of

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52. Under an Ohio statute that was enacted in 1978, the defendant had the burden of proof on self-defense. The statute was amended in 2019 to put the burden of disproving self-defense on the government. Ohio Rev. Code § 2901.05; Ohio House Bill 228 (2019). The former Ohio statute was held by the U.S. Supreme Court not to violate the Due Process Clause of the Fourteenth Amendment, in a 5-4 decision. *Martin v. Ohio*, 480 U.S. 228 (1987).

the studies find no link between higher rates of gun ownership and violent crime. Public safety may be enhanced by laws that disarm people whose individual behavior demonstrates an unusual risk that they will misuse guns in the future; however, individuals who have been peaceable all their lives may pose little or no risk of misusing arms and may (according to some of the data presented in Chapter 1) actually contribute to greater social safety if they are armed.

Hessbruegge's final argument is that a right of some persons to own guns harms the self-defense rights of people who do not want to own guns: "People who choose not to have a gun or are unable to have one will see their capacity to effectively implement their right to self-defense diminished, because any aggressors they face are more likely to be armed. . . . Those who proclaim a right of firearms as a means of self-defense fail to see how such a right diminishes the right to personal self-defense of those who also insist on their right not to own a gun." *Id.* at 289.

The argument is plausible if one makes certain assumptions. First, that a significant quantity of firearms owned by law-abiding people will come into the hands of criminal aggressors, since guns owned by law-abiding people can be stolen by criminals and then sold to other criminals. The second assumption is that a government that severely constricts or eliminates lawful gun ownership by citizens is also effective enough to thwart criminal gun acquisition from other sources, such as thefts from government armories, illicit sales of government arms by corrupt government officials, or international smuggling. As described in online Chapter 19.C, the assumption of government efficacy is plausible for certain nations, such as Japan, and less plausible for other some other nations. *See also* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 Wake Forest L. Rev. 837 (2008) (online Ch. 19.B.5) (discussing obstacles to successfully implementing government restrictions on firearm availability).

While Hessbruegge's discussion focuses on firearms, the logic of his argument applies equally to any type of personal arm, including pepper spray, stun guns, knives, swords, bows, and clubs. If the law-abiding are allowed to own any arms at all, some of those arms may leak into the hands of violent aggressors, thus making self-defense all the more difficult for the law-abiding.

The other side of the argument, however, is that self-defense without arms is not necessarily very easy for a large portion of the population. If neither law-abiding citizens nor criminals have arms, then the advantage goes to physically strong young men—all the more so if they work in groups to attack isolated victims. That is precisely why many people who worry about being victimized by criminals choose to own some kind of arm. The reason that guns are called "equalizers" is because they are by far the most effective tool allowing a small person to defend him- or herself at a distance from a group of larger people. *See* Dave Kopel, Paul Gallant & Joanne Eisen, *A World Without Guns*, Nat'l Rev. Online, Dec. 5, 2001.

But the problem with the equalizing effect of guns is that they also allow a smaller, lone individual to attack a larger victim, or group of victims, especially if the victims happen to be unarmed. Arms in the wrong hands harm public safety, while arms in the right hands enhance it. Although the principle is easy to state, implementation is more challenging.

Regardless of whether the reader agrees with Hessbruegge's conclusions, his book is a major contribution to the literature and an outstanding resource for future scholarly examination of personal self-defense in international law.

CHAPTER 19
COMPARATIVE LAW

This is online Chapter 19 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2022), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsreglation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *This chapter.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

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Online Chapter 18 covers international law — that is, law, such as treaties, that applies among nations. This Chapter studies comparative law — comparing and contrasting the "domestic" (noninternational) gun laws of various nations and examining the possible effects of those different laws. Because international law is derived in part from the "norms" of civilized nations, the study of comparative law can yield useful insights for international law.[1]

Part A covers national constitutions and reviews the following topics: (1) the three nations besides the United States that have an express constitutional right to arms; (2) constitutional guarantees of self-defense; (3) constitutional affirmations of the right and duty to resist tyranny or illegitimate government; (4) constitutional support for national liberation movements in other nations; (5) a short case study of Ghana and its constitutional duty of forcible resistance to usurpation of government; and (6) the constitutional right to security in the home.

Part B excerpts studies examining the consequences of varying rates of gun ownership among a large number of countries. One purpose of Part B is for students to develop skills in evaluating statistical studies. Accordingly, Part B begins with an explanation of some basic statistical methods and terminology. The first excerpted article, by Don Kates and Gary Mauser, observes similarities and difference of the United States and Europe.

The next Section introduces complex statistical analysis. It begins with a summary of statistical research methods and vocabulary. Next is an article by Professor Gary Kleck examining the strengths and weaknesses of various studies on the relationship between gun ownership levels and homicide levels. Although Kleck analyzes data within the United States, his methodological cautions provide a foundation for evaluating the international studies that follow. As Professor Kleck explains, one of the most daunting problems is accurately estimating levels of gun ownership, especially over time.

The third Section of Part B presents an especially sophisticated article, by John N. van Kesteren, that examines 26 countries, mostly European plus the United States, to look for relationships between gun ownership levels and violence.

The last Section of Part B directs attention to the importance of culture in comparative scholarship. An article by Irshad Altheimer and Matthew Boswell reports the diverse effects of higher rates of gun ownership in Western developed nations, Eastern Europe, and Latin America. A second article, by David Kopel, Carlisle Moody, and Howard Nemerov, investigates the relationship between gun density and various measures of economic freedom, economic prosperity, political freedom, civil freedom, and noncorruption in 78 nations.

Finally, in Section B.5, Nicholas J. Johnson describes "the remainder problem": if social science did prove that greater gun density causes the United States to have higher rates of homicide and other gun crime than some other countries, what can be done meaningfully to reduce U.S. gun density?

Part C presents case studies of gun control and gun rights in several nations. It begins with the United Kingdom, starting in the early twentieth century. (For earlier U.K. history, see Chapter 2.) For contrast, the next nation is Switzerland, with its thriving militia system.

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1. The authors thank Vincent Harinam (M.A. Criminology, Univ. Toronto 2017) for contributing to the third edition of this chapter.

The Western Hemisphere comes next, with Canada, Mexico, and Venezuela. Asia and the Pacific are covered in sections on Australia, Japan, China, and Thailand. Kenya and South Africa are the case studies for Africa. Some Notes & Questions following sections on particular countries present material about other nearby countries.

Part D considers broad perspectives in the three different ways. First, an article by Professor Carlisle Moody investigates European homicide trends over the last 800 years, and observes that growing availability of firearms that could be kept always ready for self-defense (wheel locks and flintlocks) paralleled a sharp decline in homicides.

An essay by Professor Kopel compares and contrasts homicides in the United States and Europe during the twentieth century. Europe's homicide rate is vastly higher—once one takes into account murder by government. If one makes certain assumptions designed to produce the highest possible figure, the United States had as many as 745,000 additional gun homicides in the twentieth century because the United States did not have gun control laws as restrictive as those in Europe. Conversely, Europe had about 87.1 million additional homicides by government because Europeans did not have a right to arms. The essay describes the gun control policies of dictators in Europe and elsewhere. It concludes with a pair of case studies showing the accomplishments of armed resistance to genocide: by Armenians and other Christians in the Ottoman Empire during World War I, and by Jews in Europe during World War II.

The third section of Part D investigates at length the largest mass homicide in history: the murders of over 86 million Chinese by the Mao Zedong dictatorship in 1949-76. The essays also detail armed resistance to Mao, and include a detailed description of Tibetan uprisings. While Mao adopted diverse arms control policies at different times, the objective was always the same: his political supporters would be armed and his opponents would not.

The excerpted article, John N. van Kesteren, *Revisiting the Gun Ownership and Violence Link: A Multilevel Analysis of Victimization Survey Data*, British Journal of Criminology, vol. 54, pages 53-72 (2014), is republished by permission of Oxford University Press.

A. NATIONAL CONSTITUTIONS

1. Constitutional Rights to Arms

Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 10, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.). The inhabitants of the United States of Mexico have the right to possess arms in their domiciles, for security and legitimate defense, with the exception of the prohibitions by federal law and the reservations for exclusive use of the military, army, air force, and national guard. Federal law will determine the cases, conditions, requirements, and place under which the inhabitants will be authorized to carry arms.

Constitution de la République d'Haïti art. 268-1. Every citizen has the right to armed self-defense, within the bounds of his domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police.

Guatemala Constitution art. 38. Possession and carrying of arms. The right of possession of arms, not prohibited by law, for personal use is recognized, in the home. There will be no obligation to surrender them, save in cases that are ordered by a competent judge. The right of carrying of arms is recognized, and regulated by the law.

Constitution of the Czech Republic, Charter of Fundamental Rights and Freedoms, art. 41(3). The right to defend fundamental rights and freedoms with a weapon is guaranteed under the conditions laid down by law. (See Online Ch. 18.B.4.a.)

United Kingdom, Bill of Rights, § 7. The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law. See Chs. 2.H.4, 19.C.1, 22.H.4.

NOTES & QUESTIONS

1. Why do you think that the five nations listed above (and the United States) *do* expressly recognize a right to arms?

2. Textually, how do the rights to arms recognized in the five nations' constitutions compare with the Second Amendment of the United States Constitution? With the Second Amendment as construed by *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 11.B)? With U.S. state constitutional rights to arms provisions? *See* Ch. 10 App'x.

3. *Mexico.* Constitutional rights typically limit the power of the legislature. Mexico's constitutional right to *possess* arms in homes for security and lawful self-defense is subject to federal law "prohibitions." Additionally, any right to *carry* arms is determined by federal law. Given these provisions, to what extent is Mexican federal law constrained by its constitutional right to arms? Mexico is the subject of a country study presented in Section C.4.

4. *Haiti.* Although the Haiti Constitution guarantees the constitutional right to arms, the constitutional article is not honored at present. For more on Haiti, see Topher L. McDougal, Athena Kolbe, Robert Muggah & Nicholas Marsh, *Ammunition Leakage from Military to Civilian Markets: Market Price Evidence from Haiti, 2004-2012*, Def. & Peace Econ. (July 2018) (military ammunition supplies often end up being illicitly transferred to citizens); Robert Muggah, *Securing Haiti's Transition: Reviewing Human Insecurity and the Prospects for Disarmament, Demobilization, and Reintegration*, Small Arms Survey occasional paper (2005).

5. Express constitutional protections of the right to keep and bear arms are relatively uncommon globally, compared to related rights, such as self-defense, resistance to tyranny, or security of the home, each which is discussed below. Why do you think express arms rights are not common?

2. Constitutional Right of Self-Defense

Fifteen nations, all of which have legal systems derived from English law, use nearly identical language to constitutionalize self-defense: Antigua and Barbuda (art. 4), the Bahamas (art. 16.), Barbados (art. 12), Belize (art. 4), Cyprus

(art. 7.), Grenada (art. 2), Guyana (art. 138), Jamaica (art. 14), Malta (§ 33), Nigeria (art. 33), Samoa (art. 5), St. Kitts and Nevis (art. 4), Saint Lucia (art. 2), Saint Vincent and the Grenadines (art. 2), and Zimbabwe (art. 12). Another country, Slovakia (art. 15), uses a variation of the formula.

The language in these nations' constitutions is a more elaborate version of the European Convention on Human Rights (online Ch. 18.B.3) protection of the rights to life and self-defense. The standard language in these constitutions provides:

> **(1)** No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
>
> **(2)** A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case
>
> **(a)** for the defence of any person from violence or for the defence of property;
>
> **(b)** in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> **(c)** for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or
>
> **(d)** in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

Two other countries constitutionally enumerate a right of self-defense. In Honduras, "the right of defense is inviolable" (art. 82). In Peru, "[e]very person has the right: . . . § 23 To legitimate defense."

NOTES & QUESTIONS

1. What are the arguments for and against expressly constitutionalizing a right to self-defense?

2. Suppose that one of the constitutional provisions above were repealed, and a statute were enacted that forbade self-defense. In what sense, if any, could persons in the country assert that they have a right of self-defense? **CQ:** The materials on the origins of international law (online Ch. 18.C) and antecedents of the Second Amendment (online Ch. 21) address this issue.

3. Section 2(a) recognizes legal justification for the reasonable use of deadly force for defense of persons against violence *and* "for the defence of property." Does the right to defend persons necessarily include the right to defend property? If not, why was the defense of property added?

4. If a constitution recognizes an essential right, such as food or education, can the government properly outlaw exercise of the right, such as growing food or teaching children to read? What if the government supplies everyone with plenty of food and excellent education? What if the government aspires to supply sufficient food and education, but is unable to do so? Is there a right to a government that is not tyrannical or oppressive?

3. Constitutional Resistance to Tyranny

Many nations' constitutions affirm a right or even a duty of citizens to resist usurpation of power, destruction of constitutional order, or other unlawful acts of persons purporting to exercise governmental power. These constitutions vary widely in their texts and details. Some expressly limit resistance only to nonviolent modes, such as civil disobedience. Others expressly declare a right and duty of forcible resistance. Many others have language for which the use (or nonuse) of force is left to implication. Similarly, constitutions also differ in the specificity of what kinds of acts trigger the rights of resistance.

This section groups the relevant constitutions geographically: Europe, Latin America, Africa, and Asia. After that, a subsection presents the handful of nations' constitutions that offer express moral or other support for liberation movements in other nations.

The constitutional provisions quoted in this section are only those that are currently in effect. A separate document, available online on this textbook's website, reproduces all constitutional resistance texts past and present. The texts have been translated into English and into Chinese.

The next section presents a short case study of Ghana; the section discusses a Ghanian scholar's argument that Ghana's constitutional right of resistance creates an implicit right of Ghanians to possess arms.

In addition to the constitutions quoted below, there are three nations whose constitutions specifically incorporate the Universal Declaration of Human Rights (online Ch. 18.A.1), which recognizes the right of resistance to tyranny. Those nations are Andorra (art. 5), Mauritania (pmbl.) (also incorporating African Charter of Human and Peoples' Rights), and Romania (art. 20).

a. Europe

Czech Const. art. 23. "Citizens have the right to put up resistance to any person who would do away with the democratic order of human rights and fundamental freedoms established by this Charter, if the actions of constitutional institutions or the effective use of legal means have been frustrated."

France Const. art. 2. "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression."

Germany Const. art. 20(4). "All Germans shall have the right to resist any persons seeking to abolish this constitutional order, if no other remedy is available."

Greece Const. art. 120(4). "Observance of the Constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution."

Fundamental Law of Hungary art. C. "(2) No one shall act with the aim of acquiring or exercising power by force, and/or of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way. (3) Only state authorities shall have the exclusive right to use force in order to enforce the Constitution and laws."

Lithuania Const. art. 3. "The People and each citizen shall have the right to oppose anyone who encroaches on the independence, territorial integrity, or constitutional order of the State of Lithuania by force."

Const. of the Portuguese Repub. art. 21. "Everyone has the right to refuse to comply with an order that infringes his or her rights, freedoms or guarantees and to resist by force any form of aggression when recourse to a public authority is impossible."

Const. of the Slovak Repub. art. 32. "The citizens shall have the right to resist anyone who would abolish the democratic order of human rights and freedoms set in this Constitution, if the activities of constitutional authorities and the effective application of legal means are restrained."

b. Latin America

Argentina Const. pt. I, ch. 2, § 36.

> This Constitution shall rule even when its observance is interrupted by acts of force against the institutional order and the democratic system. These acts shall be irreparably null.
>
> Their authors shall be punished with the penalty foreseen in Section 29, disqualified in perpetuity from holding public offices and excluded from the benefits of pardon and commutation of sentences.
>
> Those who, as a consequence of these acts, were to assume the powers foreseen for the authorities of this Constitution or for those of the provinces, shall be punished with the same penalties and shall be civil and criminally liable for their acts. The respective actions shall not be subject to prescription.
>
> All citizens shall have the right of resistance to those committing the acts of force stated in this section.

The Argentina Constitution was extensively revised in 1994, including by the addition of a second chapter to Part I's declarations, rights, and guarantees. The resistance section is the first item in the 1994 additions, because it is the first section in chapter 2. The resistance section refers to section 29, which provides:

> Congress may not vest on the National Executive Power — nor may the provincial legislatures vest on the provincial governors — extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland.

Id. pt. I, ch. 1, § 29.

Regarding section 36, a leading Argentinian constitutional treatise asks: "What is this right of resistance; it is not defined. Maybe it can be joined with section 21,

which *obliges* every citizen *to arm themselves* in *defense of the constitution*.[2] We say that the right of resistance — even with arms — has a minimum and essential content that comes directly from section 36, and that the *defense of the constitution* — which is the objective of the defense — is equivalent to the institutional order and of the democratic system contained in it." 3 German J. Bidart Campos, Manual de la Constitucion Reformada 35 (2008) (translation by this work's authors); *cf. David Baigún*, El delito de « atentado al orden constitucional y la vida democrática » y la reforma de la constitución nacional (Univ. of Fribourg).[3]

On the other hand, when section 36 was presented at the 1994 constitutional convention, the first speaker said that it referred only to forms of nonviolent resistance — for example, the recent examples of people whistling political songs that had been forbidden by military governments. The convention transcript does not shed more light on the interpretation of the section 36 Resistance Clause.

Cuba Const. art. 3. "When no other recourse is possible, all citizens have the right to resist through all means, including armed struggle, anyone who tries to overthrow the political, social and economic order established in this Constitution." Like most of the rest of the text of the Cuban Constitution, this provision is a sham. The regime founded by Fidel Castro is and always has been a totalitarian military dictatorship.

Dominican Repub. Const. art. 8(5). "No person is obligated to comply with what is not required by law; nor can they legitimately be impeded from actions not prohibited by law." *See also* art. 46 ("All laws, decrees, resolutions, regulations or acts are null and void if contrary to the rights in this constitution.").

Ecuador Const. art. 98. "Individuals and groups may exercise the right of resistance against acts or omissions of public authorities, persons or legal entities that may violate or infringe their constitutional rights, and demand the recognition of new rights."

El Salvador Const. art. 87.

> The right of the people to insurrection is recognized, for the sole object of reestablishing constitutional order altered by the transgression of the norms relative to the form of government or to the established political system, or for serious violations of the rights consecrated in this Constitution.
>
> The exercise of this right shall not produce the abrogation nor the reform of this Constitution, and shall be limited to the removal insofar as necessary of transgressing officials, replacing them in a transitory manner until they are substituted in the form established by this Constitution.

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2. "Every Argentine citizen is obliged to bear arms [*armarse*. lit. "to arm oneself"] in defense of the fatherland and of this Constitution, in accordance with the laws issued by Congress and the Decrees of the National Executive Power to this effect. Citizens by naturalization are free to render or not this service for a period of ten years as from the date they obtain naturalization papers." *Id.* pt. I, ch. 1, § 29.

3. David Baigún had a long and eminent career as an Argentinian law professor and human rights advocate.

> Under no circumstances shall the powers and jurisdictions which correspond to the fundamental organs established by this Constitution be exercised by the same person or by a sole institution.

Id. art. 88: "The principle that a President cannot succeed himself [*alternabilidad*] is indispensable for the maintenance of the established form of government and political system. Violation of this norm makes insurrection an obligation."

Const. of the Rep. of Guatemala art. 5.

> Any person has the right to do whatever the law does not prohibit; he is not obligated to obey orders not based on the law or issued according to it. Neither can he be harassed or persecuted for his opinions or for acts that do not involve violation of same.

Id. art. 45: "Action to prosecute the violators of human rights is public and can be exercised through a simple denunciation, without any guarantee or formality whatever. The opposition of the people to protect and defend the rights and guarantees granted in the Constitution is legitimate."

Honduras Const. art. 3. "No one owes obedience to a usurping government or to those who assume public functions or jobs by force of arms or using means or procedures that violate or ignore what this Constitution and the laws establish. The acts verified by such authorities are null. The people have the right to resort to insurrection in defense of the constitutional order."

Mexico Const. art. 136: "This Constitution shall not lose its force and effect, even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established through any public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who have taken part in the government emanating from the rebellion, as well as those who have cooperated with such persons, shall be judged in accordance with this Constitution and the laws that have been enacted by virtue thereof."

Paraguay Const. art. 138. "(1) Citizens are hereby authorized to resist usurpers through every means available to them. If a person or a group of persons, acting in the name of any principle or representation contrary to this Constitution, was to seize public power, their action will be null, nonbinding, and of no value, and therefore, exercising their right to resist oppression, the people will be excused from having to comply with such actions. (2) Those foreign states that, under any circumstance, cooperate with such usurpers will not be able to demand compliance with any pact, treaty, or agreement signed with or authorized by an usurping government as if these were obligations or commitments of the Republic of Paraguay."

Const. of Peru art. 46. "No one owes obedience to a usurping government or to anyone who assumes public office in violation of the Constitution and the law. The civil population has the right to insurrection in defense of the constitutional order. Acts of those who usurp public office are null and void."

c. Africa

Algeria Const. art. 33. "Individual or associative defence of the fundamental human rights and individual and collective liberties is guaranteed."

Benin Const. art. 66. "In case of a coup d'état, of a putsch, of aggression by mercenaries or of any action by force whatsoever, any member of a constitutional agency shall have the right and the duty to make an appeal by any means in order to re-establish the constitutional legitimacy, including recourse to existing agreements of military or defense co-operation. In these circumstances for any Beninese to disobey and organize himself to put a check to the illegitimate authority shall constitute the most sacred of rights and the most imperative of duties."

Cape Verde Const. art. 18. "Any citizen shall have the right not to obey any order that offends his right, liberties and guarantees and to resist by force any illegal aggression, when the recourse to the public authority is not possible."

Chad Const. pmbl.

We the Chadian people: . . .

— Proclaim solemnly our right and duty to resist and disobey any individual or group of individuals, any corps of State that would assume power by force or would exercise it in violation of the present Constitution;
— Affirm our total opposition to any regime whose policy would be founded on the arbitrariness, dictatorship, injustice, corruption, extortion, nepotism, clanism, tribalism, confessionalism, or confiscation of power; . . .

. . . Adopt solemnly the present Constitution as the supreme law of the State.

This Preamble is an integral part of the Constitution.

Dem. Repub. of Congo (Brazzaville) Const. art. 64. "All Congolese have the duty to oppose any individual or group of individuals who seize power by force or who exercise it in violation of the provisions of this Constitution."

Ghana Const. *See* Section A.5.

Guinea Const. art. 21. "The people of Guinea shall freely and sovereignly determine its institutions and the economic and social organization of the Nation. . . . They shall have the right to resist oppression."

Mali Const. art. 121. "The people have the right to civil disobedience in order to preserve the republican form of the State. Any coup d'Etat or putsch is a crime against the Malian People."

Mozambique Const. art. 80. "All citizens shall have the right not to comply with orders that are unlawful or that infringe on their rights, freedoms and guarantees."

Niger Const. art. 6. "The people shall have the right and duty to resist an oppressive regime through civil disobedience. Any regime that deliberately violates

the carrying out of this present Constitution shall be considered an oppressive regime. The people shall have the right to defend the established democratic regime against a coup d'etat through civil disobedience. Civil disobedience shall be exercised peacefully and only as a last resort."

Rwanda Const. art. 48. "In all circumstances, every citizen, whether civilian or military, has the duty to respect the Constitution, other laws and regulations of the country. Every citizen has the right to defy orders received from his or her superior authority if the orders constitute a serious and manifest violation of human rights and public freedoms."

d. Asia

Armenia Const. art. 18. "Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law."

Azerbaijan Const. art. 52(2). "Every citizen of the Azerbaijan Republic has the right to independently show resistance to the attempt of a mutiny against the State or forced change of the constitutional order."

Maldives Const. art. 64. "No employee of the State shall impose any orders on a person except under authority of a law. Everyone has the right not to obey an unlawful order." *Id.* art. 245: "No person shall give an illegal order to a member of the security services. Members of the security services shall not obey a manifestly illegal order."

Thailand Const. § 69. "A person shall have the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution."

4. Support for National Liberation Movements

Some constitutions offer moral support, at least, for liberation movements in other nations:

Algeria Const. art. 27. "Algeria associates itself with all the peoples fighting for their political and economic liberation, for the right of self-determination and against any racial discrimination."

Angola Const. art. 16. Angola "shall support and be in solidarity with the struggles of peoples for national liberation."

Cuba Const. art. 12(g). Cuba "recognizes the legitimacy of struggles for national liberation, as well as armed resistance to aggression, and considers its internationalist obligation to support the one attacked and [stands] with the peoples who fight for their liberation and self-determination."

Ecuador Const. art. 416(8). "The Ecuadoran State condemns all forms of colonialism, neocolonialism and racial discrimination or segregation. It recognizes the right of peoples to liberate themselves from these oppressive systems."

Portugal Const. art. 7(3). "Portugal recognises the right of peoples to rebel against all forms of oppression, in particular colonialism and imperialism."

Suriname Const. art. 7(4). "The Republic of Suriname promotes the solidarity and collaboration with other peoples in the combat against colonialism, neocolonialism, racism, genocide and in the combat for national liberation, peace and social progress."

Only Portugal's national-liberation provision was enacted by a democratic government. The Angolan government was put in power by Cuban troops during a post-colonial civil war among anticolonial groups, following Portugal's 1975 relinquishment of its Angolan colony.

5. Ghana: An Explicit Right and Duty to Restore Constitutional Order

Under Ghana's Constitution, adopted in 1992,

> (4) All citizens of Ghana shall have the right and duty at all times—
>
> (a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to commit any of the acts referred to in clause (3) of this article; and
>
> (b) to do all in their power to restore this Constitution after it has been suspended, overthrown, or abrogated as referred to in clause (3) of this article.

Ghana Const. ch. I, art. 4. The acts that must be resisted are listed in article 3: establishment of a one-party state, suppression of anyone's lawful political activity, violent overthrow of government, abrogation of the constitution or any part of it, and high treason. Articles 5, 6, and 7 provide indemnity and immunity to all citizens exercising their Article 4 "right and duty."

The 1992 right and duty of resistance are based in part on Ghana's history of military coups and dictatorship. The timeline is as follows: 1957—independence from the United Kingdom; 1958—independence leader and President Kwame Nkrumah begins establishing a one-party state; 1964—Nkrumah suspends the constitution; 1966—military coup ousts Nkrumah while he is in China visiting Chairman Mao; 1969—political parties are relegalized, and free elections are held; 1972—another junta takes power in a coup; 1979—the highly corrupt junta is removed in a coup led by Lt. Jerry Rawlings, who leads the way in putting a right to resist into the new constitution, and new elections are held; 1981—Rawlings takes power in another coup; 1992—a new constitution is enacted, free elections are held, and Rawlings wins the election. Since then, free elections have taken place every four years.

Ishmael Norman, a professor at Ghana's University of Health and Allied Sciences, argues that "[t]he 1992 Constitution provides explicit instructions to the citizens of Ghana to defend it. That is to say, the citizens are inured with the correlative constitutional right to acquire arms, to keep and to bear them in anticipation of national defense." Ishmael Norman, *The Right to Keep and Bear Arms, Ghana*, 8 Advances in Applied Sociol. 668 (2018).

Professor Norman argues that current Ghanaian arms laws violate the right. He places blame on the National Commission on Small Arms and on a regional gun control convention, the ECOWAS (Economic Community of West African States) Convention on Small Arms and Light Weapons. The present laws have roots

in colonial days, when the British Empire forbade Ghanaians to make firearms, lest anticolonial forces obtain them. Emmanuel Addo Sowatey, *Small Arms Proliferation and Regional Security in West Africa: The Ghanaian Case*, *in* 1 News from the Nordic Afr. Inst. 6, 6 (Nordiska Afrikainstitutet 2005).

Yet Ghana has a thriving firearms manufacturing business. With little more than "a pair of bellows to fan the fire, a hammer, and an iron pipe," an individual Ghanaian gunsmith can produce several working guns per day; collectively, about a hundred thousand per year are produced. *Id.* at 8. Illegally made firearms have become common, and their quality continues to improve. Some fall into the hands of street criminals. Kai Ryssdal, *Ghana Blacksmiths Fuel Gun Crime*, Marketplace, July 10, 2009. The clandestine gun-making skills that were originally learned during colonial days have made Ghana a regional exporter of quality firearms. Emmanuel Kwesi Aning, *The Anatomy of Ghana's Secret Arms Industry*, *in* Armed and Aimless: Armed Groups, Guns, and Human Security in the ECOWAS Region 78 (Nicolas Florquin & Eric G. Berman eds. 2005) (Geneva, Small Arms Survey).

NOTES & QUESTIONS

1. *Constitutional order.* All of the resistance articles seem to say that the constitution is always the law—even when the government suspends, annuls, or violates the constitution. This is so even if a dictatorship's puppet legislature purported to repeal the constitution. How could a document that the current government does not consider binding be called "law"?

2. *Enforcers of the constitutions.* Imagine a nation in which the duty of resistance was constitutionally triggered—such as by establishment of a one-party state or the violent abolition of the constitution. In such circumstances, judges would probably have little or no independence from the dictatorship. Saving the constitutional order would be the right and the duty of the people directly. Thus, the resistance articles function as a last-resort safety instruction: when all the other checks and balances have failed, the people must restore constitutional order. How can instructions to commit insurrection or engage in unauthorized mass public protests be called "law"?

3. All of the constitutions with resistance provisions are relatively new and from times when memories were fresh of cruel "governments" run by communists, fascists, or other military dictators.[4] With tyranny having been common globally in the last century, why do you think these particular nations, and not others in their regions, have resistance articles?

4. Professor Norman argues that the resistance article of the Ghana Constitution implies an individual right to possess arms. Do you agree? Can any of the other constitutions in this section also be read to imply a right to arms? Can there be effective resistance to violent tyranny without bearing arms?

5. Hypothesize a right to arms derived from the above constitutional provisions. How would this right be similar to or different from the Second Amendment

4. France's provision first appeared in the 1795 constitution, following the French Revolution. The constitution did not survive. The resistance provision was restored by a new constitution in 1958, creating France's "Fifth Republic."

right? **CQ:** Recall from Chapters 6 and 7 the nineteenth-century American concept of what Professor Michael O'Shea calls the "hybrid right," which was a popular interpretation of the Second Amendment in the American South, in order to allow for certain gun controls. The hybrid right, in its most restrictive form, allowed for the home possession of all types of arms that could be used in a militia—for example, rifles or large handguns suitable for military use—but not small and easily concealable handguns. It did not include a right to bear arms in public for personal defense when not in militia service. *See Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840) (Ch. 6.B.2) (noting that the Tennessee Constitution's arms-bearing provision was intended to protect against tyranny of the type experienced by the colonists under the Stuart monarchs (Ch. 2.H)). Is the hybrid right a possible model for an anti-tyranny right to arms based on some of the above constitutional provisions?

6. Some of the above constitutions expressly recognize the right of "insurrection" in their text. Greece's "duty to resist by all possible means" seems to the same effect. Portugal, however, recognizes "the right . . . to repel by force any form of aggression when recourse to public authority is impossible." Does the Portuguese provision authorize the use of force only if a dictatorship acts violently? Suppose, for example, that the Portuguese government announced that all future elections were cancelled, turned off all telephones and electronic communications, shut down the postal system, and closed the borders—but did not initiate violence. What should a constitutionally scrupulous Portuguese citizen do?

7. In Hungary, everyone has "the right and obligation to resist such activities in such ways as permitted by law." What is the effect of the "permitted by law" language? Suppose a democratically elected government requires a government license to publish books or newspapers and institutes a prior restraint censorship regime to prevent published criticism of the government. Some patriotic Hungarian dissidents want to illegally publish an underground newspaper criticizing the government, and they want to be sure that they are acting within the bounds of Hungary's constitutional system of resistance. Is their publication of the newspaper in violation of the statute compliant with Hungary's article 2? Does the answer depend on what "law" is? **CQ:** See the discussion of "pretend laws" in Ch. 4.B.5 Note 2 (laws such as those of the pro-Nazi Vichy regime in France were denounced as "pretend laws"; although they had the form of real laws, there was no moral obligation to obey them).

8. *When to resist?* All of the above nations (except Andorra) at some point in the twentieth century suffered the destruction of self-government and constitutional order. Sometimes the destruction was obvious and abrupt, as in the 1939 Nazi invasion of Czechoslovakia or the 1940 Soviet invasion of Lithuania.[5] Or the destruction may be perpetrated by domestic traitors abetted by an outside power, as in the 1948 communist coup in Czechoslovakia (*see* online Ch. 18.B.4.a).

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5. Lithuania was a large and powerful state during the Middle Ages but was later conquered by the Russian Empire. Its independence was proclaimed in 1918, and then defended for the next several years in fighting with the Soviets, Germans, and Poles. Pursuant to the 1939 Hitler-Stalin Pact, Lithuania was secretly given to the Soviets, who invaded in 1940. The Soviets were expelled by the 1941 Nazi invasion of the Soviet Union. The Soviets returned in 1944. Thereafter, Lithuania was incorporated in the Union of the Soviet Socialist Republics. Independence was declared in 1990, and firmly established in 1991 as the Soviet Union collapsed.

Foreign conquest or the abrupt and unconstitutional seizure of power by domestic totalitarians may be obvious signals that the duty of constitutional resistance arisen. But often domestic dictatorships do not arise all at once. The Hugo Chávez regime first came to power in Venezuela through democratic elections in 1998. The regime's destruction of constitutional order took place over the next two decades. Today, Chávez's successor, Nicolás Maduro, rules a communist tyranny and narco-state, and has sworn never to relinquish power. (For more on Venezuela, see Section C.5.) Similarly, the Turkish dictator Recep Tayyip Erdoğan won elections, then exterminated Turkish liberty in stages, not all at once. Even Adolf Hitler and his National Socialist German Workers Party (*Nazi*) first came to power by winning a plurality in a free election and being chosen to head a multiparty coalition government.

In a situation of gradual tyrannization, how does one determine that the time has come for the resistance that the nation's constitution demands? How did the American colonists decide during the growing political crisis with Great Britain in the 1770s? What factors did Patrick Henry consider decisive in his 1776 "Give me liberty" speech urging Virginia to fight? (Ch. 4.A.6). What British actions provoked the Americans to start arming themselves in earnest? To turn a long-running political dispute with Great Britain into a shooting war?

9. *Spain's statutory right of resistance.* Although the Spanish Constitution does not mention a right of resistance, Spain's statutes do. Under Spanish law, certain acts of the public administration are null and void: acts damaging constitutional rights and freedoms; dictates of an organ that is manifestly incompetent because it lacks territorial or subject matter jurisdiction; acts that have impossible content; acts that constitute a criminal offense; dictates totally and absolutely disregarding the legally established procedures for creating laws; usurpations of power; unconstitutional administrative acts; and ex post facto laws. Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, ch. IV, art. 62 ("Nulidad de pleno derecho") (Spain) (Ley 4/1999, de 13 de enero, de modificación de la Ley 30/1992, de 26 de noviembre). Accordingly, persons have a right (but not a duty) of self-defense against such acts. Diego M. Luzón Peña, Aspectos Esenciales de la Legítima Defensa 282-83 (Julio César Faria ed,. Buenos Aires 2d ed. 2006) (1978) (discussing 1992 and 1978 texts of the same law). From 1936 to 1975, Spain was ruled by the fascist dictator Francisco Franco. Franco's death in 1975 led to the restoration of the monarchy under King Juan Carlos I, and the beginning of transition to democracy. A new constitution was established in 1978, along with the above statute governing public administration.

10. Nineteenth-century Prussian philosopher Immanuel Kant argued that a legal order must, by its nature, always retain its supremacy over the governed. Accordingly, citizens may not pass judgment on the legal order; it is immoral for citizens to resist abuses of government power, no matter how extreme. Immanuel Kant, The Science of Right 60 (W. Hastie transl., U. Adelaide 2005) (1790). For criticism of Kant, see Shannon K. Brincat, *"Death to Tyrants": The Political Philosophy of Tyrannicide—Part I*, 4 J. Int'l Pol. Theory 212 (2008). *Cf.* Shannon K. Brincat, *The Legal Philosophy of Internationally Assisted Tyrannicide*, 34 Australian J. Legal Phil. 151 (2009). **CQ:** Compare Kant's argument with the English Stuart kings who claimed

unlimited power to rule by "divine right" (Ch. 2.H.2) and to the long argument in Chinese and European history over whether resistance to government can ever be legitimate (online Ch. 21).

11. *Further reading*: Tim Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. Rev. 1184 (2013); Edward Rubin, *Judicial Review and the Right to Resist*, 97 Geo. L.J. 61 (2008) (American judicial review was premised on centuries of development in political thought holding that governments are bound to obey higher law); Roberto Gargarella, *The Last Resort: The Right of Resistance in Situations of Legal Alienation*, Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers (2003) (supporting right of resistance in situations of "legal alienation"—when the legal order is not supported by the community).

As of the early eighteenth century, a quarter of constitutions included a right to resist. Ginsburg et al., at 1217. As new countries emerged, the right was not usually included in new constitutions. In recent decades, though, the right has proliferated, although not quite returning to its eighteenth-century peak percentage. *Id.* at 1217-18. The Ginsburg et al. article divides resistance clauses into two types: Forward-looking clauses aim to encourage the citizenry to resist the next coup, and are the type found in Europe. Backward-looking clauses are essentially post-hoc justifications for the coup that put the current government in power, and are typical of Latin America. In our view, although this geographical division is overstated, the insight that some resistance clauses may actually just be excuses for dictatorship is important; the Cuban Constitution imposed by the Castro dictatorship is a good example of Ginsburg's theory of resistance clauses serving as pretexts for the endless perpetuation of the existing tyranny.

EXERCISE: FORMULATING A RIGHT TO RESISTANCE

The constitutional convention of a new nation has asked you to draft a provision for the right to resistance. Write a proposed constitutional article, which may combine and modify the above provisions, or incorporate other ideas. Also write a short commentary explaining why you chose the particular language; your commentary will become part of the official records of the convention.

6. Constitutional Security Against Home Invasion

National constitutions that include a bill of rights very frequently contain a provision protecting the right to security against home invasion. Sometimes—as in the U.S. Fourth Amendment—the right is stated in terms that implicitly or explicitly apply only to home invasions committed by the government. Often, however, the right is stated in terms that are not limited to government actors. For example, Afghanistan's Constitution insists that "no one, including the state, is allowed to enter or inspect a private residence without prior permission of the resident or holding a court order." Afghanistan Const. art. 38. The Slovak Constitution similarly combines protection against state action and nongovernment action:

(1) A person's home is inviolable. It must not be entered without the resident's consent.

(2) A house search is admissible only in connection with criminal proceedings and only on the basis of the judge's written and substantiated order. The method of carrying out a house search will be set out in a law.

(3) Other infringements upon the inviolability of one's home can be permitted by law only if this is inevitable in a democratic society in order to protect people's lives, health, or property, to protect the rights and liberties of others, or to ward off a serious threat to public order. If the home is used also for business or to perform some other economic activity, such infringements can be permitted by law also when this is unavoidable in meeting the tasks of public administration.

Constitution of the Slovak Republic art. 21 (1992).

Other provisions protecting the home:

Andorra Const. art. 14. "No one shall enter a dwelling or any other premises against the will of the owner or without a warrant, except in case of flagrant delicto."

Angola Const. art. 44. "The State shall guarantee the inviolability of the home. . . ."

Antigua and Barbuda Const. ch. 2(3)(c). "protection for his family life, his personal privacy, the privacy of his home and other property . . ."

Armenia Const. art. 21. "It is prohibited to enter a person's dwelling against his or her own will except under cases prescribed by law."

Azerbaijan Const. art. 33.1-2. "With the exception of cases specified by Law or Court no one shall be authorized to enter the Apartment against the will of the Resident."

Bahamas Const. ch. 3.15(c). "protection for the privacy of his home and other property . . ."

Belarus Const. art. 29. "No person shall have the right, save in due course of law to enter the premises or other legal property of a citizen against one's will."

Belgium Const. art. 15. "The domicile is inviolable; no visit to the individual's residence can take place except in the cases provided for by law and in the form prescribed by law."

Belize Const. art. II.9.1. "Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises."

Benin Const. art. 20. "The domicile is inviolable. There may be no inspections or searches except according to the forms and conditions envisaged by the law."

Bolivia Const. art. 21. "Every house is an inviolable asylum; at night, no one may enter without the consent of the inhabitants, and by day only by written authorization of a competent authority or in case of flagrante delicto."

Brazil Const. art. 5. "The home is the inviolable asylum of the individual; it is forbidden to enter except with the consent of those who live there, in case of a crime detected in the act, a disaster, or to give aid, according to a judicial determination."

Bulgaria Const. art. 33.2. "(2) Entering a residence or staying in it without the consent of its occupant or without the permission of the judicial authority may be allowed only for the purpose of preventing an imminent crime or a crime in progress, for the capture of a criminal, or in extreme necessity."

Burkina Faso Const. art. 6. "[T]he residence, the domicile, the private and family life, the secrecy of the correspondence of every person are inviolable."

Burundi Const. art. 23. "No one can be the subject of arbitrary interference [with] his private life, his family, his residence or his correspondence. . . . There may not be orders for searches or home inspections except by the forms and the conditions envisaged by the law."

Cambodia Const. art. 40. "The rights to privacy of residence . . . shall be guaranteed."

China Const. art. 39. "Unlawful search of, or intrusion into, a citizen's home is prohibited."

Congo Const. art. 29. "The home is inviolable. There may not be inspections or searches except according to the forms and conditions envisaged by the law."

Cuba Const. art. 56. "Nobody can enter the home of another against his will, except in those cases foreseen by law."

Dominican Rep. Const. art. 8.3. "Inviolability of the home. No domiciliary inspection can be legitimate but in the cases anticipated by the law and with the formalities that it prescribes."

Egypt Const. art. 39. "Private homes are inviolable. With the exception of cases of immediate danger and distress, they may not be entered, searched or monitored, except in cases defined by law, and by a causal judicial warrant which specifies place, timing and purpose. Those in a home shall be alerted before the home is entered or searched."

El Salvador Const. art. 20. "The dwelling is inviolable and it will only be able to be entered by consent of the person who inhabits it, by judicial mandate, in case of a flagrant crime or imminent danger of its perpetration, or of serious risk to the people."

Eritrea Const. art. 18(2). "No person shall be subjected to unlawful search, including his home or other property."

Estonia Const. art. 33. "No one's dwelling . . . shall be forcibly entered or searched, except in the cases and pursuant to procedure provided by law."

Ethiopia Const. art. 26.1. "Everyone has . . . the right not to be subjected to searches of his home, person or property."

Germany Const. art. 13.1. "The home is inviolable."

Grenada Const. ch. 1.7. "Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

Guatemala Const. art. 23. "The home is inviolable. No one can enter another's dwelling without the permission of the inhabitants, except by written order of a competent judge, specifying the reason for the investigation, and never before 6:00 or after 18:00. Such investigation should be carried out in the presence of the person concerned, or his authorized representative."

Guyana Const. art. 40.1(c). "Protection for the privacy of his home and other property and from deprivation of property without compensation."

Honduras Const. art. 99. "The domicile is inviolable. No entrance or search will be able to be authorized without consent of the person who inhabits it or approval of competent authority."

Hong Kong Const. art. 29. "Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

Iran Const. art. 22. "The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law."

Ireland Const art. 40.5. "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

Italy Const. art. 14. "(2) No one's domicile may be inspected, searched, or seized save in cases and in the manner laid down by law."

Jamaica Const. art. 19.1. "Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."

Jordan Const. art. 10. "Dwelling houses shall be inviolable and shall not be entered except in the circumstances and in the manner prescribed by law."

Kuwait Const. art. 38. "Places of residence shall be inviolable. They may not be entered without the permission of their occupants except in the circumstances and manner specified by law."

Latvia Const. art. 96. "Everyone has the right to inviolability of a private life, place of residence and correspondence."

Lebanon Const. art. 14. "The citizen's place of residence is inviolable. No one may enter it except in the circumstances and manners prescribed by law."

Liberia Const. art. 16. "No person shall be subjected to interference with his privacy of person, family, home or correspondence except by order of a court of competent jurisdiction."

Libya Const. art. 12. "The home is inviolable and shall not be entered or searched except under the circumstances and conditions defined by the law."[6]

6. This is the relevant article from the Libyan constitution as it stood under Moamar Gaddafi's government. As of 2021, the Libyan people have not yet adopted a replacement.

Luxembourg Const. art. 15. "No domiciliary visit may be made except in cases and according to the procedure laid down by the law."

Macedonia Const. art. 26.1. "The inviolability of the home is guaranteed."

Madagascar Const. art. 13.1. "Everyone shall be assured of protection of his person, his residence, and his correspondence."

Mongolia Const. art. 16.13. "Privacy of citizens, their families, correspondence, and homes are protected by law."

Nepal Const. art. 22. "Except as provided by law, the privacy of the person, house, property, document, correspondence or information of anyone is inviolable."

Nicaragua Const. art. 26. "Every person has the right: 1. To his private life and that of his family. 2. To the inviolability of his domicile, his correspondence and his communications of all types."

Nigeria Const. art. 37. "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

Oman Const. art. 27. "Dwellings are inviolable and it is not permitted to enter them without the permission . . . except in the circumstances specified by the Law."

Panamá Const. art. 26. "The domicile or residence is inviolable."

Paraguay Const. art. 33. "Personal and family privacy, as well as respect for privacy, are inviolable"; *id.* art. 34: "Every private enclosure is inviolable."

Perú Const. art. 2.9. Every person has a right "[t]o the inviolability of the domicile."

Portugal Const. art. 34. "The individual's home and the privacy of his correspondence and other means of private communication are inviolable. . . ."

Qatar Const. art. 37: "The sanctity of human privacy shall be inviolable, and therefore interference into privacy of a person, family affairs, home of residence . . . may not be allowed save as limited by the provisions of the law stipulated therein."

Romania Const. art. 27.1. "No one shall enter or remain in the domicile or residence of a person without his consent."

Russia Const. art. 25. "No one shall have the right to penetrate the home against the will of those residing in it unless in cases provided for by the federal law or upon the decision of the court."

Rwanda Const. art. 22. "A person's home is inviolable."

St. Kitts and Nevis Const. art. 9.1. "Except with his own consent, a person shall not be subject to the search of his person or his property or the entry by others on his premises."

Saint Lucia Const. art. 7.1. (same as St. Kitts and Nevis).

Saint Vincent Const. art. 7.1. (same as St. Kitts and Nevis).

Saudi Arabia Const. art. 37. "The home is sacrosanct and shall not be entered without the permission of the owner or be searched except in cases specified by statutes."

Slovakia Const. art. 21.1. "Entrance without consent of the person residing therein is not permitted."

South Korea Const. art. 16. "All citizens are free from intrusion into their place of residence."

Spain Const. art. 18.2. "The home is inviolable."

Suriname Const. art. 17.1. "Everyone has a right to respect of his privacy, his family life, his home."

Switzerland Const. art. 13.1. "Every person has the right to receive respect for their private and family life, home, and secrecy of the mails and telecommunications."

Syria Const. art. 31. "Homes are inviolable."

Thailand Const. §**35.** "The entry into a dwelling place without consent of its possessor or the search thereof shall not be made except by virtue of the law."

Trinidad and Tobago Const. art. 4(c). "the right of the individual to respect for his private and family life"

Tunisia Const. art. 23. "The state protects the right to privacy and the sanctity of domiciles, and the confidentiality of correspondence and communications, and personal information. Every citizen has the right to choose a place of residence and to free movement within the country and the right to leave the country."

Turkey Const. art. 21.1. "The domicile of an individual shall not be violated."

Uruguay Const. art. 11. "The home is an inviolable asylum. At night nobody may enter without consent of the head of the house, and by day, only by express order of a competent judge, in writing and according to cases determined by the law."

Venezuela Const. art. 47. "The domestic home and all private personal enclosures are inviolable."

Vietnam Const. art. 73.1-2. "No one is allowed to enter another person's home without the latter's consent, unless otherwise authorised by the law."

Zambia Const. art. 17.1. "Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

Zimbabwe Const. art. 17.1. "Except with his own consent . . . no person shall be subjected to the search of his person or his property or the entry by others on his premises."

NOTES & QUESTIONS

1. *Derivative or penumbral rights.* Explicit constitutional rights to arms are much less common internationally than rights to be secure against home invasion. Could the right to be secure against home invasion imply derivative rights to resist home invasion—for example, a derivative right to door and window locks? Would it be a violation of the right to be secure against home invasion if the government outlawed reinforced glass? Window bars? Dogs trained to attack intruders? Dogs trained to raise an alarm? Defensive weapons, such as chemical sprays? Contact weapons, such as clubs or bats? What about firearms?

2. The Castle Doctrine of English common law ("That the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)) is discussed in Chapter 2.E. Is it analogous to the explicit home protection provisions of the national constitutions?

3. Is *District of Columbia v. Heller*'s (Ch. 11.A) strong protection of self-defense inside the home consistent with international norms?

4. The actual practices of many nations diverge considerably from what their written constitutions require. For example, although many constitutions strongly guarantee the inviolability of the home, warrantless intrusions by police may be common. Likewise, as detailed Section C.4, Mexico's current laws on arms control are vastly more restrictive than what the Mexican Constitution seems to allow. Does the frequent violation of constitutions prove that constitutions are unimportant? Are certain human rights so universally respected that even oppressive governments at least pay lip service to them?

5. Tunisia's constitution was ratified in January 2014. It provides "The state protects the right to privacy and the sanctity of domiciles. . . ." Tunisia's previous constitution, which was in place under a politically moderate kleptocracy, stated: "The inviolability of the home and the secrecy of correspondence are guaranteed, save in exceptional cases established by the law." Tunisia Const. of 1956, art. 9. As a purely textual matter, what is the difference between the two provisions? Does the type of regime under which the constitution exists influence your view as to which you would prefer?

B. MULTINATIONAL COMPARATIVE STUDIES OF THE EFFECTS OF PRIVATE GUN OWNERSHIP ON CRIME AND VIOLENCE

Arguments about American firearms policy often refer to the experiences of other countries. It is common to assume that the effects of policies or practices in one nation will translate into another. A comparison of American crime rates (and other social ills such as suicide), not with a few isolated examples of other countries, but with a broad range of jurisdictions that have varying levels of gun regulation and rates of gun ownership, is worthwhile.

The comparative studies excerpted below try to assess the relationship between firearms policy and outcomes across nations. In reading them, pay attention to the

correlations (and lack of correlations!) that each study claims. Consider the arguments that each study makes about whether the correlations are *caused* by the rate of gun ownership in each country.

All the studies examine gun density as a variable among nations. One of the difficulties of conducting such studies is estimating the actual number of firearms in a nation. Many governments have gun registration data, but the data by definition include only the guns that have been registered with the government. Especially when the government makes it difficult or expensive for people to acquire firearms lawfully and register them, the number of firearms in a nation may vastly exceed the number of registered firearms. Mexico, Part C.5, is a case in point, in which unregistered guns comprise the vast majority of the gun stock. Professor Johnson's article, Section B.5, provides a list of other nations where unregistered guns far outnumber registered ones—based, of course, on rough estimates of the quantity of unregistered guns.

Some scholars, such those at the Small Arms Survey (a research institute in Geneva, Switzerland), start with registration data, and then use other sources to estimate the total gun supply in a nation. The Kopel et al. article, Section B.4, relies on the Small Arms Survey for national data.

Another source for estimates is annual data about firearms manufacture, imports, and exports in a particular nation. Chapter 1.B uses over half a century of U.S. data to estimate the U.S. gun supply. In most nations, however, the long-term data on manufacture, imports, and exports are not nearly so complete.

Some scholars, such as Professor Gary Kleck, dismiss the Small Arms Survey figures as near-worthless and prefer to use "Percentage Gun Suicide" (PGS) to estimate the firearms inventory. Under this approach, a country where 18 percent of suicide victims use guns would presumably have 9 times more guns per capita than a country where 2 percent of suicides were committed with guns. PGS is considered a reasonably valid indicator of gun availability in the general population.

Because suicide itself is far more prevalent among older males than among the general population, however, PGS might be more representative of gun possession within this group, rather than of the general population. In addition, one unexplored subject of research is whether, from country to country, there are different attitudes and influences affecting the use of guns as suicide instruments such that people in countries with relatively equal gun inventories would be differently inclined to use guns in suicide.

Keep these points of uncertainty in mind as you read the following studies. You will see how different researchers take diverse approaches to a vexing challenge in social science and to the challenge of assembling data worth analyzing.

Section 1 presents a fairly sophisticated example of the simplest type of comparative international study. In this *observational study*, the authors detail the past and present homicide rates and gun ownership rates in various European nations, plus the United States, and look to see if there is any pattern.

Although observational studies can be informative, a more complex form of analysis attempts to account for national differences in other social factors, such as poverty rates, percentage of the population that are young males, and so on. These types of studies are called *multivariate studies*.

Section 2 presents a brief guide for evaluating statistical research, including multivariate studies. A lawyer may not have had training in statistical analysis, but

client representation may sometimes require addressing statistical research. Section 2 is a helpful guide to the process, with introductions to the vocabulary and methods of analysis. The section concludes with an excerpt from an article by Gary Kleck explaining the pitfalls of studies that fail to properly consider variables and causation.

Section 3 provides a lengthy excerpt from a sophisticated international study of the complex effects of varying rates of handgun and long gun ownership in different nations.

Not all differences between nations can be statistically quantified. Yet the influence of culture on how arms are used or misused in a nation can be profound. Section 4 excerpts two statistical studies that attempt to consider arms data in broader social context. The first study contrasts the effects of increased gun density in Eastern Europe with the effects in Latin America. The second study looks at whether there is any relationship between higher rates of gun density and political or civil liberty, economic freedom and prosperity, or noncorrupt government.

The studies below come to different conclusions about whether increased or decreased density of guns in general (or some types of guns) have beneficial, harmful, or insignificant social effects. Assuming arguendo that the effects of high rates of gun ownership are mainly harmful, a resulting question is what, if anything, can be done in the United States, where the per-capita gun ownership rate vastly exceeds that of any other nation, and there are already more guns than people. The article in Section 5, by Professor Johnson, addresses this "remainder problem."

1. Observational Study

The simplest approach to comparative analysis is just to compare a few nations with each other, based on some basic statistics. For example: The United States has more guns per capita than do the United Kingdom, Canada, or Japan, and the United States also has higher homicide rates than the other three nations; therefore, one might conclude that greatly reducing gun ownership in the United States would greatly reduce homicide. This sort of argument has been part of the U.S. gun control debate for decades.

When one is trying to make international comparisons, an important question is what makes one country "like" another? For example, what makes another country "like" the United States? Having an English common law heritage? Having a diverse ethnic mix? An advanced economy? A history of slavery that persisted until the nineteenth century? Should one compare the United States to Luxembourg (a microstate with an advanced economy, a homogeneous population, total prohibition of citizen firearms, and a low homicide rate) or to Mexico (less developed economically, but more like the United States in terms of size and population diversity, with very restrictive but not prohibitory gun laws, and a very high homicide rate)? If one compares the United States to Western Europe, the United States has a much higher homicide rate. If one compares the United States to other counties in the Western Hemisphere, the U.S. homicide rate looks low. The U.S. rate is also low in comparison to a broad group of high- and middle-income nations. *See* Ryan McMaken, *The Mistake of Only Comparing US Murder Rates to "Developed" Countries*, Mises Wire (Oct. 12, 2015).

Similar questions arise for quantifying mass shootings. If a drug cartel murders ten members of a rival cartel, is that a "mass shooting"? If religiously motivated terrorists murder a dozen people of a different religion (or of the same religion, but with different practices) is that a "mass shooting"? Using a narrow definition, the United States has a higher per-capita death rate from mass shootings than most but not all European countries. If one counts drug cartel murders in Mexico, Boko Haram attacks in Nigeria, and so on, then the United States looks relatively peaceful by comparison. Some mass shootings, such as the Islamist murders of the staff of the *Charlie Hebdo* magazine in Paris in January 2015 are not counted as "mass shootings" in many databases because they were terrorist attacks. Jaclyn Schildkraut & H. Jaymi Elsass, Mass Shootings: Media, Myths, and Realities 113 (2016). Professors Schildkraut and Elsass call President Barack H. Obama's claim that mass shootings happen with unique frequency in the United States a "myth." *Id.* at 84. If we consider per-capita rates, and the many types of mass shootings that are somehow not labeled as a "mass shooting," then "it is probable the statistics would show even less disparity in terms of the 'frequency' of mass shootings in other countries." *Id.* at 114.

The following article is an observational study of European nations plus the United States. It looks at homicide, gun homicide, suicide, gun suicide, and gun ownership rates, past and present, to see if there is a correlation between rates of gun ownership and the various causes of death.

Don B. Kates & Gary Mauser

Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence

30 Harv. J.L. & Pub. Pol'y 649 (2007)

INTRODUCTION

International evidence and comparisons have long been offered as proof of the mantra that more guns mean more deaths and that fewer guns, therefore, mean fewer deaths. Unfortunately, such discussions are all too often afflicted by misconceptions and factual error and focus on comparisons that are unrepresentative. It may be useful to begin with a few examples. There is a compound assertion that (a) guns are uniquely available in the United States compared with other modern developed nations, which is why (b) the United States has by far the highest murder rate. Though these assertions have been endlessly repeated, statement (b) is, in fact, false and statement (a) is substantially so.

Since at least 1965, the false assertion that the United States has the industrialized world's highest murder rate has been an artifact of politically motivated Soviet minimization designed to hide the true homicide rates. Since well before that date, the Soviet Union possessed extremely stringent gun controls that were effectuated by a police state apparatus providing stringent enforcement. So successful was that regime that few Russian civilians now have firearms and very few murders involve them. Yet, manifest success in keeping its people disarmed did not prevent the Soviet Union from having far and away the highest murder rate in the developed world. In the 1960s and early 1970s, the gunless Soviet Union's murder rates

paralleled or generally exceeded those of gun-ridden America. While American rates stabilized and then steeply declined, however, Russian murder increased so drastically that by the early 1990s the Russian rate was three times higher than that of the United States. Between 1998-2004 (the latest figure available for Russia), Russian murder rates were nearly four times higher than American rates. Similar murder rates also characterize the Ukraine, Estonia, Latvia, Lithuania, and various other now-independent European nations of the former U.S.S.R. Thus, in the United States and the former Soviet Union transitioning into current-day Russia, "homicide results suggest that where guns are scarce other weapons are substituted in killings."[8] While American gun ownership is quite high, Table 1 shows many other developed nations (e.g., Norway, Finland, Germany, France, Denmark) with high rates of gun ownership. These countries, however, have murder rates as low or lower than many developed nations in which gun ownership is much rarer.

Table 1 European Gun Ownership and Murder Rates (Rates Given Are per 100,000 People and in Descending Order)

Nation	Murder Rate	Rate of Gun Ownership
Russia	20.54 [2002]	4,000
Hungary	2.22 [2003]	2,000
Finland	1.98 [2004]	39,000
Sweden	1.87 [2001]	24,000
Poland	1.79 [2003]	1,500
France	1.65 [2003]	30,000
Denmark	1.21 [2003]	19,000
Greece	1.12 [2003]	11,000
Switzerland	0.99 [2003]	16,000
Germany	0.93 [2003]	30,000
Luxembourg	0.90[7] [2002]	c. 0
Norway	0.81 [2001]	36,000
Austria	0.80 [2002]	17,000

. . .

The same pattern appears when comparisons of violence to gun ownership are made within nations. Indeed, "data on firearms ownership by constabulary area in England," like data from the United States, show "a *negative* correlation,"[10] that is, "where firearms are most dense violent crime rates are lowest, and where guns

8. Gary Kleck, Targeting Guns: Firearms and Their Control 20 (1997).

7. [In the original article, the authors relied on a source that misstated the Luxembourg homicide rate as 9.01. They acknowledged the error as soon as it was brought to their attention, and their subsequent citations of the article mentioned the error. In this excerpt, we have inserted appropriate corrections.—Eds.]

10. Joyce Lee Malcolm, Guns and Violence: The English Experience 204 (2002).

are least dense violent crime rates are highest."[11] Many different data sets from various kinds of sources are summarized as follows by the leading text:

> [T]here is no consistent significant positive association between gun ownership levels and violence rates: across (1) time within the United States, (2) U.S. cities, (3) counties within Illinois, (4) country-sized areas like England, U.S. states, (5) regions of the United States, (6) nations, or (7) population subgroups. . . .[12]

A second misconception about the relationship between firearms and violence attributes Europe's generally low homicide rates to stringent gun control. That attribution cannot be accurate since murder in Europe was at an all-time low *before* the gun controls were introduced. For instance, virtually the only English gun control during the nineteenth and early twentieth centuries was the practice that police patrolled without guns.[8] During this period gun control prevailed far less in England or Europe than in certain American states which nevertheless had — and continue to have — murder rates that were and are comparatively very high.

In this connection, two recent studies are pertinent. In 2004, the U.S. National Academy of Sciences released its evaluation from a review of 253 journal articles, 99 books, 43 government publications, and some original empirical research. It failed to identify any gun control that had reduced violent crime, suicide, or gun accidents. The same conclusion was reached in 2003 by the U.S. Centers for Disease Control's review of then extant studies.

Stringent gun controls were not adopted in England and Western Europe until after World War I. Consistent with the outcomes of the recent American studies just mentioned, these strict controls did not stem the general trend of ever-growing violent crime throughout the post-WWII industrialized world including the United States and Russia. Professor Malcolm's study of English gun law and violent crime summarizes that nation's nineteenth and twentieth century experience as follows:

> The peacefulness England used to enjoy was not the result of strict gun laws. When it had no firearms restrictions [nineteenth- and early twentieth-century] England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence or even the increase in armed violence.[17]

Armed crime, never a problem in England, has now become one. Handguns are banned but the Kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957, the use of guns in serious crime increased a hundredfold.[18]

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11. Hans Toch & Alan J. Lizotte, Research and Policy: The Case for Gun Control, *in* Psychology & Social Policy 223, 232 (Peter Suedfeld & Philip E. Tetlock eds., 1992). . . .

12. Kleck, *supra* note 8, at 22-23.

8. [This is generally true, with the exception of the Seizure of Arms Act, which attempted to disarm revolutionaries in selected cities and counties in 1819-21, and, less importantly, the requirement that handgun buyers purchase a no-questions-asked tax stamp from the post office, starting in 1870. *See* Chs. 2.J.4, 22.J.4. — Eds.]

17. Malcolm, *supra* note 10, at 219.

18. *Id.* at 209.

In the late 1990s, England moved from stringent controls to a complete ban of all handguns and many types of long guns. Hundreds of thousands of guns were confiscated from those owners law-abiding enough to turn them in to authorities. . . . Today, English news media headline violence in terms redolent of the doleful, melodramatic language that for so long characterized American news reports. One aspect of England's recent experience deserves note, given how often and favorably advocates have compared English gun policy to its American counterpart over the past 35 years. A generally unstated issue in this notoriously emotional debate was the effect of the Warren Court and later restrictions on police powers on American gun policy. Critics of these decisions pointed to soaring American crime rates and argued simplistically that such decisions caused, or at least hampered, police in suppressing crime. But to some supporters of these judicial decisions, the example of England argued that the solution to crime was to restrict guns, not civil liberties. To gun control advocates, England, the cradle of our liberties, was a nation made so peaceful by strict gun control that its police did not even need to carry guns. The United States, it was argued, could attain such a desirable situation by radically reducing gun ownership, preferably by banning and confiscating handguns.

The results discussed earlier contradict those expectations. On the one hand, despite constant and substantially increasing gun ownership, the United States saw progressive and dramatic reductions in criminal violence in the 1990s. On the other hand, the same time period in the United Kingdom saw a constant and dramatic increase in violent crime to which England's response was ever-more drastic gun control including, eventually, banning and confiscating all handguns and many types of long guns. . . .

To conserve the resources of the inundated criminal justice system, English police no longer investigate burglary and "minor assaults." As of 2006, if the police catch a mugger, robber, or burglar, or other "minor" criminal in the act, the policy is to release them with a warning rather than to arrest and prosecute them. It used to be that English police vehemently opposed the idea of armed policing. Today, ever more police are being armed. Justifying the assignment of armed squads to block roads and carry out random car searches, a police commander asserts: "It is a massive deterrent to gunmen if they think that there are going to be armed police."[25] How far is that from the rationale on which 40 American states have enacted laws giving qualified, trained citizens the right to carry concealed guns? Indeed, news media editorials have appeared in England arguing that civilians should be allowed guns for defense. . . .

The divergence between the United States and the British Commonwealth became especially pronounced during the 1980s and 1990s. During these two decades, while Britain and the Commonwealth were making lawful firearm ownership increasingly difficult, more than 25 states in the United States passed laws allowing responsible citizens to carry concealed handguns. . . .

Although the reason is thus obscured, the undeniable result is that violent crime, and homicide in particular, has plummeted in the United States over the

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25. Matthew Beard, *Armed Police to Man Checkpoints in London as Drug-Related Crime Soars*, Independent (London), Sept. 7, 2002, at 2.

past 15 years. The fall in the American crime rate is even more impressive when compared with the rest of the world. In 18 of the 25 countries surveyed by the British Home Office, violent crime increased during the 1990s. . . . Perhaps the United States is doing something right in promoting firearms for law-abiding responsible adults. Or perhaps the United States' success in lowering its violent crime rate relates to increasing its prison population or its death sentences. Further research is required to identify more precisely which elements of the United States' approach are the most important, or whether all three elements acting in concert were necessary to reduce violent crimes.

I. VIOLENCE: THE DECISIVENESS OF SOCIAL FACTORS

One reason the extent of gun ownership in a society does not spur the murder rate is that murderers are not spread evenly throughout the population. Analysis of perpetrator studies shows that violent criminals—especially murderers—"*almost uniformly* have a long history of involvement in criminal behavior."[37] So it would not appreciably raise violence if all law-abiding, responsible people had firearms because they are not the ones who rape, rob, or murder. By the same token, violent crime would not fall if guns were totally banned to civilians. As the example of Russia suggests, individuals who commit violent crimes will either find guns despite severe controls or will find other weapons to use.

Startling as the foregoing may seem, it represents the cross-national norm, not some bizarre departure from it. If the mantra "more guns equal more death and fewer guns equal less death" were true, broad based cross-national comparisons should show that nations with higher gun ownership per capita consistently have more death. Nations with higher gun ownership rates, however, do not have higher murder or suicide rates than those with lower gun ownership. Indeed many high gun ownership nations have much lower murder rates. Consider, for example, the wide divergence in murder rates among Continental European nations with widely divergent gun ownership rates.

The non-correlation between gun ownership and murder is reinforced by examination of statistics from larger numbers of nations across the developed world. Comparison of "homicide and suicide mortality data for thirty-six nations (including the United States) for the period 1990-1995" to gun ownership levels showed "no significant (at the 5% level) association between gun ownership levels and the total homicide rate."[41] Consistent with this is a later European study of data from 21 nations in which "no significant correlations [of gun ownership levels] with total suicide or homicide rates were found."[42]

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37. *See* Delbert S. Elliott, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1089 (1998) (emphasis added).

41. Kleck, *supra* note 8, at 254. The study also found no correlation to suicide rates. *Id.*

42. Martin Killias et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 Can. J. Criminology & Crim. Just. 429, 430 (2001). . . . [T]he authors, who are deeply anti-gun, emphasize the "very strong correlations between the presence of guns in the home and suicide committed with a gun"—as if there were some import to the death being by gun rather than by hanging, poison, or some other means. . . .

II. ASKING THE WRONG QUESTION

However unintentionally, the irrelevance of focusing on weaponry is highlighted by the most common theme in the more guns equal more death argument. Epitomizing this theme is a World Health Organization (WHO) report asserting, "The easy availability of firearms has been associated with higher *firearm* mortality rates."[43] The authors, in noting that the presence of a gun in a home corresponds to a higher risk of suicide, apparently assume that if denied firearms, potential suicides will decide to live rather than turning to the numerous alternative suicide mechanisms. The evidence, however, indicates that denying one particular means to people who are motivated to commit suicide by social, economic, cultural, or other circumstances simply pushes them to some other means. Thus, it is not just the murder rate in gun-less Russia that is four times higher than the American rate; the Russian suicide rate is also about four times higher than the American rate.

There is no social benefit in decreasing the availability of guns if the result is only to increase the use of other means of suicide and murder, resulting in more or less the same amount of death. Elementary as this point is, proponents of the more guns equal more death mantra seem oblivious to it. One study asserts that Americans are more likely to be shot to death than people in the world's other 35 wealthier nations. While this is literally true, it is irrelevant — except, perhaps to people terrified not of death per se but just death by gunshot. A fact that should be of greater concern — but which the study fails to mention — is that per capita murder *overall* is only half as frequent in the United States as in several other nations where *gun* murder is rarer, but murder by strangling, stabbing, or beating is much more frequent.

Of course, it may be speculated that murder rates around the world would be higher if guns were more available. But there is simply no evidence to support this. Like any speculation, it is not subject to conclusive disproof; but the European data in Table 1 and the studies across 36 and 21 nations already discussed show no correlation of high gun ownership nations and greater murder per capita or lower gun ownership nations and less murder per capita.

To reiterate, the determinants of murder and suicide are basic social, economic, and cultural factors, not the prevalence of some form of deadly mechanism. In this connection, recall that the American jurisdictions which have the highest violent crime rates are precisely those with the most stringent gun controls. This correlation does not necessarily prove gun advocates' assertion that gun controls actually encourage crime by depriving victims of the means of self-defense. The explanation of this correlation may be political rather than criminological: jurisdictions afflicted with violent crime tend to severely restrict gun ownership. This, however, does not suppress the crime, for banning guns cannot alleviate the socio-cultural and economic factors that are the real determinants of violence and crime rates. . . .

Once again, we are not arguing that the data in Table 2 shows that gun control *causes* nations to have much higher murder rates than neighboring nations that

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43. World Health Organization, Small Arms and Global Health 11 (2001) (emphasis added).

permit handgun ownership. Rather, we assert a political causation for the observed correlation that nations with stringent gun controls tend to have much higher murder rates than nations that allow guns. The political causation is that nations that have violence problems tend to adopt severe gun controls, but these do not reduce violence, which is determined by basic socio-cultural and economic factors.

Table 2 Murder Rates of European Nations that Ban Handguns as Compared to Their Neighbors that Allow Handguns (Rates are per 100,000 Persons)

Nation	Handgun Policy	Murder Rate	Year
A. Belarus	banned	10.40	late 1990s
[Neighboring countries with gun law and murder rate data available]			
Poland	allowed	1.98	2003
Russia	banned	20.54	2002
B. Luxembourg	banned	0.90	2002
[Neighboring countries with gun law and murder rate data available]			
Belgium	allowed	1.70	late 1990s
France	allowed	1.65	2003
Germany	allowed	0.93	2003
C. Russia	banned	20.54	2002
[Neighboring countries with gun law and murder rate data available]			
Finland	allowed	1.98	2004
Norway	allowed	0.81	2001

The point is exemplified by the conclusions of the premier study of English gun control. Done by a senior English police official as his thesis at the Cambridge University Institute of Criminology and later published as a book, it found (as of the early 1970s), "Half a century of strict controls . . . has ended, perversely, with a far greater use of [handguns] in crime than ever before."[51] The study also states that:

> No matter how one approaches the figures, one is forced to the rather startling conclusion that the use of firearms in crime was very much less [in England before 1920] when there were no controls of any sort and when anyone, convicted criminal or lunatic, could buy any type of firearm without restriction.[52]

Of course the point of this analysis is not that the law should allow lunatics and criminals to own guns. The point is that violence will be rare when the basic

51. Colin Greenwood, Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales 243 (1972).

52. *Id.*

socio-cultural and economic determinants so dictate; and conversely, crime will rise in response to changes in those determinants—without much regard to the mere availability of some particular weaponry or the severity of laws against it. . . .

IV. MORE GUNS, LESS CRIME?

Anti-gun activists are not alone in their belief that widespread firearm ownership substantially affects violent crime rates. The same understanding also characterizes many pro-gun activists. Of course, pro-gun activists' belief leads them to the opposite conclusion: that widespread firearm ownership reduces violence by deterring criminals from confrontation crimes and making more attractive such nonconfrontation crimes as theft from unoccupied commercial or residential premises. Superficially, the evidence for this belief seems persuasive. Table 1, for instance, shows that Denmark has roughly half the gun ownership rate of Norway, but a 50% higher murder rate, while Russia has only one-ninth Norway's gun ownership rate but a murder rate 2500% higher. Looking at Tables 1-3, it is easy to find nations in which very high gun ownership rates correlate with very low murder rates, while other nations with very low gun ownership rates have much higher murder rates. Moreover, there is not insubstantial evidence that *in the United States* widespread gun availability has helped reduce murder and other violent crime rates. On closer analysis, however, this evidence appears uniquely applicable to the United States.

More than 100 million handguns are owned in the United States primarily for self-defense, and 3.5 million people have permits to carry concealed handguns for protection. Recent analysis reveals "a great deal of self-defensive use of firearms" in the United States, "in fact, more defensive gun uses [by victims] than crimes committed with firearms."[87] It is little wonder that the

> National Institute of Justice surveys (Ch. 1.K.2) among prison inmates find that large percentages report that their fear that a victim might be armed deterred them from confrontation crimes. "[T]he felons most frightened 'about confronting an armed victim' were those from states with the greatest relative number of privately owned firearms." Conversely, robbery is highest in states that most restrict gun ownership.[88]. . .

Ironically, to detail the American evidence for widespread defensive gun ownership's deterrent value is also to raise questions about how applicable that evidence would be even to the other nations that have widespread gun ownership but low violence. There are no data for foreign nations comparable to the American data just discussed. Without such data, we cannot know whether millions of Norwegians own handguns and carry them for protection, thereby deterring Norwegian criminals from committing violent crimes. Nor can we know whether guns are commonly kept for defense in German homes and stores, thus preventing German criminals from robbing them.

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87. James B. Jacobs, Can Gun Control Work? 14 (2002).

88. Don Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, *in* Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts 70 (Timothy D. Lytton ed. 2005).

Moreover, if the deterrent effect of gun ownership accounts for low violence rates in high gun ownership nations other than the United States, one wonders why that deterrent effect would be amplified there. . . . [T]he United States murder rate is still eight times higher than Norway's—even though the U.S. has an almost 300% higher rate of gun ownership. That is consistent with the points made above. Murder rates are determined by socio-economic and cultural factors.

In the United States, those factors include that the number of civilian-owned guns nearly equals the population—triple the ownership rate in even the highest European gun-ownership nations—and that vast numbers of guns are kept for personal defense. That is not a factor in other nations with comparatively high firearm ownership. . . .

In sum, though many nations with widespread gun ownership have much lower murder rates than nations that severely restrict gun ownership, it would be simplistic to assume that at all times and in all places widespread gun ownership depresses violence by deterring many criminals into nonconfrontation crime. There is evidence that it does so in the United States, where defensive gun ownership is a substantial socio-cultural phenomenon. But the more plausible explanation for many nations having widespread gun ownership with low violence is that these nations never had high murder and violence rates and so never had occasion to enact severe anti-gun laws. On the other hand, in nations that have experienced high and rising violent crime rates, the legislative reaction has generally been to enact increasingly severe antigun laws. This is futile, for reducing gun ownership by the law-abiding citizenry—the only ones who obey gun laws—does not reduce violence or murder. The result is that high crime nations that ban guns to reduce crime end up having both high crime and stringent gun laws, while it appears that low crime nations that do not significantly restrict guns continue to have low violence rates.

Thus both sides of the gun prohibition debate are likely wrong in viewing the availability of guns as a major factor in the incidence of murder in any particular society. . . . Whether gun availability is viewed as a cause or as a mere coincidence, the long term macrocosmic evidence is that gun ownership spread widely throughout societies consistently correlates with stable or declining murder rates. Whether causative or not, the consistent international pattern is that more guns equal *less* murder and other violent crime. . . .

V. GEOGRAPHIC, HISTORICAL AND DEMOGRAPHIC PATTERNS

If more guns equal more death and fewer guns equal less death, it should follow, all things being equal, (1) that geographic areas with higher gun ownership should have more murder than those with less gun ownership; (2) that demographic groups with higher gun ownership should be more prone to murder than those with less ownership; and (3) that historical eras in which gun ownership is widespread should have more murder than those in which guns were fewer or less widespread. As discussed earlier, these effects are not present. Historical eras, demographic groups, and geographic areas with more guns do not have more murders than those with fewer guns. Indeed, those with more guns often, or even generally, have fewer murders.

Of course, all other things may not be equal. Obviously, many factors other than guns may promote or reduce the number of murders in any given place or time or among particular groups. And it may be impossible even to identify these factors, much less to take account of them all. Thus any conclusions drawn from the kinds of evidence presented earlier in this paper must necessarily be tentative.

Acknowledging this does not, however, blunt the force of two crucial points. The first regards the burden of proof. Those who assert the mantra, and urge that public policy be based on it, bear the burden of proving that more guns do equal more death and fewer guns equal less death. But they cannot bear that burden because there simply is no large number of cases in which the widespread prevalence of guns among the general population has led to more murder. By the same token, but even more importantly, it cannot be shown consistently that a reduction in the number of guns available to the general population has led to fewer deaths. Nor is the burden borne by *speculating* that the reason such cases do not appear is that other factors always intervene.

The second issue, allied to the burden of proof, regards plausibility. On their face, the following facts from Tables 1 and 2 suggest that gun ownership is irrelevant, or has little relevance, to murder: France and neighboring Germany have exactly the same, comparatively high rate of gun ownership, yet the French murder rate is nearly twice the German . . . ; Germany has almost double the gun ownership rate of neighboring Austria yet a similarly very low murder rate; the Norwegian gun ownership rate is over twice the Austrian rate, yet the murder rates are almost identical.

And then there is Table 3 [not reproduced in this excerpt], which shows Slovenia, with 66% more gun ownership than Slovakia, nevertheless has roughly one-third less murder per capita; Hungary has more than 6 times the gun ownership rate of neighboring Romania but a lower murder rate; the Czech Republic's gun ownership rate is more than 3 times that of neighboring Poland, but its murder rate is lower; Poland and neighboring Slovenia have exactly the same murder rate, though Slovenia has over triple the gun ownership per capita. . . .

On their face, Tables 1, 2, and 3 and the comparisons gleaned from them suggest that gun ownership is irrelevant, or has little relevance, to murder. Historical and demographic comparisons offer further evidence. Again, all the data may be misleading. It is conceivable that more guns do equal more murder, but that this causation does not appear because some unidentifiable extraneous factor always intervenes. That is conceivable, but ultimately unlikely. As Hans Toch, a senior American criminologist who 35 years ago endorsed handgun prohibition and confiscation, but then recanted based on later research, argues "it is hard to explain that where firearms are most dense, violent crime rates are lowest and where guns are least dense, violent crime rates are highest."[90]. . .

B. Macro-Historical Evidence: From the Middle Ages to the 20th Century

The Middle Ages were a time of notoriously brutal and endemic warfare. They also experienced rates of ordinary murder almost double the highest recorded U.S. murder rate. But Middle Age homicide "cannot be explained in terms of the availability of firearms, which had not yet been invented."[101] The invention provides

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90. Toch & Lizotte, *supra* note 11, at 232.

101. [Roger Lane, Murder in America: A History 151 (1997).] *See generally id.* Ch.1.

some test of the mantra. If it is true that more guns equal more murder and fewer guns equal less death, murder should have risen with the invention, increased efficiency, and greater availability of firearms across the population.[9]

Yet, using England as an example, murder rates seem to have fallen sharply as guns became progressively more efficient and widely owned during the five centuries after the invention of firearms. During much of this period, because the entire adult male population of England was deemed to constitute a militia, every military age male was required to possess arms for use in militia training and service.

The same requirement was true in America during the period of colonial and post-colonial settlement. Indeed, the basic English militia laws were superceded by the colonies' even more specific and demanding legal requirements of *universal* gun ownership. Under those laws, virtually all colonists and every household were required to own guns. Depending on the colony's laws, male youths were deemed of military age at 16, 17, or 18, and every military age man, except for the insane, infirm, and criminals, had to possess arms. They were subject to being called for inspection, militia drill, or service, all of which legally required them to bring and present their guns. To arm those too poor to afford guns, the laws required that guns be purchased for them and that they make installment payments to pay back the cost.

It bears emphasis that these gun ownership requirements were not limited to those subject to militia service. Women, seamen, clergy, and some public officials were automatically exempt from militia call up, as were men over the upper military age, which varied from 45 to 60, depending on the colony. But every household was required to have a gun, even if all its occupants were otherwise exempt from militia service, to deter criminals and other attackers. Likewise, all respectable men were theoretically required to carry arms when out and abroad.[10]

These laws may not have been fully enforced (except in times of danger) in areas that had been long-settled and peaceful. Nevertheless, "by the eighteenth century, colonial Americans were the most heavily armed people in the world."[106] Yet, far from more guns equaling more death, murders in the New England colonies were "rare," and "few" murderers in all the colonies involved guns "despite their wide availability."[107]

America remained very well armed yet homicide remained quite low for over two hundred years, from the earliest settlements through the entire colonial period and early years of the United States. Homicide in more settled areas only began rising markedly in the two decades before the Civil War. By that time the universal militia was inoperative and the universality of American gun ownership had disappeared as many people in long-settled peaceful areas did not hunt and had no other need for a firearm.

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9. [A study by Professor Carlisle Moody, excerpted in Section D.1, examines the relationship between growing availability of firearms and homicide rates in Europe.—Eds.]

10. [The above two paragraphs are generally accurate, although not perfectly so. For the precise laws of early America, see Chapters 3 and 4.—Eds.]

106. John Morgan Dederer, War in America to 1775, at 116 (1990).

107. Lane, *supra* note [101], at 48, 59-60.

The Civil War acquainted vast numbers of men with modern rapid-fire guns, and, in its aftermath, provided a unique opportunity to acquire them. Before the Civil War, reliable multi-shot rifles or shotguns did not exist and revolvers (though they had been invented in the 1830s) were so expensive they were effectively out of reach for most of the American populace. The Civil War changed all that. Officers on both sides had to buy their own revolvers, while sidearms were issued to non-commissioned officers generally, as well as those ordinary soldiers who were in the artillery, cavalry, and dragoons. The fact that over two million men served in the Union Army at various times while the Confederates had over half that number suggests the number of revolvers involved.

At war's end, the U.S. Army and Navy were left with vast numbers of surplus revolvers, both those they had purchased and those captured from Confederate forces. As the Army plummeted to slightly over 11,000 men, hundreds of thousands of military surplus revolvers were sold at very low prices. In addition, when their enlistments were up, or when they were mustered out at war's end, former officers and soldiers retained hundreds of thousands of both revolvers and rifles. These commandeered arms included many of the new repeating rifles the Union had bought (over the fervent objections of short-sighted military procurement officers) at the command of President Lincoln, who had tested the Spencer rifle himself. After his death the Army reverted to the single-shot rifle, disposing of all its multi-shots at surplus and thereby ruining Spencer by glutting the market.

Thus over the immediate post-Civil War years "the country was awash with military pistols" and rifles of the most modern design.[115] The final three decades of the century saw the introduction and marketing of the "two dollar pistol," which were very cheap handguns manufactured largely out of pot metal. In addition to being sold locally, such "suicide specials" were marketed nationwide through Montgomery Ward catalogs starting in 1872 and by Sears from 1886. They were priced as low as $1.69, and were marketed under names like the "Little Giant" and the "Tramp's Terror."

Thus, the period between 1866 and 1900 saw a vast diffusion of commercial and military surplus revolvers and lever action rifles throughout the American populace. Yet, far from rising, homicide seems to have fallen off sharply during these thirty years.

Whether or not guns were the cause, homicide steadily declined over a period of five centuries coincident with the invention of guns and their diffusion throughout the continent. In America, from the seventeenth century through the early nineteenth century, murder was rare and rarely involved guns, though gun ownership was universal by law and "colonial Americans were the most heavily armed people in the world."[119] By the 1840s, gun ownership had declined but homicide began a spectacular rise through the early 1860s.[11] From the end of the Civil War

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115. David T. Courtwright, Violent Land: Single Men and Social Disorder from the Frontier to the Inner City 42 (1996).

119. Dederer, *supra* note 106, at 116.

11. [For more on gun ownership in America, from colonial days through the antebellum period, see Clayton E. Cramer, Lock, Stock, and Barrel: The Origins of American Gun Culture (2018); Clayton E. Cramer, Armed America: The Remarkable Story of How and Why Guns Became as American as Apple Pie (2007); and Chapters 3 through 7 of the printed textbook. Cramer and the textbook differ from Kates and Mauser on some details.—Eds.]

to the turn of the twentieth century, however, America in general, and urban areas in particular, such as New York, experienced a tremendous spurt in ownership of higher capacity revolvers and rifles than had ever existed before, but the number of murders sharply declined.

In sum, the notion that more guns equal more death is not borne out by the historical evidence available for the period between the Middle Ages and the twentieth century. Yet this conclusion must be viewed with caution. While one may describe broad general trends in murder rates and in the availability of firearms, it is not possible to do so with exactitude. Not until the late 1800s in England, and the mid-1900s in the United States were there detailed data on homicide. Information about the distribution of firearms is even more sparse. For instance, Lane's generalizations about the rarity of gun murders and low American murder rates in general are subject to some dispute. Professor Randolph Roth, for example, has shown that early American murder rates and the extent to which guns were used in murder varied greatly between differing areas and time periods.

C. Later and More Specific Macro-Historical Evidence

Malcolm presents reliable trend data on both gun ownership and crime in England for the period between 1871 and 1964. Significantly, these trend data do not at all correlate as the mantra would predict: violent crime did not increase with increased gun ownership nor did it decline in periods in which gun ownership was lower.

In the United States, the murder rate doubled in the ten-year span between the mid-1960s and the mid-1970s. Since this rise coincided with vastly increasing gun sales, it was viewed by many as proof positive that more guns equal more death. That conclusion, however, does not follow. It is at least equally possible that the causation was reversed: that is, the decade's spectacular increases in murder, burglary, and all kinds of violent crimes caused fearful people to buy guns. The dubiousness of assuming that the gun sales caused the rise in murder rather than the reverse might have been clearer had it been known in this period that virtually the same murder rate increase was occurring in gun-less Russia. Clearly there is little basis to assume guns were the reason for the American murder rate rise when the Russian murder rate exhibited the same increase without a similar increase in the number of guns.

Reliable information on both gun ownership and murder rates in the United States is available only for the period commencing at the end of World War II. Significantly, the decade from the mid-1960s to the mid-1970s is a unique exception to the general pattern that, decade-by-decade, the number of guns owned by civilians has risen steadily and dramatically but murder rates nevertheless have remained stable or even declined. As for the second half of the twentieth century, and especially its last quarter, a study comparing the number of guns to murder rates found that during the 25-year period from 1973 to 1997, the number of handguns owned by Americans increased 160% while the number of all firearms rose 103%. Yet over that period, the murder rate declined 27.7%. It continued to decline in the years 1998, 1999, and 2000, despite the addition in each year of two to three million handguns and approximately five million firearms of all kinds. By the end of 2000,

the total American gunstock stood at well over 260 million—951.1 guns for every 1,000 Americans—but the murder rate had returned to the comparatively low level prior to the increases of the mid-1960s to mid-1970s period.

In sum, the data for the decades since the end of World War II also fails to bear out the more guns equal more death mantra. The per capita accumulated stock of guns has increased, yet there has been no correspondingly consistent increase in either total violence or gun violence. The evidence is consistent with the hypothesis that gun possession levels have little impact on violence rates.

D. Geographic Patterns Within Nations

Once again, if more guns equal more death and fewer guns equal less death, areas within nations with higher gun ownership should in general have more murders than those with less gun ownership in a similar area. But, in fact, the reverse pattern prevails in Canada, "England, America, and Switzerland, [where the areas] with the highest rates of gun ownership were in fact those with the lowest rates of violence."[129] A recent study of all counties in the United States has again demonstrated the lack of relationship between the prevalence of firearms and homicide.[130]

This inverse correlation is one of several that seems to contradict more guns equal more death. For decades the gun lobby has emphasized that, in general, the American jurisdictions where guns are most restricted have consistently had the highest violent crime rates, and those with the fewest restrictions have the lowest violent crime rates. For instance, robbery is highest in jurisdictions which are most restrictive of gun ownership. . . . Also of interest are the extensive opinion surveys of incarcerated felons, both juvenile and adult, in which large percentages of the felons replied that they often feared potential victims might be armed and aborted violent crimes because of that fear. The felons most frightened about confronting an armed victim were those "from states with the greatest relative number of privately owned firearms."[135]

E. Geographic Comparisons: European Gun Ownership and Murder Rates

This topic has already been addressed at some length in connection with Tables 1-3, which contain the latest data available. Tables 4-6 contain further, and somewhat more comprehensive, data from the early and mid-1990s. These statistics reinforce the point that murder rates are determined by basic socio-cultural and economic factors rather than mere availability of some particular form of weaponry. Consider Norway and its neighbors Sweden, the Netherlands, and Denmark. Norway has far and away Western Europe's highest household gun ownership rate (32%), but also its lowest murder rate. The Netherlands has the lowest gun ownership rate in Western Europe (1.9%), and Sweden lies midway between (15.1%) the Netherlands and Norway. Yet the Dutch gun murder rate is higher than the Norwegian, and the Swedish rate is even higher, though only slightly. . . .

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129. Malcolm, *supra* note 10, at 204.

130. Tomislav Kovandzic, Mark E. Schaffer, & Gary Kleck, Gun Prevalence, Homicide Rates and Causality: A GMM Approach to Endogeneity Bias 39-40 (Ctr. for Econ. Policy Research, Discussion Paper No. 5357, 2005).

135. James D. Wright & Peter H. Rossi, Armed and Considered Dangerous: A Survey of Felons and Their Firearms 147, 150 (1986) (Ch. 1.K.2).

Table 4 Intentional Deaths: United States vs. Continental Europe: Rates in Order of Highest Combined Rate; Nations Having Higher Rates than the United States Are Indicated by Asterisk (Suicide Rate) or + Sign (Murder Rate)

Nation	Suicide	Murder	Combined Rates
Russia	41.2*	30.6+	71.8
Estonia	40.1*	22.2+	62.3
Latvia	40.7*	18.2+	58.9
Lithuania	45.6*	11.7+	57.3
Belarus	27.9*	10.4+	38.3
Hungary	32.9*	3.5	36.4
Ukraine	22.5*	11.3+	33.8
Slovenia	28.4*	2.4	30.4
Finland	27.2*	2.9	30.1
Denmark	22.3*	4.9	27.2
Croatia	22.8*	3.3	26.1
Austria	22.2*	1.0	23.2
Bulgaria	17.3*	5.1	22.4
France	20.8*	1.1	21.9
Switzerland	21.4*	1.1	24.1
Belgium	18.7*	1.7	20.4
United States	11.6*	7.8	19.4
Poland	14.2*	2.8	17.0
Germany	15.8*	1.1	16.9
Romania	12.3*	4.1	16.4
Sweden	15.3*	1.0	16.3
Norway	12.3*	0.8	13.1
Holland	9.8	1.2	11.0
Italy	8.2	1.7	9.9
Portugal	8.2	1.7	9.9
Spain	8.1	0.9	9.0
Greece	3.3	1.3	4.6

. . .

Table 5 European Gun/Handgun Violent Death [Columns 2 and 3 are per 100,000 population]

Nation	Suicide with Handgun (per 100,000 Popul.)	Murder with Handgun (per 100,000 Popul.)	% of Households with Guns	% of Households with Handguns
Belgium	18.7	1.7	16.6%	6.8%
France	20.8	1.1	22.6%	5.5%
West Germany	15.8	1.1	8.9%	6.7%
Holland	9.8	1.2	1.9%	1.2%
Italy	8.2	1.7	16.0%	5.5%
Norway	12.3	0.8	32.0%	3.8%
Sweden	15.3	1.3	15.1%	1.5%
Switzerland	20.8	1.1	27.2%	12.2%

Table 6 European Firearms—Violent Deaths [All figures are per 100,000 population]

Nation	Suicide	Suicide with Gun	Murder	Murder with Gun	Number of Guns . . .
Austria	N/A	N/A	2.14	0.53	41.02
Belarus	27.26	N/A	9.86	N/A	16.5
Czech Rep.	9.88	1.01	2.80	0.92	27.58
Estonia	39.99	3.63	22.11	6.2	28.56
Finland	27.28	5.78	3.25	0.87	411.20
Germany	15.80	1.23	1.81	0.21	122.56
Greece	3.54	1.30	1.33	0.55	77.00
Hungary	33.34	0.88	4.07	0.47	15.54
Moldova	N/A	N/A	17.06	0.63	6.61
Poland	14.23	0.16	2.61	0.27	5.30
Romania	N/A	N/A	4.32	0.12	2.97
Slovakia	13.24	0.58	2.38	0.36	31.91
Spain	5.92	N/A	1.58	0.19	64.69
Sweden	15.65	1.95	1.35	0.31	246.65

These comparisons are reinforced by Table 6, which gives differently derived (and non-comparable) gun ownership rates, overall murder rates, and rates of gun murder, for a larger set of European nations. Table 6 reveals that even though Sweden has more than double the rate of gun ownership as neighboring Germany, as well as more gun murders, it has 25% less murder overall. In turn, Germany, with three times the gun ownership rate of neighboring Austria, has a substantially lower murder rate overall and a lower gun murder rate. Likewise, though Greece has over twice the per capita gun ownership rate of the Czech Republic, Greece has

substantially less gun murder and less than half as much murder overall. Although Spain has over 12 times more gun ownership than Poland, the latter has almost a third more gun murder and more overall murder than the former. Finally, Finland has 14 times more gun ownership than neighboring Estonia, yet Estonia's gun murder and overall murder rates are about seven times higher than Finland's.

F. Geographic Comparisons: Gun Ownership and Suicide Rates

The mantra more guns equal more death and fewer guns equal less death is also used to argue that "limiting access to firearms could prevent many suicides."[141] Once again, this assertion is directly contradicted by the studies of 36 and 21 nations (respectively) which find no statistical relationship. Overall suicide rates were no worse in nations with many firearms than in those where firearms were far less widespread.[142]. . .

There is simply no relationship evident between the extent of suicide and the extent of gun ownership. People do not commit suicide because they have guns available. In the absence of firearms, people who are inclined to commit suicide kill themselves some other way. Two examples seem as pertinent as they are poignant. The first concerns the 1980s increase in suicide among young American males, an increase that, although relatively modest, inspired perfervid denunciations of gun ownership. What these denunciations failed to mention was that suicide of teenagers and young adults was increasing throughout the entire industrialized world, regardless of gun availability, and often much more rapidly than in the United States. The only unusual aspect of suicide in the United States was that it involved guns. The irrelevancy of guns to the increase in American suicide is evident because suicide among English youth actually increased 10 times more sharply, with "car exhaust poisoning [being] the method of suicide used most often."[145] By omitting such facts, the articles blaming guns for increasing American suicide evaded the inconvenience of having to explain exactly what social benefit nations with few guns received from having their youth suicides occur in other ways.

Even more poignant are the suicides of many young Indian women born and raised on the island of Fiji. In general, women are much less likely to commit suicide than are men. This statistic is true of Fijian women overall as well, but not of women in the large part of Fiji's population that is of Indian ancestry. As children, these Indian women are raised in more-or-less loving and supportive homes. But upon marriage they are dispersed across the island to remote areas where they live with their husbands' families, an often overtly hostile situation the husbands do little to mitigate. Indian women on Fiji have a suicide rate nearly as high as that of Indian men, a rate many times greater than that of non-Indian Fijian women. It also bears emphasis that the overall Fijian suicide rate far exceeds that of the United States.

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141. Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467, 467, 471-72 (1992). . . .

142. *See* Killias et al., *supra* note 42, at 430 (study of 21 nations). *See generally* Kleck, *supra* note 8.

145. Keith Hawton, *By Their Own Young Hand*, 304 Brit. Med. J. 1000 (1992). . . .

The method of suicide is particularly significant. Fijian women of Indian ancestry commit suicide without using guns, perhaps because guns are unavailable. About three-quarters of these women hang themselves, while virtually all the rest die from consuming the agricultural pesticide paraquat. The recommendation of the author whose article chronicles all these suicides is so myopic as to almost caricature the more guns equal more death mindset: to reduce suicide by Indian women, she recommends that the Fijian state stringently control paraquat.[148] Apparently she believes decreased access to a means of death will reconcile these women to a life situation they regard as unendurable. At the risk of belaboring what should be all too obvious, restricting paraquat will not improve the lives of these poor women. It will only reorient them towards hanging, drowning, or some other means of suicide.

Guns are just one among numerous available deadly instruments. Thus, banning guns cannot reduce the amount of suicides. Such measures only reduce the number of suicides by firearms. Suicides committed in other ways increase to make up the difference. People do not commit suicide because they have guns available. They kill themselves for reasons they deem sufficient, and in the absence of firearms they just kill themselves in some other way.

CONCLUSION

This Article has reviewed a significant amount of evidence from a wide variety of international sources. Each individual portion of evidence is subject to cavil—at the very least the general objection that the persuasiveness of social scientific evidence cannot remotely approach the persuasiveness of conclusions in the physical sciences. Nevertheless, the burden of proof rests on the proponents of the more guns equal more death and fewer guns equal less death mantra, especially since they argue public policy ought to be based on that mantra. To bear that burden would at the very least require showing that a large number of nations with more guns have more death and that nations that have imposed stringent gun controls have achieved substantial reductions in criminal violence (or suicide). But those correlations are not observed when a large number of nations are compared across the world.

Over a decade ago, Professor Brandon Centerwall of the University of Washington undertook an extensive, statistically sophisticated study comparing areas in the United States and Canada to determine whether Canada's more restrictive policies had better contained criminal violence. When he published his results it was with the admonition:

> If you are surprised by [our] finding[s], so [are we]. [We] did not begin this research with any intent to "exonerate" handguns, but there it is—a negative finding, to be sure, but a negative finding is nevertheless a positive contribution. It directs us where not to aim public health resources.[150]

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148. Ruth H. Haynes, *Suicide in Fiji: A Preliminary Study*, 145 Brit. J. Psychiatry 433 (1984).

150. Brandon S. Centerwall, *Author's Response to "Invited Commentary: Common Wisdom and Plain Truth,"* 134 Am. J. Epidemiology 1264, 1264 (1991).

NOTES & QUESTIONS

1. Are you persuaded by Kates and Mauser's thesis that social and cultural factors are far more important than gun density in determining a nation's homicide rate?

2. What follows if Kates and Mauser are correct? What measures should citizens and governments pursue to reduce suicides and criminal homicides?

3. Rather than using formal statistical tests, Kates and Mauser produce a great deal of observational data, such as by comparing neighboring countries, or looking at changes over time in national homicide rates. Is this informal method useful for analyzing policy questions, or should any such analysis conform to formal statistical methods, including the use of significance tests? What are the advantages and disadvantages of the two approaches?

2. Brief Guide for Evaluating Statistical Studies

The quality of social science research varies. A researcher's study design and methods can overlook important elements or may be incapable of properly assessing the topic of study. Faulty research methods produce incorrect findings that in turn generate improper conclusions about the relationship between variables. More broadly, improper conclusions may be used to promulgate potentially disastrous policies. In this section, we will consider elements of social science research that should be evaluated in order to determine the quality of gun control studies.

The majority of social science research seeks to determine the relationship between an *independent variable* (X) and a *dependent variable* (Y). As the name suggests, an independent variable is not affected by other variables but instead produces a change in other variables. Naturally, a dependent variable is one that is affected by the independent variable. In evaluating social science research, we must determine if there is *internal validity*.

Internal validity is the extent to which a causal relationship exists between the independent and dependent variables. There are three fundamental criteria for establishing internal validity. First, is there statistical association between X and Y (*concomitant variation*)? For example, a study finds that on days when the outside air temperature is above 90 degrees Fahrenheit, ice cream cone sales are much higher. So there is a concomitant variation between air temperature and sales.

Second, is X causally antecedent to Y and not the reverse (*temporal sequencing*)? In other words, when X and Y increase together, are we sure that X causes Y? Or could it be possible that Y causes X? It is also possible that a third factor causes both X and Y. For ice cream sales, we can be sure of the temporal sequencing, since we know from climate science that ice cream cone sales cannot increase air temperature in the short run.

But with guns, the temporal sequencing may not be so clear. A study shows that neighborhoods with high crime tend to have higher rates of gun ownership. Is this because the presence of guns leads more people to commit crimes? Or does the pre-existing high crime level cause more people to buy guns, because self-defense needs are greater? More information is needed to determine temporal sequencing: which came first, the high crime, or the high gun ownership?

Similarly, a study might find that gang members perpetrate more crimes than people who are not gang members. Is this because joining a gang makes people commit more crimes? Or do people who are already predisposed to commit crimes decide to join gangs?

Third, a study must be able to rule out *confounding effects*—alternative explanations for the observed relationship. In the ice cream study, perhaps the reason that sales are high on hot days is because schools are on summer vacation, so children can run to the ice cream truck when they hear it jingling at 2 p.m. Perhaps they would buy just as much ice cream in April as they do in July—if only they were not stuck in a classroom in April.

Thus, a well-structured study would include a *control variable* for whether or not school is in session. The data might show that the school variable fully or partially accounts for differences in ice cream sales. Or if the school variable turns out to have little effect, then we can be more confident that the study has found a genuine causal relationship between hot weather and ice cream sales.

As a methodological rule of thumb, the more confounding factors for which a researcher controls, the more likely the study is to accurately identify the actual effect of the independent variable on the dependent variable. The best studies of the relationship between guns and crime include controls for many confounding variables that might affect crime rates, such as gang membership, poverty, police per capita, etc.

When evaluating the quality of a study, one must also consider *construct validity*. Because social scientists are often studying broad concepts that cannot be perfectly measured, they must select proxies that accurately represent these concepts. As such, construct validity is the extent to which the measures chosen accurately represent the independent and dependent variables.

To determine whether gun ownership is associated with crime rates, it is necessary to consider construct validity. Without proper measures, it is impossible to compute a valid statistical association between gun levels and crime rates. Consider whether the proxies used in the following studies to measure various concepts (e.g., firearm prevalence, gun ownership, violence) meet the criteria of construct validity.

Suppose one wanted to understand the relationship between intelligence and academic success. These are of course very broad concepts that can be measured in a number of different ways. IQ might be employed as a proxy for intelligence and grade point average to measure academic success. Do these measurements accurately represent the concepts of study?

There is no simple formula for determining the validity of a measure. As with internal validity, one must depend on a set of overlapping criteria for evaluating construct validity.

First, one must examine a measure's *face validity*. Simply put, is the measure, on its face, measuring what it purports to be measuring? Determining face validity is often a matter of using intuitive logic. In the case of IQ, one can, presumably, be confident that IQ is an accurate metric for many but not all aspects of human intelligence. This does not mean that IQ is the best, or even only, measure of intelligence.

Second, and a bit more advanced, is *content validity*. Content validity simply asks whether or not all of the essential elements of a concept have been captured by the measure. Additionally, one must also determine whether all the elements not representative of the concept have been excluded.

Does GPA alone measure academic success? Certainly not. Academic success can also include, for example, the number of academic papers published, the number of academic awards and scholarships won, citations by other scholars, the number of advanced degrees earned, and other measures of academic success. Content validation pushes researchers to consider all critical elements of a concept they are seeking to measure.

Finally, one must also consider *criterion validity*. This evaluates whether the measure predicts what it is intended to. Stated differently, does the measure for the independent variable predict for the measure of the dependent variable? In the case of intelligence and academic success, is there empirical evidence which suggests that IQ is a predictor of GPA? The short answer, in this case, is yes. Similarly, in a law school context, LSAT scores are by far the strongest predictor of first-year grades and of bar passage rates.

A final consideration in evaluating study quality, including studies examining gun ownership and crime, is *data disaggregation*. This is the practice of breaking the data within a large dataset into smaller units/components so as to better understand finer trends. Aggregated data tends to obscure important trends that are occurring at lower levels of analysis.

Suppose one wanted to know how levels of household income were distributed across the United States (i.e., which households brought home the most income). One would not get a very clear picture of household income in the United States by examining incomes at the state level. Such an analysis would only provide insight into the average household income by state. It would not shed light on how incomes differed within states, or within counties, cities, and so forth. On the other hand, a disaggregation of the state-level income data to also show household income by rural/urban residence, ethnic/cultural group affiliation, education level, and family size would provide a clearer idea about the profiles of households with low, average, and high incomes.

In studies of gun ownership and crime, it is important to consider whether the authors have aggregated the data according to large units of analysis (nations, states, regions, etc.) and whether this can provide a clear picture of a causal relationship. In general, the smaller the unit of analysis the easier it is to see how the data is actually distributed.

Following are the definitions of some of the specialized terms you will encounter in the articles in this chapter or in other professional contexts. Although law schools rarely offer training in social science statistics, attorneys who practice in fields involving public policy often need to be able to understand social science articles, and to present the findings of such articles to a court.

Significance. In general usage, "significant" means about the same as "important" or "meaningful." Relatedly, the term "statistically significant" is widely misunderstood to mean something akin to "measurable" or "observable."

The statistical meaning is much more precise. When a social science study shows a correlation between two things (e.g., the rate of heart attacks on a given day, and whether the temperature that day was above 100 degrees Fahrenheit), the question arises whether the correlation is due simply to chance. Statisticians use well-established formulas to estimate the probability that the correlation is random.

Usually, a result is said to be "significant" (or *statistically significant*) if the significance test's *p*-value (see immediately *infra*) is 0.05 or lower.[12] In other words, there is a 95 percent probability that the correlation of the two things is not explained by mere chance, *assuming that no confounding factors — unknown outside influences — are skewing the results.* As a matter of standard practice, a correlation that is not statistically significant is ignored; it is treated as if it does not exist, as if there is no correlation.

Confounding factors can be eliminated fairly well in controlled laboratory experiments. But it is exceedingly difficult to eliminate the effect of outside variables in other contexts because it is impossible to compare real-world data — say, data obtained in a world where firearms exist — to equivalent data obtained from a counter-factual world — say, one in which firearms do not exist. That it is often difficult to estimate even those variables that the researcher intends to include in the study makes things even less certain.

It is important to remember that a mere finding of significance is not certain proof. There may be other factors that explain the relationship. For example, in the United States, blacks have a much higher rate of being convicted for felonies than do whites. The racial difference is statistically significant. However, this does *not* prove that race differences cause difference in crime rates. For example, it might be that other factors (e.g., disparate treatment by the criminal justice system, poverty rates, education levels, unemployment levels, broken families, etc.) account for all or most of the black/white differences.

In addition, that a correlation is statistically significant does not mean that it is *practically significant.* Practical significance, unlike statistical significance, is a measure of how important or meaningful an effect is. For example, there may be a statistically significant correlation between the number of letters in people's names and the number of sunny days in those people's neighborhoods, but, as common sense suggests, this finding has no practical significance.

p-value. Often referred to simply as "*p*," *p*-value is the probability that the results are as extreme as those found, or more extreme (again, assuming no confounding variables). If *p* is less than 0.05 (in other words, the probability is less than 5 percent that an observed association between the dependent and independent variables is due to chance), then the results are considered significant.[13]

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12. Sometimes, a looser standard of 0.10, or a more stringent standard of 0.01, is used.

13. For example, suppose a population consists of 50 percent Republicans and 50 percent Democrats, but the statistician does not actually know this. A sample of ten voters is drawn, and merely by chance, it contains seven Republicans and three Democrats. The statistician's best guess is that the population is actually 70 percent Republican, but it is also possible that the population is really 90 percent Republican or 10 percent Republican or any other value, and the sample just happens by chance to differ from the population. A finding of statistical significance is a finding that results as extreme as those found — or more extreme — would be found less than 5 percent of the time, given some initial guess (the ***null hypothesis***, often referred to simply as the *hypothesis*) about the population from which a sample was drawn. If the initial guess about the population was that it was 10 percent Republican and 90 percent Democrat, then it would be quite unlikely to draw a random sample of ten people consisting of seven Republicans and three Democrats, and the precise probability that this would occur is *p*-value.

Confidence Interval. Statistical significance is sometimes expressed as a range of values, and the result of an experiment is said to be significant if it is *outside* the "95-percent confidence interval." For a given sample size, a confidence interval of a certain percentage denotes the percentage of samples taken from the population that will capture the true value. A confidence interval is primarily used as a measure of a study's precision. The narrower the confidence interval, the more precise the study is.

Margins of error in surveys, for example, are typically expressions of 95-percent confidence intervals; a ±3 percent margin of error means that one can be 95 percent certain that the true proportion of the population that would answer a survey question a certain way is within 3 percent of the result obtained in the survey. For example, a political poll samples 750 people in a state, and reports that candidate A is supported by 48 percent and candidate B is supported by 40 percent; the pollster states that the 95 percent confident interval is plus or minus 3 percent. This means that it is 95 percent likely that if the pollster had sampled every voter in the state, between 45 percent and 51 percent would have expressed support for candidate A, and between 37 percent and 43 percent would have expressed support for candidate B. In interpreting political polls, it is always important to note whether a candidate's lead is *greater* than the confidence intervals, as candidate A's lead is in the example above.

Because a confidence interval is calculated using the same equations as are used to calculate *p*-values, they can also be used as an alternate measure of statistical significance. If the confidence interval includes the possibility that the effect being tested is zero, then a result is not statistically significant. If the confidence interval does not include the possibility that the effect being tested is zero, then the result is statistically significant.

For example, if a study found that an expansion of the right to carry handguns reduced a state's homicide rates from 4.7 per 100,000 to 4.5 per 100,000, with a 95 percent confidence interval of plus or minus .3; in other words, the 95 percent confidence interval was 4.2 to 4.8 per 100,000. The finding that the new gun law reduced homicide rates would not be statistically significant. Because the premeasure rate of 4.7 per 100,000 is within the confidence interval, the 95 percent confidence interval includes the possibility of zero effect.

Readers should always remember that a 95 percent confidence interval is not the same as 100 percent. For example, the final pre-election poll conducted by Gallup reported Mitt Romney at 49 percent and Barack Obama at 48 percent; on election day, Mitt Romney won 47.2 percent of the popular vote (within the confidence interval), whereas Barack Obama won 51.1 percent (outside the 95 percent confidence interval).

r. The r is the strength of the correlation of two variables. It is important to distinguish r (strength of correlation) from p (probability that the correlation is not due to random chance). A weak correlation can still be statistically significant. For example, even though drunk driving is very dangerous, the majority of drunk driving events do not result in accidents. Thus the r will be low (closer to 0 than to 1) for both sober and drunk driving. If drunk driving events always resulted in an accident, then r would be 1. But we also know that driving drunk markedly increases the chances of an accident relative to sober driving, so it is not surprising that the correlation between drunk driving and an increase in accident rates is statistically significant. That is, $p < 0.05$.

N. N is the sample size. If you perform a study of 150 people, or 150 nations, then N = 150.

Spearman's rho. Spearman's rho is the same as *Spearman's rank correlation coefficient*, and similar to *r*. Sometimes the shorthand *rho* is used. In a formula, the shorthand is *rs*. This is a formula for calculating the correlation between two things. The result will be between –1 and 1. If the two things are closely correlated (e.g., the number of fans in a football stadium vs. the decibel level of crowd roars), then Spearman's rho will be close to 1. If the two things are inversely correlated (e.g., obeying all traffic laws while driving vs. auto accident injury), then Spearman's rho will be close to –1. If the two things have little correlation (e.g., sunspot activity vs. whether the National or American League wins the World Series), then Spearman's rho will be close to 0.

Pearson's r. Pearson's *r* serves the same purpose as Spearman's rho, but the formula is different. Pearson's *r* is a formula for measuring the direction and the magnitude of the correlation between two variables. If increases in X are correlated with increases in Y, then the correlation of X and Y moves in the same direction. If a 50 percent increase in X is correlated with a 50 percent increase in Y, then the magnitude of the correlation is high. The Pearson's *r* formula produces a number between –1 and 1. If the number is positive, then the direction is the same. If the number is close to –1 or 1, and far from 0, then the magnitude of the correlation is high.

Variance and Standard Deviation. Variance and standard deviation are ways of measuring the range over which a set of numbers is spread out. A higher value indicates that the numbers are more dispersed.

Type-I and Type-II Errors. The probability of a Type-I error is the probability that a study's authors conclude that a correlation exists where in fact there is no correlation. Where the standard 0.05 significance level is used as the decision rule, the probability of a Type-I error is 5 percent. The probability of a Type-II error is the probability that a correlation is not found where in fact one does exist. The probabilities of Type-I and Type-II errors are inversely correlated — as one increases, the other decreases. Type-II errors can only be calculated for a given strength of correlation.

Cross-Sectional Studies (CX). CX studies measure different populations at a fixed point in time, for example, a study that looks at data from all 50 states for the year 2018.

Interrupted Time-Series Design (ITSD). ITSD refers to before-and-after studies. Examining one or more populations, ITSD looks at changes that occurred after some event. For example, one could look at every state that adopted a "shall issue" concealed handgun carry law in the past 20 years. On a state-by-state basis, did the crime rates go up, go down, or not change, after the law came into force?

Panel Designs and Panel/Multiple Time-Series Designs. A panel design studies the same group of people (the "panel") over a period of time. A multiple time-series design compares and contrasts two groups of people over time; one group was subject to an experimental intervention, while the control group was

not. For example, a Panel/Multiple Time-Series Design might look at states that enacted bans on "assault weapons" and states that did not enact such a ban (the control group), and see whether the two groups of states experienced similar or divergent changes in crime rates over time.

General Social Survey (GSS). The GSS is a major annual survey of the American population, conducted since 1972 by the National Opinion Research Center at the University of Chicago, and is a leading source for social science data.

As an introduction to comparative studies, the next short excerpt presents useful warnings about the types of errors that are often made in gun research. Professor Gary Kleck describes some methodological difficulties in social science studies about gun control. First, when a researcher is comparing different jurisdictions, how does the researcher know how many guns there really are in each jurisdiction? Since it is impossible to actually count all the guns, researchers must make a *proxy selection*; the proxy (e.g., the percentage of suicides in which guns are used) is taken as proxy for the prevalence of guns.

Second, how does the researcher account for cause and effect? For example, if a jurisdiction with more guns has more crime, is that because more guns causes more crime? Or because people who live in high-crime areas buy more defensive guns? Or both? This issue is called *reverse causality*.

Third, how has the author accounted for confounding factors that might independently affect crime rates, such as unemployment or police effectiveness?

Many studies comparing U.S. jurisdictions have serious deficiencies in addressing the above problems. When comparing nations, the difficulties become even worse, because comparable data are even harder to obtain. For example, unemployment data within the United States is compiled by the U.S. Department of Labor, and so unemployment is defined and measured exactly the same way in Montana that it is in Mississippi. But unemployment levels in two different countries may be measured in very different ways, and the data quality between the two countries may be very different.

Gary Kleck

The Impact of Gun Ownership Rates on Crime Rates: A Methodological Review of the Evidence

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ABSTRACT

Purpose: This paper reviews 41 studies that tested the hypothesis that higher gun prevalence levels cause higher crime rates, especially higher homicide rates.

Methods: Each study was assessed as to whether it solved or reduced each of three critical methodological problems: (1) whether a validated measure of gun prevalence was used, (2) whether the authors controlled for more than a handful of possible confounding variables, and (3) whether the researchers used suitable causal order procedures to deal with the possibility of crime rates affecting gun rates, instead of the reverse.

Results: It was found that most studies did not solve *any* of these problems, and that research that did a better job of addressing these problems was less likely to support the more-guns-cause-more-crime hypothesis. Indeed, none of the studies that solved all three problems supported the hypothesis.

Conclusions: Technically weak research mostly supports the hypothesis, while strong research does not. It must be tentatively concluded that higher gun ownership rates do not cause higher crime rates, including homicide rates. . . .

WAS A GUNS-CRIME ASSOCIATION ESTABLISHED? VALIDITY OF THE MEASURES OF GUN PREVALENCE

To determine whether the prevalence of guns is even associated with crime rates, it is of course necessary to have a valid measure of the prevalence of guns. Without this, it is impossible to even compute a valid statistical association between gun levels and crime rates. . . . Only the percent of suicides committed with guns (PSG) shows strong validity for purposes of measuring levels of gun ownership in different areas. Further, none of the proxies used in prior research, including PSG, have been shown to be valid for purposes of judging trends over time. . . .

This problem is therefore especially serious in studies using a longitudinal design, such as a panel design, since those using such designs appear to implicitly assume that any proxies that are valid for establishing differences in gun levels across areas must also be valid for establishing changes in gun levels over time. Direct tests of the validity of nearly 20 proxies used in this body of research clearly indicate that this assumption is false. . . . [M]ost of the variation (52%) in PSG is independent of variation over time in gun prevalence as measured in the [General Social Survey (GSS)]. By no stretch of the imagination can a proxy measure be regarded as having good validity if most of the variation in the proxy is independent of the target construct being measured. Further, . . . when year-to-year changes are analyzed, there is essentially no association over time between changes in PSG and changes in direct survey measures of gun prevalence. In sum, PSG is apparently useless for tracking changes in gun prevalence, despite its considerable ability to assess differences in gun prevalence across areas. The same is true of all other gun proxies tested for validity. Consequently, the findings of nearly all studies that have attempted to relate changes over time in gun ownership to changes in PSG are uninterpretable, because the researchers were not actually measuring changes in gun levels. . . .

An alternative to using proxies for gun levels is to use direct survey measures of gun ownership. Survey measures of gun ownership are themselves subject to serious error, mostly in the form of underreporting of gun ownership, but do have the merit of being fairly direct modes of measurement. The main problem with the studies that have used this method so far . . . , however, is that (a) the survey's sample sizes for the areas used in the study (typically Census regions or states) were far too small to provide meaningful estimates of changes in gun prevalence. The number of respondents in any one region in the GSS is often less than 100 . . . , so only the largest (and most implausible) changes in regional gun prevalence measures could be statistically significant. For example, [one study] claimed that region-level changes in survey measured gun prevalence caused changes in homicide rates, but they did not show that any of their survey-based year-to-year changes in regional

gun prevalence were statistically significant. In fact, reanalysis of the GSS regional data indicates that very few of the changes were significant, and the handful that were significant were implausibly large and erratic. For example, the GSS results indicate that in New England the percent of households with guns supposedly jumped from 16.6 in 1982 to 42.9 percent in 1984 (a 158% increase in two years!), and then dropped back to 25.1 in 1985. . . . It is highly unlikely that New England, or any other region actually experienced changes in gun prevalence this radical in such short time periods or that were this erratic. More likely, these apparent changes largely reflect sampling error and changes in the willingness of gun owners to their report gun ownership. [The researchers] were thus probably mostly modeling statistical noise.

CONTROLS FOR CONFOUNDING VARIABLES

It is also essential that researchers seeking to estimate the effect of gun levels on crime rates statistically control for confounding variables—those factors that affect crime rates, but that are also associated with gun prevalence rates. If this is not done, the supposed effects of gun levels will be confused with the effects of the confounding variables. The more of these likely confounding variables that a researcher controls, the less likely this problem will be a serious one. Statisticians describe this as the "omitted variables" problem, because researchers failed to include confounding variables in their multivariate equations predicting crime rates. For example, if an area was characterized by a culture that encouraged violent behavior, but gun ownership was also common in that area, then that violent subculture would be a confounding variable because it affects violence rates but is also correlated with gun ownership. Because the southern parts of the U.S. are thought to be characterized by a regional culture of violence, and also have higher gun ownership rates, more careful analysts control for the regional location of states or cities as a way of indirectly controlling for a possible Southern subculture of violence whose effects on violence might be confused with effects of gun levels.

A variable must, at minimum, possess both of two properties in order to actually be a confounder: (1) it must show a statistically significant association with the outcome (dependent) variable, and (2) must be associated with the predictor of interest—gun prevalence in the present case. If a supposed confounder lacks either of these attributes, it is not in fact a confounder, and controlling for it does not help isolate the effect of the predictor of interest. . . .

[T]he vast majority of studies of the effect on gun levels on crime rates did a poor job of controlling for likely confounding variables, in that their own reported findings indicated that the authors controlled for few control variables that had a documented statistically significant association with crime rates. Of the 41 studies reviewed, fourteen did not control for a single confounder. Only six studies controlled for more than five statistically significant control variables. All six of these studies found no significant positive effect of gun levels on violence rates. The pattern, then, is highly consistent and simple to summarize. When researchers do a poor job of controlling for potential confounding variables, they often find apparent support for the hypothesis that more guns lead to more crime. When authors do even a minimally adequate job of controlling confounders, they find no support for the hypothesis.

CAUSAL ORDER—DID THE RESEARCHERS DISTINGUISH THE EFFECT OF GUN LEVELS ON CRIME RATES FROM THE EFFECT OF CRIME RATES ON GUN LEVELS?

Gun prevalence might affect crime rates, but it also possible that higher crime rates cause higher gun prevalence, as more people acquire guns, particularly handguns, for self-protection. A large and varied body of research strongly supports the hypothesis that crime rates—especially homicide rates—have a positive effect on rates of gun ownership, especially handgun ownership. The implication for macro-level studies of the impact of gun levels on crime rates is that researchers who fail to adopt appropriate methods for addressing causal order are likely to mistake a positive effect of crime rates on gun levels for a positive effect of gun levels on crime rates.

At least eleven published macro-level studies have found evidence indicating a positive effect of crime rates on gun levels. . . . Further, most of these studies adopted arguably appropriate ways to address the causal order issue, and still consistently found that crime rates have significant positive effects on gun rates. . . .

Few scholars even made an attempt to address the causal order problem. Researchers have typically adopted one of four unhelpful responses to this problem: (1) ignoring the issue altogether, (2) mentioning the issue but arguing that it is not really a problem, (3) acknowledging it as a possible problem in a pro forma way, as a mere logical possibility, but without conveying its seriousness or doing anything about it, or (4) forthrightly acknowledging the problem but applying inadequate solutions.

The 41 studies generated 90 distinct findings, 40 of which pertained to homicide. There is no point to providing separate tabulations for any other crime type, since no other crime type yielded more than ten findings, and there was virtually no variation in the non-homicide findings—nearly all indicated that gun levels did not have a significant positive effect.

The overall quality of this body of research is poor, with many primitive studies and a handful of more sophisticated ones. Of the 90 total findings, only 28 (31%) were based on valid measures of gun prevalence, only six (7%) were based on appropriate methods to address causal order (instrumental variables methods, using instruments demonstrated to be relevant and valid), and only eleven (12%) controlled for more than five statistically significant control variables. Only four findings (8%) were produced by research that met all three conditions for establish[ing] a causal effect and only ten were produced by research that met two or more of the conditions.

Of 40 findings regarding homicide, 21 (52%) were positive and significant at the .05 level. Thus, most findings appear to support the hypothesis that higher gun rates cause higher homicide rates. Once one takes account of differences in fundamental methodological flaws in the research, a very different pattern emerges. The findings of lower quality studies are diametrically opposed to those of higher quality studies. When researchers used an invalid measure of gun prevalence, 62% of the homicide findings were positive and significant, but when a valid gun measure was used, only 36% of the homicide findings were positive and significant. Of the 37 homicide findings generated by studies failing to use appropriate methods for addressing causal order, 57% were positive and significant, but none of the homicide findings generated by studies using proper causal order methods supported it. When researchers controlled five or fewer significant control variables, 59% of the homicide findings were positive and significant, but when more than five significant control variables

were controlled, only 17% of the findings were positive and significant. Finally, there were only three studies that used a valid gun measure, and controlled for more than five significant control variables, and addressed the causal order issue with appropriate methods. None of these methodologically stronger studies supported the hypothesis. Conversely, among studies that failed to properly deal with any of these three fundamental problems, 65% of the homicide findings supported the hypothesis. The overall pattern is very clear—the more methodologically adequate research is, the less likely it is to support the more guns–more crime hypothesis.

These patterns are not likely to [be] coincidental, since each of the flaws can bias findings in favor of a misleading positive guns/violence association. Failing to properly model causal order leads researchers to misinterpret the well-documented positive effects of crime rates on gun rates as a positive effect of gun rates on crime rates. . . . Failing to control for confounders that have a positive effect on crime rates but are also positively associated with gun rates (such as a pro-violence culture) leads to an upward omitted variables bias in estimates of the effect of gun levels on crime rates. And using invalid measures of gun prevalence that actually measure pro-violence culture or some other factor with a positive effect on crime rates leads to researchers misinterpreting effects of these other factors as effects of gun prevalence.

CONCLUSIONS

To summarize, the only prior research that supports the hypothesis that higher gun ownership rates cause higher crime rates is research that makes at least one, and usually all of, the three fundamental methodological errors identified here. Conversely, research that avoids or minimizes these flaws consistently finds no support for the hypothesis. . . .

Why does gun prevalence not have a significant positive effect on homicide? The most likely explanation is that (a) most guns are possessed by noncriminals whose only involvement in crime is as victims, and (b) defensive gun use by crime victims is both common and effective in preventing the offender from injuring the victim. . . . These violence reducing-effects of guns in the hands of victims may roughly cancel out the violence-increasing effects of guns in the hands of offenders, resulting in a near-zero net effect on homicide rates. . . .

3. Multivariate Studies

Many comparative international studies on gun control are deficient in research design. The next article is one of the most sophisticated international comparative gun control studies ever published. It examines 26 developed nations, using data from the International Crime Victims Survey (ICVS). The survey is necessarily dependent on respondents truthfully reporting about crime victimization and about their gun ownership.

As you read the article, consider how it addresses the methodological problems that Kleck has identified: (1) accurately measuring gun ownership; (2) reverse causality (the possibility that higher gun ownership levels might be a consequence of, and not a cause of, higher crime rates); and (3) confounding variables (controlling for other factors that affect crime rates).

John N. van Kesteren

Revisiting the Gun Ownership and Violence Link: A Multilevel Analysis of Victimization Survey Data

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BACKGROUND

One of the ongoing debates in evidence-based crime prevention concerns the possible causal relationship between gun ownership and violent crime. On one side of the debate stand those claiming that the availability of a firearm acts as a facilitator of the commission of serious crimes of violence by providing potential assaulters with the opportunity to attack others with an especially dangerous instrument. This position in the debate is theoretically grounded in situational crime prevention theory. . . . The notion of guns facilitating violence is the key assumption behind the strict regulation of gun ownership in most European countries and behind government programmes seeking to decrease gun availability in a variety of countries including Brazil, Canada, Columbia, Mexico, South Africa and parts of the United States. It also lies behind the global campaigns against illicit production and trafficking in small firearms. . . . On the other side of the debate stand those who deny the facilitating impact of gun availability. Some authors claim that the gun ownership of potential victims acts as a preventive or protective measure by deterring would-be attackers. . . .

Over the years, many empirical studies have been conducted on the gun ownership-violence link. Research on this relationship is methodologically difficult, for several reasons. First, a dearth of reliable data exists on both gun ownership and on violence between civilians. Especially in countries where gun ownership is illegal, as in most countries in Western Europe and Asia, official ownership statistics possess ample "dark numbers." Official statistics on gun ownership cannot therefore be reliably used for cross-country comparisons. The same can be said of official statistics on the numbers of crimes of violence committed. Numbers of violent crimes recorded by the police are known to be heavily influenced by different reporting patterns and recording practices. This explains why countries with efficient police forces such as Sweden and Denmark invariably come at the top of the list of recorded crimes of violence per capita and many developing countries at the bottom. . . .

A second constraint of studies on the gun-violence link—partly related to the dearth of reliable data on violent crime—is that data used in analyses often come from relatively small and possibly unrepresentative populations. Many studies have been conducted on data from the United States only. Other studies look at the relationships between firearm ownership and homicide rates (which are supposed to be more comparable than those on other violent crime). Statistics on homicide are mainly from developed countries. The use of such restricted datasets obviously limits the generalizability of the results. The dynamics of guns and violence in the United States might not be representative for the rest of the world. Findings on relationships between guns and homicide in small samples of mainly developed countries might not apply to other types of violent crime or to other regions.

A third factor complicating this line of research is the need to distinguish between relationships at the level of countries with those at the level of individuals.

Official statistics on gun ownership and violent crime are typically available at the aggregate level only. However, from statistical relationships at the level of countries, no inferences can be made about relationships at the micro level of individuals.

The conduct of victimization surveys among the general public has yielded data sets which can be used to examine the gun-violence link. This is true for major national victimization surveys such as the NCVS [U.S. National Crime Victimization Survey] and the BCS [British Crime Survey] and it is especially true for the first internationally conducted standardized victimization survey, the International Crime Victims Survey (ICVS). The ICVS has been carried out once or more in over 80 countries in six global sweeps between 1989 and 2010. . . . The ICVS data set has three characteristics facilitating the examination of the possible links between gun ownership and violence. It, first, contains data on victimization by a range of different types of violence, including on gun-related crimes. It, second, contains data on self-reported ownership of firearms and handguns. And, third, its data allow an analysis of links between gun ownership and victimization by violence at both individual and aggregate (country or city) levels. Over the years, the ICVS data sets have been used to examine the gun-violence link from an international perspective. . . .

SUBJECT MATTER AND OUTLINE

This article revisits the gun ownership-violence link, mainly using data from the fifth sweep of the ICVS, conducted in 2004 and 2005. In this sweep, the survey was carried out in 31 nations, among randomly selected samples of the public of 2,000 persons per country. . . . Data are available from 26 industrialized countries in the world, including Japan, as well as from a number of Eastern European countries (four) and Mexico. The ICVS provides information on victimization by ten common crimes including various types of contact crimes involving or not involving guns. Also available is self-reported information on ownership of different types of firearms in the household. This information is, as said, available at the level both of individual respondents and of countries. In order to broaden the variation in key variables, some analyses of relationships between gun ownership and homicides were carried out using data sets from older ICVS sweeps covering a larger number of countries.

We will first present some descriptive data on the levels and nature of gun ownership per country based on the ICVS 2005. Next, we will explore the gun ownership-violence link presenting basic bivariate statistics at the country level. This is followed by an analysis of the gun-violence link at the level of individuals. The key question is whether ownership of a gun acts as a risk-enhancing factor for victimization by contact crimes or not, controlling for known risk factors such as age, and the number of outdoor leisure activities. . . . In a final section, we will discuss the results of a multilevel analysis integrating the previous analyses at the macro and micro levels. The results will show whether and to what extent the effects of firearm ownership on the risk of individuals to be victimized are determined by contextual variables. In a concluding paragraph, we will discuss how the findings compare with results of previous studies and which general conclusions can be drawn. The article finishes with some suggestions for further research.

DESCRIPTION OF THE DATA ON FIREARMS AND VICTIMIZATION

Firearms, Guns and Reasons for Ownership

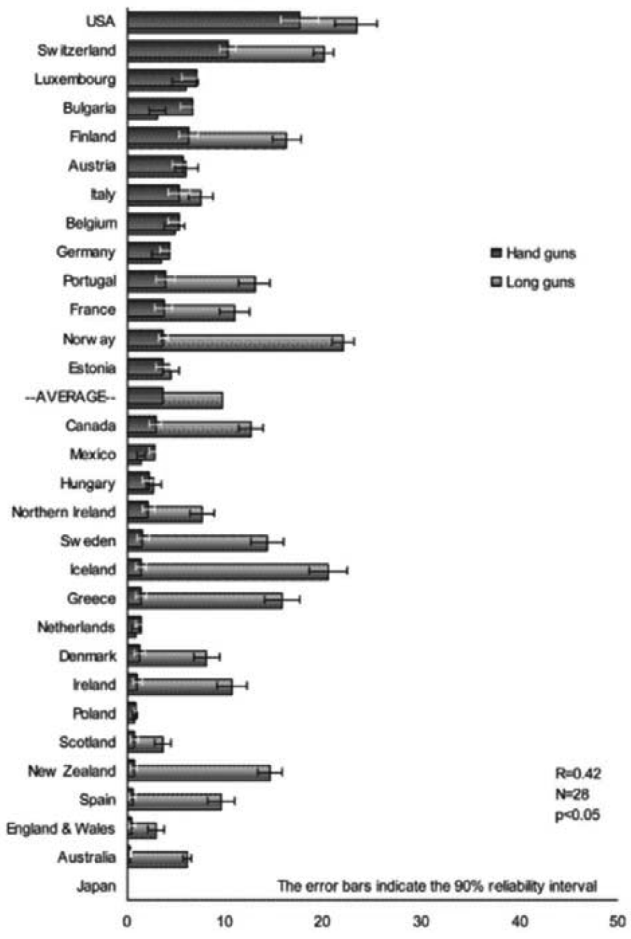
The ICVS asks respondents whether a firearm is present in the house and, if so, what type of firearm. The questionnaire distinguishes between long guns (rifles and shotguns) and handguns. Those who own any firearms are asked the reasons for ownership. The results are given in Figure 1. As can be seen in the figure, the United States, Switzerland, Finland, Norway and Iceland have the largest number of rifles and shotguns, directly followed by Sweden, Greece and New Zealand. Of this set of countries, only the United States and Switzerland also belong to the group of countries with the highest number of handguns. Japan, Australia, England and Wales, Spain, New Zealand, Scotland, Poland and Ireland know ownership rates for handguns below 1 per cent. Reliability intervals have been indicated in the graph. The reliability intervals are relatively large for countries with low ownership levels. . . .

Those owning firearms were asked for the reasons for their ownership. . . . Hunting is the main reason for owning a firearm in all countries. This typically applies to the ownership of long guns. For handguns, hunting is the second most frequently mentioned reason after sports. Quite a number of households possess a gun for no particular reason (the weapon has always been in the family or is part of a collection). Handguns are also owned for reasons of protection or prevention; this is the case for 23 per cent of the handgun owners. The fifth most common reason is that the guns are owned because someone in the household carries out police or security work or because it is an army gun. No data are available for Switzerland, but previous research indicates that the most important reasons for ownership in this country are hunting and mandatory ownership of a handgun among army reservists. . . . There are some noticeable cross-country differences in the reasons for ownership. A pronounced difference was found between the reasons of owners in the United States and those elsewhere. Overall, prevention and protection are a more prominent reason for owning a firearm in the United States than anywhere else. This difference is fully explained by the relatively large number of handguns.

The correlation between ownership rates of the two types of firearms is modest ($r = 0.42$, $n = 28$) but statistically significant. The 28 countries can be grouped according to whether they have above or below-average ownership levels for the two types of guns. . . .

Victimization by Contact Crimes

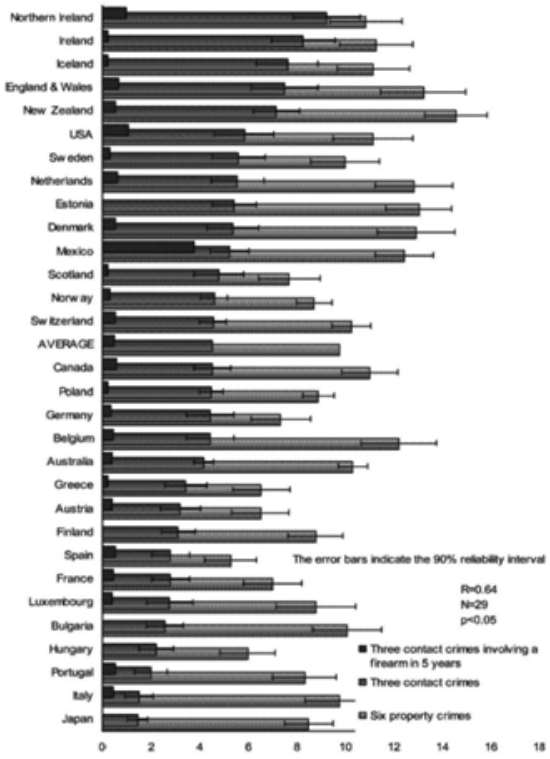
Contact crimes are defined as crimes whereby victim and offender are in direct contact with each other during the commission of the offence. As said, the ICVS distinguishes three main types of contact crimes: robbery, sexual offences and assaults and threats. Figure 2 shows the one-year prevalence rates for these three types of contact crimes from the 2005 ICVS (data available from 29 countries). Also shown are one-year victimization rates for six types of non-contact property crimes (burglary, three types of vehicle theft, theft from a car and other personal theft). Also included in the graph are five-years victimization rates for contact crimes in which a firearm was involved.[1]



Countries with the highest victimization rates for contact crimes include New Zealand, England and Wales, Iceland, Ireland and Northern Ireland. Above-average victimization rates are found in Denmark, Estonia, Netherlands, Sweden and the United States. Bulgaria, Luxembourg, France, Spain, Finland, Austria and Greece have figures below average. Lowest victimization rates are found in Japan, Italy, Portugal and Hungary. . . .

Of the countries with high victimization rates for contact crimes, New Zealand and England and Wales are also in the group of countries with the highest rates of property crimes. Japan, Italy and Portugal have relatively more property crimes than contact crimes; they have victimization rates for property crimes slightly below average, but very low rates for contact crimes. Also included in the graph are the five-year victimization levels for contact crimes whereby a firearm was involved. The

1. Five-year prevalence rates are shown because of the very low one-year victimization rates for these types of crimes.



differences between the countries are in most cases not statistically significant due to the low percentages, but Mexico, Northern Ireland and the United States stand out with the highest rates.

CORRELATIONS BETWEEN FIREARM OWNERSHIP AND VICTIMIZATION AT COUNTRY LEVEL

As a first step in the analysis of the guns-violence link, we have looked at the correlations between firearm ownership (handguns and long guns separately) and victimization rates for contact crimes with the use of firearms, other contact crimes and property crimes. In order to maximize the numbers of countries included, we have combined data from the 1996, 2000 and 2005 rounds, always using the latest data available per country (n = 50). Since gun-related crimes are rare in most countries, five-year victimization rates are used for these types of crime. . . .

The results show that ownership rates for handguns are positively related to victimization rates for contact crimes involving firearms, including assaults and threats involving a gun. A positive but statistically insignificant relation is found between handgun ownership and victimization by contact crimes generally. . . . There is no correlation at a national level between handgun ownership and victimization by property crime. Neither is there a relationship between long-gun ownership and any type of victimization. These results show that analyses of the gun-violence link at the macro level should focus on handgun ownership.

The ICVS produces no data on victimization by homicide. To replicate previous studies of the gun ownership-homicide link, data have been used from a newly developed dataset of the United Nations distinguishing between firearm-related and non-firearm-related homicides (UNODC 2009) [United Nations Office on Drugs and Crime] as well as from similar older UNODC data sets. The homicide data relate to 2005 or 2006 or, when these were missing, from older years. In the analyses, we have looked at overall homicide rates, rates of homicides involving firearms and the proportion of all homicides involving firearms. Firearms ownership data are from the ICVS 2005 or from older sweeps if no recent data were available. . . .

The results show significant positive relationships between handgun ownership and the three measures of homicide. The correlations are dependent on the inclusion of the United States and some non-Western countries (notably Brazil, Colombia and South Africa). As was the case with victimization by contact crimes, ownership of long guns shows no significant correlations with any type of homicide. The weak relationship between long guns and the proportion of homicides committed by firearms is likely to be caused by the impact of handgun ownership, since national rates of handgun ownership are, as discussed, correlated with ownership of long guns.

INDIVIDUAL-LEVEL ANALYSIS

The next question to be addressed is whether for individuals ownership of a firearm increases or decreases the risk of becoming a victim of a crime. As explained, information is available on the question of whether or not a firearm was in possession of the respondent's household. An important category of contextual information used in this analysis is whether the respondent lives in a country with low, average or high ownership rates of long guns or handguns, respectively. The analysis is, of necessity, restricted to victimization by non-lethal contact crimes, since homicide is not covered in the ICVS questionnaire. In the first analysis, the dependent variable is one-year victimization by contact crimes (robbery, sexual offences, threats and assaults). In a second analysis, the dependent variable is victimization by these crimes with or without involvement of a firearm. In this analysis, five-year victimization rates are used because the one-year victimization figures are too low. Both analyses are carried out using the data of the ICVS 2004/05 encompassing results from 31, mainly Western, countries. . . .

[O]wners of a handgun are more often a victim of contact crimes than non-owners, especially in countries with low availability of such firearms. For countries with high and average ownership rates, the relationship between ownership of a handgun and victimization by contact crime goes in the expected direction but is not statistically significant. This result suggests that, in countries where gun ownership is rare, those owning a gun may also possess other risk-enhancing characteristics. This hypothesis will be explored in more detail in a multivariate analysis. Ownership of a long gun is apparently not related to victimization by contact crime at the individual level either.

In a second analysis, we have looked at the relationship between gun ownership and victimization by contact crimes with or without firearms, respectively. . . . The results are similar to those regarding victimization by total contact crimes. Individuals owning a handgun tend to be more at risk of being threatened or attacked (with or without a firearm) in countries where gun ownership is not common:

- For contact crimes not involving a firearm, the differences are the largest in countries with low ownership levels. There is no significant difference for countries with high ownership levels.
- For gun-related contact crimes, countries with average ownership levels, 2.5 per cent of the owners are victimized by contact crimes involving firearms and only 0.3 per cent of the non-owners. The differences in countries with low and high ownership are not statistically significant but go in the same, expected direction.

Correlates of Victimization at the Individual Level

Various theoretical models have been developed to explain how the differential vulnerability of individuals to criminal victimization is determined by their lifestyle or "routine activities". . . . The ICVS includes information on demographics such as age, gender, town size, marital status, income and education of respondents. Previous multivariate victimological risk analysis using the ICVS data sets has shown that many of these factors have independent effects on victimization by contact crimes. . . . Besides these known risk factors, the ICVS includes a question on the frequency of outdoor activities in the evening. This factor has also been found to be an independent risk factor of victimization by contact crimes. . . . Finally, previous analyses have shown that victimization by property crime is an independent predictor of victimization by contact crime. A possible explanation for the latter finding is that those victimized by property crime are more exposed to victimization because of their proximity to potential offenders. To test whether gun ownership as such is an independent risk factor, multivariate analyses have been conducted including these other known risk factors besides gun ownership. To this end, log-linear analyses were carried out whereby the independent variables were coded in categories against a base. . . . The key independent is the variable distinguishing between gun ownership at individual and country levels. For technical reasons, only 26 Western countries were included (22 European countries plus the United States, Canada, Australia and New Zealand). The dependent variable was the five-year victimization rate. . . .

The multivariate analysis confirms the known independent risk factors for victimization by contact crime such as young age, being single, living in a big city and an outgoing lifestyle. Being female enhances exposure because of higher victimization by sexual violence. Low education and/or income are risk-reducing factors, probably because they limit leisure time activities. As expected, victimization by property crime acts as a powerful predictor of victimization by contact crime. Controlling for the effects of these external independents, handgun ownership comes out as an independent predictor of victimization by contact crimes in countries with medium and high levels of gun availability.

MULTILEVEL RESULTS ON INDIVIDUAL AND COUNTRY LEVELS

A multilevel analysis using the same ICVS 2004/05 data is the final step in our analysis. The data have been subjected to the same list-wise procedure as was done for the log-linear analysis and therefore represent the same population. The difference, however, is that most of the variables were not categorized but interpreted as data at the interval level. With the exception of gender, firearm ownership and living with

a partner remained dichotomies. All variables have been transformed into z-scores. This means that the average of the variables is set at 0 and the standard deviation at 1. In this final stage of the analysis, the same independents as in the log-linear analysis at the level of individuals were included and some characteristics of countries. The added variables at country level are wealth (GDP per capita), income differences (GINI index) and educational level from the 2005 Human Development Report (UNDP 2005) [United Nations Development Programme]. Also included is the rate of urbanization taken from the UN World Urbanisation Prospects (United Nations 2006). From the ICVS database, we took the handgun and long-gun firearm-ownership levels (percentage of households owning at least one). . . .

Interaction Effects

In the fifth and final model, two interaction effects with ownership levels of handguns showed a significant effect:

- People living without a partner are more at risk than people living with a partner, but even more so in countries with higher ownership levels for handguns.
- Owning a long gun is in itself no risk factor, but it diminishes the risk in countries with high ownership levels of handguns.

In the final model, having controlled for any effects of independents at the individual or country level (including firearm-ownership levels), people owning handguns are more at risk of becoming a victim of a contact crime. In those countries where many people own handguns, being single is an extra risk factor (on top of the already high risk anywhere else). But, in these countries, owners of a long gun (but not a handgun) are somewhat less at risk.

CONCLUSIONS AND DISCUSSION

Using a data set including 50 countries, we have found a statistically significant correlation at the country level between ownership levels of handguns and rates of victimization by gun-related contact crimes, gun-related threats and assaults and homicides, gun-related or otherwise. No correlation was found between handgun ownership levels and levels of contact crimes overall.

At the individual level, owners of handguns are significantly more often victims of contact crimes. When controls are introduced for known risk factors such as age, gender, income, educational level, frequency of going out, living with a partner and size of the town of residence, owning a handgun remains a risk factor for victimization by contact crimes. The result was not altered by entering victimization by property crime, a proxy for a risk-taking lifestyle, as an extra control. A multilevel analysis that involved both individual factors related to victimization and country-level factors confirms the conclusion that owning a handgun brings a higher risk for victimization by contact crime. But, at the same time, high availability of handguns is related to slightly lower risks of victimization by contact crimes in general.

The finding that high availability of guns in a country increases the risk to be victimized by gun-related violence or homicide but slightly less to victimization by violent crime (for the non-owners) generally lends support to the hypothesis that

gun availability offers potential offenders the opportunity to be more intimidating in their threats or attacks. Through this effect, high availability raises the stakes of violent crime and exacerbates its medical and mental impact on victims. Our results show that high availability results in slightly lower levels of violence across the board, presumably by de-motivating people to commit such crimes. We found some support for the hypothesis that high availability prevents crime by deterring would-be offenders of less serious contact crimes. The analysis, however, shows that owners themselves are more at risk than non-owners.

Of special interest are our results of the role of gun ownership at the individual level in developed countries, since this issue has rarely been examined empirically before. Gun ownership has been found to be a powerful, independent risk-enhancing factor. This result could be spurious in the sense that gun ownership is closely related to other risk-enhancing characteristics. Ownership of a gun could be a flag or symptom of other risk-enhancing characteristics. After entering various proxies for a risk-taking lifestyle as controls, the link did not weaken. It cannot be excluded that the inclusion in future studies of other controls such as, for example, minority group status, gang membership or employment in law enforcement might partly explain the established relation between ownership of a gun and victimization. Another consideration is that, in the present study, respondents were asked whether a gun was present in the household, not whether the respondent himself owns a gun and carries it around on a regular basis. In our opinion, such more detailed information on ownership is likely to show stronger relationships with victimization by serious violence.

The relation between ownership and victimization also showed up in the analysis . . . of an ICVS-based data set from respondents in developing countries only and in the results of a dedicated survey on gun ownership and violence in Venezuela. . . . One explanation is that a gun in the house is risk-enhancing because it can be used against other household members (including partners). This argument has been mentioned in the literature. . . .

The second explanation is that ownership and especially the habit of carrying a concealed gun around may generate the "illusion of invincibility." This mental state could result in risk-taking or provocative behaviour which enhances victimization risks. Similar counterproductive effects have been observed among users of safety belts in motorcars, the "security illusion" or "risk homeostasis theory". . . . In some countries, those in possession of a gun may share values of a macho or honour culture which further stimulates them to act dangerously. Our results offer, at any rate, no support for the notion that gun ownership performs a protective function for the owner.

To conclude, at the community level, high levels of gun ownership seem to have conflicting effects on levels of violence. When conflicts arise in high-gun environments, the stakes of a fight are relatively high. This may deter some would-be attackers and prevent acts of simple violence. In other words, would-be attackers may feel less restrained in low-gun countries such as Great Britain and the Netherlands. At the same time, in high-gun countries, the risks of escalation to more serious and lethal violence are higher. On balance, considerably more serious crimes of violence are committed in such countries. For this reason, the strict gun-reduction policies of many governments seem to be a sensible means to advance the common good.

At the individual level, the statistical facts are unambiguous. Contrary to what has been claimed by proponents of widespread gun ownership in the United States, those households that own guns run higher risks of seeing their members being criminally victimized, either by other household members or by outsiders who are not deterred from attacking. This correlational finding provides no proof that the higher risks are caused by ownership of a gun; ownership might also be a proxy for a high-risk lifestyle. But this result certainly sheds serious doubt on the notion of gun ownership as a protective factor.

Where previous studies used data sources from a limited number of countries or even from one single country only, this article is based on victimization data from almost all major industrialized countries. Future studies using international data should, in our view, focus on three different issues:

- First, these studies ought to include larger samples of developing countries. Although much information on the gun-violence link is available from the Small Arms Surveys on individual countries, there is a lack of quantitative cross-sectional and time-series studies from Africa and Latin America. The repeat of the ICVS in more developing countries would greatly increase the opportunities for such policy-relevant analyses. Fortunately, more victimization surveys are now being conducted in South America, including in Argentina, Brazil, Mexico and Venezuela.
- Second, future studies should seek to make more detailed distinctions between the various types of violence and the circumstances under which they are committed. For this purpose, data from victimization surveys could be supplemented with more detailed police-recorded information on serious crimes of violence.
- Third, our analyses have consistently shown that availability of long guns bears no relationship with levels of victimization by any type of crime at either collective or individual levels, since most of these guns are used for hunting. Future studies on the gun-violence link should, in our view, be restricted to data on handgun ownership and perhaps assault rifles at the individual level. The use of data on firearm ownership including long guns could result into false negatives regarding the gun-violence link.

NOTES & QUESTIONS

1. Does the study adequately consider the reverse-causality problem? Did the study consider whether persons might choose to own handguns because they are already at higher risk of being victimized? In other words, is it proper to say that "[g]un ownership has been found to be a powerful, independent risk-enhancing factor"?

The study notes that it controlled for some risk-taking lifestyles, which did not change the result, and it calls for further study, presumably including whether an owned gun is regularly carried. It then adds that, "[i]n our opinion, such more detailed information on ownership is likely to show stronger *relationships* with victimization by serious violence" (emphasis added).

Does the study inaccurately imply that gun ownership causes victimization? Does the statement that "[t]his correlational finding provides no proof that the

higher risks are caused by ownership of a gun" fit with what the study examined, the rest of the authors' conclusions, and with the article's tone?

2. The study noted that, because the survey examined whether there was a gun in the household (rather than whether the gun is regularly carried), it may be capturing victimizations that result in the victim's partner using the victim's gun against the victim. It is generally agreed that a gun in a domestic-violence situation increases the chance that the victim will be harmed by the gun. *See* Ch. 1.L.3. Does the van Kesteren study look at victimization by firearm, or all victimization? Does it matter?

3. The van Kesteren article finds that in countries where handgun ownership rates are low, handgun owners are significantly more likely to be victimized by violent crime. Van Kesteren suggests that one reason might be security illusion; that is, people with handguns might engage in riskier behaviors (e.g., walking down a dark alley at night) because they wrongly feel that the handgun makes them invincible. Is it proper for a study that asks "whether a gun is present in the household" to suggest that such ownership *causes* victimization because "the habit of carrying a concealed gun around may generate the 'illusion of invincibility'"?

Would one expect a firearm that is carried concealed to reduce the likelihood that one is victimized, that one is better able to defend oneself after an attack occurs, or both?

Van Kesteren found that increased risk of contact crimes was significant for handgun owners only in nations with low levels of handgun ownership. In such nations, few people other than law enforcement officers are allowed to own handguns, and so law enforcement officers may comprise a large percentage of handgun owners. Compared to the general population, are law enforcement officers at greater risk of being violently attacked?

4. Did the article examine whether or how often firearms are used for protection?

5. What might explain van Kesteren's finding that the availability and ownership of long guns have no effect on the risk of criminal victimization at the collective or individual level? Does this suggest that ownership of long guns for lawful activities like hunting is a proxy for a more low-risk (i.e., law-abiding) lifestyle?

6. The article uses data from the International Crime Victims Survey (ICVS), and necessarily depends on gun owners voluntarily disclosing their gun ownership to a stranger on the phone. In the U.S. context, this problem is discussed in Chapter 1.A. A recent study of American refusal to answer survey questions about gun ownership finds that the refusal rate has increased in the United States, particularly among Republicans and conservatives. R. Urbatsch, *Gun-Shy: Refusal to Answer Questions About Firearm Ownership*, 56 Soc. Sci. J. 189 (2019).

In the United Kingdom, where gun ownership regulation is especially stringent, telephone surveys report a household gun ownership rate well below what other data suggest. David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 60, 89-90, 109 n.14 (1992). How would these issues affect the reliability of van Kesteren's estimates of national gun ownership? Are there reasons to believe that respondents in some countries might be less willing to self-disclose than respondents in other countries?

7. Presuming that the van Kesteren article is accurate, what are the implications for what gun policies should be adopted in general?

8. The article addresses four confounding variables: GDP, income inequality, education, and urbanization. Can you think of other confounders that might have been useful to consider?

9. **CQ:** Professor Johnson's article on the "remainder problem," Section B.5, discusses some special difficulties in the United States for any policy intended to greatly reduce the possession of firearms.

10. *University of Liege study.* Another recent, sophisticated comparative study examined the relationship between the severity of firearms laws and homicide rates in 52 nations, not including the United States. Written in French, the study is a 150-page monograph. A 24-page English-language summary of the study is available as Michaël Dantinne & Sophie Andre, *Factors Influencing the Rate of Homicides by Firearms* (2015). The study finds that severity of national gun control laws has no effect on a nation's firearms homicide rate. Using multivariate regressions, the study finds that the only independent variable with a clear correlation with the firearms homicide rate is the child mortality rate. How could child mortality (or whatever causes increased child mortality) have any effect on firearms homicides? Can the findings of the Liege study be reconciled with van Kesteren's results?

11. The van Kesteren study follows prior research in saying that the use of seat belts (indeed, safety devices generally) leads to more injuries. This is not because seat belts are dangerous; to the contrary, they provide lifesaving protection. However, some studies have shown that risky drivers (the kind most likely to cause crashes) take into account the extra safety provided by seat belts and adjust their driving behavior to be *more* risky; such drivers thus maintain a constant level of risk that they prefer.

> Troublingly, and . . . in accord with moral hazard theory, improved vehicle safety for occupants . . . causes drivers to be more reckless, and the saving of auto occupants' lives results in more pedestrian and other nonoccupant deaths. This type of trade-off would be especially problematic in the gun-use context.

George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209, 1253 (2014) (comparing mandatory firearm-owner liability insurance with mandatory automobile liability insurance). In other words, having insurance for gun use might incline some gun owners to engage in riskier behaviors with guns. Do you agree with van Kesteren's speculation that firearm carriage might makes carriers more aggressive or risky? If yes, which ones? Would you expect this behavior to increase the likelihood of injury to the carrier, to others, or both?

4. Statistical Data in Cultural Context

How does culture influence the positive and negative effects of gun ownership and gun use? The two articles in this section address the question in different ways. The first article examines the effects of increased gun density in Latin America and Eastern Europe, and finds that the effects are quite different in the two regions. The second article examines the relationship, if any, between gun density and levels of civil liberty, economic liberty, and good government.

Irshad Altheimer & Matthew Boswell

Reassessing the Association Between Gun Availability and Homicide at the Cross-National Level

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INTRODUCTION

The relationship between gun availability and homicide continues to be a source of debate among criminologists. Competing perspectives have emerged that view guns as a cause of violent crime, a mechanism to reduce violent crime, and totally unrelated to violent crime. Macro-level research on this issue has yet to establish a consensus. For example, some studies have found a significant association between gun availability and homicide while others have not. As a result, the debate about the relationship between guns and violent crime at the macro-level continues. . . .

Recent research has documented the importance of considering socio-historical and cultural contexts when examining crime at the cross-national level. For example, research on Eastern European nations has found that age structure and economic inequality operate to influence homicide differently in Eastern European nations than in Western Developed nations. The authors of this research attributed these differences to the unique changes that have occurred in Eastern European nations in recent decades. Additionally, Ortega, Corzine, Burnett and Poyer found that the effects of modernity on homicide may vary by region, a proxy for culture. Further, Neopolitan found that cultural factors explained high rates of homicide in Latin American nations. There is also a body of research that suggests that the symbolism associated with guns in some cultures influences levels of homicide. Despite these findings, no research to date has examined if the manner that gun availability influences violence across nations is contingent upon socio-historical and cultural contexts.

These issues have important implications for international gun control policy. If gun availability levels positively influence homicide rates across nations, without regard to socio-historical or cultural factors, then measures to reduce the availability of guns within nations, as well as the transfer of weapons between nations, should lead to subsequent reductions in lethal violence. This would occur if the lower levels of gun availability decrease the likelihood that crime prone individuals use a gun during the commission of a crime. If, on the other hand, the effect of gun availability on homicide is found to be contingent upon socio-historical and cultural factors, the policy approaches will have to be more nuanced. For example, if gun availability is found to decrease rates of homicide in certain nations, then it would be prudent for policy makers to develop a policy that reduces gun availability among criminal aggressors, but still allows citizen[s] to utilize guns for self-defense.

The aim of this paper is to further clarify the nature of the relationship between gun availability and homicide at the cross-national level. Towards that end, this paper has two objectives. First, to examine the association between gun availability and homicide in a manner that better accounts for simultaneity than previous research. Second, to examine the manner that the relationship between gun availability and homicide is shaped by socio-historical and cultural context.

THEORY

No dominant theoretical perspective exists that explains the relationship between gun ownership and homicide. The basis for such a perspective, however, has been proposed by Kleck and McElrath, who suggest that weapons are a source of power used instrumentally to achieve goals by inducing compliance with the user's demands. The goals of a potential gun user are numerous and could include money, sexual gratification, respect, attention, or domination. Importantly, this perspective suggests that guns can confer power to both a potential aggressor and a potential victim seeking to resist aggression. When viewed in this manner, several hypotheses can be derived concerning the relationship between gun availability and homicide at the macro-level. Importantly, applying these hypotheses to the macro-level leads to analyses that are more concerned with aggregate social factors and statistical associations than direct causality. Macro-level analysis of the relationship between gun availability and violence is often misconstrued as supporting the contention that guns "cause" crime. In reality, this research is primarily driven by questions about the role that gun availability plays in facilitating choices and other behavior that may influence levels of criminal violence.

The facilitation, triggering, and weapon instrumentality hypotheses have been put forth to explain why gun availability and homicide should be positively associated. The facilitation hypothesis suggests that gun availability is positively associated with homicide because the availability of guns provides encouragement to potential attackers or to persons who normally would not commit an attack. This encouragement is derived from the fact that the possession of a gun can enhance the power of a potential aggressor; thereby increasing the chances that a violent crime will be successfully completed. Guns can also facilitate crime by emboldening an aggressor who would normally avoid coming into close contact with a victim or using a knife or blunt object to stab or bludgeon someone to death. This is particularly important in situations when the aggressor is smaller or weaker than the victim. In such cases, the aggressor's possession of a gun can neutralize the size and strength advantage of an opponent. The triggering hypothesis suggests that gun availability triggers aggression among potential offenders. This "weapons effect" is said to occur because angry people are likely to associate guns with aggressive behavior. Similarly, it has been suggested that the presence of a gun is likely to intensify negative emotions such as anger.

The weapon instrumentality hypothesis suggests that gun availability increases the lethality of violent crime. This occurs when increasing gun availability increases the likelihood that an aggressor substitutes a gun for another weapon or no weapon at all during the commission of a crime. The end result is often homicide. The basic premise of the weapon instrumentality perspective is that the use of a gun during the commission of an assault or robbery (1) increases the likelihood of death or serious injury; (2) provides aggressors with the opportunity to inflict injury at long distances; and (3) makes it easier to assault multiple victims than the use of other weapons that are commonly used to commit violent crime (i.e. knife or bat).

Another perspective on this issue suggests that the availability of guns is negatively associated with homicide. From this perspective, increased levels of gun availability empower the general public to disrupt or deter criminal aggression[, which] suggests that gun availability can disrupt criminal aggression in two ways. First, an

armed victim can prevent the completion of a crime by neutralizing the power of an armed aggressor or by shifting the balance of power in favor of the victim when confronted by an unarmed aggressor. Second, an armed victim can use a weapon to resist offender aggression and avoid injury. Increased levels of gun availability may also reduce crime by deterring potential aggressors. Aggressors may refrain from committing crime due to fear of violent retaliation from victims. This deterrence can be both specific and general. For instance, a criminal aggressor may refrain from committing future attacks because they were confronted with an armed victim during a previous experience. Alternatively, an aggressor may refrain from committing a criminal act if they believe that a large proportion of the pool of potential victims is armed. When applied to the macro-level, this perspective suggests that gun availability should be negatively associated with homicide. This is because in nations where citizens have greater access to guns, potential victims will be better able to deter or disrupt the acts of criminal aggressors.

The third perspective discussed here suggests that gun availability and homicide are unrelated. The absence of an effect can be the result of two things. First, gun availability simply may not influence homicide. From this perspective, the use of a gun simply may reflect an aggressor's greater motivation to seriously harm a victim. This suggests that factors other than gun availability motivate gun use and that a lack of access to a gun will simply cause an aggressor to substitute another weapon to achieve a desired outcome. Second, an effect between gun availability and crime may not be detected because defensive gun use may offset the effects of guns being used for criminal aggression.

CROSS-NATIONAL RESEARCH ON GUNS AND HOMICIDE

Cross-national research examining the relationship between gun availability and homicide has been small in number. . . .

Criticisms of this research can be placed in two categories. The first category involves criticism of the overreliance of correlation coefficients in the examination of this relationship. The overreliance of correlation coefficients precludes the establishment of causality. For example, Kleck notes that a significant association between gun availability and homicide can be interpreted to represent the effect of violent crime on gun availability. The overreliance on correlation coefficients also makes it impossible to control for other important predictors of homicide at the cross-national level. Due to this some researchers have concluded that "Cross national research holds little promise for assessing the impact of gun levels on violence levels." But the failure to establish causality and control for other variables does not mean that research performing bivariate analysis is worthless. Rather, this research serves an important exploratory step in examining the relationship between gun availability and homicide. The analyses performed in previous research may be viewed as one step in the career of a causal relationship. When viewed in this way, the finding of a significant association would suggest the need to explore the relationship with more rigorous statistical approaches in the future. Hoskin attempted to control for potential simultaneity between gun availability and homicide by using two-stage least squares regression to examine the gun/homicide relationship. His results suggest that gun availability levels influenced rates of homicide, but his failure to include proper instruments for gun availability [led] to serious questions about the veracity of his results. . . .

Critics of this research also point out that it has primarily focused on Western Developed nations. Importantly, in the one situation when non-Western or lower income nations were included in the analysis the relationship between gun availability and gun homicide dropped from significance. In the same study, gun availability was found to have no association with homicide when all nations were included. Hepburn and Hemenway argued that inconsistent results emerge when high income and non-high income nations are included in the same analysis because differences in socioeconomic status may affect levels of lethal violence in these nations. Although this assertion seems plausible, an alternative proposition is that gun availability and homicide only exhibit a significant association in certain cultural and socio-historical settings.

EXPANDING EXISTING THEORY AND LITERATURE TO ACCOUNT FOR SOCIO-HISTORICAL AND CULTURAL FACTORS

Macro-level criminological research can be divided into three categories. The first involves social-structural approaches to the study of homicide. This research views homicide rates as social facts that are distributed in patterned ways. Patterns of homicide are influenced by the social structure, which describes the positions or statuses that people occupy and the behavioral expectations attached to these statuses. From a social-structural perspective, gun availability can be viewed as a material social fact that operates somewhat independent of socio-historical and cultural factors to influence gun homicide and homicide rates. A positive association between gun availability and homicide would be hypothesized to exist cross-nationally, in spite of socio-historical and cultural differences between nations.

The second approach involves research that examines how cultural processes influence rates of homicide. Proponents of this perspective argue that variation in homicide rates can be explained by values, norms, and beliefs held by members of a society. Although there are numerous cultural theories that attempt to explain crime, virtually all of these approaches to crime suggest that, at least in certain situations, some societies—or subgroups within society—are more accepting than others of the use of the violence in upholding certain values. In essence, it is culture that establishes how people within society interpret and respond to certain events and provocations. Thus, cultural processes may influence knowledge of weapons—including how to identify and use them—as well as situational definitions of when it is appropriate to use a weapon to injure or kill someone.

The third approach involves consideration of how socio-historical factors influence homicide. Socio-historical research is primarily concerned with how space and time shape structures of order and disorder across nations, and the implications that this has for cross-national variation in violence. Both political boundaries and geographic characteristics shape the social organization of societies. Consideration of time is important because social forces are temporally linked; and the occurrence and sequence of important historical events within specific political and geographic boundaries may influence the levels of violence within societies. From the socio-historical perspective, the manner that gun availability is associated with crime is influenced by the history and geography of a nation, as well as the occurrence of important temporal events. In nations where the gun historically has been viewed as a civilizing force against indigenous populations (i.e. cowboys and Native Americans); or in nations with vast and diverse geographic boundaries that

make the development of gun sports possible; or in nations where the occurrence of certain temporal events lead[s] to the breakdown of collective security; citizens may come to view [ ] the use of guns as a viable option when responding to interpersonal disputes.

Although most cross-national research has been social-structural in nature, there is evidence in the criminological literature that both cultural and socio-historical processes influence cross-national variation in homicide. Results of this research suggest that important structural predictors of crime do not necessarily operate uniformly across nations. This notion is further supported by historical and ethnographic firearm research that documents the greater glorification and toleration of gun use and gun violence in some societies than in others. Taken together, this research suggests that an examination of the manner that socio-historical and cultural processes shape the nature [of the] gun/homicide relationship is warranted.

THE CURRENT STUDY

The current study has two objectives. First, to examine the association between gun availability and homicide in a manner that better accounts for simultaneity than previous research. Second, to examine the manner that the relationship between gun availability and homicide is shaped by socio-historical and cultural context. To address these objectives, the analysis proceeds in the following manner. First, the relationship between gun availability, gun homicide, and homicide is examined for the entire sample of nations. Examining the effect of gun availability on gun homicide is necessary to determine if the greater availability of guns increases the likelihood that societal members will make a gun their weapon of choice when committing a violent assault. Importantly, a significant relationship between these two variables doesn't suggest weapon instrumentality. It is possible that citizens in these nations choose guns as their weapon of choice when they intend to seriously harm or kill their victim. A significant relationship between gun availability and homicide, however, would suggest greater weapon lethality.

The second objective will be met by examining the association between gun availability, gun homicide, and homicide across three groups of nations that are culturally and socio-historically distinct: Western nations, Latin American nations, and Eastern European nations. Examining Latin American nations is important because previous research has argued that these nations are characterized by a machismo culture that increases the use of weapons and the likelihood of violence. Examining Eastern European nations is important because previous research has found that the transition to market capitalism has led to the breakdown of collective security in many of these nations. Under these circumstances it is plausible that gun violence has become more likely in these nations.

Although it is recognized that the nations in each respective category are not entirely homogenous, it is assumed that nations are more similar to neighboring nations than nations in different cultural regions. Placing nations in categories, rather than looking at the effects of each nation separately, is necessary because data on the socio-historical and cultural processes of interest here are not available for a cross-national sample. This approach has been taken in previous cross-national research attempting to assess the effects of socio-historical and cultural processes on crime.

DATA AND METHODS

This study provides a methodological improvement to existing cross-national work on guns and homicide. Specifically, we are able to model the effects of gun prevalence on homicide with special attention being paid to variation over both time and space.

Data

To test these arguments we collected annual national-level data for the years 2000 to 2005 on gun homicide, characteristics of nations, and meaningful controls. The use of yearly data is a methodological improvement to cross-sectional studies of guns and homicide for several reasons. First, by using time-varying data effects can be estimated more efficiently. Second, variation from year-to-year can be captured. Finally, the time-series design allows for claims of causality, which are stronger than analyses which cannot account for temporal ordering.

This full sample used in this study contains data on 43 nations measured over 6 years. An investigation of the data showed no systematic patterns to missing data. Regional subsamples varied in the number of nations. Table 5 in the Appendix shows the composition of both the baseline set of nations as well as the specific regional groupings. Our choices of nations to include were determined by data availability. We note that the total number of nations included in the analysis is similar in size to other work in cross-national criminology.

Variables

Independent Variable

Gun availability was measured by the rate of gun suicides in each nation per 100,000 inhabitants for the years 2000 to 2005. These data were collected from the WHO ICD-10 [Worth Health Organization, International Classification of Diseases, 10th edition] raw data files. Suicide data were aggregated for each nation for the years 2000 through 2005. Each year of the suicide rate was operationalized by taking the number [of] gun suicides for that particular year, dividing it by the national population for the same period of time, and multiplying that number by 100,000. The gun suicide rate is considered the proxy of choice for examining gun availability levels across macro-level units. Confidence in the validity of this measure is further bolstered by the fact that it is highly correlated with Krug et al.'s cross-national indicator of the gun suicide rate. For the 21 nations that are included in both our dataset and Krug et al.'s dataset, the Pearson correlation is .93 and the Spearman's rho is .96.

Dependent Variables

Data for gun homicide were collected from the WHO ICD-10 raw data files. The gun homicide measure represents the proportion of homicides in each respective nation that involved the use of a firearm. It was operationalized as the number of gun homicides per 100,000 inhabitants for the years 2000 to 2005. Due to data limitations, no distinction could be made between hand guns and long guns. The homicide measure was operationalized as the rate of homicides per 100,000 population for the years 2000 to 2005, [respectively].

Control Variables

The control variables included in the analyses of this study were selected to isolate the effects of gun availability on homicide and gun homicide. The following control variables were included in these analyses: economic inequality, GDP/capita, male population between the ages of 15 to 34 (young males), social support, urbanization, sex ratio. For all of the control variables, data were taken for the years 2000-2005. Data for GDP/capita, social support, and urbanization were taken from the World Development Indicators website. Economic inequality was operationalized using the Gini index. There are numerous sources for this variable. Because of the yearly observations used in this analysis, we chose the net Gini indicator[14] from the Standardized World Income Inequality Database (SWIID). This dataset standardizes the United Nations World Income Inequality Database while drawing from other sources and also providing yearly data. The net Gini indicator is a measure of inequality after all transfer payments are taken into consideration.

Controlling for this indicator is important because previous research has found economic inequality to be one of the most robust predictors of crime across nations. Gross Domestic Product was included as an indicator of the level of development within a nation. Previous research has found that Developed nations have lower levels of violence than developing and underdeveloped nations. Development was operationalized as GDP per capita[] in 1000s of U.S. dollars. This figure was then log transformed to correct for skewness. Social support was operationalized as the percentage of the nation's GDP spent on healthcare.

Urbanization was operationalized as the proportion of national citizens who live in urban areas. This indicator measures the population density within a nation. . . . Young males is an indicator of the proportion of male citizens between the ages of 15 to 34. Previous research has found that nations with larger young populations have higher rates of homicide. Sex ratio was operationalized as the ratio of men per 100 women in society. Sex ratio has been found to be an important predictor of violence both within and between nations (Pratt & Cullen, 2005). Table 6 in the Appendix presents descriptive statistics for the nations in the sample. Correlations are based on the pooled sample.[15] Means and standard deviations for all variables are presented. . . .

RESULTS

Results for this study are reported in Tables 1 through 4. Table 1 reports the analysis of the effects of gun availability on gun homicide and homicide for all of the nations sampled. Model 1 in Table 1 presents a baseline model that examines the effects of the statistical controls on gun homicide. The model reveals that economic inequality, proportion young males, and urbanization all influence rates of gun homicide. Interestingly, the effects of economic inequality, proportion young

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14. [A measure of the distribution of income within a nation. A higher number corresponds to higher income inequality.—Eds.]

15. [A pooled sample is the combination, or pooling, of two or more smaller samples.—Eds.]

males and urbanization are opposite of what might be expected. Model 2 shows the effects when lagged levels of gun availability are introduced in the model. Gun availability significantly influences levels of gun homicide. For every unit increase in gun availability, gun homicide decreases .145 units. Model 3 reports the baseline model that examines the effects of the statistical controls on homicide. The results reveal that economic inequality, proportion young males, sex ratio, urbanization, and social support significantly influence rates of homicide. As in the previous models, and contrary to what has been found in previous research, economic inequality, young males, and urbanization exhibit effects opposite of what was expected. Gun availability is introduced in Model 4 and is found to have no effect on homicide.

Table 1 Baseline Models

	Gun Homicide		Homicide	
	Model 1	Model 2	Model 3	Model 4
Log GDP	–0.010	–0.010	–0.010	–0.011
	(0.025)	(0.025)	(0.009)	(0.009)
Inequality	–0.059**	–0.053**	–0.025**	–0.023**
	(0.014)	(0.014)	(0.005)	(0.005)
Young Males	–9.626**	–10.986**	–4.352**	–4.710**
	(2.804)	(2.791)	(0.982)	(1.063)
Sex Ratio	0.060*	0.062**	0.047*	0.047*
	(0.028)	(0.022)	(0.020)	(0.022)
Urbanization	–0.007**	–0.005	–0.008**	–0.008**
	(0.002)	(0.003)	(0.003)	(0.003)
Social Support	–0.014	–0.042	–0.087**	–0.086**
	(0.019)	(0.024)	(0.011)	(0.012)
Year	–0.028**	–0.030**	–0.021**	–0.021**
	(0.007)	(0.007)	(0.003)	(0.004)
Log Gun Homicide$_{t-1}$	0.033	0.040		
	(0.064)	(0.069)		
Log Gun Availability$_{t-1}$		–0.145**		0.016
		(0.028)		(0.037)
Log Homicide$_{t-1}$			–0.114	–0.055
			(0.060)	(0.071)
Observations	188	188	195	191

*p < .05, **p < .01

Table 2 reports the effects of gun availability on gun homicide and homicide in Western nations only. The baseline model reports that economic inequality, sex ratio, and urbanization significantly influence gun homicide levels. Importantly, the effect of economic inequality is in the expected direction. In Model 2 lagged gun

availability is introduced. The results suggest that higher levels of gun availability increase levels of gun homicide in Western developed nations. Model 3 examines the effects of the statistical controls on homicide. The model reveals that GDP/capita, economic inequality, and urbanization influence homicide. As reported in Table 1, the effect of economic inequality is opposite of what is expected. Lagged gun availability is introduced into Model 4. The results reveal that gun availability significantly influences rates of homicide in this sample of nations. Increases in gun availability are associated with subsequent decreases in homicide.

Table 2 Western Nations

	Gun Homicide		Homicide	
	Model 1	Model 2	Model 3	Model 4
Log GDP	0.002	0.001	–0.010**	–0.007
	(0.033)	(0.030)	(0.005)	(0.007)
Inequality	0.232***	0.241***	–0.085**	–0.090**
	(0.070)	(0.069)	(0.033)	(0.039)
Young Males	4.566	8.964	–0.329	–1.221
	(7.604)	(7.120)	(3.724)	(4.367)
Sex Ratio	0.357**	0.258*	–0.040	0.064
	(0.149)	(0.148)	(0.057)	(0.079)
Urbanization	–0.038*	–0.038	0.029***	0.029**
	(0.023)	(0.027)	(0.010)	(0.013)
Social Support	–0.070	–0.072	–0.025	–0.034
	(0.069)	(0.073)	(0.023)	(0.030)
Year	–0.009	0.022	–0.025*	–0.040**
	(0.026)	(0.032)	(0.014)	(0.018)
Log Gun Homicide$_{t-1}$	–0.036	–0.023		
	(0.116)	(0.115)		
Log Gun Availability$_{t-1}$		0.906***		–0.225*
		(0.270)		(0.116)
Log Homicide$_{t-1}$			–0.294***	–0.260**
			(0.077)	(0.107)
Observations	59	59	65	61

* p < .10, ** p < .05, *** p < .01

Table 3 reports the effects of gun availability on gun homicide and homicide for Eastern European nations. The baseline model of the effects of the statistical controls on gun homicide reveals that economic inequality, proportion young males, urbanization, and social support influence gun homicide levels. Importantly, all of these variables influence gun homicide in a manner opposite of what might be expected. Lagged gun availability is introduced in Model 2. Gun availability has a negative effect on gun homicide. This suggests that, in Eastern European nations, increased levels of gun availability reduce rates of gun violence. Model 3

examines the effects of the statistical controls on homicide. GDP/capita, economic inequality, urbanization, and social support all significantly influence rates of homicide. Gun availability is introduced in Model 4. The results reveal that gun availability negatively influences rates of homicide in Eastern European nations ($p < .10$). Additionally, gun availability seems to mediate the effect of economic inequality on homicide.

Table 3 Eastern European Nations

	Gun Homicide		Homicide	
	Model 1	Model 2	Model 3	Model 4
Log GDP	–0.103	–0.341	–0.357***	–0.338***
	(0.201)	(0.256)	(0.062)	(0.062)
Inequality	–0.068**	–0.091***	–0.862	0.007
	(0.032)	(0.032)	(1.266)	(0.006)
Young Males	–29.045***	–24.790***	–0.329	–1.164
	(6.039)	(6.027)	(3.724)	(1.224)
Sex Ratio	–0.224	–0.269	0.015	–0.026
	(0.222)	(0.209)	(0.025)	(0.031)
Urbanization	–0.018*	–0.016	–0.024***	–0.030***
	(0.010)	(0.012)	(0.003)	(0.004)
Social Support	0.157**	0.113	–0.099***	–0.094***
	(0.076)	(0.079)	(0.018)	(0.016)
Year	–0.043	–0.015	0.002	0.004**
	(0.027)	(0.031)	(0.001)	(0.002)
Log Gun Homicide$_{t-1}$	–0.056	0.016		
	(0.132)	(0.130)		
Log Gun Availability$_{t-1}$		–0.527***		–0.048**
		(0.178)		(0.022)
Log Homicide$_{t-1}$			0.201**	0.162*
			(0.096)	(0.094)
Observations	60	60	60	60

*$p < .01$, **$p < .05$, ***$p < .10$

Table 4 reports the effects of gun availability on gun homicide and homicide for Latin American nations. Model 1 reports the baseline model that regresses gun homicide on the important statistical controls. The findings reveal that GDP/capita, young males, sex ratio, and social support influence gun homicide levels. Lagged levels of gun availability were added in Model 2. Gun availability exhibits a significant positive effect on gun homicide. Additionally, when gun availability is added to the model economic inequality emerges as significant, thereby suggesting a suppression effect. Model 3 examines the effects of the statistical controls on homicide. Only social support is found to significantly influence homicide in these models. Gun availability is added in Model [4] and is found to significantly

influence rates of homicide. This suggests that higher levels of gun availability lead to higher rates of homicide in Latin American nations. Interestingly, urbanization exhibits a significant negative effect once gun availability is introduced in the model. This suggests a suppression effect. The implications of these findings are discussed below.

Table 4 Latin American Nations

	Gun Homicide		Homicide	
	Model 1	Model 2	Model 3	Model 4
Log GDP	–0.032**	–0.035***	–0.004	–0.027
	(0.013)	(0.014)	(0.051)	(0.060)
Inequality	–0.010	–0.016*	0.032	0.023
	(0.008)	(0.009)	(0.021)	(0.023)
Young Males	–8.213**	–7.308*	–7.203	–8.509
	(3.754)	(3.785)	(5.424)	(6.479)
Sex Ratio	0.076**	0.075**	0.079	0.101
	(0.036)	(0.036)	(0.053)	(0.063)
Urbanization	–0.001	–0.001	–0.001	–0.006*
	(0.001)	(0.001)	(0.003)	(0.004)
Social Support	–0.077***	–0.075***	–0.085***	–0.103***
	(0.017)	(0.019)	(0.021)	(0.027)
Year	0.014**	0.016***	0.014	0.018
	(0.006)	(0.006)	(0.012)	(0.013)
Log Gun Homicide$_{t-1}$	0.069	0.016		
	(0.125)	(0.127)		
Log Gun Availability$_{t-1}$		0.046*		.237***
		(0.026)		(0.071)
Log Homicide$_{t-1}$			0.093	–0.085
			(0.135)	(0.144)
Observations	53	53	53	53

* p < .10, ** p < .05, *** p < .01,

DISCUSSION . . .

Several of the results warrant discussion here. The first concerns the dynamic between gun availability, gun homicide, and homicide. As discussed above, gun availability exhibited a positive effect on gun homicide in Western Developed nations and Latin American nations, and a negative effect in Eastern European nations and in the baseline model. Similar patterns were found with the dynamic between gun availability and homicide. No effect was found in the baseline model, but positive significant effects were found in Latin American nations and negative significant effects were found in Western nations and Eastern European nations.

These results suggest that the extent that guns are considered the weapon of choice for the commission of violence is largely shaped by cultural and socio-historical factors. In Western nations citizens appear to be more likely to view guns as the weapon of choice when committing violence, but apparently this preference for guns does not increase overall levels of lethality. Rather, this preference for use of guns seems to decrease overall rates of homicide. Perhaps Western citizens view guns as a defense mechanism against the aggression of others, rather than a tool to be used with the intent of causing great bodily harm or death. In Latin American nations it appears that gun availability increases both the preference for guns and the lethality of violence. This suggests that citizens of Latin American nations have a preference for gun use, and the sheer availability of guns in these nations increases the likelihood that violent altercations result in death. It may also suggest that a greater use of guns in Latin American violence represents [the] greater likelihood that Latin American aggressors intend to greatly harm or kill their victims. An entirely different dynamic seems to be occurring in Eastern European nations. It seems that guns are primarily being used in these nations as a deterrent against potential aggression in an era characterized by weakened collective security.

In addition to the direct effects of gun availability exhibited here, gun availability was found to suppress the effects of urbanization on gun homicide in Latin American nations and to mediate the effects of economic inequality on homicide in Western Developed nations and Eastern European nations. The suppression effect suggests that the effects of gun availability on homicide may not be as pronounced in Latin American nations with high levels [of] urbanization. This finding is somewhat counter intuitive but may suggest that citizens are more likely to benefit from the guardianship of others in densely populated areas of Latin American nations. The mediation effects suggest that the extent that economic inequality influences homicide across Eastern European nations is contingent upon gun availability levels.

These findings also reveal that the causes of gun homicide and homicide diverge considerably. This was especially the case in the regional models. In some instances, a particular variable that influenced gun homicide was not found to influence homicide. In other instances, the effect was significant for both variables but the effect signs were in opposite directions. This suggests that criminologists must look to develop distinct explanations for the occurrence of weapon violence across nations.

Gun availability was not the only indicator to exhibit variable effects on violence across regions. Several of the control variables operated to influence violence in a similar ma[nn]er. For example, economic inequality—one of the most robust predictors of homicide at the cross-national level—exhibited strong positive effects on homicide in the models that included Eastern European nations, negative effects in Western nations, and no effects in Latin American nations. This suggests that even the effects of robust predictors of violence, such as economic inequality, are influenced by socio-historical and cultural factors.

One question that emerges from these results concerns the anomalous findings related to our statistical controls and homicide. That is, in some models economic inequality, urbanization, and young males all exhibited effects contrary to what might be expected. It is not entirely clear why this occurred, but the following

explanations are given here. First, one potential explanation for the negative effect of economic inequality on homicide is that the relationship is non-linear. A recent article by Jacobs and Richardson found that the relationship between economic inequality and homicide changes from positive to negative at extreme levels of inequality. The inclusion of Latin American and Eastern European nations in this analysis led to a higher proportion of nations with extreme levels of economic inequality being examined than what is normally the case in cross-national criminological research. Second, the negative relationship between urbanization and homicide that was found in the Eastern European models may suggest that urban areas provide greater protection for potential victims in these societies. This seems especially plausible if a considerable proportion of the homicides committed in these nations occur in rural areas. Third, the negative relationship between young males and violence in Latin American and Eastern European nations may suggest that older adults commit a higher proportion of homicides in these nations than the proportion committed by older adults in Western nations. Indeed, previous research has found evidence of higher rates of violence among older adults in Eastern Europe.

Taken together, these results point to the need for greater consideration of the role that cultural and socio-historical factors play in influencing the manner that structural predictors influence homicide. Indeed, one assumption implicit in much of the existing cross-national research is that the effects of important structural predictors such as gun availability and economic inequality are invariant across nations. These finding[s] suggest that this may not be the case. Instead, the unique cultural and socio-historical processes occurring across nations may be more important than many assume.

The results of this study have implications for theory and research on guns and violence. These results suggest that theoretical advancement of this relationship is contingent upon the ability of criminologists to address two issues. First, researchers must identify the macro-social processes that link gun availability to homicide at the cross-national level. Most of the macro-level research on guns and violence is reductionist in nature. Assuming that micro-social dynamics account for macro-level processes, however, limits our ability to address important questions that have emerged from cross-national research. For example, applying the weapon instrumentality hypothesis to the cross-national level leads one to assume that, under all circumstances, increasing gun availability will increase homicide. Such a straight-forward application does not allow for consideration of the macro-level factors that may mediate or moderate the effects of gun availability on homicide. . . .

The utility of the approach proposed by Corzine et al. (1999) is further illustrated when it is applied to an explanation of why gun availability is more likely to lead to homicide in Latin American nations than Western Developed and Eastern European nations. Existing cultural explanations of violence in Latin America conceptualize these nations as having higher levels of machismo. This machismo is said to be characterized by aggressive masculinity, domination of women, and the use of violence. The problem with such values based approaches is that they are difficult to empirically test because behavioral manifestations of values are often constrained by how culture organizes and patterns behavior. In other words, people in a certain nation may aspire to solve altercations peacefully, but the "strategies of action" outlined by the culture may encourage, or even require, the use of physical

violence. A more fruitful approach may be to examine if the cultural toolkits in Latin American nations are more likely to legitimate the use of a firearm and sanction the commission of interpersonal violence than the toolkits of other nations. Applying this approach to Eastern European nations would lead one to ask if the unique socio-historical changes that have occurred in Eastern European nations in recent decades have led to the development of a cultural toolkit that legitimates the use of weapons for personal defense and to reduce the likelihood of interpersonal violence. . . .

Future research should also explore potential non-linear relationships between gun availability, gun homicide, and homicide. These examinations should consider non-linear relationships in cross-national samples and samples of specific cultural regions. Examinations of such relationships may be important because it is plausible that gun availability will only be associated with homicide after certain levels of gun availability are reached. It is equally plausible that once gun availability levels reach a saturation phase the strength of the association between gun availability and homicide may become attenuated.

APPENDIX

Table 5 Nations Included in Analyses

Baseline Models		Western Models	East European Models	Latin American Models
Argentina	Latvia	Australia	Croatia	Argentina
Australia	Lithuania	Austria	Czech Rep	Brazil
Austria	Luxembourg	Canada	Estonia	Chile
Brazil	Malta	Finland	Hungary	Costa Rica
Canada	Mexico	France	Kyrgyzstan	Dominican
Chile	Moldova	Germany	Latvia	Republic
Costa Rica	Netherlands	Luxembourg	Lithuania	Ecuador
Croatia	New Zealand	Netherlands	Moldova	El Salvador
Czech	Nicaragua	New Zealand	Poland	Mexico
Republic	Norway	Norway	Romania	Nicaragua
Dominican	Panama	Spain	Slovakia	Panama
Republic	Paraguay	Sweden	Slovenia	Paraguay
Ecuador	Poland	UK		Venezuela
El Salvador	Romania	USA		
Estonia	Slovakia			
Finland	Slovenia			
France	Spain			
Germany	Sweden			
Hungary	UK			
Israel	USA			
Japan	Venezuela			
Korea				
Kyrgyzstan				

NOTES & QUESTIONS

1. After reading the preceding studies, what effects on crime and suicide rates would you expect to see if the rate of private gun ownership in a given nation increases substantially? What effects if gun ownership decreases?

2. How do the findings by Altheimer and Boswell affect the conclusions of the articles presented earlier in this Part? Do the conclusions reached in those articles need to be revised or qualified in light of this one? How could you harmonize them all?

3. The previous articles considered the variable of the per-capita number of guns or handguns in a nation. An additional variable, which was not explored, is how the firearms were acquired. Consider Altheimer and Boswell's finding that more guns are correlated with decreased homicide in Eastern Europe, and with increased homicide in Latin America. During the period from the late 1940s through 1989, when Eastern Europe was under the neo-colonial hegemony of the Soviet Union, gun laws there were extremely repressive. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by "Non-State Actors": The Question of Sovereignty*, 8 Tex. Rev. L. & Pol. 373, 435 (2004). After the fall of the Berlin Wall, firearm laws in Eastern Europe were greatly liberalized, allowing many people to acquire firearms legally. In much of Latin America, government corruption and distrust of the public may make it nearly impossible for a citizen to acquire a firearm lawfully. For example, in 2012, the Hugo Chávez regime in Venezuela banned all firearms purchases. (Venezuela is discussed further Section C.5.) Accordingly, gun acquisition in some parts of Latin America may operate primarily through the black market. Could the differences in firearms acquisition patterns be one cause of the contrasting results that Altheimer and Boswell found between Latin America and Eastern Europe? Nearly a quarter-century after scholars first began serious research on comparative gun control law, a great deal remains unknown.

4. A review of even the most basic statistics test will reveal that all statistical models are laden with assumptions. These assumptions can be very basic and mathematically oriented (for example, that the relationship between guns and crime or suicide can be explained using a linear model), or more complex and involve important value judgments (for example, not differentiating between justified and unjustified homicides). What are some assumptions that underlie the studies discussed in this section so far? What are some factors that were not mentioned by the studies' authors that may explain their conclusions? What is the role of what some scholars call "ordinary reasoning" in *both* setting up *and* interpreting statistical studies? For example, how much credence would you lend to a study that "showed with data taken literally from a telephone book that telephone numbers are 'significantly associated' with psychometric variables"? Stephen T. Ziliak & Deidre N. McCloskey, The Cult of Statistical Significance: How the Standard Error Costs Us Jobs, Justice, and Lives 47 (2007). When is it acceptable to infer causation from correlation?

5. Evaluate and compare the following statements in the Altheimer and Boswell article:

   a. "The model reveals that economic inequality, proportion young males, and urbanization all influence rates of gun homicide."

b. "[T]he effects of economic inequality, proportion young males and urbanization are opposite of what might be expected."
c. "Increases in unavailability are associated with subsequent decreases in homicide."
d. "Gun availability has a negative effect on gun homicide."
e. "Gun availability was not the only indicator to exhibit variable effects on violence across regions. Several of the control variables operated to influence violence in a similar ma[nn]er."

David Kopel, Carlisle Moody & Howard Nemerov

Is There a Relationship Between Guns and Freedom? Comparative Results from 59 Nations

13 Tex. Rev. L. & Pol. 1 (2008)

. . . Using data on per capita firearm ownership from the Small Arms Survey, this Article examines the relationship between per capita firearm rates and several measures of freedom. These measures are:

- Freedom House's ratings of political rights (such as free elections) and civil liberty (such as freedom of religion).
- Transparency International's ratings of government corruption levels.
- Heritage Foundation's ratings of economic freedom. . . .

III. RESULTS

The data for each country are presented in Table 7, found in the Appendix. The fifty-nine nations with per capita firearms estimates are listed in order, from those with the lowest to those with the highest. The list begins with low-firearms countries of Romania, Japan, Moldova, and Poland. It ends with high-firearms countries such as Switzerland, Finland, Yemen, and the United States. The ratings from *Freedom in the World*, *Corruption Perceptions Index*, *Index of Economic Freedom*, and the World Bank PPP[16] are also listed for each country.

Next, we divided the nations into quartiles based on their gun ownership rates. For each quartile, we averaged the nations' ratings for political and civil liberty from Freedom in the World, for corruption from Corruption Perceptions Index, and for economic freedom from the Index of Economic Freedom. Results are presented in Table 1.

16. [Purchasing Power Parity (PPP) rates the relative strength of the currencies of different countries. Currency exchange strength is not a perfect measure of a nation's economic success. Nevertheless, prosperous countries tend to have much stronger currencies than do poor countries, so PPP is usually valid as a rough measure of national economic success, at least for currencies that are allowed to rise and fall freely.—Eds.]

Table 1 Firearms Ownership Quartiles Compared with Liberty Indices

Quartile	Firearms Per 1,000 Population	Freedom in the World (1-7, lower is better)	Corruption Perceptions Index (0-10, higher is better)	Index of Economic Freedom (0-100, higher is better)
1	388	1.93	7.09	69.79
2	145	2.80	4.35	63.59
3	81	2.53	4.75	62.57
4	24	2.32	4.31	63.03
Average 2-4	84	2.56	4.47	63.06

The most notable difference between the quartiles involves corruption. The top quartile has an average of 7.09 in the Corruption Perceptions Index, which means this quartile could be called "mostly clean." All the other quartiles score between 4.31 and 4.75, scores that indicate moderate corruption.

The differences in Freedom in the World rating are not as large. One reason is that Freedom in the World has a 1-7 scale with only 7 steps, whereas the Corruption Perceptions Index has a 0-10 scale with 11 steps. But even taking into account the relative compression of the scale used by Freedom in the World, the differences between the top quartile and the rest are relatively smaller. Still, the average of the countries in the first quartile is "free," according to the Freedom House definition, while the average for all other quartiles is "partly free."

On the Index of Economic Freedom, all quartiles averaged a "moderately free" rating. Nevertheless, the first quartile had the highest average, but not quite 70, which is the threshold for "mostly free."

For all three indices of liberty, the top firearms quartile rates higher than every other quartile.

This is not to say that every country in a certain quartile is better than countries in lower quartiles. For example, the top firearms quartile has the highest average rating in Freedom in the World, but it includes Angola, rated "not free," Saudi Arabia, also rated "not free," and Yemen, rated "partly free." On the Index of Economic Freedom, Angola is "repressed," while Saudi Arabia and Yemen are rated "mostly unfree." Conversely, the bottom firearms quartile includes Japan and the Netherlands, who both have low levels of government corruption, and high levels of political, civil, and economic liberty.

The similarity in ratings among the three lower quartiles is interesting. For example, their Corruption Perceptions Index ratings averaged between 4.31 and 4.75 and their Index of Economic Freedom ratings are nearly identical, falling between 62.57 and 63.59.

While the top firearms quartile rates highest in all categories, the relationship between firearms and liberty is inconsistent among the lower three quartiles. For example, among the lower three quartiles, the second quartile rates slightly higher on the Index of Economic Freedom, while the third quartile has the best rating on the Corruption Perceptions Index, and the fourth quartile has the best Freedom in the World rating.

Next, we looked at the data by quintiles based on firearms per capita. The results are in Table 2.

When sorted by quintiles, the top firearms quintile averaged "mostly free" on the Index of Economic Freedom, while the lower quintiles averaged "moderately free." The first and second quintiles rate notably better in the Corruption Perceptions Index than do the first and second quartiles. There is a large gap between the first and second quintiles, although not quite [as] large as between the first and second quartiles. The top quintile's success in Freedom in the World is even more pronounced than the top quartile's success.

As with the quartile analysis, the lower quintiles do not rank on the other indices in accordance with their firearms per capita. The second quintile's average ratings on the Corruption Perceptions Index and the Index of Economic Freedom are better than all lower quintiles, but the lowest quintile's average Freedom in the World rating is better than that of quintiles 2-4.

When we looked at the countries with the most guns, we saw that they had the most freedom as measured by the liberty indices, but the relationship was only pronounced for high-gun countries. There was no difference between medium-gun and low-gun countries. Suppose we look at the relationship the other way and ask, "Do countries with the most freedom have the most guns?" Table 3 provides the results.

When sorted by the Freedom in the World rating, the freest countries (scores of 1 for both political rights and civil liberties) had the highest density of civilian firearms, and . . . the best Corruption Perceptions Index and Index of Economic Freedom of any group. Countries rated "free" but having imperfect scores (above 1 on either political or civil freedom) had a lower firearms ownership rate than any other group. They also had a worse Corruption Perceptions Index and a lower Index of Economic Freedom than the freest countries. "Partly free" countries had much lower ratings in all indices than all "free" countries. "Not free" countries had the poorest scores.

We also looked at differences within the freest countries. Of the 59 countries, 26 scored a Freedom in the World 1 on political freedom and in civil liberty. These countries included some countries with very low levels of firearms ownership (e.g., Poland, Hungary, Estonia) as well as countries with much higher levels (e.g., Norway, Uruguay). Since there were only 26 countries in this data subset, we sorted these freest countries into thirds, by per-capita firearms ownership. The results are in Table 4.

Table 4 Firearms Ownership Versus Indices Among the Freest Countries in the World

Third	Firearms Per 1,000 Population	Corruption Perceptions Index	PPP (lower is better)	Index of Economic Freedom
1	463	7.84	23.38	72.39
2	197	8.16	26.44	75.40
3	42	6.23	48.56	71.31
Average 2-3	119	7.19	37.50	73.36

In the Index of Economic Freedom, the thirds have very close scores. For PPP (economic success) the bottom third of gun ownership is significantly less wealthy. In corruption, the top two thirds are separated by only a third of a point, but they are both notably better than the bottom third. The data suggest that among the freest countries, higher levels of corruption and lower levels of wealth may have a significant inhibiting effect on gun ownership.

The results are similar if we divide the 26 freest nations into quartiles, and rank them by firearms ownership. The lowest ownership group has the worst scores on everything. The best scores for non-corruption are in the second highest quartile. In other respects, the top three quartiles are similar, except that the third quartile is weaker on PPP.

Table 5 Firearms Ownership Versus Indices Among the Freest Countries in the World, by Quartiles

Quartile	Firearms per 1,000 Population	Corruption Perceptions Index	PPP	Index of Economic Freedom
1	484	7.64	24.14	72.36
2	255	8.9	20.83	75.88
3	120	7.52	37.50	75.97
4	31	5.74	49.00	68.84

Finally, we tested the data for statistical significance. We found three statistically significant[17] relationships:

- more guns, less corruption;
- more guns, more economic freedom; and
- more guns, more economic success.

These statistically significant associations do not indicate the cause-and-effect relationships—such as whether guns are a cause or a consequence of prosperity, or whether the relationship runs both ways. That topic is discussed in the next Part of this Article. . . .

IV. CAUSE AND EFFECT

In Part IV, we sketch out some causal mechanisms and suggest some ways in which guns and freedom can have positive or negative relationships. We define "freedom" broadly to include each of the following measures: political and civil freedom (Freedom in the World), freedom from corrupt government (Corruption Perceptions Index), economic freedom (Index of Economic Freedom), and economic success (PPP). We argue that high levels of prosperity can provide a person with the means to exercise lifestyle and other personal choices. The various causal

17. [This term is here used in the technical sense, as described in Section B.2.—Eds.]

mechanisms are by no means mutually exclusive. Some of them may reinforce each other. Although only some of the relationships between guns and freedom are statistically significant, we discuss all possible relationships, both positive and negative. Even though a particular relationship might not be statistically significant in general, the relationship might be important in a particular country.

A. Freedom Causes Guns

One set of relationships to examine is whether increased levels of freedom tend to lead to increased levels of gun ownership. For example, greater economic freedom and economic success lead to greater prosperity, which in turn gives people more money to buy all sorts of consumer goods, including firearms. This explanation is supported by evidence from the last half-century in the United States. Although business regulation has grown over the last half-century, economic freedom has also increased in the United States. Federal tax rates are far lower: the top rate was 92% in 1952, and 35% in 2007. Free trade agreements have greatly reduced international trade barriers. The abolition of Jim Crow laws has allowed much greater participation by Black people in the economy. Thus, it is not surprising that per capita gun ownership in the U.S. has risen by 158% over the last half-century. America formerly had about one gun for every three people. Now, there is nearly one gun for every American.

Non-corruption could also increase gun ownership. If two nations have very similar statutory gun laws, but the first nation is much less corrupt than the second, then citizens in the first nation will have an easier time getting permits or licenses, completing purchases that need government approval, and so on. As noted above, there is a statistically significant relationship between higher per capita gun ownership and freedom from corruption, economic freedom, and economic success. Even within the countries with perfect scores for political and civil freedom, the third with the lowest gun ownership rates had a notably worse Corruption Perceptions Index than the other two.

Germany has a very extensive set of gun regulations (as it does for many other activities). Yet despite high regulation, Germany is eleventh out of the fifty-nine nations in per-capita ownership rates. The explanation may be that Germany is non-corrupt and prosperous: the German gun licensing system is generally administered according to objective criteria, and there is no expectation that a prospective gun owner might have to bribe a police officer to get a license. Further, Germany's PPP is better than 41 of the 48 countries it outranks in per capita ownership. As shown in Table 4, even within the countries with excellent economic and political-civil freedom, the lowest third for firearms per capita were much lower in PPP than the other two thirds.

Another possibility is that political liberty and/or civil liberty help cause gun ownership. Political systems that are more open may allow people who own guns, who want to own guns, or who want other people to have the choice, to participate more effectively in the political system, and to have their concerns addressed. In Canada, for example, firearms rights advocates played an important role in the 2006 election of Stephen Harper's Conservative party. The Harper government created an amnesty period for people who disobeyed the previous Liberal government's gun registration deadline, waived fees for certain gun licenses, and also

deferred a regulation that would have raised the price of all new guns imported into or manufactured in Canada by about 200 Canadian Dollars. [Later, the Harper government abolished long gun registration, as detailed *infra* Section C.3.]

Civil liberty, such as freedom of religion and speech, could also be a factor in higher gun ownership. Civil liberty can foster a culture of individual self-actualization, in which a person feels that he can control the course of his life by choosing his religion (or choosing not to be religious), freely saying what he thinks and reading whatever he wants. Such a culture may also encourage people to exercise personal responsibility in other ways, such as by choosing to own a tool to protect themselves and their families rather than entirely relying on the state, or by providing some food for the family by hunting rather than having to buy all of one's food from supermarkets.

B. Guns Cause Freedom

One way that guns cause freedom is by facilitating revolutions or wars of independence that replace one regime, often a colonial one, with a freer government. Examples of successful revolutions or wars of independence in which privately-owned arms played an important role are the American revolution against Britain, the Greek revolution against the Ottoman Empire, the Israeli revolution against Britain, the Irish revolution against Britain, and the Swiss revolution against the Austrian Empire. Long after the new nation has secured its freedom, high levels of gun ownership may persist or grow even higher, partly as a result of the collective positive memory of the freedom enhancing benefits of arms.

Guns in citizen hands may also help protect an already free nation by contributing to the defeat of a foreign invader, or by helping to deter a foreign invasion. An example of the former is the American victory at the Battle of New Orleans (Ch. 6.A.6) in 1815. An example of the latter is Swiss deterrence of Nazi invasion during World War II (Section C.2).

Firearms can also promote freedom in more localized ways. During the 1950s and 1960s, American civil rights workers were able to protect themselves from the Ku Klux Klan because so many civil rights workers had guns. The father of U.S. Secretary of State Condoleezza Rice carried a shotgun as part of a neighborhood civil rights safety patrol, which is why Secretary Rice opposes the government having a registration list of guns and their owners, Condolezza Rice, Extraordinary Ordinary People: A Memoir of Family 93 (2012). Similarly, former First Lady Eleanor Roosevelt carried a handgun for protection against Klansmen during her civil rights travels in the South in the 1950s.

More broadly, the exercise of one right may, for some persons, foster more positive attitudes about rights in general. This is one reason why American gun organizations such as the National Rifle Association and Gun Owners of America are strong supporters of First Amendment free speech rights, Fourth Amendment freedom from unreasonable or warrantless search, Fifth Amendment due process and property rights. . . .

C. Freedom Reduces Guns

Under certain conditions, increased freedom can lead to decreases in gun ownership. Under U.N. auspices, governments in nations such as Mali have

attempted to entice formerly oppressed tribal groups to surrender their guns. The promise is that the government will treat the tribal groups better, be less corrupt, be more respectful of due process, and so on, once the guns are surrendered.

For several years, the Mali disarmament program was successful. More recently, the government has not been keeping its promises, and the Tuareg tribes in northern Mali have been re-arming.[18] Even so, Mali shows that there can be circumstances in which greater freedom leads to fewer guns. In other nations, such as the Netherlands, a long history of democracy, respect for the rule of law, and clean government may result in people believing that they have no need for guns as a safeguard against tyranny.

D. GUNS REDUCE FREEDOM

There are many modern nations where it is easy to see how the widespread presence of guns in the wrong hands reduces freedom. Guns in the hands of warlords in the Ivory Coast, the Democratic Republic of Congo, and in Sudan/Uganda (the Lord's Resistance Army) wreak havoc on civilian populations, making it nearly impossible for civil society and its attendant freedoms to exist.[19] Guns in the hands of terrorists and extremists in places such as Lebanon, Gaza, the West Bank, and other places in the Middle East or South Asia are used to assassinate moderates for exercising their right of free speech, to murder women for not submitting to rigid gender restrictions, and to kill people for exercising their freedom to choose their own religion.

E. GUN CULTURES AND FREEDOM

One thing we know from the data is that the relationship between guns and freedom is often indirect. For example, Norway has high levels of guns and of religious freedom, but that is not because gun owners constantly protect churches from government attacks.

Accordingly, it may be helpful to consider the effect of gun culture, rather than direct uses of guns, as a partial explanation for this Article's findings. We should first explain what we mean by gun culture. To a firearms prohibition advocate in Great Britain, gun culture is an epithet, and it conjures images of dangerous gangs in downtrodden cities such as Manchester, dubbed "Gunchester" by some police, carrying illegal handguns for criminal purposes.

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18. [For more on Mali, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Microdisarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969 (2005) (examining UN-sponsored programs to disarm people in Cambodia, Bougainville, Albania, Panama, Guatemala, and Mali).—Eds.]

19. [For more on Uganda, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 Quinnipiac L. Rev. 383 (2008) (examining gun confiscation programs in Kenya and Uganda, and South Africa's quasi-confiscatory licensing law).—Eds.]

It is easy to see how a destructive gun culture, such as that of the British gangs, can harm a country's freedom ratings. For example, higher crime rates will reduce a nation's prosperity, and may lead to repressive government actions that reduce civil freedom. Great Britain, for example, has drastically weakened its centuries-old rule against double jeopardy, eliminated jury trials in many civil cases, and given the police the power to issue on-the-spot fines without due process.[20]

"Gun culture" in America, however, has a benign connotation. People who use the term tend to be thinking about images such as father taking his son on a hunting trip, or of young people practicing target shooting with .22 smallbore rifles, under the supervision of expert marksmen at a gun club. Rather tellingly, in America, even elected officials who are the strongest proponents of much stricter anti-gun laws almost never criticize "the gun culture," but instead insist on their devotion to the Second Amendment. It seems reasonable to assume that countries that have relatively more guns per capita (e.g., the United States, France, Switzerland) will have a much stronger gun culture of the benign type, than will countries such as the Netherlands, Japan, or Bolivia, where lawful gun ownership is rare. A full explanation for why citizens in some nations are more rights-conscious than in other nations is beyond the scope of this Article. However, we suggest that one important factor in rights-consciousness may be the presence of a thriving benign gun culture.

Almost every legitimate purpose for which a person might own a gun can strengthen the person's feelings of competence and self-control. The hunter thinks, "I am a capable outdoorsman. I can put food on my family's table, and don't have to rely entirely on the supermarket." The defensive gun owner thinks, "I am ready to protect my family, because I know that the police may not come in time." The target shooter thinks, "I am skilled at a precise, challenging sport." Many gun owners may think, "If, God forbid, my country ever succumbed to tyranny, I could help my community resist." Almost all gun owners have made the decision, "Even though some people claim that guns are too dangerous, I am capable of handling a powerful tool safely."

For the countries in the top quintile for gun ownership (at least one gun per three persons), it is reasonable to assume that . . . many people in those countries have personal experience with a benign, individual-affirming gun culture. Participation in a benign gun culture is hardly the only way in which a person can have personal experiences that affirm and strengthen the individual's beliefs in his or her own competence. But when a country has a benign, thriving gun culture, it is certain that there are [a] great many persons who do have such experiences, and who do so in a context (successful, safe handling of potentially deadly tools) that is especially likely to induce and strengthen feelings of personal competence. The effect of a gun culture in promoting greater levels of individual competence and personal responsibility may be one reason

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20. [*See* David B. Kopel, Gun Control in Great Britain: Saving Lives or Constricting Liberty? (1992).—Eds.]

for the statistically significant association between higher rates of gun ownership and higher rates of freedom from corruption, of economic freedom, and of economic success.

CONCLUSION

There are many causal mechanisms by which guns and freedom can advance or inhibit each other. The mechanisms that are most influential at a given point in time can vary widely from nation to nation. Historically and today, we can find ways in which freedom has increased guns, guns have increased freedom, freedom has reduced guns, and guns have reduced freedom. International firearms scholars, except those based in North America, have tended to focus their research only on the latter two relationships, while ignoring the first two. Some of the more enthusiastic proponents of gun prohibition have asserted that the relationship between freedom and guns is always negative.

The data in this Article reveal a more complex picture. As [a] general (but not invariable rule), countries with more guns have more economic freedom, less corruption, and more economic success. The broad international data, for any of the measures of freedom, do not support theories that more guns [mean] less freedom. The data provide reason for caution about embracing a global agenda of reducing civilian gun ownership. There may be particular countries where reductions might enhance freedom, but the data raise serious doubts about whether the gun-reducing agenda makes sense as a categorical imperative, at least if freedom ranks highly in one's hierarchy of values.

When we acknowledge that guns can have a positive and a negative relationship with freedom, then we can begin to look for more sophisticated, carefully tailored approaches to gun policy, that attempt to address the negative effects, and that are careful not to reduce the apparently significant positive effects. Such an approach offers a better possibility of enhancing freedom than does a simplistic program that only considers negative effects.

APPENDIX

In the following tables, the column headings and ratings have the following meanings:

PR—Political Rights (lower is better)
CL—Civil Liberties (lower is better)
AVE—Average of PR and CL (lower is better)
CI—Corruption Index (higher is better)
PPP—Purchasing Power Parity (lower is better)
EI—Economic Freedom (higher is better)
F—Free (political or economic)
PF—Partly Free (political)
NF—Not Free (political)
MF, ModF—Moderately Free (economic)
MU, ModU—Moderately Unfree (economic)
R—Repressed (economic)—Eds.

Table 6 All UN Member-States, Ratings in All Available Categories

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Afghanistan	5	5	5	PF					
Albania	3	3	3	PF	2.6	127	61.4	ModF	0.160
Algeria	6	5	6	NF		112	52.2	MU	
Andorra	1	1	1	F					
Angola	6	5	6	NF	2.2	166	43.5	R	0.205
Antigua and Barbuda	2	2	2	F		72			
Argentina	2	2	2	F	2.9	64	57.5	MU	0.127
Armenia	5	4	5	PF	2.9	126	69.4	ModF	
Australia	1	1	1	F	8.7	24	82.7	F	0.155
Austria	1	1	1	F	8.6	15	71.3	MF	0.170
Azerbaijan	6	5	6	NF	2.4	124	55.4	MU	
Bahamas	1	1	1	F			71.4	MF	
Bahrain	5	5	5	PF	5.7	50	68.4	ModF	
Bangladesh	4	4	4	PF	2.0	167	47.8	R	
Barbados	1	1	1	F	6.7		70.5	MF	
Belarus	7	6	7	NF	2.1	90	47.4	R	
Belgium	1	1	1	F	7.3	20	74.5	MF	0.160
Belize	1	2	2	F	3.5	113	63.7	ModF	
Benin	2	2	2	F	2.5	191	54.8	MU	
Bhutan	6	5	6	NF	6.0				
Bolivia	3	3	3	PF	2.7	153	55.0	MU	0.022
Bosnia-Herzegovina	3	3	3	PF	2.9		54.7	MU	
Botswana	2	2	2	F	5.6	75	68.4	ModF	
Brazil	2	2	2	F	3.3	91	60.9	ModF	0.088
Brunei Darussalam	6	5	6	NF					
Bulgaria	1	2	2	F	4.0	85	62.2	ModF	
Burkina Faso	5	3	4	PF	3.2	184	55.0	MU	
Burundi	5	5	5	PF	2.4	209	46.8	R	
Cambodia	6	5	6	NF	2.1	152	56.5	MU	
Cameroon	6	6	6	NF	2.3	165	54.4	MU	
Canada	1	1	1	F	8.5	19	78.7	MF	0.315
Cape Verde	1	1	1	F		122	58.4	MU	

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Central Afr. Rep.	5	4	5	PF	2.4	186	50.3	MU	
Chad	6	5	6	NF	2.0	188	46.4	R	
Chile	1	1	1	F	7.3	81	78.3	MF	0.108
China	7	6	7	NF	3.3	102	54.0	MU	0.031
Colombia	3	3	3	PF	3.9	105	60.5	ModF	0.073
Comoros	3	4	4	PF		173			
Congo (D.R.)	5	6	6	NF	2.0	207			
Congo (Rep.)	6	5	6	NF	2.2	197	43.0	R	
Costa Rica	1	1	1	F	4.1	83	65.1	ModF	
Cote d'Ivorie	6	6	6	NF	2.1	179	55.5	MU	
Croatia	2	2	2	F	3.4	70	55.3	MU	0.115
Cuba	7	7	7	NF	3.5		29.7	R	
Cyprus	1	1	1	F	5.6	45	73.1	MF	
Czech Republic	1	1	1	F	4.8	48	69.7	ModF	0.050
Denmark	1	1	1	F	9.5	9	77.6	MF	0.180
Djibouti	5	5	5	PF		160	52.6	MU	
Dominica	1	1	1	F	4.5	114			
Dominican Republic	2	2	2	F	2.8	95	56.7	MU	
Ecuador	3	3	3	PF	2.3	138	55.3	MU	0.027
Egypt	7	6	7	NF	3.3	136	53.2	MU	
El Salvador	2	3	3	F	4.0	129	70.3	MF	
Equatorial Guinea	7	6	7	NF	2.1	84	53.2	MU	
Eritrea	7	6	7	NF	2.9	194			
Estonia	1	1	1	F	6.7	57	78.1	MF	0.030
Ethiopia	5	5	5	PF	2.4	190	54.4	MU	
Fiji	6	4	5	PF		119	59.8	MU	
Finland	1	1	1	F	9.6	17	76.5	MF	0.550
France	1	1	1	F	7.4	23	66.1	ModF	0.320
Gabon	6	4	5	PF	3.0	130	53.0	MU	
Gambia (The)	4	4	4	PF	2.5	176	57.6	MU	
Georgia	3	3	3	PF	2.8	147	68.7	ModF	
Germany	1	1	1	F	8.0	28	73.5	MF	0.300

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Ghana	1	2	2	F	3.3	157	58.1	MU	
Greece	1	2	2	F	4.4	42	57.6	MU	0.110
Grenada	1	2	2	F	3.5	99			
Guatemala	3	4	4	PF	2.6	135	61.2	ModF	
Guinea	6	5	6	NF	1.9	163	55.1	MU	
Guinea-Bissau	4	4	4	PF		203	45.7	R	
Guyana	2	3	3	F	2.5	136	58.2	MU	
Haiti	4	5	5	PF	1.8	180	52.2	MU	
Honduras	3	3	3	PF	2.5	148	60.3	ModF	
Hungary	1	1	1	F	5.2	56	66.2	ModF	0.020
Iceland	1	1	1	F	9.6	10	77.1	MF	
India	2	3	3	F	3.3	145	55.6	MU	0.043
Indonesia	2	3	3	F	2.4	143	55.1	MU	
Iran	6	6	6	NF	2.7	94	43.1	R	0.053
Iraq	6	6	6	NF	1.9				0.390
Ireland	1	1	1	F	7.4	14	81.3	F	
Israel	1	2	2	F	5.9	37	68.4	ModF	0.081
Italy	1	1	1	F	4.9	31	63.4	ModF	0.432
Jamaica	2	3	3	F	3.7	141	66.1	ModF	
Japan	1	2	2	F	7.6	21	73.6	MF	0.003
Jordan	5	4	5	PF	5.3	120	64.0	ModF	0.087
Kazakhstan	6	5	6	NF	2.6	101	60.4	ModF	
Kenya	3	3	3	PF	2.2	185	59.4	MU	
Kiribati	1	1	1	F		89			
Korea (North)	7	7	7	NF			3.0	R	
Korea (South)	1	2	2	F	5.1	44	68.6	ModF	
Kuwait	4	5	5	PF	4.8	30	63.7	ModF	
Kyrgyzstan	5	4	5	PF	2.2	175	59.9	MU	
Lao P. D.R.	7	6	7	NF	2.6	172	49.1	R	
Latvia	1	1	1	F	4.7	65	68.2	ModF	
Lebanon	4	4	4	PF	3.6	128	60.3	ModF	0.139
Lesotho	2	3	3	F	3.2	139	54.1	MU	
Liberia	3	4	4	PF					
Libya	7	7	7	NF	2.7		34.5	R	
Liechtenstein	1	1	1	F		3			
Lithuania	1	1	1	F	4.8	67	72.0	MF	

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Luxembourg	1	1	1	F	8.6	1	79.3	MF	
Macedonia	3	3	3	PF	2.7	106	60.8	ModF	0.160
Madagascar	3	3	3	PF	3.1	198	61.4	ModF	
Malawi	4	3	4	PF	2.7	207	55.5	MU	
Malaysia	4	4	4	PF	5.0	80	65.8	ModF	
Maldives	6	5	6	NF					
Mali	2	2	2	F	2.8	193	53.7	MU	
Malta	1	1	1	F	6.4	54	67.8	ModF	0.130
Marshall Islands	1	1	1	F					
Mauritania	5	4	5	PF	3.1	158	53.2	MU	
Mauritius	1	2	2	F	5.1	71	69.0	ModF	
Mexico	2	2	2	F	3.3	79	65.8	ModF	0.150
Micronesia	1	1	1	F		98			
Moldova	3	4	4	PF	3.2	154	59.5	MU	0.010
Monaco	2	1	2	F					
Mongolia	2	2	2	F	2.8	168	60.1	ModF	
Montenegro	3	3	3	PF					
Morocco	5	4	5	PF	3.2	132	57.4	MU	0.050
Mozambique	3	4	4	PF	2.8	189	56.6	MU	
Myanmar (Burma)	7	7	7	NF	1.9		40.1	R	
Namibia	2	2	2	F	4.1	97	63.8	ModF	
Nauru	1	1	1	F					
Nepal	5	4	5	PF	2.5	178	54.0	MU	
Netherlands	1	1	1	F	8.7	12	77.1	MF	0.020
New Zealand	1	1	1	F	9.6	36	81.6	F	0.250
Nicaragua	3	3	3	PF	2.6	142	62.7	ModF	
Niger	3	3	3	PF	2.3	203	53.5	MU	
Nigeria	4	4	4	PF	2.2	195	52.6	MU	
Norway	1	1	1	F	8.8	5	70.1	MF	0.360
Oman	6	5	6	NF	5.4	63	63.9	ModF	
Pakistan	6	5	6	NF	2.2	161	58.2	MU	0.120
Palau	1	1	1	F				R	
Panama	1	2	2	F	3.1	103	65.9	ModF	
Papua New Guinea	3	3	3	PF	2.4	164			

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Paraguay	3	3	3	PF	2.6	132	56.8	MU	0.144
Peru	2	3	3	F	3.3	121	62.1	ModF	0.028
Philippines	3	3	3	PF	2.5	122	57.4	MU	0.048
Poland	1	1	1	F	3.7	68	58.8	MU	0.015
Portugal	1	1	1	F	6.6	49	66.7	ModF	
Qatar	6	5	6	NF	6.0	16	60.7	ModF	
Romania	2	2	2	F	3.1	86	61.3	ModF	0.003
Russian Federation	6	5	6	NF	2.5	78	54.0	MU	0.090
Rwanda	6	5	6	NF	2.5	187	52.1	MU	
Saint Kitts and Nevis	1	1	1	F		74			
Saint Lucia	1	1	1	F		111			
Saint Vincent & Grenadines	2	1	2	F		110			
Samoa	2	2	2	F		116			
San Marino	1	1	1	F		11			
Sao Tome & Principe	2	2	2	F					
Saudi Arabia	7	6	7	NF	3.3	58	59.1	MU	0.263
Senegal	2	3	3	F	3.3	177	58.8	MU	
Serbia	3	2	3	F	3.0				0.375
Seychelles	3	3	3	PF	3.6	60			
Sierra Leone	4	3	4	PF	2.2	200	48.4	R	
Singapore	5	4	5	PF	9.4	26	85.7	F	
Slovakia	1	1	1	F	4.7	59	68.4	ModF	0.030
Slovenia	1	1	1	F	6.4	43	63.6	ModF	0.050
Solomon Islands	4	3	4	PF		170			
Somalia	7	7	7	NF					
South Africa	2	2	2	F	4.6	77	64.1	ModF	0.132
Spain	1	1	1	F	6.8	33	70.9	MF	0.110
Sri Lanka	4	4	4	PF	3.1	134	59.3	MU	
Sudan	7	6	7	NF	2.0	171			
Suriname	2	2	2	F	3.0	96	52.6	MU	
Swaziland	7	5	6	NF	2.5	131	61.6	ModF	

Country	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Sweden	1	1	1	F	9.2	18	72.6	MF	0.315
Switzerland	1	1	1	F	9.1	7	79.1	MF	0.460
Syria	7	7	7	NF	2.9	144	48.2	R	
Tajikistan	6	5	6	NF	2.2	183	56.9	MU	
Tanzania	4	3	4	PF	2.9	205	56.4	MU	
Thailand	7	4	6	NF	3.6	87	65.6	ModF	0.161
Timor-Leste (East Timor)	3	4	4	PF	2.6				
Togo	6	5	6	NF	2.4	181	49.8	R	
Tonga	5	2	4	PF		92			
Trinidad and Tobago	2	2	2	F	3.2	62	71.4	MF	
Tunisia	6	5	6	NF	4.6	93	61.0	ModF	
Turkey	3	3	3	PF	3.8	88	59.3	MU	0.130
Turkmenistan	7	7	7	NF	2.2		42.5	R	
Tuvalu	1	1	1	F					
Uganda	5	4	5	PF	2.7	181	63.4	ModF	
Ukraine	3	2	3	F	2.8	107	53.3	MU	0.090
United Arab Emirates	6	5	6	NF	6.2	35	60.4	ModF	
United Kingdom	1	1	1	F	8.6	13	81.6	F	0.056
United States	1	1	1	F	7.3	4	82.0	F	0.900
Uruguay	1	1	1	F	6.4	82	69.3	ModF	0.368
Uzbekistan	7	7	7	NF	2.1	169	52.6	MU	
Vanuatu	2	2	2	F		151			
Venezuela	4	4	4	PF	2.3	108	47.7	R	0.140
Vietnam	7	5	6	NF	2.6	150	50.0	MU	
Yemen	5	5	5	PF	2.6	199	53.8	MU	0.610
Zambia	4	4	4	PF	2.6	196	57.9	MU	
Zimbabwe	7	6	7	NF	2.4	173	35.8	R	

Table 7 All Ratings for Countries for Which There Are Per Capita Firearms Data

Ranking by Firearms per Capita	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Romania	2	2	2	F	3.1	86	61.3	ModF	0.003
Japan	1	2	1.5	F	7.6	21	73.6	MF	0.003
Moldova	3	4	3.5	PF	3.2	154	59.5	MU	0.010
Poland	1	1	1	F	3.7	68	58.8	MU	0.015
Hungary	1	1	1	F	5.2	56	66.2	ModF	0.020
Netherlands	1	1	1	F	8.7	12	77.1	MF	0.020
Bolivia	3	3	3	PF	2.7	153	55.0	MU	0.022
Ecuador	3	3	3	PF	2.3	138	55.3	MU	0.027
Peru	2	3	2.5	F	3.3	121	62.1	ModF	0.028
Estonia	1	1	1	F	6.7	57	78.1	MF	0.030
Slovakia	1	1	1	F	4.7	59	68.4	ModF	0.030
China	7	6	6.5	NF	3.3	102	54.0	MU	0.031
India	2	3	2.5	F	3.3	145	55.6	MU	0.043
Philippines	3	3	3	PF	2.5	122	57.4	MU	0.048
Czech Republic	1	1	1	F	4.8	48	69.7	ModF	0.050
Morocco	5	4	4.5	PF	3.2	132	57.4	MU	0.050
Slovenia	1	1	1	F	6.4	43	63.6	ModF	0.050
Iran	6	6	6	NF	2.7	94	43.1	R	0.053
United Kingdom	1	1	1	F	8.6	13	81.6	F	0.056
Colombia	3	3	3	PF	3.9	105	60.5	ModF	0.073
Israel	1	2	1.5	F	5.9	37	68.4	ModF	0.081
Jordan	5	4	4.5	PF	5.3	120	64.0	ModF	0.087
Brazil	2	2	2	F	3.3	91	60.9	ModF	0.088
Russian Fed.	6	5	5.5	NF	2.5	78	54.0	MU	0.090
Ukraine	3	2	2.5	F	2.8	107	53.3	MU	0.090
Chile	1	1	1	F	7.3	81	78.3	MF	0.108
Greece	1	2	1.5	F	4.4	42	57.6	MU	0.110
Spain	1	1	1	F	6.8	33	70.9	MF	0.110
Croatia	2	2	2	F	3.4	70	55.3	MU	0.115
Pakistan	6	5	5.5	NF	2.2	161	58.2	MU	0.120
Argentina	2	2	2	F	2.9	64	57.5	MU	0.127
Malta	1	1	1	F	6.4	54	67.8	ModF	0.130
Turkey	3	3	3	PF	3.8	88	59.3	MU	0.130
South Africa	2	2	2	F	4.6	77	64.1	ModF	0.132

Ranking by Firearms per Capita	PR	CL	AVE	Political Rating	CI	PPP	EI	Economic Rating	Firearms per Capita
Lebanon	4	4	4	PF	3.6	128	60.3	ModF	0.139
Venezuela	4	4	4	PF	2.3	108	47.7	R	0.140
Paraguay	3	3	3	PF	2.6	132	56.8	MU	0.144
Mexico	2	3	2.5	F	3.3	79	65.8	ModF	0.150
Australia	1	1	1	F	8.7	24	82.7	F	0.155
Albania	3	3	3	PF	2.6	127	61.4	ModF	0.160
Belgium	1	1	1	F	7.3	20	74.5	MF	0.160
Macedonia	3	3	3	PF	2.7	106	60.8	ModF	0.160
Thailand	7	4	5.5	NF	3.6	87	65.6	ModF	0.161
Austria	1	1	1	F	8.6	15	71.3	MF	0.170
Denmark	1	1	1	F	9.5	9	77.6	MF	0.180
Angola	6	5	5.5	NF	2.2	166	43.5	R	0.205
New Zealand	1	1	1	F	9.6	36	81.6	F	0.250
Saudi Arabia	7	6	6.5	NF	3.3	58	59.1	MU	0.263
Germany	1	1	1	F	8.0	28	73.5	MF	0.300
Canada	1	1	1	F	8.5	19	78.7	MF	0.315
Sweden	1	1	1	F	9.2	18	72.6	MF	0.315
France	1	1	1	F	7.4	23	66.1	ModF	0.320
Norway	1	1	1	F	8.8	5	70.1	MF	0.360
Uruguay	1	1	1	F	6.4	82	69.3	ModF	0.368
Italy	1	1	1	F	4.9	31	63.4	ModF	0.432
Switzerland	1	1	1	F	9.1	7	79.1	MF	0.460
Finland	1	1	1	F	9.6	17	76.5	MF	0.550
Yemen	5	5	5	PF	2.6	199	53.8	MU	0.610
United States	1	1	1	F	7.3	4	82.0	F	0.900

[Firearms per capita were taken based on the following annual editions of the Small Arms Survey:

2007 Table 2.3, page 47 & Table 2.9, page 59: China, India, Philippines, Morocco, Iran, U.K., Colombia, Brazil, Russian Federation, Ukraine, Spain, Pakistan, Argentina, Turkey, South Africa, Australia, Thailand, Angola, Saudi Arabia, Germany, Canada, Sweden, France, Italy, Switzerland, Finland, Yemen, United States

2005 Table 3.3, page 78: Japan

2005 Table 3.9, page 91: Israel, Jordan, Lebanon

2004 Table 2.3, page 51: Bolivia, Ecuador, Peru, Chile, Venezuela, Paraguay, Mexico, Uruguay

2004 Table 2.3, page 45: New Zealand

2003 Tables 2.2 & 2.3, pp. 64-65: Romania, Moldova, Poland, Hungary, Netherlands, Estonia, Slovakia, Czech Republic, Slovenia, Croatia, Malta, Albania, Belgium, Macedonia, Austria, Denmark, Norway.]

Table 8 Relationship Between Firearms, Corruption, Purchasing Power, and Economic Freedom

Dependent Variable	Firearms Coefficient	*T*-Ratio
Corruption	4.362**	2.42
PPP	81.662**	2.18
Economic Freedom	18.421**	2.63
Dropping the US:		
Corruption	4.950**	2.26
PPP	74.986	1.62
Economic Freedom	15.903*	1.76

Notes: The number of observations is 59. PPP is rescaled so that higher purchasing power is reflected by higher values of PPP. ** indicates significant at the .05 level, two-tailed. * indicates significant at the .10 level, two-tailed.[21]

NOTES & QUESTIONS

1. *Correlation or causation.* Kopel et al. identify significant correlations between gun ownership and economic freedom, purchasing power, and lower levels of government corruption. They also propose causal arguments that might explain the correlations; that is, ways in which gun ownership might directly or indirectly generate the three social goods with which they find it correlated. Another possibility is that gun ownership is *correlated* with these social goods but does not *cause* them; rather, the same things that tend to create economic freedom, clean government, etc., also tend to facilitate higher rates of gun ownership. Which kind of explanation do you think is more likely? Are you persuaded by Kopel et al.'s causal hypotheses? If so, which ones? In the end, what causes the different levels of freedom enjoyed by different nations?

2. Cross-cultural comparisons like Kopel et al.'s are illuminating, but on close examination also raise new questions. Comparing overall rates of gun ownership

21. [A two-tailed test looks at statistical significance in both directions. Were changes in one variable (e.g., guns per capita) correlated with positive or negative changes in another variable (e.g., the homicide rate)? So the two-tailed test would examine whether more guns led to a statistically significant increase *or* a statistically significant decrease in the homicide rate. A one-tailed test looks for an effect in only one direction. For example, a one-tailed test might examine whether more guns were correlated with a statistically significant increase in the homicide rate, but would not consider whether more guns were correlated with less homicide.—Eds.]

between high- and low-freedom countries relies on a monolithic view of gun ownership in each country. On the other hand, we know from Chapter 1.B that, in the United States, rates of gun ownership vary substantially by region. Reported rates of gun ownership are notably higher in the South and the West than in the Northeast. If the rate of gun ownership in other countries also varies by region, should that be incorporated into the cross-cultural comparisons? How?

3. Carrying forward Kopel et al.'s assessment, would you say that the regions of the United States with lower rates of gun ownership rank lower on the freedom scale? Do large population centers naturally require a different balance between liberty and order? If so, is it accurate to say that New York City (with a high population density and low gun density) has fewer guns because it is less free than, say, Cody, Wyoming?

5. The Remainder Problem

Kates and Mauser argue that social factors, not gun laws, drive violent crime and gun crime. Altheimer and Boswell argue that the effects of increased guns vary by society: more guns lead to less homicide in Eastern Europe, but to more homicide in Latin America. In the excerpt below, Professor Johnson considers a separate question. Even if one concludes that private gun ownership invariably leads to social harm, could government ever effectively impose a program of legal prohibitions on gun ownership in a society like the United States? Assume, arguendo, that the United States would be much better off with very low rates of gun ownership in the range of countries like the Netherlands, or even the moderate (but still high by global standards) rates of France, Germany, or Italy. Johnson suggests that conditions in the United States render the more stringent gun control policies of other countries nontransferable to the United States.

Nicholas J. Johnson

Imagining Gun Control in America: Understanding the Remainder Problem

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I. THE SUPPLY-SIDE IDEAL

The conclusion that some horrible gun crime would not have happened if we had prevented the scoundrel from getting a firearm is straightforward and quite natural. This calculation is the foundation for views that advance supply-side gun regulation as a recipe for crime control. It conforms to simple tests of logic. Consider two scenarios. In the first, we are sitting in a room with a gun in the middle. In the second, our room is gun free and sealed—the supply-side ideal. The risk of gun violence is obviously higher in the first scenario. Indeed, absent creative cheating, it is zero in the second. Projecting this dynamic to society generally allows the claim that laws limiting the supply of guns in private hands will dramatically reduce gun crime. . . .

The supply-side ideal remains the philosophical foundation of the modern quest for restrictions on access to firearms sufficient to thwart gun crime. But there is a problem. In our political skirmishes over new, more aggressive supply regulation, the supply-side ideal has receded into the background. We have not talked candidly about what is necessary for the supply-side formula to work. We have not confronted the reality that the existing inventory of guns is vast.

As a consequence, supply-side controls, often implemented prospectively, without explicit commitment to disarming ordinary Americans, have affected only a tiny fraction of the inventory. It is as if we are in the sealed room, but now everybody has a gun or two tucked away, there are piles of them in the corners, and we are debating reducing gun violence with laws that allow only one more gun a month or no more guns with high capacity magazines. Our results have been disappointing because supply-side rules depend, ultimately, on cutting the inventory close to zero. And that, in America, is a problem.

II. CHALLENGES TO THE SUPPLY-SIDE IDEAL

Erring on the high side, there are around 13,000 gun homicides in the United States each year. Suicides with a firearm add another 17,000 deaths. If there were only 30,000 private guns in America, and we knew where they were, it would be easy to imagine mustering the political will to confiscate those guns and ban new ones. If our borders were reasonably secure against illegal imports and contraband guns could not be manufactured domestically, we would expect dramatic reductions in gun crimes, accidents, and suicides.

But our problem is different. The guns used in our roughly 30,000 annual gun deaths are drawn from an inventory approaching 300 million. This is far more guns than the countries in any of the cross-cultural comparisons — far more private guns than any other country ever. Americans own close to half the private firearms on the planet. Plus, our borders are permeable, and guns and ammunition are relatively easy to manufacture. So achieving the supply-side ideal is not just a matter of channeling enough outrage to finally get the right words enacted into law.

1. Porous Borders

We modeled the supply-side ideal on the gun-free sealed room. The single qualification was the assumption that no one in the room was cheating. And cheat they might, if the incentives were sufficient and the boundaries of the room permeable. Effective supply-side restrictions at the societal level have to account for this.

So what about this cheating? If we managed to enact supply-side restrictions with real bite, would cheating be pervasive? Could it be controlled? Perhaps the level of cheating would be small. A black market fueled just by this cheating might make guns prohibitively expensive for many people with bad intentions. With fewer bad people able to afford the higher prices caused by restricted supply, there should be a reduction in gun crime.

One worry, however, is the argument that the most dangerous among us have an inelastic demand for guns. Criminal penalties for gun possession or use will not matter much to people whose primary activities are already illegal. Daniel Polsby contends that their static demand will be supplied through the same channels that distribute other contraband. . . .

[S]ome contraband imported guns will be more lethal than the ones they replaced. In Britain, after further tightening of already stringent gun laws, the black market began supplying previously unseen and more lethal guns. Ireland banned handguns in the early 1970s and a large group of rifles and repeating shotguns in 1976.[22] "Despite these measures, in the early 2000s the Irish police . . . were reporting steep increases in gun crime."[29] The most serious concern being "an invasion of handguns and automatics smuggled in from Europe," many of them "semi-automatic pistols and sub-machine guns, previously unknown in public hands."[30] Swedish police report a similar phenomenon: "Before, there were a lot of shotguns — now it's all automatic weapons."[31] Even without sweeping supply restrictions, the United States has encountered this phenomenon. In 1996, authorities intercepted a shipment of two thousand AK-47s from China. Unlike the semi-automatic rifles that were prohibited under the expired 1994 Assault Weapons Ban, these black-market imports really were fully automatic machine guns. In 2005, federal authorities broke up a network of arms suppliers who illegally imported fully automatic rifles from Russia and had arranged to sell anti-tank guns to an undercover officer. . . .

2. Defiance in Practice

Data tracking defiance of registration and prohibition internationally, and similar domestic experiments, provide a basis for projecting how people will react to aggressive supply-side rules. The most notable domestic experiment with prohibition was in Washington, D.C. Until the challenge culminating in *Heller* [Ch. 11.A], the District of Columbia banned handguns and required long guns to be kept disassembled and locked away from their ammunition. Overall, this was the most aggressive set of supply restrictions in the country. There is no dispute that handgun prohibition failed to stop gun crime in D.C. The District has been perennially at or close to the top of the list for gun crime in American jurisdictions.

The efforts of other restrictive U.S. jurisdictions tell more about the defiance impulse and the character of the remainder problem. New York City imposes stringent requirements on purchase and ownership of handguns. Still, handgun crime persists. New York City Mayor Michael Bloomberg's straw purchase "stings" confirm that tough municipal laws alone are not enough. The source of some of the contraband guns in Bloomberg's sights come from scofflaw dealers from other states. But this is literally only a basketful of guns. The number of illegal guns in

22. [In 1973, the police collected all registered handguns, ostensibly for ballistics testing, and then refused to return the handguns to their owners. In 2004, Irish courts ruled the de facto ban illegal, and ordered the police to resume issuing handgun permits. *See* David B. Kopel, *Ireland on the Brink*, America's 1st Freedom (Apr. 2011). — Eds.]

29. Small Arms Survey, Graduate Inst. of Int'l Studies, Small Arms Survey 2007: Guns and the City 44 (2007).

30. *Id.* (citation omitted).

31. *Id.* at 56 (internal quotation marks omitted) (citation omitted).

New York City is in the range of two million.[67] This is in a region where the overall rate of gun ownership is lower than average and gun culture is less robust. The roughly two million guns [illegally] owned by the residents of New York City are from sources much more disparate than rogue dealers. Some of these guns are new, but an inventory this large suggests that many New Yorkers have had guns, have been acquiring guns, and deciding to keep guns illegally for a long time. This type of defiance should be stronger in most other parts of the country, where gun culture runs deeper.

The city of Chicago also has very restrictive gun laws. Still, between 1999 and 2003, Chicago averaged about 10,000 illegal gun confiscations per year. In one particular high-crime neighborhood studied by Cook et al., there was approximately one illegal gun sale per thirty people each year.[73] Stripping out children from the count, this rate seems sufficient to achieve saturation in less than a generation.

The rates of non-compliance with state assault weapons bans tell a similar story. James Jacobs and Kimberly Potter report:

> In recent years, several states and municipalities passed laws mandating the registration [and subsequent prohibition] of assault rifles. These laws failed miserably, primarily due to owner resistance. In Boston and Cleveland, the rate of compliance with the ban on assault rifles is estimated at 1%. In California, nearly 90% of the approximately 300,000 assault weapons owners did not register their weapons. Out of the 100,000-300,000 assault rifles estimated to be in private hands in New Jersey, 947 were registered, an additional 888 were rendered inoperable, and four were turned over to the authorities.[76]

Data from international experiments with gun prohibition and registration illustrates a powerful and nearly universal individual impulse to defy gun bans. With data from seventy-seven countries, the International Small Arms Survey reports massive illegal parallel holdings with an average defiance ratio of 2.6 illegal guns for every legal one. This average is pulled down by rare cases like Japan. But even the Japanese, whose society David Kopel casts as the polar opposite of our gun culture, experience "unregistered [gun] holdings . . . one-quarter to one-half as large as registered holdings."[23]. . .

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67. It is estimated that as many as two million illegal guns were in circulation in New York City in 1993. Ninety percent of the guns seized in New York City that year were originally purchased in other states. There are no precise measurements of what proportion of New York's total contraband inventory are recent imports versus classic remainders. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Programs, Getting Guns Off the Streets (1994-2008), http://ojjdp.ncjrs.org/pubs/gun_violence/profile19.html. . . .

73. Philip J. Cook et al., *Underground Gun Markets* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 11737, 2005).

76. James Jacobs & Kimberly Potter, *Comprehensive Handgun Licensing & Registration: An Analysis and Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. Crim. L. & Criminology 81, 106 (1998).

23. [The estimates of legal and illegal guns starting in this and the next three paragraphs are from the Small Arms Survey, *supra* note 29, at 46-55.—Eds.]

This level of defiance cannot be explained by the observation that criminals have an inelastic demand curve. A large slice of the ordinary citizenry seems to be operating under the same curve. Across the board, for countries large and small, developed and emerging, a strong defiance impulse is evident.

In England and Wales there were 1.7 million legally registered firearms in 2005; illegal, unregistered guns were estimated as high as 4 million. The Chinese reported 680,000 legal guns in 2005, with estimates of nearly 40 million illegal guns. The German police union estimates that Germany has "about 45 million civilian guns: about 10 million registered firearms; 20 million that should be registered, but apparently are not; and 15 million firearms such as antiques . . . and black-powder weapons . . . that do not have to be registered."

The German experience also tells us something about the staying power of defiance. Registration was introduced in Germany in 1972 "when the nation's civilian holdings reportedly totaled 7-20 million firearms." Only 3.2 million of these guns were registered. "In the thirty-five years since then, roughly 8 million additional firearms were legally acquired, accounting for the rest of the registered guns thought to exist today."

With close to 7 million registered guns, Canada is estimated to have about 10 million unregistered guns.[24] Brazil reports nearly 7 million registered guns and estimates 15 million unregistered. India reports fewer than 6 million registered guns against an estimated 45 million illegal ones. France has less than 3 million guns registered and estimates nearly 20 million unregistered. Mexico reports fewer than 5 million registered with about 15 million unregistered guns. Jordan has 126,000 registered guns and an estimated 500,000 illegal ones. Sudan reports about 7,000 registered and 2.2 to 3.6 million illegal ones.

While there are exceptions like Japan, where illegal guns are a fraction of those legally registered, nearly every country surveyed produced estimates of illegal guns that are a multiple of legal guns. Extrapolation from these rates of defiance to projections about the United States also must account for our unparalleled gun culture. Extrapolating ninety to ninety-nine percent defiance from state or municipal assault weapons bans seems too aggressive. But, conservatively, the international data show that we should expect three or more people to defy confiscation for every one who complies.

Nothing else in our experience contradicts these signals. Many people evidently believe guns protect against things they fear more than criminal sanctions. The risk-reward calculation that pushes ordinary people to obey a wide array of criminal laws seems different here.

The American attachment to the gun is exceptional. We own close to half the world's private firearms and buy half the world's output of new civilian guns each year. This demand and cultural attachment highlight an obstacle to the supply-side ideal that may be unique to the United States. Whatever courts say about the Second Amendment, a majority of Americans believe they have a right to own a gun. This belief, as much as any court pronouncement, will drive defiance of confiscation. Even if *Heller* [Ch. 10.A] is ultimately nullified, the opinion itself, along with

24. [Canadian gun registration is detailed later in Section C.3.—Eds.]

[other] powerfully reasoned circuit court opinions, are more than sufficient to rationalize civil disobedience by people who ultimately would have defied confiscation anyway. If the Supreme Court [simply reversed *McDonald v. City of Chicago* (Ch. 11.B), eliminating the Second and Fourteenth Amendments][25] as a limitation on state lawmaking, the capacity of individual states to implement confiscation laws still seems near zero, with the defiance impulse of gun-owning citizens validated by recognition of a federal right, and few people bothering with the federalist details.

The risk of noncompliance in this context is different from the run-of-the-mill cheating that might afflict any prohibition legislation. This means we must expand our thinking about noncompliance beyond the idea that criminals will resist confiscation. What does it mean that otherwise law-abiding people will hold back some portion of the gun inventory in defiance of sweeping supply-side restrictions? What consequences should we anticipate? . . .

. . . Pure supply-side rules are fatally compromised by the remainder problem. . . . Some proposals are hybrids, however, and thus are affected by the remainder problem in more limited and unique ways. Other proposals detach from supply-side theory almost entirely and are not snared by the remainder problem. . . .

. . . It is best to acknowledge the blocking power of the remainder problem and adjust our gun control regulations and goals to that reality.

NOTES & QUESTIONS

1. *Large-capacity magazine bans.* As of March 2020, eight states ban so-called large-capacity magazines that hold more than 10 rounds, while Colorado bans magazines over 15. According to one estimate, there are more than 250 million firearm magazines in circulation that have a capacity for more than 10 rounds, with about 100 million of those capable of holding at least 30 rounds. Griff Witte, *As Mass Shootings Rise, Experts Say High-Capacity Magazines Should Be the Focus*, Washington Post, Aug. 18, 2019. Does Professor Johnson's "remainder problem" prevent large-capacity magazine bans from being effective?

2. *Ammunition control?* Do Professor Johnson's arguments that "supply-side" control of guns is impracticable in America apply equally well to controls on ammunition? Guns are easily hidden and can be used for generations with minimal maintenance. Quality ammunition will also last for decades, but unlike firearms, ammunition is depleted by usage. Could prohibitory ammunition controls eventually render guns useless and undermine the strong shooting culture in a society like America? Or is supply of ammunition held by citizens sufficient to supply a black market for the foreseeable future? Note that some components of ammunition, such as brass cases and lead bullets, are fairly easy to replicate at home, but chemical primers and smokeless gunpowder are not (though the older, "blackpowder" gunpowder can be made at home). Further reading: Mark A. Tallman, Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution (2020).

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25. [The original text, written before *McDonald v. City of Chicago* (Ch. 11.B) was handed down, read ". . . fails to incorporate an individual right. . . ."—Eds.]

3. *Temporary shortages of ammunition and primers.* During the run-up to the 2008 election, and for quite a while afterward, many gun owners were concerned that the new President would be as aggressively anti-gun as President William Jefferson Clinton, or even more so. As a U.S. Senator and Illinois State Senator, Barack Obama had a long record of voting for prohibitory and confiscatory legislation. *See* David B. Kopel, *FactCheck Flubs Obama Gun Fact Check*, Volokh Conspiracy, Sept. 23, 2008. Having won reelection in November 2012, President Obama began a major campaign for firearm restrictions in December, after the Newtown, Connecticut, murders. There was a massive increase in gun sales, and an even larger increase in ammunition sales, which resulted in many stores running out of popular calibers of ammunition.

During these periods the worst shortage of all, from the ordinary buyer's viewpoint, was the acute shortage of *primers*, which were apparently being bought up in tremendous quantities for keeping as long-term reserves. As discussed in online Chapter 20, home manufacture of ammunition ("reloading" or "handloading") is very common, and not particularly difficult. But the primer caps used in modern metallic cartridges cannot easily be made at home.

4. Would prohibition of firearms be easier or harder to accomplish than drug or alcohol prohibition? If we accept the many secondary harms of drug prohibition, why not gun prohibition?

5. *Defiance.* Noncompliance with restrictive gun laws by both law enforcement officials and citizens exists in many jurisdictions in the United States. *See, e.g.*, J.D. Tuccille, *Popular Defiance Will Kneecap Gun Laws in New Mexico, As It Has in Other States*, Reason, Mar. 4, 2019; Jon Caldara, *To Boulder's Anti-Gun Bigots, I Will Not Comply with Your Hate Law*, Denver Post, Apr. 13, 2018. There is a growing movement to establish "Second Amendment" sanctuaries where such laws are not enforced, similar to sanctuary cities or states where federal immigration laws are not enforced, including Arizona, Colorado, Florida, Illinois, Kentucky, New Mexico, New Jersey, Oregon, Virginia, and Washington state. *See, e.g.*, Kerry Picket, *Sheriffs May Go to Jail to Protect Second Amendment Sanctuaries, Kentucky Congressman Says*, Washington Examiner, Jan. 2, 2020; Daniel Trotta, *Defiant U.S. Sheriffs Push Gun Sanctuaries, Imitating Liberals on Immigration*, Reuters, Mar. 4, 2019; Andrea Diaz & Marlena Baldacci, *Sanctuary Counties to Protect Gun Owners from New Laws*, CNN, May 8, 2018. In Colorado, more than half the state's counties have declared themselves "Second Amendment sanctuaries." Erin Powell, *These Colorado Counties Have Declared Themselves "2nd Amendment Sanctuaries" as Red Flag Bill Progresses*, 9News.com, Apr. 10, 2019. More than 100 counties and municipalities in Virginia became Second Amendment sanctuaries after lawmakers proposed strict gun control laws. Associated Press, *In Virginia and Elsewhere 2nd Amendment "Sanctuary" Movement Aims to Defy New Gun Laws*, Los Angeles Times, Dec. 21, 2019. *See* Ch. 9.B.c.3. Defiance of gun laws exists internationally, with two recent examples being Australia and New Zealand. *See* J.D. Tuccille, *Noncompliance Kneecaps New Zealand's Gun Control Scheme*, Reason, July 8, 2019; Calla Wahlquist, *Australian Gun Control Audit Finds States Failed to Fully Comply with 1996 Agreement*, The Guardian, Oct. 4, 2017. *See* Section C.6.

6. Consider the following moral questions: What would you do if new, severe gun control laws were enacted in your jurisdiction, and you then learned that a friend or family member was keeping a secret cache of prohibited weapons and

ammunition? What actions would you be willing to take to help him or her? Or would you take actions to ensure that he or she were apprehended and punished? Or would you just keep quiet about the whole thing? Would your answer vary depending on *why* your friend or family member had chosen to keep the illegal weapons? If *you* owned the banned weapons, would you comply with the law?

7. If there were a magical way to get rid of all guns, would the world be better off? Would all the world then be more like low-crime Japan? *See* Section C.7. Or would we then live in a world where, as in the Dark Ages, the physically strong could always have their way with the weak? *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *A World Without Guns*, Nat'l Rev. Online, Dec. 5, 2001.

8. Does the statistic in the U.S. Department of Justice's report in note 67 of Professor Johnson's article that there are 2 million illegal guns in New York City seem reasonable given that New York City has a population of about 8.25 million?

EXERCISE: DEVELOPING FIREARMS POLICY

In cooperation with your classmates, and drawing on the studies above, predict the likely effects (on crime, gun deaths, civic freedom, and other important variables) of some or all of the following proposals for new laws or regulations in the United States:

- A national ban of semi-automatic handguns.
- A ban of semi-automatic rifles that look like military guns.
- A ban of magazines holding more than ten rounds of ammunition.
- A policy that limits firearms purchasers to one gun per month.
- Limiting ammunitions purchasers to 500 rounds of ammunition per month.
- A ban of *all* semi-automatic firearms.
- Universal registration of firearms.

After you have developed and debated these specific issues, try to develop a comprehensive federal firearms policy agenda, based on the lessons from other countries and the limitations that you believe constrain policy in the United States.

C. GUN CONTROL AND GUN RIGHTS IN SELECTED NATIONS

This Part examines firearms law and policy issues in several nations. It is not a comprehensive analysis; a thorough examination of any particular country would require its own chapter. Some of the country studies are broad, while others focus on a single topic. The purpose is to show the variety of materials that are available, and the some of the topics that are currently of interest to scholars. For students or professors writing research papers, country studies of arms laws and history are wide-open topics. To that end, for readers interested in particular countries, the Notes at the end of some Sections list leading books and articles for further reading.

This Part begins with the United Kingdom, the source of much American law, and then Switzerland, whose vibrant militia system was admired by the Founders and feared by the Nazis. Next come Canada, Mexico, and Venezuela, followed by Australia, Japan, China, and Thailand, and finally, the African nations of Kenya and South Africa. The Notes & Questions following the above nations sometimes discuss other nations in the region.

Part D closes the chapter with an in-depth look at Europe and the world over the long historical term. The Part includes an analysis of homicide trends in Europe over the last eight centuries, an essay contrasting U.S. and European homicide rates when murder by government is considered, and a detailed study of the most murderous regime in global history, that of China's Mao Zedong 1949-76. Part D includes case studies of armed resistance to genocide by Armenians and other Christians in the Ottoman Empire during World War I, by Jews in Europe during World War II, and by Tibetan Buddhists and Muslims against Chinese invaders in the 1950s and 1960s.

1. United Kingdom

The earlier firearms law history of the United Kingdom is the subject of Chapters 2 and online 22 (in more detail). In modern British law, a "firearm" means a handgun or a rifle, but not a shotgun. Throughout this chapter, we use "firearm" in the American sense, to encompass shotguns, rifles, and handguns.

David B. Kopel

United Kingdom — History of Gun Laws Since 1900

in 3 Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law 842 (Gregg Lee Carter ed., 2d ed. 2012) (revised for this work)

Gun laws in the United Kingdom are among the most severe in the democratic world. From having essentially no gun controls at the start of the twentieth century, the United Kingdom moved to near prohibition by the end of the century.

In 1900, the official attitude about guns was summed up by Prime Minister Robert Gascoyne-Cecil, the Marquess of Salisbury, who said he would "laud the day when there is a rifle in every cottage in England." Led by the Duke of Norfolk and the mayors of London and of Liverpool, a number of gentlemen formed a cooperative association that year to promote the creation of rifle clubs for working men. The Prime Minister and the rest of the aristocracy viewed the widespread ownership of rifles by the working classes as an asset to national security.

Although Great Britain entered the twentieth century with essentially no gun laws, pressure began to build for change. As revolvers were becoming less expensive and better, concern arose regarding the increase in firepower available to the public. Low-cost guns were, in some eyes, associated with hated minority groups, particularly Irish supporters of independence.

The Pistols Act of 1903 forbade pistol sales to minors and felons and dictated that sales be made only to buyers with a gun license. The gun license could be obtained at the post office, the only requirement being payment of a fee. Firearms suicides fell, but the decline was more than matched by an increase in suicide by poisons and knives. The bill defined pistols as guns having a barrel of nine inches or less, and thus pistols manufactured by Webley or Hammerli with ten inch barrels were soon popular.

The early years of the twentieth century saw an increasingly bitter series of confrontations between capital and labor throughout the English-speaking world. Tensions were especially high around the 1910 coronation of George V. After the 1911 "Siege of Sidney Street"—the culmination of a confrontation with three anarchists—Parliament voted against proposed gun controls.

After "The Great War" broke out in August 1914, the British government began assuming "emergency" powers for itself. "Defense of the Realm Regulations" required a license to buy pistols, rifles, or ammunition at retail.

When the war ended in November 1918, the government worried about what would happen when gun controls expired. A secret government committee on arms traffic warned of danger from two sources: the "savage or semi-civilized tribesmen in outlying parts of the British Empire" who might obtain surplus war arms, and "the anarchist or 'intellectual' malcontent of the great cities, whose weapon is the bomb and the automatic pistol."

At a Cabinet meeting on January 17, 1919, the Chief of the Imperial General Staff raised the threat of "Red Revolution and blood and war at home and abroad." The Minister of Transport, Sir Eric Geddes, predicted "a revolutionary outbreak in Glasgow, Liverpool or London in the early spring, when a definite attempt may be made to seize the reins of government." "It is not inconceivable," Geddes warned, "that a dramatic and successful coup d'etat in some large center of population might win the support of the unthinking mass of labour." Using the Irish gun licensing system as a model,[26] the Cabinet made plans to disarm enemies of the state and to prepare arms for distribution "to friends of the Government."

However, the Home Secretary presented the government's 1920 Firearms Act to Parliament as strictly a measure "to prevent criminals and persons of that description from being able to have revolvers and to use them." In fact, the problem of criminal, non-political misuse of firearms remained minuscule.

The Firearms Act banned CS[27] self-defense spray canisters and allowed Britons to possess pistols and rifles only if they could show a "good reason" for obtaining a police permit. Shotguns and airguns, which were perceived as "sporting" weapons, remained exempt from control.

Britons who had formerly enjoyed a *right* to have arms, [*see* Chs. 2.H.4, 22.H.4] were now allowed to possess pistols and rifles only if they proved they had "good

26. [English rule in Ireland had always been concerned with disarming the majority Catholic population. During the nineteenth century, the "Penal Laws," which explicitly disarmed Catholics, were replaced with a facially neutral licensing system aimed at allowing only politically correct persons to possess arms. *See* Chs. 2.J.2, 22.J.2.—Eds.]

27. [The most common form of "tear gas" used for riot control.—Eds.]

reason." In the early years of the Firearms Act, the law was enforced moderately in England, Wales, and Scotland. A Firearms Certificate for possession of rifles or handguns was readily obtainable. Wanting to possess a firearm for self-defense was considered a "good reason." Not so in Ireland, where revolutionary agitators were demanding independence from British rule. As for ordinary firearms crime — the pretext for the Firearms Act — it remained minimal.

In 1934, short-barreled shotguns and fully automatic firearms were outlawed. Although there had been no instance of a machine gun being misused in Britain, the government pointed to misuse of such guns in the United States, where organized crime gangs with machine guns were notorious. The government also argued that there was no need for anyone (other than the government) to have such guns.

The situation changed during World War II (1939-45). As discussed in Chapter 8.F.2., there was much concern about a Nazi invasion. At first, the Home Guard was pathetically under-armed. But during the war, British figured out how to make low-cost, yet sturdy, machine guns from stamped metal. The Sten Guns were carbines (short rifles) and they were distributed by the hundreds of thousands to the Home Guard, and to British soldiers.

Before the war, the Thompson machine gun couldn't be manufactured in the United Kingdom. But during the war, large numbers of American-made Thompsons were shipped to Britain, where they were dubbed "tommie guns," since "Tommie" is the nickname for a British soldier.

As World War II ended, everything was rounded up. The Sten guns were taken from the Home Guard, as were the Home Guard arms that had been donated by American civilians. Troop ships returning to England were searched for souvenir or captured rifles, and men caught attempting to bring firearms home were punished. Even so, large quantities of firearms slipped into Britain, where many of them remain to this day in attics and under floorboards.

In 1946 the Home Secretary[28] announced that self-defense would no longer be considered a good reason for being granted a Firearms Certificate.

In 1965, Parliament suspended the death penalty. The large majority of public opinion was on the other side, and their opposition came to a head after illegal handguns were used to murder three policemen at Shepherd's Bush (a district in west London). In 1966, Home Secretary Roy Jenkins, an ardent opponent of capital punishment, successfully diverted public enthusiasm for the death penalty by initiating shotgun control legislation. Heretofore, the gun control laws had only applied to rifles and handguns (which had a military connotation) but not to shotguns (which were seen as bird-hunting tools). A few weeks before Shepherd's Bush, Jenkins had told Parliament that after consulting with the Chief Constables and the Home Office, he had concluded that shotgun controls were not worth the trouble.

Jenkins' new proposals, embodied in the 1967 Criminal Justice Act, established a permissive licensing system for shotguns. To possess a shotgun, an individual needed a Shotgun Certificate. A person could only be denied a Certificate if there were evidence that his "possession of a shotgun would endanger public

28. [A Cabinet Minister with responsibility for a wide range of domestic issues. — Eds.]

safety." In contrast, a Firearms Certificate (for rifles and pistols) had always operated on the presumption that the owner had to prove need.

A Shotgun Certificate allowed unlimited acquisition of shotguns, with no registration. Firearms Certificates had to be amended every time a new rifle or pistol was acquired—if the police decided to grant permission for the new acquisition. An applicant for a Shotgun Certificate was required to supply a countersignatory, a person who would attest to the accuracy of the information in the application. During an investigation period, which might last several weeks, the police might visit the applicant's home. In the first decades of the system, about 98 percent of all applications were granted.

The Criminal Justice Act also abolished the requirement of unanimous jury verdicts in criminal trials and imposed various restrictions on the press and on trial procedures.

Prime Minister Edward Heath's government considered sweeping new controls in a 1973 Green Paper,[29] but the proposal was rejected due to a strong political response against it. Over the next several decades, however, almost all of the Green Paper agenda became law.

On the morning of August 19, 1987, a licensed gun owner named Michael Ryan dressed up like Rambo and shot 16 people and himself in the market town of Hungerford. Among his weapons was a Chinese semi-automatic rifle.

Parliament moved to restrict all types of firearms. Semi-automatic centerfire rifles and shotguns were confiscated. Pump-action rifles are banned as well, since it was argued that these guns could be substituted for semi-automatics.

The 1988 Firearms Act made Shotgun Certificates much more difficult to obtain. The statutory change merely said that Certificate could be denied if the applicant did not have "a good reason." Police practice immediately enforced this standard by requiring applicants to prove that they did have a good reason. It was up to the police to decide if a reason was good enough. For example, wanting to retain a family heirloom was not considered a good reason. In practice, only active participation in the shooting sports, or pest control for farming would satisfy the police. The number of Shotgun Certificate holders plunged.

In addition, shotguns that can hold more than two shells at once now require a Firearms Certificate, the same as rifles and handguns. All shotguns must now be registered. Shotgun sales between private parties must be reported to the police. (Still, police permission is not required for additional acquisitions.) Buyers of shot shells must produce a Shotgun Certificate.

Home Secretary Douglas Hurd later admitted that the government prepared the provisions of the 1988 Firearms Act long before Hungerford and had been waiting for the right moment to introduce them.

In March 1996, Thomas Hamilton, a licensed handgun owner who retained his license even though the police had investigated him seven times as a pederast and knew him to be mentally unstable, used handguns to murder 17 teachers and children at a preschool in Dunblane, Scotland.

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29. [A preliminary research report on government policy. A White Paper is a more formal and final statement of policy.—Eds.]

The Tory government, headed by John Major, convened a Dunblane Enquiry Commission. The Commission advised various forms of tightening the gun laws but did not recommend banning all handguns. Prime Minister John Major, though, insisted on a handgun ban. He allowed an exception for single-shot .22 handguns that were stored at licensed shooting ranges. The new gun laws went into effect in February 1997.

A few months later, Labour Party leader Tony Blair was swept into office in a landslide. One of his first acts was to complete the handgun ban, by removing the exemption for single-shot .22s. Since 1920, all lawful acquisitions of handguns in Great Britain have been registered with the government, so handgun owners had little choice but to surrender their guns, in exchange for payment according to a government schedule.

Subsequent legislation has increasingly regulated air guns. Some air guns now require a Firearms Certificate. Firearms Act 1968 section 1(3)(b) (as amended). In Scotland, most airguns require an Air Weapons License. Air Weapons and Licensing (Scotland) Act 2015.

The most important gun controls in the U.K., however, are not the statutes enacted by Parliament. Rather, the gun controls which have helped reduce the nation's rate of lawful gun ownership to extremely low levels are the controls which are invented and enforced by the British police. The fact that gun owners need to obtain a license from the police has given the police enormous opportunities to make their own gun controls.

For example, starting in 1936, the British police began adding a requirement to Firearms Certificates requiring that the guns be stored securely. As shotguns were not licensed, there was no such requirement for them. Today, British statutory law merely mandates that guns be stored in "a secure place."

But when a person seeks to obtain or renew a gun license, in most jurisdictions the British police send a pair of officers to the person's home, to inspect the form of storage. Often, a pair of expensive safes (one for the guns, one for the ammunition) is considered the only acceptable form of storage. Police standards change from time to time, regarding what kinds of safes and supplementary electronic security systems are mandated. In many districts, an acceptable safe is one that can withstand a half-hour attack by a burglar who arrives with a full set of safe-opening tools, and who even has time to take a short rest if his first efforts to pry open the safe do not succeed. The police have no legal authority to require such home inspections, nor does the law specify that a hardened safe is the only acceptable form of storage. But if a homeowner refuses the police entry or refuses to buy the types of safe demanded by the police, the certificate application or renewal will be denied.

One effect of the heavy security costs is to reduce the ability of middle-income or poor people to legally own guns. Of course, the requirement that guns be locked in safes makes it nearly impossible for the gun to be used for home protection.

The police have invented many other conditions that they impose on gun license applicants. A certificate for rifle possession often includes "territorial conditions" specifying exactly where the person may hunt. While it is not legally necessary for shooters to have written permission to hunt on a particular piece of land, police have been stopping shooters, demanding written proof, and threatening to

confiscate guns from persons who cannot produce the proof. The police also have, without legal authority, required applicants for shotguns capable of holding more than two shells to prove a special need for the gun. Without legal authority, some police have begun to phase out firearms collections by refusing new applications.

If a policeman has a personal interest in the shooting sports, that interest will generally disqualify him from being assigned to any role in the police gun licensing program. Applicants may appeal police denials of permit applications, but the courts are generally deferential to police decisions. Hearsay evidence is admissible against the applicant. An appellant does not have a right to present evidence on his own behalf.

By police estimates, the stockpile of illegal guns in the U.K. is over three million. Gun crime rates have risen steadily, and some police now call lower-class Manchester "Gunchester." A black market supplies young criminals with Beretta sub-machine guns, Luger pistols, and many other weapons.

One of the most important differences between American and British law is in regards to self-defense. Britain's 1967 Criminal Justice Act made it illegal to use a firearm against a violent home intruder—whereas firearms are used (usually with only a threat) against American burglars and other home invaders many thousands of times a year. In a highly-publicized case in 2000, an older man named Tony Martin, who had been repeatedly burglarized, and had received no meaningful assistance from the police, shot a pair of career burglars who had broken into his home. The man was sentenced to life in prison, although paroled after serving part of the sentence.

Less-than-lethal defensive weapons have been outlawed. These include chemical defense sprays, electric stun devices, and martial arts gear. Knife carrying was made presumptively illegal in 1996. Before that, carrying even a pen-knife had been illegal if it were intended for use in self-defense, which legally made the knife into an "offensive weapon."

According to a British police website, it is illegal to carry any "product which is made or adapted to cause a person injury." Britons are allowed, for example, to carry colored dye spray to mark an attacker, but if they spray the dye in the attacker's eyes, it "would become an offensive weapon because it would be used in a way that was intended to cause injury."

"Hot" burglaries (against an occupied home) comprise only about a quarter of American burglaries, but over half of British burglaries. David B. Kopel, *Lawyers, Guns, and Burglars*, 43 Ariz. L. Rev. 345 (2001). The *Daily Telegraph* (June 29, 2000) argues that "the main reason for a much lower burglary rate in America is householders' propensity to shoot intruders. They do so without fear of being dragged before courts and jailed for life."

Gun crime rates, however, remain substantially lower in the U.K. than in the United States, even though they are much higher than they were in the nineteenth century or most of the twentieth.

Following years of public pressure, the government of the U.K. in July 2008 amended the self-defense law to clarify and protect some self-defense rights for the victims of home invasions. Criminal Justice and Immigration Act, 2008, c. 4, § 76(7) (U.K.). Reasonable use of the force is to be judged according to the circumstances as the defender perceived them; and must consider:

> (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

Notwithstanding the easing of self-defense laws, the general trend on arms laws continues towards ever-greater severity. One reason is terrorist attacks perpetrated by exploding bombs, by throwing caustic liquids, or other means. A second problem is the very high levels of knife crime that have arisen in the twenty-first century, much of it related to gangs. *See* David B. Kopel & Vincent Harinam, *Britain's Failed Weapons-Control Laws Show Why the Second Amendment Matters*, Nat'l Rev. Online, Aug. 28, 2018. In 2016, the government banned the sale of so-called zombie knives—horror-film-inspired blades that are marketed as collectors' items.

In 2019, a new Offensive Weapons Act became law. Since semiautomatic rifles had already been prohibited, the new statute outlawed attachments to other rifles that increase the rifle's rate of fire. A "buyback" system will compensate owners for the property that they must surrender. The sale of corrosive substances to persons under 18 was prohibited, and possession of such a substance by anyone in a public place is unlawful.

Mail-order vendors who ship bladed products to residential addresses must now verify the age of the buyer. A new system of "knife crime prevention orders" has been introduced. The government may seek an ex parte order to prohibit an individual from possessing knives. If the order is issued, the individual will later have an opportunity to contest the order.

NOTES & QUESTIONS

1. **CQ:** Several former British colonies are covered in this Chapter: Australia (Section C.6), Burma (Section C.9 Note 3), Canada (Section C.3), Ghana (Section A.5), Kenya (Section C.10), and South Africa (Section C.11). All of them once had arms laws imposed by the British Empire. In many British colonies, laws were modeled on the Firearms Act 1920, with some changes to increase stringency. Even in post-colonial times, the British colonial law is often the foundation of some nations' arms laws. As you read the stories of other countries, consider how they have followed or not followed the British model.

2. *"Carrying an offensive weapon."* Britain's 1953 Prevention of Crime Act criminalizes the carrying of an "offensive weapon" in any public place unless the defendant can show that he had "lawful authority or excuse." "Offensive weapon" is broadly defined to include not only "any article made or adapted for use in causing injury to the person," but also "any article . . . intended by the person having it with him for such use." Thus any item designed as a weapon is illegal to carry, as is any nonweapon if the person carrying it intends to use it as a weapon. Note, too, that despite the statute's title, the statute does not distinguish between weapons carried for defense and those carried for offense.

In contrast, many American jurisdictions criminalize carrying weapons with unlawful intent, but do not deem carrying for *self-defense* unlawful, even though defensive use often does "caus[e] injury" to another.

For example, Oklahoma prohibits "carr[ying] or wear[ing] any deadly weapons or dangerous instrument whatsoever with the intent or for the avowed purpose of *unlawfully* injuring another person. . . ." 21 Okla. Stat. 1278 (2012) (emphasis added). The Oklahoma statute adds that "[t]he mere possession of . . . a weapon or dangerous instrument, without more, . . . shall not be sufficient to establish intent as required by this section." *Id.*

Is this approach better or worse than Great Britain's? Should the legality of carrying weapons (or items usable as weapons) turn on the carrier's intent? Is intent too subjective or difficult to discern? Do intent-based prohibitions on carrying open the door to invidious discrimination by the law enforcement officials that must apply them?

Can one even distinguish between "offensive" and "defensive" weapons? If so, should objective traits be used to distinguish them?

3. As the 2008 self-defense law states, "a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action." **CQ:** The same point has been made by the U.S. Supreme Court, in a famous line by Justice Holmes: "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921); Ch. 7.J.

4. *Knives.* Knife control is nothing new in England. **CQ:** In 1388, King Richard II banned servants and laborers from carrying knives in public, except when accompanied by their masters. To his frustration, the statute was often ignored. Chs. 2.F.2, 22.F.2.

5. *Home storage.* How much control should government impose on the ways people store lawfully owned guns at home? Under *Heller* (Ch. 11.A), government cannot require guns in the homes to be locked up at all times, but some safe storage requirements have been ruled constitutional. *See* Chs. 10.D.3, 16.A note 3. Which aspects, if any, of the British system of extensive government supervision of home storage do you think would make sense to adopt in your jurisdiction?

6. *Which is worse: rare lethal violence or frequent nonlethal violence?* By most measures, the United Kingdom today has a much higher rate of violent crime than the United States. *See, e.g.*, James Slack, *The Most Violent Country in Europe: Britain Is Also Worse than South Africa and U.S.*, Daily Mail, July 2, 2009 (U.K.) (British annual violent crime rate of over 2,000 per 100,000 inhabitants is more than four times greater than United States). On the other hand, the homicide rate in the United Kingdom is lower than that in the United States; the official U.S. rate is around 4-6 per 100,000 population per year, whereas the U.K. rate is around 1-2 per 100,000 population.

The gap is smaller, however, than the official numbers suggest. The U.S. rate is based on initial reports of homicides and includes lawful self-defense killings (about 7-13 percent of the total). Gary Kleck, Point Blank: Guns and Violence in America 114 (2005). The England and Wales rate is based only on final dispositions, so that an unsolved murder, or a murder that is pleaded down to a lesser offense, is not counted as a homicide. In addition, multiple murders by one murderer are counted as only a single homicide for Scottish statistics. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Gold Standard of Gun Control*, 2 J.L., Econ. & Pol'y 417 (2006).

Even so, it would be fair to say that the actual U.K. homicide rate is lower than in the United States. Many factors can contribute to such a difference. But it is at

least plausible that a higher rate of ownership of lethal weapons among citizens will tend to make violent encounters more costly (because more lethal), but therefore also rarer. If going from a low-gun to a high-gun-owning society does involve a trade-off of this kind, is it a worthwhile trade? To put it somewhat crudely, if increasing the number of lawfully owned guns means a few more murders a year, but many fewer "ordinary" assaults and muggings, is that a net social benefit? What variables (e.g., who gets shot, who doesn't get mugged or raped) are important?

7. *The slippery slope in action?* For an extended account of the rise of British gun control in the twentieth century, see Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 Hamline L. Rev. 399 (1999). Professors Olson and Kopel argue that the near-elimination of the right to arms in Britain is an instructive example that "slippery slopes"—claims that allowing small increases in regulation will tend to lead to greater and greater infringements until the right is abrogated—are sometimes a realistic fear.

8. Over half of firearms crimes in England and Wales are perpetrated with "unidentified, imitation, reactivated or other firearms." At present, little is known about the "criminal armourers" who make these guns. Helen Williamson, *Criminal Armourers and Illegal Firearm Supply in England and Wales*, 15 Papers from the British Criminology Conference 93 (2015).

9. *Further reading*: Richard Law & Peter Brooksmith, Does the Trigger Pull the Finger: The Uses, Abuses, and Rational Reform of Firearms Laws in the United Kingdom (2011) (arguing for relaxation of U.K. laws); Joyce Malcolm, Guns and Violence: The English Experience (2004) (surveying U.K. gun law developments in the nineteenth and twentieth centuries); Peter Squires, Gun Culture or Gun Control: Firearms, Violence and Society (2001) (warning against the spread of an American-style gun culture in the U.K.); David B. Kopel, Gun Control in Great Britain: Saving Lives or Constricting Liberty? (1992) (according to the author, perhaps both); Colin Greenwood, Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales (1971) (criticizing expansion of U.K. gun controls over the previous half-century).

10. The following websites are helpful for researching British arms laws.

- British Shooting Sports Council.
- Home Office, United Kingdom, Guide on Firearms Licensing Law (Apr. 2016).
- Her Majesty's Stationery Office (text of laws of recent decades).

2. *Switzerland*

As of 1400, the arms cultures in England and Switzerland had many similarities. The people of both small nations had very high rates of personal arms ownership and proficiency. In England, the most common arm was the long bow, and in Switzerland it was the crossbow. In each nation, the bow was iconic, representing how the people maintained their independence against the armies of larger, powerful neighbors.

By the time of the American Revolution, mass expertise with arms had long since disappeared in England, but continued to thrive in Switzerland. The

American Founders greatly admired the Swiss militia, which helped inspire the Second Amendment to the U.S. Constitution — the preference for a "well regulated militia" as "necessary for the security of a free state," and the guarantee of "the right of the people to keep and bear arms." Late in the nineteenth century, the American military sent observers to Switzerland in hopes of emulating the Swiss shooting culture. This was part of the background of the energetic efforts by the U.S. federal government during most of the twentieth century to promote civilian marksmanship. Ch. 8.B.2, 8.F.1.c.

Under the Swiss militia system, every male, when he turns 20, is issued a fully automatic military rifle and required to keep it at home along with 50 rounds. Universal service in the Militia Army is required. When a Swiss is no longer required to serve (age 50 for officers, 45 for others), he may keep his rifle (converted from automatic to semi-automatic) or his pistol (if he served as an officer).

The American Founders also admired Switzerland's decentralized system of government. Switzerland is a confederation in which the federal government has strictly defined and limited powers, and the cantons, even more so than American states, have the main powers to legislate. The citizens often exercise direct democracy, in the form of the initiative and the referendum.

For centuries, the Swiss cantons had no restrictions on keeping and bearing arms, though every male was required to provide himself with arms for militia service. By the latter part of the twentieth century, some cantons required licenses to carry pistols, imposed fees for the acquisition of certain firearms (which could be evaded by buying them in other cantons), and enacted other restrictions — albeit never interfering with the ever-present shooting matches.

In other cantons — usually those with the lowest crime rates — one did not need a police permit for carrying a pistol or for buying a semi-automatic Kalashnikov rifle. A permit was necessary only for a nonmilitia machine gun. Suppressors were unrestricted. Indeed, the Swiss federal government sold to civilian collectors all manner of military surplus, including anti-aircraft guns, cannons, and machine guns.

In 1996, the Swiss people voted to allow the federal government to legislate concerning firearms, and to prohibit the cantons from regulating firearms. Some who favored more restrictions (as in other European countries) saw this as a way to pass gun control laws at the federal level; those who objected to restrictions in some cantons saw it as a way to preempt cantonal regulation, such as the former requirement in Geneva of a permit for an air gun.

The result was a federal firearms law that imposed certain restrictions but left virtually untouched the ability of citizens to possess Swiss military firearms and to participate in competitions all over the country.

The Federal Weapons Law of 1998 regulated the import, export, manufacture, trade, and certain types of possession of firearms. The right of buying, possessing, and carrying arms was guaranteed, with certain restrictions. The law did not apply to the police or to the Militia Army — of which most adult males are members.

The law forbade fully automatic arms and certain semi-automatics "derived" therefrom; but Swiss military rifles were excluded from this prohibition. The exclusion made the prohibition nearly meaningless. Further, collectors could obtain special permits for the "banned" arms, such as submachine guns and machine guns.

In purchasing a firearm from a licensed dealer, a permit was required for handguns and some long guns, but not for single-shot rifles, multi-barrel rifles, Swiss bolt-action military rifles, target rifles, or hunting rifles. Permits were to be granted to all applicants at least 18 years old and with no disqualifying criminal record. Authorities could not keep any registry of firearms owners. Private persons could freely buy and sell firearms without restriction, provided that they retained a written record, and that the seller believed the purchaser is not criminally disqualified.

A permit was already required for manufacturing and dealing in firearms, but now there were more regulations. Storage regulations were introduced for both shops and individuals. During the Cold War, the government required every house to include a bomb shelter, which today often provide safe storage for large collections of firearms (and double as wine cellars).

Criminal penalties were dependent on intent. Willfully committing an offense could be punishable by incarceration for up to five years, but failure to comply through neglect, or without intent, might result in a fine or no punishment at all.

Before 1998, about half the cantons allowed all law-abiding citizens to carry handguns for protection in public; in some cases, an easily obtainable permit was needed. The new federal law made permits necessary everywhere, and permits are issued restrictively. Still, one can freely carry a handgun or rifle to shooting ranges, which are common.

Proposed restrictions on peaceable firearm possession and use are opposed by the Militia Army; by shooting organizations, such as the Swiss Shooting Federation; and by the arms-rights group ProTell, named after national hero William Tell. Their allies are the political parties that support free trade, federalism, limited government, noninterventionism, and remaining independent from international organizations such as the European Union or United Nations.

Supporters of firearm restrictions tend to be socialists and leftists—including those who wish to abolish the Militia Army, to strengthen the central government to be more like Germany, and to join the European Union. The Swiss Socialist Party had similar ideas at the beginning of Hitler's rise. But the Swiss socialists soon recognized the danger, and in 1942—when Switzerland was completely surrounded by Axis dictatorships—the Socialist Party resolved that "the Swiss should never disarm, even in peacetime."

As described in online Chapter 18.B, Switzerland is part of the Schengen travel zone in Europe, so that people may travel to and from Switzerland without border checks (if they are coming from or going to other Schengen nations). In order to remain in the Schengen zone, Switzerland has been required to comply with the 2016 European Firearms Directive. The economic and convenience cost of being removed from Schengen would have been high. A secondary effect of being removed from Schengen would also have removed Switzerland from the Dublin Regulation, which provides asylum rules in the Schengen zone. Under the Dublin Regulation, asylum seekers can only apply to one Schengen nation for protection. Without the Dublin Regulation, Switzerland would be at risk of being flooded with asylum seekers who had already been rejected by a Schengen nation.

So in May 2019, 64 percent of Swiss voters approved new laws to bring Switzerland into compliance with the European Firearms Directive. The Directive includes certain exceptions for Switzerland, allowing for the continuation of current militia

practices.[30] Owners of semi-automatic rifles must now have regular training. Current owners may keep them,[31] but must register them within three years. Swiss who want to purchase firearms with magazines over ten rounds for target shooting may continue to do so but will need an "exemption permit." Swiss Federal Police, *Häufige Fragen betreffend die Anpassungen im Waffenrecht ab dem 15.8.19*.[32] To obtain such a permit, owners of these guns will need to prove that they are members of a shooting club or that they are have gone target shooting at least five times in the previous five years. *Id.*[33] *See generally* Urs Geiser, *Gun Lobby Misses Its Target as Swiss Voters Approve Tougher Gun Control*, SWI swissinfo.ch, May 19, 2019; George Mills, *What You Need to Know About Switzerland's Crucial Gun Control Referendum*, Thelocal.ch, May 19, 2019.

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30. Commonly known as the Swiss Militiamen exemption, Article 6 of the EU Firearms Directive provides: "As regards firearms classified in point 6 of category A, Member States applying a military system based on general conscription and having in place over the last 50 years a system of transfer of military firearms to persons leaving the army after fulfilling their military duties may grant to those persons, in their capacity as a target shooter, an authorisation to keep one firearm used during the mandatory military period. The relevant public authority shall transform those firearms into semi-automatic firearms and shall periodically check that the persons using such firearms do not represent a risk to public security. The provisions set out in points (a), (b) and (c) of the first subparagraph shall apply."

31. Article 6, § 6 of the EU Firearms Directive provides an exemption for "target shooters to acquire and possess semi-automatic firearms classified in point 6 or 7 of category A." These firearms include:

> 6. Automatic firearms which have been converted into semi-automatic firearms, without prejudice to Article 7(4a).
>
> 7. Any of the following centre-fire semi-automatic firearms:
>
> (a) short firearms which allow the firing of more than 21 rounds without reloading, if:
>
> (i) a loading device with a capacity exceeding 20 rounds is part of that firearm; or
>
> (ii) a detachable loading device with a capacity exceeding 20 rounds is inserted into it;
>
> (b) long firearms which allow the firing of more than 11 rounds without reloading, if:
>
> (i) a loading device with a capacity exceeding 10 rounds is part of that firearm; or
>
> (ii) a detachable loading device with a capacity exceeding 10 rounds is inserted into it.

32. "I have one of the weapons at home, which are new to acquire with an exception. What should I do?

You can keep this weapon. If your weapon is listed in a cantonal arms register, you do not have to do anything. If this is not the case, you must notify the Cantonal Gun Bureau of possession of this weapon within three years. There are no costs for reporting to the cantonal arms office." (originally in German, translated to English by Google).

33. "As a sports shooter, you can continue to purchase such weapons. You must meet the eligibility requirements for acquisition of arms under applicable law (see question 3) and, in addition, one of the following two conditions to obtain an exemption for the weapons:

Either you are a member of a shooting club or

They prove to the competent cantonal authority that they regularly use their firearm for sporting shooting. As a rule, five sporting shooting event are necessary within five years."

According to Article 17 of the European Firearms Directive, the Directive is supposed to be reassessed every five years. This has raised concerns among some Swiss about what additional controls may be imposed in the future.

The next essay summarizes the role of the Swiss Militia Army in World War II, when Switzerland successfully deterred invasion by the Third Reich.

Stephen P. Halbrook

Remarks at the Introduction of His Book, Target Switzerland: Swiss Armed Neutrality in World War II

University Club, New York, N.Y. (July 16, 1998), and Mayflower Hotel, Washington, D.C. (July 21, 1998)

Americans have been known to confuse the Swiss flag—white cross, red background—with the Red Cross banner, which is the opposite. In World War II, Swiss fighter planes, painted with the Swiss flag, attempted to intercept all foreign planes in Swiss air space and to order them to land. An American pilot, asked whether he thought about firing on the fighters which instructed him to land, responded: "I would never fire on a Red Cross plane!"

Almost 1700 American pilots found refuge in Switzerland after their planes were damaged in bombing raids over Germany. However, the Nazis were not amused by Switzerland's armed neutrality. Hitler was livid that the Swiss used fighters bought from Germany to shoot down 11 German Luftwaffe planes; the saboteurs he sent to blow up Swiss airfields were captured (they aroused suspicion because they were all dressed in the same odd outfits!).

Over 200 years ago, America's Founding Fathers like Patrick Henry and John Adams were inspired by the example of Switzerland—a democracy in a sea of monarchial despotism. Having devoted much of my career to American constitutional law, publishing books and arguing in the Supreme Court, I was intrigued to know how the Swiss institutions which influenced our Constitution proved their worthiness in the darkest years of European history: Hitler's Third Reich, 1933-45.

In 1940, after the rest of central Europe collapsed before the German army, Swiss Commander in Chief Henri Guisan assembled his officers at the Rotli meadow near the Lake of Lucerne. He reminded them that, at this sacred spot, in the year 1291, the Swiss Confederation was born as an alliance against despotism. Guisan admonished that the Swiss would always stand up to any invader. One has only to recall the medieval battle of Morgarten, where 1,400 Swiss peasants ambushed and defeated 20,000 Austrian knights.

In World War II, the Swiss had defenses no other country had. Let's begin with the rifle in every home combined with the Alpine terrain. When the German Kaiser asked in 1912 what the quarter of a million Swiss militiamen would do if invaded by a half million German soldiers, a Swiss replied: shoot twice and go home. Switzerland also had a decentralized, direct democracy which could not be surrendered to a foreign enemy by a political élite. Some governments surrendered to Hitler without resistance based on the decision of a king or dictator; this was institutionally impossible in Switzerland. If an ordinary Swiss citizen was told that the Federal President—a relatively powerless official—had surrendered the country, the

citizen might not even know the president's name, and would have held any "surrender" order in contempt.

When Hitler came to power in 1933, the Swiss feared an invasion and began military preparations like no other European nation. On Hitler's 1938 *Anschluss* or annexation of Austria, the Swiss Parliament declared that the Swiss were prepared to defend themselves "to the last drop of their blood."

When the Fuehrer attacked Poland in 1939, Swiss General Guisan ordered the citizen army to resist any attack to the last cartridge. After Denmark and Norway fell in 1940, Guisan and the Federal Council gave the order to the populace: Aggressively attack invaders; act on your own initiative; regard any surrender broadcast or announcement as enemy propaganda; resist to the end. This was published as a message to the Swiss and a warning to the Germans; surrender was impossible, even if ordered by the government, for the prior order mandated that it be treated as an enemy lie.

When the Germany army, the Wehrmacht, attacked Belgium and Holland, it feigned preparations for attack through Switzerland. Like a giant movie set, divisions moved toward the Swiss border by day, only to sneak back again by night and repeat the ruse the next day. Both the Swiss and the French were tricked into thinking that concentrations of troops were massing to attack through Switzerland and into France. Swiss border troops nervously awaited an assault each time the clock approached the hour, for the Germans were punctual in launching attacks on the hour.

When France collapsed, detailed Nazi invasion plans with names like "Case Switzerland" and "Operation Tannenbaum" were prepared for the German General Staff. They only awaited the Fuehrer's nod.

Threatened with attack from German and Italian forces from all sides, General Guisan devised the strategy of a delaying stand at the border, and a concentration of Swiss forces in the rugged and impassable Alps. This chosen place of engagement was called the *Réduit national*, meaning a national fort within a fort. German tanks and planes, Panzers and Luftwaffe, would be ineffective there.

A fifth of the Swiss people, 850,000 out of the 4.2 million population, was under arms and mobilized. Most men were in the citizens army, and boys and old men with rifles constituted the Home Guard. Many women served in the civil defense and the anti-aircraft defense.

Nazi invasion plans for 1941 were postponed to devote all forces to Operation Barbarossa, the attack on Russia. The Swiss would have their turn in due time, Hitler said. Hitler banned the play *William Tell*. He called the Swiss "the most despicable and wretched people, mortal enemies of the new Germany." In the same breath he fumed that all Jews must be expelled from Europe. His plan to annihilate the Jews would have faced a special obstacle in Switzerland, where every Swiss Jew (like every other citizen) had a rifle in his home. In the heroic Warsaw ghetto uprising of 1943, Jews demonstrated how genocide could be resisted with only a few pistols and rifles.[34] Hitler boasted that he would liquidate "the rubbish of small nations" and would be "the Butcher of the Swiss." But the dictator was more comfortable with liquidating unarmed peoples and was dissuaded from invading Switzerland. There was no Holocaust on Swiss soil.

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34. [For more on the Warsaw ghetto, see David B. Kopel, *Armed Resistance to the Holocaust*, 19 J. on Firearms & Pub. Pol'y 144 (2007).—Eds.]

As a neutral, the Swiss represented American interests before the Axis powers, such as by inspecting German prison camps holding American POWs. When Vichy France was occupied, German soldiers with submachineguns took over the American embassy.[35] The Swiss minister, brandishing his Swiss army knife, drove them out.

A Nazi SS invasion plan, recommended for execution in 1944, warned the German general staff that the Swiss fighting spirit was high and shooting instruction good; German losses would be heavy, and a conquered Switzerland would require a strong occupation force. D-Day put the Nazi plan on hold, but new dangers threatened Switzerland as the Allies pushed the Nazis back. In 1944, the Wehrmacht's counter-offensive in the Ardennes, leading to the Battle of the Bulge, proved that the Nazi beast was still strong and full of surprises. The Swiss prepared for an attack from Germans retreating from Italy. The Swiss resolve remained high, for, as the US State Department declared, "no people in Europe are more profoundly attached to democratic principles than the Swiss."

Switzerland saved a half million refugees who came there in the war. Restrictive policies by government officials, often secret, were ignored by Swiss who helped refugees. Let it be remembered that Switzerland took in more Jewish refugees than the United States took in refugees of all kinds.

America's great journalist Walter Lippmann wrote that the Swiss proved their honor by surviving the dark days of 1940-41; they proved that diverse peoples and language groups can live peacefully together; they repudiated Nazism.[36] "It must never be forgotten," he wrote, "how the Swiss served the cause of freedom."

In the American Revolution, a Swiss leader wrote to Benjamin Franklin calling America and Switzerland the "Sister Republics." After two centuries of mutual respect, today a media frenzy falsely depicts the Swiss as Nazi collaborators.[37] It was

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35. [As part of France's surrender agreement with Nazi Germany in June 1940, two-thirds of France was put under direct German military occupation. One-third of France, in the southeast, was allowed to exist as a nominally independent and neutral state. With a capital in the town of Vichy, the new government was fascist. Its leaders were Marshall Pétain (an elderly hero of World War I) and Pierre Laval (formerly a prime minister of the former French Third Republic in the 1930s). The Vichy government retained control of the French fleet and the French colonies. In November 1942, U.S. forces, in Operation Torch, began an invasion of the neutral Vichy French colonies of Morocco, Algeria, and Tunisia. The plan was to drive the Axis powers out of Libya, which was an Italian colony. From there, they would have a base to invade southern Italy. One result of the invasion was that Germany did away with the Vichy regime, and the German army occupied all of France. German forces quickly moved into French North Africa, where they gave the Americans stiff resistance in Tunisia.—Eds.]

36. [The official languages of the Swiss are German, French, Italian, and Romansch (a descendant of Latin, but with German influence).—Eds.]

37. [Until not long ago, the Swiss banking system was designed for opacity. People from anywhere could deposit money and keep it secret from their home governments. This worked to the benefit of tax evaders, people subject to political persecution (including European Jews, and other victims of fascism or communism), and various bad actors, including German officials who stashed money in Swiss banks during the war.—Eds.]

the opposite. Nazi Propaganda Minister Goebbels called Switzerland "this stinking little state" and ranted that the Swiss press was "either bought or Jewish." The Swiss bashing seen in the *New York Times* today could use a reality check by reference to the *Times* issues of the war period—such as a 1939 issue with a map showing Switzerland as a possible invasion route, or a 1942 issue calling Switzerland an "Oasis of Democracy." Our new "Ugly Americanism" will never have the credibility of Winston Churchill, who observed near the end of the war: "Of all the neutrals Switzerland has the greatest right to distinction. . . . She has been a democratic State, standing for freedom in self-defence among her mountains, and in thought, in spite of race, largely on our side."

NOTES & QUESTIONS

1. Compare Halbrook's summary of the Swiss experience during World War II with the argument that individuals bearing their private arms could offer little resistance to tyranny against states wielding advanced military technology. Has military technology advanced so much since World War II that the Swiss lesson is no longer applicable? Does your assessment change depending on whether people are resisting an outside force or their own domestic government gone rogue? *See* Ch. 16, Concluding Exercise 3.

2. **CQ:** For the dictatorships discussed in case studies *infra*, consider, as a practical political matter, how much advanced military technology can "domestic tyrants" intent on preserving a functioning state really use against their own populations? Do private arms give citizens more protection, or do they just impose more risk that the state will use higher levels of violence?

3. Canada

Chapters 3, 4, and 6 provide some Canadian history, including how the failed American invasion during the War of 1812 strengthened Canada's sense of national identity, and its rejection of the less hierarchical system of government in the United States. The cultural differences between the United States and Canada have been reflected in the different gun laws of the two nations, with handguns being much rarer in Canada than in the United States. *See* David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? (1992). More sources on Canadian gun law past and present are listed in the Notes & Questions.

In 2012, the Canadian Parliament passed Bill C-19, which repealed Canada's federal registry of all privately owned long guns, by a vote of 159-130 in the House of Commons and 50-27 in the Senate. Handgun registration had existed since the 1930s and was not repealed; nor was the registration of certain long guns classified as "restricted." What follows is excerpted from the debate on the bill in the House of Commons. In Canada, as in the United Kingdom, "government" is often used to mean the party that currently has the majority in Parliament.

Parliament of Canada, 41st Parliament, 1st Session

Ending the Long-Gun Registry Act

Feb. 13, 2012

Hon. Diane Finley [of the Conservative Party of Canada] (for the Minister of Public Safety) moved that Bill C-19, An Act to amend the Criminal Code and the Firearms Act, be read the third time and passed.

Mr. Garry Breitkreuz (Yorkton—Melville, [Saskatchewan,] CPC [Conservative Party of Canada]):

Mr. Speaker, I am pleased and honoured to have the opportunity to begin the third reading debate on Bill C-19, ending the long-gun registry act. I thank the public safety minister and the parliamentary secretary for allowing me the honour to lead off on this debate.

The legislation before us today fulfills a long-standing commitment of our government to stand up for law-abiding Canadians while ensuring effective measures to crack down on crime and make our streets and communities safer for all Canadians. The bill before us today is quite simple. It would put an end to the need for law-abiding hunters, farmers and sports shooters to register their non-restricted hunting rifles and shotguns. It is nothing more and nothing less.

For those who are not familiar with this issue, there were two requirements to gun ownership in Canada. One was registration and the other was licensing. I am sure by now that my hon. colleagues on both sides of the House are very familiar with my position on Bill C-19. I feel that laying a piece of paper beside a firearm, which is called registration, does nothing to improve public safety.

Instead of explaining my position over again, I have decided to simply highlight testimony from several expert witnesses who appeared before the public safety committee as it studied Bill C-19 last November. There is a recurring theme in all of their remarks and the four elements of that theme are: First, the long gun registry has been a colossal waste of money; second, it has targeted law-abiding gun owners, not the criminal use of firearms; third, it has done nothing to enhance public safety; and fourth, the data is so horribly flawed that it must be destroyed.

For the rest of my remarks, I will read into the record witnesses' testimony. The first person I will quote is Mr. Greg Farrant of the Ontario Federation of Anglers and Hunters who had this to say about Bill C-19:

> A paper trail of trained, legal, licensed firearm owners does not address the real problem. Even a well-run registry, which this is not, will not prevent random violent crime. Believing in that ignores the glaring reality that the vast majority of criminals don't register firearms; and in the rare case when they do, a piece of paper and the creation of a system where possibly 50% of the firearms in Canada are not included[38] does nothing to anticipate the actions of an individual, nor do anything to prevent such actions in the first place.

38. [Due to massive noncompliance.—Eds.]

> In the case of the long-gun registry, there's a glaring absence of fact-based evidence to support its existence. Suggestions that gun crime in Canada has declined since the introduction of the long-gun registry under Bill C-68 ignores the fact that gun crime, particularly gun crime using long guns, has been on the decline in this country since the 1970s, two decades before this registry ever came into being. Crimes committed with long guns have fallen steadily since 1981. Bill C-68 was not introduced until 1985 [*sic*, 1995] and wasn't mandatory until 2005.
>
> The present system focuses all of its efforts on law-abiding firearms owners and includes no provisions for tracking prohibited offenders, who are most likely to commit gun crimes.
>
> This should be about who should not have guns rather than about who does.
>
> Another prominent argument we've already heard here today is how many times per day the system is used by police. . . . We've recently heard 14,000 and 17,000. . . . The vast majority of so-called hits on the registry have little or nothing to do with gun crime. The majority of these are cases of an officer maybe stopping a vehicle for a plate identification or an address identification, which automatically touches all databases, including the long-gun registry, despite the fact that the check has nothing to do with firearms in the first place.

The next quote I will read is from Solomon Friedman, who is a criminal defence lawyer. He stated:

> You will no doubt hear in the coming days and weeks from various interest groups about how the long-gun registry is a minor inconvenience, merely a matter of paperwork. We register our dogs, our cats, and our cars, they say. Why not register our shotguns and rifles, as well? As you know, the registration scheme for non-restricted long guns, and for prohibited and restricted firearms as well, is enacted as federal legislation under the Criminal Code and under the Firearms Act.
>
> With the criminal law power comes criminal law procedure and, most importantly, for the nearly two million law-abiding licensed gun owners in Canada, criminal law penalties. Unlike a failure to register a pet or a motor vehicle, any violation of the firearms registration scheme, even the mislaying of paperwork, carries with it the most severe consequences: a criminal charge, a potential criminal record, detention, and sometimes incarceration. This is hardly comparable to the ticket under the Provincial Offences Act or the Highway Traffic Act. . . .
>
> In addition, registry violations are often grounds for colourable attempts on the part of police, the crown, and the chief firearms officer to confiscate firearms and revoke lawfully obtained gun licences. . . . [L]ong-gun registry violations [are] used as a pretext to detain individuals, search their belongings and their homes, and secure evidence to lay additional charges.
>
> Parliament ought not to be in the business of transforming licensed, law-abiding, responsible citizens into criminals, especially not for paper crimes.

> There are millions of Canadian gun owners who will be glad to know that in the halls of Parliament Hill, hysteria and hyperbole no longer trump reason, facts, and empirical evidence.
>
> . . . [T]he registration of firearms, aside from having no discernible impact on crime or public safety, has merely alienated law-abiding firearms owners and driven a deep wedge between gun owners and law enforcement.

The next quotation is from Sergeant Murray Grismer of the Saskatoon[, Saskatchewan] police service. He said:

> . . . [T]he registry for non-restricted rifles and shotguns . . . should be abolished. Thousands of police officers across Canada, who are in my opinion the silent or silenced majority, also share this position.
>
> . . . [T]he Canadian Police Association . . . adopted their position without ever formally having polled their membership.
>
> The Saskatchewan federation is the only provincial police association that polled its entire membership on the issue of the registration of firearms. When polled, the Saskatoon Police Association was 99.46% against the registry, while our compatriots in many of the other Saskatchewan police forces were 100% in opposition to the registry.
>
> . . . [T]he registry can do nothing to prevent criminals from obtaining or using firearms. École Polytechnique, Mayerthorpe, Spiritwood and Dawson College are synonymous with tragic events involving firearms. However, the firearms registry for long guns would not, could not, and did not stop these tragic events. The retention of the firearms registry or records will do nothing to prevent any further such occurrences. . . . [E]ven Canada's strict licensing regime and firearms registry cannot prevent random acts of violence.
>
> For the officers using the registry, trusting in the inaccurate, unverified information contained therein, tragedy looms at the next door. . . . Knowing what I do about the registry, I cannot use any of the information contained in it to square with a search warrant. To do so would be a criminal act.
>
> Projections from within the Canadian Firearms Centre privately state that it will take 70 years of attrition to eliminate all of the errors in the registry and to have all of the firearms currently in Canada registered. This level of inaccuracy is unacceptable for any industry, let alone law enforcement. . . .

I would like to now quote from Linda Thom, the Canadian Olympic gold medal winning shooter, who said:

> —I'm accorded fewer legal rights than a criminal. Measures enacted by Bill C-68 allow police to enter my home at any time without a search warrant because I own registered firearms, yet the same police must have a search warrant to enter the home of a criminal. I'm not arguing that criminals should not have this right—they should. I'm arguing that this right should be restored to me and all Canadian firearms owners.

My next quotation comes from Ms. Diana Cabrera of the Canadian Shooting Sports Association. She had this to say:

> —I'm an international competitor shooter. Although I'm Canadian, I currently compete for the Uruguay national team. . . . The challenge of obtaining the public safety goals . . . are major concerns . . . the fear of confiscation, the perceived social stigma of firearm ownership and demonization, and the many costs and burdensome processes involved. . . . There is no question that the long-gun registry has deterred individuals from entering their shooting sports. . . . The main issue for competitive participants is the fear of imminent criminality. They may easily find themselves afoul of uniformed law enforcement or [Canadian Border Services Agency] officers, even if all the paperwork is in order. Any paperwork error may lead to temporary detention, missed flights, missed shooting matches, and confiscation of property. . . . Law enforcement and media coverage of firearm issues have made this situation even worse. Firearm owners are subject to spectacular press coverage in which reporters tirelessly describe small and very ordinary collections of firearms as an "arsenal". . . . Will I be targeted at a traffic checkpoint if a CPIC verification says I possess firearms?

Tony Bernardo, executive director of the Canadian Shooting Sports Association, talked about the number of firearms owners of guns in Canada. He said:

> Based upon the Canada Firearms Centre's polling figures, in 1998 there were 3.3 million firearms owners in Canada. On January 1, 2001, 40% of Canadian gun owners—over 1 million people—became instant criminals.
>
> Fewer than half the guns in Canada are actually in the registry. . . . Getting the ones that are out there to actually come into the system would be like pulling teeth. . . . To get those people to come forward now, you would have to go right back to the very basics of the act and change the very premise of the act; the first sentence says that it's a criminal offence to possess a firearm without a licence.

Mr. Garry Breitkreuz: . . .

I would like to point out to the member something that was said at committee. I have to lay this on the public record here. During the eight years from 2003 to 2010, there were 4,811 homicides, and of these, 1,408 involved firearms. The data Statistics Canada gathered revealed that only 135 of the guns were registered. In just 73 cases, fewer than 5% of all firearms homicides, was the gun registered to the accused, and some of them of course may be innocent. Only 45 of the 73 cases involved long guns, fewer than 1% of homicides. One hundred and twenty-three police have been shot and killed. Only one of these murders involved a registered long gun and it did not belong to the murderer.

We are focusing on the wrong thing. All the statistics I have heard, and the member referred to some of them, are completely irrelevant in the way they are being cited.

We really need to dig to the bottom of this. I have done that. I had to change my mind on this issue after I had dealt with it for one year. I had to do a 180 and tell

myself after I had looked at the evidence that the firearms registry is not working. I thought one could not be opposed to gun control, but many people confuse gun control with the firearms registry. It is not, and that is what we need to remember.

Ms. Françoise Boivin (Gatineau, [Québec,] NDP [New Democratic Party]): . . .

From the outset, I have been in favour of maintaining the firearms registry. In fact, I was in favour of creating it. Unfortunately, we have a tendency to quickly forget history, and that is why we keep making the same damn mistakes all the time. We are forgetting why the registry was created. The firearms registry was created under Bill C-68. I would like to give a short history lesson. I would like to tell you what really happened, since the Conservatives like to reinvent history.

This bill was introduced because, in 1989, a deranged man entered the École Polytechnique with the expressed intention of shooting the young women who were going to school there. He had mental health problems, but whatever the reasons, this crazed gunman entered the school, targeted people and killed them. We must remember this. My heart bleeds for these victims.

Yet since that time, the Conservatives have been constantly using the issue of abolishing the firearms registry to gain political advantage. They have turned it into their pet issue, as though Canada would crumble if we kept the firearms registry. . . .

The goal was for our society, our country, to have a record of who owns guns and how many they own in order to ensure that the individuals have the right to own those guns, that they are storing the weapons safely, and that they do not intend to use them for criminal purposes. Is it a threat to public safety for a society to seek that assurance? If so, what a terrible society. This is not a perfect system, but if we have to choose between scrapping it entirely and improving it, I think we would be better off improving it.

. . . You do not, however, throw the baby out with the bathwater just because the Liberals did not know how to do their job. You try to improve things.

That is what we strove to do, on our side of the House. We listened to people with completely opposing points of view. We listened to those who said that the registry must not be touched. That is what we do in the NDP: we listen to what people have to say. We do not listen only to one category of individuals in society, as the members opposite have done on this issue. We listened to the concerns of hunters, aboriginal people, first nations and police chiefs. We listened to the concerns of almost all stakeholders so that we could attempt to eliminate the irritants.

Obviously, if you are a hunter, you do not want to be labeled a criminal for forgetting to register a weapon. However, what our colleagues opposite do not admit is that the irritants have been largely removed. There are now fewer complaints because of the armistice [an amnesty allowing registration by people who had missed the original deadline] and the fact that there are incredibly generous time frames for the registration of firearms. . . .

The Conservatives are speaking on behalf of a minority of people and the National Rifle Association. There is perhaps no hard evidence that this is the case, but there is something fundamentally bizarre. As a lawyer, I know that when something factual seems to point to but one conclusion, even if not by direct association, there is a good chance that it will be fact. Given that the witnesses who appeared

before us in committee are the same people who travel around the United States advocating that every American citizen should carry a weapon in their pocket, I can put two and two together and work out what truly motivates them.

When I talk to hunters—and there are many in my neck of the woods—I ask them what is the matter with the gun registry. They have told me that, at first, it was cumbersome, and that they did not know how it worked. They do not seem to really understand how it works. They also told me that, with time, they have gotten used to it, have registered their guns and do not talk about it.

In a similar vein, I can just imagine the debate that took place when the lawmakers introduced automobile licensing. People travelled by horse and buggy, and I am sure that there was not much registration. How did we establish the registration system when we began driving cars? I am trying to imagine the debates that took place in the early days of Confederation.

That said, we do not have to get rid of something just because it irritates people. After conducting studies and having discussions with various people who were for or against the registry, we presented some very reasonable proposals to remove the irritants.

From the outset, I have tried to understand why our friends opposite have mounted such a visceral attack on the registry. Thinking of the victims does elicit great emotions in me and I do feel very sad. But I can still take Bill C-19, read it and ask myself, what complaints do our Conservative friends have? First, they say that it does not save lives. No one here can confirm this.

When I asked the question in committee, it made the government's witnesses uncomfortable. It bothered them when I asked them whether they could tell me with certainty and with evidence to back their claims, that not one life had been saved thanks to the firearms registry. Chiefs of police came to tell us that they were using the registry. People in suicide prevention came to tell us that since the registry was established, suicide rates had dropped. Generally speaking, long guns are used for suicide. A smart person can put two and two together and realize that the number of suicides with a long gun goes down when there is a registry. The problem was that no one was able to tell me that the registry had not saved at least one life. Saving a single life is certainly worth $1 million or $2 million a year. If we can save a few lives a year, then so much the better.

Whether some people like it or not, the registry is that and more. I would not base my entire argument on the fact that the registry saves lives because often, people will counter the argument by saying that the registry did not prevent a man from gunning down women at the Polytechnique. That is the type of debate we are having. No one on this side of the House is claiming that the registry is going to prevent a mentally ill person from walking around with a legally obtained gun and doing whatever he wants with it. That is one of the Conservatives' arguments. However, evidence shows that the police have used the data in the registry in their investigations in order to find out how many guns a person possesses, and so forth. . . .

Quebec wants to have the data transferred to it. How does transferring the data to Quebec hurt anyone? The province does not want to use the data to criminalize people. It has no jurisdiction when it comes to the Criminal Code. The friends of the members opposite who are hunters will not have a problem. If Quebec wants to legislate in this area and ensure that people with long guns are registered and wants to know how many weapons the registrants have, then the data will be useful.

Clause 11 of Bill C-19 includes a shocking loophole: I could own a legally obtained weapon and transfer ownership to my colleague on my right, and the only question I would be asked would be whether I had reason to believe that my colleague should not have a weapon.

Some people might contradict me on this, but honestly, I do not really get the sense that he should not have a weapon, so I transfer ownership of the weapon because I do not feel like having it anymore and I need the $300. So I give the weapon to my friend. If the Conservatives cannot see the loophole in that, then there is a problem. It is not safe.

Let us turn to the Commissioner of Firearms' report. From what I know, the commissioner is not a hysterical person or someone who is out of touch. The commissioner's report includes facts and is based on factual data collected year after year demonstrating how the registry works and how it is useful. I would encourage hon. members to read this report, because having read it, members cannot in all decency rise in this House and vote in favour of Bill C-19 because we know what steps have been taken to address all the irritants. And that is all the hunters, aboriginal peoples, first nations, gun collectors and the rest were asking us for: to have a way of registering a weapon without it being more worrisome and damaging than necessary. Everything is there, everything is permitted and registration hardly takes 15 minutes. Hold on. We may want to prevent the proliferation of weapons in circulation, but we will no longer be complying with our international treaties. . . .

In closing, there are so many things that need to be said. People write to me about this every day to share data with me. The public health authorities in Quebec are calling unanimously for the registry to be kept. This is important, and it has been proven that the registry has had an impact when [it] comes to long guns. . . .

Mr. Ryan Leef (Yukon, CPC):

Mr. Speaker, it is important that we clear up the record on one thing. It is not something the opposition has done throughout this debate, much of which I have been privy to.

I heard the hon. member say that we had heard testimony at the committee about a reduction in suicide rates. That is absolutely not the case. In fact, the expert testimony and evidence we heard at committee was that suicide rates had no correlation whatsoever with the long gun registry and had more in fact to do with the introduction of medications, the SSRIs.[39]

For the member to stand up in the House and say that the long gun registry is correlated in any way with the prevention of suicide is just wrong. However, that is consistent with all of the other messages by the opposition.

I would like my hon. colleague to reiterate the testimony she heard directly linking declining suicide rates and the long gun registry. That is not what I heard and not what other members of the public safety committee heard. . . .

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39. [Selective serotonin reuptake inhibitors—the class of drugs that includes Prozac and Zoloft and is commonly prescribed to fight depression and other disorders.—Eds.]

Ms. Françoise Boivin:

Mr. Speaker, I will cite two sources. The first one would be the people from the Association québécoise de prévention du suicide. They spoke in French, but I imagine that the hon. member was listening to the interpretation. They said very clearly that the registry had an impact. Directors of Quebec's public health said that making it more difficult to access long guns had an impact. Statistics show that long guns had been used in most suicides. The registry makes it more difficult to access long guns. . . .

Mr. Francis Scarpaleggia (Lac-Saint-Louis, [Quebec,] Liberal): . . .

The government has been very shrewd in presenting this issue in very simplistic black and white terms, namely that the problem of guns in cities is a problem of handguns and that when we talk about long guns, we are talking about rural populations who need the long guns either to protect their agricultural operations or to pursue their traditional culture of hunting, as the hon. member across the way mentioned before. However, as I mentioned in my speech on second reading, this is a false dichotomy because more and more urban dwellers are buying long guns and replicas of guns they see in movies and video games. In fact, in the metropolis of Toronto alone, not a rural region but the great metropolis of Toronto, there are 287,000 non-restricted firearms registered. To say it is just a rural versus urban issue is a false argument.

The second myth or false argument is that all of these inquiries to the gun registry, some estimated to be as high as 17,000 per day, are a function of routine or perfunctory inquiries, for example, of a driver of a car who is receiving a parking ticket. In other words, all of these queries are said to be automatic and secondary to the rather routine and mundane primary queries. However, that is not what the committee heard from Mr. Mario Harel, chief of police of the Gatineau police service and vice-president of the Canadian Association of Chiefs of Police, who told the committee:

> There is truth to the fact that a number of these are what has been referred to as "auto-queries." However these cases are rare, which we believe is an endorsement of the fact that law enforcement views this information as a valuable tool, a bit of information that, when combined with other information, assists in assessing a situation an officer may face.

The third myth or false argument is the idea that the registry has not been proven to save lives. There was a study presented to the committee by Étienne Blais, Ph.D., and Marie-Pier Gagné, M.Sc., and Isabelle Linteau showing that the registry does save lives. Let us put that aside for a moment, because we can get into a battle of studies and the hon. member for Yukon will bring up Dr. Gary Mauser's study and others. We can get into these battles between studies, but let us look at this from a logical, practical or common sense point of view. I know the party opposite likes to focus on practical, common sense arguments.

It is very hard to prove that the registry saves a life. Theoretically, it makes sense. Practically, it is very hard to prove. For example, it is impossible to prove that I made it to Ottawa via the highway today and remained alive because of the 100 kilometre an hour speed limit, which, by the way, I respect. It is very hard to prove that is why I am here speaking to the House today. In fact, there will be no headline tomorrow saying that the life of the member for Lac-Saint-Louis was saved

because of the 100 kilometre per hour speed limit. I will not be a statistic, but we know that this speed limit saves lives. It is something that makes sense and it is very hard to prove that someone is alive because of either this speed limit or the registry.

A fourth myth or false argument is the idea that people are still killed with long guns even though we have a registry. I would stress that there is no policy instrument that can fully prevent that which it aims to prevent. It can only control that which is socially undesirable.

This is what I would call an ironclad law of public policy. Public policy is almost always based on the findings and recommendations of social science which itself by definition comes with associated margins of error.

I can boldly predict based on this ironclad law of public policy that dog bites will continue into the foreseeable future even by dogs that have been registered with city hall. I can put my money on that. I will also predict that car theft will continue into the future even though cars are registered with the province.

Unfortunately, it is clear to all of us that gun crimes will not disappear even should the registry by some miracle survive. There will be, unfortunately, future gun crimes, some of which will be quite heinous. It is unfortunate and this will happen even if the registry were to survive.

It is interesting that members opposite will say that registering guns just does not work because criminals do not register guns. I can see that point. Criminals do not register their guns. Therefore, that means criminals do not register their handguns. The only people registering handguns would be law-abiding citizens, as the members across the way like to invoke. As I said in my speech at second reading, the people in my riding [district for electing members of a legislature] who are gun owners are sterling citizens. They are the most active volunteers, conscientious and responsible, but that is not the point.

The point I am trying to make with respect to the handgun registry is that if the Conservatives were logical, they would say that registries do not work because criminals do not register firearms; therefore, they are getting rid of the long gun registry and they are getting rid of the handgun registry. Thankfully, they are not getting rid of the handgun registry. That points out the fundamental contradiction in their thinking on gun control.

The fifth myth or false argument is that the registry is wasteful and useless. I have heard that many times. We hear that from the Minister of Public Safety on a continual basis. We have evidence from the police, including the [Royal Canadian Mounted Police (RCMP)]. If the government does not buy the RCMP's evidence, then there is a problem between the government and the RCMP. There is a lack of faith in the RCMP by the government. There is concrete evidence that the registry helps with police investigations.

I will quote Mr. Mario Harel, the chief of the Gatineau police service and vice-president of the Canadian Association of Chiefs of Police, who said that the elimination of the gun registry will add significant costs to their investigations, costs which will be downloaded to police services and lead to crucial delays in gaining investigative information.

The word "downloading" seems to come up a lot with the government. It downloads costs of the prison agenda and all kinds of other things to the provinces. Here is an example where again the government will be downloading costs, in this case to provincial and municipal police forces.

One does not have to take Mr. Harel's word for it. One just has to listen to what Matt Torigian, the chief of Waterloo Regional Police, has said about the long gun registry's usefulness in police investigations. He has given a couple of concrete examples. One is real and the other is more hypothetical, but based on typical cases that the police are involved with. He said:

> We came across a crime scene recently with a man who was obviously deceased by gunshot and a long gun was at the scene. Because of the registry, we were able to trace the weapon to the person who had just sold it to the man who was deceased. We determined it was a suicide and the investigation stopped there.
>
> We know from this example that if there had been no registry the police would have thought that maybe it was a crime and would have had to open up an investigation. Many hours of valuable police time would have been wasted looking for a perpetrator of a crime that was really a suicide.

Another example given by Chief Torigian is more hypothetical but no doubt commonplace. Say a group of thieves break into a farmhouse near Montreal and steal a shotgun. They saw it off to conceal it better under their clothes. They drive to Windsor, Ontario, where in the course of committing a bank robbery they drop the gun and flee the scene. Because of the registry, the police find out that the gun is owned by a Montreal man, a victim of theft. This might give the force a lot more leads to go on. For example, there might be witnesses to the break-in in Montreal. The registry would thus allow coordination of efforts between police departments in order to efficiently resolve the case and move on to something else.

There is more anecdotal evidence. The following example is from the 2010 RCMP firearms report, the one that was ready a while back but was only released on January 19 after the committee had finished its hearings on the bill:

> A large municipal police force contacted CFP NWEST for assistance in recovering obliterated serial numbers on two firearms seized in a robbery and kidnapping investigation. After the serial number of one of the guns was restored, NWEST used the CFP's Registry database to determine that the gun was registered to one of the suspects and had not been reported lost or stolen.

In another example the registry helped police link a grandfather's gun to his grandson who had perpetrated a gun crime. Again, I quote from the RCMP report:

> CFP NWEST was asked to assist in a shooting investigation. They confirmed, through the Canadian Firearms Information System, the firearm was one of seven registered to the same individual, and it had not been reported lost, missing or stolen.
>
> RCMP investigators met with the registered owner who was able to account for only four of his seven firearms. The subject was interviewed in order to establish a possible link between him and the shooting suspects.
>
> As a result of the interview, the owner's grandson was identified as one of the accused in the shooting, and all seven firearms were accounted for in the follow-up interview of the accused. Numerous firearms-related charges were laid in relation to this incident.

> The police caught the grandson. If the police had not caught the grandson by using the registry, the grandson might still be wandering around with a gun. Who knows what might have happened.

This is another point I would like to make about those who want to dismantle the registry. They will not admit to possibilities, and this is a fundamental error when it comes to social science. It is all about probabilities and possibilities.

Dr. Gary Mauser made a fine presentation at committee. It was quite rigorous and he was a very agreeable witness. This is not an attack on Dr. Mauser. After I gave him some examples of how it was plausible the registry might have saved lives, I asked him, in his opinion, in the 10 years the registry has existed is it not possible that one life may have been saved. I was not even asking Dr. Mauser was one life saved; I was asking him if it is not possible in this universe of probabilities that one life may have been saved. His answer was a categorical, "It's impossible."

This is what we are dealing with. We are not dealing with open-minded thinking on this issue. We are dealing with categorical statements that actually are nonsensical when we really think about it. Ending the registry would be a mistake.

The Liberal Party in the last election campaign was quite cognizant of the fact that some legitimate law-abiding firearms owners feel criminalized by the system, that first-time failure to register not be a criminal offence, thereby compromising with one of the points the government is making. There was some movement on the issue. It would have solved the problem and it could have kept the registry. People would not have felt criminalized and Canada would be safer.

Mr. Ryan Leef (Yukon, CPC):

Mr. Speaker, I have spoken to this bill a number of times. I would say to my hon. colleague that I certainly have never separated rural and urban Canadians' concerns around the long gun registry nor rural and urban Canadians' use of long guns. In fact, we are well aware that both rural and urban Canadians utilize long guns.

A good portion of what the member is saying makes sense, but I will tell him what the people in my riding and I have a hard time with. We never hear concerns that this legislation that has been brought in has criminalized Canadians. It is not for want or need of registering these long guns. A lot of times it boils down to errors made in the system which cause registrants, law-abiding Canadian citizens, to be not necessarily targeted but subjected to these crazy search and seizure provisions and criminal sanctions because of it. We are making Canadians into criminals because of paper errors. Nobody thinks that is an effective use of government legislation, Canadian taxpayer dollars, or police resources and time. . . .

Mr. Dan Albas (Okanagan–Coquihalla, [British Columbia,] CPC): . . .

I believe it is important to share with the House the frustration that I hear from the rural residents in my riding. They are law-abiding citizens and they are taxpayers, and yet they are forced to comply with a system created out of Ottawa that does nothing but inconvenience the lifestyle they work hard to enjoy.

Everyone in the House knows that criminals do not register their guns. It is often a repeated point in this debate but it is the truth. However, more important, we need to recognize that there are times when a registered gun is used to take a life. Recently, in my riding, a family lost a loved one as a result of domestic violence.

Did the registered gun stop the alleged murderer from pulling the trigger? Sadly, it did not. For those people in society who are capable of taking a life, the fact that a gun may or may not be registered means nothing to them. The simple fact of the matter is that the long gun registry has not stopped crime, nor is it saving lives.

I have also listened to the opposition arguments in favour of the long gun registry. The opposition suggests that its greatest contribution is that it provides law enforcement with a record of where guns are, and not just where they are but what kinds of guns they are.

Those who followed the committee hearings for Bill C-391 last year will know that members heard testimony from numerous respected and experienced police officers. Those experienced officers told us that the information provided by the long gun registry was not reliable. I have met with many front-line officers who have made it very clear that they cannot rely on the registry to confirm if a gun may or may not be at that address. In fact, if officers were to rely solely on the long gun registry, they would be putting their life and the life of their colleagues at risk.

We also know that there are long guns that have never been registered and those that have not been registered properly, and situations where model numbers or catalogue numbers were used instead of serial numbers.

The long gun registry has been in place for over a decade. What are the results? The registry has not stopped crime, nor has it saved lives. Millions of dollars were spent on the registry and what are the results for the taxpayers? We have a database that front-line officers tell us that they cannot depend on. . . .

One of the challenges that many communities in my region are facing is an overpopulation of deer. On the surface it may not seem like a problem, however, deer destroy small gardens and can be aggressive to small animals and even adults. They also present a real danger to motorists. The reality is that fewer people are hunting these days, in part because of the burden and costs of dealing with issues like the long gun registry. In my riding, many residents have told me that they feel the quality of life in rural Canada is threatened. That is why I believe it is important we take action on their issue. . . .

I am proud to say that our government is now investing $7 million a year to make the screening process for people applying for a firearm's licence stronger. Bill C-19 would not change any of those requirements. In fact, no one would be able to buy a firearm of any kind without passing the Canadian firearms safety course, the background check and without having a proper licence.

I support the bill because it would eliminate a law that places an unnecessary burden on law-abiding Canadians. The bill would also free up resources that could be better spent on anti-crime initiatives to help make our streets safer.

We need to be honest with ourselves about the real gun problem in Canada. It is not just the legally acquired shotguns and rifles in the hands of our farmers and hunters that is the problem. While we continue to penalize them, it may seem like a solution to some members opposite, but doing so does not stop crime. A failed registry and a flawed database is not an answer.

Between 2005 and 2009, police in Canada recovered 253 firearms that had been used in the commission of a homicide. Some of those guns were registered, most were not. However, we need recognize that the registry failed 253 times to prevent crime, much as it failed in my riding last year. As a result, I cannot support a process that requires law-abiding, tax paying citizens to continue to dump money into a system that offers no tangible results. . . .

Mr. Dean Del Mastro (Parliamentary Secretary to the Prime Minister and to the Minister of Intergovernmental Affairs, CPC): . . .

I have had a number of constituents in my riding office over the last number of years who have come in, World War II veterans, for example, who have had their firearms confiscated for no reason other than forgetting to renew their registration. They had been registered. I have seen these people come into my office absolutely stricken, feeling that they were treated like criminals by a registry that was created by the former Liberal government.

Has the member heard of any of these people coming in, talking about how they were treated by officials who subjected them to these laws? . . .

Mr. Bob Zimmer (Prince George–Peace River, [British Columbia,] CPC): . . .

The long gun registry has been expensive. This is an indisputable fact. The [Canadian Broadcasting Corporation], not known for its Conservative bias, has estimated a total cost of over $2 billion over the 17 years of the registry. Let me remind members that the former Liberal justice minister, Allan Rock promised it would not cost a cent more than $2 million. That is a hefty price to pay for an inferior product, as we can all agree. The $2 billion could have gone a long way in other safety initiatives, including preventive action or rehabilitative programs.

Across this country, Canadians are working hard to provide for their families. They do not throw money away on items or services that are not beneficial or practical for them or for their families. It is time that we follow their lead and do away with the needless spending on the registry.

The long gun registry does a fine job of collecting the names of those using their long guns for sport and protecting their livestock. It does an awful job at stopping illegal activity, using guns that were never legally purchased or registered in the first place. That is because the people listed in the registry are individuals who have acquired and wish to use their long guns in legal ways.

They have followed their government's requirements. They comply because they wish to abide by the law. These people are not the ones committing gun crimes in Canada. This is the key reason that the long gun registry is an ineffective piece of legislation.

This is not a surprise to me, yet I suspect it will come as one to the opposition. Most criminal activity naturally operates outside of the law, hence its criminality. Guns used in crime are generally not legally purchased or registered. More often than not, they have been brought into Canada for criminal use and for that reason are never registered. This renders the registry useless in both tracking down criminals and protecting Canadians from harm. . . .

We are looking forward to the day that law-abiding Canadians can relax and know that their information has been completely destroyed. That is why Bill C-19 also includes a provision to destroy all data collected by the registry in the last 17 years. This aspect is extremely important, as it is necessary to protect innocent citizens from ever being targeted by their government again.

Canadians gave their support for the abolition of the registry last May. Our government stands by our promise to remove it from the federal level forever. . . .

Mr. Bob Zimmer:

Mr. Speaker, the hon. member across the way brought up one of the most misunderstood facts about the registry. She brought up questions about licensing.

That is one thing this government would not change. It would be just as hard to purchase a weapon now as it has been in the past. That all has to do with licensing of firearms as opposed to the registration of law-abiding farmers and gun owners. It is an apples and oranges argument. We would not change licensing, it would be just as difficult as it was before. We would continue to provide safety for Canadians. . . .

NOTES & QUESTIONS

1. *Non-restricted, restricted, and prohibited firearms.* Bill C-19 only repealed the federal registration requirements that applied to "*non-restricted*" firearms, such as most traditional rifles and shotguns. Prior law had divided guns into three categories:

- *Non-restricted* firearms. This includes rifles and shotguns that are not restricted or prohibited.
- *Restricted* firearms. This includes handguns that have a barrel longer than 105 mm (about 4.1") in length and a caliber other than .25 or .32. It also includes long guns that can be folded or telescoped down to less than 660 mm (about 26") in length. All AR-15 pattern semi-automatic rifles are designated as restricted firearms by federal regulation. Restricted firearms may be lawfully owned with a special permit, but are subject to stricter regulations on transportation, storage, and use than non-restricted firearms.
- *Prohibited* firearms. This includes all handguns in .25 or .32 caliber or with barrels of 105 mm or less (except for certain Olympic target pistols).

In addition, semi-automatic rifle magazines are limited to five-round capacity and handguns are generally limited to ten-round magazines. Notwithstanding the repeal of the long gun registry, Canadian law still requires all gun owners to obtain a gun-owner's license.

2. What are the implications of a public domestic gun registry? What are the positives or negatives of mandating private citizens disclose their ownership of firearms? Is a gun registry a necessary first step toward gun confiscation? If you were a Canadian MP or Senator, and your party allowed you to vote your conscience on the registration repeal, how would you have voted? Why? If you thought that the pro/con arguments were about equal, would you have voted in accord with the majority view in your riding (district)?

3. *Quebec.* Opposition to the effort to repeal the long gun registry was centered in the province of Quebec. After the passage of the repeal, Quebec unsuccessfully sued to prevent the destruction of the registry data for Quebec gun owners' long guns. Quebec stated that it wanted to maintain its own, provincial registry. The Canadian Supreme Court ruled 5-4 that Quebec could not block the federal government in Ottawa from destroying federal registration records for Quebecois. *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693.

After the Supreme Court decision, the Quebec provincial legislature voted to create a long gun registry to be maintained by the provincial government. Critics of the registry sued, arguing that a provincial registry is preempted by federal law. The trial court dismissed the challenge, *Association canadienne pour les armes à feu c.*

Procureure générale du Québec, 2017 QCCS 4690 (CanLII), and the appellate court affirmed, *Association canadienne pour les armes à feu c. Procureure générale du Québec*, 2018 QCCA 179 (CanLII). The defunct federal registry had included 1.6 million long guns from Quebec; nine months after the registration deadline, the number of firearms registered in Quebec was slightly over half the total of those that had been federally registered. *See De Plus en Plus d'Armes Enregistrées*, Le Quotidien, Oct. 12, 2019 (post-deadline registrations); *Deadline has Passed, but 75% of Quebec's Long Guns Aren't Registered*, Presse Canadienne, Jan. 31, 2019.

Quebec, a majority French-speaking province with a cultural and legal tradition distinct from the rest of English Canada, has long maintained its right to govern itself. As such, Quebec legislators have often passed laws that come into conflict with the Canadian Charter of Rights of Freedoms (e.g., banning religious symbols for public-sector employees, restricting English-language advertisements, and imposing speech codes).

4. If you were a strategist for Canada's Liberal Party, which enacted the gun registration law, how much political capital would you have spent in trying to defend the law? As things turned out, long gun registration helped cost the Liberals control of government in the 2006 election, partly because of a scandal involving the discovery that millions of dollars in government funds that were given to an advertising agency to encourage gun owners to comply with the registration law were instead diverted into a slush fund for Liberal politicians. Out of power, the Liberals continued to defend registration, and lost the 2008 federal election and then the 2011 federal election. The 2011 election gave the Conservative Party a majority (rather than just a plurality) in Canada's multi-party Parliament, thus enabling the repeal of registration in 2012.

According to Bill Clinton, in 1996, New Jersey Governor James Florio lost his 1993 re-election bid because of Florio's defense of the state's ban on "assault weapons," and Clinton declared his own willingness to lose reelection in 1996 over the federal ban. *Prez Hits the Road Assails GOP as He Launches Re-election Bid*, (N.Y.) Newsday, June 23, 1995 ("Jim Florio gave his governorship for it. If I have to give the White House for it, I'll do it."). If you were an elected official, what gun control or gun rights measures would you defend at the cost of your own reelection?

5. In 2013, the town of High River in Alberta, Canada, experienced significant flooding following torrential downpours. In response, the Royal Canadian Mounted Police (RCMP) conducted door-to-door searches, checking for stranded people and animals as well as gas leaks and biohazards. However, it was later discovered by High River residents that the RCMP had improperly seized over 600 legally owned firearms from over 100 homes. *See Gun Grab in High River Was a Serious RCMP Failure*, National Post, Feb. 13, 2015. The civilian review commission for the RCMP sternly criticized the seizures. *See* Civilian Review and Complaints Commission for the RCMP, Chair-Initiated Complaint and Public Interest Investigation into the RCMP's Response to the 2013 Flood in High River, Alberta (2016). Eventually, the Canadian federal government paid $2.3 million in reparations to High River residents. Interestingly, though gun registry records were destroyed following the repeal of the long gun registry in 2012, it is realized that the RCMP used copies of registry records to make these seizures. *See* Lorne Gunter, *The Gun*

Registry's Legacy — Creating Needless Paperwork Criminals, Toronto Sun, Sept. 16, 2016. The Alberta provincial government has ordered an inquiry. Bill Kaufman, *RCMP Forced Home Entries in Flooded High River to Be Subject of Inquiry*, Calgary Herald, Oct. 17, 2019.

6. Along with repealing the registry, Bill C-19 included transitional provision 29: "The Commissioner of Firearms shall ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control." In accordance with this provision, the RCMP were instructed to complete all existing informational requests and then destroy the documents immediately in all regions (with the exception of Quebec, which did not have its documents destroyed until 2015 on account of the Supreme Court challenge). *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 (2015), 1 S.C.R. 693. Despite the assurances made to the public and to other government officials, however, questions still loom around the supposed destruction of the registry lists. A report by the Office of the Privacy Commissioner of Canada published in 2015 investigated one particular claim, and was unable to find conclusive evidence that the RCMP had retained access to the registry. In May 2021, these claims resurfaced again, as new evidence was discovered that showed the RCMP referencing data that could only have been obtained from the (supposedly destroyed) registry. Brian Lilley, *Evidence Shows Mounties Kept a Copy of the Gun Registry*, Toronto Sun, May 2, 2021.

7. In 2020, Justin Trudeau's government passed Bill C-21, which explicitly prohibits so-called assault-style weapons (Registration, Can. Gaz. SOR/2020-96 (May 1, 2020) (implementing regulations). Because assault-style weapons are not a category of firearm, the regulations outlaw specific firearm platforms, such as the AR-10 and AR-15. Also banned are "Firearms with a bore 20mm or greater" [.787 inches], and "Firearms capable of discharging a projectile with a muzzle energy greater than 10,000 Joules." The term "bore" refers to the inside of the barrel of the gun. These regulations initially sparked outrage among Canadian shotgun owners, who felt that the regulation would incorrectly encompass a wide variety of hunting shotguns. Many shotguns can be fitted with a choke at the front of their barrel that restricts the spread of fired projectiles. To accommodate such additions, the end of the barrel is flared and threaded — making it larger than the 20mm restricted by C-21. This, however, was refuted by the RCMP. They measure the bore from farther down on the barrel to avoid unintentional shotgun inclusion.

To enforce their ban, the government had planned to introduce a compensated surrender program (euphemistically called a "buyback," although the government had never owned the guns). As of August 2021, the surrender program has not been implemented. C-21 outlines provisions for lawful continued ownership of prohibited firearms, "subject to strict conditions including no permitted use, no import, no further acquisition, no sale and no bequeathal." Additionally, persons wishing to keep their weapons must also register them and complete the Canadian Restricted Firearm Safety Course. The RCMP recommends that individuals have their firearms professionally "deactivated," if desired, or presents the option of exporting them if the proper licenses are obtained.

8. For more on Canadian firearms laws, see R. Blake Brown, Arming and Disarming: A History of Gun Control in Canada (2012) (the first comprehensive

history of gun rights and gun control in Canada); Caillin Langmann, *Canadian Firearms Legislation and Effects on Homicide 1974 to 2008*, 27 J. Interpersonal Violence 2303 (2012) (several different time-series analyses find no beneficial impact on homicide or spousal homicide from any Canadian gun control laws enacted in 1977 or later; homicide rates were associated with factors such as unemployment, percentage of population in low-income brackets, police officers per capita, and incarceration rates). Canada's main firearms law is the Firearms Act, as amended. The website Firearms Law Canada, maintained by a Canadian attorney, is a good starting point for information about statutes and regulations. Professor Wendy Cukier is Canada's leading scholarly advocate of gun control, and Professor Gary Mauser is Canada's leading scholarly skeptic. Activist groups include the Canadian Coalition for Firearm Rights and the National Firearms Association.

4. Mexico

The text of the Mexican constitutional right to arms appears in Section A.1.a. As the excerpt below explains, the Mexican federal gun control has mostly nullified the constitutional rights.

Ernesto Villanueva & Karla Valenzuela

Security, Firearms and Transparency: Myths and Reality of the Right to Own and Bear Firearms in Mexico

2012

First: The starting point that must remain clear is that the People's prerogative of owning and possessing firearms for their self-defense and security is a fundamental human right foreseen in the 10th article of the current Constitution and has been part of the text of our Supreme Law since its 1857 predecessor. It did not appear as an addition or constitutional reform by what is denominated the Power of Constitutional Reform or the Permanent Constituent; rather, it has been part of the initial text of both constitutions, so there is no doubt about the will of the Constitutional Power (i.e., the original, sovereign political will that is not subject to a prior Constitution). This translates into a group of fundamental legal norms that give life to the Mexican State, both in its liberal 19th century version and in its 20th century social-liberal form or its dogmatic or teleological intentions (i.e., the ends or purposes it seeks) from the Constitution to the present day.

This right has not been imposed, but self-legislated by the Constitutional Power's own will. . . .

At the Constituent Congress of 1856-1857, after deliberations for and against the right to own and possess firearms, the proposal was approved with 67 votes in favor and 21 against in its first part and 50 votes in favor and 21 against in its second part. During the debates of the Constituent Congress of 1916-1917, the proposed Article 10 presented by the Chief of the Constitutionalist Army, Venustiano Carranza, by way of General Francisco J. Mujica was approved unanimously and without discussion. . . .

Second: The right to own and carry firearms has become perceived in a negative way possibly because of the convenience this represents to the Mexican political regime, and the conceptions it has of political stability and the freedoms of the governed.

. . . We must also dismantle the encompassing social stigma using information that will allow us to confront each of the supposed "dangers" the exercise of this constitutional right would allegedly bring. It is important to point out that these claims are not the result of empirical investigations into the subject-matter to substantiate at least a majority of these contentions/perceptions. At least, none based on data available to the public.

The process of progressive debilitation affecting the ability of the institutions charged with providing security and procuring justice to fulfill their constitutionally and legally-mandated duties has brought about a redefinition of different concepts and values within Mexican society. It is necessary to determine the proper scope and limits of the right to own and carry firearms. . . .

Day by day, not only is the number of public spaces which assure citizens the fundamental right to freedom of transit and the most-fundamental right to life increasingly constricted, but so too is the number of those private spaces that in principle demand even greater protection.

It is not, however, through the restriction of the fundamental rights of the People that public security and social confidence in our public institutions may be restored. To the contrary, an opportunity presents itself to make effective the fundamental rights consecrated in the Constitution, including, of course, the right provided by the Article 10, by reforming the secondary legislations to potentiate its normative efficacy in order to guard the legal values it protects: life and property. The right to own and carry arms is not, in principle, an end unto itself; it is a prerogative that enables the governed to defend against any potential action that places them in real, immediate or imminent danger. The underlying principle is self-evident: It is preferable to have a firearm and never need it, than it is to need a firearm and not have one. In any case, as indicated by its very name, it is the People's right, their prerogative; it is not their obligation.

Third: To enforce the right to own and carry firearms, there must be a series of reforms to the current legislation and, in particular but not exclusively, to the Federal Firearms and Explosives Law (LFAFE). . . .

. . . The following is a list of some, but not all, of the ways the secondary law goes against the nucleus of the fundamental right in question:

(a) It restricts the possibilities of gun ownership and possession to a series of firearms whose calibers and characteristic, in most cases, lack the capacity and potency to effectively stop an aggressor;

(b) It stems from the absurd supposition that the citizenship is schooled and trained in the correct use of firearms. As is well known, practically no one, save the people who are or once were part of one of the many different security forces, and the people who utilize firearms for hunting or sport, and alleged criminals, has any sort of instruction on the use of firearms. This possibility does exist in the comparative experience of other

countries however. This fact, paradoxically, makes the regulatory law an obstacle for the citizenship to own and carry firearms for their defense and security;

(c) It limits the task of firearms control to the military authorities, revealing lingering notes of authoritarianism that is not present in other contemporary democracies, where these chores have been assigned to the civilian authorities, as is the case in, say, the United States.

(d) It establishes a wide margin for bureaucratic discretion in the issuance of the various permits for the ownership and possession of firearms, in addition to creating a greater waiting period and more requirements than is perceived in the compared experience with other countries. This also represents an obstacle for the adequate exercise of the fundamental right enshrined in the 10th article of the Constitution.

(e) It creates a monopoly favoring the military authorities regarding the production and sale of firearms. These measures limit the possibilities and potential of the public to lawfully participate in this activity without providing society any legal argumentation or justification as to how they honor the right established by Article 10 of the Constitution. This is part of the legacy of authoritarianism in our country and runs contrary to international best practices; and

(f) The concept of "home" established by the Law is restrictive. . . . The penumbra of the concept does not allow us to determine if certain places such as commercial establishments or other places where the right to self-protection and self-defense may be exercised.

Fourth: One should remember that fundamental rights lack entity if they do not have normative guarantees allowing them to be exercised. . . . Such is the case with the Federal Firearms Law which, instead of protecting the rights granted by Article 10, in fact restricts them by overextending the legal powers of the secondary law by altering and modifying the sense of the law it was meant to regulate.

Fifth: In the passing of years, particularly recent years, one can perceive how the area dominated by the Rule of Law has been reduced, allowing for greater prevalence of ever-widening islands of insecurity, corruption and impunity throughout the national territory. There are fact-based analyses supporting this observation.

. . . Worse still, the recent assassinations of public servants, candidates to public office and well-known political leaders have brought to light a disquieting question: How can the Mexican State defend the security of its citizens, when it cannot defend the physical integrity of a growing number of men and women charged with enforcing the Law? It is not our position that allowing the population to exercise their right to own and carry firearms is "the" solution to the violence and generalized insecurity throughout the country. It is, however, part of a long list of pending tasks that will be necessary for the people on foot, almost the totality of the population, to be able to carry an instrument for their self-defense in the framework of the Constitution. It would be futile to recount all of the human rights, from the first to the most recent generation, if the most basic requirements for their exercise are not met: the existence of physical and spiritual life. Without a human life

to enjoy them, all rights become moot. It is improbable that the immobility of the community and the government's bet on silently waiting will be enough to recover the tranquility we have lost. . . . The expansive exercise of the right to own and carry arms must be accompanied by a process of evaluation and reformation of the educative system. Education is a vehicle for transmitting the consciousness that give people the cognitive elements allowing them to exercise the sociological notion of citizenship. The right to own and carry firearms in terms of what the regulatory law has developed is inversely proportional to its due exercise. In effect, the Mexican intellectual and technical diet regarding the use of firearms has historically been found lacking, nurtured instead by moral judgments, and deprived of the elements present in relative international best practices.

Sixth: The recovery of the normative effectuality pertaining to this right on behalf of the People implies a substantial reform or perhaps even the abrogation of the current LFAFE and the implementation of a new legal framework, derived from the best practices concluded from past experience.

. . . Among the many changes required we can include those relative to civic education. . . .

Today, the references available to society are not sympathetic to elements drawn from empirical research . . . ; elementary and middle school textbooks do not cover this fundamental right; and the vacuums of information that should be filled by the right to knowledge granted by Article 6 of the Constitution, are substituted with discourse and news media imagery that perpetuate the myths and prejudices surrounding firearms. Paradoxically, this only serves to generate a vicious circle of social disinformation.

It would be redundant to say that personal responsibility is not out of the scope of civic education. . . . In other words, formal and informal educational programs must emphasize the use of firearms in a manner that is rational, responsible, limited and focused on self-defense and personal security.

Seventh: Simultaneously, a future regulatory law must take into account, at least, the following considerations:

(a) The subordination of the authorization of permits for the ownership and possession of firearms to the successful completion of technical instruction courses on the use of firearms, for their ideal use in personal security and self-defense situations. Today, existing firearms-related courses, certifications and technical studies are available only to law enforcement agents, leaving the civilian population in a state of defenselessness. It is evident that the lack of instruction in this matter could potentially facilitate the fundamental right in question becoming a danger to society instead of a complementary tool for the action of the State, within the bounds of the Constitution. For this reason, police academies, military command zones and especially private firearms-instruction centers should provide the widest array of instruction courses on the subject. The presence of private firearms-instruction centers throughout the country should be encouraged, but their self-defense curricula should be subject to previously established, objective criteria.

(b) The establishment of clear criteria regarding the authorization of weapons-carry permits that allow for a reasonable degree of predictability, something which today does not exist.

(c) The creation of mechanisms to dissuade people from carrying firearms in public without the proper license, in order to incentivize the registration of the greatest possible number of firearms. This will allow for a degree of control that will disincentive people from participating in the black market, which today fills the void caused by the restrictions in the current legislation.
(d) Indicating, in a restrictive manner, the firearms destined for the exclusive use of the Armed Forces, so that citizens may have access to firearms with an adequate capacity for safeguarding their lives, physical integrity and their property. In other words, doing the exact opposite of what the legislation dictates today.
(e) The monopoly on the sale and fabrication of firearms on behalf of the SEDENA [the national army] should be eliminated, allowing the participation of the private sector in this quadrant of the economy, subject, of course, to supervision by the competent authorities. This decision would not only expand supply, but also reduce the costs of acquiring a firearm while fighting illegal arms traffic (by establishing tariffs for the importation of firearms by private persons, with the restriction that they obtain a letter of naturalization in customs practices through the so-called tax-exempt franchises) and creating employment opportunities in the industry, as comparative experience has demonstrated.
(f) The specific and personal information contained in firearms registrations should be kept confidential, under the premise that knowledge of the names of gun owners and the type of firearm registered would eliminate the elements of surprise and preventive dissuasion that are coupled with the ownership and possession of firearms.
(g) Mechanisms guaranteeing transparency must be put into place throughout the entire process to allow the community to follow and verify the emergence of this legal institution in Mexican society.
(h) All indirect measures designed to constrain gun rights (such as high permit costs, prolonged waiting periods, among others) should be eliminated.

Eighth: It is no secret that the Mexican state is currently going through a period of weakness or the Rule of Law is fragile in ample segments of the country. A simplistic pseudo-solution in this context would be to wait for a better moment to give life to our civil rights, which include the human right to the possession and ownership of firearms.

This stance, which may appear attractive in its simplicity, does bring with it certain risks, not just to the spread and survival of democracy, but to the permanence of a national identity and the survival of common citizens, particularly the vast majority of the population who does not have access to bodyguards and protection details, to privileged and guarded areas for recreation and socialization, to securely guarded schools and neighborhoods; in sum, all of the things that help to make life more livable.

There are no rational reasons to allow the weakening of society's efforts to restore the physical and psychological security that has been lost, opting to merely hope that a miracle (and it would certainly be a miracle), or transient administrative measures such as constantly replacing public servants, will restore them on their own.

The citizens of Mexico can wait for someone or something to provide them with reforms that would, in the long term, allow these times to be looked back upon as a dark but transient time in our nation's history; or they can seize this historic moment and use the current institutional crisis as an opportunity to initiate a normative reformation and a process of change in the various pernicious social and cultural practices that plague us today, without leaving aside this human right that would serve, at the very least, to halt the increasing areas of insecurity, particularly for those in society who are the least fortunate. The once untouched areas of comfort held by middle income sectors have not been immune to erosion or intrusion in these last few years. This alone justifies that deciding to look the other way is no longer an option.

NOTES & QUESTIONS

1. For the current text of Mexico's constitutional right to arms, see Section A.1. For the text of Mexico's national gun control statute, and for prior versions of the constitutional guarantee, see David B. Kopel, *Mexico's Gun Control Laws: A Model for the United States?*, 18 Tex. Rev. L. & Pol. 27 (2014). The article also provides data about gun ownership in Mexico, the practical operation of Mexican gun laws, and current controversies, such as the smuggling of U.S. guns into Mexico.

2. Villanueva and Valenzuela argue that violent crime is destroying the fabric of life in Mexico, and that the Mexican gun control statute should be changed so that Mexican citizens can purchase, possess, and carry effective arms for self-defense, and receive training in doing so. If you were a member of the Mexican Senate or the Chamber of Deputies, which, if any, of Villanueva's and Valenzuela's specific proposals would you vote for?

3. *Citizen militias.* With the government unable or unwilling to protect the public, Mexican citizens in some areas have formed community defense militias. The government has sometimes cooperated with these militias, and sometimes attempted to disarm them. *See* Carlos Alonso Reynoso, Movimientos Recientes de Autodefensas y Policías Comunitarias en México (2018); Raúl Ornelas & Sandy E. Ramírez Gutiérrez, *Los Grupos de Autodefensa en Michoacán*, 4 De Raíz Diversa 249 (no. 7, Jan. 2017); Dudly Althaus & Steven Dudley, *Mexico's Security Dilemma: Michoacán's Militias: The Rise of Vigilantism in Mexico and Its Implications Going Forward* (Wilson Center, Working Paper, 2014).

4. *Fast and Furious.* In early 2009, the ATF regional office in Arizona organized a plan to coerce licensed firearms dealers to allow firearms sales to buyers who were obviously straw purchasers. The buyers were supplying arms to Mexican drug gangs, principally the Sinaloa Cartel. ATF told the gun stores that the buyers would be followed the moment they left the store, and the ATF would thus be able to break up gun-running gangs. To the contrary, ATF made no such effort. The guns disappeared into Mexico and, according to the Mexican Senate, were used in over 200 homicides. ATF's objective was for the American guns to be found, to be traced by ATF to the United States (since their serial numbers would be used to show that the guns were recently sold at retail in the United States), and to be used to demonstrate the need for Congress to pass gun control laws. The scheme began to unravel

in December 2012, when American Border Patrol Agent Brian Terry was murdered with a Fast and Furious rifle. Although there is little evidence that Attorney General Eric Holder knew about Fast and Furious from the outset, the Attorney General and White House worked diligently to attempt to cover up Fast and Furious, eventually leading General Holder to be the first Attorney General held in contempt of Congress. *See* Katie Pavlich, Fast and Furious: Barack Obama's Bloodiest Scandal and the Shameless Cover-Up (2012); 158 Cong. Rec. H4177 (June 28, 2012).

5. In August 2021, the United States of Mexico sued eight American firearms manufacturers for "actively facilitating the unlawful trafficking of their guns to drug cartels and other criminals in Mexico." Attorneys for plaintiffs include the gun control organization presently known as Brady. The allegations of tortious behavior of the defendant manufacturers are very similar to the allegations made by Brady in the lawsuits against manufacturers that the group organized in the 1990s and early 2000s. (At the time, Brady called itself "Handgun Control, Inc."). *See* Ch. 9.E. Some of the factual allegations, such as the percentage of Mexican crime guns that come from the United States, are disputed by sources cited in David B. Kopel, *Mexico's Gun Control Laws: A Model for the United States?*, 18 Tex. Rev. L. & Pol. 27 (2014). The lawsuit would seem to be barred by the federal Protection of Lawful Commerce in Arms Act (PLCAA), which bars most tort suits against firearms manufacturers who comply with U.S. law. Ch. 9.E. However, the complaint briefly argues that the PLCAA does not apply to lawsuits involving harms that occurred in a foreign nation. Filed in the U.S. District Court for the Eastern District of Massachusetts, the complaint is available on the Student Materials page of the website for this textbook, http://firearmsregulation.org/StudentMaterials.html.

5. Venezuela

President Hugo Chávez was first elected in 1998, leading the United Socialist Party. He stated that a peaceful society is one in which citizens do not have guns. His political movement styled itself as the Bolivarian Revolution and aimed to rule according to "twenty-first century socialism." Chávez died March 5, 2013, and was succeeded by Nicolás Maduro.

As of 2009, it was estimated that Venezuela's population of 29 million people owned about 15 million firearms, including illegal ones. *Venezuelan Government Announces Disarmament Plan—Again*, Vice News, Sept. 23, 2014.

At Chávez's urging, the Control of Arms, Munitions and Disarmament Law was enacted by the National Assembly in June 2012, coming into force in June 2013. Textually, the law allows firearms to be owned for sports or self-defense. Private sales of firearms were prohibited; personally possessed firearms may only be sold to the government. In May 2013, the Ministry of Justice ordered that all gun stores (*armerías*) be closed. The government's gun-owning company is the Compañía Anónima Venezolana de Industrias Militares. According to the law, the government always owns all firearms, and individual possession is merely a lease of government property—which the government can "recuperate" at any time. To buy a gun, a person must have a license. According to the legislation, no licenses would be issued for the next two years. Citizens may purchase no more than 50

cartridges per year. Prison sentences for possession of an illegal gun are four to six years, and four to eight for carrying. David Smilde, Citizen Security Reform, Part 5: Gun Control, *Advocacy for Human Rights in the Americans*, Aug. 5, 2013.

From time to time, the government runs amnesties to encourage citizens to surrender their arms, sometimes in exchange for a gift, such as electronics. "Disarmament must come from the conscience of the youth" ("Hace falta que este desarme se haga con la colaboración de la juventud desde su conciencia"), President Maduro declared at the beginning of a 2014 surrender program.

In the last two decades, Venezuela has become extremely dangerous. Its murder rate is the second highest in the world, exceeded only by Honduras. Caracas, the capital and largest city, is the third most dangerous city in the world. Stiven Tremaria, Violent Caracas: Understanding Violence and Homicide in Contemporary Venezuela 63-64 (2016) (San Pedro Sula, Honduras, and Acapulco, Mexico, are worse).

The national homicide rate in 2012 was 48 homicides per 100,000 inhabitants; the rate in Caracas was 122. *Id.* at 63. As of 2011, 91 percent of Caracas homicides were perpetrated with firearms, and 5 percent with bladed arms. *Id.* at 65. "The exponential growth in homicide rates in the last two decades has coincided with an increase in brutality. Victims were shot multiple times in public during daylight; 30 percent of all victims murdered with firearms were shot more than six times, and 16 percent received more than eleven gunshots." *Id.* (citations omitted). Robbery is common; in Caracas, 70 percent of robberies "are committed by armed motorcyclists, mainly during rush hour in traffic jams on the main traffic arteries." *Id.* at 66.

Police officers are often murdered for the purpose of stealing their firearms. "Before 2005, most police officers died in the line of duty. But nowadays, 65% of crimes against officers are motorcycle and weapon theft." *Murdered for Their Guns, Venezuela's Police Are Now Victims of Crime*, The Guardian, Nov. 4, 2015 (noting 252 security officers killed in Jan.-Oct. 2015).

Under the Chávez/Maduro regime, society has been militarized. The military, now called the National Bolivarian Armed Forces, has repeatedly suppressed protests or other threats to the regime's perpetuity. Beginning in 2002, the government began to establish *colectivos*— paramilitary groups loyal to the regime. With names such as *Colectivo La Piedrita*, *Tupamaros*, and *Grupo Carapaica*, the groups parade with arms in public, and have close ties to the government. Here is a video of pro-Maduro militiamen marching: https://www.youtube.com/watch?v=b1xD3qsVy3I.

"The strategy of installing progovernment militias has certainly counteracted any efforts to reduce the availability of firearms, and has certainly also increased membership of gangs and other illegal armed groups. Presently, the number of firearms in legal or illegal civilian possession is estimated at approximately eight million." Tremaria, at 72 (citing research from 2011).

A key role for *colectivos* is attacking and sometimes murdering anti-government protesters. This allows the government to deny responsibility, since the killings were not formally perpetrated by the government. Maria C. Werlau, Venezuela's Criminal Gangs: Warriors of Cultural Revolution 90 (2014);[40] *Armed Civilian Bands*

40. Werlau is President of the Free Society Project and Executive Director of the Cuba Archive.

in Venezuela Prop Up Unpopular President, N.Y. Times, Apr. 22, 2017; UN Human Rights Office of the High Commissioner, *UN Human Rights Team's Findings Indicate Patterns of Rights Violations amid Mass Protests in Venezuela* (2017) ("armed colectivos routinely break into protests on motorcycles, wielding firearms and harassing or in some cases shooting at people").

In anticipation of a new round of anti-government protests in April 2017, Maduro promised "a gun for every militiaman!" He announced that the *colectivos* would be expanded to 400,000 members. Venezuela's Maduro Arms Supporters in Preparation for "Mother of All Protests," PJ Media, Apr. 19, 2017.

Often, *colectivo* members are recruited by Cuban agents, instructed in Marxism-Leninism, and taught how to "kill and repress," as one former Cuban agent put it. Besides Cubans, trainers are supplied by FARC, the Colombian Marxist terrorist organization. Werlau, at 90. Sometimes they are sent to Cuba for training. *Id.* at 91.

"Colectivos control vast territory across Venezuela, financed in some cases by extortion, black-market food and parts of the drug trade as the government turns a blind eye in exchange for loyalty." *Armed Civilian Bands in Venezuela Prop Up Unpopular President*, N.Y. Times, Apr. 22, 2017. Professor Fermín Mármol, of University of Santa María, predicts that "[i]f tomorrow the revolution loses the presidency, the colectivos will immediately change to urban guerrilla warfare." *Id.*

Recall from Chapter 4.A.3 the 1774 incident in which the British military governor sent a contingent of Redcoats to break up an illegal political meeting in Massachusetts. The Redcoats desisted when they saw that were far outnumbered by armed Americans. Such an event would not occur in Venezuela today, where the government has made sure to have much more armed power than protesters. For examples, here is a video of *colectivos* using a FN machine gun against protesters in Caracas in 2017: https://www.youtube.com/watch?v=a4jUlo7AOoA. Here is another video of *colectivo* gun use: https://www.youtube.com/watch?v=aClL1CwhW4U.

The protesters have rocks and Molotov cocktails.[41] They also have created large slingshots that use a four-person crew to throw "baby-food jars full of paint or even human excrement." For defense, protestors may wear swim goggles, "create shinguards from old magazines and duct tape," make body armor from carpet scraps, or carry shields made from wood or oil drums. *The Battle for Venezuela, Through a Lens, Helmet and Gas Mask*, N.Y. Times, July 22, 2017.

The Venezuelan dictatorship has announced that it will never relinquish its power. Its human rights abuses make it one of the worst regimes in the Western Hemisphere, exceeded in its repressiveness only by Cuba. *See, e.g.*, Human Rights Watch, "Venezuela: Events in 2017" in World Report (2017); Human Rights Watch, Crackdown on Dissent (2017). *See generally* James Ausman, *The Devastating Venezuelan Crisis*, 10 Surgical Neurology Int'l 145 (July 26, 2019).

The ordinary (nongovernment) gun crime situation, while still severe, has recently abated, thanks to the communist regime's destruction of the economy. Although cartridges are readily available on the black market, criminals are

41. Flammable liquids in a bottle. The name was first used by Finns resisting the 1939 Soviet invasion. Stalin's Foreign Minister was Vyacheslav Molotov.

increasingly unable to afford the cost of $1 per round. Moreover, hyperinflation has made the Venezuelan currency (the Bolívar) not worth robbing even from a bank, and muggings are not worth the trouble because the victims no longer have anything worth stealing. Beatrice Christofaro, *Venezuela's Economic Crisis Is Now so Bad That Criminals Can't Afford to Buy Bullets*, Insider, May 28, 2019.

NOTES & QUESTIONS

1. **CQ:** Compare the Chávez-Maduro policies with those of the Stuart kings of England, including their efforts to create a "perfect militia" solely of loyalists to their dictatorial regime. Chs. 2.H, 22.H.

2. **CQ:** John Locke (Chs. 2.K.2, 22.K.2) and Patrick Henry (Ch. 4.A.6) warned against waiting too long to forcibly resist an incipient tyranny. Is it too late for Venezuela?

3. News reports indicate that some Venezuelans regret the gun control policies their government has implemented since 2012. *See, e.g.*, José Niño, *Gun Control Preceded the Tyranny in Venezuela*, Foundation for Economic Education (FEE) (Jan. 22, 2019); Hollie McKay, *Venezuelans Regret Gun Ban, "A Declaration of War Against an Unarmed Population*," Fox News, Dec. 18, 2018. To what extent does Venezuela serve as a modern example that citizen arms are an essential guard against government tyranny? Can you think of other modern examples?

4. Reports on violent crime in Venezuela are available from the Observatorio Venezolano de Violencia.

5. In response to a home invasion by a gang of four youths, the victim shot one of the invaders, who was the son of a politically powerful lawyer. The judiciary upheld the criminal conviction and imprisonment of the victim. The decision was criticized for disregarding "legitimate self-defence" under the Criminal Code of Venezuela "as well as under the legislation of countries governed by the rule of law." *José Daniel Ferrer García v. Bolivarian Republic of Venezuela*, Working Group on Arbitrary Detention, Opinion No. 28/2012, U.N. Doc. A/HRC/WGAD/2012/28. 28 (2012).

6. Australia

The history of arms and arms control in Australia through 1991 is a subject of a chapter in David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? (1992). However, Australia is mainly of interest to Americans because of what happened later in the decade.

Gun laws in Australia are made at the state level. Historically, Western Australia was the most restrictive. In 1988, a bitter fight over gun registration in the most populous state, New South Wales, led to the defeat of the incumbent party that had enacted a registration law.

But by the mid-1990s, universal gun registration was the law in most of Australia. Persons who worried that registration lists could be used for confiscation were derided as paranoid extremists.

Working with renowned gun control expert and advocate Rebecca Peters, the national government, led by Prime Minister John Howard, made plans for major steps forward. However, the government decided to withhold the program until

the right moment. That moment came in April 1996, when a man using two semi-automatic rifles murdered 35 people and wounded 23 at the Port Arthur tourist site on the island of Tasmania. The government immediately unveiled the National Firearms Agreement.

To be implemented, the agreement required the assent of the legislatures of Australia's six states and two mainland territories, which was obtained. A new temporary tax was imposed, to raise $AU500 million to pay remuneration for the confiscation of approximately 643,726 firearms. Commonwealth Attorney-General's Department, Australia, The Australian Firearms Buyback: tally for number of firearms collected and compensation (2002). This was approximately a fifth or a sixth of the total gun stock. Since Australia's population at the time was about 20 million, the tax amounted to about $AU25 per person.

All semi-automatic and pump-action rifles and shotguns were prohibited. The confiscation included .22 rimfire rifles, which had long been used for rabbit hunting. The program was euphemistically called a "buyback," although the government had never owned the guns in the first place. Nor were the guns for sale; the registered guns were surrendered at confiscation centers under pain of imprisonment. There were no known examples of civil disobedience. In the state of Queensland, registration was brought in contemporaneously with the confiscation. Ownership of any gun for self-defense was prohibited. Likewise prohibited, as in the United Kingdom, was *any* item whose purpose is self-defense. Thus, tasers and chemical defense sprays are forbidden. Carrying knives or sticks for defense also became illegal.

To outsiders, the political ease of the confiscation might have seemed surprising. Yet despite Australia's vast open spaces, the country's population is over 85 percent urban, about the same as Japan's. Unlike North America, Australia's ecology did not lend itself to a hunting culture. Australian hunting is mainly duck hunting in the relatively few areas with enough good water, as well as rabbit hunting. However, an estimated quarter of the prohibited firearms were illegally retained, rather than surrendered. Peter Reuter & Jenny D. Mouzos, *Australia: A Massive Buyback of Low-Risk Guns*, *in* Evaluating Gun Policy, 121, 141 (Jens Ludwig & Philip J. Cook eds. 2003). These were presumably guns that had not previously been registered.

In 2003, the Howard government successfully led another confiscation program, which took hundreds of models of handguns. As in Canada and New Zealand, all handguns in Australia had been registered and tightly controlled since the 1930s. In all three nations, handgun ownership has always been lower relative to long guns than is the case in the United States. Handgun crime involving registered handguns was rare. For example, in 2001 and 2002, only one registered handgun was used in a homicide. In addition to the confiscation program, the government also runs "buyback" programs to encourage target shooters to give up their sport and voluntarily sell their guns to the government.

Today, for the remaining types of lawful handguns, the licensing process requires several months' probation with an accredited target-shooting club, after which a person may apply to the police for a license. Licensees must participate in a given number of competition shoots annually or monthly. Almost no one (except the government) may possess handguns over .38 caliber, or above a certain barrel length (100mm for revolvers, 120mm for semi-automatics). The safe storage rules

for handgun owners include monitored alarm systems, even for antique pistols made before 1900 for which no commercial ammunition currently exists.

Over the last two decades, Australians have bought enough new firearms to replace the number that were confiscated. Of course, the new guns are of different types from the confiscated ones.

Before and after 1996, the homicide rate and the suicide rate were falling in Australia. Did the 1996 laws contribute to the decline? Several studies found no effect on homicide, and mixed results on suicide. Stuart Gilmour, Kittima Wattanakamolkul & Maaya Kita Sugui, *The Effect of the Australian National Firearms Agreement on Suicide and Homicide Mortality, 1978-2015*, 108 Am. J. Pub. Health e1 (Sept. 2018) (no statistically discernable effect on homicide or suicide); Jeanine Baker & Samara McPhedran, *Australian Firearm Related Deaths: New Findings and Implications for Crime Prevention and Health Policies Following Revisions to Official Death Count Data*, 10 Int'l J. Crim. Just. Sci. 1 (2015) (no effect on homicide, but lower suicide rates); Wang-Sheng Lee & Sandy Suardi, *The Australian Firearms Buyback and Its Effect on Gun Deaths*, 28 Contemp. Econ. Pol'y 65 (2010) (no effect on firearms homicide or firearms suicide rates); A. Leigh & C. Neill, *Do Gun Buybacks Save Lives?Evidence from Panel Data*, 12 Am. L. & Econ. Rev. 509 (2010) (no statistically significant effect on firearms homicides; large drop in firearms suicides, although the data do not exclude the possibility of a substitution effect resulting in no aggregate saving in lives).

However, a much-noticed article in *JAMA* (Journal of the American Medical Association) reported that the 1996 law did reduce homicide and suicide. Simon Chapman, Philip Alpers & Michael Jones, *Association Between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979-2013*, 316 JAMA 291 (2016).

A subsequent study examined the methodology of the *JAMA* article. The methodology did show significant before/after effects from 1996. But that same methodology also found significant before/after effects for earlier years in the 1990s—years when gun laws did not change. Accordingly, "[c]urrent evidence showing decreases in firearm mortality after the 1996 Australian national firearm law relies on an empirical model that may have limited ability to identify the true effects of the law." Ben Ukert, Elena Andreyeva & Charles C. Branas, *Time Series Robustness Checks to Test the Effects of the 1996 Australian Firearm Law on Cause-Specific Mortality*, 14 J. Experimental Criminology 141 (2017).

As Professor Gary Kleck pointed out, the *JAMA* analysis was univariate, that is, it had no direct control variables. (See Section B.2 for discussion of the limitations of studies that do not attempt to control for social variables.) Surprisingly, the 1996 law appears to have caused an increase in gun accidents. Perhaps, suggests Kleck, the reason is that gun owners surrendered firearms with which they were familiar, and replaced them with other firearms with which they were not; alternatively, the data might simply reflect suicides being misclassified as accidents. (Coroners sometimes make such classifications out of sensitivity for the decedent's family.) Gary Kleck, *Did Australia's Ban on Semiauto Firearms Really Reduce Violence? A Critique of the Chapman et al. (2016) Study* (2018).

According to the *JAMA* article, "[f]rom 1979-1996 (before gun law reforms), 13 fatal mass shootings occurred in Australia, whereas from 1997 through May 2016 (after gun law reforms), no fatal mass shootings occurred." Chapman et al., at 298. The authors defined a "mass shooting" as one in which five or more people

were killed.[42] The causal mechanism was apparently the ban on what the authors called "rapid-fire" guns. *Id.* at 291-93. Six of the 13 crimes were spree killings—that is, crimes in which the criminal or criminals shot people at different locations, with a sufficient time interval between two locations to reload. Some of these took place on multiple floors of the same building, while others had very large time intervals. For example, one "mass shooting" involved three criminals killing a total of five people over the course of a month, with the crimes taking place at multiple locations and in two different states. Kleck, at 16-18. Given the ample time for a criminal to reload a gun from one day to the next, or while traveling from one location to the next, it is difficult to see how a gun's "rapid-fire" capability would be relevant.

By Kleck's analysis, there were seven crimes in which five or more people were killed in a single location. Of those, two involved types of guns that were covered by the National Firearms Agreement. *Id.* at 18-19. Subsequent to the Agreement, there have been six mass murders (five or more fatalities, in a single location) in Australia perpetrated with means other than a firearm; from 1979 to 1996 (the pre-Agreement years covered by the *JAMA* study), there had been none. *Id.* at 19-20.

The *JAMA* authors did not respond to the critique from Ukert, Andreyeva, and Branas. They did respond to Kleck, pointing out that Kleck did not suggest what control variables *should* have been included. Further, the *JAMA* authors had noted the possibility of extraneous factors, such as cell phones making it possible for emergency responders to reach gunshot victims more quickly, and thus save their lives. Simon Chapman & Philp Alpers, *Australia's 1996 Gun Law Reforms Halted Mass Shootings for 22 Years: A Response to Criticism from Gary Kleck*, 10 Contemp. Readings in L. & Soc. Just. 94, 101-02 (2018).

In 2018, Australia did have a mass shooting, as that term is defined in the *JAMA* article. A grandfather killed his four autistic grandchildren, the children's mother, his wife, and himself. The murderer was upset about losing a custody dispute and shot the victims in their beds. Australian Associated Press, *Margaret River Shooting: Murder-Suicide Could Not Be Predicted, WA Premier Says*, The Guardian, May 14, 2018.

The Australian government reports that there are currently about 2.89 million legally registered firearms in Australia, owned by 816,000 licensees; meanwhile there over 250,000 long guns and 10,000 handguns in the black market. Australian Criminal Intelligence Commission, Illicit Firearms in Australia 7, 27 (2018). Illicit arms have been used by terrorists. For example, in 2014, a radical Islamist took 17 people hostage at the Lindt Chocolate Café, in the heart of Sydney's financial and legal district. He was armed with a semi-automatic shotgun, which is prohibited. Two victims were killed. The gun was supplied by a Middle Eastern organized crime group that is based in Sydney and supportive of terrorism. April Glover, *Middle Eastern Crime Family "with Links to Muslim Extremists Sold Shotgun to Terrorist Man Haron Monis for $570" Days Before the Lindt Café Siege*, Daily Mail Australia, Dec. 10, 2017.

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42. The *JAMA* count did not include a September 2014 family murder-suicide, because there were four victims, plus the perpetrator, who killed himself. *Lockhart Shooting: "Egocentric Delusion" Drove Geoff Hunt to Shoot Dead Wife and Children Before Killing Himself, Coroner Says*, Australian Broadcasting Corp., Oct. 8, 2015.

In 2015, a radical Islamist teenager assassinated an unarmed police office accountant outside the New South Wales Police Force headquarters in Parramatta, Sydney. The murder weapon, a revolver, apparently was supplied by a Middle Eastern gang. Mark Morri, *Parramatta Shooting: Farhad Jabar's Gun Allegedly Came from Middle Eastern Crime Gang*, Daily Telegraph, Oct. 7, 2015. In response, the government's Firearms and Weapons Policy Working Group (FWPWG) recommended another round of amnesties for the surrender of firearms, in the hope of collecting unregistered guns. Accordingly, a three-month amnesty was held in 2017, in which 57,324 firearms were voluntarily surrendered without compensation. Australian Government, National Firearms and Weapons Policy Working Group, National Firearms Amnesty 2017 Report 6 (Dec. 2017).

Could the Australia model—a ban on self-defense, registration of all guns, and confiscation of about 20 percent of all guns—be used in the United States? President Obama so suggested: "We know that other countries, in response to one mass shooting, have been able to craft laws that almost eliminate mass shootings. Friends of ours, allies of ours—Great Britain, Australia—countries like ours. So we know there are ways to prevent it." Barack Obama, Presidential Statement, October 1, 2015. U.S. Representative Eric Swalwell (D-Cal.) urges that the United States adopt legislation based on the Australian model. Eric Swalwell, *Ban Assault Weapons, Buy Them Back, Go After Resisters: Ex-Prosecutor in Congress*, USA Today, May 3, 2018. The call has been echoed by other American political leaders.

Professor Philip Alpers, coauthor of the *JAMA* article discussed above, is hopeful that the Australia model eventually will be followed in the United States. However, he considers it "inconceivable that a public safety measure on this scale might occur any time soon in the United States. Australia's gun buybacks amounted to confiscation of private property, albeit fairly compensated, under the threat of jail time. In the United States, destroying an equivalent one-third of the country's civilian firearms would require sending 90 million weapons to the smelter. Further, an attitude adjustment would be required." Philip Alpers, *Australia's Gun Laws Can't Work in America—For Now*, Geo. J. Int'l Aff. (Mar. 30, 2018).

NOTES & QUESTIONS

1. What parts, if any, of the Australia model could or should be adopted in the United States. **CQ:** For the confiscation issue, consider Professor Johnson's analysis of the "remainder problem," in Section B.5.

2. *Further reading*: Simon Chapman, Over Our Dead Bodies: Port Arthur and Australia's Fight for Gun Control (2013) (overview by one of Australia's leading gun control advocates); Denise Cartolano, *Check "Mate": Australia's Gun Law Reform Presents the United States with the Challenge to Safeguard Their Citizens from Mass Shootings*, 41 Nova L. Rev. 139 (2017); Jonathan Weg, *We Don't Come from a Land Down Under: How Adopting Australia's Gun Laws Would Violate the Second Amendment of the U.S. Constitution*, 24 Cardozo J. Int'l & Comp. L. 657 (2016).

3. The leading gun policy advocacy groups in Australia are the Sporting Shooters' Association of Australia, and Gun Control Australia.

4. *Papua New Guinea*. Besides writing extensively on Australia, Professor Philip Alpers is author of Gun-running in Papua New Guinea: From Arrows to Assault

Weapons in the Southern Highlands (Small Arms Survey Occasional Paper, 2005). The secessionist movement in Bougainville, PNG, is discussed in David B. Kopel, Paul Gallant & Joanne D. Eisen, *Micro-Disarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969, 983-85 (2005) (also discussing disarmament programs in Cambodia, Albania, Panama, Guatemala, and Mali).

5. *New Zealand*. As of 2013, New Zealand's 4.3 million people owned over 1 million firearms. Chaz Forsyth, New Zealand Firearms—An Exploration into Firearm Possession, Use and Misuse in New Zealand (2013).

Approximately 230,000 people have arms licenses. Every year, about 10,000 new people apply. Of the licensed owners, under 50,000 belong to a gun club or other firearms organization. Annually, there are about 500 violent crimes in which firearms are used.

New Zealand followed the United Kingdom's lead in the early 1920s by enacting gun control laws based on fears of communist revolution. In 1983, a new Arms Act repealed registration for long guns, at police request. In 1984, a program for shooter licensing was created. Handguns are lawful, but much less common than shotguns and rifles. David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? (1992).

In 1997, a criminal murdered six people at Raurimu. New Zealand left its laws intact and did not adopt the Australian model of mass confiscation. Ownership of semiautomatic long guns had already been subjected to a more stringent licensing system than other guns.

There were no mass shootings in New Zealand for the next two decades. But in April 2019, a criminal who advocated for racism, gun control, and extreme environmentalism murdered 51 people at a mosque in Christchurch. The New Zealand government quickly implemented a gun confiscation program on the Australian model. Newly prohibited were all semi-automatic centerfire rifles, all shotguns of any type with a magazine capacity over five, and any rifle of any type with an ammunition capacity greater than ten, which included semiautomatics, bolt action, lever action, and pump action rifles, and all long gun magazines over ten rounds. Arms (Prohibited Firearms Magazines, and Parts) Amendment Regulations 2019, Order in Council, June 19, 2019; New Zealand Police, *Firearms law changes & prohibited firearms*.

Compliance has been higher than with arms surrender programs in the United States (for which compliance tends to be near zero) but significantly lower than in Australia. By the December 2019 final deadline, about 56,000 of the government-estimated 170,000 firearms affected had been surrendered. *Gun Buyback: Over 56,000 Guns Collected as Police Release Official Figures*, NZ Herald, Dec. 21, 2019; Thomas Manch, *Claims That Banned Firearms Are Being Hidden as Gun Buyback Ends with 50,000 Collected*, Dominion Post, Dec. 20 2019. Last-minute compliance may have been reduced by reports of extensive data privacy breaches of the records of gun owners who did surrender their arms. Noah Shepardson, *New Zealand's Mandatory Buyback Program Leaked Gun Owners' Personal Info*, Reason, Dec. 4, 2019. Unlike in Australia, relations between firearm owners and the police had been mutually respectful rather than antagonistic. That is now a thing of the past; the criminal at the mosque has succeeded at his objective of inflaming culture war.

The leading gun policy organizations in New Zealand are Gun Control NZ, which argues that the 2019 laws should be the starting point for much more

control. On the other side is the Council of Licensed Firearms Owners, which has launched a Fair and Reasonable public information to oppose proposed new laws, and criticizes defects in the application of the 2019 ones.

7. *Japan*

David B. Kopel

Japan, Gun Laws

in 2 Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law 449 (Gregg Lee Carter ed., 2d ed. 2012) (revised for this work)[43]

Japanese law prohibits the ownership of rifles and pistols and imposes very strict licensing for shotguns and air guns. The firearms law appears to be both a cause and a consequence of the relatively authoritarian nature of Japanese society. Starting in the 1990s, Japan has begun to work to export its firearms policies on other nations.

Japanese gun law starts with prohibition as the norm: "No-one shall possess a fire-arm or fire-arms or a sword or swords." From there, some exceptions are created.

Japanese sportsmen are permitted to possess shotguns for hunting and for skeet and trap shooting, but only after submitting to a lengthy licensing procedure. Air rifles (but not air pistols) are also allowed for sporting purposes.

A prospective gun owner must first attend classes and pass a written test. Shooting range classes and a shooting test follow; 95 percent pass. After the safety exam, the applicant takes a simple "mental test" at a local hospital, to ensure that the applicant is not suffering from a readily detectable mental illness. The applicant then produces for the police a medical certificate attesting that he or she is mentally healthy and not addicted to drugs. The police investigate the applicant's background and relatives, ensuring that both are crime-free. Membership in "aggressive" political or activist groups disqualifies an applicant. The police have unlimited discretion to deny licenses to any person for whom "there is reasonable cause to suspect may be dangerous to other persons' lives or properties or to the public peace."

Gun owners must store their weapons in a locker and give the police a map of the apartment showing the location of the locker. Ammunition must be kept in a separate locked safe. The licenses allow the holder to buy a few thousand rounds of ammunition, with each transaction being registered.

Civilians can never own handguns. Small caliber rifles were once legal, but in 1971, the Government forbade all transfers of rifles. Current rifle license holders were allowed to continue to own them, but their heirs must turn them into the police when the license-holder dies.

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43. A longer analysis, with footnotes, is David B. Kopel, Japanese Gun Control, 2 Asia-Pac. L. Rev. 26 (1993).

The severe controls on gun ownership in Japan are consistent with Japanese practices regarding other matters which are guaranteed by the Bill of Rights in America, but which are subject to extensive control in Japan. For example, Japan has no meaningful limits on police search and seizure. A person who is arrested may be held incommunicado for long periods of time, and not released unless he confesses. *Call to Eliminate Japan's "Hostage Justice" System by Japanese Legal Professionals*, Human Rights Watch, Apr. 10, 2019. Criminal trial procedures are, compared to the trials in the U.S., much more heavily tilted towards the government, and acquittals are extremely rare. Trial by jury has been abolished. Restrictions on speech and the press are much broader than in the U.S.

Guns first arrived in Japan along with the first trading ships from Portugal in 1542 or 1543. The Portuguese had landed on Tanegashima Island, outside Kyushu. One day the Portuguese trader Mendez Pinto took Totitaka, Lord of Tanegashima for a walk; the trader shot a duck. The Lord of Tanegashima made immediate arrangements to take shooting lessons, and within a month he bought Portuguese guns, or *Tanegashima* as the Japanese soon called them.

The *Tanegashima* caught on quickly among Japan's feuding warlords. The novelty of the guns was the main reason that the Portuguese were treated well. The Japanese rapidly improved firearms technology. They invented a device to make matchlocks[44] fire better in the rain (the Europeans never figured out how to do this), refined the matchlock trigger and spring, and increased the matchlock's caliber. The Arabs, Indians, and Chinese had all acquired firearms long before the Japanese, but only the Japanese mastered large-scale domestic manufacture.

By 1560, firearms were being used effectively in large battles. In 1567, Lord Takeda Harunobu declared, "Hereafter, guns will be the most important arms." Less than three decades after Japan saw its first gun, there were more guns in Japan than any other nation. Several Japanese feudal lords had more guns than the whole British army.

It was Lord Oda Nobunaga whose army truly mastered the new firearms technology. "Nobunaga's strength derived from a superior arsental and the use of foot soldiers armed with muskets . . . to displace the mounted warrior with the historically despised infantryman." Mary Elizabeth Berry, Hideyoshi 45 (1982). The advantage in battle shifted "to those who held Japan's foreign ports and metal works." *Id.*

At Nagashino in 1575, three thousand of Nobunaga's conscript peasants with muskets hid behind wooden posts and devastated the enemy. *Id.* at 63. Feudal wars between armies of samurai knights had ravaged Japan for thirteen decades. Nobunaga and his peasant army, equipped with matchlocks, conquered most of Japan, and helped bring the feudal wars to an end. Part of his advantage lay in controlling most of the areas that produced arms in large scale. *Id.* at 79.

Guns dramatically changed the nature of war. In earlier times, after the introductions, fighters would pair off, to go at each other in single combat—a method of fighting apt to let individual heroism shine. Armored, highly trained samurai

44. [The standard firearm of the time. The shooter would light a match, then use the match to inflame a slow-burning wick, and the wick would ignite the gunpowder. *See* Chs. 2.I.1, 23.A.1.—Eds.]

had the advantage. But with guns, the unskilled could be deployed *en masse*, and could destroy the armored knights with ease. Understandably, the noble *bushi* class thought firearms undignified.

Starting out as a groom for Lord Nobunaga, a peasant named Hidéyoshi rose through the ranks to take control of Nobunaga's army after Nobunaga was assassinated. A brilliant strategist, Hidéyoshi finished the job that Nobunaga began, and re-unified Japan's feudal states under a strong central government. On August 29, 1588, Hidéyoshi announced "the Sword Hunt" (*taiko no katanagari*) and banned possession of arms by the non-noble classes. He decreed:

> The farmers in the various provinces are strictly forbidden to have in their possession long swords, short swords, bows, spears, muskets, or any other form of weapon. If there are persons who maintain unnecessary implements, cause hardship in collection of annual taxes, and foment uprisings, or commit wrong acts toward the retainers, they shall, needless to say, be brought to judgment. . . . So that the long and short swords collected shall not be wasted, they shall be [melted down and] used as rivets and clamps in the forthcoming construction of the Great Buddha. This will be an act by which farmers will be saved in this life, needless to say, and the life to come. . . . Collect the above-mentioned implements without fail and deliver them [to us].

Berry, at 102-103 (brackets in original).

The Western missionaries' *Jesuit Annual Letter* reported that Hidéyoshi "is depriving the people of their arms under the pretext of devotion to religion." 2 James Murdoch, A History of Japan 369 n.4 (1930).

The Japanese experience was consistent with the belief of Aristotle and Plato that deprivation of a role in the armed defense of a society would lead to deprivation of any role in governing that society. *See* online Chapter 21.B.1. Berkeley professor Mary Elizabeth Berry explains: "The mounted magistrates who rounded up everything from muskets to daggers changed men's thoughts about themselves. Farmers had borne arms for centuries and taken part in the contests that helped fix the rights of lordship. Their military role brought political influence and obscured class boundaries. A pivotal member of his community by the warring-states era, the armed peasant symbolized opportunity. The confiscation of his weapons, far more than a 'hardship,' altered a condition of life." Berry at 104.

Besides disarming peasants, Hidéyoshi was particularly keen on disarming the Buddhist monasteries, whose armed monks had long been power centers that were not easily controlled by a central government. Berry, at 86. Within the cities, non-nobles were eventually allowed to carry short swords but not long ones. In case of a confrontation with a samurai, the samurai with his long sword would have a considerable advantage. Constantine Nomikos Vaporis, Voices of Early Modern Japan: Contemporary Accounts of Daily Life During the Age of the Shoguns 78-79 (2013).

In 1591, Hidéyoshi forbade farmers to abandon their fields for wage labor or a trade. Men in the military class were forbidden to exist without a master. The next year, changes in residence from one district, village, or province to another were forbidden. A police state was established to stop occupational or geographical mobility.

Berry, at 106-10, "[T]he armed peasant and the presumption of social mobility" had been "constant[s] in the warring states world." *id.* at 108. Formerly, villages had been "an armed unit of resistance to authority." *Id.* Hidéyoshi's cleavage of the noble and peasant classes ended the possibility of them working together to resist central power. Further reading on Hidéyoshi: Stephen Turnbull, Toyotomi Hideyoshi (2010).

Enforcement of the above was mostly left to the *daimyo* (great lords) of any given province. There are no known reports of major resistance, and in at least some areas, implementation was gradual. Berry, at 137. As applied, the government's policy seems to have concentrated mainly on preventing non-nobles from carrying swords; there were later rebellions in which peasants used firearms, indicating that disarmament of the peasants was not comprehensively accomplished. *See* Tamara Enomoto, *Giving Up the Gun? Overcoming Myths about Japanese Sword-Hunting and Firearms Control*, 6 Hist. of Global Arms Transfer 45 (2018). Or perhaps some nobles retained large enough armories to supply local rebellions.

The inferior status of the peasantry having been affirmed by the sword carrying ban, the Samurai enjoyed *kiri-sute gomen*, permission to kill and depart. Any disrespectful member of the lower class could be executed by a Samurai's sword.

After Hidéyoshi died in 1598, Tokugawa Iéyasu won the ensuing power struggle and founded the Tokugawa Shogunate in 1603; it would rule Japan until 1867. Peasants were assigned to a "five-man group," headed by landholders who were responsible for the group's behavior. The groups arranged marriages, resolved disputes, maintained religious orthodoxy, and enforced the rules against peasants possessing firearms or swords. The weapons laws clarified and stabilized class distinctions.

Historian Noel Perrin suggests that the anti-gun edicts were part of a xenophobic reaction against outside influences, particularly Christianity. The Samurai were culturally willing to discard firearms because, unlike firearms, swords were graceful to use in combat. Noel Perrin, Giving Up the Gun: Japan's Reversion to the Sword 1543-1879 (1979).

"The separation of classes, the regulation of movement, the monopolization of political power by the military, the restriction on arms—these policies, if sometimes laxly enforced, remained law in mid-nineteenth century Japan." Berry, at 239. During the early twentieth century, the gun controls were slightly relaxed. Tokyo and other major ports were allowed to have five gun shops each, other prefectures, three. Revolver sales were allowed with a police permit, and registration of every transaction was required.

In the 1920s and 1930s, the military came increasingly to control civilian life. Historian Hidehiro Sonoda explains: "The army and the navy were vast organizations with a monopoly on physical violence. There was no force in Japan that could offer any resistance." Seventy-Seven Keys to the Civilization of Japan (Tadao Umesai ed., 1985).

After World War II ended with Japan in ruins, the military was reviled by the Japanese people, and abolished by General MacArthur's occupation government. The MacArthur government also dismantled centralized national control of the police. In 1946, MacArthur's government ordered the Japanese police to begin carrying guns; finding out that this edict was still being ignored in 1948, the American occupation forces distributed revolvers to the Japanese police.

Today, the police have reverted to central national control, and many of the American-style restrictions on police power that the occupation government wrote into the new Japanese Constitution are ignored. The American-imposed policy of police armament remains in place, though.

But unlike in America, police regulations and culture do not valorize police gun ownership and use (and therefore, unlike in America, do not promote a broader gun culture by example). No officer would ever carry a second, smaller handgun as a backup, as many American police do. Policeman may not add individual touches, such as ergonomic grips or a preferred holster. While American police are often required to carry guns while off-duty, and almost always allowed to if they wish (even when retired), Japanese police must leave their guns at the station. Unlike in the United States, desk-bound police administrators, traffic police, most plainclothes detectives, and even the riot police do not carry guns.

One poster on Japanese police walls ordered: "Don't take it out of the holster, don't put your finger on the trigger, don't point it at people." Shooting at a fleeing felon is unlawful under any circumstance, whereas American police and citizens are both authorized to use deadly force to stop certain types of escaping felons. In an average year, the entire Tokyo police force only fires a few shots.

Historically, Japan has had a very high suicide rate, although there has been notable progress in recent years. Several decades ago, Japanese scholars Mamon Iga and Kichinosuke Tatai argued that one cause of Japan's suicide problem was that people had little sympathy for suicide victims. Iga and Tatai suggested that the lack of sympathy was based on Japanese feelings of insecurity and consequent lack of empathy. They traced the lack of empathy to a "dread of power." That dread is caused in part by the awareness that a person cannot count on others for help against violence or against authority. In addition, said Iga and Tatai, the dread of power stems from the people being forbidden to possess swords or firearms for self-defense. Mamon Iga & Kichinosuke Tatai, *Characteristics of Suicide and Attitudes toward Suicides in Japan, in* Suicide in Different Cultures 255-80 (Norman Faberow ed., 1975).

In 2017 in Japan, there were 306 homicides, 4 of which involved firearms. (The homicide data does not include murder/suicides in which parents kill their children and then themselves; such deaths are classified as suicides.) In a population of over 120 million, there were only 2,332 reported robberies in 2016. "Japan: Crime Statistics," in Knoemo.com World Data Atlas. Some scholars argue that Japanese crime reporting rates are unusually low because victims fear retaliation from the organized criminal gangs (Yakuza) who perpetrate much of the crime. Even so, gun crime is very rare, and violent crime is far lower than in the United States or Western Europe.

To gun prohibition advocates, Japan represents the ideal, with near-prohibitory controls, and nearly no gun crime. Skeptics argue that Japan's low crime rates are mainly due to cultural factors.

It is also argued that Japanese-style gun laws, whatever their efficacy, are particularly unsuited to the United States, since American ownership of guns is deeply tied to American concepts of individualism, self-protection, and freedom from oppressive government. To many in Japan, where the focus is on the group rather than the individual, the American attitude seems absurd and barbaric.

On the evening of October 17, 1992, in Baton Rouge, Louisiana, a Japanese exchange student named Yoshihiro Hattori and a teenager from his host family, Webb Haymaker, entered a carport, mistakenly thinking that the home was hosting

a Halloween party. The teenagers had the wrong address. Frightened by the rapidly approaching young males, Bonnie Peairs screamed for help and her husband Rodney came running with .44 Smith & Wesson revolver. He yelled "freeze!" Haymaker retreated and tried to get Hattori to stop, but Hattori, apparently not understanding the American idiom that "freeze!" can mean "Don't move or I'll shoot," advanced towards Mr. Peairs, who pulled the trigger and shot him dead.

Rodney Peairs was acquitted of manslaughter in a criminal trial, partly because Haymaker testified that, in the dark, Hattori's camera might have looked like a gun, and that Hattori waved his arms at Peairs.

Although the incident initially attracted only brief attention in the national American press, the shooting horrified Japan, where television networks devoted massive coverage to "the freeze case." In July 1993, President Clinton apologized to Hattori's parents Masaichi and Mieko. At Yoshi's funeral, the parents stated, "The thing we must really despise, more than the criminal, is the American law that permits people to own guns."

Over the next several months, 1.7 million Japanese and 150,000 Americans signed Mrs. Hattori's "Petition for Removing Guns from Households in the United States." Working with the Coalition to Stop Gun Violence, the Hattoris delivered the petitions to President Clinton personally on November 16, 1993, a few days before final Senate passage of the Brady Bill. President Clinton told the Hattoris that he believed that only police and the military should have handguns.

Mrs. Hattori tells Japanese audiences that the petitions led to the passage of the Brady Bill. Mr. and Mrs. Hattori filed a civil suit against Peairs, won $653,000, and used part of the money to set up foundations which award money to anti-gun groups in the U.S., and which bring an American student to Japan each year, to experience gun-free life.

Spurred in part by the Hattori tragedy, in the 1990s Japan began funding gun surrender programs in South Africa, pushing the United Nations to act against private gun ownership, and supporting gun prohibition around the world.

Although the core of the gun prohibition campaign is a belief that Japan's policy is culturally superior, another basis is the fact that, according to the Japanese National Policy Agency (NPA), handguns are smuggled into Japan from the United States, China, the Philippines, Thailand, Russia, Brazil, Peru and South Africa. The NPA reports that the main techniques are "(1) spot-welding of guns to a car imported from overseas to Japan, (2) smuggled aboard fishing boats, (3) concealment in sea or air cargo and (4) concealment in hand carrying luggage inside items such as electric appliance."

Ironically, Japan has a large firearms manufacturing industry, geared towards the export market. Browning firearms are manufactured there, as are several other well-respected brands of shotguns.

NOTES & QUESTIONS

1. *International transmission of cultural norms.* The Hattori tragedy brought to light the sharply different attitudes toward private gun ownership in Japanese and American society. What weight should Americans give to Japanese criticisms of America's gun culture? More generally, should Americans view widespread criticism

from other nations toward an American practice as presumptive evidence that the criticized practice is unwise? When are such cross-national (and cross-cultural) criticisms persuasive?

2. Compare the Japanese approach to eliminating privately owned rifles to the U.S. 1994 "assault weapons" ban (which sunset in 2004). In 1971, the Japanese government forbade all transfers of rifles, allowing license holders to keep them but requiring heirs to turn over the guns when the license holder died. The U.S. "assault weapons" ban grandfathered existing guns, which remained freely transferable. In 2013, Senator Dianne Feinstein, sponsor of the 1994-2004 ban, introduced a bill for a new permanent ban, S.150, 113th Congress (2013); under an early draft of the bill (although not the bill as introduced), current owners could keep their guns if they paid a $200 per gun tax and got local police permission. The guns could never be transferred, and upon the owner's death, they would be confiscated. If you were designing a new ban, which approach would you favor? Why? Can you identify any constitutional problems with a law that prohibited owners from selling these guns or passing them on to heirs?

3. The United States and Japan have many cultural differences, including dramatically different experiences with firearms ownership and regulation. One consequence of this is vast differences in the number of private firearms, rate of firearms homicide, and rate of firearms crime in the two countries. Constitutional questions aside, what is the likelihood that the United States could pass and effectively implement Japanese-style gun laws? Would the degree of government control necessary to create such a gun-free society in the United States be worth the elimination of nearly all violent crime involving guns?

4. Would effective implementation of Japanese-style firearms regulation in the United States require cultural change in the United States? If so, would you recommend a gradual process or a quick drastic change? Is that gradual process similar to the slippery slope fear that seems to drive some objections to gun control? Is legislation sufficient to facilitate the necessary cultural change? Can you think of other areas of policy where law and culture collided in a dramatic way? Do those examples offer any lessons for the gun question? Aside from legislation, what other tools are available to push cultural change?

8. China After 1976

In 1949, Mao Zedong led a revolution that overthrew the Republic of China and replaced it with a communist government, renaming the nation the People's Republic of China. Mao ruled until his death in 1976, which resulted in the end of the "Cultural Revolution" he had launched in 1966.

During the Cultural Revolution, China had "no legal system so to speak . . . the social, economic, cultural and political lives have no laws or regulations to abide by." Xin-yi Hou, *Review and Outlook in the Process of Rule of Law in China Since Reform and Opening Up*, Tianjin Leg. Sci. 5, 7 (Winter 2011).

After Mao did in 1976, his wife and three of her cohorts ("the Gang of Four") were purged, and a more pragmatic group took power, led by Deng Xiaoping. He launched the *Boluan Fanzheng* (拨乱反正) [Bring Order Out of Chaos] campaign, which aimed to clear the names of those who had been wrongfully prosecuted in

the past. In 1978, the Communist Party of China (CPC) adopted the *Gaige Kaifang* (改革开放) [Reform and Opening-Up] strategy. During this period, "the main objective of reconstructing the rule of law [was] to restore the legal system and necessary legal order destroyed during the Cultural Revolution." Hou, at 8.

This section describes the laws and regulations enacted after the Cultural Revolution on weapons owned by parties other than the armed forces (the People's Liberation Army, the People's Armed Police, and China Militia). These laws and regulations do not cover Hong Kong, Macau, and Taiwan. Many Chinese legal materials are available at the Pkulaw website, and the citations in this section indicate which documents are available there. There is also an English-language version of Pkulaw.

a. Firearms

From 1981 to 1996, firearms in China were regulated by the *Qiangzhi Guanli Banfa* (枪支管理办法) [Measures for the Control of Guns]. The *Banfa* was replaced by the *Qiangzhi Guanli Fa* (枪支管理法) [Law on Control of Guns] on October 1, 1996, with amendments added in 2009 and 2015. The current law governing firearms in China is the 2015 revised version of the *Qiangzhi Guanli Fa*.

b. The Cultural Revolution and Its Aftermath

During the Cultural Revolution, "especially after Jiang Qing[45] mentioned '*Wengong Wuwei*' (文攻武卫) [Attack with words but defend with arms], mass organizations around the country started to openly raid military units stationed locally and the militia for weapons and ammunition." Hui Zhou, *A Research on the Reform of Gun-Control System in China* 30 (Shandong Univ. Master's Thesis, 2010). One of the major reasons behind the implementation of the 1981 *Banfa* was "to restore the gun control effort, which has been critically damaged during the Cultural Revolution, and to confiscate the large number of guns scattered throughout the society." *Id.* at 31.

Compared to the previous regulations on firearms, the 1981 *Banfa* reduced the scope of officials eligible to carry firearms to "leading cadres working in the border areas, coastal defence areas, and other remote areas." Zhonghua Renmin Gongheguo Qiangzhi Guanli Banfa (中华人民共和国枪支管理办法) [Measures of the People's Republic of China for the Control of Firearms] (promulgated by the Ministry of Public Security, Apr. 25, 1981, expired), art. 3, § 2, CLI.2.967(EN) (Pkulaw). The 1981 law affirmed that firearms may be issued, among others, to "[t]he security sections of factories and mines, enterprises, government departments, schools and universities, research institutions, that have the necessity to be fitted out with firearms." Qiangzhi Guanli Banfa art. 4, § 1. Thus, many government agencies besides law enforcement and state or collectively owned enterprises could keep firearms for guarding their own premises.

45. A/k/a "Madame Mao," Mao's former secretary and fourth wife. Jiang Qing was arrested in 1976, sentenced to death, commuted to life imprisonment, and committed suicide in 1991.

The private ownership of firearms was generally prohibited, with a hunting exemption: "As regards the non-professional hunting personnel, only citizens aged eighteen or over may keep hunting rifles, and each can keep no more than two hunting rifles." Qiangzhi Guanli Banfa art. 6. Individuals or organizations that possess firearms "shall apply to the local county or municipal bureau of public security for firearm licenses." *Id.* art. 12.

When licensed individuals moved to a new county or city, individuals had to "return for cancellation their firearm licences to the original licence-issuing public security organ and obtain firearm-transport passes. On their arrival at their destinations, they shall present the firearm-transport passes to the local public security organ and go through the procedures for obtaining new firearm licences." *Id.* art. 17. Short-term transport of firearms required a transport pass; the individual would "apply to the county or municipal public security bureau stationed at the destination of transportation for a transport pass. Upon arrival at the destination, the applicant shall present the transport pass to the local public security organ and go through the procedures for registration or for obtaining a new firearm licence." *Id.* art. 18.

China in the early 1980s was somewhat chaotic. Using the crime data from Guangdong Province as an example, "[s]ince the first year after the Reform and Opening-up, there are more than 30,000 criminal cases provincial wide in 1979, and that number goes over 50,000 in 1981, which is the highest peak for the number of criminal cases in the province since the establishment of the People's Republic of China." Chen Leigang (陈雷刚), *1983 Nian Guangdong "Yanda" Shimo* (1983年广东"严打"始末), Hong Guang Jiao (红广角), at 33 (Aug. 2012).

c. Changes in 1996

In support of tighter firearms laws in 1996, then-Minister of Public Security Tao Siju stated that "the number of crimes committed with the aid of firearms is increasing annually, and has become one of the outstanding issues threatening the public security order of the society." *Guanyu <Zhonghua Renmin Gongheguo Qiangzhi Guanli Fa (Caoan)> de Shuoming* (关于《中华人民共和国枪支管理法(草案)》的说明) [The Explanation Regarding the Law of the People's Republic of China on Control of Guns (draft)] (promulgated by the Ministry of Public Security, effective May 11, 1996), CLI.DL.148 (Pkulaw). Further:

> The overflow of firearms leads to the decrease of the sense of safety among the people, thus buying guns for self-defense becomes a necessity for some people, causing a vicious circle. Due to the large number of guns owned by civilians, criminals can obtain guns easily, leading to an increasing number of crimes committed with the aid of guns. With participants using guns in some affrays, these incidences are becoming increasingly violent, and the [police] handling of such events is becoming very difficult. The wildlife preservation effort of the state is greatly undermined due to the large number of guns circulating in society.

Id. § 1, ¶ 1.

The new law aimed "[t]o limit the number and scope of hunting firearms to the minimum." *Qiangzhi Guanli Fa* § 2, ¶ 3. Then-Minister Tao explained that "all

firearms must be registered with the public security organ within three months after the law goes into effect" and "those who refuse to register their firearms within this period will be prosecuted with illegal possession of firearms (art. 50)." *Id.* § 3, ¶ 1. The *Shuomin* also mentions three possible results after one had registered his or her firearms:

> If the firearm is legal in the past and remains to be legal under the new law, after the registration and other relevant procedures, the continued possession is permitted; if it is illegal not only in the past but also under the new law, it shall be confiscated after the registration, but the owner is exempt from criminal prosecution if the firearm is turned in during this period; if it is legal in the past, but the owner no longer satisfies the conditions for legal possession due to the limited scope of the new law, the firearm shall be confiscated.

Id. § 3, ¶ 1.

Firearm ownership by private individuals is limited to "[h]unters in hunting zones and herdsmen in pastoral areas." *Zhonghua Renmin Gongheguo Qiangzhi Guanli Fa (2015 Xiuzheng)* (中华人民共和国枪支管理法 (2015 修正)) [Gun Control Law of the People's Republic of China (2015 Amendment)] (promulgated by the 20th Meeting of the Standing Committee of the Eighth National People's Congress, July 5, 1996, amended for the first time by the tenth meeting of the Standing Committee of the Eleventh National People's Congress on August 27, 2009; and amended for the second time by the Third Session of the Standing Committee of the Twelfth National People's Congress on April 24, 2015, effective Apr. 24, 2015) art. 6, § 3, CLI.1.252601(EN) (Pkulaw). The firearms owned privately by hunters and herdsmen "may not be taken out of the hunting zones or the pastoral areas." *Qiangzhi Guanli Fa*, art. 12.

The new *Qiangzhi Guanli Fa* limited the scope of government/party officials eligible to carry firearms. Unlike the 1981 *Qiangzhi Guanli Banfa*, the current law only allows "People's policemen of the public security organs, State security organs, prisons and institutions of reeducation through labour, judicial policemen of the People's Courts and the People's Procuratorates, people's procurators who are charged with the task of investigation of cases, and customs coast guards" to carry firearms. Qiangzhi Guanli Fa, art. 5. The new law ended the common practice of allowing government and party officials other than law enforcement to possess firearms, which was "considered to be a symbol of one's official status." Zhou, at 33. To centralize the issuance of firearms permits, public security organs "at or above the county level shall be in charge of the control of guns in their administrative regions respectively." Qiangzhi Guanli Fa, art. 4. Thus, government agencies other than law enforcement lost their authority to arm themselves without obtaining prior approval from their local public security bureaus.

According to a 2019 press release from the Ministry of Public Security, "from January to November 2018, there are a total number of 42 crimes nationwide where firearms were used." Ministry of Public Security, *Quanguo Daji Zhengzhi Qiangbao Weifa Fanzui Zhuanxiang Xingdong Qude Mingxian Chengxiao* ¶ 3 (全国打击整治枪爆违法犯罪专项行动取得明显成效) [The nationwide special operation on cracking down crimes involving guns and explosives has achieved tangible results] (Jan. 9,

2019). The ministry reported the following confiscations in 2018: "hunting firearms: 12,000, air guns: 42,000, black powder firearms: 38,000, modified nail guns and other firearms: 54,000, all types of cartridges: 3.69 million, explosives: 416 tons, detonators: 500,000." *Id.*

Are the above figures accurate? Not necessarily. "[C]rime statistics should be more carefully understood as part of a legitimization apparatus in China" since Beijing "mainly relies on performance such as economic development and crime control for its legitimacy." Jianhua Xu, *Legitimization Imperative: The Production of Crime Statistics in Guangzhou, China*, 58 Brit. J. Criminology 155, 156 (2017).

d. The Broad Definition of Forbidden Guns

The legal definition of guns in the current *Qiangzhi Guanli Fa* refers to "the various kinds of guns that, with gunpowder or compressed gas as the propelling force and with a barrel for projecting metal bullets or other substances, can readily inflict injury upon people, cause death or render them unconscious." Qiangzhi Guanli Fa, art. 46. There had been no definition in the previous arms law, which only listed "the types of guns that are within the purview of the respective regulations without providing definitions for guns." Chen Zhijun (陈志军), *Qiangzhi Rending Biaozhun Jubian de Xingfa Fenxi* (枪支认定标准剧变的刑法分析) [Using the criminal law perspective to analyze the drastic change on the standards of identifying guns], J. Nat'l Prosecutors Coll. 107 (Sept. 2013).

When a "gun" is confiscated by law enforcement during an investigation, it will be examined by the "prefecture (municipal) level public security organ." *Gongan Jiguan Shean Qiangzhi Danyao Xingneng Jianding Gongzuo Guiding* (公安机关涉案枪支弹药性能鉴定工作规定) [The regulation for public security organs on identifying guns and ammunition involved in criminal investigations] (promulgated by the Ministry of Public Security, Dec. 7, 2010, effective Dec. 7, 2010) art. 2, CLI.4.144563 (Pkulaw). If a gun does not fire standard cartridges, it is treated as a prohibited item if its projectile has "specific kinetic energy" greater than 1.8 Joules per cubic centimeter. Jianding Gongzuo Guiding, art. 3, § 3. The "specific kinetic energy" is based on "the ratio between the kinetic energy of the bullet and the maximum cross-sectional area of the bullet." The National Commission on Forensic Science Standardization, *Qiangzhi Zhishangli de Fating Kexue Jianding Panju* (枪支致伤力的法庭科学鉴定判据) [Identification criteria to cause casualty of firearms] 2 (2008). Specific kinetic energy is measured at 50cm from the muzzle for firearms, and 30cm for air/gas guns. *Id.* at 2. A projectile with a kinetic energy of 1.8 joules per square centimeter is not strong enough to break human skin, but it could damage an eye. Chen, at 109-10.

Chen argues that the 1.8 Joule standard is "an unreasonable expansion from the current regulatory documents on interpreting the definition of a gun, as well as creating an overly restrictive interpretation on the definition of a toy gun." *Id.* at 113. This gap between the public understanding and the legal definition of guns creates many cases where persons convicted of illegal possession or trafficking of guns had no knowledge that toy guns can be treated as real guns in the eyes of the law. For example, in a case from Tianjin, a major coastal city in northern China, the court found:

> From August to October 12, 2016, defendant Zhao Chunhua set up a shooting gallery for business purposes near the waterside platform on Li

> Gongci Street, Hebei District, Tianjin Municipality. At around 10 p.m., October 12, 2016, Zhao's above-mentioned activity was found, and she was arrested on the spot with nine items that have the resemblance to guns, other relevant gun parts and plastic bullets by public security officers conducting a patrol. According to the Judicial Expertise Center of Tianjin Municipality Public Security Bureau, the test results show that six out of the nine confiscated items are usable guns that are propelled by compressed gas.

Zhao Chunhua Feifa Chiyou Qiangzhi An (赵春华非法持有枪支案) [*People v. Zhao Chunhua* (crimes involving illegal possession of guns)], CLI.C.8726848, at ¶ 8 (Pkulaw, Tianjin Hebei District People's. Ct. Dec. 17, 2016).

Zhao's daughter claimed that "everybody knows that those guns are toy guns" and her mother "had absolutely no idea that those [toy guns] are real guns according to the legal definition." Shao Ke (邵客), *Tianjin Laotai Bai Shejitan Beipan Feifa Chiyou Qiangzhi Zui, Jingfang Jiandingchu 6zhi Qiangzhi* (天津老太摆射击摊被判非法持有枪支罪，警方鉴定出6支枪支) [A Tianjin elderly woman is convicted of illegal possession of guns for setting up a shooting gallery; police have identified six guns], Pengpai Xinwen (澎湃新闻) [The Paper] (Dec. 29, 2016), ¶ 2 & ¶ 7. Zhao was convicted of illegal possession of guns and received a sentence of imprisonment for three years and six months. *People v. Zhao Chunhua*, ¶ 11.

Wide media coverage of the case "sparked anger over what many people see as the uncompromising application of the law." Ben Blanchard, *Chinese Woman Jailed over Balloon-popping Guns Set Free*, Reuters, Jan. 26, 2017. On appeal, the "Tianjin No 1 Intermediate People's Court reduced the punishment to three years in prison suspended for three years, which meant Zhao was released from custody." Yin Cao & Yining Peng, *Shooting Gallery Owner Wins Appeal over Gun Sentence*, China Daily, Jan. 27, 2017.

In 2018, the Supreme People's Court and the Supreme People's Procuratorate together issued an "official reply," requiring prosecutors to consider other elements and not just muzzle energy. For "guns powered by compressed gas and having low muzzle energy," prosecutors should look into "the appearance, material, projectile, purchase place and channel, price, use purpose, and lethality of the gun involved, whether the lethality can be easily improved through modification, as well as the subjective cognition, motive and purpose, past behaviors, and illegal gains of the perpetrator." *Official Reply of the Supreme People's Court and the Supreme People's Procuratorate on Issues Concerning Conviction and Sentencing in Criminal Cases Involving Guns Powered by Compressed Gas and Air Rifle Pellets* (promulgated by the Supreme People's Court and the Supreme People's Procuratorate, Mar. 8, 2018, effective Mar. 30, 2018), art. 1, CLI.3.312342(EN) (Pkulaw). In a follow-up explanation, the Supreme People's Procuratorate explained that the joint "official reply" was needed because some prosecutors had "mechanically applied the relevant laws and judicial explanations regarding the use of the number [of guns identified in the case] to determine the severity of the case. Such practices have violated the criminal justice principle of determining the appropriate crime and punishment for the responsible party and caused unreasonable and inappropriate convictions and sentencing." Wan Chun (万春) & Yang Jianjun (杨建军), *<Guanyu She yi Yasuo Qiti wei Dongli de Qiangzhi, Qiqiang Qiandan Xinshi Anjian Dingzui Liangxing Wenti de Pifu> Jiedu* ¶ 2 (关于涉以压

缩气体为动力的枪支、气枪铅弹刑事案件定罪量刑问题的批复》解读) [The Explanation on the Official Reply on Issues Concerning Conviction and Sentencing in Criminal Cases Involving Guns Powered by Compressed Gas and Air Rifle Pellets], the Supreme People's Procuratorate website (Apr. 22, 2018).

e. Knives

Knives remained largely unregulated in China until 1983. "From 1983, the management of cutters in China has gone through several modes: from no specialized regulation to 'classification + permission' and eventually to 'classification management' alone." Xie Chuanyu (谢川豫), *Woguo Guanzhi Qiju Lifa Yanjiu* (我国管制器具立法研究) [Legislative research on controlled instruments in China], Journal of People's Security University of China (Social Science Edition), 129, 129 (Oct.-Dec. 2016). National statutes regulating knives include *Xingfa* (刑法) [Criminal Law] (art. 130 & art. 297); *Renmin Jingcha Fa* (人民警察法) [People's Police Law] (art. 6, § 5); *Jieyan Fa* (戒严法) [Martial Law] (art. 16); *Tielu Fa* (铁路法) [Railway Law] (art. 60); *Minyong Hangkong Fa* (民用航空法) [Civil Aviation Law] (art. 101 & art. 193).

Certain knives are defined as "controlled knives" and are subject to special restrictions. Carrying a controlled knife into a public space and "endangering public safety, is to be sentenced, when the circumstances are serious, to not more than three years of fixed-term imprisonment, detention, or control." Xingfa, art. 130 (2017 amend.). A person bringing a controlled knife into "an assembly, parade, demonstration is to be to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprived of political rights." Xingfa, art. 297 (2017 amend.). For merely carrying a controlled knife in public places, the punishment is detention "for not less than 5 days but not more than 10 days" plus a fine of up to 500 yuan. *Zhonghua Renmin Gongheguo Zhian Guanli Chufa Fa* (中华人民共和国治安管理处罚法) [Public Security Administration Punishments Law of the People's Republic of China] (promulgated by the 17th Session of the Standing Committee of the 10th National People's Congress on Aug. 28, 2005, amended by the 29th Session of the Standing Committee of the 11th National People's Congress on Oct. 26, 2012, effective Jan. 1, 2013) art. 32, CLI.1.188539(EN) (Pkulaw).

Starting in 1983, controlled knives were defined as daggers, triangular knives, spring-loaded knives "and other similar single-blade, double-blade and triangular-blade knives." *Gongan Bu dui Bufen Daoju Shixing Guanzhi de Zanxing Guiding* art. 2. (公安部对部分刀具实行管制的暂行规定) [Temporary Regulation of the Ministry of Public Security on Implementing Controls on Certain Knives] (promulgated by the Ministry of Public Security, Mar. 12, 1983, partially effective), CLI.4.1580 (Pkulaw).

Controlled knives were only for the military and law enforcement. However, a Dagger Carry permit was available for "professional hunters, geological explorers and other individuals who work in the wilderness that must carry daggers due to the needs of their professions." *Id.* at art. 3. Manufacturers of controlled knives had to obtain a "Specialized Knives Manufacturing Permit." *Id.* at art. 5. Controlled knife retailers needed permissions from their local county or city public security bureau and had to "maintain a registry of buying and selling records ready for inspections by the public security organ." *Id.* at art. 6.

In 2002, the State Council issued an edict cancelling existing permits for carry, sales, and manufacturing. *Guanyu Quxiao Diyipi Xingzheng Shenpi Xiangmu*

de Jueding (关于取消第一批行政审批项目的决定) [Decision on the Cancellation of the First Batch of Administrative Approval Items] (promulgated by the State Council, Nov. 1, 2002, effective Nov. 1, 2002), CLI.2.44187 (Pkulaw). This Decision ended the following permits regarding knives: item 104 (canceling "Specialized Knives Manufacturing Permit"), 105 (canceling "Dagger Carry Permit"), 106 (canceling "Administrative Approval for Selling Controlled Knives"), 107 (canceling "Specialized Knives Purchase Permit"). Xie claims that in this second stage of the regulation on knives, "the focus of the regulation is on identifying controlled knives under the current, still existing classification management model for knives." Xie, at 130.

The 1983 *Temporary Regulation on Implementing Controls on Certain Knives* only gave "a general description of the scope of controlled knives, which lacks a standardized identifying criterion. This further stirs controversies in society due to arbitrary enforcement in practice." Zhang Jiazhong, *The Issue in Legal Documents About Management of Public Security of Controlled Knives*, J. Guizhou Police Officer Vocational Coll. 16, 18 (July-Aug., 2012).

The confusing standard on controlled knives was replaced in 2007 by specific definitions from the Ministry of Public Security. A controlled knife is now any of the following:

1. A dagger: contains a handle, a blade and a fuller [a groove in the blade to reduce weight]; the tip of the knife has an angle of less than 60 degrees; may have single, double or more edges on the blade;
2. A triangular knife: a knife used in machining that has a triple-edged blade;
3. A spring-loaded knife with self-locking mechanisms: a folding knife with a blade capable of being secured or locked when deployed with springs or other locking mechanisms in the handle;
4. Other similar sharp knives with single, double or triple edges: all other single, double or multiple-edged knives with a blade longer than 150 mm and an angle of less than 60 degrees on the tip;
5. Other single, double or multiple-edged knives with an angle greater than 60 degrees on the tip, but with a blade longer than 220 mm.

Guanzhi Daoju Rending Biaozhun art. 1 (管制刀具认定标准) [Standard for Identifying Controlled Knives] (promulgated by the Ministry of Public Security, Jan. 4, 2007, effective Jan. 4, 2007), CLI.4.89274 (Pkulaw).

The definition of controlled knives from art. 1, § 5 includes "the most commonly used cleavers in family lives, watermelon knives used by fruit vendors and chopping knives widely used in the countryside" if their blades exceed 220mm (8.6 inches). Xie, at 130.

The northwestern region of Xinjiang has especially tight knife control. The Xijiang local authority is now "requiring all knives in the township to be engraved with the ID number of the owner." *Xinjiang Qizhao Weiwen Daoju Bixu Kezhu Yongzhe Shenfenzheng Haoma* ¶ 5 (新疆奇招維穩刀具必須刻鑄用者身份證號碼) [Xinjiang's creative measure to maintain social stability: knives must bear engravings of the owner's ID number], Dongwang (東網) [Oriental Daily News], Jan. 10, 2017. A *Wall Street Journal* video shows a transaction with the engraving. Clément Bürge, *Life Inside China's Total Surveillance State*, Wall Street J., Dec. 19, 2017 (video at 3:56 to 4:30).

However, the specific regulations on knives in Xinjiang are largely unavailable via Chinese legal databases like Pkulaw or even local government websites in Xinjiang. The only Xinjiang regional regulation on knives available via Pkulaw has no requirements on engraving owners' information on knives, but only requires manufacturers of controlled knives to "engrave business or trade names and numbers (serial number or batch number) on their products." *Xinjiang Weiwuer Zizhiqu dui Bufen Qiju Shishi Guanzhi de Zanxing Banfa* (新疆维吾尔自治区对部分器具实施管制的暂行办法) [Temporary Regulation of the Xinjiang Uygur Autonomous Region on Implementing Controls on Certain Items] (promulgated by the Xinjiang Uygur Autonomous Region Government, May 9, 2012, effective Aug. 1, 2012), art. 10, CLI.11.610698 (Pkulaw). In this Xinjiang regional regulation, the term "controlled item" is broader than the list of "controlled knives" from the national *Zhian Guanli Chufa Fa*. In Xinjiang, "controlled items" include "[d]angerous instruments like hatchets, battle axes, adzes, folding sickles, etc." *Xinjiang Weiwuer Zizhiqu*, art. 3, § 2.

Major cities such as Shanghai and Guangzhou have previously implemented temporary ID registration requirements for knife buyers when cities were hosting major events. In 2010, the Shanghai municipal government "decided to take special measures to administrate cutters during the hosting of Expo 2010 Shanghai" and established a "[r]eal name registration system for selling and purchasing" for "dangerous cutters." *Announcement of Shanghai Municipal People's Government on Strengthening the Safety Administration of Cutters* (promulgated by the Shanghai Municipal People's Government, Apr. 15, 2010, effective Apr. 15, 2010), art. 5, CLI.11.406172(EN) (Pkulaw). As for Guangzhou, during the 2010 Asian Games similar temporary measures were taken, namely a "real name registration system for purchasing and selling dangerous cutters." *Guanyu Jiaqiang Daoju Anquan Guanli de Jueding* art. 4 (关于加强刀具安全管理的决定) [Decision on Strengthening the Safety Administration of Cutters] (promulgated by the Guangzhou Municipal People's Government, Oct. 26, 2010, expired).

Notwithstanding all the above, a quick search on Taobao, a primary Chinese online shopping website, with the keyword "菜刀" [Chinese cleaver], produced 100 pages of results with 48 individual listings on each page. Many of these online vendors have posted shipping restriction notices and refuse to ship their knives to Xinjiang or Tibet; some other vendors even refuse to ship to Beijing and Inner Mongolia.

NOTES & QUESTIONS

1. **CQ.** Ancient Chinese thought and law on arms are covered in online Chapter 16.A. The Mao period in China is covered *infra* Section D.3.

2. The U.S. State Department issues annual Country Reports on Human Rights Practices. The annual reports on China describe human rights violations there. In retaliation, China's Information Office of the State Council issues its own reports on the United States. *E.g.*, Human Rights Record of the United States in 2017, XinhuaNet, Apr. 24, 2018. The reports always castigate the United States for, inter alia, insufficient gun control. Do you agree? **CQ:** Online Chapter 18 details the efforts of gun control advocates and gun rights advocates to have their preferred position recognized as an international human right.

3. China's restrictive gun laws have not eliminated private possession of firearms. Handguns and rifles still circulate due to smuggling, theft, lax controls at firearm factories and arsenals, and small-shop or home production. Defiance of gun laws is on the rise, increasing by more than 50 percent in 2015, according to government statistics. *See* Te-Pin Chen, *Shooting Highlights Gun Concerns in China*, Wall St. J., Jan. 4, 2017. What might explain this sharp rise?

4. Despite China's strict knife laws, there have been several deadly knife attacks in recent years. Nine students were killed and ten injured in a knife attack in April 2018 outside a school in the Shaanxi province. Two were killed and nine hurt in a meat cleaver attack at a Wal-mart store in Shenzhen in July 2017. Three assailants killed five and wounded ten others in a February 2017 knife attack in the Xinjian region. Several attackers with knives killed 29 people and wounded more than 100 others at train station in Kunming, Yunaan in April 2014. Multiple unrelated stabbings at schools from 2010 to 2012 killed at least 25 and injured over 100.

9. Thailand

Formally speaking, Thailand is a constitutional monarchy. Over the past decades, it has alternated between periods of democracy and periods of military rule.

Thailand's Interior Ministry reports that there are over 6 million registered firearms in the nation, whose population is over 66 million. About 4 million additional guns are estimated to be illegally owned. In 2013 there were 7.48 gun homicides per 100,000 people, compared the U.S. rate of 3.55. *A Look at Thailand's Fervent Gun Culture*, Deutsche Welle, Feb. 19, 2016. New legislation in October 2017 limited gun ownership to citizens only. The law also specified that a separate permit is necessary to carry a licensed gun concealed.

In the southern provinces of Narathiwat, Yala, and Pattani, jihadi terrorists aim to create an Islamic state independent of Thailand, whose population is predominantly Buddhist. The three southern states are about 80 percent Muslim, and 20 percent Buddhist. The Muslims are predominantly of Malay ethnicity, making them different from the Thai majority.

Many of the 2 million Thais who live in the far south responded by legally arming themselves. There are more guns per capita among the southerners than elsewhere. Buddhists and moderate Muslims have acquired shotguns, rifles, and pistols. *Thailand: The Red, The Yellow and the Green*, StrategyPage, Sept. 21, 2009. Some of the armed Thais serve as village defense volunteers, in a program encouraged by the government. *Thailand: All Quieter on the Southern Front*, StrategyPage, Sept. 26, 2018.

The jihadis despise the secular education offered in Thailand's public schools. They would prefer that all Muslims be forced to study in madrasas. In the south, most public school teachers are Buddhists, and most come from more northerly states.

Accordingly, schools and teachers became particular targets for the jihadis. Then, "Interior Minister Bhokin Bhalakula ordered provincial governors to give teachers licenses to buy guns if they want to even though it would mean bringing

firearms into the classrooms when the region's 925 schools reopen May 17 after two months of summer holiday." *Thailand Allows Teachers in Restive South to Carry Guns for Protection*, Associated Press, Apr. 27, 2004. "Pairat Wihakarat, the president of a teachers' union in the three provinces, said more than 1,700 teachers have already asked for transfers to safer areas. Those who are willing to stay want to carry guns to protect themselves, he said." *Id.* In Narathiwat, the president of the Teacher's Association reported that about 70 percent of the province's teachers carry guns. *Teachers Being Targeted and Murdered in Thailand*, N.Y. Times, Dec. 16, 2012.

The military provided teachers with firearms safety and tactical training. While teachers were allowed to have long guns, most chose a handgun, for easier handling and carry. Most popular were 9mm pistols made by Steyr (a high-quality Austrian company). The army sold Steyrs to teachers for 75 percent off the market price. *Teachers in Southern Thailand Learning to Use Guns*, AsiaNews, Sept. 13, 2006.

Another component of the security strategy was creating military bases on school grounds. *Target of Both Sides*, Human Rights Watch, Sept. 21, 2010. Not all schools had military bases, but they did have soldiers present for part of the day. As a retired teacher explained, "After we arrive at school, the soldiers stick around for a while until the morning flag-raising ceremony is over and the students are in their classrooms. . . . At lunchtime, the soldiers return to protect us inside the school grounds. Then the same thing happens in the afternoon when class is over. The soldiers escort us back home." *Teachers Being Targeted and Murdered in Thailand*.

These policies certainly saved some lives. In 2006, a teacher who was driving to school drove away jihadi attackers by shooting back at them. *Teachers in Southern Thailand Learning to Use Guns*.

Yet the increased defensive force did not solve everything. By 2010, nearly 330 schools had been attacked. Teachers were also attacked when alone and most vulnerable—that is, when traveling to or from school. This led to the military escorts for traveling teachers. *Teachers Take to Guns as Insurgency Targets Schools*, Inter Press Service, Sept. 27, 2010. Critics of the civilian arms program have worried that it might eventually cause an increase in intercommunal violence. Diana Sarosi & Janjira Sombatpoonsiri, *Arming Civilians for Self-Defense: The Impact of Firearms Proliferation on the Conflict Dynamics in Southern Thailand*, 23 Global Change, Peace & Security 387 (2011).

Not every school had full-time guards, and at some schools, teachers did not carry. On December 11, 2012, five men attacked one such school, the Ban Ba Ngo School in Mayo district, Pattani. After taking over the cafeteria, they murdered the school's two Buddhist teachers, and spared the five Muslims. The next day, the Confederation of Teachers of Southern Border Provinces announced that it was shutting down 1,300 public schools in the three southern provinces until the government provided better protection. *Thailand: Rebels Escalate Killings of Teachers*, Human Rights Watch, Dec. 17, 2012.

Steady military pressure on the jihadis slowly bore fruit after 2010. That year, there were 2,061 terrorist incidents; by 2017, the number had fallen to 489. Likewise, deaths continued their steady decline, down to 235 in 2017. Over the years, the insurgents killed over 7,000 people. *Thailand: All Quieter on the Southern Front*. Peace talks have been going on since 2013, although not all of the separatist groups are willing to negotiate.

NOTES & QUESTIONS

1. Was it a good idea for the Thai government to respond to terrorism by arming the public? By arming schoolteachers? Are the justifications for arming schoolteachers in Thailand different than those offered for arming schoolteachers in the United States?

2. Some Westerners believe that all Buddhists are absolute pacifists, but this has never been so, and is particularly untrue for the Theravāda branch, which predominates in Thailand, Burma, and Sri Lanka. *See* David B. Kopel, *Self-defense in Asian Religions*, 2 Liberty L. Rev. 79, 135-40 (2007).

3. *Burma.* As in other British colonies, the colonial government in Burma in the late nineteenth century aimed to disarm the subject peoples. In the Chin Hills, the people had a strong culture of hunting and archery. During the nineteenth century, they eagerly acquired firearms. "There were three things that Chin men regarded as their most valued possessions, also representing their masculinity: corrugated iron sheets, a house made of teak, and a gun." Pum Khan Pau, *Disarmament and Resistance in Colonial Burma: A Case Study of the Chin Hills*, 21 J. Burma Stud. 233, 239 (2017).

For the most part, the Chin guns were flintlocks, much inferior to the British infantry rifles of the later nineteenth century. *Id.* at 241. But by avoiding open battles, and relying on ambushes, Chin resistance was effective. *Id.* at 241-42. The British "pacification" of Burma relied heavily on burning villages and shooting anyone found in possession of arms. *Id.* at 244. The British campaign backfired. "To save their guns," all the Chin tribes united to drive out the British. *Id.* at 245. The British responded with 26,000 troops, who destroyed all food and food cultivation, to starve the Chin into submission. The policy worked, and by 1893 the Chin were mostly disarmed. *Id.* at 250-52.

Beginning in 1895-96, the British set up a licensing and registration system for the remaining guns that the Chin were allowed. This was one gun per ten houses. *Id.* at 252. Many Chin did not comply, and instead secretly re-armed. *Id.* at 252-55. The British granted Burma independence in 1948.

10. Kenya

David B. Kopel, Paul Gallant & Joanne D. Eisen

Human Rights and Gun Confiscation

26 Quinnipiac L. Rev. 385 (2008) (revised for this work by Vincent Harinam)

. . . When Kenya attained independence from Great Britain in 1963, it was a land rich in natural resources. From the outset, its first president, Jomo Kenyatta, ruled in a brutal and repressive manner. He abused the power of his office, rewarded his political and ethnic cronies, and eliminated political rivals. Although central state planning was implemented under a pretext of fairness and efficiency, it became the mechanism for kleptocracy. A similar pattern of corruption and ethnic rivalry persists today.

Karamoja is a region in the borderlands between Kenya and Uganda. The Karamoja Cluster is the largest of the three pastoral clusters in the Horn of Africa.

Many arms from former Warsaw Pact arsenals have found their way to Africa, including Karamoja. To counteract this proliferation of firearms, the Government of Kenya, in 2000, convened a ministerial conference on small arms. This culminated in the Nairobi Declaration where 10 regional governments, including Kenya and Uganda, vowed to cooperate in stemming the supply of firearms within the region. (The Nairobi Protocol is detailed in online Chapter 18.B.2.[46])

Some disarmament activists contend that the pastoralist culture is deficient, and when this culture is coupled with modern weapons, the result is violence and poverty. On the other hand, Kilfemarian Gebre-Wold, former director of a German-sponsored disarmament program in East Africa, acknowledged that "though many pastoralist households have small arms, the rate of crime and violent incidents is not high in their community. . . . [T]he density of weapons does not mean automatically the rise of gun-related violence."

The Kenyan government itself is responsible for much violence. In Kenya, as in much of the world, tribalism lies at the heart of politics, with devastating effects on the disfavored tribes.

Disfavored by the regimes in the capital city, Nairobi, the pastoralists have been denied legal access to land and water. The livelihood of the pastoralists depends on the preservation of their livestock. Needing to find suitable pastures, Kenya pastoralists move into and out of neighboring countries, with little or no attention to international boundaries. The movements cause misunderstandings and armed conflict between neighboring pastoralist clans. Cattle-raiding between tribes has been a custom from time immemorial. But cattle-raiding has increased due to the high price of bridal dowries (paid in cattle) and diminishing livestock due to frequent droughts. Furthermore, raiding has been commercialized in recent decades with wealthy urbanites subsidizing cattle raids in order to shore up regional beef supplies.

To secure their livestock, pastoralists have armed themselves. It has been suggested that almost all households and homesteads within the region possess a firearm or two. Among Turkana people, firearms have been an especially well-established tradition, given the need to protect their livestock from incursions by the neighboring Pokot and Samburu in north-western Kenya.

In 2005, the governments of Kenya and Uganda began a coordinated campaign to prevent their shared border from becoming a haven of safety for civilians with weapons. Estimates of the civilian gun stock, as of August 2005, ranged from a very conservative 50,000 up to 200,000 in Kenya. On the other side of the border, in Uganda, estimates ranged from 50,000 to 150,000.

The first stage in gun confiscation is typically the announcement of a "voluntary" surrender program, accompanied by promises that the government will provide security. The government also promises to provide full compensation for surrendered weapons, but none of the promises are kept.

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46. [The other regional gun control treaties in Africa are among the South African Development Community (SADC) and the Economic Community of West African States (Ecowas). They are essentially similar to the Nairobi Protocol.—Eds.]

The response to livestock raiding by the law enforcement agencies is often slow and ineffective, sometimes overly forceful, and sometimes non-existent. The Kenya government's inability to provide holistic security for pastoralists and their livestock is a primary driver of violence within the region. At times, government agents have colluded in crimes against people who have been disarmed.

The populace is further aware that government has not kept its promises to develop the area, or even to provide basic goods and services. With government corruption out of control, it is unlikely that the promises could be kept, even if the political will to do so were present.

Disarmament is followed by destitution. The pastoralists already live at a subsistence level, with survival dependent on the next water hole. If defenseless against cattle raids, they fall into destitution. No rational person, having seen her neighbors in such dire circumstances, would gamble her family's survival on empty government promises. Although, as the disarmament community recognizes, women are often interested in peace through disarmament, they are not willing to remain passive while their families suffer and die. According to scholars Margie Buchanan-Smith and Jeremy Lind, "[t]here are anecdotal reports of women defending themselves with guns. . . . Women often request ownership of their man's gun if he is killed. . . ."

The Kenyan government will resort to any means to collect firearms. According to West Pokot District Commissioner Stephen Ikua, "[w]e shall use force to get them." In March 2006, Internal Security minister John Michuki issued a shoot-to-kill directive for the entire country of Kenya, giving the police free rein against the populace.

The existence of a gun licensing program creates the legal fiction that ordinary citizens can possess a firearm, a fiction which bolsters the claim that the government will follow the proper legal procedures. Yet according to Peter Mwaura of the United Nations Environmental Programme, "[i]n practice, however, only the rich and the socially or politically correct or well connected manage to obtain firearms certificates and keep them. . . . Thus the gun law can be pretty arbitrary and subjective in its application." Likewise, Taya Weiss of South Africa's pro-disarmament Institute for Security Studies stated, "[v]ery few Kenyan citizens, especially those living in remote areas, meet the criteria for a gun license and can afford to pay the associated fees."

Ordinary Kenyans are not even allowed to possess bows and arrows, and the bow laws, too, are applied discriminately. Government security agents can therefore safely assume that every ordinary person with a bow or gun lacks a license, and thus the police can shoot to kill with impunity.

If the Kenyan government had paid some attention to the needs of the people, rather than discriminating against selected tribes, conditions might not have degenerated to the point where factional fighting has become the last survival mechanism available to many pastoralists. If government would first attend to the basic life necessities of northern Kenya, survival would not necessitate weapons possession. Yet, some NGOs share the Kenyan government's fixation with arms confiscation above all else. For example, Oxfam (which is a major supporter of two international gun confiscation NGOs—ControlArms, and the International Action Network on Small Arms, Ch. 18) declares that what Kenya really needs is "community arms collection and voluntary arms surrender activities."

The pastoralists of Kenya, however, have remained armed, despite almost-continuous disarmament programs for over a century. As old arms are confiscated, fresher arms acquired from the international black market.

Some of the disarmament programs have been accompanied by brutality, a fact remembered by many tribal leaders. One operation conducted by the military in 1950 caused the deaths of fifty people. In addition, the government confiscated 10,000 head of cattle.

The problems today existed under many different governments. In 1961, when Uganda was still a British colony, then-Lieutenant Colonel Idi Amin of the Uganda's King's African Rifles crossed the border into Kenya and tortured and terrorized civilians who refused to give up their weapons.[47] Although at least 127 men were castrated and left to die, the operation failed to disarm the Turkana people of northwest Kenya.

The unsuccessful 1984 "Operation NYUNDO" (Operation Hammer) was an example of the difficulty of disarming civilians who would rather die than disarm. "Operation NYUNDO" was a collaborative effort of the Kenyan and Ugandan armies, similar to the joint campaign against civilian gun owners that began in 2005. Krop Muroto, a political activist, recalled:

> No one knows to date how many people were killed in that operation that lasted three months. The community was further devastated by mass killing of their cattle. 20,000 head of cattle were confiscated, rounded up in sheds and starved to death. Among other atrocities, . . . the army used helicopter gunships, killed people and destroyed a lot of property.

Confiscation promotes violence, since tribes that have been (temporarily) disarmed become prime targets for other tribes. After the Turkana voluntarily disarmed, they suffered repeated attacks from the neighboring Pokot and Karimojong. Many members of the Pokot community fled to Uganda to avoid weapons confiscation. Later, they later returned from Uganda with newly acquired firearms to torment the Turkana, who were unable to relocate. The assurance of protection of the Turkana by the Government of Kenya did not materialize.

Later, when government attention did turn to the Pokot, Reuters reported:

> Lopokoy Kolimuk, an elder in the dusty and dry village of Kanyarkwat in the West Pokot district, said the soldiers who carried out that mission were wild, beyond humanity. He said many shot Pokots on sight, or forced men to lie on the ground in a line as they ran across their backs. Other men had their testicles tied together and were then made to run away from each other, he said. Women were raped in front of their husbands, sometimes with empty beer bottles.

In April 2006, Kenyan Security Minister John Michuki told Parliament, "[t]he Government has decided to disarm the Pokot by force. If they want an experience of 1984 when the Government used force to disarm them, then this is precisely what is going to happen. . . ."

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47. [Amin took over independent Uganda in a 1971 military coup. Before he was deposed in 1978 by a Tanzanian invasion, he murdered several hundred thousand Ugandans.—Eds.]

Tapangole Lokeno, another Pokot elder, stated: "It is so fresh in our minds, so when Michuki says this operation will be worse, we just wish this world would bring us down first." Stephen Ikua, a government spokesman, said that threats were necessary in order to get civilians to peacefully surrender their firearms. He explained, "As a government, you should talk from a position of strength. You cannot come in saying you are going to respect human rights."

In May 2006, the BBC described the latest military operation in Kenya, codenamed "Okota" (Collect), utilizing tanks, trucks, and helicopters, and taking over a local school building as a barracks for the army. In the village of about 2,000 people, eight weapons were recovered. Fearing a repeat of the 1984 atrocities, 15,000 panicked people fled to Uganda with their cattle and their guns, leaving behind the aged, the infirm, and the children. In West Pokot alone, 120,000 people needed food aid, but only 68,000 received rations. Schooling was disrupted, and farmsteads were neglected.

Five weeks after the forced disarmament began, only seventy illegally possessed firearms had been recovered. Collecting a few dozen firearms seems to be reason enough for the Kenyan government to go to war against its own citizens. Apparently, confiscating a few dozen firearms is, and for decades has been, a government priority that eclipses the digging of wells, the construction of more schools, or the establishment of medical clinics. And many Kenyans seem to have the same sentiment as Charlton Heston, the former President of the National Rifle Association, who declared that the only way anyone would ever get his guns was to take them "from my cold, dead hands."

In mid-2006, the United Nations Development Programme withdrew its support for the Ugandan side of the joint disarmament program. At the time, a major conference for the U.N. gun control effort, the Programme of Action [online Ch. 18.A.3] was underway in New York and the situation in east Africa was giving coercive disarmament a bad name. The Kenyan government likewise backed away from Operation Okota.

Instead, Internal Security Minister John Michuki launched Kenya's Action Plan for Arms Control and Management (KNAP) on July 14, 2006, giving civil society and local NGOs, in lieu of government forces, greater responsibility for further disarmament. Rather than repeating his previous violent threats (which had turned out to be accurate), Michuki merely stated, "[t]he Government remains steadfast in its war against illicit small arms." Although the government of Kenya has discontinued the joint forcible disarmament exercise with Uganda, the government of Uganda continues to send its own soldiers into Kenya, where they pillage and steal cattle, while recovering small quantities of weapons. Kenyan military personnel torture and abuse civilians refusing to surrender their weapons or divulge information on other armed community members.

Arms confiscation is not restricted to pastoralists or the average citizen. In March 2016, Mombasa's Governor, Hassan Joho, was forced to surrender his firearm to Mombasa Central Police following a government directive. Though Joho had owned the firearm for 20 years with no misuse, the order was signed by Chief Licensing Officer Samuel Kimaru who maintained that the governor was "unfit" to carry a firearm. The disarmament came on the same day seven police officers attached to the governor were withdrawn from his home.

The letter, which was made public on the governor's official Facebook page, required Mr. Joho to also surrender his firearm certificate, stating: "I wish to notify

you in accordance with the provisions of the firearms Act. Cap 114 laws of Kenya that your firearms certificate number 4773 issued to you on June 18, 2008 is with effect from the date of this notice, revoked as I am satisfied that the revocation is warranted under section 5(7) of the above mentioned act." Joho saw the removal of his police escort and confiscation of his firearm as part a crackdown on political opposition.

NOTES & QUESTIONS

1. *Death penalty.* The Kenyan government at one point proposed execution by hanging as the punishment for the illegal possession of semi-automatic weapons. *See* NRA News, *Kenya Proposes Execution of Gun Owners*, YouTube, Oct. 7, 2009 (updated Nov. 15, 2009). Assuming that one has no qualms about the death penalty, or about imposing it for crimes other than murder or treason, is the Kenyan proposal reasonable? If government agents can kill arms owners with impunity, does it matter whether a statute formally declares a death penalty?

2. What do you predict would occur in Kenya if the government were to succeed in disarming the Kenyan population?

3. *International intervention?* Is it sometimes morally legitimate for Nation A to assist the government of Nation B in disarming Nation B's people? Under what circumstances? Is assisting in such disarmament ever morally obligatory?

Now consider the converse. Is it sometimes morally legitimate for Nation A to seek to arm the people of Nation B, contrary to the wishes of Nation B's government? Is it ever morally *obligatory* to help another nation's citizens prevent disarmament efforts by their own government? **CQ:** Consider how these questions were answered by the classical founders of international law (online Ch. 18.C) and my modern international law regarding genocide (online Ch. 18.D).

4. Assuming one favors citizen disarmament as a general matter, is there some level of state dysfunction where the argument for disarmament fails? What are the characteristics of that dysfunction? Does Kenya exhibit those characteristics?

Is allowing individual access to private firearms in failing or dysfunctional states reasonable? Are private arms a component of a long-term strategy for building stable and just relationships between government and citizenry? Are private arms a tool allowing citizens a chance to survive in emergencies caused by failed or malevolent states?

5. *Counter-terrorism.* In 2013, Islamist terrorists executed a well-planned attack on the Westgate Mall, in Nairobi. They murdered 60 people and would have murdered hundreds more but for the intervention of armed citizens. Ronald K. Noble, who served as Secretary-General of Interpol from 2000 to 2014, argues that there are two security approaches to such attacks. One is target-hardening, which would include metal detectors and large contingents of armed police at the entrances to every potential target. Noble contends that while a selected number of potential targets can be hardened, it is impossible to harden all or most targets. The other alternative is the title to Noble's video: *Armed Citizens Can Help Stop Terrorist Massacres Like Nairobi and Paris*. The video includes graphic footage of the attack and of the response of armed citizens. According to Noble, "[t]his is not an American argument, nor a political argument. In these horrific situations, law-abiding armed citizens have helped protect others and literally saved lives, and the world should

be made aware of this reality. . . . In the hands of law-abiding citizens, guns can and do save lives." Would Kenya be safer if, like most American states, it allowed handgun carrying by all adults who passed safety training and background checks?

6. Long before the Westgate attack, some Kenyans had been urging the government to abandon the confiscation campaigns, and instead to follow the Second Amendment model. As an essay in Kenya's leading newspaper put it:

> "How can the Government ask us to surrender our guns when we know very well that there is no security for us? If we give out our firearms, say today, who will protect us when the neighbouring tribes strike? How about our stolen livestock? Who is going to return them to us?" Mr. Lengilikwai talks with bitterness.
>
> In the past, critics of liberalising access to firearms have argued that they would put ordinary people's lives in peril because even squabbles in the streets or the bedroom would be resolved by bullets. Incidentally, such incidents are few and far between in the Kerio Valley despite the easy accessibility of AK-47s as well as the relatively low levels of education and social sophistication. . . . If Kenya is to achieve long-lasting stability, it ought to borrow a leaf from the US, whose constitution gives the people the right to bear arms and form militias for their own defence should the armed forces fail them, as happened in Kenya after the December elections.[48]

Paul Letiwa, *Why Herders Won't Surrender Their Firearms Just Yet*, Daily Nation, Apr. 30, 2008; *see also* Ng'ang'a Mbugua, *Law Should Be Changed to Free Guns*, Daily Nation, Apr. 25, 2008 (noting success of armed defense program of the people of the Kerio Valley).

Suppose that the idea of a fundamental human right to keep and bear arms became popular globally. What consequences might ensue?

7. *Further reading*, including on Uganda's Karamoja disarmament program: Karol Czuba, *Karamojan Politics: Extension of State Power and Formation of a Subordinate Political Elite in Northeastern Uganda*, 39 Third World Q. 557 (2018); David-Ngendo Tshimba, *"Our" Cows Do Matter: Arguing for Human and Livestock Security Among Pastoralist Communities in the Karamoja Cluster of the Greater Horn of Africa*, 1 IHL Paper Series (no. 1, Sept. 2013) (explaining how government confiscates firearms instead of addressing the causes of economic instability); Eria Olowo Onyango, *Pastoralists in Violent Defiance of the State: The Case of the Karimojong in Northeastern Uganda*, Ph.D. diss. Univ. of Bergen (2010); James Bevan, Crisis in Karamoja: Armed Violence and the Failure of Disarmament in Uganda's Most Deprived Region (Small Arms Survey 2008); Kennedy Agade Mkutu, Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms (2008); Human Rights Watch, "Get the Gun!" Human Rights Violations by Uganda's National Arms in Law Enforcement Operations in the Karamoja Region (2007); Ben Knighton, *Belief in Guns and Warlords: Freeing Karamojong Identity from Africanist Theory*, 4 African Identities 269 (2006); Ben Knighton, *The State as Raider Among the Karamojong: "Where There Are No Guns, They Use the Threat of Guns,"* 73 Africa 437 (2003).

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48. [Following disputes about theft of the presidential election, large-scale inter-tribal violence broke out, leading to the deaths of about a thousand people and the displacement of several hundred thousand.—Eds.]

11. South Africa

David B. Kopel, Paul Gallant & Joanne D. Eisen

Human Rights and Gun Confiscation

26 Quinnipiac L. Rev. 385 (2008) (revised for this work)

The main South African gun control statute is the Firearms Control Act (FCA), which the South African Parliament enacted in 2000 (Act 60 of 2000). The law was favored by the African National Congress (ANC), which is the only political party that has ruled Parliament in the post-apartheid era. Opposition came from Democratic Alliance, another party which, like the ANC, had opposed apartheid.

The leading advocates for the new law were Gun Free South Africa. Drafting advice was provided by Canada, Japan, the United Kingdom, and New Zealand, as well by Professor Wendy Cukier, head of Canada's gun control lobby. In the difficult political struggle to pass the FCA, Kristin Rand, the head of Gun Free South Africa, stated, "We're not naive enough to think that the reason the majority of black people don't have guns is because they believe as we do." Rather, "It's because they can't afford them." Donald G. McNeil, Jr., *Racial Edge Sharpens Debate on South Africa's Gun Laws*, N.Y. Times, Dec. 23, 1997, at A1. South Africa has also joined a regional gun control treaty, organized by the Southern African Development Community. Protocol on the Control of Firearms and Ammunition (2001). There is similar regional convention, the Nairobi Protocol, for gun control in the Great Lakes region of central and east Africa. West Africa's regional convention was created by ECOWAS (Economic Community of West African States.) These conventions are discussed in online Ch. Change to 18.B.

Under the 2000 law, firearms may only be possessed if a person has been issued a license. A person may possess no more than four guns. Only one of the guns may be for self-defense. The self-defense arm may be a handgun (either a semi-automatic or a revolver) or a shotgun that is not semi-automatic. FCA, ch. 6, § 13.

"Restricted firearms" are semi-automatic rifles and shotguns. The government may administratively declare other firearms to be restricted. At the discretion of the government, a person may be granted permission to possess a semi-automatic long gun for self-defense. FCA, ch. 6, § 14.

Persons may also be licensed to possess guns for sporting purposes, including hunting. Allowable hunting arms are pistols, revolvers, and long guns that are not semi-automatic. FCA ch. 6, § 15. Members of hunting clubs and target shooting clubs may also be issued licenses for semi-automatic long guns. FCA ch. 6, § 16.

The license to possess a gun also serves as license to carry. The gun may not be carried loose; handguns must be in a holster or other container, and long guns must be carried in a holder designed for long guns. The gun may not be visible.

All guns must be registered. When not in use, guns must be stored in safes.

When the FCA came into effect, about a third of gun owners had more than four guns. They were required to sell them, or to turn them over to the government. About six hundred thousand guns have been given to the government, including in various amnesties. Section 137 of the FCA had promised compensation for guns, but lawsuits to compel payment have failed.

Licenses are valid for five years. An applicant must pass a written "competency test." Although the South African Constitution recognizes 11 official languages, the test is only given in Afrikaans and English.

The Central Firearms Registry (CFR) denies licenses to persons it considers at risk of violence. As applied, this includes being divorced, separated, or fired within the previous two years. Michelle Jones & Catherine Boulle, *Four SA Woman [sic] Killed Every Day by an Intimate Partner: NSW*, Pretoria News, Dec. 12, 2008, at 6.

Under the FCA, a license application must be determined to have "good motivation." The CFR has never specified what it considers "good motivation" to be. Applications are often rejected with the simple statement "Lack of motivation." Notwithstanding the statutory provisions about self-defense guns, self-defense applicants are often denied. *See* Estelle Ellis, *Getting a Legal Gun Is a Long Shot*, The Star, June 23, 2004, at 15. People who live in high crime areas are told that the police will protect them, notwithstanding South Africa's very high violent crime rates. Married women may be told that they should rely on their husbands for protection.

The statutory minimum age for a license is 21 years old, an increase from the previous law, which set the age at 16. Bianca Capazorio, *Shops Report Sharp Drop in Gun Sales*, The Herald (Port Elizabeth, South Africa), Aug. 18, 2005.

The FCA achieved its objective of sharply reducing legal gun ownership. According to the South African Police Service (SAPS), the number of legal gun owners fell by 44 percent from 1999 to 2007. The number of gun stores fell from over 700 before the FCA was passed to about 200 in 2006 and about 50 in 2007. Edwin Naidu, *Getting a Gun Is Easy—for Criminals; But If You're a Law-abiding Citizen It's a Lot More Complicated and Will Probably Take up to Two Years*, Sunday Independent, Feb. 4, 2007, at 2; Shaun Smillie, *500 Guns But No Buyers; Gunshop Owners Are Suffering a Great Loss Following the Firearm Control Act*, The Star, June 23, 2006, at 16; RW Johnson George, *South Africa Sticks to Its Guns*, The Sunday Times (London, England), Jan. 23, 2005, at 29. Within a year, the law resulted in a 24 percent decline in foreign trophy hunting because it became very difficult for foreigners to get temporary import permits for their hunting rifles. Domestic sales of hunting rifles dropped significantly, with overall sales falling as much as 95 percent. Capazorio.

In the first decade of the FCA, the licensing process was extremely slow, often taking two years. If an owner's license expired while a renewal application was pending, the owner was required to surrender all of his or her firearms. A 2005 English news story stated, "The regulations are bewilderingly complex and the licensing department is so slow that at its present rate it will take 65 years to re-register all South Africa's 4.5m legally held private guns." Johnson George. A year later, the number of licensed guns was estimated at 3.7 million. Clare Nullis, *New Lobby Aims to Fight Gun Control in Crime-Plagued South Africa*, Associated Press Archive, Jan. 26, 2006. As of early 2015, the government reported that 1,749,034 individual firearm owners possessed 3,081,173 firearms. Riah Phiyega, Implementing the Firearms Control Act: Presentation to the National Firearm Summit 2015, Report of the Portfolio Committee on Police on the National Firearms Summit Held on 24 and 25 March 2015 (2015). The Small Arms Survey estimates the total of legal and illegal guns in South Africa to be 5.4 million. Aaron Karp, *Estimating global Civilian-held Firearms Numbers* 4 (Small Arms Survey Briefing Paper, June 2018). South Africa's 2018 population was about 58 million.

According to the Black Gun Owners Association of South Africa (BGOASA), the government was especially hostile to black people in urban areas who wanted guns for protection. As a result, many blacks, including business owners, acquired defensive arms illegally. Johan Burger, Strategic Perspectives on Crime and Policing

in South Africa (2007, Pretoria: Van Schaik); *Guns Out of Control: The Continuing Threat of Small Arms*, IRIN 1 (2006); Johnson George (quoting a gun-store owner saying that "[w]ell-off whites can retreat inside high-walled houses with expensive alarm systems and security companies offering instant armed response. But 95% of my customers are black and they can't afford that. They buy my guns but have to leave them in my safe because they can't get licences for them. They are all going to be driven into becoming illegal gun owners."); M. Wines, In South Africa, Licensing Law Poses Hurdles for Gun Buyers, N.Y. Times, Jan. 3, 2005; E. Jacobs, *Anger over Gun Licence Law Sparks Protest*, IOL News, Aug. 23, 2004.

On the streets, a small pistol can be bought for 200 Rand, and an AK-47 for 800 Rand. Business Day, Nov. 25, 2005.[50] In contrast, a legal gun costs about four or five thousand Rand, plus more than a thousand additional Rand for fees and mandatory training.

Suing the government in 2010, the BGOASA claimed that 40,000 blacks had been denied firearms licenses. The lawsuit, along with years of pressure from other advocates, finally led to the government clearing out the licensing backlog. Since 2011, most license applications have been processed within 90 days.

In a subsequent lawsuit, South Africa's High Court found certain provisions of the FCA unconstitutional. First, the licensing procedures were irrational and vague. Second, differential treatment of gun owners under certain interim provisions versus permanent provisions violated the right of equality. Third, the absence of a proper procedure for surrendering a firearm whose license had expired, as well as the absence of compensation, violated property rights. The government appealed, and before the Constitutional Court, the government prevailed on all issues. *Minister of Safety & Security v. South African Hunters & Game Conservation Assoc.* 2018, CCT177/17 ZACC 14; 2018 (2) South Africa Criminal Law Reports 164; 2018 (10) Buttersworth Constitutional Law Reports 1268.

There remains a very serious problem of gun use by violent criminals. One important source of crime guns is the South African National Defence Force (SADF). This is suggested by the fact that R5 automatic carbines and predecessor models are common crime guns. The R5 is the primary weapon of the SADF and it is not legal for citizens.

Another source of crime guns is the African National Congress. For decades the ANC fought a war to overthrow the apartheid government and was generously supplied by the Soviet Union and its proxies. Apartheid ended in 1994 when multiracial elections were held. The ANC, however, held onto its arms—estimated at 100 tons of weapons and munitions. What has happened with those arms remains secret. The BGOASA and others charge that many ANC weapons have ended up as crime guns. Maritz Spaarwater, *Not So Fast, Mac!*, Sunday Times, Aug. 9, 2009.

A third source of crime guns is the police. There is a widespread problem of corrupt police selling guns to criminals. This includes guns that were surrendered to police pursuant to the FCA. *South African Police Lost 20,000 Guns*, BBC News, Mar. 9, 2011; Carien du Plessis, *DA Takes Aim at Zuma over Mooted Clamp Down on Civilian Gun Rights*, The Argus, Oct. 26, 2009, at 5; Mbulelo Baloyi, *Surrendered Guns*

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49. [As of 2021, the South African Rand is worth about six or seven American cents. The same was true as of Jan. 1, 2008, the earliest date for which we found a USD/ZAR exchange rate on the public internet.—Eds.]

"Used by Criminals," All Africa, Jan. 29, 2007 (Cape Argus/All Africa Global Media via COMTEX); Naidu.

Some illegal arms are "home-made guns, turned out in township backyards." Johnson George; G. Hay & N.R. Jenzen-Jones, Beyond State Control: Improvised and Craft-produced Small Arms and Light Weapons 41 (Small Arms Survey, Nov. 2018) ("In South Africa, craft accelerated under apartheid, but has since evolved into a driver and tool of criminal activity."). Finally, many legal citizen guns are stolen during burglaries, and then sold on the black market. Although the FCA requires that guns be stored in safes, the gun theft rate in South Africa is three times the U.S. level.

NOTES & QUESTIONS

1. South Africa's leading pro-gun group is the South Africa Gunowners' Association. It was formed in 1984, when the apartheid government proposed limiting the number and types of firearms that individuals could own. After defeating the government plan, SAGA began pushing to eliminate racial discrimination in gun control laws. Although SAGA prevailed in law, some abusive police administrators continued to reject license applications by blacks. Another pro-gun group is Gun Owners South Africa. The leading anti-gun group is Gun Free South Africa. Its patrons include Archbishop Desmond Tutu.

2. *Further reading*: Adele Kirsten, A Nation Without Guns?: The Story of Gun Free South Africa (2008) (how and why Gun Free South Africa helped enact the FCA); R. Matzopoulos, J. Simonetti, M. Prinsloo, I. Neethling, P. Groenewald, J. Dempers, L.J. Martin, A. Rowhani-Rahbar, J.E. Myers & M.L. Thompson, *A Retrospective Time Trend Study of Firearm and Non-firearm Homicide in Cape Town from 1994 to 2013*, 108 SAMJ [South African Medical Journal] 197 (2018) (FCA reduced firearms homicides in Cape Town for several years, but the trend was reversed starting in 2011. The authors hypothesize two major causes: First, the police cleared a large backlog of firearms license applications. Second, many firearms in government custody were corruptly sold to gangs.); Guy Lamb, *Policing Firearm Flows and Adaptive Illicit Networks: The Case of South Africa* (preprint 2018) (roles of corrupt police and corrupt licensed dealers who sell to criminals); David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 Penn St. L. Rev. 891 (2010) (The ANC government—in flagrant violation of the FCA and international arms trade treaties ratified by South Africa—follows its apartheid predecessor by smuggling arms to allied dictatorships in southern Africa, including the murderous regime in Zimbabwe.); David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 Quinnipiac L. Rev. 383 (2008) (human rights abuses in gun confiscation programs in South Africa, Kenya, and Uganda); Lesetja Simon Bopape, An Analysis of the Firearms Control Measures Used by the South African Police Service, Ph.D. thesis, Univ. of S. Afr. (exploring gaps between statute and enforcement in the FCA).

3. *Media licensing*. Like the apartheid regime, the ANC controls the South African Broadcasting Corporation's radio and television stations, keeping them in conformity with ruling party ideology, and using the license system to exclude alternative viewpoints.

4. *Libya*. Following the fall of the Qaddafi dictatorship in 2011, Libya has become a site of civil war, anarchy, and violence. According to one estimate, Libya's 6.4 million people own about 125,000 weapons. Violence-related problems for the health care system are detailed in Gemma Bowsher, Patrick Bogue, Preeti Patel, Peter Boyle & Richard Sullivan, *Small and Light Arms Violence Reduction as a Public Health Measure: The Case of Libya*, 12 Conflict & Health 29 (2018).

D. LONG-TERM HISTORICAL PERSPECTIVES

This Chapter concludes with three essays providing long-term perspectives. The first essay, by Professor Carlisle Moody, looks at the decline in European homicide the past eight centuries. He suggests that the proliferation of firearms—especially the proliferation of firearms that were easy to keep ready for sudden self-defense—may have contributed to the decline.

In the second essay, Professor Kopel argues that murder during the last century has been far more prevalent in Europe (and the rest of the world) than in the United States—if one counts murder by government. He challenges the idea that the United States has more murder than Europe because the United States has so many more guns. Indeed, historical experience in Europe and elsewhere shows that armed populations deter mass murder, and that if mass murder does begin, intended victims who acquire arms save many lives. The essay concludes with case studies of armed resistance to genocide by Armenians and other Christians in the Ottoman Empire during World War I and by Jews in Europe during World War II.

The third essay, also by Professor Kopel, is a case study of the diverse roles of arms in largest mass murder in history: the Mao Zedong regime against the people of China from 1949-1976. The essay examines how arms prohibition was reinforced by prohibitions on communication, religion, and independent thinking and by the elimination of the rule of law.

The essay includes a detailed examination of Tibet's armed revolts against totalitarian imperialism. The story of the Tibetan Buddhist and Tibetan Muslim resistance to Mao complements the prior Section's case studies of Christian and Jewish resistance to genocide. Set among diverse people, places, and times, the three case studies examine the factors that affect the success of resistance, and the different ways in which resistance movements may succeed.

1. Individual Violence in Europe

Over the last millennium, the long-term homicide trend in Europe has been downward. In investigating the causes, some historians have suggested that, over the centuries, Europeans grew more civilized. As people became more emotionally mature, they better realized the long-term consequences of their actions and were more considerate of other people's feelings. So there were fewer duels, brawls, and so on. Further, government became strong enough begin to establish monopolies on the use of force. Undoubtedly there have been other causes; improvements in medical care for the wounded must account for at least part of the decline. So too would growing economic prosperity, in the sense that better nourished and healthier people might be less likely

to succumb to infections caused by wounds. The essay below suggests a potential additional cause: the growing ability of smaller persons to defend themselves against larger aggressors. Note that this essay's homicide data considers only homicides by ordinary criminals, and not homicides by government, such as the death penalty or mass murders of civilians. The complete version of the essay is available here.

Carlisle E. Moody

Firearms and the Decline of Violence in Europe: 1200-2010

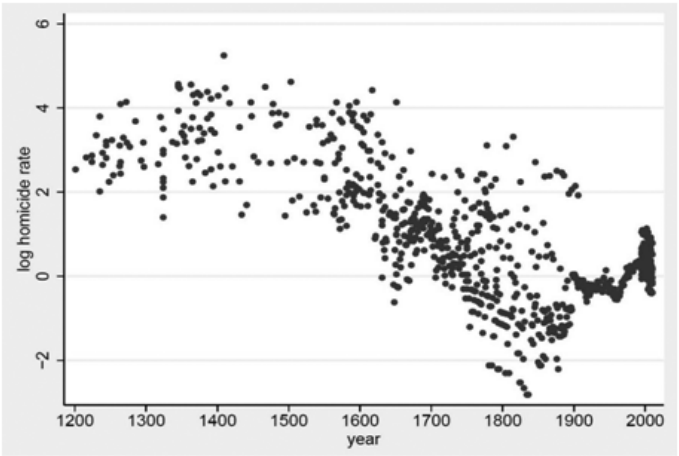
9 Rev. Eur. Stud. 53 (2017)

Personal violence has declined substantially in Europe from 1200-2010. The conventional wisdom is that the state's monopoly on violence is the cause of this happy result. I find some evidence that does not support this hypothesis. I suggest an alternative hypothesis that could explain at least some of the reduction in violence, namely that the invention and proliferation of compact, concealable, ready-to-use firearms caused potential assailants to recalculate the probability of a successful assault and seek alternatives to violence. I use structural change models to test this hypothesis and find breakpoints consistent with the invention of certain firearms. . . .

While homicide rates today are much lower than they were in the 13th century, they do not appear to be falling continuously. The trend from 1200 to at least 1500 appears to be slightly upward, or at best constant. There also appears to be an upward trend since 1900. Table 1 presents means by centuries to get a better idea of the pattern.

What theory explains the decline in homicide from 1500 to 1900? The conventional wisdom (Johnson & Monkkonen, 1996; Pinker, 2011) attributes the decline in personal violence to the "civilizing process" first suggested by Elias (1939) who hypothesized that the primary cause was the transformation of Europe from a large number of fiefdoms in the Middle Ages to a small number of large, centralized nation states under a single monarch. The centralized state instituted and enforced a monopoly on violence, known as the king's peace. . . .

Figure 1 Homicide Rates, Europe, 1201-2010



To have an appreciable effect on the homicide rate, there must be enough firearms distributed among the population of potential victims to generate a significant probability of harm to the assailant. We know that there were enough wheel lock pistols in 1517 to cause an attempted ban in the Holy Roman Empire. There is also evidence that by 1541 wheel lock pistols were in widespread use in England in the form of an English statute attempting to limit their use. A stream of legislation over the next 75 years tried unsuccessfully to regulate the increasing supply of pistols in England.[50]

Table 1 Homicide Rates by Century

Century	Homicide Rate
1200s	22.68
1300s	36.84
1400s	40.79
1500s	20.28
1600s	7.84
1700s	2.48
1800s	1.78
1900s	1.18
2000s	1.41

The flintlock, familiar to most people from the US Civil War and pirate movies, was invented by the French gunsmith Marin le Bourgeoys sometime between 1610 and 1615. It was the standard firearm technology for 250 years, eventually replaced by revolvers and breech loading rifles in the second half of the 19th century. Like wheel locks, flintlock pistols could be carried loaded, primed, concealed, and ready for instant use. For personal self-defense, flintlocks had all the advantages of wheel locks and were simpler, cheaper, and more durable. In addition, the flintlock could be cocked with the thumb rather than wound up with a separate tool, allowing it to be used with one hand. The flintlock technology spread rapidly.[51]. . .

3. A CLOSER LOOK AT THE DATA

Homicide rates were constant or increasing from 1200 to 1500, indicating that the civilizing process was not particularly effective in Europe during that time. The first great decline appears to take place in the 1500s when homicide rates fell to half of those in the previous century. The process continues into the 1600s and

50. [For the English legislation, see Chapters 2.G, 2.H, 22.G, 22.H; for wheel lock pistols, Chapters 2.I.1, 23.A.1.—Eds.]

51. [Flintlocks are covered in Chapters 2.I.2, 3.E.2.a, 23.A.2.—Eds.]

1700s where homicide rates fall by another 50 percent or more in each century. If homicide rates are constant or increasing and then suddenly plummet, it is incumbent upon the analyst to suggest what might have happened at that time that might explain the phenomenon. . . .

The obvious test of the concealable firearms hypothesis is the Chow (1960) test which requires that the breakpoint be specified exogenously. There are two exogenous dates suggested by the theory: 1505, the earliest year the wheel lock pistol was known, and 1610, the earliest year the flintlock could have been invented. . . .

The results indicate that there is a significant downward shift in the mean [homicide rate] after 1505 and again after 1610. In addition, the trend, which was positive but insignificantly different from zero, does not become negative until after 1610. See Figure 3 below.

[Another test] indicated that there are two significant breaks, in 1621 and 1793. . . .

4. AN ATTEMPT AT EX-POST THEORIZING

The breaks in 1505 and 1621 are clearly consistent with the firearms hypothesis and not consistent with the civilizing process theory. The fact that no breakpoints are found before 1505 fails to falsify the self-defense theory. The 1793 break consists of two parts, a negative shift in the mean and a positive break in trend. The break in trend is in the wrong direction to be the result of any of the strands of the civilizing process hypothesis. The negative break in 1793 could be capturing some of the effect of the [Coalition and] Napoleonic Wars which put young men who would otherwise be committing illegal homicide into the army where they committed legal homicide.

Figure 3 Chow Breakpoint Model . . .

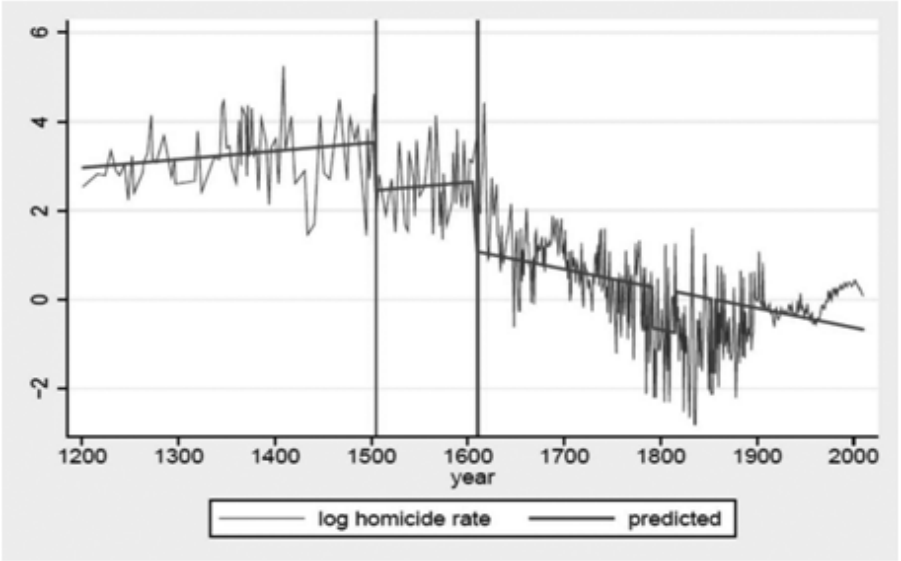
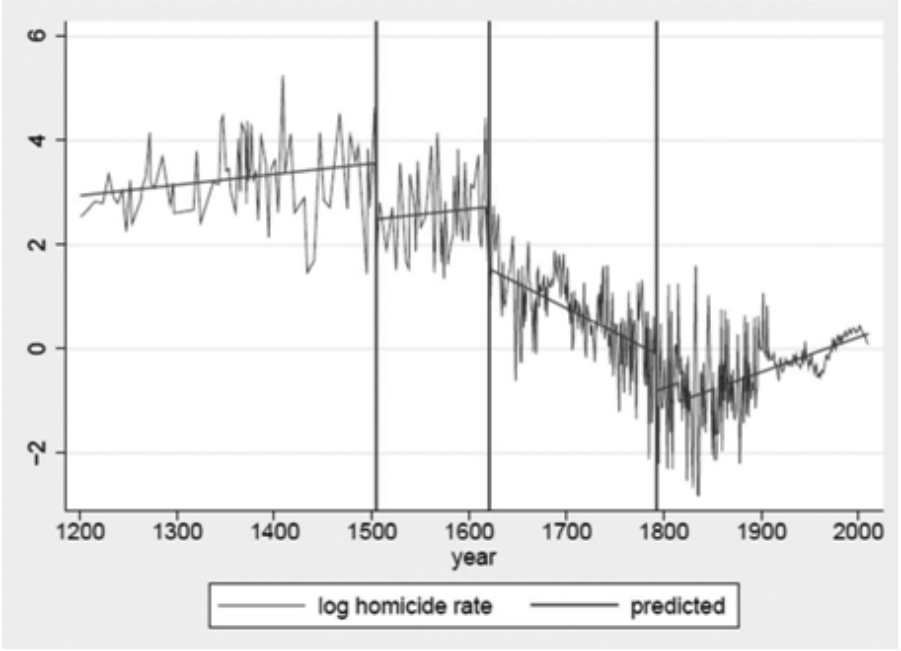


Figure 4 **Breakpoints at 1505, 1621, and 1793**



The positive break in trend is a function of the higher homicide rates after 1793 and could be a function of the supply of firearms. . . .

Under this theory the homicide rate peaked as firearms reached a critical mass and then decreased. After 1793 when homicide fell to historically low levels, people could have begun to feel safe enough to go about unarmed, thereby reducing the effective stock of guns. There is some evidence that this happened in England. . . .

6. CONCLUSION

The weight of evidence is that there was a negative break in the mean European homicide rate around 1505, coincident with the invention of the wheel lock pistol, but the major effect was the significant and negative break in mean and trend around 1621, coincident with the introduction and proliferation of the flintlock. The positive break in trend in 1793 is not consistent with the civilizing process but is consistent with either a reduction in the effective stock of firearms or a decrease in the deterrent effect of firearms at low assault levels. It is also consistent with inefficiency in the state's monopoly on violence and a number of other hypotheses. It is possible that firearms outlived their usefulness as weapons of self-defense when the homicide rate fell to very low levels in modern Europe. The rise in homicide after 1793 could be the result of the lethality and instrumentality effects of firearms exceeding the deterrent effect at low assault levels.

The firearms theory is plausible in that concealable firearms could deter individuals from making assaults, it is testable using breakpoint analysis on the time

series of homicide, and it is falsifiable in the sense that the discovery of negative breakpoints before the invention of concealable firearms could be interpreted as evidence suggesting some other process was reducing homicide. The civilizing process theory is also testable and falsifiable in that positive breakpoints after 1200 could be interpreted as indicating the failure of the process.

Correlation is a necessary but not a sufficient condition for causality. The correlation of the breakpoints with the introduction of concealable firearms could be coincidental, but the fact that correlation can be spurious does not mean it is spurious in any given case. All one can do is provide a plausible theory of causation, a falsifiable hypothesis, and a corresponding hypothesis test. If the hypothesis does not reject, the theory survives for possible refutation later.

There is no reason to suppose that Elias' civilizing process has had no effect on homicide, but it is not possible with currently available data to identify the separate effect of firearms and the growth of government on homicide rates. In any case, the civilizing process theory is not consistent with the rise in violence between 1200 and 1500, it does not explain the sudden and precipitous decline and reversal of trend that occurred in the 16th and 17th centuries, and it is not consistent with the 1793 reversal of trend.

According to Pinker (2011), "[Elias] proposed that over a span of several centuries, beginning in the 11th or 12th and maturing in the 17th or 18th, Europeans increasingly inhibited their impulses, anticipated the long-term consequences of their actions, and took other people's thoughts and feelings into consideration. A culture of honor—the readiness to take revenge—gave way to a culture of dignity—the readiness to control one's emotions. . . . The standards also trickled down from the upper classes to the bourgeoisie that strove to emulate them, and from them to the lower classes, eventually becoming a part of the culture as a whole". . . .

Obviously, it is much more important to inhibit your impulses and to take other people's thoughts and feelings into consideration when the other people are likely to be armed. The transition from a coarse and violent Medieval era to a more refined and gentle modern era does not have to be exclusively due to etiquette trickling down from the nobility. To quote Robert A. Heinlein . . . , "An armed society is a polite society. Manners are good when one may have to back up his acts with his life." [Robert A. Heinlein, Beyond This Horizon 147 (1948).]

Homicide was increasing before the invention of concealable firearms and decreasing after. While there may be many other theories, the sudden and spectacular decline in violence around 1505 and again around 1610-1621 is consistent with the theory that the invention and proliferation of concealable firearms was responsible, at least in part, for the decline in homicide. The landscape of personal violence was suddenly and permanently altered by the introduction of a new technology. The handgun was the ultimate equalizer. The physically strong could no longer feel confident of domination over the weak. The fact that potential assailants could not determine who among a set of possible victims was carrying a firearm generated an externality in which those that were armed protected those that were not and thereby multiplied the effectiveness of the stock of firearms.

[The wheel lock] must have produced an enormous sensation, for it suddenly altered the whole condition of affairs for the weaker man. Till then he had always been subject to the personal element of muscular superiority. Any armour-plated

robber knight and his gang of ruffians could raid into a merchant caravan. Small gentry were at the mercy of the turbulent local nobles. It was a predatory age but the invention of the wheel lock introduced a totally new factor into the equation. . . . There are still countries where banditry, raiding and civil wars flourish, and if we argue from personal experience it is probable that in the Middle Ages a display of armament was as protective then as now. . . .

NOTES & QUESTIONS

1. Which of Professor Moody's conclusions do you find to be the strongest? About which are you most skeptical?

2. Do you agree with Heinlein's observation that "an armed society is a polite society"? Gun control advocates say that more privately owned guns lead to more violence, while gun rights advocates say that more privately owned guns deter violence. Which is correct? Could they both be wrong? Both right, in different ways?

2. State Violence in Europe and Elsewhere

David B. Kopel

Fewer Guns, More Genocide: Europe in the Twentieth Century

(prepared for this work)

This essay compares the relative dangers of excessive gun ownership and of excessive gun control, based on the historical record of the twentieth century.

The essay begins in Section D.2.a by presenting homicide data for the United States and Europe during the twentieth century. First, the essay considers gun death rates from ordinary crimes—robberies, domestic violence, and so on. Based on certain assumptions that bias the figure upward, if the U.S. gun homicide rate from ordinary crime had been the same as Europe's, there might have been three-quarters of a million fewer deaths in America during the twentieth century. The figure is a data point for the dangers of insufficient gun control.

Next, Section D.2.b presents data on mass murders perpetrated by governments, such as the Hitler or Stalin regimes. In Europe in the twentieth century, states murdered about 87.1 million people. Globally, governments murdered well over 200 million people. The figure does not include combat deaths from wars. As will be detailed, the death toll of all the people killed in battle in the twentieth century is much smaller than the number of noncombatants killed by governments—such as the Jews murdered by Hitler, or the Ukranians murdered by Stalin. The mass murder by government figures are, arguably, data points for the dangers of excessive gun control.

As the data in Section D.2.c show, totalitarian governments are the most likely to perpetrate mass murder. Section D.2.d argues against the complacent belief that any nation, including the United States, is immune from the dangers of being taken over by a murderous government. The historical record shows that risks are very broad.

The record also shows that governments intent on mass murder prioritize victim disarmament. Such governments consider victim armament to be a serious impediment to mass murder and to the government itself, as described in Section D.2.e and f.

The most effective means by which citizen arms possession prevents mass murder is deterrence, according to Section D.2.g. When deterrence fails, rebels who attempt to overthrow a murderous regime usually lose, as noted in Section D.2.h. Sometimes, bad regimes can be removed by nonviolent citizen action, as described in Section D.2.i.

In worst-case scenarios, the government is slaughtering people *en masse*, and the victims have no possibility of removing the regime by forcible or nonforcible means. Even then, armed resistance can save many lives—as demonstrated by Armenians and other Christians in the Ottoman Empire during and after World War I and by armed Jews during World War II. Section D.2.j, k, and l present case studies of armed resistance in dire circumstances.

Readers who do not find the essay persuasive might still find it useful, as presentation of a viewpoint that is common among American right to arms supporters and that explains some of their skepticism about citizen disarmament and certain gun controls. For example, opponents of gun registration often point out how registration lists have been used by confiscatory dictators.

The next and final essay in this chapter, Section D.3, is a case study of how arms were used and misused during the Mao regime in China from 1949-76. Mao perpetrated the largest mass murders ever—more than Hitler and Stalin combined. The essay shows how Mao's arms policies and victim disarmament were integral to his mass killings and are a sine qua non for a communist regime maintaining power.

a. Excess Firearms Homicides in the United States in the Twentieth Century

If U.S. gun homicide rates were as low as European homicide rates in the twentieth century, how many lives might have been saved? The largest global dataset for firearms homicide is from M. Naghavi et al., *Global Mortality from Firearms, 1990-2016*, 320 JAMA 792 (2018). The relevant data are online in supplemental eTable9. In 1990, which was a very high year for firearms homicide (and for all crime) in the United States, the age-adjusted firearms homicide rate was 5.57 per 100,000 population (i.e., 557 firearms homicides per 10 million Americans). The rate in Western Europe was 0.53; in Eastern Europe, it was 1.31. The European average is 0.92. The difference between the European rate of 0.92 and the American rate of 5.57 is 4.65. In other words, there were about 465 more firearms murders per 10 million people in the United States than in Europe. The U.S. population in 1990 was nearly 249 million. Multiplying 24.9 (population in tens of millions) by 465 (excess U.S. deaths) yields 11,785. This is the excess of U.S. firearms homicides in 1990 due to the higher firearms homicide rate in the United States.

If instead of using 1990 as the base year, we use the *JAMA* data for 1990-2000, then the average U.S. gun homicide rate is 5.09 per 100,000 population; the Western European average is 0.46; and the Eastern European is 2.24. So the European average is 1.35, and the U.S.-Europe difference is 3.71. This is significantly lower than the 1990-only difference of 4.65. In order to maximize the U.S.-Europe

difference, we will make calculations based on the 4.65 figure for 1990, even though the 3.71 figure for 1990-2000 is more accurate.

Use the figure of 4.65 excess U.S. gun homicides per 100,000 population (in other words, 465 per 10 million population) for every year of the twentieth century, covering the years 1901 to 2000.[1] Over the course of the century, the United States had 745,162 more firearms homicides than if the United States had the European rate of firearms homicides.

Assume that *every* excess American gun homicide would not have been a homicide if the United States had adopted European-style gun control. That is, assume that other lethal means would not have been substituted for firearms. Do not consider the American gun homicides that are justifiable self-defense. Do not consider data about how often nonfatal defensive uses of firearms prevent homicides or other crimes. Ch. 1.C.2.

With the above assumptions, the failure of the United States to adopt European gun control was responsible for almost three-quarters of a million excess deaths in the United States in the twentieth century.

b. Homicides by European and Other Governments in the Twentieth Century

Seven hundred and forty-five thousand is a very large number. It is, however, a much smaller number, by two orders of magnitude, than the number of Europeans killed by governments in the twentieth century. International homicide statistics usually only count murders by individuals or small groups. A serial killer may murder two dozen people over several years. A mass shooter may murder dozens at once. Murderers who use explosives or arson sometimes kill even more. Even in the aggregate, individuals or small groups perpetrate vastly less homicide than is perpetrated by criminal governments.

Government is a means to organize large numbers of people for collective action. Such actions can be benign or malign. The U.S. interstate highway system, begun in part as a national defense project under President Eisenhower, constructed high-quality highways that would not have been produced so quickly by a system that relied only on entrepreneurs building toll roads. Similarly, when murder is the objective, a well-organized government can murder many more people than can murderously inclined individuals who lack massive resources. Murder statistics that do not count murder by government are missing most of the murders.

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1. Although twentieth-century homicide data are available for many European nations, the Naghavi study was a breakthrough in comprehensiveness. Accordingly, it is the best source for U.S./Europe comparisons. Of course, it would be ideal if the data started in 1901, rather than in 1990. By extrapolating from the 1990 U.S. vs. Europe homicide differential, this essay is biased toward a larger gap than might be found if precise year-by-year comparisons were available for the entire century. Because 1990 was a among the highest year for gun homicides in the United States, extrapolating from 1990 rates likely exaggerates the size of the century-long difference between the United States and Europe.

For simplicity, the calculation assumed a straight linear increase for U.S. population between one decennial census and the next.

A comprehensive quantitative analyses of murder by government in the twentieth century was published in 1994, by the late University of Hawaii political science professor Rudolph J. Rummel. It covered the 15 most lethal regimes from 1900 to 1987. R.J. Rummel, Death by Government: Genocide and Mass Murder Since 1900 (2017) (1994). He had already written a trilogy covering each of the century's three deadliest regimes. China's Bloody Century: Genocide and Mass Murder Since 1900 (2017) (1991); Lethal Politics: Soviet Genocide and Mass Murder Since 1917 (1990); and Democide: Nazi Genocide and Mass Murder (1991). Each of the books in the trilogy contains detailed tables and data sources. Data sources for the fourth through fifteenth deadliest regimes are provided in R.J. Rummel, Statistics of Democide: Genocide and Mass Murder Since 1900 (1998). That book also provides data sources and murder estimates for all other mass killings by other governments from 1900 to 1987, as well as Rummel's regression analysis of what factors are associated with democide. Much of Rummel's work, including the data, is available on his University of Hawaii website, Power Kills. Professor Rummel analyzed the causes of mass murder by government in all his books and synthesized and summarized the causes in Power Kills: Democracy as a Method of Nonviolence (2017) (1997). His argument that public safety, prosperity, and peace thrive best under democratic governments is elaborated in The Blue Book of Freedom: Ending Famine, Poverty, Democide, and War (2006).

Not all mass murders by government are "genocide" in the narrowest legal sense. At the insistence of the Soviet Union, the Convention on the Prevention and Punishment of the Crime of Genocide (1949) does not cover mass killings of economic classes, political dissenters, and so on. Rather, the Genocide Convention addresses only "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.* art. 2; *see* online Ch. 18.D. Accordingly, Professor Rummel coined the word "democide" to denote all mass murder by government, regardless of whether the victims were selected for ethnicity, politics, economics, or other reasons.[2] This essay uses "democide" and "mass murder" as equivalent terms.[3]

2. "Democide" is narrower than "genocide," in that the former includes only killing, whereas the latter can include intentional destruction of a group by other means, such as forbidding the practice of the group's religion, rape by out-group members for the purpose of preventing reproduction within the group, deporting group members from their homeland so that once dispersed, they and will be less likely to marry and reproduce with each other, and so on.

3. Rummel's definitions are as follows: "Genocide: among other things, the killing of people by a government because of their indelible group membership (race, ethnicity, religion, language). Politicide: the murder of any person or people by a government because of their politics or for political purposes. Mass Murder: the indiscriminate killing of any person or people by a government. Democide: The murder of any person or people by a government, including genocide, politicide, and mass murder." Rummel, Death by Government, at 31. This essay, however, uses "mass killing" or "mass murder" as equivalents for Rummel's neologism, "democide."

Although Professor Rummel's books provide extensive data on battlefield deaths, he does not include battle deaths in his democide totals. He *does* include military killings in violation of the 1977, 1949, and prior Geneva Conventions on the laws of war. These killings include "the intentional bombing of a hospital, shooting of captured POWs, using civilians for target practice, shelling a refugee column, indiscriminate bombing of a village, and the like."[4] Civilian deaths that occur as collateral damage to attacks on legitimate military targets, such as bombing a village "beneath which have been built enemy bunkers," is not a violation of the laws of war, and is not included in Rummel's definition of democide. The same is true for bombings that are aimed at a military target, but which hit a school or hospital because of navigation errors.[5]

Capital punishment with due process is not democide per se. "All extrajudicial or summary executions comprise democide. Even judicial executions may be democide, as in the Soviet show trials of the late 1930s. Judicial executions for 'crimes' internationally considered trivial or noncapital—as of peasants picking up grain at the edge of a collective's fields, or a worker telling an antigovernment joke," are democide. Rummel, Death by Government, at 41.

For each nation, Professor Rummel describes the various sources that have estimated particular killings. He then offers his own "prudent or conservative midrange estimate, which is based on my reading of the events involved, the nature of the different estimates, and the estimates of professionals who have long studied the country or government involved."[6] He cautions that his estimates should "be viewed as rough approximations—as suggestive of an order of magnitude." He expects that future scholars might arrive at different estimates, based on further research.[7]

As Rummel points out, exactitude is impossible, partly because murderous regimes often do not admit the full scope of their atrocities. Even when data gathering has all possible advantages, exactitude may still be very difficult. For example, the Nazis kept meticulous records, and after they lost World War II, all of their records fell into enemy hands. Even so, the scholarly estimates of the number of Jews murdered by the Nazis had a difference of 41 percent between the lowest and highest figures suggested by credible scholars.[8] The oft-quoted figure of "six million" Jews is within that range. Rummel's own estimate is 5.3 million.[9] As that estimate indicates, Rummel is generally inclined to risk being too low rather than being too high.

Tables 1 through 3 present some of Rummel's data for democides involving particular nations. Table 1 lists the 15 deadliest regimes of the century, each of which is covered by a chapter of *Death by Government*. Table 2 covers some major European democides that were not large enough to be listed in the global top-15. Table 3 lists some other major 1900-87 democides on other continents.

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4. Rummel, Power Kills, at 98.
5. Rummel, Death by Government, at 37-38.
6. *Id.* at xix.
7. *Id.* at xvii.
8. *Id.* at xvii.
9. *Id.* at 112 tbl. 6.1.

Except as otherwise noted, the figures are purely domestic, and include killing only within the particular nation. The figures do include killings by Nazi Germany, the Soviet Union, and Japan in nations they conquered during, before, or shortly after World War II.

The tables do not include deaths from "blue water" (overseas) colonialism—such as the killings in Africa or Asia by European colonial powers. Rummel's *Statistics of Democide* does cover colonial killings, but as detailed *infra*, those figures were based on reported massacres and the like, and greatly undercounted deaths due to forced slave labor. Those killings are certainly democide, but there has not yet been sufficient research for rigorous estimates of the colonial death tolls, which Rummel suggests could number in the tens of millions in 1900-87.

As the "Years" columns indicate, the data cover only 1900-87. "This means that post-1987 democides by Iraq, Iran, Burundi, Serbian and Bosnian Serbs, Bosnia, Croatia, Sudan, Somalia, the Khmer Rouge guerrillas, Armenia, Azerbaijan, and others have not been included."[10] Likewise not covered is the 1994 Rwandan democide. Of course, twenty-first-century genocides are not covered; for current nations experiencing or at high risk of genocide, see the Genocide Watch website.

Table 1 Mega-Murders—Over 1 Million Victims

Regime	Years	Democide (000,000s)	Summary
Deka-megamurderers (over 10 million victims)			
People's Public of China	1949-1987	87.6	Mao et al. communist regime. Differs from Rummel's figure, for reasons detailed *infra* Section D.3. Does not include 3.5 million murders by Chinese communists during the 1927-1949 civil war.
Union of Soviet Socialist Republics	1917-1987	61.9	Communist regime. Includes 54.8 million within the Soviet Union, plus 6.9 million in areas conquered by the USSR. Josef Stalin's rule (1929-1953) accounts for 43 million. On an annualized basis, the pre-Stalin regime founded by Lenin was more murderous than the post-Stalin one.
Germany	1933-1945	20.9	National Socialist German Workers (a/k/a Nazi) Party. Includes Hitler regime's murders throughout occupied Europe. Does not include World War II battle deaths.
China	1928-1949	10.1	Kuomintang party. Summarized *infra* Section D.3.

10. Rummel, Death by Government, at xxi.

Regime	Years	Democide (000,000s)	Summary
Megamurders (over 1 million victims)			
Japan	1936-1945	6.0	Military dictatorship. Principally, war crimes perpetrated by the Japanese army against civilians in occupied nations, such as China or the Philippines. Chinese data are summarized *infra* Section D.3.
China	1923-1949	3.5	Communist revolutionary army before victory in 1949. Summarized *infra* Section D.3.
Cambodia	1975-1979	1.5	Khmer Rouge communist regime. Per capita, the largest democide against a domestic population. Includes murders of ethnic minorities, intellectuals, and dissidents, plus deaths from slave labor.
Turkey	1909-1918	1.9	Young Turks regime. Military dictatorship killings of Armenians and other Christians. Discussed *infra* Section D.2.k.
Vietnam	1945-1987	1.7	Communist regime. Includes 1.1 million in Vietnam and 0.6 million in Laos and Cambodia. Does not include battle deaths.
Poland	1945-1948	1.6	Communist regime, post-World War II. Ethnic cleansing of German-speaking population. Deaths mainly from subhuman conditions of deportation.[11]
Pakistan	1970-1971	1.5	Islamist military dictatorship. A 267-day military attack by West Pakistan on East Pakistan (which is now the independent nation of Bangladesh). The attacks were ended by Indian military intervention. The 1.5 million figure does not include battle deaths.

11. For hundreds of years, governments in Eastern Europe had encouraged German immigration, believing Germans to be high-skilled and hard-working. However, Hitler used the existence of these *Volksdeutsche* (ethnic Germans living outside Germany) as a pretext for his expansionist territorial demands—most notably against Czechoslovakia in 1938. *See* online Ch. 18.B.4.a. Determined to prevent a recurrence of a future war by an expansionist Germany, the Allies at the 1945 Potsdam Conference agreed to the deportation of the *Volksdeutsche*. Those in Eastern European nations were sent to Germany; those in the Soviet Union (e.g., in Ukraine) were shipped by Stalin to Siberia. In the infamous 1944 Yalta accords, Roosevelt and Churchill agreed to give eastern Poland to the Soviet Union. In return, Poland was given a large portion of eastern Germany. So the Germans who lived within the former boundaries of Germany were also shipped out. The border change explain why Poland had such a large number of deportable Germans, compared to other Eastern European nations.

Regime	Years	Democide (000,000s)	Summary
Yugoslavia	1944-1963	1.1	Josip Broz Tito communist dictatorship. Mass killings of ethnic groups and non-communists in 1944-1946, plus deaths in slave labor camps through 1963.
Suspected megamurders (data are less certain, so estimates are rougher)			
North Korea	1948-1987	1.7	Sung family's communist absolute monarchy. Includes killings of prisoners of war and civilian South Koreans during the Korean War (1950-1953).
Mexico	1900-1920	1.4	Porfiro Díaz authoritarian regime till 1911; revolutionary regimes and warlords thereafter. Deaths of Indians and peons on slave labor haciendas, plus massacres of civilians and conscription into slave labor by various forces in the civil wars of 1911-1920.
Russia	1900-1917	1.1	Czarist regime. Includes about 0.5 million from Russian Empire Armenian irregulars slaughtering Kurds in Turkey in World War I, in reprisal for genocide of Armenians in Turkey. Most of the rest from deaths of prisoners of war in World War I. Some from Jewish pogroms.
	Total:	203.5 million	

Table 2 Next-Largest European Domestic Mass Murders

Regime	Years	Democide (0s)	Summary
Albania	1944-1987	100,000	Communist. Ultra-totalitarian regime of Enver Hoxha.
Balkan Christians	1912-1913	10,000	Targeted by various governments.
Bulgaria	1944-1987	222,000	Communist.
Czechoslovakia	1945-1948	197,000	Coalition government including democrats and communists. Primarily reprisals and ethnic cleansing of German-speaking population.
East Germany	1945-1987	70,000	Communist.
Hungary	1919-1944	138,000	Authoritarian. Includes 79,000 in Yugoslavia in areas temporarily annexed by Hungary in World War II.

Regime	Years	Democide (0s)	Summary
Rumania	1941-1987	919,000	Fascist then communist after 1944.
Spain	1936-1975	452,000	Fascist Francisco Franco dictatorship. Mutual democide of 202,000 by Fascists and Republicans during Civil War. 250,000 by Franco thereafter.
	Total:	2,108,000	

European Total Democide Calculation. Although a small part of Turkey is in Europe, and some of the Turkish genocide was perpetrated there, including against the Greek population, most of the Turkish mass murder was perpetrated against Armenians and other Christians in Asian Turkey (discussed infra Section D.2.a). So all the Turkish democide is omitted from the European total.

The communist regime in the Union of Soviet Socialist Republics murdered about 5.6 million Eastern Europeans. The rest of its mass murders were within the USSR. As of 1940, the population of the Soviet Union was 194 million. Of that total, about 25.2 million lived in "republics" in Asia (Uzbek, Kazakh, Georgian, Azerbaijan, Kirghiz, Tadzhik, Armenian, and Turkmen Soviet Socialist Republics). The Russian Soviet Federated Socialist Republic was by far the largest in area and population (110 million as of 1940), and spanned Europe and Asia. Using the common figure that about three-quarters of the Russian population is in Europe, about 27.5 million of the Russian SFR population was Asian. So of the USSR's 194 million population, about 52.7 million was Asian. Therefore, about 73 percent of the USSR population was European. Accordingly, of the 56.3 million Soviet murders within the USSR, 73 percent are assigned to Europe. The Soviet European democide is thus 41.1 million internally plus 5.6 million in Eastern Europe. Of the Russian Czarist regime's 1.1 murders in 1900-17, half a million were in Asian Turkey with the remainder in Europe.

The total European democide is: USSR 61.9 million + Russian Czars .6 million + Nazis 20.9 million + Poland post-WWII ethnic cleansing 1.6 million + other lesser European democides (Table 2) 2.1 million = 87.1 million. The figure does not include the mass murder of about 8,000 Bosnians by the Serbian government in the early 1990s, which is discussed in online Chapter 18.D.

Table 3 Selected Hecto-Kilomurders (over 100,000)

Regime	Years	Democide (0s)	Summary
Afghanistan	1978-1987	483,000	Does not include battle deaths. Includes democides by pre-1979 regime, by the regime installed in 1979 by Soviet coup, by Soviet Union, and by other forces.
Angola	1975-1987	125,000	By communist regime following independence from Portugal.
Burundi	1964-1987	175,000	Tutsis vs. Hutus.
China	1917-1949	910,000	Warlords. Independent regimes not under the control of the Republic of China or of the communist revolutionaries. Summarized in Section D.3.[12]
Ethiopia	1941-1974	148,000	Haile Selassie monarchy.
Ethiopia	1974-1987	725,000	Communist.
Guatemala	1956-1987	122,000	Military.
Indonesia	1965-1966	509,000	Killings of communists by the military, the select militia, and others following a failed communist coup attempt.
Indonesia	1965-1987	729,000	Against East Timor secessionists.
Iraq	1968-1987	187,000	Ba'ath party.
Mongolia	1916-1987	100,000	Communist.
Mozambique	1975-1987	323,000	198,000 by communist regime after 1975 independence from Portugal. Remainder by opposition RENAMO forces (Resistência Nacional Moçambicana).
Nigeria	1967-1970	777,000	By government and Biafran forces during Biafra's failed war of independence.
Sudan	1956-1987	627,000	Islamist military dictatorship. Against various ethnic or racial minorities.
Turkey	1919-1923	878,000	Atatürk regime. Post-World War I attacks on Armenians and other minorities. Discussed in Section D.2.k.
Uganda	1971-1979	300,000	Idi Amin military regime. Mainly against minority tribes and Ugandans of Asian descent.
Uganda	1979-1987	255,000	Post-Amin regimes.
	Total:	7,373,000	

12. Estimate from Rummel, *Power Kills*; higher than the estimate in his earlier book *China's Bloody Century*.

Sources: Except as noted below, the figures in the above tables are from R.J. Rummel, Death by Government: Genocide and Mass Murder Since 1900 (2017) (1994) and R.J. Rummel, Statistics of Democide: Genocide and Mass Murder Since 1900 (1998). The data are also on Professor Rummel's University of Hawaii website, Power Kills, which in some cases adjusts the estimates slightly.

The figures differ from Rummel for two nations. For Cambodia, Rummel estimated 2 million deaths. Later research, cited in online Chapter 18.D, suggests 1.5 million. *See* Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975-79, at 456-65 (3d ed. 2008). The Communist China total is detailed in Section D.3.a.

The European twentieth-century democide of 87.1 million is over a hundred times larger than the highest possible estimate of American twentieth-century excess gun homicides of 745,000. At the least, the data indicate that over the long run, one's risk of being murdered is much lower in the United States than in Europe. It is not surprising that migration between the two has always been very heavily in one direction!

I am alive to write this essay because my Jewish German and Lithuanian ancestors migrated to the United States in the nineteenth century. By moving to the United States, they increased their risk of being shot by an individual criminal and drastically reduced their risk of being murdered by criminal governments. The risks did, in fact, materialize in Germany under the Nazis and the communists, and in Lithuania under the Czars, the Nazis, and the communists. Because governments are so much more effective at killing than are individual criminals (even the aggregate of all individual criminals), the United States was much safer than Europe in the twentieth century.[13]

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13. [My family history is similar. My mother left communist Hungary for Austria on Christmas Eve in 1956. She had to cross a minefield at the border. By the time she left, one needed a permit to enter areas near the border. A family friend, a physician, worked at a sanatorium in that zone. He was able to obtain a permit for my mother on the ground that she needed care at the facility. From the sanatorium, a guide was to take my mother to the border and be paid upon his return. Neither my family nor the friend knew whether the guide was trustworthy. My mother, therefore, signed her name to a piece of paper, tore it in half, kept one piece on her person, and gave the other piece to the family friend. If the guide returned with the piece that my mother kept, he was to be paid. If not . . . Happily, the guide did as he promised and my mother made it.

My father was a political prisoner in then-Czechoslovakia for 16 years (six of which were in solitary confinement) for helping protesting student leaders speak and escape from behind the Iron Curtain. He was suddenly released in the 1970s.

My grandfather was minutes or hours from being put onto a cattle car to be taken to a concentration camp. When the Nazis were rounding up Jews in Hungary, a Jewish family friend who had just been lined up got the attention of my grandfather, who happened to be walking on the street nearby. My grandfather distracted the soldier who was guarding the rounded-up group, and the family friend managed to flee. The soldier realized what my grandfather did and put him into the line to take the place of the friend who escaped. My grandfather was taken to the train station to be taken to a camp. He was saved by yet another family friend, an employee at the station, who was able to get him out. He ultimately saved about 150 Jews using, among other things, his law practice's resources.

Others were not as lucky as my parents and grandfather.—G.A.M.]

As noted above, the democide figures do not include battle deaths. The toll of battle deaths worldwide from 1900 to 1987 was about 35.6 million. As Rummel shows, democracies almost never start wars with each other. Conversely, the less democratic a regime, the greater the foreign violence, although individual exceptions can be found.[14] The same conditions that gravely increase the risk of mass murder of civilians — namely, nondemocratic regimes — also gravely increase the risk of wars and ensuing combat deaths.

Does gun policy have anything to do with Americans having been so much less victimized by murder than Europeans? The answer requires consideration of several subquestions: What does the historical record show about the ability of other checks on government — such as free press and fair elections — to prevent incipient mass murderers from coming to power in the first place? Considering how many different ways governments murder people, does government arms possession matter? To what extent does victim possession of arms deter mass murder or tyranny? Do other means of resistance, such as mass demonstrations, succeed against murderous or oppressive regimes? Finally, can arms be used successfully in resisting mass murder in particular, or tyranny in general?

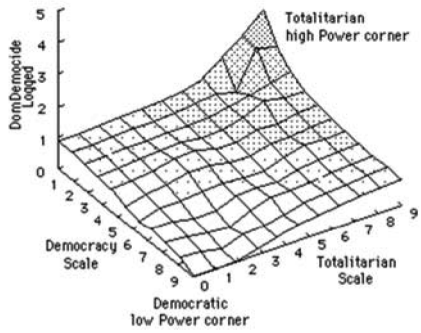
c. The Relationship Between Freedom and Democide

The best means to reduce the risk of democide is not to have a totalitarian government. And, especially, not to have a communist government. As the data above indicate, communist regimes are responsible for the very large majority of democide in the twentieth century. The bleak record of communism is detailed in Stéphane Courtois, Nicolas Werth, Jean-Louis Panné et al., The Black Book of Communism: Crimes, Terror, Repression (Jonathan Murphy & Mark Kramer trans., Harv. Univ. Pr. 1999) (France, 1991) (examination of communism in many nations, which special attention to the Soviet Union, which was the foundation and model of other communist states).

As Rummel's data show, the less free the government, the more likely it is to perpetrate domestic democide. Totalitarian regimes perpetrate by far the most democide, authoritarian regimes less so, and democratic ones least of all.[15] The very strong relationship between total regime power and domestic democide is not changed by other variables such as diversity, culture, or society.[16]

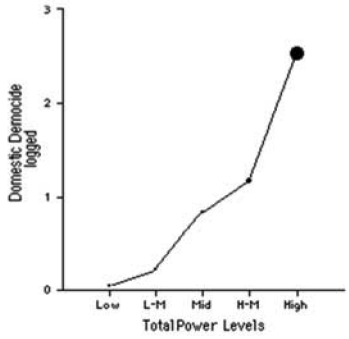
No democratic government has committed democide against an enfranchised population. Rudolph J. Rummel, *Democracy, Power, Genocide and Mass Murder*, 39 J. Conflict Resol. 3 (1995). As long as true elections are allowed, governments do not mass murder voters.

14. Rummel, Power Kills, at 59-80.
15. Rummel, Power Kills, at 91-98.
16. Rummel, Statistics of Democide, at 419.



Source: Rummel, Statistics of Democide, at 379 fig. 17.3.

FIGURE 17.5
Plot of the Mean Domestic Democide for Different Levels of Power



Source: Rummel, Statistics of Democide, at 381, Fig. 17.5.

Free governments do, however, sometimes commit democide against other nations. For example, Rummel reports that during World War I, the United Kingdom was responsible for the deaths of 334,000 persons due to its blockade on food imports to the enemy Central Powers (Germany, Austro-Hungarian Empire, Ottoman Empire).[17] The blockade was illegal under the international law of the time. The United Kingdom had every legal right to interdict the Central Powers from purchasing munitions from neutral countries, but not to blockade civilian food shipments. Even after Germany surrendered in November 1918, the blockade was continued until the Versailles peace treaty was signed in June 1919.[18] *See generally* C. Paul Vincent, The Politics of Hunger: The Allied Blockade of Germany, 1915-1919 (1985).

17. Rummel, Statistics of Democide, at 264.

18. Although the "hunger blockade" was a plain violation of the customary international law of 1915-19, the tactic was not declared to be a war crime until 1977. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 14 (adopted 1977, entered into force 1978). The first, second, and third Geneva Conventions applied only to the treatment of combatants (e.g., outlawing certain weapons, specifying conditions for prisoners of war). The Fourth Convention, in 1949, added protections for civilians. The 1977 Protocols expanded civilian protection and extended the Geneva Conventions' scope to include warfare within a single nation (e.g., civil war, secession movements) and not just international warfare.

Similarly, in World War II, the United Kingdom and the United States extensively bombed the Axis powers. Under the laws of war then and now, they had every right to attempt to bomb military factories; the fact that some bombs would inevitably miss their targets and hit civilians was no violation of laws of war and was not democide. However, urban bombing simply for the purpose of destroying the homes of factory workers, or just to demoralize the enemy civilian population, does qualify as democide in Rummel's view. Thus, he ascribes to the United Kingdom a democide of 424,000 for its area bombing of Axis cities in World War II.[19] The same applies to area bombing by the United States during the war, for which he estimates 32,000 deaths of German civilians and 337,000 deaths of Japanese civilians. About half of the latter figure comes from the two atomic bombs used at Hiroshima and Nagasaki.[20]

Defenders of the bombing could point out that the Germans and Japanese flouted all the laws of war and perpetrated many area bombings of civilian populations, including an enormous wave against England in 1941. Further, the result of the Allied area bombings was probably a net savings of German and Japanese lives, by hastening the end of the war. This is especially so for Japan, where the military dictatorship was preparing to sacrifice the entire population ("a hundred million shattered jewels") in warfare against the expected American invasion. For careful examination of the decision to use the A-bomb, see Wilson D. Miscamble, The Most Controversial Decision (2011). Regardless of what one thinks of the arguments, the bombings were democides by Rummel's definition.

The largest number of democide deaths attributable to democratic government come from overseas colonialism. Rummel's books had estimated colonialism deaths of 1900-87 at 870,000, based mainly on reports of massacres and similar killings. But as he later explained on his website, he believes the total should be much higher. For example, Belgium was a democracy but starting in 1885 the Congo (later named Zaire, and today, the Democratic Republic of Congo) was directly ruled by the Belgian monarchy, which inflicted the most brutal regime of colonial system on the continent, probably killing several million and perhaps many more via forced labor. R.J. Rummel, *Exemplifying the Horror of European Colonization: Leopold's Congo* (June 24, 2003).

Reevaluation of deaths from the forced labor system in the Congo led Rummel to greatly revise his death estimates from colonialism in Africa and Asia in the twentieth century, because forced labor (de facto slavery) was common in many colonies, the "British being the least brutal and [Belgian King] Leopold and the French, Germans, and Portuguese the worst." *Id.* Rummel suggested that total colonial deaths could be 50 million, although this is a very rough extrapolation from the Congo data. As Rummel acknowledged, the research on the matter is sparse, and he urged younger scholars to investigate further. *Id.*

The democide total in Table 1 indicated about 203.5 million democides from the 15 regimes that killed over a million each. The other democides listed in Tables 2 and 3 bring the global total to around 213 million. Adding in the colonial democides, plus others not listed above, indicates a 1900 to 1987 total of over 263 million persons. This compares to a total of 36.5 million battle deaths in the entire world for the entire period. According to a poster that debuted in 1966, "War is not healthy for children and other living things." This is certainly true. According to the data

19. Rummel, Statistics of Democide, at 265; Rummel, Death by Government, at 14.
20. Rummel, Statistics of Democide, at 200-13.

presented here, murderous governments are six times deadlier than war, making them very dangerous indeed. The data further indicate that just about the only means of avoiding the risk of high-volume murder by government is to live in a democracy.

d. It Can't Happen Here

If it is expected that a particular government will always be free, then there would be no need in the particular nation for citizen arms to deter or resist democide within that nation. Free governments could enact any sort of gun control without worrying that citizens might need guns to resist a future government that was trying to kill them *en masse*.

But what if one's predictions about the future are wrong? What if the good government that one hoped would endure forever is taken over by totalitarians? This is what happened in Germany, as Stephen P. Halbrook describes in Gun Control in the Third Reich: Disarming the Jews and "Enemies of the State" (2014).

In 1928, the democratic government of the Weimar Republic was concerned about political street violence, perpetrated mainly by Nazi[21] and communist gangs. The democratic legislature passed a law requiring a license to acquire a firearm or ammunition. Further legislation authorized the states to impose retroactive registration of all firearms.

At the time, some persons in the Weimar government had worried about the dangers of registration lists falling into the hands of extremists. For example, if Nazis or communists obtained the registration list for a town, they would know which homes to burglarize to steal guns. Both groups had an established record of criminal violence, including by armed gangs using illegally obtained guns.

In January 1933, after winning a plurality in a free election, Adolf Hitler was lawfully appointed Chancellor of Germany. Not only the registration lists, but the government itself fell into the hands of extremists. Almost immediately upon seizing power, the Nazis began using the registration lists to seize guns, knives, and other arms from members of other political parties, especially the Social Democrats, and from Jews. *See, e.g.*, *Permission to Possess Arms Withdrawn from Breslau Jews*, N.Y. Times, Apr. 23, 1933, at E1.

The Nazi policy over the next five years was "forcing into line"—bringing all elements of civil society under party control. For example, independent gun or shooting sports clubs were outlawed. Instead, clubs were to be registered with the state and ruled by a Nazi political officer. Many clubs disbanded instead.

The Weimar gun control laws worked well for the Nazis, and so they were not revised until March 1938. Although the 1938 law was presented as a liberalization, in practice it further narrowed lawful ownership to only the Nazis and their politically reliable supporters. In October 1938, arms registration lists were used to complete the disarmament of the Jews, including even knives. Shortly thereafter, on November 9-10, 1938, the Nazis unleashed *Kristallnacht*—government-orchestrated mob violence against the Jews.[22]

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21. "Nazi" was a shorthand for the party's formal name, *Nationalsozialistische Deutsche Arbeiterpartei (NSDAP)*—National Socialist German Workers Party.

22. *Kristallnacht* is literally translated as "crystal night," but often referred to as the "night of broken glass." The attacks were led by the Nazi Party's paramilitary force, the SA (*Sturmabteilung*, lit. "Storm detachment"; often called "brownshirts"). Many civilians participated.

Something similar happened in France. Founded in 1870, the French Third Republic was the glory of Western civilization. In 1936, Prime Minister Pierre Laval led enactment of a gun registration law, which exempted some sporting long guns. In May-June 1940, France was conquered by Nazi Germany, and the French gun registration lists fell into Nazi hands. Laval, meanwhile, had turned traitor, and maneuvered himself into becoming the ruler of Vichy—a fascist rump state in southeastern France. *See* Stephen P. Halbrook, Gun Control in Nazi Occupied-France: Tyranny and Resistance (2018); *cf.* William Shirer, The Collapse of the Third Republic: An Inquiry into the Fall of France in 1940 (1969) (tracing the collapse to the moral exhaustion of the French people, and to the torpor and incompetence of successive French governments).[23]

A prudent constitutional order aims to reduce the risk of tyranny. Tyranny prevention mechanisms include regular elections, military subordination to civilian government, restraints on executive power, free press, an independent judiciary, and guarantees of personal freedoms. Such constitutional protections are often effective.

But not always. Europe is the birthplace of democracy in a formal sense, in the city-states of ancient Greece. Yet in the twentieth century, almost all European nations were conquered by Germany, the USSR/Russia, or both, or were ruled for some period of time by local dictatorships friendly with Hitler, Stalin, or the Czars. On the European continent, Sweden and Switzerland are the only exceptions.[24]

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23. The nominal head of the Vichy regime was Philippe Petain, the very elderly and partly senile French hero from World War I. Laval arranged to make himself the regime's official second-in-command. After the war, Laval was convicted of treason and executed. Petain was also convicted, but allowed to spend his remaining years in prison, in light of his advanced age and great service in World War I.

24. As a neutral in World War II, Sweden freely traded with the Axis, providing the essential iron ore for the Axis war machine. There was no Axis military benefit from invading Sweden. Unlike Norway, Sweden had no Atlantic ports from which Nazi submarines could harass British shipping.

Switzerland also conducted business, primarily banking, with both the Axis and Allies. One reason Germany did not invade this relatively small nation was Switzerland's militia system. *See* Section C.2. With a gun in nearly every home on Switzerland's difficult terrain, the cost to the German military of taking and holding the country would have been excessive.

Finland was part of Czarist Russia until Czar Nicholas II was overthrown in 1917. Thereafter, Finland has maintained its sovereignty and freedom. In 1939-40, the Finns beat back an attempted conquest by Stalin's Red Army, although Finland eventually did have to cede substantial territory to the Soviet Union. *See generally* Vesa Nenye, Peter Munter & Toni Wirtanen, Finland at War: The Winter War 1939-40 (2018).

Two European microstates maintained self-government throughout the twentieth century. Liechtenstein is a tiny principality between Austria and Switzerland; it was left alone by the Nazis and the Soviets. The Holy See (a/k/a Vatican City) comprises a few blocks within Rome. Pursuant to the 1929 Lateran Pacts between the Holy See and Mussolini's Fascist Italy, the Italian government recognized the political independence of Vatican City. During World II, Mussolini attempted to coerce the Vatican but did not invade Vatican City. Meanwhile, Pope Pius XXIII used his independence to organize an anti-Nazi network of priests in Germany, to transmit German military secrets to the Allies, and to support plots to assassinate Hitler. *See* Mark Riebling, Church of Spies: The Pope's Secret War Against Hitler (2015).

The list of nations to have both (1) maintained independence for the entire time since 1900 and (2) maintained free government during that time is short. There are no such nations in Asia, Africa, South America, or Central America. The full list is: Australia, Canada, Iceland, Sweden, Switzerland, New Zealand, the United Kingdom, and the United States—that is, 8 nations out of the 196 nations in the world.[25]

Over a century, the odds are low that a nation will enjoy independent and free government for the entire time. Considering free government during the time after a particular nation became independent, there are several additional nations that have maintained free post-colonial government. The largest is Israel, which won independence in 1948. There are also some islands in the Caribbean and the Pacific that have had free governments throughout their independence.

The majority of the nations that have maintained independence and freedom are part of the Anglosphere. The last proto-totalitarian ruler of England was King James II, who was deposed in the Glorious Revolution of 1688. Ch. 2.H. Within the United Kingdom today, there are worrisome signs. One of the two major political parties has been led by Jeremy Corbyn, a long-time supporter of Soviet totalitarianism and of Hamas and other similar entities devoted to exterminating Jews. A polity that is well vaccinated against supporters of mass murder would never elevate a person such as Corbyn to major party leadership.

Only a foolish version of American exceptionalism would imagine that the United States has been granted some sort of permanent immunity from the dangers of totalitarianism. "It can't happen here," people have often told themselves. Yet it did happen almost everywhere in Europe, including in democratic, economically advanced, and socially progressive nations such as Germany. As detailed in Chapters 3 through 5, the American Founders were acutely concerned about the dangers of American tyranny, and the Constitution was their best effort to prevent it. It has worked fairly well so far, but constitutions have force only so long as they are cherished in the hearts and minds of the people.

Today in America, as in the 1930s, many persons are openly hostile to the Constitution. The political fights concentrate on a President who will rule by decree. Although there are no Hitlerist professors in American higher education, there are many Marxists. As applied, the difference between Hitlerism and Marxism is slight—other than the higher murder count of the latter. *Cf.* Arthur M. Schlesinger, Jr., The Vital Center (1948) (observing that the communist far left and the fascist far right are the same in practice).

As detailed by the Canary Mission, Jew-hating student leaders are common on American college campuses. Like their national socialist German ancestors of the 1920s, they use violence and intimidation to suppress speech in favor of Jews or by Jews.

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25. The 196 figure includes Taiwan, which has been independent of China since 1948, but over which China continues to make claims. It also includes Palestine, which the United Nations treats at a nonmember observer state.

Today, there are many worrisome trends that having been going on for years, under both Democratic and Republican administrations: disrespect for the rule of law; hostility to constitutional restraints on power; congressional abdication of responsibility to govern, ceding decisions to a hyperexecutive; growing hostility toward freedom of speech and religion; growing tolerance for political riots and violence against people based on political opinions; acceptance of anti-Semites and other haters as legitimate political actors and their election to high offices. *E pluribus unum* is giving way to division between warring social and cultural tribes. Such ills can be found in many contemporary democracies.

Persons of any political persuasion can easily point to political opponents who embrace malignity, hatred, and authoritarianism. The fingerpointing is accurate. The problem is not just one side of the political spectrum; civil society as whole is deteriorating. *See, e.g.*, Jonah Goldberg, The Suicide of the West: How the Rebirth of Tribalism, Populism, Nationalism, and Identity Politics Is Destroying American Democracy (2018). The people of Rome had an outstanding republic that had endured for centuries, and then they lost it. *See* online Ch. 21.B.2; Edward J. Watts, Mortal Republic: How Rome Fell into Tyranny (2018) (centralization, inequality, venal politicians, public's neglect in protecting republican institutions); Mike Duncan, The Storm Before the Storm: The Beginning of the End of the Roman Republic (2018) (covering 146 B.C. to 78 B.C.; breakdown of the "unwritten rules, traditions, and mutual expectations collectively known as *mos maiorum*, which means 'the way of the elders'").

While historians may always debate about why the Roman Republic fell, the historical fact is that it was established in 509 B.C. and breathed its last gasp in 27 B.C., after a long period of decline. The fall of a republic hundreds of years old, holding immense territory and global power, should caution Americans who fantasize that a republic established in 1776 is guaranteed perpetual existence.

No one knows the future of the United States. Over past decades, the party in power has alternated, but the overall trend has been centralization of executive power. Where today's hyperpartisan centralization will lead in a decade or a half-century is unknown. Perhaps the constitutional order will prevent the worst from happening. Perhaps not. Germany in 1900 was a progressive democracy and one of the most tolerant places in the world for Jews; in any country, things can change a lot in a few decades.

e. Arms Monopolies Promote Killing with Arms, and Killing by Other Means

Democide is not always directly perpetrated with firearms. It is possible to commit mass murder with machetes, as in the Hutu genocide of 800,000 Tutsis in Rwanda in 1994. It is likewise possible to perpetrate mass murder with advanced technology, as in the gas chambers of the Nazi extermination camps. Or a government can kill millions by deliberately causing a famine, as Stalin did in Ukraine in the 1930s. *See* Robert Conquest, The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine (1986).

Even so, the direct toll of government mass murder by firearms is enormous. For example, Nazi genocide of Jews and Gypsies (Roma) was initially carried out

by mass shootings. As soon as the Nazi invasion of the Soviet Union began on June 22, 1941, special SS units called *Einsatzgruppen* were deployed for mass killings.[26] All the Jews or Gypsies in a town would be assembled and marched out of town. Then they would all be shot at once. Yehuda Bauer, *Jewish Resistance in the Ukraine and Belarus During the Holocaust, in* Jewish Resistance Against the Nazis 485-93 (Patrick Henry ed. 2014). Within a year, the three thousand *Einsatzgruppen*, aided by several thousand helpers from the German police and military, had murdered roughly one million people, concentrating on small towns in formerly Soviet territory. Hillary Earl, The Nuremberg SS-Einsatzgruppen Trial, 1945-1958, at 4-8 (2009); Reuben Ainsztein, Jewish Resistance in Nazi-Occupied Eastern Europe 222-25 (1974).

Because of the psychological damage to the members of the *Einsatzgruppen*, the Nazis attempted to replace mass shootings with mobile gas vans.[27] But these did not work well, partly because herding people into the gas vans required even closer contact with the victims than did mass shooting. So the Nazis invented extermination camps with huge gas chambers, which were more efficient at mass killing, and which created a larger physical (and, consequently, psychological) distance between the murderers and their victims.

Possession of arms by victims is a serious nuisance to totalitarian police, such as the Nazi SS or the Soviet NKVD and KGB. If frontline forces of totalitarianism can get shot for doing their jobs, the result is not necessarily the overthrow of the totalitarian regime. But necessarily, the possibility of being shot encourages caution and circumspection. When the political police do not have an arms monopoly, their efficiency is reduced. The more secret police who end up dead or wounded, the harder it is to recruit replacements. It is harder to round up people for shipment to slave labor camps or gas chambers if the intended deportees will shoot some of the secret police who are coming to take them to the train station.

Aleksandr Solzhenitsyn, the Russian author of the most influential exposé of the communist slave labor camps under Lenin and Stalin, recalled his and his fellow prisoners' feelings:

> And how we burned in the camps later, thinking: What would things have been like if every Security operative, when he went out at night to make an arrest, had been uncertain whether he would return alive and had to say good-bye to his family? Or if, during periods of mass arrests, as for example in Leningrad, when they arrested a quarter of the entire city, people had not simply sat there in their lairs, paling with terror at every bang of the downstairs door and at every step on the staircase, but had understood they had nothing left to lose and had boldly set up in the downstairs hall an ambush of half a dozen people with axes, hammers, pokers, or whatever else was at hand? . . . The Organs [of the state] would very quickly have suffered a shortage of officers and transport and, notwithstanding all of Stalin's thirst, the cursed machine would have ground

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26. *SS* was short for *Schutzstaffel* (Protection Squadron). The SS included élite military units, but it was better known as Hitler's secret police, displacing the SA from its previous spot as key enforcer of Hitlerism. *Einsatzgruppen* means "task force."

27. Earl, at 7.

> to a halt! If . . . if . . . We didn't love freedom enough. And even more—we had no awareness of the real situation. . . . We purely and simply deserved everything that happened afterward.

1-2 Aleksandr I. Solzhenitsyn, The Gulag Archipelago 1918-1956: An Experiment in Literary Investigation 13 n.5 (Thomas P. Whitney trans. 1973) (brackets added, ellipses in original).

It is no surprise that people in extermination camps, slave labor camps, and other persecution camps are not allowed to be armed. During the Holocaust, the Sobibor and Treblinka extermination camps were permanently shut down by prisoner revolts, when the prisoners managed to steal some weapons from the guards, and then use those weapons to take some more. Few prisoners survived the revolts, but they were all going to die anyway; their heroism saved many by putting the death camps out of business permanently. David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Perspective 108-11 (2017).

Statistically speaking, mass shootings occur predominantly in gun-free zones—that is, places where the population has been disarmed. Hitler's *Einsatzgruppen* shot a million, and Mao's 1949-51 Great Terror shot 1.5 to 2 million more. *See infra* Section D.3.d. Even one of these examples shows that mass shootings by government far outnumber mass shootings by individuals. Successful societies suppress shootings by individual psychopaths and prevent psychopaths from obtaining government power. As the history of the twentieth century indicates, this is easier said than done.

Whatever the means, murder is most frequent when governments have arms and victims do not. Guns are frequently used to coerce the conditions for mass murder by other means. For example, after the Khmer Rouge communist regime took over Cambodia in 1975, the cities were depopulated as Cambodians were marched at gunpoint to rural slave labor camps. There, they were forced to work at gunpoint. Many Cambodians were shot, but many more were worked to death in the camps or died of starvation. Armed guards also patrolled in search of Cambodians who were trying to flee, such as by escaping to Thailand.[28]

Similarly, in the Ukrainian famine created by Stalin, the people being starved to death had to be stopped from fleeing to areas where food was available. "Under the direction of the OGPU, *militsiia* [Stalin's select militia] were deployed to liquidate kulaks [peasants who owned land] and quell opposition from other rebellious peasants during the collectivization of agriculture. And when the collectivization drive led to a mass exodus out of the countryside, the *militsiia* were assigned responsibility for enforcing a rigid internal passport and registration system to deprive the peasantry of geographical mobility."[29] Elizabeth J. Perry, Patrolling the Revolution: Worker Militias, Citizenship, and the Modern Chinese State 323 (2007). The same occurred in communist China, as detailed *infra* Section D.3.

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28. Rummel, Power Kills, at 195-96, 201.

29. The OGPU were the communist secret police. Formally, Joint State Political Directorate under the Council of People's Commissars of the USSR (Объединённое государственное политическое управление при СНК СССР). Later reincorporated as the NKVD (People's Commissariat for Internal Affairs) and still later the KGB (Committee for State Security).

f. The Perpetrators' Viewpoints in Tyranny and Mass Murder

Most people have never plotted to become a national tyrant, and so they often do not evaluate strategy from a dictator's perspective. But consider persons who have. In 1923, Adolf Hitler attempted to lead a coup to take over the German state of Bavaria and from there, the entire nation. The coup failed and Hitler and his co-conspirators were put on trial. Thanks to widespread public support, they received light sentences. Hitler's closing speech to the trial court explained that he was born to be a dictator, and, no matter what, he would never stop trying: "My opinion is that a bird sings because it is a bird. . . . The man who is born to be a dictator is not compelled, but wills; he is not driven forward but drives himself. . . . The man who feels compelled to govern a people has no right to wait until they summon him. It is his duty to step forward." John Dornberg, Munich 1923: The Story of Hitler's First Grab for Power 336 (1982).

While serving several months in prison in 1924, Hitler wrote a book of political theory, *Mein Kampf* (My Struggle), which frankly set forth his ideas and plans, including totalitarian rule and elimination of the Jews. Having learned from his 1923 failure, Hitler no longer attempted to destroy German democracy by force; instead, he decided to destroy democracy from within, by participating in the political process. In less than a decade, he had succeeded. Notwithstanding criticism of him by Germany's free press, he won a plurality in the 1933 election, and was appointed Chancellor, under the mistaken belief that other people in the government could control him. By 1942, his empire stretched from France's Atlantic Coast to deep inside Russia.

In creating what he called "the New Order" in his empire, Hitler explained the necessity of disarmament:

> The most foolish mistake we could possibly make would be to allow the subjugated races to possess arms. History shows that all conquerors who have allowed their subjugated races to carry arms have prepared their own downfall by so doing. Indeed, I would go so far as to say that the supply of arms to the underdogs is a sine qua non for the overthrow of any sovereignty. So let's not have any native militia or native police.[30]

Hitler's Table Talk, 1941-1944 (H.R. Trevor-Roper ed., Gerhard L. Weinberg transl., 2d ed. 2007) 321 (statement from between February and September 1942).

Tyrants past and present are diverse, found on every continent, and comprising all races and many different ethnic groups. Their ideology might be communist, fascist, extremist religious, or absolute monarchist. Or they might have no ideology at all. Despite the diversity, mass murderers and other tyrants are united by many common practices, all of which were implemented by Hitler, Lenin, Stalin,

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30. Hitler's concern about native police was well founded. Because Denmark surrendered almost immediately when Germany attacked it, the nation was not put under direct military rule. Instead, it was, for a while, treated as a friendly "protectorate" of Nazi Germany. Accordingly, the Danish police remained intact. The armed Danish police were essential in the night-time boat lift of Denmark's Jews in September 1943, to prevent the Germans from seizing them and sending them to camps. Kopel, Morality, at 400-04.

Mao, Pol Pot, and many other democidal regimes. They do not allow freedom of the press. They attempt to bring religion under state control. Courts are not independent. And these governments attempt to acquire a monopoly of force. This was true, for example, in Darfur, Sudan, in the twenty-first century; in Indonesia's ethnic cleansing of East Timor in the 1970s; in Srebenica, Bosnia, in the 1990s; in Kenya and Uganda from the 1960s onward; in Ethiopia against the Anuak in the twenty-first century; and on the Pacific Island of Bougainville. Disarmament was also the condition precedent for the mass murders of Jews by Nazis, of Armenians by Turks, and of Chinese by Mao, discussed *infra*.

As Ronald Reagan observed, "When dictators come to power, the first thing they do is take away the people's weapons. It makes it so much easier for the secret police to operate, it makes it so much easier to force the will of the ruler upon the ruled." Ronald Reagan, *The Gun Owners' Champion*, Guns & Ammo, Sept. 1975. Thus, "[t]he gun has been called the great equalizer, meaning that a small person with a gun is equal to a large person, but it is a great equalizer in another way, too. It insures that the people are the equal of their government whenever that government forgets that it is servant and not master of the governed." *Id.* Search the history of the world from ancient times to the present, and one will not find many tyrants who deviated from the principle that the state must be stronger than the people.

A government that wants to be stronger than the people does not necessarily have to prohibit all arms possession by its subjects. Hitler, Mussolini, and the Soviets allowed the politically correct to possess sporting arms. A government may even encourage armament by an allied group that is carrying out the government's wishes. For example, the Bashir dictatorship in Sudan ignored its own very severe gun control laws, and fostered armament of the Arab *Janjaweed*, who were carrying out the government's plan to mass murder the African Dafari people in western Sudan. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 Notre Dame L. Rev. 1275 (2006); online Chapter 18.D. Mao tried a similar policy during the Cultural Revolution in 1967-68, distributing arms to his supporters on the far left in an effort to topple less-extremist communist leaders. *See* Section D.3.g.

Throughout human history, totalitarians have always disarmed their subjects. This indicates that they considered widespread citizen armament to be a serious danger to their regimes. Tyrants are evil but not stupid. A population that is well armed is much harder to tyrannize and to kill *en masse*. Often, tyranny and arms confiscation are imposed as soon as a regime seizes power—such as Mao in China in 1949, Castro in Cuba in 1959, or the Khmer Rouge in Cambodia in 1975.[31] The pattern is long-standing. *See, e.g.*, Aristotle, Constitution of Athens, ch. XV (Thomas J. Dymes trans. 1891); Plato, The Republic 353 (Book VIII) (Benjamin Jowett trans. 1928) (360 B.C.) (excerpted in online Ch. 21.B.1).

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31. For China, see Section D.3.c. For Cuba, see Miguel A. Faria, America, Guns, and Freedom: A Journey Into Politics and the Public Health & Gun Control Movements 258-62, 267, 318-319 (2019); Miguel A. Faria, Cuba in Revolution: Escape From a Lost Paradise 62-64, 303 (2002). *See also* Enrique Encinosa, Cuba En Guerra: Historia de la Oposicion Anticastrista 1959-1993 (1993) (history of Cuban resistance to Castro regime).

In other nations, circumstances may require aspiring tyrants to move more gradually in disarming the population and achieving absolute power. Venezuela under Chávez and Maduro (Section C.5), and seventeenth-century Great Britain under Charles II and James II are examples. Chs. 2.H, 22.H.

Although tyranny requires disarmament, disarmament does *not* always lead to tyranny. There are many countries, such as today's Luxembourg and the Netherlands, where the population has been completely or almost completely disarmed, and which are not tyrannies. In the short to medium run, a disarmed nation can remain free. Whether that is so in the long run is more questionable, according to the twentieth century's political history. A person who removes the seat belts and air bags from his or her automobile, and is conscientious in driving safely, may never be impacted by the decision to remove last-resort safety equipment. Likewise, a people that thinks that its nation is permanently immune to dictatorship or conquest may remove its last-resort safety tools. History suggests that this would be a gamble.

g. Deterrence

Regime change is difficult once a tyrant has taken power. So as an anti-tyranny tool, widespread citizen arms ownership works most effectively when it functions as a deterrent. "The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move." J.L. de Lolme, The Constitution of England 219 (John MacGregor ed., J. Cuthell 1853) (1775). As detailed in Chapters 2.G.2 and 22.G.2, the very existence of a well-armed population deterred England's despotically inclined Henry VIII from pushing things so far as to cause a national uprising. During World War II, one reason there was no Holocaust in Switzerland was because the Swiss people were heavily armed in a very well-regulated militia. *See* Section C.2. Most importantly, the very strong deterrent effect of armed victims is demonstrated by the consistent behavior of tyrants in waiting to start mass murder until the victims have been disarmed.

Incipient tyrants can sometimes solve the problem of deterrence by disarming the public in gradual stages, so that people do not recognize tyranny until their chains have been fettered. In England in the late seventeenth century, by the time it became clear to many people that the Stuart kings intended to impose French-style absolutism, the disarmament program was already well advanced. Whether the English people could ever have liberated themselves is uncertain. They had the good fortune to be saved in 1688 by an invasion from the Netherlands, which provided the occasion for General John Churchill to lead half the British army in switching sides. Chs. 2.H.3.b, 22.H.3.b.

A key reason that the American Revolution began in April 1775, when the British started forcible gun confiscation, was the American fear that waiting longer would leave them disarmed and unable to resist. As Patrick Henry put it, "They tell us, sir, that we are weak; unable to cope with so formidable an adversary. But when shall we be stronger? Will it be the next week, or the next year? Will it be when we are totally disarmed, and when a British guard shall be stationed in every house?" Ch. 4.A.6. As a 1789 history of the American Revolution explained, Americans "commenced an opposition to Great-Britain, and ultimately engaged in a defensive war, on speculation. They were not so much moved by oppression actually felt, as by

a conviction that a foundation was laid, and a precedent about to be established for future oppressions." 1 David Ramsay, A History of the American Revolution 105-06 (Lester H. Cohen ed., Liberty Fund, 1990) (1789). It is dangerous to start a revolution based on speculation. But as modern Venezuela illustrates, it may also be dangerous not to.

h. Rebels Often Lose

Once a tyrant has established power, armed rebels will not necessarily be able to change the regime. The essay on China, *infra* Section D.3, discusses some large armed uprisings against Mao, none of which removed the communists.

In Nazi Germany, Jews constituted less than 1 percent of the population. Even if every Jew had been armed, they had no chance to remove the Hitler regime unless a significant number of other Germans were willing to join them in fighting. A mass German armed revolt against Hitler might have had a chance in 1933-34, but by 1936, it was too late. Hitler's program of "forcing into line" had brought almost all of civil society under the National Socialist jackboot.

History is full of examples of fighters who had a just cause and who were destroyed by a superior army. The American revolutionaries started with an unusual advantage: functioning state governments to organize and lead the rebels, and the best-armed population in the world. Even so, the Revolution repeatedly came close to being crushed.

Geography also helped the American rebels. Although the British could seize any city they chose, the American interior was so vast that it could not be controlled by Britain's finite manpower. Rebels and defenders have better odds when the terrain is favorable. During World War II, the marshes and forests of eastern Poland provided hiding places for Jewish resistance fighters, whereas the plains of western Poland did not. Likewise in Czechoslovakia, the mountainous regions of Slovakia helped make possible a scale of resistance that was impossible in the plains and urban areas of the Czech region, to the west. Online Ch. 18.B.4.a.

Anti-tyranny rebels may fail without outside support. The American Revolution depended on arms imports from the French, Dutch, and Spanish, and then on the assistance of the French navy and army. Albania was the only nation in World War II that expelled Italian and German occupiers without any need for Allied boots on the ground, but even the Albanians needed arms supplies from the Allies.

Sometimes, democides are terminated because the democidal regime makes itself so obnoxious to its neighbors and to other nations that they invade and depose the regime. That is what happened to Idi Amin in Uganda, when his murder of hundreds of thousands of Ugandans of East Asian descent was finally stopped by an invasion from Tanzania. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 Quinnipiac L. Rev. 383 (2008) (examining human rights abuses in gun control programs in Kenya, Uganda, and South Africa). The same happened to the genocidal Khmer Rouge in Cambodia; four years into the largest per capita democide in the history of nations, Vietnam invaded Cambodia and dethroned the Khmer Rouge.

Counting on foreign rescue is foolish. The international community undertook extensive handwringing after its failures to stop the mass murders in Rwanda and Bosnia in the 1990s. Examining conditions since then, Professor Deborah

Mayersen considers whether there would be effective international action if a new genocide, similar to the one in Cambodia, were found to be taking place at present. She concludes that it is "highly likely" that there would be no effective international response. Deborah Mayersen, *"Never Again" or Again and Again*, *in* Genocide and Mass Atrocities in Asia: Legacies and Prevention 190 (Deborah Mayersen & Annie Pohlman eds. 2013).

Historically, foreign military intervention has been the most common reason that mass killings by government end, although the foreign interventions sometimes have their own negative consequences. Surveying several nations, each with multiple episodes of mass murder, scholars have pointed out the diversity of why mass killings end. Sometimes, the regime stops because it has accomplished its objectives. Other times, a regime may desist because of internal political or practical considerations: military resources might be stretched too thin; the domestic political situation might have changed. There is, as yet, no particular set of policy approaches by other nations, such as sanctions, that appear to reliably lead to better outcomes. *See* Bridget Conley-Zilkic, *Introduction*, *in* How Mass Atrocities End: Studies from Guatemala, Burundi, Indonesia, the Sudans, Bosnia-Herzegovina, and Iraq 1 (Bridget Conley-Zilkic ed. 2016).

Although rebels usually lose, on occasion they prevail even under desparate circumstances. The Sudanese government's genocide campaign in the Nuba Mountains failed because well-trained defenders were better fighters than the government's militias. "Throughout the early 1990s, the Nuba SPLA [Sudan People's Liberation Army] was cut off from the world. There was no resupply: they had no vehicles, had no heavy weapons, and sometimes only had a handful of bullets each. There was no humanitarian presence in the SPLA-held areas at all. There was no news coverage. Facing collective annihilation and with nothing but themselves to rely on, the Nubu people found the necessary determination and reserves of energy." Although they lost territory, "a mountainous base area remained impregnable." Alex de Waal, *Sudan: Patterns of Violence and Imperfect Endings*, *in id.* at 121, 129-32.

i. Advantages and Limits of Nonviolent Resistance

Unpopular, nondemocratic governments can sometimes be removed by nonviolent means. Recent examples include the overthrow of the Tunisian and Egyptian dictatorships in the Arab Spring of 2011, where huge street protests eventually prompted dictators to abdicate. Mohandas Gandhi's decades-long nonviolent protests and boycotts against British colonial rule of India eventually resulted in the British granting independence in 1948. In the Philippines, dictator Ferdinand Marcos imposed gun prohibition as soon as he seized power in 1972. Proclamation No. 1081 (Sept. 21, 1972); General Order No. 6 (Sept. 22, 1972) (banning keeping or carrying firearms; providing for capital punishment for some violations). The Philippines was under his dictatorship for the next 14 years. Although Philippine gun control was (and still is) widely ignored by the Filipinos, Marcos peacefully surrendered power in 1986 after he lost an election that he was forced to call because of massive peaceful demonstrations.

Peaceful resistance can succeed when a government's willingness or ability to use its arms monopoly to eliminate resistance is constrained. The Philippines under Marcos was an American client state, and Marcos could not go too far without

risking loss of American support. Indeed, when he decided to hold an election, he made the announcement on a Sunday morning American television political interview show, rather than in a speech to the Filipino people.

Thanks to freedom of the press, public opinion in Great Britain made it politically unfeasible for the British imperial government in India to kill Gandhi and his supporters. The British government may also have been constrained by its own scruples.

Dictators who consider using the standing army to mass murder citizen protesters must consider the risk that the standing army might not obey and might even switch sides. That is one reason why today's Venezuelan army and secret police are run by Cubans who do not have scruples about killing Venezuelans.

Peaceful, unarmed mass protesters can be murdered *en masse* if the government has the nerve and a compliant military. The Chinese Communist Party so demonstrated in Beijing's Tiananmen Square in 1989 and 1976. *See* Sections D.3.i-j. Venezuela's communist regime has been demonstrating the same point for years, using its armed forces—including the government-armed *collectivo* gangsters—to suppress and kill demonstrators. Section C.5.

Prudence dictates that peaceful rather than armed resistance be used when possible, but peaceful resistance is not always possible. Both violent and nonviolent resistance sometimes succeed and sometimes fail, depending on the circumstances. That is one reason why the Resistance Clauses of many national constitutions, discussed in Part A.3, sometimes include explicit instructions for the citizenry to use force against usurpers.

j. Saving Lives Without Changing the Regime

The most effective form of arms use to stop mass murder by government is deterrence. But sometimes people find themselves in a position where the possibility of deterrence is long past.

Even after genocides and other mass murders have already begun, when victims obtain arms, they can save lives. Overthrowing a democidal tyranny is not the only means to resist democide. As noted the Nazi extermination camps of Sobibor and Treblinka were shut down forever because Jewish prisoners stole guns from the guards and led mass revolts. How many lives were saved because the revolts disrupted the functioning of the Nazi machinery of death? Persons who use arms against concentration camp guards or secret police are unlikely to survive, but they may save others—sometimes many others.

This essay concludes with two case studies of armed resistance under worst-case scenarios: a detailed description of Armenian and other Christian resistance to Turkish mass murder in World War I, and a summary of Jewish resistance to German mass murder in World War II.

k. Armed Armenians and Other Christians

This section examines Turkish governmental genocide against minority groups in the first decades of the twentieth century, especially against Armenians during World War I. It begins with an explanation of the political background in Turkey in the late nineteenth century, including disarmament and mass murder.

Disarmament for Dhimmis

Modern Turkey was once the center of the Ottoman Empire. It was also the center of the Muslim world, because the Sultan of the Ottoman Empire was the Caliph of all Muslims. The Ottoman Empire was established by Turks who in 1453 conquered the Byzantine Empire, which had been the eastern Mediterranean successor of the Roman Empire. The Byzantine capital, Constantinople, was renamed Istanbul. The Ottoman Empire at its peak (and including vassal states) encompassed almost all of the North African coast, almost all the Balkans, much of the Arabian Peninsula, the Black Sea coast, part of Persia, plus Syria, Israel, Jordan, and Lebanon.

The empire's system for treating non-Muslim subjects was based on Islamic law (*shariah*). In the centuries after Muhammed, Islamic jihad had rapidly conquered vast territories and so the conquerors had to decide how to treat their many non-Islamic subjects, who were the large majority. The new subjects were allowed to retain their religions, provided that they accepted a subordinate status as *dhimmis*. In theory, dhimmitude was only available for "people of the book"—that is, Jews and Christians; according to Islam, the Jewish and Christian faiths were based on authentic revelations from the one God who had made his final revelation in Islam. In practice, conquered Buddhists and Hindus were sometime also allowed to be dhimmis, since forcible religious conversion of the vast majority of a conquered nation was impractical.

The Ottomans followed the standard rules for dhimmis: "Christians were not allowed to serve in the army, but had to pay a special tax for that exemption. They were not allowed to bear arms, so they could not defend their farms, property, or families when attacked by predatory nomads. If a Christian on horseback encountered a Muslim on horseback, the Christian must dismount until the Muslim passed by. The testimony of a Christian against a Muslim in court was not valid." George N. Shirinian, *The Background to the Late Ottoman Genocides*, *in* Genocide in the Ottoman Empire: Armenians, Assyrians, and Greeks, 1913-1923, at 20 (George N. Shirinian ed. 2017). Socially and legally inferior to Muslims, dhimmis were not allowed to defend themselves if attacked by Muslims. Christian churches could exist, but their bells could not be rung, and no new churches could be built.

The dhimmi system worked brilliantly for gradual Islamic assimilation of conquered populations. Subjects who truly cared about their old religion could keep it. Over the course of generations, some people who did not have strong feelings about religion would convert to Islam, in order to escape the taxes and dhimmi disabilities. Because Islam does not allow apostasy, once a family converted, their descendants would have to be Muslims forever. Over time, conquered regions became majority Muslim, *See* David B. Kopel, *Dhimmis*, *in* Encyclopedia of Political Thought (2014); David B. Kopel, *Dhimmitude and Disarmament*, 18 Geo. Mason U. Civ. Rts. L.J. 305 (2008).

In many cases, the dhimmi system kept its promise of providing non-Muslims with protected status. For example, in the late fifteenth century, Jews in the growing Ottoman Empire were usually tolerated, whereas in the Spanish empire they were viciously persecuted. The practice of Judaism in Spain was illegal, and the penalty for a second offense could be burning at the stake.

Unfortunately, as non-Muslims shrank from majorities to minorities, prejudice against them increased, as they were increasingly seen as deviants who undermined society. Contrary to the promise of dhimmitude, the government often refused to

protect them, making them easy prey for thugs and extortionists. For example, Armenian Christians in the nineteenth century had to pay the Muslim Kurds not to attack their villages and pillage their monasteries.

Mass Murders in 1894-96

Since the late 1870s, the Turks who ran the Ottoman Empire had seen the Armenian population as "an existential threat," but had been constrained from action by fear of European reaction. Deborah Mayersen, On the Path to Genocide: Armenia and Rwanda Reexamined 194 (2014). The Ottoman Empire was a declining power, and the Christian empires of England, France, and Russia were sometimes able to use their clout to restrain persecution of Christians in Ottoman territory. Ottoman Jews, meanwhile, were often left to fend for themselves.

Many of the inhabitants of eastern Turkey are Kurds; although they are Muslim, their ethnicity is Iranian, not Turkic. Starting in 1891, the Turkish government began providing the Kurds with arms and encouraging them to form militias. The militias were for national defense on the frontiers and oppression of Armenians in the interior. The Kurdish armament project was partially successful for both purposes, although there were some Kurds who refused to participate in attacks on Armenians.

Arming the Kurds had unexpected consequences in the long term, however, as Kurds gained greater self-confidence and increased their own demands for autonomy or independence. The conflict continues today in what many Kurds consider the incipient nation of Kurdistan, comprising parts of eastern Turkey, northern Syria and Iraq, and northwestern Iran. *See* Janet Klein, The Margins of Empire: Kurdish Militias in the Ottoman Tribal Zone (2011).

From 1894 to 1896, the Ottoman Caliphate perpetrated mass murder against Christian minorities. "Armenians would be burned alive in their own churches, shot or cut down in the streets as they fled Turkish mobs or troops, or dumped into harbors to drown. These were the lucky ones. Many were tortured, raped, or otherwise brutalized before being killed. Probably between 100,000 to over 300,000 Armenians were massacred." Rummel, Death by Government, at 61; Shirinian, at 29.

Some massacres resulted from Armenian demands that the Turkish government protect them from Muslim attacks. The government would insist that the Armenians must first surrender their weapons. The Armenians would do so—sometimes fully, sometimes only partially. (Armenians had been smuggling in arms from Russia and Persia, and at least some Armenians had high-quality modern Martini rifles.[32]) After the Armenians were disarmed, the Turkish authorities sometimes pushed back the mobs that were trying to attack the Armenians, and other times stood aside. Usually, when protection was provided, it was temporary. Benny Morris & Dror Ze'evi, The Thirty-Year Genocide 41, 55-56, 58, 66-67, 80, 86-89, 94, 96, 99-104, 108 (2019).

32. The single-shot Martini-Henry rifle was introduced as the United Kingdom's main service rifle in 1871; although later displaced from its leading role, the Martini was still used by some British forces through World War I, and by other forces thereafter. The Martinis purchased by the Ottoman Empire came from the Providence Tool Company, in Rhode Island. *See generally* Stephen Manning, The Martini-Henry Rifle (2013).

For example, at Gurun (Sivas province, east-central Turkey) in November 1895, "[r]eplaying a standard pattern, the Armenians there were duped into defenselessness by official lies. The Armenians handed over their guns to the vali [governor] in exchange for a promise of state protection. When the mob attacked, its members had no trouble breaking into homes, where reports indicate that they killed the men 'and outraged the young women and girls; they cut open mothers with child, and tossed little children from knife to knife.' Then they torched the houses, burning to death anyone hiding inside. Estimates of the death toll range from 400 to as many as 2,000." *Id.* at 96; *cf.* Ch. 4.A.2-5 (describing Britain's broken promises to American colonists after they surrendered their arms).

Some Armenians, after learning of massacres in other villages, joined Armenian revolutionary movements and endeavored to arm themselves. As a local British consul reported, "The argument that, unless they armed, their wives and children would be butchered was used with great effect." So the "men would part with everything they had in order to obtain money enough to buy shot-guns and revolvers." Morris & Ze'evi, at 66.

The Christian empires protested ineffectually against the massacres in 1894, which led to another series of massacres in 1895-96. At that point, foreign pressure forced the Ottomans to stop the killing and to grant the Armenians increased autonomy in the regions where Armenians were a majority. Some scholars view 1894-96 as an attempted genocide that was thwarted from completion only by foreign pressure.[33] A differing view is that the Sultan wanted to amputate the Armenian social body, but not to eliminate it entirely. Raymond Kévorkian, The Armenian Genocide: A Complete History 807 (2011) (1st pub. 2006 as *Le Génocide des Arméniens*).

Professor Rummel estimates cumulative Ottoman democides before the twentieth century as 2 million Armenians, Bulgars, Serbs, Greeks, Turks, and others.[34]

Changes in Government

In 1908, a group known as the Young Turks, which called itself the "Committee for Union and Progress," overthrew the government, but allowed the Sultan to stay. They forced him to turn the Ottoman Empire into a liberal constitutional democracy, with an elected legislature and strong guarantees of religious and civil liberty.[35]

But in 1909, a failed attempt at a countercoup led the Young Turks to establish a state of siege, suspend rights, and rule despotically.[36] That year, in the southeastern region of Cilicia, Muslim mobs and soldiers killed about 30,000 Armenians. Some Armenians defended themselves with firearms.[37] A government commission looked into the matter, and some of the leaders of the attacks on the Armenians were executed.[38]

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33. Rummel, Death by Government, at 209-10; Morris & Ze'evi, at 66-67.
34. Rummel, Death by Government, at 61.
35. *Id.* at 210.
36. *Id.* at 211.
37. *Id.* at 210-11; Kévorkian, at 71-76.
38. *Id.* at 98-107.

Besides Armenians, there were a variety of other Christians in Turkey. Some of them were Greeks, adherents to the Greek Orthodox Church. Most of the rest fell under the broad heading of "Syriac," so named because their original writings and rites were in the Syriac language. The term "Syriac" includes several denominations, including Nestorians, Assyrians, and Chaldeans. (The Syriac denominational and ethnic groupings are complex but not relevant here; they were attacked because they were Christians.)

The Young Turks were "practically all atheists," so they had no religious quarrel per se with Christian minority groups. But when the time came, the Young Turks were happy to use Islam pretextually to incite destruction of the Christian minorities and homogenization of Turkey.[39]

An obstacle for the Young Turks was that some of the minorities had nearby friends. Greece was an independent nation, and it kept a careful eye on treatment of Greeks living in the Ottoman Empire.[40] At the time, there was no independent nation of Armenia, but there were lots of Armenians in the Caucasus Mountain region of the Russian Empire; the Russian Empire frequently applied pressure to protect fellow Armenian Christians in the Ottoman Empire — as in 1913-14 when the Turks were forced to grant Armenian provinces greater autonomy — widely seen as a stepping stone to outright independence. Taner Akçam, The Young Turks' Crime Against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire xvii-xviii (2013); Rummel, Death by Government, at 226-27.

One cause of anti-Armenian sentiment in Turkey was that Armenians were like the Jews or overseas Chinese in some other nations: they were resented because they were hardworking and entrepreneurial. "They were the main businessmen, tradesmen, and intellectuals — the middle-class — in Turkey. . . . In some areas, Armenians were the only carpenters, tentmakers, masons, smiths, weavers, shoemakers, potters, jewelers, lawyers, pharmacists, and doctors. Furthermore, they were a distinctive religious, cultural, and political group, as Jews had been in Germany when the Nazis came to power. This superimposition of ethnicity, culture, religion, historical experiences, occupations, economic success, and minority status would be a dangerous brew in any country." *Id.* at 227.

Starting in 1908, Armenian Christian soldiers were permitted to serve in the military. Although Armenian civilians were not supposed to have firearms, they acquired them anyway. For example, after the Balkan War of 1912, many Armenian civilians bought firearms from returning Turkish soldiers. Weapons and ammunition were secreted in the walls of homes.

Mass Murders in 1915-16

World War I began in July-August 1914, and the Ottoman Empire entered the war in October, under strong German influence. The Ottomans joined the Central Powers (led by Germany and Austro-Hungary) against the Allies (led by Britain, France, and Russia). Eugene Rogan, The Fall of the Ottomans: The Great War in

39. Rummel, Death by Government, at 213-26.
40. *Id.* at 213.

the Middle East (2016). Since the Allied powers were the ones whose pressure had forced the Turks to ease up on persecution of Armenians, the war presented the perfect opportunity for the Ottoman government to impose a final solution to its Armenian problem.

According to some arguments, the Turkish government did not have specific intent to perpetrate genocide. Instead, the Ottomans realized that at least a substantial fraction of the Christian minorities would rise up in support of the Russian army, if the opportunity presented itself. In fact, Armenian revolutionary forces, some of them armed by the Russians, had been in existence for decades. The April 1915 Armenian uprising in the far eastern province of Van showed how effective they could be; the uprising tied down so many Ottoman forces that it directly caused the defeat of the Ottoman invasion of Persia and harmed the war effort in the east. Justin McCarthy, Esat Arslan, Cemalettin Taşkiran & Őmer Turan, The Armenian Rebellion at Van 212-19 (2006). There was no practical means to separate the loyal from the disloyal, and so mass deportation was a military necessity. Although the deaths on the deportation marches cannot be justified by military necessity, the deportations were a classic counterinsurgency tactic to deprive the guerillas of a friendly population in which they could hide. *See* Edward J. Erickson, Ottomans and Armenians: A Study in Counterinsurgency (2013). Moreover, Armenian guerillas perpetrated mass killings, plunder, and rape against the Muslim population. *See* McCarthy et al.

Other scholars discern genocidal intent from the government's actions:

> The most compelling evidence for prior top-down planning and for the true genocidal intentions of the CUP [Committee for Union and Progress, the formal name for the dictatorship] leadership is the way the deportation and mass murder actually unfolded. The initial moves were perfectly designed to soften up the broader civilian population. First came the disarming of the soldiers, then the beheading of the Armenian communities via the April mass arrests of notables. Most of the notables and soldiers were soon murdered. By removing the prominent Armenians and disarming the soldiers, the government rendered the community unable effectively to resist.

Morris & Ze'evi, at 252. "In what appears as meticulous planning, the genocide first involved the conscription of able-bodied men, the disarming of the civilian population and the removal of community leaders followed by the separation of men from families." Mayersen, at 75.

In the view of Professor Raymond Kévorkian, genocidal intent was most clearly shown in 1916, with the massacres of women and children in the deportation camps—acts that could not possibly be justified by military necessity.[41]

Without needing to make a determination about the specific intent of the Ottoman government, two patterns are clear: first, the government began a program that directly and indirectly killed very large numbers of Christians; and second, a significant number of Christians forcibly resisted. This essay will first detail the patterns and scope of the killings, and then describe some examples of resistance.

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41. Kévorkian, at 808-09.

Disarming Soldiers to Kill Them

Conveniently, much of the able-bodied Armenian male population had already been conscripted into the Ottoman army. On February 19, 1915, Ottoman commanders received new secret orders:

1. All Ottoman subjects over the age of five years bearing the name Armenian and residing in the country should be taken out of the city and killed.
2. All Armenians serving in the Imperial armies should be separated from their divisions, without creating incidents, taken into solitary places, away from the public eyes, and shot.
3. All Armenian officers in the army should be imprisoned in their respective military camps until further notice.

Rummel, Death by Government, at 216 (citing Dickran H. Boyajian, Armenia: The Case for a Forgotten Genocide 333-34 (1972)). Armenian conscripts were disarmed and put into "labour battlions," under miserable conditions such that many died.[42] Others were simply marched to secluded locations and shot. Some were bound and force-marched on isolated roads, where they were attacked and slaughtered by Kurds. At least 200,000 Armenians soldiers were killed in total.[43] Whatever the numbers of soldiers who were disarmed and then killed, there were some Armenian soldiers who escaped and warned civilians.

The Armenian civilians included "many males who could fight and might have the weapons to do so. Moreover, the Armenian leadership still could organize a rebellion."[44] As U.S. Ambassador Henry Morgenthau later reported, "If this plan of murdering a race were to succeed, two preliminary steps would therefore have to be taken: it would be necessary to render all Armenian soldiers powerless and to deprive of their arms the Armenians in every city and town. Before Armenia could be slaughtered, Armenia must be made defenseless." Henry Morgenthau, Ambassador Morgenthau's Story: A Personal Account of the Armenian Genocide 301-02 (1919).

So the next stage was to get the civilian Armenian guns. On April 22, 1915, and again on May 6, the government ordered the requisitioning of all arms for the civilian population, ostensibly for their use by the army. The requisition provided a pretext for massive efforts to round up Armenian arms. The universal terms of the requisition were to deceive the Armenian victims. Kévorkian, at 259, 435 (In Sivas, "Armenians and Turks handed over their weapons (for the sake of appearances, the decree applied to the entire population).")

Under the guise of wartime necessity and to protect against possible sabotage and rebellion by Armenians, the first stage was to demand throughout all towns and villages that Armenians turn in their arms or face severe penalties. Turk soldiers and police ransacked Armenian homes, and many suspected of having weapons

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42. Mayersen, at 79.

43. Rummel, Death by Government, at 216-17. *But see* Kévorkian, at 241 (suggesting that only a few thousand were disarmed, and pointing out that some armed Armenians remained in the army though 1918, in areas not close to Armenia).

44. Rummel, Death by Government, at 217.

were shot or horribly tortured. This created such terror that Armenians bought or begged from Turkish friends weapons that they could turn in to authorities. The terroristic searches provided the government a cover for softening up the Armenians and for beginning the series of civilian massacres that led to the final stage. Rummel, Death by Government, at 216-17; Akçam, at 187-88 (April 1915 government instructions to search for and confiscate weapons possessed by Christians); Morgenthau, at 305, 307 (the Turks studied and copied torture methods from the Spanish Inquisition).

Turkish troops were quartered in Armenian homes, "and rape and robbery were common." Mayersen, at 79. Throughout the Ottoman Empire, "[a]ll weapons belonging to Armenians were confiscated. In this way, the preparation for genocide were quietly completed." *Id.* Turkish propaganda incited fears of hidden Armenian weapons stockpiles. *Id.* at 82.

The democide entered a new phase in April 1915. *Id.* at 78. The Turkish army went from town to town, ordering all Armenian males over 15 (or sometimes younger) to appear at a particular location. The males would be imprisoned, and a few days later, marched out of town and then slaughtered.[45]

Deportations

With all the males over 15 dead, the remaining population comprised only women and children. They were ordered to get ready to be deported. Women could be exempted from deportation if they converted to Islam and immediately married a Turkish husband. Their children had to be surrendered to government orphanages, where they would be raised as Muslims.[46]

Under armed Turkish guard, the deportees began to trudge off to unknown locations. Many died from hunger, thirst, or exposure—aggravated by guards who refused to let them drink from water sources they passed. Stragglers were shot, and sometimes impatient guards just killed everyone. As the deportees passed through Muslim villages, they were plundered, raped, and killed. In the mountains, they were similarly attacked by Kurdish tribes. Some of the Kurdish attacks were voluntary and others were coerced by the government. Other attacks were perpetrated by Muslim prisoners whom the Turks had released so they could kill Armenians. Rummel, Death by Government, at 218; Kévorkian, at 409 (German pastor writing that he was "initially surprised that all these people were immediately given arms, although they were robbers and murderers").

According to Professor Kévorkian, most the Kurdish attacks on Armenians were committed by nomadic tribes. Sedentary Kurdish villagers participated, for the most part, only when incited by Turkish authorities who promised them plunder. *Id.* at 810.

Only a minority of deportees survived long enough to be imprisoned in concentration camps in the Mesopotamian desert, where many died from starvation, dehydration, or disease. Rummel, Death by Government, at 219-22 (estimating 10

45. Rummel, Death by Government, at 217-18.
46. *Id.* at 218.

to 15 percent survival rate from the marches); Mayersen, at 76 (estimating one-third survival rate). "For those who insisted on surviving, the government ordered three large massacres at the deportation camps." *Id.* at 77.

Although simply killing everyone in a town (which happened often) might seem a more efficient form of democide, deportations had some countervailing advantages. First, they allowed maintenance of the pretext that the deportations were just relocations due to wartime necessity. Second, as one Turk explained, "If we had killed these women and children in the towns, we would not have known where their riches were, whether buried in the ground or otherwise hidden. That is why we allowed precious items such as jewelry to be taken. But after we had proceeded for about four hours, we came into a valley. With us were some thirty Turkish women who began to go through the clothing of the Armenian women and girls and took away the money and jewelry. It took them four days."[47]

Back in Istanbul, the government realized that some of the dead Armenians had American-issued life insurance policies. A Turkish diplomat asked American ambassador Morgenthau to tell the American insurers to send the Turks "a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State."[48]

During the war, the Ottoman army invaded Caucasian Russia and northern Persia. There, they exterminated tens of thousands of Armenians and Syriac Christians. In Syria and Lebanon, they killed another hundred thousand Christians by creating a famine.[49]

Greek and Syriac Christians

At about the same time the Armenian genocide began, the Syriac Christians were targeted with the same methods: disarmament, massacre of males over 15, followed by deportation death marches or quick massacres for everyone else. *See* David Gaunt, Massacres, Resistance, Protectors: Muslim-Christian Relations in Eastern Anatolia During World War I (2006); Anahit Khosroeva, *Assyrians in the Ottoman Empire and the Official Turkish Policy of Their Extermination, 1890s-1918*, *in* Genocide in the Ottoman Empire, at 116-22.

Until Greece entered the war on the side of the Allies in 1917, the Greek population was relatively better off. In 1913-14, some of them had been ethnically cleansed and deported to Greece. Others had been put into army labor battalions and worked to death. Akçam, at xvii; Rummel, Death by Government, at 229-30 (estimating about 84,000 Greek deaths in this period). Once Greece joined the Allies, the Greeks in the Ottoman Empire got treatment similar to the other Christians, somewhat mitigated by their living mainly in far western Turkey, where many diplomats from countries not at war with Turkey could observe. *See* Gevorg Vardanyan, *The Greek Genocide in the Ottoman Empire: Parallels with the Armenian Genocide*, *in* Genocide in the Ottoman Empire, at 275-80.

47. Rummel, Death by Government, at 228.
48. Morgenthau, at 339.
49. Rummel, Death by Government, at 228-29.

Post–World War I

The Ottoman Empire surrendered on October 30, 1918; Austro-Hungary and Germany followed suit shortly thereafter. The CUP dictatorship attempted to accommodate to new realities, but it was overthrown in 1919 by Kemal Atatürk (also known as Mustapha Kemal Pasha). The former Ottoman Empire was divided up by the winners. (The Russian Empire was not among the winners; Russia had exited the war after a communist coup, followed by the communists signing a peace treaty very favorable to the Central Powers in March 1918.)

Much of Turkey itself was carved into military occupation zones for the winning powers, and short-lived nation of Armenia was created. But Atatürk and his Nationalists refused to accept national dismemberment, and fought on. In the 1923 Treaty of Lausanne, the Allies recognized the new government, whose territory encompassed the modern state of Turkey.[50] During the post-1918 fighting, the Turkish governments kept on killing Christians, including in Persian or Russian territories that the Turkish army sometimes occupied.

Observing a local battle in the one of the post-war wars, American missionary Alice Keep Clark explained why Armenians rejected a purported Turkish peace offer: "They cannot accept the terms because they have known too many cases in the past when the giving up of arms has been the signal for a massacre." Based on experience, surrendering arms was "most ominous sign," namely "a sure forerunner of an imminent massacre." Alice Keep Clark, Letters from Cilicia 158-59 (1924).

Death Toll

The Turkish government admitted that about 800,000 Armenians died from deportation, while scholars put the death toll at 1.2 to 1.5 million, partly by taking into account the killings that continued through 1922.[51] About half the Armenian population of Turkey had died.[52] When the Young Turks ruled, they killed 9 percent of Turkey's population.[53]

Rummel estimates the total democide by the Young Turks (1909-18) at 1,889,000. The victims were mainly Armenians, and also included 84,000 Greeks and 107,000 other Christians. For democide by the Nationalists (1918-23), he estimates 878,000 murdered, consisting of 440,000 domestic Armenians, 175,000 foreign Armenians, and 264,000 domestic Greeks.[54] Total democide by Turkish governments in 1900-23 is therefore 2,767,000. There were also reprisal democides against Turks and Kurds, perpetrated by the Greek army or by Armenians, especially by Armenian irregulars who lived in Russia and whose actions were, at the least, tolerated by the Russian Empire.

Resistance

The Turkish governments' democides were efficiently structured: the victim populations had been forbidden for centuries to possess arms or engage in

50. Rummel, Death by Government, at 230-31.
51. Mayersen, at 77.
52. *Id.* at 77.
53. Rummel, Death by Government, at 235.
54. *Id.* at 224 tbl. 10.1.

self-defense. Thanks to military conscription, most of the able-bodied males had been removed from the population. Town by town, the Turks first apprehended and killed the leading men, and then all the other men. After that, the women and children could be slaughtered on the spot or sent on death marches.

As the persecution intensified, contemporaneous Armenian writings lamented that if civilians had taken a more proactive approach sooner, more Armenians would have survived. But initially, many Armenians felt their best chance for survival lay in keeping a low profile and remaining passive.

Essential to the destruction of the Armenians was the destruction of communications—so that people in one village would not know what had happened in other villages. "The maintenance of a kind of cordon sanitaire that blocked all communication between regions, together with a strategy centered on concealing the CUP's true objectives, were the two indispensable conditions for the success of the plan to liquidate the Armenians without provoking resistance."[55] Kévorkian, at 240, 435 ("early in April 1915 the authorities took all the measures required to completely cut off relations and correspondence between Sivas and the neighboring villages: 'no one knew what was going on, even in a village just an hour away'"); Morgenthau, at 311 (Armenians were told that they would be allowed to return home after the war was over).

Thus, in a given village, the people would not know that each successive Turkish demand—give us your weapons and we will not harm you; assemble your men in the town square; let us march you off to new location—was not a bargain to save one's life but was instead a step toward being murdered.

A key reason for the successful resistance at Musa Dagh, *infra*, was that the villagers "were among the rare Armenians who had no doubt about the authorities' real intentions toward them, which is what brought them to fight at all costs." Kévorkian, at 612.

The Jews in Europe during World War II faced a similar problem due to lack of communications. As detailed in Section D.2.e, when the Nazis took formerly Soviet territory in 1941-42, they would machine-gun all the Jews and Gypsies (Roma) in a village. The remaining villagers would not dare trying to travel to another village to warn about what was coming.

In other areas, such as Poland, the Jews were herded into urban ghettos. Later, some of them would be shipped out by train, ostensibly to labor camps. Eventually, the ghetto would be depopulated. As far as the isolated urban Jews could tell, (1) being put in a ghetto was a return to medieval conditions, when Jews had also been required to live in ghettos; and (2) the deportations were for slave labor, and not for immediate extermination. The urban Jews only learned what was really going on after some Jews in Vilna, Lithuania, discovered mass killing sites that were indiscreetly close to town. Starting on New Year's Day 1942, the Vilna Jews wrote down the truth and began to smuggle the message to other ghettos. David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition 111-16 (2017). Only then did many Jews realize that certain death awaited if they failed to

55. *Cordon sanitaire* is French for "sanitary cordon"—a movement barrier to prevent the spread of infectious disease—similar to a quarantine. The term later because used in geopolitics, in the sense of buffer states, starting with the French-built *cordon sanitaire* in Eastern Europe to try to contain the Soviet Union after World War I.

resist, and even if they died resisting, that was better than passively allowing themselves to be slaughtered.

The problem for the Turks was that their controls of guns and communication, while severe, were not airtight. Some people did escape and warn others. Moreover, the mass murders of 1894-96 and 1909 had made some Ottoman Christians skeptical about allowing themselves to be disarmed. So in some areas, there was substantial armed resistance.

Before describing some notable instances of resistance, it is important to acknowledge that the success of any given resistance is not measured solely by how many people from a resisting town survived. Even when all the resisters were killed, they still helped to save other persons. Soldiers fighting for a just cause—such as Americans in World War II—are not necessarily fighting mainly to save their own lives. Rather, they are risking and sacrificing their lives to save others. Because many Armenians and other Christians did the same, many other people survived. Giving one's life to save others is perhaps the best possible use of one's life. *Cf. John* 15:13 ("No one has greater love than this, to lay down one's life for one's friends.").

The more Ottoman soldiers, militia, and free-range murderers whom the resisters killed or seriously wounded, the fewer people who were available to kill other Christians. If resisters in a town managed to hold out for one day or one week, every minute that they kept up the fight provided more time for people in other towns to learn what was happening, to prepare, or to flee.

Unlike some other democidal regimes, the Ottomans faced a serious multi-front war. In the west, Australian, British, and New Zealand forces had landed at Gallipoli, not far from Istanbul. To the south, the allies sent forces into Arabia and Syria, while inciting and arming Arabs to revolt. Forces from British India attacked Mesopotamia. In the east, the Ottomans and the Russians invaded each others' lands, and their forces also warred in formally neutral Persia. Frontline forces could not readily be pulled out of combat to make up for losses suffered by the murder units within Turkey. The multiple demands on the Ottoman army helps explain why so many of the armed attacks on the Christians were left up to the Kurds.

In the resistance descriptions below, the village or provincial names were those in use at the time. Parentheticals indicate alternative names, including newer ones.

Musa Dagh

The best-known resistance occurred at Musa Dagh (Mount Moses) in south-central Turkey, on the Mediterranean coast. The story is told in Franz Werfel's 1933 two-volume historical novel *Die vierzig Tage des Musa Dagh*; a shorter version, in English, was *The Forty Days of Musa Dagh.* Metro-Goldwyn-Mayer began work on a movie adaptation starring Clark Gable, but abandoned the project due to pressure from the Turkish government. Werfel's 1933 novel was an indirect warning about Hitler, whose government banned and burned the book in February 1934. During World War II, the book was read by Jews as an inspiration and instruction manual for resistance. More recently, an unabridged English version has been published, and the 2016 movie *The Promise*, starring Christian Bale, is based on the same source material.

Today, the Musa Dagh story is well known to scholars of the Turkish democides, *e.g.*, Morris & Ze'evi, at 209-11, but not to the general public. The ignorance aids denialists who falsely contend that the Turkish government did not perpetrate

mass murders, and other denialists who contend that armed resistance to mass murder is futile.

The Musa Dagh resistance lasted for 53 days; the "forty days" of Werfel's title was literary license, evoking the 40 days that Moses spent on Mount Sinai before receiving the Ten Commandments, and also the 40 days that Jesus spent in the desert after his baptism and before beginning his ministry, as well as the 40 days between the resurrection of Jesus and his ascension. *Exodus* 32; *Deuteronomy* 9-10; *Luke* 4:1-13; *Acts* 1.

The first eyewitness account of Musa Dagh was written in 1915 by the pastor Dikran Andreasian, who led the resistance. Dikran Andreasian, *A Red Cross Flag that Saved Four Thousand* (reprinted in Outlook, Dec. 1, 1915) (Stephen Trowbridge trans.). Rev. Andreasian was the pastor of the Armenian Protestant Church in Zeitoun. In the spring of 1915, six thousand Turkish soldiers were sent to the city. They attempted to seize the monastery but were driven back by armed young men. Once the Turks brought in artillery, they were able to take their objective.

The Turks summoned 50 of the leading men of Zeitoun to a "conference with the commander" at the army barracks. The men were imprisoned, and then the Turks demanded the men's families present themselves. Then more families were summoned. All of them were then taken out to march by foot, with no supplies, to destinations unknown. "Day by day we saw the various quarters of the city stripped of inhabitants, until at last a single neighborhood remained." *Id.* at 2. Rev. Andreasian was among the final group of seven thousand who were marched out of Zeitoun. Thanks to the intercession of American missionaries, the pastor and his wife were allowed to proceed to his home town, near Antioch (which is near Musa Dagh).

Twelve days after the pastor arrived at his father's home, orders were received for the six villages of Musa Dagh to prepare for deportation eight days hence. By this point, communication with the outside world had been severed. Opinion was divided, and some families accepted the advice of another minister who argued that resistance was impossible, and so they accepted their fate and were marched away. Rev. Andreasian and a group of over four thousand decided to abandon the villages in the foothills. They would stand and fight in the mountain heights.

They brought all the food they could carry, and their flocks of sheep and goats. They also brought all their weapons: 120 modern rifles and shotguns, and about 360 old flintlocks and horse-pistols.[56] With fewer than five hundred guns total, over half the men were left unarmed.

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56. Flintlocks were state of the art in the 1620s when Captain Myles Standish obtained one for the Pilgrims at Plymouth. They were the standard arms of the American Revolution, and for the American military and militia through the 1820s. As of 1915 in the United States, they had long been displaced by modern firearms. Horse-pistols were large handguns suitable for men on horseback; the term horse-pistol can include a flintlock, or a handgun with a more advanced firing mechanism. Since the 1880s, modern firearms have used primers and smokeless gunpowder that are too chemically sophisticated for home manufacture by an average person. Flintlocks used old-fashioned blackpowder, which can be made at home if one has the right ingredients, including saltpeter, which is a product of the decay of animal waste. For either flintlocks or newer arms, bullets can be made by casting molten lead in molds. *See* Chs. 2.H.1.d, 2.I.1, 3.E, 5.E, 6.C.

Encamping in the upper crags of Mount Moses, the Armenians were drenched by rain; they had no tents or waterproof clothing. The men managed to keep the gunpowder dry. To defend each mountain pass and approach to the camp, trenches were dug and rocks were rolled to create barricades. Scouts, messengers, and a central reserve of sharpshooters took their positions.

When Turks attacked with 200 men on July 21, 1915, they were driven back. The Turks returned with a field-gun (mobile artillery) and bombarded the camp. A brave sniper crept toward the artillery, and with five shots dispatched four artillery gunners, forcing the field-gun to be withdrawn.

The Turks then amassed a force of three thousand regulars, plus four thousand local Muslims who were given army rifles. They advanced on the Armenian camp from all directions, and the Armenians dispersed to meet each column. All but one of the Turkish advances was a feint, designed to draw Armenians away from the main force. That force broke through the outnumbered defenders; by nightfall, the army was bivouacked in the woods within four hundred yards of the Armenian camp. Although there was a deep ravine in between, the Turkish rifles could hit the Armenians, but the older Armenian guns did not have the range to hit the Turks.

On the brink of annihilation, the Armenians devised a desperate plan. Under cover of darkness, they would surround the Turkish camp, close in suddenly with a fusillade of gunfire, and then attack hand to hand. "It was here that our familiarity with these crags and thickets made it possible to do what the invaders could not attempt." *Id.* at 9. The surprise attack threw the Turks into confusion and forced them to withdraw. Over 200 soldiers were killed, and the Armenians captured seven Mauser rifles, 2,500 rounds of ammunition, and a mule.

The Ottomans then armed more Muslims, and fifteen thousand Muslims, plus the Turkish regulars, were sufficient to lay a siege on all of the landward side of the mountain. The plan was to starve out the Armenians, who even on short rations had only two weeks of food left. Forty days after the Ottomans had announced the deportation order, Rev. Andreasian wrote three copies of an appeal for rescue. Three strong swimmers were dispatched to the coast to look for any ship that might provide rescue, and then to swim to the ship with the message. The Armenians kept up their prayers. "Gregorians and Protestants were fused into one faith and fellowship by this baptism of suffering."[57] *Id.* at 10.

The women sewed two immense flags. One said, in English, "CHRISTIANS IN DISTRESS—RESCUE." The other flag was white, with a large red cross. Because of the war, there was little shipping on the coast. Rain and fog often made the flags impossible to see from a distance. Meanwhile, Turkish attacks continued, and were repulsed as the Armenians rolled boulders down onto the army. Gunpowder and ammunition were running low. *Id.* at 13.

On a Sunday 53 days after the Armenians had ascended Mount Moses, the French cruiser Guichen waved signal flags to the Armenians. French and Armenian delegates quickly met, and soon the Armenians were embarked by four French

57. "Gregorian" is a short name for the Armenian Orthodox Church.

and one English war vessels. Two days later they were provided refuge in Port Said, Egypt, a British protectorate. About 4,200 people had gone up Mount Moses and 4,049 came down: 413 children aged 0-3; 505 girls and 606 boys aged 4-14; 1,449 women; and 1,076 men. *Id.* at 795; Kévorkian, at 611. "We do not forget that our Saviour was brought in his infancy to Egypt for safety and shelter," Rev. Andreasian wrote. Andreasian, at 15.

The resisters at Musa Dagh had advantages that many resisters do not: highly defensible terrain with which the defenders were intimately familiar; a nearby outlet for rescue; time to prepare a defense; and, as it turned out, just enough ammunition to survive. Importantly, they acted before it was too late.

Azakh

The little of village of Azakh (Azekh, İdil) lies near the modern border of Turkey, Syria, and Iraq, far from any coast. Azakh was one of five villages in the area that defended itself against Kurdish attacks. Although the Kurds were repulsed, the villagers were unable to leave the defended villages to tend their flocks and crops, so they obtained food by night-time raids on Kurdish villages. Because of surviving documentation, the rest of the story is best known about Azakh.

The town had a population of about a thousand Syriac Catholics and Syriac Orthodox. Its population grew with the influx of refugees from other towns, as well as Armenians who had escaped the death marches. They perhaps chose to come to Azakh because it "was a traditional fortification famous for its defensive walls and aggressive inhabitants."[58] There, the people swore a traditional oath, "We all have to die sometime, do not die in shame and humiliation."[59]

In June and July 1915, emissaries tried to convince the people of Azakh to leave, in exchange for guarantees of safety, but the entreaties were rejected. The people spent the time constructing platforms for snipers and a secret tunnel out of the city.[60] A Kurdish attack from mid-August through September 9 was repulsed, and night-time attacks from Azakh captured Kurdish strategic positions. For the time being, the Kurds attacked other towns instead.[61] The Ottoman army arrived in early November, and unsuccessfully demanded that people surrender their arms and accept deportation.[62] A Turkish attack was repulsed, with heavy casualties among the attackers.[63]

The Turks augmented their forces and, in combination with the Kurds, had about eight thousand men at arms. The élite of the Azakh defenders were the Jesus *fedai*—the latter word (in Arabic, *fedayeen*) signifying fighters willing to die for a cause. On the night of November 13-14, they snuck through the secret tunnel and surprised the sleeping Turkish soldiers. The *fedai* killed several hundred soldiers

58. Gaunt, at 276-77.
59. *Id.* at 277.
60. *Id.* at 278-79.
61. *Id.* at 279-80.
62. *Id.* at 282-83.
63. *Id.* at 285.

and captured semi-automatic rifles and ammunition—a big upgrade from their old flintlocks and homemade blackpowder (made from tree roots, charcoal, and boiled excrement).[64]

The fighting at Azakh, a town with no strategic military value, was slowing the Ottoman buildup for operations in Persia (Iran), much to the annoyance of the Ottomans' German military advisors. *Id.* at 288-89. Finally, the Ottoman commander gave up, lifted the siege, and Azakh was spared, to the great embarrassment of the government in Istanbul.[65]

Van

The largest military action of Armenian resistance took place in the far northeastern province of Van, bordering Persia and the Armenian part of Russia. Although some pro-Armenian sources deny that any resistance had been taking place before the democide began, there is substantial evidence that Armenian guerillas in Van province (but not the city) were perpetrating atrocities against Muslims, and working in support of an expected Russian invasion.[66]

The Armenian guerillas hoped to establish an independent Armenian state under the protection of a Russian big brother. Whether the Russians would have gone along is questionable. They were certainly eager to sweep south and west into Ottoman territory, inciting Christian revolts as they went—just as the Ottomans hoped to do in Russian territory, inciting Muslim revolts. But whether the Russians would have acquiesced to an independent Armenia, rather than outright annexation, is doubtful.

According to the most ardent pro-Armenian sources, Ottoman actions at Van were just another attempted massacre. According to the pro-Ottoman sources, the Ottoman offensive against Van was counterinsurgency to suppress an Armenian revolt that was having disastrous effects on Ottoman operations in the east, including in Persia. As noted, this essay does not aim to parcel out blame for the actions of the combatants in World War I; there is plenty to go around. Rather, the question addressed here is the efficacy of armed resistance to government forces intent on mass killing of civilians.

Thousands of Turkish soldiers converged on Van, a large city whose Armenian and Muslim populations each had their own neighborhoods. The Turks demanded the Armenians give up their arms. The Armenians "knew that they were doomed if they obeyed; yet, if they failed to, they would provide the vali [governor] with the pretext he needed to attack the city's Christian quarters and the rural areas."[67]

The Armenians had 90 Mauser C96 semi-automatic pistols, 120 small revolvers, 101 rifles, and over 30,000 rounds of ammunition.[68] Some Armenians in Van used bombs, grenades, or dynamite.[69]

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64. *Id.* at 288.
65. *Id.* at 289-94.
66. McCarthy et al., at 176-221.
67. Kévorkian, at 319.
68. McCarthy et al., at 209.
69. *Id.* at 203.

"Van's defenders, albeit heavily outnumbered and poorly armed, had an advantage — they found themselves in a densely urban environment — and a disadvantage: their positions communicated directly with all the government buildings in the city. . . ."[70] A Turkish commander remembered "the resistance of the Armenians was terrific. . . . Each house was a fortress that had to be conquered separately."[71]

A battle raged for weeks. As ammunition began to run low, the Armenians "improvised a cartridge factory, a gunpowder factory (directed by a chemist), and an arms factory. A smithy was even converted into a cannon foundry. Although this project was of merely symbolic value, it seems to have sustained the morale of the populace, which was invited to donate its copper pots and pans; they were melted down to make an 'Armenian cannon' that was used to shell the Hacibekir barracks on 4 May, albeit to no great effect."[72]

Although the Armenians were "[o]utnumbered, outgunned and with dwindling supplies of food and ammunition," they fought the Turks' siege for four weeks until Russian troops came to the rescue. About 210,000 Armenians then fled to Russia, one of the two large groups of Turkish Armenians who escaped.[73] On the road to Russia, they were attacked by Turks and Kurds, suffering losses of 1,600. They were also joined by other refugees.[74]

The 1912 population of Van province had included 130,000 Armenians plus 62,000 Syrian, Chaldean, or Nestorian Christians.[75] So the figure of 210,000 refugees from Van must also include a substantial number of Christians from other provinces.

Hakkari

Resisting ethnic cleansing, tens of thousands of Assyrians took to the Hakkari Mountains, armed only with flintlocks and other antiquated rifles. For weeks they defeated Turkish and Kurdish attacks until they began to run out of ammunition. They then began to make their way to Persia, fighting and defeating Kurdish attacks along the way. About fifteen to twenty thousand of them reached their destination. Gaunt, at 121-49.

More Syriac Resistance

A village-by-village account of the massacres, and, sometimes, of resistance, is provided in David Gaunt, Massacres, Resistance, Protectors: Muslim-Christian Relations in Eastern Anatolia During World War I (2006) (covering Syriacs in the eastern Ottoman provinces of Van, Diyarbekir, and Bitlis, plus the Persian province of Azerbaijan during the Ottoman invasion). While details vary, the general

70. *Id.* at 326.
71. *Id.* at 328.
72. *Id.*
73. Mayersen, at 80; Kévorkian, at 334-35.
74. *Id.* at 335.
75. McCarthy et al., at 10.

pattern is familiar: disarmament, sometimes accomplished by torture in order to reveal where arms were hidden; decapitation of village leadership; removal/killing of males over a certain age; removal/killing of all the rest. Most of these accounts do not involve resistance.

Gaunt presents "A Catalogue of Massacres"—an alphabetical list of about 180 villages where Syriacs were massacred. For some villages, the only surviving records merely provide a sentence or short paragraph describing the location and the number of families that were killed. For others, there are more details. *Id.* at 200-72.

Except as otherwise noted, all of the villages below are (were) within about 40 miles of the town to Midyat, the center of the Assyrian community in Turkey. Midyat is in southeastern Turkey, close to the Syrian border, and not far from Iraq.

Anhel (Enhil). This was a large Syriac village, and also the site of a concentration camp for persons who survived the death marches. The inhabitants expected that they would eventually be attacked. They never were, because the attackers first wanted to massacre 'Ayn-Wardo, and since 'Ayn-Wardo never fell, Anhel was never attacked. The Anhel villagers smuggled supplies and weapons to 'Ayn-Wardo. *Id.* at 200-01.

'Ayn-Wardo (Gülgöze). During the summer of 1915, over six thousand refugees of various denominations and ethnicities fled to 'Ayn-Wardo. Turkish officials assembled and armed thirteen thousand Kurdish tribesmen. Despite two months of attacks and siege, the Kurds failed to take 'Ayn-Wardo. A local Kurdish sheik (shaykh), Fathullah, whom the Syriacs trusted, brokered a ceasefire. The Syriacs gave up their arms; the Turks ordered the attackers away; the sheik ordered the Muslims not to harm Christians, and he placed 'Ayn-Wardo under his personal protection. The village was not molested again. "Since the mass attack on 'Ayn-Wardo failed, it made possible the survival on Anhel, which never had to face a storming." *Id.* at 202-05.

Basibrin. Taking in refugees from other villages, the Syriacs created a force of two thousand well-armed defenders. One reason they were well armed was that they had preemptively seized the rifles from the 40-man Turkish army garrison in town. In the fall of 1915, the Syriacs inflicted heavy casualties on attacking Kurds, and drove them off. But the Kurds returned in the summer of 1917 and killed about 90 percent of the Syriacs. *Id.* at 206-07.

Beth-Debe. Located on a mountaintop, the village of 40 families was doubled in size by incoming refugees. Their forces were augmented by a hundred armed men sent from a nearby monastery, and a friendly Kurdish leader who gave them arms and ammunitions. Other Kurds attacked for 15 days in August 1915, but after taking more casualties than the Syriacs, departed. *Id.* at 211.

Dayro da Şliabo (Çatalçam). This village was located further west than the above villages—straight north of the easternmost point of the Mediterranean Sea, and well inland. The 70 Syriac families fled to the nearby walled monastery. Over three months, a force of fifteen thousand Kurds could not breach the monastery walls, and eventually left. After things seemed to have returned to normal, the people returned to the village. A surprise night-time attack by a local tribe captured the monastery, forced the villagers into the town square, and burned them alive. *Id.* at 216-17.

Hah (Anitli). After the village headman learned about the Armenian massacres to the north, the Syriacs of Hah began strengthening the village walls, building

barricades, and stockpiling food and water. Including refugees from other villages, the population rose to about two thousand, including 200 armed men. The local Kurdish chief warned the Syriacs that the Turks would prevent him from protecting them. After other Kurds and Turks besieged Hah for 45 days, the same Kurdish sheik who had negotiated the 'Ayn-Wardo ceasefire negotiated a similar one of Hah. *Id.* at 223.

Kfar-Boran (Kerburan). In a town with about two thousand Christians of diverse denominations, refugees in the summer of 1915 informed the people about what was going on elsewhere. Many in the town favored reliance on Ottoman promises of protection. The area was flat, with few natural defenses, so when the Kurds attacked, the people retreated to the seven large building complexes in town. The Turks promised that if the people came out, they would be safe; those who did come out were promptly killed. The remainder of the people fought for about a week, but they had not had time to obtain or make reserves of ammunition. The army captured one building at a time and then killed everyone inside. *Id.* at 232-33.

Kfarze. After initially relying on promises of protection, the villagers discovered Kurdish plans for a massacre. They asked 'Ayn-Wardo for help, and that village sent an armed escort that led the people to 'Ayn-Wardo, fighting off Kurds along the way. Other villagers fled to Muslim villages, where they were taken hostage; a detachment of 300 armed men from 'Ayn-Wardo liberated some of them and arranged for prisoner exchanges to free the rest. *Id.* at 234.

Mor Malke Qluzmoyo. This monastery near Midyat was a very defensible stone fortress. In the summer of 1915, nearby villagers and refugees from other areas took shelter there. The local Kurds did not even attempt to take it, and the monastery was a base for Christian raiding parties taking reprisals against Kurds who had attacked other villages. In mid-September, the people began to return to their villages, but then went back to the monastery after the Turkish government told them to surrender their weapons in exchange for protection. They spent the winter there, under sniper fire, and close to starvation. *Id.* at 240-41.

Saleh. "On July 3, 1915, soldiers and Turkish clans instigated by Midyat's new kaymakam [provincial governor], Bashar Bey, surrounded the village. The Christians fought back in defense but were overpowered and killed in their homes." *Id.* at 256.

Yardo. The local Kurds deceitfully made a non-aggression pact with the Syriacs. One night, the Kurds cried out for help, saying that their cattle were being stolen. After the Syriac armed men had been lured outside the village, the Kurds moved in, took the villagers hostage, and prepared to ambush the returning Syriacs. Realizing the trick, the Syriac men went to the ruins of an old fortress, and told the Kurds to release the hostages. After the hostages were released, the Syriacs began trekking to 'Ayn-Wardo; on the way, they were ambushed by Kurds. All were killed, except for 40 who were sold as slaves. *Id.* at 269.

Za'faran. After nearby massacres, seven hundred armed Syriacs took refuge in a monastery, joined by hundreds of refugees. A Turkish and Kurdish assault on July 4, 1915, was repulsed. Although the Kurds departed, the Syriacs had to pay continuing bribes to local Turkish officials for protection. In October, they felt safe enough to return to their homes. While in the monastery, about half the refugees died from epidemics. *Id.* at 269-70.

Zaz. This village was the home of about 200 Syriac families. The local church and nearby building complexes had high, thick walls. Although the people held off a siege for 20 days, they ran out of food and water. At that point, many came out in exchange for promises of protection, but they were soon killed. Attacking the remaining defenders, the Kurds fought their way into the churchyard, but were driven off from the church after a three-day battle. Then, a Turkish officer, backed by soldiers and artillery, arrived. The officer negotiated with the Syriacs inside the church, and he realized the falsity of Kurdish claims that the Syriacs were receiving foreign help and had a huge arms stockpile. He put the Syriacs under his protection and led them to another church, and after that they were moved to another town. Under the harsh conditions of their new homes, many died from disease or starvation. About a hundred survived. *Id.* at 270-71.

More Armenian Resistance

Like Gaunt for the Syriacs, Kévorkian for the Armenians provides a long list of particular massacres, and of instances of resistance. While Gaunt's list was organized by village, Kévorkian's is organized by province (*vilayet*), since the victim Armenian population was much larger and more dispersed than the Syriacs. Within a given vilayet, Kévorkian describes activities in individual villages in 1915.[76] In describing the attackers, Kévorkian sometimes uses the Turkish word *çetes*, meaning "Muslim armed irregular brigands."

Erzerum vilayet. This province was in the northeast, one step closer to the interior than the provinces that bordered Russia or Persia. "The last village to be attacked, Haramig (pop. 898), valiantly withstood the çetes' assaults under the command of Hagop Kharpertsi, a hekim [doctor] who practiced traditional medicine. The people of Haramig held out for two weeks until their ammunition ran out; they inflicted heavy losses on the Kurds. A few old men and children who had survived these slaughters and been left to wander through the villages were gathered together in Hinis and deported a few weeks later."[77]

"[W]hen the bands of çetes attacked the village of Khups/Çanakci (pop. 1,216) at six o'clock on 7 June 1915, they were met with gunfire from the peasants, organized into six self-defense groups. . . . After two days of uninterrupted fighting, which cost 40 Kurdish çetes and one Armenian (Giragos Baghdigian) their lives, the villagers decided to break through the enemy lines. They succeeded, but were all killed somewhat further off in a mill, in which they fought to the last bullet."[78]

Bitlis vilayet. This province was in the southwest, one province away from Persia, and two away from Iraq. In the high mountains of Sasun (Sassoun), about a thousand armed men attempted to defend tens of thousands of refugees. The defenders "had very few modern weapons and a great many hunting rifles." *Id.* at 352. Starting on July 18, they repulsed Turkish-Kurdish assaults. "By 28 July, Sasun was running low on ammunition and famine had begun to claim lives, especially among the refugees." So the defenders on August 2 attempted a breakout, to try to

76. Kévorkian, at 265-621.
77. *Id.* at 304.
78. *Id.* at 305.

bring the entire population to the Russian army. "A few thousand Armenians succeeded in crossing the Kurdish-Turkish lines and making their way to the Russian positions in the northern extremity of the sancak [administrative district] of Mush, but the vast majority were massacred, notably in the valley of Gorshik, after the hand-to-hand fighting of the final battles of 5 August, in which the women, armed with daggers, also took part."[79]

Harput/Mamuret ul-Aziz vilayet. This province was in east-central Turkey. "An examination of the way events unfolded shows that the local authorities methodically enacted a plan that had probably been hammered out in Istanbul; it was distinguished by the fact [that] each step paved the way for the next. Thus, the hunt for arms justified the arrests, tortures, and house searches. These made the thesis of an Armenian 'plot' credible; the existence of the 'plot' justified extending the measures taken to all males over the age of ten, followed by the deportation of the whole population. It was an almost perfect mechanism."[80]

"The sole act of resistance we know of took place at Morenig, where a dozen adolescents barricaded themselves in the church and fought back until they were all killed—but not before inflicting a few casualties on the 'gendarmes.'"[81] Additionally, an Armenian guerilla attack wiped out a Turkish battalion and thus allowed the slave laborers to escape.[82]

Shabin Karahissar, Giresun vilayet. After young men were imprisoned and 200 merchants killed, the five thousand townspeople of Shabin Karahissar burned their own homes and took refuge up the mountain in an old Roman fort. Although they were poorly armed, they kept thousands of Ottomans at bay for 26 days. While the fort had water, the defenders began to starve and ran out of ammunition. At the last, they exited the fort and fought hand to hand. Only 47 survived. *See* Aram Haigaz, The Fall of the Aerie (1935).

Sivas vilayet. This province was in north-central Turkey. Many Armenians obeyed the bishops' order to surrender their arms, and the usual results ensued. On June 16, when the Armenians of Şabinkarahisar saw a distant village in flames, they barricaded themselves in their neighborhood, joined by refugees from other towns. There were about 500 males capable of bearing arms, who had among them 200 weapons, including 100 modern Mauser rifles. For water, the Armenians had to make dangerous night-time sorties to the nearby springs. After the Ottomans burned down the Armenian quarter, the Armenians retreated to the town citadel. The Ottomans shelled it with artillery, but without great effect. The Armenians used metal scraps from the spent artillery to manufacture bullets. Direct attacks on the citadel resulted in dead Turks, with Armenians capturing their rifles. A six-thousand-man Turk offensive on July 4 resulted in the deaths of 300 Armenian fighters, and probably a larger number of Turks. But the Armenians were running out of ammunition and now had only 200 fighters, many of them adolescents. An attempted sortie on the night of July 8 was unsuccessful. On July 11, after 27 days of

79. *Id.*
80. *Id.* at 386.
81. *Id.* at 396.
82. *Id.* at 398.

siege, the Armenians surrendered. The males over 15 were executed, and the rest of the people were deported.[83]

Urfa (Edessa) was an administrative district near the middle of the Turkey-Syria border. At the time, it was in the province of Aleppo, historically home to one of the first Christian congregations outside Israel. It had been the site of massacres in 1895. The townspeople of Urfa and nearby towns first learned of the democide in March 1915, when some escapees from the death marches arrived. People initially disobeyed a June 1915 order to surrender their weapons, until the Armenian bishop told them to comply. Many weapons were handed over, but not all. Then began the arrests and killings of leading men and the deportation of other men. When deportation of everyone was ordered on August 23, the Armenians refused, and fortified their quarter. Because the Turkish attack did not begin until September 29, the Armenians had plenty of time to prepare, including acquiring ammunition that the females smuggled in beneath their chadors. Since 1895, the Armenians had been forbidden to ring their church bells. On the 29th of September, all the bells pealed, announcing the beginning of the insurrection.

Expecting little resistance, since most of the men had already been killed or deported, the Turks and Kurds advanced deep into the Armenian quarter. Then, they were showered with homemade bombs; in a panicked retreat, many of the attackers were trampled to death. So many men being gone, Armenian women and girls fought as combatants.

On October 1, the aggressors focused on the Catholic church, but the Armenians were forewarned and forearmed. Once the enemy was in the church and courtyard, the Armenians hit them with gunfire and explosives.

The Turks brought in six thousand more soldiers, plus German artillery guns and German officers. Beyond the range of Armenian firearms, the artillery systematically destroyed the Armenian quarter. The Armenians fought to the very last, burning their possessions so they could not be plundered, throwing their gold coins into the street and taunting the enemy come and take them; and in the last extremity, committing suicide rather than be captured. The insurrection was finally suppressed on October 25, and the Armenian survivors executed.[84]

Aftermath and Observations

About 339,000 Christian refugees from the Ottoman Empire ended up in southern Russia during World War I.[85] For the refugees, the death rate from disease and malnutrition was high. For the refugees who remained in southern Russia, things might have been all right if the Russian Empire had remained intact, but the empire was taken over by communists, who were considerably more murderous than their imperial predecessors. After Lenin died, Stalin took over, and used Lenin's systems of mass murder on an even greater scale against all the people of the Soviet Union, with minorities such as Armenians often being specially targeted. *See* Section D.2.e.

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83. Kévorkian, at 435, 458.
84. Gaunt, at 264-67; Kévorkian, at 613-21.
85. McCarthy et al., at 374.

As the Ottoman and Russian Empire disintegrated, an independent Armenian republic was briefly established. but it was gobbled up and reincorporated by the imperial successors—Kemal Atatürk's Nationalists and Lenin's regime.

The Christian minority resistance to Ottoman mass murder during World War I is consistent with some long-standing observations about armed resistance:

- If the situation has deteriorated to the point that armed deterrence has failed and armed resistance becomes necessary, the odds are that most of the resisters in any given area will eventually be killed.
- One of the most difficult decisions is whether and when to begin armed resistance, because governments intent on mass killing are often able to conceal their intentions.
- Resistance forces are greatly aided by defensible positions, such as mountains, fortified buildings, or dense urban areas. The advantage is magnified when the defenders know the area well and the attackers do not. With some preparation time and a good defensive position, a fairly small group of defenders with firearms may be able to hold off a much larger number of attackers with firearms.
- When escape is impossible, fighting for as long as possible may sometimes convince the attackers to leave.
- Resistance can often save others by depleting and occupying their attackers' resources, necessarily preventing them from using those resources against others.
- As in sieges throughout history, the besiegers may win by waiting for the defenders to run out of water, food, or ammunition. Ordinary quantities of household reserves for these items are insufficient for a protracted siege, so the more reserves that have been accumulated in advance, the better. Access to a reliable source of fresh water (or of water purification) is essential in the long run.
- If the attackers have sufficient resources, they often can bring in long-range artillery (or today, airplane bombers) that can fire from positions beyond the range of the defenders' rifles and reduce the defenders' stronghold to rubble. There is not much the defenders can do about artillery, other than sorties to try to take out the artillery—a difficult operation, since the defenders are presumably far outnumbered.
- The best chance for the defenders to survive is to escape, as at Musa Dagh or Van. But not all defenders have the good fortune of being located near a friendly nation or a coast with friendly ships.
- In some cases, defenders can hold out long enough for others to help them.

In a given situation, the defenders may never know who or how many others they will save, but the odds are good that armed defenders will directly or indirectly save the lives of innocents. In the hands of people resisting mass murder, guns save lives. More guns and more ammunition save more lives.

On August 22, 1939, a few days before Germany would attack Poland and begin World War II, Adolf Hitler spoke to his top generals and announced his plans to exterminate the Polish people. He mocked the importance of world opinion: "Who still talks nowadays of the extermination of the Armenians?" *See* Kevork

B. Bardakjian, Hitler and the Armenian Genocide (1985). He was partly correct. Although some American parents urged children to eat their vegetables by telling them "remember the starving Armenians," what had really happened to the Armenians was mostly forgotten in the West, and children at the dinner table had little clue who the Armenians really were.

Hitler and his generals of course remembered; the murderous Ottomans had been aided by German military advisors. Some Jews remembered too; as noted *infra*, they studied Musa Dagh for tactical lessons in resistance. The next section examines Jewish resistance during the Holocaust—resistance that took place under even less favorable conditions than the Ottoman Christians faced: the Jews started with many fewer arms, rarely had nearby friendly countries to which they could flee, and had no monasteries or other established fortresses where they could make a stand. Moreover, the World War II Nazi army was a juggernaut compared to the Ottoman army of World War I. Under the most difficult circumstances, could armed Jewish resistance make any difference?

I. Armed Jews

Contrary to the myth of Jewish passivity during the Holocaust, about 30,000 Jewish partisans fought in eastern Poland, Belarus, and the northern Ukraine, where thick woods and swamps provided hiding places.[86] In 1942-43, Jews constituted half of all the partisans in Poland. In other parts of Europe, Jews joined the resistance at much higher rates than the rest of the population. For example, in France, Jews amounted to less than 1 percent of the French population, but made up about 15-20 percent of the French Resistance. When the Allies invaded Vichy France's colonies in North Africa in November 1942, five-sixths of the Underground that assisted was Jewish. Guerilla resistance by the Jews and other fighters behind Nazi lines forced the Germans to divert manpower from the front lines. In this regard, the resistance hastened the Allied victory, even though the resistance forces never had the ability by themselves to defeat the Nazis.

Although Jews resisted Hitler more so than any other group behind Nazi lines, most Jews did not engage in armed resistance. As one Holocaust survivor from Poland later put it, "In response to the question of why people did not resist, there is a simple answer: there were no arms." Leib Spiesman, Ghettos in Revolt (1944) (original in Yiddish), *reprinted in* 4 Emil Kerenji, Jewish Reponses to Persecution, 1942-43 Doc. 5-12, at 201 (2015) (quoting an unnamed Jew who had escaped to Israel). Holocaust historian Reuben Ainsztein notes that "some people, especially in the United States, find it difficult to understand why obtaining arms represented such a problem." Reuben Ainsztein, Jewish Resistance in Nazi-Occupied Eastern Europe 304 (1974).

In pre-war Poland and in the Soviet Union, "no firearm, not even a shotgun," could be obtained legally without a government permit. For most people, "such permits were impossible to obtain." *Id.* at 304; *see also* Chaika Grossman, The

86. The section is adapted in part from David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017), and David B. Kopel, *Armed Resistance to the Holocaust*, 19. J. on Firearms & Pub. Pol'y 143 (2007).

Underground Army: Fighters of Bialystok Ghetto 3 (Schmuel Beeri transl., Holocaust Library, 1987) (1965). "Not to allow the peasants to have arms" had been the policy "from time immemorial."[87] Regarding arms, Lenin and Stalin carried on the Russian Czarist tradition, as they did in many other ways. *See generally* Eugene Lyons, Stalin: Czar of All the Russias (1940); Simon Sebag Montefiore, Stalin: The Court of the Red Tsar (2004).

In Poland, the main way that firearms got into citizens' hands was peasant scavenging of rifles that had been left behind from the battles of World War I (1914-18) and the Russo-Polish War (1919-20). Usually the rifle barrels would be sawed short, for concealment.[88] But thanks to the 1939 Hitler-Stalin Pact, the Soviet Union invaded and conquered the eastern third of Poland at the beginning of World War II. The Soviet secret police, the NKVD, "took great care to disarm the local population, and was very successful."[89] The one big chance to acquire arms was in the chaos immediately after Germany invaded the Soviet Union on June 22, 1941. In those first weeks, the Soviet army reeled in retreat, leaving large quantities of weapons behind. But the abandoned arms tended to be in rural areas (where Polish peasants picked up many), whereas most Jews lived in cities or towns.[90]

During the chaotic early weeks on the Eastern Front, the Nazis successfully deterred most Jews from attempting to scavenge arms. As in every nation conquered by the Third Reich, being caught with a firearm meant instant death for oneself and one's family, and perhaps even for others, in reprisal.[91] This was especially so for Jews. Disarmed, the Jews and Roma (European gypsies) were soon destroyed.

On top of the governmental obstacle there was a cultural one. Except in the Zionist self-defense units that had begun to arise in response to Russian pogroms in the late nineteenth century, there was no gun culture among most of Europe's Jews. As Holocaust scholar Yehuda Bauer observes, the general Jewish problem was not merely "lack of arms" but also "lack of knowledge about how to use them." Yehuda Bauer, Rethinking the Holocaust 166 (2001). There were few Jews who were gunsmiths or gun hobbyists and had basic skills at fixing firearms. Very few Jews had the workshop tools, or the knowledge, to manufacture gun components or to produce ammunition at home. Many of the Jews who did acquire arms had no prior experience with using them. Ghetto conditions, and the severe shortage of ammunition, prevented Jews from taking the first steps at practicing shooting before they had to fire arms in combat.

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87. Ainsztein, at 304.

88. Ainsztein, at 304.

89. *Id.*

90. *Id.*

91. For examples of such decrees, see Proclamation to the Occupied Yugoslav Territory, Apr. 1941, *in* Raphaël Lemkin, Axis Rule in Occupied Europe 591 (2d ed. Lawbook Exchange 2008) (1944) (ordering "[t]he surrender of guns and other implements of war" and also surrender of radio transmitters). *Cf.* Gen. Ion Antonescu [Rumanian fascist dictator and Nazi ally], Decree-Law concerning Ownership of Goods Left by the Retreating Enemy, July 9, 1941, in Lemkin at 365-66 ("Arms of every kind" left by the Soviet army must be surrendered or declared within 24 hours of publication of the decree. For violations, "[t]he trial and execution shall take place within twenty-four hours. In cases of *flagrante delicto*, the culprit shall be executed on the spot.").

Unlike in Western Europe, where Jews could join the national undergrounds, Jews in Eastern Europe, where most Jews lived, were generally excluded from national undergrounds. The independent Jewish partisans received no weapons from the Allies, unlike all the other undergrounds in Europe. Holocaust scholar Nechama Tec summarizes: "As regards resistance, in practical terms, the Allies had virtually no interest in the Jews. This indifference translated into a rejection of all known Jewish pleas, including those requesting arms and ammunition. It goes without saying that the Jews experienced a chronic arms shortage." Nechama Tec, *Jewish Resistance: Facts, Omissions, Distortions*, *in* Jewish Resistance Against the Nazis, at 62.

Suppose that every one of the 1 million Jews and Roma who were murdered by the *Einsatzgruppen* in 1941-42 had possessed a good rifle. Could they have driven the *Wehrmacht* out of Russia, Belarus, Poland, Latvia, Lithuania, and Estonia? Definitely not. What they could have done is shoot the *Einsatzgruppen* who were coming to kill them. As the Jewish Talmud puts it, "if one comes to kill you, hasten to kill him first." The Babylonian Talmud: Tract Sanhedrin 214 (Michael L. Rodkinson trans. 1918). Then, it would not have been so simple for a million people to be slaughtered by a few thousand. Plenty of *Einsatzgruppen* would have been shot and that would at least have slowed down the pace of murders, providing more time for some potential victims to escape, and making it harder for Hitler's regime to recruit replacements. The armed Jews and Roma who shot at the *Einsatzgruppen* might have eventually been killed anyway, but in dying they would have saved others.

Now imagine that the entire European population was as well armed as the American Founders wanted the American people to be: "The great object is that every man be armed." Ch. 5.B.5 (Patrick Henry). Imagine no government registrations lists of who has what firearms. Could the tyranny and mass murders of the Nazis and Communists have been accomplished so easily as it was against European populations that were mostly disarmed, and for whom the legally armed population was readily identifiable from government lists?

We know what did happen when Jews got arms. Holocaust historian Abram L. Sachar writes: "The indispensable need, of course, was arms. As soon as some Jews, even in the camps themselves, obtained possession of a weapon, however pathetically inadequate—a rifle, an ax, a sewer cover, a homemade bomb—they used it and often took Nazis with them to death." Abram L. Sachar, The Redemption of the Unwanted: From the Liberation of the Death Camps to the Founding of Israel 47-48 (1983). Thus, writes Sachar, "the difference between resistance and submission depended very largely upon who was in possession of the arms that back up the will to do or die." *Id.* at 60. "Under the New Order introduced by the Germans, the possession of firearms decided everything."[92]

Shepl Borkowski, a butcher, led 120 people from Yanov, Ukraine, into the forest. Starting with five guns, they were able to obtain more by killing seven collaborator policemen. The 12 armed men "were able to defend the women and children against many dangers and ensure their survival." The 12 armed men saved 120 lives—10 times their number.

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92. Ainsztein, Jewish Resistance in Nazi-Occupied Eastern Europe, at 305.

The largest Jewish partisan force in Europe started with the three Bielski brothers in the forests of Belarus. They grew to over a hundred armed fighters and carried out dozens of anti-Nazi combat missions, including destroying trains, telegraph poles, and bridges. They also sheltered over a thousand noncombatants. On the day the Bielski unit was disbanded, "Bielski's Shtetl" comprised 1,140 Jews, of whom 149 were armed combatants. Peter Duffy, The Bielski Brothers 259, 265, 282 (2002). So 149 armed men saved 1,140 lives—7.65 times their number. Could 600,000 or 1 million armed Jews have saved the 6 million? They surely could have saved some of them. The same point can be made for the millions of Gypsies, Russians, and other Slavs who were exterminated by the Nazis.

While most of the Jewish resistance was unknown in the West during the war, the most spectacular revolt—the Warsaw Ghetto Uprising—changed the world. Shortly after Nazi conquest of an area in Eastern Europe, all the Jews would be herded into walled urban ghettos, as in the Middle Ages. As the National Socialist industrial system of genocide grew, the ghettos would be ordered to supply a certain number of people to be transported to, ostensibly, labor camps. In fact, the transit was to sites where the Jews would be murdered. At first, Jews in the ghettos complied, because they did not know. But by late 1941, the Jews of Vilnius, Lithuania, had learned the truth, and through underground couriers, they alerted other ghettos, with a January 1, 1942 manifesto urging Jews everywhere to fight.

The Warsaw Ghetto Uprising began on January 18, 1943, in response to a new round of deportations. At first the Jewish Fighting Organization had only 24 handguns and 18 grenades, but they used those weapons to capture more. Always hampered by a severe shortage of ammunition (learning how to make ammunition at home had not been part of Jewish culture in Eastern Europe), the Jews hid in secret fortifications they had been building since 1942. As German Warsaw commander Juergen Stroop later recalled, in urban guerilla combat, the "Jews were much better than we at such warfare."[93] Before being executed as a war criminal in 1952, Stroop explained, "It's all history now, and the world's gone topsy-turvy, so why not speak the truth here in our cell? The Jews surprised me and my officers . . . with their determination in battle. And believe me, as veterans of World War I and SS members, we knew what determination in battle was all about. The tenacity of your Warsaw Jews took us completely by surprise. That's the real reason the Grossaktion [extermination operation] lasted as long as it did." Kazimierz Moczarski, Conversations with an Executioner (1981) (1st pub. Poland as *Rozmowy Z Kate*, 1977).

Finally, the Nazis set the entire ghetto on fire and then used explosives to demolish it. Even so, 20,000 Jews survived and hid, emerging in August 1944 to join the Polish Underground uprising that month. The mostly Christian Poles had postponed their uprising until the Soviet Red Army was nearby; the Polish Jews had not enjoyed the luxury of being able to wait until then. Rather than assisting the 1944 Polish uprising, Stalin ordered the Red Army to halt and give the Germans as much time as necessary to kill the Polish freedom fighters, whom Stalin viewed as a potential obstacle to his plan to turn post-war Poland into a totalitarian satellite of the Soviet Union.

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93. Ainsztein, at 655.

The Warsaw Jews, like many other Jewish fighters, knew they had almost no chance of survival. They decided that it would be better to die in collective self-defense against the murderers rather than to passively let themselves be exterminated. As the West learned about the Warsaw Revolt, the Western media began to change its attitude toward Jews. "They concluded that the Jews had earned the right to be regarded not as supplicants, but as allies."[94] An article in Harper's explained, "As the British press was the first to admit, the Jews now have a new and different claim for consideration, a claim not of passive victims, but of active allies and partners who have fought the common enemy." William Zukerman, *The Revolt in the Warsaw Ghetto*, Harper's Mag., Sept. 1943. *See* Kopel, The Morality of Self-Defense, at 111-16. There is a direct line from Warsaw and other Jewish resistance to establishment of the State of Israel. Before and after 1948, many people have worked fervently to exterminate Jews. With the Jewish people now having their own military, the exterminationists have not gotten very far since 1948.

In 1967, the International Society for the Prevention of Crime held a Congress in Paris on the prevention of genocide. The Congress concluded that ". . . defensive measures are the most effective means for the prevention of genocide. Not all aggression is criminal. A defense reaction is for the human race what the wind is for navigation—the result depends on the direction. The most moral violence is that used in legitimate self-defense, the most sacred judicial institution." V.V. Stanciu, *Reflections on the Congress for the Prevention of Genocide*, *in* 7 Yad Vashem Studies on the European Jewish Catastrophe and Resistance 187 (Livia Rothkirchen ed. 1968).

During the Holocaust, perpetrators and resisters agreed that "the possession of firearms decided everything." Denial of the facts of the Holocaust facilitates future mass murders. Until mankind figures out how to eliminate forever the possibility of governmental mass murder, the short-term risks of a well-armed civilian population are vastly outweighed by the long-term risks of a government that is stronger than the people.

NOTES & QUESTIONS

1. Numerous comparisons have been made between murder rates in Europe and the United States to prove that the United States has more murders because it has more guns. But these comparisons are limited to murders committed by individuals. Do you agree with Professor Kopel's point that an accurate comparison must include mass murders perpetrated by governments? Why or why not? What do you think of Professor Kopel's evidence that when murders by government are counted, murder during the last century has been far more prevalent in Europe and the rest of the world than in the United States? Does this support the idea that armed populations best deter murder?

2. According to Aleksandr Solzhenitsyn, preventing public "awareness of the real situation" is essential to tyranny or mass murder by government. Can you think of examples of how different governments have perpetrated crimes by keep the people ignorant?

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94. Sachar, at 54.

It is often said that the members of the United States military would never turn on their fellow citizens if a tyrant ordered them to. Would an evil government be able to prevent American soldiers from learning the information about whether the orders given to the soldiers to use force against Americans were justified?

James Madison believed that a citizen militia, "officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence" would be at least a partial counterweight to the danger of military rule. (The Federalist 46.) Do you agree?

3. Is Professor Mayersen correct that there probably would not be an international reaction to genocide if it began today? Does it depend on who the perpetrator is? Who the victim is? What perpetrator and victim characteristics should determine an international response? What characteristics actually do determine whether this is an international response?

4. Suppose you were asked for advice by people who worried that their government might initiate mass murder against them. What would you tell them to do? Would you advise them to obtain any tools or supplies? Which ones and in what quantities?

5. **CQ:** Many Armenians and Syriacs were disarmed under the pretext that their firearms were being requisitioned for use by the Ottoman army. In the United States during World War II, the Property Requisition of Act of 1941 (Ch. 8.F.1.a) forbade the federal government to requisition firearms. The Act was also the first of several federal statutes to outlaw federal gun registration. Congress was well aware of what had already taken place in Europe, where Hitler and Stalin used registration lists to confiscate guns, create gun-free zones, and then perpetrate mass shootings. The 1941 act by its terms applied only to the U.S. military buildup for World War II. Should the United States enact a firearms requisition prohibition today? Should other countries?

6. Registration, confiscation, extermination. Under what conditions does this sequence occur? What are some ways that people have stopped the progression of the sequence?

3. China Under Mao

David B. Kopel

The Party Commands the Gun: Mao Zedong's Arms Policies and Mass Killings

(prepared for this work)

Feeding on whatever lives,
they don't care if you're noble and wise.
We all nurse our lives into death alone,
nothing to trust among all our fetid words,
songs forced, happiness a sham.

Meng Chiao, *Laments of the Gorges*, *in* The New Directions Anthology of Classical Chinese Poetry 126 (Eliot Weinberg ed., David Hinton trans., 2003).

a. Introduction: Estimating Chinese Communist Democide

The most murderous government of the twentieth century was the 1949-76 Mao Zedong regime in China. It was responsible for the deaths of over 86 million people. This essay examines how Mao's repression of arms and other liberties—particularly, the freedom of speech—helped him retain power for so long and kill so many.

The essay is organized chronologically, with two subsections that are longer than the others because they involve the greatest armed challenges to communist party rule. Section D.3.f covers Tibet, where major guerilla resistance arose in the 1950s and recaptured, for a while, vast amounts of territory. Section D.3.i, on the first years of the Cultural Revolution (1966-68), describes Mao's program to overthrow the communist party bureaucracy by arming the masses; the result nearly toppled Mao's regime.

The estimate of 86 million deaths from the Mao regime is calculated as follows: in 1991 Professor R.J. Rummel estimated that the Chinese communist regime from 1949 to 1987 killed between 5,999,000 and 102,671,000 people. R.J. Rummel, China's Bloody Century: Genocide and Mass Murder Since 1900 (1991). Rummel's best estimate was 35,236,000. *Id.* at 305. Not all of the deaths occurred during Mao's reign. From 1976 through 1987, the post-Mao regime killed 874,000. *Id.* at 267-73.

Rummel's total originally did not include the tens of millions of deaths from the famine caused by the 1958-62 Great Leap Forward. Later, however, Rummel decided that the famine deaths should be included in the Chinese communist death count, because they were, at a minimum, the result of depraved indifference to human life. R.J. Rummel, *Reevaluating China's Democide to 73,000,000*. Rummel's new figure used the then-common estimate of 38 million deaths from the Great Leap Forward. However, as discussed below, more recent scholarship, based on research of Chinese archives that were not available to Rummel, estimates deaths from the Great Leap Forward at 45-55 million. The figure overlaps with the five million deaths in the Chinese slave labor gulags (the *lao gai*) in 1958-62, estimated by Rummel. So if one estimates Great Leap Forward deaths to be about 50 million and then subtracts out the 5 million slave labor camp deaths already counted by Rummel, we add 45 million to Rummel's figure for Mao-era death, indicating 79,362,000 deaths for the Mao period.

Still missing from the above total are the *other* famines during Mao's reign of 1949-76. Although famines were a long-standing problem in China well before the communists took over, it is reasonable to attribute the Mao-era famines to depraved indifference to human life, for reasons detailed *infra*. The number of people starved to death by Mao (not counting the Great Leap Forward starvation) is estimated at about 7.5 million, as described *infra*.

The figure of 86,862,000 understates the number of killings attributable to the Chinese Communist Party. As discussed *infra*, in the years before the party won its revolution in 1949, its democide killed 3,466,000 Chinese in areas the party controlled. Not all of these deaths can be attributed to Mao's rule since he did not become Chairman until 1943. Including the pre-1949 democides brings the Chinese Communist Party's death count to over 90 million. These may be underestimates.

The magnitude of so much homicide can be difficult to grasp. This Chapter consists of about 836,000 characters—that is, every single letter, numeral, or punctuation mark. Each character represents 104 individuals in China who were killed because of the Mao regime in 1949-76.

Background on Names and Chinese Words

In Chinese, the family name comes first. So "Mao" was the family name and "Zedong" was the given name. This essay follows the practice, except that citations to book authors follow the book's usage.[1]

The leading system for translating the sounds of Chinese characters into the Roman alphabet is *pinyin*. For the convenience of readers, especially those conducting research, a parenthetical in pinyin will be supplied for some important nouns or phrases. The romanization system before pinyin was Wade-Giles; it was in widespread use for English translations through the 1970s, including in many sources below.[2] For places or individual names, the essay usually provides the pinyin in the text, followed by a parenthetical in Wade-Giles. When quoting older sources that used Wades-Giles, the essay uses the spelling from the quote. For example, the current spelling of the ruler of China from 1949-76 is Mao Zedong, but sources from the 1970s and before used Mao Tse-tung.

Because Chinese characters themselves do not indicate the sounds to be used for the word, Chinese children now learn pinyin before they learn Chinese characters.[3]

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1. The number of family names in Chinese is fairly small, as reflected in a saying about "the hundred old names." Thus, in this essay, there are five cited authors whose family name is Li.

2. Pinyin (literally, "spell sound") was created by the Chinese government in 1958. However, even in the 1960s the Chinese government's Foreign Languages Press published its English translations in Wade-Giles (e.g., "Mao Tse-Tung"). Pinyin was adopted by the International Organization for Standardization in 1979.

Pinyin is sometimes written with accent marks, indicating which of five tones is used for the syllable. The tones are high, rising, falling, falling then rising, and flat. The tone changes the meaning of a word. For example, the word for "horse" is pronounced "ma," with a falling then rising tone. If "ma" is pronounced with an even, high tone, then it means "mother." So, the meaning of "ma" in pinyin must be discerned from its context.

Even with tone marks, there are vast number of homonyms in Chinese. Mao had wanted to totally replace the Chinese characters with pinyin. He was eventually talked out of the idea because the number of homonyms would make a pinyin-only language unintelligible.

3. While the written characters are understandable to anyone who is literate in "Chinese," the spoken languages (e.g., Mandarin, Cantonese, Hakka) are so different as to often be mutually unintelligible. This is one reason why the written language has been so important in Chinese history. Many ethnic minorities in China have their own language, such as Tibetan or Mongolian.

Today, the official version of Chinese (in both China and Taiwan) is Mandarin, a version native to Beijing. Mandarin is a *lingua franca* in much of Southeast Asia — commonly spoken as a second language to allow communication among people who have different first languages, just as French was in Europe in the eighteenth century, or English is in Europe today.

In the 1950s, Mao replaced traditional written Chinese with a simplified version. For example, the traditional character for "horse" is 馬, and the simplified character is 马. The former looks more like a horse (in profile, facing left, with a flowing mane) while the latter is easier to write. Today, simplified Chinese is standard in China, Indonesia, and Malaysia, while the traditional version predominates in other overseas Chinese communities, as well as in Hong Kong and Macau. In simplifying complex characters. Mao was following the example of his model, the First Emperor, who is discussed *infra*. *See* Jonathan Clements, The First Emperor of China 81-82 (2015).

Pinyin is the standard means to type Chinese on computers. Helen Wang, Chairman Mao Badges, Symbols and Slogans of the Cultural Revolution vii (2008).[4]

Today, Chinese scholarly articles often have a double title: one in Chinese characters, and a second title in pinyin. Knowing the pinyin is important for researchers because English translations of Chinese characters are not necessarily exact. For example, the slogan that launched the Cultural Revolution in 1966 has been accurately translated as "Destroy all monsters and demons" or "Destroy all freaks and monsters." But the literal translation is "Sweep away all ox-ghosts and snake-spirits"—a widely understood reference to monsters from traditional Chinese folk beliefs. By knowing the pinyin version of the phrase, *hengsao yiqie niugaui sheshen,* the scholar can better find sources that address the usage of this slogan.

Like classical Latin and Greek, Chinese characters are written without spaces between the words. For example, "combat and prevent revisionism" is 打击和防止修正主义. Many Chinese words are compounds. As a result, the romanized versions of any given Chinese phrase sometimes differ in where spaces are inserted. "Hundred Year Tide" can be Bai nian chao, Bainan Chao, or Bainianchao.

Regions, Governments, and Peoples

China's land mass is slightly larger than the United States. In China today there are 22 provinces, five autonomous regions (similar to a province, and with little real autonomy), four "municipalities under the direct administration of central government," and "special administrative regions" for Hong Kong and Macau.[5] The number of provinces has changed over the years. Provinces and autonomous regions are subdivided into counties.

Over 90 percent of the population of China is Han—that is, the ethnic group whose traditional language is Chinese. The rest of the population consists of many different minority groups. Those best known internationally are in the far west autonomous regions: Tibetans are in the southwest; Uyghurs and other Muslims live mainly in the northwestern Xinjiang Uyghur Autonomous Region. There are also Mongols, mainly in the province of Inner Mongolia (adjacent to the nation of Mongolia, which was once China's "Outer Mongolia"). There are many other ethnic or tribal groups, especially in border or western areas.

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4. This British Museum Research Publication includes excellent full text compendia of Chinese communist songs, slogans, and other cultural material, with full texts in English, pinyin, and Chinese.

5. Hong Kong and Macau had been administered by the British and Portuguese, respectively. In 1999, both cities were reverted to China. Mao or his successors easily could have conquered either city rather than waiting for reversion, but the cities provided the CCP regime with a useful entrée into global financial and commercial trade.

6. Because of Han immigration, Inner Mongolia is now 17 percent Mongol, 79 percent Han, 2 percent Manchu, with the remainder Hui, Daur, or other.

Manchuria was on the far side of the Great Wall, and not part of China, but in 1644 a Chinese general let a Manchu army pass through; he then joined the Manchus in conquering China, establishing the Manchu Dynasty. In the twentieth century, Han migration to Manchuria and intermarriage with Manchus has mostly ended the Manchus as a distinct group. Only a few hundred people today speak Manchu.

The traditional Han regions are sometimes called "China proper." Today, Han immigration to Inner Mongolia and Manchuria (named for their respective native groups) has made Han residents the large majority there.[6] A similar process is underway, with government encouragement, in Tibet and Xinjiang.

Short List of Sources

Because this essay is long, below is a list of some sources that are cited in multiple subsections:

Jung Chang & Jon Halliday, Mao: The Unknown Story (2005).
Chou Ching-Wen, Ten Years of Storm: The True Story of the Communist Regime in China (1973) (Lai Ming ed. & trans., 1960).
Valentin Chu, Ta Ta, Tan Tan: The Inside Story of Communist China (1963).
Jonathan Clements, The First Emperor of China (2015).
Frank Dikötter, The Tragedy of Liberation: A History of the Chinese Revolution 1945-1957 (2013); Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958-1962 (2010); The Cultural Revolution: A People's History, 1962-1976 (2016). The middle book in the trilogy, on the Great Famine, was awarded the annual Samuel Johnson prize as the best British book of nonfiction.
Daniel Leese, Mao Cult: Rhetoric and Ritual in China's Cultural Revolution (2011).
Li Cheng-Chung, The Question of Human Rights on China Mainland (1979).
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Elizabeth J. Perry, Patrolling the Revolution: Worker Militias, Citizenship, and the Modern Chinese State (2007).
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Jonathan D. Spence, Mao Zedong: A Life (2006) (1999).
Yang Su, Collective Killings in Rural China During the Cultural Revolution (2011).
Helen Wang, Chairman Mao Badges, Symbols and Slogans of the Cultural Revolution (2008).
Ralph A. Thaxton, Jr., Catastrophe and Contention in Rural China: Mao's Great Leap Forward: Famine and the Origins of Righteous Resistance in Da Fo Village (2008).
Anne F. Thurston, Enemies of the People: The Ordeal of the Intellectuals in China's Great Cultural Revolution (1987).
Fang Zhu, Gun Barrel Politics: Party-Army Relations in Mao's China (2018).

b. Mass Murder in China 1900-49

Before the twentieth century, China had not been immune from democide. For the 2,500 years before 1900 A.D., Professor Rummel estimates total Chinese democide to be about 34 million, perhaps as high as 90 million; this does not include the many millions killed by the Mongols who conquered China in the

thirteenth and fourteenth centuries. R.J. Rummel, Death by Government: Genocide and Mass Murder Since 1900, at 59-60 (2017) (1994).

Killings greatly increased in the first half of the twentieth century. Partly because foreign powers were extracting more and more concessions from China, the decrepit Manchu Dynasty was overthrown in 1911 with relatively little violence.[7] The Republic of China was proclaimed on January 1, 1912. Within a few years, much of China was in the hands of regional warlords—some of whom treated people decently and many who did not.

By 1928, the government of the Republic had suppressed most of the warlords and reunified China proper. The reunification did not encompass Central Asian regions where the Chinese Empire and the Republic claimed sovereignty, such as Mongolia, Tibet, and Xinjiang (sometimes called Eastern Turkestan).

From 1928 onward, the Republic of China was ruled by General Chiang Kai-Shek (pinyin Jiang Jieshi; also Chiang Chung-cheng, Chiang Chieh-shih). He led the Nationalist Party, the *Kuomintang* (pinyin *Guomindang*).[8]

On August 1, 1927, the Chinese Communist Party (CCP, *Zhongguo Gongchandang*) began a violent effort to overthrow the Republic of China. On August 7, Mao wrote a report explaining why violence was necessary: "From now on, we should pay the greatest attention to military affairs. We must know that political power is obtained from the barrel of the gun." Jonathan D. Spence, Mao Zedong: A Life 75 (2006) (1999). Initially, the CCP revolutionaries had little success.

Japan invaded China in 1931 and set up a puppet state called Manchuko. It comprised Manchuria (an industrialized region in the northeast) and part of Inner Mongolia (bordering the nation of Mongolia). The former boy emperor from the Manchu Dynasty was installed as the nominal ruler of Manchuko.

After disastrous defeats by the Republican government, the communists in 1934-35 retreated in arduous long marches (*chang zheng*) searching for a new base. A hundred thousand communists had begun the retreat, but only eight thousand arrived at the ultimate destination: an isolated plateau in the north-central mountains, Yenan (Yan'an), Shaanxi province. During the retreat and then while living in caves at Yenan, they considered the causes of their failures thus far.

At the beginning of the revolution, Mao was a leader in his home province of Hunan, and later in neighboring Jiangxi (both in the southeast). He ascended in party rank and influence during the retreat. By 1936 he was named Chairman of the Communist Military Council.[9]

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7. The Manchu Dynasty is also called the Qing Dynasty (pinyin) or Ching Dynasty (Wade-Giles.) The Manchus came from Manchuria and reigned from 1644 to 1911. The Manchu/Qing/Ching Dynasty should not be confused with the Qin/Chin Dynasty, which briefly ruled in the third century B.C., and is discussed *infra*.

8. Taiwan uses Wade-Giles for certain historical names associated with Taiwan, and this essay follows that practice. Chiang Kai-Shek ruled Taiwan from 1945 until his death in 1975. Today, the Kuomintang (KMT) is one of the two major political parties in Taiwan.

9. Spence, Mao Zedong, at 89.

In Yenan, the communists "introduced a major cause of mortality by banning firearms. Wolves sauntered into people's front yards, and leopards roamed freely in the hills." To keep livestock safe, people had to bring them into their homes, which was unhygienic and spread disease. "Access to game as food was also strangled by the firearms ban." Under the communists in Yenan, "[c]ontrol of guns was watertight." Jung Chang & Jon Halliday, Mao: The Unknown Story 278 & n.* (2005).[10]

Maoist Arms Philosophy

Mao elaborated his arms policy in a 1938 speech:

> Our principle is that the Party commands the gun, and the gun must never be allowed to command the Party. Yet, having guns, we can create Party organizations, as witness the powerful Party organizations which the Eighth Route Army has created in northern China.[11] We can also create cadres, create schools, create culture, create mass movements. Everything in Yenan has been created by having guns. All things grow out of the barrel of a gun. (*Qiangganzi limian chu zhengquan.*) According to the Marxist theory of the state, the army is the chief component of state power. Whoever wants to seize and retain state power must have a strong army. Some people ridicule us as advocates of the "omnipotence of war." Yes, we are advocates of the omnipotence of revolutionary war; that is good, not bad, it is Marxist. The guns of the Russian Communist Party created socialism. We shall create a democratic republic. Experience in the class struggle in the era of imperialism teaches us that it is only by the power of the gun that the working class and the labouring masses can defeat the armed bourgeoisie and landlords; in this sense we may say that only with guns

10. The Chang and Halliday book is critiqued by some scholars who argue that it is too one-sided in its portrayal of Mao. *See* Was Mao Really a Monster?: The Academic Response to Chang and Halliday's "Mao: The Unknown Story" (Gregor Benton & Lin Chun eds. 2013) (reprinting book reviews). Nothing in the Benton and Chun book casts doubt on any facts from Chang and Halliday that are presented in this essay. The essays in *Was Mao Really a Monster?* are of uneven quality. Some persuasively show that certain incidents described in Chang and Holliday have weak documentation or involve shortened quotes for which the longer quote provides a less-damning context. Some essays accurately point out that Chang and Halliday's relentlessly hostile treatment of Mao's personality and abilities make it difficult for the reader to understand how Mao was so effective in accumulating so much power. Other essays are weak defenses by Mao apologists—such as arguments that comparing Hitler to Mao is unfair because, although Mao's regime was even more lethal Hitler's, Mao foreign policy was much less militarily aggressive. According to the editors, "it is also unacceptable to put Mao at the top of a league of modern atrocities without due regard for historical perspective, given that the twentieth century is littered with such tragedies and evils." Gregor Benton & Lin Chun, *Introduction*, *in Id.* at 9. The editors are correct in pointing out that Mao was hardly the only person in the twentieth century who murdered millions. *See* online Ch. 18.D; Section D.2.

11. [When the Communists and Nationalists formed a unified front to fight the Japanese in 1937, the communists' Workers' and Peasants' Red Army was renamed the Eighth Route Army.—Eds]

> can the whole world be transformed. We are advocates of the abolition of war, we do not want war; but war can only be abolished through war, and in order to get rid of the gun it is necessary to take up the gun.

Problems of War and Strategy (Nov. 6, 1938) (*Zhanzheng he zhanlü wenti*). In 1943, Mao was named Chairman of the CCP.

According to the CCP's arms philosophy, communists should not be content with winning elections and participating in parliamentary government. Communists should use guns to "break" and "smash" parliament and the existing state. The new communist state should be a "dictatorship of the proletariat" or "democratic dictatorship." This was defined as absolute rule by the top leadership of the communist party. As Mao and Marx had said, the army is the chief component of communist state power. So the dictatorship would rely on "a people's army armed with Marxist-Leninist ideology." The army could "deal with any complicated situation," foreign or domestic, and safeguard the state. Editorial Departments of People's Daily, Red Flag, and Liberation Army Daily, Long Live the Victory of the Dictatorship of the Proletariat—In Commemoration of the Centenary of the Paris Commune (1971).

Throughout Mao's regime, from 1949 to 1976, command of the gun would be at the center of politics—sometimes in complex and surprising ways.

The Sino-Japanese War

In 1937, Japan attacked the rest of China, eventually conquering most of the Pacific Coast and a considerable amount of inland territory. The Republicans and communists agreed to a unified front in fighting Japan. Accordingly, the communist armed forces were legitimated.

During the 1937-45 Sino-Japanese War and then in the 1945-49 revolution, Mao was a brilliant strategist of guerilla warfare. He synthesized classic Chinese military works such as Sun Tzu's *The Art of War*, Chinese history, and literature, and applied them to modern conditions. He was willing to retreat and give up substantial territory rather than directly confront a stronger enemy. The communists avoided battle except in circumstances where they had concentrated superior forces. Lin Biao, Long Live the Victory of People's War: In Commemoration of the 20th Anniversary of Victory in the Chinese People's War of Resistance Against Japan 33-34 (1965). In Mao's words, "we fight when we can win and move away when we can't." *Id.* at 36.

When the Japanese or the Nationalists were too strong to confront head on, the communist guerillas used "sparrow warfare"—sudden hit-and-run raids by three or five guerillas. *See id.* at 33 n.1.

For arms, the communists relied mainly on captured arms from the enemy, and to a lesser degree on making their own. *Id.* at 40-41. *See also* Li Ting, Militia of Communist China 49-79 (1954) (describing militia tactics in the Sino-Japanese War and noting the communists' nonchalance about vast numbers of militia deaths from poorly planned projects, such as underground tunnels).[12]

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12. In the early years of the Sino-Japanese war, the communist militia had only "native-made" guns, cannons, and "red tassel" spears. A few had grenades or crude rifles provided by the communist army. Later, the militia began to manufacture its own single-shot muskets ("one-horn bulls"), ammunition, and explosives. The muskets had a very short range; the ammunition often did not work; and the mines, manufactured from pig iron, had little effect. Li, Militia, at 52-54.

Mao knew how to use temporary truces and promises of conciliation to stop the fighting when conditions were unfavorable. He employed the lull in combat to build strength for the next offensive. As he put it, "Talk talk, fight fight, talk talk, fight fight" (*ta ta, tan tan, ta ta, tan tan*). Valentin Chu, Ta Ta, Tan Tan: The Inside Story of Communist China 15 (1963).[13] Mao adroitly used similar tactics in politics.

For eight years the Nationalist government and the CCP cooperated, somewhat, in fighting the Japanese. After Nazi Germany surrendered in May 1945, ending World War II in Europe, the Soviet Army expelled the Japanese from Manchuria. The Soviet Red Army gave the Japanese arms to the Chinese Communists. Manchuria's industry was dismantled and shipped to the Soviet Union. Civil war resumed between the Communists and Nationalists. The revolutionaries triumphed in 1949, bringing Mao Zedong to power.

According to the official CCP version of history, revolutionaries "with only their bare hands at the outset . . . beginning with only primitive swords, spears, rifles and hand-grenades" had defeated the ruling classes who were "armed to the teeth. The poorly armed have defeated the better armed." The self-taught amateurs had vanquished the graduates of the military academies. Lin, at 59.

Democide Totals in China 1900-49

Rummel estimates 8,963,000 battlefield deaths from the various wars. The figure includes civilians killed during the course of battle, such as artillery shelling of a city occupied by enemy troops. The battle deaths for China in 1900-49 were about equal to all the battle deaths in World War I. Rummel, China's Bloody Century, at 12 tbl. 1.1.

Rummel does not count battlefield deaths in his definition of democide. As discussed in Section D.2.b, genocide is one type of democide. The Genocide Convention covers mass murder because of religion, race, or ethnicity, but does not cover mass murder based on economic class, politics, and so on. Rummel coined the word *democide* to cover all noncombat mass murders by government, regardless of motive.

For pre-1949 Chinese democide by the various forces, Rummel counts 3,949,000 by the Japanese; 3,466,000 by the Communists (in areas they controlled); and 10,215,000 by the Nationalists. Adding in the smaller number of mass killings by the warlords and the pre-1928 central governments produces a democide total of 18,645,000 from 1900 to Oct. 1, 1949. *Id.*

The democide in China in the first half of the twentieth century was enormous; the 18.6 million victims were nearly as many as the 21 million victims of Hitler's European democide. (Again, battle deaths are not included either total.) *Id.* at 10.

During the first half of the twentieth century, no single group had absolute power throughout China. After 1949, the Chinese Communist Party (CCP) did

13. Likewise, "[t]he enemy advances, we retreat; the enemy camps, we harass; the enemy tires, we attack; the enemy retreats, we pursue." Mao Tse-Tung, *A Single Spark Can Start a Prairie Fire*, 1 Mao Tse-Tung, Selected Works 124 (1965) (letter by Mao of Jan. 5, 1930) (*Xingxing shi huo keyi liaoyuan*).

hold absolute power, personified by party Chairman Mao Zedong. In the 27 years of Mao's reign, mass murder skyrocketed, resulting in the deaths of 86 million. Mao in a quarter-century murdered nearly five times as many people as had all the governments of the previous half-century combined.

c. The Communists Seize Power

In 1949, the communists defeated the Nationalist government of Chiang Kai-Shek, which fled to Taiwan.[14] The communists "promised each disaffected group what it wanted most: land for the farmers, independence for all minorities, freedom for intellectuals, protection of private property for businessmen, higher living standards for the workers." Frank Dikötter, The Cultural Revolution: A People's History, 1962-1976, at 119 (2016). The People's Republic of China was proclaimed on October 1, 1949. Although the Nationalists still held substantial territory, by the end of the year, they had been defeated everywhere but the far south.

Mao had proclaimed the People's Republic while standing at a rostrum on Tiananmen (Heavenly Peace) Gate, the northern entrance to the old imperial government complexes in Beijing. The Tiananmen area was large enough for a crowd of tens of thousands, and earlier in the century had been a site of several historic protests. The symbolism of Tiananmen was so powerful that on September 30, 1949, the day before the proclamation of the new government, the CCP leadership spent its time giving final approval to major renovation of the Tiananmen area. Buildings around the gate area would be razed, so that much larger crowds could gather to hear speeches by the CCP leadership. In an open area, at the opposite side from Tiananmen gate, there would be a huge obelisk monument of China's revolutionary martyrs. Tiananmen Gate and Mao became the leading symbols of the "New China." Wu Hunh, *Tiananmen Square: A Political History of Monuments*, 35 Representations 84 (1991).

One of the new regime's "first acts" was "to confiscate weapons." Chang & Halliday, at 424. Homes were inspected to "search for forbidden items, from weapons to radios." Frank Dikötter, The Tragedy of Liberation: A History of the Chinese Revolution 1945-1957, at 45-46 (2013); *see also id.* at 49, 118, 188, 239. Nongovernment newspapers were closed, and religious organizations suppressed or brought under state control. Dikötter, Cultural Revolution, at 27; Chang & Halliday, at 327, 454-57.

Other restrictions were imposed more gradually. Starting in 1955-56, freedom of movement and of domicile were eliminated, via a household registration system (*hukou*). People were required to stay where they were registered, travel only when

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14. For several decades, the Chiang regime (Republic of China) and the Mao regime (People's Republic of China) mutually purported that China and Taiwan were part of the same polity, with the only dispute being who was the legitimate ruler of both. The claims were historically and legally dubious in light of Taiwan's separation from China during all but four years of the twentieth century, during most of the long history of previous centuries, and Taiwan's current independence under modern standards of international law. *See* Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 Mich. J. Int'l L. 765 (2007); Parris Chang & Kok-ui Lim, *Taiwan's Case for United Nations Membership*, 1 UCLA J. Int'l L. & Foreign Aff. 393 (1996).

issued a permit, register when staying somewhere else overnight, register house guests and report on the content of conversations with the guests, allow home inspections at any time, purchase food only with government issued food coupons, and purchase anything only from government authorized stores. Rummel, China's Bloody Century, at 233.

Peasants and their children had to remain in their villages forever. A starving peasant was forbidden to leave his or her village and try to find work in a city. Mao was following the feudal example of Stalin, who the 1930s had de facto reimposed the old Russian system of serfdom, by tying peasants and their children to land they did not own.[15] "Everything that stood between the state and the individual had been eliminated. . . ." Dikötter, Cultural Revolution, at 119.

The Mao regime was not based on formal law. Mao told the very sympathetic American journalist Edgar Snow, "We don't really know what is meant by law, because we have never paid any attention to it!" Li Cheng-Chung, The Question of Human Rights on China Mainland 12 (1979) (statement to Edgar Snow 1961).[16]

In contrast to the Hitler regime, which issued many statutes and regulations, the Mao system relied mainly on edicts from the communist leadership, the Party Center. There were many exhortative propaganda campaigns based on slogans. *See* Yang Su, Collective Killings in Rural China During the Cultural Revolution 156-87 (2011) (showing how Mao followed Marxist-Leninist precepts for abolishing a neutral system of law);[17] Jay Simkin, Aaron Zelman & Alan M. Rice, Lethal Laws: Gun Control Is the Key to Genocide 55 (1994) (on an annual basis, the Nazis issued

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15. Russian serfdom had been abolished by Czar Alexander II in 1861.

16. According to legend, Lenin once said that Western intellectuals who supported communism were "useful idiots." However, there is no evidence that Lenin said such a thing. *See* William Safire, *On Language: Useful Idiots of the West*, N.Y. Times, Apr. 12, 1987. Nevertheless, useful idiots do exist. Perhaps the most useful idiot of the twentieth century was Edgar Snow, an American journalist who traveled to Mao's guerilla headquarters in the 1930s, and penned a hagiography, Red Star Over China (1938). He portrayed Mao as a democratic agrarian reformer who was "quite free from symptoms of megalomania." *Id.* at 74. Snow's book drastically distorted Western understanding of Mao and his aims. Jonathan D. Spence, *Portrait of a Monster*, N.Y. Rev. Books (Nov. 3, 2005). The Chinese language translation of Snow's book had a similar effect in China.

For examination of the phenomenon of useful idiots for tyrants, see Paul Hollander, From Benito Mussolini to Hugo Chavez: Intellectuals and a Century of Political Hero Worship (2016).

17. In Leninist theory, a communist state would be a "dictatorship of the proletariat" led by a "vanguard" of communist intellectuals. "The scientific concept of dictatorship means nothing else but this: power without limit, resting directly upon force, restrained by no laws, absolutely unrestricted by rules." George Leggett, The Cheka: Lenin's Political Police 186 (1981) (citing 41 V.I. Lenin, Polnoe sobranie sochinenii [Collected Works] 383 (1958-66) (58 vols.) (from Oct. 1920)). Lenin and his party purported to be acting on behalf of proletarians, and especially of the Soviets (democratically elected worker's councils). But as Lenin and his minions well knew, the workers and Soviets overwhelmingly opposed his totalitarian dictatorship. Under Leninism, totalitarianism is called "democratic" because it supposedly benefits noncommunist workers who do not realize their true interests in being communized. *See generally*, V.I. Lenin, The State and Revolution (1917); V.I. Lenin, What Is to Be Done? (1901-02); Richard Pipes, The Russian Revolution (1990).

laws and regulations at 2.5 times the rate of the preceding democratic Weimar government).[18]

As legal knowledge was destroyed, the courts devolved to administrative processing units for predetermined sentences. Courts ceased to exist as finders of fact. Entirely under the thumb of the CCP, judges merely pronounced the severe sentences that CCP cadres had already decided. (A "cadre" is a government or communist party employee.) In cases where the law was not clear, judges were required to follow the Central Party line. Chou Ching-Wen, Ten Years of Storm: The True Story of the Communist Regime in China 139-44 (1973) (Lai Ming ed. & trans., 1960).[19] According to the CCP official newspaper, *People's Daily*, the accused were "presumed to be guilty. . . . Giving the accused the benefit of the doubt is a bourgeois weakness." Chu, at 160.

The *People's Daily* (*Renmin ribao, Jen Min Jih Pao*) was distributed nationally and read to peasants and workers in frequent, mandatory political instruction meetings, which often consumed the rest of the day after work. In effect, the latest article in the *People's Daily* was the official source for people to learn how to behave without getting in trouble with the authorities. Chang & Halliday, at 525.

As for what was forbidden or mandatory, "[a]t the top, thirty to forty men made all the major decisions. Their power was personal, fluid, and dependent on their relations with Mao." Andrew J. Nathan, *Foreword,in* Li Zhusui, The Private Life of Chairman Mao xi (Tai Hung-Chao trans. 1994).

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18. During the 1950s, there were some efforts to create normal legal codes, but these were abandoned once the Great Leap Forward into full communism began in 1958. An Act of February 20, 1951, outlawed counterrevolutionary activities; article 6 of the Act prohibited "[s]upplying domestic or foreign enemies with weapons, ammunition, or other war material." An Act of October 22, 1957, article 7(1) declared hunting or fishing in prohibited places to be "disrupting public order." *See* Simkin et al., at 193-227 (reproducing full Chinese text and English translation of the 1951 and 1957 statutes).

The 1951 act was first passed by the Committee on Political and Legal Affairs, and then by the full Government Administrative Council. Thereafter, Mao announced his approval. One member of the committee later regretted his support: "I never dreamed that the Regulations would bring about atrocities. . . ." Chow Ching-Wen, Ten Years of Storm: The True Story of the Communist Regime in China 107 (1973) (1960). The law was ex post facto, applying to actions from decades ago. *Id.* at 114-15.

19. The author was formerly President of Northeastern University, in Manchuria. Chow was appointed a member of the Committee on Political and Legal Affairs of the Government Administration Council—a high-ranking body. He eventually escaped to Hong Kong.

His political party was the China Democratic League, one of eight non-communist parties that had supported the revolution. After the revolution, they were nominally allowed to exist, although forbidden to enroll new members or to question what the communists were doing. Even the most submissive were persecuted during the Anti-Rightist movements of the 1950s and the Cultural Revolution. Li, Human Rights, at 19.

Noncommunists who collaborate with communists are known as "fellow travelers." Once communists obtain power, fellow travelers are tolerated to the extent that communists consider them convenient.

d. The Great Terror

The new regime set out to exterminate political enemies, real and imaginary. There were plenty of real enemies. Nationalist insurgents were active for years after 1949. Su, at 216. In January through October 1950, there were 816 counterrevolutionary uprisings. Elizabeth J. Perry, Patrolling the Revolution: Worker Militias, Citizenship, and the Modern Chinese State 183 n.127 (2007) (citing public security statistics). In early 1951, Minister of Public Security Luo Ruiqing (Lo Jui-ching) reported that there had been over four hundred thousand organized revolts. Party cadres sent to work in the countryside were being killed—in some provinces by the thousands.[20]

The possibility of an American or Nationalist invasion of China was heightened by the Korean War. The communist regime in North Korea had invaded South Korea in June 1950. By November, the North Korean regime was on the brink of defeat by the South Korean, U.S., and other armies that had responded to the United Nations' resolution authorizing use of force against North Korea. Then Mao invaded North Korea with an army of hundreds of thousands, in the greatest surprise attack on U.S. forces in history. The front see-sawed back and forth, and then stalemated near the South Korea/North Korea border, the 38th parallel. An armistice was signed in 1953, with the border slightly adjusted in South Korea's favor for better defensibility.

During the Korean War, Chinese military strength was built up in northeast China, as a staging area for Korea, and for defense against a possible United Nations invasion. Military strength was correspondingly reduced elsewhere in China, and therefore many people took the opportunity to revolt, hoping that Chiang Kai-Shek might use Korean War as an occasion to invade. Shih Ch'eng-chih, People's Resistance in Mainland China, 1950-1955, at 5-6 (1956). As of 1950, the Pentagon estimated that there were at most 600,000 guerillas in China, with about half of them loyal to Chiang Kai-Shek. William M. Leary, Perilous Missions: Civil Air Transport and Covert Operations in Asia 132-33 (2002).

Guangdong (Kwantung) province, on the southeast coast, had a rebel force of 40,000, divided into several hundred bands. Although the communists had confiscated tens of thousands of rifles, people apparently still had more. "Since it is so much easier to resist with arms than bare-handed, people in this part of the country were naturally more 'rebellious.'" Shih, at 15-17. Rebellion was also strong in Guanxi (Kwangsi) province, bordering Vietnam. The "self-defense organizations" were "sound and efficient"; 16 months of fighting left the rebels still in control of 9 border counties. *Id.* at 18-19. There were also 1951 revolts in Fujian (Fukian), the Chinese province nearest Taiwan, directly across the Taiwan Strait.[21] In far-western Qinghai (Chinghai) province, which borders Tibet and Xinjiang, two underground armies were active. *Id.* at 21.

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20. Chow, at 303-04. *See also* Li, Militia, at 35-37 (1954) (describing some early revolts).

21. According to the government, in early 1951, there was a 2,000-member counterrevolutionary force in Fujian. The army killed most of them, but 300 were able to hide in the forests and mountains. Shih, at 14-15.

The resistance through 1951 was defeated for five reasons: (1) lack of communication and command, thus preventing cooperation and making resistance groups vulnerable to being defeated by the army one at a time; (2) focus on sabotage to the exclusion of building relationships with the masses; (3) selection of targets not necessarily in the best interests of the people; (4) "[t]he anti-Communists could not carry out a long period of armed resistance because they were technically backward and short of modern weapons. Their materials[,] supplies and means of communication were poor and inefficient"; and (5) "[d]uring the 'agrarian reform,' most of the arms possessed by the people for self-defence were confiscated. Foodstuffs were severely controlled and movements of the peasants were closely watched." *Id.* at 24-25.

Land Reform

Besides the resistance, there were many other people the new regime wanted to kill. In rural areas, "[t]he communists armed the poor, sometimes with guns, more often with pikes, sticks and hoes." Dikötter, Tragedy, at 66. Armed militia sealed off the towns. (The Maoist select militia is described *infra.*) Then the landlords and other class enemies were tortured and killed, mostly by being beaten to death, while some were shot. *Id.* at 66-67, 204; Chow, at 102 (listing "homicidal-maniac devices" of torturing victims to death); Li, Militia, at 111 (in Kiangsi province, militia captured five thousand landlords who had escaped) (citing Chiang Ji Pao, July 31, 1951). "By implicating a majority in the murder of a carefully designated minority, Mao managed to permanently link the people to the party." Dikötter, Cultural Revolution, at 4.

The 1947-52 land reform murdered at least 1.5 million to 2 million people. Dikötter, Tragedy, at 83. According to a report covering one of China's seven administrative districts, 10 percent of peasants were classified as "rich peasants" or "landlords." Of those, 15 percent were killed, 25 percent sent to slave labor camps, and the remainder put into local slave labor. This was consistent with Mao's 1948 instruction that "one-tenth of the peasants would have to be destroyed." Extrapolating the execution rate nationwide to China's 500 million peasants implies 7,500,000 murders in the land reform. Professor Rummel suggests that "a reasonably conservative figure seems to be about 4,500,000 landlords, and relatively rich and better-off peasants killed." Of the millions who were put into slave labor, many would not survive. Rummel, China's Bloody Century, at 223.

The land reform killings and persecutions served an additional purpose: the "gentry and relatively rich land owners . . . were a largely independent power base, historically moderating between peasants and the power of local governments." *Id.* at 221. The organizing principle of Mao's reign was eliminating everything impeding direct imposition of Mao's will on the people.

Suppression of Counterrevolutionaries

Besides land reform, the other major killing campaign was "Suppression of Counterrevolutionaries." During the Great Terror of 1950-51, communist party officials had orders to kill about one person per thousand population. Dikötter, Tragedy, at 86, 97. Data from six provinces where records are available show that

from October 1950 to November 1951, the number of executions per thousand population ranged from a low of 1.24 to a high of 2.56. *Id.* at 99.

"Across the country people were tortured or beaten to death. A few were bayoneted and decapitated. But for the most part they were shot."[22] The communist executioners discovered that all the shootings created a lot of splatter, so they developed the technique of making the victim kneel, and then shooting him or her in the back of the head, making cleanup easier.[23] "The countryside echoed to the crack of the executioner's bullet, as real and imaginary enemies were forced to kneel on makeshift platforms and executed from behind before the assembled villagers." *Id.* at 92. In Zhejiang province (Chekiang, central coast), a quarter-million militia guarded roads to prevent escape from the terror.[24]

Mass executions were often held in large venues with crowds ordered to attend and cheer. For example, in Beijing in a single year, there were 30,000 sentencing and execution rallies, with a cumulative audience in the millions.[25] "Mao made sure that much violence and humiliation was carried out in public, and he vastly increased the number of persecutors by getting his victims tormented and tortured by their own direct subordinates." Chang & Halliday, at 523. According to a government official who later defected to Hong Kong, "The masses had no quarrel with those who were executed, yet they shouted and applauded the Government-sponsored massacre. I think in their hearts they must have been frightened." Chow, at 113.

The mass hate and murder rallies made Mao "an innovative contributor to modern terrorism." Rather than kidnapping political enemies and making them silently disappear, as Hitler often did, Mao used violence "in public humiliations, public interrogation under duress, public executions."[26] Lowell Dittmer, *Pitfalls of Charisma*, *in* Was Mao Really a Monster?, at 72.

"The campaign of terror was over by the end of 1951, but the killings never really stopped." Dikötter, Tragedy, at 92. Overall, about 2 million people were executed in 1950-52. *Id.* at 100. Rummel estimates 3 million deaths for 1949-55. Rummel, China's Bloody Century, at 225. Another source reports that the communist militia alone killed 2.4 million alleged bandits (the regime's euphemism for resistance forces) or secret agents in the regime's first three years. Perry, at 183 n.129. Whatever the exact number, the fatalities more than doubled the previous record for mass shootings: the 1 million Jews and Roma (gypsies) machine-gunned by Nazi *Einsatzgruppen* in former Soviet areas in 1941-42. Section D.2.e.

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22. *Id.* at 91.
23. *Id.* at 91-92.
24. *Id.* at 92.
25. Rummel, China's Bloody Century, at 224-25.
26. *Nacht und Nebel* (Night and Fog) was Hitler's system that political opponents should be kidnapped and disappeared, so that their families would not know what happened to them. Such procedures were sometimes used by Mao. At the secret Qincheng prison outside Beijing, senior officials who had gotten on Mao's wrong side were held in isolation, known only as a number, tortured, driven insane, and sometimes killed. Rummel, China's Bloody Century, at 255-56; Spence, Mao Zedong, at 162.

By comparison, the CCP's takeover of businesses during the 1950s was relatively peaceful, as business owners complied by pretending that they were gladly and voluntarily handing over their assets. For businessmen, executions were outnumbered by suicides—of which there were 5,000 just in Shanghai in the first half of 1952.[27]

Family Destruction

The leading cause of suicide may have been the 1950 Fulfillment of New Marriage Law. It prohibited arranged marriages, which had been common in China. Such marriages were voided, regardless of whether the couple wished to stay together. Husbands and wives were coerced to denounce each other at public meetings. Rummel estimates half a million suicides and homicides, predominantly female, from the first four years of the marriage law.[28]

Any new marriage by anyone required CCP consent. CCP officials forbade marriages between classes or between partners "attracted by each other's good looks and not labor productivity." Chu, at 128. (The new class system created by the CCP is described *infra.*) Marriage was harder, unilateral divorce very easy, and adultery legalized—all for the purpose of weakening the family as a social institution. *Id.* at 127-29. Romantic love and maternal love were denounced as selfish bourgeois egotism. The CCP's first ambassador to Indonesia, Pa Jen, was purged for writing that love, the pursuit of happiness, and admiration for gallantry were "all things common to mankind." To the contrary, the CCP informed him that "[t]here is fundamentally no such thing as sentiment common to mankind, nor as common human nature. . . . There is no such thing as 'human love.'" *Id.* at 134.

The marriage law "brought virtually every person under party control, while severely weakening the traditional Chinese family as an independent source of power. All individuals stood alone, with nothing between them and the party." Rummel, China's Bloody Century, at 227 (internal quotation marks omitted).[29]

Highly publicized persecutions of persons for writing private letters critical of the regime frightened people not to write down their thoughts. Punishment for expressing thoughts was one of many ways the regime "undermined people's ability to form their own independent judgment." Chang & Halliday, at 395-96; *see also*

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27. Li, Human Rights, at 72 (citing Tsingtao Weekly (Hong Kong), July 2, 1952).

28. Rummel, China's Bloody Century, at 226-27.

29. Mao's family destruction program was later emulated and exceeded by the Maoist Khmer Rouge regime in Cambodia (1975-79). There, individuals' names were replaced with numbers. Children were taken from their families to be raised by the state. Affection between husbands and wives was forbidden. For example, one escapee recounted that the government told him "the *chhlop* [spies] say that you call your wife 'sweet.' We have no 'sweethearts' here. That is forbidden." R.J. Rummel, Death by Government: Genocide and Mass Murder Since 1900, at 187 (2017) (1994). He was then imprisoned, tortured nearly to death, and one of his fingers was cut off. Haing Ngor, A Cambodian Odyssey 216-25 (1987); *see also* Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975-79, at 456-65 (3d ed. 2008); Pin Yathay, Stay Alive, My Son (1987); Martin Stuart-Fox with Bunheang Ung, The Murderous Revolution: Life and Death in Pol Pot's Kampuchea (1985).

Chu, at 159 (describing government surveillance of private letters, to accumulate material for use against the writers later). The government kept a file on everyone, and no one knew the contents of one's file, or what might be used against one someday. People "burned the greater part of their privately-owned books for fear of being incriminated." Chow, at 271.

From October 1, 1949, through 1953, "the totalization of Chinese politics and society cost from 843,000 to 27,616,000 Chinese lives," not including battle deaths and famines; the best estimate is 8,427,000, or "fifteen people per every thousand." Rummel, China's Bloody Century, at 233. On an annualized basis, the rate was 353 persons per 100,000 population. In the United States since 1900, the peak annual homicide rates in the worst years have been about 11 persons per 100,000.

Resistance in 1952

Land was given to the peasants, as Mao and the revolution had promised. But the government began to establish a monopsony on farm produce, requisitioning everything for itself. "[F]amished villagers turned against the party." Dikötter, Tragedy, at 77. On top of that, many in the militia were tired of being forced to work relentlessly for the government. With immense casualties, they had fought the Sino-Japanese war and the 1945-49 revolution. Once land reform was accomplished, they wanted to enjoy their new land, instead of being forced into one mass labor project after another. *See* Li, Militia, at 112-27. There were thousands of incidents in which small groups of militia rebelled, sometimes fleeing into the mountains.[30] The government began programs to impose more political supervision on the militia, to root out those who were not subservient to the demands of the Party Center.[31]

A 1952 government report covering southwest China stated that in the previous three years, government forces had killed 120,000 "bandits" (i.e., rebels) and seized over 210,000 rifles.[32]

Religion caused an April-June revolt that year in the far western Gansu (Kansu) province, Pingliang district. It was precipitated by confiscation of a mosque's land pursuant to land reform. The rebellion united the Hui (natives) and Han (Chinese settlers). It began with three dozen axes and swords made by a local blacksmith. Given the time it takes to manufacture such weapons, and the lack of privacy in communist China, the blacksmith's big order likely came to the attention of local communist cadres. Perhaps the cadres sympathized with the rebels and did not stop them from acquiring arms. The rebels captured Siki, the most important town in the area, notwithstanding the presence of several hundred police and security officials with firearms. The outcome indicates that some of the armed government employees stayed neutral or joined the rebels. The rebellion was ended with government promises of aid, and restoration of Muslim sites.[33]

30. *Id.* at 136-37.
31. *Id.* at 121-41.
32. Shih, at 47-48.
33. Shih, at 40-45; Chu, at 200; Chow, at 304.

Fujian, the province nearest Taiwan, remained a trouble spot. In Guankou (Kwankow, a town within Xiamen City), 280 unarmed peasants, including some dismissed cadres, attacked several local government headquarters, killed cadres, and captured two rifles. Eventually confronted by the militia, the rebels resisted with "swords and spears; others were bare-handed, chanting liturgy and drawing spells and incantations." Shih, at 26-36. For more on armed and unarmed rebellions in the first half of the 1950s, see Dikötter, Tragedy, at 76-78, 85-86.

Most of the rebels of 1952 "were forced by poverty and starvation, and very few of them had any political idea." Shih, at 51. "In 1952, after the open resisters were suppressed," new movements were initiated to purge or intimidate potential allies of revolutionaries: Three Anti (against impure party cadres), Five Anti (against industrialists and merchants), and Thought Reform (against intellectuals, "to isolate the masses of people from their social leaders"). Shih, at 52.

The Anti campaigns were nominally to fight corruption, but in practice they intensified persecution of anyone who had even a trivial connection with the pre-1949 government.[34] Previously, such persons had been told that if they registered, they would not be persecuted. About 200,000 suicides resulted.[35]

Thought Reform was aimed at intellectuals and others whose thoughts did not conform to the party line. Persons who had ever expressed non-communist thoughts, even decades ago, were forced to confess their errors and grovel for survival.[36] For example, according to the government, 6,188 university professors in Beijing (Peking) and Tianjin (Tientisn) accepted being ideologically remolded. As Sun Yat-sen University in Guangzhou (Canton), a hundred professors wrote confession letters of their errors and expressed their willingness to be reformed. Li, Human Rights, at 73.

At the same time "judicial reform" purged judicial officers and ensured that a puppet judiciary would never err on the side of lenience against dissidents.[37] "Under these adverse conditions, activities and resistance in 1952, though rampant indeed, could still not strike any fatal blow to the Red regime." Shih, at 52.

e. The Socialist High Tide

Food Policy

In 1953, the government imposed a full monopsony on grain, initiating what Mao called the Socialist High Tide. A key purpose was to export grain to other

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34. The Three Antis were "against corruption," "against extravagance and waste," and "against bureaucracy." When the campaigns uncovered endemic corruption within the communist party (a typical condition of communist regimes), the regime pivoted to shift blame to the private enterprise that had been allowed to exist until then. Private business was targeted by the Five Anti campaign, against "bribery," "tax evasion," "theft of state property," "malpractices and jerry-building," and "theft of state economic information." The Five Anti campaign was used to extort money from businesses, and thereafter, to coerce businesses to "voluntarily" surrender their property to the state. The process of converting major "state-private" enterprises into purely "state" was completed in 1956. Li, Human Rights, at 70-71, 75.

35. Rummel, China's Bloody Century, at 228; Chu, at 158-59.

36. Chow, at 124-39.

37. Shih, at 52.

nations, especially to pay the Soviet Union for military production technology.[38] Additionally, huge exports of food were sent to other communist nations, such as Poland, East Germany, and Albania, as Mao aimed to build his global influence. None of the recipient nations were prosperous, but all were much better off than China, where food shortages led to famine.

Farmers had to meet production quotas, which often were impossible based on the quality of their land. Peasants were put on a starvation diet, allowed only about half the calories necessary for basic health for persons engaged in relentless manual labor. The cities were where Mao was building heavy military industry and they were given priority for food. The state industry workers had their "iron rice bowl," with enough food to at least stay productive on the job.[39]

Within the CCP, there was a food chain for quantity and quality. The high ranks had personal cooks; the very highest had fine chefs and unlimited quantities of delicacies. Chow, at 181-83. "Except for the privileged class and its parasites, the people do not have enough to eat," reported a high-ranking official who had defected to Hong Kong. *Id.* at xvii.

The highest priority for food was for the portly Chairman Mao himself.[40] The special Giant Mountain (*Jushan*) farm supplied fine foods daily to Mao and the others at the CCP apex. When Mao was away from Beijing, which was most of the time, daily airplanes delivered food from Jushan. The élite CCP leadership in the provinces had similar arrangements for special food, while the masses starved.[41] Several years later, in the worst of the Great Leap Forward famine, even the top staff in the CCP's Beijing headquarters, such as Mao's personal doctor, were cut back to short rations and malnourished. As a gesture of solidarity, Mao gave up meat for the time being, which was a sacrifice considering his lifelong love of fatty pork.[42] Like others in the Party Center, Mao, a heavy smoker, also enjoyed imported cigarettes.[43]

As explained by a former vice-president of communist Yugoslavia, all communist governments eventually replace the old wealthy class with a new class of reactionary despots. Property that was nationalized in the name of "the people" becomes the property of the most privileged at the top of the inner party, the "all-powerful exploiters and masters." *See* Milovan Dijilas, New Class: An Analysis of the Communist System 47 (1957); *see also* George Orwell, Animal Farm (1945).

Under Mao, the Gini coefficient (a measure of income equality) was excellent. Dittmer, at 72. The vast majority of Chinese lived in extreme poverty; those who were better off, such as urban factory workers, were still quite poor. Thus, extreme equality.

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38. Dikötter, Tragedy, at 216.

39. Spence, Mao Zedong, at 120.

40. As of 1956, aged 62, Mao was 5 feet, 10 inches, and weighed a little over 190 pounds. Li, Private Life of Chairman Mao, at 81-82. This is considered "overweight," about halfway between "normal weight" and "obese" according to the World Health Organization standards for the body mass index. He grew fatter in succeeding years.

41. Li, Private Life of Chairman Mao, at 78-79, 128, 134-36.

42. *Id.* at 82, 339-40.

43. *Id.* at 67-68, 79.

Slave Labor

Incarceration of alleged ideological enemies had built a large prison population, most of which was put to work at slave labor. The slave labor camps, which are still in operation, were known as *laogai* camps. The word is short for *laodong gaizo*, reform through labor. The *laogai* camps past and present are based on the *gulags* of the Soviet Union and were set up with advice from Soviet experts. The theory is that hard and miserable labor would lead the prisoner to reform his or her thoughts, and thereby become willing to serve the state.[44] Every one of China's more than 2,000 counties had at least one *laogai* camp. Rummel, China's Bloody Century, at 229; *cf.* Aleksandr I. Solzhenitsyn, The Gulag Archipelago 1918-1956: An Experiment in Literary Investigation (Thomas P. Whitney & Harry Willetts trans. 1973-78) (multivolume description of the Soviet gulags under Lenin and Stalin, written by a former prisoner).

Under Mao, the *laogai* camp population stabilized at about 10 million. Rummel, China's Bloody Century, at 231-32 New slaves were sent to the camps to replace the dead ones. People could be sent to the *laogai* camps because of class background, political dissent, any sign of disrespect, "or for no reason at all. . . . [T]hey were exploited, worked, and treated as no slave master would treat his slaves (who were valuable personal property); to the Marxists . . . these forced laborers were only expendable, easily replaceable worker ants for the making of a utopia. Millions were worked to death . . . or succumbed to exposure, disease, malnutrition, or hunger." *Id.* at 214, 229.

Whereas the annual death rate in the Soviet *gulags* was 10 percent, the *laogai* camp death rate only reached that figure in 1959-62. Rummel estimates a 2 percent death rate for 1950-53, and 1 percent for 1954-58 and 1963-70. He suggests 2,125,000 *laogai* camp deaths in 1949-53. The total deaths in the *laogai* camps from 1949 to 1987 were 15,720,000. This includes 720,000 in the post-Mao period of 1976-87. *Id.* at 214, 231-32.

As detailed by the Laogai Research Foundation, the slave labor system remains active in China to the present day, although with a lower death rate than under Mao, and with a new name since 1994 ("prisons"), due to international scrutiny. Many *laogai* camps produce slave labor goods for export.

Separately, a locally managed system of slave labor encompassed about 1 or 2 million more people who had gotten in trouble with the authorities, such as by talking back to a party cadre.[45] On top of that, peasants who had never gotten in trouble were also conscripted to labor on construction projects under savage conditions, including beatings for spending more than three minutes in the toilet.[46]

Resistance in 1953-55

Many Chinese recognized that they were being enslaved, and there was massive resistance in many forms, including strikes, riots, and destruction of government property.[47]

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44. Dikötter, Tragedy, at 242-48.
45. Dikötter, Tragedy, at 248-49.
46. *Id.* at 249-53.
47. Dikötter, Tragedy, at 218-19, 279-81.

Chinese newspapers in 1955 collectively reported on 26 counterrevolutionary groups operating in eight provinces. At least 12 of these must have been engaged in forcible resistance, since their names include military terms such as "battalion," "army," or "guerilla force."[48]

For armed resistance, many of the rebels' arms and radios were supplied by airdrops from Taiwan. Suzanne Labin, The Anthill: The Human Condition in Communist China 358-59 (Edward Fitzgerald trans., Praeger 1960) (1st pub. in France as *La Condition Humaine en Chine Communiste* (1959)) (French journalist interviews with Chinese refugees in Hong Kong). One resistance leader said that 85 percent of their arms and radios came from Taiwan, the rest from raids on the communists.[49] In the early years of Taiwan aid to the Chinese resistance, the aircraft for supply deliveries were provided by the U.S. Central Intelligence Agency (CIA). Kenneth Conboy & James Morrison, The CIA's Secret War in Tibet 37-38 (2002). As of mid-1953, the U.S. National Security Council estimated that there were 70,000 guerillas loyal to Chiang operating in the PRC. *The Chargé in the Republic of China (Jones) to the Department of State*, June 18, 1953, *in* 14 Foreign Relations of the United States (FRUS) 1952-1954 China and Japan (Part 1) 205, 209. The CCP, of course, worked vigorously to seize the contraband.[50]

Even without modern arms, many people revolted. On the fourth anniversary of the establishment of the People's Republic of China, October 1, 1953, over six thousand peasants rioted in Teng Xian county, Guangxi province (Tenghsien, Kwangsi, southeast coast, bordering Vietnam). They "fought bitterly with sickles and axes against communist troops for a whole week." Shih, at 54-55 (quoting *People's Resistance in Mainland China During the Past Year*, China Weekly (Hong Kong), Jan. 1954). There was similar uprising in Pingnan county, Fujian province. Shih, at 55. Farmers and miners rioted sporadically the summer of 1953 in Guangdong province. In Hubei (Hupeh, central China) province, many peasants abandoned their farms and joined guerillas in the mountains. Meanwhile in the northwest, the government reported killing three thousand rebels in Qinghai and Gansu (Kansu) from February to June. *Id.*

The revolting peasants were "practically unarmed (at most a part of them were carrying knives or wooden sticks)." *Id.* at 68. Their short-term successes indicate the local militia and cadres were sympathetic to their cause. *Id.* The 1953 uprisings were caused mainly by increased pace of collectivization. *Id.* at 70. In pastoral areas

48. Shih, at 98-99.

49. *Id.* at 350.

50. At a November 1955 Communist conference in Heilongjiang (Heilungkiang, northeast) province, the government reported the seizure in the last year from counterrevolutionaries of 2 light machine guns, 208 rifles and pistols, 9,105 round of ammunition, 13 grenades, 22 catties of explosives, 9 radio transmitting and receiving sets, 97 Republic of China flags, and large quantities of anti-communist documents. Shih at 97-98. One Chinese catty equals about 1.3 pounds, although conversion rates vary.

In Hankou (Hankow, a large inland port, later merged into the city of Wuhan), the authorities put on an exhibition regarding "Counter-Revolutionary Activities." On display were 172,769 anti-communist documents; 10,837 light arms; 525,402 rounds of ammunition; and 57 radio transmitters. Labin, at 359.

at least, the resistance forced the communists to back off from collectivization and allow private enterprise. *Id.* at 72-73.

People tried to manufacture arms for resistance. In 1954, the CCP discovered a secret "China Civil Administration Party" within the Penki Iron & Steel Company (today, Benxi Steel Group). At the time, not all private industry had been nationalized. The covert party was found in possession of tools and chemicals for manufacturing explosives and small pistols. They had already manufactured 200 grams of gunpowder and had blueprints for making radios. *Id.* at 79-81.

In 1954 there were revolts in Jiangsu (Kiangsu, east-central coast), with 51 leaders in more than 60 cities. Mainly engaged in robbery of government property, "[t]hey disguised themselves as jugglers, pedlars, fishermen, and menders of kitchen utensils, . . . seized pistols from Communist cadres and PLA [army] men who walked alone . . . and even attempted to sabotage railway communications and organized armed revolts." *Id.* at 81-82 (quoting *People's Daily*, Nov. 18, 1954). In the major city of Xuzhou (Hsuchow, northern Jiangsu), ten thousand peasants nearly "raided the Government granary, but were surrounded by troops and disarmed, and leaders subsequently executed." Chow, at 304.[51] Similar revolts were taking place elsewhere. *Id.*

Again, the CCP's response to widespread discontent was further effort to prevent politically incorrect thinking. In 1955, a new campaign was launched to root out dissident thinkers: the Anti-Hu Feng Movement. Hu Feng was a Marxist literary intellectual who criticized the sterility of the literature that was allowed to be published under Mao. The campaign was expanded into a reign of terror against intellectuals. *Id.* at 147-58, 304-05; *Hu Feng*, *in* Chinese Posters: Propaganda, Politics, History, Art, chineseposters.net.

Xinjiang Resistance

In the far northwest, on the northern border of Tibet, is Xinjiang (Sinkiang). The Chinese name was coined in 1885 and means "new territory." Xinjiang comprises a sixth of China's land mass, but only 1 percent of its population. The native people are Muslim and Turkic, with ties to similar peoples in adjacent Kazakhstan, Kyrgyzstan, and Afghanistan. Among these Turks, the majority group are the Uyghurs (a/k/a Uighers). Independence advocates call Xinjiang "Eastern Turkestan."

China's Han Dynasty (206 B.C.-220 A.D.) conquered Xinjiang in the first century A.D. and held it until the dynasty collapsed. China's Tang Dynasty ruled Xinjiang in the first half of the seventh century. Xinjiang became part of the Mongol empire of the thirteenth and fourteenth centuries, which also ruled China. In the mid-eighteenth century, the Manchu Dynasty (from Manchuria), which had previously conquered China, also conquered Xinjiang. There were several revolts,

51. Also in 1954, a rebel band operated in 17 counties in Hebei province (surrounding Beijing). Shih, at 74-76. A 1954 newspaper article admitted that since 1948 a rebel band had been operating in 19 counties in the northeast. The group likely included disillusioned cadres. *Id.* at 77-79.

including a 1865-77 interruption of Chinese rule. After the Manchus fell, Xinjiang was among the many areas that spun away from central control. *See* Christian Tyler, Wild West China: The Untold Story of a Frontier Land 24-87, 268-69 (2003).

During the chaotic 1940s, while the Chinese were busy fighting the Japanese and each other, the Russians made a play for influence in Xinjiang, helping to build up a local Nationalities Army. Seven of the ten districts of Xinjiang were ruled by a warlord who initially sided with the communists, and then switched in 1942 to support the Nationalists. The other three districts, adjacent to the Soviet Union, aligned with Stalin and declared themselves the independent East Turkestan Republic. *See* Allen S. Whiting & Sheng Shti-ts'ai, Sinkiang: Pawn or Pivot (1958) (containing analysis by Whiting, and autobiography by the former warlord); David D. Wang, Clouds over Tianshan: Essays on Social Disturbance in Xinjiang in the 1940s (1999).

When the communist People's Liberation Army (PLA, *zhongguo renmin jiefangjun*) showed up in 1949 and announced that it would take over the Nationalities Army, many people in Xinjiang were resentful. Whiting & Sheng, at 143. The Kazakh peoples were soon in rebellion against central control from China; they kept up the fighting until 1953, and in the meantime, many Kazakhs escaped to India, Afghanistan, or Turkey. *Id.* at 143-44.

In 1951, the Uyghurs joined forces with a cavalry division that had once been part of the Republic of China army. Eventually, the Chinese "People's Liberation Army" crushed them, but for a while they managed to establish a clandestine government. Chow, at 304; Rummel, China's Bloody Century, at 239. In 1956, a revolt by 110,000 nomads in the west (not only Xinjiang) killed 800 communists. Chu, at 200. Within Xinjiang that year there were rebel attacks in ten counties. *Id.*. The next year, a thousand western Muslims initiated a revolt that grew to thirty thousand; they captured 250 square miles of land, killed a thousand communists, and fought against two full divisions of the PLA that needed armored support. Then, many "evaporated into the deserts." *Id.*

When news of the 1959 Tibetan uprising, *infra*, reached Xinjiang, slave laborers revolted, with Chinese (Han), Hui, and Uyghur slaves joining together. "Many were massacred but a large number escaped into the wilderness." *Id.* As of 1960, guerillas in Xinjiang were said to be sixty thousand strong. A third of them had spontaneously revolted against the CCP; the rest were from the Russian-trained national minorities army. Although they were communists, their leaders were liquidated by the triumphant CCP, and so they fought back. Chow, at 306-07.

In 1990, the Union of Soviet Socialist Republics broke up. The Kazakh Soviet Socialist Republic, the Kyrgyz Soviet Socialist Republic, and the Tajik Soviet Socialist Republic became the independent nations of Kazakhstan, Kyrgyzstan, and Tajikistan. Many people in Xinjiang believe that they too should be independent. The current conflict between imperialism and self-determination has led to continuing unrest, as briefly discussed in the final subsection of this essay.

f. Tibetan Resistance

During the 1950s, the greatest armed resistance to Mao's rule was in Tibet. "The Tibetan Revolt was a major international embarrassment for the Chinese and for Mao; it must be considered one of the factors in Mao's eclipse and in the

retrenchment polices of the early 1960s." Warren W. Smith, *The Nationalities Policy of the Chinese Communist Party and the Socialist Transformation of Tibet, in* Resistance and Reform in Tibet 53, 67-68 (Robert Barnett & Shirin Akiner eds. 1994).

Section D.2.k presented a case study of Armenian and other Christian resistance to genocide in Turkey during World War I; the next section discussed Jewish resistance to the Holocaust during World War II. This section on Tibet provides the chapter's third and final study of ethnic and religious groups' armed resistance to genocide. Unlike the Ottoman Christians or the European Jews, Tibetans had a very strong and longstanding gun culture. They immediately recognized that orders to register or surrender their guns were orders to submit to imminent enslavement. Like the Christians and Jews, Tibet's Buddhists and Muslims drew courage from faith to battle a great imperial worldly power. As you read this section, consider the differences and similarities of the challenges faced by twentieth-century genocide resisters—and the diverse strategies and tactics adopted by the resisters.

The Tibetan Section is lengthy, so if you wish to immediately continue with the history of China, skip to Section D.3.g.

Historically, Tibet comprised three large provinces: Kham (southeast), Amdo (northeast), and U-Tsang (west). Over half the Tibetan population lived in the two eastern provinces. The national capital is Lhasa, in U-Tsang.[52] Kham and Amdo are often referred to as Eastern Tibet, while the U-Tsang area comprises most of Central Tibet. Central Tibet also includes Chamdo, the westernmost province of Kham. Resistance by the Khampos of Chamdo would help draw the rest of Central Tibet into the armed revolt against Chinese invaders.

Tibet had long exercised autonomy while acknowledging the suzerainty of another empire, either Mongol or Chinese. "Suzreainty" was a deliberately vague term. To the extent the meaning can be pinned down, it means nominal sovereignty over an internally autonomous or semi-independent state. Hugh Richardson, High Peaks, Pure Earth: Collected Writings on Tibetan History and Culture 625-30 (Michael Aris ed. 1998).

In the Tibetan view, this was a reciprocal priest-patron relationship. The Tibetans Buddhists, as priests, provided religious leadership, and the patrons helped to protect Tibet. The priest-patron model was reasonably accurate for Tibetan relations with the Mongols, who embraced the Buddhism they learned from the Tibetans. Notwithstanding Tibetan pride, priest-patron was not how the Chinese treated Sino-Tibetan relations, as the Chinese were disinclined to think they had anything to learn from mountain barbarians. All of Tibet was beyond China proper and the Great Wall. Supplying a foreign military presence in Central Tibet was especially difficult, resulting in de facto independence for long periods.[53]

In the mid-eighteenth century, China's Manchu Dynasty wrested much of Kham and Amdo from Tibet and held onto them until the dynasty fell in 1911. Melvyn C. Goldstein, *Change, Conflict and Continuity Among a Community of Nomadic*

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52. The western-most part of Tibet is part of U-Tsang. It is less populous and more desolate than the rest of the Tibet. Lhasa is to the South and East of geographic center of U-Tsang.

53. Conboy & Morrison, at 2-3.

Pastoralists: A Case Study from Western Tibet, 1950-1990, *in* Resistance and Reform in Tibet, at 76, 77. After a failed 1905 uprising of Tibetans in China's Yunnan and Sichuan provinces, the Manchu Dynasty began a campaign to eradicate the Buddhist clergy, and to populate Tibetan areas with poor peasants from Sichuan. Heather Stoddard, *Tibetan Publications and National History*, *in* Resistance and Reform in Tibet, at 121, 124. In 1910, a bloodthirsty Chinese army led by Zhao Erfeng took over Lhasa and drove the thirteenth Dalai Lama into exile.

Whatever nominal allegiance Tibet thought it might owe to the Manchu Dynasty in Beijing, Tibet felt no obligation to the brand-new Republic of China.[54] On August 12, 1912, the Tibetans rose up and expelled the Chinese army.

During 1917-18, Tibet repelled an attack by the Republic of China, and then advanced into Tibetan ethnic areas formerly under Chinese control, reacquiring them in the 1918 Treaty of Rongbatsa. But in 1931-32, the Republic of China pushed the Tibet army back to the Yangtze (Tibetan *Drichu*) River. Premen Addy, *British and Indian Strategic Perceptions of Tibet*, *in* Resistance and Reform in Tibet, at 15, 28-29; Goldstein, at 85-88; Carole McGranahan, *From Simla to Rongbatsa: The British and the "Modern" Boundaries of Tibet*, 28 Tibet J. 39 (2003).

The most thorough attempt to delineate the Tibet-China-India borders based on historical practice was the 1914 Simla Accord. In the three-way negotiations between Tibet, China, and British India, the Tibetans produced extensive documentary evidence for their claims, while the Chinese had bare assertion. *Id.* at 42. The Simla Accord divided Tibet into "Outer Tibet" (Central Tibet plus some of Eastern Tibet) and "Inner Tibet" (the rest of Eastern Tibet).[55] The parties recognized "the suzerainty of China" and also "autonomy" and "territorial integrity" of the "country" of Outer Tibet. Simla Accord, art. 2. China would not convert Tibet into a Chinese province, and Great Britain would not annex any portion of Tibet. *Id.* Neither China nor Great Britain would send troops into Tibet (with some small specified exceptions); neither would interfere with the civil administration of Outer Tibet by the "Tibetan Government in Lhasa." *Id.* arts. 3-4. As for Inner Tibet, "[n]othing in the present Convention shall be held to prejudice the existing rights of the Tibetan Government in Inner Tibet, which include the power to select and appoint the high priests of monasteries and to retain full control in all matters affecting religious institutions." *Id.* art. 9. A map attached to the treaty delineated the borders of Inner Tibet and Outer Tibet. *Id.*

Although the three negotiating parties had agreed to the Simla Accord, the Chinese central government ultimately refused to ratify it because it wanted a different boundary, even though Simla had attempted to placate China by assigning to Inner Tibet many areas where Outer Tibet had the better claim. Tibet and Great Britain mutually agreed to adhere to the accord; they stated that China was debarred from enjoyment of the accord's benefits until China ratified it. McGranahan, *From Simla to Rongbatsa*, at 45-46.

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54. Conboy & Morrison, at 3-4.

55. The terms "Inner Tibet" and "Outer Tibet" assume that China is the center. Indeed, the Chinese word for China, *Zhongguo* 中国, is literally "central state." Tibetans, however, thought their own land "the centre of the sphere of the gods." Samten G. Karmay, *Mountain Cults and National Identity in Tibet*, *in* Resistance and Reform in Tibet, at 112, 112.

Whatever the legal effects of the Simla Accord, the reality on the ground remained the same: "there was no modern boundary between Tibet and China; instead there were overlapping zones, open zones, and locally governed territories, both lay and monastic." *Id.* at 40. Kham was "mostly under the local control of hereditary kings, chiefs, and lamas. . . ." *Id.* Tibetans and China did not think of the contested regions in the sense that European nation-states had defined their own borders—as exact lines where a nation enjoyed 100 percent sovereignty on its side, and no sovereignty on the other. The situation remained unchanged until the Chinese invasion that would come in 1949. *Id.* at 54.

Starting in 1931, the Japanese invasion distracted the Republic of China. "By the mid-1930s, most of Tibet was again enjoying de facto independence." Conboy & Morrison, at 5.

As a practical matter, the Eastern Tibetans who lived within areas claimed by China or Tibet mostly governed themselves. Many were pastoralists or nomads. To the extent that they felt any allegiance to a faraway capital, it was to Lhasa, with whom they shared language and religion, and not to the more distant Beijing or Nanjing.[56] While always respectful of the Dalai Lama, Kham's leaders did not necessarily feel responsible to the government in Lhasa. Carole McGranahan, *Tibet's Cold War: The CIA and the Chushi Gangdrug Resistance 1956-1974*, 8 J. Cold War Stud. 102, 115-16 (2006); Jianglin Li, Tibet in Agony: Lhasa 1959, at 26-27 (2016).[57] Likewise, before communism was imposed, the Amdowas comprised hundreds of nomadic tribes, each with "its own army, temples, and laws." *Id.* at 45. The Eastern Tibetans would contribute the greatest armed resistance to Maoist imperialism.

Today, the "Tibet Autonomous Region," formally created in 1965 by the People's Republic of China, does not include vast areas of historic or ethnic Tibet. Most of Amdo has been transferred to China's Qinghai province, plus a smaller part to Gansu.[58] While the Chamdo region of Kham is in the Tibet Autonomous Region, most of Kham is presently divided between China's Qinghai, Sichuan, and Yunnan provinces. Tibetan ethnic areas constitute a quarter of the territory of the People's Republic of China. Wang Xiaoqiang, *The Dispute Between Tibetans and the Han: When Will It Be Solved?*, *in* Resistance and Reform in Tibet, at 290, 292.[59]

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56. Beijing means "northern capital" and Nanjing (Nanking) means "southern capital." Nanjing was the capital of the Republic of China from 1927-37 and 1945-49. Nanjing also had a long history as a capital during the various regional or national dynasties of the previous 2,500 years, most notably the Ming Dynasty of 1368-1644.

57. Kham consisted of 30 districts (*phayul*), governed by local kings, chiefs, or lamas. A few were governed by appointees from Lhasa or from the Chinese government in next-door Sichuan province. There was lots of banditry and feuding. Unlike much of Central Tibet, Kham's land was not divided into large estates based around monasteries. McGranahan, *Tibet's Cold War*, at 115-16.

58. Qinghai province was on the outer side of the Great Wall of China. The province consists of territories of Tibetans (almost all of Amdo, and some Kham) and of other minorities, including as Mongols and Kazakhs. Li, Tibet in Agony, at 45. The Eastern Tibet regions were assigned to Chinese provinces in 1956. McGranahan, *Simla to Rongbatsa*, at 51.

59. In the view of the Tibetan government in exile, Tibet consists of what the Chinese call the Tibet Autonomous Region, most of Qinghai province (including areas where Tibetans are mixed with other minorities); about half of Sichuan province; and part of Yunnan and Gansu provinces. Wang, at 292; Li, Tibet in Agony, at 45 (also noting that the majority population in Qinghai as of 1950 was Han, concentrated in cities).

Tibetan identity has long been closely tied to Tibetan Buddhism (Vajrayana), which is distinct from the Hinyana (a/k/a Theravāda), Mahayana, or Zen sects of other nations.[60] While Buddhist scriptures are predominantly pacifist, they are not exclusively so. The martial arts were created by Buddhist teachers. Buddhist nations have employed armed force for self-defense as much as other nations. The core principle of Buddhism is *ahimsa*, compassion for the suffering of others. In the views of many Buddhists, including the present Dalai Lama,[61] *ahimsa* permits the choice to reduce the suffering of others by using violence, including deadly force, against the persons causing the suffering. *See* David B. Kopel, *Self-defense in Asian Religions*, 2 Liberty L. Rev. 79 (2007).

Tibetan Buddhists were familiar with the martial example Manjushri (Manjushree, Manjusri), Bodhisattva of Wisdom. He had transformed himself in a successful mission to kill Death. Paintings depicted him with a holy book in one hand and a flaming sword in the other. Manjusri, Encyclopedia of Buddhism 330 (Edward A. Irons ed. 2008).[62] The sword cut through the roots of ignorance. Another bodhisattva, Vajrapani, pugnaciously defended embattled guardians of the Buddhist faith. Mikel Dunham, Buddha's Warriors: The Story of the CIA-Backed Tibetan Freedom Fighters, the Chinese Invasion, and the Ultimate Fall of Tibet 149 (2004); Alice Getty, The Gods of Northern Buddhism (1962). The *Epic of King Gesar* told the historical (according to Tibetans) story of the great warrior king from days of yore who fought enemies of *dharma* (Buddhist teachings and the natural order of existence). Dharma, *in* Encyclopedia of Buddhism, at 156-57. "Tibetan history was littered with examples of monks taking up arms when Buddhism was perceived as being threatened. . . . [W]hen defending the faith, monks could be the most magnificent of soldiers," with a stamina and rigor fortified by the monastic lifestyle. Dunham, at 149.

Tibet is not exclusively Buddhist. There had long been a Muslim minority that was respected and religiously free. There were four mosques in Lhasa alone. The Bon religion arose around the tenth century and was persecuted as a rival to Buddhism. By the twentieth century, it existed mainly in eastern Tibet, well beyond Lhasa's control. *Bon religion*, *in* Encylopedia of Buddhism, at 54-55.

The Dalai Lama's Proposal for Collective Defense

While Tibet was independent, the then-Dalai Lama, Thupten Gyatso (birth-name Choekyi Gyaltsen), proposed a Tibet-Nepal-Bhutan defense alliance, with

60. Unlike some other Buddhists, Tibetan Buddhists consider meat eating acceptable. Vegetarianism, *in* Encyclopedia of Buddhism 543, 544 (Edward A. Irons ed. 2008).

61. "Dalai" is a Mongolian word for "oceanwide," and is used in the sense of "vast wisdom." "Lama" is Tibetan for "the superior one." "The word lama is equivalent to the Sanskrit/Indian title *guru*. Strictly speaking a *lama* has completed a three-year period of cultivation and need not necessarily be a monk who has taken the precepts. As is *guru*, the title *lama* is often used simply as a sign of respect." Titles and terms of address, Buddhist, *in* Encyclopedia of Buddhism, at 515.

62. A bodhisattva is an advanced being who chooses not to attain nirvana, but instead to stay in the material world to help other beings reach enlightenment. *See* Bodhisattva, *in* Encyclopedia of Buddhism, at 52.

military training for young men.[63] Although the Dalai Lama was head of state, much of the political power in Tibet's quasi-feudal theocracy was held by three large monasteries in Lhasa. Their armed monks, *dob-dobs*, outnumbered Tibet's tiny army and police. As military buildup would have required substantial taxes on the monasteries, the monasteries squashed the plan. Dunham, at 48-49. Nepal and Bhutan rejected the alliance proposal.

In a "Political Last Testament" in August 1932, the thirteenth Dalai Lama wrote:

> Efficient and well-equipped troops must be stationed even on the minor frontiers bordering hostile forces. Such an army must be well-trained in warfare as a sure deterrent against any adversaries.
>
> Furthermore, the present era is rampant with the five forms of degeneration,[64] in particular the "red" ideology. [He then summarized communist abuses of Buddhism in Outer Mongolia.] In the future, this system will certainly be forced either from within or without on this land. . . . If, in such an event, we fail to defend our land, the holy lamas . . . will be eliminated without a trace of their names remaining. . . . Moreover, our political system . . . will be reduced to an empty name; my officials . . . will be subjugated like slaves to the enemy; and my people, subjected to fear and miseries, will be unable to endure day or night. Such an era will certainly come.

Roger E. McCarthy, Tears of the Lotus: Accounts of Tibetan Resistance to the Chinese Invasion, 1950-1962, at 37-38 (1997).[65]

Would the defense system have saved Tibet? "I'm convinced it would have," said the current Dalai Lama, Tenzin Gyatso. Dalai Lama with Jean-Claude Carrière, Violence and Compassion: Dialogues on Life Today 149 (1996) (originally published in France as *La Fource du Bouddhisme* (1994)).

In the Tibetan Buddhist system, after the death of the Dalai Lama or the Panchen Lama (second-ranking), the people would wait until his reincarnated soul was discovered in a young boy.[66] The thirteenth Dalai Lama died in 1933; Lhamo

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63. Most Tibetans do not employ family names.

64. [Degeneration of life-span (e.g., from homicide); degeneration of time (the quality of things such as grain); degeneration of disturbing emotions (less virtue); degeneration of views (decline of good views and increase of bad ones); degeneration of experience (health, intellect, etc.). *See* Guru Yoga, Dilgo Khyentse Rinpoche 50 (1999).—Eds.]

65. McCarthy was the creator of the CIA Tibetan Task Force. Dunham, at 193 n.7.

66. The current, fourteenth, Dalai Lama has stated that he may decide not to be reincarnated. His primary motivation seems to be the avoidance of communist interference in the selection process. The communist rulers of today's China, although officially atheist, have asserted authority over the "control and recognition of reincarnations." The Dalai Lama notes that the communist Chinese "are waiting for my death and will recognize a Fifteenth Dalai Lama of their choice." The Dalai Lama, Reincarnation (Sept. 24, 2011). After China declared that the next Dalai Lama's selection process "must comply with Chinese law," the current Dalai Lama replied, "In future, in case you see two Dalai Lamas come, one from here, in free country, one chosen by Chinese, then nobody will trust, nobody will respect [the one chosen by China]." Sophia Yan, *China Says Dalai Lama Reincarnation "Must Comply" with Chinese Laws*, The Telegraph, Mar. 21, 2019.

Thondup was born in 1935. Identified as a possible Dalai Lama when he was a small child in a small Amdo village, he was enthroned in 1940, taking the religious name Tenzin Gyatso. Since Dalai Lamas were chosen in early childhood, there would always be a number of years before the child reached maturity and could assume leadership. In the interim, Tibet would be governed by a regency. As history demonstrates, regencies can be dangerous, because the government is often weak and subject to intrigues. After the death of the thirteenth Dalai Lama, "the Tibetan Government, such as it was, appeared oblivious to the need for national reform to prepare for the challenges ahead." Addy, at 35. The regent "allowed the military to decline, while lining his pockets at the expense of Tibetan economic surpluses." Dunham, at 49.

Tibetan Arms Culture

Tibetans had a long tradition of being armed, but many of their firearms were flintlocks or matchlocks, which had long been obsolete. McCarthy, at 38; *Introduction*, *in* Genocide in Tibet: A Study in Communist Aggression 3-4 (Rodney Gilbert ed. 1959).

Matchlocks are impossible to keep always-ready, ill-suited for long distance, poor for maintaining the user's concealment, and quite slow to reload after the single shot. *See* Ch. 2.I (describing matchlocks, and their replacement by improved guns starting in the early seventeenth century). Flintlocks were better in all respects, but still far inferior to firearms invented since the mid-nineteenth century, which used metallic cartridges, and which were much faster to reload and more powerful. Chs. 3.E.2 (flintlocks), 5.E (mid-nineteenth century), 23.C.4.b. Tibet was economically backwards and had no firearms manufacturing industry. Tibetans could and did make their own swords and knives.

During World War II, Tibet stayed neutral, and did not authorize Allied arms shipments to the Republic of China's army that was battling Japanese invasion. John Kenneth Knaus, Orphans of the Cold War: America and the Tibetan Struggle for Survival 5 (1999) (by former CIA Tibetan Task Force political officer). Nevertheless, wartime conditions tend to increase the gun supply, and Tibetans, especially in Kham, seem to have taken the opportunity to acquire a wide variety of modern firearms, some of them purchased in Burma and then imported.

Tibet's formally organized military forces were small. As of the mid-1930s, Eastern Tibet had about ten thousand regulars and militia; half of them had modern British Lee-Enfield .303 bolt action rifles. In Lhasa there were under a thousand soldiers plus 300 armed police. In most of the nation, defense was provided only by militia armed with matchlocks. Military training in general was desultory.[67] On the eve of the communist invasion, "Tibet's army—if you could call it that—was at most ten thousand troops with nineteenth century weapons." Dunham, at 56.

Although many Tibetan firearms were inferior, Tibet's arms culture was strong. High proficiency at riding, shooting, and swordsmanship were part of Tibetan identity, and the skills were learned early in childhood. Such skills had

67. McCarthy, at 38.

always been necessary for survival—whether for protection against bandits, or for hunting in an environment where neither game nor ammunition were abundant.[68]

"Khampas were heavily armed," skilled at brigandage, and "incomparable horsemen, hunters, and trackers." Dunham, at 7. "Every self-respecting male owned at least one silver embellished pistol or rifle, even if it was nothing more than a flintlock. The poorest of beggars carried a sword or oversized knife hitched at his waist, and he knew how to use it." *Id.* at 17. Wealthy families had arsenals. So did the monasteries, with their warrior monks, the *dob-dobs*. *Id.* at 146.

Man for man, the Tibetans were far superior to the Chinese People's Liberation Army (PLA). The Tibetans often inflicted casualties on the Chinese at about ten times the rate that the Chinese did on them.[69] Unlike the Tibetans, the Chinese were poor marksmen. While the PLA demanded unthinking obedience, the Tibetans knew how to think for themselves, to improvise and survive.[70] In combat, PLA officers did not lead their men, but instead stayed in the rear, to shoot those who tried to escape.[71]

According to a captured Chinese army document, PLA soldiers fired 20 bullets per Tibetan guerilla killed, whereas for Tibetans shooting at the PLA, the norm was one shot, one kill.[72]

Moreover, the average altitude of Kham and Amdo is over 3,000 meters (about 10,000 feet), and even higher in Central Tibet. Tibetan physiology has evolved such that Tibetans breathe easily in very thin air, whereas invading lowlanders have a much more difficult time. *See* Conboy & Morrison, at 2; S.C. Erzurum, S. Ghosh, A.J. Janocha, W. Xu, S. Bauer, N.S. Bryan et al., *Higher Blood Flow and Circulating NO Products Offset High-Altitude Hypoxia Among Tibetans*, 104 Proc. Nat'l Acad. Sci. 17593 (2007); Cynthia M. Beall, *Two Routes to Functional Adaptation: Tibetan and Andean High-Altitude Natives*, 104 (supp. 1) Proc. Nat'l Acad. Sci. 8655 (2007).

Supported and sheltered by the Tibetan people, Tibet's guerillas could hit, run, and disappear. "Many people think it impossible for guerrillas to exist for long in the enemy's rear. Such a belief reveals lack of comprehension of the relationship that should exist between the people and the troops. The former may be likened to water the latter to the fish who inhabit it. How may it be said that these two cannot exist together? It is only undisciplined troops who make the people their enemies and who, like the fish out of its native element cannot live." Mao Tse-tung, On Guerrilla Warfare, ch. 6 (1937).

The Chinese Occupation of Eastern Tibet

In February 1949, Mao explained his Tibet policy to a leading Soviet official. Tibet, said Mao, would be easy to solve, but could not be rushed. "First transportation is poor in the region, making it difficult to move in large numbers of troops

68. McCarthy, at 248-49.
69. McCarthy, at 247.
70. *Id.* at 248-49.
71. *Id.* at 147.
72. Knaus, at 234.

and keep them supplied. Second, it takes longer to solve the ethnic questions in regions where religion holds sway. . . ." Li, Tibet in Agonyat 23.[73]

As the communists were winning the civil war in 1949, they began to enter Tibetan areas, some of which resisted immediately. In far southeastern Kham (China's Yunnan province), the Tibetans of Gyalthang drove back a PLA attempt to enter their territory, although the PLA did move in later. Jamyang Norbu, *The Tibetan Resistance Movement and the Role of the C.I.A., in* Resistance and Reform in Tibet, at 186, 190.[74]

Chinese troops entered Amdo (the Chinese province of Qinghai) in the summer of 1949. "Tibetan resistance was immediately aroused," with "armed revolts in Choni, Nangra, and Trika." Smith, at 63. By 1950, Chinese reinforcements had overwhelmed the rebels, so they left home to pursue guerilla warfare from the mountains. They were wiped out by even more reinforcements in 1953. Norbu, *The Tibetan Resistance Movement*, at 190-91. The early instances of resistance were exceptional. Most of Kham and Amdo initially accepted the arrival of the PLA. *Id.* at 191-92.

The first PLA had arrived in Kham in 1949 and a much larger number entered in March 1950.[75] They explained that they were just there temporarily to help the Tibetans and would leave thereafter. The troops were very polite, friendly, and helpful, and spent generously to boost local economies. They also worked on building roads. Even so, "[m]any people were buying British-made rifles from Datsedo [in Amdo] for their protection; in the Lithang area [in southeastern Kham] alone, about 1,500 were purchased." Gompo Tashi Andrugtsang, Four Rivers, Six Ranges: Reminisces of the Resistance Movement in Tibet 11-12 (1973).

Invasion of Central Tibet

Having peacefully built a road network in Eastern Tibet, Mao used it to invade Central Tibet in October 1950. The Tibetan defending commander had previously torn down defensive positions. He fecklessly forced the Tibetan army and the Kham militia into a chaotic retreat. Soon he deserted, after giving orders that an ammunition depot be destroyed, thereby crippling the fighters he left behind. He later became a public traitor, and perhaps was treasonous from the beginning. Three radio reports about the invasion were sent to Lhasa, but the central government did not respond, being busy with a five-day festival and picnic. The war was over

73. One reason Tibet did not have much of a road network was that the government opposed the use of motor vehicles, which were seen "as modern and anti-Tibetan." Knaus, at 10 (quoting U.S. envoy to Tibet during World War II). The traditional lack of good roads ultimately helped the resistance. If Tibetans had grown accustomed to motor transport, they would have been reliant on imported fuel, and the Chinese could easily have cut off resistance access to fueling stations. Because the Tibetan resistance used horses rather than motor vehicles, their transport has ready access to local fuel derived from solar power—namely grass.

74. Jamyang Norbu was resistance fighter who later became a writer and historian.

75. Addy, at 40-41; Dunham, at 54.

in 11 days, with barely any resistance.[76] The Chinese army was now across Yangtze River, inside Central Tibet, in a Kham ethnic area known as Chamdo.[77]

A better-prepared Tibet might have been able to turn back the 1950 invasion. The mountainous terrain and thin oxygen greatly favored the defenders. The Tibetans had very high motivation, especially compared to the PLA, who were de facto slaves. Tibetans were much better fighters, and far superior with firearms and swords. The Tibetans could have put up powerful and perhaps victorious resistance to the Chinese invasion in 1950, if only the government had put enough Tibetans in the field under a strong and unified command—and not a mere nine regiments led by an incipient traitor. The objective would have been to block the Chinese at mountain passes, rather than allowing the PLA to penetrate into the interior.[78]

At the urging of the people and an oracle, the 15-year-old fourteenth Dalai Lama ended his regency and reluctantly took the reins of state in November 1950.[79] While he had an excellent religious education, he had been taught little about worldly affairs.[80]

With Chamdo taken, the way to Lhasa was open for the PLA, but winter was coming, and so the PLA concentrated on more roadbuilding.[81] According to Gompo Tashi Andrugtsang, a resistance leader later in the 1950s, *infra*, if the Khampas and Amdowas had united and if they had been given outside support, Tibetans could have prevented the completion of the PLA's road network and defeated the PLA.

But as usual, the government in Lhasa failed to take measures for national defense, for fear of provoking the Chinese. With the realities on the ground having changed since 1949, the Chinese coerced the Tibetan government into accepting the dictates of a "Seventeen Point Agreement," which the Tibetan National Assembly ratified in October 1951.

The agreement did nothing to protect Eastern Tibet. As for Central Tibet, the agreement promised "no compulsion" in changing the social, religious, or economic systems. On paper, this was solid protection against the communists' "democratic reforms." What the communists meant by "democratic reforms" for Tibet was the same as for China: confiscating all the land, crops, and livestock, and forcing everyone to labor for the government. Whatever the laborers produced belonged to the government, which would give back a portion to the producers. Civil society and religion would be eliminated.

For Central Tibet, the Seventeen Point Agreement promised no "democratic reform" without democratic consent. In return, Central Tibet acknowledged Chinese sovereignty. Many in the Lhasa government favored rejection of the Seventeen

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76. *Id.* 68-79.

77. Chamdo is the easternmost prefecture of Central Tibet. The other Central Tibet prefectures are not mainly inhabited by Khampas. The prefectures are Ngari, Nagqu, Shigatse, Lhasa, Shanan, and Nyinghci.

78. McCarthy, at 249.

79. In Tibet, as in China, the Dalai Lama was considered 16 years old at the time. In both cultures, a newborn baby is said to be one year old.

80. Dunham, at 83.

81. *Id.* at 87-88.

Point Agreement, even though it would mean fighting sooner rather than later. As they knew, communist promises of fair dealing were expedient lies—like "honey spread on a sharp knife," as a Tibetan saying put it.[82]

The main proponents of ratifying the agreement were the aristocrats and the most powerful monasteries, because of Chinese promises that the aristocrats could keep their property and privileges. As the aristocrats later found out, their reprieve would only be temporary. To this day, the Chinese communists describe their invasion of Tibet as a liberation of serfs and peasants; to the contrary, the invasion was accomplished by communist collaboration with the most reactionary and selfish elements in Tibet. In both Eastern and Central Tibet, the Chinese quickly put many Tibetans on the Chinese payroll and enriched others with trade, forming a class of local collaborators and spies. Conboy & Morrison, at 24; Li, Tibet in Agony, at 7, 11 (first Khampas in Derge to ally with the communists were the hereditary ruling class, whom the communists wooed), 123-24 (Lhasa).

Under the Seventeen Point Agreement, the PLA established a large army garrison right outside Lhasa. Loudspeakers were set up all over, so that in Lhasa, as elsewhere in the PRC, there was a relentless blare of communist propaganda.[83] Notwithstanding what the Seventeen Point Agreement promised, the Tibetan government was gradually rendered impotent, with only the Dalai Lama retaining some independence.[84]

Initially, the Chinese did govern U-Tsang, and especially Lhasa, with a relatively light hand. The PLA recognized that its long-term occupation would require a strong logistical network. So while the communists rapidly built roads, they did not press their full program on Central Tibet.[85]

Kham and Amdo, meanwhile, felt the full weight of communism: the same famines, slavery, totalitarianism, and destruction of civil society that characterized CCP rule in China proper. For Tibetans, the oppression was aggravated by the Han communists' sense of racial superiority.

Resistance in 1954-55

Next to the Khampas and Amdowas, the largest tribe in Eastern Tibet was the nomadic and fearless Goloks, based in southeast Amdo. Their name means "backwards head," "rebel," or "bellicosity." Over the centuries, the Goloks had defeated Tibetan, Mongol, or Chinese governments that tried to tell them what to do.[86] After the PLA burned some Golok monasteries in 1954, the Goloks declared guerilla war, which they waged from the mountains, with substantial support from the monasteries. "They waited until the PLA was drawn deep into their traps and then they slaughtered the godless enemy to a man."[87] The PLA sent Amdowa emissaries to try

82. Dunham, at 94.
83. Dunham, at 113.
84. *Id.* at 126-27.
85. Conboy & Marrison, at 24.
86. McCarthy, at 218; Dunham, at 141-42.
87. *Id.* at 142.

to convince the Goloks to give up their guns, but the Goloks "would die before they would submit to disarmament."[88]

In the spring of 1955, the Chinese completed their roads from Kham and Amdo to Lhasa. With a foundation of physical control established, the communists were ready to expand their control, via disarmament.[89]

The "greatest miscalculation perpetrated by the Chinese was their not-so-subtle move for gun control." Dunham, at 148. The CCP informed the Khampas that all their weapons must be registered. *Id.*

> This was the last straw. No Khampa believed it would stop there. Overnight, guns were squirreled away. A Khampa's gun was the quintessential component of his worth as a protector of his family, home, and religion—no possession was more jealously guarded. If the Chinese wanted the Khampas' guns, they would have to fight for them. And that was exactly what many Khampas were in the mood for. No action so unified the Tibetans as the threat of disarmament. Tibetans who had seldom, if ever, joined forces with neighboring tribes, now met secretly to find ways to face the Chinese with a united front.

Id. Many monks who had taken vows of nonviolence went through the ceremony to be released from those vows, so they could join the resistance. *Id.*

In a Kham region of China's Yunnan province, communists came to the Lithang (Litang) Monastery, the biggest monastery in all of Kham. The communists ordered that the monastery's large arsenal be surrendered. When the lamas refused, they were dragged to the courtyard before the townspeople, who had been forced to watch at PLA gunpoint. The Chinese yelled that they had been trying to civilize the Tibetans for five years, but the Tibetans still acted like animals. So now the choice: White Road or Black Road. The former was peaceful surrender of arms. The latter road would be fighting the PLA and losing.

An elder lama stepped forward: "What is there to decide? Our own families will not give up what is theirs and has always been theirs. You Chinese did not give us our property. Our forefathers gave us our property. Why should we suddenly have to hand it over to you, as if it were yours in the first place?" *Id.* at 150. For the time being, the Chinese backed off.

1956: Kham Explodes

In 1956, the Chinese transferred almost all political power in Central Tibet to a new entity they controlled, the Preparatory Committee for the Autonomous Region of Tibet. The Central Tibetan national assembly and cabinet (*Kashag*) became nearly powerless. Gompo Tashi Andrugtsang, Four Rivers Six Ranges: Reminisces of the Resistance Movement in Tibet 39 (1973). In Eastern Tibet, the pace for imposing communism was accelerated.

In the Golok territory, the PLA escalated its manpower to impose forcible disarmament. An 800-man PLA garrison was wiped out by Goloks and Muslims on

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88. *Id.* at 142-43.

89. Conboy & Morrison, at 25.

horseback, armed with muzzleloaders and swords. Even more PLA came, and they burned more monasteries, stole the livestock, and slaughtered the women and children. The surviving men had lost everything, and they took to the hills vowing to fight the Chinese for the rest of their lives. The outside world knew nothing of the Golok revolt at the time. *Id.* at 155.

Further south, at the Lithang monastery, the communists attempted to arrest the lamas at the spring religious festival, but thousands of armed people assembled to protect the lamas and the monastery complex. The PLA shelled the monastery with artillery, and then sent in infantry. In fierce combat at close quarters, the PLA prevailed after the defenders ran out of ammunition. Finally, on March 29, the monastery was bombed by Ilyushin-28 jets, purchased from the Soviet Union. *Id.* at 160-65. Then the Chathreng monastery was bombed on April 2, and the Bathang monastery on April 7. Li, Tibet in Agony, at 321 n.42.[90]

In the Nyarong region of Kham, the communists were going village to village to confiscate arms. After confiscation, the communists would hold "struggle sessions" (Tibetan, *thamzing*). Struggle sessions were pervasive wherever Mao reigned. Individuals would be brought before large group meetings that all locals were required to attend. The locals would be ordered to scream at the victims and denounce them for being counterrevolutionary, and sometimes to physically assault them. The victims would be required to confess to various sins. At the end, victims might be released, imprisoned, sent to a slave labor camp, or executed.

A revolt was planned for eighteenth day of the first moon in 1956. In the Upper Nyarong region of eastern Kham, the local chief and his elder wife had been summoned to a meeting by the Chinese, and so the younger wife, 25-year-old Dorje Yudon, had leadership responsibility for the first time in her life.[91] "Dorje Yudon gathered her men and weapons and dispatched missives all over eastern Tibet, urging the people to rise against the Chinese. Dressed in a man's robe and with a pistol strapped to her side, she rode before her warriors to do battle with the enemy. She ferociously attacked Chinese columns and outposts everywhere in Nyarong." McCarthy, at 107;*see also* Norbu, *The Tibetan Resistance Movement*, at 192-93; Dunham, at 158-60. Dorje Yudon's band of warriors numbered in the hundreds, and nearly four thousand people in the area joined the revolt, about 17 percent of the population, and including participants from the large majority of households. Li, Tibet in Agony, at 12-13.[92]

Revolts were spreading all over Kham. In Ngaba (northwest Kham), three thousand rose up in 17 townships in March, and by May their numbers had

90. Earlier in the year, in Kham's far southeastern Changtreng, monks and the people had driven off the Chinese. Dunham, at 155-56.

91. Polygamy (more than one wife) and polyandry (more than one husband) were long-standing customs in Tibet. Poly families in Tibet often consisted of one husband and two sisters, or one wife and two brothers.

92. Eventually, the PLA wore the Dorje Yudon group down to only 200, at which point Dorje Yudon escaped to India. Carole McGranahan, *Narrative Dispossession: Tibet and the Gendered Logics of Historical Possibility*, 52 Comp. Stud. Soc. & Hist. 768, 785 (2010) (based on interview with Dorje Yudon).

quadrupled.[93] Sixteen thousand rebels were in 18 counties of Garze (west Kham) by the end of March 1956.[94] "In early 1956, Chamdo, Lithang, Bathang, and Kantzu were temporarily overrun and the Chinese garrisons stationed there completely wiped out." Six thousand Tibet irregulars "ranged freely from their mountain hideouts, wreaking widespread havoc and destruction." Andrugtsang, at 47.

Tibetans were not the only ones revolting. In Yunnan and Sichuan provinces, the Li minority in 1956 began "massive resistance in the form of a several-year guerrilla war against the Communist mission." Thomas Heberer, *Nationalities Conflict and Ethnicity in the People's Republic of China, with Special Reference to the Yi in the Liangshan Yi Autonomous Prefecture*, *in* Perspectives on the Yi of Southwest China 214, 215 (Stevan Harrell ed. 2001).

By the fall of 1956, tens of thousands of guerillas had arisen in Eastern Tibet. Many fighters had started with no knowledge of guerilla warfare. They were ordinary people who banded together and attacked the communists who were destroying their communities. As the rebellion continued, smaller guerilla groups formed. Li, Tibet in Agony, at 6, 24-25 (all of Chamdo revolting by fall 1956 because of land confiscation program begun in June). Some of the fighters called themselves the Volunteer Army to Defend Buddhism (Tib., *Tensung Dhanglang Magar*). Norbu, at 193.

Based in the mountains, the mounted guerilla Khampas, Amdowas, and Goloks burned Chinese outposts, destroyed Chinese garrisons, and raided western China. The PLA rushed in more soldiers, bringing the total force in Tibet to 150,000.[95] Guerilla organization was facilitated by Tibet's six thousand monasteries, which functioned as the resistance's information network.[96] The population helped with information, too; for example, when the PLA was nearby, village women warned the guerillas by hanging only red laundry out to dry.[97]

"In thousands of square miles . . . no Han dared set foot without backup. Only the strongest Chinese bases were safe from attack." PLA who rode more than a day from base were usually ambushed. On the road from Kham to Lhasa, PLA supply convoys had to travel in groups of 40 or 50 trucks, heavily guarded, advancing slowly for fear of ambush around every corner.[98] "[F]or a few months," nearly all of Eastern Tibet was cleared of the PLA and CCP. Norbu, *The Tibetan Resistance Movement*, at 193. "By 1956, the PLA had, at best, wobbly control over the eastern province of Kham and, to a lesser extent, Amdo and Golok." Dunham, at 5.

Tibet had been easy to conquer but was hard to rule.

In Lhasa lived a wealthy businessman, Gompo Tashi Andrugtsang (often called just "Gompo Tashi").[99] He came from Lithang, Kham. Like many wealthy

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93. Li, Tibet in Agony, at 13.

94. *Id.* at 11-12.

95. McCarthy, at 102-14.

96. Dunham, at 147. Radio communications would have been faster, but as of 1950, there were fewer than ten radios in all of Tibet. "Tibet's lack of communication within the country and without was one of Mao's greatest assets." *Id.* at 60.

97. *Id.* at 168-69.

98. *Id.*

99. Also referred to as Andrug (or Andruk) Gompo Tashi, or Andrug Jindak. Andrugtsang was the family name. Many Tibetans do not use family names. The Andrugtsang family ran one of the four big international trading houses in Kham. Knaus, at 57-58.

Tibetans, he owned a large arsenal. As a teenager, he had served in a posse that captured mountain bandits; the experience made him very interested in firearms, hunting, and shooting. Andrugtsang, at 7-9; *see also id.* at 5 (youthful participation in riding and target shooting contests for the Tibetan New Year). During World War II, Gompo Tashi had purchased many modern firearms via Burma, Laos, and India. Dunham, at 39.

As refugees from Lithang arrived in Lhasa, they urged that more fighters be sent to Lithang. Gompo Tashi disagreed. In his view, it was time for businessmen to liquidate their assets and turn them into weapons and ammunition. People had already lost homes, families, and monasteries. There was nothing left to lose. It was time for Tibetans to unite, to create a central fighting force for the entire nation, not just for their native regions. In October 1956, Gompo Tashi began networking for an all-Tibet army. *Id.* at 173-74, 183. He soon sent emissaries to Eastern Tibet; ostensibly they were on a business trip. In fact, they were carrying his message that "the Tibetans now have no alternative but to take up arms against the Chinese." Andrugtsang, at 42-43.

The outside world heard very little about the Tibetan resistance. There was no foreign press in Tibet, and very few diplomatic missions in Lhasa. Li, Tibet in Agony, at 32 (only India, Nepal, and Bhutan had diplomatic representatives in Lhasa). Refugees escaping to India sometimes carried firsthand reports, which were published in the Tibetan language newspaper *Tibet Mirror* in Kalimpong, India.[100] But Indian Prime Minister Nehru banned dissemination of Tibet revolt news, calling it "anti-Chinese propaganda."[101] The atrocities, suffering, and resistance in Amdo were even less known in Lhasa or the outside world than those in Kham.[102]

1957: Mao Temporarily Retreats

On February 27, 1957, Mao Zedong gave a speech promising to postpone "Democrat reforms" in Tibet until they were supported by "the great majority of the people." Mao Zedong, On the Correct Handling of Contradictions Among the People, Speech at the Eleventh Session (Enlarged) of the Supreme State Conference (with additions by Mao before publication in People's Daily, June 19, 1957). Mao did not really like the idea, but it had been forced on him by other party leaders, including CCP Vice-Chairman Liu Shaoqi (Liu Shao-ch'i). Liu's actions contributed to his later being purged in the Cultural Revolution.[103]

Whatever reduction in hostilities had resulted from the February 1957 announcement were entirely reversed by another announcement not long

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100. *E.g.*, 24 Tibet Mirror, no. 3, at 3-6 (1957) (witness drawings of bombings of the "Chatrin Samphelling Monastery, Drago Monastery, Ba Chode Gonpa [ecclesiastical fortification], Lithang Monastery"). For the story of the Christian missionary who published *Tibet Mirror*, see Isrun Enghelhardt, *Reflections in The Tibet Mirror: News of the World 1937-1964*, *in* Mapping the Modern in Tibet (Gray Tuttle ed. 2011).

The other major Indian destination for Tibetan refugees was Darjeeling. Li, Tibet in Agony, at 28.

101. Li, Tibet in Agony, at 28, 42; Dunham, at 165-66, 277.

102. Li, Tibet in Agony, at 65.

103. McCarthy, at 124-25.

afterward: all Tibetan arms would be confiscated. As the Dalai Lama later recalled, when he heard about the confiscation order, "I knew without being told that a Khamba would never surrender his rifle—he would use it first." Roger Hicks & Ngakpa Chogyam, Great Ocean 102 (1984) (authorized biography). According to secret PLA documents, the PLA worried there were about 100,000 to 150,000 rifles owned by the Tibetan army and people. Ben Kieler, The 1959 Tibetan Uprising Documents: The Chinese Army Documents 32 (2017).

As Gompo Tashi put it, "No Tibetans, and especially the fiercely independent tribes, would voluntarily surrender their weapons to the Chinese. If there was a single act by the Chinese that galvanized the resistance it was probably this plan to seize all weapons from the Tibetans. It could be interpreted by a Tibetan to mean but one thing: total loss of freedom. It was, in effect, the final insult. There would be no more broken promises." McCarthy, at 129-30. "For hundreds of years our weapons had been more precious than jewels. And now the Red Devils expected us to simply let them take our weapons away from us? We had no choice but to move forward with our plans to fight." *Id.* at 132.

In June 1957, the CCP reneged on Mao's promise. The communist "democratic reform" would be imposed within the Tibet Autonomous Region, in a Kham area known as Chamdo.[104] Khampa, Amdo, and Golok cavalrymen continued to raid PLA conveys and capture their arms.[105]

Gompo Tashi kept on working to raise and unite national resistance forces. To provide cover for the necessary nationwide travel and meetings, a plan was created to present the Dalai Lama with a bejeweled golden throne. Gathering the materials for the gift required much networking among potential donors all over Tibet; the kind of people who could donate gold or jewels for the throne were also likely to have plenty of arms and money to contribute to the resistance. The magnificent throne was presented in a ceremony on July 4, 1957.[106] While the Chinese saw the throne as just another example of Tibetan superstition, it was also a political statement understood by Tibetans. The throne was a gift from all three provinces of Tibet (Kham, Amdo, and U-Tsang), united in loyalty to the Dalai Lama and not to Mao Zedong. Jamyang Norbu, *The Political Vision of Andrugtsang Gompo Tashi*, Shadow Tibet, Sept. 27, 2014.

Gompo Tashi met with the Dalai Lama, who viewed the planned national resistance army as inspired fighters with a just cause but no hope of success. The Dalai Lama advised Gompo Tashi that if he did choose to lead an army, he must do so with compassion and in full awareness of the consequences; the path might not be easy, but it might be the only one.[107] The rebel leaders then consulted the oracle of Shukden, who told them no longer to remain idle; it was time for Tibetans to rise as one.[108]

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104. Smith, at 66.
105. *Id.* at 126-28.
106. Dunham, at 195-96; Andrugtsang, at 51-54.
107. Hicks & Chogyam, at 102-03.
108. McCarthy, at 142.

U.S. Central Intelligence Agency

Created in 1947, the U.S. Central Intelligence Agency was open to, but cautious in, aiding anti-communist rebels. Earlier in the 1950s, the Agency had been duped into attempted support for planned anti-communist uprisings in Poland and Albania, only to eventually discover that they were actually sting operations run by the communist secret police. In the early 1950s in China, the CIA's airdrops for anti-Mao revolutionaries had come to naught.[109] Although communism in China was increasingly unpopular, many Chinese did not view rebels aligned with Chiang Kai-Shek as a credible alternative. Even many non-communists considered Chiang's rule of China to have been a failure.

Getting information on conditions in Tibet was very difficult. When the people of Hungary revolted against communist dictatorship in October-November 1956, the news was disseminated immediately.[110] But the 1956 uprisings in Eastern Tibet were almost unknown to the outside world. By the summer of 1956, the CIA had determined that reports of the Eastern Tibetan uprisings, with impressive initial successes, were genuine, and not mere Chiang Kai-Shek–style bluster. Since the early 1950s, the CIA had been in touch with the Dalai Lama's elder brother, Gyalo Thondup, who quietly became the rebels' principal ambassador and contact with the world.[111] In the CIA's new program to aid the Tibetans, the Dalai Lama's brother was the principal leader, and Gompo Tashi Andrugtsang the head of operations.

In 1957, several Tibetan freedom fighters were exfiltrated and then taken to Saipan for a pilot program of training in guerilla warfare. The program was soon expanded, with a permanent training center established at Camp Hale, Colorado.[112] McCarthy, at 139, 238.

The Tibetans and their American trainers got along very well. One instructor remembered, "They really enjoyed blowing things up during demolition class, but when they caught a fly in the mess hall, they would hold it in their cupped palms and let it loose outside." Conboy & Morrison, at 107.

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109. Conboy & Morrison, at 38-39.

110. The Hungarian Revolution is briefly discussed in Section D.3.g.

111. McGranahan, *Tibet's Cold War*, at 111, 117.

112. Saipan is part of the Northern Mariana Islands, in the northwest Pacific. Japan had seized it from Germany during World War I. The island was the scene of intense fighting during World War II. As of 1957, the Northern Mariana Islands were a United Nations trust territory administered by the United States. In 1975-76, the voters of the Northern Mariana Islands and U.S. Congress ratified a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. Citizens of the Commonwealth of the Northern Mariana Islands are citizens of the United States, similar to citizens of the Commonwealth of Puerto Rico. *See* Ch. 11.C.3 (Second Amendment litigation in the CNMI).

Camp Hale was in the high Rocky Mountains, near Leadville, Colorado. The camp had been the training facility for the U.S. Tenth Mountain Division during World War II. *See* Maurice Isserman, The Winter Army (2019) (the men of the Tenth Mountain Division in war, and later in the Olympics, and in creating the ski industry).

Besides training, the United States also began airdrops of supplies to the resistance fighters, eventually making about three dozen airdrops through 1965.[113] An airdrop in the fall of 1958 included Lee Enfield .303 bolt action rifles, 60mm mortars, 2.36 inch bazookas, 57mm recoilless rifles, .30 caliber light machine guns, and grenades.[114] The equipment had been chosen for plausible deniability; it was the type of material that had been used in Asia in preceding decades by many different forces. By 1959, the CIA grew less considered about deniability, and began supplying the M-1 Garand, the outstanding American semi-automatic rifle from World War II. Knaus, at 220-21; Conboy & Morrison, at 107; Ch. 7.C.2.b, 7.F.1.d (Garand). But the quantity of arms and ammunition was not sufficient to supply all of the freedom fighters.[115]

Unfortunately, by the time the assistance program was up to speed, it was too late to make a great difference. If it had begun earlier in the 1950s, its effect could have been dramatic.[116] Aid could have come sooner if the Dalai Lama had renounced the Seventeen Point Agreement (which he finally did in March 1959) and had requested aid. He was, after all, head of state, and his blessing would have made the Americans more confident about intervening earlier. Carole McGranahan, Arrested History, Tibet, the CIA, and Memories of a Forgotten War 46 (2010); McCarthy, at 244. The program was also hindered by lack of express support from the government of Indian Prime Minister Jawaharlal Nehru, who, at least in public, was playing a game of supporting China's claims to Tibet.[117]

1958: The Chushi Gangdruk Unify the Resistance

The Chinese repeated their arms surrender order in April 1958.[118] In the summer of 1958, all agriculture and pasturage in Kham and Amdo were fully communized. This was part of the Great Leap Forward, *infra*, that was enforced in all of the PRC (except Central Tibet) starting in 1958.

The Khampas were already in revolt, and now more Amdowas joined them.[119] So did the Muslim Salars of Xunhua county (Qinghai province), fighting alongside the Tibetans. Their April 1958 interfaith revolt spread to eight townships and

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113. McCarthy, at 240-44.

114. Dunham, at 254. The measurements for the weapons are the muzzle bore diameters. The diameter of the projectiles fired by the weapons would be very slightly smaller.

115. Knaus, at 154.

116. McCarthy, at 244-45.

117. In Nehru's optimistic imagination, China and India were jointly leading a pan-Asian nonaligned movement. Nehru's appeasement policy ended in 1962 when China invaded India and seized disputed territory. *See* Bertil Lintner, China's India War: Collision Course on the Roof of the World (2018) (arguing that the Chinese invasion had been planned since 1959); S. Mahmud Ali, Cold War in the High Himalayas: The USA, China, and South Asia in the 1950s (1999) (suggesting that Nehru was more active in trying to contain China behind the scenes than he acted in public); Neville Maxwell, India's China War (1970) (assigning the majority of the blame for the Sino-Indian War to Nehru's intransigence on border issues).

118. McCarthy at 136.

119. Smith, at 67.

lasted one week. The rebellion was joined by 68 percent of local CCP members and 69 percent of the Communist Youth League.[120]

A subsequent CCP investigation on Xunhau events found that 78 percent of the communists who had joined the rebellion did so because of "extremely confused ideas about religion . . . preferring to forsake the Party rather than forsake their religion, or even preferring death to forsaking their religion."[121] When Mao and the Dalai Lama had met in Beijing in 1954, Mao told him, "I understand you well. But of course, religion is poison. It has two great defects: It undermines the race, and secondly it retards the progress of the country. Tibet and Mongolia have both been poisoned by it." Dalai Lama, My Land and My People 117-18 (2006).

Another Amdo rebellion took place in Tsikorthang county, Qinghai. There were 10,840 fighters, including 1,020 monks and nuns. A PLA infantry regiment was deployed in July, fought the rebel nomads for five months, claimed victory, and withdrew. The rest of the population took the opportunity to escape to the hills. As a PLA commander indignantly reported to his superiors, the masses supported the rebels, feeding them, sheltering them, and concealing them.[122]

According to the Qinghai province Party Committee's June 1958 report to Mao, there were a hundred thousand Amdo rebels from 240 tribes revolting. The fighters constituted one-fifth of Qinghai's Tibetan population. The uprisings involved 24 counties, six prefectures, and 307 monasteries.[123]

Meanwhile, Lhasa and environs were becoming crowded with refugees. About ten to fifteen thousand were Chinese who had fled Maoism in China and were contentedly making a living running small shops. The CCP deported them back to China. Then the communists announced a program to register the refugees from Kham and Amdo who were living around Lhasa. They too would be deported unless they had written permission from the CCP to live in Lhasa. Some of them disappeared, including those who left to join the resistance forces; many already had arms and combat experience from the earlier revolts in Eastern Tibet. Li, Tibet in Agony, at 78; Andrugtsang, at 58-59.

Gompo Tashi Andrugtsang decided that it was time to publicly proclaim the all-Tibet resistance army. He sold all his wealth to purchase ammunition and arms — including rifles and handguns from Germany, Japan, the United Kingdom, Canada, and Czechoslovakia. His 46 employees were "armed to the teeth and provided with horses" to join the resistance. *Id.* at 59-60. In Tibetan Buddhism, being born with wealth, power, or intelligence "automatically came with the moral responsibility of helping other sentient beings less fortunate." Dunham, at 250.[124]

The new national resistance army was named the Chushi Gangdruk (Gandgrug, Gangrug). It was proclaimed on June 16, 1958, in the Triguthang valley of the

120. Li, Tibet in Agony, at 46-49.

121. *Id.* at 57.

122. Li, Tibet in Agony, at 50-55

123. *Id.* at 56.

124. In Buddhism, the *ahimsa* imperative for sentient beings includes nonhuman animals.

Lhoka area, fewer than a hundred miles south of Lhasa.[125] Lhoka was fully under the control of the twenty to thirty thousand Chushi Gangdruk there. "They were farmers, nomads, peddlers, and monks. They carried their own rifles, flintlocks, hunting guns, and swords, and wore their everyday clothes: leather or felt books, assorted caps, and the traditional Tibetan robes, known is *chupas*. . . ." Li, Tibet in Agony, at 69. While most of the Chushi Gangdruk came from Kham, the fighters also included volunteers from Amdo and Central Tibet.[126] By one estimate, over half the resistance fighters were monks.[127]

The Chushi Gangdruk unfurled their flag: crossed swords on a yellow background. Yellow was the color of Buddhism, which the Chushi Gangdruk defended from communism. The flaming sword belonged to Manjusri, the bodhisattva who sliced through ignorance, which was the root cause of communism. The other sword, a symbol of bravery, was a weapon that Tibetans made themselves.[128]

In a sense, the Chushi Gangdruk was carrying out the letter of the Seventeen Point Agreement: "The Tibetan people shall unite and drive out imperialist aggressive forces from Tibet." Seventeen Point Agreement, § 1.[129]

To the extent possible, Chushi Gangdruk guerilla units comprised fighters from the same native place or district. Officers were the leading men from their home area; they were not necessarily the most expert in military matters, but they had the confidence and loyalty of their troops, which was essential.[130] Twenty-eight resistance groups joined the Chushi Gangdruk.[131]

The Chushi Gangdruk were acquiring arms from all over. The Tibetan government did not try very hard to prevent them from "stealing" arms from the Tibetan army arsenals.[132] The PLA did try to thwart raids on its own arsenals, but often not successfully.[133] Meanwhile, Gompo Tashi was buying Russian-made rifles and pistols from India, Nepal, Sikkim, Bhutan, Pakistan, and China.[134] The Tibetan cabinet, the *Kashag*, ordered monasteries not to distribute arms to the freedom fighters, but this order was not always obeyed.[135]

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125. The full name was Chushi Gangdrug Tensrid Danglang Mak ("the Kham Four Rivers, Six Ranges Tibetan Defenders of the Faith Volunteer Army"). They were also known as Volunteer Freedom Fighters for Religious and Political Resistance (VFF). Andrugtsang, at 62; Knaus, at 150. "Four Rives, Six Ranges" was a traditional appellation for Kham. The rivers are the Mekong, Salween, Yangtze, and Yalung.

126. Granahan, *Tibet's Cold War*, at 111.

127. Knaus, at 141.

128. Dunham, at 197; Andrugtsang, at 62.

129. The CCP claim that pre-communist Tibet needed to be liberated from imperialism was preposterous. As of 1949, there were a total of eight Americans or Britons living in Tibet, all of them having permission from the Tibetan government and assisting the government with various projects, such as radio communication.

130. McGranahan, *Tibet's Cold War*, at 116.

131. Knaus, at 349 n.18.

132. Norbu, *The Tibetan Resistance Movement*, at 394.

133. Dunham, at 237.

134. Dunham, at 237. Sikkim was an independent kingdom until 1950, then an Indian protectorate, and since 1975 an Indian state.

135. Andrugtsang, at 74-75.

With the new arms supplies and unity, the Chushi Gangdruk cut off the three strategic highways south of Lhasa, thwarting PLA mobility. The Prince of Derge was leading his own men in hit-and-run raids on Kongpo (Nyinghci prefecture), an area in between Lhoka and Chamdo.[136]

The Chinese communists were outraged at the Chushi Gangdruk. It was clearly a coordinated national campaign, far more so than the local rebellions of earlier years. The CCP commanded the Dalai Lama to deploy the Tibetan army against the Chushi Gangdruk. Directly disobeying a Chinese order for the first time, the Dalai Lama pointed out that if the army were ordered to fight the Chushi Gangdruk, the army would instead join them. The Tibetan cabinet, the *Kashag*, agreed with the Dalai Lama—well aware that the army might remove the *Kashag* rather than wage war against the Chushi Gangdruk.[137] Indeed, starting in November 1958, many Tibetan army soldiers deserted to join the Chushi Gangdruk.[138]

The Dalai Lama did issue announcements urging the rebels to lay down their arms, but "the Chinese censors were so heavy-handed, and the messages so clearly written for the benefit of the Chinese, that the freedom fighters could see behind the words. They knew that His Holiness might not approve of their actions, but they took comfort in the knowledge that he was not against them."[139]

More rebel bands arose and expanded. For example, one group that began with ten men and four rifles grew to 40 families, and then to 300 families.[140] By late 1958, the revolt had become massive. Some Tibetan refugees in India returned to Tibet to join the Chushi Gangdruk. All of the tribes of Kham were resisting in arms. Amdo was in rebellion, and twenty thousand Goloks were fighting too.[141]

The Tibetans had the morale advantage. "PLA troops fought because they were told to." When the Chushi Gangdruk "drew their swords, they had an image of a raped wife or a murdered father to urge them on. And unlike the Chinese soldiers, they held the ultimate trump card: They had nothing left to lose." Dunham, at 261.

The terrain naturally favored the Tibetans. They knew the rugged mountains well, and the Chinese did not. Their bodies were built to thrive in thin air that exhausted invaders from the lowlands.[142] As in the Korean War, some PLA soldiers deserted at the first opportunity. The Chushi Gangdruk had to discern which self-proclaimed PLA deserters were sincere and which were PLA spies.[143]

To attempt to discredit the resistance, the PLA paid local bandits to pose as rebels and plunder villages. The Chushi Gangdruk worked hard to eliminate the false flag criminals.[144]

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136. Dunham, at 256. Derge is in Eastern Tibet. The prince had become a rebel leader after the CCP took all his property and killed his family.

137. McCarthy, at 136.

138. Li, Tibet in Agony, at 240-41.

139. Hick & Chogyam, at 105; Dunham, at 239.

140. *Id.* at 259.

141. McCarthy, at 163.

142. McCarthy, at 249.

143. *Id.* at 143, 147.

144. *Id.* at 146, 163; McGranahan, *Tibet's Cold War*, at 110; Andrugtsang, at 66-67.

The rebels faced other challenges. Although they were proficient with firearms and swords, most were not trained in guerilla warfare.[145] The CIA-trained leaders, once they returned to Tibet, could disseminate knowledge of tactics and operations, but these trainees were not able to reach or interact with all of the many resistance groups throughout Tibet.

In addition, the resistance was often short of arms and ammunition.[146] As discussed, Tibet before 1949 had lots of firearms, but many of these were flintlocks or matchlocks, far inferior to the bolt action and semi-automatic firearms that had been invented in the late nineteenth century. As for ammunition, many Tibetan families before 1949 had quantities sufficient for ordinary uses—such as hunting, or family and community defense from bandits—but not for protracted guerilla warfare with numerous battles lasting hours or days.

Sharing of information among the rebels remained a problem. The only newspapers were published in Lhasa, and they were run by collaborationists and the CCP. Monasteries were information nodes, but even among them, news could only spread by word of mouth, the distance that a man could walk or travel on horseback. "Tibet was a million-and-one informational cul-de-sacs." Dunham, at 251.

The volunteers were short of equipment for radio communication, which of course hampered coordination.[147] But this was a blessing in disguise. Secret Chinese military documents have revealed that the PLA had cracked the Tibetans' simple radio encryption codes.[148] Besides that, the PLA had spies inside the Tibetan resistance forces.[149]

The PLA's biggest advantage was manpower. The Tibetan population was relatively small, and so attrition, including from absence of medical care, gradually wore them down. In contrast, the PLA had no concern for soldiers' lives, and could easily replace dead soldiers from an inexhaustible supply back in China. McCarthy, at 228, 248; Conboy & Morrison, at 270 n.1 (estimating Tibet population at 3 million as of 1950). As the Tibetans said, if they killed one PLA soldier, ten would replace him. If they killed ten, a hundred would replace them. The overwhelming Chinese advantage was worsened by the Tibetans' ammunition shortage. They could not afford many shots that did not cause a casualty.[150]

In military history, there are many examples of fighters who were, man for man, superior to their opponents, but who were eventually defeated by sheer force of numbers—for example, the Romans against the barbarian tribes during the last century of the Western Roman Empire, New Zealand's Maori natives against the

145. McCarthy, at 163.
146. *Id.*
147. McCarthy, at 160.
148. Kieler, at 94-96.
149. *Id.* at 97-98.
150. Dunham, at 320-21.

invading British in the nineteenth century, or the Germans against the Soviets in World War II.[151]

Massive Chinese reinforcements began arriving in late 1958. By the end of the year, the situation in Eastern Tibet was mostly under control, even though some resistance there would continue for years.[152]

As local uprisings were crushed, the PLA would round up all the able-bodied surviving men, imprisoning them or sending them to a *laogai* slave labor camp. Their families would be permanently branded as part of the lowest class. "Prominent citizens mysteriously disappeared forever," even those who had cooperated with the communists.[153] "In Yulshui Tibetan Autonomous Prefecture, the slaughter created ghost towns and 'widows villages.' Young men escaped death by donning their sheepskin jackets inside out as camouflage and hiding among their flocks of sheep."[154]

Within Central Tibet, the Chushi Gangdruk still had the initiative. In the winter of 1958, their Lhoka force advanced to within 30 miles of Lhasa.[155] The presence of resistance fighters in Chamdo was making travel on the two highways from China to Lhasa impossible except with heavy military escort. The new airport at Lhasa helped the PLA overcome some of the problem.[156]

On November 8, 1958, the PLA's Tibet Military Command established a militia in Lhasa, consisting of Han whom Mao had exported to Tibet. Quickly, the militia was well organized and well armed.[157] At the PLA garrison next to Lhasa, a buildup of artillery gave the PLA the ability to hit any building in the city and to shut off access to the entire valley.[158]

1959, Lhasa, and the Momentous Day

As of early 1959, there were fifteen thousand Eastern Tibetans camped outside Lhasa. "They moved about the city fully armed and with trigger-happy eyes."[159] The only remaining Tibetan supporters of the PLA in Lhasa were the dwindling numbers of collaborationist aristocrats.[160] To the immense embarrassment of the PLA, two thousand Chushi Gangdruk attacked a three-thousand-man PLA garrison.

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151. The Maori defense of New Zealand was the longest and most effective resistance by any outnumbered indigenous group to invasion during the nineteenth century. The Maori, who had never seen firearms before Captain Cook landed, quickly became excellent marksmen and proficient in advanced battle tactics, including trench warfare. Whereas the stone age Aborigines of Australia had been rapidly defeated by the British invaders, the Maori fought so long and so effectively that the final peace settlement guaranteed them representation in the New Zealand parliament—in contrast to the Australian aborigines, who were not even given citizenship. *See* David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 233-36 (1992).

152. Li, Tibet in Agony, at 66-67.

153. *Id.* at 61-63.

154. *Id.* at 63.

155. Dunham, at 261.

156. Li, Tibet in Agony, at 78.

157. *Id.* at 75.

158. *Id.* at 78.

159. Dunham, at 261.

160. *Id.* at 261-62.

In a six-hour battle, the Tibetans battered the PLA, and made off with a trove of weaponry.[161] Gompo Tashi Andrugtsang then headed to Chamdo, to urge everyone "to form their own armed force to defend their native towns and villages," to block Chinese communications, and to "seize every opportunity for damaging and harassing the enemy war machine." Andrugtsang, at 93-94.

In early February, the CCP had announced that the Dalai Lama would visit Beijing. Surprised, the Dalai Lama and the Tibetans suspected a kidnapping plot. The Chinese had recently been kidnapping and then murdering lamas by inviting them to Chinese social events.[162] By March, the Lhasa population tripled, with pilgrims arriving for the greatest of the Tibetan Buddhist religious events, the Monlam Prayer Festival.[163]

The Dalai Lama was busy studying for the final exams for his *Geshe Lharampa* degree—the highest theological degree conferred in Tibet, equivalent to a Ph.D.[164] Chinese officials began demanding that the Dalai Lama attend a theater performance at the PLA camp outside Lhasa on the afternoon of March 10. According to the invitation, he could not bring his customary armed bodyguards, nor could he tell the public about the visit. The Dalai Lama told the Chinese that he accepted.[165]

The news spread rapidly in Lhasa when the Dalai Lama's officials announced special traffic restrictions for the road from Lhasa to the PLA camp.[166] On the morning of March 10, thousands of Tibetans spontaneously assembled around the Dalai Lama's Norbulingka palace, "armed and indifferent to personal safety."[167] About half the crowd were Khampas, Amdowas, or Goloks. "[F]or the first time, Lhasans and Eastern Tibetans were acting as one."[168] Lhasans who did not have firearms or swords brought their axes, picks, and shovels, or whatever else they could use as a weapon.[169]

The Chinese Communist Party refers to March 10, 1959, as the "Lhasa incident" or the "March 10 Incident of 1959." The Tibetan government-in-exile recognizes it as an official holiday, Tibetan Uprising Day. It was perhaps "The Most Momentous Day in Tibetan History."[170]

The people of Lhasa reclaimed their city. They blocked incoming roads with barricades.[171] For the first time since the PLA had arrived in 1951, the sovereignty in Lhasa was exercised by Tibetans. "The people were now the ruling body of Tibet."[172] They took over the National Assembly and the government.[173] What was

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161. *Id.* at 262-63.
162. Dunham, at 266.
163. The Monlam Prayer Festival was banned from 1960 to 1985, allowed to take place in 1986-89, banned again in 1990, and then "severely restricted ever since." Li, Tibet in Agony, at 338 n.23.
164. Dunham, at 266.
165. Li, Tibet in Agony, at 16-19.
166. Knaus, at 163.
167. Dunham, at 269; Li, Tibet in Agony, at 119-27.
168. Dunham, at 269.
169. *Id.* at 277.
170. Li, Tibet in Agony, at 135, 340.
171. Dunham, at 276.
172. Dunham, at 269-70.
173. Li, Tibet in Agony, at 131-34; Dunham, at 274.

left of the Tibetan army distributed arms to the people.[174] So did the Sera monastery, which had one of the biggest arsenals in Lhasa.[175]

The PLA began preparing for action. Scouts took readings for artillery targeting. When a large PLA force advanced on the city, the defenders gathered. But the PLA movement was just a feint, to discover the size of the Tibetan forces.[176]

In the Dalai Lama's view, "[h]and to hand, with fists or swords, one Tibetan would have been worth a dozen Chinese — recent experience in the eastern provinces had confirmed this old belief." But he knew that Lhasa could not defeat China's heavy artillery.[177]

On March 17, the Dalai Lama consulted the State Oracle. The oracle monk was brought forth, staggering under the weight of his ceremonial armor and 30-pound headdress. While other monks chanted or played the horns and drums, the oracle went into his dancing trance.

> His face was distorted, his eyes bulging, his breathing labored. He appeared to swell in stature, no longer struggling under the costume's weight. Suddenly he let out a piercing shriek.
>
> "Go! Go! Tonight!"
>
> He grabbed a pen and paper in a frenzy and jotted down a clear route map. Then his attendants rushed forward and relieved him of his enormous headdress. The deity departed from his body, and he collapsed onto the floor.

Li, Tibet in Agony, at 193-94; *see also* Dunham, at 282.

That afternoon, the communists lobbed a pair of mortar shells into the marsh next to Norbulingka palace — taken as a warning of the consequences of disobedience.[178] The Dalai Lama escaped during the night of March 17.[179] Very few people in Lhasa knew. Disguised as a soldier, with a rifle and without his glasses the Dalai Lama was escorted by Chushi Gangdruk and the Tibetan army, and also "protected by unseen resistance bands covering their flanks as they passed through the mountains."[180]

Shortly before entering India, the Dalai Lama repudiated the Seventeen Point Agreement, which the Chinese had violated, and which was the sole legal pretext for their presence in Central Tibet. He apologized for the Tibetan government's issuance of anti–Chushi Gangdruk statements, which he explained were compelled and dictated by the Chinese. The Dalai Lama promoted Gompo Tashi, in absentia, to General (*Dzasak*) in the Tibetan army. The promotion letter stated: "the present situation calls for a continuance of your brave struggle with the same determination

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174. *Id.* at 275-76.
175. *Id.* at 293.
176. *Id.* at 282-83.
177. *Id.* at 278-79.
178. Li, Tibet in Agony, at 194-99.
179. The State Oracle was the thirteenth Nechung Oracle, and was believed to channel the Dalai Lama's protector, the spirit Dorje Drakden. Li, Tibet in Agony, at 193.
180. Knaus, at 165; Li, Tibet in Agony, at 199-230, 371 n.21.

and courage."[181] Necessarily, the promotion recognized the Chushi Gangdruk as an army of the legitimate government of Tibet.[182]

The communists did not discover that the Dalai Lama had escaped until March 19. They began claiming that the Dalai Lama had not chosen to flee, but instead had been abducted by imperialists and their accomplices.[183] Later, in 1995 when the Dalai Lama's campaign for Tibetan freedom was earning global attention, the CCP started putting out a story that Mao had intentionally allowed the Dalai Lama to escape. The tale has many factual weaknesses.[184]

During the night of March 20, the PLA erected a barrier preventing movement between the eastern and western sides of Lhasa. Their attack began in the morning, supported by massive artillery bombardment. After two days of fierce building-to-building fighting, the PLA prevailed on the third morning as the defenders ran out of food and ammunition. Lhasa was in ruins, but the Dalai Lama was gone.[185]

The PLA leadership brazenly lied to its troops. For example, the Tibetans were said to be "callous murderers" who tortured and killed people for the slightest infraction (a description more aptly applied to the CCP). Supposedly, the Tibetans slaughtered the laboring masses, and then used their skulls for rice bowls, their skins for drums, and female femurs for horns.[186] Three decades later, at Tiananmen Square in Beijing, the PLA soldiers would be fed a different set of lies about the student protesters. And since the CCP controlled the media, most soldiers had no means of learning the truth. Timothy Brook, Quelling the People: The Military Suppression of the Beijing Democracy Movement 114-15 (1998).

The PLA had grown increasingly proficient at counterinsurgency. They brought in non-Han cavalry, who as horsemen were far superior to the often inept Hans.[187] The PLA improved at deploying mobile artillery.[188] In places where it was not possible to deploy artillery, bombers were employed.[189] When weather or terrain obstructed bombers, scout planes could still report the movement of resistance groups.[190] Most importantly, the Chinese had spent the previous decade building a strong road and airport network in Central and Eastern Tibet. Although the Tibetans could and did cause trouble for Chinese supply convoys, the PLA forces in the field never ran out supplies.[191]

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181. Knaus, at 166; Dunham, at 302-03; Andrugtsang, at 107 (copy of the letter, in Tibetan).

182. In the 1990s, the Dalai Lama reiterated his position that Tibetan resistance has been legitimate: "If there is a clear indication that there is no alternative to violence, then violence is permissible." In the Dalai Lama's understanding of Buddhism, motivation and results are more important than method. Therefore, violence is justifiable when motivated by compassion if it leads to good results. Knaus, at 313.

183. *Chou Insists Rebels Seized Dalai Lama: Hopes He Will Return*, N.Y. Times, Apr. 19, 1959.

184. *See* Li, Tibet in Agony, at 218-25.

185. *Id.* at 259-90; Dunham, at 292-98.

186. Li, Tibet in Agony, at 80.

187. McCarthy, at 231, 249.

188. *Id.* at 160, 248.

189. Kieler, at 105; Dunham, at 257.

190. *Id.*; McCarthy, at 160; Li, Tibet in Agony, at 79.

191. Conboy & Morrison, at 99.

An April 1959 PLA counteroffensive in Lhoka captured several strategic towns. The Chushi Gangdruk in the region, exhausted and running out of supplies, took the Dalai Lama's advice and used their last chance to escape to India.[192]

By mid-1959, control of the tempo of warfare had shifted to the PLA. The rebels, rather than being able to attack at times and places of their choosing, were trying to outrun PLA pursuit and were having to fight several engagements per week to do so. Eventually, many of them escaped to Nepal or India. They also guided other Tibetans past Chinese lines, and to the border.[193] Cumulatively, eighty thousand Tibetans escaped to India.[194]

As the PLA advantages grew, the rebels should have dispersed into smaller groups, which would have been harder to detect. If the fighting men had split into small guerilla bands, they could have kept operating for a long time. But the men would not abandon their defenseless families, and they needed to keep their herds with them for food. So the resistance camps were large and moved slowly.[195]

Further from the border, hundreds of other resistance fighters, with no opportunity to escape, kept up the fight. By this time, they were no longer attempting to liberate territory, but simply to conduct raids on enemy forces.[196] The Goloks, too far north to flee to another country, continued their resistance.[197]

By the fall of 1959, most of Tibet was back under PLA control, except for parts of Kham.[198] There, the Khampas continued to disrupt Chinese conveys and their effort allowed "untold thousands of Tibetans to make their way safely to the border—a major contribution that has often been overlooked by Western historians."[199] As for Central Tibet, the resistance in outlying areas continued until 1962.[200]

Tired of armed Tibetans, the Chinese forbade the Tibetan men's tradition of wearing swords. Dawa Norbu, China's Tibet Policy 131 (2001). About half of the men were put into prisons and worked to death.[201] The communization of Tibetan culture and religion, already well underway in Eastern Tibet, was fully inflicted on Central Tibet. The policy continues to this day. *See* Tibet Policy Institute, Cultural Genocide in Tibet: A Report (2017).

In April 1959, the Tibetans set up a government in exile, at Dharamasala, India, which continues to this day.[202] The government is democratic, and provides education from kindergarten through high school.[203]

192. Dunham, at 322-23.
193. McCarthy, at 228-33.
194. *Chronology in* Resistance and Reform in Tibet, at xix.
195. McCarthy, at 168-70, 228-29; Knaus, at 225-26, 321-22.
196. *Id.* at 218-20; Dunham, at 324-25.
197. McCarthy, at 218.
198. Dunham, at 340.
199. *Id.* at 340-41.
200. Li, Tibet in Agony, at 314.
201. Chang & Halliday, at 453-56.
202. The government in exile is for all Tibetans, regardless of province of origin.
203. Li, Tibet in Agony, at 310.

The CCP's Political Commissar for Tibet, General Tan Guansen, might have thought he had earned a lifetime of respect from Mao's regime. But during the Cultural Revolution that began in 1966, *infra*, he would be purged as a supposed "capitalist roader."[204]

Resistance from Nepal

The Tibetan freedom fighters were allowed to set up in Mustang, a thinly populated district in Nepal, surrounded on three sides by Tibet, populated primarily by Tibetans, and run by a friendly and mostly autonomous local king who was Tibetan. The fighters who had retreated to India in 1959 were joined by other fighters coming directly to Mustang from Tibet. Over the next several years, they caused so much trouble on the highway from Kham to Lhasa that the Chinese had to divert traffic to the other highway 180 miles north.[205]

In 1961, the Mustang fighters scored the biggest anti-communist intelligence coup since the Korean War, capturing over 1,600 classified PLA documents from a PLA commander. The documents provided much insight into the Chinese PLA and government, including secret codes and Sino-Soviet relations. The documents noted that the famine in China caused by the Great Leap Forward, *infra*, was demoralizing PLA troops. The communist militia was acknowledged to be of almost no value militarily, and some of the militia was joining uprisings in China. Some of the captured materials were later used as evidence by the Tibetan government in exile in its international law protests against Chinese atrocities in Tibet.[206]

Through 1963, the Mustang fighters helped five thousand Tibetans escape to India, Nepal, Bhutan, or Sikkim.[207] The last CIA airdrop into Tibet was in 1965 and Camp Hale was shut down.[208] However, other CIA support for the Mustang fighters continued.[209]

The governments of Nepal, India, and East Pakistan (a part of Pakistan near southeast Nepal) were pretending not to know about CIA support for Mustang, so the need to maintain secrecy was paramount. Accordingly, the CIA could not send a case officer to observe the situation in Mustang, since a stranger would be readily observed. As of 1960, only one Westerner had ever entered Mustang.[210] Thus, the CIA was not able to monitor how its donations were being spent. Unfortunately, the first Mustang general, Baba Gen Yeshi, who was in charge of the rebels, stole a great deal of the resources.[211]

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204. *Id.* at 314.

205. Knaus, at 246-47; Dunham, at 374.

206. *Id.* at 355; Knaus, at 247; McCarthy, at 236; McGranahan, *Tibet's Cold War*, at 119-20. The documents were released in 1963 and published in 1966. The Politics of the Chinese Red Army: A Translation of the Bulletin of the Activities of the People's Liberation Army (J. Chester Cheng ed. 1966).

207. Andrugtsang, at 110.

208. Dunham, at 374.

209. *Id.*

210. Conboy & Morrison, at 146.

211. Dunham, at 332-34.

U.S. financial assistance ended after 1969; the Mustang guerillas were clearly not able to meet the CIA's metric that they establish operational bases within Tibet.[212] Although the Mustang resistance persisted even without CIA backing, a few years later the Nepali central government began tilting toward China for support against India, and so insisted that the Tibet venture be ended. The Mustang fighters finally shut down in 1974.[213]

The final major combat mission of the Tibetan exiles was to fight a different genocide. Starting in 1962, the government of India had created a Special Frontier Force, consisting of three thousand Tibetan exiles living in India; the Chushi Gangdruk in Nepal regarded them as an Indian branch. India used the Tibetans for scouting near the India-Tibet border.[214] After the British had left their Indian colony in 1947, the Muslim majority portions of India were partitioned into the new nation of Pakistan, which consisted of West Pakistan and East Pakistan. In 1970-71, West Pakistan attacked East Pakistan, to put down an incipient independence movement and to mass murder the Bengali people.[215]

After East Pakistan was invaded, the Tibetans were sent into the Chittagong Hill Tracts of East Pakistan. For deniability, their American and British rifles were replaced with Bulgarian AK-47s. The Tibetan guerillas were "unstoppable." There, they halted the West Pakistani army's advance, and saved the royal family of the Chakmas, the Tibeto-Burman ethnic group who live in the area. Tying up West Pakistani forces, the Tibetans helped set the stage for a direct invasion by the Indian army three weeks later, ending the genocide. When the West Pakistan army tried to retreat via Burma, the Tibetans blocked them. With West Pakistan defeated, East Pakistan became the new, independent nation of Bangladesh. The Tibetans "paraded through Chittagong to ecstatic Bangladeshi masses."[216]

Genocide

Mao's stated position had always been that the Tibet uprisings were a good thing: they provided a pretext for faster imposition of full communism, and they offered the PLA combat training under challenging conditions.[217] But not all of the CCP élite shared Mao's bravado.

For years Chinese premier Zhou Enlai (Chou Enlai) had been attempting to deal with the diplomatic problems that the Chinese colonization of Tibet was causing with public opinion in India and (in private) with Nehru's government there. After the Lhasa uprising and the Dalai Lama's escape, Tibet's plight finally garnered worldwide attention. No recent communist event was more broadly condemned in South and Southeast Asia. Conboy & Morrison, at 96; Knaus, at 181 (Chinese actions universally condemned in non-communist press).

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212. Knaus, at 296-97.

213. Dunham, at 382; McGranahan, *Tibet's Cold War*, at 122-24; Conboy & Morrison, at 145-253 (detailed history of Tibetan exile fighters).

214. Knaus, at 270-77.

215. Rummel, Death by Government, ch. 13.

216. Conboy & Morrison, at 242-45; McGranahan, *Tibet's Cold War*, at 123-24; Knaus, at 305-06.

217. *See, e.g.*, Li, Tibet in Agony, at 81, 165-67.

The suppression of the Tibetans was blatant and vicious imperialism. It undermined Mao's pretensions to be the anti-imperialist leader of the Third World, the supposed global hero of national liberation movements. Once the truth about Tibet was exposed to the world, many people realized that Maoism as applied was little different from Hitlerism—including in terms of genocide.

Because of the new global awareness engendered by the March 10 uprising and the escape of the Dalai Lama, the International Commission of Jurists began an inquiry into genocide in Tibet. The Commission concluded that the evidence showed a prima facie case for Chinese government acts in violation of the Convention on the Prevention and Punishment of the Crime of Genocide. International Commission of Jurists, *The Question of Tibet and the Rule of Law in* Genocide in Tibet at 34, 98.[218] According to the Tibetan government in exile, the Mao regime slayed 1.2 million Tibetans, including those killed in the 1966-76 Cultural Revolution, *infra.*[219]

Accomplishments of the Resistance

What did the Tibetan resistance accomplish? First, it helped the Dalai Lama escape to India; he has traveled the world and informed the people of the world of Tibet's right to self-government.[220] Had the Dalai Lama been captured by the Chinese (as the Panchen Lama was), the Tibetans and their cause would never have been as globally visible as they did in fact become.[221]

It was not just the Dalai Lama who was saved by the freedom fighters. "Because of the efforts by the resistance forces, many tens of thousands of Tibetans were able to escape their Chinese executioners." McCarthy, at vi. Today, most Tibetan refugees remain in the adjacent nations of India, Nepal, or Bhutan, to which they originally fled, while many others in the Tibetan diaspora have moved to North America, Europe, or Oceania, sharing their religion and educating the public about Tibetan rights. Whereas the outside world knew very little about Tibet before 1949, today there are many scholars of Tibetan Studies and many lay persons who have learned about Tibetan culture.

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218. The Genocide Convention treats only some mass murders by government as genocide. Murders based on religion, race, or ethnicity are covered, whereas murders based on class or ideology are not. The distinction was put into the Convention at the insistence of the Soviet Union. *See* online Ch. 18.D. Thus, most of the CCP's mass murders in China were not genocide under international law. The murders of Tibetans, however, were in part aimed at exterminating the Buddhist religion, and thus were illegal acts under the Genocide Convention, which all nations that ratified the Convention had (and have) a legal obligation to prevent and punish.

219. Dunham, at 372.

220. Although the Tibetan government in exile states that Tibet has never been part of China, the government has offered to compromise, with Tibet remaining in the PRC if Tibetans could have genuine autonomy, rather than the current sham of "autonomous" regions with no actual self-government.

221. According to the Dalai Lama, the international attention focused on Tibet by the resistance movement and by the Dalai Lama's escape deterred the Chinese from executing the Panchen Lama, who had refused the Chinese order to replace the Dalai Lama as head of Tibet's government. Knaus, at 312.

Within Tibet, the Tibetan Buddhist religion is being perverted, like all religions under CCP control, into an empty shell where compassion for sentient beings is replaced with submission to the will of the atheistic communist party. *See* Tibet Policy Institute, Cultural Genocide in Tibet: A Report (2017); U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, *China (Includes Tibet, Xinjiang, Hong Kong, and Macau)*, *in* 2018 Report on International Religious Freedom (2019); Eleanor Albert, *Religion in China*, Council on For. Rel. backgrounder, Oct. 11, 2018 ("Tibetan Buddhists face the highest levels of religious persecution in China, along with Uighur Muslims and Falun Gong members."); 中國靈魂爭奪戰：習近平治下的宗教復興、壓制和抵抗 [The battle for Chinese souls: religious revival, suppression and resistance under Xi Jinping], Freedom House (2017) (in Chinese).

But in the diaspora made possible by the resistance, Tibetan Buddhism thrives. The "great three" Lhasa monasteries of Sera, Drepung, and Ganden have been established anew in southern India. Li, Tibet in Agony, at 310. "Tibetan Buddhism moved onto the worldwide stage after the Chinese invasion of Tibet in 1959, and the subsequent mass migration of Tibetan masters to India." United States, Buddhism in, *in* Encyclopedia of Buddhism, at 530; *see also* Jeffrey Paine, Re-Enchantment: Tibetan Buddhism Comes to the West (2004) (describing growing Western interest in Tibetan Buddhism, beginning in the late 1960s).

Importantly, the Tibetan resistance set a marker so that all future generations may know that China took Tibet by violence and not by consent. As the Dalai Lama wrote:

> Intergenerational awareness of what took place in the Land of Snows may generally have grown, but what may not be so well known or appreciated is the fact that there was an armed resistance. In Kham, Eastern Tibet, in particular, where people retained warrior-like qualities of old, groups of men banded together to oppose the Chinese by force. These guerillas riding on horseback and often equipped with outdated weapons, put up a good fight. They expressed their loyalty and love for Tibet with indomitable courage. And although they were ultimately unsuccessful in preventing the Chinese from overwhelming Tibet, they let the so-called People's Liberation Army know what the majority of Tibetans felt about their presence.
>
> Although I believe the Tibetan struggle can only be won by a long-term approach and peaceful means, I have always admired these freedom fighters for their unflinching courage and determination.

The Dalai Lama, Foreword, in Dunham, at xi. Likewise, in a preface to Gompo Tashi Andrugtsang's autobiography, the Dalai Lama praised his sacrifices of "his wealth and his life for the Dharma and the national freedom of Tibet. Despite the insuperable and awesome odds that China posed, Gompo Tashi was undaunted. . . . I pray that the forces of his meritorious deeds—his noble act of sincerely and perseveringly struggling for the Dharma, the nation and the people of Tibet allow him to reach the highest level of attainment." Dalai Lama, Preface, *in* Andrugstang, at 6. The Dalai Lama has encouraged all Tibetan freedom fighters to record their stories, so that new generations will learn from them.

Today, Tibetan independence seems impossible. The same was true in 1983 for the many captive nations trapped in what Ronald Reagan called the Soviet Union's "evil empire." Less than a decade later, 14 sovereign nations had broken the fetters

of Soviet imperialism.[222] On the other hand, the current Chinese government is strongly encouraging Han immigration to Tibet and Xinjiang, to change the population balance. A similar strategy succeeded in Manchuria and Inner Mongolia, where Manchus and Mongols are now very much the minority. Perhaps one day a free vote of the residents of Tibet might even support keeping Tibet in China. But that day has not come, nor has free voting anywhere in the PRC.

Further reading: Jane Ardley, The Tibetan Independence Movement: Political, Religious, and Gandhian Perspectives (2002); George N. Patterson, Tragic Destiny: The Khamba Rebellion in Tibet (2008) (autobiography of a Scotsman who aided the resistance in Eastern Tibet); March 10th Memorial (website commemorating the 1959 uprising); Carole McGranahan, Tashi Dhondup, Dorjee Damdul & Tashi Gelek, Resistance and Unity: The Chinese Invasion, Makchi Shangri Lhagyal, and a History of Tibet (1947-1959) (2019) (biography of resistance leader, and detailed descriptions of the many revolts); Robert Ford, Captured in Tibet (1990) (1957) (English radio expert who worked for the Tibetan government in 1948-50, and then was captured by the Chinese and held prisoner for five years); Michael C. van Walt van Praag, The Status of Tibet: History, Rights, and Prospects in International Law (1987) (including an appendix of the full text of Tibet's international treaties and agreements); Chanakya Sen (pseud.), Tibet Disappears: A Documentary History of Tibet's International Status, the Great Rebellion and Its Aftermath (1960) (including reprints of debates about Tibet in India's legislature and press); Birgit van de Wijer, Tibet's Forgotten Heroes: The Story of Tibet's Armed Resistance Against China (2012) (includes oral histories of 48 freedom fighters from Mustang).

g. Destalinization, Destabilization, and the Hundred Flowers

Mao and His Army

Despite all the rebellions in Tibet and in China itself, Mao said he was not worried. He frankly told the Politburo, the highest body of the CCP, that the party was engaged in "a war on food producers—as well as on food consumers."[223] He warned that the food confiscation could result in riots in a hundred thousand villages. Mao compared his great requisitions to what the Japanese had done in Manchuria (northeastern China) after they conquered it in 1931. The Manchurian peasants were angry, but the Japanese army kept the Manchurians under its thumb and kept taking their crops until the Japanese were expelled by the Soviet army in 1945. Similarly, argued Mao, the Chinese army could keep the Chinese people

222. Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

223. Formally speaking, power in the CCP one-party state was held by the CCP Central Committee, which passed its power to the Politburo (political bureau), which passed its power to the Politburo Standing Committee, which in turn passed most of its power to the Chairman of the CCP Central Committee, Chairman Mao. Li Cheng-Chung, The Question of Human Rights in China Mainland 14 (1979) (hereinafter Li, Human Rights). As discussed below, part of Mao's strategy during the 1966-76 Cultural Revolution was to shift power from the Politburo to his handpicked Central Cultural Revolution Group.

under control.[224] In January 1957, he mused that "even if several counties and provinces were occupied, with rebel troops all the way up to West Chang'an Avenue in Beijing, would the country collapse? Not as long as the army is reliable."[225]

But would the military, formally known as the "People's Liberation Army," stay reliable? Mao had to manage the issue throughout his reign. PLA recruits were carefully vetted for ideology. "Great care was taken to ensure that only the politically reliable were allowed to carry a gun." Fang Zhu, Gun Barrel Politics: Party-Army Relations in Mao's China 19-20 (2018).

The backbone of the PLA was the Group Armies (*jituanjun*), which were capable of being moved anywhere in the nation. To prevent a coup, these troops could not leave their region without express permission from the Party Center. Movements of these units within their region did not require permission, nor did the smaller movements of more local forces. *Id.* at 166. The most reliable units were stationed around Beijing, while all other units were forbidden to be armed in Beijing. Top generals were not supposed to travel without Mao's advance permission. He was surrounded at all times by a large Praetorian Guard, and when he traveled, it was usually in a special armor-plated train.[226]

The apex of the CCP lived in or near what had once been the emperor's grounds in Beijing. Within the heavily guarded Zhongnanhai (Chung Nan Hai) compound, Mao occupied a former imperial palace. The compound had concentric circles of armed guards, with a special group guarding Mao at the center. The palace and compound grounds were surrounded by the Central Guard Regiment, consisting of 35,000 to 40,000 ultra-loyal soldiers.[227]

Mao moved around constantly and spent lots of time away from Beijing. His movements and locations were kept secret from all but a few, and even they were notified only at the last minute. When he moved, all train traffic along the line was halted, leading to national train disruptions that lasted a week. The journey was protected by guards stationed every 50 meters. At the train stations, everyone was cleared out and replaced by security personnel. To make their appearance more pleasing, the security dressed as vendors. Since Mao's schedule was erratic, the guards might have to stand duty for two weeks before Mao's train eventually passed. When traveling, Mao stayed at one of his 50 luxurious and heavily fortified villas around China.[228]

For most of his reign Mao was a master tactician at army and CCP factional politics, maneuvering to keep the balance of power favorable to him. *See* Zhu. Mao was a "marvelous actor." Li, Private Life of Chairman Mao, at 343. "He loved the traditional stories of strategy and deception. He was an expert in when to wait, feint, and withdraw, and how to attack obliquely." Nathan, at ix.

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224. Chang & Halliday, at 393.

225. Dikötter, Tragedy, at 285. Chang'an Avenue (Avenue of Eternal Peace) is a large east-west boulevard in Beijing. It separates the Tiananmen Gate from Tiananmen Square.

226. Li, Private Life of Chairman Mao, at 128; Chang & Halliday, at 505-11, 556-58. The Praetorian Guard was the portion of the army around the Roman emperor, under his immediate control. *See* Guy de la Bédoyère, Praetorian: The Rise and Fall of Rome's Imperial Bodyguard (2017).

227. Li, Private Life of Chairman Mao, at 76-78, 344; Zhu, at 115.

228. Li, Private Life of Chairman Mao, at 128-33.

Destalinization Destabilizes Mao

Political trends in the rest of the communist world worried Mao. His model was Soviet tyrant Josef Stalin, who murdered tens of millions. *See* R.J. Rummel, Lethal Politics: Soviet Genocide and Mass Murder Since 1917 (1990) (about 61 million murdered by the Soviet regime from 1917 to 1987, with the peak under Stalin). Stalin died in 1953, and then in February 1956, Stalin's successor, Nikita Khrushchev, denounced Stalin in a sensational and widely read speech. Khrushchev said what everyone knew but had been afraid to say: forced collectivization of agriculture in the USSR had been a catastrophe; Stalin had created "a cult of personality" around himself; his erratic and narcissistic dictatorship had gravely injured the people and the communist party. *Cf.* Frank Dikötter, How to Be a Dictator: The Cult of Personality in the Twentieth Century (2019) (detailing how dictators create personality cults to create an illusion of popularity, and thereby to terrify opponents of dictatorship from revealing their true feelings to each other).

Under Khrushchev, the Soviet Union remained totalitarian, but some controls on the economy were loosened. While Khrushchev demanded to be obeyed and feared, he did not insist on being worshipped. Many prisoners in the slave labor *gulags* were released. The Soviet Union was "destalinized." At times, Khrushchev spoke in favor of "peaceful coexistence" with the West.

The reverberations were felt in China. Even in the highest ranks of the party, there were leaders who were increasingly willing to suggest that the food requisitions and exports were going too far, or that the military construction buildup should be slowed down and better organized. More resistance was appearing nationally.

In May 1956, Mao listened to the criticism and changed course. Or at least he appeared to. He announced, "Let a hundred flowers bloom, let a hundred schools of thought contend." The government asked for denunciation of communist party errors. After a few months of repeated urging to speak up, many people began to do so.[229] Mao was deeply hurt to find out how unpopular he was. After students in Beijing created a "Democracy Wall" with anti-communist slogans in May 1957, strikes and student protests intensified. In a secret instruction article for party leaders, Mao urged continued encouragement of dissent, so that the "rightists" could later be "rounded up and annihilated."[230]

The temporary free speech of Hundred Flowers months led to revolts. Students demonstrated, went on strike, and beat up communist officials. "[I]n every part of the nation except Tibet and Sinkiang," which were having their own ethnic revolts, students "exploded into violent defiance and enjoyed delirious freedom of speech."[231] They spread news about the 1956 Hungarian Uprising against communism, which had restored freedom to Hungary for 12 days until being crushed by a

229. Chu, at 169.

230. Dikötter, Tragedy, at 289-91; Chang & Halliday, at 417-23.

231. Chu, at 173.

Soviet invasion.[232] Some Chinese students tried to organize a revolution, predicting that the peasants "will rise all over the country if they have weapons and leaders."[233]

The peasants had neither, but some revolted anyway. In 1956 in Henan (Honan, central China) province, ten thousand peasants used farm implements such as hoes, scythes, and poles to take over the county seat, and then two more counties. *Cf. Joel* 13:10 ("Beat your plowshares into swords, and your pruning hooks into spears; let the weak say, 'I am a warrior.'"). It took a hundred thousand troops two months to suppress them. Overall, 90,000 peasants participated in 320 riots against the CCP.[234] The communist press admitted that there were at least 27 anti-communist rebel organizations nationwide.[235] In Shandong (Shantung) province, on the northeast coast, villagers attacked locations where the government was storing confiscated food, and they killed CCP cadres.[236]

Hundred Flowers had worked well in tricking peaceful and nonpeaceful dissidents into exposing themselves. A new Anti-Rightist Movement inflicted mass arrests and executions. Starting in June 1957, "[r]ioting students were subdued by troops, secret police, and party goons, and their leaders condemned to slave labor or execution."[237] All elementary and secondary schools were ordered to declare 5 to 10 percent of their staff to be "rightists," whether or not there were sufficient people who had spoken up during the Hundred Flowers period. About half a million people were swept up, including sincere party loyalists..[238]

Hundred Flowers and the Anti-Rightist Movement identified and removed people who had spread counterrevolutionary ideas, such as freedom of speech and antislavery. The leader of the persecutions in the Anti-Rightist Movement was CCP Secretary General Deng Xiaoping (Teng Hsiao-ping), a veteran commander of communist forces during the revolution and the Sino-Japanese War.[239]

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232. *Id.* at 168. The main phase of the Hungarian Revolution lasted from October 23 to November 3, 1956, when it was suppressed by a Soviet Red Army invasion. Guerilla warfare continued afterward. The uprising allowed 200,000 Hungarians to escape to neighboring Austria. *See* Victor Sebestyen, Twelve Days: The Story of the 1956 Hungarian Revolution (2006) (best overview); Erwin Schmidl & László Ritter, The Hungarian Revolution 1956 (2006) (military history); John P.C. Matthews, Explosion: The Hungarian Revolution of 1956 (2007) (by Radio Free Europe reporter who was on scene); Paul Lendvai, One Day That Shook the Communist World: The 1956 Hungarian Uprising and Its Legacy (Ann Major trans. 2008) (by Hungarian journalist who was on scene); Sandor Kopacsi, In the Name of the Working Class: The Inside Story of the Hungarian Revolution (Daniel & Judy Stoffman trans. 1987) (1979) (by Budapest police chief who joined the uprising and served as deputy commander of the revolutionary militia); Csaba Bekes, The 1956 Hungarian Revolution: A History in Documents (2002) (Soviet, Hungarian, and U.S. documents not previously available in English); Zoltan Virag, Factors that Contributed to the Success of the Revolutionary Forces in the Early Phase of the Hungarian Revolution of 1956, M.A. thesis, Defense Technical Info. Ctr. (2011).

233. Chu, at 172.

234. Chow, at 305; Chu, at 175.

235. *Id.* at 175.

236. Chow, at 306.

237. Chu, at 176.

238. Rummel, China's Bloody Century, at 214, 242; Dikötter, Tragedy, at 291-96

239. Spence, Mao Zedong, at 120.

As intellectual life was strangled, college and high school students took refuge in surreptitiously reading the Chinese classics, notwithstanding the Anti-Ancient campaign and the Anti-Ancient-Love-Modern purge.[240]

Legalism and Lawlessness

During Hundred Flowers, a professor's ten-thousand-word letter to Mao had been published in the *Yangtze Daily*. The letter complained about the persecution of intellectuals and referred to a notorious emperor who had buried alive 460 scholars.[241] In 1958, Mao responded in a speech at a CCP assembly: "What's so unusual about Emperor Shih Huang of the Chin Dynasty? He had buried alive 460 scholars only, but we have buried alive 46,000 scholars. They say we are behaving worse than Emperor Shih Huang of the Chin Dynasty. That's definitely not correct. We are 100 times ahead of Emperor Shih of the Chin Dynasty in repression of counter-revolutionary scholars."[242]

Mao liked to compare himself to the ruthless Emperor Shih Huang, and Mao was not incorrect in boasting about exceeding the emperor. Indeed, although Mao was a Marxist-Leninist-Stalinist, much of his philosophy came from the reign of Shih Huang. That philosophy is known as Legalism. As an 18-year-old student, Mao had written an essay defying the long-standing consensus against Emperor Shih; Mao extolled the emperor's most notorious advisor, Lord Shang, and bemoaned "the stupidity of the people of our country" for failing to accept Lord Shang's totalitarian program. Mao's Road to Power: Revolutionary Writings, 1912-49: vol. 1: Pre-Marxist Period, 1912-20, at 5-6 (Stuart R. Schram ed. 1992) ("Essay on How Shang Yang Established Confidence by the Moving of the Pole," June 1912).

As Mao and other educated Chinese of his time knew, in 246 B.C., Ying Zheng became king of Chin (pinyin *Qin*), one of several kingdoms in the region. The militaristic, totalitarian Chin kingdom had long been gobbling up other kingdoms, and King Ying conquered the last holdout in 221 B.C. This marked the end of the Warring States Period (475-221 B.C.), which was regarded as an unfortunate period of chaos, with inferior rulers compared to more ancient times. Upon completion of the conquests, Ying dubbed himself Shih Huang, literally

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240. Chu, at 180-81.

241. To prevent scholars from contrasting the emperor's reign unfavorably with previous rulers, in 213 B.C. the emperor ordered the burning of most books, especially the *Book of Songs* (a/k/a *Book of Poetry*, a collection of ancient poetry) and the *Classic of History* (a collection of government and political documents, essays, and speeches). Clements, at 131-32. *See also* Sima Qian, *Records of the Grand Historian* (ca. 94 B.C.); Jens Østergård Petersen, *Which Books Did the First Emperor of Ch'in Burn? On the Meaning of Pai Chia in Early Chinese Sources*, 43 J. Oriental Stud. 1 (1995).

The burying incident took place in 212 B.C. Although Mao and everyone else during Mao's reign thought that the 460 men had been buried alive because they were Confucian scholars, newer scholarship suggests that the 460 were court scientists for the emperor, who killed them because they had failed in their project to discover the secret of immortality so that the emperor could reign forever. *See* Clements, at 133-35; Nicolas Zuffery, *Le Premier Empereur et les Lettrés: L'exécution de 212 av. J.-C.*, 16 Etudes Chinoises 59 (1998).

242. Li, Human Rights, at 12.

"First Emperor"—above mere kings. Foreigners began to call the large, unified realm "China." Jonathan Clements, The First Emperor of China 199 (2015).[243] The First Emperor reigned until his death in 210 B.C., which was followed by a succession crisis, and then the replacement of the Chin Dynasty by the Han Dynasty in 202 B.C.

Under the First Emperor, "weapons were confiscated" and melted into statues. *Id.* at 80. We do not know how much democide he perpetrated, but we do know that from 221 to 207 B.C., the population of China decreased from 20 million to 10 million.[244]

The governing political philosophy of the short-lived Chin/Qin Dynasty was Legalism. With roots hundreds of years old, Legalism was perfected in the writings of Mao's favorite philosopher, Han Feizi. *See* Han Feizi: Basic Writings (Burton Watson trans. 2003); Chu, at 225.[245] The Han Feizi "condemns counter-revolution, glorifies war and is utterly totalitarian." *Id.*

> Legalism reduced its adherents to animals. . . . [T]o the average inhabitant of Qin, life was a constant round of compulsory government service, timid interactions with neighbours who could turn one in, and constant fear of bucking the status quo. It is perhaps no surprise that one of the First Emperor's greatest modern admirers was Chairman Mao, who imposed similarly restrictive conditions on the populace of modern China.

Clements, at 91. Reporting on suspected crimes, or anything suspicious, such as a sudden increase in wealth, was mandatory. Spouses were required to inform on each other. *Id.* at 93. Slave labor was a typical punishment for crimes, and judges who failed to convict and enslave put their own lives at risk. *Id.* at 94-97. All the same was true under Mao.

Mao also followed the Han Feizi's advice for how an emperor should behave. The Legalist ruler

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243. "After long debate, Ying Zheng's advisers decided to combine a series of old terms for the all-highest, including huang, the old term for the rulers of the world, and di, an archaic word for the supreme being of a departed dynasty. The final term, huangdi, means Emperor in Chinese to this day." In pinyin, he was *Qin Shi Huangdi* (Wales-Giles, *Chin Shih Huang*). Clements, at 76-77. Literally, China First Emperor.

Today, the First Emperor is best known for his necropolis, constructed by slave labor and comprising a vast number of terracotta figures. Shortly after the emperor's death, many of the swords and other weapons of the terracotta soldiers were looted, for use in the ongoing battles among rival claimants to the throne. *Id.* at 151 (noting that the weapons looting was necessitated by the emperor's earlier confiscation of weapons from the living). The necropolis was forgotten, then rediscovered in 1974. The First Emperor also used his slave labor machine, consisting of convicted criminals, to build earthen mounds linking the several anti-barbarian walls that had been constructed by different kingdoms. This was the first iteration of the Great Wall of China. The Great Wall as we know it today was constructed much later, in the Ming Dynasty

244. Rummel, Death by Government, at 51.

245. The authoritative Chinese edition of the complete Han Feizi is Chen Qiyou, Han Feizi jishi (2 vols., Shanghai, 1958). The year of publication is notable, since by 1958, publication of anything not in accord with the communist party line was not allowed.

> withdraws, deliberately shunning contacts with his subordinates that might breed familiarity, dwelling deep within his palace, concealing his true motives and desires, and surrounding himself with an aura of mystery and inscrutability. . . . [H]e sits, far removed . . . at his desk in the innermost office and quietly initials things. . . . The ruler, to succeed, must eschew all impulses toward mercy and affection and be guided solely by enlightened self-interest. Even his own friends and relations, his own wife and children, Han Feizi warned, are not to be trusted, since all for one reason or another stand to profit from his death. He must be constantly alert, constantly on guard against deception from all quarters, trust no one and never reveal[] his inner thoughts and desires.

Burton Watson, *Introduction*, in Han Feizi, at 10-11. The ruler should have "the people kept in a state of ignorance and awe." *Id.* at 7.

Pursuant to the Han Feizi, the First Emperor "built magnificent palaces and surrounded himself with the appropriate air of aloofness and mystery." *Id.* at 11. He was so mistrustful that he coerced Han Feizi to commit suicide. *Id.* at 3-4. Living in social isolation, the First Emperor grew paranoid and increasingly agitated by the realization that he would die one day. He ordered the construction of an immense tunnel network connecting his palaces, so that there were 277 locations to which he could secretly move and almost no one would know where he was. Clements, at 133-34.

Mao imitated all of the above. Rarely appearing in public, he moved frequently among his 50 fortified palaces.[246] He slept odd hours, seldom as much as 30 hours per week, and he thought nothing of summoning someone to a meeting at 2 A.M.[247]

Mao was personally estranged from his fourth wife, the former Shanghai stage and screen actress Jiang Qing (Chiang Ching, Madame Mao), who had a separate bedroom in the palaces.[248] Nevertheless, he made her a valuable political ally, as described *infra*. Most of Mao's waking time was spent reading in bed, working at his desk in the bedroom, or lounging by the private pools or beaches that were a feature of his palaces.[249] He was a strong swimmer.

The isolation left Mao very few people to talk with. He had a large and ultra-loyal Praetorian Guard around him at all times, but these were mainly peasants or workers, and not much good for conversation about Chinese history and philosophy, Mao's favorite topics.[250] He also had an enormous number of mistresses, partly

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246. Li, Private Life of Chairman Mao, at 128-33.

247. *Id.* at 107.

248. Mao had ignored his first marriage, which had been arranged by his father. He then married the daughter of his favorite teacher, but later abandoned her to fight as a guerilla. She stayed loyal to him and was eventually executed by the Nationalists for refusing to denounce him. While the second wife was still alive, Mao married wife number three. Later, when living in the caves at Yenan, Mao dumped wife three and took up with Jiang, 20 years his junior. Chu, at 225. *See generally* Spence, Mao Zedong (describing Mao's relationships).

249. Li, Private Life, at 107, 132.

250. *Id.* at 85.

because he believed that prolonged intercourse with young women would enhance his longevity. Although Mao enjoyed playing Mahjong with the ladies, they had been procured for looks, not erudition.[251] So Mao spent much time talking with his personal physician, one of the few well-educated people Mao allowed to be around him on a regular basis.[252] He was often depressed.[253]

Mao's major break from Legalism was in legal codes. The Legalists got their name because they favored comprehensive laws, rigidly applied. As detailed in Section D.3.c, Mao eschewed law as such, and instead preferred that people could be executed or enslaved on a more arbitrary and changeable basis than would be possible under detailed codes.

As Mao accurately understood, Legalism was contrary to Confucianism, which favored a hierarchical society in which everyone, including the emperor, performs his or her duties according to law and custom. If the emperor did not rule for the benefit of the people, but instead behaved tyrannically, the people were authorized to overthrow him, Confucius said. Mao disdained Confucianism as "humanism . . . that is to say, People-centred-ism."[254] According to Confucianism, the preeminent moral precept is to treat others as one would want to be treated—a principle that Westerners call the Golden Rule.[255] As Mencius, the leading developer of Confucian thought, put it, "Try your best to treat others as you would wish to be treated yourself, and you will find that this is the shortest way to benevolence." Mencius, Mencius 182 (D.C. Lau trans. 1970) (bk. 7, pt. A, no. 4). Mao said his own "principle is exactly the opposite. Do to others precisely what I don't want done to myself."[256]

In the anti-Confucian campaigns during Mao's reign, the people were ordered to study why Confucius was reactionary and Legalism was progressive—perhaps even a predecessor of Mao Zedong Thought. Yuri Pines, *Legalism in Chinese Philosophy*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., rev. entry 2018). For more on Confucius and Mencius, see online Chapter 21.A.1.

Death Count

Not counting regional famines, Rummel puts the 1954-58 regime's death toll at 7,474,000, including 1,875,000 in the *laogai* camps. This appears to be an undercount. As discussed in Section D.3.a, Rummel concluded that the famine deaths from the Great Leap Forward (discussed next) should be considered democide because the famine was man-made and the government persisted in policies knowingly causing starvation. If the famine deaths in 1949-58 and 1963-75 (i.e., famine

251. *Id.* at 80, 94, 104, 150, 260, 358.

252. *Id.* at 85.

253. *Id.* at 8, 109-10, 197, 200, 339, 356, 542, 652. Although Doctor Li was not specifically trained as a psychiatrist, he presumably had enough medical training to recognize depression. A fifth-generation physician, Li had returned to China from Australia after the 1949 revolution. His grandfather had been a physician to a Manchu emperor. *Id.* at 14, 33-41.

254. Chang & Halliday, at 522.

255. Clements, at 17.

256. Chang & Halliday, at 433.

in years other than the Great Leap Forward) are considered to be the result of depraved indifference to human life, then these too should be included in Mao's democide count.

Rummel estimates famine deaths in 1949-53 as 1.0 million; 1954-58 as 5.5 million; and 1964-75 as 1.0 million. Mao died in 1976, and Rummel finds no evidence of large-scale famine deaths for 1976-87 (the last year for which he collected data).[257] According to Dikötter, in 1953-54 "much of the starvation was man-made" and CCP evaded responsibility by falsely blaming natural disaster.[258] It is fair to ascribe all of the Mao reign's famine deaths to Mao. Since Mao died, there have been no famines in China, because the government has operated more rationally.

"[T]here has never been a famine in a functioning multiparty democracy." Amartya Sen, Development as Freedom 178 (2000). "Famines are so easy to prevent that it is amazing that they are allowed to occur at all." *Id.* at 175. Thus, India's last famine was the Bengal famine of 1943, when it was a British colony; since independence, there have been no famines in India. *Id.* at 180.

To be sure, conditions that could lead to famine still arise: natural disasters cause crop failures, or the purchasing power of the poorest people suddenly declines. When such conditions arise, democratic governments even in very poor countries—like India after 1948—prevent starvation by helping those at most risk. *Id.* at 163-87. Among the advantages of free government is that a free press and free political opposition provide early warning about famine conditions and pressure the government to take steps to relieve the famine. *Id.* at 181.

Not counting the famines, over the five-year period of 1954-58, about one person per hundred in China was killed.[259] On an annualized basis, this is a homicide rate of 200 victims per 100,000 population. Adding in the famine deaths in the period raises the death by government rate to about 340 victims per 100,000 population. As noted the worst annual homicide rates in the United States have been 11 victims per 100,000 population.

h. The Great Leap Forward and the Select Militia

In Marxist-Leninist theory, a post-revolutionary nation must initially go through a period of building and achieving socialism before it can move to building and then achieving communism. Firmly back in control, Mao was ready for full communism. In the Great Leap Forward (*dayue jin*), all labor and all products would be directly owned by the state. Peasants were herded into slave labor farms, euphemistically called "people's communes" (*renmin gongshe*).[260] Keeping the peasants in camps prevented them from surreptitiously harvesting food and eating it themselves, rather than letting the government take it.[261]

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257. Rummel, China's Bloody Century, at 12 tbl. 1.1.

258. Dikötter, Tragedy, at 222.

259. Rummel, China's Bloody Century, at 244.

260. People's communes were replaced by township governments in 1983. CLI.16.1809 (pkulaw). After the separation between governments and communes, most communes simply vanished by June 1985.

261. Chang & Halliday, at 434-35.

In many communes, families were forced to leave their homes, live in sex-segregated barracks, and eat in mess halls. Husbands and wives were allowed one short conjugal visit per week.[262] Mothers were sent out to hard labor in the fields; pregnant women were allowed respite 40 days before parturition. They were liberated from childcare, as babies over a month old were taken to be communally raised by youngest and oldest females of the commune, sometimes sleeping communally rather than with parents. Starting at age 3, the child would be under the control of state education.[263] This was consistent with Marxism, which boldly demanded "[a]bolition of the family!" Karl Marx, Communist Manifesto 24 (Samuel Moore & Friedrich Engels trans. 1888) (1848); *see also* Fredrick Engels, The Origin of the Family, Private Property and the State (Ernest Untermann trans. 1909) (1884, as *Der Ursprung der Familie*) (families with fathers exist only because of private property).

To enforce the slave labor system, a select militia was used. Mao's militia was theoretically broad, consisting of most of the able-bodied population. Mao said that the militia was "the armed force of all the people" (*quanmin wuzhuang*). Ralph A. Thaxton, Jr., Catastrophe and Contention in Rural China: Mao's Great Leap Forward Famine and the Origins of Righteous Resistance in Da Fo Village 331 (2008); Frank Dikötter, Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958-1962, at 49-50 (2010). According to government propaganda, "the people of the commune are armed."[264] If one took the rhetoric of Mao and CCP at face value, one might think that they were the words of enthusiasts for a broad militia—such as the ancient Chinese Taoists (online Ch. 21.A.2), the Renaissance Italians (online Ch. 21.D); the English Whigs (Ch. 2.H & K, 22.H & K), or the American Founders (Chs. 3-5). In the 1958 People's Militia Movement, Mao had declared: "Organize the people's militia on a big scale" (*da ban min bing shi*).[265]

But what Mao created was actually a select militia, consisting of a small portion of the population. *See* Ch. 5.A. The greatest famine in history was the intentional result of the Great Leap Forward. The means by which the famine was imposed was the employment of Mao's select militia against the disarmed populace.

At the Virginia Convention for ratifying the U.S. Constitution, George Mason had warned that a select militia would "have no fellow-feeling for the people." Ch. 5.B.5. In England, the despotic Stuart kings had used "select militias loyal to them to suppress political dissidents, in part by disarming their opponents." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (Ch. 11.A). One reason the Second Amendment was enacted was to assuage fears that the U.S. government "would disarm the people in order to impose rule through a standing army or select militia." *Id.* at 588.

As Mao imposed what he called "war communism" on society, the slogan was "everyone is a soldier" (*quanmin jiebing*). *E.g.*, U.S. Joint Publications Research Service, Conference of Militia Leaders in Communist China 7 (1960) (translation of Michio Iwaruma, *Communist China's Defense Advances on Two Legs* (Nihon Ashide Aruku Chugoku Kokobu), Asian Econ. Thrice-Monthly Report (Tokyo), May 20,

262. Chu, at 127.
263. Chu, at 133, 185; Chow, at 234-35.
264. Labin, at 104.
265. Wang, at 136.

1960). "Everyone is a soldier" hardly meant that everyone had arms. Instead, it meant slave labor, no private property (not even clothing or eating utensils), and no dissent.[266]

In the cities, many workers had been armed during the revolution, and they wanted to keep their arms and their unions. The new regime in its first several years eliminated the right to strike, eliminated independent unions (replaced by puppet organizations controlled by the CCP), constricted the worker militias, and confiscated their guns.[267] The militias (*minting*, *minbing*) were under the direct formal control of the PLA and the CCP, although actual control varied at times. Thomas C. Roberts, The Chinese People's Militia and the Doctrine of People's War 14, 35-37 (1983); Perry, at 183, 239 n.115.

Most Chinese of the requisite ages (often, 16-45 for males, 16-35 for females) were pressured to "voluntarily" join the local militia. Persons from bad class backgrounds, such as the son of a former small landowner, were excluded. So were persons not considered politically reliable. On a daily basis, the militia was mainly a large labor force assigned to construction projects, agricultural work, and so on. The majority of the militia received little military training. A subset of them, males 16-30 and females 16-25, might receive several days or two weeks of training annually. The "armed backbone militia" (*wuzhuang jigan minbing*) were especially screened for family background, political loyalty, and military aptitude. Many of them were demobilized former PLA soldiers. Ralph L. Powell, *Everyone a Soldier: The Communist Chinese Militia*, For. Aff. 100 (Oct. 1960); Roberts, at 19 (summarizing a 1978 PLA document). Sometimes the militia were given no funds to pay for training equipment, such as wooden rifles, so they resorted to extortion to raise money from the public.[268]

A 1965 report indicated that there were 9 million militia weapons, including rifles, mortars, and antitank guns. So in a nation of over 600 million people, the armed select militia comprised fewer than 2 percent of the population. Militia arms were not personally owned but were usually centrally stored and guarded.[269] Militia rifles were not standardized to match PLA arms until the early 1980s. Before that, militia arms included a heterogeneous mix of Japanese, German, British, or U.S. rifles, perhaps scavenged from battlefields.[270] A 1963 book stated that the PLA "supply of rifle bullets is so precious that in recent years they have seldom been used for target practice."[271] If the standing army was not getting much target practice, the militia was presumably getting even less, especially given the diverse ammunition it would need. In rural areas, most Chinese militia members were unarmed. Only "a small proportion practised with live ammunition and were trained as shock troops."[272] Accordingly, the firearms proficiency of much of the armed militia may have been low. However, while proficiency may be necessary to fight an invading foreign army, not much proficiency is needed to shoot an unarmed peasant a few feet away.

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266. Dikötter, Famine, at 298.
267. Perry, at 158-68, 178-81.
268. *See* Li, Militia, at 45-46, 139-41.
269. Roberts, at 42-45.
270. *Id.*
271. Chu, at 279.
272. Dikötter, Famine, at 50.

As discussed *infra*, during the 1950s some militia joined resistance fighters, or turned a blind eye to their activities. After several militias in Guangdong province attacked government offices and then launched guerilla warfare from the mountains, controls on the political reliability of the militia were intensified.[273]

In a 1960 speech, a high-ranking CCP official bragged that the people are the masters in China because they are armed; in the same speech he urged that the militia be reorganized so that only true communist loyalists would be armed. Powell, at 105 (quoting Huang Huo-ch'ing, *Liaoning Jih-Pao*, Feb. 27, 1960, as reported in *Survey of the China Mainland Press*, Apr. 12, 1960, 13, 15 (American Consulate General, Hong Kong)).

According to a political refugee interviewed in Hong Kong, in a commune of 15,000 families, there would be about 1,500 militiamen, chosen from the politically correct, who would have rifles. Of these there was "a further selection of 150 super-reliable men whose rifles are always loaded."[274] "Otherwise ammunition is kept at a central armoury guarded day and night by special police armed with machine-guns. As an extra precaution the personnel of this guard is changed every two months."[275] A hundred and fifty always-armed males could control 15,000 families.

"They would turn out to be crucial in enforcing discipline, not only during the frenzy to establish communes, but throughout the years of famine that lay ahead." Dikötter, Famine, at 50. *See also* Perry, at 182 ("local militia were a critical ingredient in the CCP's consolidation of power in the countryside").

> The militia movement and a small corps of trained fighters brought military organization to every commune. All over China farmers were roused from sleep at dawn at the sound of a bugle and filed into the canteen for quick bowl of watery rice gruel. Whistles were blown to gather the workforce, which moved in military step to the fields. . . . Party activists, local cadres and the militia enforced discipline, sometimes punishing underachievers with beatings. At the end of the day, villagers returned to their living quarters, assigned according to each person's work shift. Meetings followed in the evening to evaluate each worker's performance and review the local tactics.

Dikötter, Famine, at 50. "Militiamen spearheaded the countless mobilization campaigns that were the hallmark of Mao's rule. They enforced universal participation by all members of the factory or village, dragged out or designated targets of struggle, and monitored mass meetings." Perry, at 191.

A case study of the remote village of Da Fo, located on the North China Plain, details the operation of the select militia. There, guns had been confiscated in 1951 (later than the general confiscation in 1949, perhaps because of the village's isolation). Over the course of the war against the Japanese (1937-45) and then the civil war (1945-49), the high-quality leaders of the Da Fo communist militia had been moved elsewhere, to positions of greater responsibility. The militiamen left behind were the dregs of society. "Villagers remember them as poorly endowed,

273. Perry, at 184-88.
274. Labin, at 104.
275. *Id.*

uneducated, quick-tempered, perfidious hustlers and ruffians who more often than not operated in an arbitrary and brutal political manner in the name of the Communist Party." Thaxton, at 329. There were no rules against them exploiting or coercing peasants. *Id.* at 327. To the extent that the national government provided subsidies, the militia took them. *Id.* at 328. The Da Fo militia had 30 guns and kept the crop fields under a four-man armed guard day and night, to prevent peasants from obtaining food. *Id.* at 205.

Because the government was seizing so much food for export and for the cities, widespread famine developed. All food was dispensed collectively, with only the most productive workers getting life-sustaining rations. The elderly, infirm, sick, or weak, already half-starving, were deliberately starved or beaten to death, thus reducing state expenditures on what the state considered to be inefficient production inputs.[276] "In collective canteens, food, distributed by the spoonful according to merit, became a weapon to force people to follow the party's every dictate." Dikötter, Cultural Revolution, at 8. Indeed, "the most common weapon was food, as starvation become the punishment of first resort." *Id.* at 10.

"The militia was a repressive institution, and Mao needed it to press the countless rural dwellers who were resisting disentitlement by the agents of the people's commune." Thaxton, at 329. "These men were practically the perfect candidates to tear apart civil society and destroy human purpose. . . . [T]hey had a lot in common with the Khmer Rouge in Cambodia, with Ceauşescu's militias in Transylvania, and with the Janjaweed in the Darfur region of Sudan. In rural China of the late 1950s, as in these other killing field environments, such men were backed by state power." *Id.* at 330.[277] The militia played "a critical role in helping the Great Leap to achieve liftoff," as it forced the peasantry into slave labor at the point of a gun. *Id.* at 331.

Da Fo village had a strong martial arts tradition when China was a republic (1912-49), but the exhaustion and poverty caused by communization made it impossible to pay for training, and "forced the abandonment of the sport. From the standpoint of Communist Party leaders, this development proved politically convenient, for without martial arts training it became far more difficult for male villagers to defend themselves and family members against Great Leap berating and beatings." *Id.* at 315.

The militia and the communist party cadres carried large sticks they used to beat the peasants.[278] The frontline enforcers were under orders from their superiors to administer frequent beatings, and those who failed to do so were punished.[279] "A vicious circle of repression was created, as ever more relentless beatings were required to get the starving to perform whatever tasks were assigned to them."[280]

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276. Dikötter, Famine, at 299-302.

277. The Darfur genocide is discussed in online Chapter 18.D. Nicolae Ceauşescu was the communist ruler of Rumania from 1965 to 1989. Transylvania ("the land beyond the forest") is a region in central Rumania. Many English speakers know of Transylvania from Bram Stoker's 1897 novel *Dracula*, whose vampire shares a name with the notoriously cruel fifteenth-century monarch Vlad Dracula (in English, Vlad the Impaler).

278. Dikötter, Famine, at 293.

279. *Id.* at 293, 299-300.

280. *Id.* at 299.

Without the select militia, "surely the famine's death rate would not have been so high."[281] Because of the select militia, peasants suffered "socialist colonization, subhuman forms of labor, and starvation."[282]

"As starvation sets in, famished people are often too weak and too focused on their own survival to contemplate rebellion."[283] "As in other famines, from Bengal and Ireland to the Ukraine, most villagers, by the time it became clear that starvation was there to stay, were already too weak to walk down the road to the next village, let alone find weapons and organize an uprising."[284]

The same was true for Cambodians two decades later, under Mao's proteges the Khmer Rouge; the Cambodians who were not immediately exterminated by the government were put into slave labor and half-starved, leaving them in no condition to organize a revolt. *See* Pin Yathay, Stay Alive, My Son 102 (1987). *See generally* Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975-79 (3d ed. 2008).

Thaxton's study of Da Fo village found that because the militia confiscated all of the weapons they could find, "the physically exhausted and virtually weaponless villagers were not prepared to pursue aggressive retaliation."[285] Some persons did have hidden guns; in 1960 house-to-house searches for hidden food turned up 23 rifles and "scores of rifles in surrounding villages."[286]

Resistance

Although starvation dampened the ability of many to revolt, there were many revolts during the Great Leap Forward. Mao knew his regime was unpopular. As he privately acknowledged in 1959, "Several hundred million peasants and production team leaders are united against the Party."[287]

Indeed, forced communization had partly been for the purpose of preventing uprisings. After losing the civil war in 1949, the Nationalist government of Chiang Kai-Shek had fled to the island of Taiwan. The communists worried that the Nationalists might invade at any time, and

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281. Thaxton, at 331.

282. *Id.* at 334.

283. *Id.*

284. Dikötter, Famine, at 227. The Great Bengal Famine of 1769-73 killed 10 million people in India and was caused by the rapacity of England's East India Tea Company. The famine was one of the reasons why American Patriots resisted being coerced into buying the company's tea. *See* Ch. 2.E. There was another Bengal famine in 1943, during World War II, killing 3 to 7 million.

The Irish Potato Famine (1845-49) killed about a million, and forced another million Irish to emigrate, many to America.

The Ukraine famine (*Holmodor*) of 1932-33 was similar to the Great Leap Forward. It was deliberately imposed by Stalin as part of his farm collectivization program, and was intended to destroy middle class farmers, known as *kulaks*. The death toll was about 6 or 7 million. *See* Robert Conquest, The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine (1986).

285. Thaxton, at 246.

286. *Id.* at 180, 246.

287. Chang & Halliday, at 446.

> if such an invasion did take place, the danger would not be so much from the military strength of the invaders, but from the popular risings which would take place in support of them all over the country. Such risings must therefore be prevented before they have a chance of developing. That is why Mao organises his praetorian militia all over the country, and that is why he is concentrating the population in the People's Communes, where he can keep an eye on them better and have them always under his own guns.

Labin, at 115 (citing the CCP political magazine *Red Flag*, Sept. 1, 1958).

The regime's fears were well founded. As described *infra*, the mere hope of a Taiwanese invasion had led to uprisings during the Korean War. Starting in 1954, Mao ordered artillery bombardment of Quemoy, a small Taiwanese-controlled island near the Chinese coast. In the next several months, there were 11 peasant uprisings in the area from which the shells were launched, "touched off by rumors that the Nationalists were landing in the vicinity. These suicidal revolts by peasants armed with scythes, hoes and a few seized rifles do not prove the feasibility of such actions, but they reveal the immense probabilities in case an outside force does land in the coastal areas."[288]

On September 24, 1958, Taiwan airplanes bombed a town in Fujian, the province nearest Taiwan. Thousands of people — including militia — rose up. They raided arsenals, seized communication facilities, and killed CCP cadres. The army responded immediately and defeated them within 24 hours. Three thousand rebels and four hundred CCP cadres were killed.[289] Fujian saw another "serious armed uprising" in the fall of 1961, lasting into the next year.[290]

Fujian was not the only province to see desperate insurrection against the Great Leap Forward. In December 1958, a revolt at a commune in Guangdong resulted in a two-hour battle, with shots that were heard in nearby Macau (at the time, a Portuguese colony and port; now a special administrative region in China).[291] In the west in 1959-60, armed revolts took place in the provinces Qinghai, Gansu, Sichuan (Szechuan), Henan, and Shandong; they were caused in part by the CCP's confiscation of livestock.[292] In 1961-62, there was "continuous guerilla warfare" in southern China. *Id.* at 250. In Wuhua county, near the southeast coast, in 1962 a "former army officer, a Colonel Chung, led some 8,000 peasants to attack the militia and loot granaries."[293]

Not all forms of resistance involved weapons. On a few occasions, a huge mass of people used their bodies to block trains, and then take the food that was being shipped to the cities.[294] Throughout Mao's reign, arson was an especially common form of resistance, in part because it did not require armed confrontation with the standing army and the select militia. Sabotage was also frequent, sometimes

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288. Chu, at 243.
289. Chow, at 310.
290. Rummel, China's Bloody Century, at 250; *see also* Chu, at 200-01.
291. Chow, at 311.
292. Chu, at 200; Rummel, China's Bloody Century, at 247-49.
293. *Id.*; Chu, at 201.
294. Dikötter, Famine, at 224.

accompanied by hit-and-run raids. *See, e.g.*, Chu, at 201 (describing northeastern rebels who "used coal shops as secret arms depots"). In Mao's home province of Hunan, the militia reported in 1959 that during the last decade it had dealt with 19,584 instances of sabotage and 1,692 revolts.[295] Sometimes slave laborers revolted and destroyed infrastructure.[296]

Overall for 1961, the central government reported 146,852 granary raids, 94,532 arsons, and 3,738 revolts.[297] In short, there were many people who did not like what the CCP was doing to them and were brave or desperate enough to take violent action.

Around New Year's Day 1963, the China and Taiwan regimes confirmed that the Taiwanese were transporting armed supporters into China to prepare for guerilla warfare. The PLA held conferences to make plans in case of large Taiwanese landings.[298] Luckily for Mao, Chiang would not actually invade if the Americans objected; Presidents Truman, Eisenhower, and Kennedy rejected calls from some Americans to "unleash Chiang Kai-shek." The U.S. government supplied Taiwan enough military aid to defend itself, but not enough to support full aid to the resistance in China, let alone an invasion. *See* Leonard H.D. Gordon, *United States Opposition to Use of Force in the Taiwan Strait, 1954-1962*, 72 J. Am. Hist. 637 (1985).

Although a full-scale Taiwanese invasion might have sparked a simultaneous nationwide revolution, the CCP regime was able to weather lesser revolts. First of all, the confiscation of radios, especially radio transmitters, made it very difficult for news about an uprising in one area to inspire similar action elsewhere.

The effect of radio confiscation was augmented by a ban on distribution or possession of newspapers outside their local circulation area. Only "two newspapers, one journal" (*liang bao yi kan*) were allowed national circulation. They were the *People's Daily* (the CCP newspaper, *Renmin ribao*), *Liberation Army Daily* (the military newspaper, *Jiefang jun bao*), and *Red Flag* (the CCP political magazine, *Hongqi*). They often published joint editorials.[299] So even though local newspapers might report on a local revolt after it had been defeated, readers in other provinces would never learn that the revolt had taken place.

Besides successfully controlling communications, the CCP retained the loyalty of the military, the People's Liberation Army. The PLA suppressed local revolts with local army units, and called in forces from other areas when needed.[300] As the economy collapsed, and famine spread, popular revolts could be put down one at a time by the army. By tightly controlling communication and arms, the communists retained domination.

The Rise of Lin Biao and Political Correctness in the Army

When the CCP Politburo and Central Committee gathered at the Mount Lushan resort in the summer of 1959, defense minister Peng Dehuai sent Mao a private memo, politely suggesting the Great Leap Forward's communization of

295. Chu, at 205.
296. Rummel, China's Bloody Century, at 248.
297. Chu, at 205-06.
298. *Id.* at 247.
299. Chu, at 154, 272; Wang, at 147.
300. Dikötter, Famine, at 224-25; Dikötter, Cultural Revolution, at 35.

agriculture was having counterproductive results. Peng had previously opposed Mao's personality cult, to Mao's annoyance. And Peng had interfered with Mao's personal fun, by complaining about Mao's sybaritic lifestyle, such as all the government-procured concubines.

At the Lushan conference, Mao circulated Peng's letter and soon thereafter purged him. Responding to criticisms of the Great Leap, an angry Mao said that the army was still with him, and that was enough. If the army ever did turn against him, warned Mao, he would head to the hills and lead a guerilla opposition. Nobody dared speak against him. Forever after, it was clear that anyone who dared to contradict Mao would be eliminated.[301]

To replace Peng, Mao turned to war hero Lin Biao. A great general from the revolution, Lin had won two of the three decisive battles. With an army of over a million, Lin had swept from frigid Manchuria all the way south to the tropical island of Hainan.[302] Within the PLA, Lin had a natural base of support among the officers who had served under him; their political fortunes were partly tied to his reputation. Roberts, at 61-62. Mao had been jealous of Lin's popularity, so after the revolution Mao had sidelined Lin into jobs with good titles but nothing to do. Chow, at 69.

By installing Lin, Mao got the kind of defense minister he wanted: one who never questioned him. Lin Biao purged the PLA officer corps, rooting out officers suspected of insufficient submissiveness to Mao. Lin dedicated the PLA to political indoctrination of service members. Zhu, at 111, 128-31. As Lin proceeded, he made many enemies in the PLA. He not only stripped the officers of their privileges, such as separate dining areas, in 1965 he even abolished ranks. Zhu, at 195; Li, Private Life, at 543; Roberts, at 6.

Lin relentlessly parroted Mao's military strategy of "People's War." If China were invaded by the Soviet Union, whose army was well trained and well armed, the Chinese could retreat, lure the invaders deep into the country, and then destroy them, with joint operations of the regular army and the militia. A huge mass of people, even if poorly armed, could triumph over weapons. "Militia is the basis of victory" was the official line. Roberts, at 15, 115-17.[303]

Whether the strategy that had won the revolution would have been effective to defend China in the case of major invasion by the Soviet Union is questionable. Many PLA officers did not think so. They also "opposed the hyperbole of Lin's cult

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301. Zhu, at 86-88, 103; Spence, Mao Zedong, at 144-46.

302. Hainan Island was invaded by the PLA in March 1950 and conquered by May.

303. During the Chinese revolution, Mao had accepted Stalin's leadership of the communist bloc. But after Stalin died, personality conflicts between Mao and Khruschev exacerbated conflicts over global communist leadership, with Mao unsuccessfully demanding to be in charge of communism throughout Asia, and making pretensions to be leader of the "Third World." Additionally, China and Russia had a centuries-long rivalry over influence in Siberia and Central Asia, with Russia having emerged the victor by the late nineteenth century, and then adding to its advantage immediately after World War II. Border disputes between China and the Soviet Union in Manchuria and Xinjiang turned violent in 1969, and no one knew whether the Soviets would launch an invasion to replace Mao with a more pro-Soviet regime. *See* Danhui Li & Yafeng Xia, Mao and the Sino-Soviet Split, 1959-1973: A New History (2018).

of personality, his simplistic insistence on men over machines, his opposition to modernization, his inane mouthing of slogans." Li, Private Life, at 543.

Lin himself knew that Mao did not deserve worship. In his private diary he wrote that the Great Leap Forward was "based on fantasy and a total mess." Mao "worships himself, he has blind faith in himself, adores himself, he will take credit for every achievement but blame others for his failures," Lin wrote.[304]

Whatever people privately thought of Mao, "[t]he secret of Mao's political survival lay in his ability to take advantage of the unique nature of the Chinese political system, characterized by the civil-military dualism and factional divisions. He managed to stay in power by playing the civil and military groups off against each other and by utilizing all the cleavages among the civilian and military elites."[305]

Seven Thousand Cadres and the End of the Great Leap Forward

The Party Center had backed off somewhat from the Great Leap Forward in October 1960, but too late to prevent continuing famine. To Mao's great humiliation, the Great Leap Forward was recognized by the party as a failure. The verdict came in 1962, at the January-February conference of the Seven Thousand Cadres. There, leading CCP officials from all over the nation were able to meet and find that the deadly conditions in their own provinces and counties were a nationwide problem. Although Mao managed to suppress public discussion of the famine for most of the meeting, the tide turned when the CCP's second-highest official, Liu Shaoqui, departed from his prepared text in his closing remarks and bravely denounced the famine as a "man-made disaster" (*renhuo*). He received a standing ovation, and even Mao was forced to pretend to take some of the responsibility.[306] The government's food requisition for the next year was significantly reduced.[307]

Rummel's range for deaths in 1959-62 is 4,244,000 to 21,955,000 killed; he estimates about 10,729,000, including 5 million in the *laogai* camps.[308] As noted above, Rummel originally did not include the Great Leap famine in his totals, but he later decided that it should be included, since it was the result, at the least, of depraved indifference to human life.

Dikötter, using archival population data and other sources not available when Rummel was writing in the early 1990s, estimates a minimum of 45 million people perished during the Great Leap Forward (1958-62); of these, "at least 6 to 8 percent of the famine victims were directly killed or died as a result of injuries inflicted

304. Dikötter, The Cultural Revolution, at 35.

305. Zhu, at 103.

306. Liu, a leading communist theoretician, had created the Mao cult in 1943 as a counterpoint to Chiang Kai-shek's portrayal of himself as the savior of China. Among Liu's many works was the widely read How to be a Good Communist (1939). During the Cultural Revolution, he was beaten nearly to death, put under house arrest in a single room (separate from his wife), and denied medical care. Rather than execute Liu, Chairman and Madame Mao kept Liu alive to prolong his suffering. Like many high-ranking victims of the Cultural Revolution, he was posthumously rehabilitated after Mao died. *See generally* Lowell Dittmer, Liu Shao-ch'i and the Chinese Cultural Revolution: The Politics of Mass Criticism (1974).

307. Dikötter, The Cultural Revolution, at 10.

308. Rummel, China's Bloody Century, at 251.

by cadres or the militia."[309] The 45 million figure is consistent with secret research conducted by senior CCP official Chen Yizi in the post-Mao era, which assessed the Great Leap fatalities at 43 to 46 million. As Dikötter notes, another researcher "with a great of experience" estimates a death toll of 55 million.[310] As detailed the figure of 86 million deaths used in this chapter is based on 50 million deaths in the Great Leap Forward, including 5 million in the *lao gai*.

Mao's Grip Loosens

In order to survive the Great Leap Forward, the people had begun massive evasion of the party's monopoly on all production and trade. Black markets became pervasive, often with the tacit consent (or bribery) of local party officials.[311]

With the Great Leap Forward finished, and the underground economy spreading, some illegal private tutors and schools were even teaching the Confucian Classics. Traditional folk culture was being revived. In some places, Buddhist temples and Christian churches were operating. Young people took the pervasive propaganda song "Without the Communist Party, There Would be No New China," and instead sang "Without the Communist Party, There Would be No Dried Yam" (a dried yam being a symbol of famine).[312]

Ever since Mao's defeat at the Seven Thousand Cadres meeting in 1962, he had been working on plans to put things fully under his thumb, and to get rid of Liu Shaoqi. In 1963, Mao coerced the CCP leadership into purging 5 million party members and killing 77,000. Dikötter, Cultural Revolution, at 23.

Despite all the forced professions of loyalty that had been required ever since the CCP took over in 1949, in 1964 Mao estimated that "a third of the power in this country is no longer in our hands, it is in the hands of our enemies."[313]

It was time for bolder steps. By the mid-1960s, it had become clear that killing off the bourgeoise had not killed bourgeois ideas — such as free labor and free exchange. Even within the high echelons of the CCP, there were "revisionists." They secretly thought that the Soviet Union's post-Stalin version of communism was more sensible than Stalin's and Mao's. From the top party leaders in Beijing to the rank and file party cadres a thousand miles away, much of the Chinese Communist Party was aligned with antidemocratic but rational party officials such as Liu Shaoqui and Deng Xiaoping.

Mao devised a plan to deal with them. Its aims and methods were audacious. He was going to incite a popular revolution to overthrow the communist party itself. He would start a civil war. Making sure that his side would win would require control of weapons.

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309. Dikötter, Famine, at 295, 326-33.

310. *Id.* at 324-25; Yu Xiguang, Dayeujin Ku Rizi: Shangshuis (The Great Leap Forward and the Years of Bitterness: A Collection of Memorials 8 (2005) (55 million).

311. Dikötter, Cultural Revolution, at 15-22; *see also* Thaxton, at 170-76 (case study in Da Fo).

312. Dikötter, Cultural Revolution, at 30-32.

313. *Id.* at 22.

i. The Cultural Revolution

The warmup to the Cultural Revolution began in 1963, with attacks on classical Chinese opera. In China, opera has always been popular with people of all educational levels. Mao's fourth wife, a former actress from Shanghai, led campaigns denouncing operas for political incorrectness. Jiang Qing, *On the Revolution in Peking Opera (Tan Jingju geming): A Speech from the Plenary Discussion with Performers After the Modern Peking Opera Trial Performance Convention in Beijing, July 1964*, 26 Opera Q. 455 (2010) (published in 1967 in *Red Flag*, *People's Daily*, and *People's Liberation Army Daily*). *See generally* Ross Terrill, Madame Mao, the White-Boned Demon: A Biography of Madame Mao Zedong (rev. ed. 1992).

By the time she was done, fine arts performances were limited to five operas, two ballets, and one symphony. These post-1949 "model" pieces were crude propaganda. In the privacy of her palaces, Madame Mao had a broader selection of entertainment and enjoyed private screenings of Western movies.

The major problem, in Mao's view, was that people were not fully thinking like socialists. "Dead people are still in control of literature and the arts," Mao complained in 1963. Party members were "promoting feudal and capitalist art but ignoring socialist art."[314]

Playwrights and other intellectuals were targeted. The most-vilified playwright had previously been praised by Mao himself for the 1961 opera *Hai Rui Dismissed from Office* (or *Dismissal of Hai Jui from Official Post*). The story was based on a historical hero who was imprisoned because he told the Ming emperor that the emperor was out of touch with the people and did not recognize their suffering.[315]

There is a long Chinese literary tradition of "pointing at the mulberry and reviling the ash"—in other words, indirectly criticizing A by criticizing B. Anne F. Thurston, Enemies of the People: The Ordeal of the Intellectuals in China's Great Cultural Revolution 85-89 (1987). Mao apparently realized that he was seen as more like the incompetent and self-centered emperor and not as the brave and honest civil servant. *Id.*; Dikötter, Cultural Revolution, at 46-48, 295; Yao Wenyuan, *On the New Historical Play "Dismissal of Hai Jui*," Shanghai Wen Huipao, Nov. 10, 1965, *reprinted in* People's Daily, Nov. 30, 1965 (article initiating the campaign against the play's author).[316]

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314. Li, Private Life, at 405.

315. The Ming Dynasty ruled from 1368 to 1644. The Hai Ru incident took place in 1565.

316. Other works attacked were Hsia Yen, Lin Family Store; Yang Han-sheng, Pei Kuo Chang Nan; Ko Ling, A Nightless City; Meng Chao, Li Hui Liang; Shao Chuan-lin, Theory of Writing About Intermediate Personages; Chou Ku-cheng, Theory of Literature and Arts: A Reflection of the Spirit of Our Era; Tien Han, Hsieh Yao Huan (1961) (the dramatist Tien was author of, inter alia, the lyrics of the Communist China national anthem, *March of the Volunteers*); Chien Po-tsang, Views on History; Teng To, Night Talks at Yenshan (denounced in Yao Wenyuan, *On "Three-Family Village"—The Reactionary Nature of Evening Chats at Yenshan and Notes from Three-Family Village*, Liberation Daily, May 10, 1966); and Liao Mo-sha, Three Family Village (discussed in Roderick MacFarquhar, *The Curious Case of the "Three-Family Village*," *in* Origins of the Cultural Revolution: Volume 3: The Coming of the Cataclysm 1961-1966 (1987)). *See* Li, Human Rights, at 123, 126.

Mao's objective in the Cultural Revolution was to overthrow the CCP itself, which had always been closely tied to the army. He knew that the majority of the Politburo was against his plans, and so were most of the provincial and local CCP committees.[317] So Mao knew he needed the army's backing. Although Lin Biao would prove himself absolutely subservient to Mao and the Cultural Revolution, getting the entire army to go along was not so easy, as Mao and Lin would later discover.

Next to Liu Shaoqi, Mao's top target in the Cultural Revolution was Deng Xiaoping, who had also objected to the excesses of the Great Leap Forward, although in a more circumspect manner than Liu. "Why did Liu, Deng, and their followers in the Party Center allow such blatant political manipulation against them without objecting? The answer was military intimidation." Shortly before the launch of the Cultural Revolution, troops loyal to Lin were moved into Beijing, encircling the city. Commando units took over media offices, such as those of the *People's Daily*, and the radio stations. Troops under the command of Mao's personal bodyguard were sent to surveil (or, supposedly, protect) the homes of all high-ranking officials in the Zhongnanhai compound. "Mao and Lin would not have been able to prevail, at least not so easily, without the threat of force against their opposition in the party leadership." Zhu, at 117-20.[318]

Rage Mobs of the Most Privileged Students

To start the "Great Proletarian Cultural Revolution" (*wuchan jieji wenhua da geming*), Mao used the most privileged youths in China. Mao had won the war in 1949 in part by promising to abolish the old class system, and he had done so. Rather than creating a classless society (the proclaimed goal of communism), Mao had instead established a new class of inherited rank. Everyone was color-coded. The top class were those who had fought in the revolution and belonged to the party. They and their descendants were "red." The lowest new class was colored black. It consisted of the former "bourgeoise" and "landlords"—not just the middle class and large landowners, but also peasants or vendors who had made small profits before the revolution. The blacks also included persons who once had a minor relation with the former government. In between was the white class—such as apolitical peasants. In the class system, class was inherited. If your parents were red, so were you; if your parents had been blacks, you were forever black. Interclass marriage had been forbidden since 1950. Rummel, China's Bloody Century, at 226-27.

The class system was not perfectly stable, especially in a relentless atmosphere of purges and accusations. For example, in the 1930s and 1940s, some loyal communists had been ordered by the CCP to infiltrate Nationalist labor unions by posing as Nationalists. Considering the risks they took, they should have been impeccably red. But during the Cultural Revolution, as everyone was looking for

317. Zhu, at 116-17.

318. The Cultural Revolution purges of 1966-69 removed 7 of the 17 Politburo members, 53 of the 97 members of the CCP Central Committee, 4 of the 6 first regional party secretaries, and 23 of the 29 provincial first party secretaries. Thurston, at 108.

reasons to denounce everyone else, the old labor union records of the former spies were dug up, and they were persecuted for supposedly being collaborators with the Nationalists.

More generally, there were always propaganda campaigns against the Four Types (*silei fenzi*): former landlords; former rich peasants (e.g., a small family business); counterrevolutionaries (non-communists); and bad elements (persons who deviated from the CCP orthodoxy of the moment). The first two types were straightforwardly black bloods; the latter two "types" were sufficiently elastic that almost anyone could be accused. Being securely recognized as a good red one day did not necessarily protect individuals and their relatives from being reclassified another day and then murdered or sent to a slave labor camp.

The top schools were mainly for the children of the red class. The students at these schools received military training, starting in elementary school by shooting air guns at pictures of Chiang Kai-Shek and Americans, then progressing to rifles in secondary school.[319] The Cultural Revolution began in earnest at Beijing's top school for the children of Chinese Communist Party élite.

At schools in general, pureblood students resented the students of lower-class blood; having no class advantage, the black students tended to work harder in school and thereby outperform their social betters.[320]

In the first half of 1966, based on articles in the *People's Daily*, politically correct students realized that something was up. They began scouring libraries "and soon problems were discovered with short stories, novels, movies and plays. . . . Posters appeared questioning the background of some teachers."[321]

On May 16, 1966, a circular within the Party Center announced the creation of the Central Cultural Revolution Group, CCRG.[322] In effect, the CCRG, and not the Politburo Standing Committee, would be in charge for quite a while.

The Cultural Revolution was often publicized via big character posters—handwritten political essays in large characters, affixed to walls. To get things going, Madame Mao's allies searched for people at Beijing University to write a big character poster denouncing the university president. An uneducated party hack, Nie Yuanzi, and some of other university employees took on the job. On May 25, 1966, they pasted their big character poster accusing the university administration of being "Khrushchev-type counterrevolutionary revisionists," and "ox ghosts and snake spirits."[323] The university president, Lu Peng, was fired the next day.[324] An ox-ghost is a mythical fanged monster that devours people.[325]

The Cultural Revolution was publicly declared on June 1, 1966, with a *People's Daily* editorial telling the people to "[s]weep away all ox-ghosts and snake spirits" (also translated as "monsters and demons" or "freaks and monsters"; *hengsao yiqie*

319. Dikötter, Cultural Revolution, at 36.
320. Dikötter, Cultural Revolution, at 38; Thurston, at 48.
321. Dikötter, Cultural Revolution, at 54; Li, Human Rights, at 81.
322. Sometimes translated as Cultural Revolution Small Group, or another variant.
323. Thurston, at 89-90.
324. *Id.* at 93.
325. *Id.* at 223.

niugui sheshen). Editorial (Chen Boda), *Sweep Away All Monsters and Demons*, People's Daily, June 1, 1966; Dikötter, Cultural Revolution, at 55; Wang, at 143.

Classes were cancelled at schools nationwide so that students could attack their teachers. The next day, Nie Yuanzi's big character poster was reprinted in *People's Daily*, accompanied by an editorial urging people to "oppose, beat, and thoroughly destroy" revisionists.[326]

Students were encouraged to put up big character posters denouncing teachers for revisionist thinking. "Revisionist" meant thinking like Khrushchev or anyone else who deviated from pure communist totalitarianism: all life must be political; only one political line is allowed. Often, "revisionist" was just a label for persecuting anyone, including sincere ultra-Maoists.

Student mobs beat and humiliated their teachers. Many used improvised weapons, fencing swords, or javelins. Fearful, the teachers began to denounce each other, since teachers know much more about each other than students do. At the beginning, the violence of the Cultural Revolution was only on campus.[327]

The student mobs began to call themselves "Red Guards" (*hong weibing*), since they were acting to guard Chairman Mao. Under communism, there was supposed to be no civil society; no organization should exist outside the state. All Chinese charities, unions, religions, or other independent groups had been eliminated or were under state control. But the Red Guards boldly created themselves. They did not ask for official party approval.

The red bloods already were organized, thanks to military training at summer camps and rifle clubs at home. Mao's constant exhortation was "Never forget class struggle." Dressed in their parents' old military uniforms and proud of their blood purity, they attacked black students. Children of high-ranking military and political parents, the Red Guards had been told by their parents that communist party revisionists were against Mao. Fully indoctrinated in Maoism, the superior class of students was eager for violent class war.

At first, adult political cadres and others resisted, attempting to suppress the violent upstarts. The CCP center was dispatching "work groups" to high schools and universities to try to guide the Cultural Revolution, and some of those groups tried to stop the attacks on school staff. "However, without the support of the gun barrel, their cause was doomed." Beijing was fully under Maoist military control.[328] When a CCP Central Committee plenum (full meeting) opened on August 1, 1966, it was surrounded by Lin's soldiers. A PLA marshal warned the plenum that the military would act against any dissenters.[329] As a speech by Lin Biao several days later explained, there had been two essentials to the beginning of the Cultural Revolution: Mao's thought and the power of the PLA.[330]

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326. Thurston, at 90.
327. Dikötter, Cultural Revolution, at 61-62.
328. Zhu, at 120.
329. Zhu, at 123-24.
330. Zhu, at 119.

The day the plenum opened, Mao wrote a public letter to some Red Guards, telling them, "Revolution is not a crime, to rebel is justified."[331] On August 5, 1966, Mao put up his own big character poster at Beijing University: "Bombard the Headquarters" (*paoda silingbu*). Violence exploded. Dikötter, Cultural Revolution, at 69-75. *See also* Shaorong Huang, To Rebel Is Justified: A Rhetorical Study of China's Cultural Revolution Movement 1966-1969 (1996).

On August 18, 1966, a million youths were assembled in Tiananmen Square, where defense minister Lin Biao, repeating the June 1 *People's Daily* editorial, exhorted them to "Smash the Four Olds": "all old ideas, old culture, old customs and old habits of the exploiting classes." Two weeks earlier, the first murder in the Cultural Revolution had taken place. The victim was Bian Zhongyun, an assistant headmistress at the Girls' Middle School (a secondary school) attached to Beijing Normal University. She was tortured to death for hours by a mob of students. At the Tiananmen rally, one of the murderous student leaders—a daughter of one of the top generals of the revolution—was given the honor of putting a Red Guard armband on Chairman Mao's sleeve. Mao changed her given name from Binbin (suave or refined) to Yaowu (be martial). The school where the murder took place changed its name to "the Red Martial School." Song Yaowu became an instant national celebrity.[332]

Wang Rongfen, who was studying German at the Foreign Languages Institute, observed the similarities between Lin Biao's speech and Hitler's speeches at his Nuremberg rallies.[333] She sent Chairman Mao a letter: "the Cultural Revolution is not a mass movement. It is one man with a gun manipulating the people." He sent her to prison for life. In prison, her manacles bore points to dig into her flesh. She had to roll on the floor to eat. She was released in 1979, three years after Mao's death, with her spirit unbroken.[334]

Even at elementary schools, which were for students up to age 13, student mobs attacked teachers. The Minister of Public Security instructed the police to support the Red Guards. "Don't say that it is wrong for them to beat up bad people. If in anger they beat someone to death, then so be it." Even when Red Guards assaulted the police, the police were not supposed to fight back. Dikötter, Cultural Revolution, at 73-80; Su, at 177. *Cf.* William Golding, Lord of the Flies (1954).

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331. Wang, at 140 (*Geming wu zui, zaofan you li*). In 1939, Mao had said, "All the many truths of Marxism-Leninism, in the last analysis, may be expressed in one sentence: to rebel is justified." Speech to the Meeting Sponsored by All Circles in Yan'an to Celebrate the 60th Birthday of Stalin. "To rebel is justified" also appeared in the June 1, 1966, *People's Daily* article that launched the Cultural Revolution. Wang, at 146.

332. Dikötter, Cultural Revolution, at 73-80. The father was Song Renqiong. He was later purged during the Cultural Revolution, and still later brought back to power by Deng Xiaoping. *See Mapping China's Red Nobility*, Bloomberg, Dec. 26, 2012. In 1989, Song Renqiong strongly supported Deng Xioaping's use of deadly force to end the Tiananmen Square democracy protests. The daughter, Song Binbin/Yaowu, later studied at the Massachusetts Institute of Technology and worked for the Massachusetts Department of Environmental Protection. In 2013, she apologized for her actions. Her story is among those told in the 2003 television documentary *Morning Sun*.

333. Massive Nazi rallies held in Bavaria, glowingly portrayed in Leni Riefenstahl's films, most notably the propaganda film, *Triumph of the Will* (*Triumph des Willens*) (1935).

334. Dikötter, Cultural Revolution, at 109.

While murders by students had initially been only in the Beijing area, the lethal mobs spread nationwide as students returned home from the Tiananmen rally. The Red Guards were declared to be reserve forces of the PLA, and the PLA was ordered to assist their travel. For the rest of the year they were given free rail and bus transport plus free accommodations and food. Quite a change from the usual rules against leaving one's registered city or village.

Twelve million Red Guards traveled to Beijing over the next several months, to wait weeks until Mao would appear on a balcony and acknowledge them, in seven more rallies from August 31 to November 26. Hideously overcrowded and filthy trains and buses, and conditions in Beijing produced a meningitis epidemic that killed 160,000. There was no money for antidotes because government spending was oriented to the Cultural Revolution.[335] European governments later donated vaccines.

Although some students just took advantage of the opportunity for free travel and left Beijing to visit scenic or historical places, many others came home empowered. Under state direction, rage mobs roamed the streets, attacking women for bourgeoise behavior such as wearing dresses or having long hair. They ransacked homes, especially of the blacks, but also of some reds. Poor street peddlers, barbers, tailors, and anyone else participating in the non-state economy were attacked and destroyed. Many of them were ruined and became destitute. Street names that referenced the past were replaced with communist names. Historic artifacts, public monuments, non-communist historic sites, religious buildings, tombs, and non-communist art were destroyed. So were cats, which supposedly expressed bourgeoise decadence, and pigeons, which were bred for racing. (Dogs already been wiped out for sanitary reasons.)[336]

Libraries were pillaged, including rare historic manuscripts; "entire sections of libraries — the Chinese, Western, and Russian classics — were often put to the torch in huge outdoor bonfires." Thurston, at 101. *See generally* Rebecca Knuth, Libricide: The Regime-Sponsored Destruction of Books and Libraries in the Twentieth Century (2003) (destruction of books as a prelude to mass murder in Nazi Germany, Bosnia under the Serbs, the Cultural Revolution, Tibet under Chinese rule, and Kuwait under Saddam Hussein).

House-to-house searches were conducted to look for concealed arms, books, religious items, gold coins, and evidence of disloyalty. If something was found, the victims were tortured. "Every night there were terrifying sounds of loud knocks on the door, objects breaking, students shouting and children crying. But most ordinary people had no idea when the Red Guards would appear, and what harmless possessions might be seen as suspicious. They lived in fear."[337] Many people preemptively destroyed their books and artwork, lest the Red Guards discover them. Ordinary thieves posed as Red Guards to get in on the looting.[338] Most victims were ordinary people, but party officials, especially those linked to leaders who had previously been purged, were also targeted.[339]

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335. Dikötter, Cultural Revolution, at 101-114; Zhu, at 140.
336. Dikötter, Cultural Revolution, at 74-84, 94.
337. Dikötter, Cultural Revolution, at 86-90.
338. *Id.*; Chang & Halliday, at 520-21.
339. Dikötter, Cultural Revolution, at 92.

Even under Stalin and Hitler, being educated was not a *per se* offense. A research chemist or a scholar of ancient literature was not at specially high risk. But in China's Cultural Revolution (and even more so in Cambodia under the Khmer Rouge 1975-79), being educated or an intellectual or able to speak a foreign language could be cause enough to be killed, tortured, or put into forced labor.[340]

The gun control program begun in 1949 appeared to have been successful. In Wuhan, the largest city in central China, two thousand black homes were ransacked. The Red Guards found plenty of gold, porcelain, art, and other valuables — but only 22 rifles.[341]

While Red Guards used a variety of improvised arms, their main weapons were simply leather belts with brass buckles, which they used to beat their targets senseless, often inflicting severe injury. Sometimes the victims were forced to lick their blood up from the street.[342] Any pedestrian could be accosted by Red Guards, ordered to recite quotations from Chairman Mao, and then punished on the spot for not having memorized enough of them. Daniel Leese, Mao Cult: Rhetoric and Ritual in China's Cultural Revolution 135 (2011).

What could a person attacked by the mob do? Resistance might be immediately fatal, since the police were not going to intervene. If the victim somehow did manage to resist, then the government, which had almost all the guns, would finish off the resister, or ship her to a *laogai* camp.

All Mao, All the Time

"Soon enough everybody understood that the only acceptable proletarian culture was the cult of Chairman Mao." Dikötter, Cultural Revolution, at 96. His picture and words were everywhere — on giant posters and blasted full volume on pervasive loudspeakers.

Under Lin Biao's direction, the army since 1960 had been making soldiers read and learn collections of short teachings by Mao. These became the basis for the *Little Red Book* (*Hong bao shu*), with an introduction by Lin Biao (full title, *Quotations from Chairman Mao Zedong*). In 1966, everyone in China was required to buy the Little Red Book. State printers ran out of paper, even though printing of all nonpolitical works had been eliminated. Mao ranked the Little Red Book alongside the works of Confucius and the Bible.[343] In terms of sales, he had a good point. The royalties made Mao the first millionaire in the People's Republic of China. Lowell Dittmer, *Pitfalls of Charisma, in* Was Mao a Monster?, at 72.

The only safe way to dress was in a simple unisex military-like uniform, plus a military cap with a red star, and a Mao badge on one's breast. There were about 5 billion badges produced, sucking up so much aluminum that some other industries were brought to a standstill. *See* Melissa Schrift, Biography of a Chairman Mao Badge: The Creation and Mass Consumption of a Personality Cult (2001); Helen

340. Rummel, China's Bloody Century, at 259-60.
341. Dikötter, Cultural Revolution, at 89.
342. Dikötter, Cultural Revolution, at 76-77; Chang & Halliday, at 519.
343. Chang & Halliday, at 451, 514.

Wang, Chairman Mao Badges, Symbols and Slogans of the Cultural Revolution (2008).

According to a well-known list of Red Guard rules for everyone:

> Every street was to have a quotation from Chairman Mao prominently displayed, and loudspeakers at every intersection and in all parks were to broadcast his thought. Every household as well as all trains and buses, bicycles and pedicabs, had to have a picture of Mao on its walls. Ticket takers on trains and buses should all declaim Mao's thought. Every bookstore had to stock Mao's quotations, and every hand in China had to hold one. No one could wear blue jeans, tight pants, "weird women's outfits," or have "slick hairdos or wear rocket shoes." No perfumes or beauty creams could be used. No one could keep pet fish, cats, or dogs, or raise fighting crickets. No shop could sell classical books. All those identified by the masses as landlords, hooligans, rightists, and capitalists had to wear a plaque identifying themselves. . . .

Spence, Mao Zedong, at 163. Hospitals were forbidden to perform any "complicated treatment." *Id.*

"Keep people stupid," was how Mao had described his policy in 1962. Chang & Halliday, at 486 (citing Bainan Chao (Hundred Year Tide, monthly magazine of the Central Party History Research Center), no. 3, 1999, at 18).

Mao had eclipsed Stalin's and Hitler's cults of personality; not even they had forbidden the classic apolitical literature and art of their nation's culture.[344] Even under Hitler and Stalin, there was no harm in playing chess with a friend at home while listening to classical music and chatting about nonpolitical topics. But at the height of the Cultural Revolution, chess, playing cards, and Mahjong were forbidden.[345] Listening to music other than CCP songs was not allowed.

As for songs, the most-approved were not about China or communism, but about Mao. For example, since the late 1950s, Mao had been trying to displace the PRC national anthem, March of the Volunteers, with a song about him. Mao liked The East Is Red (*Dongfang hong*):

> *From China comes Mao Zedong.*
> *He strives for the people's happiness,*
> *Hurrah, he is the people's great saviour!*
> *Chairman Mao loves the people,*
> *He is our guide to building a new China.*
> *Hurrah, lead us forward!*

During the Cultural Revolution, Mao would get his wish, and *The East Is Red* took the place of the national anthem about the volunteers. The author of the actual national anthem died in a Maoist prison.

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344. Chang & Halliday, at 488.

345. Thurston, at 125.

For years the Socialist Education Campaign had made sure that everyone sang loyalty songs. For schoolchildren, a soon-to-be pervasive new song was composed in 1966: "Father is dear, mother is dear, But not as dear as Chairman Mao."[346]

Under the national socialists in Germany, ordinary greetings such as "Good morning" or "Hello" had to be replaced with a mutual exchange of "Heil Hitler." *See* Victor Klemperer, Language of the Third Reich (2013) (*LTI: Lingua Tertii Imperii*, 1957) (describing Nazification of public discourse). The same became true in China with "Long Live Chairman Mao"—literally, "Chairman Mao ten thousand years" (*Mao Zhuxi wansui*).

Consumer product names such as "Fairy" or "Golden Pagoda" were forbidden; some existing inventory was allowed to be sold if it had a warning attached, but customers were afraid to buy these products. To stay safe, shops retitled themselves with monotonous names like "Red Guard" or "Red Flag." Eventually, Mao quotes were printed on almost every object.[347]

The country had changed greatly in just a few months. Rage mobs can accomplish a great deal when everyone is afraid to fight back.

The pure bloods seemed on top of the world. But in October, the Party Center in Beijing denounced pure bloods who discriminated against other classes. Discriminating was a "bourgeois reactionary line." Red was the new black. Children of black and white (also called "gray") families formed their own Red Guards to fight the classic Red Guards. Mao had "realized that the children of the cadre who constituted the Red Guard movement were much less apt to challenge authorities at the highest levels." Schrift, at 51; Anita Chan, Children of Mao: Personality Development and Political Activism in the Red Guard Movement 137-38 (1985).

On November 1, 1966, Mao called for "the masses" to "educate and liberate themselves"—a statement that factory workers treated as permission to revolt against factory bosses, who were CCP cadres. Factory bosses assembled their own organizations of supporters, and fought back, pitting worker against worker.[348]

Under Mao, the cities were always subsidized by the peasants, as food from the country was expropriated for the cities. Some factory workers had job security, enough food to stay somewhat healthy, and some health care. Many other city workers, including those who had violated the household registration order and had fled the famines in the country, subsisted on the margins, performing temporary labor under miserable conditions. Some of the urban battles pitted these two groups of workers against each other.

In vast and diverse China, many party officials had built their own fiefdoms. These too were attacked by the Red Guards or some other mass faction. Sometimes the officials managed to convince the groups to go attack some black families instead. Or officials raised their own band of Red Guards, or a group with a different name. There were Scarlet Guards (*chi wei dui*), rebels, all sorts of splinter

346. Wang, at 102; Dikötter, Cultural Revolution, at 297 (*die qin nian qin, buru Mao zhuxi qin*). Composed 1966. *See* 红色音乐家李劫夫在"文革"中 [Red musician Li Jiefu during the Cultural Revolution] Southcn.com, July 16, 2004.

347. Dikötter, Cultural Revolution, at 95-100; Leese, at 212.

348. Dikötter, Cultural Revolution, at 118-23.

groups, with shifting alliances and enemies. Different army factions got involved as well. Telling who was on the official side became hard, as conflicting signals from party propaganda in Beijing reflected conflicts among the élite running the Cultural Revolution.[349]

"Seize Power!"

In December 1966, Mao gave a toast: "To the unfolding of a nationwide civil war."[350] Wherever there was violence, all sides insisted that they were the ones truly fighting for Mao Zedong Thought (*Mao Zedong sixiang*). Actually, many were fighting for something much more practical: economic rights. "[A]fter the state organs of power had been shattered by the Red Guards . . . the broad masses of people rose up to take advantage of the chaotic situation. They translated their anti-Mao and anti-communist thinking into concrete actions." Factory workers went on strike, even though strikes are illegal under communism. Peasants demanded the option of "doing it alone in agricultural production"—their own small farms, not mass communes. Li, Human Rights, at 83.

Huge battles were fought in Shanghai, with hundreds of thousands of fighters wielding iron pipes, clubs, and bamboo sticks. Early 1967 brought the "January Storm" (*yiyue fengbao*); a rebel faction captured the city's newspapers and radio station, formerly the propaganda outlets for the traditional party. Mao telegrammed his congratulations. He publicly urged everyone to "Seize power!" following the Shanghai example.[351]

Things did not always work out as the Red Guards hoped. In February in Qinghai province, a crowd of over a hundred people decided to "Seize power!" by taking over the *Qinghai Daily* newspaper building in the provincial capital, Xining. After they did so, the army machine-gunned them all, not needing to use the flamethrowers that had been brought as backup.[352]

Although defense minister Lin Biao was Mao's toady, plenty of army commanders had different ideas. The CCP and the People's Liberation Army had always been closely intertwined. In many places, the CCP and the PLA élites lived nearby each other, socialized together, and sent their children to the same schools.[353] The PLA was not amused by violent workers and students. So the army often suppressed the mass insurgents, labeling them as counterrevolutionaries or rightists. In the "February Adverse Current" (*eryue niliu*), some army commanders rounded up January Storm people.[354]

Then in April 1967, Lin Biao ordered the military not to shoot rebels or to break up mass organizations. Significantly, the army was forbidden to punish raids on military armories. Some persons who in February had been labeled "counterrevolutionary" (a generic term for any political opponent) were released. The war of all against all spread.

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349. *Id.* at 101-04, 115-18.
350. *Id.* at 124.
351. Zhu, at 142, 169 n.3.
352. Dikötter, Cultural Revolution, at 134-35.
353. Zhu, at 163.
354. Zhu, at 141, 144-51.

Since the PLA was forbidden to punish raids on its armories, more and more people had firearms. Others fought with clubs, knives, javelins, or spears constructed by attaching scissors to a pole. Electricity lines were cut and water was poisoned.[355] Weapons were especially easy to come by in arms manufacturing cities, such as the west's Chengdu and Chongqing (Chungking). There, combatants used grenades, rocket-propelled grenade launchers, automatic rifles, and mortars.[356]

The cycle of violence was intensified by mutual retribution for past actions and by fear that the losing side would end up in prison slave labor camps or (best-case scenario) marginalized and destitute.[357] "By June 1967 China was in chaos."[358]

Nonpolitical crime, from pickpocketing to robbery, soared. Some was perpetrated by Red Guards who had enjoyed the violent sprees of the previous summer.[359] Sometimes mobs retaliated by beating the criminals to death. With increasing frequency neighbors decided that now was the time to kill other neighbors over past disputes.[360]

Even after April, some in the army were still siding with the political incumbents, rather than the movements against them. In July 1967, Mao flew to the industrial, arms-manufacturing city of Wuhan to order the local army to stop fighting the ultra-left. Army general Chen Zaidao refused. That evening, hundreds of soldiers accompanied by tens of thousands of workers carrying iron bars marched on Mao's fortified lakeside villa in Wuhan. A crowd of several hundred broke into the villa compound and beat up one of Mao's top Cultural Revolution lieutenants. Mao was snuck out of the villa at 2 A.M. and fled the city, protected by 200 members of his imperial guard, who had been quickly flown in from Beijing. Once Mao was safe, he had the defiant general Chen brought to Beijing and tortured in front of the Politburo.[361]

Mao concluded that three-quarters of army officers were not politically reliable. But "having sacked most civilian officials, he simply could not afford to create more enemies in what was now his only power base." Lin Biao took the opportunity to fill the very highest ranks with Lin's own cronies, and Mao had to go along.[362]

"Arm the Left"

Mao escalated. Mao's fourth wife, Jiang Qing, was deputy chair of the Central Cultural Revolution Group, which Mao had appointed to run the Cultural Revolution. "Why don't we arm the Left?" Mao instructed his wife. She issued a famous statement, "Attack with words, defend with weapons" (*wen gong wu wei*), universally interpreted as authorizing the Maoist masses to fight back against the army.

355. Dikötter, Cultural Revolution, at 139-44; Zhu, at 152.
356. *Id.* at 145; Zhu, at 152.
357. *Id.* at 145.
358. Dikötter, Cultural Revolution, at 147.
359. *Id.* at 147.
360. *Id.* at 147-48.
361. Dikötter, Cultural Revolution, at 149-50; Zhu, at 154-55.
362. Chang & Halliday, at 537-40.

"The Proletariat Must Take Firm Hold of the Gun" (*Wuchanjieji bixu laolao zhangwo qiangganzi*) declared an August 1, 1967, editorial in *Red Flag*. It urged mass organization to seize firearms, pursuant to a historic quote by Mao: "If we do not seize the barrel of the gun, if we do not use the revolutionary armed forces to oppose the counter-revolutionary armed forces, people will never be able to liberate themselves." The editorial urged violence against "the Chen Zaidao type of person" in the PLA. Zhu, at 158; Michael Schoenhals, *"Why Don't We Arm the Left?": Mao's Culpability for the Cultural Revolution's "Great Chaos" of 1967*, 182 China Q. 277 (2005); Dikötter, Cultural Revolution, at 151-56.

Defense minister Lin Biao enthusiastically agreed. Some fighters were given guns by the People's Liberation Army. Others raided factories or armories, acquiring semi-automatic firearms, machine guns, explosives, mortars, and anti-aircraft guns. In areas where the commanders distributed arms to one side, the other side would sometimes seize military arms with the complicity of sympathizers among the soldiers in control of the armory.[363]

The arms seizures were getting out of control. A rail shipment carrying Soviet arms to the North Vietnamese Army was stopped and pillaged. At a slave labor camp, prisoners revolted and took weapons from the guards.[364] In 1967, peasants revolted in 21 of the 26 provinces.[365]

In the far west, there was a "Second Tibetan Revolt." The Cultural Revolution had "unforeseen consequences in Tibet . . . an unprecedented opportunity to criticise and 'struggle' against Han cadres and their Tibetan collaborators."[366] In Kham in 1966, the people heard Chinese speaking against other Chinese, and seized the opportunity to rise up. Armed only with swords, they attacked a Chinese garrison and took the rifles and ammunition. "Overnight, the revolt spread to every district in Kham." However, the guerillas had no time or opportunity to coordinate. They were eventually put down by tens of thousands of PLA reinforcements.[367]

In the Tibet Autonomous Region, the people rose up in 20 of the 51 districts, and there were also revolts in Amdo.[368] The PLA in Tibet split between different Red Guard factions. In 1968, PLA from the Xinjiang military district suppressed the fighting.[369] Then in 1969, nomads copying the name of a Red Guard faction in Lhasa "seized power in their area for three months, declaring religious and economic freedom."[370] Revolts in Tibet continued through 1972.[371]

Another problem with "Arm the Left" was that people on all sides sincerely thought themselves to be pro-Mao. Like many Germans under Hitler, many Chinese believed that their far-away leader had good intentions and did not know about the

363. Su, at 200.
364. Dikötter, Cultural Revolution, at 151-56, 174.
365. Rummel, China's Bloody Century, at 260.
367. Dunham, at 399.
366. Smith, at 68-69.
368. Smith, at 68-69.
369. Smith, at 68-69.
370. Goldstein, at 94.
371. Rummel, China's Bloody Century, at 260-61.

abuses of local officials. The Chinese said "if only Chairman Mao knew" just as the Germans had said "if only the Führer knew about this" (*Wenn das der Führer wüßte*). Thurston, at 48; Vinzenz Hediger, *Wile E. Coyote in the Bunker: Film, History, and the Haunted Unlife of Adolf Hitler on the Silver Screen*, 76 Scandia 99, 108 (2010).

Notwithstanding the vituperation from the media and the instructions of Lin Biao, many army commanders continued to fight back. Rural militias were shipped into the cities to combat the Maoists. PLA units fought each other. The PLA had been willing to support the Cultural Revolution as long as the victims were somebody else, but when the army itself became a target, it defended itself. The PLA had "control of the gun barrel." So "[w]hen threatened, they had the means as well as the will to block the Maoists' assaults." Zhu, at 158-59, 162.

Mao had to retreat. While he previously had played off the PLA and the CCP against each other, they were uniting against him. He had started the Cultural Revolution with the PLA and the Red Guards united against the CCP. But now the Red Guards and the army were fighting, and Mao realized he had to side with the army. "The alternative was to mobilize the rebel forces and the PLA troops still loyal to him to fight an all-out civil war against the joint opposition of the local party and the army elites. This course of action would have been suicidal politically, even if Mao prevailed militarily. Mao apparently was not ready to jeopardize the very existence of the regime he had fought decades to establish." *Id.* at 159. In the latter half of August, articles in the *People's Daily* and *Red Flag* suddenly began praising the PLA, which they had excoriated only days before. *Id.*

On September 5, 1967, Mao rescinded "Arm the Left," except in Shanghai, where Mao's control was particularly strong.[372] Shanghai was a power base of Mao's wife, Jiang Qing. In Shanghai, Jiang and her allies would build a militia of over a million. Eventually, the Shanghai militia would take over the police function and send out patrols to beat up suspected ordinary criminals, as well as blacks, Four Types, or anyone suspected of independent thought or behavior.[373] The Shanghai militia would play a major role in Chinese politics in the 1970s, as described *in* Section D.3.k.

Trying to quell the national chaos, Mao called for "great revolutionary unity." He ordered an end to attacks on the military and authorized the PLA to arrest the rebels. Many people ignored his plea, and also ignored his repeated orders that guns be surrendered.[374] In late 1968, Mao told the Albanian defense minister that in Sichuan province (whose population was 70 million) 360,000 arms had been recovered, and many more were still out there.[375] "Banditry," the regime's euphemism for armed resistance, began to appear on the periphery. Many young men "carried on fighting, finding it more fun than doing boring jobs." Chang & Halliday, at 543;

372. Su, at 183.

373. Perry, at 208-47.

374. Perry, at 221 n.56; Su, at 196-97; Zhu, at 160.

375. Albania was the sole European communist state that Mao had successfully bribed into allying with him instead of the Soviet Union. Thanks to generous Chinese food donations (while millions of Chinese were dying of starvation) Albania did not have to impose food rationing, giving the country a very high standard of living by communist standards. Chang & Halliday, at 461-62.

Rummel, China's Bloody Century, at 225 ("In the countryside, another word for 'counterrevolutionaries' was 'bandits'"); Shih, at 1 (regime's description of military action against the resistance as "extirpating the bandits"), 6 (use of "bandit" to deceptively claim that resistance to the regime was apolitical).

Continuing into 1968 there were large urban battles with firearms, machine guns, mortars, and napalm. It was often impossible to keep up with which side was in or out, or who was really the most pro-Mao. For example, in Anhui province (near Shanghai), the two warring factions called themselves "Wonderful" (*hao pai*) and "Fart" (*hao ge pi*, as good as a fart). Each insisted that the other was a capitalist-roader.[376] Everywhere people were "waving the red flag to oppose the red flag" (*dazhe hongqi fan hongqi*) — that is, adopting communist symbols and rhetoric to oppose true communism. Who was really entitled to the red flag was impossible to tell. The country was becoming anarchic. Another set of orders from Mao, on July 3, 1968, demanded that everyone "immediately stop armed battles, dismantle forts and strongholds." He repeated the order on July 24.[377]

The PLA and militia killings and destruction of rebel areas matched or exceeded the brutality that had been inflicted by the Japanese, according to persons who had been lucky enough to survive both.[378] There was still more fighting in the 1969, leading to general defeat of the rebels.[379]

The PLA Takes Over

Mao's first few years in power had deliberately destroyed civil society — everything that interposed between the individual and the state. The destruction was insufficient for Mao. The state — that is, the Chinese Communist Party — had proved itself to be an obstacle to Mao's imposing his own will on the Chinese. Mao had incited the Cultural Revolution, starting with the privileged class of youths he had nurtured, to replace the Chinese Communist Party with mass organizations more responsive to his pure will. But things had gotten out of hand.

The army was the only organization left that was capable of running the country. Over the course of 1968, the Cultural Revolution was turned over to the army, acting as "revolutionary party committees." "Weapons were turned in, students returned to school, and workers went back on full shifts." By September 1968, the PLA was in control of 21 of China's 26 provincial administrations. The result gave Mao part of what he had been trying to achieve with the Cultural Revolution: a system that would immediately carry out his orders, without the bureaucratic layers of the Chinese Communist Party.[380]

However, the ultra-Maoist mass groups, especially the Red Guards, had been crushed. Despite all the prior purges, most of the officer corps was loyal to its own interests, not to Mao's. If Mao had been willing or able to incite his armed Left into

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376. Or less concisely: "Our seizing power is wonderful" versus "'Wonderful'? What a load of fart!" Chang & Halliday, at 542; Schrift, at 53.

377. Su, at 200; Dikötter, Cultural Revolution, at 174-79.

378. Rummel, China's Bloody Century, at 257.

379. *Id.*

380. Dikötter, Cultural Revolution, at 165-66, 179-84; Zhu, at 5, 142.

guerilla war, they might have been able to fight for years. But in head-on urban battles with the PLA, they were defeated.

Having to yield "to local military pressure, Mao paid a high price. He was forced to sacrifice his most loyal supporters on the revolutionary left and to give the military elites more political power than he ever had wished. His main problems from now on would be getting the soldiers to go back to the barracks and curbing the rapidly rising power of his erstwhile comrade in arms, Lin Biao." Zhu, at 168.

As the army took over, there were more purges, some for settling grudges, and others just to intimidate the populace. Some of the accused were executed, while many more were sent to slave labor in the *laogai* camps. Various campaigns cleared out the cities, whose population was expensive to support. People were exiled to the countryside for arduous labor in miserable conditions. While some naively volunteered pursuant to Mao's instructions to "learn from the peasants," many millions were sent involuntarily. In the countryside, the newcomers were burdensome mouths to feed from an already-scarce food supply. Sexual abuse of them was common. About 70 million educated youths in 1969-75 were shipped out of the cities for hard labor.[381]

A new round of purges began in 1969 and ran through 1971, based on a supposed "May Sixteenth" conspiracy from 1966. (This was the date that a circular had announced the creation of the Central Cultural Revolution Group, which would publicly unleash the Cultural Revolution several days later.) Supposedly, May 16 was also the debut of a secret plot against Premier Zhou Enlai. Although Zhou was himself a member of the Central Cultural Revolution Group, there were others in the group, including Mao's wife, who hated him and plotted against him. Whatever the intrigue at the top, the persecution of "May Sixteenth elements" did not target Madame Mao but instead large numbers of people who had no plausible connection to any conspiracy; they were tortured into confessing to having joined a conspiracy that they had never heard of before they were arrested.[382]

Some political victims had made "rightist" errors while others had made "leftist" ones. Any record that a student had attended one of the 1966 Cultural Revolution rallies in Tiananmen Square was a one-way ticket to forced labor in the countryside. About 3.5 million people who had joined the Cultural Revolution were affected. "The history of communism is, after all, a history of endless purges."[383]

Inner Mongolia was subjected to a particularly savage campaign of genocide and torture of the minority Mongol population. Ethnic groups in other border regions received similar treatment.[384]

Cultural Revolution warfare had been concentrated in the cities. The Red Guards and other students had mostly stayed out of the countryside, on government orders. In rural areas, mass faction battles occurred mostly in the county

381. Rummel, China's Bloody Century, at 261.
382. Thurston, at 142-45.
383. Dikötter, Cultural Revolution, at 184-203, 232-34.
384. *Id.* at 189-91.

seats.[385] As a result, country people were sometimes freer while government officials were distracted by the national chaos. An underground free economy had again arisen.

On the other hand, there was another round of mass murders of peasants in 1967 through mid-1968. About 1.45 million perished from "collective killing"—defined as the killing of at least ten people at once. The collective killings were primarily rural and were perpetrated almost entirely by the select militia.

The victims were not participants in Cultural Revolution politics. Rather, the targets were the Four Types—always a handy target for political activists of any persuasion. The mass murders were an opportunity for the militia to demonstrate their loyalty to Mao by killing lots of people without needing to be asked. Victims were typically denounced in public show trials that everyone in the village had to attend. Some victims were executed in plain sight to spread terror. Execution methods involved firearms, beating and torturing people to death (always common under Mao), or imaginative procedures, such as marching victims off a cliff. The rural collective killings were a sideline to the Cultural Revolution; they were not ordered by the Party Center. Yang Su, Collective Killings in Rural China During the Cultural Revolution (2011).

Post-Mao Chinese government statistics report a Cultural Revolution death toll of 1,728,000, including 237,000 in mass faction battles and 13,500 executed as counterrevolutionaries. For 1962-75, Rummel estimates about 537,000 battle deaths; 1,613,000 killings of noncombatants for political reasons; 118,000 ethnic killings of noncombatants (e.g., Mongols, Tibetans), and 6,000,000 deaths in the *laogai* camps. He estimates 7,731,000 dead, with a range of 549,000 to 32,269,000. The annual homicide rate by government/because of government was 80 killed per 100,000 population. The Cultural Revolution was the least murderous period of Mao's reign.[386] In one sense, the CCP promise that life in 1970 would be much better than 1950 came true.

Settling Back into Slave Labor

As the 1968 PLA crackdown spread nationwide, peasants were once again forced into slave labor under armed supervision. The labor was often a complete waste of effort. The economic slogans of the time were to imitate a model agricultural village and a model industrial town that had supposedly become self-sufficient by relentless work. "Learning from Dazhai" (Tachai) and "Learning from Daqing" (Taching) were frauds. The superficial autarky was orchestrated by the CCP, relying on secret large subsidies from elsewhere.

People were forced to labor under terrible conditions in huge construction and landclearing projects that made no economic or environmental sense, were poorly planned, and immediately failed. All in service of Mao's declaration that "Man Must Conquer Nature" (*Ren Ding Sheng Tian*).

385. Su, at 209, 224.

386. Rummel, China's Bloody Century, at 262-63.

Mao's reign was one man-made environmental disaster after another:

- killing all the sparrows while ignoring scientists' warnings that sparrows were necessary to control the insect population;
- deforestation to fuel "backyard" steelmaking furnaces that produced worthless slag, iron, and crude steel;
- cutting down fruit trees, deforesting, and filling in lakes for grain cultivation even though the land was useless for the purpose ("Take Grain as the Key Link");
- poorly built hydropower projects that increased flooding; and
- persecution of scientists who raised warnings about Mao's idiotic mandates.

To Mao, the environment was like the people of China: of no intrinsic value, serving only to be bent to his will. According to Mao Zedong Thought, Mao's pure will, instantiated through slave labor, could overcome the scientific laws of nature and the laws of human nature. *See* Judith Shapiro, Mao's War Against Nature: Politics and the Environment in Revolutionary China (2001); Dikötter, Cultural Revolution, at 220-30. "The environmental dynamics of the period suggest a congruence between violence among human beings and violence by humans toward the nonhuman world." Shapiro, at 1.

The necessity of survival again fostered an underground economy. It was partially suppressed with the "One Strike and Three Antis" campaign. The campaign's description of what was forbidden was deliberately vague, so as to authorize persecution of people who could not be persecuted for other reasons. Fewer than 1 percent of persons accused were executed; most were instead shipped to *laogai* camps. A large number committed suicide, which was always a common response to persecution under Mao. "The objective was to produce a docile population by transforming almost every act and every utterance into a political crime." Dikötter, Cultural Revolution, at 235-40.

Mao Religion

With Mao's blessing, the PLA began establishing a new religion for China.[387] Starting in the latter part of 1967, most nonwork time was taken up by mandatory nightly assemblies where people had to discuss their personal behavior in light of Mao Zedong Thought.[388] Then came the 1968-69 campaign of "Three Loyalties" (*san zhongyu*) and "Four Boundless Loves" (*si wuxian*).[389]

Statues and shrines of Mao were erected everywhere. Busts or pictures of Mao were mandatory home religious items. Although there was good money to be made, painters often declined the opportunity to paint a Mao icon, since the artist

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387. Leese, at 258.

388. *Id.* at 175.

389. Loyalty to Chairman Mao, loyalty to Mao Zedong Thought, loyalty to Chairman Mao's revolutionary line; boundless hot love, boundless faith, boundless adoration, boundless loyalty. Wang, at 124; Leese, at 194, 202, 205. Supplemented by the Four Greats (*si ge weida*): Mao as great teacher, great leader, great commander, and great helmsman. The Four Greats were introduced at the August 1966 Tiananmen rally by Mao's ghostwriter Chen Boda. Wang, at 124.

would be scrutinized and punished for the slightest inadvertent sign of insufficient veneration.[390]

Upon arising in the morning, everyone had to face their home Mao shrine and "ask for instructions." The day ended with "reporting back in the evening" (*zao qingshi, wan huibao*).[391] Mao replaced the "kitchen god" of Chinese folk culture. *See* Stefan R. Landsberger, *Mao as the Kitchen God: Religious Aspects of the Mao Cult During the Cultural Revolution*, 11 China Information 196, 208-09 (1996). In other aspects Mao was portrayed as the sun god.[392]

Life was structured around Mao and his words. Before every meal, people had to say grace: "Long live Chairman Mao and the Chinese Communist Party."[393] If a peasant walked into a store, the clerk was supposed to say "keep a firm hold on grain and cotton production," and the peasant would reply "strive for even greater bumper crops." If the customer was a student, the clerk would say "read Chairman Mao's books," and the student would answer "heed Chairman Mao's words." Wang, at 7; Leese, at 190-91 (describing "loyalty-ficating" of language). "[Q]uotations of the leader came to replace even the most mundane speech acts during a period ranging roughly from March 1968 to April 1969." Leese, at 192.

"The Cultural Revolution is perhaps the time in the twentieth century when language was most separated from meaning. . . . If you do not mean what you say, because what you say has no meaning beyond the immediate present, then it is impossible to imbue language with any system of values. . . . This led to the overall moral nullity of the Cultural Revolution during its most manic phase." Rana Mitter, A Bitter Revolution: China's Struggle with the Modern World 209 (2004). "The intention was to make speech, and especially speech on any subject not ideologically neutral, as nearly as possible independent of consciousness." George Orwell, *Appendix: The Principles of Newspeak*, *in* 1984 (1990) (1949).

Maoist life encompassed the body as well as the mind. Instead of "revisionist" sports, the new exercise routine was "quotation gymnastics" (*yulu cao*)—a set of group exercises in which participants shouted Mao quotes related to the motions. For example, in the third set of exercises, the leader would yell "political power grows out of the barrel of a gun." The exercisers would make nine thrusting and stabbing motions with imaginary bayonets.[394]

Even more common were "loyalty dances," in which individuals or groups stretched their arms to show their "boundless hot love" for Mao, sometimes worshipping him as the sun.[395] People began reporting miracles such as healing of the sick and attributing them to Mao.[396] Communist temples were erected, based on the historic model of ancestral temples. When buying a Mao item in a store, one could not use the common word for buying, *mai*; instead one would use the

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390. Dikötter, Cultural Revolution, at 167-70.
391. Leese, at 195-96.
392. Schrift, at 106, fig. 4.
393. Landsberger, at 208-09.
394. Leese, at 202-04.
395. *Id.* at 204-05.
396. *See* The Miracles of Chairman Mao: A Compendium of Devotional Literature, 1966-1970 (George Urban ed. 1971); Leese, at 193-94.

polite verb *qing*, previously reserved for the purchase of religious items.[397] The PLA enforcers labeled any nonparticipant in the Mao rites as an "active counterrevolutionary" (*xianxing fangeming*).[398]

The CCP Party Center supported the new religion, but also had some doubts. Public participation in the worship rituals helped people avoid being politically denounced in "a completely volatile situation dominated by witch hunts."[399] For persons who privately detested Mao, performing the Maoist rites could protect against suspicion of being counterrevolutionary. The Central Cultural Revolution Group was annoyed by the grassroots origins of the religious practices, which reduced the CCRG's opportunities to control from above.[400] "These excesses of public veneration underscored Mao's perception that the cult no longer served the intended function of providing him with an immediate and nonbureaucratic link to the revolutionary masses. Popular reaction had turned into a bewildering array of quasireligious worship, loyalty performances, and cult-symbol exchanges that resisted top-down control."[401]

Starting in May 1969, the Party Center began discouraging "formalistic" rituals and trying to regain control of the Mao brand.[402] Nevertheless, the cult continued for years. For example, in June 1970, a peasant in Shaanxi province was executed for not having a Mao poster in his hut, and for saying that Mao would not literally live ten thousand years.[403]

j. Lin Biao

When U.S. President John F. Kennedy delivered his inaugural address in January 1961, he rephrased an old Chinese saying, and cautioned newly emerging post-colonial states about the perils of communism. Kennedy urged the world's people "to remember that, in the past, those who foolishly sought power by riding the back of the tiger ended up inside."

In 1969, a new Chinese Constitution proclaimed in its first chapter: "The Communist Party of China takes Marxism-Leninism-Mao Tsetung Thought as the theoretical basis guiding its thinking. Mao Tsetung Thought is Marxism-Leninism of the era in which imperialism is heading for total collapse and socialism is advancing to world-wide victory. . . . Comrade Lin Piao has consistently held high the great red banner of Mao Tsetung Thought and has most loyally and resolutely carried out and defended Comrade Mao Tsetung's proletarian revolutionary line. Comrade

397. *Id.* at 210-13.
398. *Id.* at 207.
399. *Id.* at 174.
400. *Id.* at 174, 208.
401. *Id.* at 224.
402. *Id.* at 224-31.
403. *Id.* at 194.

Lin Piao is Comrade Mao Tsetung's close comrade-in-arms and successor." Chinese Const. (1969), ch. 1.

Lin Biao was riding high. Mao had needed the army, and so Mao had needed to give Lin whatever Lin wanted. Because of the excesses of the Cultural Revolution, Mao had, for the first time since the proclamation of the People's Republic of China, lost the support of *both* the PLA élite and the civilian élite.[404] During the Cultural Revolution, the Politburo had ceased to function, since so many of its members had been purged. In the reconstituted Politburo of 1969, over half the seats were held by the PLA.[405] The gun commanded the party.

The army ran education. Universities and other institutions of higher education had all been closed, and the key subject of lower education was Mao Zedong Thought. The army ran the economy and the government. The army was also starting to run Mao Zedong himself, Mao thought. Were the soldiers who were everywhere around him telling the PLA about Mao's private conversations and activities?

Mao began to move against Lin. In the spiderweb of CCP politics, Mao was crafty, patient, and duplicitous. Lin was too strong to confront directly, and if Mao tried, the PLA might side with Lin. A first step against Lin was undercutting of the "formalistic" rituals of the Mao religion, and thereby undercutting Lin, who was "the most prominent public supporter of the cult."[406]

In working against Lin, Mao was aided by each of the two major factions in the CCP: the ultra-left, led by Jiang Qing (Madame Mao), and the traditional party, led by premier Zhou Enlai. Both groups wished to reduce PLA power. At a 1970 conference, Mao pulled the rug out from under Lin's campaign to have Mao officially declared to be a "genius." He purged Lin's ally Chen Boda—a former Mao ghostwriter who was one of the most virulent members of the Central Cultural Revolution Group. And Mao blocked Lin's efforts to be named Chairman of the State, a post that had been vacant since Mao resigned it in 1959; after 1959, Mao's only official title was Chairman of the CCP.

In August and September 1971, Mao toured southern China to shore up his support among the southern generals. Lin could see the writing on the wall. Starting in March 1971, Lin Biao's son Lin Liguo started trying to organize an assassination of Mao and an army coup. They planned to bomb Mao's train on its return trip from the south. Mao was too careful to present an opportunity; as always, his travel plans changed suddenly and erratically, so he could not be targeted. Once Mao was safely back in Beijing, Lin and his family tried to flee to Mongolia, dying in a plane crash on September 13, 1971.[407] Dikötter, Cultural

404. Zhu, at 15, 165.

405. *Id.* at 134-36; Li, Private Life of Chairman Mao, at 545.

406. Leese, at 224-25.

407. Communist Mongolia was a satellite of the Soviet Union, which was hostile to Mao, and presumably would have welcomed Lin Biao as a high-ranking defector.

Revolution, at 241-52; Zhu, at 173-74, 182-84; Li, Private Life of Chairman Mao, at 540-43.[408]

In the ensuing posthumous propaganda campaign against Lin, Mao ordered the release of the evidence against Lin's family, including the son's "571 Engineering Project." In Chinese, 571 (*wu qi yi*) is close to "armed uprising" (*wuzhuang qiyi*). The 571 document called Mao "not a true Marxist but an emperor type of dictator." He "changed the political life of the party and state into the life of a feudal, dictatorial, patriarchal type." Mao was "the present-day Emperor Shih Huang of the Chin Dynasty," inflicting "a feudal dynasty that carries a socialist banner."

According to the 571 manifesto, Mao's theory of "continued revolution" (i.e., the continuation of class struggle even after the original enemy economic classes had been liquidated) meant that the "targets of such a revolution actually were the Chinese people, the army, and anyone who disagreed with them." The Maoists

> not only incite cadres to struggle against cadres and masses against masses but also incite armed forces to struggle against armed forces and party members against party members. . . . They manufacture controversies and cleavages so as to achieve their goal to divide and rule, destroying each group, one by one, to maintain their power. They understand that to attack everyone at the same time is suicidal. Thus, each time, he [Mao] uses one force to attack another. Today, he enlists this force to attack that force; tomorrow, he enlists that force to attack this force. . . . He suspects everything and everybody. He has a habitual practice of illtreating others. The men who had worked for him but were later kicked out one by one are in reality scapegoats bearing blame for him.

Zhu, at 190; Li, Human Rights, at 86-87.

Mao had expected the evidence against the Lin family to be damning, but many people agreed with the 571 manifesto by Lin's son. Mao had spent a decade building up Lin as *the* expositor of Mao Zedong Thought, and Lin had been Mao's named heir since 1965. Mao apparently did not always hire the best people. The Lin Biao incident stripped Mao of whatever remaining legitimacy he had, in the eyes of many.[409]

The 571 manifesto had accused Mao of being like the First Emperor, Shih Huang. Mao retorted that he indeed was like Shih Huang, and proud of it. The First Emperor and Chairman Mao both hated the influence of Confucianism on the Chinese people.

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408. The portrayal of Lin in this essay has followed the standard view of Lin in the West and in China. That view is challenged in Frederick C. Teiwes & Warren Sun, The Tragedy of Lin Biao: Riding the Tiger During the Cultural Revolution 1966-1971 (1996) (Mao forced Lin into power against Lin's wishes; Lin was not interested in politics and just did whatever Mao wanted, to the extent Mao's will was discernable); Jin Qiu, The Culture of Power: The Lin Biao Incident in the Cultural Revolution (1999) (Lin was not an enthusiast for the Cultural Revolution, was targeted in palace intrigue led by Jiang Qing, and did not know of his son's assassination plans). Whatever Lin's inner thoughts, in his public role he was the nation's most avid promoter of Mao Zedong Thought.

409. Zhu, at 174, 188-90, 202-03, 210; Dikötter, Cultural Revolution, at 242-44.

So starting in 1972-73, the people were ordered to condemn the "reactionary" ideas of Confucius, such as "the people are the foundation of the state," "depositing riches in the people," and "in teaching make no class distinctions." Denunciation of Confucius was coupled with praise of the First Emperor for burning books and for burying scholars alive, because the First Emperor had been engaged in historically progressive class struggle. Li, Human Rights, at 87-88 (citing *People's Daily*, Sept. 23, 1972, reprinting *Liaoning Daily* article extolling "burning of heretic books and burying alive of Confucian scholars").

Allegedly, the root cause of the greatest treason ever against Mao was Confucianism. "Criticism of Lin Piao and repudiation of Confucius" went hand in hand (*pi Lin pi Kong yundong*).[410] As the *People's Daily* put it, "Lin Biao feverishly advocated the doctrine of Confucius and Mencius. His reactionary ideological system was identical to Confucius and Mencius." Roberts, at 58 (quoting *People's Daily* editorial, Feb. 2, 1973). Even more so than Confucius, the Confucian philosopher Mencius was an outspoken advocate of revolution against tyrants. *See* online Ch. 21.A.1.

A subtext of the anti-Confucian campaign was to weaken premier Zhou Enlai, who was considered too pragmatic. Because Confucius had praised the Duke of Zhou as an ideal ruler, anti-Confucian propaganda could denounce "Zhou" and "present-day Confucians" without directly naming the premier.[411] The indirect criticism was an example of what the Chinese call "pointing at the mulberry and reviling the ash." Jiang Qing and her allies did it to Zhou Enlai often.

k. The Militia and the Power Struggles of the 1970s

The Cultural Revolution continued until Mao's death in 1976, although the severity of repression lightened somewhat after 1971, with ups and downs in different times and regions. Universities began to reopen in 1973. Instead of having to dress in drab loose pants and a shirt, women were allowed to choose a single type of ugly dress authorized by the CCP.

Deng Xiaoping—who had been one of the top two individual targets of the Cultural Revolution—was rehabilitated and brought back into government. He in turn rehabilitated many survivors among the old-line party cadres—the class who had been target of the Cultural Revolution. The return of Deng may in part have been Mao's effort to build up a political force to balance the army's dominance.

Violence was reduced, compared to previous years—at least for people who didn't challenge the system. In November 1974, Muslims in Shadian county (Yunnan province) formed their own militia to protect their mosques from being closed. The group trying to shut the mosques had been armed by the government. The Muslims snatched "guns from the local authorities and created homemade weapons with steel tubes filled with firepower, glass and other materials." Xian Wang, *Islamic Religiosity, Revolution, and State Violence in Southwest China: The 1975 Shadian Massacre* 41 (M.A. Asia Pacific Policy Studies, Univ. Brit. Col. 2013). The People's Liberation Army was ordered in, killing 1,600 and razing villages.[412]

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410. Li, Human Rights, at 84.
411. Leese, at 241.
412. Dikötter, Cultural Revolution, at 30.

In the post-Lin period, there was a continuing struggle among the PLA, the CCP pragmatists (led by Zhou Enlai and Deng Xiaoping), and the idealistic radicals (the Gang of Four, Jiang Qing and her Shanghai cohorts[413]). Both CCP groups worked together to push the PLA out of day-to-day government administration. Some in the PLA were happy to be able to focus on military preparedness instead.

The civilians were also maneuvering for who would take over after Mao. As noted above, the political base of Mao's wife Jiang was Shanghai. Starting with Mao's "Arm the Left" campaign in 1967, the Shanghai militia had become a force of over a million, running the city, and administering beatings as it saw fit. Although the normal Chinese pattern was for the militia to be integrated in the PLA command structure, the Shanghai militia was not answerable to the PLA. Nor did the Shanghai militia depend on the PLA for arms. Militia-run factories in Shanghai had been repurposed to build militia weapons.

In 1973, the Gang of Four had enough political clout to launch a national campaign for the militia everywhere to copy "the Shanghai Experience." In effect, this meant a militia led by the ultra-left, and not answerable to the PLA. The campaign was fairly successful in large northeastern cities, creating a large armed force responsive to the Gang of Four. But elsewhere, and especially in the rural areas, PLA foot-dragging and outright noncompliance kept the militia under PLA control.[414] A new constitution in 1975 elevated the militia to equality with the army.[415]

Mao wanted to reignite the Cultural Revolution, get rid of the revisionists, and put the Gang of Four in charge. But he also did not want to die in prison. The danger posed by the army prevented him from fully pushing his political objectives.[416]

When Zhou Enlai died in January 1976, huge, spontaneous, and unauthorized crowds assembled to mourn him. The crowds considered him relatively less totalitarian and oppressive than Mao. Unlike the Tiananmen rallies of the early Cultural Revolution, which originated from the top down, the crowds that gathered to mourn Zhou expressed people power. "The country had not witnessed such an outpouring of popular sentiment since before the communists came to power in 1949." Li, Private Life of Chairman Mao, at 611.

While there were demonstrations at over 200 locations throughout the country, the flashpoint was in Beijing's Tiananmen Square, which saw the largest spontaneous demonstration ever in China.[417] On April 4, Tomb-Sweeping Day (*Qing Ming*), a traditional day for honoring one's ancestors, an immense crowd gathered at the Monument to the People's Martyrs in Tiananmen Square. Erected in 1959, the monument honored Chinese revolutionary martyrs from 1840 onward.

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413. The appellation "Gang of Four" was coined by Mao. The members were Jiang Qing, Chang Chung-chiao, Wang Hung-wen, and Yao Wen-yuan.

414. Roberts, at 51-77; Perry, at 247-49.

415. "The Chinese People's Liberation Army and the people's militia are the workers' and peasants' own armed forces led by the Communist Party of China; they are the armed forces of the people of all nationalities." China Const. art. 15 (1975).

416. Zhu, at 201-17, 243-45; Dikötter, Cultural Revolution, at 241-95.

417. Thurston, at 18.

At the monument, poems were read aloud, then transmitted throughout the square by relay teams shouting each line, as the people wrote them down.[418] One poet said:

In our grief we hear the devils shrieking;
We weep while wolves and jackals laugh.
Shedding tears, we come to mourn our hero,
Heads raised we unsheathe our swords.[419]

The crowds shouted, "People's Troops are on the Side of the People!" Some protestors wrote big character posters: "The people are no longer stupid as they were before" and "We are no longer afraid of losing heads and shedding our blood."[420]

The masses denounced Chairman and Madame Mao, indirectly: "Down with Franco!" (recently deceased Spanish fascist dictator), "Down with Indira Gandhi!" (Indian Prime Minister who had recently overturned democracy and was ruling by decree), "Down with the Empress Dowager!" (Manchu Dynasty ruler of China 1861-1908) — pointing at the mulberry and reviling the ash.

That night, the government dispatched fire engines and cranes to remove the tens of thousands of wreaths deposited in honor of Zhou.[421] The next day, a worker's militia was sent to disperse the crowd, but it was hesitant to act, with many members themselves having laid wreaths for Zhou.[422] Police and more militia surrounded the square. People could leave but not enter. Some protesters broke into government buildings, destroyed propaganda vans, toppled and burned cars, or attacked security guards and militia.[423]

As dusk neared, a final poem was pasted on the monument. Three lines brought the crowd to silence. As they were relayed, no one else spoke. The listeners quickly scribbled the words onto paper. "For the unspoken had finally been said, the thought that had lain barely below the surface had become manifest, the undertow had merged with the current." Thurston, at 21.

China is no longer the China of yore
Its people are no longer wrapped in ignorance
Gone for good is the feudal society of Qin Shi Huang.

Id. "The last of the Tiananmen poems had turned the tide of protest. It was directed now against the party chairman himself." *Id.* at 22.

That night, the Tiananmen revolutionaries were attacked by the Capital Militia Command Post (a/k/a the "Cudgel Corps"). In Beijing as in Shanghai, the militia were under the command of the Gang of Four.[424]

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418. *Id.* at 15.
419. *Id.*
420. Li, Human Rights, at 173-75.
421. Thurston, at 19.
422. *Id.* at 20-21.
423. *Id.*; Li, Human Rights, at 173-75.
424. Perry, at 249-52; Zhu, at 219-20, 226 n.15; Li, Private Life, at 611-12; Li, Human Rights, at 174-75.

The minister of defense said that over ten thousand in the crowd of a hundred thousand might have been killed; another official said there were only a hundred deaths.[425] Newer scholarship argues that the violence lasted only 10-15 minutes; people were beaten bloody but no one was killed. Frederick C. Teiwes & Warren Sun, *The First Tiananmen Incident Revisited: Elite Politics and Crisis Management at the End of the Maoist Era*, 77 Pac. Aff. 211, 219 (2004). According to one report, it took hundreds of workers to scrub off the blood.[426]

On April 7, Deng Xiaoping was purged again. That evening and the next two, the government ordered in large crowds to express their loyalty to Mao. Together they yelled, "Resolutely carry the struggle against the right deviationist attempt to reverse correct verdicts through to the end." Thurston, at 23. On the Martyrs Monument, "gleaming like a red neon light, was one stain of blood that somehow had been missed." *Id.* at 24. *Cf.* William Shakespeare, Macbeth, act v, scene 1 ("Out, damned spot! . . . What need fear who knows it, when none can call our power to account?").

l. Post-Mao and the Mao Legacy

Mao died September 9, 1976. People made a show of crying in public, as they had to. Unlike with Zhou, there were many official events commemorating the passing of Mao—and "no comparable spontaneous expressions of grief."[427]

Jiang Qing and her Gang had been arming their urban militias, preparing to carry out a long-planned coup.[428] With little time to spare, the other side struck first, arresting Madame Mao and her cohorts on October 6, 1976.[429]

Deng was rehabilitated for a second time in July 1977 and by 1978 he had taken over. "Seek truth from facts," was his slogan. Although it echoed something Mao had once said, the import was an obvious heresy against Mao Zedong Thought. The new policies shifted emphasis "from judging a policy by the degree to which it is grounded in the tenets of Mao's thought, and toward measuring its legitimacy by its ability to achieve practical results." Thomas C. Roberts, The Chinese People's Militia and the Doctrine of People's War 3 (1983).

Over time, the urban militias were brought back under PLA control. The militia—while still select—was removed from intraparty politics and refocused on its classic tasks: labor, controlling the population, and serving as a reserve force in case of a land war. *Id.* at 79-107.

Deng began to open up the economy, while still maintaining substantial state control. Over time, living standards soared. The regime kept Mao's cult of personality but toned it down, and admitted he had made mistakes. Deng's enemies had called him the number two Khrushchev of China (Zhou Enlai being number one).[430] They had a point. Deng had been a great military leader in establishing a

425. Rummel, China's Bloody Century, at 268; Li, Human Rights, at 174-75.
426. Li, Human Rights, at 175.
427. Leese, at 244.
428. Zhu, at 217-23.
429. Li, Private Life of Chairman Mao, at 624-32.
430. Li, Human Rights, at 90.

totalitarian communist state. Like Khrushchev, and unlike Stalin and Mao, Deng recognized that rule by a self-deluded, isolated, irrational, megalomaniac was destructive to the long-term interests of a communist party. Although human rights could be obliterated, human nature and common sense could not.

Mao's Pros, Cons, and Legacy

Today, Mao's defenders argue that, notwithstanding the mass murder, tyranny, destruction of civil society, and his policy of keeping people stupid, he improved living conditions. Actually, caloric intake did not exceed the low pre-Mao levels of the late 1920s and early 1930s until the late 1970s, after Mao was gone and farming was decommunized.[431]

By one analysis, life expectancy at birth was 43.45 years in 1950, and began to substantially improve when the Great Leap Forward ended, reaching 63.97 by 1976. Another analysis found that life expectancy was over 40 in 1950, 49 in 1957, only 25 in 1960, 61 in 1970, and 65 in 1980. Nicholas Eberstadt, The Poverty of Communism 131, tbl. 7.1 (1988) (citing Judith Banister, *An Analysis of Recent Data on the Population of China*, 10 Population & Dev. Rev. (June 1984)). The long-term improvement in China was greater than in India.

Mao is also praised as a pioneer in sex equality, and he did make a genuine difference for women. Forbidden to stay home and raise their children, who would instead be raised by the state, young urban mothers worked in factories, whereas working mothers were frowned on socially in Japan and South Korea. Since factory workers were better off than most, the equality that allowed factory work by women made many of them better off compared to the alternatives available under Maoism.

Liberated from childcare, peasant women participated equally in hard labor at gunpoint in the fields. After birth, mothers were permitted about a month before the baby was sent to the communal nursery and the mother back to the fields.[432] Since women, on the whole, are physically less strong than men, they earned fewer "work points" from labor, and were therefore paid and fed less.[433]

Because of Mao, many women did not need the free state-provided childcare: chronic malnutrition and deprivation of rest caused prolapsed uteruses, amenorrhea, and widespread infertility. Dikötter, Cultural Revolution, at 264, 269 (conditions in 1972); Dikötter, Famine, at 257-58 (during Great Leap Forward). Mao robbed many women of reproductive rights.

Under Mao, birth control policies varied. There were bans on birth control, then free distribution of birth control, then laws raising the marriage ages, requiring four or five years spacing between a first and second child, and allowing a third child only with a permit. Thomas Scharping, Birth Control in China 1949-2000: Population Policy and Demographic Development 47-50 (2003).

Starting in 1979, the CCP reduced the permissible number of births per woman to one. If a woman had already given birth to a child at any time in her life, abortion was often mandatory for a second pregnancy. *Id.* at 119-22. The policy led

431. Rummel, China's Bloody Century, at 215.

432. Chow, at 237-38.

433. Li, Human Rights, at 135.

to tens of millions of abortions, some of them voluntary and many coerced, including by physical force. *See, e.g.*, Rummel, China's Bloody Century, at 271 (describing the "Clean out the Stomach" forced abortion program in Henan Province, due to 3,000 over-quota pregnancies there). *See generally* Population Research Institute (research organization focused on population control as means of interference with reproductive rights, including in China).

Sex-specific abortion of females became very common.[434] Infanticide also was practiced, although data are hard to come by, and it was presumably more frequent in rural areas, where it was easier to conceal.[435] From 2000 to 2010, data from China's National Bureau of Statistics indicates 66.88 million girls born and 79.52 million boys. Weida Li, *China's Sex Ratio Disparity Increases*, GBTimes, Sept. 5, 2018. The figures indicate over 10 million sex-selection abortions in the decade, and perhaps also reflects female infanticide for births that were never officially recorded. In 2016, the birth cap was raised back to two, if the woman obtains permission from her work unit.

Mao is credited, by some, for ending China's "century of humiliation"—the period starting in with the First Opium War (1839-42) when foreign powers bullied China, extorting territory and unequal trade concessions. Really though, Chiang Kai-Shek and the Nationalists did more to end the century of humiliation. Much larger than the communist army, the Republic of China army defeated the warlords. The Republic's military did far more than the communist military to drive back the Japanese invasion.

China became a global power, and hundreds of millions of Chinese escaped extreme poverty not because Mao lived but because he died. Freed from Mao's crazy strangulation of economic life, China has risen swiftly.

As a territorial conqueror, Mao was among the greatest in Chinese history. Whatever one thinks about the legal status of Tibet and Xinjiang, both areas were in fact self-governing in 1949. Both areas had been self-governing for most of their history, including recently. After Mao was finished, Tibet and Xinjiang were under very strong control from afar.

An enduring, although diminished, Mao legacy has been the *laogai* work camps—renamed, but still in operation, enslaving millions. Rummel estimates that after Mao the camp population was reduced to about 5 million, and conditions improved, so that *laogai* camp deaths in 1976-87 were a comparatively low 720,000. As the government was discovering, keeping slaves alive was economically sensible, because they could produce export goods at very low labor cost. The total of mass killing in 1977-87 was 874,000, with most of the non-camp deaths from persecutions in Tibet and other ethnic areas.[436]

Today in Xinjiang, over a million Muslims are held in concentration camps. Adrian Zenz, *Xinjiang's New Slavery: Coerced Uighur Labor Touches Almost Every Part of the Supply Chain*, For. Pol'y, Dec. 11, 2019. *See generally* Nick Holdstock, China's Forgotten People: Xinjiang, Terror and the Chinese State (2019); Debasish Chaudhur, Xinjiang and the Chinese State: Violence in the Reform Era (2018); Ethnic

434. Scharping, at 291-98.
435. *Id.*
436. Rummel, China's Bloody Century, at 273.

Conflict and Protest in Tibet and Xinjiang: Unrest in China's West (Ben Hillman & Gray Tuttle eds. 2016); Michael Dillon, Xinjiang and the Expansion of Chinese Community Power (2014); Gardner Bovingdon, The Uyghurs: Strangers in Their Own Land (2010).

Post-Mao, freedom of thought and inquiry in China has waxed and waned, with waning in recent years as Xi Jinping has made himself dictator for life and demanded that all aspects of life in China be directed by the CCP. Human rights activists and the lawyers who defend them are kidnapped, held incommunicado, and tortured—sometimes for years. *See, e.g.*, The People's Republic of the Disappeared: Stories from Inside China's System for Enforced Disappearances (Michael Caster ed., 2d ed. 2019). The CCP employs technological surveillance beyond anything Mao could have dreamed. *See, e.g.*, James Griffiths, The Great Firewall of China: How to Build and Control an Alternative Version of the Internet (2019). *Cf.* Jude B. Blanchette, China's New Red Guards: The Return of Radicalism and the Rebirth of Mao Zedong (2019); Nicholas R. Lardy, The State Strikes Back: The End of Economic Reform in China? (2019).

Tiananmen Square

In 1989, democracy demonstrators began to threaten the one-party state. Beginning in mid-April, they demonstrated and camped in Tiananmen Square. Against the armed force of the People's Liberation Army, they knew their only hope was the moral force of nonviolence. *See* Timothy Brook, Quelling the People: The Military Suppression of the Beijing Democracy Movement (1998).[437]

Deng Xiaoping declared martial law on May 20. The evening before, the PLA had been sent in to clear the protesters. But as soon as PLA forces were spotted moving into Beijing, huge crowds assembled to block them. The PLA had not been given orders to shoot if necessary, and so the army was blocked.

The people of Beijing had come out *en masse*, and they stayed out *en masse*, fortifying their city against invasion by the standing army. Street barricades were constructed with overturned buses, bicycles, cement blocks, or whatever else was at hand. A spontaneous network spread the word on how to immobilize a vehicle column: use gravel to stop the lead vehicle, let the air out of its tires, and then remove or cut the ignition wires.

A few days later, the PLA pulled its forces back outside Beijing, leaving many stranded vehicles behind. The PLA began preparing for a second assault. Inside Beijing, tactical knowledge continued to disseminate. For example, if a whole armored column cannot be stopped, surround and stop the final third of the column. Then as the reduced vanguard moves forward, isolate and halt its rear third, and so on.

While the students were concentrated in Tiananmen Square, the city itself was defended by people of all backgrounds and classes. New citizen militia self-defense forces, with names such as "Dare-to-Die-Corps," vowed to defend the students at all costs. The people desperately hoped that the People's Liberation Army would never obey orders to fire on the people. With many military personnel stuck in

437. This subsection is based mainly on Brook.

immobilized caravans, there were plenty of opportunities for friendly conversations, and some soldiers vowed never to harm the people. But most of the soldiers who would soon attack Beijing never had an opportunity to interact with the people, and were told by their officers that the protesters were just bunch of hooligans who were endangering public safety.

The possibility that some military units might actually fight for the people was apparently considered a serious risk by the regime. The military deployment aimed at Beijing included anti-aircraft rockets—of no use against land-based protesters, but handy in case some of the air force switched sides.

On May 30 the democracy protesters at Tiananmen Square, now numbering over a million, raised a statue of the Goddess of Liberty. She directly faced and confronted Mao's giant cult portrait hanging in the square.[438] Around the city the masses were singing with new meaning the global communist anthem, *The Internationale*:

For reason in revolt now thunders and at last ends the age of cant.
Now away with all your superstitions.
Servile masses arise, arise!
We'll change forthwith the old conditions and spurn the dust to win the prize. . . .
On our flesh too long has fed the raven.
We've too long been the vultures' prey.
But now farewell to spirit craven.
The dawn brings in a brighter day . . .
No savior from on high delivers.
No trust have we in prince or peer.
Our own right hand the chains must sever,
Chains of hatred, greed and fear . . .
Each at his forge must do his duty
And strike the iron while hot.

The PLA senior officer corps was not sympathetic to the protesters. They "owe[d] their power and allegiance to Deng Xiaoping's faction within the Communist Party. Their allegiance [was] not abstract; most of them personally served in Deng's Second Field Army during the 1940s." Brook, at 206.

On June 3-4, the PLA followed orders from the CCP leadership.[439] This time, use of deadly force was authorized. Soldiers attacked the people with AK-47 automatic rifles and other machine guns, plus "metal bars, nail-studded clubs, garottes and whips." Brook, at 202. The PLA had infiltrated plainclothes soldiers, posing as civilians, into the Tiananmen area. They were on standby waiting for delivery of firearms. The street barricades did stop some movement by PLA forces, but many

438. Wu, at 109-10.

439. Not everyone. "Maj. Gen. Xu Qinxian, leader of the mighty 38th Group Army, said the protests were a political problem and should be settled through negotiations, not force. . . . In the end, General Xu agreed to pass the orders to his officers, but not to lead armed troops into the capital. He was arrested, expelled from the party, and served four years in prison." Andrew Jacobs & Chris Buckley, *Tales of Army Discord Show Tiananmen Square in a New Light*, N.Y. Times, June 2, 2014, at A1.

of the barricades were knocked away by armored personnel carriers running at full speed. As the noose tightened around Tiananmen, the students decided to surrender. Most were allowed to leave peacefully through one exit.

Most fatalities were not in Tiananmen Square, but in the city, as the PLA shot and rammed its way through the people. The highest estimate of city-wide fatalities of the PLA attack is ten thousand, according to a secret British diplomatic cable sent the next day. *Tiananmen Square Protest Death Toll "Was 10,000,"* BBC News, Dec. 23, 2017. The Chinese government claims only a few hundred. Preliminary estimates by the Red Cross and the Swiss Ambassador suggested about 2,600 or 2,700. Brook, at 155.

"It is difficult to imagine how the power of Deng Xiaoping and [premier] Li Peng might have been shored up without the Army's intervention, though what the outcome might have been had the Army remained in its barracks is anyone's guess. . . . The regime as it stood on June 4 existed by dint of armed force." *Id.* at 204. The party controlled the gun.

Conclusion

Suppose that on October 1, 1949, every Chinese home contained a good firearm, ample ammunition, and inhabitants determined to use it against anyone who tried to take their gun or enslave them. If so, there could have been many deaths in China, with neighbors or families shooting each other in violent quarrels that were fatal because a firearm was present. Perhaps an armed populace would have caused chaos, and led to something like the warlord period of the early twentieth century or the warring states of 475-221 B.C.

In worst-case scenarios, there might have been millions of deaths, but perhaps many fewer than the 86 million who died because of Mao's reign. When governments were busy fighting each other in the warlord period, there was much less killing than when Mao was the only government. All governmental energy could be concentrated on Mao's war on the people. Only a government that is much stronger than the people has the capability to kill on such a scale.

The one-party state confiscated guns starting in 1949. As Mao and others accurately said, communists can rule only if they alone control the gun. Post-1949, to the extent that the Chinese or Tibetan people were able to keep or obtain arms, they caused the tyrants much trouble, and sometimes blunted oppression. In 1967, when Mao said, "Arm the Left," the masses did obtain arms, and they brought the Mao regime close to collapse within a few weeks. To maintain communist rule, China today remains a one-party state with prohibitory arms laws.

NOTES & QUESTIONS

1. Around the world, many constitutional provisions exist to prevent tyranny and military rule, or to keep one man from having absolute power. Some of these constitutional provisions are discussed in the global constitutional survey in Part A. The U.S. Constitution has been described as a tyranny-control mechanism. Lawrence Tribe, American Constitutional Law 19, 306 (3d ed. 2000) (citing Rebecca I. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 570

(1998) ("the people did not establish primarily a utility-maximizing constitution, but rather a tyranny-minimizing one")). In response to the abuses of monarchs, the United Kingdom's constitution adopted provisions to prevent tyranny and military rule. Chapter 2.H. Many of the British protections influenced the U.S. Constitution. *See* Chapter 2. If you were designing a constitution to prevent what happened during Mao's reign in China, what provisions would you include? Conversely, if you wanted to ensure that the leader of a revolutionary vanguard could enforce his vision with as little interference as possible, what kind of constitution would you create? For either scenario, how would you make sure that your constitutional provisions are actually put into effect?

2. Lily Tang Williams was born in Chengdu (southwest China) shortly before the beginning of the Cultural Revolution. She recalls:

> Citizens were not allowed to have any guns or they would be put into prison, or worse. Chinese people were helpless when they needed to defend themselves. I grew up with fear, like millions of other children—fear that the police would pound on our doors at night and take my loved ones away, fear that bad guys would come to rob us. Sometimes I could not sleep from hearing the screaming people outside. . . .
>
> There were many stories of local people defending themselves with kitchen knives and sticks. Women were even more helpless when they were attacked and raped. I was molested as a college student once while walking home at night. It was common then.
>
> When it came to dealing with the Chinese government and police brutality, there was nothing we could do. They had guns, while law-abiding citizens did not. . . .
>
> After I went to law school, and later joined a law-school faculty, I was depressed to know that what we learned and taught in school and what was reality were such different things. The society ruled not by law but by men.
>
> Citizens still cannot buy firearms today. I remember that when I traveled to Guangdong province for business in 1997 and 1998, the residents called the local police "gangsters." Whenever the police showed up, the residents would hide.
>
> After I joined the law-school faculty in Fudan University, I had to be careful about what I said in the classroom and during the party's political-study time. My boss in law school even intruded into my private life, telling me that I received too many letters; I was too social. I should not go to my boyfriend's parents' house for dinner and spend the night. . . .
>
> I tried so hard to come to the U.S. for personal freedom, including the freedom guaranteed by the Second Amendment: the right to keep and bear arms, which makes me feel like a free person, not a slave. I felt empowered when I finally held my own gun. For the first time in my life, I truly knew I was free.
>
> I think the Founding Fathers of this country were very wise. They put that in the Constitution because they knew that a government could become either powerful or weak and that the citizens' last defense is the ability to bear arms to protect themselves against tyranny and criminals.

> The guns are not just for sports, hunting, and collecting; it is our fundamental right to bear arms and use them for our self-defense.

Lily Tang Williams, *Guns Against Tyranny*, Nat'l Rev. Online, Sept. 7, 2013.

3. "The liberation of the masses is accomplished by the masses themselves. . . . Revolution or people's war in any country is the business of the masses of the country and should be carried out primarily by their own efforts; there is no other way." Lin Biao, Long Live the Victory of People's War: In Commemoration of the 20th Anniversary of Victory in the Chinese People's War of Resistance Against Japan 38 (1965). How do undemocratic regimes, including Mao's, attempt to prevent the masses from liberating themselves? What can the masses do in response?

4. In response to public demands for modernization, the Manchu Dynasty in its final years had allowed the creation of elected provincial assemblies. Although the dynasty expected the assemblies to be powerless advisory boards, they played an important role leading the revolution that overthrew the Manchu and established the Republic of China. Spence, Mao Zedong, at 12. Online Chapters 21.C.3.b and D.2.a discuss the importance of "intermediate magistrates" in medieval and later Christian revolutionary theory: a just and prudent revolution against tyrant should be led by officials who rank in-between the tyrant and the people—for example, the nobles, local governors, assemblies, and so on. Chapter 4 describes the essential role of colonial/state governments as leaders in the American Revolution. Chapter 5.C.1 presents James Madison's argument in *Federalist* 46 that no government opposed by the people could survive if it were resisted by a well-armed population led by state governments or their equivalents. How did the Mao regime attempt to prevent resistance against the central government led by local governments or other intermediaries?

5. According to a critic of the CCP regime, "leaders coming to power with the help of rifles must rely on rifles as a principal source of strength for consolidation of power." Li, Human Rights, at 17. The American government of 1776 and the Chinese government of 1949 were both established by rifles. (To be precise, Americans relied more on muskets than on rifles. Ch. 3.E.) Compare and contrast the Mao regime's policy of consolidating power by attempting to create a government arms monopoly with the American policy of consolidating power by constitutionalizing and subsidizing widespread arms ownership.

6. Dr. Lobsang Tensing was three years old when he was brought to India by his father, a Chushi Gangdruk resistance fighter. Reflecting on the days of the Cultural Revolution, he said, "I've learned since then that, in American universities at the time, Mao Tse-Tung was very popular among the students. Why was that? Did no one tell them how many millions in Tibet and his own country he killed? Maybe they were just as ignorant of us as we were of them." Dunham, at 401. What do you think accounts for Mao's popularity among some people who consider themselves to be progressive?

7. "To rebel is justified." Under what conditions is this statement correct?

8. Should the people be stronger than the government, or vice-versa?

9. After reading the last two essays by Professor Kopel on Europe and China, do you think that an armed populace is necessary to deter political tyranny? If the U.S. Constitution did not protect the right to keep and bear arms, would its other provisions be sufficient to deter tyranny? Which ones?

Chapter 20

In-Depth Explanation of Firearms and Ammunition

This is online Chapter 20 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsreglation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*

20. *This chapter.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

Many aspects of gun policy are driven by the mechanics of firearms. Knowledge of how firearms and ammunition operate is thus essential to careful thinking about firearms law and the Second Amendment. People who learn, shape, and review laws should make every effort to understand basic facts about the operation and use of the firearms involved. Unfortunately, this does not happen in many instances. Consider, for example, the public debate over so-called assault weapons and large-capacity magazines. Here are a few examples of false or misleading claims about their functioning:

- Both a former United States President and the head of a prominent gun control advocacy group have described "assault weapons" as firing like machine guns. They confuse semi-automatic with fully automatic firearms.
- Two federal appellate courts have declared that the semi-automatic-only AR-15 rifle is a "weapon of war" made to be used on the battlefield. Yet no national military force actually uses semi-automatic-only rifles in combat.
- Another federal appellate court described "assault weapons" as being "designed to spray fire rather than to be aimed carefully." Multiple courts have asserted that pistol grips on AR-15 rifles are designed for spray-firing from the hip. The assertion is false. AR-15s, like all so-called assault weapons, are intended to be aimed. "Shooting from the hip" is a disparaging term used to describe the reckless act of discharging a firearm without aiming. These judges lacked rudimentary knowledge about the function of such firearms.
- A congressman declared after the 2016 Orlando nightclub shooting that semi-automatic-only AR-15 rifles fire "700 rounds a minute." After the 2018 Parkland, Florida school shooting, a prominent Harvard law professor tweeted that the AR-15 rifle "easily fires over 10 rounds per second." A semi-automatic rifle fires only one round with each pull of the trigger. The congressman and law professor were giving rates of fire for fully automatic weapons, not semi-automatic rifles like the AR-15.
- One congresswoman who was the prime sponsor of federal legislation to ban large-capacity magazines explained that the millions of such magazines already in circulation would be disposed of once the ammunition in them had been shot. She failed to understand that magazines can be reloaded and reused.
- Another congresswoman who had sponsored federal legislation banning "assault weapons" with certain features like "barrel shrouds" was asked in a media interview whether she knew what a barrel shroud is. She admitted, "I actually don't know what a barrel shroud is. I believe it's that shoulder thing that goes up." Barrel shrouds (or handguards) cover the barrel on a rifle or shotgun.
- Still another congresswoman who had introduced gun control legislation stated that she has "held an AR-15 in my hand" and that it is "as heavy as 10 boxes that you might be moving" and fires a .50 caliber bullet. The AR-15 rifle ordinarily weighs 6 to 8 pounds unloaded and most commonly fires a .223 caliber bullet.
- The current United States President advised his radio listeners to buy a double-barreled shotgun for self-defense rather than an AR-15 rifle because the AR-15 is "harder to aim" and "harder to use." In another interview, he

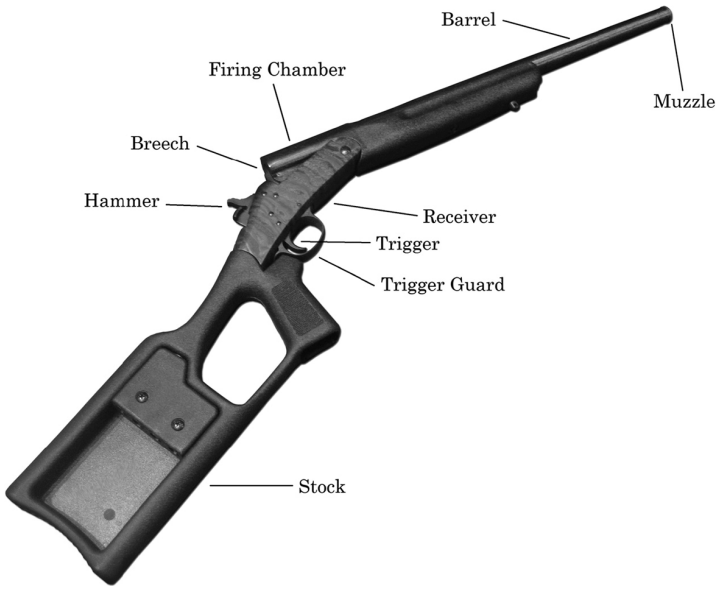
advised keeping intruders away from one's house by "fir[ing] the shotgun through the door." The AR-15 actually is easier to handle and aim and has much less recoil than a shotgun, and firing a shotgun through an entrance door is unlawful in many circumstances, especially if the shooter cannot see who's on the other side.

This chapter is designed to help the reader understand the basics of how firearms and ammunition function. Part A presents the basic parts of a firearm with summary diagrams. Part B describes the various components of firearm ammunition—the bullet, case, primer, and gunpowder. Part C discusses the operation and safe handling of modern firearms. Part D focuses on the three major types of modern firearms—handguns, rifles, and shotguns—explaining their specific features and uses. Part E examines specialty types of firearms and accessories, including those covered by the National Firearms Act (machine guns, bump-stocks, and silencers or suppressors), as well as muzzleloaders and armor-piercing ammunition. Part F covers nonfirearm arms such as stun guns, edged weapons, air and paintball guns, bows, chemical sprays, and blunt weapons.

In the printed textbook, the history and effects of developments in firearms and ammunition technology are covered in Chapters 2.I, 3.E.2, 5.E, 6.C, 7.G, 8.C, and 15.D. Additionally, online Chapter 23 discusses the evolution of firearms technology from the sixteenth to twenty-first centuries.

A. INTRODUCTION TO THE PARTS OF A FIREARM

A firearm uses the energy created by ignition of a chemical compound (gunpowder) to launch one or more projectiles out of a metal tube called a barrel. Consider a simple firearm, a single-shot rifle:

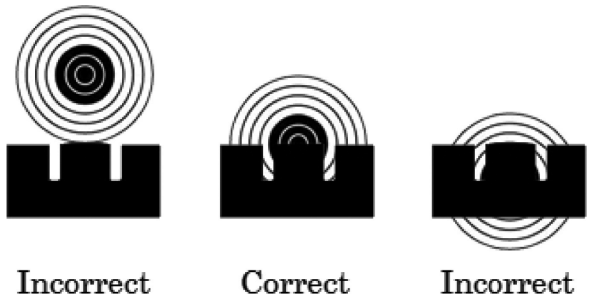


Single-shot rifle, with breech open.

The major parts of a firearm are labeled in the diagram. The firearm is fired by pressing the *trigger* with a finger. The trigger is linked to a spring-loaded *hammer*. Once the trigger is pressed, the hammer is released and pulled forward by the spring. On the front of the hammer is the *firing pin*. When the hammer springs all the way forward, the firing pin strikes the *ammunition cartridge*, which is held in the gun's *firing chamber*. The impact of the firing pin ignites the gunpowder in the cartridge (as explained further below), and the gun fires.

The cartridge consists of a metal *casing*, a *primer* (which is ignited by the blow from the firing pin), *gunpowder* (which is ignited by the primer), and a bullet—a conical or cylindrical projectile. The ignition of the gunpowder causes an expansion of gases that propels the *bullet* down the *barrel* and causes the bullet to fly at high speed out the barrel's open end, the *muzzle*, which has been aimed at the target.

When firing the rifle, the shooter braces its *stock* against the shoulder of the same arm she uses to operate the trigger. By lining up the *sights* that are attached to the top of the rifle, the shooter can aim the rifle accurately, controlling where the bullet will strike when the gun is fired.



Incorrect and correct sight alignments for an open notch-and-post sight (typically used on handguns, but also available for rifles). The tops of the three posts should form a line through the point of aim. In the left image, the bullet will strike the target below the bullseye. In the center image, it will strike the bullseye. In the right image, it will strike above the bullseye.

Almost all the moving parts of a gun are housed in its *receiver*, which is a metal frame that surrounds the firing chamber and connects it to the barrel. The receiver contains the *action* of the gun, which is the group of moving parts that allow the gun to be loaded, fired, and unloaded. Once the bullet has been fired, the empty casing is left behind in the firing chamber. To reload the gun, the user opens the action, manually removes the empty casing from the firing chamber, and inserts a fresh cartridge in order to fire again. The cartridge is inserted at the *breech*, the opening at the rear of the barrel.

The rifle just described is simple in its functions. As explained below, most modern firearms have additional features that give them greater firing capability than the basic single-shot rifle, while also making them more complex. Most of these features relate to the gun's use of ammunition. The vast majority of modern firearms are *repeaters*: they can be fired more than one time before manual reloading. They have various mechanisms that allow fired cartridges to be ejected, and fresh cartridges to be moved into the firing chamber, rather than requiring the

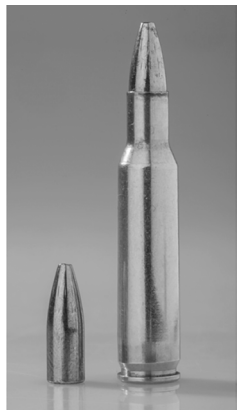
user to open up the gun and replace each fired cartridge by hand. In order to understand these features, a brief discussion of ammunition and how it works is appropriate.

B. AMMUNITION

Modern rifles and handguns use *metallic cartridges*. That is, the casing is made of metal, rather than paper or some other substance. A single unit of ammunition is called a *cartridge* or a *round*. (As explained below, shotgun ammunition is different from rifle or handgun ammunition. A single unit of shotgun ammunition typically is called a *shell*, but it also may be called a cartridge or round.)

Approximately 4 billion cartridges are produced commercially in the United States each year. Although a serious competitive shooter may fire tens of thousands of rounds of ammunition every year in practice and competition, most gun owners use ammunition at a much lower rate.

Ammunition typically is sold at retail in the United States in boxes of 20 to 100 cartridges, as well as in cases of 500 or 1,000 cartridges. It can be purchased at gun stores, sporting goods stores, large retail stores, and gun shows. A large volume of ammunition also is sold and shipped by Internet and mail-order sellers.



On the left, a rifle bullet. On the right, a complete cartridge (or "round") containing the bullet. The brass casing holds the bullet and, underneath the bullet, the gunpowder. The primer is in the bottom center of case; like the gunpowder, the primer is not visible in this photo. The upper part of the case is tapered, which is common for rifle cartridges, but much less so for handgun cartridges. The lead bullet is covered with copper alloy jacket. The jacketing improves performance and reduces lead fouling in the gun.

Like firearms manufacturers, individuals or companies that manufacture small arms ammunition for sale must obtain a Federal Firearms License (FFL) from the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). No federal license is required to manufacture a firearm or ammunition solely for personal use. A person who manufactures firearms or ammunition for sale to other persons needs an FFL, as does a person engaged in the business of selling firearms to others. For more information,

see https://www.atf.gov/qa-category/manufacturers and https://www.atf.gov/firearms/qa/license-required-engage-business-selling-small-arms-ammunition.

The ammunition cartridge has four major components: the *bullet*, the *case*, the *primer*, and the *gunpowder*.

1. Bullet

Bullets are typically metal projectiles. Some people use the word "bullet" casually to refer to a complete ammunition cartridge ("there were no bullets in the gun"), but such language is imprecise and can lead to misunderstandings. Properly speaking, one loads a gun with *cartridges* or *rounds*, not with bullets. A bullet is simply one part of a cartridge—the metal projectile, inert in itself, that is launched at high speed from the gun upon firing.

Bullets differ in their material composition, but most are composed of lead alloy. They are often coated with a thin jacket of copper or brass. Some bullets are made of metals other than lead, such as copper, steel, and tungsten. (See Section D.5 for information on armor-piercing ammunition.)

Different shapes or types of bullets are used in ammunition intended for different purposes. For example, the most common handgun bullet shape is a *round nose*, which has good aerodynamics but is not the most effective at transferring kinetic energy to a target. *Flat-nosed* bullets, also called *wadcutters*, are traditional for some types of target shooting because they cut a clean, round hole in a paper target that makes keeping score easy. Some shooters use *semi-wadcutter* bullets, which have a partially flattened nose that increases the bullet's striking power, but with more aerodynamic stability.

Cartridges loaded with different bullet shapes. From left to right, round-nose, hollow-point, and wadcutter bullets.

The most common type of handgun bullet for civilian self-defense, hunting, and law enforcement use is the *hollow point*. Such a bullet has a hollow cavity in the tip that causes the bullet to flatten and expand when it strikes a target. This makes the bullet more effective at incapacitating a human adversary or game animal because it increases the amount of tissue damage caused by the bullet. It also reduces the risk of *overpenetration* that endangers bystanders. The hollow-point

bullet is more likely to expend all its energy in its target and come to rest there, instead of piercing through the target and emerging from the other side, still traveling at a dangerous velocity.

When bullets hit their targets, the soft lead deforms. The high-performance, expensive bullet on the left has "opened up" almost perfectly, whereas the one on the right has not.

Hollow-point rifle ammunition is also popular for self-defense and for hunting small to medium game. A few jurisdictions prohibit the use of hollow-point ammunition for self-defense. *See* N.J. Stat. Ann. §§ 2C:39-3f(1), :39-3g(2), :39-6f (prohibiting individuals from possessing hollow-point ammunition, except on their own property, when hunting, target shooting, or traveling to and from a target range, or when the hollow cavity has a polymer filling).

Despite widespread use by law enforcement and civilian populations, hollow-point rounds typically are not used by the military. The Hague Convention of 1899 banned the use of hollow-point ammunition in international warfare. While the United States was not a signatory to the Convention, it generally follows this practice. For more background on the legal and operational implications of modern military use of hollow-point ammunition, see Christian Beekman, *Why the US Military Should Switch to Hollow-Points*, Task & Purpose, Jan. 8, 2015.

The military typically uses *full metal jacket* ammunition. This ammunition uses a soft-core pointed or round-nosed bullet (typically lead) surrounded by a casing of harder metal (typically copper). Because the harder coating resists deformation, the round is less prone to jams when fed into the chamber for firing. Cartridges with full metal jacket bullets also are popular for practice shooting by civilians as well. The copper coating reduces the lead residue (which can impede accuracy) in the barrel when the gun is fired. Because the jacket keeps the bullet from expanding, the ammunition penetrates more deeply into a target, producing a narrower wound channel and increasing the risk of overpenetration and damage to an unintended target. Some military rounds are designed to break into fragments when they strike a target, which can increase wounding potential.

Soft point ammunition is often used by rifle hunters. It is simply a jacketed bullet with an exposed, nonjacketed lead tip. It strikes a balance between full metal jacket and hollow-point ammunition, expanding more on impact than the former but penetrating more than the latter.

Some bullets are made of rubber. They are nonlethal, intended to hurt, bruise, and disorient a target. They are often used by law enforcement for crowd control and to deter further action. In most cases, the efficacy of rubber bullets depends on their deterrence effect because they are insufficient to incapacitate a target.

2. *Case*

The components of a cartridge are held together by a hollow *case* of brass, aluminum, or steel. After a shot is fired, the empty case remains. Repeating firearms use a mechanical protrusion called an *ejector* to remove the spent case from the gun's firing chamber in order to make room for a fresh cartridge. Handgun ammunition cases are usually *straight-walled*, while rifle ammunition often uses *bottlenecked* cases whose tapered shape allows large powder charges to be used and improves the loading of fresh ammunition from a magazine (see below).

A brass case recovered after firing can usually be reused. After the case is cleaned, it can be refilled with gunpowder, a primer, and a bullet to create another cartridge. This process of recycling is called *hand loading* or *reloading*.[1] Many gun owners reload their own ammunition at home, using tools that are created for this purpose. Competitive target shooters reload for more precise bullet control as well as out of economic necessity, as they typically fire thousands of rounds per month in practice. Some hunters reload in order to produce a small number of high-quality rounds precisely tailored to particular conditions. Other reloaders simply enjoy making things.

The bottom surface (or *head*) of the case will usually be marked with the name of the cartridge it fires (called the *headstamp*). For safety, it is essential that a gun only be loaded with a matching cartridge. The appropriate cartridge type will be stamped on the barrel or receiver.

A firearm's caliber is essentially a measure of the diameter of the barrel and bullet that it accepts. Within a single caliber, different types of ammunition may have widely varying loads of gunpowder. For example, by far the most common type of ammunition in the United States is .22LR. (The "LR" stands for "long rifle," but the .22LR round is used in both rifles and handguns.) Other types of .22 caliber ammunition include the .22 Long, .22 Short, .22 Spitfire, and the .22 Winchester Magnum Rimfire (also called .22 WMR, .22 Magnum, or .22 Mag). The .22 WMR uses much more gunpowder than a .22LR. Accordingly, if a firearm has ".22LR" stamped on its barrel, and no other caliber or type stamp, one must not use, for example, .22WMR in that gun. The extra gunpowder could expose the firing chamber to pressures for which it was not designed, thereby causing a dangerous explosion.

The same is true for the popular AR-15 type rifle, which typically is chambered for .223 Remington (Rem.) or 5.56 NATO ammunition. The 5.56 NATO, measured in millimeters, is a standard caliber designation for military rifles used by NATO countries. Both rounds look identical, but the .223 Rem. cartridge has a lower pressure than the 5.56 NATO. While it is safe to shoot .223 Rem. ammunition in a 5.56 NATO caliber rifle, it is *unsafe* to fire a 5.56 NATO round in a .223 Rem. caliber rifle (the only exception is a .223 Wylde rifle). The pressures of a 5.56 NATO cartridge are too high for the .223 Rem. chamber and can result in a dangerous pressure spike that can damage the firearm and cause serious injury to the person using it.

If you ever have doubts about a cartridge's suitability for a particular firearm, do not fire the cartridge, and wait until you can ask a reliable source. As the

1. Thus "reloading" has two meanings. One meaning is the manufacture of a new cartridge from a used case. The other meaning is the placement of a fresh cartridge in the firing chamber after the gun has been fired.

following figure illustrates, each of these cartridges is more powerful than the one following it.

Different types of ammunition. From left to right, .223 Remington, .22 WMR, and .22 LR. Note that the bullet (the top part) for the .223 Remington is only 3/1000 of an inch wider than the .22 caliber bullets. But the .223 Remington's case is much wider and larger, allowing more room for gunpowder, making it far more powerful than the other two.

3. Primer

The primer has often been described as the spark plug of the cartridge. When a gun is loaded with a cartridge and the hammer falls, the gun's firing pin sharply strikes the primer. The blow causes a pressure-sensitive chemical compound in the primer to ignite and emit an instantaneous hot flash. The flash then ignites the gunpowder inside the case. The gunpowder burns in a fraction of a second, releasing expanding hot gases, whose pressure pushes the bullet free from the case, and launches the bullet down the barrel.

Cartridges are primed in two different ways. *Centerfire priming* is used for all modern cartridges larger than .22 caliber (as well as some smaller caliber cartridges, such as some .17 calibers). In this system, the priming compound is enclosed inside a thin metal casing to form a *primer cup*. The cup, in turn, fits into a hollow pocket in the center of the bottom face of the cartridge. Thus, a primer is in line with the firing pin when a cartridge is loaded into the gun's firing chamber. When the gun's trigger is pressed, the firing pin sharply strikes the primer

and compresses the priming compound, detonating it. The primer's flash passes through a *flash hole* between the primer cup and the cartridge case and ignites the gunpowder there.

The older system of *rimfire priming* does not use a separate primer cap. Instead, priming compound is applied directly to the inside of the bottom of the cartridge case, inside a cavity in the cartridge rim. The firing pin of a rimfire gun does not strike the rear of the cartridge in the center, but instead on the edge of the rim (hence the name). Again, once the firing pin impacts the primer, the priming compound detonates, and in turn ignites the gunpowder, firing the round. Unlike centerfire cartridge cases, rimfire cartridge cases are not reloadable.

Rimfire vs. centerfire cartridges. At left is a .22 Long Rifle round, a rimfire cartridge. At right is a .38 Special round, a centerfire cartridge. Note the telltale, circular primer cup that sits at the bottom of the centerfire cartridge's case head. The rimfire cartridge lacks this. Instead, it has a layer of priming compound (not visible) applied to the inside of the brass rim of the cartridge.

Rimfire priming is still used for some small cartridges, including the extremely common .22 Long Rifle cartridge, introduced in 1887. Despite its name, the .22 Long Rifle is a small, inexpensive cartridge that is widely used in both handguns and rifles. It is the most popular cartridge in the world by a wide margin, used extensively for practice, small game hunting, and formal target shooting, including Olympic pistol and rifle shooting events. Approximately 2 billion rounds of .22 LR ammunition are manufactured each year in the United States. Some shooting events are divided into centerfire and rimfire divisions, corresponding to the division between the larger, more powerful centerfire cartridges and the smaller rimfires.

The most common chemical in priming compounds today is lead styphnate. Firing ammunition with lead styphnate-based primers emits minute particles of

lead compounds into the surrounding air. In indoor shooting ranges, adequate ventilation is necessary in order to prevent these lead compounds from building up. Sustained indoor exposure without ventilation could create a risk of lead poisoning. Health and environmental concerns about conventional primers have led manufacturers to develop lead-free primers that do not emit compounds containing lead or other heavy metals. Ammunition with lead-free primers is commercially available, and is gaining in popularity, but still comprises only a minority of ammunition sold in the United States.

4. Gunpowder

A major innovation in firearms technology was the development in the 1880s of modern *smokeless gunpowder*, based on nitrocellulose and nitroglycerin. Before then, all firearms were powered by *black powder*, a mixture of saltpeter (potassium nitrate), charcoal, and sulfur.

Smokeless powder is much less volatile in storage than black powder.[2] Smokeless powder also burns more uniformly and consistently, produces less smoke, and delivers far more energy when ignited, combusting in thousandths of a second. Smokeless powder enabled the development of rifle ammunition that launches bullets at more than twice the speed of sound—a far greater velocity than had been possible with black powder. It also allows a shooter to deliver repeated fire from a single location, because his vision is not obscured by the thick clouds of smoke characteristic of black powder. Commercial ammunition today overwhelmingly uses smokeless powder.

Black powder is obsolete for most purposes, but is still used today by hobbyists and hunters, who often fire it in antique or replica firearms. For example, a hobbyist firing an exact replica of an old-fashioned flintlock rifle might use standard black powder. Modern uses of old-fashioned muzzle-loading guns are discussed below. Today, most people who shoot muzzleloaders use one of the many black powder substitutes, which are much less volatile, and produce less smoke, than traditional black powder. Smokeless powder and black powder substitutes are nearly impossible to produce at home, while black powder is readily manufactured at home—as it frequently was before, during, and after the American Revolution.

For further information on ammunition, see the reference page of the International Ammunition Association website. The site also has a very long bibliography of books on cartridges or ammunition. La Asociación Española de Coleccionistas de Cartuchería (AECC)[3] provides a tremendous amount of graphical and Spanish-language textual information at https://municion.org.

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2. Old-fashioned black powder's volatility is the reason that, in colonial America and the Early Republic, large quantities of black powder were typically stored in a communal "powder house," made of brick. Chapter 4.A.3 describes the "powder alarms" that took place in 1774 when the British seized some of these American powder houses.

3. "Spanish Association of Cartridge Collectors."

C. FIREARM OPERATION AND SAFETY

Understanding firearm and ammunition basics is important to understanding how to operate firearms, and to do so safely.

1. Firing Mechanism

The *action* is the part of the firearm that loads, fires, and ejects the ammunition cartridge. Lever-action, pump action, and bolt-action firearms require manual operation between rounds, while semi-automatic and automatic actions will eject the fired round and load the next one mechanically.

The firearm is fired by pressing the trigger. In a typical design, the trigger is connected to a mechanical linkage called a *sear*. Pressing the trigger moves the sear, which releases a spring-loaded hammer. When the hammer falls, its force causes the firing pin to strike the primer in the ammunition cartridge. Some modern firearms use a similar spring-loaded mechanism called a *striker*. Once the propellant in the cartridge is ignited, the bullet travels down the barrel and emerges from the firearm.

The barrel in a modern handgun or rifle is *rifled*. This means its inside surface has been cut with a pattern of spiral grooves that cause the bullet to spin around its long axis as it travels through the barrel. The rotation, like the spin on a properly thrown football, makes the bullet fly in a straighter path when it emerges from the muzzle.

2. Magazine

Most modern firearms are *repeating arms*, or *repeaters*: they can be fired multiple times before it is necessary to manually insert more ammunition into the gun. A repeater is not the same as a "machine gun" or an "automatic" firearm (discussed below). The mechanism where a repeating arm stores its ammunition, and from which ammunition is fed during use, is called a *magazine*. With some guns, the magazine is a hollow compartment or tube that is permanently attached to the gun. The *tubular magazine* is common in shotguns and *lever-action* rifles (discussed below).

Other guns, especially semi-automatic and fully automatic firearms, use *detachable magazines*, which are rectangular, parallelogram, or curved boxes that can be filled with ammunition, temporarily attached to the gun during use, and then removed when empty and replaced with a freshly loaded magazine, allowing continued firing. Detachable magazines can be reloaded and reused many times until their internal springs lose proper tension.

Another common device for storing several rounds in a firearm is the *revolving cylinder* of a *revolver* handgun, discussed below.

Detachable magazines for semi-automatic firearms.

3. Safety Devices

A modern firearm will only fire when the trigger is pressed. Older firearms also were designed to fire only when the trigger was pressed, but they lacked many of the safety features detailed below. If the gun fires under any other circumstance (e.g., if the gun is dropped), the gun is defective, and would be the target of a product liability lawsuit. Product liability suits have driven many such defective firearms out of the market. *See* Chapter 9.E (discussing product liability and other lawsuits against firearms manufacturers).

The most elementary safety device, found on nearly all modern firearms, is the *trigger guard*. The trigger guard protects the trigger from accidental motion, such as when a gun is being pulled out of a holster. The trigger guard also makes it easier for the gun user to obey one of the fundamental rules of gun safety: "Keep your finger off the trigger until you are ready to shoot." (The safety rules are discussed in the next Section.)

Trigger guard.

For firearms design and firearms user training, a key principle is redundancy. So even though keeping one's finger outside the trigger guard is excellent protection against accidental discharge (unless the firearm is defective), modern firearms typically include additional safety features.

The most common of these is called the *safety*. The safety blocks the trigger or hammer from moving. The safety is typically activated by pressing a button, small slide, or lever that is located near the trigger.

Button safety.

Lever safety.

When the safety is in the "safe" position, the gun will not fire even when the trigger is pressed. To fire the gun, the user must move the safety to the "fire" position.

Virtually all modern rifles, shotguns, and semi-automatic handguns have external safeties. (Glock and some other semi-automatic handguns have a different type of safety, and revolver handguns do not have safeties, as explained in the discussion on handguns below.)

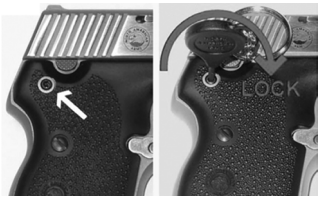
The safety devices discussed so far are intended to be operated while the gun is being used. For example, a bird hunter carrying a shotgun would keep the safety engaged while walking through a field, to reduce the chance of an accidental discharge if he stumbles or if his hand slips. When he needs to fire, he can quickly push the safety to the "fire" position.

An entirely different class of safety devices is employed when the gun is *not* being used. The purpose of these devices is to prevent use by an unauthorized user. The most obvious of these is a gun safe. Many gun owners store several firearms in a large safe. There also are smaller safes that hold one or two handguns. Alternatively, guns may be stored in a securely locked room.

Likewise, there are devices that can be attached to the gun itself to prevent unauthorized use. One of the simplest is a *trigger lock*, which wraps around the trigger guard, and (depending on the design of the lock and of the gun) keeps the trigger from being touched or from moving when touched.

The *cable lock* threads through the action, and sometimes also through the barrel. It prevents the action from completing its movement, thereby rendering the gun inoperable. Trigger locks and cable locks are typically unlocked with keys, although some use combination locks.

Cable lock on Heckler & Koch semi-automatic rifle.



North American Arms offers an optional integral locking system on its semi-automatic pistols.

Recently, some manufacturers have begun building firearms in which a key-controlled locking mechanism is built into the gun itself.

Since the 1990s, some researchers have been investigating more sophisticated integral locking mechanisms, such as palm-print readers built into the grip of a handgun. Firearms equipped with such devices sometimes are called *smart guns*. *See* Ch. 15.D. Thus far, no smart gun technology is sufficiently reliable to be commercially viable. Even a one percent failure or delay rate would not be acceptable to anyone who uses a firearm for self-defense or, for that matter, to a hunter who may have a two-second window of opportunity for the right shot. For this reason, law enforcement does not use smart guns, and its members actively resist attempts to require them to do so.

Locking devices can be defeated. A trigger lock can be smashed with a hammer, a cable lock can be cut, a safe can be broken open, and the mini-computer in a smart gun can be destroyed by heating the gun in an oven.

All of the locking devices involve trade-offs. A gun that is locked is more secure from an unauthorized user but much slower to deploy in a sudden emergency, such as a home invasion. Whether to use locks and what kinds of locks to use depend on individual circumstances and on whether the gun is intended to be available for self-defense. Finally, trigger locks are not infallible — with some low-quality trigger locks, the gun can be fired anyway.

4. Rules for Safe Firearm Operation

Firearms safety education stresses the importance of careful adherence to gun-handling rules to avoid accidents. While the user must know how to operate mechanical safety devices, safety training emphasizes that reliance on mechanical devices is never a substitute for rigorously following all safety rules.

Four basic rules of gun safety are commonly emphasized:

1. *Treat every gun as if it is loaded.* Never assume a gun is unloaded, safetied, or otherwise inoperable when handling it. Many firearm accidents—typically called "negligent discharges"—occur because the user mistakenly believes the gun is not ready to fire. The user may wrongly think that the gun is empty when there is a round in the chamber, that the safety is on when it really is off, or that the gun is in good condition mechanically when it is ready to malfunction. Additionally, never rely on someone else's assurance the gun is unloaded—always check it yourself. Even if you are certain that a gun is unloaded, you must still obey all other safety rules.
2. *Always point the gun in a safe direction.* This is the practice of *muzzle discipline*, referring to the end of the gun's barrel that is pointed toward the target. This rule means that under no circumstances should a gun ever be pointed at any person, unless the gun is being used for lawful self-defense. Playfully pointing a gun at other people violates this rule. Never point the gun at anything you do not intend to shoot.
3. *Keep your finger off the trigger and out of the trigger guard until you are ready to shoot.* This is the practice of *trigger discipline*, and is critical to avoid unintentionally firing the gun. Movies and television promote irresponsible gun use by showing supposedly expert shooters violating trigger discipline. There is no reason *ever* to violate trigger discipline. Even when a gun is being drawn for instant self-defense, the proper motion is to keep the index finger outside the trigger guard until the muzzle is almost on the target. With proper training, trigger discipline does *not* delay a defensive shot by even a fraction of a second.
4. *Be sure of your target and what is beyond it.* This rule reduces the risk of harm to non-targets when the gun is intentionally fired. Such harm can occur if the shooter either misidentifies the intended target or misses the intended target and hits someone or something else around or beyond the target. To avoid misidentifying a target in home defense or other low-light areas, it is best for the shooter to have an attached or hand-held light. The shooter also must be aware what is beyond the intended target because the bullet may pass through the target and hit a non-target due to "overpenetration."

Firearm safety also requires use of two very important pieces of safety equipment. Whenever possible, the shooter should wear *safety glasses* and *ear protection.*

Safety glasses. Note the wrap-around design, protecting the eyes from flying debris at all angles.

Disposable foam earplugs provide hearing protection.

Ear muffs have always provided the best hearing protection. Today, electronic ear muffs are broadly affordable. The electronic speakers in muffs transmit human speech at normal levels, but when there is a sharp spike of sound—such as from a gunshot—the speakers shut down, instantly shielding the ear from the intense sound.

Anyone who wants to own a firearm should consider taking a firearms safety class. Indeed, even for a person who is certain that he or she will never own a firearm, safety education can be useful—just as people who do not like swimming or boating should still know the elementary rules of water safety.

Classes and other educational safety materials are available from the National Rifle Association (NRA), the National Shooting Sports Foundation (NSSF), the 4-H Clubs, some sheriff offices or police departments, gun clubs, and sporting-goods stores. Many have introductory classes that can be completed in an afternoon, as well as longer classes on particular topics such as pistol or rifle shooting.

State Fish & Game departments sponsor or offer hunter safety classes. Completion of the classes is necessary to obtain a hunter safety card, which typically is a prerequisite for getting a hunting license. The classes are fairly elaborate, often spanning multiple days, and cover a wide range of material, including firearm safety. The International Hunter Education Association and other groups offer online hunter safety classes, sometimes for free; classes include several modules on firearm operation and safety. To obtain a hunter safety card, some states require at least one in-person class session after the completion of an online class.

D. TYPES OF MODERN FIREARMS

Handguns, rifles, and shotguns make up the vast majority of privately owned firearms in the United States. According to the authors' estimates,[4] there were

4. These estimates are based on (1) the gun-stock figures through 2018 in Chapter 1.B, and (2) the proportion of each type of firearm manufactured in, imported into, and exported out of the United States from 1990 through 2018 as measured by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

approximately 210 million handguns, 141 million rifles, and 68 million shotguns in the United States in 2018, comprising about 49, 33, and 16 percent of the nation's gun stock.

Before discussing the various types of modern firearms, it is important to understand the difference between *semi-automatic* operation, which is found in many types of common pistols, rifles, and shotguns, and *automatic* (also called *fully automatic*) operation, which is found in machine guns and heavier military weapons, and is subject to severe legal regulation.

A *semi-automatic* firearm fires only one round of ammunition with each press of the trigger. Each time the gun is fired, the semi-automatic action uses part of the energy from firing the cartridge to automatically eject the spent casing, recock the firing mechanism, and load a new cartridge into the firing chamber. For example, in a semi-automatic pistol, the energy of firing the gun causes the metal slide that forms the top of the pistol to cycle back and forth one time. The slide's motion backward causes the empty case to be ejected out of the side of the gun, and the slide's return forward brings the top cartridge in the magazine into the firing chamber, ready to be fired with another press of the trigger. Thus, the user of a semi-automatic firearm does not need to manipulate the gun by hand in order to load the next round. The gun loads itself. This is why semi-automatic guns are also referred to as *self-loading* or *auto-loading* guns.

By contrast, an *automatic* gun fires multiple times with a single press of the trigger. The mechanism of a fully automatic firearm works similarly to a semi-automatic gun, up to the point when the returning slide loads a fresh cartridge from the magazine into the firing chamber. From that point, the two types of actions behave very differently. A semi-automatic firearm simply loads the fresh round and stops: the trigger must be pressed again to fire the gun. An automatic firearm automatically strikes the freshly loaded cartridge with the firing pin, which fires the gun again and starts over the whole cycle of ejection and feeding described above, so long as the user keeps the trigger pressed and there is ammunition in the magazine. Once the trigger is pressed, the automatic gun will continue to fire until the trigger is released or all the ammunition is expended.

Some automatic firearms use *burst fire*, a mode in which they fire two or three rounds per trigger press, then stop until the trigger is released and pressed again. This difference, however, is not as important as the difference between semi-automatic action (one round per trigger press), on the one hand, and fully automatic or burst-fire actions, on the other.

Under federal law, any firearm that can fire more than one round per trigger press is deemed a *machine gun*. See Chapter 8.D.7 for the main federal law on the topic, the National Firearms Act of 1934 (NFA). See Chapter 8.E.4 for *Staples v. United States*, 511 U.S. 600 (1994), which deals with the status of a malfunctioning semi-automatic rifle that sometimes fired two rounds with one trigger pull.

1. Handguns

The handgun is the most controversial broad type of firearm. Unlike long guns (rifles and shotguns), a handgun can be conveniently carried on one's person

for long periods of time. Handguns are also more convenient to store than long guns, taking up little room inside a dwelling or vehicle. Importantly, most handguns can be carried concealed from detection by others, whereas long guns are virtually impossible to carry concealed.

These traits make the handgun, in the words of the United States Supreme Court, the firearm that "is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense, and "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (Ch. 11.A) (invalidating a ban on handguns as a violation of the Second Amendment).

The ATF's Annual Firearms Manufacturing and Export Report shows that in 2019 American manufacturers produced 3,046,013 pistols and 580,601 revolvers (the pistol/revolver distinction is explained below), 1,957,667 rifles, 480,735 shotguns, and 946,929 miscellaneous firearms. More than 150,000 handguns were exported. The totals in the report do not include production for the United States military. Almost 3 million handguns were imported into the United States in 2018, according to the BATF's Firearms Commerce in the United States Annual Statistical Update 2019. The leading exporters to the United States were Austria, Brazil, Germany, Croatia, and the Czech Republic.

a. Semi-Automatic Pistols

More than three-quarters of new handguns produced in the United States in recent years have been *semi-automatic pistols*, also frequently referred to simply as *pistols*.[5] The vast majority of semi-automatic pistols feed their ammunition from a detachable magazine inserted into the gun's grip, although a few have magazines that are inserted elsewhere.

The use of detachable magazines makes reloading a semi-automatic pistol fast and simple. When the gun is empty, the slide locks back. The user can press a magazine release button or lever, causing the empty magazine to drop free. The user then can insert a fresh magazine into the *magazine well* and cycle the slide back (or depress a slide release button) to chamber a fresh round and continue firing.

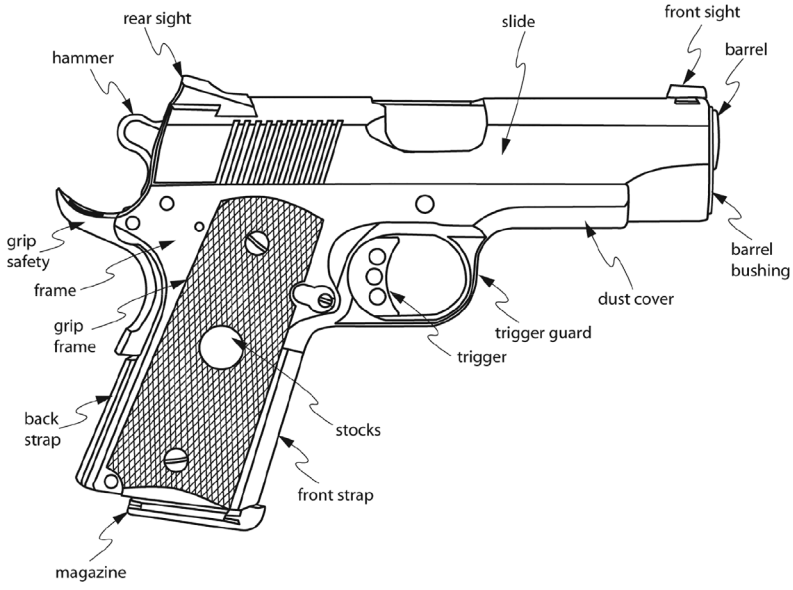
The typical magazine capacity for today's full-sized semi-automatic pistols is 8 to 21 rounds, or more; compact or subcompact pistols typically have fewer, sometimes as few as 6.

The ease of reloading and a larger magazine capacity have made semi-automatic pistols the dominant type of handgun used for military issue, law enforcement, self-defense, and many pistol competitions. The most common ammunition

5. Federal regulations define as a "pistol" any handgun that has a firing chamber that is "an integral part[] of, or permanently aligned with, the bore[]," in contrast to a "revolver," which is a handgun whose firing chambers are part of a rotating cylinder. 27 C.F.R. § 479.11. The vast majority of handguns classified as "pistols" under this definition are semi-automatics. However, there are a few types of specialty handguns, such as derringers and single-shot hunting handguns, that are also considered "pistols." In common parlance, "pistol" is often used to refer to all handguns, including revolvers. It is more precise, however, to distinguish pistols and revolvers, as the federal regulations do.

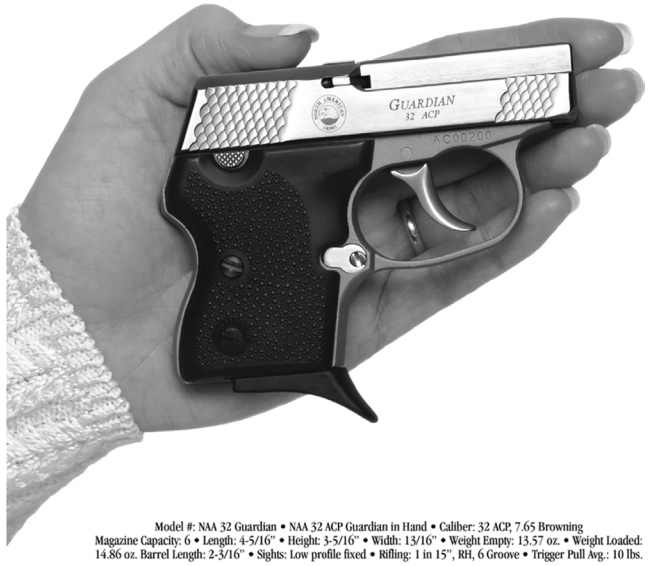
sizes for full-size semi-automatic pistols are the 9x19mm Parabellum (sometimes called the 9mm Para, 9mm Luger, or 9mm NATO), the .40 Smith & Wesson, and the .45 ACP.[6] Small, lightweight pistols chambered in the .380 ACP cartridge have recently gained popularity for concealed carry. Many of these pistols weigh less than ten ounces and are no larger in size than a typical wallet. Finally, numerous semi-automatic pistols used for target shooting and recreation are chambered in the .22 Long Rifle (LR) cartridge. Some people choose compact .22 caliber handguns for concealed carry because of their small size. Persons with lesser upper-body strength may also choose a .22, of any size, for home defense, because of its light recoil.

This .45 caliber semi-automatic centerfire pistol is made by Colt's Manufacturing. It is a "Model 1911," meaning that its design is based on the Colt .45 pistol invented in 1911. The 1911-type pistol has remained popular for over a century. Today, it is manufactured by many different companies, and remains one of the most popular pistols for self-defense and target shooting.



The major external parts of a semi-automatic handgun (also called a pistol).

6. "ACP" stands for "Automatic Colt Pistol." Semi-automatic pistols are sometimes called "automatics," even though their action is semi-automatic, not automatic.



Model #: NAA 32 Guardian • NAA 32 ACP Guardian in Hand • Caliber: 32 ACP, 7.65 Browning
Magazine Capacity: 6 • Length: 4-5/16" • Height: 3-5/16" • Width: 13/16" • Weight Empty: 13.57 oz. • Weight Loaded: 14.86 oz. Barrel Length: 2-3/16" • Sights: Low profile fixed • Rifling: 1 in 15", RH, 6 Groove • Trigger Pull Avg.: 10 lbs.

This .32 caliber semi-automatic pistol from North American Arms is considered an "ultra-compact" because of its small size. If carried for protection, it would be put in a small holster, and the holster would be attached to the inside of a belt, or placed into a pocket or purse.

b. Revolvers

The two main types of revolvers. Left: Double-action revolver (Smith & Wesson Model 19). Right: Single-action revolver (Colt Single Action Army, colloquially known as the "Peacemaker"). An observer will note that on any single action, the trigger will be very close to the back of the trigger guard because the trigger pull need only release the already cocked hammer. On a double action, the trigger must also pull the hammer back.

The first well-known *revolvers* were produced by Samuel Colt in the 1830s. Ever since, revolvers have been popular for many purposes. Revolvers carry their ammunition in chambers cut into a revolving cylinder located behind the barrel of the gun. Working the gun's action rotates the cylinder, causing the next chamber to come into line with the barrel and hammer, allowing the user to fire the round loaded in that chamber. While revolvers of the twenty-first century take advantage of improvements in metallurgy, their basic design has changed little since the late nineteenth century.

Revolvers generally are simpler to load, operate, and unload than semi-automatic pistols. For many users, the simplicity and the greater reliability are important

features. Some of the best-selling revolvers today are small, lightweight guns with short "snubnose" barrels, often used for concealed carry. Revolvers with especially long barrels are popular for target shooting or informal "plinking." These can be chambered in the .22 Long Rifle rimfire cartridge or in centerfire calibers.

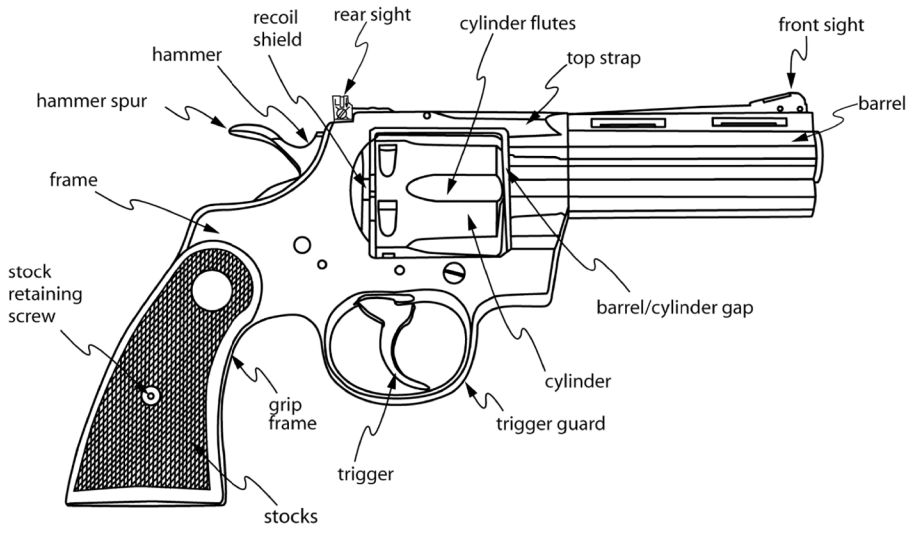
Revolvers often are preferred to semi-automatic pistols for hunting because revolvers can better accommodate the large powder charges necessary to fire a large bullet at hunting distances. Hunting revolvers are long barreled and bulky and generally weigh in excess of three pounds. They frequently are used with a mounted telescopic sight. Many hunters who carry a rifle or shotgun for hunting also carry a revolver as a sidearm for self-defense in case of an attack by a bear or other large predator.

Revolvers were the most common handgun produced in the United States and the standard sidearm for police until the last part of the twentieth century, when semi-automatic handguns became more popular. Although semi-automatic pistols comprised only 28 percent of new handguns produced in the United States in 1973, semi-automatics today account for more than 75 percent of handguns produced domestically. Today, the large majority of police officers use semi-automatic pistols as sidearms. The most common brands include Glock, Smith & Wesson, and Sig Sauer.

Modern centerfire revolvers typically hold five or six rounds of ammunition, although some models hold more. Rimfire revolvers can hold ten or more rounds.

To remove empty shells from a revolver cylinder, the user presses an *ejector rod* on the front of the cylinder. The rod pushes the empty cases out the back of the cylinder.

The most common centerfire chamberings for revolvers are the .38 Special and the more powerful, high-velocity .357 Magnum, introduced in 1935.[7] For hunting deer and larger game, popular revolver cartridges include .357 Magnum, .44 Magnum, and .500.



The major external parts of a revolver.

7. Revolvers chambered for the .357 Magnum can also chamber and fire .38 Special cartridges. The reverse is *not* true. A gun that has a ".38 Special" stamp on the barrel must never be loaded with .357 Magnum. "Magnum" is a term of art in cartridge manufacture indicating that the cartridge has a relatively large amount of gun powder for its caliber. Oenophiles may recognize "magnum" as the term for a double-sized bottle of champagne.

Revolvers divide into two categories according to how the action is operated.

i. Single-Action Revolvers

The first revolvers were *single-action revolvers*, such as the Colt Navy Model of 1851 and the famous Colt Single Action Army ("Peacemaker") of 1873, popularized for modern audiences by Western movies and television programs. The user of a single-action revolver must cock the gun's hammer by hand before firing each shot. Cocking the hammer rotates the cylinder and brings a fresh round under the hammer to be fired. Pressing the trigger simply drops the cocked hammer to fire the gun—a single action. Single-action revolvers are slower to load and unload than any other type of repeating handgun. Once all the cartridges are fired, the revolver is unloaded by using a rod to punch the fired cases free of the cylinder, one at a time, through the revolver's loading gate. A revolver is usually reloaded through the same gate. A notable exception is the Schofield revolver, which is reloaded by releasing a latch that causes the top of the revolver to break open, ejecting the spent shells and allowing access to the entire empty cylinder.

Although obsolete for self-defense purposes, single-action revolvers remain in production, and are popular for recreational shooting and handgun hunting. Single-action revolvers are also required equipment for the sport of cowboy action shooting, in which participants dress up in historic American Western garb and shoot themed target courses with firearms of nineteenth-century design. *See* Abigail A. Kohn, Shooters: Myths and Realities of America's Gun Cultures (2004).

ii. Double-Action Revolvers

Double-action revolvers date from the 1880s. Pressing the trigger of a double-action revolver performs two actions: it cocks the hammer back (thereby rotating the cylinder), then drops the hammer to fire the gun. To fire again, the user simply presses the trigger again. Cocking by hand is not necessary, although most double-action revolvers can also be manually cocked like a single-action. Most double-action revolvers have a latch or button that allows the whole cylinder of the handgun to swing out from the gun frame, so that the user can access all of the chambers in the cylinder at the same time. This makes double-action revolvers faster to load and unload than single-action revolvers, though still slower than semi-automatic pistols.

c. Legitimate Uses of Handguns

Handguns are commonly owned and used for home defense, concealed or open carry, recreational target shooting, competition, and hunting.

Handguns are more likely to be acquired for the purpose of self-defense than are long guns, such as rifles and shotguns. Surveys consistently report that the majority of handgun purchasers are motivated at least in part by personal protection. In the 2015 National Firearms Survey, 76 percent of handgun owners reported that they owned a handgun primarily for protection. *See* Deborah Azrael et al., at 44.

Recent studies show that Americans hold at least 17 million active, state-issued permits to carry concealed handguns for self-defense outside the home. *See, e.g.*, John R. Lott, *Concealed Carry Permit Holders Across the United States: 2018*. Most states today will issue a permit to carry a concealed handgun to an adult who passes

a fingerprint-based background check and a safety class. (Chapter 10 details how some states vary from the standard practice.) Licensed carry provides a growing consumer market for small, easily carried handguns.

A Pew Research Center 2017 survey found that more than half of handgun owners carry their handguns outside of their home on some occasions (not including when they are transporting the gun). Additionally, the study found no significant differences in sex, education, region, or community among those who carry a handgun outside the home. *See* Pew Research Center, *America's Complex Relationship with Guns*: *An In-Depth Look at the Attitudes and Experiences of U.S. Adults* (June 2017).

Many modern handguns are constructed in part from lightweight plastic polymers, rather than metal. As a result, these guns are more comfortable for long-term carry, and are popular with both police and ordinary citizens. By federal law, the guns must include at least four ounces of metal, and the shape of the metal must visibly show a gun to x-ray metal detectors. *See* 18 U.S.C. § 922(p).

The frame of this pistol is made from plastic polymers. Note the double trigger, a safety mechanism on some modern pistols. The forward trigger is a safety. The rear trigger operates the gun like a standard trigger. To fire the gun, the shooter presses both triggers in one continuous motion.

Another popular use for handguns is target shooting. There are 18.4 million Americans who "currently participate" in target shooting with handguns, according to a 2010 Harris Survey for the National Shooting Sports Foundation (NSSF), the trade association for the firearms industry. Informal target shooting or "plinking" can be conducted at commercial shooting ranges and clubs, at public ranges, on undeveloped public lands, or on private property.

Organized target shooting with handguns takes numerous forms. In bullseye competition, participants stand in place and shoot at paper targets up to 50 yards away. In action pistol shooting, participants move through a course set up to simulate defensive shooting scenarios and are scored based upon time and accuracy in shooting "bad guy" targets, with large penalties for shooting the wrong target. Target pistol shooting is an international sport that includes Olympic competition. It was one of the original sports of the modern Olympics.

Hunting with handguns is allowed in every state, usually as part of the general firearms hunting season. Many types of non-bird land animals can be successfully hunted in this way. For larger game, hunting handguns are typically large and powerful revolvers, often mounted with a telescopic sight. Scopes are also popular for handguns that are used for target shooting.

Ruger Mark III .22 caliber semi-automatic pistol, with scope.

d. Criminal Uses of Handguns

The handgun also epitomizes the crime gun. About 62 percent of all murders committed with firearms in the United States in 2019 were perpetrated with handguns. FBI crime report data show that in 2019 a total of 10,258 murders were committed with firearms. Handguns were used in 6,368 of these murders, rifles in 364, shotguns in 200, and other guns in 45. For the remaining 3,281 murders, the firearm type was not identified.

Similarly, the U.S. Department of Justice's Bureau of Justice Statistics survey of federal and state prison inmates in 2016 indicates that 21 percent of state prisoners and 20 percent of federal prisoners reported being armed with a firearm during the offense for which they were incarcerated. Of those offenders who were armed, 88 percent reported being armed with a handgun, while only 7 percent reported possessing a rifle and about 8 percent reported possessing a shotgun. (Figures

do not sum to 100 percent because prisoners could report possessing more than one type of firearm.) *See* U.S. Dep't of Justice, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*. Thus, while handguns comprise a plurality of privately owned firearms, they are disproportionately used in gun crimes.

2. Rifles

Rifles typically are larger, have greater range and accuracy, and fire rounds at higher velocities than handguns. Federal law defines a rifle as

> a weapon designed . . . and intended to be fired from the shoulder and . . . to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single press of the trigger.

28 U.S.C. § 5845 (c). Thus, a rifle is defined by two main traits:

- It is a *long gun*: the gun has a stock and is designed to be used with the stock braced against a shoulder.
- It has a *rifled bore*: the inside of the gun's barrel is cut with a pattern of spiral grooves that rotate the bullet as it travels down the barrel.

The parts of the barrel that do not have the groove cuttings are called the *lands*. Caliber is a measure of barrel diameter from the lands. The rotation, like the spin on a properly thrown football, makes the bullet fly in a straighter path when it emerges from the muzzle of the gun—the open end of the barrel. Most modern handguns have rifled bores as well.

The ATF's Annual Firearms Manufacturing and Export Report shows American manufacturers produced 1,957,667 rifles in 2019 (not including rifles for the U.S. military). Of those rifles, 147,044 and 158,871 were exported in 2016 and 2017. The ATF's *Firearms Commerce in the United States Annual Statistical Update 2019* shows that 572,309 rifles were imported into the United States in 2017, while 652,031 were imported in 2018. Canada, Brazil, Japan, and Spain were the leading sources of imports in 2018.

a. Characteristics of Rifles

Rifles have greater accuracy than handguns or shotguns. Rifles can be fired more accurately than handguns because they have stocks braced against the shoulder for firing, and longer barrels. With a handgun, one or two hands hold the grip immediately behind the trigger, providing one point of contact with the firearm for stability. With a long gun, there are three points of contact: the stock against the shoulder, the trigger hand holding the stock or pistol grip immediately behind the trigger, and the nontrigger hand holding the fore-end of the gun. The rifle barrel also provides a longer sight radius (the distance between the rear and front sights) for greater accuracy. Rifles are more accurate than shotguns because the rifling in the barrel makes the conical or cylindrical bullet more aerodynamically stable. (Shotguns, discussed below, generally fire multiple spherical pellets, which are not nearly so aerodynamically stable.)

Rifles typically are more powerful than handguns, giving them greater range and impact. Most types of centerfire rifle ammunition deliver dramatically more kinetic energy than common handgun rounds. Consider the example of an ordinary bolt-action deer-hunting rifle in a popular medium game cartridge, the .270 Winchester, introduced in 1925. The .270 Winchester launches a 145-grain[8] bullet though a 24-inch barrel at a velocity of 2,970 feet per second (more than 2.5 times the speed of sound), delivering more than 2,500 foot-pounds of kinetic energy to a target at 100 yards distance from the muzzle.[9]

Compare this with a handgun firing a bullet of similar weight. The most widely used handgun round is the 9mm Luger. It fires a 147-grain bullet at a velocity of 1,000 feet per second (slightly less than the speed of sound) and delivers 273 foot-pounds of kinetic energy at 100 yards distance — about one-ninth of the energy of the rifle.[10] Even a more powerful handgun cartridge, such as the .40 Smith & Wesson, used by some law enforcement agencies, launches a 155-grain bullet at a velocity of only 1,140 feet per second (slightly more than the speed of sound), delivering about 313 foot-pounds of kinetic energy at 100 yards distance — about one-eighth the energy of the rifle.[11] At short distances — the distances at which handguns are typically used — the differences in kinetic energy are less dramatic.

When fired from a stable rest with a telescopic sight, the .270 Win. rifle with a high-grade barrel can place a group of three shots within a one-inch diameter at 100 yards. Even a skilled pistol shooter would have difficulty keeping a group of shots within one inch at 25 yards with a typical police or self-defense handgun.

The ammunition capacity of rifles varies widely. Bolt-action rifles typically hold 5 or 10 rounds. Lever-action rifles range from 4 rounds to a dozen or more. Semi-automatic rifles use magazines that can range from 5 rounds up to 20 or 30 rounds. Specialized magazines with very high capacities of up to 75 or 100 rounds are available for some semi-automatic rifles, but such magazines are more prone to malfunctioning.

Some of the most popular rifles are rimfire rifles, particularly in the .22 Long Rifle chambering. The two most popular semi-automatic .22 rimfire rifles, the Marlin 60 (introduced in 1960) and the Ruger 10/22 (introduced 1964), have together accounted for more than 15 million rifles sold. These rifles are commonly used for target shooting, practice, and small-game hunting, or for self-defense, especially by persons who would have difficulty the recoil of a more powerful rifle.

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8. A "grain" is 1/7,000 of a pound, or approximately 0.0648 gram. Grains are used for measurement of bullet weight, and for gunpowder. The term originally referred to the approximate weight of one grain of wheat.
9. This data is for the Hornady 270 Win. 145gr ELD-X Precision Hunter round.
10. This data is for the Federal 9mm Luger Personal Defense Hydra-Shok round.
11. This data is for the Federal .40 S&W Personal Defense Hydra-Shok round.

b. Types of Rifles

Most rifles today can be categorized into four common types: bolt-action, semi-automatic, lever- or pump-action, and single shot.

i. Bolt-Action Rifles

Bolt-action rifle.

Bolt-action rifles, introduced as military weapons in the late nineteenth century, are now the most commonly used rifle for hunting deer and other large game. Approximately 44 percent of the rifles purchased in the United States in the first four months of 2010 were bolt-action rifles. Debbie Thurman, *Target Long Guns*, Shooting Indus., Aug. 2010, at 33.

A bolt-action rifle holds several cartridges in its magazine. By manually lifting a handle attached to the bolt, pulling the handle back, and then returning the bolt to its starting place, the user can eject an empty case from the firing chamber, and load a fresh round into the chamber from the magazine.

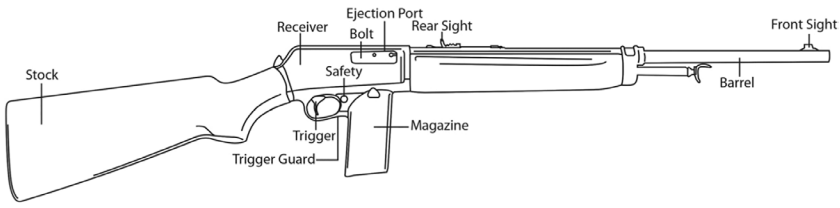
Along with single-shot rifles (discussed below), bolt-action rifles are usually the most accurate rifles, especially at longer distances. The reason is that the cartridge's fit inside the firing chamber is usually tighter than for other types of rifles.

ii. Semi-Automatic Rifles

The other leading type of rifle is the *semi-automatic* rifle. In recent years, sales of semi-automatic rifles have been comparable to bolt-action rifle sales: about 42 percent of the rifles sold in early 2010 were semi-automatic. *Id.*

A semi-automatic rifle functions in a manner similar to a semi-automatic pistol, discussed in Section D.1.a. Some of the energy produced by the burning gunpowder pushes the bullet forward, while an equal and opposite amount of energy dissipates in other directions and causes the firearm to recoil. The semi-automatic firearm uses some of this energy to cycle the rifle's action. Typically, the bolt moves backward inside the rifle's receiver, then returns forward into place. The bolt's movement automatically ejects the now-empty cartridge case, cocks the hammer or other firing mechanism, and loads a fresh cartridge into the firing chamber, ready to be fired with the next press of the trigger. Other things being equal, a semi-automatic firearm will produce less felt recoil for the user than other types of firearms.

Semi-automatic rifles store and feed their ammunition from a magazine. Some use *fixed* internal magazines that are part of the rifle and are loaded by inserting ammunition through the top of the gun or into a tube that runs parallel to the rifle's barrel. Other semi-automatic rifles use *detachable* magazines that can be quickly swapped out when empty and replaced with other loaded magazines.



The major external parts of a semi-automatic rifle.

Because the use of recoil energy or diversion of gases in the semi-automatic action significantly reduces felt recoil, semi-automatics can be easier to use by persons who do not have great upper-body strength. For all users, the reduced recoil helps keep the muzzle on target, increasing the accuracy of a second shot. Many hunters trade off the long-range accuracy of a bolt action for the better second-shot accuracy of a semi-automatic, especially at medium or shorter ranges. The reduced recoil and greater accuracy for second or subsequent shots also have obvious self-defense utility. Additionally, firearms with detachable magazines (i.e., most semi-automatic rifles and handguns, and some bolt-action rifles) typically can be reloaded more quickly than other firearms, especially by nonexperts. Although many gun fights are over after just a few shots, many police and citizens prefer the ability to quickly reload if necessary.

Some popular models of semi-automatic rifles are chambered in the .22 Long Rifle rimfire cartridge and are used for recreation, target shooting, training new shooters, and hunting small game. Millions of relatively inexpensive semi-automatic .22 rifles have been sold.

A pair of .22 caliber semi-automatic rifles. This is the same gun in two different configurations. The one in back has a traditional wood stock, while the one in front has a modern plastic polymer stock. The black gun also has a rail for mounting a riflescope, and it has a muzzle brake (mounted on the muzzle), which stabilizes barrel vibration so that the user more easily can stay on target for the second shot.

The most popular general-purpose rifle in America is the semi-automatic AR-15. The "AR" stands for "ArmaLite," the company that developed the prototype rifle in the late 1950s that later became the military M16 and civilian AR-15.

Americans own more than 18 million AR-15 variants and "the AR-15 remains a jewel of the gun industry, the country's most popular rifle, irreversibly lodged into American culture." Jon Schuppe, *America's Rifle: Why So Many People Love the AR-15*, NBC News, Dec. 27, 2017.

While the AR-15 looks like the fully automatic military M4 carbine or M16 rifle, it has a semi-automatic-only firing mechanism like most modern handguns. The M4 and M16 are "select" or "selective" fire weapons, meaning that they can be fired either in semi-automatic mode or automatic mode (or three-round burst mode, depending on the model) by toggling a selector switch on the side of the rifle. A fully automatic weapon like the M4 or M16 is a machine gun—it fires more than one round when the shooter presses and holds the trigger. A semi-automatic firearm like the AR-15 is not a machine gun—it fires only one bullet for each pull of the trigger.

The Supreme Court in *Staples v. United States*, 511 U.S. 600, 603 (1994) (Ch. 8.E.5), described the basic difference between the AR-15 and the M16: "The AR-15 is the civilian version of the military M-16 rifle, and is, unless modified, a semi-automatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semi-automatic or automatic fire."

AR-15-type semi-automatic rifles.

AR-15-type rifles are used for lawful purposes such as self-defense, hunting, competitive shooting, and target practice. They come in a variety of calibers and barrel lengths. Most AR-15s are chambered for the .223 Rem./5.56 NATO round (*see* Section B.2). AR-15-style rifles also can be chambered for other calibers, such as the .22 Long Rifle, .223 Wylde, .224 Valkyrie, and .300 Blackout. Large frame AR models (AR-10s) typically are chambered for the .308 Winchester (Win.) and 6.5 Creedmoor, but also can include other calibers such as .243 Win., .260 Rem., and 6mm Creedmoor. The AR-platform also includes pistol-caliber carbines (called PCCs or AR-9s) that fire 9 mm rounds used in popular handguns.

AR-15 rifles typically are fitted with carbine-length barrels (14.5 or 16 inch) or rifle-length barrels (18 or 20 inch). The 14.5-inch barrel must have a pinned and welded muzzle device (compensator or flash hider) to bring its length to 16 inches or it will be classified as a *short-barrel rifle* under the National Firearms Act (NFA) (*see* Chapter 8). Short-barrel AR-15 rifles requiring a tax stamp under the NFA are popular in barrel lengths ranging from 9 to 12.5 inches.

The AR-15 chambered for .223 Rem./5.56 NATO ammunition is especially suitable for home defense. While handguns are easier to maneuver and store and shotguns have devastating firepower at short distances, the AR-15 carbine offers several advantages as a primary home defense weapon:

- The AR-15 has far less recoil than shotguns and less recoil than most other rifles and handguns. Less recoil makes the AR-15 easier to shoot and speeds follow-up shots.
- The AR-15's lighter weight, shorter barrel, and ergonomic stock and grip make it easier to handle than shotguns and most other rifles.
- The AR-15 can be equipped with a red-dot sight or low-power scope for more accurate aiming. Lights and lasers easily can be attached to the AR-15's handguard for better identification and targeting. Scopes and lights can be added to most firearms, but the AR-15 is famously easy to accessorize because it often comes with rails that make accessorizing simple. Because of easy customization, the AR-15 has been compared to the Mr. Potato Head toy.
- The AR-15's standard 30-round magazine is larger than standard semiautomatic handguns (15-18 rounds), revolvers (5-6 rounds), and shotguns (3-6 rounds). This ensures that the operator is prepared for a variety of defensive scenarios without carrying additional ammunition and pausing to reload, such as when confronting multiple attackers in a home invasion.

The AR-15 provides 30 rounds of highly effective ammunition in a package that allows high accuracy, low recoil, and a convenient mounting system for lights and optics. These features make it easier for most persons to hit human-sized targets at in-house distances in low-light conditions under stress. Handguns are more likely to be used in multiple defensive settings and persons who use firearms for self-defense should develop a handgun skill set. But the handgun's portability advantages make little difference inside the home. Handguns require a higher degree of skill to shoot accurately than AR-15s and hold half as many rounds. Shotguns are highly lethal at close ranges, but they hold an even smaller number of rounds. It is unrealistic to expect the average person to reload a shotgun under the life-or-death conditions of home defense.

Some argue that overpenetration by AR-15 rounds makes the AR-15 too dangerous for home defense. Bullets fired in a home can go through interior and exterior walls and hurt innocent persons. *Any* defensive pistol or rifle ammunition that will effectively penetrate a human target will go through drywall, sheetrock, and other wall materials if the shooter misses. Ordinary defensive 9 mm hollow-point pistol rounds, for example, will penetrate several sheets of drywall. While tests have shown that hollow-point .223/5.56 rounds generally penetrate less than hollow-point handgun rounds, both are capable of penetrating multiple interior walls, as well as exterior house walls. Still, almost every military or law enforcement team that must fight inside houses and can choose its own weapons selects an M4/AR-15 variant.

Persons who choose to use a firearm for home defense should select a firearm that gives the highest probability of hitting the threat, should train and practice for accuracy, and must know what is beyond the target. Handguns, rifles, and shotguns all have advantages and disadvantages for lawful self-defense in the home, so it is impossible to say which firearm is "best" for home defense in every case.

The AR-15 rifle platform also can be configured for a variety of sporting and hunting applications. It is the primary type of rifle used in organized centerfire rifle-shooting events such as the NRA High Power Rifle competition. ("High power" in the competitive shooting context means anything larger than .22 caliber.) Due to the increased popularity of AR-15-type rifles, ammunition manufacturers have developed various cartridges suited for hunting small varmints, feral hogs and goats, coyotes, deer, and other animals. *See* Will Drabold, *Here Are 7 Animals Hunters Kill Using an AR-15*, Time, July 6, 2016.

Many law enforcement agencies supply their officers with semi-automatic AR-15 "patrol rifles" chambered in .223 Rem./5.56 NATO to supplement the officers' service pistols. They choose the AR-15 for its accuracy, ease of use, utility for diverse defensive scenarios, less danger of overpenetration, and reliability, as well as two characteristics common to almost all rifles: higher velocity rounds and the ability to penetrate soft body armor. *See, e.g.*, Massachusetts Municipal Police Training Committee, *Basic Firearms Instructor Course: Patrol Rifle Manual* 3-7 (2007) (discussing advantages of AR-15 patrol rifle).

While AR-15-type rifles are the most common in their category, there are many other popular semi-automatic rifles, such as the Ruger Mini-14 and Mini-30. The fully automatic AK-47 (and its descendants, the AK-74 and AKM) is the most common rifle in much of the world. Designed for the Soviet Union and its allies by Mikhail Kalashnikov in 1947, the AK-47 is extremely durable and reliable, even under very adverse environmental conditions. Semi-automatic variants of the Kalashnikov design were popular in the American market in the 1980s, but are relatively less so today as the more customizable and more accurate ARs have eclipsed them. One reason is that there is a great deal of American consumer resistance to imported Chinese firearms, so the Chinese semi-automatic AKs are much less popular in the United States than might be expected based on their relatively low prices. However, fully automatic Chinese AKs can be found throughout many developing countries—in the hands of ordinary persons, warlords, organized criminals, and anyone else with ready cash to pay China's government affiliated manufacturers, who produce reliable firearms that they sell without scruples.

Gun control advocates (and oftentimes the media) refer to AR-15-type rifles as "assault weapons" and typically use machine-gun terms to describe these rifles, even though AR-15s are not fully automatic weapons. While "assault weapon" is an elastic marketing term, the term "assault rifle" has a precise and long-standing definition. According to the Defense Intelligence Agency, "assault rifles" are "short, compact, selective-fire weapons that fire a cartridge intermediate in power between a submachine gun and rifle cartridges." Defense Intelligence Agency, Small Arms Identification and Operation Guide—Eurasian Communist Countries 105 (Gov't Print. Office, 1988) (same definition in earlier editions). In other words, an "assault rifle" is a midsize portable rifle that the user can fire automatically or semi-automatically. The first such rifle was the German Sturmgewehr, introduced in 1943. The Soviet AK-47 and the U.S. M-16 are also assault rifles.

"Assault weapon" is a term that has literally been used to describe almost every type of gun—including air guns, paintball guns, most shotguns, most handguns, or most rifles. David B. Kopel, *Defining "Assault Weapons"* The Regulatory Rev. (Univ. of Penn.), Nov. 14, 2018 (citing "assault weapon" laws covering various guns). Sometimes "assault weapons" are said to be "weapons of war" with "spray fire" capability. Some laws define "assault weapons" by the presence of one or more features on a firearm, such as a forward grip on a long gun, barrel covers or extensions to improve grip and accuracy, adjustable stocks to fit the user's size, bayonet lugs, or detachable magazines.

Under diverse definitions, "assault weapons" currently are banned in California, Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, New Jersey, and New York, as well as in local jurisdictions in Illinois. Some other jurisdictions, such as Washington State, impose special regulations. None of the legislative classifications are based on the guns' rate of fire or power.

From 1994 to 2004, United States federal law contained a similar set of restrictions. The Public Safety and Recreational Firearms Use Protection Act, formerly at 18 U.S.C. § 922(v) (1994), prohibited the manufacture for sale to private individuals of defined "assault weapons," including the AR-15. The federal ban also prohibited the manufacture for sale to private individuals of detachable rifle or handgun magazines holding more than ten rounds. *Id.* § 922(w). However, the federal assault weapons ban included a sunset clause, which caused the law to expire by its terms on September 13, 2004, ten years after its passage. Today, these rifles are no longer specially regulated by federal law, although they are, like other firearms, regulated by the federal Gun Control Act of 1968 (Ch. 9).

While the Supreme Court has never addressed the constitutionality of "assault weapon" bans, five federal circuit courts have upheld such bans against Second Amendment challenges. *See Worman v. Healey*, 922 F.3d 26 (2d Cir. 2019) (Ch. 15.A); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (Ch. 15.A); *New York State Rifle and Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (Ch. 15.A); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015) (Ch. 15.A); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (Ch. 12.D) (*Heller II*). For more on the constitutionality of such bans, see Chapter 15.

Several courts upholding "assault weapon" bans have made erroneous or misleading factual claims about the design and operation of AR-15s. For example, both *Heller II* and *Kolbe* identify the banned AR-15s as "weapons of war," even though no national military uses a service rifle that is semi-automatic only. *Friedman* describes the banned "assault weapons" as being "designed to spray fire rather than to be aimed carefully," which is contrary to both the design and capability of the firearm. *Kolbe* concludes that the rate of fire for the semi-automatic AR-15 is "nearly identical" to the fully automatic military M16 and cites a source claiming that semi-automatic rifles can be fired at rates of 300 to 500 rounds per minute. Because the AR-15 is a semi-automatic weapon and fires only one round with each pull of the trigger, such a rate of fire would require the operator to pull the trigger five to eight times per *second*. The AR-15's actual rate of fire is similar to modern semi-automatic pistols rather than the military's fully automatic weapons. Most shooters can fire at most two to three rounds per second at a single, stationary target.

For articles refuting popular misconceptions about the design and operation of the AR-15, see E. Gregory Wallace, *"Assault Weapon" Lethality*, 88 Tenn. L. Rev. 1 (2020), E. Gregory Wallace, *"Assault Weapon" Myths*, 43 S. Ill. U. L.J. 193 (2018),

and David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381 (1994).

iii. Lever-Action Rifles and Pump-Action Rifles

Lever-action rifles, the first repeating rifles, were introduced before the American Civil War. The user can manually eject a spent round and chamber a fresh round by cycling a lever assembly attached to the rifle's trigger guard. Lever-action rifles, such as replicas of the famed Winchester 1873 rifle, are still fairly popular today for hunting. They are widely used in the self-consciously nostalgic sport of cowboy action shooting, in which participants wear Western clothing and shoot cowboy-themed target courses using firearms of nineteenth-century design. Pump- or slide-action rifles operate like shotguns of the same type.

Winchester Model 1873 lever-action rifle.

iv. Single-Shot Rifles

Single-shot rifles are still produced. They are simple and often economically priced. After firing, the cartridge must be removed or ejected from the breech of the rifle and replaced by hand. Single-shot rifles typically are highly accurate for hunting and for long-distance target shooting.

c. Legitimate Uses of Rifles

As explained above, rifles commonly are used for self-defense, hunting non-bird animals, and target shooting. According to the National Shooting Sports Foundation's *Report on Sport Shooting Participation in the United States in 2014*, a total of 21.9 percent of all Americans went target or sport shooting in the previous year. Of that number, 59.8 percent used a traditional rifle and 31.7 percent used a modern sporting rifle (i.e., AR-type rifle) (multiple responses were allowed). For those who used a firearm for hunting, 69 percent used a traditional rifle and 31 percent used a modern sporting rifle (multiple responses allowed).

d. Criminal Uses of Rifles

Rifles are not commonly used in violent crime. According to the U.S. Department of Justice's 2016 Bureau of Justice Statistics survey of federal and state prison inmates, 21 percent of state prisoners and 20 percent of federal prisoners reported being armed with a firearm during the offense for which they were incarcerated.

Of those offenders who were armed, only 7 percent reported possessing a rifle. *See* U.S. Dep't of Justice, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*. The FBI's report on *Crime in the United States* indicates that 10,258 murders were committed with firearms in 2019. For the 6,977 murders about which the type of firearm is known, 6,368 were committed with handguns, while only 364 were committed with rifles. This is about 3.5 percent of murders committed with firearms.

Handguns are the most common firearm used in mass shootings, accounting for over 50 percent. According to one database, semi-automatic rifles, including AR-15-style rifles, have been used in about 29 percent (33 of 115) of mass shootings since 1982. *Mother Jones Mass Shootings Database 1982-2019* (last updated August 31, 2019). According to FBI data, rifles of all types were used in less than one-third of 277 active shooter incidents from 2000-18.[12]

Rifles have figured prominently in political assassinations. In the 1960s, President John F. Kennedy and civil rights leader Rev. Martin Luther King, Jr., were both killed by assassins firing rifles from concealment. Today, one challenge of protecting dignitaries from assassination stems from the threat posed by potential assassins armed with rifles.

3. Shotguns

Shotguns are the third major category of common firearms. The ATF's *Annual Firearms Manufacturing and Export Report* for 2019 shows that 480,735 shotguns were manufactured that year in the United States and 22,319 were exported. The ATF's *Firearms Commerce in the United States Annual Statistical Update 2019* shows that 713,931 shotguns were imported into the United States in 2018, with Turkey, Italy, and China the leading sources.

Federal law defines a shotgun as a firearm that is

> intended to be fired from the shoulder . . . [and uses] the energy of the explosive in a fixed shotgun to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger.

28 U.S.C. § 5845(d). Thus, a shotgun is a long gun with a *smooth bore*, a barrel whose interior lacks the spiral rifling grooves found in rifles and handguns.

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12. The FBI has published *Active Shooter Incidents in the United States* for 2000-13, 2014-15, 2016-17, 2018, 2019, and 2020. The FBI defines an active shooter incident as involving an individual or individuals actively engaged in killing or attempting to kill people with a firearm in a populated area. It excludes shootings that resulted from gang or drug violence.

a. Shotgun Shells

Shotguns use ammunition that differs in several respects from handgun or rifle ammunition. While handgun and rifle cartridges use metallic *cases*, shotgun cartridges use cylindrical *shot shells* with plastic cases (or in previous times, paper cases).

Shotgun shells, pictured next to rifle and handgun cartridges for scale.

A typical shot shell is filled with round metal *shot pellets* that are released when the shell is fired. Shot shells range from *birdshot* loads, the smallest of which fit hundreds of tiny pellets into a single shell, to *buckshot* loads, which use much larger and heavier pellets, sometimes as few as eight or nine pellets per shell.

Shotguns are commonly used for bird hunting. Larger loads with fewer pellets are used for bigger birds, such as geese, while loads containing tiny pellets are standard for small birds. The largest pellets (buckshot) are used for hunting deer or for police work and self-defense.

Other than the differences in casing, and the use of round pellets rather than conical bullets, shotgun ammunition works the same as rifle or handgun ammunition.

Traditionally, shot pellets have been made of lead, like most handgun and rifle bullets. However, concern about the effects of ingested lead on animals has led to restrictions on its use in hunting. In 1991, the U.S. government banned the use of lead shot while hunting waterfowl in the United States. 50 C.F.R. §§ 20.21(j), 20.134. Ammunition manufacturers now sell a variety of shotgun shells loaded with nonlead shot composed of other metals, such as bismuth, tin, steel, and tungsten. These nonlead alternatives are widely used for shotgun hunting today, although some argue that they remain inferior to lead shot in performance, price, or both.

Not all shotgun shells contain multiple pellets; they can also be loaded with a single, large-bore projectile, a shotgun *slug*. Shooting slugs lets the shotgun function similarly to a powerful rifle at short ranges. The typical use for a shotgun slug would be deer hunting, police work, or self-defense. (Some specialty shotguns for slugs may have rifling inside the barrel, which by federal law makes them "rifles," although everyone still calls them "shotguns.")

Some shotgun shells contain nonlethal loads, including rubber pellets, bean bags, pepper spray and chemicals, and flash bangs. Like rubber bullets, they are intended to bruise and disorient targets. Chemical and flash-bang loads are further

intended to partially incapacitate and confuse targets. They are often used by law enforcement for crowd control and to deter further action.

b. Shotgun Gauges

Rifle and handgun calibers are measured in inches (e.g., .22, .357, .45) or millimeters (e.g., 5.56 mm, 9 mm). This is straightforward measurement of the width of the gun's bore diameter. Shotgun calibers also indicate the gun's bore diameter, but in an indirect measurement called *gauge*. A shotgun's gauge corresponds to the number of lead balls, of the same diameter as the shotgun's bore, that weigh one pound. If 12 lead balls of the shotgun's diameter weigh one pound, the shotgun is 12 gauge. If shotgun bore is slightly smaller, requiring 16 lead balls to weigh one pound, the shotgun is 16 gauge. The lower the gauge number, the wider the gun's bore, and thus the wider the shell that the shotgun can shoot.

Twelve gauge is most common in the United States. Its bore is .729 inches wide. Other popular modern gauges are 10, 16, 20, 24, and 28. (Historically, there are plenty of other shotgun gauges, such as 8 or 32.) The .410 shotgun is also common today. It has the smallest bore diameter, and its caliber is expressed in inches, not gauge.

c. Types of Shotguns

Pump shotgun.

Like rifles and handguns, shotguns are available as single-shot guns. Like single-shot rifles, single-shot shotguns have often been a youngster's first firearm, a rite of passage. As with rifles, repeating shotguns are far more common than single-shots.

The most common repeating shotgun in the United States is the *pump action*. The pump shotgun stores shells in a tubular magazine underneath the barrel. Wrapped around the magazine is a wood or plastic fore-end. To eject an empty shell

and load a fresh one, the user pumps the fore-end backward and then forward. Pump actions are also called *slide actions*. (The same words are also used for similar rifles.) Pump shotguns typically hold from three to eight shells. They are less expensive to manufacture than semi-automatic or double-barreled shotguns. They are widely used for police work, self-defense, hunting, and rural control of pests and predators.

Semi-automatic shotguns function similarly to other semi-automatic firearms. When the shotgun is fired, the recoil energy or gas released by firing causes a reciprocating bolt to eject the spent shell and load a fresh shell into the firing chamber, ready to be fired with another press of the trigger. Unlike semi-automatic pistols and rifles, semi-automatic shotguns rarely use detachable ammunition magazines. As with pump-action shotguns, three to eight shells are typically stored in a fixed magazine tube that runs underneath the shotgun's barrel. The few shotguns that use a detachable box magazine, or a revolving cylinder, for ammunition storage have been subjected to special controls. *See* ATF Rul. 94-2 (classifying such shotguns as a "destructive device" under 26 U.S.C. § 5845(f)(2)); Ch. 8.E.2.g.

Double-barreled shotguns have no magazine. Instead, they feature two adjacent barrels that can each be loaded with a shell, allowing a total of two shots before reloading. "Over/under" double-barreled shotguns place one barrel atop the other. "Side by side" shotguns orient the barrels alongside one another. Double-barreled shotguns are popular for skeet, trap, and sporting clays (below). Double-barreled shotguns are offered at a range of price points, but high-quality examples are very expensive, often boasting fine wood and engraving. Such shotguns are used mainly for sporting purposes such as competition and bird hunting. Many countries with very restrictive firearms laws, such as the United Kingdom, impose relatively less regulation on double-barreled shotguns.

d. Legitimate Uses of Shotguns

Shotguns are commonly used for hunting, especially bird hunting; for shooting sports such as trap shooting, skeet shooting, and sporting clays; for self-defense; for police work; and for protection from threatening or pest animals in rural areas. They also play a limited role in military operations—they are useful for security duty and for fighting in buildings or other close quarters. Some states, such as Illinois, Massachusetts, New Jersey, and Ohio, disallow the use of rifles for hunting deer. In these areas, it is common for deer hunters to employ shotguns loaded with buckshot or, most commonly, slugs.

Shotgun sports are one of the most popular organized shooting sports in the United States. In addition to hunting, popular shotgun sports are trap shooting, skeet shooting, and sporting clays. Trap and skeet shooting were both created to simulate bird shooting. In both sports, the shooter tries to hit flying clay disks. Trap and skeet shooting take place on specially constructed target ranges. The differences between trap and skeet are whether the shooter stays in a single spot or rotates among five different shooting positions along about a quarter of a circle, and whether the clay "birds" are released from one fixed position or two.

The shotgun sport of sporting clays, invented in the latter twentieth century, also involves firing at flying clay targets. However, the sporting clays course involves ten different shooting positions in a large outdoor area. Participants shoot clay targets in a variety of natural settings that present differing terrain and obstacles. At each position, the shooter will fire at two different flying clays. While the flight paths of the clays in trap and skeet are relatively fixed, the flying patterns in sporting clays are much more

diverse. One sporting clays stand might involve a first shot at a clay bouncing along the ground, and a second shot at a clay flying almost straight up into the air.

According to the National Shooting Sports Foundation's *Report on Sport Shooting Participation in the United States in 2014*, an estimated 13 million participate in sporting clays, 12.6 million in skeet shooting, and 11.2 million in trap shooting.

Shotguns can be used for military purposes, particularly at close range. They were common in World War I as "trench guns," had an important role in the Vietnam War, and are still used for specialized purposes. The bulk and weight of their ammunition, however, make them unsuitable for extended carrying. At distances beyond a few dozen yards, the much greater accuracy of the rifle makes it the preferred military arm.

Some firearms trainers recommend the use of a shotgun instead of a handgun for home defense. They emphasize that the shotgun is much more powerful than the handgun and that the use of a shoulder stock enables the shotgun to be aimed more accurately under stress than a handgun. Other trainers point out that the shotgun's heavy recoil can make it difficult for small-statured shooters or those with limited upper-body strength to use a shotgun effectively for self-defense. The shotgun's limited ammunition capacity could also be a disadvantage for home defense, as it would be very difficult for the average operator to reload quickly under the stress of a defensive situation.

All firearms, and other arms, have their particular advantages and disadvantages for lawful self-defense. Individual ergonomics vary widely, and individual circumstances even more. The choice of defensive arms is a very personal decision.

e. Criminal Uses of Shotguns

Shotguns are used far less frequently than handguns in murders. The FBI's report on *Crime in the United States* indicates that 10,258 murders were committed with firearms in 2019. For the 6,977 murders about which the type of firearm is known, 6,368 were committed with handguns, while 364 were committed with rifles and 200 were committed with shotguns.

The U.S. Department of Justice's Bureau of Justice Statistics survey of federal and state prison inmates in 2016 indicates that 21 percent of state prisoners and 20 percent of federal prisoners reported being armed with a firearm during the offense for which they were incarcerated. Of those offenders who were armed, only about 8 percent reported possessing a shotgun. *See* U.S. Dep't of Justice, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*.

Criminals carrying shotguns sometimes will saw off much of the barrel (an act that is illegal under federal law, *see* Ch. 8.E.2.e.). The sawed-off shotgun is not very accurate, but (like any shotgun) is devastating at close range.

E. SPECIALTY TYPES OF FIREARMS AND ACCESSORIES

1. Muzzleloaders

All of the types of modern firearms described above are sometimes called *breech-loading* guns: the user loads the gun's ammunition into the firing chamber from the gun's *breech*, that is, the rear of the barrel.

The first firearms were *muzzleloaders*. They were loaded from the front of the gun, the *muzzle*. The flintlock muskets and rifles used by the American pioneers and by soldiers in the American Revolution are examples of historically significant muzzleloading firearms.

To load a muzzleloading gun, the user pours a charge of black powder down the *front* of the barrel (i.e., the muzzle) and then uses a ramrod to ram a bullet or round ball projectile down the muzzle, covering the powder charge. Introducing a spark into the firing chamber ignites the powder and fires the gun with an accompanying large cloud of smoke.

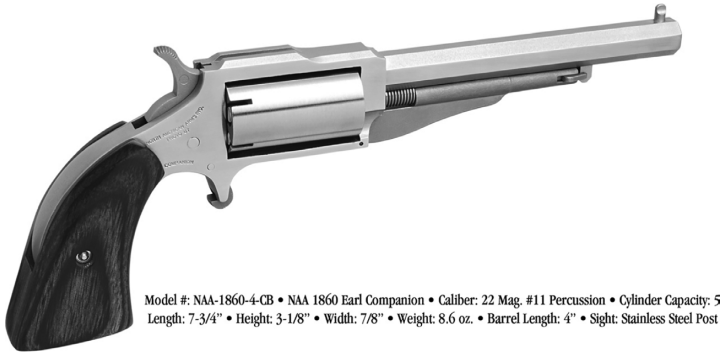
To provide the priming spark, the flintlock muzzleloaders of the seventeenth and eighteenth centuries used a small amount of fine gunpowder in a small pan just behind the breech. When the user pulled the trigger, flint struck steel, producing a spark to ignite the powder in the pan. In the early nineteenth century, self-contained *percussion caps* were invented. Placed on a small nipple near the gun's breech, the primer cap detonated when struck by the gun's hammer. These were the ancestors of today's centerfire primer cups.

Most muzzleloaders can only fire a single shot. After that, the slow loading process must be repeated. As of the time of the Revolution, an average shooter could fire about three shots per minute, a proficient user up to five.

Repeating muzzleloaders date back to the fifteenth century but were expensive. The first repeating muzzleloaders to win a big place in the mass market were the "pepperbox" handguns introduced around 1830. *See* Chs. 6.C.5.a, 23.C.4.a. These were ancestors of the revolver. With rotating barrels, they most often held 4 or 8 rounds, and sometimes up to 24.

Muzzleloaders are technologically obsolete, but their features and traditional quality give them an appeal to hunters and historical firearms aficionados. Today, many states maintain special "muzzleloading" or "black powder" hunting seasons in addition to the regular firearms hunting seasons. Hunters willing to use single-shot, muzzleloading rifles receive the benefits of a separate season to hunt, usually before the regular hunting season begins. The growing popularity of muzzleloading hunting has fueled a steady improvement in the sophistication of commercial muzzleloading firearms. It is now possible to purchase muzzleloaders that, apart from their one-shot capacity and slow loading procedure, have the features of a high-quality modern hunting rifle. Some are even strong enough in construction that they can use smokeless gunpowder. Most modern muzzleloaders use commercial black powder "substitutes" that have similar burning properties to traditional black powder, but are more stable in storage and easier to clean. In modern muzzleloaders, the gunpowder is not loose, but is a cylindrical pellet. Modern replicas of old-fashioned flintlocks are also popular today, thanks in part to the build-at-home kits that became available about a half-century ago.

Muzzleloading firearms have a distinctive legal status. Under current federal law, muzzleloading firearms, including "cap and ball" revolvers, are much less closely regulated by federal law than modern, cartridge-using firearms. The Gun Control Act of 1968 classifies black powder rifles, shotguns, and handguns as "antique firearms" that are exempt from federal regulation, as long as the guns cannot use fixed (cartridge) ammunition. *See* 18 U.S.C. § 921(a)(4), (a)(16)(C). Individuals can order many kinds of black powder muzzleloading firearms directly through the mail or the Internet.



This North American Arms revolver is a muzzleloader. To load the gun, one removes the revolving cylinder from the frame of the gun. After that, one rams gunpowder and then a bullet into each of the five cylinder chambers, from the front. Finally, one places percussion caps on the back of each cylinder chamber, and then puts the cylinder back into the gun.

2. Machine Guns

Federal law defines any firearm that can fire more than one shot per press of the trigger as a machine gun — or rather, to use the actual spelling found in the National Firearms Act of 1934 (Ch. 8.D.7), a "machinegun."

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b). The standard infantry weapons of national armies today are machine guns, including the U.S. military's M4 and M16 rifles as well as the AK-47 and AK-74 rifles of the former Soviet bloc nations. Each of the rifles is capable of at least one type of automatic fire, and some can do both: in "fully automatic" fire the gun keeps firing as long as the trigger is held down, until the ammunition runs out; in "burst" fire, a single trigger press fires two or three shots automatically.

Automatic firearms available to civilians are closely regulated by the federal government under the National Firearms Act (Ch. 8.D.7). Possession of a machine gun is illegal unless the possessor has completed extensive tax and registration requirements. Ch. 8.E. Federal law was amended in 1986 to ban the private possession of machine guns manufactured after May 19, 1986. *See* Firearms Owners' Protection Act, 18 U.S.C. § 922(o). Only machine guns that were lawfully registered prior to that date may be owned and transferred pursuant to the National Firearms Act. In effect, the 1986 federal ban created a fixed pool of somewhat more than 100,000 legally "transferable" machine guns, to which no new guns can be added. This scarcity, as you might predict, has caused the price of transferable machine guns to climb steadily in the decades since the ban was enacted. Prices currently

begin at around $3,000 for the simplest models and range upward to $25,000 or more for rare or high-quality weapons.

Federal law uses the term "machinegun" to mean a fully automatic firearm, but there is a technical distinction. The Gatling Gun, invented during the Civil War, is an example of a machine gun that is not fully automatic. The Gatling Gun is powered by a hand crank, rather than energy from the firing of ammunition. Gatling Guns, and other nonautomatic machine guns, are not covered by the National Firearms Act.

The Bureau of Alcohol, Firearms, Tobacco, and Explosives (ATF) issued a final rule in December 2018 designating bump-stock-type devices (bump-stocks, slide-fire stocks, and similar devices) as machineguns under the National Firearms Act. The ATF explained that

> these devices convert an otherwise semi-automatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semi-automatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semi-automatic firearm to which a bump-stock-type is attached is able to produce automatic fire with a single pull of the trigger.

Bump-stock-type devices are not used by the military or law enforcement, are notoriously inaccurate and prone to misfiring, and are not particularly useful for target shooting or self-defense. Their utility was purely recreational, in that a user at a shooting range is able to simulate something like automatic fire. Until the tragic mass shooting in Las Vegas in September 2017, bump-stock-type devices had not been used in any crime. Whether the ATF correctly determined that bump-stock-type devices are machineguns under federal law and whether the ATF can ban such devices without congressional legislation will be resolved in litigation. Ch. 8.E.2.c.

3. Silencers or Suppressors

A silencer (also called a suppressor) is a mechanical device that reduces the sound created by firing a gun, much as an automobile muffler reduces the sound created by running the car's motor. It usually takes the form of a can-like cylinder that attaches to the muzzle of the gun.

Suppressor attached to firearm.

Many consider "suppressor" to be a more correct term than "silencer" because the devices reduce noise but do not render a firearm even close to silent. (This is an important difference between real suppressors and ones portrayed in movies.) "Silencer" is the term used in federal law:

> The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

18 U.S.C. § 921(a)(24). Thus, both terms refer to the same device and can be used interchangeably. "Silencer" is the legal term, while "suppressor" is the technical term.

The effect of suppressors is widely misunderstood and sometimes misrepresented. Gun control advocates have claimed, for example, that using a silencer makes a gun "quiet" so active shooters can inflict harm without being detected by potential victims or police. Suppressors reduce a gunshot sound by about 30 decibels on the average. The typical gunshot is about 160 decibels, so a suppressor will lower the noise to 130 decibels, which still is as loud as a jackhammer and louder than a chainsaw. The primary benefit of suppressors for civilian use is hearing protection. *See* Ch. 8.E.

Silencers purchased by civilians in the United States are highly regulated under the National Firearms Act. Like the possession of a machine gun, the possession of a silencer is illegal unless the possessor first completes extensive tax and registration requirements. However, there is no ban on the manufacture of new silencers. Eight states (California, Delaware, Hawaii, Illinois, Massachusetts, New Jersey, New York, and Rhode Island) and the District of Columbia currently ban civilian ownership of silencers. In many European countries, suppressors are not regulated as strictly as in the United States. Instead, suppressors are commonly available and are frequently used to reduce "noise pollution" from hunting and target shooting near inhabited areas.

4. Armor-Piercing Ammunition

Federal law and some states restrict the manufacture, sale, and possession of bullets whose composition makes them unusually effective at penetrating modern body armor such as the bullet-resistant vests worn by police officers. Federal law prohibits the manufacture of "armor piercing ammunition," except for sale to government agencies, and prohibits federally licensed dealers from selling armor-piercing ammunition to individuals. 18 U.S.C. § 922(a)(7)-(8), (b)(5).

Most prohibitions of "armor piercing" ammunition define that category by focusing on the bullet's material composition. Ordinary ammunition uses bullets made of lead and copper, while laws regulating armor-piercing ammunition typically restrict the use of very dense metals such as brass, steel, or tungsten. The bullets that were later dubbed "cop-killer" were actually invented by law enforcement and known as KTW bullets, based on the initials of the inventors: Dr. Paul Kopsch and two police officers named Turcus and Ward. The KTW's purpose was and is to

shoot through automobile doors or similar targets. *See* David Kopel, *The Return of a Legislative Legend*, Nat'l Rev. Online, Mar. 1, 2004.

The armor-penetrating ability of ammunition depends greatly upon the velocity of the bullet, not just the bullet's composition. A bullet fired from a rifle will have much higher velocity than the same bullet fired from a handgun, because the rifle has a much longer barrel. Thus, as a practical matter, virtually all rifle ammunition introduced within the last hundred years that is suitable for hunting deer or larger game will penetrate soft body armor (which is typically made of a flexible fabric called Kevlar), regardless of the composition of its bullets.

Hard body armor comprises rigid steel, ceramic, or ultra-high-molecular-weight polyethylene (UHNWPE) plates that can stop rifle fire, but such armor is much heavier and more cumbersome than soft body armor. American soldiers going into combat often wear hard body armor, and police officers on special combat teams do also; for ordinary daily police work, soft body armor is the norm.

F. NONFIREARM ARMS

As the title of this book indicates, it is mainly about firearms. But the right to keep and bear arms, as interpreted by the courts, is not confined to firearms. There are certain to be many cases in the future as to what constitute constitutionally protected "arms." This Part surveys some categories of nongun arms. For case excerpts and other information on nongun arms, see Chapter 15.C.

1. Stun Guns and Tasers

Stun guns have two exposed electrical prongs. The current between the two prongs can temporarily disable a person. To use a stun gun, one must touch the stun gun to the target's body. A variant of the stun gun commonly used in law enforcement is the *Taser*, which fires darts connected to the main unit by thin insulated copper wires. The darts deliver electric current to disrupt the voluntary control of muscles and can be used against an assailant several feet away. Stun guns and Tasers will not work on an attacker wearing a thick coat.

The Supreme Court in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (Ch. 11.C.2), reversed a state court decision holding that stun guns are not protected arms under the Second Amendment because they are unusual, were not in common use when the Amendment was enacted, and have no military utility. None of these reasons ruled out Second Amendment protection, the Supreme Court emphasized, because they were inconsistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A).

Following *Caetano*, the Massachusetts Supreme Judicial Court held in *Ramirez v. Commonwealth*, 94 N.E.3d 809 (Mass. 2018), that the state's absolute ban on civilian possession of stun guns, even in one's home, violated the Second Amendment. Likewise, the Supreme Court of Illinois held in *People v. Webb*, 131 N.E.3d 93 (Ill. 2019), that a state statute imposing a complete ban on public carrying of stun guns is unconstitutional under the Second Amendment.

2. *Swords, Knives, and Other Edged Weapons*

In the nineteenth century, the sword, particularly the short swords wielded by cavalrymen, was often listed as among the core type of militia-suitable arms protected by state constitutional guarantees. During the colonial period and the early decades of independence, most militia laws (and often laws applying to other persons, such as a female head of a house) required ownership of both firearms and edged weapons. These included swords, knives, hatchets, and similar arms. *See* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495 (2019) (listing the mandatory arms and the persons covered by the statutes).

To the generation who fought and won the American Revolution, a paradigmatic arm was the bayonet, a knife made to be attached to the tip of a rifle or musket. (As discussed in Section E.1, a musket is a long gun that shoots a single large ball of lead.) At close quarters, the bayonet was a more effective weapon than the firearm, partly because it did not need to be reloaded. Nineteenth-century decisions generally treated swords and knives as being within the scope of the right to arms, although there were sometimes exceptions for knives thought to be used mainly by ruffians or brawlers—such as the Bowie knife. *See* Ch. 6.

Most states have no particular restrictions on purchasing and owning swords or knives, but carrying restrictions may exist, especially on knives, and there may be bans on certain types of knives, especially switchblades and daggers.

Fencing, using sabre, epee, or foil, is a popular sport. History-minded organizations such as the Academy of European Medieval Martial Arts (based in Toronto, Canada) train people in old-fashioned combat techniques, such as swordsmanship.

Buck Knife, model 482.

Buck Knife, model 730CM X-tract.

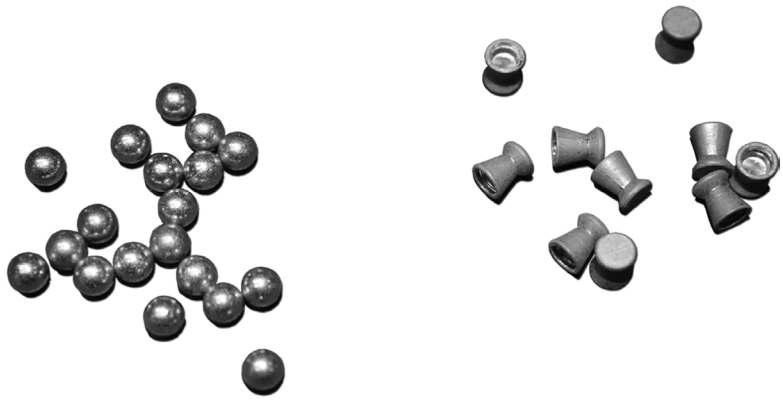
Is a hatchet a Second Amendment arm?

For further information on edged weapons, see David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. Mich. J.L. Reform 167 (2013), and Knife Rights.

3. Air Guns

Air guns are not "firearms." Instead of being powered by the burning of gunpowder, they are powered by compressed air or carbon dioxide. The compressed gas is usually stored in a small cylinder that fits in the gun's grip or stock. The compressed air may also be created by pumping a slide or lever on the gun. The simplest air guns, such as the famous Daisy Red Ryder, shoot a small (.177 caliber) round ball called a *BB*. Other air guns fire a special *pellet*.

Air guns can be rifles or handguns.



BBs and pellets.

Air-gun shooting is an Olympic sport. While having a limited range, the highest-quality air guns can be extremely accurate, more so than even the best firearms.

Air guns are subject to no special controls in most jurisdictions, although some jurisdictions limit unsupervised use by minors. New Jersey regulates air guns the same as firearms (police permission is required for each purchase), and New York City bans them.

4. Paint Guns

Paint guns are used in the sport of *paintball*. Teams with paint guns shoot at each other in a special field that has various obstacles and places to take cover. Informal matches can also be held in the woods or other natural settings. Paint guns (usually smooth-bore long guns with a relatively short barrel) fire a round paintball, whose caliber is typically from .43 to .68 inches. If a player is hit by a paintball, he must leave the field for the remainder of the match, or for a period of time.

The gun (or "marker," as players call it) is powered by a large cylinder of compressed air or carbon dioxide attached to the gun and connected to the action via a hose. Markers can be pump action, semi-automatic, or automatic.

Head protection is mandatory, especially for the eyes, and a paintball hit on bare skin can raise a welt. Military training is sometimes conducted with paint guns, allowing simulation of close-quarters combat without a risk of injury or death. The United States Army is a leading sponsor of paintball products and events and works assiduously to enlist paintball competitors. Paintball is an intercollegiate sport.

As with air guns, paint guns in most jurisdictions are subject to no special restrictions, but in a few places are regulated as if they were firearms.

5. Bows

Until well into the sixteenth century, the paradigmatic militia arm in England was the *longbow*. In Switzerland, it was the *crossbow*.

Bow hunting (archery) still is popular in the modern United States. Many states have special bow-only hunting seasons. Hunting with a bow is more difficult than hunting with a firearm. In order to make a lethal shot, the bowhunter must get much closer than does a firearm hunter.

Invented in the latter twentieth century, *compound bows*, which use a system of pulleys, predominate in modern hunting. The pulleys allow the bowman to store more mechanical energy with the pull of the bow string. Compound bows are more difficult to draw when the bow string is first pulled but are easier to hold in the fully drawn position. They were originally controversial but are now accepted everywhere that bow hunting is allowed.

A huntress with a Hoyt compound bow, wearing camouflage by Prois Hunting Apparel for Women.

Outside Switzerland, crossbows have always been more controversial, being associated with highwaymen and other criminals. However, a growing number of states now allow crossbow hunting, some for all hunters, and others only for older or physically challenged hunters. Unlike vertical bows, the string of some crossbows can be drawn by turning a crank. Other crossbows have a metal loop on their fronts that assists weaker shooters in reloading. The shooter places the loop onto the ground, places his foot into the loop to hold the crossbow down, and then pulls the string back with both arms. Once the string is drawn, it is held in position by a lever until it is released by the pressing of a trigger. These features make crossbows easier to employ by bowhunters lacking upper-body strength. The stock and trigger of a crossbow look much like a firearm, and thereby make the crossbow look more controversial.

For further information, including safety instruction, see North American Crossbow Federation and North American Bowhunting Coalition.

6. *Sprays*

Chemical defense sprays have been common in the United States since the late 1960s. Pepper spray is legal in all states, but many states limit the size or strength of the spray. For a summary of state laws on pepper sprays, see https://www.defensivestrategies.org/self-defense-security-products/pepper-spray-laws. Other types of defensive sprays include tear gas and mace.[13]

Many hunters carry a large and especially powerful canister called *bear spray*, which is sometimes more effective than a gunshot at turning away an aggressive bear.

Like any method of self-defense, sprays have particular advantages and disadvantages. Many people prefer a nonlethal means, and the carrying of sprays is allowed in many places where firearms are not. However, sprays tend to be less effective against aggressors who are under the influence of drugs or alcohol, or who consume a diet with lots of hot peppers.

7. *Blunt Weapons*

Laws about blunt weapons, such as *billie clubs* (also spelled "billy"), are extremely varied, ranging from no controls to prohibition. Like some other weapons discussed in this section, they may be prohibited from public carry by general laws against carrying dangerous weapons.

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13. Precisely speaking, "Mace" is the name of a product invented in 1965, using aerosol as a carrier for tear gas. The product's popularity led to "mace" becoming a common, but incorrect, term for defensive sprays from other manufacturers. Separately, "mace" is also the name of a spice made from nutmeg coatings, and a heavy medieval war club with a round, spiked, or flanged metal head.

8. Martial Arts Weapons

Most martial arts weapons, such as *nunchaku* or *throwing stars*, were created by the Chinese, Japanese, or Okinawans. They became popular in the United States as part of the surge of interest in all things Chinese, including the martial arts, that followed President Richard Nixon's 1971 opening to China. Most states have no special laws about them, although some states restrict carrying. New York and Massachusetts (and to a lesser degree, California) ban almost all of them.

Nunchaku are a pair of sticks connected by a chain.[14] They were briefly famous in public discourse when Second Circuit Judge Sonia Sotomayor was nominated to the Supreme Court. As a circuit judge, she had been part of a per curiam panel that upheld a New York State ban. *See Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009) (Ch. 11.C.1). The decision led some persons to question her commitment to Second Amendment rights. After the Supreme Court decided *McDonald v. Chicago*, it vacated and remanded the nunchaku case. *Maloney v. Rice*, 561 U.S. 1040 (2010) (Ch. 11.C.1). Eventually, the ban was declared unconstitutional, because the government had failed to prove that nunchaku are not in common use, and are not typically possessed by law-abiding persons for lawful purposes, *Maloney v. Singas*, 351 F. Supp. 3d 222 (E.D.N.Y. 2018).

The *tonfa* (essentially a billie club with an extra, perpendicular handle) is a popular arm for police use.

9. Brass Knuckles

Brass knuckles and similar devices for the fingers (e.g., rings with fighting spikes) are prohibited in many jurisdictions.

For further information, see Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 Stan. L. Rev. 199 (2009).

14. "Nunchaku" is the plural and the singular, properly speaking. However, "nunchuks" is used informally. Nunchaku are also called "chuka sticks."

Chapter 21

Antecedents of the Second Amendment

This is online Chapter 21 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsreglation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *This chapter.*

22. *Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

Chapter 2 of the printed textbook examines the history of the United Kingdom's right to arms; the rest of the printed book studies the right in the United States. Occasionally the printed chapters discuss related laws from other nations,

such as Hungary's Golden Bull (1222), which is similar to England's Magna Carta (1215). Yet debates about the legitimate use of arms and legitimate forms of arms control long precede the invention of firearms, the English settlement of America, or even the most rudimentary existence of "England" as a kingdom.

This Chapter provides a sample of the arguments that various philosophers have offered for or against arms possession, and about appropriate constraints on the use of arms. Many of the readings in this Chapter are part of the intellectual background of the Second Amendment. These include material from ancient Greece and Rome (Part B), the Judeo-Christian tradition (Part C), and European political philosophy (Part D). Other material, especially Part A on ancient China, was unknown to the Americans who adopted the Second Amendment. Yet the same questions that concerned Confucians and Taoists have been at issue throughout history.

One key issue is personal ethics. Is it moral to use force, or deadly force, in self-defense? Does the answer depend on whether the attacker is an individual criminal or a governmental tyrant?

The other major question is the distribution of force. Because arms greatly amplify the user's physical force, should government have a monopoly on arms possession and use? Or should arms be broadly distributed among the population? Each system has benefits and dangers. Chapters 2 and 22 describe how distributionism was a sine qua non for England's maintenance of its independence for many centuries. But in the twentieth century, English policy moved strongly toward centralization. Online Chapter 19.C.1. Chapters 3 through 7 describe how American policy, from colonial days to the present, has generally been distributionist, based in part on the view that England was insufficiently so.

This Chapter steps away from the United States and the United Kingdom to consider how some great minds outside the Anglosphere have thought about the distribution of force.

One theme of this Chapter is the benefits and dangers of militias versus standing armies. Standing armies consist of full-time soldiers, usually but not always armed by the state. In contrast, a militia consists of soldiers who only serve for part of the year or in situations of necessity. The rest of the time, they maintain their civilian occupations as farmers, merchants, and so on. Usually they supply their own arms. A select militia is a hybrid in which militiamen are drawn from a small segment of the population, spend more (perhaps all) of their time soldiering, and may depend on their militia pay for their livelihoods.

A. THE EARLY FAR EAST

1. Confucianism

There is no evidence that Framers of the Second Amendment were familiar with the Confucians or Taoists. Yet the Chinese and Framers, like many other people, faced the same challenge: allocating power, while avoiding the dual perils of too little government or too much. So Confucians and Taoists wrote about issues such as resistance to tyranny, just warfare, militias, and arms ethics.

"Confucius" is an imperfect translation of "K'ung-tzu," or, in English, "Master K'ung." The most important collection of Confucian sayings is the *Analects*.

The Analects of Confucius

Simon Leys trans., 1997

"To govern a state of middle size," the ruler should "mobilize the people only at the right times." (Analects 1:5). The Master said: "The people need to be taught by good men for seven years before they can take arms." The Master said: "To send a people to war that has not been properly taught is wasting them." (13:29-30)

The Master said: "A gentleman avoids competition. Still, if he must compete let it be at archery. There, as he bows and exchanges civilities both before the contest and over drinks afterward, he remains a gentleman, even in competition." (3:7)

In archery, it does not matter whether one pierces the target, for archers may be of uneven strengths. Such was the view of the ancients. (3:16)

The Master fished with a line, not with a net. When hunting, he never shot a roosting bird. (7:27)

The Head of the Ji Family was richer than a king, and yet Ran Qiu kept pressuring the peasants to make him richer still. The Master said: "He is my disciple no more. Beat the drum, my little ones, and attack him: you have my permission." (11:17)

MENCIUS[1]

Mencius was the most influential developer of Master K'ung's thought. He lived from about 371 to 289 B.C., a period when rival Chinese states were adopting the principles of the Legalist philosophers. The Legalists favored extremely centralized governments with rigidly applied laws. The Legalist states were very militaristic, aiming to regiment the peasants into armies made for wars of conquest. Eventually, the state of Ch'in, which had gone further than any other in adopting Legalism, conquered all of China, ruling it from 221 to 207 B.C. The Legalists, like the Utilitarian philosophers of nineteenth-century Great Britain, viewed humans as egocentrics, motivated only by reward or punishment. D.C. Lau, "Introduction," *in* Mencius 10-11 (D.C. Lau trans., 1970).

Mencius viewed rapacious governors as equivalent to ordinary robbers: "Now the way feudal lords take from the people is no different from robbery." Accordingly, accepting a gift from a feudal lord was like accepting stolen property from a robber. *Id.* at 154 (bk. 5, pt. B). Mencius told King Hsüan of Ch'i that royal ministers should remove a king who repeatedly ignored their warnings and made serious mistakes. *Id.* at 66-67 (bk. 1, pt. B, no. 6); 121-22 (bk. 4, pt. A, item 9). Further, said

1. Most of what we know about the thought of Mencius is in a book that is simply called "The Mencius." For the benefit of readers who may use a different edition of this often-republished work, information about cited subdivisions is provided, in addition to the page number of the particular edition used. Similar information is provided for some other ancient sources cited in this Chapter. Parts of this Chapter are based on David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017).

Mencius, a good subject could banish a bad ruler, if the subject had good motives. *Id.* at 188-89 (bk. 7, pt. A, no. 31).

In a discussion of two previous emperors who had been overthrown, Mencius was asked, "Is regicide permissible?" He replied:

> A man who mutilates benevolence is a mutilator, while one who cripples rightness is a crippler. He who is both a mutilator and a crippler is an "outcast." I have heard of the punishment of the "outcast Tchou," but I have not heard of any regicide.

Id. at 68 (bk. 1, pt. B, no. 8).

The common Chinese understanding was that the ruler had the "mandate of heaven." Mencius added an important qualification: "Heaven sees as the people see; Heaven hears as the people hear." Michael Nylan, The Five "Confucian" Classics 155 (2001). In other words, a ruler who lost the support of the people had necessarily lost the mandate of heaven, and hence was no longer a legitimate ruler.

Like Confucius (and the Taoists, see below), Mencius strictly insisted that hunting be according to the rules. One day, a charioteer drove all morning for an archer who failed to shoot any birds; the charioteer had obeyed all the rules, and the archer blamed the charioteer for the archer's lack of success. The charioteer asked for another chance; after the second hunt, the charioteer explained, "I used underhanded methods, and we caught ten birds in one morning." Mencius rebuked the charioteer for bending himself to please others. Mencius 106-07 (bk. 3, pt. B, no. 1). Conversely, Mencius praised a gamekeeper who refused to answer a summons from his master, because the master had given an improper signal, by raising a pennon (a thin triangular flag) rather than by raising a cap. *Id.* at 157-58 (bk. 5, pt. B, no. 7).

Personal protection was uncontroversial for Confucians. In a story illustrating that one should only accept gifts when there is justification, Mencius seemed to accept the legitimacy of arms for personal protection:

> In Hsüeh, I had to take precautions for my safety. The message accompanying the gift said, "I hear you are taking precautions for your safety. This is a contribution towards the expense of acquiring arms." Again, why should have I refused? But in the case of Ch'i, I had no justification for accepting a gift. To accept a gift without justification is tantamount to being bought.

Id. at 88 (bk. 2, pt. B, no. 3).

NOTES & QUESTIONS

1. In Confucian theory, a state of "middle size" was ideal because it could manifest the characteristics of moderation that Confucianism extolled. How might a militia system, as opposed to a full-time professional standing army, foster moderation?

2. Why might Confucius have favored such extensive training before militiamen were sent into combat?

3. One of the modern martial arts is a form of archery called *kyudo* (pronounced "cue-dough"). In *kyudo*, marksmanship is much less important than good

form and a proper mental state. What virtues might be cultivated by noncompetitive, highly ritualized sports, such as the archery favored by Confucius?

4. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind." Letter from Thomas Jefferson to Peter Carr (1785) *in* John Foley, The Jeffersonian Cyclopedia 318 (1900). "As to the species of exercise, I advise the gun."*Id.* Do you see any parallels between the Jeffersonian and Confucian attitudes? Does either make sense today?

5. What is the conservation basis for Confucius's fishing and hunting practices? Are there rationales in addition to species protection? Why should one not shoot a roosting bird? Why is such hunting dishonorable? If the etiquette rules for hunting are so rigid that raising a pennon as a signal is improper, does this suggest that one purpose of hunting is something other than catching game? If so, what might the purpose be? **CQ:** In what ways has the concept of honorable usage of arms been relevant at different periods in the history of the United States? Online Chapter 19.C examines Legalism, Confucius, and Mencius in Maoist China.

6. Confucius authorized the beating of the war drum to summon people to overthrow a king who was extorting money from them. How could a philosopher who extolled moderation in all things support the violent overthrow of a ruler? How could Mencius claim that killing a wicked king was not "regicide"?

7. Mencius was not unique in believing that unjust and oppressive rulers were simply a type of criminal. The fifth-century Christian theologian Augustine of Hippo wrote:

> Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor."

Augustine, Concerning the City of God Against the Pagans 139 (Henry Bettenson trans., Penguin Books, 1984) (translation of 1467 edition; original edition c. 410). Or as the fourth-century B.C. Taoist philosopher Chuang Tzu put it: "The petty thief is imprisoned but the big thief becomes a feudal lord. . . ." The Complete Works of Chuang Tzu § 29 (Burton Watson trans., 1968).

The seventeenth-century English political writer Algernon Sidney wrote that being subjected to a tyrant is little different from being under the power of a pirate. Algernon Sidney, Discourses Concerning Government 574 (Thomas G. West ed., Liberty Fund 1996) (ch. 3, § 46) (1698, published posthumously). Sidney was executed for treason in 1683, and later venerated by the English and Americans as one of the greatest martyrs of liberty. *See* Ch. 2.K.3. He was much admired by the American Founders. Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87 (1992).

What is your assessment of the claim by Mencius and the rest that the difference between an ordinary mugger and a criminal government is one of scale? If forcible resistance to the former is legitimate, does it follow that forcible resistance to the latter is also legitimate? Compare the views of Thomas Hobbes (Ch. 2.K.4 Note 5) and John Locke (Ch. 2.K.2).

8. In 124 B.C., Han Dynasty chancellor Gongsun Hong proposed banning nongovernment possession of bows and crossbows. He argued that the possession of distance weapons allowed bandits to defeat a larger group of law enforcement officers who were trying to apprehend them. The proposal would have been a drastic change from the Han Dynasty's generally permissive arms policies, with subjects permitted to own and carry a wide variety of arms. Another court official, Yuqui Shouwang, wrote an essay against the proposed ban. As he pointed out, during the Qin(Chin) Dynasty, a notoriously cruel emperor had confiscated all the subjects' arms, lawless violence greatly increased, and the unpopular emperor was overthrown. Yuqui Shouwang blamed the current crime problem on poverty, which was exacerbated by venal and incompetent local officials. Since the ancients had made and used arms, arms could not be intrinsically bad, Shouwang argued. Bandits would violate arms laws with impunity, since banditry itself was already a capital offense. Meanwhile, "[t]he good people who might have them for self-defense would run into legal prohibition." The emperor decided not to adopt the ban. *See* Charles Sanft, *Bow Control in Han China: Yuqiu Shouwang on Self-Defense*, 42 J. Asian Hist. 143 (2008).

9. Confucian law was embedded in the Rites of Zhou, written around the second century B.C. It affirmed the lawfulness of killing to defend one's home or community. 2 Le Tcheou-Li, or Rites des Tcheou 352 (Édouard Biot trans., 1851). The Rites of Zhou principles were included in the code of the T'ang Dynasty (618-907 A.D.), which is the oldest Chinese legal code whose text has survived in its entirety. Under the T'ang Code, there was no punishment for killing a night-time home invader, unless it was known that the invader intended no harm. If the intruder was captured, the homeowner could not then kill him. 2 The T'ang Code: Specific Articles 276-77 (Wallace Johnson trans., 1997) (art. 269). Use of force in defense of a third party, or to apprehend a criminal, was lawful and was sometimes a duty. *See id.* at 291 (art. 281), 515-19 (arts. 453-56) The T'ang Code was very hostile to private possession of "military weapons," which meant armor, crossbows, long spears, lances, and horse armor. Nonmilitary weapons, which private persons could possess, were bows, arrows, knives, shields, and short spears. *See id.* at 227 (art. 238), 233-34 (art. 243), 284-85 (art. 275), 331-33 (art. 306), 504-06 (art. 444).

2. Taoism

The second great world religion to emerge from China was Taoism. As with Confucianism, Taoism's historical roots are obscure; the foundation is usually attributed to a sage named Lao Tzu, although some people argue that the Lao Tzu material is a collection of earlier sources. In legend, Lao Tzu is said to have been renowned as a swordsman. Deng Ming-Dao, Scholar Warrior: An Introduction to the Tao in Everyday Life 11 (1990).

"The Tao" literally means "the way." Over the centuries, various versions of Taoism have developed; in some of these versions, Taoism is a philosophy, or a way of life, but it is not what Westerners would usually call a religion. In other versions, Taoism does have the characteristics of a religion. Over Chinese history, many people have followed various blends of Confucianism and Taoism. Taoism has also mixed with Buddhism, especially Zen Buddhism.

a. Tao Te Ching

The foundation of Taoism is the *Tao Te Ching*, ascribed to Lao Tzu, and probably written around the sixth century B.C. The *Tao Te Ching* (Book of the Way and Its Power) is a collection of poems, prose, and proverbs. It is second only to the Bible in the number of worldwide translations. Regarding arms it states:

> Now arms, however beautiful, are instruments of evil omen, hateful, it may be said, to all creatures. Therefore they who have the Tao do not like to employ them.
>
> The superior man . . . uses them only on the compulsion of necessity. Calm and repose are what he prizes; victory (by force of arms) is to him undesirable.

Lao-tzu, Tao Te Ching, no. 31 (J. Legge trans., 1891).

> In a little state with a small population, I would so order it, that, though there were individuals with the abilities of ten or a hundred men, there should be no employment of them; . . .
>
> Though they had boats and carriages, they should have no occasion to ride in them; though they had buff coats and sharp weapons, they should have no occasion to don or use them.

Id. no. 80.

NOTES & QUESTIONS

1. Do you agree or disagree with the views expressed in the first poem? Why?
2. In the second poem, why does the state have people keep arms but not use them?
3. **CQ:** Compare the description of the state described in the second poem to the description of Switzerland in online Chapter 19.C.2. Switzerland continues to have a robust militia system, in which men train regularly, are encouraged to additional practice, and keep arms at home. The nation has fought no war since 1847.

b. Wen-Tzu

The *Wen-Tzu*, also known as "Understanding the Mysteries," is attributed to disciples of Lao Tzu who wrote down his discourses. A major theme of the *Wen-Tzu* is the virtue of moderation, both in the individual and the state. It warned: "If you allow small groups to infringe upon the right of large masses and allow the weak to be oppressed by the strong, then weapons will kill you." Thomas Cleary, The Taoist Classics: The Collected Translations of Thomas Cleary 192 (1999) (no. 49). The *Wen-Tzu* further states:

> What makes a country strong is willingness to die. What makes people willing to die is justice. What makes justice possible to carry out is power. So give people direction by means of culture, make them equal by arming them, and they may be said to be sure of victory. When power and justice are exercised together, this may be said to be certain strength. . . .

> . . . When there is a day set for battle, if they [the people] look upon death as like going home, it is because of the benevolence [that] has been bestowed upon them.

Id. at 289-90 (no. 171).

The *Wen-Tzu* also praised certain regulations on hunting:

> There were laws of ancient kings not to surround the herds to take the full-grown animals, not to drain the ponds to catch fish, and not to burn the woods to hunt for game. Before the proper seasons, traps were not to be set in the wild and nets were not to be set in the water. . . . Pregnant animals were not to be killed, birds' eggs were not to be sought out, fish less than a foot long were not to be taken. . . .

Id. at 270-71 (no. 151).

c. The Master of the Hidden Storehouse

Lao Tzu's disciple Keng Sang-tzu has been credited with writing *The Master of the Hidden Storehouse*, a collection of advice for rulers. However, the history of the work is obscure until the T'ang Dynasty in the eighth century A.D., where it was honored as part of a revival of Taoist studies. The Emperor Hsuan-tsung, who reigned from 713 to 755, liked it so much that he called it the "Scripture of Open Awareness." Regarding militias, it says:

> When warfare is truly just, it is used to eliminate brutal rulers and rescue those in misery. . . .
>
> . . . [W]hen a just militia enters enemy territory, the people know they are being protected. When the militia comes to the outskirts of cities, it does not trample the crops, does not loot the tombs, does not plunder the treasures, and does not burn the houses. . . .
>
> . . . [A] just militia safeguards the lives of individual human beings many times over, why would people not like it?
>
> Therefore, when a just militia arrives, people of the neighboring countries join it like flowing water; the people of an oppressed country look to it in hope as if it were their parents. The further it travels, the more people it wins.

Id. at 126-27, 141-42 (2000).

d. Huainanzi

Sometime before the first millennium A.D., the *Huainanzi* (The Masters of Huainan) was composed. The *Huainanzi* extolled a free, diverse society, in which individuals lived in a balanced way, including in balance with nature. It observes:

- "The reason why leaders are set up is to eliminate violence and quell disorder. Now they take advantage of the power of the people to become plunderers themselves. They're like winged tigers—why shouldn't they be eliminated? If you want to raise fish in the pond, you have to get rid of otters; if you want to raise domestic animals, you have to get rid of wolves—how much the more so when governing people!"

- "When water is polluted, fish choke; when government is harsh, people rebel."
- "So you cannot fight against an army of parents, children, and siblings, because of how much they have already done for one another." "When people serve as militia in the same spirit as children doing something for their parents or older siblings, then the force of their power is like an avalanche—who can withstand it?"
- "What makes warriors strong is readiness to fight to the death. What makes people ready to fight to death is justice. . . . Therefore, when people are united by culture and equalized by martial training, they are called sure winners."
- The people expect "three things from the rulers: that the hungry can be fed, the weary can be given rest, and the worthy can be rewarded." If the government neglects them, "then even if the country is large and its people many, the militia will still be weak."
- "The basis of military victory or defeat is in government." If the people "cleave to those above, then the militia is strong." But when "those below turn against those above, then the militia is weak."
- "When you use arms well, you employ people to work for their own benefit. When you use arms badly, you employ people to work for your own benefit. When you employ people to work for their own benefit, anyone in the world can be employed. When you employ people to work for your own benefit, then you will find few."
- "A degenerate society is characterized by expansionism and imperialism, starting unjust military operations against innocent countries, killing innocent people, cutting off the heritage of ancient sages. . . . This is not what armies are really for. A militia is supposed to put down violence, not cause violence."
- "Sages' use of arms is like combing hair or thinning sprouts: a few are removed for the benefit of many. There is no greater harm than killing innocent people in supporting unjust rulers." Likewise, "[i]n ancient wars, they did not kill the young or capture the old. . . ."

Id. at 313, 316-18, 330, 357, 360-61, 367.

The *Huainanzi* contained language on hunting similar to the *Wen-Tzu*, and added more rules for hunting in harmony with the Way: "In early spring . . . pregnant animals are not to be killed. . . . In late autumn, hunters practice with their weapons, and ceremonies propitiating animals are carried out." In contrast to the harmonious hunting of the idealized past, "[i]n latter-day government, there are heavy taxes on hunting, fishing, and commerce. Hatcheries are closed off; there is nowhere to string nets, nowhere to plow." *Id.* at 325, 329, 352-53.

A well-ordered mind is more important than material possessions. "So to obtain sharp swords is not as good as mastering the art of the swordsmith." *Id.* at 314. Likewise:

> In human nature, nothing is more valuable than benevolence; nothing is more urgent than wisdom. Therefore, if one has courage and daring without benevolence, one is like a madman wielding a sharp sword. . . . So the

> ambitious should not be lent convenient power; the foolish should not be given sharp instruments.

Id. at 326.

For society to function well, people should recognize that different people contribute in different ways:

> In the space of one generation, the cultural and the martial may shift in relative significance, insofar as there are times when each is useful. Nowadays, however, martialists repudiate culture and the cultured repudiate the martial. Adherents of cultural and martial arts reject each other, not knowing their functions according to the time.

Id. at 369.

NOTES & QUESTIONS

1. What role does arms possession play in political order and civil equality, according to the *Wen-Tzu*?

2. Why might a militia be better or worse at liberating foreign countries than a standing army?

3. The *Huainanzi* (like many other Taoists, and many Confucians) analogized the government and the people to a benevolent family, with government playing the role of parents. How did the militia fit into this vision?

4. According to the *Huainanzi*, under what circumstances is it legitimate to use violence to overthrow the government?

5. The Taoists and the American Founders both thought that large armies and warfare states were an abomination that would destroy a good society. Conversely, a harmonious and ideal state simply defended itself with a well-trained and well-armed citizen militia. As far as we know, the American Founders had no knowledge of Taoism, but instead drew their vision of a militia from knowledge of the history of Greece, Rome, Switzerland, England, and other parts of Europe. Yet the Taoists and the Americans arrived at similar conclusions. What might account for this?

6. The Taoists seem to have envisioned a more active welfare state than did the American Founders. In what ways might a more activist government contribute to the effective functioning of a militia in a balanced, harmonious society? In making a society more balanced and harmonious?

7. Could a larger state have *less* need for a militia to deter or resist tyranny? Does a large state have *greater* needs for checks against tyranny?

8. Taoist hunting and fishing rules promote conservation, such as by the prohibition on shooting pregnant animals. Ecological balance aside, in what other ways do the Taoist game rules help a society live in harmony with nature?

9. For what practical or other reasons could being a swordsmith be considered better than owning many swords?

10. How might one prevent the foolish from obtaining sharp instruments, and the ambitious from obtaining inordinate power? **CQ:** This is a central question of the textbook, and there are no perfect answers.

11. Can you think of times in American history, or today, in which martialists and the cultured have failed to respect the contributions of each other?

12. *Further reading* on other Asian religions: Joan V. Bondurant, Conquest of Violence: The Gandhian Philosophy of Conflict (rev. ed. 1988); Tessa J. Bartholomeusz, In Defense of Dharma: Just-War Ideology in Buddhist Sri Lanka (2002); Trevor Ling, Buddhism, Imperialism and War (1979); Thomas Cleary, Code of the Samurai: A Modern Translation of the Bushido Shoshinshu of Taira Siigesuike (Thomas Cleary trans., 1999); Taisen Deshimaru, The Zen Way to the Martial Arts (1982); David B. Kopel, *Self-Defense in Asian Religions*, 2 Liberty L. Rev. 79 (2007) (particular attention given to the Theravada, Mahayana, Tibetan, and Zen forms of Buddhism, and their diverse understandings of *ahimsa*, the compassionate principle of not harming others).

B. ANCIENT GREECE AND ROME

1. Greece

While the Framers of the Second Amendment knew almost nothing about Chinese political philosophy, they were eminently familiar with the history of ancient Greece and Rome. The Framers carefully studied classical history in order to understand how liberty had been defended, advanced, and lost. The Constitution sought to prevent takeover by a military strongman or demagogue, such as Julius Caesar or Alexander the Great. *See* Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment (1994).

a. Greek Law

From the ancient world until the present, people who aspire to eloquence have studied the speeches of Demosthenes (384-322 B.C.). He was the greatest orator of ancient Greece, a lawyer, and a speechwriter for parties in legal disputes. In 352 B.C., the Athenian Senate passed a decree written by Aristocrates, which greatly revised the homicide law. Among its features were eliminating all due process, granting absolute immunity to Charidemus (a mercenary who had previously assisted Athens), and abolishing the right of self-defense. When Euthycles brought a case in the law courts against Aristocrates, Demosthenes delivered his famous oration "Against Aristocrates." The oration included an explication of the self-defense provision in traditional Athenian law. Because of the lawsuit, the new homicide law never went into effect.

Demosthenes

Against Aristocrates

The Orations of Demosthenes 168, 186-87 (Charles Rann Kennedy trans., 1856)

Read the next law:

THE LAW.

"And if one resisting any unlawful seizure or violence shall immediately kill the aggressor, his death shall not be punishable."

Here are other causes for which it is lawful to take life. If a man resisting any unlawful seizure or violence shall immediately kill the aggressor, he orders that the death shall not be punishable. Pray observe, how wisely. By his having first mentioned the causes for which life may be taken, and then adding the word "immediately," he left no time for contriving any foul play: by the word "resisting," it is clear that that he gives the power to the aggrieved party, not to anyone else. The law has therefore given permission to kill immediately in self-defence; Aristocrates has it simply, "if any one shall kill," even though with justice or as the laws allow. Oh, but we are caviling; for whom will Charidemus attack or seize unjustly? Everybody. For you are of course aware, that all military commanders lay violent hands upon those whom they think they can overpower, to make requisitions for money. Is it not shameful then — (O earth and heaven!) — is it not manifestly illegal, contrary to not only the written law, but to the common law of all mankind, that I am not at liberty to resist a person who seizes or forcibly carries off my property, treating me as an enemy? — for even in this way it will not be lawful to kill Charidemus; but, should he iniquitously seize and make booty of any man's property, the party killing him will be liable to arrest, although the law gives him impunity under such circumstances.

NOTES & QUESTIONS

1. Suppose that Demosthenes had not prevailed, and that Aristocrates' new law had gone into effect. The written statute that forbade self-defense would have been in conflict with what Demosthenes called "the common law of all mankind." In situations of perceived conflict between a written statute and inherent human rights, what should responsible citizens do?

2. At the 480 b.c. Battle of Themophylae, Persian Emperor Xerxes offered vastly outnumbered Greeks an opportunity to save their lives by handing over their arms. Spartan King Leonidas replied, "come and take them" *(Molòn labé)*. The 1836 Texan War of Independence began when Texans rejected a disarmament order from the Mexican army. Instead, they raised a flag that said, "Come and take it." Ch. 6.A.7.

b. Plato

Many of the major debates in 2,500 years of Western philosophy can be found in the contrasting views of Plato and his student Aristotle. Plato and Aristotle both agreed that arms possession and political power were inseparable. Or as Mao Zedong, founder of the People's Republic of China, would later put it, "Political power grows out of the barrel of a gun." Mao Zedong, *Problems of War and Strategy*, Speech to the Central Committee of the Chinese Communist Party (Nov. 6, 1938).

Plato and Aristotle drew very different lessons from their shared insight. Mao's policy was Platonic, not Aristotelian. *See* Ch. 19.D.3.

The Republic is Plato's most important work of political philosophy. He describes how the possession of arms plays an essential role in what he considers the inevitable development of society from oligarchy to democracy to despotism:

> [The oligarchs] next proceed to make a law which fixes a sum of money as the qualification of citizenship; the sum is higher in one place and lower

> in another, as the oligarchy is more or less exclusive; and they allow no one whose property falls below the amount fixed to have any share in the government. These changes in the constitution they effect by force of arms, if intimidation has not already done their work. . . .
>
> Another discreditable feature [of oligarchy] is, that, for a like reason, they are incapable of carrying on any war. Either they arm the multitude, and then they are more afraid of them than of the enemy; or, if they do not call them out in the hour of battle, they are oligarchs indeed, few to fight as they are few to rule. . . .
>
> [The people eventually displace the oligarchs,] whether the revolution has been effected by arms, or whether fear [of an imminent armed revolution] has caused the opposite party to withdraw.
>
> [Later, the democratic people fall under the sway of a demagogic tyrant. The tyrant does not fully reveal himself until he has disarmed the people:]
>
> *Teacher:* "Then the parent [the people] will discover what a monster he has been fostering in his bosom; and, when he wants to drive him out, he will find that he is weak and his son [the tyrant] strong."
>
> *Student:* "Why, you do not mean to say that the tyrant will use violence? What! Beat his father if he opposes him?"
>
> *Teacher:* "Yes, he will, having first disarmed him."

Plato, The Republic 353 (Book VIII) (Benjamin Jowett trans., 1928) (360 B.C.).[2]

In *The Laws*, Plato set out his vision of an ideal state, which was ruled by a philosopher-king. The king would use a standing professional army, "the Guardians," to police society and keep everyone else under control. Arms would be stored at central armories and could only be used by the people once a month, during state-supervised training. The military would have full control of all arms imports, and independent retail sale of arms would be forbidden. Plato, Laws, Books VII-VIII (A.E. Taylor ed., 1966).

The following is Plato's ideal law of self-defense, although we do not know if any Greek government followed this particular law.

> But if a brother kills brother in a civil broil or under other like circumstances, if the other has begun, and he only defends himself, let him be free from guilt as he would be if he had slain an enemy; and the same rule will apply if a citizen kills a citizen, or a stranger a stranger. Or if a stranger kill a citizen or a citizen a stranger in self-defence, let him be free from guilt in like manner; and so in the case of a slave who has killed a slave; but if a slave have killed a freeman in self-defence, let him be subject to the same law as he who has killed a father. . . . If a man catch a thief coming, into his house by night to steal, and he take and kill him, of if he slay a footpad in self-defence, he shall be guiltless. And any one who does violence to a free woman or a youth, shall be slain with impunity by the

2. In the Ancient and Classical periods, bound books did not exist. A writing that could be bound in a single volume today would have to be written on multiple scrolls. "Book IX" was the ninth scroll of *The Republic*.

> injured person, or by his or her father or brother or sons. If a man find his wife suffering violence, he may kill the violator, and be guiltless in the eye of the law; or if a person kill another in warding off death from his father or mother or children or brethren or wife who are doing no wrong, he shall assuredly be guiltless.

Plato, Laws, Book IX, at 209, 213 (Benjamin Jowett trans., 1871).

NOTES & QUESTIONS

1. What is the difference between a philosopher-king and a tyrant? Is there a danger that a philosopher-king could become a tyrant? Is there a way to enjoy the benefits of a philosopher-king without risking tyranny?

2. Karl Marx and Plato agreed that societies must move through stages of development in a particular order, and that material conditions greatly influence this evolution. How might the presence or absence of arms affect these developments?

3. Are *The Republic* and *The Laws* inconsistent with each other? How might they be synthesized?

4. **CQ:** In England, starting in the latter sixteenth century, some militia arms were centrally stored—as Plato had prescribed. Early American law, in contrast, required militiamen to keep their arms at home. Some colonies required that people *not* in the militia be armed—for example, female householders, men too old for the militia, or men with occupational exemptions from the militia. They too had to keep their arms at home. *See* Ch. 2 (England) and Chs. 3-4 (early America); David B. Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495 (2019). What are the advantages and disadvantages of central storage versus distributed storage?

5. *Karl Popper.* After Athens was defeated by Sparta in the Peloponnesian War, Sparta appointed the Thirty Tyrants to rule Athens in 404 B.C. Consolidating power, the tyrants disarmed the Athenians, except for 3,000 supporters of the tyrants. The tyrants murdered approximately 8 percent of the Athenians. In *The Open Society and Its Enemies*, the influential twentieth-century philosopher Karl Popper devoted considerable energy to arguing that Plato was an ally of the Thirty Tyrants. There is no historical consensus on this charge.

Popper extolled the resistance to the tyrants: "[T]he democrats fought on. At first only seventy strong, they prepared under the leadership of Thrasybulus[3] and Antyus[4] the liberation of Athens, where Critias [leader of the Thirty Tyrants] was meanwhile killing scores of citizens. . . ." 1 Karl Popper, The Open Society and Its Enemies 192 (Princeton Univ. Press 1971) (1945). After months of warfare, the democrats destabilized the tyrants, who lost their support from Sparta. Democracy was restored to Athens. According to Popper, there are two circumstances when violence against the government is permissible:

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3. [An Athenian general.—Eds.]
4. [An Athenian politician.—Eds.]

> [First,] under a tyranny which makes reforms without violence impossible, and it should have only one aim, that is, to bring about a state of affairs which makes reforms without violence possible.
>
> [Second,] resistance, once democracy has been attained, to any attack (whether from within or without the state) against the democratic constitution and the use of democratic methods. Any such attack, especially if it comes from the government in power, or if it is tolerated by it, should be resisted by all loyal citizens, even to the use of violence. In fact, the working of democracy rests largely on the understanding that a government which attempts to misuse its powers and to establish itself as a tyranny (or which tolerates the establishment of a tyranny by anybody else) outlaws itself, and that citizens have not only a right but also a duty to consider the action of such a government as a crime, and its members as a dangerous gang of criminals.

Id. at 151-52.

Do you agree with Popper's rules for resistance? **CQ:** Chapter 4, on the American Revolution, shows how Americans wrestled with the question of when violence against government is justified. Consider the Declaration of Independence's claim that the American use of arms was a last resort, all other means of redress having failed.

6. *Self-defense against social superiors.* Plato placed an important limitation on self-defense: It was forbidden against social superiors. Are there noninvidious reasons for a prohibition on "upward" self-defense? How might the allowance or prohibition of upward self-defense affect social relations?

Unlike Plato, the political philosophers who conceived international law (such as Francisco Suárez and Hugo Grotius, online Ch. 18.C.2) explicitly approved of personal self-defense against one's superior, in case of necessity. Even in the American South on the eve of the Civil War, a court ruled that the natural right of self-defense guaranteed the right to a free Black to use violence against a White law enforcement officer:

> The conviction of the defendant may involve the proposition that a free negro is not justified, under any circumstances, in striking a white man. To this, we cannot yield our assent. . . . An officer of the town having a *notice to serve on the defendant*, without any authority whatever, *arrests him and attempts to tie him!!* Is not this gross oppression? For what purpose was he to be tied? What degree of cruelty might not the defendant reasonably apprehend after he should be entirely in the power of one who had set upon him in so highhanded and lawless a manner? Was he to submit tamely?—Or, was he not excusable for resorting to the natural right of self-defense? Upon the facts stated, we think his Honor ought to have instructed the jury to find the defendant not guilty. There is error. *Venire de novo* [order for retrial].

State v. Davis, 52 N.C. (7 Jones) 52, 53, 55 (1859).

On the other hand, under Sharia law certain people under Islamic rule (typically Jews and Christians, and sometimes Buddhists or Hindus) are classified as *dhimmi:* To be allowed to continue to practice their religion, they must accept a second-class status that includes a prohibition on the possession of arms, and a

prohibition on any use of force against a Muslim, including in self-defense. This prohibition can be traced to the Covenant of 'Umar, which traditionally was said to have been a seventh-century treaty between the Caliph Umar I and Syrian Christians. Although the true historical origins of the Covenant are unclear, the Covenant was universally accepted by Muslim legal scholars as setting forth the basic standards for Muslim rule over conquered monotheists. The Covenant requires that the conquered people agree "not to ride on saddles; not to keep arms nor put them in our houses nor to wear swords. . . . [H]e who strikes a Muslim has forfeited his rights." A.S. Tritton, The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar 5-9 (1970); *see also* David B. Kopel, *Dhimmis*, *in* Encyclopedia of Political Thought (Michael T. Gibbons et al. eds., 2014).

Similar standards have sometimes been applied by Christian nations. For example, the Visigothic Code, which was used in Spain after the fall of the Western Roman Empire, provided: "All Christians are Forbidden to Defend or Protect a Jew, by Either Force or Favor. . . . No one shall attempt, under any pretext, to defend such persons in the continuance of their depravity, even should they be under his patronage. No one, for any reason, or in any manner, shall attempt by word or deed, to aid or protect such persons, either openly or secretly, in their opposition to the Holy Faith and the Christian religion." The Visigothic Code (Forum judicum) bk. 12, tit. 2, law 15 (S.P. Scott ed., 1910).

Likewise, in Japan during the Tokugawa Shogunate (1603-1868) self-defense against a social superior was forbidden, whereas the Samurai could kill disrespectful commoners at will, under *kiri-sute gomen* (permission to kill and depart). David B. Kopel, *Japanese Gun Control*, 1993 Asia-Pac. L. Rev. 26, 33.

c. Aristotle

In *Politics*, Aristotle maintained that each citizen should work to earn his own living, should participate in political or legislative affairs, and should bear arms. Aristotle criticized the theory of the philosopher Hippodamus, who wanted a strict division of roles between skilled labor, agriculture, and defense. Aristotle found Hippodamus' division defective, because such a division would lead to the armed ruling the unarmed: "But the husbandmen have no arms, and the artisans neither arms nor land, and therefore they become all but slaves of the warrior class." 1 The Politics of Aristotle 48 (B. Jowett trans. & ed., 1885).

Aristotle explained the connection between arms and self-government:

- "[W]hen the citizens at large administer the state for the common interest, the government is called by the generic name,—a constitution. . . . And there is a reason for this use of language. One man or a few may excel in virtue; but of virtue there are many kinds: and as the number increases it becomes more difficult for them to attain perfection in every kind, though they may in military virtue, for this is found in the masses. Hence, in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens." *Id.* at 80.
- "The devices by which oligarchies deceive the people are five in number: . . . (4) concerning the possession of arms, and (5) gymnastic exercises, they legislate in a similar spirit. For the poor are not obliged to have

arms, but the rich are fined for not having them; and in like manner no penalty is inflicted on the poor for non-attendance at the gymnasium, and consequently, having nothing to fear, they do not attend, whereas the rich are liable to a fine, and therefore they take care to attend. . . ." *Id.* at 131.

- "[W]ithout discipline, infantry are useless, and in ancient times there was no military knowledge or tactics, and therefore the strength of armies lay in their cavalry. But when cities increased and the heavy armed grew in strength, more had a share in the government; and this is the reason why the states, which we call constitutional governments, have been hitherto called democracies." *Id.* at 73.
- "As of oligarchy so of tyranny . . . both mistrust the people, and therefore deprive them of their arms." *Id.* at 171.
- "Let us then enumerate the functions of a state . . . there must be arms, for the members of a community have need of them in order to maintain authority both against disobedient subjects and against external assailants." *Id.* at 220.
- "Again, there is in a state a class of warriors, and another of councillors, who advise about the expedient and determine matters of law, and these seem in an especial manner parts of a state. Now, should these two classes be distinguished, or are both functions to be assigned to the same persons? Here again there is no difficulty in seeing that both functions will in one way belong to the same, in another, to different persons. To different persons in so far as their employments are suited to different ages of life, for the one requires wisdom, and the other strength. But on the other hand, since it is an impossible thing that those who are able to use or to resist force should be willing to remain always in subjection, from this point of view the persons are the same; for those who carry arms can always determine the fate of the constitution. It remains therefore that both functions of government should be entrusted to the same persons, not, however, at the same time, but in the order prescribed by nature, who has given to young men strength and to older men wisdom." *Id.* at 221-22.

In *The Athenian Constitution*, Aristotle wrote a political history of the city-state of Athens. Rediscovered in the late nineteenth century, *The Athenian Constitution* provided an example of how tyrants disarm the people. In the sixth century B.C., the tyrant Peisistratus took over Athens. Aristotle described how the tyrant obtained absolute power by disarmament:

> Now, he stripped the people of their arms after the following fashion: Ordering a review under arms in the Anakeum, he pretended to make an attempt to harangue them, but spoke in a low voice; and when they said they could not hear, he bade them go up to the propylæa of the Acropolis,[5] that he might be heard the better. Whilst he continued addressing them, those who had been appointed for the purpose took away the arms of the people, and shut them up in the neighbouring buildings of the

5. [The Acropolis was the citadel of Athens. The propylæa were the monumental gateway.—Eds.]

> Thesæum.[6] They then came and informed Peisistratus. After finishing his speech, he told the people what had been done about their arms, saying that they had no need to be surprised or out of heart, but bade them go home and attend to their own affairs, adding that all public matters would now be his concern.

Aristotle, Constitution of Athens, ch. XV (Thomas J. Dymes trans., 1891).

NOTES & QUESTIONS

1. Imagine you are founding a new nation, and you have carefully studied Plato and Aristotle. What lessons about arms-control policy would you draw from your studies?

2. **CQ:** Thomas Jefferson described Aristotle, Cicero (*infra* Section B.2.c.), John Locke (Ch. 2.K.2), and Algernon Sidney (Ch. 2.K.3) as the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 The Writings of Thomas Jefferson 117-19 (Andrew A. Lipscomb ed., 1903). What elements of Aristotle's political philosophy can you find in the Declaration of Independence, and in the political structure of the American Early Republic?

3. By about 1830, the United States reflected Aristotle's view about the scope of the voting franchise. Property requirements for voting had been abolished in almost every state, so that the class of eligible voters was similar to the class of persons liable to perform militia duty—namely, free White adult males. (However, the states did allow voting by males over the age of 45, which was the typical upper limit for militia service, and did not allow voting by males under 21, who had to serve in the militia.) What are the arguments for and against Aristotle's view that the people with the responsibility for defending the state should be the ones who control the state?

4. *Further reading*: Michael Gagarin, *Self-Defence in Athenian Homicide Law*, 19 Greek, Roman, and Byzantine Stud. 111 (1978).

2. Rome

The law of the Roman Republic and Empire was the leading legal system in the Western world for many centuries. Even after the Western Roman Empire fell in the fifth century A.D., Roman law remained a foundation of European law. Thus, Roman law later became part of the laws of much of Latin America, Africa, and Asia, through the process of colonization. Roman law continued to be the core of European law until the Napoleonic era. Although post-colonial nations have developed their legal systems in diverse ways, Roman law still comes closer than anything else to being the common global legal heritage.

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6. [The Thesæum was an important temple. It was dedicated to the iron-forging god Hephestus, and also known as the *Hephaisteion*.—Eds.]

a. The Twelve Tables

The foundation of Roman law was the Twelve Tables (*Lex Duodecim Tabularum*, or *Duodecim Tabulae*). The Twelve Tables were, literally, 12 bronze tablets containing basic legal rules, published in final form in 449 B.C. So that every citizen could easily read them, they were placed in the Forum, which was the marketplace and the government center. The Twelve Tables were written by a committee of ten (*decemvirs*), after extensive public debate and discussion. They relied in part on Greek law and made revisions based on public comment by citizens. 1 Titus Livius, The Early History of Rome 255, 260, 292 (bk. 3, §§ XXXIV, XXXVIII, LVII) (George Baker trans., 1823) (first published sometime during the reign of Augustus Caesar).

The creation of the Twelve Tables was a monumental development in due process. The laws were published, readily accessible, and written to be readily understood by an ordinary citizen. Previously, the laws had been closely guarded by an élite that secretly manipulated the laws to its own benefit. Unfortunately, the Twelve Tables themselves were later destroyed, so what we know of them comes from secondary sources. Self-defense rules were in Table VIII:

> 12. If a theft be committed at night, and the thief be killed, let his death be deemed lawful.
> 13. If in the daytime (only if he defend himself with weapons).

Id. at Table VIII, items 12-13 (parenthetical addition by translator).[7] An alternate version reads:

> 12. If a thief commits a theft by night, if the owner kills the thief, the thief shall be killed lawfully.
> 13. By daylight . . . if a thief defends himself with a weapon . . . and the owner shall shout.
> 14. In the case of all other . . . thieves caught in the act[,] freemen shall be scourged and shall be adjudged as bondsmen to the person against whom the theft has been committed provided that they have done this by daylight and have not defended themselves with a weapon. . . .

The Twelve Tables, Table VIII: Torts or Delicts, items 12-14. For a thousand years, the Twelve Tables were venerated as the embodiment of Roman law.

NOTES & QUESTIONS

1. Why do the Twelve Tables distinguish between nighttime and daytime burglars? Jewish law (*infra* Section C.1) makes a similar distinction.

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7. *See also* Allan Chester Johnson et al., Ancient Roman Statutes 11 (2003) (alternate translation, to the same effect). Another translator locates this law in Table VIII, law 3: "If one is slain while committing theft by night, he is rightly slain." Fordham University, Ancient History Sourcebook: The Twelve Tables, Table VIII. Still another scholar puts the law in Table II, law 4. "Where anyone commits a theft by night, and having been caught in the act is killed, he is legally killed." S.P. Scott, 1 The Civil Law Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo 59 (1932).

2. The present-day laws of France and Belgium establish a presumption of the lawfulness of use of deadly force against nighttime home invaders. Code Pénal [France], § 122-6; Code Pénal [Belgium], art. 417. In contrast, Costa Rica and Honduras presume the lawfulness of deadly force against home invaders regardless of the time of the invasion. Código Penal [Costa Rica], Ley no. 4573, art. 28; Código Penal [Honduras], Decreto No. 144-83, art. 24(1). Which approach is better?

b. Militias and Standing Armies

After the people of Rome overthrew the Tarquin kings in 509 B.C., Rome's growing military might was based on a militia. When needed, some or many free men were required to serve in the militia for several months a year and to supply all their own equipment. In 107 B.C., Gaius Marius, who seized and held near-absolute power for several years, began to supplant the militia with a professional standing army, using a mixture of volunteers and conscripts. There were short-term benefits, in that soldiers were now supplied with equipment at government expense; previously, some militiamen lacked the resources even to buy shoes for themselves. The increased training and drilling made possible by a standing army made the Roman army more effective in combat.

However, the shift of the military balance in Rome from militia to army ultimately shifted the political balance. Ambitious politicians, including Julius Caesar, began to threaten to use the troops under their command to achieve near-absolute rule. After a series of civil wars, Julius's great-nephew Octavian completed the destruction of the Republic by using the army to install himself as absolute ruler. He renamed himself "Augustus Caesar." For the next five centuries, control of Rome would hinge on who commanded the support of the most powerful faction of the army.

The lesson drawn by the Enlightenment in Europe was summarized by Edward Gibbon: "A martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince." 1 Edward Gibbon, Decline and Fall of the Roman Empire 78 [ch. 3] (1787).

Among the most influential political philosophers of the Renaissance was Niccolo Machiavelli (*infra* Section D.1.a). He detailed how the first two emperors of Rome (Octavian/Augustus and his successor Tiberius) used weapons control and a standing army to hold absolute power. According to Machiavelli, the Roman policy had led to ruin. Machiavelli argued that a king would be more secure in the long term if he were defended by a militia rather than by a standing army:

> . . . Ottavianus[8] first, and then Tiberius, thinking more of their own power than the public usefulness, in order to rule over the Roman people more easily, begun to disarm them and to keep the same armies continually at the frontiers of the Empire. And because they did not think it sufficient to hold the Roman People and the Senate in check, they instituted an army called the Praetorian (Guard), which was kept near the walls of Rome in

8. [Machiavelli's rendition of "Octavian" in Italian.—Eds.]

> a fort adjacent to that City.[9] And as they now begun freely to permit men assigned to the army to practice military matters as their profession, there soon resulted that these men became insolent, and they became formidable to the Senate and damaging to the Emperor. Whence there resulted that many men were killed because of their insolence, for they gave the Empire and took it away from anyone they wished, and it often occurred that at one time there were many Emperors created by the several armies. From which state of affairs proceeded first the division of the Empire and finally its ruin. Kings ought, therefore, if they want to live securely, have their infantry composed of men, who, when it is necessary for him to wage war, will willingly go forth to it for love of him, and afterwards when peace comes, more willingly return to their homes; which will always happen if he selects men who know how to live by a profession other than this. And thus he ought to desire, with the coming of peace, that his Princes return to governing their people, gentlemen to the cultivation of their possessions, and the infantry to their particular arts (trades or professions); and everyone of these will willingly make war in order to have peace, and will not seek to disturb the peace to have war.

Niccolo Machiavelli, The Art of War 16-17 (Christopher Lynch trans., Wilder Publications 2008) (1521).

c. Cicero

Cicero was the greatest Roman lawyer and orator of the first century B.C. Historically, he has been viewed as one of the noblest of all Romans, a hero who did his best to prevent the degenerate Republic from transforming into Empire.

During the Dark Ages, knowledge of many of the Greek and Roman writers (including Aristotle) was lost in the West, but Cicero never disappeared from view. Recovery of knowledge of Antiquity and the Classical Age began in the Little Renaissance of the twelfth century; it continued with enthusiasm in the Renaissance in the fourteenth through seventeenth centuries, and then the Enlightenment in the eighteenth century. Cicero's prestige continued to grow. As of the 1600s, he was the most influential and admired political theorist in the West.

Until the nineteenth century, Latin was a standard part of secondary education. Countless pupils studied the following speech by Cicero, in defense of Titus Annius Milo:

> What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger

9. [The Praetorian Guard was the portion of the army around the emperor, under his immediate control. They were a formidable bodyguard and were also in the best position to stage a coup. Accordingly, emperors tended to pay them well.—Eds.]

> from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.
>
> The law very wisely, and in a manner silently, gives a man a right to defend himself. . . . [T]he man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.

Cicero, Speech in Defence of Titus Annius Milo, *in* Orations of Marcus Tullius Cicero 204-05 (Charles Duke Yonge trans., rev. ed. 1899) (written 52 B.C.). Although the above oration has been delivered by students in many classrooms, Cicero himself was prevented from delivering it; Milo's enemy, Pompey, surrounded the court with troops.

Cicero was an explicit advocate of tyrannicide:

> What can be greater wickedness than to slay not only a man, but even an intimate friend? Has he then involved himself in guilt, who slays a tyrant, however, intimate? He does not appear so to the Roman people at least, who of all great exploits deems that the most honorable. Has expediency, then, overcome virtue? Nay, rather, expediency has followed virtue.

Cicero, On Duties [*De Officiis*], *in* Cicero's Three Books of Offices and Other Moral Works 120-21 (bk. III, ch. 4) (Cyrus R. Edmonds trans., 1865).

> Now as to what relates to Phalaris,[10] the decision is very easy; for we have no society with tyrants, but rather the broadest separation from them; nor is it contrary to nature to despoil, if you can, him whom it is a virtue to slay—and this pestilential and impious class of men ought to be entirely exterminated from the community of mankind. For as certain limbs are amputated, both if they themselves have begun to be destitute of blood, and, as it were, of life, and if they injure the other parts of the body, so the brutality and ferocity of a beast in the figure of a man, ought to be cut off from the common body, as it were, of humanity.
>
> Of this sort are all those questions in which our duty is sought out of the circumstances of the case.

Id. at 126-27 (Book III, ch. 6). Cicero's principles were put into action in 44 B.C. when Marcus Junius Brutus the Younger and other Senators assassinated Julius Caesar. The assassination failed to restore the Republic, however, and over the next five centuries, assassinations or military coups were the only means of removing an especially bad emperor.

In the same vein, the Roman philosopher Seneca (4 B.C.-65 A.D.) wrote, "No offering is more acceptable to God than the blood of a tyrant." Seneca, On Benefits [*De Beneficiis*] 8, 20 (A. Golding trans., 1974).

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10. [Tyrant of Acragas, Sicily, alleged to have engaged in torture and cannibalism, and who ruled from approximately 570 to 554 B.C.—Eds.]

d. Arms Law

Under Roman law, citizens could carry personal arms for lawful defense. Conquered peoples had no legal right to arms until 212 A.D. Then, Roman citizenship was extended to all free subjects of the Empire. Emperor Caracalla, *Constitutio Antoniniana De Civitate*, *in* Paul Robinson Coleman-Norton, Frank Card Bourne, Allan Chester Johnson & Clyde Pharr, Ancient Roman Statutes: A Translation with Introduction, Commentary, Glossary, and Index 212, 225-26 (2003) (Latin text here). The right to arms was abolished in 364, at least for persons who did not have advance approval from the government: "No person whatever, without Our knowledge and advice, shall be granted the right to employ any weapons whatsoever." Clyde Pharr, The Theodosian Code and Novels § XV.15.1, at 439 (2001) (Emperors Valentian (Valentinianus I) and Valens Augustuses, to Bulphorus, Governor of Campia, Decree of Oct. 5, 364).[11]

The inability of the emperors to protect their subjects led to a restoration of the right in 440 in both the Western and the Eastern Roman Empires. The restoration was reconfirmed several years later by the Western Emperor Majorian Augustus:

> [B]ecause it is not sufficiently certain, under summertime opportunities for navigation, to what shore the ships of the enemy can come, We admonish each and all by this edict that, with confidence in the Roman strength and the courage with which they ought to defend their own, with their own men against the enemy. . . . [T]hey shall use those arms which they can, but they shall preserve the public discipline and the moderation of free birth unimpaired.

Restoration of the Right to Use Weapons (De Reddito Jure Amrorum) (June 24, 440), *in id.*, at tit. 9, p. 524.

NOTES & QUESTIONS

1. Cicero's line "laws are silent when arms are raised" (*inter arma enim silent leges*, also translated as "For laws are silent amid arms") became a legal principle. It is sometimes invoked as a justification that "anything goes" during wartime; governments may even ignore their own constitutions. Cicero, though, was arguing about personal self-defense. Under what circumstances can the government legitimately forbid self-defense by a person who at a moment of peril is left unprotected by the government? Can the government forbid self-defense under positive law? Does natural law, as Cicero suggests, limit positive law? *Cf.* Ch. 6.H.5 Note 4; Ch. 11.A Note 21.

2. If assassination is the only way to depose a ruler like Julius Caesar, Caligula, Commodus,[12] or Hitler, is it legitimate? How can any theory that authorizes tyrannicide prevent self-appointed rescuers (or the self-deluded) from threatening any ruler with assassination?

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11. "Novels" was a legal term of art for new laws. In 286 A.D., governance of the Roman Empire was divided, with a separate emperor for East and West. Laws applicable to both halves bore the names of both emperors, here, Valentian and Valens Augustuses.

12. Caligula reigned 37-41 A.D., Nero 54-68 A.D., and Commodus A.D. 180-92. All were notoriously tyrannical, and often deranged.

3. Does the fact that tyranny and despotism thrived after Julius Caesar's assassination show that tyrannicide is not a justifiable reason for arming a population? Recall that Roman citizens had the right to possess personal arms at the time of the assassination.

4. *Trajan.* The Roman emperor Trajan reigned from 98 to 117 A.D. He was the second of the "Five Good Emperors" (Nerva, Trajan, Hadrian, Antonius Pius, and Marcus Aurelius). They guided the area governed by the Roman Empire to a broad prosperity that was never equaled until 1,500 years later. According to the historian Cassius Dio, "Indeed, when he [Trajan] first handed to the man [Sura] who was to be prefect of the Praetorians the sword which this official was required to wear at his side, he bared the blade and holding it up said: 'Take this sword, in order that, if I rule well, you may use it for me, but if ill, against me.'" Cassius Dio, Roman History, Book 68, 393 (Earnest Cary trans., 1925).

In the Roman Empire, the only way to get rid of a good emperor who had gone bad was to kill him, as Trajan recognized. Should well-intentioned rulers in nations that do not have elections give a trusted aide the power to assassinate them if necessary?

For further reading on Trajan's exemplary governance, see Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. Rich. L. Rev. 191 (2001).

5. *Civic Virtue.* To the American Founders, Rome's degeneration from Republic to Empire epitomized what America must avoid. Roman history is part of the explanation for the separation of powers, federalism, insulation of government from transient passions (e.g., staggered terms for the Senate), and many other constitutional provisions. *See, e.g.*, U.S. Const. art. I, § 8 (Congress, not a single man, has the power to declare war; army appropriations limited to two years); art. II, § 2 (a civil officer, the President—and not a general—is commander-in-chief); art. III, § 3 (treason is levying war against the United States or adhering to its enemies—and thus does not include criticizing the ruler).

The Founders believed the constitutional safeguards would fail if the American people, like the degenerate Romans of the late Republic, lost their civic virtue. When Benjamin Franklin was leaving Independence Hall, after the concluding day of the Constitutional Convention, a woman asked him "Well, Doctor, what have we got—a Republic or a Monarchy?" He replied, "A Republic, if you can keep it." 3 The Records of the Federal Convention of 1787, app'x A, at 85 (Max Farrand ed., 1934 reprint ed.) (1911) (citing notes of Maryland delegate James McHenry). Does modern America more resemble a virtuous republic or a decadent empire? Under current conditions, how can an American republic be sustained?

e. Corpus Juris

The Western Roman Empire fell in 476, when the last emperor, Romulus Augustulus, was deposed. The Eastern Roman Empire, also known as the Byzantine Empire, lasted until 1453, when Constantinople was captured by the Ottomans.[13]

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13. The Byzantines never called themselves "Byzantines." Instead, they considered themselves "Romans"—a continuation of the state that had, according to tradition, been founded in 753 B.C.

The Byzantines were especially powerful under Emperor Justinian I (reigned 527-565), who ordered the creation of a compilation of all Roman law, which became known as the *Corpus Juris Civilis*. The *Corpus Juris*, by preserving for posterity the work of Rome's legal scholars, transmitted to the world the memory of Rome's historic culture of ordered liberty and the rule of law. Emperor Justinian's *Corpus Juris* formally replaced the Twelve Tables as the embodiment of Roman law. The self-defense principles of the Twelve Tables were incorporated into the *Corpus Juris*.

The *Corpus Juris* was not meant to create new law, but to provide a comprehensive collection of existing law. Accordingly, it contains rules from many different Roman legal commentators from previous centuries. These rules are not necessarily mutually consistent. However, the general principle was that the use of deadly force was permissible when no lesser force would suffice.

The famous formulation of the self-defense rule was "Cassius writes that it is permissible to repel force by force, and this right is conferred by nature. From this it appears, he says, that arms may be repelled by arms."[14] Dig. 43.16.1.27 (Ulpian, Edict 69). In Latin, this is succinctly expressed as *vim vi licit repellere*, also translated as "force may be repelled by force." The rule is pervasively quoted throughout the Western legal tradition, sometimes with attribution and sometimes not. *See, e.g.*, Edward Coke (Ch. 2.E Note 3), William Blackstone (Ch. 2.K.1), the Massachusetts royal government describing the behavior of the colonists (Ch. 3.E.3), South Carolina's first constitution (Ch. 4.D.1), Francisco de Vitoria (online Ch. 18.C.1), Francisco Suárez (online Ch. 18.C.2), and Hugo Grotius (online Ch. 18.C.3). Typically, the phrase was interpreted to encompass forceful resistance to criminal government, as well as resistance to ordinary criminals.

The *Digest* (in Latin, *Digesta*) was by far the lengthiest part of the *Corpus Juris*; it consisted of 50 books that compiled the surviving fragments from cases decided by Roman judges, and opinions written by legal scholars. The Bluebook citations for the *Digest* provide the volume, title, law, and part numbers. The parenthetical after the numbers indicates the author and the document quoted and cited by the *Digest*—in the quote above, the eminent Roman lawyer Gnaeus Domitius Annius Ulpianus, who wrote in the early third century A.D.; fragments from his 83-book legal commentary *Ad edictum* comprise about a fifth of the *Digest*.

A near-identical formulation is embodied in the self-defense provision of the modern Italian criminal code (*è lecito respingere la violenza con la violenza*), which recognizes self-defense as a justification. Codice Penale art. 52 (It.); *see also id.* art. 53 (legitimate use of arms as a justification).

In addition to the *Digest*, the *Corpus Juris* also contained the Code (*Codex Justinianus*, laws and decisions made by Roman Emperors before Justinian), and the Institutes (a summary of key laws).[15] The Digest, the Code, and the Institutes

14. "Cassius" here is the first-century A.D. Roman jurist Gaius Cassius Longinus, author of *Libri juris civilis*. He is not the Senator of the exact same name who participated in the assassination of Julius Caesar.

15. For detailed analysis of Code provisions on self-defense and arms, see Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the* Codex Justinianus, 16 J. Firearms & Pub. Pol'y 163 (2004).

collectively comprised the original *Corpus Juris*. The *Novels* (statutes promulgated by Justinian after the 534 A.D. publication of the second edition of the *Corpus Juris*) were considered by later generations to be part of the *Corpus Juris*.[16] *Corpus Juris* provisions on self-defense are as follows:

- "The right to repel violent injuries. You see, it emerges from this law that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another." Dig. 1.1.3 (Florentinus, Institutes 1).
- "If someone kills anyone else who is trying to go for him with a sword, he will not be deemed to have killed unlawfully; and if for fear of death someone kills a thief, there is no doubt he should not be liable under the *lex Aquila*.[17] But if, although he could have arrested him, he preferred to kill him, the better opinion is that he should be deemed to have acted unlawfully." Dig. 9.2.5 (Ulpian, Edict 18).
- "A person lawfully in possession has the right to use a moderate degree of force to repel any violence exerted for the purpose of depriving him of possession, if he holds it under a title which is not defective." Code Just. 8.4.1 (Emperors Diocletian and Maximian).
- "But anyone who uses force to retain his possession is not, Labeo says, possessing it by [illegitimate] force." Dig. 43.16.1.28 (Ulpian, Edict 69).[18]
- "Someone who recovers by force in the same conflict a possession of which he has been forcibly deprived is to be understood as reverting to his original condition rather than possessing it by force. So if I eject you and you immediately eject me, and I then eject you, the interdict 'where by force' will lie effectively in your favor."[19] Dig. 43.16.17 (Julian, Digest 48).
- "[I]t is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon. . . ." Dig. 4.2.7 (Ulpian, Edict 11).
- "If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man[']s life] without risk to his own." Dig. 48.8.9 (Ulpian, Edict 37).
- "The Law of the *Twelve Tables* permits one to kill a thief caught in the night, provided one gives evidence of the fact by shouting aloud, but someone may only kill a person caught in such circumstances at any other time if he defends himself with a weapon, though only if he provides evidence by shouting." Dig. 9.1.4 (Gaius, Provincial Edict 7).[20]

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16. The *Corpus Juris* translations are from 1 Alan Watson, The Digest of Justinian (Univ. of Pa. Press 1998). The bracketed inserts were added by the translator, Prof. Watson.

17. A statute from about 287 B.C. imposing liability for various torts.

18. Marcus Antistius Labeo (c. 54 B.C.-c. 10/11 A.D.) was a prolific and eminent Roman jurist.

19. In other words, a rightful owner who forcefully reclaimed his own property would not lose a lawsuit claiming that his possession of the land was based merely on force.

20. Gaius was a Roman jurist active around 130 to 180 A.D.

- "[I]f I kill your slave who is lying in ambush to rob me, I shall go free; for natural reason permits a person to defend himself against danger." Dig. 9.2.4 (Gaius, Provincial Edict 7).
- "Where parties commit damage because they could not otherwise protect themselves, they are guiltless; for all laws and all legal principles permit persons to repel force by force. But if I throw a stone at an adversary for the purpose of defending myself, and I do not hit him but do hit a passer-by, I will be liable under the *Lex Aquilia*; for you are only permitted to strike a person who is attacking you, and this solely where you do so in defending yourself, and not where it is done for the purpose of revenge." Dig. 9.2.45 (Paul, Sabinus 10).[21]

The *Corpus Juris* authorized the possession of arms for lawful defense or hunting, while forbidding the accumulation of arms for seditious purposes:

- "Persons who bear weapons for the purpose of protecting their own safety are not regarded as carrying them for the purpose of homicide." Dig. 48.6.11 (Paul, Views 5).
- "A man is liable under the *lex Julia*[22] on *vis publica*[23] on the grounds that he collects arms or weapons at his home or on his farm or at his country house beyond those customary for hunting or a journey by land or sea. But those arms are excepted which someone has by way of trade or which come to him by inheritance. Under the same heading come those who have entered into a conspiracy to raise a mob or a sedition or who keep either slaves or freemen under arms. 1. A man is also liable under the same statute if, being of full age, he appears in public with a missile weapon." Dig. 48.6.1-3 (Marcian, Institutes 14 & Scaevola).[24]

The *Corpus Juris* served as a source—often the primary source—for local laws and was regarded as the authoritative source of international law. Indeed, the *jus gentium* (the *Corpus Juris* term for laws that apply everywhere) became synonymous with what we today call international law.

Notwithstanding the *Corpus Juris*'s apparent legal protection of self-defense and the possession of arms, the Emperor Justinian himself made arms manufacture a government monopoly and forbade all arms sales to civilians. The law was perhaps inspired by the Niko riots of 532 A.D., which were provoked by Justinian's oppressive taxation, fierce religious persecutions over differences in Christian doctrine, ravages inflicted on the people by Justinian's mercenary Huns, and popular armed resistance to Hunnish depredations.[25]

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21. Masurius Sabinus was a Roman jurist during the reign of Tiberius (14-37 A.D.).

22. [Roman statutes from the reigns of Julius Caesar (47-44 B.C.) or Augustus Caesar (27 B.C.-14 A.D.).—EDS.]

23. [Use of force in public in a manner that disturbs the operation of the laws. For example, a mob that prevents a court from operating.—EDS.]

24. Marcian was Eastern Roman Emperor from 450 to 457 A.D.; Quintus Mucius Scaevola (d. 82 B.C.) was a Roman jurist.

25. The religious persecutions involved controversies about the relationship between Jesus' human and divine natures. Many Christian sects oppressed by the Byzantines welcomed Muslim conquest, since the Muslims had no interest in policing the details of local Christian doctrine. *See* Philip Jenkins, Jesus Wars: How Four Patriarchs, Three Queens, and Two Emperors Decided What Christians Would Believe for the Next 1,500 Years (2010).

> Therefore, desiring to prevent men from killing each other, We have thought it proper to decree that no private person shall engage in the manufacture of weapons, and that only those shall be authorized to do so who are employed in the public arsenals, or are called armorers; and also that manufacturers of arms should not sell them to any private individual. . . . We prohibit private individuals from either making or buying bows, arrows, double-edged swords, ordinary swords, weapons usually called hunting knives, those styled *zavae*,[26] breast-plates, javelins, lances and spears of every shape whatever, arms called by the Isaurians[27] *monocopia*, others called *siginnos* or missiles,[28] shields, and helmets; for We do not permit anything of this kind to be manufactured, except by those who are appointed for that purpose in Our arsenals, and only small knives which no one uses in fighting shall be allowed to be made and sold by private persons.

Novel 85, ch. 4. Nevertheless, Justinian affirmed the lawfulness of self-defense: "Someone who kills a robber is not liable, at least if he could not otherwise escape danger." J. Inst. 4.3 (enactment of Justinian).

NOTES & QUESTIONS

1. What sorts of modern gun controls are prefigured by the weapons restrictions in the *Corpus Juris*?

2. How similar are modern statutory and common-law self-defense rules to those of the *Corpus Juris*?

3. Missile arms allow a smaller person to project force at a distance against a larger group. The capability can be used for good or ill. Note the restrictions in Roman law on missile arms. Why might such weapons be given special negative treatment? Are modern guns the equivalent of the missile weapons referred to by the *Corpus Juris*? **CQ:** Consider the arguments for and against the proposed ban on bows and crossbows during the Han Dynasty in China, discussed in Section A.1 Note 8.

4. *Further reading*: The Roman Law Library (full texts in Latin).

C. JUDEO-CHRISTIAN THOUGHT

1. Jewish Thought

In addition to studying Greece and Rome, the American Framers looked closely to the history of ancient Israel and the Jewish people, which they knew from the Old Testament (the Hebrew Bible).

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26. [Probably a form of chain mail.—Eds.]
27. [Inhabitants of a mountainous region in south-central Turkey.—Eds.]
28. [*Monocopia* and *siginnos* appear to be types of missiles.—Eds.]

a. Arms for Ex-Slaves

According to the Book of Exodus, after the Egyptians suffered ten plagues because Pharaoh refused Moses's repeated commands to "let my people go," the Hebrew slaves were permitted to leave. Before departing Egypt, the Hebrews were allowed to take whatever they wanted from the Egyptians, because God made the Egyptians favorably disposed to the Hebrews. *Exodus* 12:35-36. The Hebrew slaves thus received partial reparations for hundreds of years of slavery. "And God took the people toward the way of the Wilderness to the Sea of Reeds. And the Children of Israel were armed when they went up from Egypt."*Exodus* 13:18.[29] Presumably, the weapons were obtained from the Egyptians.[30]

b. Legal Duties of Self-Defense and Defense of Others

Later, according to the Old Testament, God gave the Jewish people a detailed legal code, which today is called the Mosaic law. Under that law, the nearest relative of a person who was murdered was obliged to kill the murderer, providing blood restitution for the death of the innocent. However, restitution was not necessary if the decedent was killed while attempting to perpetrate a robbery. Edward J. White, The Law in Scriptures 77 (2000).

The key law for self-defense was: "If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him. If the sun be risen upon him, there shall be blood shed for him."*Exodus* 22:2. In other words, killing a nighttime burglar was lawful, and killing a daytime burglar was not. However, the day/night distinction was not applied literally.[31]

The *Talmud* is a multilayered commentary on Jewish law and is itself a source of Jewish law. Regarding the passages in *Exodus*, the *Talmud* explains:

> The reason why the Scripture freed the detector if he killed the burglar, is because it is certain that a man cannot control himself when he sees his property taken. And as the burglar must have had the intention to kill anyone, in such a case, who should oppose him, the Scripture dictates that if one comes to kill you, hasten to kill him first.

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29. This is a standard Jewish Bible translation. 2 Rashi, The Torah: With Rashi's Commentary Translated, Annotated, and Elucidated: Shemos/Exodus 145 (Yisrael Isser Zvi Herczeg et al. trans. & eds., 4th ed. 1997). Rashi is the foremost of all Jewish Bible commentators.

Instead of "armed," the King James Version uses the word "harnessed," an archaic word for wearing military equipment. More recent translations also express that the Hebrews marched out in battle array: "And the people of Israel went up . . . equipped for battle" (Revised Standard Version); "and the children of Israel went up armed" (American Standard Version); "And the sons of Israel went up in military order" (American Baptist Publication Society). The Hebrew word is *chamushim*, probably related to the Egyptian *chams*, meaning "lance." The Pentateuch and Haftorahs 265 n.18 (Joseph H. Hertz ed., 1967).

30. This is the view set forth in Rashi, at 145 (explaining that *Exodus* 13:18 was written so that readers would not wonder where the Israelites got the arms with which they fought the Amalekites a short while later).

31. If the deceased were not a real burglar, but someone who was mistaken for a burglar, there was no criminal offense. Samuel Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrews 33 n.55 (The Lawbook Exchange 2001) (1891).

The Babylonian Talmud: Tract Sanhedrin 214 (Michael L. Rodkinson trans., 1918). The final phrases are not optional; they are a positive command: There is a duty to use deadly force to defend oneself against murderous attack.

The *Talmud* also imposes an affirmative duty for bystanders to kill if necessary to prevent murder, rape of a betrothed woman, or pederasty. 2 Talmud Bavli; The Gemara: The Classic Vilna Edition with an Annotated, Interpretive Elucidation, as an Aid to Talmud Study, Tractate Sanhedrin folio 73a[1] (Michael Wiener & Asher Dicker elucidators, Mesorah Pubs., 2d ed. 2002).[32] The commentators agree that a person is required to hire a rescuer if necessary to save the victim from the "pursuer" (the *rodef*). *Id.* at folio 73a[3]. Likewise, "if one sees a wild beast ravaging [a fellow] or bandits coming to attack him . . . he is obligated to save [the fellow]." *Id.* at folio 73a[1] (brackets in original).

The duty to use force to defend an innocent is based on two Bible passages. The first is *Leviticus* 19:16, "you shall not stand up against the life of your neighbor." Or in the modern New American Bible translation, "nor shall you stand idly by when your neighbor's life is at stake."

The second passage comes from *Deuteronomy* 22:23-27. If a man and a betrothed (engaged) woman have illicit sex in the city, it would be initially (not conclusively) presumed that she consented because she could have cried out for help. But if the sexual act occurred in the country, she would be presumed to have been the victim of a forcible rape: "For he found her in the field, and the betrothed damsel cried, and there was none to save her." The passage implies that bystanders must heed a woman's cries and come to her rescue. 2(a) The Mishneh, Sefer Nezekin 150-51 (Matis Roberts trans. & commentary, 1987). *See generally* Michael N. Rader, *The "Good Samaritan" in Jewish Law: Lessons for Physicians, Attorneys, and Laypeople*, 22 J. Legal Med. 375 (2001).

c. Overthrowing Governments

The Biblical history of the Jewish people included many stories that, to some readers, justified forcible resistance to tyranny. For example, the seventeenth-century English patriot and political philosopher Algernon Sidney advocated revolution against the oppressive Stuart kings of England. In support of his position, he reeled off a list of well-known Jewish heroes who used violence against tyrants: "Moses, Othniel, Ehud, Barak, Gideon, Samson, Jephthah, Samuel, David, Jehu, the Maccabees, and others." Algernon Sidney, Discourses Concerning Government 228 (Thomas G. West ed., Liberty Fund 1996) (1698). For more on Sidney, see Chapter 2.K.3.

Here is how Sidney (and other advocates of forcible resistance to tyranny) would have understood the above stories: Moses, while a prince of Egypt, killed a slave driver who was beating a Hebrew slave. Othniel led the Hebrews in a war of national liberation against a Mesopotamian king. Ehud assassinated a foreign king who had conquered the Hebrews. Barak, along with General Deborah, liberated the Hebrews from Canaanite rule. Gideon liberated the Hebrews from the Midianites. Samson fought the Philistines. Jephthah led the war of liberation against the

32. The superscripted numbers in the citations are to particular pages within a folio.

Ammonites. Samuel was the spiritual leader in a war of national liberation against the Philistines. David overthrew King Saul at Samuel's orders. Jehu overthrew the Israelite King Jehoram, who was leading Israel to participate in a nature religion involving human sacrifice. The Maccabees led a successful war of national liberation against the Seleucid Empire, which wanted to eliminate the Jewish religion.

d. Arms Bans

The Hebrew Bible also told the story of what might be the first arms ban in recorded history. The Hebrews had invaded the "promised land" of Canaan by crossing the Jordan River from the east. At about the same time, Canaan came under assault from the west as well. The sea-faring Philistines, who may have come from Crete, had failed in an attempt to conquer Egypt, so they set their sights on Canaan. Technologically superior to the Israelites, the Philistines were outstanding ironsmiths who equipped their soldiers with high-quality iron weapons. Chaim Herzog & Mordechai Gichon, Battles of the Bible 81-82 (Greenhill Books 2002) (1978); William G. Dever, Who Were the Early Israelites and Where Did They Come From? 69 (2003). The Philistine invasion of Canaan was partially successful, for they established secure control over the territory of Gaza.

Much later, as described in the final chapters of the *Book of Judges*, some of the Israelites came under a degree of Philistine control. Samson fought them single-handedly, over the objections of other Israelites. By the beginning of the *First Book of Samuel*, the Philistines had captured extensive territories from the disunited Israelite tribes. After conquering the tribe of Judah, which controlled the southern part of modern-day Israel, the Philistines imposed a weapons-control law: "Now there was no smith found throughout the land of Israel: for the Philistines said, Lest the Hebrews make them swords or spears." 1 *Samuel* 13:19. In order to sharpen agricultural tools such as plows, the Israelites had to pay for services from a Philistine ironsmith. *Id.* 13:20-21.

Because of the weapons control law, the Israelites had few good weapons to use against the Philistines, although the future Israeli king Saul and his son Jonathan apparently had some of their own: "So it came to pass on the day of battle, that there was neither sword nor spear found in the hand of any of the people that were with Saul and Jonathan: but with Saul and with Jonathan his son was there found." *Id.* 13:22.

e. Standing Armies versus Militias

The Hebrew Bible also addressed another issue of prime concern to the American Founders: the relationship between militias, standing armies, national security, and liberty. Initially, as a tribal confederation, the Hebrews relied on a militia system. *See* David B. Kopel, *Ancient Hebrew Militia Law*, 90 Denv. U. L. Rev. Online 175 (2013). But there were frequent problems of getting all the tribes to participate in wars of national defense. Too often, the tribes fought each other.

Around 1020 B.C., the Hebrews asked the prophet Samuel to ask God to appoint a king to rule over them. Samuel replied with God's warning about the dangers of abusive government, including a prophecy that a king would conscript the Israelites into a standing army:

> He will take your sons and appoint them for himself, for his chariots, and to be his horsemen; some shall run before his chariots. And he will appoint him captains over thousands, and captains over fifties; and will set them to ear [plough] his ground, and to reap his harvest, and to make his instruments of war, and instruments of his chariots.

1 *Samuel* 8:111-12.

In other words, military conscription for a standing army would lead to labor conscription, with Israelites forced to toil for the king. Samuel continued with more warnings about how the Hebrews would have to labor for greedy kings. Nevertheless, the Hebrews persisted in wanting a monarch, and God gave them what they wanted. Saul was the first king. He was later overthrown by David, who was succeeded by his son Solomon.

To many latter political commentators, *Samuel*'s story of the creation of the Hebrew monarchy was evidence that kings receive their power from the people, and therefore may rule only by consent. The American patriot writer Thomas Paine went further. To him, "That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false." Thomas Paine, Common Sense 39 (1776) (Ch. 4.B.6).

Every warning that Samuel issued about monarchy came to pass. Kings David and Solomon built large standing armies and turned many nations in the region into tributaries. But the Hebrews suffered from centralization of political power, labor conscription, and oppressive taxation. After Solomon died and was succeeded by Rehoboam (928-911 B.C.), the people petitioned for easing of their burdens. The new king's older advisors suggested that he lie to the public, but the younger ones urged him to be frank. "And the king answered the people roughly . . . saying, My father made your yoke heavy, and I will add to your yoke: my father also chastised you with whips, but I will chastise you with scorpions." 1 *Kings* 12:13-14.

As a result, Judah, the southern part of the kingdom, successfully revolted. Thereafter, the Hebrew kingdom was split between a southern kingdom of Judah and a northern kingdom of Israel. The consequences of disunity eventually led to Israel being conquered by the Assyrians, with the ten tribes of the northern kingdom deported and mostly disappearing from history. The small southern kingdom of Judah hung on longer, until it was conquered by Babylon around 587 B.C. The Jewish upper class was carried away to Babylon.

Later, after Babylon was conquered by the Persians, Persian King Cyrus allowed some of the exiled Jews to return in 538 B.C. Cyrus knew that the Jews' martial vigor would help them maintain their hold on Judah. He also knew that a small Jewish settlement would not be strong enough to seek independence; surrounded by hostile neighbors, it would be dependent on Persia. As the Jews rebuilt their Temple and the wall around Jerusalem, half of them did the construction work while the other half stood armed guard. *Nehemiah* 4:16-18.

Two centuries later, the Persian Empire was swept away by Alexander the Great. After he died, his empire split into four parts. The Jews were initially part of the Ptolemaic Empire (based in Egypt), and then the Seleucid Empire (based in Syria and Iraq). For a long time, the empires extracted tribute while otherwise leaving the Jews to govern themselves. But when the Seleucids outlawed the Jewish religion and attempted to force all Jews to adopt Greek culture, rural Jews began a

successful revolt that won national independence, in the second century B.C. The story is told in the First and Second *Books of Maccabees*.

Although Rome had been an early ally of the Jewish rebels, the Romans eventually took over the Jewish kingdom, turning it into a client state in 63 B.C. and assuming direct rule in 6 A.D. The Jewish homeland proved to be an especially troublesome addition to the Roman Empire, with major revolts in 57-50 B.C., 66-73 A.D. (culminating in the siege of the Masada fortress), 115 A.D., and 132-35 A.D. The last one needed 12 legions (about 60,000 soldiers, plus support personnel) to suppress. Determining that Judea, the central part of modern Israel, could never be in secure imperial control as long as so many Jews were there, the Romans exiled most of them, creating the diaspora. In the area near Jerusalem, only a small Jewish population remained.

In sum, Jewish political history embodied many of the eternally difficult questions on the organization of military force. Disunity—whether in the ancient Hebrew confederation, or during the various anti-Roman revolts—is often fatal. Yet centralized unity can sometimes lead to government as oppressive as that of a harsh foreign conqueror. Standing armies may be superior to militias for national defense and are almost always superior for foreign conquest. A government with a powerful standing army can also endanger the lives, liberty, and property of the people whom it is supposed to protect.

NOTES & QUESTIONS

1. Like the ancient Hebrews, many other societies have believed that a distinctive feature of a free man is possession of arms, and a distinctive feature of a slave is to be disarmed. What accounts for this view? Does this distinction make sense today?

2. *Thou shalt not kill.* In a common English translation, the Sixth Commandment states: "Thou shalt not kill." Many scholars, however, argue that "Thou shalt not murder" more closely matches the original Hebrew. The Hebrew Bible has numerous mandates for killing: in defense of self or others, in warfare, and in the dozens of capital offenses in the Mosaic law. *See* David B. Kopel, The Morality of Self-Defense and Military Action 13-15, 23-25 (2017). In the views of Algernon Sidney and many other readers, the Bible also sanctions tyrannicide. How can all this be squared with the Sixth Commandment?

3. *Parallels with Roman law.* One of the greatest Jewish legal scholars of antiquity was Philo of Alexandria (approx. 20 B.C.-50 A.D.), who wrote about the Jewish law in Alexandria, Egypt, during the period when Egypt and Israel were both under Roman rule. Much of Philo's treatise aimed to show that Jewish law from the Bible was consistent with Roman law. Philo argued that the Mosaic provision about killing robbers conformed to the Roman law of the Twelve Tables (Section B.2.a), because every night robber was a potential murderer. The burglar would be armed, at the least, with iron house-breaking tools, which could be used as weapons. Because assistance from the police or neighbors would be unlikely during the night, the victim was allowed immediate resort to deadly force. Philo of Alexandria, *The Special Laws, IV,in* The Works of Philo 616-17 (C.D. Yonge trans., 1993) ("Concerning Housebreakers"). Modern scholarship about the practices at Philo's time suggests that use of deadly force during a daytime burglary would be legal if

a victim in mortal peril called for help and none arrived. Edwin R. Goodenough, The Jurisprudence of the Jewish Courts of Egypt: Legal Administration by the Jews Under the Early Roman Empire as Described by Philo Judaeaus 154-55, 231-32 (The Lawbook Exchange 2002) (1929). (Philo Judaeaus is better known as Philo of Alexandria.)

4. *Daytime burglaries. Exodus* says that the burglar may not be killed "[i]f the sun be risen upon him." Jewish commentators have unanimously interpreted the "sun" language metaphorically: If the circumstances indicated that the burglar posed a violent threat to the victims in the home, the burglar could be slain regardless of the time of day. Conversely, if it were clear that the burglar was only taking property, and would not attack the people in the home, even if they interfered with the burglary, the burglar could not be slain. In modern legal theory, this form of interpretation is called "purposivism." That is, the interpreter seeks to fulfill the purpose behind the particular statute or constitutional provision. Purposivism has sometimes been used by the U.S. Supreme Court, and is especially favored by Justice Breyer. Purposivism is quite different from reading the statute literally, which would make the legality of killing a burglar depend on the hour of the day, not on the homeowner's perception of the burglar's intentions. Is purposivism a legitimate interpretive method for the burglary laws in *Exodus*? For modern American statutes and constitutions? Can different rules of interpretation be appropriate for different sources?

5. *Spatial restrictions on self-defense against burglars.* The great Jewish legal scholar Maimonides (Rabbi Moshe Ben Maimon, a/k/a "Rambam") (1153-1204) elaborated on when it was permissible to kill a burglar:

> 8. [The license mentioned above] applies to a thief caught breaking in or one caught on a person's roof, courtyard or enclosed area, whether during the day or during the night. . . .
>
> 12. Similarly, a person who breaks into a garden, a field, a pen or a corral may not be killed, for the prevailing assumption is that he came merely [to steal] money, for generally the owners are not found in such places."

James Townley, The Reasons of the Laws of Moses from the "More Nevochim" of Maimonides 226-28 (The Lawbook Exchange 2001) (1827). Are Maimonides's spatial distinctions sensible? Many American states recognize greater self-defense rights (such as a stronger presumption in favor of the use of deadly force in self-defense) in the home than in other places. Some statutes distinguish the home from one's yard, porch, or outbuildings. Are the distinctions compelling?

6. A 1998 law in Israel, derived from the Mosaic law, mandates that a person aid another who is in immediate danger if aid can be rendered without danger to the rescuer. A few American states have similar laws, often called Good Samaritan laws. *See, e.g.*, Victor D. López & Eugene T. Maccarrone, *Should Emergency Good Deeds Go Unpunished? An Analysis of the Good Samaritan Statutes of the United States*, 45 Rutgers L. Rec. 105 (2018) (also discussing statutes providing civil immunity to various types of rescuers); Thomas Lateano, Silvina Ituarte & Garth Davies, *Does the Law Encourage or Hinder Bystander Intervention? An Analysis of Good Samaritan Laws*, 44 Crim. L. Bull. art. 4 (Fall 2008); *cf.* David C. Biggs, *"The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire*

to Possess Concealed Weapons, 22 U. Dayton. L. Rev. 225 (1997) (arguing that armed assistance to strangers is too dangerous). Is it appropriate to mandate that a person come to the aid of others? That she defend herself against certain types of attacks? Does it depend on the particular type of society?

7. *Arms-making controls*. As the Philistine conquerors of the Hebrews understood, governments intending to prevent subjects from possessing arms must do more than outlaw arms themselves; they must also find a way to prevent people from making their own arms. Similarly, during the Tokugawa period in Japan, starting in the seventeenth century, the government was able to impose very restrictive controls on the small number of gunsmiths in the nation, thereby attempting to ensure that almost complete national prohibition of firearms would be effective. Ch. 19.C.7.

Today, the manufacture of a working firearm is not particularly difficult. People with access to the machine tools found in many homes make firearms, as do West African villagers with considerably inferior tools. *See, e.g.*, Mark A. Tallman, Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution (2020); Charles Chandler, *Gun-Making as a Cottage Industry*, 3 J. Firearms & Pub. Pol'y 155 (1990); Emanuel Addo Sowatey, *Small Arms Proliferation and Regional Security in West Africa: The Ghanian Case,in* 1 News from the Nordic Afr. Inst. 6 (2005) (despite colonial and postcolonial arms bans, a gunsmith in Ghana can make several guns per day; some make working copies of the AK-47); online Ch. 19.A.3.c (more on Ghana manufacture). Developments in 3D printing add a new angle to an old issue. Under what circumstances could a government attempting to impose arms prohibition succeed?

8. *Further reading*: Flavius Josephus, War of the Jews (78 A.D.); Moses Maimonides, Mishneh Torah: Hilchot Melachim U'Milchamoteihem (The Laws of Kings and Their Wars) (Eliyahu Touger trans., 1987); Geoffrey Miller, The Ways of a King: Legal and Political Ideas in the Bible (2011) (the Bible suggests that although monarchy is flawed, it is preferable to anarchy or loose confederation — provided that the monarch obeys the law and is constrained by checks and balances); Joshua Berman, Created Equal: How the Bible Broke with Ancient Political Thought (2008) (the first five books of the Bible created a society and government much more egalitarian than were the surrounding nations of the ancient Near East); Robert Eisen, The Peace and Violence of Judaism: From the Bible to Modern Zionism (2011); Derek J. Penslar, Jews and the Military (2013); David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017); David B. Kopel, *The Torah and Self-Defense*, 109 Penn St. L. Rev. 17 (2004). The Holocaust is covered in online Chapters 19.C.2 and 19.D.2.

2. *Early Christian Thought*

The New Testament, which is the story of early Christianity, covers a much shorter period of time than does the Old Testament, and pays much less attention to political history. However, two passages are often cited in discussions about the legitimacy of weapons. Another passage has been important to Western political thinking about the legitimacy of resistance to government.

a. The Sermon on the Mount

These are excerpts from the most famous sermon by Jesus.

> You have heard that it was said of them of old time, You shall not kill; and whosoever shall kill shall be in danger of the judgment: But I say unto you, That whosoever is angry with his brother without a cause shall be in danger of the judgment: and whosoever shall say to his brother, Raca,[33] shall be in danger of the council: but whosoever shall say, You fool, shall be in danger of hell fire. . . .
>
> You have heard that it was said by them of old time, You shall not commit adultery: But I say unto you, That whosoever looks on a woman to lust after her has committed adultery with her already in his heart. And if your right eye offend you, pluck it out, and cast it from you: for it is profitable for you that one of your members should perish, and not that your whole body should be cast into hell. And if your right hand offend you, cut it off, and cast it from you: for it is profitable for you that one of your members should perish, and not that your whole body should be cast into hell. . . .
>
> You have heard that it has been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That you resist not evil: but whosoever shall smite you on your right cheek, turn to him the other also. And if any man will sue you at the law, and take away your coat, let him have your cloak also. And whosoever shall compel you to go a mile, go with him two. Give to him that asks you, and from him that would borrow of you turn you not away. You have heard that it has been said, You shall love your neighbor, and hate your enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for those who despitefully use you, and persecute you. . . . Be you therefore perfect, just as your Father which is in heaven is perfect. . . .

Matthew 5:21, 27-30, 38-43, 48 (King James Version).

NOTES & QUESTIONS

1. Which of the sayings in the Sermon on the Mount appear to be meant to be taken literally?

2. In the context of the times, a slap on the cheek was a serious personal insult. Can the example be extrapolated to a general admonition against self-defense?

3. Does "resist not evil" mean that a person should not resist evil? In what ways, if any, might resistance to evil be legitimate?

4. The great Russian novelist Leo Tolstoy was a pacifist who believed that all government is evil, because all government depends on force. His favorite quote was "Resist not evil." *See* Leo Tolstoy, The Kingdom of God Is Within You (Constance Garnett trans., 1894); Leo Tolstoy, My Religion: What I Believe (Huntington

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33. [A contemptuous word meaning "worthless." Derived from the root of "to spit."—Eds.]

Smith trans., White Crow Books, 2009) (1884). He opposed revolution against bad government, because "[a]ll the revolutions in history are only examples of the more wicked seizing power and oppressing the good." Tolstoy, Kingdom of God, at 182. Writing in 1894, Tolstoy predicted that in the near future there would be mass global conversion to his form of pacifist Christianity that would bring global peace and happiness. Before that tipping point of global conversion, Tolstoy anticipated what would happen to pacifists, and he put the prediction in capital letters: "THE WICKED WILL ALWAYS DOMINATE THE GOOD, AND WILL ALWAYS OPPRESS THEM. . . . To terrify men with the prospect of the wicked dominating the good is impossible, for that is just what has always been, and is now, and cannot but be." *Id.* In other words, do not use force to resist evil, because evil will always win, until the world converts. Was Tolstoy right?

b. The Final Instructions to the Apostles

According to the New Testament, at the Last Supper, Jesus gave his final instructions to the apostles, and revoked a previous order about not carrying useful items. He asked, "When I sent you out with no moneybag or knapsack or sandals, did you lack anything?" "Nothing," the apostles replied. Jesus continued:

> But now, let the one who has a moneybag take it, and likewise a knapsack. And let the one who has no sword sell his cloak and buy one. For I tell you that this scripture must be fulfilled in me: And he was numbered with the transgressors. For what is written about me has its fulfillment.

The apostles responded, "Look, Lord, here are two swords." Jesus said to them, "It is enough." *Luke* 22:35-38 (English Standard Version).

Although the New Testament does not explicitly say so, the sword carrying by 2 of the 12 apostles was apparently illegal under Roman law, since few Jews at the time were Roman citizens.[34]

NOTES & QUESTIONS

1. What should be drawn from Jesus' instruction that the apostles should carry swords?

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34. Edwin R. Goodenough, The Jurisprudence of the Jewish Courts of Egypt: Legal Administration by the Jews Under the Early Roman Empire as Described by Philo Judaeaus 151 (The Lawbook Exchange 2002) (1929). The weapons prohibition was enacted sometime between 35 B.C. and 5 A.D. *Id.*

The apostle Matthew was a tax collector (*Matthew* 10:3). He might therefore have been allowed legally to carry a sword. One of the swords presumably belonged to Peter (whom Jesus has appointed as leader of the apostles, making him the first Pope in some interpretations). Peter unsheathed his sword to use it against a Roman soldier a few hours after the Last Supper. In the first century A.D., the typical Roman sword was the Pompeii type, with a blade of only 16 inches. *See* M.C. Bishop & J.C.N. Coulston, Roman Military Equipment: From the Punic Wars to the Fall of Rome 78-82 (2d ed. 2006). The form of the disciples' presentation of the swords ("Look") indicates that the swords had been concealed—most likely, they were short swords hidden underneath loose clothing.

2. In medieval Christian thought, the self-defense implication of carrying swords was considered obvious. But there was a great debate about the metaphorical implication of the "two swords." One sword was considered to be the power of the civil government, and the other sword to be the power of the church. Philosophers argued at length about which sword was the greater one—that is, whether the civil government should rule over the church, or the church should rule over the civil government. Within the context of the Two Swords debate, the idea of each side leaving the other alone was not much considered.

c. The Arrest of Jesus

Just a few hours after Jesus had given the above instructions, Roman soldiers came to arrest him in the Garden of Gethsemane. Peter, whom Jesus had appointed as the leader of the disciples, rushed to defend Jesus, drew his sword, and cut off the ear of a Roman soldier. Jesus healed the soldier's ear by touching it. He said to Peter: "Put up again thy sword into its place: for all they that take the sword shall perish with the sword," or "Put up thy sword into the sheath: the cup which my Father has given me, shall I not drink it?" *Matthew* 26:52; *John* 18:11 (King James Version).

NOTES & QUESTIONS

1. The instruction to Peter to put his sword away is one of the most common proof texts for Christian pacifists. Nonpacifists argue that when Peter put his sword back in its sheath, he was no more disarmed than a man who puts his handgun back into its holster. Which interpretation do you think is more persuasive?

d. Paul's Letter to the Romans

Next to the Gospels (four biographies of Jesus), the most influential book of the New Testament is Paul's letter to the Christians in Rome. Regarding submission to government, Paul wrote in *Romans* 13:1-7 (King James Version):

> Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.

To the same effect is 1 *Peter* 2:11-25.

Ever since *Romans* 13 was written, Christians have debated its meaning about their duties of submission to government. According to many, no matter how bad the government, Christians must submit. In contrast, the second-century theologian Irenaeus interpreted Paul to mean that good government comes from God, whereas tyrannical or unjust government comes from the devil. Irenaeus, *Against Heresies* (also known as "A Refutation and Subversion of Knowledge falsely so called"), in 1 The Ante-Nicene Fathers: Translations of the Writings of the Fathers Down to A.D. 325, bk. 5, ch. 24, ¶¶ 1-3 (Alexander Roberts & James Donaldson eds., 1885). During the last millennium, this view became widely accepted, starting with religious dissidents who refused to conform to governments' religious edicts.

The Massachusetts Reverend Jonathan Mayhew's famous 1750 sermon *A Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers* developed the latter view in depth. According to Mayhew—and to the Americans whom he convinced that challenging King George III was morally legitimate—the praise that St. Paul offers to rulers for their good works necessarily means that Christians owe obedience only to "*good rulers*, such as are, in the exercise of their office and power, benefactors to society." By the time of the American Revolution, the mainstream of American Christian opinion had swung so decisively in favor of the analysis favored by Mayhew and others that the American Revolution was incited and fought as a holy war to protect God-given liberty. *See* Ch. 3.C.3. "The basic fact is that the Revolution had been preached to the masses as a religious revival, and had the astonishing fortune to succeed." Perry Miller, Nature's Nation 110 (1967); *cf.* Harry S. Stout, The New England Soul: Preaching and Religious Culture in Colonial New England 311 (1988) ("New England's revolution would be nothing less than America's sermon to the world.").

e. Other Early Christian Writings

It is sometimes asserted that early Christians were uniformly pacifist. But there is extensive evidence of Christians serving in the Roman army, especially after Roman citizenship was extended empire-wide in 212 A.D. Moreover, the Biblical history of the earliest church, the *Book of Acts*, contains stories of Roman soldiers who converted to Christianity, and who continued to serve as soldiers.

Many early Christians were indeed complete pacifists. *The Didache*, also known as *Teaching of the Twelve Apostles*, is an early set of instructions for gentile converts, perhaps dating from the latter part of the first century or the first half of early second century. Near the beginning of a restatement of the Sermon on the Mount, *The Didache* instructs: "[W]hen anyone robs you of your property, demand no return. You really cannot do it. Give to anyone that asks you, and demand no return." *The Didache*, *in* 6 Ancient Christian Writers: The Didache 15 (James A. Kleist trans. & annot., 1948).

Writing in the latter part of the second century, Athenagoras was one of the first Christian writers to blend Christian doctrine with the ideas of the Greek philosopher Plato. He wrote: "[W]e have learned, not only not to return blow for blow, nor to go to law with those who plunder and rob us, but to those who smite us on one side of the face to offer the other side also, and to those who take away our coat to give likewise our cloak." Athenagoras, A Plea for the Christians, *in* The Writings of Justin Martyr and Athenagoras (Marcus Dods et al. trans., 1868), *in* 2

Ante-Nicene Christian Library: Translations of the Writings of the Fathers Down to A.D. 325, at 376 (Alexander Roberts & James Donaldson eds., 1868).

Among the influential intellectuals of the first centuries of Christianity, nonpacifists included Irenaeus and Clement of Alexandria. Pacifists included Minucius Felix, Origen, St. Cyprian, and St. Martin of Tours. *See* Kopel, The Morality of Self-Defense, at 173-88. Other than the authors of the New Testament, the most influential Christian writer was St. Augustine of Hippo. Although he took varying positions, he ultimately came to the view that Christian participation in Just War was legitimate. While laws allowing self-defense were just, Christians should adhere to a higher morality, and refrain from killing in self-defense. *Id.* at 199-201; Augustine, Free Choice of the Will (*De Libero Arbitrio*) bk. 1, §§ 5, 8-9 (Thomas Williams trans., 1993). As discussed *supra*, Augustine thought that rapacious governments were morally no different from common robbers or pirates. Section A.1 Note 7.

NOTES & QUESTIONS

1. Athenagoras extended the New Testament injunction that Christians should not use secular lawsuits to settle their disputes with each other. 1 *Corinthians* 6:1-8. To what extent, if any, is asking a court to criminally prosecute someone, or asking a court to settle a civil dispute, akin to participation in violence?

2. *Further reading* on early Christian views on the use of force: C. John Cadoux, The Early Christian Attitude to War (Seabury Press 1982) (1919) (taking Origen's view that Christians should be pacifists personally, but they can hope and pray for the success of soldiers in just wars); Louis J. Swift, The Early Christians on War and Military Service (1983) (the best short source for original materials); David B. Kopel, The Morality of Self-Defense and Military Action (2017). Full annotated translations of early Christian writers are available at the Christian Classics Ethereal Library, www.ccel.org.

3. Medieval Christian Thought

The Dark Ages in the West are commonly dated from the fall of the Western Roman Empire in the fifth century A.D. until the early second millennium. The general Christian view of the time was that, pursuant to *Romans* 13, everyone must submit to government, no matter how oppressive.

A leading contrary voice was Manegold of Lautenbach, a scholar at a monastery destroyed by the German Emperor Henry IV. Writing in 1085, Manegold analogized a cruel tyrant to a disobedient swineherd who stole his master's pigs, and who could be removed from his job by the master. A.J. Carlyle & R.W. Carlyle, Medieval Political Theory in the West 164 (1950) (translating and paraphrasing Manegold's Latin text in *Liber ad Gebehardum*). According to Manegold:

> [I]f the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people are entitled to depose the king and to set up another, inasmuch as he has broken the principle upon which their mutual obligation depended.

In the "Little Renaissance" that began in the twelfth century, one of the most important events was the Western rediscovery of Aristotle and of the *Corpus Juris* (Sections B.1.c, B.2.e). The University of Bologna, Italy, was the first Western academic institution to study the *Corpus*. Almost as soon as the *Corpus Juris* was rediscovered, and for centuries afterward, the greatest activity of legal scholars was studying and writing commentaries on it. The commentaries were usually written *Talmud*-style, in the form of marginal annotations. The *Corpus Juris* led to the University of Bologna creating the first law school that the Western world had known since the fall of Rome.

Because the authors of the *Corpus Juris* had written down all the legal rules and decisions they could find, and simply organized the rules and decisions by subject matter, there appeared to be many legal standards that were contradicted by other legal standards. Using techniques that are the intellectual tools of every good lawyer, scholars at the University of Bologna and elsewhere looked for ways to reconcile the seemingly inconsistent statements in Justinian's text. "Glossolators" provided a gloss—an explanatory commentary in the wide margins of the printed edition of Justinian's *Corpus Juris*—that explicated and reconciled the various rules. The method of scholarship was known as Scholasticism.

a. Gratian and Natural Law

Around 1140 A.D., Gratian of Bologna was the first scholar to bring the Scholastic approach to canon law (church law). The formal title was *Concordia discordantium canonum* (Harmonization of discordant canons), but it was also known as the *Decretum Gratiani* or just *Decretum*. The *Decretum* (including later commentaries on the *Dectrum* by other authors) was the definitive consolidation, harmonization, and analysis of all church laws since the time of the apostles. The *Decretum* was taught in law schools, and until 1917 served as the first volume of the *Corpus Juris Canonici*, the law of the Roman Catholic Church.

Gratian began with a concise expression of natural law:

> Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.
>
> For example: the union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things which are taken from the heavens, earth, or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force. This, and everything similar, is never regarded as unjust but is held to be natural and equitable.

Gratian, The Treatise on Law (Decretum Dd. 1-20) with the Ordinary Gloss Pt. 1 D.1 p.2 c.7 (Augustine Thompson & James Gordley trans., 1993).

NOTES & QUESTIONS

1. Do you think there is a "natural law," in the sense that Gratian used the term? If so, is self-defense part of it?

2. **CQ:** Compare Manegold's views with the American Declaration of Independence: "That to secure these rights, Governments are instituted among Men. . . .

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government. . . ." Do you agree with Manegold and Jefferson that any legitimate ruler is necessarily contractually bound to protect the public good? That the people necessarily have a right to remove their rulers, by force if necessary?

b. John of Salisbury's *Policraticus*

A cosmopolitan and well-educated English bishop, John of Salisbury, wrote the first serious new book of political science published in the West since the fourth century. It was perhaps the most influential book written since the Byzantine Emperor Justinian's legal treatise *Corpus Juris* had been compiled six centuries before, and it remained influential throughout the Middle Ages. *Policraticus* (Statesman's Book), published around 1159, was for the next hundred years considered the most important book on government. Thomas Aquinas, whose work later displaced Salisbury's, consciously built on Salisbury's foundation.

Policraticus argued that intermediate magistrates, such as local governors, had a duty to lead forcible resistance, if necessary, against serious abuses by the highest magistrate, such as the king. Not since Cicero had any Western writer provided a detailed theory of tyrannicide. Salisbury wrote:

> [I]t is not only permitted, but it is also equitable and just to slay tyrants. For he who receives the sword deserves to perish by the sword.
>
> But "receives" is to be understood to pertain to he who has rashly usurped that which is not his, not to he who receives what he uses from the power of God. He who receives power from God serves the laws and is the slave of justice and right. He who usurps power suppresses justice and places the laws beneath his will. Therefore, justice is deservedly armed against those who disarm the law, and the public power treats harshly those who endeavour to put aside the public hand. And, although there are many forms of high treason, none of them is so serious as that which is executed against the body of justice itself. Tyranny is, therefore, not only a public crime, but if this can happen, it is more than public. For if all prosecutors may be allowed in the case of high treason, how much more are they allowed when there is oppression of laws which should themselves command emperors? Surely no one will avenge a public enemy, and whoever does not prosecute him transgresses against himself and against the whole body of the earthly republic. . . .

John of Salisbury, Policraticus 25 (Cary J. Nederman ed. & trans., Cambridge Univ. Press 1990) (circa 1159).

> As the image of the deity, the prince is to be loved, venerated and respected; the tyrant, as the image of depravity, is for the most part even to be killed. . . . [I]t is just for public tyrants to be killed and the people to be liberated for obedience to God.

Id. at 191, 207.

NOTES & QUESTIONS

1. **CQ:** Compare John of Salisbury's views with the motto that Thomas Jefferson and Benjamin Franklin proposed placing on the Great Seal of the United States: "Rebellion to tyrants is obedience to God." The words were the motto of John Bradshaw (1602-1659), the lawyer who served as President of the Parliamentary Commission that sentenced British King Charles I to death. (Chs. 2.H.2.a, 3.C.5 Note 5).

2. The theory in *Policraticus* of "intermediate magistrates" is a check on the use of forcible resistance. It means that self-appointed individuals (in the worst case, people like Timothy McVeigh or Charles Manson) have no authority to try to start a revolution. Rather, a revolution may only be initiated by "intermediate magistrates," such as local governments. **CQ:** Was the American Revolution consistent with this theory? In *Federalist* 46, James Madison described resistance to a hypothetically tyrannical federal government as being led by the states (Ch. 5.C.1). Is Salisbury's view merely an invitation for *coup d'états*?

c. Thomas Aquinas

The apex of medieval thought was Saint Thomas Aquinas's *Summa Theologica*, a massive treatise on numerous matters of ethics and theology.

Thomas Aquinas

Summa Theologica

The "Summa Theologica" of St. Thomas Aquinas: Part II. (Second Part): Second Number 195, 208, 209-10 (Fathers of the English Dominican Province trans., Benziger Bros. 1918)

QUESTION LXIV.

Of the Vices Opposed to Commutative Justice, and, in the First Place, of Murder . . . Seventh Article. Whether It Is Lawful to Kill a Man in Self-Defence? . . .

. . . It is written (Exod. xxii. 2): "*If (a thief) be found breaking into a house or undermining it, and be wounded so as to die; he that slew him shall not be guilty of blood.*" Now it is much more lawful to defend one's life than one's house. Therefore neither is a man guilty of murder if he kill another in defence of his own life.

I answer that, Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above. . . . Accordingly the act of self-defence may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, Seeing that it is natural to everything to keep itself in *being*, as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defence, uses more than necessary violence, it will be unlawful: whereas if he repel force with

moderation his defence will be lawful, because according to the jurists, *it is lawful to repel force by force, provided one does not exceed the limits of a blameless defence.* Nor is it necessary for salvation that a man omit the act of moderate self-defence in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good, . . . it is not lawful for a man to intend killing a man in self-defence, except for such as have public authority, who while intending to kill a man in self-defence, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.

* * *

Another topic covered by the *Summa Theologica* was resistance to government.

Thomas Aquinas

Summa Theologica

The "Summa Theologica" of St. Thomas Aquinas: Part II. (Second Part): First Number 515, 517-18 (Fathers of the English Dominican Province trans., Benziger Bros. 1917)

QUESTION XLII.

Of Sedition . . . Second Article. Whether Sedition Is Always a Mortal Sin? . . .

. . . [S]edition is contrary to the unity of the multitude, viz. the people of a city or kingdom. . . . [S]edition is opposed to the unity of law and common good: whence it follows manifestly that sedition is opposed to justice and the common good. Therefore by reason of its genus it is a mortal sin,[35] and its gravity will be all the greater according as the common good which it assails surpasses the private good which is assailed by strife.

Accordingly the sin of sedition is first and chiefly in its authors, who sin most grievously; and secondly it is in those who are led by them to disturb the common good. Those, however, who defend the common good, and withstand the seditious party, are not themselves seditious, even as neither is a man to be called quarrelsome because he defends himself. . . .

. . . A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler, as the Philosopher [Aristotle] states (Polit. iii, 5; Ethic. viii). Consequently there is no sedition in disturbing a government of this kind, unless indeed the tyrant's rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant's government. Indeed it is the tyrant rather that is guilty of sedition, since he encourages discord and sedition among his subjects, that he may lord over them more securely; for this is tyranny, being conducive to the private good of the ruler, and to the injury of the multitude.

35. [A mortal sin is an especially serious sin, with grave danger to the soul. *Contrast* "venial sin."—Eds.]

NOTES & QUESTIONS

1. Note how Aquinas's theory of double effect resembles Cicero's speech in defense of Milo (Section B.2.c): "[T]he man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man." The Aquinas theory of double effect has been used to analyze many ethical issues. Is it persuasive?

2. **CQ:** Like Thomas Aquinas and John of Salisbury, U.S. Supreme Court Justice Joseph Story suggested that the forceful removal of a tyrant would be a legitimate way to restore constitutional law and order: "The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. . . . The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. . . ." Joseph Story, A Familiar Exposition of the Constitution of the United States 264-65 (1842) (Ch. 6.F.2.b). What is your assessment of the claims by Salisbury, Aquinas, and Story that overthrowing a perceived tyrant by force can lead to the restoration of a society of ordered liberty? What about Leo Tolstoy's point that any use of force just replaces a bad government with a worse one?

3. *Further reading*: The Cambridge History of Medieval Political Thought (J.H. Burns ed., 1988); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983) (how the eleventh-century papal revolution against secular control, especially against the Holy Roman Emperor, whose territory included much of Italy and Germany, permanently changed Western political thought); Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges (Sohail H. Hashmi ed., 2012); The Ethics of War: Shared Problems in Different Traditions (Richard Sorabji & David Rodin eds., 2006); David B. Kopel, *The Catholic Second Amendment*, 29 Hamline L. Rev. 519 (2006).

D. SECOND-MILLENNIUM EUROPE

1. Italian Influence

From time immemorial, the Swiss cantons maintained a citizen militia. The crossbow was the symbolic national weapon, and William Tell the exemplar of civic virtue. With the militia, the Swiss cantons fought for and secured their independence from nearby empires. In the Renaissance and thereafter, Italian city-states followed the Swiss example. They mobilized their militias and won independence from various empires.

The pro-militia Italian writers were heavily influenced by Aristotle (Section B.1.c), who believed that citizenship and the possession of arms were coextensive. During the seventeenth century, militia advocates in England and Scotland carefully studied the Italian writers. The foundation of militia ideology was belief in active citizenship: that free states should be defended by the armed citizens of

those states, that participation in the militia was the embodiment of virtuous active citizenship, and that reliance on professionals and mercenaries to defend a state was expensive, dangerous, and degrading to the citizenry's character.

For example, Leonardo Bruni, writing in the early fifteenth century, praised the city whose inhabitants "acted by themselves without the help of any foreign auxiliaries, fighting on their own behalf and contending as much as possible for glory and dignity." Unlike foreign mercenaries, native militia "fighting for the love of their city" would be fearless. 1 Quentin Skinner, The Foundations of Modern Political Thought: The Renaissance 76-77 (2002).

In Italy, reliance on militias was sometimes successful, and sometimes not. It was always in tension with the aristocracy's fear of the people being armed. *See* J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (2d ed. 2003).

a. Machiavelli

Among the Italian militia authors, the one who is best known in the twenty-first century, and who was by far the most influential in Great Britain, was Niccolo Machiavelli. Here, he tells the story of how the ancient Roman Republic used the militia for self-defense, and argues that modern Italian city-states should do the same.

Niccolo Machiavelli

Discourses on the First Decade of Titus Livius

Bk. 2, ch. 30 (Ninian Hill Thomson trans., 1883)

Now, one of the tests whereby to gauge the strength of any State, is to observe on what terms it lives with its neighbours: for when it so carries itself that, to secure its friendship, its neighbours pay it tribute, this is a sure sign of its strength, but when its neighbours, though of less reputation, receive payments from it, this is a clear proof of its weakness. . . . And, to begin with our own republic of Florence, we know that in times past, when she was at the height of her renown, there was never a lordling of Romagna who had not a subsidy from her, to say nothing of what she paid to the Perugians, to the Castellans, and to all her other neighbours. But had our city been armed and strong, the direct contrary would have been the case, for, to obtain her protection, all would have poured money into her lap, not seeking to sell their friendship but to purchase hers.

Nor are the Florentines the only people who have lived on this dishonourable footing. The Venetians have done the same, nay, the King of France himself, for all his great dominions, lives tributary to the Swiss and to the King of England; and this because the French king and the others named, with a view to escape dangers rather imaginary than real, have disarmed their subjects; seeking to reap a present gain by wringing money from them, rather than follow a course which would secure their own safety and the lasting welfare of their country. Which ill-practices of theirs, though they quiet things for a time, must in the end exhaust their resources, and give rise in seasons of danger to incurable mischief and disorder. It

would be tedious to count up how often in the course of their wars, the Florentines, the Venetians, and the kingdom of France have had to ransom themselves from their enemies, and to submit to an ignominy to which, once only, the Romans were very near being subjected. It would be tedious, too, to recite how many towns have been bought by the Florentines and by the Venetians, which, afterwards, have only been a trouble to them, from their not knowing how to defend with iron what they had won with gold. While the Romans continued free they adhered to this more generous and noble method, but when they came under the emperors, and these, again, began to deteriorate, and to love the shade rather than the sunshine, they also took to purchasing peace, now from the Parthians,[36] now from the Germans, and at other times from other neighbouring nations. And this was the beginning of the decline of their great empire.

Such are the evils that befall when you withhold arms from your subjects; and this course is attended by the still greater disadvantage, that the closer an enemy presses you the weaker he finds you. For any one who follows the evil methods of which I speak, must, in order to support troops whom he thinks can be trusted to keep off his enemies, be very exacting in his dealings with those of his subjects who dwell in the heart of his dominions; since, to widen the interval between himself and his enemies, he must subsidize those princes and peoples who adjoin his frontiers. States maintained on this footing may make a little resistance on their confines; but when these are passed by the enemy no further defence remains. Those who pursue such methods as these seem not to perceive that they are opposed to reason and common sense. For the heart and vital parts of the body, not the extremities, are those which we should keep guarded, since we may live on without the latter, but must die if the former be hurt. But the States of which I speak, leaving the heart undefended, defend only the hands and feet. The mischief which has thus been, and is at this day wrought in Florence is plain enough to see. For so soon as an enemy penetrates within her frontiers, and approaches her heart, all is over with her. . . .

But with the Romans the reverse of all this took place. For the nearer an enemy approached Rome, the more completely he found her armed for resistance; and accordingly we see that on the occasion of Hannibal's invasion of Italy, the Romans, after three defeats, and after the slaughter of so many of their captains and soldiers, were still able, not merely to withstand the invader, but even, in the end, to come off victorious.[37] This we may ascribe to the heart being well guarded, while the extremities were but little heeded. For the strength of Rome rested on the Roman people themselves, on the Latin league, on the confederate towns of Italy, and on her colonies, from all of which sources she drew so numerous an army, as enabled her to subdue the whole world and to keep it in subjection.

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36. [An empire based in northeastern Iran.—Eds.]

37. [Led by Hannibal, the forces of Carthage—an empire based in Tunisia—invaded Italy during the Second Punic War (218-204 B.C.). The three disasters were presumably Ticinus (driving Romans out of Lombardy), Lake Trasimene (the worst ambush suffered thus far by the Romans), and Cannae (at least 50,000 Romans killed or captured).—Eds.]

NOTES & QUESTIONS

1. Even if Machiavelli were right about the value of a well-armed militia for Italian city-states, does that mean militias are *necessarily* the best defense of the state? Does the answer depend on the circumstances of the time and place, including the kind of tools and technology available?

2. **CQ:** As described in Chapter 2, the United Kingdom, like the Italian city-states, also had tensions between the need of a well-armed public for national defense, and the aristocracy's worries about an armed populace.

b. Beccaria

The Italian Cesare Beccaria (1738-1794) was the founder of the social science of criminology. His masterpiece *On Crimes and Punishments* (*Dei Delitti e Delle Pene*) proposed humanizing reforms of criminal justice, such as the abolition of torture and of secret trials. As soon as the book appeared in English, it was snapped up by John Adams, Thomas Jefferson, and other influential Americans. Jefferson liked Beccaria's passage on gun control so much that he copied it into his "commonplace book" of favorite sayings. The Commonplace Book of Thomas Jefferson: A Repertory of His Ideas on Government 314 (Gilbert Chinard ed., 1926). Two and a half centuries later, the passage is still oft-quoted in the American gun control debate.

Cesare Beccaria

An Essay on Crimes and Punishments

ch. 40, Edward D. Ingraham trans., 1819 (1764)

A principal source of errors and injustice are false ideas of utility. For example: that legislator has false ideas of utility who considers particular more than general conveniencies, . . . who would sacrifice a thousand real advantages to the fear of an imaginary or trifling inconvenience; who would deprive men of the use of fire for fear of their being burnt, and of water for fear of their being drowned; and who knows of no means of preventing evil but by destroying it.

The laws of this nature are those which forbid to wear arms, disarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? Does not the execution of this law deprive the subject of that personal liberty, so dear to mankind and to the wise legislator? And does it not subject the innocent to all the disagreeable circumstances that should only fall on the guilty? It certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder, as it requires less courage to attack unarmed than armed persons.

NOTES & QUESTIONS

1. Is Beccaria's analysis sound? Can one accept Beccaria's analysis and still support some gun controls, such as laws forbidding convicted violent criminals from possessing guns, or attempt to prevent such criminals from acquiring guns?

2. French Influence

a. The Huguenot Struggles, and *Vindication Against Tyrants*

The Reformation in France led many people, especially in southeast France, to become Protestants. Known as *Huguenots*, they were Calvinists, following the theology of reformer John Calvin. They fought against the French Catholic majority in 1562, 1567, 1568, 1572, 1574, 1577, and 1580—the "Wars of Religion." The Huguenots lost every time. Although the French monarchy was sometimes willing to tolerate the Huguenots, the Catholic leadership and intellectuals were not.

In the infamous Saint Bartholomew's Eve massacre in August 1572, Catholic mobs used edged weapons to hack to death thousands of Huguenots in Paris and elsewhere. Ordered by King Charles IX, the massacre radicalized many French Calvinists.

One of them took the pseudonym Marcus Junius Brutus (the Roman Senator who assassinated Julius Caesar). In 1579 he wrote *Vindication Against Tyrants*. Marcus Junius Brutus, Vindiciae, Contra Tyrannos: or, Concerning the Legitimate Power of a Prince over the People, and of the People over a Prince (George Garnett ed., Cambridge Univ. Press 1994) (1579). The book owed a great debt to Catholic thought on the subject of Just Revolution.

Brutus praised the heavenly merit of the Crusaders, and then advanced the lesson of the Crusades, arguing that the French Catholic kings who oppressed Protestants were even worse than the Holy Land Muslims who had oppressed Christians. The Muslims did not deny Christian subjects liberty of religion, but the French government did. Accordingly, resisting the French government was even more meritorious than crusading, which was even more meritorious than martyrdom. *Id.* at 9, 65-66, 178.

Vindiciae presented four basic questions, along with objections and responses to the objections. Like Scholastic works, the book was organized in the form of geometric proofs.

The first question was whether subjects must obey a ruler who commands an act that is contrary to God's law. "No" was the easy answer in Christian tradition. Because disobedience could include passive resistance, the answer did not necessarily imply a right to revolution.

Question two asked about forceful resistance, in the context of a king breaking God's law and trying to destroy the church. *Vindiciae* argued that resistance was required. However, individuals without the leadership of intermediate magistrates were not supposed to fight against government. Individuals should fight tyrants without title, a mere conqueror who had no claim to legitimacy. *Id.* at 60, 150.

Brutus acknowledged that there were cases where private individuals had fought tyrants who had legitimate title—such as Ehud in the *Book of Judges*, who

assassinated Moab's corpulent King Eglon. But these were special cases of direct orders from God, said *Vindiciae*. A person who thinks that he may be the recipient of such orders "should certainly make sure that he is not puffed up with pride, that he is not God to himself, that he does not derive the great spirit for himself from within himself." The failed Second Jewish Revolt in Roman-ruled Israel (Section C.1.e), and the failed Peasants' War led by Thomas Müntzer "not long ago in Germany" were cited as examples of unwise rebellion led by individuals. *Id.* at 62, 168-69, 172.

Question three went beyond the traditional Lutheran-Calvinist focus on resisting kings who suppressed Protestantism and asked the broader question of the lawfulness of resisting a king who oppressed the people. The general rightfulness of self-defense was obvious: "natural law teaches us to preserve and protect our life and liberty—without which life is scarcely life at all—against all force and injustice. Nature implants this in dogs against wolves . . . the more so in man against himself, if he has become a wolf to himself. So he who disputes whether it is lawful to fight back seems to be fighting nature itself." *Id.* at 149, 172.

Among differences between good and evil rulers were their treatment of weapons and self-defense. A good prince ruled according to law. "He will punish a bandit with death, but should acquit someone who killed a bandit while repelling force with force." *Id.* at 105.

A tyrant used foreign armies to protect himself from his subjects. Then, "[h]e disarms the people, and expels it from fortifications." In contrast, a lawful king relied on the nation's armed people for defense. Thus, the Old Testament kings of Canaan were "truly tyrants" because "they forbade free passage and arms." *Id.* at 145, 160.

Looking at the Old Testament, *Vindiciae* argued that kingly rule was based on covenant with the people. *Id.* at 67-76. If the tyrant could not be otherwise expelled, it would be lawful for the magistrates "to call the people to arms, to conscript an army, and to move against him [the tyrant] with force. . . ." *Id.* at 156.

Finally, question four inquired whether neighboring kings could rescue the subjects of a tyrant. *Vindiciae* answered "yes." Brutus used Cicero (Section B.2.c) and the parable of the Good Samaritan to prove that failure to come to the aid of an innocent victim was contrary to natural law. *Id.* at 181-83; *Luke* 10:25-37.

Vindiciae won extremely wide influence—printed 12 times in Latin, and translated into English in 1581, 1648, and 1689 (the latter two being revolutionary years in England). Philip Benedict, Christ's Churches Purely Reformed: A Social History of Calvinism 147 (2002); Robert M. Kingdon, *Calvinism and Resistance Theory, 1550-1580, in* The Cambridge History of Political Thought 1450-1700, at 211 (J.H. Burns ed., 1996). The English government ordered the book burned in 1683. George Garnett, Vindiciae, at xvi (Acknowledgements).

While the early Protestant resistance writers had been mainly concerned with governments that violated religious laws, Huguenot writers (known as the Tractarians) broadened the purely religious focus to a more inclusive vision of just government. When the Dutch people rose against Spanish domination, and eventually won their independence, they drew inspiration from the Tractarians. Douglas F. Kelly, The Emergence of Liberty in the Modern World: The Influence of Calvin on Five Governments from the 16th Through 18th Centuries 47 (1992). The English who twice overthrew a dictatorial monarchy in the next century also looked to the Tractarians. *Id.* (For the English revolutions, see Chs. 2.H & 22.H.)

John Adams called *Vindiciae* one of the leading books by which England's and America's "present liberties have been established." 3 John Adams, A Defence of the Constitutions of the United States of America 210-11 (The Lawbook Exchange, 2001) (1797).[38] Adams also praised John Poynet, author in 1556 of *A Shorte Treatise of Politike Power, and of the true obedience which subjects owe to kynges and other civil governours*. According to Adams, Poynet set forth "all the essential principles of liberty, which were afterward dilated on by Sidney and Locke." *Id.* at 210.

Defeated, the Huguenots learned how to operate self-governing communities, strictly separating themselves from the French government and its church. Huguenots who committed serious crimes would not be turned over to the French authorities. The Huguenots thus learned practical lessons in the separation of church and state. Benedict, at 147-48.

At the same time, resistance theory became less popular. Like Jews in some other nations, the Huguenots realized that they were quite unpopular with most of the population, so their safety lay in strict adherence to all royal decrees—the better to encourage the monarchy to enforce the limited protections that the 1598 Edict of Nantes gave to Huguenots. *Id.* at 534-35.

Reliance on the monarch's good will, however, no longer worked when the ruler hated minorities just as much as the public did. As the Catholic counter-reformation gained strength, the new French king, Louis XIII, decided to reclaim some Huguenot areas for Catholicism. The Huguenots resisted, and were defeated. The 1629 Peace of Alais eliminated the military rights that had been granted to the Huguenots by the Edict of Nantes. *Id.* at 371.

In 1685, the Edict of Fontainebleau fully revoked the Edict of Nantes, and so Huguenots had no legal protection against unlimited persecution. The victims disarmed, the oppressions multiplied. "[T]he most atrocious—and effective—were the *dragonnades*, or billeting of dragoons [mounted soldiers] on Huguenot families with encouragement to behave as viciously as they wished. Notoriously rough and undisciplined, the enlisted troops of the dragoons spread carnage, beating and robbing the householders, raping the women, smashing and wrecking and leaving filth. . . ." Barbara W. Tuchman, The March of Folly: From Troy to Vietnam 21 (1984).

The billeting of soldiers, which had been introduced in 1681, would continue until the family converted to Catholicism. Benedict, at 372-74. The first use of billeting (or quartering) to force conversions to Catholicism may have taken place in parts of Germany during the 1620s. *Id.* at 379-80. In England, the Stuart kings of the seventeenth century used billeting against their political opponents—among the many abuses that eventually led to them being deposed Chs. 2.H & 22.H.

After the revocation of the Edict of Nantes, hundreds of thousands of Huguenots fled France, even though they had to be smuggled across the border. Some came to British North America. Paul Revere was among the many patriots of Huguenot ancestry. The American Founders were acutely aware of the torments to which the French Huguenots were subjected after they were disarmed. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87, 99-100 (1992). The Third Amendment to the U.S. Constitution forbids

38. *Defence of the Constitutions* is also reprinted in *The Works of John Adams*. The above quote is at 6 The Works of John Adams 3 (Charles Frances Adams ed., 1851).

the peacetime quartering of soldiers and allows wartime quartering only when according to law; it was likely influenced by the Huguenot experience and by similar abuses in England.

In the response to the revocation of the Edict of Nantes, the world's first international law professor, Samuel Pufendorf (online Ch. 18.C.4) wrote a famous book, *On the Nature and Qualification of Religion in Reference to Civil Society*. Arguing in favor of religious toleration, Pufendorf insisted that citizens had a duty to obey their religious conscience, and this duty could not be handed over to the government. According to Pufendorf, "as it is the greatest piece of Injustice to compel Subjects by force of Arms to any Religion, so these may justly defend their Religion by force of Arms, especially if they live under a Government where they have a Right belonging to them of Protecting their Liberties against any Invaders." Samuel Pufendorf, Of the Nature and Qualification of Religion in Reference to Civil Society 114, § 52 (Simone Zurbuchen ed., Jodocus Crull trans., Liberty Fund 2002) (1687).

NOTES & QUESTIONS

1. Does the history above help explain why the First, Second, and Third Amendments are next to each other?

2. The right of resistance is one thing, but the practical ability to exercise that right is another. The theory of resistance led by "intermediate magistrates" (e.g., the nobility, state governments) presumes at least a semi-open society, with mediating institutions around which resistance might rally. The theory does not work so well in efficiently totalitarian societies, such as today's People's Republic of China, where the government is able to suppress or control all the mediating institutions. Likewise, in Germany by 1935, the Nazi regime had taken control of most of civil society (except for, most notably, the Catholic Church), thereby preventing the rise of a resistance movement powerful enough to overthrow the dictatorship. *See* Stephen P. Halbrook, Gun Control in Nazi Occupied-France: Tyranny and Resistance (2018); *see also* Mark Riebling, Church of Spies: The Pope's Secret War Against Hitler (2016) (describing the Catholic Church's efforts to overthrow Hitler).

The existence of mediating institutions is related to the distribution of physical force. If only the government has arms, then resistance may be impossible. One article examines the divergence in political structure between the Muslim world and Christian Western Europe from the eighth century until 1500 A.D. As of the eighth century, there were many similarities. But under the feudal system as it developed in the West, financial necessity required kings to rely for fighting power on the feudal arrays raised by the nobles from their vassals. So military power was decentralized. In contrast, Muslim sultans used central standing armies of *mamluks*—that is, warrior-slaves. Accordingly, the sultans had much more of a practical monopoly on the use of force. The differing systems produced greater political stability in the West, where kings could maintain power as long as a consensus of nobles agreed. In contrast, the centralized sultanates were prone to palace coups by whomever had the military's favor. The decentralization of force in the West made it relatively easier to get rid of monarchs who were becoming too despotic. Thus, "Muslim societies' reliance on *mamluks*, rather than local elites, as the basis for military leadership, may explain why the Glorious Revolution occurred in England, not Egypt." Lisa

Blaydes & Eric Chaney, *The Feudal Revolution and Europe's Rise: Political Divergence in the Christian West and the Muslim World before 1500 CE*, 107 Am. Pol. Sci. Rev. 16, 16 (2013).

b. Jean Bodin

Perhaps no French political philosopher was more important to the development of absolutism than Jean Bodin (1530-1596). Bodin's major work was *Six Livres de la République* (Six Books of a Commonweal), published in 1576. France had just suffered five Catholic versus Huguenot civil wars in the last 15 years. Bodin's solution was to make the subjects' obedience to the king the central fact of life. One's duty to God was subordinate to one's duty to the king. The king, however, had no obligation to obey the laws he made. In Bodin's view, absolutist government necessitated the subjects' disarmament.

Jean Bodin

The Six Bookes of a Commonweal

542-43, 615 (Kenneth Douglas McRae ed., 1962) (1576)

[T]he most useful way to prevent sedition, is to take away the subjects arms. . . . For so *Aristotle*, speaking of the Barbarians, accounteth it for a strange thing, that a man should in a quiet and peaceable city wear a sword or a dagger in time of peace: which by our laws, as also by the manners and customs of the Germans and Englishmen is not only lawful; but by the law and decrees of the Swissers even necessarily commanded: the cause of an infinite number of murders, he which weareth a sword, a dagger, or a pistol, being more fierce and insolent to offer unto others injury, as also to commit murder if any injurie be offered him: whereas if he were disarmed, he should doe neither the one nor the other; neither should he incur the infamy and disgrace which followeth them, who when they are wronged, dare not to draw their weapons. The Turks herein go yet farther, not only in punishing with all severity the seditious and mutinous people, but also forbidding them to bear arme, yea even in time of war, expect it be when they are to give battle. . . .

Amongst many the laudable manners and customs of the policy of Paris, there is . . . a very good one . . . which is, That no car-man or porter shall wear a sword, dagger, knife, or any other offensive weapon. . . . For it is not the part of a wise politician, neither of a good governour, to expect until the murder be committed, or that the sedition be raised, before he forbid the bearing of arms, but as a good [physician] preventeth diseases: and if chance be that the parties be [suddenly] attainted with any violent grief, he first [assuages] the present pain, and that done applyeth convenient remedies unto the causes of the diseases. . . .

. . . It was an antient custom among the Romans towards those with those whom they had not joined in league, nor contracted friendship upon equal terms, never to govern them peaceably, until they had [yielded] up all, delivered hostages, disarmed them, and put garrisons in their towns. For we may not think ever to keep that people in subjection which hath always lived in liberty, if they not be disarmed. . . .

NOTES & QUESTIONS

1. Is it necessarily true that absolutist governments must disarm their subjects? Even if the regime is generally popular?

2. Why does Bodin link anti-government speech with the right to bear arms? For a pre-*Heller* analysis of the relationship between the First and Second Amendments, see L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997).

3. *Death penalty and Malaysia.* Bodin favored the death penalty for illegally carrying weapons. His proposal was later adopted in 1940, after France was conquered by Nazi Germany, and came under German military occupation. *See* Stephen P. Halbrook, Gun Control in Nazi Occupied-France: Tyranny and Resistance (2018). Malaysia adopted a similar law in 1975, when a revision of the Internal Security Act imposed the death penalty for unlicensed carrying or possession of firearms or ammunition. Frederic A. Mortiz, *Carrying a Gun in Malaysia Means Death Penalty*, Christian Sci. Mon., Mar. 31, 1980; Internal Security Act 1960, § 57 (as revised through Jan. 1, 2006). A person could avoid the death penalty by proving that he acquired the arms or ammunition lawfully, and that he never "acted in a manner prejudicial to public security or the maintenance of public order." *Id.* § 57(3).

Instead of seeking capital punishment, Malaysian prosecutors sometimes exercise discretion to charge offenders under the Firearms (Increased Penalties) Act, for which the maximum sentence is 14 years, plus whipping. Moritz; Firearms (Increased Penalties) Act 1971, art. 8 (2006). The 1971 Act does have a death penalty for arms trafficking, which is presumed to include any case of possession of more than two illegal guns. *Id.* art. 7. Discharge of a firearm during burglary, robbery, kidnapping, resisting arrest, or escape is a capital crime. *Id.* at art. 3(A). All participants in the above crimes are subject to the death penalty, even if only one of them fired a gun; a participant may avoid a capital sentence by proving that he took all reasonable steps to prevent the gun from being fired. *Id. See generally* Malaysia, Cornell Center on the Death Penalty Worldwide. Recently, Malaysia has been considering whether to reduce or eliminate its 32 capital crimes. *Malaysia Cabinet Agrees to Scrap Death Penalty*, The Straits Times (Singapore), Nov. 14, 2018.

The base Malaysia gun law is the Arms Act 1960. It prohibits possession of guns or ammunition without a license, and bans shotguns that can fire more than two cartridges without reloading, machine guns, and self-defense sprays. Rewards are provided to informers.

Would Malaysia-style laws help reduce crime? Reduce the dangers of overthrow of the government?

4. *Further reading*: The Cambridge History of Political Thought 1450-1700 (J.H. Burns ed., 1996); Quentin Skinner, The Foundations of Modern Political Thought, vol. 1, The Renaissance (2002) (1978); David Knowles, The Evolution of Medieval Thought (1962); Encyclopedia of Religion and War (Gabriel Palmer-Fernandez ed., 2004); online Ch. 18.C (self-defense, Just War, and Just Revolution views of the Classical founders of international law).

5. As this chapter shows, some ideas recur millennia apart and in very different places. Some of these ideas—such as the personal and community right of self-defense against criminals and criminal governments—have been described as part of Natural Law. That was the view of the classical founders of international

law. *See* Ch. 18.C. In this view, the Second Amendment, like some other provisions of the Bill of Rights, does not "grant" any new rights. Rather, it recognizes and protects "inalienable rights that pre-existed all government." *McDonald v. City of Chicago*, 561 U.S. 742, 842 (2010) (Thomas, J., concurring) (Ch. 11.B) (citing *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (Ch. 11.A)). In diverse times, places, and cultures, arms have also been associated with civic duty, responsible self-sufficiency, sportsmanship, and self-discipline. Conversely, in equally diverse settings, arms have been associated with criminal misuse, violence against legitimate authority, and refusal to submit to government.

This textbook covers arms and arms control in the United States and the United Kingdom and also examines many other societies past and present. Taking into account the full spectrum, what conclusions can you draw about how arms possession or arms deprivation have helped or hindered life, liberty, and the pursuit of happiness? If a new nation asked your advice on what its arms policies should be, what would you say? To give the best advice, what would you need to know about the nation's past and present?

Chapter 22

Arms Rights, Arms Duties, and Arms Control in the United Kingdom

This is online Chapter 22 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsregulation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, and case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *This chapter.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

This Chapter provides detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. In the printed textbook, Chapter 2 covers some of the same topics, but more briefly. Many sections in Chapter 2 provide brief summaries of matters that are more fully addressed in this online chapter. In particular, this Chapter provides much more detailed coverage of arms control under the Tudors, the political crisis caused by abuses of the Stuart monarchs, the British Civil Wars, the Restoration, Scotland, Ireland, and English history after the Glorious Revolution.

To Americans, Great Britain's history was their own history. The American Revolution began with Americans demanding respect for their "rights of Englishmen"—including the right to arms under the British constitution.

The right to arms was never the same in England and America. Like many Americans, Supreme Court Justice Joseph Story scorned the English right as more nominal than real. Even so, the history of the British Isles is the most important ancestor of the American right to arms, and it is relevant today. In the U.S. Supreme Court's leading decision on the Second Amendment, Justice Scalia's majority and Justice Stevens's dissent argue at length about English law. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A). In modern cases about the right to bear arms, the parties argue about the meaning of the 1328 Statute of Northampton and subsequent interpretation.

This Chapter describes the history of the right to arms in the British Isles from Anglo-Saxon times through the early twentieth century. Great Britain's legal history set a baseline that the Americans rejected in some respects and affirmed in others. As Justice John Marshall Harlan II wrote, American "liberty" includes "the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Ch. 9.B.1) (Harlan, J., dissenting). *See also Bridges v. California*, 314 U.S. 252, 264 n.7 (1941) ("At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy."); *United States v. Brewster*, 408 U.S. 501, 508 (1972) ("Even if a constitutional right's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system.").

All history, including legal history, studies continuity and change. This Chapter examines continuity and changes in arms rights and duties over the centuries in England, and then in America. Nothing in America is exactly like England in 900 A.D., but some things are surprisingly similar. Other things reflect a break from English tradition. Some of those breaks were immediate, and others gradual.

The development of firearms technology in the United Kingdom is briefly summarized in this Chapter and described in depth in online Chapter 23, which covers technological history from the sixteenth century through the twenty-first century. Arms control in the United Kingdom in the past 100 years is detailed in online Chapter 19.C.1.

Parts A through C of this Chapter survey the various purposes for which the English were required to possess and use arms. They describe how arms were integral to community defense. Part D is on the Magna Carta of 1215, which codified the right of forcible resistance to tyranny. Part E covers the Castle Doctrine and

the right to defend the home. Part F covers laws about arms carrying. Part G summarizes the reign of the Tudor monarchs and their efforts to limit handguns and crossbows. Part H presents the story of the despotic Stuart kings, whose efforts to create a government monopoly of force led to two revolutions—and how the second revolution led to formal legal recognition of a right to arms. To Americans, the story of repression and resistance was a vivid and instructive example. Part I examines changes in arms technology, and previews some of the developments in America that are addressed in Chapters 3 through 7. Part J covers Scotland and Ireland, the infamous London riots of 1780, and British arms laws through 1921. Part K is on the English ideology of armed resistance to tyranny, as it would be embraced by Americans.

For some quotes, we have modernized spelling. Other quotes we have left intact, because being able to read old materials is a legal skill. As the older quotes show, English spelling was unstandardized for many centuries.

Regarding the names of the nations, in the British Isles, there are two large islands, and many small ones. On the larger, eastern island, the southern and larger part is England. Wales is a relatively mountainous peninsula to the west of England. In 1282, England and Wales were politically united, and this union has never been undone. Precisely speaking, "Britain" is England plus Wales.

North of England is Scotland. "Great Britain" is Britain plus Scotland. "British" usually means all the people of the eastern island: English, Welsh, and Scottish. When Scotland and Britain were politically unified in 1707, the new entity was called the "United Kingdom."

The western island is Ireland. In 1167, the English invaded and took over an area around Dublin. More than four centuries later, the English achieved control of the whole island. In 1801, Ireland was brought into the "United Kingdom" of Great Britain and Ireland. Then in 1922, most of Ireland won a war of independence. Six counties in the northeast (Ulster) voted to remain part of the United Kingdom of Great Britain and Northern Ireland.

In the United States, people rarely recognize the difference between "English" and "British" (the latter term including Welsh and Scots). In the United Kingdom in the twenty-first century, there are now many people who, like Americans, make no distinction between the words "British" and "English."

Arms control laws were different for the four nations. The English disarmed the Welsh during the period when the Welsh were rebellious. The English did the same to the Scots who lived in the Highlands (the mountainous northwest). The Irish were generally rebellious, and so were legally disarmed by English statutes. Yet many Irish remained covertly armed.

Much of this Chapter is about kings, queens, and nobles, and about military uses of firearms. The arms-bearing practices of commoners are often inferred from what the aristocracy said or wrote about them. The focus is the necessary consequence of the fact that most surviving historical records, including legal records, were by and for the social elite.

In the course of examining the right to arms, this Chapter provides some general British legal and political history, which is always part of the background of the U.S. Constitution. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Guantanamo Bay detentions in light of the Habeas Corpus Act of 1679). The citations in this Chapter are broader than the typical textbook collection of cases, statutes, and law

review articles; they are starting points for readers to understand the different types of English legal history materials. Today's American law students are taught much less than most of their predecessors about understanding and applying historical English materials. In constitutional law, and sometimes in other fields, lawyers who know how to use English legal history have an advantage over those who do not.

A. *ANGLO-SAXONS, THE MILITIA, AND THE* POSSE COMITATUS

Two thousand years ago, the inhabitants of the British Isles were Celtic tribes related to the Gauls of France, the Irish, the Scots, and many other continental tribes.[1] Roman general Julius Caesar first invaded England in 55 B.C. Eventually, Roman rule encompassed all of Britain, up to Hadrian's Wall—approximately at the modern border between Britain and Scotland.[2]

Summarizing Roman and Greek descriptions of the early Britons, historian and political philosopher David Hume wrote:

> The Britons were divided into many small nations or tribes; and being a military people, whose sole property was their arms and their cattle, it was impossible, after they had acquired a relish of liberty, for their princes or chieftains to establish any despotic authority over them. Their governments, though monarchical, were free, as well as those of all the Celtic nations; and the common people seem even to have enjoyed more liberty among them, than among the nations of Gaul, from whom they were descended. Each state was divided into factions within itself. It was agitated with jealousy or animosity against the neighbouring states: And while the arts of peace were yet unknown, wars were the chief occupation, and formed the chief object of ambition, among the people.

David Hume, 1 History of England 5 (Liberty Fund 1983) (1778).[3]

The Western Roman Empire collapsed in the fifth century A.D., leaving Roman Britain to fend for itself against invasions from the northern tribes. Soon, waves of seaborne invaders arrived. Germanic tribes—Angles, Saxons, and Jutes—conquered Britain. England eventually became a heptarchy, with seven distinct kingdoms.

In the ninth century A.D., the Danes, a Viking people, threatened. The English lived in near-constant fear of Danish invasion and pillage. They were oppressed by Danes who had conquered parts of England and extorted massive tribute payments

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1. This Part includes material from on David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 671 (2015).

2. At times, Roman rule extended up to the Antonine Wall, well within Scotland.

3. Citing Diodorus Siculus, Bibliotheca historica, book 4 (c.a. 60 B.C.); Pomponius Mela, De situ orbis, book 3, ch. 6 (ca. 43 A.D.); Strabo, Geographica book 4 (23 A.D); Dion (or Dio) Cassius, Historia Romana, book 75 (211-233 A.D.); Julius Caesar, Commentarii de Bello Gallico, book 6 (52-51 B.C.); Tacitus, Agricola (ca. 98 A.D.).

known as the Danegeld. The divided English kingdoms sometimes defeated the Danes in battle, but generally they were outmatched.

King Alfred the Great ascended the throne of West Saxony during a war with the Danes in which his older brother was killed. In 878 A.D., the Danes triumphed completely. In the words of *The Anglo-Saxon Chronicle* (a historical work begun during that time), all the people of England were "subdued to their will;—ALL BUT ALFRED THE KING. He, with a little band, uneasily sought the woods and fastnesses of the moors." The Anglo-Saxon Chronicle 67 (James Ingram ed., James H. Ford trans., 2005).

Starting with a guerilla band hiding in the swamps, Alfred kept alive the principle of English sovereignty and led the English back from the brink of annihilation. Bookish and brilliant, Alfred was one of the greatest military strategists of his century. His growing army expelled the most recent Danish invaders. The Danish settlements in England were brought under Alfred's sovereignty, no longer able to plunder the English at will.

King Alfred recognized that another Danish invasion was inevitable, so he began building England's capacity for self-defense. Collective self-defense was founded on the principle that all freemen should be armed, trained, and ready to fight to defend their local and national communities. Alfred reformed and improved the English militia, consisting of all able-bodied men. In the 1939 case *United States v. Miller*, the U.S. Supreme Court explained that Alfred "first settled a national militia in this kingdom." The Second Amendment militia is a descendant of Alfred's militia. 307 U.S. 174, 179 (1939) (Ch. 8.D.7).

England's militia was based on the old Saxon tradition of the *fyrd*, in which every male aged 16 to 60 bore arms to defend the nation. Charles Hollister, Anglo-Saxon Military Institutions (1962). As people knew from the Bible, the ancient Hebrews had relied on militias during their two centuries as a tribal confederation, and later when they became a monarchy. The classical Roman Republic had been based on the militia. The Republic devolved into military dictatorship by Julius Caesar and his nephew Octavian partly because the Roman militia had been replaced by a standing army, which decided who would rule.[4]

King Alfred read as widely as he could about world history. Based on global learning, he reformed England's militia. Militias were organized by shires—what we now call "counties." In each shire, the militiamen were divided into two parts; only one part had to serve at a given time. The practical benefit was enormous. The men who were not serving in a particular campaign could work the farms, keep the economy functioning, and protect the women and children. Meanwhile, the men who were actively serving in the militia could campaign longer, knowing that the community was taking care of planting, cultivating, harvesting, and family defense. When the Danes tried invading again, they were routed.

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4. The English knew something about the Romans, but nearly nothing about the ancient Chinese, who also had militias. Confucian philosophers such as Mencius and Taoist scriptures such as the *Huainanzi* contrasted militias (which fight energetically on behalf of benevolent governments) with standing armies (which fight to oppress others). For more on these matters, see online Chapter 21.A; David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017) (discussing the Hebrews); David B. Kopel, *Self-Defense in Asian Religions*, 2 Liberty L. Rev. 79 (2007) (discussing China).

A second security reform of Alfred the Great was improving the office of sheriff. The oldest title in the Anglo-American system of government is "king" and the second oldest is "sheriff." William Alfred Morris, The Medieval English Sheriff 1 (1927). The word is a compound of "seyre" (meaning "shire") and "reve" (meaning "bailiff" or "guardian").

During the period of Danish oppression, the English had devolved into lawlessness and robbery. King Alfred fixed England's county boundaries with greater precision and used the counties to organize national and community self-defense. The sheriff was the pillar of this self-defense system and often the leader of the county militia. The sheriff exercised the authority to summon and command the armed body of the people. The armed populace would embody as the militia, the *posse comitatus*, the "hue and cry," and the "watch and ward." Each is discussed below.

According to medieval historian Frank Barlow, "[i]t is not unlikely that every freeman had the duty, and right, to bear arms" in Anglo-Saxon times. Frank Barlow, Edward the Confessor 172 (1970). When bearing (carrying) for collective defense, Englishmen most often would be under the sheriff's command. As the county leader of the armed people, "the reeve became the guarantor of the survival of the group." Thus, "[t]he people maintained law and order among themselves" because the king's central government was unable to do so. David R. Struckhoff, The American Sheriff 3-4 (1994).

A millennium later, Alfred was still revered by English and Americans of all political persuasions. He brought peace and security to England. He believed in freedom. Alfred "preserved the most sacred regard to the liberty of his people; and it is a memorable sentiment preserved in his will, that it was just the English should for ever remain as free as their own thoughts." Hume, 1 History of England at 79.

There is uncertainty about whether sheriffs were elected, appointed, or mixed during the Anglo-Saxon period. The American Founders thought that the sheriffs were elected, because Blackstone wrote that in Anglo-Saxon times, "sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves." 1 William Blackstone, Commentaries of the Laws of England *409 (1765-69).

After declaring independence, the American Continental Congress had to determine the public symbols of the new nation. On July 6, 1776, a committee discussed the design of the Great Seal of the United States. Thomas Jefferson urged that the reverse of the seal depict "Hengist and Horsa, the Saxon Chiefs, from whom We claim the Honour of being descended and whose Political Principles and Form of Government We have assumed." Letter from John Adams to Abigail Adams (Aug. 14, 1776), *in* 2 Adams Family Correspondence 96 (L.H. Butterfield ed., 1963). Hengist and Horsa were the (perhaps legendary) first Anglo-Saxon rulers in England, from the fifth century A.D.

The American Revolutionaries and their European intellectual ancestors believed that societies of liberty had existed in ancient times. They also believed that one purpose of politics was to recover lost liberty, especially to ensure that the government ruled under the law, rather than above the law. Americans idealized Anglo-Saxon England as a land of law and liberty. *See, e.g.*, Merrill D. Peterson,

Thomas Jefferson and the New Nation 57 (1970). The Americans who admired the free Anglo-Saxons were continuing a tradition of two millennia, dating back to the Roman historian Tacitus. Tacitus, De Origine et Situ Germanorum §§ 11-12 (ca. 98 A.D.) (commonly known as *Germania*) (describing decision-making by consent of the armed people).

Many English and Americans believed that the liberties of the Anglo-Saxons had been destroyed by the Norman Conquest in 1066. *See, e.g.*, Hume at 160-85, 194-98, 208, 226-27 ("[I]t would be difficult to find in all history a revolution more destructive, or attended with a more complete subjection of the antient inhabitants"), 437 (the majority of Anglo-Saxons were reduced "to a state of real slavery"); Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 76-77 (1985) (influence of "the Norman yoke" in American Revolution ideology).

Historians have questioned whether the Anglo-Saxons were really as free, or the Normans really as bad, as the American Founders and their English cousins thought. There is no doubt that the American view of Anglo-Saxon England has influenced American law—for example, the Confrontation Clause in the U.S. Bill of Rights. *See* Charles Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 6342-43, 6345, 6355 at n.80-107 (summarizing the common view of Americans and of English Whigs[5] about the imposition of "the Norman yoke" in 1066).

The office of sheriff, so important to the Anglo-Saxons, was at least as important to Americans. Thomas Jefferson wrote that "the office of sheriff" was "the most important of all the executive officers of the county." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 12 The Works of Thomas Jefferson 3, 6 (Paul Leicester Ford ed., 1905).

In the nineteenth century, the United States grew from a thin population on the Atlantic seaboard into a nation from sea to sea. In the near-constant process of forming new territories and states, Americans modeled the office of county sheriff on what they considered to be the best features of the Anglo-Saxon sheriff. Americans also included improvements from the centuries after the Norman Conquest, such as the requirement that the sheriff take an oath to uphold the law. As one historian observed in 1930, "in America today . . . the sheriff retains many of his Anglo-Saxon and Norman characteristics." Cyrus Harreld Karraker, The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and in the Chesapeake Colonies, 1607-1689, at 159 (1930). The same is true today: The fundamental structure of the American office of sheriff is nearly the same as in the nineteenth century, and very similar to the ninth century. Most important, it is elective.[6] Sheriff elections are among the many ways in which the American system of government aims to keep government use of force under the control of the people.

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5. The Whigs were the British political group in the seventeenth and eighteenth century who were the most ardent supporters of a popular form of government, civil liberties, and the rule of law; their opponents were more willing to let kings rule by personal will.

6. The exceptions are Alaska, which has no counties, and Rhode Island, Hawaii, and Connecticut.

Anglo-Saxon England was conquered by the Norman French in 1066. "The Norman yoke" was imposed. King William I ("the Conqueror") claimed ownership of every acre of land in England, so that all real property possession came from him directly, or from his tenants. Sheriffs were now appointed, not elected, although over time, some jurisdictions, such as London, obtained the right to elect their sheriffs; in some other counties, sheriff elections were allowed if the king was paid a fee.

In accordance with Roman law, Anglo-Saxon England had considered wild animals to be *ferae naturae*—belonging to no one—and thus anyone could hunt them on his own property. But William declared that besides owning all the land, he also owned the wildlife. No one could hunt—not even on one's own farm—unless authorized by the king. 4 Blackstone *410-19; Mark Hathaway, "Poaching," *in* Encyclopedia of Traditional British Rural Sports 213 (Tony Collins, John Martin, & Wray Vamplew eds., 2005). Hunting was thus reserved exclusively to the king, although the nobles thought that they, too, had the right. In America, where anyone could hunt, the hunting restrictions in Great Britain were often denounced as affronts to liberty.[7]

B. THE RESPONSIBILITY TO POSSESS ARMS

In 1181, King Henry II promulgated the Statute of Assize of Arms. It ordered the surrender of coats of mail and breastplates owned by Jews. Christian freemen, on the other hand, were *required* to acquire arms appropriate to their social rank—the higher one's rank, the more extensive and expensive the required arms. Although the Assize said nothing about the lowest classes, the Assize was prescriptive for the classes it covered; subjects had to own the specified quantities of particular arms, no more and no less. Statute of Assize of Arms, 27 Henry II, art. 3 (1181).[8]

The 1181 Assize of Arms was updated in 1285 by Edward I, in The Statute of Winchester. It, too, required arms ownership by all free men, on a sliding scale that demanded wealthier persons own more expensive arms and armor. Unlike the 1181 Assize, the statute only set the minimum requirements for arms possession; subjects could own whatever additional arms they could afford.[9] For centuries afterward, it was common for large landowners to have very large private arsenals.

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7. This textbook uses "hunting" in the American language sense: attempting to take wild game by use of a bow, firearm, etc. In Great Britain, the activity is called "shooting"; the word "hunting" refers to the riding on horseback to follow hounds that are chasing a fox or similar creature.

8. English statutes are cited according to the regnal year (e.g., "5" is the fifth year that the particular king was reigning), then the king's name (e.g., "Henry III"), and then the sequence of lawmaking that year (e.g., "ch. 25," "c. 25," or "art. 25" is the twenty-fifth statute enacted that particular regnal year). After that, the calendar year follows in parentheses. English statutes from 1235 to 1713 are authoritatively collected in the multivolume *Statutes of the Realm*, which is available in Hein Online. Following the British Civil War (Section H.2), Charles II became king in 1660. However, the numbers for his regnal years are calculated starting with 1649 as year 1, because that was the year his father, Charles I, was executed, and Charles II supposedly became the rightful king.

9. The Statute of Winchester was repealed as part of a statutory cleanup in 1624. 21 James I ch. 28, § 11 (1624).

Statute of Winchester

13 Edward I, chs. 4-6 (1285)

(5) It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize; namely that every man between fifteen years and sixty be assessed and sworn to arms according to the amount of his lands and, of his chattels; that is to say,

for fifteen pounds of land, and, forty marks worth of chattels, a hauberk [a mail shirt], a helmet of iron, a sword, a knife and a horse;

for ten pounds worth of land and, twenty marks worth of chattels, a haubergeon [a sleeveless hauberk], a helmet, a sword and a knife; for a hundred shillings[10] worth of land, a doublet [a padded defensive jacket], a helmet of iron, a sword and a knife;

for forty shillings worth of land and over, up to a hundred shillings worth, a sword, a bow, arrows and a knife;

and he who has less than forty shillings worth of land shall be sworn to keep gisarmes [a long pole with a two-sided blade], knives and other small weapons;

he who has less than twenty marks in chattels, swords, knives and other small weapons.

And all others who can do so shall have bows and arrows outside the forests and within them bows and bolts [i.e., crossbows and bolts for crossbows].

And that the view of arms be made twice a year. And in each hundred and liberty let two constables be chosen to make the view of arms and the aforesaid constables shall, when the justices assigned to this come to the district, present before them the defaults they have found in arms, in watch-keeping and in highways; and present also people who harbour strangers in upland vills for whom they are not willing to answer. And the justices assigned shall present again to the king in each parliament and the king will provide a remedy therefore. And from henceforth let sheriffs and bailiffs, whether bailiffs of liberties or not, whether of greater or less authority, who have a bailiwick or forester's office, in fee or otherwise, take good care to follow the cry with the district [the hue and cry, discussed below], and, according to their degree, keep horses and arms to do this with; and if there is any who does not do it, let the defaults be presented by the constables to the justices assigned, and then afterwards by them to the king as aforesaid.

C. THE RESPONSIBILITY TO BEAR ARMS: HUE AND CRY, WATCH AND WARD, AND THE POSSE COMITATUS

Under English law originating long before the Norman Conquest of 1066, all able-bodied men between 16 and 60 were obliged to join in the "hue and cry" (*hutesium et clamor*) to pursue fleeing criminals. Pursuing citizens were allowed to

10. [Before English currency was decimalized in 1966-71, 240 pence was equal to, and literally weighed, one pound. A shilling was worth 12 pence, or 1/20th of a pound. During the late medieval period, the "mark" was replaced by the pound.—Eds.]

use deadly force if necessary to prevent escape. *See* Frederick Pollock & Frederic W. Maitland, 2 The History of English Law Before the Time of Edward I 575-81 (1895); 4 Blackstone *290-91 (describing hue and cry as still in operation); Statute of Winchester, 13 Edward I, chs. 4-6 (1285) (formalizing hue and cry system).[11]

The responsibility to find and apprehend criminals was not limited to situations of hot pursuit. Counties (or shires) were divided into smaller units, and each unit was called a *hundred* (or *wapentake*). If a crime victim raised a hue and cry, and the hundred did not apprehend the criminal within a certain number of days, the victim could sue the hundred for compensation. The system continued into the early nineteenth century; victims would sometimes notify the community of the duty to find the criminal by publishing a notice in the newspaper. The legal cause of action against hundreds for nonapprehension was eliminated over the course of the nineteenth century, as England began to move toward creating professional police forces. *See* Philip Rawlings, *From Vigilance to Vigilante: The Rise and Fall of the Action Against the Hundred and the Reshaping of the Community's Role in Policing*, SSRN.com (2021); 7 & 8 Geo. IV ch. 31 (1827) (reducing circumstances in which the cause of action against the hundred was available).

Sheriffs (and later, other officials, such as constables or justices of the peace) had the duty to keep "watch and ward": to arrange town watches and patrols, and to require townsfolk to take turns on guard duty. Michael Dalton, Officium Vicecomitum: The Office and Authoritie of Sherif 6, 40 (Lawbook Exchange 2009) (1623) (sheriff's oath includes supervising the watch and ward, by reference to his oath specifically to uphold the Statute of Winchester); Morris, The Medieval English Sheriff at 150, 228-29, 278; William Lambarde, Eirenarcha 185, 341 (1581); Ferdinando Pulton, De Pace Regis & Regni 153a-153b (Lawbook Exchange 2007) (1609). "Ward" was the daytime activity, and "watch" the nighttime activity. Elizabeth C. Bartels, Volunteer Police in the United States 2 (2014). Starting in 1253, villages were required to provide at least some of the arms to the men serving on watch and ward. Michael Powicke, Military Obligation in Medieval England: A Study in Liberty and Duty 90 (1996) (also examining relationship between subjects' military obligations and subjects' rights to approve or reject entry into particular wars).

Another form of mandatory arms bearing was the *posse comitatus* (often translated as "power of the county"). From before King Alfred the Great, up to the United States today, the county sheriff has possessed the authority to summon the *posse comitatus* to assist him or her in enforcing the law. Nearly every able-bodied male is subject to posse duty. While militia duty usually had an upper age limit and exemptions for certain occupations, posse duty had few if any exceptions, and a much higher age limit, or no limit at all. Typically, posse members would bring their own arms, but service in the posse, and what arms would be used, was always subject to the sheriff's discretion. Posses could be employed for activities as mundane as helping to serve a writ when forcible resistance was reasonably expected. A much larger posse might be assembled to suppress a riot, or to hunt for a fugitive.

Like the office of sheriff, the *posse comitatus* has withered in modern England. In America, government revenues are greater than in the past, so sheriffs have more deputies, and are consequently less reliant on the unpaid services of the *posse*

11. For more on the hue and cry, watch and ward, and posse, see Kopel, *Posse Comitatus*.

comitatus. Still, the *posse comitatus* remains significant in some U.S. jurisdictions. For example, about a third of Colorado sheriffs use posses today. Usually, the county posses consist of up to several dozen volunteers who receive special training. Their duties range from security at county fairs to responding to hostage situations. In emergencies, such as Colorado's 2013 floods, a sheriff might designate other persons for posse duty to deter looting in isolated towns. Kopel, *Posse Comitatus*, at 808-21.

Occasionally, mass posses are needed. A posse helped recapture serial killer Ted Bundy when he escaped from the Pitkin County Courthouse in Aspen, Colorado, during a hearing recess in 1977. Another posse thwarted the escape of two criminals who murdered Hinsdale County, Colorado, Sheriff Roger Coursey during a crime spree in 1994. *Id.* at 812-15. The law of the American sheriffs and their *posse comitatus* is mostly the same as in the days of Alfred the Great, incorporating some refinements in subsequent centuries. Chapters 3 through 7 describe the *posse comitatus* in America, from colonial days through the nineteenth century.

England's medieval and early modern reliance on armed people for law enforcement and national defense was not unique. In the many German states, the legal duty to bear arms to keep the peace was stronger than in England, and so was recognition of the freeman's right to arms. Unlike England, Germany had no wealth-based restrictions on firearms or other weapons. (See Parts G and H for the economic discrimination in England.) By tradition, sword-carrying in Germany was ubiquitous, while carrying loaded guns was disfavored. To keep and bear arms for defense of family and community—and as a deterrent to abusive government—was the embodiment of patriotism.

The tradition ended sooner in Germany, France, and Spain than in England because of military necessity. As an island, Great Britain could rely on a relatively broad-based militia as the first line of land defense, even after improvements in the capabilities of standing, professional armies made militia-only defense too dangerous in most of continental Europe. America, remote from the European powers, enjoyed a similar advantage. B. Ann Tlusty, The Martial Ethic in Early Modern Germany: Civil Duty and the Right of Arms (2011). By the nineteenth century, German governments had redirected patriotism away from daily sword-carrying and into service in a standing army with standardized uniforms and equipment. "While martial identity in America remained linked to civil rights, in Germany it was channeled into a professional military experience." *Id.* at 276. Great Britain eventually developed along German lines, albeit more slowly. Because standing armies "endowed the king with power to enforce his will both in peace and in war, continental sovereigns soon began to dispense with their parliaments." Spain's parliaments "practically disappeared" and France's Estates General were not summoned from 1614 to 1789. J.F.C. Fuller, 2 A Military History of the Western World 76 (1954).

D. THE CODIFIED RIGHT TO RESIST TYRANNY: MAGNA CARTA

Henry II's son John was a terrible king, portrayed unflatteringly in the legends of Robin Hood. The abuses of Robin Hood's nemesis, the Sheriff of Nottingham, reflect the behavior of some of the appointed sheriffs of the time. King John's

harsh, abusive, and autocratic rule sparked a national revolt led by the barons (the top of the noble class). To retain his throne, John was forced to sign "the Great Charter" at Runnymeade on June 15, 1215.

Magna Carta drew on the Coronation Charter that King Henry I in 1100 had accepted as the condition for his being allowed to ascend the throne. Henry's charter had sworn to end the abuses of his predecessor, William Rufus (son of William the Conqueror). But Henry I and his successors often violated the Coronation Charter, eventually causing the revolution that resulted in Magna Carta.

The original sense of the word "revolution" was a return to original conditions. For example, when the Earth completes one revolution, the sun is in the same position in the sky as it was exactly one day previously. The Magna Carta revolution was similar, in that it meant to enforce the Coronation Charter and other long-established rights and customs, including laws that had come from the Anglo-Saxon King Edward the Confessor (reigned 1042-66).

Magna Carta's purpose is to protect life, liberty, and property against arbitrary seizure or control; to prevent interference in families; to require approval of taxes by the nobles (later by parliament, which originated as a council of nobles); and to provide for orderly, nonarbitrary enforcement and creation of law. Even the Magna Carta provisions that were technical revisions of feudalism advanced human rights—such as by negating the king's power to force baronial daughters to marry a husband picked by the king.

The Magna Carta principle is that the king and his government are under the law, not above it. Juries had existed before Magna Carta, but the "lawful judgement of his peers" provision in Magna Carta became the fountainhead of jury rights in Anglo-American law. The "law of the land" provisions were forerunners of the "due process of law" guarantees of the Fifth and Fourteenth Amendments. The barons were required to establish for all their tenants and vassals the same liberties that Magna Carta guaranteed to the barons.

During much of England's history, monarchs attempted to create armed forces independent of the control of the English people. Article 51 addressed King John's use of foreigners to subjugate the English: "As soon as peace is restored, we will banish from the kingdom all foreign born knights, crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the kingdom's hurt."

According to Articles 12 and 14, the king could not impose certain taxes without consent of a council. The tax rules drastically changed the course of English history, and therefore global history. So if the king needed money because he wanted to fight a war in France, Parliament could demand concessions on other issues, and the general tendency of the concessions was to constrict arbitrary royal power.

By depriving monarchs of the full power of the purse, Magna Carta, as well as subsequent laws in the same spirit, limited the monarch's power of the sword. On the European continent, where some kings could tax at will, the monarchs could spend freely to pay mercenaries and standing armies. The mercenaries and standing armies were used not only for foreign wars, but for domestic political control. Over the centuries, continental monarchs became more absolute in their power, but English monarchs not so much.

The final article of Magna Carta was the enforcement mechanism, which provided for a structured system for public use of force against a tyrannical king.

Magna Carta

1215[12]

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance for ever, we give and grant to them the underwritten security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault toward any one, or shall have broken any one of the articles of the peace or of this security, and the offense be notified to four barons of the foresaid five-and-twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us. And let whoever in the country desires it, swear to obey the orders of the said five-and-twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to every one who wishes to swear, and we shall never forbid any one to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty-five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect aforesaid. And if any one of the five-and-twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty-five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is intrusted to these twenty-five barons, if perchance these twenty-five are present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from any one, directly or indirectly, whereby any part of these concessions and

12. Like other English statutes of the time, Magna Carta was originally written in Latin. The above translation is from Project Gutenberg.

liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

Article 61 did not specifically mention arms, but it did imply that the barons and the people must have arms. Otherwise, it would be impossible for "the community of the whole land" and the barons to exercise their right to "distrain and distress us [the monarch] in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can."

Previously, King John had gotten himself out of self-inflicted trouble by purporting to give England to the pope, thus making the English king the pope's vassal. John sent Magna Carta to Pope Innocent III, who purported to annul Magna Carta on the grounds that it had been coerced, which it was. John made it clear that he had no intention of obeying Magna Carta, and so another rebellion ensued. John died in 1216, making his nine-year-old son Henry III the next king. The barons knew that they would have control of Henry until at least his age of majority. Henry immediately reissued Magna Carta and did so again when he became king in his own right at age 16.

The Henrican reissues, and subsequent reissues by Henry's successors, omitted Articles 12 and 14, on taxes, and Article 61, on forcible resistance. Perhaps the barons thought that since they were in control, they could run things the way they wanted without need for an express rule. In fact, Henry III did comply with both the letter and the spirit of the tax articles. When he wanted to raise taxes, he asked his Council for permission. The Council later became the Parliament, and the custom of asking for parliamentary consent became an iron-clad tradition that monarchs dared not violate. *See* Shepard Ashman Morgan, The History of Parliamentary Taxation in England (1911). That is not to say that the monarchs never tried to raise revenue via means that the monarchs claimed did not require consent. *See, e.g.*, Part H (Stuart monarchs in the seventeenth century).

As for Article 61, it had been a product of the First Barons' War (1215-17).[13] Half a century later, the barons' descendants launched the Second Barons' War (1264-67) after Henry III began trying to reassume some of the absolute powers of his Norman ancestors. Henry III prevailed in the war, but the barons were at least trying to enforce the principles of Article 61. Much later, King Charles II would be overthrown in 1642 for trying to assume dictatorial power, and the same would happen to his son James II in the Glorious Revolution of 1688, for the same reason. Legal reforms enacted after the Glorious Revolution would complete the work of Magna Carta, definitively placing the king under the rule of law, and guaranteeing the general public the right to arms, not only for personal self-defense, but for national self-defense against a tyrant. *See* Part H.

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13. The war lasted until 1217 because the moderate barons (who would control young Henry III), were revolting against John, whereas the more radical barons, mostly from the north, had taken the rebellion a step further, and allied with an invasion of England by the King of France. The moderates prevailed in the end.

Article 61 of Magna Carta was not unique. In Hungary in 1222, the nobles forced King Andrew II to promulgate a "Golden Bull," by which legal process was regularized and the government made subject to law. Taxation without consent was prohibited. A legislature (the Diet) was created. Abusive officials would forfeit their office. Like Magna Carta, the Golden Bull recognized the right to the use of force to enforce the great charter against future kings:

> We also ordain that if We or any of Our Successors shall at any time contravene the terms of this statute, the bishops and the higher and lower nobles of Our realm, one and all, both present and future, shall by virtue thereof have the uncontrolled right in perpetuity of resistance both by word and deed without thereby incurring any charge of treason.

In Castile, a kingdom comprising much of modern Spain, the Pact of 1282 recognized that towns had a right of revolution if the king violated the Pact. R. Altamira, *Magna Carta and Spanish Medieval Jurisprudence, in* Magna Carta Commemoration Essays (E.H. Malden ed., 1917). Aragon, Spain's other major kingdom, also acknowledged the right of nobles to depose a king who violated judicial procedures or other legal rights. *Id.* at 137; Geronimo Zurita, Anales de la Corona de Aragón 323 (1610).

The formula was famously summarized as "*si non, non*" ("if not, not"). That is, if the king obeyed the laws and respected the rights of the people, then the people owed him allegiance; and if not, not. Víctor Balaguer, Instituciones y Reyes de Aragón 128 (1969) (1890).

The above agreements took the form of contracts. As such, they reinforced the principle that the monarch's sovereignty was limited. Antonio Marongiu, *The Contractual Nature of Parliamentary Agreements* (1968), *in* Magna Charta and the Idea of Liberty 139-40 (J.C. Holt ed., 1972). While there is a philosophical notion of a "social contract," Magna Carta and its cousins were actual written contracts.[14] The contractual theory of government became important in Europe and America. It was a counterpoint to the claim that kings enjoyed unlimited power by divine right. In the American colonies, the contractual nature of government was an oft-repeated theme of political sermons. *See* Ch. 3.D.3. The Declaration of Independence (Ch. 4.B.5) would express the contractual theory.

NOTES & QUESTIONS

1. If a ruler agrees to conditions under which he may be forcibly and lawfully overthrown, has he made political conditions more stable or less stable?

2. Do you agree that Article 61 contains an implicit right to arms?

3. Are the Second Amendment and its state analogues modern versions of Article 61?

4. The 1215 Magna Carta had included provisions regarding the Royal Forests, a term for wooded and nonwooded land that covered about a third of

14. Technically, Magna Carta was a unilateral grant. In practice, it was a contract. The barons agreed not to immediately remove King John from the throne, in exchange for John agreeing to rule according to Magna Carta.

England. When Magna Carta was first reissued, the forest provisions were removed, expanded, and put into a separate Charter of the Forest. It allowed the population to make some economic use of forests and eliminated execution and amputation as penalties for killing the king's "venison." The Charter of the Forest was revered along with Magna Carta as a foundation of English liberty. Carta de Foresta, 1 Statutes of the Realm 20 (1800) (Latin); Richard Thomson, An Historical Essay on the Magna Charta of King John 329 (1829) (English translation); Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 Enviromental L. Rep. 10934 (Nov. 2017).

E. CASTLE DOCTRINE: SEMAYNE'S CASE

The adage that "a man's house is his castle" comes from a pair of English cases that affirmed the right of home defense. The first case, which has no name, reads in relevant part:

> If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace.[15] But a man's house is his castle and defense, and where he has a peculiar right to stay.

Y.B. Trin. 14 Henry 7 (1499), *reported in* Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) ("Anonymous." No case name).[16]

The second case is the famous *Semayne's Case*, 77 Eng. Rep. 194, 5 Coke Rep. 91a (K.B. 1604). When George Berisford died, he owed a debt to Peter Semayne. Berisford had lived in a house with Richard Gresham, as joint tenants. Upon Berisford's demise, the house passed fully to Gresham, by survivorship. Berisford had owned various goods and papers that he had kept at home; Gresham retained them. 77 Eng. Rep. at 194-95. Semayne secured a writ for the Sheriff of London to seize Berisford's goods to satisfy the debt. But when the Sheriff came to Gresham's home, Gresham shut the door, and would not let him in.

Semayne sued Gresham for frustrating the execution of the writ. *Id.* The King's Bench ruled against him: Gresham had a right to keep his doors locked, and

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15. [This common law and statutory remedy is discussed in Chapter 5.B.6. Essentially, it allows a troublemaker to be forced to post bond for good behavior. —Eds.]

16. The opinion was written in a combination of Latin, Law French, and English. The old cases were partially translated into English in the nineteenth-century English Reports, created at the order of Parliament. Much old English law is written in Law French. Law French was a result of the 1066 Norman Conquest, when French became the official language of English law. Even for centuries after English was restored as the official language for most government purposes, legal discourse included many French words. *See* J.H. Baker, Manual of Law French (2d ed. 1990).

to exclude anyone who did not knock, announce, and demonstrate lawful authority to enter. *Id.* at 199. As Edward Coke summarized the court's decision:

> That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favored in law; so that although a man kills another in his defence, or kills one *per infortun'*,[17] without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree . . . every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium.*[18]

Id. at 195.

Most of *Semayne's Case* detailed when and how sheriffs could enter homes. The foundational rule was this: "In all cases when the King is party, the sheriff may break the house, either to arrest or to do other execution upon the King's process, if otherwise he cannot enter. But he ought first to signify the cause of his coming, and to make request to open doors." *Id.* at 194.

That "a man's house is his castle" is in twenty-first century America the best-known language from any English case. The Castle Doctrine became a foundation of the Fourth Amendment. In 1761, Great Britain's Parliament authorized writs of assistance, which allowed the British army to conduct warrantless searches to crack down on the widespread import/export smuggling (for customs tax avoidance) taking place in New England.

James Otis was the Advocate-General (like an Attorney General) of Massachusetts. Rather than defend the legality of the writs of assistance, he resigned. He then became the attorney for plaintiffs challenging the writs. Otis's oral argument against the writs, which quoted Castle Doctrine, was widely reprinted, and became the most famous legal speech in colonial America:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

James Otis, Against Writs of Assistance (Feb. 24, 1761, argument before Superior Court of Massachusetts), *in* Charles Francis Adams, 2 The Works of John Adams 524

17. [*Per infortunium.* By misadventure.—Eds.]
18. ["To everyone his house is his surest refuge."—Eds.]

(1856) (Adams's notes recording Otis's speech). John Adams later recalled, "American independence was then and there born. Every man of an immense, crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance." 2 John Stetson Barry, The History of Massachusetts 266 (1856).

The speech's principles were enshrined in the Fourth Amendment. William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371, 371-72 (1980). Much later, the great progressive and future Supreme Court Justice Louis Brandeis would rely on Castle Doctrine in his seminal article arguing for judicial recognition of the right of privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 220 (1890) ("The common law has always recognized a man's house as his castle, impregnable . . . ").

Semayne's Case provided the standard American rule for the right to use deadly force against home invaders. For example, Francis Wharton's widely cited treatise on criminal law explained: "Where one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life. In this sense, and in this sense alone, are we to understand that maxim that, 'Every man's house is his castle.'" Francis Wharton, 1 A Treatise on Criminal Law § 633 (11th ed. 1912) (some internal quotation marks omitted).

The U.S. Supreme Court has invoked *Semayne's Case* repeatedly, recognizing its principle about repelling violent intruders, and examining the opinion closely to discern the meaning of the Fourth Amendment.[19]

Today, many states have passed laws to affirm the common law doctrine that a person who is violently attacked by a home invader has no duty to retreat before using deadly force. These laws are often called the "Castle Doctrine."

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19. There are 14 citations since the Warren Court, including four in the twenty-first century. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (cited for the point that "Security in property was a prominent concept in English law."); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("an unannounced entry may provoke violence in supposed self-defense by the surprised resident"); *Georgia v. Randolph*, 547 U.S. 103, 123 (2006) (Stevens, J., concurring); *United States v. Banks*, 540 U.S. 31, 41 (2003); *Wilson v. Layne*, 526 U.S. 603, 609-10 (1999); *id.* at 622 (Stevens, J., dissenting); *Minnesota v. Carter*, 525 U.S. 83, 95 (1998); *id.* at 99-100 (Kennedy, J., concurring) ("The axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."); *Wilson v. Arkansas*, 514 U.S. 927, 931, 932 n.2, 935-36 (1995) ("knock and announce" is a factor in determining Fourth Amendment reasonableness of a search; *Semayne* reaffirmed an ancient common law rule); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 488 n.3 (1986) (Stevens, J., concurring in part and concurring in the judgment); *Steagald v. United States*, 451 U.S. 204, 217-19 (1981); *id.* at 228-30 (Rehnquist, J., dissenting); *Payton v. New York*, 445 U.S. 573, 592-93, 596-97, 615 n.11 (1980) ("The zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty."); *Id.* at 604-05 (White, J., dissenting); *Ker v. State of Calif.*, 374 U.S. 23, 47, 54 n.8, 57 n.11 (1963) (Brennan, J., concurring in part); *Miller v. United States*, 357 U.S. 301, 308 (1958).

During the first century of the American Bill of Rights, nearly all cases that involved *Semayne*'s common law Castle Doctrine related to when and how sheriffs or other government officers could enter homes. *See When a House Is Not a Castle*, 6 Albany L.J. 379 (1872) (summarizing American doctrine). The right of armed home defense was uncontested in this period, except for slaves and for free people of color in some slave states. *See* Chs. 6-7. The few cases exploring the self-defense contours of Castle Doctrine held that it applied when felons invaded the home, and not to other situations, such as civil trespassers on land.[20]

NOTES & QUESTIONS

1. **CQ:** Castle Doctrine cases and other cases saying "a man's house is his castle" were cited in the U.S. Supreme Court decision holding that, absent special circumstances, a person may not be arrested in his home without a warrant. *Payton v. New York*, 445 U.S. 573, 597 (1980). The Court observed that "in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." Does special solicitude for the home still make sense today? Consider this point when you read *District of Columbia v. Heller*, 554 U.S. 570 (Ch. 11.A). Does *Heller* continue the tradition of the Castle Doctrine cases by upholding the right to own, carry, and use guns for self-defense (at minimum) in the home?

2. It has been argued that the Second, Third, and Fourth Amendments all have roots in the Castle Doctrine, as a cluster of home security protections. David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073 (2005); David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2 J. Firearms & Pub. Pol'y 165 (1989) (linking Second Amendment to Third Amendment protection against home intruders). *Cf.* Laurence H. Tribe, The Invisible Constitution 2, 156 (2008) (special regard for the sanctity of the home is part of the "invisible," unwritten understanding of the U.S. Constitution). The Fourth Amendment guards the home against irregular intrusions, or intrusions not supported by probable cause. The Second Amendment ensures that citizens will have the practical means to stop and deter home invasions. Is it fair to understand the Second, Third, and Fourth Amendments as collectively creating a zone of safety and protection in the home? Do any other constitutional provisions protect the home?

3. *Semayne's Case* appears in case reports by Sir Edward Coke (pronounced "cook"), the English Attorney General, Judge, and Member of Parliament who was

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20. *See, e.g.*, *Lee v. State*, 92 Ala. 15 (1891) (no-retreat rule applies in the home and curtilage); *Watkins v. States*, 89 Ala. 82 (1890); *Mitchell v. Commonwealth*, 10 Ky. L. Rptr. 910 (1889) (applies to cellar); *Wright v. Commonwealth*, 85 Ky. 123, 2 S.W. 904, 908 (1887) ("He was not required to flee from his dwelling, but had the right to stand his ground, and use all the force necessary . . . "); *State v. Patterson*, 45 Vt. 308 (1873); *Pierce v. Hicks*, 34 Ga. 259 (1866) (applies to a licensed tippling house, which was also part of defendant's home); *Curtis v. Hubbard*, 4 Hill 437, 439 (N.Y. 1824) ("For a man's house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence.").

much admired as a defender of civil liberty under law, and an opponent of monarchical absolutism. Coke's *Institutes of the Laws of England* was the preeminent English legal treatise prior to Blackstone. Coke wrote that "one is allowed to repel force with force" and "the laws permit the taking up of arms against armed persons." 1 Edward Coke, Institutes of the Laws of England 162a (Johnson & Warner eds., 1812) (1642).

Regarding *Semayne*'s statements about killings outside the home being felonious, a footnote added by a modern annotator of the 1907 Coke edition states: "This position is taken down much too broadly, there are many cases in which the killing another *se defendendo* [in self-defense] or *per infortunium* [an accidental killing while performing a lawful act], will not be considered by the law to be a felony, and it is doubted by Foster, J., whether in case of homicide *per infortunium* or *se defendendo*, a forfeiture of all the party's chattels was ever incurred." 2 Coke Rep. 574 (1907). Legal historians continue to argue about the scope of lawful self-defense outside the home in England during the medieval period and the sixteenth century. Does it make sense for the law to create separate rules for self-defense inside the home versus in public places? What about in one's yard or driveway?

4. In the last quarter-century, many states have enacted Castle Doctrine laws. Such laws eliminate any duty to retreat from an attacker in one's home, and allow deadly force in self-defense against violent felony attacks in the home even when lesser force might suffice. Some of the new laws also apply to special places such as one's automobile or place of business. Some laws apply everywhere. The "everywhere" laws are not Castle Doctrine in the original sense. Rather, they are applications of the American (not English) principle of "stand your ground." *See* Ch. 7.J.5. What are some of the reasons for or against treating self-defense in special private zones differently from self-defense in public places?

F. ARMS CARRYING

Two of the greatest historians of English law report that "before the end of Henry III's reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause." 2 Frederick Pollock & Frederic William Maitland, The History of English Law before the Time of Edward I, at 583 (2d ed. 1898). The authors cite a pair of ordinances issued by Henry III in 1233. The first states:

> The King to the Sheriff of Herefordshire. We order you that if any armed clan[21] is traveling around through your jurisdiction against the provision

21. [The Latin word is *gens*. Clan or tribe is the classical meaning of "gens." It probably means something like "gang" here. It can be used for animals in the sense of "swarm." The translation of both passages is by Prof. Robert G. Natelson. The reference to the provision "recently made at Gloucester" is unclear. The arms-related provisions in the Close Rolls for earlier times of Henry III's reign contain various arms mandates. 1 Calendar of the Close Roles, Henry III 395 (April 1230) (instruction to Sheriff of Worcester to raise armed men); *id.* at 398-99 (June 1230) (arms mandates); *id.* at 596 (July 1231) (instructions to Sheriff of Gloucestershire for raising armed men); 2 *id.* 60 (May 1232) (ordering all sheriffs to make sure that people are armed for the king's service). The Close Rolls are records issued by the Chancery in the name of the Crown. They are available at www.british-history.ac.uk. —Eds.]

> [of law] recently made at Gloucester by the common council of our baronage and demanded by all our realm for the purpose of preserving the peace and tranquility of our realm; and if you should have the power of arresting that clan; then you should ensure that the bodies of those people as well as their arms and household goods are arrested and taken into careful custody until you shall have informed us and we shall have commanded our will. If on the other hand, should you not have the power to arrest that clan, you should immediately raise the hue and cry regarding that armed clan and follow it from village to village until, by concourse of the country, they shall have been arrested, as aforesaid. And this, just as you love me [are fond of me; care for me], you should not fail to do with diligence. Witnessed by myself at Westminster, 31 July.

Calendar of Close Rolls, 2 Henry III (1231-1234), at 317 (1906) (July 1233).

The second is similar, directed to the sheriffs of Shropshire, Worcestershire, Gloucestershire, and Oxfordshire. "For if some armed clan shall have come into their village, then if they [the sheriffs] can they should arrest them with their horses and arms, and guard them safely until the king shall have ordered something else. And if they shall not have the power to arrest the clan in this way, then they should in no manner permit it to enter the village, but should hold it at bay so that it should not happen that the peace of the king is disturbed by their rebellion [disobedience; bad conduct] . . . " *Id.* at 328-39 (Oct. 1233).

Henry's son Edward I and grandson Edward II went further, with orders that sheriffs arrest anyone going armed without "the license of the King."[22]

The problem of armed gangs had become severe. In 1328, England's government was near collapse. The previous year, King Edward II had been deposed by an invasion led by his wife, Queen Isabella, a French princess. Isabella and her ally Roger Mortimer took over the government, which was nominally led by Edward III, the son of Edward II and Isabella. The monarchy's ability to enforce the law was virtually nonexistent. Anthony Verduyn, *The Politics of Law and Order during the Early Years of Edward III*, 108 Eng. Hist. Rev. 842 (1993).

The widespread problem was "the gentry . . . using armed force to defeat the course of justice." W.R. Jones, *Rex et ministri: English Local Government and the Crisis of 1341*, 13 J. Brit. Studs. 1, 19 (1973). Indeed, for decades there had been a problem of "magnates maintaining criminals." Verduyn, at 849. The House of "Commons' complaints about armed noblemen" were congenial to Queen Isabella and her consort Mortimer. Fearful of being overthrown, the Queen did not want armed men coming to Parliament or traveling armed to meet the Queen. *Id.* Isabella and Mortimer found it "politically necessary to check dissent against the increasingly unpopular regime." *Id.* at 856.

In 1330, Edward III seized power from his mother, and faced many of the same problems: "one of the most profound causes of disorder was the continued bond

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22. 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 1299); 5 Calendar of The Close Rolls, Edward I, 1302-1307, at 210 (June 1304); 1 Calendar of the Close Rolls, Edward II, 1307-1313, at 52 (Feb. 1308), 257 (Mar. 1310), 553 (Oct. 1312); 4 Calendar of the Close Rolls, Edward II, 1323-1327, at 560 (Apr. 1326).

of many noblemen with malefactors." As Edward III understood, "many offenders were stronger than royal officials, not only because they had the support of the nobility, but also because they were members of the gentry or could draw upon the local criminal fraternity." *Id.* at 860-61.

1. The Statute of Northampton

From the chaos arose the 1328 Statute of Northampton.

Statute of Northampton

2 Edward III ch. 3 (1328)[23]

Item, it is enacted, that no man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure. And that the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this act. And that the justices assigned, at their coming down into the country, shall have power to enquire how such officers and lords have exercised their offices in this case, and to punish them whom they find that have not done that which pertained to their office.

Much ink has been spilled over the Statute of Northampton, mostly by modern Americans who argue about what, if any, precedent, it sets for the American constitutional right to bear arms. Chapter 2.F was based on the assumption that the Statute covered the carrying of weapons. Although that assumption has been widely shared in modern scholarship, it may be misguided.

The statute forbade people to "go nor ride armed." According to a recent article, in the fourteenth century, "go armed," "going armed," or "being armed" referred to wearing body armor, such as chain mail or metal helmets. Laws about carrying weapons used terms such as "carry arms" or "bear arms." If a law that meant to restrict both wearing armor and carrying weapons, it mentioned both

23. The brackets in the text have been added by the translators of *Statutes of the Realm.*

activities separately. *See* Richard Gardiner, *The Meaning of "Going Armed" in the 1328 English Statute of Northampton*, SSRN.com (2021).

As discussed below, by the seventeenth century at least some Englishmen had forgotten the specific legal meaning of "go armed," so there were prosecutions under the Statute of Northampton for people who carried weapons. There is no known case of anyone being convicted for violating the statute who was carrying weapons peaceably. All the known cases require bad intent or terrorizing behavior as a necessary element of conviction.

To whom did the Statute of Northampton apply? Based on the text, the statute's primary concern was persons who could threaten the monarch or his ministers or thwart the operation of the courts.[24] While a middle-class person might be able to afford a leather jacket, metal body armor was affordable only to the upper class. Although aimed at predatory criminal members of the upper class, the Statute was written to apply to everyone: "no man great nor small, of what condition soever." One writer asserts that "aristocrats" were "the one group expressly exempted from the Statute of Northampton." Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11, 26 (2017). The statute's text indicates otherwise.

Where did the statute apply? The "no part elsewhere" language could be read to make the statute apply everywhere. For general language ("no part elsewhere") that follows a specific list, however, the standard interpretive rule is *noscitur a sociis* (it is known by its associates). For example, a statute that "a license is required to sell grapefruits, oranges, lemons, and other food" would be interpreted to apply to citrus fruits, but not to chickens.[25] Under *noscitur a sociis*, the Statute of Northampton would be read to ban going armed in markets, courts, and in places that are like markets and courts. *Noscitur a sociis* is reinforced by the rule against surplusage; if "no part elsewhere" were read literally, the enumeration of specific prohibited areas would be pointless.[26] Under standard statutory interpretation, the Statute of Northampton would be an early (and very overbroad) version of the "sensitive places" rule announced by the U.S. Supreme Court in *District of Columbia v. Heller*: there is a general right to bear arms, but not in "sensitive places such as schools and government buildings." *District of Columbia v. Heller*, 540 U.S. 571, 626 (2008) (Ch. 11.A). However, the Northampton cases do not seem to have paid much attention to where the activity was taking place. As discussed below, one case was in the king's presence, and the others, to the extent that information is available, were simply on streets or highways, or in one famous case, in a street and then in a church.

Three proclamations in 1337-38 by Edward III ordered enforcement of the Statute of Northampton in particular areas; there were complaints about

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24. *Cf.* Calendar of the Close Rolls, Edward III, 1337-39, at 104-05 (Feb. 20, 1337, Hatfield) (H.C. Maxwell-Lyte ed., 1900) (order to the Sheriff of Berks explaining that men had been plotting "to beat, wound and ill-treat jurors" and that the Sheriff should enforce the law that "no one, except the king's serjeants and ministers, shall go armed or ride with armed power before the justices at the said day and places, nor do anything against the peace.").

25. The formal rule appears to date from 1672. *See Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 110 (1805).

26. In Latin, the original rule against surplusage is: *verba cum effectu sunt accipienda*—words should be taken so as to have effect.

underenforcement of breaches of the peace. Each proclamation used the term of art "go armed" or "going armed," and two of them also mentioned "leading an armed force."[27] The orders appear to address Northampton's core concern: armored nobility leading criminal gangs.

The Statute of Northampton was not an upper limit on the restrictions that kings could impose. For example, royal edicts from Edward III and Richard II—both of whom had good cause to worry about being overthrown—forbade or sharply restricted arms carrying in London, the seat of government. The London restrictions, focused on the king's security, could be seen as in the Statute's spirit. Edward III instructed hostelers to tell their guests that the guests must leave their arms at the hostel or inn, and not carry them around London. The instruction assumes that carrying arms while traveling from town to town was an ordinary activity. It also may indicate that the typical English traveler did not know that there was a ban on arms carrying in London. Memorials of London and London Life 192 (Henry Thomas Riley ed. & trans., 1868) (1334; no carrying), 268-69 (1351; no carrying, but earls and barons may carry swords except in the presence of the king or the parliament meeting; mentioning Northampton), 272-73 (1353; instructions to hostelers). Richard II issued similar orders in 1381. *Id.* at 453-54 (repeating carry ban, exemption for peers of the realm, and hosteler instruction).

A nationally applicable statute, enacted in 1350, stated: "And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance, it is not the mind of the King nor his council, that in such case it shall be judged treason, but shall be judged Felony or Trespass, according to the Laws of the Land of old Times used. . . ." 5 Edw. 3 st. 5, ch. 2 (1350).

The statute did not purport to create a new crime. Rather, the statute declared that the offenses described were not treason (the highest crime), but rather lesser crimes. The "ride armed" language used the term of art for wearing body armor (like Northampton's "go nor ride armed"). The statute specified the punishment for common law crimes (e.g., kidnapping) with aggravated circumstances (concealed armor).

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27. See Membrane 8d, Aug. 21, 1337, 3 Calendar of the Patent Rolls Preserved in the Public Record Office: Edward III, A.D. 1334-38, at 512 (1895) (to the constable of the castle of Montgomery: "on complaints by men of his bailiwick that many breaches of the peace occur there and he does not remedy this, at which the king is much disturbed, to make proclamation in such places in his bailiwick as shall be expedient, and inhibit all persons from going or riding armed or otherwise disturbing the peace, and to imprison until further order those who disregard such inhibition."); Membrane 27d, Jun. 28, 1337, *id.* 510 ("proclamation in the king's name, at such places in the county of Northumberland as shall be required, that no one shall go armed or lead an armed force or do anything whereby the king's peace may be disturbed, and to arrest and imprison until further order any person found opposing them after such proclamation: made because of many complaints of breaches of the statute of Northampton"); Membrane 4d, May 4, 1338, 4 *id.* at 78 ("Mandate, pursuant to the statute of Northampton, to S. bishop of Ely, to cause any persons going armed, leading an armed force, or doing anything else whereby the king's peace may be broken in his liberties in the counties of Essex and Hertford, to be at once arrested and imprisoned.").

2. Developments in Laws About Bearing Arms

Edward III was succeeded in 1377 by Richard II. He had the potential to become a good king, but after he nearly lost his crown in the Peasants Revolt of 1381, he grew paranoid, arbitrary, and despotic. Some scholars believe that he was mentally ill. But just because he was paranoid didn't mean that he had no enemies. He was overthrown by Henry IV in 1399 and executed the next year.

In 1388, a statute prohibited servants and laborers to "bear any [Buckler], Sword, nor Dagger," except when accompanying their masters. 12 Richard II ch. 6 (1388).[28] Because the law applied to carrying weapons, it used the word "bear."

Near the end of Richard's reign, he issued an order that reiterated the Statute of Northampton, with some minor wording changes. He noted that "the said Statute is not holden" and insisted that it "shall be fully holden and kept, and duly executed." He added that no one "shall bear [Sallet] nor Skull of Iron, nor [of] other Armour." 20 Richard II ch. 1 (1396-97).[29]

Richard's restatement of Northampton introduced one novel feature: "Launcegayes shall be clear put out upon the pain contained in said Statute of Northampton." *Id.* A launcegay was a type of spear that was an "offensive weapon," typically used by a horseman. 2 Thomas Edlyne Tomlin, The Law-dictionary: Explaining the Rise, Progress and Present State of the British Law (1820) (unpaginated); George Cameron Stone, A Glossary of the Construction, Decoration and Use of Arms and Armor in All Countries and in All Times 410 (1999). Launcegays were exclusively owned by the wealthy, who would need a powerful and well-trained war horse to use one.

In the early 1500s, a statute of King Henry VII forbade armed groups in public places. 21 Henry VII 39.[30] His son, Henry VIII, forbade riding on a highway with a loaded gun or crossbow. There was an exemption for people who met the minimum income requirements for owning such arms. 33 Henry VIII ch. 6 (1541) (no person below the income threshold shall "carry or have, in his or their journey

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28. The bracketed "[Buckler]" is inserted in the official translation. A buckler is a type of small shield.

29. The bracketed "[Sallet]" is inserted in the official translation. A sallet is a type of a light helmet.

30. The statute does not appear in Statutes of the Realm, whose volume 2 ends in 1504 (the 19th year of Henry VII), and whose volume 3 begins in 1509 (the first year of Henry VIII). Nevertheless, it is cited in *Semayne's Case* (Part E) for the rule that a person may call together an armed group to defend his home, but not to protect him when he does to market.

A 1707 case involved whether several unarmed men who had disturbed a meeting for the election of a local official could be charged with riot. "The books are obscure in the definition of riots," observed the court. The court continued: "If a number of men assemble with arms, in terrorem populi, though no act is done, it is a riot. If three come out of an ale-house and go armed, it is a riot. Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence." *Queen v. Soley*, 88 Eng. Rep. 935, 936-37, 11 Modern 115, 116-17 (K.B. 1707).

going or riding in the King's highway or elsewhere, any Crossbow or Gun charged or furnished with powder, fire or touche for the same." *See* Part G. If the Statute of Northampton were generally recognized as a ban on carrying weapons, the above post-Northampton statutes would have been superfluous.

It was clear that an indictment or presentment for violation of the Statute of Northampton must specify that the arms carrying was *In quorandam de populo terror*— to the terror of the people. 3 Edward Coke, Institutes of the Laws of England 158 (1644). For example, as one case charged: four men "do frequently ride armed with sword and pistols, and do commit reskews and break the peace and threaten the people to do them bodily injury, to the great obstruction of law and justice and to the evill example of others to perpetrate the like." John Christopher Atkinson, 6 Quarter Session Records 23 (n.d.) (case of Oct. 4, 1659).[31] As the case indicates, by the seventeenth century, Northampton was at least sometimes interpreted to apply to carrying weapons, not only to wearing armor.

Did the rule mean that peaceable defensive carry was lawful? Or did it mean that the carrying of arms was inherently terrifying? We know that government-mandated arms carrying was very common, such as when keeping the daily watch and the nightly ward in towns (Part C), or when part of mandatory archery practice (Section G.1). The sight of everyday people carrying arms was, therefore, not terrifying in itself.

But based on context, it would sometimes be easy to discern that a particular arms carrier was not carrying as part of community service or practice. A person who walked into an inn or tavern to order a meal, while wearing a sword, was presumably not keeping watch and ward, and he obviously was not carrying for archery practice. Was that sight terrifying? What if the arms or armor were out of sight?

In a 1350 case, a knight named Thomas Figet wore armor, concealed underneath clothing, in the king's palace and in Westminster Hall, the home of Parliament. He said that he was wearing the armor because earlier in the week he had been attacked by another knight. The earliest surviving account of the case is from a 1584 treatise that stated: "a man will not go armed overtly, even though it be for his defense, but it seems that a man can go armed under his private coat of plate, underneath his coat etc., because this cannot cause any fear among people." Richard Crompton, L'office et Aucthoritie de Iustices de Peace 58 (1584).[32]

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31. The Courts of General Quarter Sessions of the Peace were held quarterly in the counties. The presiding judges were two justices of the peace from the county. Formally, they had general criminal jurisdiction, but rarely heard cases that were more than low-level felonies. 4 Blackstone *268.

32. A "coat of plate" was torso armor riveted within cloth or leather garments. The passage is written in Law French (the language of English courts and lawyers at the time) and translated by David B. Kopel. Later commentary on the case, from the seventeenth century, reported that Figet had been thrown in prison without trial. He petitioned for a writ of mainprise (similar to bail) and was denied. Based on the denial, the latter commentators wrote that there was no concealed carry exception. There is no doubt that unauthorized wearing of arms or armor in the presence of Edward III himself was the core of what Edward III's statute forbade.

In 1613, King James I acted against concealed carry of weapons. He proclaimed "the bearing of Weapons covertly, and specially of short Dagges [heavy handguns], and Pistol . . . had ever beene . . . straitly forbidden." He complained that the practice had "suddenly growen very common." Violators would be brought before the infamous Star Chamber. 1 Stuart Royal Proclamations: Royal Proclamations of King James I, 1603-1625, at 284-85 (James Francis Larkin & Paul L. Hughes eds., 1973) (proclamation of Jan. 16, 1613).

The first known contemporaneous case report discussing the Statute of Northampton was *Chune v. Piott*, 80 Eng. Rep. 1161, 2 Bulstrode 329 (K.B. 1615). Although the plaintiff's suit against a sheriff for false arrest did not involve the Statute of Northampton, one justice mentioned it in his opinion. According to the Ninth Circuit's 2021 *Young v. State of Hawaii*, *Chune* held that "The sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'" *Young v. State of Hawaii*, 992 F.3d 765, 790 (2021). Justice Croke's full sentence shows a very different meaning:

> Without all question, the sheriff hath power to commit, est custos, & conservator pacis [being custodian and conservator of the peace], if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.

Chune at 1162. Thus, if an arms-carrier broke the peace, the sheriff could arrest him even if the breach had not taken place in the sheriff's presence. Justice Houghton's seriatim opinion agreed that a sheriff may arrest someone, "upon suspition," for breaching the peace outside the sheriff's presence. *Id.* By omitting "in his presence," *Young* attempted to convert *Chune*'s actual rule (sheriffs can arrest even if they did not witness the peace breached) into a completely different rule (sheriffs can arrest when there is no breach). The established common law rule, and the usual rule today, is that law enforcement officials need not personally witness a crime to arrest its perpetrator.

Michael Dalton's 1618 manual for justices of the peace addressed the Statute of Northampton and Henry VIII's law on loaded guns (discussed in Part G), which allowed only the wealthy and certain other people to carry loaded handguns in certain locations. Justices of the Peace should arrest "all such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry any Dagges or Pistols charged: or that shall goe appareled with privie Coats or Doublets. . . . [Even] though those persons were so armed or weaponed for their defence; for they might have had the peace against other persons; and besides, it striketh a feare and terror into the Kings subjects." Michael Dalton, The Countrey Justice 129 (1618); *see also id.* at 30. Dalton's statement about carrying loaded handguns in certain locations was based on a statute from Henry VIII. The statements about going armed offensively and wearing concealed armor ("privie Coats or Doublets") came from the Statute of Northampton.

Dalton's 1622 revised manual was narrower. He deleted the language that defensive carry was not allowed. Instead, citing Richard Crompton's 1584 treatise, he wrote that if a group of people went to church wearing "privie" (concealed) armor "to the intent to defend themselves from some adversary, this seemeth not punishable" under the riot statutes, "for there is nothing openly done, *in terrorem populi*." Michael Dalton, The Countrey Justice 204 (Arno Pr. 1972) (1622) ("to the terror of the people"). Dalton reiterated the rules of the Henry VIII statute against carrying loaded handguns and the Richard II statute against servants or laborers carrying swords or daggers. *Id.* at 31.

A person could be required to post surety for good behavior ("surety of the peace") if he were wearing "weapons, more than usually he hath, or more than be meet for his degree." *Id.* at 169. Dalton's 1623 manual for sheriffs included the Statute of Northampton in his list of anti-riot statutes (which the 1622 justice of the peace manual had not). He described the Statute as applying to persons who "goe or ride armed offensively . . . in affray of the kings' people." Richard II's law about servants with daggers and swords was now said to also include "other weapons." Michael Dalton, Officium Vicecomitum: The Office and Authoritie of Sherif 14-15 (Lawbook Exchange 2009) (1623). An affray is "[t]he fighting of two or more persons in a public place to the terror of the people." Black's Law Dictionary (1891).

Edward Coke's very influential four-volume treatise, *Institutes of the Laws of England*, first published 1628-44, said that Thomas Figet [or Figett as Coke spelled it] had been imprisoned for wearing concealed armor in 1350, and that his petition for release had been denied. Coke listed the statute's express exceptions, such as *posse comitatus*. He added that there was also a common law exception for home defense. For the latter, Coke stated that it was even permissible for an armed assembly to defend a friend's house. 3 Coke, Institutes at 160-61. Necessarily, the friends who were coming to a man's house would have to carry their arms while they were on the way to the house.

Whatever the statutes said, the English carried arms. For example, in 1678-81, there were fears of a Catholic coup ("the Popish Plot"), and therefore many people went armed with a "Protestant flail"—a pair of leaded short clubs connected by leather straps. When folded, it was only nine inches long, and easy to carry concealed. H.W. Lewer, *The Flail*, 18 Essex Rev. 177, 184-85 (Oct. 1908). The leading case interpreting the Statute of Northampton, discussed next, acknowledged that arms carrying was common.

3. Sir John Knight's Case

The most famous case involving the carrying of arms was decided not long before the Glorious Revolution of 1688. As detailed in Section H.3, tensions had been rising because King James II (grandson of James I) was trying to disarm the entire English population, except for his political supporters. Sir John Knight was an Anglican and a fierce opponent of the Catholic James II. According to the

government's charges, Knight violated the Statute of Northampton because he allegedly "did walk about the streets armed with guns, and that he went into church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76, 3 Modern 117 (K.B. 1685). Knight was prosecuted, but acquitted by a jury.[33] Two different reporters wrote about the case.[34]

Knight's attorney had pointed to the core purpose of the Statute of Northampton: "Winnington, *pro defendente*. This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute." *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1686).

The Chief Justice of the King's Bench[35] stated that to "go armed to terrify the King's subjects" was "a great offence at the *common law*, as if the King were not able or willing to protect his subjects" and that "the Act is but an affirmance of that law." *Sir John Knight's Case*, 87 Eng. Rep. at 76.

The Chief Justice acknowledged that "this statute be almost gone in *desuetudinem*" for "now there be a general connivance to gentlemen to ride armed for their security." 90 Eng. Rep. at 330. *Desuetudinem* and its modern form, "desuetude," refer to a statute that has become obsolete from disuse. Black's Law Dictionary (1891); *Anderson v. Magistrates*, Mor. 1842, 1845 (Ct. Sess. 1749) ("[A] statute can be abrogated . . . by a contrary custom, inconsistent with the statute, consented to by the whole people; . . . When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute; and so much is implied in the very term desuetude.").

But, continued the court, "where the crime shall appear to be *malo animo* it will come within the act." 90 Eng. Rep. at 330. *Malo animo* is "With evil intent; with malice." Black's Law Dictionary.

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33. Although much smaller than London, Bristol was one of the half-dozen largest English cities at the time.

34. The reporter whose account is published in 90 Eng. Rep. (as opposed to 87 Eng. Rep.) divided the case into two parts. The first part, dealing with the meaning of the Statute of Northampton, is *Rex v. Sir John Knight*, 90 Eng. Rep. 330; Comberbach 38 (1686). The second part is the bond that Knight was required to post, even though he had been acquitted. *Rex v. Sir John Knight*, 90 Eng. Rep. 331, Comberbach 41 (1686). *Sir John Knight's Case* is also called *Rex v. Knight*.

At the time, English judges did not issue written opinions, but instead delivered their opinions orally from the bench. Entrepreneurial reporters attended the courts, wrote down what the judges said, and then collected their reports and sold them. Eventually, many of these reports were combined into the anthology known as "English Reports." Our citations first list the English Reports, and then the citation to the original reporter.

35. The King's Bench was the highest criminal court, other than the House of Lords. It had jurisdiction over all criminal cases, and the most serious cases were usually brought there.

After Knight was acquitted, the Attorney General moved that Knight be required to post a bond for good behavior, and the King's Bench upheld the bond. *Rex v. Sir John Knight*, 90 Eng. Rep. 331, Comberbach 41 (1686).[36]

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36. One scholar previously argued that Knight was acquitted because he was acting in government service, an express exemption to the Statute of Northampton. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373 (2016); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1 (2012). The interpretation is contrary to the case reports. According to the reports, Knight's legal argument was that Knight was engaged in "a private matter"—the opposite of being in government service. After acquittal, Knight was still forced to post bond for good behavior—an unlikely outcome for a government agent lawfully acting within the scope of his duty. Commendably, Charles withdrew that claim, based on further research. *See* Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party at 23 n.10, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 2173982 (" . . . Knight was prosecuted under the Statute of Northampton for a later, separate instance in which government officials were not present.").

In *Peruta v. County of San Diego*, a 7-5 en banc majority of the U.S. Court of Appeals for the Ninth Circuit apparently relied on Charles later-disclaimed theory to interpret *Sir John Knight's Case*. 842 F.3d 919, 931 (9th Cir. 2016) (Ch. 14.A) (en banc).

The government-service theory is contradicted not only by the case reports, but also by contemporary political journals. The most detailed of these is the private political journal of Roger Morrice, a Puritan minister who lived in London, and who collected information from many sources and recorded it in his *Entring Book*. 1-7 Roger Morrice, The Entring Book of Roger Morrice 1677-1691 (Mark Goldie et al eds., 2007) [hereinafter *Entring Book*].

Sir John Knight (died 1718) was the younger cousin of a man of the same name (died 1679). Both Sir John Knights loved to use the law to persecute non-Anglicans. Jason McElligott, *Biographical Dictionary*, *in* 6 *id.* at 121-22. On May 3, 1686, Morrice wrote about an event in April: Knight did "in Bristol disturbe and imprison a Popish Coventicle that was at mass." However, "they were suddenly after sent at liberty." 3 *id.* at 113. Under the 1670 Coventical Act, non-Anglican religious assemblies of five or more people were illegal. Mark Goldie, *Glossary and Chronology*, *in* 6 *id.* at 252. In 1672, the Act had been partially relaxed for Protestant Dissenters, but not Catholics. *Id* at 279.

On May 22, Morrice wrote that the "priest (Mac Don, I thinke) . . . was brought up hither on Habeas Corpus and was discharged upon Monday last" [May 17]. The priest was discharged because the Attorney General told the court, "I have nothing against him." Sir John Knight "has already been once kickt or beaten in the streets since then." 3 *id.* at 126.

Then on June 5, Morrice recorded that Knight, the Mayor of Bristol, and the Aldermen who had helped Knight arrest the priest had been "Committed" and would have "to appeare before the Counsell table at Hampton Court [a royal palace in outer London] this day." In support of Knight and the others, there was an affidavit swearing that the priest when in Ireland had spoken against the government of England. *Id.* at 134.

In the June 5 hearing, the Mayor and Alderman had pleaded ignorance of the law and had been discharged. For Knight, however, a criminal information (similar to an indictment but issued by the Attorney General, not a grand jury), was issued for his prosecution. The Chief Justice set a high bail, saying that Knight was the type of man to lead a rebellion. *Id.* at 136 (entry of June 12). On June 12, Knight appeared pursuant to the information. The case did not involve Knight's breaking up the secret Catholic mass. Rather, as the case report indicates, Knight was prosecuted for bringing a gun when he attended worship in his own faith at the Church of England services at "St. Michael, in Bristol." Catholic churches were illegal at the time. Unlike St. Michael, in Bristol, they could not exist as public buildings.

4. The Right to Carry Arms After 1686

Even after *Knight's Case*, arms bearing for peaceable purposes was not universally lawful. A 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland. 7 William III ch. 5 (1695). The anti-Irish statute was compliant with the English Bill of Rights (Section H.4), which had recognized an arms right only for Protestants. A legal manual for constables said that constables should search for arms possessed by persons who are "dangerous" or "papists." Robert Gardiner, The Compleat Constable 18 (3d ed. 1708).

As Morrice summarized, the information claimed that Knight was seditious, and that he "had caused Musketts or Armes to be carried before him in the Streets, and into the Church to publick service to the terrour of his Majesties Liege people." Knight pleaded not guilty. According to Knight, there had already been two assassination attempts against him in Bristol. It was pointed out that when Mac Don had been set free under habeas corpus, he had been required to post bond for good behavior. Knight complained to the court that the Attorney General would not receive any information from Knight that Mac Don had assaulted Knight in the streets. The court and the Attorney General told Knight not to tell the Attorney General what to do. *Id.* at 141-43.

Knight's trial took place on Nov. 23. It was clear that Knight had made many enemies by "suppressing Protestant Coventicles" (religious assemblies by dissenting, non-Anglican Protestants). According to the testimony, "soone after" the priest was released under habeas corpus, "two Irish men" lurked around Knight's house for days, found him near the Bristol town hall (the "talbooth") and "did fall upon" him. They probably would have killed him if bystanders had not come to his aid. According to a poor woman who testified, the two Irish men later demanded that she reveal Knight's location, and when she did not, they beat her. The news got back to Sir John Knight.

"[T]hereupon," he "retired to a house in the Countrey very neare the Town." When he came into town, he rode with a sword and gun, but left them at the edge of town. He "did one Lords day go to a Church in Bristol with his Sword and Gun when the two Irishmen were thought to looke for him, and left his gun in the Church Porch with his man, to stand upon the Watch &c." During the proceedings, Knight's loyalty to the (Catholic) King James II was questioned, and Knight insisted that he was loyal. *Id.* at 307-08 (entry of Nov. 27).

With the above evidence, "It seemed to be doubted by the Court whether this came within the equity and true meaning of the Statute of Northampton. . . ." The Chief Justice "seemed not be seveare upon Sir John," and Morrice was unsure whether the leniency was "because the matter would not beare it, Or for any reason of State or Composition. . . ." The Chief Justice "fell foule upon the Attorney Generall," and said "if there be any blinde side of the Kings business you will always lay your finger upon it." The jury acquitted Knight. *Id.* at 308.

Another political diary similarly reports Knight "being tried by a jury of his own city, that knew him well, he was acquitted, not thinking he did it with any ill design." 1 Narcissus Luttrell, A Brief Historical Relation of State Affairs from September 1678 to April 1714, at 389 (1857). All the details from the diaries are consistent with the case report that arms carrying was illegal only when *in malo animo*.

Knight appeared before the King's bench again on November 27. His bail for appearing for trial was lifted, but his surety for good behavior would be held until the end of the next term of court. 3 *Entring Book* at 311 (entry of Dec. 4, 1686). The Attorney General's bill for prosecuting Knight was "very high . . . and counted the higher because it had such ill success." *Id.* at 312. It took another court appearance, on Jan. 24, 1687, for Knight to get his bail money back. The court called Knight "a very dangerous man," and said that he had

Further, the right to carry was only for individuals, and not groups. "Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence." *Queen v. Soley*, 88 Eng. Rep. 935, 937 (1707).

For peaceable individuals not subject to special disabilities (e.g., being Irish Catholic), the general rules were stated with the most detail and precision in William Hawkins's *A Treatise on the Pleas of the Crown*. He explained the application of the common law offense of affray, and the influence of the Statute of Northampton. An "affray" was "a publick Offense, to the Terror of the People." So an assault perpetrated in private would not be an affray. Mere words could not be an affray.

> Sect. 4. But granting that no bare Word, in the Judgement of Law, carry in them so much terror as to amount to an Affray; yet it seems certain, that in some Cases there may be an Affray where there is no actual violence; as where a Man arms himself with dangerous and unusual Weapons, in such a manner as will naturally cause a Terror to the People, which is said to have always been an Offence at Common Law, and is strictly prohibited by many Statutes: [quoting the Statute of Northampton (Section F.1), and then citing re-issuance by Richard II (Section F.2)].
>
> Sects. 5-7: [Enforcement procedures for Justice of the Peace, Sheriffs, and others.]
>
> Sect. 8. That a Man cannot excuse the wearing of such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle.
>
> Sect. 9. That no Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, that Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons,[37] or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such occasions, in

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encouraged grand juries in Bristol not to indict for murder. But in light of the acquittal, the bail bond was released. *Id.* at 349 (entry of Jan. 29, 1687). The threats against Knight apparently continued. In November 1689, Knight asked to be excused from Parliament early, because of peril to his life. According to Knight, three members of Parliament had made threats against him. Another member had recently "thrust himself into" Knight's coach that was leaving Parliament in the evening, and accompanied Knight home, because he said Knight's life was in danger. 5 *Entring Book* at 234-35.

In sum, Knight's defense at trial was that he was acting in self-defense. He affirmed his loyalty to the king but did not claim that his gun toting was on behalf of the king.

37. ["Persons of Quality" was a common term for the upper classes. Hawkins's cautious language was appropriate because, separate from the Statute of Northampton (Section F.1), there was a prohibition against servants and laborers carrying swords and daggers, except when in service of their masters. 12 Richard II ch. 6 (1388). So it was possibly illegal for lower class people to carry these particular common arms.—Eds.]

> which it is the common Fashion to make use of them, without causing the least Suspicion to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy [concealed] Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing *in terrorem populi*.

William Hawkins, 1 A Treatise of the Pleas of the Crown 136-37, ch. 63 (1724). In short, carrying "dangerous and unusual weapons" in public was illegal because "such Armour" was inherently terrifying, even if done with defensive intent. Imagine a person today carrying a flamethrower. Carrying "common weapons" was an offense only when done in a manner "apt to terrify." As support for section 9—that peaceably carrying ordinary arms is lawful—Hawkins cited one of the reports on *Knight's Case*, 3 Modern 117 (K.B. 1685).[38]

The U.S. Supreme Court, in *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (Ch. 11.A), would later turn the rule against carrying "dangerous and unusual" weapons into a general rule allowing for prohibition of such arms.

Four decades after Hawkins, Blackstone treated the topic more tersely:

> The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 Blackstone *148-49. Blackstone's reference to the ancient Athenian laws seems to reflect the original meaning of the Statute of Northampton, as a restriction on wearing armor. The Athens sentence cites John Potter, The Antiquities of Greece (1697), which cites Xenophon, Hellenica, book 1, which says nothing about wearing armor or carrying arms.

Consistent with Hawkins's detailed treatment of the subject, case law held that peaceable carry was lawful. *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820) ("A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . .") (discussing constitutionality of a temporary law against arms possession by rebels in several counties, detailed in Section J.4).

The Statute of Northampton appears in, perhaps, one known case from the eighteenth century and none from the nineteenth.[39] It reappeared for a pair of

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38. Hawkins was first published in 1716, and went through eight editions, the last in 1824.

39. In a 1751 case, the defendant was convicted of "going Armed with a Cutlass Contrary to the Statute," although the case report does not say which "Statute." The defendant was also convicted of "making an Assault upon one John Jew," so the cutlass carrying was plainly *in malo animo*. *Rex v. Mullins* (1st conviction in Court of Oyer & Terminer, Middlesex, 1751; second in Quarter Sessions, Middlesex, 1751), *in* Middlesex Sessions: Sessions Papers—Justices Working Documents.

prosecutions in the early twentieth century. In a 1903 case a man got drunk, argued with his brother, and then fired a shot into his brother's house; the prosecution could not identify any other offense, so he was charged with violating the Statute of Northampton. The judge instructed the jury that "the offense charged against the prisoner" was "under the Statute of Edward III, but also under the common law, by which he was liable to punishment for making himself a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorized." The public should "know that people could not fire revolvers in the public streets with impunity." *Rex v. Meade*, 19 L. Times Rep. 540, 541 (1903); Stephen P. Halbrook, The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class? 107-09 (2021). In a 1914 case, the defendant shot at a victim and tried to provoke a fight. The conviction of violating Northampton was reversed because the indictment had omitted "two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*." *Rex v. Smith*, 2 Ir. Rep. 190, 204 (K.B. 1914). The second element would be superfluous if merely carrying a revolver was inherently terrifying.

The Court of Criminal Appeals in 1957 relied on Hawkins and his elucidation of the Statute of Northampton to define "affray":

> Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray, while the carrying in public of a studded mace or battle axe might be, so, if two lads indulge in a fight with fists, no one would dignify that as an affray, whereas, if they used broken bottles or knuckle dusters and drew blood, a jury might well find it was, as a passer-by might be upset and frightened by such conduct.

Regina. v. Sharp, 41 Cr. App. R. 86, 91-92 (1957).

The Statute of Northampton was repealed in 1967. Criminal Law Act 1967, Schedule 3, Part I—Repeals of Obsolete or Unnecessary Enactments ("2 Edw. 3. c.3. The Statute of Northampton. The whole Chapter."). A few years later, in 1973, the Law Lords of Appeal in Ordinary ("Law Lords," the highest court, later reconstituted as the "Supreme Court"), had to decide "whether there was a common law offence of affray consisting in the brandishing of unusual weapons to the terror of the public and, if there was, whether this had survived the repeal of the Statute of Northampton." The court said there was such a common law offense for "the brandishing of a fearful weapon." There could be no offense—under the common law or the Statute of Northampton—without "the element of terror." "From the very earliest days the offence of affray has required this element, and all the early textbooks stress the derivation of the word from the French 'effrayer,' to put in terror." In the Lord Chancellor's opinion for the court, "The violence must be such as to be calculated to terrify (that is, might reasonably be expected to terrify), not simply such as might terrify, a person of the requisite degree of firmness." *Taylor v. Director of Public Prosecutions*, 57 Cr. App. R. 915 (Lords 1973).

The most recent analysis of the Statute of Northampton by the United Kingdom's highest court came in a 2001 case about an East London gang that was carrying petrol bombs—glass bottles filled with gasoline—for use as improvised

explosive grenades.[40] The Law Lords quoted Hawkins's description of the Statute of Northampton to support the holding that "the carrying of dangerous weapons such as petrol bombs by a group of persons can constitute a threat of violence." On the other hand, "mere possession of a weapon, without threatening circumstances . . . is not enough to constitute a threat of unlawful violence. So, for example, the mere carrying of a concealed weapon could not itself be such a threat." Nobody except the police had seen the gangsters carrying the petrol bombs, so there was no affray. An affrayer, the court said, "uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness." *I v. Director of Public Prosecutions*, 2 Cr. App. R. 14, 216 (Lords 2001).[41]

From the first reported case on the Statute of Northampton, in 1615, through the latest in 2001, courts of the United Kingdom have interpreted the Statute of Northampton and its common law foundation consistently: peaceable carry of ordinary arms is lawful.

Legislatures may override the common law, and Parliament did so in the twentieth century by enacting licensing laws that greatly restricted arms carrying. Section J.4; online Ch. 19.C.1.

5. American Application of English Law on Carrying

William Hawkins's *Treatise of the Pleas of the Crown* was a leading criminal law treatise of the eighteenth century, and widely used in America.[42] It affirmed the lawfulness of peaceable carry of common arms, citing *Knight's Case* for the principle. Section F.4. In America, Hawkins's statement about lawful carry was cited by Justice of the Peace manuals.[43]

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40. In the United States, these improvised explosive devices are known as Molotov cocktails, after Finns used them to resist a Soviet Union invasion in 1939-40. The Soviet Foreign Minister was Vyacheslav Molotov.

41. The court's decision fits with the traditional definition of affray. There was no affray because there was no fighting, because there was no verbal threat, and because nobody in the public was terrorized because nobody in the public was present. The gangsters might have been subject to arrest for violation of arms control statutes that applied to possessing or carrying petrol bombs, but not for affray.

42. A survey of 21 colonial law libraries found Hawkins in 11. It tied with Matthew Hale's book as the most common English criminal law treatise in America. Owners included Thomas Jefferson, John Adams, Francis Dana (Mass. Chief Justice, Congressman, Continental Congress delegate, signer of Articles of Confederation), Robert Treat Paine (Mass. Justice, Declaration of Independence signer), Jasper Yeates (Penn. Justice, delegate to Penn. ratifying convention), and Theophilus Parsons (Mass. Chief Justice). Herbert Johnson, Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799, at 29-30, 62 (1978).

43. William Waller Hening, The New Virginia Justice 17-18 (1795); James Parker, Conductor Generalis; Or the Office, Duty and Authority of Justices of the Peace 11 (1st Ed. 1764). Parker was one of the three colonial law books written by an American. W. Hamilton Bryson, *Law Books in the Libraries of Colonial Virginians*, *in* "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia 27, 32 (Warren M. Billings & Brent Tarter eds., 2017). Hening "replaced English texts" with "homegrown . . . republican law." R. Neil Hening, *A Handbook for All: William Walter Hening's* The New Virginia Justice, in *Id.* 179, 190.

The right to bear arms being universally recognized in America, early nineteenth-century criminal justice officer manuals did not contain instructions to arrest people for peaceably carrying common arms. *See* Isaac Goodwin, New England Sheriff (1830); Charles Hartshorn, New England Sheriff (1844); John Niles, The Connecticut Civil Officer (1823); John Latrobe, The Justices' Practice Under the Laws of Maryland (1826); Henry Potter, The Office and Duty of a Justice of the Peace . . . According to the Laws of North Carolina 39, 291-92 (1816) (no going armed with dangerous and unusual weapons to terrify the people; no hunting by slaves in the woods, except with a certificate bonded by the master and issued by the county).

The sensational 1686 political trial *Sir John Knight's Case* had been reported by two independent reporters. 3 Modern 117 (K.B. 1686) (rereported in the nineteenth century in 87 Eng. Rep. 75); and Comberbach 38 (1686) (90 Eng. Rep. 330). Comberbach followed up with a report about Sir Knight having to post bond for good behavior. Comberbach 41, 90 Eng. Rep. 331 (1686). George Wythe, America's first law professor, owned the complete Modern Law Reports series, including the well-regarded volume 3, with *Knight's Case*. *See Modern Reports*, William & Mary Law Library. Wythe also owned the one volume of reports by Roger Comberbach.[44]

A signer of the Declaration of Independence, Professor Wythe served in the Continental Congress and the Philadelphia Convention. Among his apprentices and students were Chief Justice John Marshall, Justice Bushrod Washington, President Thomas Jefferson, President James Monroe, and St. George Tucker (author of the preeminent constitutional law treatise of the Early Republic, *see Heller*, at 594; Ch. 5.F.2.a). "Close with Jefferson throughout his life, [Wythe] bequeathed Jefferson his book collection, which Jefferson later sold to form the Library of Congress." *George Wythe Collection*, HeinOnline.

A few years after *Knight's Case* (1686) and the English Bill of Rights recognition of subjects' "right to have arms for their defence" (Section H.4), two colonies enacted statutes against carrying arms "offensively." Colonial Massachusetts forbade going armed "Offensively . . . in Fear or Affray of Their Majesties Liege People." Mass. Acts, no. 6, 11-12 (1694). New Hampshire ordered justices of the peace to arrest "affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively. . . ." N.H. Laws 1 (1699).

Massachusetts in 1795 toughened its statute to include menacing words. Justices of the Peace should arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensive, to the fear or terrour of the good citizens of this Commonwealth, or such others may utter any menaces or threatening speeches." Upon conviction, such a person shall be required "to find sureties for his keeping the peace"—that is, to post a bond for good behavior. 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, at 652-53 (enacted Jan. 27, 1795) (1807).

Even without a colonial statute, the common law covered the problem. A leading 1736 Virginia treatise synthesized American and English law, and explained

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44. *The Report of Several Cases Argued and Adjudged in the Court of King's Bench at Westminster: From the First Year of King James the Second, to the Tenth Year of King William the Third*, William & Mary Law Library.

that a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People" and may bring the person and the arms before a Justice of the Peace.[45] Virginia codified the principle in a 1786 statute that no one may "go nor ride armed . . . in terror of the Country." A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are Now in Force 30 (enacted Nov. 27, 1786) (Richmond 1803).

The first American decision to cite the Statute of Northampton (Section F.1) was the Tennessee Supreme Court's 1833 *Simpson v. State*. The Tennessee court expressly rejected Hawkins's rule that nonviolent carrying of dangerous and unusual arms could constitute an offense. The common law of such an offense had come from "ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III" (the Statute of Northampton). "[O]ur ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section [of Hawkins], formed no part of their selection." Alternatively, if the Statute of Northampton had become part of American common law, "our constitution has completely abrogated it; it says, 'that the freemen of this state have a right to keep and to bear arms for their common defence.'" The indictment did not specify what Simpson had done. Merely saying that he had "made an affray" was too general. The common law crime had to be narrowly construed, and the "affray" had to be described with particularity, so as not to violate the constitutional right to carry arms. Therefore the conviction was reversed and the indictment was quashed. *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833) (Ch. 6.B.2 Note 4).

In contrast, an indictment in a North Carolina case did describe how the defendant had carried arms to terrorize the public. Thus, the indictment validly described the elements of the common law crime on which the Statute of Northampton had been based. The North Carolina legislature in 1836 had expressly abrogated "all the statutes of England or Great Britain." Defendant Huntly did not contest the facts of the indictment against him: He had armed himself "with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed, did go forth and exhibit himself openly, both in the day time and in the night," to the citizens of Anson, North Carolina, in town and on the highway, and did "openly and publicly declare a purpose and intent" "to beat, wound, kill and murder" James H. Ratcliff "by which said arming, exposure, exhibition and declarations . . . divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State." Huntley's legal argument was that since the Statute of Northampton was not the law in North Carolina, the indictment did not describe a crime. The court disagreed. Quoting *Knight's Case* (Section F.3),

45. George Webb, The Office and Authority of a Justice of Peace 92 (1736). Webb's treatise was endorsed by Virginia Attorney General John Clayton. *Id.* at ii. Webb was the first Justice of the Peace manual to integrate American and English law. John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. Legal Hist. 257, 273-75 (1985).

the North Carolina court held that the common law prohibited "riding or going about armed with unusual and dangerous weapons, to the terror of the people." The court then described the common law offense:

> It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements — as a part of his dress — and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment. — But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun. It is the wicked purpose — and the mischievous result — which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

State v. Huntley, 25 N.C. (3 Ired.) 418, 422-23 (1843).[46] The decision was consistent with an earlier case that found three men guilty of common law affray when they maliciously fired guns into the home of an elderly widow. *See State v. Langford*, 10 N.C. (3 Hawks) 381 (1824).

The Statute of Northampton (Section F.1) continues to appear in American cases. In striking down Illinois's comprehensive ban on arms carrying in public places, the Seventh Circuit, like Hawkins and Crompton, stated that "Some weapons do not terrify the public (such as well-concealed weapons). . . ." Examining *Sir John Knight's Case* (Section F.3), and the works of William Blackstone and Edward Coke, the court concluded that the Statute of Northampton only banned arms carrying in certain places or by large assemblies. *Moore v. Madigan*, 702 F.3d 933, 936-37 (7th Cir. 2012) (Ch. 14.A).

An earlier federal Court of Appeals case cited the Statute of Northampton for the point that "Weapon bearing was never treated as anything like an absolute right by the common law." *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (Ch. 8.D.8), *rev'd on other grounds*, *Tot v. United States*, 319 U.S. 463 (1943). The

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46. "Business or amusement" was a legal term of art, to encompass all activity. *See The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) ("[T]he ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement. . . . "); *Johnson v. Tompkins*, 13 F. Cas. 840, No. 741 (Cir. Ct. E.D. Penn. 1833) (Supreme Court Justice Baldwin, acting as Circuit Judge) ("[A]ny traveller who comes into Pennsylvania upon a temporary excursion for business or amusement"); *Baxter v. Taber*, 4 Mass. 361, 367 (1808); ("[H]e may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water . . . "); *Respublica v. Richards*, 2 U.S. (2 Dall.) 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).

court's statement was correct, because it is universally agreed that the Statute forbade arms carrying in certain places, such as courts, and also forbade carrying in a manner calculated to terrify the public.

The Ninth Circuit has made extravagant use of the Statute of Northampton. A 7-4 en banc majority used the Statute to support the holding that there is no constitutional right to concealed carry. *Peruta v. County of San Diego*, 842 F.3d 919, 931 (9th Cir. 2016). Five years later, a 7-4 en banc majority made the Statute of Northampton the centerpiece of its holding that the Second Amendment right to "bear arms" allows the government to forbid all carrying of arms outside one's property, including open carry. According to the majority, the 1328 Statute and its common law analogue were understood in the American colonies, and then in the States in the nineteenth century, as prohibiting all carrying of arms except when in government service. *Young v. State of Hawaii*, 992 F.3d 765, 787 (2021). The Ninth Circuit does not address the text from the leading American case on the subject, *State v. Huntley*, which says the opposite. Indeed, the majority cannot address any case from any jurisdiction that interpreted the Statute or the common law so prohibitively. The majority opinion repeatedly chops quotes to distort their meaning—so the 1350 statute against carrying concealed arms to perpetrate a violent felony is described as a ban on all concealed carry. Likewise, the 1615 English case *Chune v. Piott* said that a sheriff could arrest a person even when the sheriff had not personally witnessed the breach of the peace; *Young* claims that the case said a person could be arrested even when there had not been a breach of the peace. *See* David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. State of Hawaii, 2021 U. Ill. L. Rev Online 172; Section F.2.

6. Laws Against Armed Public Assemblies

Although in England carrying common arms in a peaceable manner was clearly lawful after *Knight's Case* and then the 1689 Bill of Rights (Section H.4), armed assemblies were generally considered to be treason. This rule was rejected in the United States. St. George Tucker, author of the first American constitutional law treatise, explained:

> The same author [Matthew Hale] observes elsewhere: "The very use of weapons by such an assembly, without the King's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force." The bare circumstance of having arms, therefore, of itself, creates a presumption of warlike force in England, and may be given in evidence there to prove *quo animo* [with that motive] the people are assembled. But ought that circumstance of itself to create any such presumption in America, where the right to bear arms is recognised and secured in the Constitution itself? In many parts of the United States, a man no more thinks of going out of his house, on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

5 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and

the Commonwealth of Virginia app. 19 (Lawbook Exchange 1996) (1803) (Ch. 5.F.2.a).[47]

G. RESTRICTIVE LICENSING ATTEMPTED: THE TUDORS, CROSSBOWS, AND HANDGUNS

1. Longbows and English Liberty

Eighteenth-century dictionaries show that "bows and arrows" are among the "arms" of the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (Ch. 11.A). For centuries, bows were the most important arms in England.

The English used longbows to win stupendous victories against the French at Crécy in 1346 and Agincourt in 1415. The French had crossbows, which have a shorter range than the longbow. In a crossbow versus longbow battle, it was easy for the English longbowmen to stay out of enemy range while unleashing a hail of longbow arrows onto the French. Crossbows are better suited for close quarters or for firing out of a narrow slit (a *loophole*) inside a fortification.

Why did the English use longbows, while the French and other nations did not? Two historians suggest that the difference was the government's relation with the people. Crossbows are difficult and expensive to make, but relatively easy to use. Longbows are the opposite. At least as tall as the archer, a longbow requires years of practice to master. Strength is important, but expertise more so. *See* Thomas Esper, *The Replacement of the Longbow by Firearms in the English Army*, *in* Technology & the West 116 (Terry S. Reynolds & Stephen H. Cutcliffe eds., 1997).

Because longbows in battle were optimally fired at a distance where taking aim at an individual target was impossible, longbows had to be used en masse. So any nation that wanted to use the longbow as a primary weapon had to promote mass armament among the public, which meant that much of the population would be expert owners of the fastest firing weapon of war. For the French and Scottish monarchs, that was too risky.

Compared to the French or Scots, most British kings in the fourteenth and first half of the fifteenth centuries were relatively secure in power.[48] Accordingly, the

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47. According to one commentator, "Tucker's often quoted observation" was "written in response to the prosecution of Fries's Rebellion in Pennsylvania." Supposedly, "Tucker was commenting on a federal case," and disagreeing with jury instructions that Chief Justice Samuel Chase had given in a Fries's Rebellion trial, while riding circuit. Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11, 39 (2017). This is false. As Tucker cited the Chief Justice's jury instructions, they said nothing about arms. They involved whether private violence, such as "pulling down . . . bawdy houses was held to be treason." Tucker, at app. 19. A footnote demarcates the end of Tucker's discussion of the jury instructions and the beginning of a new topic on peaceable armed assemblies.

48. Relatively speaking. Richard II was overthrown in 1399 by a noble rival, Henry Bolingbroke, who invaded from France with a small force. Few English rallied to support the tyrannical Richard, while many joined with Bolingbroke, who quickly deposed Richard II and became Henry IV.

British monarchy promoted the longbow, and thereby gained a military advantage over its neighbors. Douglas W. Allen & Peter T. Leeson, *Institutionally Constrained Technology Adoption: Resolving the Longbow Puzzle*, 58 J. Law & Econ. 683 (2015).

Because the longbow required so much practice and skill, "beaten serfs, trained in mass and motivated by kicks and curses were not the stuff from which armies of archers could be made. The skilled archer was, instead, among the most individualistic of warriors." Richard H. Marcus, The Militia of Colonial Connecticut, 1639-1775: An Institutional Study 17 (Ph.D. diss., U. of Colo. 1965).

A 1476 book by the Chief Justice of the King's Bench explained the connection between an armed population and English liberty. Sir John Fortescue's *Governance of England* (*De laudibus legum Angliæ*) contrasted the absolutist government of France with the mixed government of England. French absolutism could be traced to the French monarchy's reliance on mercenaries. Although French land was bountiful, French peasants were poor and ill-fed because they were overtaxed. Accordingly, they "gon crokyd, and ben feble, not able to fight, nor to defend the realm; nor thai haue wepen, nor money to bie thaim wepen withall." John Fortescue, The Governance of England: The Difference between an Absolute and a Limited Monarchy 114-15 (rev. ed. 1885). Fortescue was not expressing a right to arms in the sense of the American Second Amendment and its state analogues; he was reiterating the traditional view that a well-armed society of vigorous men will be free, and a society where armed force is in the hands of paid foreign professionals will not.

With a rate of fire of 10 to 12 shots per minute, the ability to penetrate medieval armor at 60 yards, and potentially deadly at 300 yards, the longbow was not surpassed as a standard infantry weapon until the development of the magazine-fed bolt-action rifle in the late nineteenth century. Charles C. Carlton, This Seat of Mars: War and the British Isles 1585-1746, at 4-5 (2011). *See also* Charles James Longman & H. Walrond, Archery 431 (1894) (at a 1550 event, some archers shot through one-inch planks of seasoned wood); Ernest Marsh Lloyd, A Review of the History of Infantry 67 (1908) (good archers could hit reliably at 220 yards, which was the standard practice distance, and arrows could sometimes travel twice as far). So why did the English government during the sixteenth century phase out longbows and replace them with firearms as the standard weapon?

The first reason is the invention of high carbon steel armor in the late fifteenth century. It was impervious to bows, but not to firearms. Steven Gunn, *Archery Practice in Early Tudor England*, 209 Past & Present 53, 74 (2010). Second, firearms are much easier to learn, and especially easy as used in the English military, which did not need its soldiers to aim at particular targets. John Nigel George, English Guns and Rifles 8 (1947). Further, the English of the sixteenth century lost their willingness to spend years learning how to be longbow experts.

Under the 1285 Statute of Winchester, bow ownership was mandatory (Part B). As English monarchs began discerning the military advantage of a nation of bowmen, monarchs mandated archery practice, while forbidding other games. In 1365, Edward III ordered archery practice (bows or crossbows) on church feast days, and forbade other sports, such as handball or football. Calendar of Close Rolls, Edward III, vol. 12, 1364-68, at 181-82 (membrane 23d, June 12, 1365) (Kraus 1972) (1910). In addition to Sunday, there were many Church feast days, and the Church's premise was that, after church, people should have fun. The English government agreed,

as long as "fun" meant arms practice.[49] *See* 12 Richard II ch. 6 (1388) (servants and laborers shall not have swords or daggers, except when traveling on behalf of their master; they "shall Have Bows and Arrows, and use the same on Sundays and Holydays," and shall not play tennis, football, dice, or other "importune Games"); 11 Henry IV ch. 4 (1409-10) (repeating Richard II's statute); 17 Edward IV ch. 3 (1477-78) (outlawing "Closh, Kailes, Half-bow, Hand-in Hand-out and Queckboard").[50]

Although some people apparently preferred tennis, longbow practice was typically an enjoyable social activity, followed by a session at a nearby ale house. Besides shooting at target ranges (butts), groups of men and boys would pick a target, such as a gatepost or a tree branch, shoot at it, see who came closest, retrieve their arrows, and then pick a new mark—much like in a round of golf. Ruth Goodman, How to Be a Tudor: A Dawn-to-Dusk Guide to Tudor Life 190-91 (2016). "Without sociability and play, few would heed the exhortations of concerned governments." *Id.* at 193.

Further reading: The Archery Library ("digital versions of old archery books, prints and articles from times past," including Roger Ascham's pro-archery 1545 classic, *Toxophilus*).

2. Henry VII and Henry VIII

The first British king from the Tudor family, Henry VII ascended the throne in 1485, having defeated Richard III at the Battle of Bosworth Field and won the War of the Roses, a dynastic struggle among the nobility. The Tudors were the first British monarchs who were Welsh. They would rule until 1603, when Henry VII's granddaughter Elizabeth died.

Early in the sixteenth century, Henry observed that the proliferation of crossbows was leading people to neglect longbow practice, and to shoot "the king's deer." By "the king's deer," he meant all deer in England, because he claimed ownership of all wild game. Accordingly, crossbow use was banned except for persons who "shote ow of a howse for the lawfull defens of same." There were exceptions for persons who had an annual income from land of at least 200 marks, or who were granted a crossbow license. Any person who witnessed illegal crossbow use was authorized to confiscate the bow. 19 Henry VII ch. 4 (1503-04).

Upon the death of Henry VII, his son became king in 1509. The 18-year-old Henry VIII was tall, vigorous, and a superb bowman. At a 1520 pageant with the King of France, the Field of the Cloth of Gold, he impressed everyone by repeatedly

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49. Edward III outlawed bowling (lawn or indoor) and several other sports in 1361. Bowling was relegalized in 1455, and then banned again in 1541. That ban stayed on the books until 1845. Tony Collins, "Bowls," *in* Encyclopedia of Traditional British Rural Sports 47-48 (Tony Collins, John Martin & Wray Vamplew eds., 2005). Permits were available for wealthy people who wished to host bowling parties. *Id.*

50. Closh ("cosh"), kailes ("kayles"), and half-bow ("half-bowl") were skittles-type games. Skittles is a bowling game. Hand-in Hand-out was handball. Encyclopedia of Traditional British Rural Sports, at 65, 141-44, 174.75. Queckboard was a dice game.

hitting the bullseye at 240 yards. Robert Hardy, The Longbow: A Social and Military History 130-31 (3d ed. 1992).

Like his predecessors, Henry VIII attempted to stamp out distracting games. A 1511 statute forbade servants and apprentices from playing table games, plus "tennis, cosh, dice, cards, bowls, nor any other unlawful games in no wise," except during the 12 days of Christmas. One stated reason was that gambling on games sometimes led servants to rob their masters. Additionally, it was necessary "that the most defensible and natural feat of shooting should in no wise decay but increase." Every able-bodied male aged 60 or under was required to have his own bow and arrows; fathers had to teach their sons how to shoot. 3 Henry VIII ch. 25 (1511).

Devoted to the longbow, Henry throughout his reign tried to deal with declining interest among the English public. As farms were being turned into sheep pastures, there were fewer sturdy tillers of the soil who had the strength to control a longbow. The English population was shrinking, catastrophically so during the 1540s and 1550s when the bubonic plague hit England and killed about one-third of the able-bodied population. When living standards fell, and fewer people could afford meat in their regular diet, the number of well-nourished and strong commoners declined further. Wages for military archers had been high during the previous century, but they were eroded by inflation. Besides that, the people were less persuaded by the notion that it was their duty to spend their time on longbow practice so that they could serve the king. On the military side, improvements in armor were making it arrow-proof. Hardy, at 131-33; George, at 9, 66 (one-third of men were listed as competent archers in the militia muster rolls in 1522, one-quarter in 1557). Around 1520, improvements in gunpowder production made the powder burn more efficiently and raised firearms' utility in combat. George, at 202-03.

A 1514 statute eliminated the home possession exemption for crossbows and brought handguns under the same system, with possession forbidden below the annual income level of 200 pounds. Again, the king's subjects were told to possess longbows, to practice with them, and to provide longbows to their children. 6 Henry VIII ch. 13 (1514). Wars with France forced Henry VIII to lower the property qualification for handguns and crossbows to 100 pounds. 14 & 15 Henry VIII ch. 7 (1523).

The 100-pound income rule exempted about 10 percent of the population from need for a license. Under the Tudor arms statutes, a person who did not meet the income minimum for handguns or crossbows could be issued a license from the monarch. The Tudor monarchs handed out many such licenses—including to commoners whom the king wanted to reward, and to nobles to allow their servants to be able to use the arms outside the home. Lois G. Schwoerer, Gun Culture in Early Modern England 65-73 (2016).

The Tudors were constantly frustrated by underenforcement of their arms laws. A 1526 royal proclamation demanded that the mayor, sheriffs, and justice of the peace in London not be "negligent, slack, or remiss" in implementing arms restrictions. 1 Tudor Royal Proclamations 151, 152 (Paul L. Hughes & James F. Larkin eds., 1964) (Apr. 10, 1526).[51] A few weeks later, another proclamation

51. Royal proclamations had less legal force than did statutes enacted by Parliament. Proclamations usually supplemented statutes.

reaffirmed the ban on bowling, tennis, cards, and other games. It complained that games distracted people from "the exercising of longbows and archery," and ordered all justices of the peace to ensure that the householders, their servants, and their children "hereafter have in their houses bows and arrow." *Id.* at 152 (May 5, 1526).

Two years later, Henry complained that longbow archery had decayed because of "the newfangled and wanton pleasure that men now have in using crossbows and handguns." Moreover, handguns and crossbows were being used in crimes, and for hunting by the middle and lower classes. "[I]t was one thing to forbid a man to load his family's dinner table by an easy means, and quite another to keep him from doing so." Robert Held, The Age of Firearms: A Pictorial History 63 (1956). The king authorized any person to confiscate any unlawful crossbow or handgun from any person. Further, any person who shall "probably suppose" that a home contained an illegal crossbow or handgun could enter that home and take it. *Id.* at 177 (Dec. 4, 1528). Such practices are part of the background that led to the American Fourth Amendment against warrantless searches.

In 1533, the handgun and crossbow statutes were replaced by a new statute along the same lines. The minimum income requirement for unlicensed handguns and crossbows remained 100 pounds. Unlicensed possession, regardless of income level, was allowed by persons living in walled towns within seven miles of the sea, or in the four counties near the Scottish border. The statute affirmed the lawfulness of manufacturing handguns and crossbows. Extant licenses for handguns and crossbows were cancelled. The king's unlimited power to give anyone a crossbow or handgun license was affirmed. 25 Henry VIII ch. 17 (1533).

Early in his reign, Henry VIII had opposed the Protestant Reformation, persecuted Protestants, and wrote a book defending Catholic orthodoxy, *Assertio Septem Sacramentorum* (Defense of the Seven Sacraments). For the book, Pope Leo X conferred on Henry the title *Fidei Defensor* (Defender of the Faith). But when the Pope refused to grant Henry an annulment of his marriage to the Spanish princess Catherine of Aragon, Henry broke with the Catholic Church. He replaced it with the Church of England, of which he would be the head. Everyone in England was required to belong to his new Anglican Church, which adopted some moderate reformation principles. Meanwhile, Henry confiscated enormous quantities of property held by the Roman Catholic Church.

Henry's anti-Catholic activities led to an uprising in northern England in 1536-37, the Pilgrimage of Grace. Among the demands were "The statutes of handguns and crossbows to be repealed, except in the King's forests or parks." Lois Schwoerer observes that the demand, contained in a document that mainly addressed religious and economic issues, "provides striking evidence" of the broad and deep dislike of the restrictive arms laws, at least in the north. Schwoerer, at 53.

In 1537, England's first handgun shooting association, the Guild of St. George, was formed. The group encouraged handgun practice and had the legal authority to license anyone in England, regardless of income level, to have handguns or crossbows. Gunn, at 75.

The king warned that if local officials did not enforce the arms bans, they would incur his "displeasure and indignation." 1 Tudor Royal Proclamations, at 249, 250 (Jan. 24, 1537). Public safety concerns about people carelessly shooting

in cities, towns, and boroughs led to a proclamation that, in London, handgun and hackbut shooting only take place at appropriate target ranges. 1 Tudor Royal Proclamations, at 288 (July 27, 1540). "Hackbut," "hagubut," "haquebutt," and "habussh" are archaic spellings for "harquebus" or "arquebus," a type of long gun.[52]

As of the 1540s, handguns were found all over England, first becoming popular in cities, where they were manufactured. They were affordable to people of all social classes, with an average cost of about eight shillings (two-fifths of a pound, or 96 pence). Gunn, at 77-78. "By 1540 all efforts at enforcement had dissolved into chaos." In the previous quarter-century, "firearmed robbers and cutthroats had come to roam the highways and the countryside, so that in turn farmers and travelers with modest incomes . . . were compelled to firearm themselves illegally in self-defense." Held, at 65.

The income restrictions on crossbows and handguns were extended to hackbuts and to demyhakes (an especially short hackbut). 33 Henry VIII ch. 6 (1541). Again, Henry wished to promote "the good and laudable excise of the longe bowe." The statute repealed all previous handgun and crossbow limits and set up a new system. The system kept the 100-pound rule, and added new restrictions: nobody should own handguns whose total length was less than one yard, or a hackbut/demyhake with a total length less than three-quarters of a yard. Without needing to meet the income requirements, inhabitants of market towns or boroughs, and anyone with a house more than two furlongs (440 yards) outside of town, could possess guns that met the minimum length standards. They could use the guns for self-defense and for shooting at earthen embankments, but not for hunting. Likewise, no license was necessary for persons who lived within five miles of the coasts, within 12 miles of the Scottish border, or on various small islands. *Id.*[53]

Facing a two-front war against France and Scotland, King Henry in 1544 issued a proclamation authorizing all native-born subjects to use handguns and "hagbusshes"—regardless of "any Statute heretofore to the contrary." Schwoerer, at 60. After the war ended, a 1546 proclamation put the 1541 restrictions back in place. 1 Tudor Royal Proclamations, at 372 (July 8, 1546).[54]

The Henrican 1541 statute "[g]radually . . . fell into disuse. Soon, only the £ 100 qualification was enforced. . . ." Held, at 66. For the income requirement, a

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52. The French word was "arquebus," and this spelling eventually won out. John Nigel George, English Guns and Rifles 7, 15 (1947). The arquebus was much lighter than a musket. Unlike a sixteenth-century musket, an arquebus was made to be fired by a user who simply held the gun to his shoulder. The musket, a heavy military gun, usually was rested on a forked stick. Harold L. Peterson, Arms and Armor in Colonial America 1526-1783, at 13-14 (Dover 2000) (1956). A typical musket size was five feet, two inches long; a typical harquebus was three feet, nine inches. Allen French, *The Arms and Military Training of Our Colonizing Ancestors*, 67 Mass. Historical Soc. Proceedings, 3d series 3, 20 n.2 (1941-44).

53. The provision for armament of Englishmen near the Scottish border was repealed after the union between Britain and Scotland. 4 James I ch. 1 (1606).

54. Parliament in 1539 had given Henry the authority to legislate by proclamation as long as his new laws did not include capital punishment or forfeitures of property. Statute of Proclamations, 31 Hen. VIII ch. 8 (1539). His wide-ranging proclamations were considered by critics to exemplify Tudor despotism.

conviction was reported in 1669.[55] Four cases in 1685-92 appear to have been the last efforts to enforce the handgun statute; none of them succeeded, as the King's Bench had become highly vigilant about pleading or procedural defects.[56]

Military historian Charles Oman explains that Henry's despotism was partially held in check because the English people were armed. However, the development of firearms was beginning to give the government the edge over the people. Unlike continental kings, Henry never attempted to build a permanent standing army:

> This was fortunate for his subjects—with *compagnies d'ordonnance*[57] or *tercios*[58] ready to his hand, his rule would have been even more arbitrary than was actually the case. More than once he had to restrain himself, when he discovered the general feelings of his subjects was against him. As the Pilgrimage of Grace showed, great bodies of malcontents might flare up in arms, and he had no sufficient military force to oppose them. His "gentlemen pensioners" and his yeoman of the guard[59] were but a handful, and bills [edged or bladed hand weapons] or bows were in every farm and cottage. . . . [A]mong the many results of the growing importance of firearms was the fact that popular risings became progressively more impotent against trained soldiery, from the mere question of armament. The last and most complete demonstration of the fact was reserved for the next century, and field of Sedgemoor [1685, Monmouth's Rebellion (Section H.3.b)], but there were examples of the same sort to be seen in Tudor times—especially in the suppression of both the eastern and western insurgents in the third year of Edward VI . . . [by] hired bands. . . . But King Henry never let matter come to the last extreme, or turned mercenaries loose on seditious assemblies. He . . . was never obliged—thanks to his tact—to bring [mercenaries] across the channel in any numbers.

Charles Oman, A History of the Art of War in the Sixteenth Century 288 (Greenhill 1999) (1937).

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55. *Sanders's Case*, 85 Eng. Rep. 311, 1 Williams' Saunders 262 (K.B. 1669) (handgun in the home). For more on prosecutions in this period, see Section H.3.a (describing use of the 1541 statute to enforce the 1671 Game Act against handgun hunting by commoners).

56. One case had a defective indictment. *Rex v. Silcot*, 87 Eng. Rep. 186, 3 Modern 280 (1690). Two others involved delays between indictment and trial that voided the jurisdiction of the justices of the peace. *Rex & Regina v. Bullock*, 87 Eng. Rep. 315, 4 Modern 147 (1692); *The King v. Litten*, 89 Eng. Rep. 644, 1 Shower's King's Bench Rep. 367 (1689). Another conviction was overturned because the defendant might have borrowed the handgun, an act not literally prohibited by statute. *The King v. Lewellin*, 89 Eng. Rep. 440, 1 Shower's King's Bench Rep. 48 (1685) "The conviction was for having a gun in his house: the statute is, use to keep in his or her house, and perhaps it might be lent him, the words of the statute ought to be pursued."). Henry's income qualification handgun statute was formally repealed in 1831. 1 & 2 William IV, ch. 22 (1831).

57. [Foreign mercenaries who ravaged the French people.—Eds.]

58. [Italian or Spanish infantry regiments.—Eds.]

59. [The monarch's bodyguards. In practice, the nucleus of a standing army.—Eds.]

3. Edward VI

During the brief reign of Henry's only son, Edward VI (1547-53), a ban on shooting "hayle shott" was applied to persons who did not have the income qualifications for handguns and hackbuts. 2 & 3 Edward VI ch. 14 (1548). "Hail shot" is what we today call "shotgun balls"—several small pellets, rather than a single large bullet. It is used mainly for bird hunting and self-defense.

The same statute also ordered persons who were eligible to shoot to register themselves with the local Justice of the Peace. *Id.* Although people did register when the statute was enacted, by 1581, the registration program was no longer in use. Lambarde, at 296 (1581); *see also* Dalton, The Countrey Justice, at 50 ("but quaere[60] if this be now in use"). Formal repeal did not come until 1695. *See* Section H.5.

Catholic rebellions in the counties of Devonshire and Norfolk in 1549 were suppressed by Italian and German mercenaries, "obviously because no shire-levies from either immediate neighborhood could be trusted in either case." Oman, at 368-69.

4. Mary and Philip

Mary, who was Henry's eldest daughter, succeeded to the crown in 1553. She was the Catholic child of Henry's first wife, the Spanish princess Catherine of Aragon, who was the victim of Henry's infamous divorce that caused the English split from the Roman Church.

Mary's announcement that she would marry the Spanish Prince Philip and rule jointly with him provoked a rebellion. When the London militia was called out to suppress it, many of them joined the rebels. Mary's personal bodyguard deserted. Mary saved her throne by "a vehement personal appeal to the fundamental loyalty to the Crown, which was still the strongest motive in the mind of nearly every Englishman. . . . Never was a rebellion so entirely settled by the public opinion of the masses—and this opinion was wavering almost down to the last moment." *Id.* at 369-70.

Restoring Catholicism as the established religion, Philip and Mary ended persecution of Catholics, and commenced even more intense persecution of Protestants. She earned the sobriquet "Bloody Mary."

Under Philip and Mary, Parliament enacted a major reorganization of the militia. It began by repealing all previous laws concerning "the keeping or finding of Horses or Armoure or of any of them." The word "armoure" in this usage included arms, not just defensive clothing. The only things that were saved were the pro-archery provisions of Henry's 1541 statute.

Like the old Assize of Arms (Part B) and the Statute of Winchester (Part B), the new law required persons in various categories of wealth to possess specified weapons, horses, or armor. The harquebus (which had become the main military long gun) was now mandatory for persons with annual estates of as low as ten pounds.

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60. [From the Latin *quaerere*, "to seek, ask." Used to introduce a question. 2 Shorter Oxford English Dictionary 2437 (1993).—Eds.]

Persons with annual incomes of more than five pounds but less than ten had to have a bow and a sheaf of arrows. For persons with incomes below five pounds, there was no mandate. The inhabitants of towns were ordered to use common funds to purchase the necessary arms for persons who did not possess their own, and to store them in a common area, such as a church. The militia was reorganized, with each county militia to be led by a Lord Lieutenant, who would be appointed by the monarch. 4 & 5 Phil. & M. ch. 2 (1557-58); *see also id.*, ch. 3 (rules for musters).

Half a century later, under King James I, Philip and Mary's statute would be repealed. The effect included reviving the old statutes that had been repealed under Philip and Mary.

5. Elizabeth I

When Mary died childless in 1558, she was succeeded by her younger half-sister Elizabeth. An Anglican, Elizabeth had participated in Catholic ritual when so required under Mary's reign. Queen Elizabeth I switched the established religion back to the Church of England. She was initially content with mere outward shows of conformity but became more repressive following a 1569-71 Catholic plot to overthrow and assassinate her. A Papal bull had purported to depose Elizabeth from the throne, had ordered Catholics to get rid of her, and had forbidden Catholics to give even minimal outward conformity to the Church of England. The Roman Catholic Church smuggled Jesuit priests into Great Britain to keep the faith covertly alive.

a. Handgun Control

In 1559 the Queen complained that "many men do daily ride with handguns and dags [a type of heavy handgun], under the length of three quarters of a yarde" and were committing robberies and murders. Noting "how negligently" the law "is of late observed," she ordered its due execution. 2 Tudor Royal Proclamations 116 (Paul L. Hughes & James F. Larkin eds., 1969). In 1579, she outlawed possession of pocket dags (small enough to fit in a pocket), and forbade their manufacture or repair. She also ordered the arrest of people who carried or shot guns in "great cities or the suburbs of the same," except at target ranges. Further, no shooting was allowed within two miles of wherever the Queen happened to residing. The wearing of concealed armor was forbidden. Law enforcement officers should search homes and shops for pocket dags and confiscate them.*Id.* at 442-44. According to Schwoerer, "The government rightly considered the dag highly dangerous and tried without much success to ban it entirely." Schwoerer, at 182.

In 1600, Elizabeth criticized the "slack execution" of the gun control laws, and "the common carrying and use of guns contrary to said statutes." She noted the practice of illegal carry by bird hunters, by "common and ordinary persons traveling the highway" who "carry pistols and other kinds of pieces," and by "ruffians and other lewd and dissolute men." 3 Tudor Royal Proclamations, at 218 (Dec. 21, 1600).

The local sheriffs and justices of the peace apparently did not put much emphasis on enforcing the Tudor arms control laws. For example, in 1550 a Norfolk clerk reported that on any given day, there would be 60 people hunting, none of them meeting the property requirement. Gunn, at 79. The arms control system

relied on paid informants, but the informants seemed to have little enthusiasm for reporting illegal possession. *See* M.W. Beresford, *The Common Informer, the Penal Statutes, and Economic Regulation*, 10 Econ. Hist. Rev. (2d series) 221, 226 (1957) (of 26,243 information cases brought before the Court of the Exchequer from 1519-1659, only 220 involved "guns, archery, horses").

b. Elizabeth's Militia

"Since the queen never possessed a standing army, she insisted on bringing the militia, the nation's only domestic armed force, tightly under her control." T.H. Breen, *English Origins and New World Development: The Case of the Covenanted Militia in Seventeenth Century Massachusetts*, 3 Past & Present 74, 76 (1972). Pursuant to the comprehensive militia and arms law statute enacted during the reign of Philip and Mary, Elizabeth appointed leading nobles as lords lieutenant of their county's militia. Integrating the nobles into the crown's military system was intended to make them compliant. *See* Gladys Scott Thomson, Lords Lieutenants in the Sixteenth Century: A Study in Tudor Local Administration (1923).

Nominally, Elizabeth retained the traditional militia consisting of almost all able-bodied males. Yet training was provided mainly to a select group: the trained bands, established in 1573. Training twice a month, the trained bands were a select militia drawn primarily from the middle class. The upper classes were formally obliged to serve, but were allowed to send a substitute, such as a servant, in their place. Villages or other communities were responsible for providing at least some of the militiamen with arms and storing them in a secure central location. *Id.* at 76-77; Calendar of State Papers, Domestic Series, of the Reign of Elizabeth, Addenda, 1566-1579, at 78-81 (June 19, 1569) (Mary Anne Everrett Green ed., 1871).[61] *See generally* John S. Nolan, *The Militarization of the Elizabethan State*, 58 J. Mil. Hist. 391 (1994). Men formally liable for militia service, but not in the trained bands, were called the "freehold band." Victor L. Stater, Noble Government: The Stuart Lord Lieutenancy and the Transformation of English Politics 207 n.70 (1994). Due to local opposition, the central storage mandate was poorly implemented and sometimes ignored. C. G. Cruickshank, Elizabeth's Army 110-12 (2d ed. 1966).

For militiamen not in the trained bands, the main activity was the muster. About once a year, all the militiamen in an area would assemble for a formal inspection to demonstrate that they had the arms and equipment required by law. "To pass muster" was to pass this inspection. Muster days could be a welcome relief from agricultural drudgery, and after the inspection, there was often a festive dinner. The militia could not be required to serve outside its own county, except in cases of actual or threatened invasion. Lindsay Boynton, The Elizabethan Militia 1558-1638 (1967); Richard Burn, A Digest of the Militia Laws (1779).

Because counties had the financial burden of taxing themselves for militia equipment, and of paying the militia officers and militiamen whenever they mustered or trained, militia mustering and training was often desultory. The continuing danger of Spanish invasion from 1585 to 1603 did focus attention on maintaining militia quality. Neil Younger, War and Politics in the Elizabethan Counties (2012).

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61. Many volumes of the Calendar of State Papers are available at British History Online.

When the Spanish Armada threatened in 1588, the southern counties raised a formidable militia. Michael J. Braddick, State Formation in Early Modern England 190-96 (2000).

c. Archery

In the Elizabethan militia, bowmen were still present, although outnumbered by harquebusiers, and later by musketmen. Not until 1595 was enrollment of archers in the militia terminated. Oman, at 379-87. Although being displaced by firearms, longbows would continue to have military use as late as 1644 in the British Civil War (Section H.2) and 1688 in the Scottish Highlands. Ralph Payne-Gallway, The Book of the Crossbow 35 (1995).

By Elizabeth's time, archery practice was much decayed. She ordered that everyone spend Sunday afternoons in archery, rather than in forbidden games such as dice or cards, by which means she hoped "archery may be revived." Apologetically, she noted that her subjects already were required to spend money on muskets and harquebuses, and now she was forcing them to buy bows and arrows. 21 Acts of the Privy Council 174-75 (June 6, 1591).[62]

One author suggests that Elizabeth's pro-bow policies were not really "for the defence of the realm," as she claimed. Rather, the longbow mandate was intended to distract the public from "the mania for gambling which had gripped the nation," and from the use of firearms for poaching and violent crime. Hardy, at 142. People "bought their bows to give some appearance of obeying the law, but never loosed an arrow from them." Cruickshank, at 105.

d. Elizabeth and Hunting

Elizabeth was an avid huntress, along with the ladies of her court. The crossbow was her favorite arm. R.L. Wilson, Silk and Steel: Woman at Arms 4-5, 29-31 (2003). She was not very concerned about enforcement of the game laws.

The same would not be true of her successors, the Stuart family. They would impose new game laws, upend the militia, and pursue the most aggressive arms control program in English history. The consequence would be revolution, and the enactment of a Bill of Rights guaranteeing the right to arms.

H. DISARMAMENT REJECTED: THE GLORIOUS REVOLUTION AND THE BILL OF RIGHTS

According to Americans, the right to arms "originally belonging to our forefathers was trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, finally incorporated conspicuously in our own Magna Charta!"

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62. Available at British History Online. At the time, the Privy Council consisted of the Queen's leading advisors, and the Queen could make law based on its advice. Its powers were greatly curtailed following the British Civil Wars (Section H.2) in the seventeenth century.

Nunn v. State, 1 Ga. 243, 251 (1846), quoted in *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008) (Ch. 11.A). This Part tells the story of Charles Stuart and his relatives, and how their conduct led to a revolution in 1688. After the revolution, Parliament enacted a Bill of Rights, including a right to arms.

In the seventeenth century, the king, Parliament, and others fought over who should control the tools of violence in the United Kingdom. The issues were individual (who could possess and carry arms) and collective (who would control organized force, such as the militia or a standing army). The arms issues were closely related to civil liberties, including the rule of law itself. From the study of England's seventeenth century, Americans drew some of their ideology about when armed resistance to government is legitimate.

Section 1 deals with King James I and his son Charles I. James was oppressive, but within limits. Charles moved the nation toward military dictatorship. The consequence was the British Civil Wars, which are discussed in Section 2. In 1660, Charles II, the son of Charles I, re-established the monarchy. He was succeeded by his brother, James II. Their attempts to create a government monopoly of force led to the Glorious Revolution of 1688, as described in Section 3. Following the revolution, Parliament enacted a Bill of Rights, including a right to arms, the topic of Section 4. Section 5 describes the legal interpretation and effect of the right in the decades following the revolution. Observing conditions in England, James Madison and other Americans derided the English right to arms as weak and nearly useless, much inferior to the Second Amendment, as summarized in Section 6.

1. James I and Charles I: The First Stuarts

Queen Elizabeth I, the last of the Tudors, died in 1603, and was succeeded by her cousin James Stuart. Already reigning as James VI of Scotland, he took the British regnal name of James I. From then on Britons and Scots have been the subjects of the same monarch. The first Stuart kings (James I, Charles I, Charles II, James II) had an exalted view of the monarch's powers. According to James I, "The state of monarch is the supremest thing upon earth: for Kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God Himself they are called gods." George Macauley Trevelyan, England Under the Stuarts 91 (Folio Soc. 1996) (reprint of 3d ed. 1946). In the view of James I, Parliament only existed because he allowed it to, and Parliament could not purport to limit his prerogative. "As to dispute what God may do is blasphemy, so it is sedition to dispute what a king may do in height of his power." *Id.* at 92.

Although James's queen was Catholic, James made it clear that he was not going to relegalize that religion. For decades, Catholics had been hoping for an improvement in their situation once Elizabeth died, but the minor loosening under James was insufficient. On November 5, 1605, Catholic radicals attempted to blow up the Parliament building on the day that Parliament began its session. Their Gunpowder Plot aimed to decapitate the government, and then carry out a coup to remove James and replace him with one of his Catholic relatives. Mostly by luck, the plot was foiled the night before. Forever after, Great Britain celebrated November 5 as a national day of thanksgiving, with bonfires, fireworks, and the

burning of effigies. "Guy Fawkes Day" is named for the captured conspirator who led the cell that tried to carry out the bombing.

a. Hunting

Like Elizabeth Tudor, James Stuart loved to hunt. Unlike her, he was jealous of hunting by other people. Game laws aimed at commoners were long-standing, and so were ulterior motives. Following the 1381 Peasants' Revolt, a 1389 statute aimed to prevent seditious gatherings, in part by preventing commoners from assembling armed for hunting. The minimum income requirement for hunting was fairly low—40 shillings (two pounds) per year—the same as the minimum income level for voting. Persons not allowed to hunt could possess neither nets nor hunting dogs, such as greyhounds, pointers, setters, or spaniels. 13 Richard II, stat. 1 ch. 13 (1389). Over the next centuries, game laws grew increasingly complex. There were even different laws for hares and rabbits. One thing that never changed was that anyone, regardless of income, could always kill vermin, such as badgers, otters, and rats.

At the end of Elizabeth's reign, foreign visitors were surprised to see that peasants were allowed to use dogs to hunt England's plentiful game. Trevelyan, at 4-6. Two months after ascending the throne of England and Wales, James cracked down. He proclaimed that anti-hunting laws had already forbidden commoners from "the having or keeping, as the using" of "Dogs, Gunnes, Crossebowes" or other hunting tools. He acknowledged that the laws "have had (especially of late time) little or no effect" and there "hath not bene any due execution" of those laws. Accordingly, he announced that no one should unlawfully hunt, nor should anyone possess dogs, arms, nets, or other hunting instruments contrary to the law. Henceforth, violators would be subjected not only to the legal penalties, but additional penalties inflicted by the king, regardless of the violator's "estate or degree." 1 Stuart Royal Proclamations, at 15-16.

Under James, the income requirement for some hunting was raised, first to 10 pounds annually, and then to 30, depending on the type of game or the method. 1 James 1 ch. 27 (1603-04) (various birds, plus hares); 7 James I ch. 11 (1609-10) (use of hawks to hunt pheasant or partridge). Further, James asserted that even nobles could not hunt without his permission. Parliament, which was elected in part by the middle class, but which in practice usually represented the upper classes, was skeptical of the theory that all game belonged to the king. Chester Kirby & Ethyn Kirby, *The Stuart Game Prerogative*, 46 Eng. Historical Rev. 239 (1931).

James in 1609 issued a proclamation complaining that both nobles and commoners were illegally hunting. 1 Stuart Royal Proclamations, at 229-30. Among the people who annoyed the king by ignoring the anti-hunting proclamation was Sir Edward Coke—formerly the Attorney General, and at the time Chief Justice of the court of Common Pleas. *Id.* at 229 n.2. Coke would become a leading opponent of the Stuarts' despotism.

b. Arms Restrictions

In 1610, the king ordered the disarmament of all Catholics. *Id.* at 247-48 (June 2, 1610). Then in 1613, he proclaimed that although "the bearing of Weapons covertly . . . had ever beene . . . straitly forbidden," the practice "is suddenly growen

very common." Accordingly, he forbade anyone to import guns with a barrel less than 12 inches, or to "beare or carry" such guns. Persons who owned the handguns were ordered to destroy them, or to surrender them to the government. The Stuarts were justifiably fearful of assassination. The proclamation may have been motivated by reports of Spain (England's mortal enemy) smuggling pocket pistols into England, and the Spanish fleet making threatening maneuvers. *Id.* at 284-85. A 1616 proclamation repeated the carry ban and forbade domestic manufacture or sales. *Id.* at 359-60. The next year a royal proclamation forbade everyone in certain areas on the Scotch-English border from having "all manner of Weapons, and Armors." Further, commoners were outlawed from possessing horses, except for "meane Nagges" worth less than 40 shillings. *Id.* at 378.

Enforcement was rigorous, at least in some places. A study of the southwestern county of Devon during the reign of James I reported that "Constables were compelled to make frequent searches for guns, crossbows, and 'other engines,' [e.g., snares, nets] and were themselves sometimes bound over to answer for their neglect in these matters." A.H.A. Hamilton, Quarter Sessions from Queen Elizabeth to Queen Anne 90 (1878). Until 1620, when the Stuarts became more relaxed about Catholics, Catholic homes were frequently searched for arms, which Catholics learned to conceal in the same places they hid their religious items. Trevelyan, at 72-73.

At the same time, use of fowling pieces (proto-shotguns) for bird hunting by farmers and small landholders was increasing rapidly. Wildfowling was "the favourite sport of the yeoman farmer and the smallholder. Especially in the eastern counties, much of the population subsisted on fowling in winter, when fields turned into marshes and fens, and wildfowl from Scandinavia wintered there." George, at 28, 34-35.[63]

c. Virginia and New England

The first English attempt to colonize America had been Sir Walter Raleigh's 1585 establishment of a short-lived settlement on Roanoke Island, on the Outer Banks of North Carolina. A second colonization attempt began in 1606, under King James.

As detailed in Chapter 3.A, the king's royal charter for the Virginia company granted the colonists, their descendants, and anyone else they allowed to come to Virginia the perpetual right to bring arms there, and to import arms from England, "for defence or otherwise." The 1606 Virginia charter appears to be the first written recognition of a right to arms in English law. The 1620 charter for New England contained similar terms.

In America, everyone who wanted to hunt could hunt. There were no limits on arms possession based on income. It was not long before the Americans started behaving with more independence than the monarchy wished. The final rupture between the monarch and the American colonists would come a century and a half later, when King George III imposed an arms embargo on America and attempted

63. Yeomen were commoners who possessed their land by freehold. They were qualified to serve on juries. 1 Blackstone, *supra*, *394.

to carry out arms confiscation, including at Lexington and Concord, Massachusetts. *See* Ch. 4.A & B.

d. Gunpowder Monopoly, Saltpeter, and Urine Control

English monarchs were fond of creating highly taxed monopolies, even for necessities.[64] The monarchs gave production, sale, or import rights to their friends in exchange for kickbacks. The Tudors had created a monopoly on gunpowder milling and import, and the Stuarts continued it. One of the most vexatious parts of the crown's arms control system was the national program to enforce the gunpowder monopoly. The gunpowder monopoly led to attempts to monopolize human and animal waste.

Neither firearms nor artillery are useful without gunpowder. Sophisticated chemical formulations to make smokeless gunpowder would be invented in the late nineteenth century. Today smokeless powder is standard for all firearms except antiques and replicas of antiques. *See* online Ch. 23.D. In the preceding centuries, however, what we call "black powder" was the only form of gunpowder. A common English recipe was one part sulfur, one part charcoal, and six parts saltpeter. Arthur Pine Van Gelder & Hugo Schlatter, History of the Explosives Industry in America 20, table 1 (Ayer 2004) (1927) (1742 standard English formula).[65]

Saltpeter, called "the mother of gunpowder," is a naturally occurring potassium nitrate that is produced by the slow decay of urine and dung in nitrous soil. The English were able to obtain some saltpeter from bat guano deposits in caves, but not nearly enough to meet the government's needs.

Beginning with the first Tudor king, Henry VII, the government authorized saltpetermen to harvest saltpeter from private property. The saltpeter program was desultory until the latter part of the reign of the last Tudor, Elizabeth I. King James Stuart intensified it. His son Charles I was usually inclined to further intensify the abuses of his father and the Tudors. Saltpeter was no exception.

Saltpetermen dug underneath structures of all kinds, including houses. Frequently, they left the place a wreck, with floorboards pulled up. Sometimes, the foundation of a structure was undermined so badly that the building collapsed. Afterward, the saltpetermen would force the locals to cart the excavated saltpeter to locations that were miles away. They paid the carters nothing. David Cressy, Saltpeter: The Mother of Gunpowder 36-120 (2012).

The royal proclamations setting up saltpetermen said that they should leave the property in the same condition they found it and should pay compensation for any damage done. When cases were brought to court, judges did enforce limits. *The Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 12 Coke Rep. 12,

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64. By 1641, government-created monopolies included soap, salt, starch, coals, iron, pens, cards, dice, beavers (fur and hats), belts, linen, linen lace, game, eels, meat dressed in taverns, tobacco, wine, wine casks, hops, brewing, distilling, weighing hay and straw in London, gauging red herrings, butter casks, kelp, seaweed, buttons, hats, gut string, eyeglasses, combs, tobacco pipes, sedan chairs, hackney coaches, saltpeter, gunpowder, rags, and rag gathering. John Forster, The Debates on the Grand Remonstrance, November and December, 1641, at 248 (1860).

65. The charcoal makes the powder black.

(1606) (acknowledging king's power to take saltpeter for national defense without compensation, and forbidding digging in floors of houses and barns; digging must occur during daylight); 4 Blackstone, *159.

But most of the time, the saltpetermen could abuse without fear of being forced to pay compensation. Only the wealthy had the resources to bring lawsuits. In Parliament, Sir Edward Coke led efforts to impose statutory limits, particularly in defense of the gentry's property. Only minor reforms resulted. *E.g.*, 2 Stuart Royal Proclamations, at 453-57 (Mar. 14, 1635) (exempting cellars or vaults of noblemen or gentlemen, used for beer, wine, cider, or other drink).

Saltpeter is an excellent fertilizer, especially for grasslands used for grazing. Starting with Elizabeth I, royal proclamations forbade people from using saltpeter to fertilize their own fields.

Further, people were barred from improving their property if the improvement might impede saltpeter formation. For example, it was illegal to build floors in stables or under pigeon coops (dovecotes). 2 *id.* at 16 (Apr. 13, 1625), 157 (July 23, 1627).

According to the Tudors and the Stuarts, the monarch personally owned all saltpeter and could send his or her servants to collect it as he chose. Supposedly, saltpeter was part of the royal prerogatives. As understood in English law at the time, royal prerogatives were traditional powers that belonged to the king unilaterally. It was universally agreed that mining (e.g., in England's abundant tin mines) was a royal prerogative. By analogy, the collection of saltpeter was said to be a form of mining. Critics pointed out the differences between the millennia-old tradition of mining mineral deposits and the more recent practices of collecting months-old products of human and animal activity.

The saltpeter prerogative reached an extreme with Charles's 1627 order that all towns and villages store urine in "convenient vessels or receptacles" and also store "all the stale of beasts which they can save and gather together." The wastes were supposed to be transported to London, where they would be deposited in large fields for industrial production of saltpeter. That program failed. The English under the Stuarts never figured out large-scale manufacture of saltpeter. The ordinary saltpeter collection program resumed. Cressy, at 94-97.

Although vexatious, the saltpeter collections succeeded. In the first years of Elizabeth's reign, the English had produced only about 10 percent of their saltpeter and imported the rest from overseas. By the time of Charles, domestic production rose as high as 70 percent. With domestic gunpowder production thriving, Charles banned gunpowder imports. 2 Stuart Royal Proclamations, at 546 (Feb. 20, 1637).

The king had dismissed Parliament in 1629, and refused to call a new Parliament, because it might legislate contrary to his wishes. Without Parliament, the king could not impose taxes. So Charles devised mechanisms to raise money for himself and his standing army by other means. The gunpowder import ban allowed him to increase the monopoly price on royal gunpowder. Lindsay Boynton, The Elizabethan Militia 1558-1638, at 260-61 (1967); Charles Floulkes, The Gun-Founders of England 87-88 (1937). Notwithstanding the legal monopoly, there was a black market, fed by unauthorized imports and by illicit sales by saltpetermen. Cressy, at 119-21.

Because Charles foolishly started a religious war with Scotland in 1639, he had no alternative but to summon Parliament and ask for new funds. Parliament unleashed the Grand Remonstrance, cataloguing Charles's abuses and demanding

reform. The gunpowder monopoly was particularly denounced, separate from the complaints about monopolies in general. According to Charles's critics in Parliament, the gunpowder monopoly was "a project for disarming the kingdom." The high price was beyond the means of poor people, and it discouraged militia practice. The gunpowder monopoly and others were repealed in 1641. John Forster, The Debates on the Grand Remonstrance, November and December, 1641, at 232, 254-56 (1860); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 17-18 (1996).[66]

As detailed in Chapter 4.B.7, the American colonists during the Revolution faced their own critical shortage of saltpeter. Their method of addressing the problem was the opposite of the Tudor-Stuart policy—another difference between American and English arms cultures.

e. The Militia

Hatred of the saltpetermen united all classes and political persuasions. The English were divided about who was in charge of the militia and a standing army. In the view of Charles and his supporters, the king had the authority to raise and maintain a standing army of professional soldiers. Further, the militia should be the king's personal force, with his personal will imposed by the lords lieutenant whom the king appointed in every county to command the militia. Parliament disagreed and thought that Charles was moving toward military dictatorship.

Militia service was among the many duties to bear arms. Other duties included hue and cry, watch and ward, and *posse comitatus*, all well-established in law. *See* Part C. On top of that was the medieval practice of the king enrolling the able-bodied male population as sworn keepers of the peace, the *jurati*. The first invocation of the *jurati* power was in 1277, when most men had gone off to fight the Welsh. The orders of raising *jurati* were known as Commissions of Array. Powicke, at 119.

In 1604, the first year of the reign of Charles's father, James I, the militia statute and modern arms mandates from 1557-58 had been repealed. 1 James I ch. 25 (1603-04). King James relied on his alleged royal prerogative, rather than statutes, to govern the militia through the lords lieutenant. Because his foreign policy was generally pacific, neglect of the militia did not cause great controversy. Malcolm, at 7-8.

Indeed, for the entire reign of James I, and most of the reign of Charles I, the lords lieutenant were a constructive feature of government. They were appointed from the upper ranks of the nobility, and the appointment made them the top men in their county. With strong ties to the royal court and to their home counties, they were effective advocates at court for the interests of their counties. Their role extended far beyond the militia, as they were also the informal mediators of many disputes within their counties. Militia musters were mainly social occasions for the militiamen to display their respect for the lord lieutenant and his deputies, and for the lord and the deputies to distribute prizes, such as for good shooting. Stater, at 8-31.

Charles I, however, was much more belligerent overseas than was his father. Domestically, he shared his father's devotion to royal absolutism, but he lacked his father's wisdom about when to stop pressing a point that was excessively irritating

66. The full text of the Grand Remonstrance is in The Constitutional Documents of the Puritan Revolution 202-32 (Samuel Rawson Gardiner ed., 1979) (reprinting 3d. ed. 1906).

the nation. Charles aimed to create what he called "the perfect militia" or an "exact militia." He tried to enforce Henry's archery practice mandates, fostered the import of bowstaves, and ordered removal of impediments to access of archery grounds. Hardy, at 142; French, at 9. The trained part of Charles's militia was small. As of 1638, the trained bands comprised 73,116 infantry and 4,835 cavalry—out of an English population of about four or five million. Stater, at 22 (trained bands); Hubert P. H. Nusteling, *The population of England (1539-1873): An issue of Demographic Homeostasis*, 8 Histoire & Mesure 59, 77 (1993) (trans. Pascalle Videler) (population estimates).

In his futile attempt to revive archery, Charles was following Elizabeth. Yet he was more ambitious than she. She had two objectives for the militia: (1) assisting national defense, and (2) preventing her overthrow. Charles, however, used the militia for much more, especially extorting money for himself and forcing vulnerable citizens to bear the expenses of his army. Rather than spend royal funds on disabled soldiers returning from foreign wars, Charles's militia officers quartered disabled soldiers in the homes of poor families, and made the families pay for the soldiers' upkeep. Similarly, Charles's militia officers coerced householders to quarter Irish soldiers whom Charles had brought into England. Many soldiers were a barely controlled rabble who robbed their hosts, and made towns so dangerous that people were afraid to go to church, for fear that their homes might be looted in their absence. Much of the army's privates were the dregs of society; as towns had to fulfill military quotas, many of the men forced into service were local troublemakers whom the towns were glad to send elsewhere. Stater, at 40-41; Trevelyan, at 125-26; Breen, at 77-81. People who had voiced opposition to the king suffered the heaviest burdens. To Charles, a "perfect militia" was select (only a small and politically reliable subset of the population), strong, and personally controlled by him.

In 1629, Charles dismissed Parliament because it would not give him what he wanted, most importantly new taxes to pay for a naval construction program. Thus began a period known as Personal Rule. He raised the "ship money" himself, through unilateral impositions. Although many people considered the ship money to be flagrantly illegal, the courts upheld it, declaring that all property in England belonged to the king. *Rex v. Hampden*, 3 How. St. Tr. 825 (Exchequer 1638) (7-5 decision).

One of Charles's money-making schemes was aggressive use of the forest laws. The "royal forests" included much land that was not a forest in an ecological sense. Charles expanded the boundary claims of the royal forests, and also started selling off some royal forest land to buyers who would enclose it with fences, and thereby dispossess commoners who used the land as a commons. The forest policies provoked widespread rioting in the south and west. Well-armed peasants pulled down new fences and drove away royal officials. Malcolm, at 14-15. The people showed themselves to be "versed in the arts of organizing irregular military bands." Eric Kerridge, *The Revolts in Wiltshire against Charles I*, 57 Wiltshire Arch. & Nat. Hist. Mag. 64, 72 (1958-59).

On the whole, Charles's dream of a "perfect" militia did not get very far. The lords lieutenant had spent a lot of their social capital forcing men into service in 1625 so that Charles could fight a war with Spain, which turned out to be a humiliating fiasco. So the lords lieutenant were not much interested in squandering what remained of their local goodwill to create the militia Charles wanted. Rather than

fining militiamen who failed to provide themselves with required equipment, the lords lieutenant left enforcement to the Privy Council (the king's circle of close advisors), which lacked the practical administrative reach to punish militia recalcitrants. Stater, at 32-41, 48. The lieutenancy at its best "embodied the resilient traditions of English local government—provincial, conservative, and attuned to the nuances of local society." *Id.* at 46.

Using his own money, Charles built an unpopular standing army. Even the Tudors had not dared to do so. There was widespread fear that Charles was on his way to making himself a military dictator. If Charles got his way with his perfect militia, there would be no armed body capable of resisting Charles ruling by force. When Charles threatened Parliament, that body's leaders raised the mob of London to defend Westminster Hall. Trevelyan, at 176-77.

2. The British Civil Wars and the Interregnum

Royal absolutism raised tensions, many of them religious. The only legal religion was that of the Church of England, which the king controlled by his appointments. His opponents wanted some measure of democratic control, such as putting Parliament in charge, or allowing congregations to choose their own minister. Trevelyan, at 183-84. With government trying to control religion, there were many conflicts among the established Church of England (Anglican), the established Church of Scotland (Presbyterian), Protestant Nonconformists (Congregationalists and English, Welsh, or Irish Presbyterians), Anabaptists, other "Sectarians," and the remnant of Catholics in Great Britain. Ireland was predominantly Catholic but was also home to an Anglican aristocracy and a significant population of Presbyterians, especially in the northeast (Ulster). Many of the latter were Scots-Irish, who had been moved from Scotland to Ireland in the early seventeenth century, as part of an English government program to settle "plantations" on land confiscated from Gaelic nobles. (The English language word "plantations" originates from the project in Ireland.) Alliances among the religions changed often, as did the monarchy's tolerance of them. Things got much worse when Charles I tried to crack down on the Scottish Presbyterian church, and thereby provoked a Scottish revolt in 1638. Scottish religion was "another instance, like the failed plan for an exact militia, of the king's refusal to recognize the natural limits of his authority." Stater, at 49.

At enormous county expense, the lords lieutenant reluctantly mobilized a large army in the summer of 1639, but then Charles I flinched from invading. The next year, he ordered another mobilization, and this time he did fight. Because so many resources had been squandered in 1639, the Scots gained the upper hand. Although many Englishmen considered the Scots savages, they were not eager to fight against sincere fellow Protestants. *See* Mark Charles Fissel, The Bishops' Wars: Charles I's Campaigns against Scotland, 1638-1640 (1994); Stater, at 48-60.

The Anglo-Scottish war provided the opportunity for a 1641 Catholic uprising in Ireland. The next year, the English Civil War began. The British Civil Wars (also known as the Wars of the Three Kingdoms) in Ireland, Scotland, and England continued until 1653, when a parliamentary army crushed the last resistance in Ireland. Subwars included the First and Second Bishops' Wars, the Irish Confederate Wars,

the First, Second, and Third English Civil Wars, and Oliver Cromwell's conquest of Ireland. Some civil wars have two sides, like the American Civil War (Union vs. Confederacy) but the British Civil Wars had multiple sides, and alliances shifted frequently.

The proximate cause of the English Civil War was control of the military. Carlton, at 185. King Charles and Parliament each thought they had the superior power over the militia and the army. Once Charles started the war with Scotland, he found that he needed more money, so he had to summon Parliament in April 1641. Parliament was willing to give him the money, but not unconditionally, so he dismissed the Short Parliament after three weeks. He found that he had to summon Parliament again that November. It would become the Long Parliament. As parliamentary resistance to Charles intensified, Charles was outwardly open to reform, but the Queen and he were busy trying to convince the army to carry out a coup, and to convince foreign governments to send armies to suppress the opponents of royal absolutism. Trevelyan, at 187-94.

Charles was angry that Parliament had sent him the Grand Remonstrance in November 1641, which complained about his many abuses of power. He was outraged that Parliament published it for the public to read. In early January 1642, he attempted a military coup, marching with 400 men to arrest five of his leading parliamentary opponents. Tipped off, they escaped, and Parliament had no doubt that Charles intended to rule by force and not by law. The trained bands of London and the surrounding area were called forth by Parliament for its defense. Charles found his position in London untenable and fled to Oxford to raise an army by which he would subdue Parliament. John Forster, Arrest of the Five Members by Charles the First (1860); Trevelyan, at 198-200.

On May 17, 1642, Parliament declared that no one could take up arms based on the king's command. 2 Cobbett's Parliamentary History of England 1235 (1807).[67] Parliament also passed a militia bill to suppress the Irish rebellion that had begun in 1641, and in which thousands of Protestants had been massacred. The bill contained a provision giving Parliament the right to appoint military officers. "By God, not for an hour!" the king thundered when a parliamentary delegation asked him to give the royal assent to the bill.[68] Edward Hyde, Earl of Clarendon, The History of the Rebellion and Civil Wars in England 589 (1701-14).

In Charles's mind, the militia was, next to conscience, "the fittest subject for a King's Quarrel; for without it Kingly power is but a shaddow." Charles I, *Directions for my Uxbridge (Commissioners), in* The King's Cabinet Opened 26-27 (1645) (secret papers of Charles that were captured and published).

Although Charles vetoed the militia bill, Parliament said that the militia bill was law anyway, as an "ordinance" rather than a statute. The Militia Ordinance gave Parliament the power of appointing lords lieutenant, a power that Parliament swiftly exercised to put its political allies in charge. Under James I, no one had minded that lieutenancy had no statutory basis, and was just the monarch's assertion of supposed royal prerogative. But when the lieutenancy had made itself unpopular

67. Available at archive.org.

68. The monarch vetoes by denying "the royal assent." The last exercise of this royal power was in 1708, when Queen Anne vetoed a bill to re-establish the Scottish militia.

as an instrument of Charles I's excesses, the absence of statutory authority made it an easy target for Parliament. *See* Constitutional Documents of the Puritan Revolution, at 245 (Mar. 5, 1642) (Militia Ordinance); Stater, at 61-63. Parliament and Charles issued conflicting orders about who was in charge. *See* 2 Stuart Royal Proclamations, at 767 (May 27, 1642) (forbidding militia and trained bands to follow orders from Parliament); Declaration of Lords and Commons (June 6, 1642), in Constitutional Documents of the Puritan Revolution, at 254 (June 6, 1642) (no one who obeys parliamentary orders may be arrested by someone executing the king's warrant); *cf.* 2 Stuart Royal Proclamations, at 781 (July 4, 1642) (no one may seize the king's magazines).

a. Arms and Ideology During the Civil Wars

Charles left London to raise an army to suppress Parliament. Lacking any statutory authority, he relied on the (allegedly still valid) royal prerogative medieval power to levy Commissions of Array. The dubious basis of the King's military authority made many reluctant to follow the King's orders. *See* Joyce Lee Malcolm, Caesar's Due: Loyalty and King Charles 1642-1646 (1983). Charles began the English Civil War on August 22, 1642, raising the standard "Give Caesar his due!" Carlton, at 120-21. The standard evoked Jesus' statement to his followers that they should pay taxes to the Romans. Roman coinage depicted the Roman Emperor, so Christians should "Render unto Caesar the things that are Caesar's, and unto God the things that are God's." *Matthew* 22:15-22; *Mark* 12:13-17; *Luke* 20:20-26.

But what was due to Caesar or any other king? Absolute obedience because Charles ruled by divine right? Or obedience only to the extent that the king ruled according to the law, for true law comes from true God? The latter view was articulated in 1644 by the Scottish Presbyterian Samuel Rutherford in his book *Lex, Rex, or the Law and the Prince*. The point of the title was that the law precedes the king; the monarch must obey the law. *Lex, Rex* refuted the royal absolutists who claimed *rex est lex loquens*—the king is the law speaking. Lord Chancellor Ellesmere, *The Speech of the Lord Chancellor of England, in the Exchequer Chamber, Touching the Post-Nati, in* Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere 248 (Louis A. Knafla ed., 1986). *Lex, Rex* was built on the intellectual foundation of *Vindication Against Tyrants*, a 1579 French Protestant treatise, which in turn was built on Catholic writing about Just Revolution. *See* online Ch 21.D.2.a, 21.C.3. In 1690, a half-century after *Lex, Rex*, John Locke's *Two Treatises of Government* (Section K.2) would elaborate *Lex, Rex* in secular terms. Government contrary to law is merely a high-level form of organized violent crime and may be resisted with armed force when necessary. So thought the parliamentary forces in 1642, and so thought the Americans of 1776.

King Charles I lost the war, was captured, and then violated the agreement under which he was being held, by attempting to overthrow Parliament. Conniving, dishonest, and dangerous, Charles Stuart was sincerely devoted to his own divine right of power. He was tried by a special parliamentary court and executed on January 30, 1649. Parliament abolished the office of king, abolished the House of Lords (the upper house of Parliament, representing the high nobility), and declared a commonwealth. The monarchs of continental Europe were outraged. In defense of the deposition of Charles, John Milton wrote the book *The Tenure of*

Kings and Magistrates, which argued that monarchs do not rule by divine right, but only by the consent of the people.

The events became vivid in the American mind. On July 6, 1776, a special committee of the Continental Congress met to create the Great Seal of the new United States of America. Benjamin Franklin proposed that the Great Seal bear the motto of John Bradshaw, the head of the court that had tried Charles: "Rebellion to Tyrants is Obedience to God."

When the Stuarts were out of power, the press and religion were freer, and the idea of the armed people was in favor. Thus, the year 1642 saw the first publication of *Maxims of State*, a book by the late Sir Walter Raleigh (ca. 1554-1618). Raleigh—a great adventurer, soldier, and historian—had analyzed arms control in world history. Following Plato and Aristotle (online Ch. 21.B.1.b), and adding modern examples, Raleigh explained that the form of government would determine the arms control laws, and vice versa. In a good monarchy, which Raleigh thought to be the best form of government, the government will "stir up the people, if they grow secure, and *negligent of Armour*." But care must be taken not to create too many false alarms, lest the people not respond to a genuine danger. Walter Raleigh, Maxims of State 34 (W. Bentley 1651).

According to Raleigh, in an oligarchy, the rich are compelled to have arms, while the poor are not. This is supposedly a hardship for the rich and a benefit for the poor, but it means that the poor are excluded from political power. *Id.* at 18, 53-54. In overt tyranny, "Tyrants (which allow the people, no manner of dealing in *State* matters) are forced to bereave them of their wits and weapons, and all other means by whereby they may resist, or amend themselves," as in Russia and Turkey. *Id.* at 6-7. The overt tyrant's means are to "forbid learning of liberal Arts, and Martial exercise, As in the *Russe* [Russian] *Government*, to *Julian* the *Apostate* [a Roman emperor] dealt with Christians. . . . To unarm his people of weapons, money, and all means, whereby they may resist his power." *Id.* at 43-44.[69]

The shrewd tyrant will be more subtle: "To unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth, and then to arm with them, such as and so many as he shall think meet, and to commit them to such as are sure men." *Id.* at 49. Similarly, a new government that has taken power by force, and that has shaky legitimacy, will claim to be a protector rather than a tyrant. It will aim to make the people "disused from the practice of Arms, and other Exercises which increase courage, and be weakened of *Armour*, that they have neither spirit nor will to rebel." *Id.* at 40.

When Raleigh had written *Maxims* decades earlier, he was subtly criticizing the select militia of the Tudors and Stuarts. The 1642 publication of *Maxims* seemed to indicate that England's new government was committed to liberty. Yet over time, England's new government would become more like its Stuart predecessor.

b. Arms and Arms Laws of the Interregnum

In the early 1650s, the British shortage of saltpeter was solved. The British East India Company—a private company with very close ties to the government—was

69. Flavius Claudius Julianus (reigned 361-63A.D.) attempted to reverse the Christianization of the Roman Empire, and to restore the old Roman gods to their former status.

colonizing the Bengal area in India. The area turned out to have huge quantities of natural saltpeter. Eventually, 70 percent of global trade in saltpeter would come from India. India's abundance freed the British people of the vexations of the saltpetermen.

The British Civil Wars were by far the bloodiest ever fought on British soil, and on a per-capita basis, among the bloodiest anywhere. Ireland suffered worst, with about a fifth of the population dead by the end of the wars.

As is common during wars, many arms fell into civilian hands. Some were scavenged from battlefields. The men in Charles's army often sold their firearms to buy themselves food. *See, e.g.*, 2 Stuart Royal Proclamations, 828, 829 (Dec. 14, 1642) (noting the "great store" of arms "lost, sold, and left" in Worcester County by the king's army and the "Army of the Rebells"); *id.* at 842 (Jan. 5, 1643) (many soldiers in Oxford, where the king's army was keeping winter quarters, had sold, pawned, or negligently lost their arms; subjects should return them to the king); *id.* at 871, 872 (Mar. 10, 1643) (contrary to the king's orders, transfers of arms from the king's army to civilians "Continue, and increase"); *id.* at 890 (Apr. 22, 1643) (previous orders that people of Oxford should bring their arms to the king have not been "particularly observed"); *id.* at 1031, 1032 (ca. Apr. 30, 1644) ("many Countreymen have in theire Custody diver Pistolls Carabines Musquetts and other Armes" lost or taken during skirmishes between the king's army and the rebels; offering to pay for arms that are turned in; issuing threat against soldiers who pawn their arms).

Even before the wars, government-owned arms frequently had found their way into nongovernment hands. *See, e.g.*, 2 Stuart Royal Proclamations, at 174-75 (Dec. 8, 1627) ("great quantities" of arms and ammunition "have heretofore been, & still are dayly purloined, stolen, imbezelled, and conveyed away" by soldiers and sailors), 190 (Mar. 9, 1628) (same problem for government-owned militia arms; requiring such arms to have special markings).

Parliament remained interested in game laws. One Parliamentary order authorized warrantless search and arrests for people who hunted illegally, and for people who possessed greyhounds or "setting dogs" but who did not meet the ten-pound annual income requirement for hunting. The order said nothing about firearms possession by nonpoachers. Hamilton, Quarter Sessions, at 162.

The volunteers and militia who had fought for Parliament were eventually turned into a large and very capable professional force, the New Model Army. The head of the army was Oliver Cromwell, who ultimately became a military dictator (according to his critics), styling himself the "Lord Protector." Cromwell was a Puritan; at the time, Puritans were a faction within the Anglican Church, not a separate denomination. In 1647, Parliament ordered the army to disband, but it refused, mainly because Parliament had not paid overdue wages. Trevelyan, at 247. In 1648, moderate members of Parliament were expelled. Although the Rump Parliament still sat, Cromwell was in charge, by force of arms. In 1655, Cromwell got rid of the lords lieutenant, and divided England into 11 military districts, each of them ruled by a high-handed, oppressive major-general appointed by Cromwell. Stater, at 69-70.

The standing army that was supposed to defend the self-government of Englishmen had de facto replaced civil government with a military one. As educated Britons and Americans knew, the same thing had happened in classical

Rome, when the Republic was replaced by an Empire in which power belonged to whichever despot the army chose. *See* online Ch. 21.B.2. For centuries to come, the result of the British Civil Wars would be one of the foremost reasons why many Anglo-Americans distrusted standing armies. British history is one reason why the U.S. Constitution requires that a civilian—the President—and not a military man, be the commander-in-chief of the armed forces. U.S. Const. art. II, § 2.

Meanwhile, the Rump Parliament expanded Charles I's program of using a select militia for political repression, to surveil and disarm critics of the government. Malcolm, To Keep and Bear Arms, at 24-27.

Cromwell's select, oppressive militia and his standing army dictatorship were implicitly criticized in James Harrington's 1656 *The Commonwealth of Oceana*. Speaking for both radical libertarians and for country squires, Harrington expressed the conventional wisdom of the opponents of a standing army. Drawing on and advancing the militia ideology of the Renaissance Italian city-states (online Ch. 21.D.1), Harrington argued that a free society rests upon the foundation of small farmers who own their own land. The virtuous yeoman farmer, bringing his own arms to duty in a popular militia, is the best security of a free state. Unlike a standing army, a popular militia would never tyrannize its native land. Indeed, a militia could overthrow a despot. Unlike hired mercenaries or professional soldiers, the militiaman had his own country to fight for, and was therefore the best defense of a free state against foreign invasion. Harrington's ideas would be embraced by the Founders of the American republic.

Cromwell died in 1658 and was succeeded by his not especially competent son Richard ("Tumbledown Dick"), who was unable to hold power. Fearing counterrevolution, the Rump Parliament took gun control to a new extreme in 1659, demanding that all householders register all their arms, ammunition, and horses with local governments. 2 Acts and Ordinances of the Interregnum, 1642-1660, at 1317-19 (C.H. Firth & R.S. Rai eds., 1911).

With England on the brink of another civil war, in 1660 the head of the army invited Charles II, son of the executed Charles I, to return from his exile in France and resume the throne. Before giving Charles II the crown, Parliament made no effort to extract from him any concessions about civil liberty or the rule of law.

3. Charles II and James II: Arms Prohibition and the Glorious Revolution

Within weeks of the Restoration, King Charles II ordered gunsmiths to report all gun sales, and banned arms imports. Malcolm, To Keep and Bear Arms, at 42-43 (Privy Council orders). Another order forbade the import of all firearms and firearms parts. *Id.* at 48. A 1661 Militia Act declared that the king had the sole right to control the militia and all other military forces. The lords lieutenant were recreated, and finally put on a solid statutory foundation. 13 Charles II, stat. 1 ch. 6 (1661) (also immunizing persons who had seized arms from supporters of the commonwealth). A more thorough Militia Act of 1662 reorganized the militia, reaffirmed the king's unilateral power, and also authorized the king's agents "to search for and seize all arms" whom the lords lieutenant or their deputies considered dangerous. 14 Charles II ch. 3 (1662).

Before 1642, the lords lieutenant had generally been apolitical, and mainly concerned with maintaining harmony within their counties. But in the Restoration, they were chosen for political correctness. Lieutenants now needed royal approval for whom they appointed as deputy lieutenants. In imitation of the major generals under Cromwell, the lords lieutenant were tasked with using the militia to suppress political and religious nonconformists, including by confiscating their firearms. However, as the years passed, militiamen were often reluctant to perform the duty, especially against Dissenters — Protestants who did not submit to the Anglican Church. Some militiamen called out to intimidate the king's political opponents deserted at the first opportunity. *See* Malcolm, To Keep and Bear Arms, at 44-47; Braddick, at 227-31; Stater, at 66-160.[70]

Unbeknownst to the public, pursuant to the 1670 Secret Treaty of Dover, Charles II began receiving a large annual bribe from the king of France, in exchange for Charles's covert promise to ally with France and to reimpose Catholicism as the state religion. The bribe helped Charles build up a standing army for himself, without needing to ask Parliament for appropriations. Malcolm, To Keep and Bear Arms, at 67. The massive French bribery of Charles, his courtiers, and members of Parliament is a basis for the Foreign Emoluments Clause of the U.S. Constitution, which forbids federal officers to receive "any present, Emolument, Office, or Title, of any kind whatever, from any King Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8.

As for the soldiers in the former New Model Army, in 1670 Charles ordered them to stay away from London and forbade them to ride armed for six months. *Id.* The order indicates that in 1670, the old Statute of Northampton (Section F.1) from 1328 was not being interpreted or applied as a general ban on arms carrying.

a. The Game Act of 1671

Notwithstanding a century and a half of gun control by Tudors, Stuarts, and the Rump Parliament, as of the early 1670s, "it was widely accepted that guns were easily purchased in London." Even servant girls could buy small handguns, which had been formally illegal since the proclamation of James I in 1613. Schwoerer, at 135. Small handguns were also prohibited under the generally ignored minimum length rules of Henry VIII's 1541 statute. Section G.2.

Under Charles II, Parliament initiated the strictest gun control program England had ever known. The 1671 Game Act forbade the vast majority of the population from hunting, and barred nonhunters from owning guns or bows.[71] For centuries, English law had mandated ownership of particular types of bows, edged weapons, and firearms. For a millennium, the monarchy had worked to ensure that Englishmen would own arms and be expert in their use. Now, Charles Stuart

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70. After the Restoration, "nonconformist" and "dissenter" were interchangeable. A "dissenter" would be any Protestant who did not accept the Church of England. Previously, "nonconformist" had a narrower meaning, applying to Presbyterians and Congregationalists who accepted the doctrines of the Church of England, but who would not conform to certain Anglican practices. Goldie, *in* 6 Entring Book, at 258.

71. The previous law, from 1609, had allowed hunting by anyone with an annual income of at least 40 pounds, from any source. Malcolm, at 71.

wanted the English people disarmed. His new law authorized daytime searches of any home suspected of holding an illegal gun. 22 & 23 Charles II ch. 25 (1671).

To some in Parliament, the Game Act was more about hunting than about firearms. The British Civil Wars (Section H.2) had devastated England's many large forests. The Royal Forests had been harvested to build ships, or to provide fuel for the furnaces that built cannons. Private forests had been drastically thinned to pay the taxes that the various governments had imposed to feed their armies, and to pay the fines that were levied on whoever was out of political favor at the moment. "[G]ame had been destroyed wantonly, parks were ravaged of their deer." Kirby & Kirby, at 247. Falconry and hawking (using trained birds to hunt smaller birds) were devastated.

The nobility adapted by using fowling pieces (similar to shotguns) to hunt birds in flight. Although Charles's 1661 order had forbidden arms imports, excellent fowling pieces from the continent poured into England. Shotgun hunting became "almost in an instant the height of the mode." John Nigel George, English Guns and Rifles 63-65 (1947). Many in the upper classes still loved their hawks and falcons, but in the subsequent decades, marshes and fens were turned into cultivated land; and therefore herons and water fowl diminished, depriving the apex predator birds of natural prey. Gladys Scott Thomson, Life in a Noble Household 1641-1700, at 237 (1937).

Foxes had formerly been considered "vermin"—anyone could kill them but hunting them was not an activity fit for gentlemen. Now, chasing foxes on horseback while being led by trained hounds became popular. *Id.* The long chase of a fox hunt would often take the owner off his own property, and onto the property of others—sometimes even across county lines.

As previously described, English kings from William the Conqueror onward had asserted they owned all the wild animals, and that nobody could hunt without their permission—especially in "the king's forests," huge tracts of land directly owned by the king. The forest laws directly regulated these places, but the monarchs thought that the principle applied everywhere else, too. Kirby & Kirby.

There were many legal disputes about whether a tenant needed his landlord's permission to kill game on the tenant land, and whether a noble needed permission to hunt on his tenant's land or on someone else's land. The overt purposes of the 1671 Game Act were to strengthen hunting rights of the nobility, and to stop hunting by commoners, which had become common during the Interregnum. *Id.* Preventing future revolutions may have been an unexpressed purpose.

The 1671 Game Act greatly increased the annual income qualification for hunting, to 100 pounds. To exclude wealthy urban merchants, the new act required that the income had to come from land, rather than from trade or other sources. Although the Game Act did not repeal trespass laws, it removed any practical punishment for gentry who entered other people's lands to hunt. Now, without need for permission from kings or neighbors, the gentry could hunt wherever and whenever they wished. The Act helped the rural gentry reassert its social superiority, following the disruptions of the British Civil Wars and the Interregnum.

Besides being able to hunt on other people's land, the gentry were empowered by the new Game Act to enforce the game laws, to appoint gamekeepers to assist in enforcement, and to allow their social inferiors to hunt, if the gentry so

chose. In other words, a noble could allow a middle-class tradesman in his shire to hunt a few times a year on the noble's land. Granting permission to hunt (and therefore to keep arms) was an important part of the network of deference and generosity at the heart of social relations in rural England.

The 1671 Act delegated nearly limitless discretion to the rural gentry. If a noble wanted to reinforce friendships by allowing the middle class to hunt, he could do so. If he wanted to get an easily obtained warrant and rummage through his tenants' houses looking for firearms, bows, or nets, he and his gamekeepers could do that, too. P.B. Munsche, Gentlemen and Poachers: The English Game Laws 1671-1831, at 1-51 (1981). There are no known records of landlords actually using their broad powers to disarm their nonhunting tenants, although the landlords were often vigorous in tracking down poachers. Malcolm, To Keep and Bear Arms, at 87-88.

The 1671 Act had not specified any penalties beyond forfeiture of the hunting tool and paying the property owner for any damage. Thus, prosecutors who wanted additional punishment had to resort to older statutes. The 1328 Statute of Northampton was not invoked against arms carrying. Rather prosecutors relied on the Tudor statutes that banned hail shot (multiple small pellets), and penalized possession of crossbows and handguns if the possessor were below a certain income level.[72]

Much later, in 1831, the Game Reform Act repealed all the old laws. Henceforth, anyone could hunt on his own property, or on property where the owner gave permission to hunt. Not until 1880 was it legal for a tenant farmer to kill a hare on his leasehold without the landlord's permission. 43 & 44 Victoria ch. 47 (1880). After 1831, hunting by the lower classes on other people's property was controlled by the laws against trespass, for which the penalties were by then much more severe than for game law violations.

b. The Glorious Revolution

In February 1685, Charles II died, and was succeeded by his brother James II. Charles II had been quietly sympathetic to Catholicism and made a deathbed conversion to the faith. His younger brother James II was publicly an ardent Catholic. There was widespread fear that James II meant to turn the government into an absolutist regime similar to Catholic France.

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72. Munsche, at 241; John Christopher Atkinson, 6 Quarter Session Records 161 (n.d.) (case of Oct. 3, 1671; conviction of "a Rowsby gentleman, for shooting and killing hares with a hand gun charged with powder and hail-shot"), 213 (Apr. 28, 1674, "Barton yeoman for shooting at doves with a hand-gun charged with powder and hail-shot"); 216 (July 14, 1674, "Middleton laborer" for same, "and killing a pigeon"); S. C. Ratcliff & Harold Cottam Johnson, 6 Warwick County Records: Quarter Session Indictment Book, Easter 1631 to Epiphany 1674, at 195 (1941) (In 1673, "Abraham Heath of Birmingham, wheelwright, indicted for a keeping a handgun, and not having one hundred pounds a year"); William LeHardy, 1 County of Buckingham Calendar to the Sessions Records: 1678 to 1694, at 137 (1939) (indictment "for keeping guns, contrary to the statute of 33 Henry VIII"). Some courts became adept at finding technical reasons to dismiss the prosecutions. *See* Munsch 214 n. 45; *see also* Joseph Chitty, A Continuation of a Treatise on the Law Respecting Game and Fish 940-42, 946-47, 973, 977 (1816). As noted in Section G.2, the last known handgun-only conviction was in 1669; post-1669 cases included some known convictions for handguns with hail shot, and handgun-only indictments that do not report the disposition.

Most of the English people were fed up with changes of official religion. Henry VIII had broken from the Roman Catholic Church and established the Church of England (Anglican). Queen Mary (who reigned 1553-58) had switched Britain back to Catholicism. Her successor Elizabeth I (reigned 1558-1603) then reverted to the Church of England. Starting in 1642, the British Civil Wars (Section H.2) had changed the Church of England into a Puritan church. The Restoration had returned the traditional Anglicans to power in 1660. With every change, most people sheepishly complied, but those who did not were often persecuted. There was little appetite for yet another change in the established religion.

In 1686, Sir John Knight, an Anglican and a fierce political enemy of King James II, was acquitted for carrying a gun in a church. *See* Section F.3. Shortly after Knight's acquittal, King James II ordered full enforcement of the Game Act of 1671. Calendar of State Papers Domestic: James II, 1686-7, at 314 (E.K. Timings ed., 1964) (Earl of Sunderland to Earl of Burlington, Dec. 6, 1686. "The King having received information that a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses, it is his pleasure that you should send orders to your Deputy Lieutenants to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order");[73] Malcolm, To Keep and Bear Arms, at 104-05.

James II, like his elder brother Charles II, had every reason to fear an armed populace. The Rye House Plot to assassinate both of them was foiled in 1683. The Duke of Monmouth was the eldest of the many illegitimate children of Charles II (the "Merry Monarch") and his numerous mistresses.[74] Monmouth had been trying to maneuver himself onto the throne as the Protestant favorite. In June 1685 he and a small army he had raised in Holland attempted the Monmouth Rebellion in strongly Protestant southwest England. Under the leadership of General John Churchill, an ancestor of Winston, the army and militia quickly suppressed Monmouth. But James II took no chances. He asked Parliament to repeal the Habeas Corpus Act. When Parliament refused, he dismissed it. No new Parliament would sit during his reign.

The king attempted to build up his standing army. He stuffed the army with Catholic officers, especially at the highest ranks. The size of the standing army was increased from 8,565 to more than 34,000. Shrinking the militia, Charles II hoped it would wither as a threat to his power. *See* John Miller, *The Militia and the Arm in the Reign of James II*, 16 Historical Rev. 659 (1973). But with the militia, too, James II broke with the traditions of his predecessors. Under James I, Charles I, and Charles II, the lords lieutenant had been strongly Anglican and generally men of high stature in their counties. James II began replacing them with Catholics and with men of low rank—men who owed their position solely to the king, and not in part to their standing in their home county. The new men appointed by James II lacked the approval of

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73. Available at British History Online, http://www.british-history.ac.uk.

74. Some suggested that Monmouth was not the son of Charles II, but rather of Robert Sidney, another lover of the king's mistress Lucy Walters. Trevelyan, at 367. If so, Monmouth was the nephew of Algernon Sidney. Section K.3. Among the many certain extramarital descendants of Charles II was Lady Diana Spencer ("Princess Di"), whose oldest son, Prince William, is now second in line of succession to the British throne. Also extramaritally descended from Charles II is Camilla Parker Bowles, second wife of heir apparent Prince Charles, who would become Charles III should he ascend the throne.

the local people, and thus the ability to lead the militia effectively. The militia, which had been a powerful institution under Charles II, waned. Stater, at 161-74.

According to historian Charles Carlton, "nothing did the king greater harm than his policy towards the armed forces." Carlton, at 193. Soldiers were allowed to abuse civilians at will. Many feared that James was rapidly moving the nation into French-style absolutism.

During the Restoration under Charles II, Parliament had attempted to ensure Anglican control of government by enacting the Test Acts. They required appointees to government offices to take an oath swearing submission to the Church of England and denying transubstantiation.[75] 25 Charles II ch. 2 (1673); 30 Charles II, stat. 2, ch. 1 (1678). Transubstantiation is the Catholic and Eastern Orthodox doctrine that during communion, the bread and water are turned into the body and blood of Jesus Christ in a real sense, not only a symbolic one. To put Catholics in charge of the military, James II in 1687 announced that he was suspending the Test Acts. The courts allowed him to do so, holding that he had the unlimited "power to dispense with any of the laws of Government." *Godden v. Hales*, 89 Eng. Rep. 1050, 1051, 2 Show. K.B. 475 (1686). Shortly before the case was heard, King James had replaced 6 of the 12 judges. Goldie, at 276.

If James was going to oust the Church of England, there were not enough Catholics left in England to do the job. A century and a half of persecution had eliminated most overt Catholics except some wealthy families who had the resources to hold on. To fill the ranks of government with anti-Anglicans, James also announced the toleration of Protestant dissenters (Quakers, Presbyterians, etc.), who did not belong to the Church of England.

In theory, James's tolerance toward Catholics and non-Anglican Protestant dissenters was admirably liberal. The problem was that few people, including the dissenters, trusted the Catholic king's liberalism to last one minute longer than tactically necessary. Trevelyan, at 389-90. Catholic monarchs in continental Europe almost always persecuted non-Catholics. In 1685, French King Louis XIV revoked the Edict of Nantes, which had provided limited toleration of France's Protestant minority. (*See* online Ch. 21.D.2.a.) The Stuart monarchs had always been willing to ally with a wide variety of religious and political groups, had made strong promises of civil freedom to such groups, and had broken those promises the moment that the monarch found it convenient to do so.[76]

Through gun control, militia control, and a personally controlled standing army, the Stuarts had long been attempting to establish a monopoly of force. James

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75. The United States Constitution requires all government officials, at every level, to take an oath to support the Constitution, and specifically forbids any "religious Test" for holding office. U.S. Const. art. VI. The Constitution specifies the exact words of the presidential oath, and, in deference to Quaker sensibilities, allows a President to "affirm" rather than "swear" the oath, as the President chooses. U.S. Const. art. II, § 1.

76. When James had ascended the throne in 1685, he had immediately intensified the persecution of non-Anglican Protestants. "In England they were imprisoned, fined and ruined; in Scotland men were shot and women drowned. In this persecution James was following the desire of his heart; it was only when the breach with the [Anglican] episcopacy drove him to dissemble, that he took into his mouth Penn's noble doctrine of universal toleration." Trevelyan, at 384.

II was closer to achieving the goal than any of his predecessors. If he succeeded, the result might have been a French-style absolutist Catholic dictatorship, from which English people might never be able to escape. That, at least, was what many English feared.

People hoped that they could endure his reign, after which he would be succeeded by his Protestant daughters Mary and Anne, from his first marriage. But James's first wife was deceased, his new wife was Catholic, and in June she gave birth to a male, Catholic heir. People claimed that the baby, James Francis Edward Stuart, was not really a royal son, but had been smuggled into the royal bedchamber in a warming pan. Not confident that birtherism would keep the future James III off the throne, seven aristocrats ("the Immortal Seven") sent a letter to Mary's husband, the Protestant William of Orange, chief executive of the Dutch Republic. They urged him to invade England and depose James II. He was amenable to the idea, which would break the Anglo-French alliance that put the Dutch Republic in mortal peril.

The Dutch Armada caught the powerful "Protestant wind," and set sail under Dutch and English colors, with William's flagship bearing the motto "I will maintain the Protestant Religion and the Liberties of England." Edgar A. Sanderson, History of England and the British Empire 681 (1893); Marshal Mason Knappen, Constitutional and Legal History of England 447 (1942). While the Protestant wind kept King James's navy in port, William landed on the anniversary of the day the Gunpowder Plot had been foiled (that is, in the popular understanding, the day a Catholic coup had failed). Although William's invading army was far outnumbered, General John Churchill switched sides, and brought half the army with him. Some of the lords lieutenant also defected to William, and many of the rest, including the Catholic ones, kept the militia on the sidelines, rather than coming to assist James. Stater, at 175-82. James II fled to France and the forces still loyal to him collapsed. Total deaths in the Glorious Revolution were only 150. Carlton, at 195-96.[77]

Technically, Parliament could meet only when called by the monarch, and so when Parliament assembled on its own initiative in reaction to the Glorious Revolution, it did so as a Convention—an ad hoc body that performs a political function in lieu of a legislature. The question was who would be the new monarch: Mary, William, or both? The Convention eventually settled on both, but before deciding who the monarch would be, the Convention put the structure of government in proper order, by issuing a Declaration of Rights. William and Mary accepted the Declaration. Because only Parliament could pass a bill, when a new Parliament convened, it enacted the Declaration of Rights as the Bill of Rights. The new monarchs gave the royal assent.

The reforms re-established the system that the Convention considered to have been the norm before the despotic Tudors and Stuarts: limited monarchy, under the law and not above it, governing according to the English constitution. The

77. Catholic Austria and Spain, and even Pope Innocent XI favored the Calvinist William's invasion, because French King Louis XIV (the master and model of James II) was so powerful that he was a threat to all their independence. Trevelyan, at 394-95.

English constitution is not a single document, but rather a diverse collection of customs and understandings, as well as certain statutes of supreme importance, such as Magna Carta.[78]

Part of the despotism of the final years of Stuart rule had been wiping out local self-government — eliminating the charter of London, and the many other local charters and grants by which the English people had governed themselves in the counties and towns. The Stuart program had extended to North America, where Charles II and James II destroyed the colonial charters, and replaced the colonial legislatures with dictatorial rule by royally appointed governors. When Americans heard about the success of the Glorious Revolution, they deposed the Stuart governors, and restored balanced government. *See* Ch. 4.A.1.

4. The Bill of Rights

The Declaration of Rights was subsequently enacted by Parliament as the Bill of Rights. It is part of the English constitution. But as a statute, it can be changed by later Parliaments. The first part of the statute listed the abuses of James II and Charles II:

> 5. By raising and keeping a standing army within this kingdom in time of peace, without the consent of parliament, and quartering soldiers contrary to law.
> 6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed contrary to law.

The second part of the Bill of Rights created positive laws to preserve what Parliament said were ancient rights:

> And thereupon the said Lords Spiritual and Temporal and Commons . . . do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare: . . .
>
> 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against the law.
> 7. The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

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78. From the period covered in this Chapter, documents that are often said to be part of the constitution are Magna Carta (1215) (Part D), Bill of Rights (1689) (Section H.4), Crown and Parliament Recognition Act (1689) (affirming the legality of the Glorious Revolution and the acts of the Convention), Act of Settlement (1701) (rules of succession to the crown, discussed in Section J.1, on Scotland), Acts of Union (1707) (joining Britain and Scotland under a single crown), and Act of Union (1800) (joining Great Britain and Ireland under a single crown).

1 Wm. & Mary, sess. 2, ch. 2 (1689).[79]

The right not to have standing armies in the kingdom was not ancient in the sense that any prior legal document had guaranteed the right, but it had been a long-established custom. Under feudalism, the king's tenants owed him military service (e.g., *X* quantity of mounted knights, *Y* quantity of pikemen, *Z* quantity of archers), but the service was usually limited to 40 days per year. If the king wanted an army for a longer campaign, he would have to pay for it. Although the king had his own revenue sources, only Parliament could impose or raise taxes. To get enough revenue to field a substantial army for more than 40 days, the king almost always needed to convince Parliament to vote for more taxes. The custom that the king could not have a long-term standing army in England without parliamentary consent was well-established; only because of the abuses of the Stuarts had it been necessary to express the rule in statute.

The quartering of soldiers in people's homes had been among the abuses denounced in the 1628 Petition of Right, to which Charles II had grudgingly given his royal assent. 3 Charles I ch. 1 (1628). But the view that forced quartering was tyrannical was much older than that. Only because the Stuarts had violated the ancient understanding had it been necessary for Parliament to address quartering in a written document. The point was worth making again, since both sides in the English Civil War (Section H.2) had quartered troops in the homes of political opponents.

As a written right, the right to arms was no more ancient than the 1606 Virginia charter, and its 1620 parallel for New England, but those were for Americans, not people in England. *See* Section H.1.c. Writings were not what made arms or anti-quartering ancient. They were ancient in the sense of British constitutionalism, in which long-standing unwritten traditions acquired the force of law. From Anglo-Saxon times until 1671, the English government had told Englishmen that they must be armed. As Fortescue and Raleigh had written, an armed populace was inherent in the British structure of government, and of any free government. The principle of the armed people had never meant that anyone could have any weapon; Richard II had outlawed launcegays for everyone, and class distinctions were deeply embedded in British life, including arms culture. Kings Charles II and James II had radically attacked the long-established order by attempting to disarm almost everyone under the pretext of the game laws. The Stuarts thus forced Parliament to affirmatively state as "ancient rights and liberties" what previously had been implicit social understandings. The Bill of Rights was a natural evolution from the unquestionable duty of Englishmen to keep and bear arms. "It is axiomatic that rights imply obligations; given time the reverse is also true." David R. Millar, The

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79. The Bill of Rights statute was enacted in January 1689. Under the calendar system that was used in England until 1752, the new year began on March 25 (the date of the Annunciation to the Virgin Mary). So the English who voted on the Bill of Rights considered January to be part of 1688. For simplicity, we cite the year at 1689, using the "New Style" calendar.

The first draft of the Bill of Rights was presented to the House of Commons on Feb. 2, 1689, titled "Heads of Grievances." Some of the items in that first draft were not included in the final version enacted by Parliament, such as "None of the royal family to marry a Papist" and "For repealing the Acts concerning the militia and settling it anew."

Militia, the Army, and Independency in Colonial Massachusetts 15 (Ph.D. diss. in History, Cornell U. 1967).

The surviving records of the English Bill of Rights' movement through Parliament are scant. We do know that the upper chamber, the House of Lords, changed the phrase "arms for their common defence" by deleting the word "common." The change oriented the right toward what everyone recognized as the natural law right of self-defense, and less toward militia service. Malcolm, To Keep and Bear Arms, at 119. However, as described below, the standard interpretations of the right in the eighteenth century did include the common defense against tyranny, a right that is most effectively exercised by the people collectively, and not by solitary individuals. Of course, the collective right would be a nullity if there were no right of individuals to possess arms.

The language "suitable to their conditions and as allowed by law" reserved to Parliament the authority to enact some regulations on arms. In this regard, the English Bill of Rights prefigured late nineteenth-century state constitutions, which guaranteed the right to arms while reserving some subjects for legislative discretion. *See* Ch. 7.I. The Bill of Rights did not apply in Scotland, which at the time had its own Parliament, and to this day maintains a separate legal system. Nor did Parliament choose to extend the English Bill of Rights to Ireland, which also had its own Parliament. According to Americans, the Bill of Rights did apply to the American colonies, because colonial charters guaranteed that Americans would enjoy all the rights of Englishmen. *See* Ch. 3.A.

5. Legislation and Litigation After the Bill of Rights

Catholics were a tiny percentage of the English population, and they were excluded from the right to arms because they were considered potentially disloyal and seditious, especially because of the frequent efforts of the Pope and of the Catholic monarchs in France and Spain to overthrow the English Anglican kings. Civil disabilities against Catholics had been the policy since the 1580s, formalized in the Act against Popish Recusants. 35 Eliz. ch. 2 (1592-93) (Catholics must register themselves with the government and may not travel more than five miles from their homes without a special license).

As previously noted, in 1610, King James I had ordered the seizure of all "Armour, Gunpowder, and Munition" belonging to "Popish Recusants." 1 Stuart Royal Proclamations, at 247-48; *see also* Dalton, *The Countrey Justice* (1622), at 94 (Justices of the Peace should confiscate arms of convicted "popish Recusants"); 2 Stuart Royal Proclamations, 736, 737 (Nov. 11, 1640) (seizure of arms from all convicted "Popish Recusants"). Recusancy was the criminal offense of failing to attend services of the Church of England.

Having established that Catholics had no right to arms, Parliament in 1689 did improve Catholics' situation. It allowed Catholics to own and carry arms (activities for which Protestants had a constitutional right) if they would swear a loyalty oath to the monarchy. For Catholics who would not swear such an oath, arms were allowed "for the defence of his House or person" if a justice of the peace gave permission. 1 William & Mary, Session 1, ch. 15, § 4 (1689). The small English Catholic

population was generally submissive, and so over the next two centuries, the many civil disabilities against English Catholics were gradually lifted.

The situation was very different in Catholic Ireland. The population there strongly supported James Stuart, and almost as soon as William of Orange landed in England, Jacobite forces in Ireland rose in revolt, to support King James. They took over almost all the island, and were joined by James II himself, along with a French army. As discussed in Section J.2, the British Parliament's reaction was to attempt to eliminate arms possession by Irish Catholics.

A 1692 Game Act omitted firearms from the list of prohibited devices in England. 4 & 5 William & Mary ch. 23 (1692). But it did not formally repeal the gun ban in the 1671 Act. In a 1693 debate on game law revisions, Parliament rejected an amendment to expressly allow Protestants to keep muskets in their houses for self-defense. Proponents said that "for the security of the government . . . all Protestants should be armed sufficiently to defend themselves." Opponents retorted that the amendment was procedurally out of order, and besides, it "savours of the politics to arm the mob," which "is not very safe for any government." The Parliamentary Diary of Narcissus Luttrell, 1691-1693, at 444 (Henry Horwitz ed., 1972) (Debate of Feb. 23, 1693).

The next year, Parliament repealed Edward VI's 1548 statute that had banned hail shot and had required people who met the income requirements for handguns and crossbows to register with a justice of the peace. 6 & 7 William III ch. 13 (1694) (noting that these laws "hath not for many yeares last past been putt in execution but became uselesse and unnecessary yett neverthelesse several malicious persons have of late prosecuted several Gentlemen qualified to keep and use Guns").[80]

According to game law historian P.B. Munsche, the repeal of the 1548 statute made prosecutions for the rest of the Tudor gun laws impossible. Having no enforceable gun-specific statute, some prosecutors tried to use a general term in the game laws, by "arguing that guns were 'engines' to take game." Munsche, at 214.

Although it is true that firearms can be engines for hunting, courts rejected attempts to prosecute firearms ownership where there had been no illegal hunting. For example, in 1704 a court held that searches of a commoner's home for dogs or nets were permissible, and so was confiscation of guns used for hunting. However, no Protestants might "by virtue hereof disturbed in keeping arms for their own preservation." Hamilton, Quarter Sessions, at 269.

In the Game Act of 1706, Parliament omitted guns, and forbade greyhounds, setting dogs, lurchers,[81] "Tunnells or any other Engine to kill and destroy game." 6 Anne ch. 16 (1706) (in some editions, 5 & 6 Anne ch. 14). The legislative history indicates specific intent not to interfere with gun ownership. Malcolm, To Keep

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80. Following modern practice in the United Kingdom, we use the modern English abbreviations of the regnal names. In the original, "James" is abbreviated "Jaq" (for the French "Jacques."). Likewise, we write "William," but the original cite was "Gm." (for the French "Guillaume").

81. A lurcher is a cross of certain other breeds, usually involving a greyhound. The game laws usually applied only to sporting dogs, and not to other types, such as terriers (for killing vermin) or working dogs (e.g., herders, including sheepdogs or collies).

and Bear Arms, at 128. Still unwilling to put an explicit statement of arms rights into the game laws, Parliament in 1730 rejected a game law amendment "for allowing Persons, unqualified to kill Game, to keep Guns, for Defence of their Houses." 21 Journal of the House of Commons 566 (May 2, 1730).

Meanwhile, the courts continued to distinguish between hunting-only items (illegal per se, for people below the income line) and firearms (illegal only when used for hunting). A 1722 case contrasted a lurcher dog, which "could only be to destroy the game, and the keeping of a gun, which a man might do for defence of home." *Rex v. Filer*, 93 Eng. Rep. 657, 657, 1 Strange 497 (K.B. 1722). In 1739, the King's Bench held that the "engine to destroy game" did not encompass firearms, unless the prosecutor proved that the firearm had been used for hunting. The Game Act did "not extend to prohibit a man keeping a gun for his necessary defense." Indeed, "the Legislature did purposely omit the word 'gun,' because farmers are generally obliged to keep a gun." *Rex v. Gardner*, 87 Eng. Rep. 1240, 1241, 7 Modern 278 (K.B. 1739).

Relying on *Rex v. Gardner*, the King's Bench in 1752 explained "It is not to be imagined, that it was in the intention of the legislature," in enacting the 1706 Game Act, "to disarm all the people of England." Greyhounds and setting dogs have no purpose but for hunting, so an indictment need not allege that they were used for hunting. "But as Guns are not expressly mentioned in that Statute, and as a Gun may be kept for the Defence of Man's House, and for divers other lawful purpose," an indictment must allege that the gun was actually used for hunting. *Wingfield v. Statford & Osman*, Sayer 15, 96 Eng. Rep. 787; 1 Wils. K.B. 314, 95 Eng. Rep. 637 (K.B. 1751).[82]

By the next century, according to the leading game law treatise, "the *keeping* of a gun or dog is *prima facie* lawful."[83] Or as the editor of a late eighteenth-century edition of Blackstone put it, "everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 William Blackstone, Commentaries 412 n.2 (Edward Christian ed., 12th ed. 1793-95).

In sum, "There is, in particular little evidence that Englishmen as a whole were 'disarmed' by the game laws. Some undoubtedly had their guns taken from them; others may have been forced to hide theirs temporarily." Assertions of widespread disarmament are contradicted "by the known popularity of shooting matches at this time and by the openness with which unqualified men acknowledged their possession of firearms." Munsche, at 81. "Indeed, given the haphazard system of law enforcement in the late seventeenth and early eighteenth centuries, disarmament of the population was a remote possibility at best." *Id.* "But if a man's gun was relatively safe, his dog was not. Country gentlemen did not see the keeping of setters, lurchers, and greyhounds as necessary for the defense of English liberty." *Id.* at 82. Enforcement of the laws against commoners owning sporting dogs may have been aided by the fact that dogs are much harder to conceal than guns.

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82. The case was reported by two different reporters. The quote is from the longer report, by Sayer, which is reprinted in volume 96 of English Reports.

83. Joseph Chitty, Continuation of A Treatise on the Law Respecting Game and Fish 133 n. g (1816), citing *Read v. Phelps*, 33 Eng. Rep. 846, 15 East 271 (K.B. 1812); *see also* Richard Burn & George Chetwynd, 2 The Justice of the Peace and Parish Officer 547-48 (25th ed. 1830) (discussing *Phelps* and other dog cases).

To control the standing army, Parliament found three practical solutions. First, revisions in the tax system cut the percentage of government revenue that went directly to the king down to 3 percent, compared to a high of 75 percent under Charles I. Second, Parliament ensured that the king would have to call a Parliament every year. To maintain discipline, the military needed to operate courts martial, and such courts were legal only because the Mutiny Act so authorized. Because the Mutiny Act always had a one-year sunset clause, the king needed to summon annual Parliaments to renew the Act. Carlton, at 216-19. The U.S. Constitution addresses similar issues by providing fixed dates for Congress to assemble, and by limiting appropriations for the army to no more than two years. U.S. Const. art. I, § 4, *amended by* U.S. Const. amend. XX, § 2, art. I, § 8, cl. 12; *cf.* United States, Declaration of Independence (1776) ("He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil Power").

Finally, commissions for high-ranking officers were placed on the open market, where they could be bought and sold. Because of the rules of primogeniture, a landowner's real estate had to pass undivided to the eldest son; thus, younger sons needed something to do. Buying themselves a commission in the military was one outlet. The higher the rank, the more expensive the commission. Military leadership was thereby kept in the hands of the aristocracy, eliminating the possibility that the king could appoint all the officers, who would be loyal only to him personally. Carlton, at 183-87.

With the Stuarts gone, the freedom of the press expanded substantially. Now allowed was publication of pro-militia writings such as Algernon Sidney, Discourses Concerning Government (1698) (Section K.3); John Toland, The Militia Reformed (1698); Anonymous [probably John Toland, Walter Moyle, & John Trenchard], An Argument Showing that a Standing Army is inconsistent with a Free Government, and absolutely destructive to the Constitution of the English Monarchy (1697), and A Short History of Standing Armies (1698). For a more skeptical view of militias, see Andrew Fletcher, Discourse Concerning Militias (1697).

The religious conflict in England was much reduced by the Act of Toleration, 1 William & Mary ch. 18 (1689). It offered freedom of worship to all Protestants, but did not change the laws preventing non-Anglicans from holding government offices. Those laws would gradually be repealed during the following two centuries.

For more on the seventeenth-century militia conflict, see, in addition to the sources cited earlier, Lois G. Schwoerer, "No Standing Armies!" The Antiarmy Ideology in Seventeenth-Century England (1974). For a survey of the complicated politics of the Stuart period, see Peter Ackroyd, Rebellion: The History of England from James I to the Glorious Revolution (2014).

6. James Madison and Other Americans on the English Bill of Rights

In 1789 in the First Congress, James Madison introduced a set of constitutional amendments, which would become known as the Bill of Rights. Madison's notes for his speech introducing the amendments showed that he viewed the English Bill of Rights as a good start, but too weak. He wrote that his amendments "relate 1st. to private rights." A Bill of Rights was "useful—not essential." There was a "fallacy

on both sides—especy as to English Decln. of Rts." First, the English Rights were a "mere act of parlt." In other words, because the English Bill of Rights was a statute, it could be overridden, explicitly or implicitly, by any future Parliament. Thus, the Bill of Rights constrained the king but not future Parliaments.

Second, according to Madison, the scope of the English Bill of Rights was too small; it omitted certain rights and protected others too narrowly. In particular, there was "no freedom of press—Conscience." There was no prohibition on "Gl. Warrants" and no protection for "Habs. corpus." Nor was there a guarantee of "jury in Civil Causes" or a ban on "criml. attainders." Lastly, the Declaration protected only "arms to Protestts." James Madison, Notes for Speech in Congress Supporting Amendments, June 8, 1789, *in* The Origin of the Second Amendment 645 (David E. Young ed., 1991).

As discussed above, the arms control laws of the Tudors and Stuarts were failures. Arms ownership by people who did not meet the statutory income qualifications was widespread, and usually not necessary to conceal. However, Americans tended to understand the arms situation based on the English statutes, so they thought that the English had been mostly disarmed. For example, the leading legal treatise in the Early Republic was St. George Tucker's American Blackstone (Ch. 5.F.2.a). Tucker added many footnotes to Blackstone's text (Section K.1), as well as a volume on the American Constitution, to describe how American law differed from British law. Tucker's analysis of the American right to arms denounced the English game laws for having disarmed almost the entire population. *See* Ch. 5.F.2.a. Other leading authors of treatises on American constitutional law, such as William Rawle and Supreme Court Justice Joseph Story, agreed. They contrasted the robust American right with its feeble English counterpart. *See* Ch. 5.F.

An 1848 American book kept up the theme. It accurately described the harsh legal restrictions imposed in Ireland (Section J.2): "the lord-lieutenant also, under the power of certain acts, deprived the people of Dublin and many other parts of Ireland, of their guns, pistols, and other arms, a few privileged and licensed persons only being authorised to keep weapons for their defence. Persons having arms contrary to law are liable to be imprisoned. . . ." R. W. Russell, America Compared with England 147 (1848).

The book argued that even in Great Britain, freedom of the press was insecure, and the right to arms was infringed by laws against armed assembly (Section F.6):

> Any landed aristocrat, called a justice of the peace, may treat the innkeeper as a criminal if he allows any newspaper to be read in his house which tends to make people dissatisfied with the existing order of things. . . . As to the right of bearing arms.—Any person seen walking in step and learning to act together, may be arrested . . . as criminals and transported. The subject of English liberty is one which ought to be exposed fully. It is time for the people of this country and for the nations of Europe to be informed of the actual extent of the boasted liberty of Englishmen. The prevailing fallacy is productive of much positive mischief. Americans, French, Germans, and Italians, are electors and national guards-men, whilst the British and Irish are treated as unfit to be freemen. Any danger is preferred to that of allowing the people to learn the use of arms; they are consequently as little to be feared as Hindoos. . . .

Id. at 148. The language about Hindus was a reference to the British colonial policy of disarming the people of India. In the American view, arms rights were among the many ways in which liberty was real in America, and sometimes only nominal in the United Kingdom.

NOTES & QUESTIONS

1. **CQ:** As part of the modern debate about the Second Amendment, there is vigorous argument about the meaning of the English Bill of Rights' clause 7, guaranteeing Protestants "arms for their defence." Justice Scalia in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), saw the English clause as an ancestor of the Second Amendment, guaranteeing a personal right to arms for self-defense. Dissenting in *Heller*, Justice Stevens dismissed the English right as not useful in interpreting the Second Amendment. Justice Breyer, dissenting in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 11.B), argued that the clause means that a militia is to be preferred to a standing army, and that it recognizes no individual right. Which interpretation do you find persuasive? For more, see Malcolm, To Keep and Bear Arms (the right was for personal defense); Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 Cardozo L. Rev. De Novo 18 (2010) (the Bill of Rights meant that Parliament and not the king could arm the militia).

2. Some argue that restrictions from English history are implicitly incorporated in the Second Amendment and can be imposed today in the United States. *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840) (Ch. 6.B.2) (the minimum income restrictions of the 1671 Game Act are included in the Second Amendment but are negated by the Tennessee Constitution). Similarly, the 1328 Statute of Northampton is read by some modern scholars as prohibiting all arms carrying. Accordingly, the Second Amendment right to "bear arms" does not allow arms bearing outside one's property. Section F.5.

The contrary view is that James Madison himself wanted the Second Amendment to be stronger than its English predecessor. Although the legal history of the English right is important background to the Second Amendment, it does not set the limits of the American right. Similar issues arise in regard to the First Amendment. Justice Douglas wrote: "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Mass.*, 383 U.S. 413, 429 (1966) (Douglas, J., concurring) (quoting Henry Schofield, *Freedom of the Press in the United States*, 9 Publications Amer. Sociol. Soc. 67, 76 (1914)). Which view do you find more persuasive?

3. Suppose that the English history were considered authoritative for all Second Amendment issues. Would it be constitutional to impose arms restrictions based on religion? For example, to prohibit Muslims from possessing arms, or to require them to obtain licenses that could be refused, based on broad discretion of the licensing authority? Such laws would almost certainly be held to violate the Free Exercise Clause of the First Amendment. But suppose there were no Free Exercise

Clause. Would a Muslim Disarmament Act violate the Second Amendment? What about arms restrictions based on a person's income, such as the Tudor laws about handguns and crossbows? What if the laws did not explicitly limit arms ownership by annual income, but instead set fees for arms licenses so high that they were beyond the reach of poor people, and were burdensome to the middle class?

The right to hunt in America led to the adoption in the late nineteenth century of the North American Model for wildlife conservation. Ch. 7.G.6. Under this model, wild game belongs to the people (not to a king or a class) and is to be managed by the government as a public trust, so that game species thrive for the current generation and future generations. One of the trustee's duties is to make licensed hunting available to all the public, not just persons in certain economic classes. If the American right to arms were treated as identical to the English right to arms, what would become of the North American Model?

Another feature of the English right to arms seems to have been that regions that have rebelled may be disarmed, at least for a period of years. *See* Part J.1 & 2 (Ireland and the Scottish Highlands). Other than the Confederate States of America, can you think of any historic instances where such disarmament could have been applied in the United States? Any modern ones? There were riots in many large American cities from 1965-68. Would it have been constitutional to confiscate all firearms from the neighborhoods where the rioters lived? What about more recent riots?

4. *Dog control.* Besides restricting the ownership of hunting tools, the game laws restricted dog ownership. Why would anti-hunting laws include anti-dog laws? In England, the dog control laws were enforced more effectively than were the gun control laws. Could dog ownership be considered part of the right to arms? Does the answer depend on whether arms are for all legitimate purposes, including hunting (*Heller*) or only for "defence" (English Bill of Rights)? The English dog control laws were aimed at sporting breeds, and not at all dog ownership. Is a breed-specific ban for sporting breeds consistent with the English right?

CQ: Some American colonies and slave states had laws that banned or restricted firearms possession by slaves and sometimes by free people of color. Many of these laws applied with equal force to dog ownership and were not limited to specific breeds. Besides impeding hunting, what are some of the reasons that a government wanting to enforce a racial caste system would ban dog ownership, or require special licenses for the subordinate caste?

5. *Urine control.* Suppose that an American president issued an executive order similar to the Tudor-Stuart program for saltpetermen: Government officials can enter anyone's property and dig under buildings to collect saltpeter. Would there be any constitutional objections? Recall King Charles I's failed 1627 program for a national command economy of urine and dung—requiring that wastes be collected and transported to central locations to make saltpeter. Would a similar program in the United States be constitutional? Today, household human waste is usually transported off-site by municipal sewage systems. Some municipalities have processed the waste for use as agricultural fertilizer. Would there be any constitutional problem with a federal statute requiring that all waste be turned over to the federal government for gunpowder production? *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding law against feeding one's own grain to one's own cattle). To

make saltpeter, the most efficacious human urine is from males who drink wine and strong beer. Can congressional powers for the army and the militia be read broadly enough to allow Congress to preempt state or local laws impeding the consumption of beer and wine? Could an American government lawfully declare gunpowder manufacture to be a government monopoly? Is there a right to manufacture gunpowder?

6. **CQ:** Consider the gunpowder manufacture question in light of current controversies in home manufacture of firearms for personal use. *See* Ch. 15.D.2.

I. ARMS TECHNOLOGY AND OWNERSHIP IN THE UNITED KINGDOM

Chapter 2.I provided a condensed survey of the development of arms technology in the United Kingdom. A more thorough description is available in online Chapter 23. To avoid duplication, Sections 1 through 4 of this Part I contain only brief summaries. Section 5, on arms prevalence in the United Kingdom, is presented in full.

1. Matchlocks and Wheellocks

When the first Tudor king, Henry VII, took power in 1485, firearms had been in use for over a century. Before the Tudor era, firearms had been of little significance militarily in England. The most important improvement in firearms technology from 1485 to 1800 was the ignition system. The ignition change made firearms more reliable, faster to reload, and much better suited for carrying for an extended time while loaded.

In the 1400s, the user ignited a firearm's gunpowder by just holding a flame to the *touch hole*—a small hole that connected the gunpowder charge inside the gun to the outside of the gun. By 1500, the standard ignition system was *matchlock*. By pulling the trigger, the user lowered a lit rope cord down to a small pan of gunpowder. The cord would ignite the gunpowder, and the flame would travel through the touch hole and ignite the main charge of gunpowder.

Around 1500, Leonardo da Vinci invented the *wheellock*. Vernard Foley, *Leonardo and the Invention of the Wheellock*, Scientific Am., Jan. 1998, at 96. Rather than using a burning cord, the wheellock was self-igniting. When a wound-up steel wheel was released, the serrated wheel struck a piece of iron pyrite. A shower of sparks would ignite the powder in the pan. The wheellock mechanism is similar to the ignition for today's disposable cigarette lighters.

The wheellock weighed less and could be carried so that it was ready to shoot, like all modern firearms. In a self-defense emergency, the defender would not need to light a rope before being able to use the firearm. A study by Prof. Carlisle Moody suggests that the growing availability of always available defensive firearms in the centuries after 1500 may have contributed to the sharp decline in European homicide rates. *See* online Ch. 19.D.1.

2. The Flintlock and the Brown Bess

Early in the seventeenth century, a much-improved version of the wheellock was invented: the *flintlock*. It has few moving parts, was faster to reload, was more reliable, and was less expensive. In the eighteenth century, the flintlock became the standard of the British army. The British flintlocks were called "the Brown Bess."

Due to the necessities of hunting and Indian-fighting, Americans made the transition from matchlocks to flintlocks much sooner than the British did. Likewise, rifles—which have spiral grooves in the bore to impart aerodynamic stability to the bullet—were insignificant in England during the eighteenth century, but very important in America. *See* online Ch. 23.B.2.

3. The Blunderbuss

Especially common in the seventeenth and eighteenth centuries was the blunderbuss, a short flintlock. It could fire either one large projectile, or several at once. Most often it was loaded with about 20 large pellets, and so it was devastating at short range. Brown 143. The name seems to be an adaptation of the Dutch "donder-buse" or "thunder gun." Excellent for self-defense at close quarters, the blunderbuss was of little use for anything else, having an effective range of about 20 yards.

4. Breechloaders and Repeaters

The vast majority of other firearms were *muzzleloaders*. To load or reload the gun, the user would pour a premeasured quantity of gunpowder into the muzzle. Next, the user would insert the ball(s) of ammunition into the muzzle. With a ramrod, the user then pushed the balls and the powder all the way to the back of the barrel, the breech. During the nineteenth century, breechloaders would replace muzzleloaders. *See* online Ch. 23.C.

Most firearms in the eighteenth century were *single-shot*. To fire a second shot, the user had to repeat the process of ramming the powder and the bullet down the muzzle. Today, most firearms can fire more than one shot without having to be reloaded. *Repeating* arms carry their supply of ammunition internally. For example, a *revolver* usually has five or six units of ammunition in a revolving *cylinder*.

Some shotguns and rifles have two barrels, either side-by-side, or over-and-under. They can fire two shots, and then have to be reloaded. The double-barreled shotgun was firmly on stage by the end of the eighteenth century, for hunting and for self-defense. John Nigel George, English Guns and Rifles 228-38 (1947).

Breechloaders had been invented in the late fifteenth century. Brown, at 103. Repeaters appeared no later than the early sixteenth century. *See* Brown, at 50 (German breechloading matchlock arquebus from around 1490-1530 with a ten-shot revolving cylinder); Greener, at 81-82 (Henry VIII's revolving cylinder matchlock harquebus); David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 88 Albany L. Rev. 849, 852 (2015) (16-round wheellock from about 1580).

However, breechloaders and repeaters require much closer fittings among their parts than do single-shot or muzzle-loading guns. Until the invention of machine tools to make uniform parts, the quantity of labor required to build a breechloader or repeater made such guns very expensive. (Machine tools are discussed in Chapters 6.C.2 and online Ch. 23.C.) Thus, British gunsmiths concentrated on building affordable single-shot muzzle-loading flintlocks. The breechloader or repeater would be a special order for a customer who could afford to pay for a great deal of labor.

5. Firearms Prevalence

How common were personally owned firearms in Great Britain during the eighteenth or early nineteenth century? There are many more historical records, such as diaries, about the upper classes than about the others. Among the aristocracy, firearms were ubiquitous, as hunting and warfare were two of their leading pastimes.

As for everyone else, there is conflicting evidence. We know that Americans were insistent that the game laws and the Protestants-only scope of the English Bill of Rights had negated the English Bill of Rights' guarantee right of the right to arms. *See* Section H.6. Some Englishmen made the same point. For example, a 1769 pamphlet railed against game associations, by which wealthy persons pooled resources to hire gamekeepers to thwart poaching. According to the pamphlet, the game association was denuding the rural public of all firearms. *An alarm to the people of England; shewing their rights, liberties, and properties, to be in the utmost danger from the present destructive and unconstitutional association, for the preservation of the game all over England* 36 (1757) ("A Farmer truly must not be allowed to keep a Gun in his House, for Fear he should discharge it at a paltry Partridge"; "were they permitted, as formerly, to fire their Guns in support of themselves and their families").

On the other hand, we know that English courts clearly recognized the constitutional right of Englishmen to own and carry firearms, and that no statutes prohibited them from doing so—except that commoners could not use firearms for hunting, potentially seditious armed assemblies were prohibited, and rebels or Catholics who would not swear a loyalty oath to the monarch could be disarmed. Sections F.4 & 6, H.5.

There are often differences between the law on the books and the practical experiences of the public. It is possible that the 1769 pamphlet against game associations was literally accurate, and that the associations were violating the constitutional rights of the rural common people by confiscating firearms under the pretext of anti-poaching. That was certainly how the American critics described the plight of all English commoners. Or perhaps the pamphlet engaged in political hyperbole, and game association misdeeds were not universal throughout the countryside. We also know that whatever the national or local authorities said, the English had a tradition of being armed—such as the servant girls of Stuart England in the seventeenth century who apparently had no trouble buying pocket handguns, notwithstanding over a century of statutes and proclamations against such guns. Section H.3.a.

In any case, the English remembered the time as one of widespread gun ownership. Writing in 1939, the leading English firearms historian J.N. George described the eighteenth- and early nineteenth-century blunderbuss as the arm of "farmers travelling upon the roads." The blunderbuss held "a place of honour alike in the inn parlour, the farm kitchen, and the merchant's counting house, none of which was complete without such a weapon hanging over its fireplace, where the warmth of the fire would keep its powder dry." George, at 93, 223. As George noted, the ubiquitous blunderbuss was a standard image in the plays, movies, and novels about the days of stagecoaches and highwaymen.

Whatever the prevalence of firearms among the English middle and lower classes after the Bill of Rights, Americans considered it deficient. Although the English Bill of Rights protected keeping and bearing arms in England, it did not apply to the Scots or the Irish, who are discussed next.

J. THE EIGHTEENTH CENTURY AND BEYOND

Sections 1 and 2 of this Part examine disarmament of the Scots and the Irish. Section 3 discusses the worst riots in London's history, and the legal issues that arose when armed householders helped suppress the riots. Section 4 provides a brief overview of developments in the United Kingdom in the nineteenth and early twentieth centuries.

The precedent of special laws for rebellious nations had been set in Wales, a relatively mountainous portion of western Britain, which had long defended its separate sovereignty. English King Edward I brought the Welsh to subjugation in 1282. The Welsh reclaimed self-government for a while in the Welsh Revolt of 1400-15, led by Owen Glendower. The revolt coincided with laws imposing disabilities on the Welsh. *See*, *e.g.*, 2 Henry IV ch. 12 (1400-01) (Welshmen may not wear armor in towns). The disarming laws were little enforced after 1440, and anti-Welsh laws were formally repealed in the early seventeenth century as part of a general statutory cleanup. 21 James I ch. 28, § 11 (1624).

Although the post-1440 Welsh could possess arms, Parliament still saw a need for special laws about Wales. To promote shooting, Parliament banned Welsh "games of runnyage wrestling leaping or any other games, the game of shotinge only exceptyd." Further, all Welsh, nobles included, were forbidden to carry arms within two miles of a sitting court, or to any "towne, churche, fayre, market, or other congregacion." Nor could they bring arms or armor on the highways "in affray" of the King's peace. 26 Henry VIII ch. 6 (1534).

1. Scottish Highlanders

After losing the Glorious Revolution in England and then being defeated in Ireland, the Stuarts had taken up residence in continental Europe, where they continued plotting invasions of the British Isles. Their first attempt at an invasion would be timed to coincide with a succession crisis in the United Kingdom.

William and Mary had jointly held the crown. After Mary's death, William ruled alone until he died in 1702. Mary's younger sister Anne then ruled until she passed away.[84] William and Mary had no children; Anne had 17 pregnancies, but no children who outlived her. By the standard rules of succession, the oldest surviving son of James II had the best claim to the throne. That son, James Francis Edward Stuart, considered himself to be the rightful "James III" of England. He was a Catholic, living in exile in France, and Parliament did not want a return of the problems that had necessitated the Glorious Revolution.

According to Parliament, the Glorious Revolution meant that no one could be monarch without Parliament's consent. Parliament was the sole sovereign and was composed of three elements: the House of Commons, the House of Lords ("the Lords Spiritual and Temporal"—high-ranking ecclesiastics and laity), and the "King-in-Parliament." Without Parliament, the king was nothing; the king was in Parliament, and not above it. Parliament was not going to give the throne to a son of James II who thought that Parliament had been wrong and James II had been right in 1688.

Parliament anticipated the problem of Anne dying without a direct heir, and in 1701 passed the Act of Settlement, which, as amended, continues to govern succession to the crown. Not for the first time in British history, the nation traced the monarch's family tree backwards, and chose a different branch for the next monarch. The crown was bestowed on the Protestant descendants of Princess Sophia, a granddaughter of James I who had married the Elector of Hanover, an independent German state. So in 1714, Sophia's son George, the Elector of Hanover, became Britain's King George I. By the ordinary rules of inheritance, there were 57 people who had a better claim to the crown than he did. But one of the points of the Glorious Revolution was that the crown was not somebody's personal property. It was bestowed by the free choice of the people, expressing their will through Parliament.

Many Scots did not agree. The Stuart family had been monarchs of Scotland since 1371. In 1603 King James VI of Scotland had also become King James I of England. Even then, Scotland and England were two separate kingdoms. In 1707, the Acts of Union had joined England and Scotland into the single United Kingdom of Great Britain. (Ireland was also ruled by England's monarch, but it was a separate kingdom until 1801.) With a population only one-eighth of Britain's, Scotland was barely a junior partner in the United Kingdom, and often treated as less than that.

When George I showed up in London in September 1714, he was not especially popular. A native speaker of German, he spoke little English and did not like the British people, although he was impressed with their army. The time was right for an August 1715 revolt by the Jacobites[85] (adherents to King James II and his sons) in Scotland and England. They wanted a Stuart, not a Hanoverian, on the throne, and the Scots wanted to undo the Act of Union.

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84. Anne legally had the sole right to the crown after her older sister died, but she had promised not to assert the right so long as William lived.

85. From the Latin version of his name, *Jacobus*.

The revolt started well, but it was on its way to defeat by the end of year. The pretender to the crown, "James III" of England/"James VIII" of Scotland, did not arrive in Scotland until late December, and he was chased away within a few weeks, returning humiliated to France.

The most effective Jacobite fighters had been the Scottish Highlanders. The Highlands are the northwestern half of Scotland, and the nearby smaller islands. The mountainous terrain is difficult to traverse, and the land not very productive. The Highlanders lived in patriarchal clans led by chieftains and were notoriously fierce warriors. They were mostly Catholic and spoke Gaelic, in contrast to the Scottish Lowlanders, who were mostly Presbyterian and spoke English. The London government exerted little practical power over the Highlanders.

Because of the Jacobite rebellion, Parliament imposed the Disarming Act of 1715. According to the Act, "the custom that has two long prevailed amongst the Highlanders of Scotland, of having arms in their custody, and using and bearing them in travelling abroad in the fields, and at publick meetings, has greatly obstructed the civilizing of the people within the counties herein after named; has prevented their applying themselves to husbandry, manufactories, trade, and other virtuous and profitable employments." The Act forbade Highlanders "to have in his or their custody, use or bear broad sword, or target, poynard, whinger, or durk, side-pistol, or side-pistols, gun, or any other warlike weapons, in the fields," or when going to or from markets, church or meetings, "or any other occasion whatsoever," or to come armed into the Lowlands. There was an exception for the highest nobility (Peers of the Realm) and their sons. There was another exception for Highlander commoners who were eligible to vote. They could have two firelocks (a firelock is a wheellock or a flintlock), two pair of pistols, and two swords. The lords lieutenant and their deputies could issue warrants to search for illegal arms. Highlanders who had been loyal to George I during the Jacobite rebellion would receive compensation for handing over their arms. The personal duty to perform services such as watch and ward was replaced by the obligation to pay an annual tax of equivalent value. 1 George I, stat. 2, ch. 54 (1715).[86]

The Disarming Act accomplished little, so it was augmented in 1724 by "An act for the more effectual disarming the highlands." The Act noted that notwithstanding the 1715 law, "many persons" still possessed "Quantities of Arms and warlike weapons, which they use and bear as formerly." The new act empowered the lords lieutenant or other agents of the king to issue summons to individuals ordering them to appear at a specified time and place to surrender their arms. Persons who did not comply would be held without bail until trial. Entire clans could be subject to the summons if the summons were affixed to a church door on Sunday. Sheriffs were ordered to issue the clan summons everywhere in their county. If concealed arms were found in a house or other building, the tenant or possessor would be presumed guilty, unless he or she could prove lack of knowledge. The king's agents

86. A poignard (modern spelling) is a short, thin dagger. A whinger is a type of knife usable at the table, and for fighting. A durk (as it is spelled in Scotland, or "dirk," as spelled elsewhere) is a long dagger. "Dirks" and "daggers" were sometimes included in latter nineteenth-century American state laws against carrying concealed weapons. In eighteenth-century usage, a "pistol" (what we today call a handgun) was distinct from a "gun" (what we today call a long gun).

could write themselves warrants for day or night searches of houses. Enforcers of the law were immunized from criminal or civil law actions against them. The 1724 law had a sunset clause: Once seven years had passed, the law would expire at the end of the next session of Parliament. 11 George I ch. 26 (1724). The new law did work better, although not completely. Many arms confiscations were carried out by Britain's Major-General George Wade, who commanded the British army of occupation in Scotland.

In July 1745, James II's grandson attempted an invasion. Because of the British fleet, his ship carrying arms was sunk, and the ship containing allied French soldiers turned around and went home. "Bonnie Prince Charlie" landed with a very small force in the Highlands, yet he rallied one clan after another to his cause. The clans had an eclectic collection of arms; many had broad swords, some had firearms, and others had farming tools repurposed as weapons. Many Scottish Lowlanders came over to Bonnie Prince Charlie as well. Prince Charles had been an avid hunter all his life; he impressed the Highlanders by exceeding them in rapidly traversing rugged terrain — tireless and dauntless. Two months after his arrival he defeated a much larger British army and found himself recognized as the sovereign by part of Scotland.

The French were impressed, and assembled an army to help the Jacobites, but it was held up in port by bad weather and by English naval deployments. Bonnie Prince Charlie and the Jacobites advanced within 150 miles of London. But the tide turned, and by the next April, the Jacobites had been demolished. Their final battle, at Cullodeen, was the last land battle ever fought in Great Britain.

For the next five months, Bonnie Prince Charlie and his small band were on the run, trying to escape the English and to find a ship to take them back to France. Disguised as a common man or as a servant woman, he hid in caves and the Scottish moors. The Highlanders recognized him during his flight, but no one betrayed him, not even for the reward of 30,000 pounds. Meanwhile, the British Army savaged the Highlands. Almost every building was destroyed; the cattle were stolen or killed, and stores of grain and other foods demolished. Many Highlanders died of starvation. Carolly Erickson, Bonnie Prince Charlie: A Biography (1990).

Parliament decided that the clans and their culture would be eliminated. The new Disarming Act was part of a broader Act of Proscription, which also included the Dress Act, outlawing "the Highland garb," such as plaid and tartan.[87] The Gaelic language was forbidden. The 1746 Disarmament Act tracked much of the language of its 1715 predecessor. 19 George II ch. 39 (1746). Another act dispossessed the clan chieftains of their lands, and subjected sheriffs' offices (which were hereditary in some parts of Scotland) to royal appointment. Heritable Jurisdictions (Scotland) Act, 20 George II ch. 43 (1746). All these acts applied with full rigor even to the Scottish clans that had fought *for* the British government during the 1745-46 war.

A 1748 follow-up statute again ordered the Highlanders to surrender their arms. 21 George II ch. 34 (1748). As the English man of letters Samuel Johnson wrote in 1775, "the last law by which the Highlanders are deprived of their arms, has operated with efficacy beyond expectations. . . . Of former statutes made with

87. The ban on Highland dress was repealed on July 1, 1782, the anniversary of which is now celebrated in Australasia as International Tartan Day. 22 George III ch. 63 (1782).

the same design, the execution had been feeble, and the effect inconsiderable." But this time, "the arms were collected with such rigour, that every house was despoiled of its defence." Samuel Johnson, *Journey to the Western Islands of Scotland*, in 2 The Works of Samuel Johnson 645 (1834) (1775). As the Highlanders learned, arms confiscation can be more thorough if all the buildings in the area are burnt to the ground. Similar practices have been employed more recently by the governments of Uganda and Kenya, against tribes unwilling to surrender their arms. *See* online Ch. 19.C.10.

The Scottish militia had been undermined in the seventeenth century by the Stuarts. An attempt to revive it was vetoed by Queen Anne in 1708, the last time that a bill passed by Parliament was denied the royal assent. The Scots intensely resented the absence of their own militia. To them, no militia meant that Scots were subservient to Englishmen, not equals in a United Kingdom. They argued that under Scotland's Constitution — including the nation's unwritten and long-standing tradition — they had a right to a militia. The English finally relented in 1797, due to the threat of invasion from Napoleonic France. Americans listened to the Scots' outcries; the first clause of the Second Amendment was influenced by the writings of pro-militia Scotsmen. David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119 (2004).

NOTES & QUESTIONS

1. The 1715 and 1746 statutes made it illegal for Highlanders to "have in his or their custody, use, or bear" various arms. The U.S. Supreme Court considered the law when analyzing the legal meaning of "bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 588 n.10 (2008) (Ch. 11.A). In the anti-Highlander statutes, what do you think "bear" arms meant? To bear when in militia service, or to carry for personal purposes, such as self-defense or hunting?

2. If you were an American in 1775, what lessons about arms and arms laws would you draw from the history of Scotland?

2. Ireland

A London government had ruled at least part of Ireland ever since an 1167 invasion by Henry II's wicked son John (who, when he became King of England, would be forced to sign the Magna Carta (Part D) in 1215). For the next several centuries, until the time of Henry VIII, England's practical contro1 of Ireland often did not extend much beyond Dublin.

As the English gained control, they wiped out the Irish legal system of Brehon Law and tried to destroy all the Brehon texts. Based on druidic, Catholic, and natural law roots, Brehon law made no distinction between torts and crimes. If X injured or killed Y, then X would have to pay compensation — with payment in self-defense cases reduced or eliminated at the discretion of the judge. Killing a trespasser (which presumably would include a burglar) was expressly exempt from the need for compensation. *See* Jo Kerrigan, Brehon Laws: The Ancient Wisdom

of Ireland 72-73 (2020); Laurence Ginnell, The Brehon Laws: A Legal Handbook (2012) (1894).

In 1603, English rule was fully consolidated in Ireland. Before and after 1603, the Irish often rose in rebellion, especially when the English were distracted elsewhere. For example, the Irish Confederate Wars of 1641-53 overlapped with the English Civil Wars (Section H.2) and the preceding Bishops' Wars between England and Scotland. In a war that left 20 percent of the population dead, the Irish Catholics were mostly subdued by Oliver Cromwell's army, but guerillas remained active throughout the 1650s.[88] Soon after the Catholic James II was chased out of Great Britain in the Glorious Revolution of November 1688 (Section H.3), Ireland rose in a Jacobite rebellion. James, his Irish supporters, and their French allies met their final defeat in 1691. It was no surprise, then, that when the British Parliament enacted the 1689 Bill of Rights, it was not made applicable to Ireland. Even if it had applied, the right to arms was only for Protestants.

The 1691 Treaty of Limerick, formally ending the Jacobite rebellion, promised that "[e]very nobleman and gentleman . . . shall have liberty to ride with a sword and case of pistols,[89] if they think fit, and keep a gun in their houses for the defence of the same, or for fowling"—provided they took a loyalty oath to the monarch. Treaty of Limerick, Civil Articles, ¶ 7 (1691). The Treaty did not specify arms rules for persons other than loyal noblemen and gentlemen.

Irish guerillas continued to operate even after 1691. As one member of Parliament put it, "the Irish have been required to bring in their arms, which has only served to make them hide them, and when search has been made after them it has been too late." Luttrell, Parliamentary Diary 1691-1693, at 438 (Hon. Goodwin Wharton, Feb. 22, 1693). The Catholics would cover their guns with tallow, plug the holes, and "throw them into the loughs and rivers and take them up after and they are as good as ever." *Id.* at 440 (Lord Coningsby). "You may search till you are weary and not find one gun," but the guns "can all be ready in a hour's warning," one Williamite soldier complained. Carlton, at 224.

The Irish House of Commons was dominated by Protestants. In 1695 they enacted a statute ordering Catholics to hand over to the government all their arms and ammunition. However, Catholic gentlemen and noblemen who were within the terms of the Treaty of Limerick were allowed to keep their arms as specified in the Treaty. Other Irish Catholics could have arms if they were issued a discretionary license from the local governor. The Act further provided: "No person making firearms, swords, knives or other weapons shall take or instruct as an apprentice any

88. The Irish never forgot Cromwell. In the early 1970s, there was a terrorist campaign in Northern Ireland by the so-called Provisional Irish Republican Army. Among the U.K.'s responses were detention without trial of IRA suspects, and today it is recognized that this policy led to the imprisonment of many innocent people, as well as many guilty. In early 1972, the best-selling record in Irish history became "Men Behind the Wire," whose second verse is "Not for them a judge or jury, nor for them a crime at all. Being Irish means they're guilty, so we're guilty one and all. Around the world the truth will echo, Cromwell's men are here again. England's name again is sullied, in the eyes of honest men." Loyalists (Protestants) in Northern Ireland also engaged in terrorism, and were also indefinitely detained, both guilty and innocent. The Loyalists wrote their own version of "Men Behind the Wire."

89. Two matching pistols. Also called a "brace of pistols."

person of the popish religion." Informers who told the government about Catholics with arms would get half the fine as a personal reward. Any judge who even once refused to enforce the arms ban would lose office. "An Act for the better securing the government, by disarming papists," 7 William & Mary ch. 5 (Ireland 1695).

The 1695 statute was part of the period's consolidation of "Laws in Ireland for the Suppression of Popery," commonly called the "Penal Laws." The laws forbade Catholics to purchase land, to hold government office, and to sit in the Irish Parliament, among other disabilities.

In 1699, Irish Catholic arms licenses were revoked, allegedly because many of them had been fraudulently obtained. The Post Boy, Dec. 19-21, 1699, at 1, col. 1 ("all Licenses whatsoever to bear Arms, formerly Granted to any Papist in this Kingdom"). Anyone with a license had to reapply.

The Council-Chamber in Dublin (an executive body) in 1704 proclaimed that the Irish were continuing to own and carry firearms based on recalled or counterfeited licenses. The Council explained that qualified Irish Catholics could apply for licenses to "bear and keep such Arms." The licenses would specify the arms that could be borne — typically a pair of handguns, one long gun, and a sword. Irish Catholics Licensed to Keep Arms (1704), 4 Archivium Hibernicum 59, 64-65.

A 1739 statute mandated that Irish law enforcement officials conduct annual searches for arms possessed by Catholics in their jurisdiction, revoked all Irish Catholic arms licenses, and ordered the surrender of arms, with exceptions for persons covered by the Treaty of Limerick. 13 George II ch. 6 (1739).[90] Yet the Irish kept many guns. Even after Irish arms ownership was later legalized, until the 1860s the supply of hidden flintlocks "which had somehow survived all early attempts at disarmament" was "so immense" that the Irish did not buy many of the new firearms that used percussion caps. Rather, they simply had the old flintlocks retrofitted. George, English Guns and Rifles, at 296.[91]

Mostly prohibited from openly carrying firearms or edged weapons, Irish began carrying shillelaghs, walking sticks well suited for use as cudgels. Soon, the shillelagh became an Irish icon and the basis of a martial art.

When the British army in Ireland was shipped off to America to attempt to suppress the American Revolution, the island became vulnerable to foreign invasion by France or Spain, both of which by 1778 were engaged in a world war against Great Britain. Companies of Irish Volunteers began to engage in militia training. Initially Protestant, they were eventually joined by Catholics. Reluctantly, the London government supplied them with arms. In 1782, the Volunteers held a convention, and passed resolutions asking for Irish autonomy in domestic affairs.

During a parliamentary debate in 1793, a Member of the Irish Parliament described the legal differences between Irish Catholics and English Catholics: Irish Catholics could neither vote nor serve on grand juries. Further, "Catholics in Ireland are prohibited from keeping arms; no such prohibition is in England;

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90. The texts of these statutes are available at University of Minnesota Law School, Laws in Ireland for the Suppression of Popery Commonly Known as the Penal Laws.

91. The percussion cap is a separate primer that ignites the gunpowder when the percussion cap is struck by the firearm's hammer. Percussion caps appeared in 1820. Today, they are used in modern muzzleloaders. *See* Ch. 6.C.3.b., online 23.C.2.b.

but every Irish Catholic of any rank above the mere working artizan or peasant may obtain a licence to keep and carry arms, at the expense of one shilling, if he thinks fit to apply for it. . . ." The "difference then in the situation of Catholics in England and in Ireland, is that Catholics in Ireland may be deprived of arms, unless they obtain licences for using them. . . ." The Parliamentary register: or, History of the proceedings and debates of the House of Commons of Ireland 123 (Dublin: P. Byrne, 1793) (Feb. 4, 1793).

A 1793 reform bill enacted by the Irish Parliament repealed certain anti-Catholic laws, and revised the arms laws. Persons who had an annual income from land of more than 100 pounds, or over a thousand pounds in persons wealth, "are hereby authorized to keep arms and ammunition as Protestants now by law may." Catholics with landed income over 10 pounds annually, or personal wealth of over 300 pounds, could do the same if they took a loyalty oath. For other Irish Catholics, arms remained forbidden without a license. 33 George III, ch. 21 (1793).

London's attempted solution to the Irish problem was to bribe and coerce the Irish Parliament into accepting full union with Great Britain. The United Kingdom of Great Britain and Ireland came into being on January 1, 1801. Henceforth, it would be ruled by the Parliament in London, to which the Irish could send representatives, although they would never have enough votes to outnumber the English. R.K. Webb, Modern England: From the 18th Century to the Present 91-92, 141-42 (2d ed. 1880).

Whenever England was fighting with France or Spain, England's enemies often attempted to support anti-English insurrection (or wars of national liberation, depending on one's perspective) in Ireland or Scotland. Thus, with Napoleonic invasion of England a threat, temporary legislation in 1806 restricted arms and ammunition imports into Ireland. 47 George III, ch. 54 (1806). The restrictions were regularly renewed, even after Napoleon was long gone. *See, e.g.*, 6 & 7 William IV ch. 9 (1836).

All Irish (Protestants included) who lawfully possessed arms had to register them pursuant to an 1807 statute. "An Act to prevent improper Persons from having Arms in Ireland," 47 George III, Session 2, ch. 54 (1807). Parliamentary opponents argued that the bill violated the constitutional right to arms, believed the Irish should have the rights of Englishmen, and compared the effort to disarm the Irish to the similar, failed program against New England from decades before. Proponents argued that the Irish situation called for different policies than those for Great Britain. 9 Hansard's Parliamentary Debates 1086-92 (Aug. 7, 1807).

The Parliament in London in 1843 enacted a new Irish licensing system, which on its face was religiously neutral. Now, a license was required for Irish of any religion to have arms. The license to keep arms was also a license to bear arms. Serial numbers had to be placed on Irish guns, so that the authorities could be sure that an Irishman was carrying only the particular gun(s) for which he had been licensed. 6 & 7 Victoria ch. 74 (1843).

Opponents described the arbitrary abuses of the existing gun licensing system, such as an applicant being denied because he lived in a thatch house (which meant that he was poor) or because the licensing authority did not like the applicant's looks. 69 Hansard's Parliamentary Debates 1020 (May 29, 1843). Opponents insisted that the Irish had the same common law rights as the English. One Member of Parliament "claimed for Ireland the same rights with respect to bearing arms

as those enjoyed by Englishmen. . . ." *Id.* at 1118. In the words of another M.P., the licensing bill was "contrary to the constitution of the country. It was acknowledged by the Bill of Rights, which being declaratory was part of the common law, that every citizen had a right to possess himself with arms for any lawful purposes, and that bill was as applicable to Ireland as to England." *Id.* at 1123. A third opponent noted the absence of any "violent or revolutionary outbreak" that would create a need to limit "the right to bear arms for self-protection." Rather, the M.P. "considered the people of Ireland to possess every constitutional right equally with the people of England." Thus, it was improper "to restrict the Irish people from the free exercise of their admitted constitutional right to bear arms." *Id.* at 1578, 1581 (June 15, 1843).

Even if Irish arms did lead to revolution, the Irish had the right to use them, implied one M.P. Rejecting "a restriction on the common-law right to bear arms" and "an invasion of a constitutional right," he pointed out that the right to bear arms had "enabled the people of the United States to oppose to our tyranny." *Id.* at 1098-99 (May 29, 1843).

But the proponents of the licensing bill carried the day. They pointed to the long restrictions on Irish arms. *Id.* at 996–99. A reluctant supporter voted for the bill because of the serious problem of violent crime in Ireland, even though "the carrying of arms is a noble and distinguishing mark of freedom, and a constitutional right of great value. I would not infringe that right without the most grave consideration. . . ." *Id.* at 1175-76 (May 31, 1843).

Lord John Russell (who would serve as Prime Minister 1846-52 and 1865-66) explained the difference between English and Irish law on bearing arms:

> [T]he right to bear arms, which is the universal right in England, and qualified only by individual circumstances, is reversed in Ireland; the right to bear arms here being the rule, the right to bear arms in Ireland being the exception. . . . [I]t has been the principle of all Governments that you should require in Ireland a licence to bear arms, and that the right to bear arms should he held an exception to the general rule, although it be the general rule in England without any licence that every individual should be entitled to bear arms.

70 Hansard's Parliamentary Debates 66 (June 16, 1843).

The 1843 arms licensing system for Ireland later became the model for a similar system to be applied against the British population, starting in 1921. By then, the British government had become just a mistrustful of the British people as earlier governments had been of the Irish. Section J.4.

Further reading: Halbrook, The Right to Bear Arms, at 75-87, 90-102.

3. The Gordon Riots

By 1778, the British war against the American rebellion was not going as well as had been expected. The attempt to disarm and suppress the supposed "rabble" of the Massachusetts militia had failed. So had trying to cut New England off from the rest of the United States by taking control of the Hudson River. Indeed, the British

defeat at Saratoga, New York, in October 1777 had led to the French overtly entering the war on the American side. Much of the British Army was already in North America, but more manpower was needed, and enlistments were below what was necessary. To make matters much worse, France was not just fighting in America, but had initiated a global war against Great Britain. Spain had joined the French.

So the government decided to relax some anti-Catholic laws, with the expectation that Catholics, who rarely enlisted, might help fill the Redcoat ranks. In 1778, Parliament passed the Papists Act, which removed some Catholic disabilities which had been enacted in 1698, and which at present were rarely enforced. Thanks to the 1778 Act, it became lawful for Catholics to own and inherit real estate. The sentence of life in prison for Catholic clergy and schoolteachers was eliminated. 18 George III ch. 60 (1778).

On June 2, 1780, a raucous crowd of at least fifty thousand assembled outside Parliament to demand a repeal of the 1778 statute. Despite the angry mob, Parliament did not back down. What ensued was perhaps the worst riot in living memory. The first victims were Catholics and foreigners. Soon, the targets became the government itself, especially judges, courts, and prisons. The rioters were abetted and inspired by the radical Lord George Gordon of Scotland, who defended their cause in Parliament, and took to the streets to exhort them in person. As is typical in riots, the rioters who may have had some ideological motive were joined by people, from all classes, who simply wanted to loot, burn, pillage, and kill. The British army available in London was too small to suppress the mobbers, who seemed to be everywhere. The arrival of reinforcements of soldiers and militia from outside the city was inadequate to restore order. Christopher Hibbert, King Mob: The London Riots of 1780 (1958); *see also* Charles Dickens, Barnaby Rudge: A Tale of the Riots of Eighty (1841) (historical novel about the Gordon Riots).

On Tuesday night, June 6, mobs broke open Newgate Prison and the Clink Prison, liberating the convicts. For much of the public, this was the last straw, and citizens decided to protect their communities themselves. Spontaneous armed patrols began securing neighborhoods. Some of these patrols were from the London Military Association and other civic groups that had long encouraged arms training and practice (somewhat similar to the U.S. civic association volunteer militias of the eighteenth and nineteenth centuries; *see* Chs. 4-7).

Most patrols were small, but there were some large bodies. In Cripplegate Ward, two thousand armed residents guarded the community. Southwark borough had a *posse comitatus* of more than three thousand. In Covent Garden, the inhabitants "unanimously resolved each man with his servants to defend his own house and his neighbor's house." Hibbert, at 117-19.

This civic mobilization was the turning point. As historian Christopher Hibbert wrote, "It was undoubtedly due to the obvious determination of the ordinary citizens of London, who, after a week of nervous uncertainty, were resolved to defend not only themselves and their property, but also the lives and properties of fellow Londoners, whoever they might be and whatever their religion, that the young [Member of Parliament William] Pitt was able to assure his anxious mother that 'everything seems likely to subside.'" *Id.* at 117-18.

The public had mobilized itself beginning on Tuesday night; by Thursday night, there were only a few isolated attacks, and by Friday, June 9, peace had

returned. More citizens decided that they wanted to form civic patrols to ensure that the city stayed peaceful. The Commander in Chief of the army in England, Lord Amherst, "would have been thankful for the help of more irregular volunteers during the rioting," but he "was not convinced that the necessity for them any longer existed." Some of the patrolmen had been given arms by the military, and it was already proving difficult to get them back. He did not want to give away more guns. *Id.* at 118-19.

The Lord Mayor of London had a different view. He proposed arming all of London's inhabitants and housekeepers. Lord Amherst wrote him a letter of disapproval on June 12, ordering just the opposite: "[O]n the subject of the inhabitants of the city [London] being permitted to carry arms. . . . [I]f, therefore, any arms are found in the hands of persons, except they are of the city militia, or are persons authorized by the King to be armed, you will be pleased to order the arms to be delivered up to you, to be safely kept until further order." In a letter to Colonel Twistleton, Amherst was more blunt: "No person can bear arms in this country but under officers having the King's Commission. The using of firearms is improper, unnecessary, and cannot be approved." *Id.* at 119.

Lord Amherst's instructions did not sit well with Parliament. During a June 19 debate in the House of Lords regarding the Gordon Riots, the Duke of Richmond said that "the letter from noble lord [Amherst] at the head of the army to col. Twistleton, relative to disarming the citizens of London, ought to be made an object of parliamentary enquiry, and he expected the noble lord would be ready either to produce his authority for writing such a letter, or explain what he meant when he wrote it. It was founded in the law of nature for every man to arm himself in his own defence. It was the municipal, as well as the natural right of Englishmen in general, and the citizens of London in particular." 21 Parliamentary History of England from the Earliest Period to the Year 1803: Comprising the Period from the Eleventh of February 1780, to the Twenty-Fifth of March 1781, at 691 (June 19, 1780) (William Cobbett ed., 1814).

Lord Amherst admitted that he had written the letter. "He said, he thought it both improper and unsafe to trust arms in the hands of the people indiscriminately, or into the hands of a rabble or a mob." Lord Richmond then "asked the noble lord if the inhabitants of London, for that was the expression used in the first paragraph of the noble lord's letter, were a mob? . . . [D]id not the disapprobation expressed in that letter imply a disapprobation of the inhabitants being permitted to carry arms? . . . Did it not command, or authorize, col. Twistleton to take the arms from the citizens thus armed? Was not his disarming Englishmen, and with every possible aggravation of insult and injustice, wresting out of their hands their own actual property, and the means of defending their lives and fortunes?" *Id.* at 691-92.

The Earl of Bathurst spoke next: "God forbid that any man should offer to deny or controvert the right of Protestant Englishmen to arm themselves, in defense of their own houses, or those of their neighbors." He said there was "a wide difference between marching out in martial array, and acting upon the defensive to protect men's lives and properties; the latter was clearly justifiable; the former might lead to many dangerous consequences."

Richmond retorted that "embodying and march" could be legitimate, because "a state of defence included every thing necessary to render it effective; or if it did not, it amounted in fact to no defence at all." *Id.* at 692-93. The discussion in the

House of Lords then moved to other issues, such as whether the rioters ought to be charged with treason.

Eventually, the Recorder of London — the city attorney — was asked if the right to arms protected armed groups, such as those that had helped suppress the riots. He wrote:

> The right of his majesty's Protestant subjects, to have arms for their own defense, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, may, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

William Blizard, Desultory Reflections on Police: With an Essay on the Means of Preventing Crime and Amending Criminals 59-60 (1785) (emphasis in original). The Recorder of London agreed with the Duke of Richmond and the Earl of Bathurst that each Protestant Englishman had a right to arms. Further, as Richmond had argued, that individual right sometimes had to be "exercised collectively." The groups of armed men acting together to suppress the riot were acting lawfully, according to "most clearly established . . . authority of judicial decisions and ancient acts of parliament."

NOTES & QUESTIONS

1. *Armed defense against riots and other public violent attacks.* In August 2011, there was a controversial police shooting of a man in Tottenham, a region of north London. Riots ensued nationwide. Sales on Amazon.co.uk of baseball bats and self-defense weapons rose more than 5,000 percent in 24 hours. Zeke Miller, *Sales of Police Batons on Amazon.uk Are up Over 41,000% as Riots Continue*, BusinessInsider.com (Aug. 9, 2011). Firearms are difficult to obtain in the United Kingdom, and their use in self-defense is severely restricted. For example, since the early 1950s, the public carrying of *any* item with the intent to use it for self-defense has been forbidden. *See* online Ch. 19.C.1.

The same London neighborhood had been the site of the "Tottenham Outrage" in 1909. Two men armed with handguns robbed a payroll truck. A wild chase and gun battle ensued, between the robbers on the one hand, and two police officers assisted by a large spontaneous posse on the other. In England at the time, citizens could freely carry handguns, and police could not, so the police were armed by revolvers from the citizens. Frank Miniter, The Future of the Gun 137-41 (2014).

In the modern United States, some government officials have urged Americans to arm themselves to be able to respond to terrorist attacks and mass shootings. *See, e.g.*, Austin Fulleraustin, *DeBary Mayor Clint Johnson Calls for All Residents to Be Armed after Orlando Shooting*, Daytona Beach News-Journal (June 22, 2016); *Egg*

Harbor Township Mayor: Allow NJ Citizens to Carry Concealed Weapons, CBS Philly (Dec. 8, 2015); George Hunter, *Police Chief Craig: Armed Detroiters Cut Terror Risk*, Detroit News (Dec. 1, 2015).

From 1965-68, there were race riots in almost every major American city, and one result was a large increase in the purchase of firearms for self-defense—and also the passage of the federal Gun Control Act of 1968 (Ch. 9.A & C); David B. Kopel, *The Great Gun Control War of the 20th Century—and Its Lessons for Today*, 39 Fordham Urban L.J. 1527, 1537-46 (2012). The tumultuous summer of 2020 saw many similar riots, some of them comparable in destruction to the worst of those in the 1960s. In some cities, law enforcement was ordered to stand aside. As before, firearm sales soared—although riots were not the only reason. Sales had already been rising due to the COVID-19 pandemic and presidential candidate Joe Biden's promises for stringent gun control. There were approximately 21 million firearms sold in 2020, a 60 percent increase over 2019. First-time buyers accounted for about 40 percent of sales. Women (not all of them first-timers) were 40 percent of buyers. Purchases by Blacks rose 56 percent compared to 2019. *See Gun Sales Reach Record Highs in 2020 Especially among African Americans and First-Time Gun Buyers*, National Shooting Sports Foundation (Feb. 4, 2021).

For examinations of the relevance of the right to keep and bear arms when law enforcement cannot or does not protect the public, see Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 Nw. L. Rev. (forthcoming 2021); Joyce Lee Malcolm, *Self Defense, an Unalienable Right in a Time of Peril: Protected and Preserved by the Second Amendment*, SSRN.com (2020); David E. Bernstein, *The Right to Armed Self-Defense in the Light of Law Enforcement Abdication*, SSRN.com (2020).

What are the similarities and differences between the above situations and the Gordon Riots? Do armed citizens preserve law and order, or does citizen armament create disorder? What variables affect the answers?

2. *The militia in the eighteenth century.* As in America, the English militia was important mainly when there were immediate threats to national security. The militia in Great Britain was of little importance in the early eighteenth century, but was reinvigorated in 1757, during the Great War for Empire against France. J.R. Western, The English Militia in the Eighteenth Century (1965). The 1754-63 war (known in America as the French & Indian War) led to a new militia law. It maintained, and even intensified, some of the restrictive practices of the previous century. Militia arms supplied by the government had to be specially marked. They could not be distributed until the militia unit had constituted, and they had to be returned as soon as the militia drills were completed. 30 George II ch. 25 (1757). Chapter 3 compares and contrasts American militia practices with those of the British.

4. The Nineteenth and Early Twentieth Centuries

During the nineteenth century, many formal legal discriminations against Catholics were removed. In 1843, the Ireland arms ban for Catholics was replaced with a general prohibition of firearms and swords for everyone in Ireland, unless the person had been issued a license. The identity of the particular sword or firearm had to be registered at the person's local town hall and listed on the license document. Section J.2. In practice, arms possession was allowed only for persons considered politically reliable.

Throughout the nineteenth century, gun control in England was close to nil, with a few exceptions. The 1815 end of the Napoleonic Wars in Europe caused an economic downturn. The London government reduced military spending, and England's economic competitors on the continent were again open for business, free of the British naval blockade. Making matters worse, Parliament had enacted the first Corn Laws, which shielded grain farms from foreign competition, and raised the price of food so much that famine resulted.

Among the working classes, clubs had been created for political education to promote reform. Sometimes, the clubs engaged in military drills—which to the upper class reminded them too much of the French Revolution. In August 1819, at least fifty thousand people gathered in Saint Peter's Fields, Manchester, to hear the speeches of radicals who demanded repeal of the Corn Laws, and enactment of parliamentary reform, such as expanding the electoral franchise. When the horse-mounted militia was ordered to arrest a speaker, they were trapped by the crowd; as the army attempted to rescue them, several people were killed and hundreds injured. Critics called it the "Peterloo Massacre," evoking the United Kingdom's 1815 defeat of Napoleon at Waterloo, Belgium.

Parliament then passed the Six Acts, including The Seizure of Arms Act. It applied to two cities and 11 counties that were thought most vulnerable to sedition. It outlawed military-style drilling and arms training. With a warrant, justices of the peace could search for and confiscate arms that might be used "for any purpose dangerous to the Public Peace." Persons could be arrested for carrying arms for "purposes dangerous to the Public Peace." 60 George III & 1 George IV ch. 2 (1819).

The Six Acts were met with furious but unsuccessful opposition in Parliament, partly because they were said to violate the right to arms in the Bill of Rights. The Seizure of Arms Act sunset after two years. R.K. Webb, Modern England: From the 18th Century to the Present 164-67 (2d ed. 1880); S.G. Checkland, The Rise of Industrial Society in England 1815-1885, at 325-28 (1964).[92] Noting the events in Manchester, John Adams wrote that "A select militia will soon become a standing army, or a corps of Manchester yeomanry." John Adams, letter to William H. Sumner, May 19, 1823, *in* William H. Sumner, An Inquiry into the Importance of a Militia in a Free Commonwealth 70 (1823).

The Seizure of Arms Act did not prevent anyone from carrying arms in the restricted areas, but it did forbid armed assemblies of rebels. Upholding the prosecution of an armed assembly, a court the court instructed the jury:

> "The subjects which are Protestants may have arms for their defence suitable to their condition, and as allowed by law."
>
> But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is

92. English journalist William Cobbett contrasted the British and American situations. In America, the government and standing army were small, harmless, and frugal. "[T]here are no shooting of the people, and no legal murders committed, in order to defend the government against the just vengeance of an oppressed and insulted nation. . . . The government could not stand a week, if it were hated by the people, nor, indeed, ought it to stand an hour." William Cobbett, Cobbett's America 205, 212 (J.E. Morpugo ed., 1985).

> travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . .

Rex v. Dewhurst, 1 State Trials, New Series 529, 601-02 (1820).

After the Seizure of Arms Act expired, gun control almost vanished in Great Britain (but not Ireland) until the twentieth century. An exception was the Gun Licenses Act of 1870, requiring a ten-shilling annual license to "use or carry a gun elsewhere than in a dwelling-house or the curtilage thereof." The license could be obtained at a post office, and the postal clerks had no discretion to deny a license to anyone who paid the ten shillings. Joyce Lee Malcolm, Guns and Violence: The English Experience 117-22 (2002). Ten shillings—equal to half of a one-pound sterling—was equivalent to about 61 pounds today, or about 84 modern American dollars.

The nineteenth-century Whig historian Thomas Macaulay reflected consensus opinion when he wrote that the right of British subjects to arms was "the security without which every other is insufficient." Thomas Macaulay, Critical and Historical Essays, Contributed to the Edinburgh Review 154, 162 (1850).

In the Boer War of 1899-1902, the British Empire consolidated control of the region that is today the nation of South Africa. The war revealed, in the words of one writer, "that the average British citizen couldn't hit the ground with his hat in three throws, let alone hit a man with a rifle under war conditions." Consequently, the British government began to encourage the sport of small-bore (.22 caliber rifle) target shooting, which became very popular. Edward G. Crossman, Small-Bore Rifle Shooting 3-4 (1927).

During World War I (1914-18), the government, fearful of German spies or saboteurs, imposed gun licensing as an emergency wartime measure. After the German surrender in November 1918, the government worried about the imminent expiration of the wartime controls. The main concern was Communist revolution. Vladimir Lenin had taken over Russia in a November 1917 coup, and had defeated the Western armies (British, U.S., French, and others) that had attempted to depose him. A Communist attempt to forcibly seize Poland was only narrowly defeated. Immediate Bolshevik revolution was the aim of armed Communists throughout the Anglosphere, and elsewhere.

Besides the Communist problem, there was the enduring fear of Irish insurrection. During Easter week in 1916, Irish rebels had declared independence and seized the General Post Office in Dublin. Although the Easter Rebellion had lasted for barely more than a week, the executions of the rebels made them martyrs. London's Irish worries were well-founded. After sweeping the 1918 elections for Ireland's seats in the British Parliament, the Sinn Fein ("Ourselves Alone") party refused to take their seats, and instead declared independence on January 21, 1919. This time, the Irish won their war of independence, with a December 1921 treaty recognizing the Irish Free State.[93]

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93. Six Irish counties in the northeast voted to remain and became the U.K. nation of Northern Ireland. The Irish Free State initially had Dominion status within the British Empire, similar to Canada. It later separated entirely from the crown, and today is the Republic of Ireland (in Irish, *Poblacht na hÉireann*).

In 1920, the British government brought forward its proposal to control Communists by controlling guns. The Irish system for gun licensing would now be used in Great Britain. Since 1920, it has been the foundation for gun control there. There were two important differences between the laws against the Irish and the 1920 law. First, the Firearms Act 1920 was for handguns and rifles only—not for shotguns. Shotgun licensing was not instituted until 1966, and even then, it was more lenient until about 1990. Shotguns were seen as hunting tools of the landed gentry, whereas rifles and pistols had military connotations. Second, the Firearms Act was initially enforced liberally; applicants would be granted a Firearms Licence unless there was a particular reason to deny an applicant.

Speaking to Parliament and the public, the 1920 government did not disclose its concerns about Communist or Irish revolt. Instead, the government claimed—falsely—that there was a tremendous wave of gun crime. In fact, ordinary gun crime (robbery, murder, etc.) was close to nil, as it had long been. Clayton E. Cramer & Joseph Edward Olson, *Gun Control: Political Fears Trump Crime Control*, 61 Maine L. Rev. 57 (2009).

Over the course of a generation, the Firearms Act 1920 greatly weakened the traditional British system of home island defense by a well-armed population. When the possibility of Nazi invasion loomed in 1940, after the fall of France, the United Kingdom's citizen defenders lacked the capacity to put up resistance. *See* Ch. 8.F.2. The further story of the United Kingdom in the twentieth and twenty-first centuries is told in online Chapter 19.C.1.

NOTES & QUESTIONS

1. In the thirteenth and early fourteenth centuries, the English homicide rate was approximately 18 to 23 annually per 100,000 inhabitants. Thereafter, the homicide rate began a six-century decline. Even after firearms became generally available in the sixteenth century, homicide rates continued to fall. Violent crimes continued to decline until the twentieth century. Joyce Malcolm, Guns and Violence: The English Experience 20-21, 141-49 (2002). A country that had been known as one of the most dangerous in Europe became one of the safest. As in much of the Western world, starting in the 1960s, the U.K. saw violent crime increase to levels that had long been unknown. What factors might account for the long decline, and then the increase?

2. So far as the records of the parliamentary debates reveal, none of the laws to restrict arms carrying or armed assemblies by Scottish Highlanders, English Catholics, Irish Catholics, or English revolutionaries ever mentioned the Statute of Northampton. Why not?

K. THE PHILOSOPHY OF RESISTANCE

This Chapter has described the history of arms-bearing in the United Kingdom. It now shifts to provide the background of what would become the Anglo-American view of forcible resistance to lawless government. It is the foundation for

understanding how the English principles of the right of resistance were embraced by Americans and became an intellectual foundation of the American Revolution.

1. Blackstone

William Blackstone's *Commentaries* is the most influential legal treatise ever written in English. It carries enormous authority in every nation that has adopted the common law. Writing in the 1760s, Blackstone exemplified the mainstream of English legal thought of the time. His treatise was "the preeminent authority on English law for the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (Ch. 11.A) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

In detailing common law protection of human rights, Blackstone first set forth the three primary, natural, and absolute rights: personal security, personal liberty, and private property. 1 Blackstone *120-36. Blackstone then turned to the auxiliary rights that protect the primary rights. These were the existence of Parliament, the clear limits on the king's prerogative, the right to apply to courts for redress of injuries, and the right to petition the government for redress of grievances. *Id.* *136-39.

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. and M. st. 2 c. 2 and it is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

Id. *139.

Later in the four-volume treatise, Blackstone reiterated his point about armed resistance: "[I]n cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people." 4 *id.* *82. Governments that feared popular resistance used anti-hunting laws "for prevention of popular insurrection and resistance to the government, by disarming the bulk of the people . . . [a] reason oftener meant, than avowed by the makers of forest or game laws." 2 *id.* *412. Unsurprisingly, Blackstone warned against standing armies: "Nothing then . . . ought to be more guarded against in a free state, than making the military power . . . a body too distinct from the people." 1 *id.* *401.

In the following excerpt, Blackstone summarized the common law of lethal force against violent criminals.

4 William Blackstone

Commentaries on the Laws of England

*179-82 (1769)

. . . HOMICIDES, committed for the advancement of public justice, are; . . . 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. . . . 3. IN the next place, such

homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton,[94] and as it is since declared by statute 24 Hen. VIII. c. 5. . . . This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of nocturnal house-breaking: "if a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution."[95] At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact: and, by the Roman law of the twelve tables,[96] a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon: which amounts very nearly to the same as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed in defence of the chastity either of oneself or relations: and so also, according to Selden,[97] stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds "that all manner of force without right upon a man's person," puts him in a "state of war with the aggressor;" and, of consequence, that, "being in such a state of war, he may lawfully kill him" that conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.[98]

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94. [Henry de Bracton (ca. 1210-68), author of De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England).—Eds.]

95. [*Exodus* 22:2. The universal Jewish interpretation of "if the sun be risen upon him" was metaphorical. Regardless of the time of day, if the burglar were a violent threat to the people in the house, he could be killed. If he were not a violent threat, he could not be. For more on Jewish law, see online Chapter 21.C.1.—Eds.]

96. [The Twelve Tables were, literally, 12 bronze tablets containing basic legal rules, published in final form in 449 B.C. They were placed in the Forum, so that every citizen could easily read them. After extensive public debate and discussion, they were created by a committee of ten (decemvirs), which relied in part on Greek law, and which made further revisions based on public comment by citizens. Titus Livius, The Early History of Rome 192-248 (Aubrey de Sélincourt trans., 1971) (first published sometime during the reign of Augustus Caesar). *See also* online Ch. 21.B.2.a.—Eds.]

97. [John Selden (1584-1654), scholar of the history of English and Jewish law.—Eds.]

98. [At the time, major violent felonies were capital offenses.—Eds.]

IN these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame.

2. John Locke

The English philosopher John Locke (1632-1704) is known as the "Father of Liberalism." Some historians consider him the preeminent political philosopher for the American Revolution, while others rank him as one of several. Locke believed that legitimate government should be understood as a contract between citizens. Men were initially in a "state of nature," unbound by positive law. In this condition, individuals were free to use force to punish violations of their rights. However, because the state of nature is prone to devolve into war, reason dictates that persons would mutually agree to leave the state of nature by giving up some of their freedoms to a civil government to better protect their lives, liberty, and property. Yet Locke also argued that even under government, exceptional situations can arise where individuals legitimately may use force to safeguard their natural rights, whether against a common thief or a would-be tyrant. Because no rational person would agree to surrender those rights of resistance in the social contract, the rights were retained.

John Locke

Second Treatise of Government

1690

§ 16 The *State of War* is a State of Enmity and Destruction; And therefore declaring by Word or Action . . . a sedate settled Design, upon another Man's Life, *puts him in a State of War* with him against whom he has declared such an Intention, and so has exposed his Life to the others Power to be taken away by him, or any one that joins with him in his Defence, and espouses his Quarrel: it being reasonable and just I should have a Right to destroy that which threatens me with Destruction. For *by the Fundamental Law of Nature* . . . one may destroy a Man who makes War upon him . . . for the same Reason, that he may kill a *Wolf* or a *Lion;* because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey. . . .

§ 17 And hence it is, that he who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him; It being . . . a Declaration of a Design upon his Life. For . . . he who would get me into his Power without my consent, would use me as he pleased, when he had got me there, and destroy me to when he had fancy to it: for no body can desire to *have me in his Absolute Power*, unless it be to compel me by force to that which is against the Right of my Freedom, *i.e.*, make me a Slave. To be free from such force is the only security of my Preservation. . . . He that in the State of Nature, *would take away the Freedom*, that belongs to any one in that State must necessarily be supposed to have a design to

take away every thing else, that *Freedom* being the Foundation of all the rest: As he that in the State of Society would take away the *Freedom* belonging to those of that Society or Common-wealth, must be supposed to design to take away from them every thing else, and so to be looked on as *in a State of War.*

§ 18 This makes it Lawful for a Man to *kill a Thief*, who has not in the least hurt him, nor declared any design upon his Life, any farther than by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him: because using force, where he has no Right, to get me in his Power, let his pretence be what it will, I have no reason to suppose, that he, who would *take away my Liberty*, would not when he had me in his Power, take away everything else. And therefore it is Lawful for me to treat him, as one who has put *himself into a State of War* with me, *i.e.* kill him if I can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is *aggressor* in it. . . .

§ 23 . . . For a Man, not having the Power of his own Life [because life is a gift in trust from God], *cannot*, by Compact, or his own Consent, *enslave* himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. . . .

§ 220 To tell *people* they *may provide for themselves*, by erecting a new Legislature, when by Oppression, Artifice, or being delivered over to a Foreign Power, their old one is gone, is only to tell them they may expect Relief, when it is too late, and the evil is past Cure. This is in effect no more than to bid them first to be Slaves, and then to take care of their Liberty; and when their Chains are on, tell them, they may act like Freemen. . . . Men can never be secure from Tyranny, if there be no means to escape it, till they are perfectly under it: And therefore it is, that they have not only a Right to get out of it, but to prevent it. . . .

§228 . . . If the innocent honest Man must quietly quit all he has for Peace sake, to him who will lay violent hands upon it, I desire it may be considered, what a kind of Peace there will be in the World, which consists only in Violence and Rapine; and which is to be maintained only for the benefit of the Robbers and Oppressors. Who would not think it an admirable Peace betwixt the Mighty and the Mean, when the Lamb, without resistance, yielded his Throat to be torn by the imperious Wolf?

3. Algernon Sidney

Algernon Sidney was a descendant of Harry Percy, the "Hotspur" of Shakespeare's *Richard II* and *Henry IV, Part 1*. Algernon Sidney, Discourses Concerning Government xxvii (Thomas G. West ed., 1996).[99] Sidney fought bravely with the Parliamentary forces during the English Civil War (Section H.2), and lived in exile in France after the Restoration. After 1681, when fears about the Stuarts' totalitarian ambitions grew intense, Sidney, who had returned to England, worked assiduously to organize their overthrow. In 1683, Sidney was arrested for treason, related to the Rye House Plot. He was convicted in a trial that was later regarded as

99. This section is adapted from David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo- Christian Tradition (2017).

a travesty of justice, not being allowed to see the indictment. The unpublished text of his *Discourses* was used as evidence against him. Samuel March Phillips, 2 State Trials 87-117 (1826). Executed on December 7, 1683, Sidney was venerated by the Americans as one of the greatest martyrs of liberty.

Sidney's *Discourses Concerning Government* could not have been published while the despotic Stuarts sat on the throne, but the freer atmosphere after the Glorious Revolution allowed posthumous publication. Like Locke's *First Treatise*, Sidney's *Discourses Concerning Government* was a refutation of Robert Filmer's *Patriarcha*, which had argued that all kings share in the dominion that God granted to Adam, and that any resistance to a king, no matter how tyrannical he might be, is sinful. Filmer did not merely seek to restore the Dark Ages theory that the king must never be forcibly resisted. Even under the Dark Ages standard, the king was required to rule according to the law and customs of the nation. Filmer claimed that the king was free of every constraint.

Sidney tore into *Patriarcha* line by line. Because of the Reformation, almost every English-speaking home contained a Bible, and so the Jewish heroes who had led forcible resistance of bad governments were well-known: "Moses, Othniel, Ehud, Barak, Gideon, Samson, Jephthah, Samuel, David, Jehu, the Maccabees, and others." Sidney ch. 1, § 3. Such men were "perpetually renowned for having led the people by extraordinary ways . . . to recover their liberties, and avenge injuries received from foreign or domestick tyrants." *Id.* ch. 2, § 24.

As one section's title summarized, "Popular Governments are less subject to Civil Disorders than Monarchies; manage them more ably, and more easily recover out of them." *Id.* ch. 2, § 234. Hence, a violent revolution to instill a popular government would, in the long run, lead to more stability and less violence.

Sidney was a militia enthusiast, using many examples from ancient Greece and Rome, and from more recent European history, to show that a militia fighting for its freedom would defeat mercenaries merely interested in pay. *Id.* ch. 2, § 21.

On the duty of individuals and nations to use force, when necessary, to protect their own interests, Sidney coined the English version of the epigram: "God helps those who help themselves." *Id.* ch. 2, § 23.[100]

Without a natural right of self-defense, society itself would cease to exist:

> Nay, all laws must fall, human societies that subsist by them must be dissolved, and all innocent persons be exposed to the violence of most wicked, if men might not justly defend themselves against injustice by their own natural right, when the ways prescribed by public authority cannot be taken.

Id. ch. 2, § 4. From the right of personal self-defense, a right of self-defense against tyrants necessarily followed. *Id.* ch. 2, § 4. To be subject to a tyrant was little different from being under the power of a pirate. *Id.* ch. 3, § 46. The fifth-century Christian writer Augustine of Hippo had said the same, as had the Confucian philosopher Mencius. (Online Ch. 21.A.1, n.7.) Thus, "those arms were just and pious that were necessary, and necessary when there was no hope of safety by any

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100. In the fable of *Hercules and the Waggoner*, Aesop had written, "The gods help them that help themselves."

other way. This is the voice of mankind, and is disliked only" by princes who fear deserved punishments, and their flatterers and servants who share the princes' guilt. *Id.* ch. 3, § 40.

The necessary corollary of the right of self-defense against tyrants was the possession of arms: "he is a fool who knows not that swords were given to men, that none might be slaves, but such as know not how to use them." *Id.* ch. 2, § 4.

England's situation in the 1680s worried Sidney, for the old checks and balances were vanishing: "That which might have easily been performed when the people were armed, and had a great, strong, virtuous and powerful nobility to lead them, is made difficult, now they are disarmed, and that nobility abolished." *Id.* ch. 3, § 37.

The English were not obliged to live under the same system of government as their ancestors, because human understanding had increased. So "if it be lawful for us by the use of that understanding to build houses, ships, and forts better than our ancestors, to make such arms as are most fit for our defence, and to invent printing, with an infinite number of other arts beneficial to mankind, why have we not the same right in matters of government. . . ." *Id.* ch. 3, § 7.

While parts of the New Testament (particularly, *Romans* 13; see online Ch. 21.C.2.d) had urged submission to government, "those precepts were merely temporary, and directed to the person of the apostles, who were armed only with the sword of the spirit; that the primitive Christians used prayers and tears only no longer than whilst they had no other arms." By becoming Christians, men "had not lost the rights belonging to all mankind." So "when God had put means into their hands of defending themselves," then "the Christian valour soon became no less famous and remarkable than that of the pagans." *Id.* ch. 3, § 7.

Sidney disputed Filmer's claim that God "caused some to be born with crowns upon their heads, and all others with saddles upon their backs." *Id.* ch. 3, § 33. A few days before Thomas Jefferson died on July 4, 1826, the fiftieth anniversary of the Declaration of Independence, Jefferson wrote his final letter, which echoed Sidney's words from a century and a half before:

> All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.

Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), *in* The Portable Thomas Jefferson 585 (Merrill D. Peterson ed., 1977).

Together, Algernon Sidney and John Locke made the case that the right of armed resistance is inseparable from the right of religious freedom. In the past, groups who had successfully fought for their own religious freedom were usually intolerant of the freedom of other religions. Among the many examples are the Jewish Maccabees, who won a war of national independence against a government in Syria; the Lutherans and Calvinists in continental Europe who liberated themselves from Catholic rule; and the Scottish Presbyterians. The early resistance theorists were passionately interested in their own religious freedom, and intolerant of the freedom of other religions. Locke and Sidney advanced the right of resistance

to mean the right of religious freedom for everyone.[101] Since no one could use the power of the state to force a religion on someone else, there was no need to fear or suppress anyone else's religion.

It would take some time for Locke's and Sidney's ideas to be fully accepted in England. In the American colonies, they would help set off the shot heard 'round the world.

4. Novanglus

In "Novanglus," a series of 1775 newspaper essays, John Adams set forth the most sophisticated legal and philosophical arguments for the colonists' right of resistance. In essay number six, Adams cited the preeminent international law theorist Hugo Grotius to support the point that it was not seditious to resist a ruler who was assuming powers that had never been granted:

> The same course is justly used against a legal magistrate who takes upon him to exercise a power which the law does not give; for in that respect he is a private man,—"*Quia*," as Grotius says, "*eatenus non habet imperium*," [Because he does not have the authority to that extent.]—and may be restrained as well as any other; because he is not set up to do what he lists, but what the law appoints for the good of the people; and as he has no other power than what the law allows, so the same law limits and directs the exercise of that which he has.

John Adams, *Novanglus*, essay 6 (Feb. 27, 1776), *in* Charles Francis Adams, 4 The Works of John Adams 82 (1856) (some internal quotation marks omitted).

Adams quoted verbatim a massive footnote by Jean de Barbeyrac, author of an extensively annotated edition of Samuel von Pufendorf's treatise (online Chapter 18.C.4) on international law and political philosophy. In the footnote, Barbeyrac wove together Grotius (the primary founder of classical international law, and a preeminent political philosopher), and Pufendorf (the first professor of international law, and author of a treatise that was second only to that of Grotius). Elaborating on the works of Catholic scholars such as Francisco de Victoria and Francisco Suarez, Grotius and Pufendorf had used the principle of the right of personal self-defense to extrapolate an international law of warfare. For example, if a home invader had been captured and was tied up, it was not permissible to kill him. By analogy, prisoners of war could not be killed. Pufendorf's treatise was the foremost guide to moral and political philosophy in Enlightenment Europe.

Barbeyrac also drew on Jean LeClerc (a liberal Swiss Protestant philosopher and theologian), John Locke, and Algernon Sidney. Barbeyrac, with Adams in agreement, had argued that revolution against tyranny was a means to restore civil society, that resistance was justified before the tyranny was fully consolidated, and

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101. Locke's toleration did not include Catholics, whom he considered to be loyal to a foreign potentate (the Pope) rather than to the British government. Nor did it include atheists, who were considered to have no moral self-constraint.

that armed resistance would not lead to mob rule. The Barbeyrac quote is a proper end for this Chapter, for it synthesizes some of the key sources on which Americans relied to justify their armed revolt against the British Empire.

John Adams

Novanglus

4 The Works of John Adams 82-84 (Charles Francis Adams ed., 1856)

When we speak of a tyrant that may lawfully be dethroned by the people, we do not mean by the word *people*, the vile populace or rabble of the country, nor the cabal of a small number of factious persons, but the greater and more judicious part of the subjects, of all ranks. Besides, the tyranny must be so notorious, and evidently clear, as to leave nobody any room to doubt of it, & c. Now, a prince may easily avoid making himself so universally suspected and odious to his subjects; for, as Mr. Locke says in his Treatise of Civil Government, c. 18, § 209,—"It is as impossible for a governor, if he really means the good of the people, and the preservation of them and the laws together, not to make them see and feel it, as it is for the father of a family not to let his children see he loves and takes care of them." And therefore the general insurrection of a whole nation does not deserve the name of a rebellion. We may see what Mr. Sidney says upon this subject in his Discourse concerning Government:—"Neither are subjects bound to stay till the prince has entirely finished the chains which he is preparing for them, and put it out of their power to oppose. It is sufficient that all the advances which he makes are manifestly tending to their oppression, that he is marching boldly on to the ruin of the State." In such a case, says Mr. Locke, admirably well,—"How can a man any more hinder himself from believing, in his own mind, which way things are going, or from casting about to save himself, than he could from believing the captain of the ship he was in was carrying him and the rest of his company to Algiers, when he found him always steering that course, though cross winds, leaks in his ship, and want of men and provisions, did often force him to turn his course another way for some time, which he steadily returned to again, as soon as the winds, weather, and other circumstances would let him?" This chiefly takes place with respect to kings, whose power is limited by fundamental laws.

If it is objected that the people, being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and the uncertain humor of the people, is to expose it to certain ruin; the same author will answer you, that "on the contrary, people are not so easily got out of their old forms as some are apt to suggest. England, for instance, notwithstanding the many revolutions that have been seen in that kingdom, has always kept to its old legislative of king, lords, and commons; and whatever provocations have made the crown to be taken from some of their princes' heads, they never carried the people so far as to place it in another line." But it will be said, this hypothesis lays a ferment for frequent rebellion. "No more," says Mr. Locke, "than any other hypothesis. For when the people are made miserable, and find themselves exposed to the ill usage of arbitrary power, cry up their governors as you will for sons of Jupiter;

let them be sacred and divine, descended or authorized from heaven; give them out for whom or what you please, the same will happen. The people generally ill treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. 2. Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny and murmur. 3. This power in the people of providing for their safety anew by a legislative, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the probablest means to hinder it; for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they be, *who by force break through, and by force justify the violation of them, are truly and properly rebels.* For when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity, among themselves; those who set up force again, in opposition to the laws, do *rebellare*, that is, do bring back again the state of war, and are properly, rebels," as the author shows. In the last place, he demonstrates that there are also greater inconveniences in allowing all to those that govern, than in granting something to the people. But it will be said, that ill affected and factious men may spread among the people, and make them believe that the prince or legislative act contrary to their trust, when they only make use of their due prerogative. To this Mr. Locke answers, that the people, however, is to judge of all that; because nobody can better judge whether his trustee or deputy acts well, and according to the trust reposed in him, than he who deputed him. "He might make the like query," (says Mr. Le Clerc, from whom this extract is taken) "and ask, whether the people being oppressed by an authority which they set up, but for their own good, it is just that those who are vested with this authority, and of which they are complaining, should themselves be judges of the complaints made against them." The greatest flatterers of kings dare not say, that the people are obliged to suffer absolutely all their humors, how irregular soever they be; and therefore must confess, that when no regard is had to their complaints, the very foundations of society are destroyed; the prince and people are in a state of war with each other, like two independent states, that are doing themselves justice, and acknowledge no person upon earth, who, in a sovereign manner, can determine the disputes between them.

NOTES & QUESTIONS

1. **CQ:** Thomas Jefferson described Aristotle, Cicero, John Locke, and Algernon Sidney as the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence (Ch. 4.B.5). Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 The Writings of Thomas Jefferson 117-19 (Andrew A. Lipscomb ed., 1903). Can you identify passages in the Declaration that reflect the views of Locke or Sidney? Aristotle and Cicero are discussed in online Chapter 21.B.1.c, B.2.c.

2. If you were writing a constitution and you agreed with the views expressed above by Locke and Sidney, what provisions would you include?

3. Timothy McVeigh was a neo-Nazi who perpetrated the worst act of domestic terrorism in American history, blowing up the Alfred P. Murrah federal building in Oklahoma City in 1995, murdering 168 people. McVeigh was captured while fleeing in his automobile. In the car was Locke's Second Treatise on Government. McVeigh was wearing a t-shirt with the words *sic semper tyrannis* ("thus always to tyrants"). This is the state motto of Virginia, whose state flag portrays the Roman goddess Virtus holding a spear and standing with one foot on the chest of a king she has justly slain. The phrase was attributed to Brutus when he killed Julius Caesar, and it was uttered by John Wilkes Booth when he murdered Abraham Lincoln. There was a picture of Lincoln on McVeigh's t-shirt. Are crimes like McVeigh's and Booth's predictable outgrowths of a society allowing access to tools of violence and the publication of books like Locke's, or of works praising the assassination of Caesar?

4. Some critics of Locke agreed with him about the right of revolution but thought that Locke was too ready to invoke that right at early stages of oppression. Do you agree?

5. *The natural right of self-defense.* Locke and others extrapolated resistance to tyranny from the natural right of self-defense. Is the premise correct? Herbert Wechsler, one of the most influential criminal law scholars of the twentieth century, wrote that laws regarding self-defense reflect the "universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims." Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 736 (1937). Is such a judgment universal now? Was it ever? Personal self-defense is part of the law of every legal system in the world today. Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 Va. L. Rev. 999, 999 (2005) ("the right to self-defense is recognized in all jurisdictions"). The scope of the right, however, varies from nation to nation.

Locke's theories incorporated arguments by Thomas Hobbes, who wrote that people create governments to free themselves from a state of nature in which life is "nasty, brutish, and short" because there exists constant competition that leads to a constant "condition of warre." Thomas Hobbes, Leviathan 84-85 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651). In Hobbes's view, individuals covenant to cede all natural rights (including the ability to do whatever one wanted in the state of nature) to the government, including the right to change their government, no matter how bad it is. *Id.* at 120. Hobbes made an exception, however, noting that "[a] Covenant not to defend my selfe from force, by force, is always voyd. . . . For man by nature chooseth the . . . danger of death in resisting . . . than . . . certain and present death in not resisting." *Id.* at 94-95. A right that can be surrendered or delegated to the government is an "alienable" right.

CQ: The Declaration of Independence affirms that certain rights are "inalienable," and thus could never have been surrendered to Parliament or the king. Do you agree with Hobbes that self-defense is inalienable? If so, what are the legal implications?

6. *Can self-defense be prohibited?* The Second Amendment was held to be enforceable against the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 11.B). The Supreme Court reversed a decision of the Seventh Circuit, written

by Judge William Bauer and joined by Judges Frank Easterbrook and Richard Posner. *National Rifle Association et al. v. City of Chicago, Illinois, and Village of Oak Park, Illinois*, 567 F.3d 856 (7th Cir. 2009). The Seventh Circuit recognized that *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), had said that people have a right to own handguns for self-defense. But, argued the Seventh Circuit, handguns could still be banned, as long as a state first banned self-defense. "Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self-help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the Second Amendment protects only the interests of law-abiding citizens. . . . Our hypothetical is not as far-fetched as it sounds." *Id.* at 859. Can a legitimate government outlaw self-defense, or would the prohibition delegitimize the government?

7. *Self-defense against criminals and criminal governments.* The view that unjust government is just a large-scale form of organized crime is deeply rooted in Western and Eastern political philosophy; the corollary is that resistance to the large-scale tyranny of an evil king is no different in principle than resistance to the micro-tyranny of a band of robbers or rapists. Among the exponents of this view have been Cicero (Roman lawyer), Augustine (Christian writer), Thomas Aquinas (Christian writer), and Mencius (Confucian writer). *See* online Ch. 21. It was central to the ideology of the American Revolution. *See* Chs. 3-4. To the Americans, and to the Britons the Americans admired most, personal and collective self-defense were not separate categories; they were applications of the same principle. Collective action, such as in the militia, was necessary to suppress the most powerful criminals. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87 (1992).

8. *Government in rebellion against the people.* Theodore Schroeder was leader of the Free Speech League, the first group in American history to defend the rights of all speakers on all subjects, based on the principles of the First Amendment. Schroeder's 1916 book *Free Speech for Radicals* used the Glorious Revolution of 1688 to argue for protection of speech urging the overthrow of the government:

> If we are to erect this complaint against disarming part of the people into a general principle, it must be that to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.
>
> The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.

> Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright[102] made it plain that the right to resist government was one protected by the English Constitution.

Theodore Schroeder, Free Speech for Radicals 105-06 (1916). Is Schroeder correct that the Declaration of Rights implicitly recognizes a right of the people to take up arms against a government that is "in rebellion against the people?" Is the argument stronger when coupled with Blackstone's interpretation of the right to arms? How can Schroeder's views be reconciled with the fact that *after* the Declaration of Rights, England still had laws against sedition, and that Blackstone wrote about such laws with apparent approval?

9. *Arms rights and the freedom of religion.* Can you think of some reasons why protections of religious freedom and conscience in the U.S. First Amendment are followed by an amendment about arms rights? At the Virginia Convention of ratification of the U.S. Constitution, Zachariah Johnson argued that there was no risk of federal tyranny, and that a Bill of Rights was unnecessary. He pointed out that "the people are not to be disarmed of their weapons. They are left in full possession of them." Further, the government would be freely elected by the people. Unlike in the United Kingdom, the U.S. Constitution provided that "no religious Test shall ever be required as a Qualification to an Office or public Trust under the United States." U.S. Const., art. VI. Should the federal government attempt to impose a single religion, "in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly. The government will depend on the assistance of the people in the day of distress." 3 Debates on the Adoption of the Federal Constitution 644-46 (June 25, 1778) (Jonathan Elliot ed. 1845). How does the history of the United Kingdom support or contradict Johnson's political theory?

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102. [British aristocrat John Cartwright was an early supporter of American independence, and an advocate of radical reform in Great Britain, including a Parliament elected by universal suffrage. The Swiss Jean Louis de Lolme, while living in England, authored *The Constitution of England* in 1775. Quoting Blackstone's language about "the right of having and using arms for self-preservation and defence," de Lolme noted that "resistance gave birth to the Great Charter" (Magna Carta). While "resistance is looked upon by them [the English people] as the ultimate and lawful resource against the violences of Power," an armed citizenry would rarely need to resist, for "[t]he Power of the People is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move, . . . *Ostendite bellum, pace habebitis* [Make but a show of war and you shall have peace]" Jean Louis de Lolme, 1 The Constitution of England 214-15, 219 (David Lieberman ed.) (Liberty Fund 2007) (1784) (1775). De Lolme also warned against standing armies. The first step of a government protected by a standing army would be to "retrench from their unarmed Subjects, a freedom which, transmitted to the Soldiery, would be attended with so fatal consequences. . . ." Namely, the army would behave licentiously while controlling the people's behavior. *Id.* at 290.—Eds.]

Chapter 23

The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century

This is online Chapter 23 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsregulation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, and case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *Detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. A more in-depth examination of the English history from Chapter 2.*

23. *This chapter.*

This Chapter describes how the technology of firearms, accessories, and other personal arms developed from early modern England to the present. While technological history was covered in Chapters 2 through 16 of the textbook, this Chapter provides more detail and context, including how the invention of mass production techniques for firearms led to dramatic changes in the American economy.

A. FIREARMS TECHNOLOGY IN GREAT BRITAIN FROM EARLY TIMES

Understanding arms rights and arms control requires understanding arms. As with the First Amendment freedom of the press, knowledge of past technological developments provides perspective on present technology issues and those that might arise in the future.

Accordingly, Chapters 2 through 16 contain parts describing how arms changed (or did not) during their relevant time periods. Continuing themes are developments in reliability, accuracy, durability, and affordability of various arms. These developments have changed the types of arms that people keep and bear.

Some of the most important technology issues for firearms are:

- Ignition: How does a user fire the gun? How reliable is the ignition system?
- Loading: How does the user load the gun—from the front of the gun (the *muzzle*) or from the back of the barrel (the *breech*)? The latter is much faster and more convenient.
- Repeating: After the gun has been fired once, can the user fire one or more additional shots? Or does the user have to reload all over again? This is the difference between a *repeater* and a *single-shot* firearm.

The above issues have been influenced by advances in manufacturing technology, and the availability of inputs in different times and places. From the sixteenth through eighteenth centuries, firearms manufacture was primarily artisanal; a craftsman's only helper would be an apprentice. During the nineteenth century, most production shifted to factories that used machine tools. They could produce high-quality arms in large quantities. Even so, artisanal firearms manufacture in home workshops continues to the present.

It is possible that the pendulum might swing back toward home manufacture. Today, home manufacturers of firearms can use machine tools with computer numerical control (CNC) to make tasks such as cutting metal much more precise. Hobbyists are experimenting with 3-D printing (computer-aided manufacturing [CAM]) to manufacture firearms components. Mark A. Tallman, Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution (2020).

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Photos of firearms in this Chapter belong to the NRA Museums and are used with permission. The photo captions include links to the Museum webpage for the photo, which includes additional information and more photos.

1. *Matchlocks and Wheellocks*

The first firearms in the Western world are known as *hand cannons*. The user poured gunpowder down the muzzle, and then dropped in projectiles, such as stones or nails. To ignite the hand cannon, the user moved a heat source, such as a live coal held by tongs, to the *touch hole*, a small opening near the powder charge. The barrel of the hand cannon was attached to a long stick to keep the user several feet away from the touch hole; the erupting powder charge not only burned in the barrel, it also sent a large flame out the touchhole.[1]

A hand cannon from circa 1350.

When the first British king from the Tudor family, Henry VII, took power in 1485, firearms had been of little military significance in England. By the end of the reign of the last Tudor, Henry's granddaughter Elizabeth I, in 1603, firearms had much advanced; the most sophisticated handgun could automatically fire 16 shots with a single press of the trigger. By the middle of the seventeenth century, the best rifles could fire 30 shots, one at a time, without reloading. However, such firearms were quite expensive, and therefore out of reach of the average consumer.

The most important improvement in firearms technology before 1800 was in the ignition system. The ignition change made firearms more reliable, faster to reload, and much better suited for carrying for an extended time while loaded.

The *matchlock* firearm was invented in the second quarter of fifteenth century, and by Tudor times it had made the hand cannon obsolete.[2] The matchlock's trigger is connected to an S-shaped device, the *serpentine*, which holds a slow-burning cord. By pulling the trigger, the user lowers the lit cord down to a small pan of gunpowder, the *flash pan* or *firing pan*. The cord ignites the gunpowder, and the flame travels

1. Robert Held, The Age of Firearms: A Pictorial History 24 (1956).
2. *Id.* at 26-27.

along a small channel, passes through a small circular opening (the *touch hole*), and enters the *breech* (at the rear of the barrel).[3] There, the flame ignites the main charge of gunpowder. The expanding gas from the burning gunpowder pushes the spherical bullet through the barrel, and out the *muzzle* (the front of the barrel).

Today, "a flash in the pan" is a metaphor for that something briefly seemed important but soon proved to be useless. The phrase comes from a flash in the pan that failed to ignite the main charge.

Matchlocks were a big improvement from the ignition system for hand cannons. But the matchlock still had several disadvantages: the burning cord drew attention to the user—a problem in hunting and some other situations. To be ready to shoot, the user had to keep the cord lit. This was not practical for routine carriage for immediate self-defense. Nor could a matchlock be stored so that it was instantly ready for self-defense. Matchlocks usually did not work at all in the rain, or sometimes in the damp. The safety problem of burning cords near gunpowder is apparent.

What are today called "matches"—paper or wooden sticks with chemical tips that are ignited by friction—did not exist until the mid-nineteenth century.[4] So lighting the slow-burning matchlock cord required an external source of flame, such as burning coal that had been ignited in a campfire.

Spanish matchlock musket, manufactured around 1530. Usually fired while resting on a forked stick. Matchlock muskets were the standard arm for the Spanish conquest of Florida.

3. The rope was usually made from flax tow or hemp tow. George C. Neumann, Battle Weapons of the American Revolution 6-7 (2011). It was soaked in saltpeter (a gunpowder ingredient). Tow is a loose ball of coarse and unspun waste fibers from hemp or linen production. It is used for gun cleaning, for wadding, and for tinder. George C. Neumann & Frank J. Kravic, Collector's Illustrated Encyclopedia of the American Revolution 161, 262, 269 (1975); Jim Mullins, Of Sorts for Provincials: American Weapons of the French and Indian War 48 (2008).

4. What we call "matches" in the twenty-first century are paper or wood sticks with sesquisulfide of phosphorus attached to the tip. As common consumer items, they were preceded in the nineteenth century by matchsticks with white phosphorus tips. The principle was discovered in 1669, but it was not practical to apply due to the difficulty in obtaining phosphorus. *See* Anne Marie Helmenstine, *History of Chemical Matches*, ThoughtCo. (Jan. 3, 2018).

Around 1500, Leonardo da Vinci invented the *wheellock*.[5] Rather than using a burning cord, the wheellock is self-igniting. In a wheellock, the user turns a key to wind up a steel wheel under spring tension. When the tension is released by the trigger pull, the serrated wheel strikes a piece of iron pyrite. The resulting shower of sparks ignites the powder in the flash pan. The flash pan powder fire then travels through the touch hole to ignite the main powder charge. The wheellock's sparking mechanism is similar to the ignition system used in today's disposable cigarette lighters.

The wheellock weighed less and could be carried so that it was ready to shoot, like all modern firearms. In a self-defense emergency, the defender would not need to light a cord before being able to use the firearm. "Double-barreled wheellocks were nowhere unusual," so the user could fire two shots without reloading.[6] A study by Professor Carlisle Moody suggests that the growing availability of always available defensive firearms in the centuries after 1500 may have contributed to the sharp decline in European homicide rates.*See* online Ch. 19.D.1.

With no burning cord, wheellocks were much better for hunting. Compared to matchlocks, wheellocks had more intricate parts, were more likely to malfunction,

A wheellock carbine (short rifle) from the home of John Alden, one of the *Mayflower* Pilgrims. Alden shared a cabin with the Pilgrims' military captain, Miles Standish. The story of their competing courtship of Priscilla Mullins is told by Henry Wadsworth Longfellow, an Alden-Mullins descendant, in the epic poem The Courtship of Miles Standish.

5. Vernard Foley, *Leonardo and the Invention of the Wheellock*, Scientific Am., Jan. 1998, at 96.
6. Held, at 52

and were nearly four times as expensive. Wheellocks worked somewhat better in rain or damp, but still had many problems in bad weather.[7]

Henry VIII (reigned 1509-47) and his successors did integrate some wheellocks into their military forces, especially cavalry, for which the matchlock was too clumsy. But they continued to rely mainly on matchlocks until nearly the end of the seventeenth century because matchlocks cost so much less. Except for soldiers on guard duty, military personnel rarely need to be able to fire at a moment's notice. European battles were almost never a surprise event. "Wheellocks remained essentially private weapons."[8]

The wheellock was well-suited for a European gentleman or lady who could afford to carry one for protection. Wheellocks were also apparently available to members of the working class who were sufficiently motivated to scrimp and save to buy one — as apparently was the Pilgrim John Alden. He was a cooper (a barrel-maker) — not a highly lucrative calling. His possession of the relatively expensive wheellock exemplifies the importance that the English emigrants to America placed on quality firearms.

But the wheellock proved too delicate for the rough conditions of use in American forests.[9] A frontiersman on a weeks-long hunting expedition needed to be able to repair gun parts using only a campfire for heat and a rock as an anvil; wheellock parts, like clock parts, were too intricate for such repair.[10] Based on experience, Americans and American Indians instead chose a different firearm, which made its appearance just as the European-American settlement of North American was getting underway: the flintlock.

2. The Flintlock, the Brown Bess Musket, and Fowlers

Early in the seventeenth century, a much-improved version of the wheellock was invented: the *flintlock*. In the flintlock, the gunpowder is ignited by flint striking a piece of steel and producing sparks. A matchlock took 43 steps to reload, but a flintlock needed only 26. Flintlocks were mechanically simpler than wheellocks, and so could be manufactured more affordably. Flintlocks reduced *misfires* (failure to ignite)

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7. M.L. Brown, Firearms in Colonial America: The Impact of History and Technology, 1492-1792, at 57-58 (1980); W.W. Greener, The Gun and Its Development 65-66 (9th ed. 1910). A wheellock required "weeks of labor of the most expert craftsmen, for every screw, must, bolt, wheel, sear, lockplate and others of the thirty-five to fifty components — all of which had to be fitted with watchlike precision — entered the gunmaker's shop as bars of pig iron and scraps of steel which could take shape only by patient and skillful application of the smelting furnace and of a hundred different tools through a thousand stages of gradual, hand-wrought process." Held, at 50. "No experienced master gunsmith worked cheaply — by 1580 that trade being universally among the most lucrative," matched in Germany by making watches, clocks, and armor, in Italy by "landscape gardening and mosaic in-laying, "and in England, where there were still few gunsmiths," by "shipwrighting, printing, and bookbinding." *Id.* at 57.

8. *Id.* at 58.

9. David B. Silverman, Thundersticks: Firearms and Violent Transformation of Native America 27 (2016).

10. Held, at 142.

by 40 percent. A well-trained user could fire up to five shots per minute, depending on the gun.[11]

Collectively, the wheellock, the flintlock, and intermediate types (latter sixteenth-century proto-flintlocks such as the *snaphaunce*) were called *firelocks.*[12] Unlike a matchlock, a firelock is capable of igniting gunpowder by itself, with no need for an external source of fire. Whereas a long gun matchlock is held against the user's chest, a firelock's buttstock can be brought to the shoulder. Shouldering improves the gun's stability and puts the user's sight line on the same line as the barrel, thus improving accuracy. The disadvantage of firelocks compared to matchlocks is their greater number of small internal parts, making them less

This snaphaunce pistol is an early type of flintlock. It was manufactured in northern Italy in the sixteenth century by Beretta, perhaps the world's oldest continuously operating business enterprise, established in 1526. Note the folding stock on the pistol, allowing for concealed carry under a cloak. Today, a gun with a barrel under 16 inches and stock is classified as a short-barreled rifle (SBR), and subject to special restrictions pursuant to the National Firearms Act of 1934. Ch. 8.E.2.d.

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11. W.W. Greener, The Gun and Its Development 66-67 (9th ed. 1910); Charles C. Carlton, This Seat of Mars: War and the British Isles 1585-1746, at 171-73 (2011).

12. "The true snaphaunce, rarely used in New England" differs from the "true" flintlock in how the cover of the flash pan (a/k/a firing pan) is connected to the rest of the gun lock. Patrick A. Malone, The Skulking Way of War: Technology and Tactics among the New England Indians 34 (1991). American sources often do not use the different terms with precision.

Because of simpler mechanics, a snaphaunce was about half of the price of a comparable quality wheellock, which is to say about double the cost of a matchlock. Unlike the wheellock, the snaphaunce did not have a wheel housing or chain drive that could become clogged. Moreover, the snaphaunce flint, unlike the wheellock pyrite, was not friable (easily crumbled). A sharpened flint could reliably produce sparks for about 20 shots before needing to be resharpened. Because of cost, most military stuck with matchlocks (except for snaphaunce handguns), making the snaphaunce mainly a civilian gun. Held, at 72.

durable under hard use.[13] As seen in Chapters 3 through 5, the word "firelock" often appears in American colonial and Early Republic firearms legislation.

For either firelocks or matchlocks, once the powder and ammunition have been loaded, the user might tap on the gun's exterior, so that a few grains of powder in the flash pan fall into the touch hole. This is the origin of "knock on wood" for good luck.

Until the Glorious Revolution in 1688, the British government had been relatively slow in adopting flintlocks, compared to the Continent. Afterward, new King William III began to make the flintlock the main military arm in England. In the early eighteenth century, General John Churchill was responsible for the adoption of what became the standard military flintlock musket: the .75 caliber Brown Bess.[14]

Due to the necessities of hunting and Indian-fighting, Americans made the transition from matchlocks to flintlocks much sooner than the British did.[15] In Great Britain, only the upper class could legally hunt, but in America anyone could. Chs. 2-3.

Like its predecessor the arquebus, the musket is a long gun that has a smooth *bore* (the interior of the barrel). If the bore is not smooth, but instead has spiral grooves, *rifling*, the firearm is a *rifle*, not a classic musket. The rifling makes the bullet spin on its horizontal access, and thereby improves aerodynamic stability. Especially at a distance, a gun with rifling is much more accurate than a smoothbore. Today, most modern shotguns have smooth bores, whereas rifles and handguns have rifled barrels.

The smoothbore Brown Bess was not accurate, but it did not need to be. The standard European fighting method of the time involved massed lines of infantry, so a high rate of fire in the enemy's general direction was sufficient. The Brown Bess remained the main service firearm of the British army and militia until well into the nineteenth century.[16]

This Brown Bess musket was captured and used by Americans during the American Revolution.

13. Ernest Marsh Lloyd, A Review of the History of Infantry 133-34 (1908).
14. John Nigel George, English Guns and Rifles 80-81 (1947).
15. *Id.* at 85.
16. *See generally* Stuart Reid, The Flintlock Musket: Brown Bess and Charleville 1715-1865 (2016); Erik Goldstein & Stuart Mowbray, The Brown Bess (2010).

A close-up of the lock of a Brown Bess flintlock. The sharpened piece of flint is held in the jaws of the hammer, which are tightened by a screw. When the trigger is pulled, the hammer falls forward to strike the frizzen (the L-shaped piece of steel on the right, also known as the battery). The sparks fall onto the flash pan to ignite the gunpowder. The flame then travels inside the gun, via the touch hole, and ignites the main powder charge.

Another very common firearm was the fowling piece, for bird hunting. Like the Brown Bess, it was a smoothbore long gun. The difference was that the fowling piece barrel was lighter and its muzzle was slightly flared to increase the velocity of the birdshot.[17] As the American fowler evolved, influenced by the English and by immigrant French Huguenot gunsmiths, "[t]he result was the development of a unique variety of American long fowler. These American long guns served as an all-purpose firearm. When loaded with shot, they were suited to hunt birds and small game, and when loaded with a ball, they could provide venison for the table. In times of emergency, they were needed for militia, and more than a few saw service in the early colonial wars as well as the Revolution."[18] The modified Dutch fowlers were the first distinctively American firearms.[19]

17. George, at 85.
18. *Id.*
19. Bill Ahearn, Muskets of the Revolution and the French & Indian Wars 101 (2005).

This Dutch fowler from about 1680 is typical of the long guns that were first introduced to the Hudson Valley when it was part of New Netherland.

In the period before the Revolution, most American gunsmiths used imported locks.[20] The *lock*, or *action*, is the mechanism that contains the trigger and other components that fire the gun. The use of recycled parts was also common.[21] So, for example, a damaged fowling piece might be repaired with some lock parts scavenged from a musket. Thus, the musket versus fowler categories should not be viewed as rigidly divided in America. There were many hybrids.[22] The variety of American firearms and edged weapons was further increased because America at all times, including after the Revolution, was a major export market for older, surplus European arms—not only from the United Kingdom, but also from Germany, France, Spain, and the low countries; to these would be added firearms scavenged from the various European armies that fought in colonial wars or the American Revolution.[23] During the Revolution, many fowling pieces were employed as militia arms. Ideally, although not always in practice, they would be retrofitted to allow for the attachment of a bayonet.[24] As a British officer noted after the battles of

20. Tom Grinslade, Flintlock Fowlers: The First Guns Made in America 1, 5, 15, 23-25 (2005).

21. *Id.*

22. Goldstein & Mowbray, at 40-41; Grinslade, at 5, 23 ("The distinction between fowlers and muskets in the eighteenth century was not always clear-cut. Those manufactured from existing parts shared a common appearance, often combining aspects of both fowler and musket."). For example, the locks from French muskets that were captured during France's various wars in North America were often recycled into use on American fowlers.

23. George G. Neumann, Swords & Blades of the American Revolution 7, 53 (3d ed. 1991).

24. Grinslade, at 5, 54, 63 ("In times of Indian raids or war, the family fowling-piece served the need for a fighting gun."); Mullins, at 49 (The classic fowling piece lacked the musket's swivels for attachment of a sling).

Lexington and Concord in 1775, "These fellows were generally good marksmen, and many of them used long guns made for Duck-Shooting."[25]

Whatever the specifics of any state or colony's arms requirements, Americans went to war with a very wide variety of personal arms, not always necessarily in precise compliance with the narrowest definitions of arms that might appear in a militia equipment statute. At Valley Forge in 1777, Baron von Steuben was encamped with the Continental Army, most of whose members had brought their personal firearms to service. Von Steuben observed that "muskets, carbines, fowling pieces, and rifles were found in the same company."[26]

Before pulling the trigger on a flintlock or wheellock, the user must use his or her thumb to pull the hammer all the way to a back position. A hammer that is ready to fire is *cocked*.[27] Dutch guns made for the Indian trade were among the first to allow for a *half-cock* position, which could be maintained indefinitely. Having the gun half-cocked made it faster to fire in an emergency.[28] The *sear* is a ratcheted device that holds the hammer in either fully cocked or half-cocked position. "Going off half-cocked" literally indicates a defective or worn-out sear, and metaphorically describes rash action without proper preparation.

All of the guns pictured above are smoothbores, except for John Alden's carbine rifle. Rifled arms were insignificant in England during the eighteenth century, but very important in America, as described below.

3. The Blunderbuss and Other Handguns

Especially common in the seventeenth and eighteenth centuries was the flintlock blunderbuss. Recall that Sir John Knight was prosecuted for carrying one in 1685 but was acquitted. *See* Ch. 22.F.3.[29] It could be loaded with a single very large bullet, but the more common load was 20 large pellets, or even up to 50.[30] It was devastating at short range.[31] The name seems to be an adaptation of the Dutch "donder-buse" or "thunder gun." A blunderbuss could be a large handgun, or it could have a short stock attached and be used as a shoulder arm.

Excellent for self-defense at close quarters, the blunderbuss was of little use for anything else, having an effective range of about 20 yards. Travel increased

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25. Frederick MacKenzie, A British Fusilier in Revolutionary Boston, Being the Diary of Lieutenant Frederick Mackenzie, Adjutant of the Royal Welch Fusiliers, January 5-April 30, 1775, at 67 (Allen French ed., 1926; rprnt. ed. 1969) (quoting an unnamed officer).

26. Friedrich Kapp, The Life of Frederick William Von Steuben 117 (2d ed. 1859).

27. The hammer was sometimes called the "cock," because its motion "resembled the pecking motion of a bird." Ahearn, at 98.

28. Silverman, at 28.

29. The case reports do not indicate what type of firearm Knight carried, but contemporary accounts indicate that Knight had at least one blunderbuss.

30. George, at 92-93.

31. Brown, at 143.

greatly in the eighteenth century, but even the main English highways were not safe after dark. Stagecoach guards and travelers carried blunderbusses, or other short guns, such as traveling or coaching carbines, or (most often) a pair of ordinary pistols.[32] The muzzle of the blunderbuss flared outward slightly, like a bell. This made it easier to load while bouncing in stagecoach, or on a swaying ship.[33] One military use was by sailors to repel boarders.[34] In the American Revolution, Americans found it most useful for "street control, sentry duty and as personal officer weapons."[35]

For centuries England had been a backwater for firearms manufacture, and most firearms, other than basic military matchlocks, were imported. By the early eighteenth century, that had changed, and far more handguns were manufactured in England than anywhere else.[36]

British navy blunderbuss made about 1760.

4. Breechloaders and Repeaters

The blunderbuss, the Brown Bess, fowlers, and the vast majority of other firearms were *muzzleloaders*. To load or reload the gun, the user would pour a

32. George, at 80, 91, 98.
33. Brown, at 143.
34. George, at 59.
35. Neumann, at 20.
36. Harold L. Peterson, Arms and Armor in Colonial America 1526-1783, at 212 (Dover 2000) (1956) (handguns); Held, at 51 (no one in England could make a good matchlock before 1660, or repair one before 1600; before 1620, only "crude military matchlocks" and cannons were manufactured in England).

premeasured quantity of gunpowder into the muzzle.[37] Next, the user would insert the ball(s) of ammunition into the muzzle.[38] With a ramrod, the user then pushed the ball and the powder all the way to the back of the barrel, the breech. Breechloaders replaced muzzleloaders during the nineteenth century.

Most firearms in the eighteenth century were *single-shot*. To fire a second shot, the user had to repeat the process of ramming the powder and the bullet down the muzzle. Today, most firearms can fire more than one shot without having to be reloaded. *Repeating* arms carry their supply of ammunition internally. For example, a *revolver* usually has five or six units of ammunition in a revolving *cylinder*.

Some shotguns and rifles have two barrels, either side-by-side, or over-and-under. They can fire two shots, and then have to be reloaded. The double-barreled shotgun was firmly on stage by the end of the eighteenth century, for hunting and for self-defense.[39]

In firearms parlance, to "regulate" a gun is to adjust the two barrels so they both fire at the same point of aim. Likewise, to regulate a mechanical clock is to adjust the moving parts so they keep proper time. A "well-regulated" militia can shoot accurately, and move in proper formation, such as by keeping in a straight line as it turns to meet an oncoming foe. More broadly, a well-regulated militia is the opposite of a disorderly rabble or mob.

Breechloading and repeating arms would become predominant in the nineteenth century, but they had been around for centuries before. The first breechloaders were invented in the late fifteenth century.[40] Some breechloading wheellocks were made for Henry VIII in 1535 and 1537.[41] Some single shot breechloading rifles invented during the reign of Henry VIII, "with some minor difference in details, were found to be veritable Snider rifles."[42] The Snider was the main firearm of the British army from 1866 to 1874. By the seventeenth and eighteenth centuries, breechloaders had become numerous, but were still far outnumbered by muzzleloaders.[43] As for repeaters, they appeared no later than the early sixteenth century.[44]

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37. The premeasured gunpowder might be applied with a *charger*, a cylinder that would receive powder poured from the gunpowder carried in a powder horn. Or the premeasured gunpowder might be contained in paper cartridges, which would be torn open and poured down the muzzle.

38. One ball for any shot at distance. Multiple small balls for bird hunting, and sometimes for close-quarters defense. For gun with rifling, only a single ball, under all circumstances.

39. George, at 228-38.

40. Brown, at 103.

41. *Id.* at 80.

42. Charles B. Norton, American Breech-loading Small Arms 10 (1872).

43. Greener, at 103-110.

44. Brown, at 50 (German breechloading matchlock arquebus from around 1490-1530 with a ten-shot revolving cylinder); Greener, at 81-82 (Henry VIII's revolving cylinder matchlock arquebus); David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 88 Albany L. Rev. 849, 852 (2015) (16-round wheellock from about 1580). Such guns were also made in the seventeenth century. *See, e.g.*, Brown, at 105-06 (seventeenth-century four-barreled wheellock pistol could fire 15 shots in a few seconds).

This German wheellock from the late sixteenth century fired 16 rounds with a single trigger pull. The ammunition is superposed—one round is stacked atop another.

For repeating arms, "Successful systems definitely had developed by 1640, and within the next twenty years they had spread throughout most of Western Europe and even to Moscow."[45] The leading magazine-fed repeaters starting in the mid-seventeenth century were "the Kalthoff and the Lorenzoni. These were the first guns of their kind to achieve success."[46]

The former "had two magazines, one for powder and one for balls. The earliest datable specimens which survive are two wheel-lock rifles made by Peter Kalthoff in Denmark in 1645 and 1646."[47] "[T]he number of charges in the magazines ran all the way from six or seven to thirty."[48]

Kalthoff repeaters "were undoubtedly the first magazine repeaters to be adopted for military purposes. About a hundred flintlock rifles of their pattern were issued to picked marksmen of the [Danish] Royal Foot Guards and are believed to have seen active service during the siege of Copenhagen in 1658, 1659, and again in the Scanian War of 1675-1679."[49]

Kalthoff-type repeaters "spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost. . . . [A]t least nineteen gunsmiths are known to have made such arms in an area stretching from London on the west to Moscow on the east, and from Copenhagen south to Salzburg. There may well have been even more."[50]

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45. Harold L. Peterson, The Treasury of the Gun 229 (1962).
46. *Id.*
47. *Id.*
48. *Id.* at 230.
49. *Id.*
50. *Id.*

As with a lever-action rifle, the next shot was made ready by a simple two-step motion of the trigger guard.[51]

The Lorenzoni pistol also "was developed during the first half of the Seventeenth Century."[52] It was a magazine-fed Italian repeating handgun that "used gravity to self-reload."[53] In being able to self-reload, Lorenzonis are similar to modern semi-automatic firearms, which are also known as *self-loading* arms. The Lorenzonis' ammunition capacity was typically around seven shots. The gun's repeating mechanism quickly spread throughout Europe and to the colonies, and the mechanism was soon applied to rifles as well.[54]

On July 3, 1662, famed London diarist Samuel Pepys observed "a gun to discharge seven times, the best of all devices that ever I saw, and very serviceable, and not a bawble; for it is much approved of, and many thereof made."[55] Abraham Hill patented the Lorenzoni repeating mechanism in London on March 3, 1664.[56] On March 4, 1664, Pepys wrote about "several people" who were "trying a new-fashion gun" that could "shoot off often, one after another, without trouble or danger, very pretty."[57]

Despite Hill's patent, "[m]any other English gunsmiths also made guns with the Lorenzoni action during the next two or three decades."[58] Most notably, famous English gunsmiths John Cookson and John Shaw adopted the Lorenzoni action for their firearms. So did "a host of others throughout the 18th century."[59]

"The Kalthoff and Lorenzoni actions . . . were probably the first and certainly the most popular of the early magazine repeaters. But there were many others. Another version, also attributed to the Lorenzoni family, boasted brass tubular magazines beneath the forestock . . . Guns of this type seem to have been made in several parts of Europe during the Eighteenth Century and apparently functioned well."[60] "The Lorenzoni system even found its way to America where records indicate that at least two New England gunsmiths actually manufactured such guns."[61]

England's Prince Rupert — nephew of King Charles I, and a leading military commander of the mid-seventeenth century — owned two types of advanced repeating guns, which would not become common until two centuries later. One was a breech-loading lever-action repeater. The other was a revolver.[62] As of the mid-eighteenth century, German-made revolving pistols and rifles "were not rare."[63]

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51. Brown, at 106-07.

52. Peterson, Treasury, at 230.

53. Martin Dougherty, Small Arms Visual Encyclopedia 34 (2011).

54. Peterson, Treasury, at 232.

55. 4 The Diary of Samuel Pepys 258 (Henry Wheatley ed., 1893).

56. The patent was for a "gun or pistol for small shot carrying seven or eight charges of the same in the stock of the gun. . . ." Clifford Walton, History of the British Standing Army. A.D. 1660 to 1700, at 337 (1894).

57. 7 Pepys, at 61.

58. Peterson, Treasury, at 232.

59. Peterson, Arms and Armor, at 215.

60. Peterson, Treasury, at 233.

61. *Id.* at 232.

62. George, at 55-58 (both guns made in England no later than the British Civil Wars (Ch. 22.H.2) by an English gunmaker).

63. Held, at 153.

London's gunmakers in the latter half of the eighteenth century sold a wide variety of single-shot and repeating handguns. They were as small as five inches for pocket carry, or as large as "horse pistols" with detachable shoulder stocks, to be carried by travelers in saddlebags.[64] Repeaters' ammunition capacity was up to six.[65]

If gunmakers knew how to make breechloaders and repeaters, why did it take until the nineteenth century for such guns to become the main type of firearms? Why didn't the English army have Snider rifles when Henry VIII was king, rather than over three hundred years later? Why didn't the 30-shot Danish flintlocks become standard, instead of the one-shot Brown Bess?

Breechloaders and repeaters require much closer fittings among their parts than do single-shot or muzzle-loading guns. Until the invention of machine tools to make uniform parts, the quantity of labor required to build a breechloader or repeater made such guns very expensive.[66] (Machine tools are discussed in Part C.) Thus, British gunsmiths concentrated on building affordable, single-shot, muzzle-loading flintlocks. The breechloader or repeater would be a special order for a customer who could afford to pay for a great deal of labor.

The issues for telescopic sights were similar. They were first produced no later than 1702 but did not become common until the mid-nineteenth century.[67] The knowledge existed, but not the means of high-volume affordable production.

During the eighteenth century, British firearms development was mainly the refinement of flintlocks, rather than innovation.[68] One novelty was replacement of wooden ramrods with iron ones, starting in 1740.[69] In the third quarter of the eighteenth century, English gunsmiths invented the *tumbler swivel* and the *roller-bearing feather-spring*. The combination created the *frictionless lock*. (That is, the lock moved with almost no friction; the lock still produced desired friction by striking flint against the steel frizzen.) The frictionless lock fired faster and misfired much less.[70] The "waterproof" flash pan from the same time made the flintlock less vulnerable to moisture.[71] Finally, the *patent breech* much improved the efficiency of the gunpowder explosion.[72]

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64. *Id.* at 162.

65. *Id.* at 162-63.

66. Additionally, until improvements in the latter part of the eighteenth century, it was "prohibitively expensive" to make a breechloader whose breech could be sealed tightly enough to always prevent gas seepage (which reduced the power propelling the bullet) or in the worst case that might cause a backfire and seriously injure the user. *Id.* at 61. Also, rifles are well-suited for deer hunting, but the Tudor English aristocracy preferred to chase deer to exhaustion with horses and hounds, rather than take them by shooting. *Id.*

68. George, at 101-04.

69. J.F.C. Fuller, Armament and History 100 (Da Capo Pr. 1998) (1945).

67. Brown, at 148.

70. Held, at 136.

71. *Id.*

72. In the early flintlocks, the touch hole connected to an edge of the main powder charge. Thus, part of the powder would start burning before other parts. With the patent breech, the touch hole does not directly connect to the main charge. Instead, the touch hole follows a channel to an *antechamber* centered behind the main charge. The fire from the touch hole ignites the powder in the antechamber, which then instantly ignites the main charge. *Id.* at 137.

The patent breech made "the gun shot so hard and so fast that the very possibility of such performance had not hitherto been imaginable."[73] Previously, to get the full propellant benefit of the relatively long time it took for all the powder to burn, barrels had to be long. By 1795 in England, "the old thirty-nine to forty-eight inch barrels were obsolete," replaced by 26 to 32-inch barrels, and sometimes as short as 22 inches. The lower barrel weight made double-barreled guns so much easier to carry and aim that by 1810 double-barreled guns outsold single-barreled guns.[74] So the high-quality flintlock of 1800 was much superior to its ancestor of 1700.

Likewise, American firearms development in the twentieth century was primarily about improving the types of guns. Part E. Even in the twenty-first century, the archetypical "modern" gun is something that a consumer could have bought in the late nineteenth century: a breech-loading semi-automatic pistol using a detachable magazine to fire metal-cased ammunition with smokeless powder. Part D.

B. COLONIAL AMERICA'S GROWING DIVERGENCE FROM GREAT BRITAIN

1. Flintlocks

As described in Section A.2, in seventeenth-century England the predominant ignition system for firearms was the matchlock, with the shift to flintlocks beginning late in the century. Americans made the transition much earlier. The matchlock was inexpensive, and served well enough for European-type battles, in which large masses of infantry shot in each other's general direction. Nobody bothered to take careful aim, because the objective was volleys of fire at the closely packed troops of the enemy.

But Indians did not fight that way. They preferred quick raids and ambushes. Because a matchlock is ignited by a slow-burning cord, it was impractical to keep in a constant state of readiness against surprise attack. The burning cord also revealed the location of the matchlock's user. Concealment did not matter in European infantry battles, but it was a fatal flaw in America, where fighting often took place in the woods, with both sides hiding behind natural cover. Concealment problems also made the matchlock inferior for hunting, so Americans in the seventeenth century replaced their matchlocks with flintlocks as soon as they could. For the same reasons, Indians who were buying arms from the colonists strongly preferred flintlocks to matchlocks.[75] Captain Miles (or Myles) Standish, a former professional soldier who was a military leader of Plymouth Colony, was the first famous New England user of a proto-flintlock (a snaphaunce), in 1620.[76] As discussed in Section A.1,

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73. *Id.*

74. *Id.*

75. Harold L. Peterson, Arms and Armor in Colonial America 1526-1783, at 18-49 (Dover 2000) (1956).

76. Patrick A. Malone, The Skulking Way of War: Technology and Tactics among the New England Indians 33 (1991).

Standish's cabinmate, John Alden, owned a wheellock rifle, a firearm that was much more advanced than a matchlock, although less sturdy than Standish's flintlock.

2. *The Pennsylvania-Kentucky Rifle*

The most common arms in the United Kingdom in the eighteenth century were *smoothbores*. That is, the *bore*, the interior of the barrel, was smooth. Smoothbores are well-suited for bird-hunting. They are not very accurate beyond 50 yards. Today, the most common smoothbores are shotguns.

In a rifle, spiral grooves (*rifling*) are cut in the bore. The grooves make the bullet spin on its horizontal axis, so the bullet's flight is more aerodynamically stable.[77] Rifles are superior for long-range shooting. Since the late fifteenth century, rifles had been well established in the mountainous regions of southern Germany and northern Switzerland.[78] Rifled arms were originally created for target shooting and sport. "In the latter part of the seventeenth century some of the German princes employed mountaineers as sharpshooters, who brought their rifles with them."[79] But rifles had not caught on in Great Britain.

Early in the eighteenth century, rifle makers from Germany and Switzerland began settling in Pennsylvania, in the Lancaster area. America was attracting skilled craftsmen immigrants, who could set up their own business and prosper, free of the extensive controls of guilds and government in the homeland. Pennsylvania, with its complete religious freedom, was especially attractive for craftsmen who also sought the free exercise of religion. When George Hanover, a German, became King George I of Great Britain in 1714 (Ch. 22.J.1), many German-speaking gunsmiths decided that the time was right to emigrate to America.[80]

Over the century, knowledge of rifle-making spread nationally, as apprentices who trained in Pennsylvania moved throughout the colonies. The Pennsylvania gunmakers initially produced the Jaeger model, which they had made in central Europe. But it was very heavy to carry; the bullets were large and slow; and it required adjusting the rear sight to shoot at different distances.[81] "What Americans demanded of their gunsmiths seemed impossible": a rifle that weighed ten pounds or less, for which a month of ammunition would weigh one to three pounds, "with proportionately small quantities of powder, be easy to load," and "with such velocity and flat trajectories that *one* fixed rear sight would serve as well at fifty yards as at three hundred, the necessary but slight difference in elevation being supplied by the user's experience."[82]

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77. It had long been recognized that rifling made bullets more accurate, but the reason why was not understood until 1747, when Newtonian mathematician and gun enthusiast Benjamin Robins presented his paper *Observations on the Nature and Advantages of Rifled Barrel Pieces*. Held, at 36.

78. M.L. Brown, Firearms in Colonial America: The Impact of History and Technology, 1492-1792, at 28 (1980).

79. Lloyd, at 235.

80. George, at 144-47.

81. Held, at 141.

82. *Id.* at 142

"By about 1735 the impossible had taken shape" with the creation of a new type of rifle, the iconic early American gun: the Pennsylvania-Kentucky Rifle.[83] Pennsylvania was the primary place where it was made, and Kentuckians became the most famous users.[84]

The Pennsylvania-Kentucky rifle was longer than the European Jaeger. The longer barrel improved the balance, and helped the user obtain a more accurate sight of the distant target.[85] While European rifles generally had a *caliber* (the interior bore diameter) of .60 or .75 inches, Americans preferred a smaller caliber, usually somewhere from .40 to .46, and sometimes as low as .32.[86] A smaller caliber meant smaller bullets. One pound of lead will make 16 bullets for a .70 caliber gun, but 46 bullets for a .45 caliber. With the smaller caliber, a person on a hunting expedition that might last for weeks or months could carry a greater quantity of ammunition.

Riflemen were careful to learn the exact quantity of powder their rifle needed, so that none was wasted.[87] They could then adjust the quantity as appropriate, such as adding more powder for an especially long shot. Among America's riflemen, there was "a cult of accuracy."[88] Long-distance shooting contests were major events in rural communities. Everyone was expected to be a master of precision

Kentucky rifle. Manufactured in Lancaster, Penn., sometime in 1780-1810.

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83. *Id.*

84. John G.W. Dillin, The Kentucky Rifle (1924). Originally, "Kentucky" referred to an area extending from southern Ohio and Indiana all the way to northern Tennessee. Charles Edward Chapel, Guns of the Old West 20-21 (1961).

85. A common sighting system was a small blade above the top of the muzzle, and a U-shaped notch atop the breech. The user aligned the gun so that the view of the front blade fit inside the U of the back notch. This showed where the barrel was pointed. If the barrel is longer, then so is the *sight radius*—the distance between the front and rear sights. A longer sight radius is more accurate. Brown, at 268.

86. *Id.* at 267.

87. *Id.* at 268.

88. Alexander Rose, American Rifle: A Biography 18-19 (2008).

shooting — not just for prestige, but for dinner. For example, in squirrel shooting, a shot to the center of the body would ruin much of the meat. So Americans could "bark" a squirrel: a shot just under the tail would knock the squirrel off a tree branch, and the squirrel would fall to the ground, intact.

Until around 1840, the Pennsylvania-Kentucky rifle was the most accurate long-distance firearm in the world.[89] It was ideal for hunting mammals and for the irregular tactics of Indian-fighting. Indians preferred them for the same reasons. It fit the forest.

Rifles were important on the frontier and other areas west of the Hudson River. Until the American Revolution, they were rarely seen in New England, where smoothbore muskets continued to predominate. New Englanders and others also had many fowling pieces — a bird-hunting gun similar to a shotgun. *See* Part A.2. Although fowling pieces were lighter than muskets, a musket could be used for bird hunting, and a fowling piece could be used for infantry combat.[90]

For European-style fighting, rifles had several disadvantages compared to muskets. First, they needed more labor to produce, and were consequently more expensive. Second, they took longer to reload, in part because pushing a spherical bullet past the rifling grooves was difficult. Under optimal conditions with expert use, the maximum rate of rifle fire was about three shots per minute, compared to four or five with a musket. Third, they were too delicate to use with a bayonet.[91]

A bayonet is a dagger or other straight knife that is attached to the front of a gun. (The word comes from Bayonne, France, the bayonet-manufacturing capital.[92]) The standard *socket bayonet* of the eighteenth century was attached to the side of the muzzle by a lug. In a typical European battle, fought with linear tactics, the musket-armed infantry on each side would be lined up three deep in rows. Without bothering to aim at a particular target, the first row would fire a volley at the opposing army. The first row would then step to the rear and begin reloading. The second row would step forward and fire its volley. The three-row cycle made it possible to fire a volley every several seconds.

Eventually, one army would march quickly toward the enemy ranks, absorbing some volleys on the way. Then, the battle would be decided by hand-to-hand

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89. Held, at 144. The barrels and stocks of the Kentucky rifles were as good as those of the best European guns. The locks were of much lesser quality compared to Europe's best. *Id.* at 145.

90. Brown. at 85.

91. Peterson, Arms and Armor, at 198-203; Lloyd, at 234.

92. Bayonne had long been a manufacturing center for cutlery and weapons. While it is generally agreed that bayonets were invented around 1640, there are several stories about how the invention happened. Thompson, at 61-62. According to one version, "Some peasants of the Basque provinces, whilst on an expedition against a company of bandits, having used all their ammunition, were driven to the desperate necessity of inserting their long knives into the mouths of their arquebuses, by which means they routed their adversaries." Greener, at 626.

combat. The soldiers would stab and slash each other with the bayonets at the end of their muskets. They would also use their muskets as clubs. The rifleman was at a huge disadvantage. All riflemen had a tomahawk, a hatchet, or some other edged weapon. But their opponents who had a bayonet at the end of their muskets had a much longer reach.[93]

Accordingly, when Americans had to fight European armies—such as the French from 1744-45 and from 1754-63, or the British from 1775-83—the musket was the more important arm. The American Revolution was won mainly with muskets, not rifles. During the Revolution, rifles did play a decisive role in the West. There, Americans and their Indian allies defeated the British and their Indian allies, securing American claims to the vast lands between the Appalachian Mountains and the Mississippi River. The Pennsylvania-Kentucky rifle was a leading firearm of the 1815 Battle of New Orleans, when Americans led by General Andrew Jackson routed the best forces in the British army. *See* Ch. 6.A.6. The Pennsylvania-Kentucky rifle would become the first iconic American firearm. To Americans, the Pennsylvania-Kentucky rifle showed that Americans were free because they were excellent marksmen.

Many people needed a firearm that met militia requirements and was also useful for hunting. In America, "civil and military uses of firearms dovetailed as they had not generally done in Europe."[94] "Thus the distinction between military and sporting arms is almost lost."[95] Americans developed what collectors call the "semi-military" firearm. It was usually .70 to .75 caliber, and similar to a musket, but with variations that made it better for hunting.[96] The short blunderbuss, ubiquitous in England (Section A.3), became popular in America in the eighteenth century, mainly for self-defense in urban areas, and for naval use.[97]

Handguns were used for self-defense, and in the militia, army, or navy by officers, cavalry, and sailors. Depending on size and purpose, handguns were carried in saddle holsters ("horse pistols"), on belts, in trouser pockets, in vests, or "in the big outer pockets of the greatcoat."[98] A variety of multishot pistols from the late eighteenth century have been preserved, holding two to four rounds.[99]

3. Breechloaders and Repeaters

As in Great Britain during the seventeenth and eighteenth centuries, the very large majority of firearms in America were single-shot muzzleloaders. Firearms that load from the back (*breechloaders*) or that can fire several shots without reloading (*repeaters*) did not become mass-market consumer items until the nineteenth

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93. Peterson, Arms and Armor, at 294-303.

94. Lee Kennett & James LaVerne Anderson, The Gun in America: The Origins of National Dilemma 41 (1975).

95. Peterson, Arms and Armor, at 179.

96. *Id.*

97. *Id.* at 204-05.

98. *Id.* at 208-11; Charles Winthrop Sawyer, Firearms in American History: 1600 to 1800, at 165 (1910).

99. *Id.* at 194-98, 215-16.

century. Large-scale production of such arms at affordable prices required the prior invention of machine tools. Part C.

Nevertheless, breechloaders and repeaters were available in colonial America for persons who could afford them. In September 1722, Boston gunsmith John Pim entertained some Indians by demonstrating a firearm he had made. Although "loaded but once," it "was discharged eleven times following, with bullets in the space of two minutes each which went through a double door at fifty yards' distance."[100] Pim's gun may have been a type of the repeating flintlock that became "popular in England from the third quarter of the 17th century," and was manufactured in Massachusetts starting in the early eighteenth century.[101] Pim also owned a .52 caliber six-shot flintlock revolver, similar to the revolvers that had been made in England since the turn of the century.[102]

The most common American repeaters of the early eighteenth century were probably Cooksons—originally named after English gunsmith John Cookson.[103] A ten-round Cookson later displayed in a museum "found its way into Maryland with one of the early English colonists."[104] A Boston gunsmith also named John Cookson (perhaps related to the eponymous Englishman) manufactured repeaters in the eighteenth century. The American Cookson advertised a repeater in the *Boston Gazette* on April 12 and 26, 1756, explaining that the rifle was "to be sold at his house in Boston . . . the said gun will fire 9 Times distinctly, as quick, or as slow as you please."[105] "Thus this type of repeating flintlock popular in England from the

Cookson flintlock repeating rifle. The powder and ammunition magazines were in the buttstock; they were brought into the firing chamber by rotating the side lever.

100. Samuel Niles, *A Summary Historical Narrative of the Wars in New England*, *in* Massachusetts Historical Society Collections, 4th ser., vol. 5, at 347 (1837).

101. Peterson, Arms and Armor, at 215-17.

102. Brown, at 255.

103. Harold L. Peterson, The Treasury of the Gun 230 (1962).

104. *The Cookson Gun and the Mortimer Pistols*, Am. Rifleman, Sept. 29, 1917, at 3, 4.

105. Peterson, Arms and Armor, at 215.

third quarter of the 17th century, was known and manufactured in Massachusetts early in the 18th century."[106]

In 1777, the Continental Congress ordered from Philadelphia's Joseph Belton one hundred rifles that could "discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds."[107] Belton demonstrated his rifle before leading military officers (including General Horatio Gates and Major General Benedict Arnold) and scientists (including David Rittenhouse), who verified that "[h]e discharged Sixteen Balls loaded at one time."[108] However, the deal fell through when Belton demanded "an extraordinary allowance."[109]

The British similarly recognized the advantage of repeaters, employing the Ferguson Rifle during the Revolutionary War, which "fired six shots in one minute" during a government test on June 1, 1776.[110] The gun was quite expensive to produce, however, and insufficiently sturdy in combat conditions.

When the Second Amendment was ratified, the state-of-the-art repeater was the Girandoni air rifle, which could shoot 21 or 22 rounds in .46 or .49 caliber.[111] The Girandoni was ballistically equal to a powder gun,[112] and powerful enough to take an elk.[113] At the time, "there were many gunsmiths in Europe producing compressed air weapons powerful enough to use for big game hunting or as military weapons."[114] The Girandoni was invented for the Austrian army; 1,500 were issued to sharpshooters and remained in service for 25 years, including in the French Revolution and Napoleonic Wars between 1796 and 1815.[115] Isaiah Lukens of Pennsylvania manufactured such rifles,[116] along with "many makers in Austria, Russia, Switzerland, England, and various German principalities."[117]

Meriwether Lewis seemingly acquired from Lukens the Girandoni rifle he famously carried on the Lewis and Clark Expedition.[118] Lewis mentioned it in his journal 39 times, demonstrating the rifle to impress various Indian tribes encountered on the expedition—often "astonishing" or "surprising" them, and making

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106. *Id.*

107. Joseph Belton, *Letter to the Continental Congress*, Apr. 11, 1777, *in* Papers of the Continental Congress, Compiled 1774-1789, vol. 1 A-B, at 123; 7 Journals of the Continental Congress 1774-1789, at 324 (1907).

108. *Id.* at 139.

109. *Id.* at 361.

110. Roger Lamb, An Original and Authentic Journal of Occurrences During the Late American War 309 (1809).

111. James Garry, Weapons of the Lewis and Clark Expedition 100-01 (2012).

112. John Plaster, The History of Sniping and Sharpshooting 69-70 (2008).

113. Jim Supica, et al., Treasures of the NRA National Firearms Museum 31 (2013).

114. Garry, at 91

115. Gerald Prenderghast, Repeating and Multi-Fire Weapons 100-01 (2018); Garry, at 91-94.

116. Nancy McClure, *Treasures from Our West: Lukens Air Rifle*, Buffalo Bill Center for the American West, Aug. 3, 2014. Located in Cody, Wyoming, the five museums of the Buffalo Bill Center include an outstanding firearms museum.

117. Garry, at 99.

118. Prenderghast.

the point that although the expedition was usually outnumbered, the smaller group could defend itself.[119]

The problem in America, as in England, was that repeating guns require a much closer fitting of the parts than do single-shot guns, so they could only be produced more slowly by very skilled gunsmiths. The same was true for breech-loading guns.[120] The expense made repeaters and breechloaders unaffordable to much of the population. Affordability would change in the nineteenth century with the rise of machine tools. *See* Part C.

4. Edged Weapons

As the American colonies' arms mandates demonstrate, edged weapons were pervasive. Ch. 3.B. Besides the bayonet, there were swords, tomahawks, hatchets, and a wide variety of knives. At close quarters, most firearms would be good for one shot. If a person carried a pair of pistols (a *brace*), then he or she could fire two shots. But there would be no time to reload anything more against an adversary who was within arm's reach. So edged weapons were essential to self-defense.[121]

5. Armor

In Europe in the sixteenth century, the increasing use of firearms had made plate armor obsolete. In the early years of American settlement, when Indians with arrows were the principal opponent, Americans continued to wear armor. For purposes of mobility, leather or quilted jackets became popular; they would not always stop an arrow, but they did mitigate its damage. Once the Indians acquired firearms in large quantities, armor was generally abandoned. By the time of the Revolution, the principal armor was metal headgear. Although it would not necessarily stop a bullet, it offered some protection against edged weapons. Militiamen often had to provide themselves with some form of armor.[122]

6. Production Issues

Today a gunsmith is typically separate from a gun manufacturer. The former repairs or customizes firearms and is usually a small businessperson. In England and America during the seventeenth and eighteenth centuries, the

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119. Meriwether Lewis and William Clark, The Journals of the Lewis & Clark Expedition (Gary Moulton ed., 1983) (13 vols.). *See e.g.*,6 *id.* at 233, Jan. 24, 1806, entry ("My Air-gun also astonishes them very much, they cannot comprehend it's shooting so often and without powder; and think that it is *great medicine* which comprehends every thing that is to them incomprehensible.").

120. Peterson, Arms and Armor, at 217-18.

121. *Id.* at 69-101.

122. *Id.* at 103-51, 307-16; Ch. 3.B.

gunsmiths were also the manufacturers. In England, most gunsmiths belonged to guilds, which imposed price controls on gunsmithing services. There were no such guilds in America.[123] The effect of supplier-based price controls, a form of oligopoly, is usually a reduction in the supply, and an increase in profits to the suppliers.

The United Kingdom's 1750 Iron Act restricted American mines and steel furnaces. Among its provisions were a ban on the use of the tilt hammer, which is necessary to produce the thin iron for knife-making.[124] The Act was poorly enforced, however, because some British officials in America had financial interests in the iron and steel business, and others were simply bribed. Had the American colonists not illegally developed an iron industry, the Revolution would have been impossible for lack of arms.[125] A shortage of quality iron did reduce the quality of American firearms.[126] Thomas Jefferson's 1774 tract *A Summary View of the Rights of British America* listed the Iron Act as among the abuses inflicted on the Americans.

Further reading: David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U.L.J. 495 (2019) (extensive description of American arms and arms terminology from the colonial period through 1800).

C. THE AMERICAN INDUSTRIAL REVOLUTION

1. The Rise of the Machine Tools

The period from the beginning to the middle of the nineteenth century was the greatest in the development of American firearms. By the end of this period, there were mass market firearms basically like those that are common today: repeating, breechloading firearms that use metallic cartridges, which contain the bullet, gunpowder, and primer in a single unit. Repeaters and breechloaders had been produced for centuries. Parts A, B. What put them on the mass market was a revolution in firearms manufacture.

As of 1800, the United States was an importer of manufactured goods, and an exporter of raw materials such as wheat, corn, rice, timber, tobacco, and cotton. By 1900, America had become an industrial powerhouse, exporting its high-quality and low-cost manufactured products globally. The most important cause of the change was the American industrial revolution. That revolution began because of the firearms industry, and the revolution in the firearms industry began because of the federal government.

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123. Brown, at 87, 150.

124. 23 George II ch. 29 (1750).

125. Arthur C. Bining, British Regulation of the Colonial Iron Industry (1933); Brown, at 241.

126. *Id.* at 377. In particular, the steel shortage made American springs for the gunlock inferior to the best European guns, so ignition speed (from the time the trigger is pulled until the gun fires) was slower on American guns. Brown, at 377.

a. The Federal Armories

In 1794, Congress authorized President George Washington to establish federal armories. 1 Stat. 352 (1794). He chose Springfield, Massachusetts, and Harpers Ferry, Virginia. Initially, the armories were collections of craftsmen working under the same roof. Although they had divisions of labor, they did not use machine tools. By using the factory system, the armories before 1815 made guns at a higher rate and for lower cost, and somewhat lower quality than did independent small business craftsmen.[127]

By 1809, the ongoing Napoleonic Wars in Europe had so damaged United States relations with European powers that imported arms were unavailable. The U.S. needed to be self-sufficient in arms manufacture.

Weapons procurement problems during the War of 1812 spurred reorganization. Secretary of War (and future President) James Monroe successfully urged legislation in 1815 to put the federal armories under the direct control of the War Department's Ordnance Department.[128] Thereafter, the Ordnance Department pushed vigorously for firearms with interchangeable parts. The potential military utility was apparent: Suppose that three muskets were damaged in battle. If the parts were interchangeable, then a field armorer might be able to reassemble them into two functioning muskets. Ideally, interchangeable parts would reduce manufacturing costs and increase manufacturing speed. Interchangeability was the Ordnance Department's holy grail. The initial objective was not perfect interchangeability. If a field armorer only needed to do a little filing and fitting, that was good enough.[129]

Before 1815, even firearms from the same artisan did not have interchangeable parts. Interchangeability was impossible without machine tools. Craftsmen could make good parts one at a time, but they could not make them uniform. The heavy capital outlays to buy or build machine tools were made possible by generous federal contracts to private firearms makers. Those contracts awarded much of the payment up front, so that the manufacturers could spend several years setting up and perfecting their factories. The Ordnance Department policy was to subsidize technological innovation.[130] The Democratic-Republicans and the Federalists disagreed on many issues, but they strongly agreed that federal support for advancing the firearms industry was in the national interest, and a proper function of the national government.

The Springfield Armory led the way. Its geographical location was perfect. Far enough inland to be safe from a hostile navy, it was close to the Salisbury iron region. The many tributaries of the Connecticut River provided abundant waterpower for the machine tools, and good transportation. Springfield did not produce everything itself, instead working with a large network of private contractors. Springfield insisted that its contractors work in open, cooperative networks, so that knowledge, personnel, and machinery were freely shared among the Springfield Armory and the private contractors. Soon, the Connecticut River Valley became the

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127. David R. Meyer, Networked Machinists: High-Technology Industries in Antebellum America 82-83 (2006).

128. 8 Stat. 204 (1815).

129. Merritt Roe Smith, Harpers Ferry Armory and the New Technology: The Challenge of Change 107 n.6 (1977).

130. Ross Thomson, Structures of Change in the Mechanical Age: Technological Innovation in the United States 1790-1865, at 54-59 (2009).

center of American firearms manufacture. "Gun Valley" was its nickname.[131] New England remained the leading region for American firearms manufacture until the latter part of the twentieth century. The region accounted for 35 percent of the industry in 1850, 65 percent in 1860, and 60 to 83 percent from 1870 until 1940.[132]

Harpers Ferry had no such stimulating effect. It was too remote from the world of commerce. As in most slave regions, the White population preferred their rural idyll and their craftsmanship to the growing world of industry and mass production. Harpers Ferry was not as productive as Springfield and made no significant contributions to manufacturing knowledge. The great exception was John H. Hall, discussed in Section C.2, who set up his own buildings at Harpers Ferry, and operated as an independent contractor. He and his family were snubbed by the locals. Smith, Harpers Ferry Armory.

In the Springfield area, prosperous farmers, professionals, and businessmen invested their own capital in new manufacturing businesses, which made products to satisfy growing consumer demand. Around Harpers Ferry, as in most of the slave plantation regions, plantation owners produced their own goods. The goods they did purchase for slaves were cheap and imported from elsewhere. In the slavery economy, money invested in new capital was used to buy more slaves—not toward manufacturing equipment, nor toward infrastructure such as roads. In the Gun Valley, and in New England generally, a virtuous cycle of investment, growth, and prosperity led to relentless improvements in firearms manufacture, textiles, and many other products. The stasis of a slave-based economy retarded Harpers Ferry in particular, and Southern firearms manufacturing in general.[133]

While the federal armories and their associated contractors were used to procure weapons for the federal armory, Congress set up a separate system to purchase firearms from private gunsmiths and donate them to state militias. Although the system persisted for decades, the amounts appropriated were not remotely close to sufficient to standardize militia arms. Militia arms were still a hodgepodge of whatever militiamen supplied themselves, notwithstanding the specificity of the Second Militia Act of 1792 (Ch. 5.F.1).

b. The American System of Manufacture

Before the nineteenth century, firearms manufacture was artisanal. Guns were made one at a time by craftsmen. The craftsman, perhaps aided by an apprentice, often made the whole gun himself: "lock, stock, and barrel." The advances in the nineteenth century were made possible by the development of machine tools.

Consider the wooden stock of a long gun. The back of the stock is held against the user's shoulder. The middle of the stock is where the action is attached. For many guns, the forward part of the stock would contain a groove to hold the barrel. Making a stock requires many different cuts of wood, few of them straight. The artisanal gunmaker would cut with hand tools such as saws and chisels.

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131. Felicia Johnson Deyrup, Arms Makers of the Connecticut Valley: A Regional Study of the Economic Development of the Small Arms Industry, 1798-1870 (1948); Meyer, at 73-103, 229-80.

132. Deyrup, at 218, app'x A, tbl. 3; Meyer, at 84.

133. Meyer, at 81.

To make stocks faster and more uniformly, Thomas Blanchard invented 14 different machine tools. Each machine would be set up for one particular cut. As the stock was cut, it would be moved from machine to machine. By mounting the stock to the machine tool with *jigs* and *fixtures*, a manufacturer could ensure that each stock would be placed in precisely the same position in the machine as the previous stock. The mounting was in relation to a *bearing*—a particular place on the stock that was used as a reference point. To check that the various parts of the firearm, and the machine tools themselves, were consistent, many new *gauges* were invented.[134] In a state-of-the-art armory, the number of machinists who maintained the machine tools could be as great as the number of people who operated the machines to make the firearms parts.

What Blanchard accomplished for stocks, John H. Hall accomplished for manufacturing the rest of the gun. Based at Harpers Ferry, Virginia, Hall shipped some of his machine tools to Simeon North, in Connecticut. In 1834, Hall and North made interchangeable firearms. This was the first time that geographically separate factories had made interchangeable parts.[135]

John Hall model 1816 musket. The specimen is a Type II, manufactured 1822-31.

The effect on production volume was tremendous. At the Springfield Armory, the average number of barrels welded annually per man in 1806 was 1,200. By 1860, it had increased to 12,615. That figure would double by 1870.[136]

Mass production by machine tools has many potential benefits: interchangeable parts, faster production, lower cost, or higher quality. The Ordnance Department

134. Deyrup, at 97-98; Thomson, at 56-57.
135. *Id.* at 58; Smith, at 212.
136. Deyrup, at 247, app'x A, tbl. 5.

obtained first what it wanted most: interchangeability. Production speed and volume also gradually improved. The costs, though, were often higher than for craft arms.

Because the federal contractors were producing only for the federal army and navy, which were small, their output was correspondingly small. The next steps to advance the use of machine tools would come from companies that were manufacturing for the consumer market, and who had seen what Hall had accomplished. Because Hall "established the efficacy" of machine tools, he "bolstered the confidence among arms makers that one day they would achieve in a larger, more efficient manner, what he had done on a limited scale. In this sense, Hall's work represented an important extension of the industrial revolution in America, a mechanical synthesis so different in degree as to constitute a difference in kind."[137]

The first to follow Hall was Col. Samuel Colt, who mass-produced revolvers for the consumer and military markets. Colt certainly did not invent the revolver, a design that was already four centuries old.[138] Colt's 1835 revolver patent was preceded by, inter alia, the 1818 patent of Boston's Joseph Collier for a new system of revolver-based handguns and rifles.[139] Colt's initial contribution was twofold. First, he eliminated the long-standing danger of the gunpowder ignition from the firing chamber seeping into other cavities in the cylinder, setting off the powder therein, and causing the gun to explode in the user's hand.[140]

Second, Colt figured out how to use machine tools to make high-quality revolvers in large quantities. Like Henry Ford with the automobile, Colt did not invent the revolver. Like Ford, he "adapted and redesigned an idea into industrial success" so that "what had hitherto been achieved at great expense with only moderately satisfactory results was suddenly rendered highly functional, durable, and," relative to its quality, "remarkably cheap."[141]

To keep workers at their best, Colt limited the working day to ten hours, long before that became a norm, with a mandatory one-hour lunch break. He built a factory town, Coltsville, near Hartford, providing highly paid workers with the finest amenities of the time, sometimes extravagantly so.[142]

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137. Smith, at 249.

138. Held, at 177.

139. Held, at 164.

140. Held at 177.

141. Held, at 177.

142. The families in Coltsville needed furniture. The world's best makers lived in Germany, and Colt convinced some of them to emigrate. He built a replica German town next to the furniture factory in Coltsville. The new town included a beer garden and folk music instruments for the immigrants. Potsdam Village became a major part of Coltsville. Later, furniture-making with machine tools reduced the need for skilled craftsmen such as the German immigrants. Yet Colt continued to employ the immigrants and to maintain their original pay. A grateful workforce made the Colt furniture business so efficient that it could undersell competitors in markets as far away as California and Cuba. *See* Dave Kopel & Michael Brotherton, *Learning from Coltsville: The Case for This National-Park Candidate*, National Rev. Online. Sept. 23, 2002; *see generally* David B. Kopel, "Samuel Colt," *in* Inventors and Inventions 212 (Alvin K. Benson ed., 2009) (Great Lives from History series). Most arms manufacturers did not go to the extremes that Colt did, but they did pay well. A study covering 1850 to 1940 found that average annual wages in the arms industry always exceeded wages in overall U.S. industry, sometimes by large margins. Deyrup, at 217 app'x A, tbl. 1.

In the early 1850s, Christian Sharps hired some of the best machinists from New England to build a state-of-the-art rifle factory in Hartford.[143] In upstate New York, at Ilion, Eliphalet Remington founded the Remington Arms Company. The son of a gunsmith, he turned his family's craft business into a high-volume industrial manufacturer. Remington is America's oldest continuously operating firearms maker. Two other enduring companies—Smith & Wesson, and Winchester Repeating Arms—would enter the market in the 1850s.

At the 1851 Crystal Palace Exhibition in London, visitors marveled at Colt's new American firearms. The British government dispatched experts to visit and study companies such as Colt and their "American system of manufacture."

In Great Britain, artisanal arms makers looked down on the new American system as déclassé. A gunsmith, like a tailor, should make his product precisely to fit the individual buyer. Purchasing a suit or a gun off the track was vulgar.[144] The snobbery was sincere, and a result of the United Kingdom's guild system. British gunmakers, like many other artisans, belonged to guilds, which restrained trade, raised prices, and retarded innovation.

Having begun with firearms, the American system of manufacture spread. Initially, the closest relatives of the arms makers were the textile makers. For example, Hall's firearms gauges were improved for textile use.

Colt's factory incubated machine tool makers who took their expertise into new fields. Among Colt's offspring is the industrial giant Pratt & Whitney.[145] The first application of armory practice to manufacturing other consumer durables was for sewing machines. Later came reapers (machines for harvesting grain), and then bicycles. Bicycle manufacture in turn became the foundation for mass production of automobiles. Remington used its machine tool knowledge to build the first commercial typewriters.[146]

Gun Valley was the Silicon Valley of its era. Its networks of "retained knowledge" and "technical skills and innovations . . . became embedded in communities of practice." The job-hopping, sophisticated, and youthful "machinists in the antebellum East anticipated modern behavior by over one hundred and fifty years." Meyer, at 280.

While manufacturing was concentrated in the Northeast, invention was more dispersed. In 1790-1865, the Mid-Atlantic slightly led New England in American firearms patents. Contributions from the South or the sparsely populated West were much fewer. The combination of the new mass producers catering to consumers, plus the enormous federal government demand for firearms during the Civil War, spurred innovation. In 1856-65, firearms accounted for 64.8 percent of American patents.[147]

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143. Meyer, at 252, 262.

144. Terry S. Reynolds & Stephen H. Cutcliffe, *Technology and the Industrial West*, *in* Technology & the West 259-61 (Terry S. Reynolds & Stephen H. Cutcliffe eds., 1997).

145. Meyer, at 258.

146. David A. Hounshell, From the American System to Mass Production, 1800-1932, at 1-65 (1985); Alexander Rose, American Rifle: A Biography 69-102 (2008), Thomson, at 97, 267-68, Smith, at 325.

147. Thomson, at 69, 93.

The American system eventually caught on almost everywhere. As a Smithsonian Institution book summarized: "Thus it can be said that the firearms industry, especially as it evolved in the United States during the late eighteenth and early nineteenth century, generally exerted a greater economic and technological impact on civilization than any other dynamic human endeavor since the dawn of recorded history."[148]

Artisanal production continues to the present. Yet even artisans took some advantage of machine tools. In the late eighteenth century, firearms artisans had to make their own tools, including saws; this became less necessary over time. From the 1820s onward, more and more artisans owned their own lathe.[149] Rather than producing everything themselves or buying parts from other artisans, artisans increasingly used parts that had been made by machine—for example, rifle barrels in which the bore had already been drilled by machine, to which the artisans would add the rifling themselves.[150]

2. Loading, Ignition, and Ammunition

a. Mass Market Breechloaders

Improvements in machine tools and in gauges made possible the mass production of affordable breechloaders. During the eighteenth century, there had been five English patents for breech-loading firearms. The first American breech-loading patent was awarded in 1811 to John H. Hall, the machine tool inventor discussed in Section C.1. By 1860, there were more than a hundred American breech-loading patents, and by 1871 more than 700—four times the rest of the world combined.[151]

The first consumer mass market breechloader was the Sharps rifle, introduced in 1850. Although it was a single-shot gun, the breech-loading mechanism was so simple that a novice could fire nine shots in a minute. *Sharps' Breech-loading Patent Rifle*, Scientific American, Mar. 9, 1850. The Sharps rifles were particularly popular with pioneer families heading West. A superb long-range gun, the Sharps remained in common use for decades afterward, often retrofitted to use metallic cartridges.[152] Whereas a person using a muzzleloader must stand while reloading, a breechloader can be reloaded from the prone position—a great defensive advantage.[153]

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148. M.L. Brown, Firearms in Colonial America: The Impact of History and Technology, 1492-1792, at 387 (1980).

149. Ned H. Roberts, The Muzzle-Loading Caplock Rifle 329-31 (2d ed. 1944).

150. *Id.* at 384.

151. Norton, at 11, 19.

152. Townsend Whelan, The American Rifle 9 (1923); Section C.4.b (metallic cartridges).

153. Fuller, at 118.

Sharps carbine. This specimen was captured by Indians, who decorated the stock with bone and shell inlays.

b. Ignition

The development of the breechloader was considerably aided by a new method of igniting the gunpowder. Part A describes how the flintlock and its wheellock predecessors were ignited: Pulling the trigger would start a process that would strike a spark in a small pan of gunpowder, the *flash pan*. The flame from the flash pan traveled through a channel to a small opening in the gun, the *touch hole*. Via the touch hole, the flame entered the breech, where the main charge of gunpowder was located, and ignited it.

In 1807, Scottish clergyman Rev. Alexander John Forsyth was granted the first patent for the use of fulminates in ignition. A fulminate (from the Latin word for lightning) is a chemical compound that readily explodes when it is physically struck (*percussed*).

Fulminate-based ignition was simple. The fulminate is next to the touch hole. Pulling the trigger causes a firing pin to strike the fulminate. The fulminate detonation then ignites the gunpowder. The difference between percussion ignition and flintlock ignition is that the primer is hit, not lit.

Percussion ignition was instant, and noticeably faster than the flintlock, increasing accuracy because the shooter is less likely to move the firearm between the time that he or she pulls the trigger and the gun fires.[154] It was about 99 percent less likely to *misfire* (fail to ignite the main powder charge) or to *hang fire* (delayed ignition).[155] Percussion also made reloading faster,

154. In well-made flintlocks of the early nineteenth century, the lapse between trigger pull and ignition was "virtually zero," and in percussion guns, "absolutely zero if the nipple was kept clean." Held, at 174.

155. Fuller, at 113. By Forsyth's time, the best-made flintlocks had become very reliable, albeit not perfectly so. Meanwhile, lower quality flintlocks, such as the Brown Bess, "were not expected to do better than fire seven times out of ten." Held, at 175.

and reduced recoil, thereby improving accuracy.[156] Whereas flintlock ignition started a fire at the bottom of the powder charge, percussion ignition instantly shot a flame through the entire charge, burning it all at once. There being no touch hole from which a little gas could escape, all of the gas contributed to pushing the bullet. Percussion cap guns "shot harder and still faster than the best flintlock ever known."[157]

At first, there were a variety of mechanisms for holding the fulminate. The *tapelock* contained small circles of fulminate in a two-sided strip of tape. Toy cap guns still use the tapelock.

Eventually, the predominant fulminate system became the percussion cap—a small, short cup containing the fulminate. The percussion cap would be placed on a short hollow tube (the *nipple*) near the touch hole. By 1820 the percussion cap had made the flintlock obsolete, and by 1825 only a few gunsmiths catering to hard-core traditionalists were even making flintlocks.[158] Many were retrofitted to use percussion caps, which was an easy conversion.[159] For gunsmiths, "the simplicity of percussion locks required none of the masterful skill of the vanished age, and consequently the manufacture lent itself well to the universally booming new factory system."[160]

This Model 1816 flintlock musket was converted to percussion cap ignition.

156. Lloyd, at 234.
157. Held, at 171.
158. Held, at 174-75.
159. Fuller, at 113; Brown, at 379; Philip B. Sharpe, The Rifle in America 17-20 (1938).
160. Held, at 175.

c. Better Bullets

In a muzzleloader, the bullet must be slightly smaller than the bore diameter and must be of relatively soft lead. In the breechloader, the bullet can be closer to the bore size, so that it fits the rifled grooves more closely. The bullet can also be harder. Hardness helps the bullet retain its shape while traveling through the barrel. Thus, the bullet is more stable aerodynamically, and shooting is more accurate, especially at longer ranges.[161]

For centuries, bullets had been round. In the early nineteenth century, it was recognized that bullets would have more aerodynamic stability if they had a more conical shape. Further, if the back of the bullet were flat, and carefully fitted to match the size of the barrel's bore, the flat surface would prevent forward leakage of expanding gas from the gunpowder's ignition; thus, there would be more gas energy behind the bullet to propel it faster. Speed makes a bullet more resistant to air friction and gravity, which will eventually make a bullet fall to the earth. Although bullets today are conical, one unit of ammunition is still called a *round*, from the days when bullets were spheres.

Additionally, inventors learned how to make bullets that would expand slightly when fired. For rifles, this made it much easier for bullets to engage with the spiral grooves that are cut into a rifle barrel. Such engagement is necessary to make the rifle bullet spin on its axis.[162]

3. The Demand for Accuracy

Percussion-based ignition made the gunpowder burn more efficiently, which meant that the bullet is pushed by more energy, and so will travel a longer distance more accurately.[163] Long-range accuracy was just what Americans wanted as they moved West, where there was more need for longer distance shooting, compared to the thickly wooded regions east of the Appalachian Mountains.

All things being equal, a larger bullet propelled by a larger gunpowder load will travel a longer distance more accurately. More internal gas pressure from gunpowder explosions means that the gun must have a higher tensile strength. Responding to consumer demand, around 1840 the better rifle barrels were made from cast steel, rather than from welded iron. The new barrels had fewer imperfections in the bore, which made them all the more accurate.[164]

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161. Greener, at 640.

162. Held, at 183. Before the expanding bullet, there were two solutions. The German-Swiss solution, as in Jaeger rifles, was to have a bullet as large as the bore, and to force it from muzzle to breech with an iron ramrod. This could take some time. The American solution, as in the Pennsylvania-Kentucky rifle, was to use a bullet slightly smaller than the bore and wrap it in a greased cloth or linen patch. When the gun was fired, the patch would act as a forward gas seal, so that expanding gas did not exit the muzzle before the bullet did (at least not until the patch had been burned in the fire).

163. Roberts, at 51.

164. *Id.* at 11-12.

As more accurate rifles were developed, there was a corresponding increase in demand for telescopic sights—that is, a scope mounted on top of a rifle. While telescopic sights by this time were over two centuries old, the 1840s was the first time that ordinary rifles were accurate enough to take full advantage of them.[165] Sights were among the many consumer goods whose prices dropped as mass production became possible.

4. Repeaters

As described in Parts A and B, repeating firearms had been around for hundreds of years. But they were expensive, out of reach of most consumers. Beginning in the 1830s, cost savings from mass production made repeaters broadly available.

a. Repeating Handguns: Revolvers and Pepperboxes

Front view of the six-barreled pepperbox handgun manufactured by Robbins & Lawrence, 1851-54.

Pepperbox handguns are similar to revolvers but have multiple barrels that fire sequentially. Pepperboxes had been around since the eighteenth century,[166] but it was the combination of the percussion cap and improved manufacturing that brought them to the American mass market in the 1830s. The most common configurations were four to eight shots, but some models had as many as 24.[167] Pepperboxes were good enough for self-defense at close range, but not accurate enough for anything else.[168] The multiple barrels made them unbalanced, being heavy at the muzzle, and so more difficult to aim precisely.

Also in the 1830s, revolvers were first brought to the American market by Samuel Colt. Instead of multiple barrels (as in a pepperbox), his handgun had a single barrel, behind which was a rotating cylinder holding five or six rounds of ammunition.

Unlike the rifles and muskets made in the federal armories, Colt's revolvers were not perfectly interchangeable. Colt and other manufacturers still needed skilled labor hand fitters, who would assemble the parts and file or otherwise adjust them to make the gun work properly. Colt used machine tools for high quality and for high production volume—275 revolvers per day, from 600 employees. Colt revolvers were the most expensive handgun on the mass market.[169] The moving

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165. *Id.* at 51, 66-67.

166. *E.g.*, Held, at 162 (six-barreled flintlock made in London ca. 1760-80).

167. Lewis Winant, Pepperbox Firearms 7 (1952).

168. Jack Dunlap, American British & Continental Pepperbox Firearms (1964); Winant, Pepperbox Firearms.

169. William B. Edwards, The Story of Colt's Revolver (1953); Jack Rohan, Yankee Arms Maker (rev. ed. 1948); Meyer, at 258-59, 278.

parts of a revolver are much more intricate and closely fit than those of a single-shot handgun. Until the rise of machine tools, the mass market revolver was impossible.

Persons who wanted a less expensive, albeit less versatile, repeating handgun bought pepperboxes, which stayed on the market until well after the Civil War. In the Northeast, where most handguns were made, a good pepperbox might cost $10 or $15, and a Colt revolver $25. In California, the Colt might be sold for $200 or more. Many of the Forty-Niners who joined the California gold rush carried pepperboxes.[170] Today, revolvers are still very common in the United States, while the pepperbox has been forgotten.

Colt Dragoon revolver, manufactured 1848-50. It is .44 caliber and uses percussion cap ignition. As the name indicates, it is well-suited for use on horseback, and was popular in the California gold rush for people who could afford one.

b. The Metallic Cartridge

Colt's first revolvers, like pepperboxes, were muzzleloaders. The development of breechloaders and of repeating arms was greatly assisted by the invention of a new type of ammunition in the early 1850s: the metallic *cartridge*, an invention made possible by the expanding bullet.[171] The cartridge contained the bullet, the gunpowder, and the primer (the fulminate) in a single metallic case.

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170. Chapel, at 85.

171. Greener, at 773; Deyrup, at 28; Held, at 183-84. The first self-contained metallic cartridge, the *pinfire cartridge*, had been invented in Paris in 1846. It worked fine when loaded in a gun and fired shortly thereafter, but it was prone to explosions when dropped or when jostled during transport. Held, at 184.

Although cartridges improved in subsequent decades, the basic design remains the same. The metallic cartridge made breech-loading easier; it made the operation of a repeater much easier; and it facilitated much quicker reloading for repeaters and for single-shot firearms.[172]

The first commercially successful American handgun to take advantage of the metallic cartridge was the Smith & Wesson Model 1, of 1857. It was by far the fastest reloading handgun invented up to that time. After the six shots in the cylinder had been fired, loading six fresh cartridges took just a few seconds. The next major step in handgun reloading would take place in the latter nineteenth century, with the detachable box magazine. Part D.

The Smith & Wesson Model 1, the first U.S. firearm to use metallic cartridges. Manufactured 1857-60. The revolver rests atop its original case.

172. The metallic cartridge also solved the last remaining major problem for breech-loaders. Whereas in a muzzleloader the breech is completely sealed, the breech in a breech-loader, which is opened and closed during reloading, could never be perfectly sealed. Thus, some gas from the gunpowder explosion could leak backwards via the breech opening. At the last, the gas leak resulted in a loss of expansive gas that could have propelled the bullet. In metallic cartridges, the brass case expands because of the heat and pressure of the gunpowder explosion. The expansion to the circular base of the case creates a seal that prevents any backwards leakage of gas. Held, at 184.

c. The Repeating Rifle

Inventors were busy on many types of repeating firearms. In 1821, the *New York Evening Post* lauded Isaiah Jennings for inventing a repeater, "importan[t], both for public and private use," whose "number of charges may be extended to fifteen or even twenty . . . and may be fired in the space of two seconds to a charge."[173] The government considered the guns promising. "About 1828 . . . Reuben Ellis . . . made military rifles under contract on the Jennings principle."[174]

There was much innovation in repeating long guns and handguns. The Bennett and Haviland Rifle used the same concept as the pepperbox. It had 12 individual barrels that fired sequentially.[175] The Walch 12-Shot Navy Revolver had six chambers each holding two rounds that fired separately. It was used in the Civil War and made its way to the western frontier.[176] Europeans exported pinfire revolvers, with capacities of up to 21 rounds.[177] In 1855, Joseph Enouy invented a 42-shot Ferris Wheel pistol.[178] Alexander Hall's rifle with a 15-round rotating cylinder was introduced in the 1850s.[179] In 1851, Parry Porter created a rifle with a 38-shot canister magazine. The Porter Rifle could fire 60 shots in 60 seconds.[180] In 1866, the 20-round Josselyn belt-fed chain pistol made its debut. Some later chain pistols had greater capacities.[181]

None of these guns sold well. Some were unwieldy and many had reliability problems. The path to the mass market repeating rifle lay in a different direction. In 1855, an alliance of Daniel Wesson and Oliver Winchester produced a *lever-action* rifle, taking advantage of the new metallic cartridge. The lever action had been invented in the early seventeenth century, but had never become common, due to cost. Section A.4.

With a lever action, loading the next shot is simple. To eject the empty metallic case and then bring a fresh cartridge into the firing chamber, the user pulls down a lever and then pushes it back up. In a typical lever-action rifle, the reserve ammunition is held in a tubular magazine underneath the barrel.

Wesson and Winchester's first model, the 30-shot Volcanic Rifle, had reliability problems. But the Volcanic was improved into the 16-shot Henry Rifle of 1860.[182] Tested at the Washington Navy Yard in 1862, the Henry fired 15 shots in

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173. *Newly Invented Muskets*, N.Y. Evening Post, Apr. 10, 1822, *in* 59 Alexander Tilloch, The Philosophical Magazine and Journal 467-68 (1822).

174. Lewis Winant, Firearms Curiosa 174 (Odysseus 1996) (1955).

175. Norm Flayderman, Flayderman's Guide to Antique American Firearms and Their Values 711 (9th ed. 2007).

176. Chapel, at 188-89.

177. Supica, at 48-49; Winant, Pepperbox Firearms, at 67-70.

178. Winant, Firearms Curiosa, at 208.

179. Flayderman, at 713, 716.

180. *A New Gun Patent*, Athens (Tenn.) Post, Feb. 25, 1853 (reprinted from N.Y. Post); 2 Sawyer, at 147.

181. Winant, Firearms Curiosa, at 204, 206.

182. Fifteen rounds in the tubular magazine, plus one round in the firing chamber.

10.8 seconds.[183] Taking into account reloading time, a Henry could fire about 28 shots per minute. A famous testimonial came from Captain James M. Wilson of the 12th Kentucky Cavalry, who used a Henry Rifle to kill Confederates who broke into his home and ambushed his family. "When attacked alone by seven guerillas I found it to be particularly useful not only in regard to its fatal precision, but also in the number of shots held in reserve for immediate action in case of an overwhelming force."[184] Soon after, Wilson's entire command was armed with Henry rifles.[185]

The 1860 Henry lever action rifle. This specimen was manufactured 1864. The lever is the oval that attaches to the trigger guard. The oval and the guard move as a unit, swung down to eject, then up to reload. The pivot is at the top front of the trigger guard. The rifle is still in production today, with modifications for modern ammunition.

An even bigger success was an improved version of the Henry, the Winchester Model 1866. It had a capacity of "eighteen charges, which can be fired in nine seconds."[186] A favorite in the West, the Model 1866 was the first repeating long gun to become a major consumer product.[187]

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183. H.W.S. Cleveland, Hints to Riflemen 177 (1864).

184. *Id.* at 181.

185. Andrew L. Bresnan, *The Henry Repeating Rifle*, RareWinchesters.com, Aug. 17, 2007.

186. Louis Garavaglia & Charles Worman, Firearms of the American West 1866-1894, at 128 (1985); *see also* Peterson, Treasury, at 234-35 (advertising promised "Two shots a second").

187. Not counting the two-shot double-barreled rifles or shotguns, which had been widespread since the seventeenth century. Part A.4.

More than 170,000 Winchester Model 1866s were produced. For the successor, more than 720,000 Winchester Model 1873s were produced from 1873 until 1919.[188] Magazine capacity for the Model 1873 ranged from 6 to 25.[189] Today, the Henry and the Winchester 1866 and 1873 are manufactured in modern calibers by Uberti, an Italian company specializing in Old West reproductions.[190]

The Winchester Model 1866 lever action rifle, which is still in production today, with modifications for modern ammunition.

5. Conclusion

Mass production in the fullest sense was not perfected until Henry Ford's assembly line for the Model T automobile in the early twentieth century. Even so, the advances that were initially fostered by the Ordnance Department greatly changed

188. Flayderman, at 306-09. As was the American norm since the Jamestown settlement in 1607, almost as soon as a firearm type entered the middle-class market, it ended up in Indian hands. Indians called the Henry and its successors "many-shots guns." *See, e.g.*, James Willard Schultz, Friends of My Life as an Indian 233 (1923) (.44 caliber Henry); Laura Trevalyan, The Winchester: The Gun that Built an American Dynasty 53 (2016) ("William Henry Jackson's portraits of Native Americans show them brandishing what they called 'heap-firing' guns or 'many-shots.'") (citing John E. Parsons, The First Winchester 69 (1955)).

189. Arthur Pirkle, Winchester Lever Action Repeating Firearms: The Models of 1866, 1873 & 1876, at 107 (2010).

190. Among the endorsers of the Winchester 1873 was the famous scout (and later, entertainer) Col. William F. "Buffalo Bill" Cody, who praised the rifle's versatility. Flayderman, at 55.

the firearms used by ordinary Americans. Breechloaders and repeaters were nothing new, but their mass availability and affordability was quite a change from 1791.

With a muzzle-loading musket in 1791, an expert shooter might be able to fire up to five shots per minute—although three was more typical. With a single-shot Sharps rifle, anyone could fire nine shots per minute. With a revolver or a repeating rifle, that rate of fire could be doubled, tripled, or more. And the new guns had much greater range and accuracy than their predecessors.

The trends that had been established in the 1850s were accelerated by the Civil War in 1861-65. "Breechloaders, repeaters, and metal ammunition were exceptional at the beginning of the war but had become the weapon of choice at the war's end." Thomson, at 307. Shortly before the Civil War, federal ordnance spending had been $1.5 million annually. That figure soared to $43 million. During the first year of the war, imports accounted for five-sixths of federal firearms purchases. By 1862, domestic producers supplied the majority of Union arms.[191] The war happened at a time when the domestic industry had developed the ability to scale up massively. That scaled-up industry is essentially the American firearms industry that has continued to the present—of course with various manufacturers rising and falling, and with the early mass producers, such as Colt, Remington, Winchester, and Smith & Wesson going through several changes of ownership.

Even after the Civil War, Americans still had plenty of muzzleloaders, and it took decades before every family could afford to upgrade to a more modern gun. The remainder of the nineteenth century (Part D) would see very important improvements in gunpowder and metallic cartridges; new types of actions (pump, slide, bolt, semi-automatic) to perform the same work as the lever action; and the detachable box magazine (to hold the reserve ammunition in a rectangular box). From 1866 to the present, there would be many improvements in accuracy, reliability, durability, and affordability. While developments in the last century and a half are significant, they pale in comparison to the advances in the first part of the nineteenth century. Invented in the seventeenth century, breech-loading repeaters in the mid-nineteenth century became an ordinary consumer good.[192]

D. THE LATTER NINETEENTH CENTURY: MASS MARKET FIREARMS AS WE KNOW THEM TODAY

During the Civil War, the Union's demand for firearms was enormous, and private companies manufactured between 2.5 and 3 million arms. Alexander Rose, American Rifle: A Biography 137 (2008). This still was not enough to fully supply Union needs, so the Union imported large quantities of firearms from Europe. But the Union's demands for American production did help create a large and robust domestic firearms industry that could produce affordable and reliable firearms.

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191. Thomson, at 301-04.

192. "[C]ivilians and lower-rank military men advanced the effectiveness of firearms further in the forty years between 1830 and 1870 than it had been during the preceding three hundred. . . ." Held, at 183.

1. Ammunition

The single most important advance in arms technology was in ammunition. Part C discussed the invention of the metallic cartridge, which contains the primer, gunpowder, and bullet in a metal case. Most metallic cartridges were originally *rimfire*: The primer (a chemical fulminate) was placed onto the inside of the rim at the base of the cartridge. In 1867, the modern *centerfire* cartridge was invented. It put the fulminate in a short, enclosed cylinder in the middle of the case's base. The rimfire case had to have thin walls, but the centerfire case's wall could be thicker. Stronger walls increased how much gunpowder could be used in a cartridge and resulted in bullets that flew much faster and farther than ever before.[193]

a. Smokeless Powder

The gunpowder that we today call *blackpowder* is as old as firearms. It is made from a mixture of sulfur, charcoal, and saltpeter (Ch. 4.B.7, online Ch. 22.H.1.d). In 1884, modern *smokeless powder* was invented; it is made from insoluble nitrocellulose, soluble nitrocellulose, and paraffin. As the name implies, it creates much less smoke than does traditional blackpowder. One consequence is that when someone is firing the second shot from a repeater, there will be no obscurity from smoke. On a battlefield, where many people are shooting at the same time, the change in visibility is enormous.

Smokeless powder burns cleaner than does blackpowder. In the latter, about 35 percent of the gunpowder is converted into gas, and 65 percent remains as residue. In smokeless powder, 70 becomes gas, and only 30 percent is solid residue. Because smokeless powder is over twice as efficient, the quantity of powder needed is cut in half. Reducing the quantity of gunpowder further reduced the amount of residue, so the new smokeless powder left only about one-quarter as much residue as did blackpowder. The residue reduction thus made cleaning the gun much easier.[194]

Smokeless powder facilitated the improvement of repeating arms. If the first and second shots leave less residue in the barrel, then the third shot does not have to push past so much obstruction (*fouling*). There is less interference with the spin and forward motion of the bullet, so the bullet will exit the muzzle more precisely on its path to the target. *See* W.W. Greener, The Gun and Its Development 560 (9th ed. 1910). Because fouling can clog the small moving parts of a firearm, reduced residue is especially important to the operation of repeaters, which depend on closely fit parts. Powder fouling creates corrosive salts, which promote rust. So the advent of smokeless powders significantly improved firearms durability. M.L. Brown, Firearms in Colonial America: The Impact of History and Technology, 1492-1792, at 11 (1980).

Smokeless powder facilitated the growth of indoor shooting galleries, which proliferated in the following decades. It also made shooting more pleasant, and thus helped the growth of recreational shooting. Blackpowder guns need to be cleaned more often than do smokeless powder guns. At a target match, a blackpowder gun

193. Rose, at 171.

194. Greener, at 560.

might need to be cleaned after every 50 or 100 shots. A.L.A. Himmelwright, Pistol and Revolver Shooting 96 (rev. ed. 1930).

Smokeless powder generates higher gas pressures than does blackpowder. The 1873 invention of decarbonized Bessemer steel was among the advances in metallurgy that made firearms able to tolerate the greater pressures. Rose, at 219.

For technical reasons, smokeless powder was initially easier to use on shotguns. The first commercially successful smokeless powder for rifles came from the Du Pont Company, in 1894.[195] Before the turn of the century, rifles made for smokeless powder could fire 30 rounds a minute.[196]

b. Jacketed Bullets

Another ammunition improvement of the era was the *jacketed* bullet. When a lead bullet travels down a barrel, heat and friction cause some small lead particles to shed from the bullet and remain in the barrel. The shedding degrades accuracy in the short run by altering the bullet shape in uneven ways—and in the long run because lead fouling makes the interior barrel surface (the *bore*) uneven. In 1882, the first copper-jacketed bullet was introduced; the lead bullet was wrapped in a thin layer of copper. Because copper has a higher melting point than lead, and is harder, copper jacketing keeps the bullet intact and the barrel cleaner. As detailed in online Chapters 21.B and G, ammunition today includes the entire spectrum from full-jacketing to no-jacketing, with many intermediate variations, such as jacketing for most of the bullet but not the nose.

Jacketed ammunition, in turn, gave rise to the *hollow-point* bullet. If the point of a bullet is hollow, it is more likely to deform on impact. Thus, all the kinetic energy of the bullet is transferred to the target. If a bullet does not deform, it may pass through the target (*over-penetrate*). For hunting, the hollow point is more humane, because it is more likely to kill the animal quickly, rather than leaving a wound that causes death hours or days later. For self-defense, the hollow-point is superior because it is much less likely to exit the target, and thereby strike someone else. It is also more likely to deliver a fight-stopping hit. Law enforcement agencies in the United States generally require the use of jacketed hollow-points by law enforcement officers while on duty.

2. Repeaters

Section C.4 described the mass market arrival of the lever-action rifle. After firing a cartridge, the user would pull down a lever to eject the empty metallic case. Then, by pushing the lever back up into place, the user would load a fresh cartridge from the magazine into the firing chamber. In the nineteenth century, the lever action was supplemented by the *pump action* (also known as slide action), and the *bolt action*. All of these involved a short back-and-forth (or down-up) movement by the user.

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195. Whelan, at 302.

196. Lloyd, at 275.

As noted in Section A.2, the introduction of the flintlock rifle had reduced from 43 to 26 the number of steps necessary to reload a firearm. With the lever/slide/pump actions, the number of steps for reloading fell to two: move something one way, then move it back. The bolt action has four movements, but they are all very short. Two new types of actions would reduce the number of steps for reloading to zero.

The revolvers discussed in Section C.3, from Colt or Smith & Wesson, had been *single-action*. After firing one round, the user would use his or her thumb to cock back the hammer. Because the hammer was connected to the rotating cylinder, cocking the hammer would rotate the cylinder, and bring a fresh round into the firing position. Then, the user would press the trigger.

In *double-action* revolvers, pressing the trigger also cocks the hammer and rotates the cylinder, so the double-action revolver can be fired as fast as the user presses the trigger.

In 1883, the first *semi-automatic* handgun was invented, by Orbeas Hermanos, of Spain.[197] All semi-automatics use energy from the gunpowder explosion to perform the mechanical work of extracting and ejecting the empty case from the firing chamber, and then loading a fresh round into the chamber. Like the double-action revolver, the semi-automatic has zero steps to reload, and it can fire as fast the user can press the trigger. Also as with the revolver, the semi-automatic user still has to press the trigger to fire a new cartridge. This is what makes semi-automatics different from automatics.[198] In automatics, ammunition will fire continuously as long as the user keeps the trigger pressed. Section D.4. For this reason, automatics fire much faster than semi-automatics. Online Chapter 21 Parts D-G detail how various actions work.

The first functional semi-automatic firearm was the Mannlicher Model 85 rifle, invented in 1885.[199] Mannlicher introduced new models in 1891, 1893, and 1895.[200]

3. The Box Magazine

In repeating rifles or shotguns such as those from Winchester (Section C.4) or Spencer, the reserve ammunition was stored in a line, in a tubular magazine underneath the barrel. In repeating handguns that are revolvers, the ammunition is stored in a rotating cylinder. During the nineteenth century, inventors worked

197. Held, at 185.

198. Orbea's invention was gas-operated. It diverted some of the gas from the gunpowder explosion to do the mechanical work. The alternative method, introduced in 1885, is recoil- (or inertia-) operated. All gunpowder explosions in a firearm create forward energy and an equal amount of backward energy. The forward energy pushes the bullet out of the metal case, and down the barrel toward the muzzle. The backward energy is felt by the user as recoil. A recoil-operated semi-automatic firearm uses some of the recoil energy to eject the empty case, and then move a fresh cartridge from the magazine into the firing chamber. The gas and recoil systems have their advantages. The gas system reduces felt recoil more, but it is more prone to fouling. *See, e.g.*, Phil Bourjaily, *Gas vs. Inertia Shotguns—Which is Better?*, Field & Stream, Jan 25, 2021 ("Gas shotguns are softer-shooting. Inertia guns are ultra-reliable.").

199. U.S. Navy SEAL Sniper Training Program 87 (2011).

200. John Walter, Rifles of the World 568-69 (3rd ed. 2006).

European harmonica pistol, 10 shots in 9 mm caliber.

on box magazines, which hold the ammunition in a stack underneath the firing chamber. The first handgun to use a detachable box magazine was the Jarre harmonica pistol, invented in 1862. Its magazine was horizontal, not vertical, making the gun awkward to carry in a holster.

A more successful design for a semi-automatic pistol with a detachable box magazine came from Hugo Borchardt, whose C-93 pistol, named for the year of its invention, had fairly good sales. But it was soon eclipsed by the 1896 Mauser, which was less bulky.[201] The German Mauser "broomhandle" model C96 came with a ten-round standard magazine, and optional magazines of as few as six or as many as 20 rounds.[202]

Mauser Model 1896 semi-automatic pistol.

Other semi-automatic handguns with detachable magazines were introduced before the turn of the century, including the Bergmann Simplex,[203] Fabrique Nationale M1899, Mannlicher M1896 and M1897, Luger M1898 and M1899,

201. Frank Miniter, The Future of the Gun 25-26 (2014).
202. Kopel, *The History of Firearms Magazines*, at 856-57 (2015); Dougherty, at 84.
203. Dougherty, at 85.

Roth-Theodorovic M1895, M1897, and M1898, and the Schwarzlose M1898.[204] Many of these were issued with magazines greater than ten rounds, including Luger's M1899, which could be purchased with 32-round magazines. Jean-Noel Mouret, Pistols and Revolvers 126–27 (1993); Supica, at 86.

4. Machine Guns and Automatics

From mid-century onward, inventors had been working on machine guns. A major advance was the Gatling Gun, introduced during the Civil War. It had 10 or 12 rotating barrels, which were operated by a hand crank; ammunition was fed from a belt. The Gatling saw mediocre sales. For example, the *New York Times* mounted a Gatling Gun on its roof during the 1863 anti-draft riot in New York City to deter rioters who were angry about the paper's pro-war, pro-draft editorial position. But the Gatling Gun often had reliability problems, and it eventually became a historical curiosity.[205]

True automatic weapons were invented by Hiram Stevens Maxim in 1884. In an automatic, ammunition fires continuously, as long as the user keeps the trigger pressed. This distinguishes automatics from all other types of firearms (revolvers, lever action, semi-automatic action, pump action, etc.). The new automatics were very large and heavy—often mounted on a tripod, and requiring a crew of two or more men to operate or transport. Few individuals bought them, but sales

Gatling Gun, U.S. Navy Model. The blue-gray mount affixed the gun to a ship's deck. Land models of the Gatling Gun were mounted on portable tripods. Note the ten rotating barrels visible at the muzzle, and the hand crank at the rear. Because the Gatling is hand-cranked, it is a machine gun but not an automatic.

204. Leonardo Antaris, *In the Beginning: Semi-Automatic Pistols of the 19th Century*, American Rifleman, Jan. 4, 2018.

205. *See* Julia Keller, Mr. Gatling's Terrible Marvel (2008).

to governments were strong. They were effective weapons for European colonial armies in Africa and Asia. They were also deadly in wars between the colonial powers, as the trench warfare of World War I would demonstrate.

5. Manufacturing

Better machine tools greatly reduced costs and improved quality. Drilling the bore in a rifle barrel had taken hours with the machine tools of the early nineteenth century. Now it took minutes.[206] Many firearms producers did not make all of their own parts, but instead bought them from other companies that sold parts to various manufacturers. The system was a boon for smaller companies; a small business did not have to make a large capital outlay for machines whose full-time use would produce more parts than the company needed.[207]

By the turn of the century, every firearms type that can be found in a twenty-first-century gun store had been invented and was on the commercial market, including the semi-automatic with the box magazine. Like the eighteenth century in England, the twentieth century in the United States would see the refinement and improvement of existing technology, and no dramatic innovations. Better manufacturing during the twentieth century did lead to significant gains in reliability, durability, accuracy, and affordability. Although the firearms technology developments of the twentieth century should not be slighted, they are small compared to what took place in the nineteenth century.

6. Target Shooting

Target shooting became for a while the most popular sport in America, starting in 1873 when the American team beat the world-champion Irish at an NRA-organized match. (The NRA had been founded in 1871 by former Union Army officers.) Shooting events were an Americanized version of the *schützenfeste*, which America's many German immigrants had enjoyed in the old country. Target shooting peaked around 1885, being thereafter displaced by bicycling and automobiling.

During the latter part of the nineteenth century, many colleges and private organizations formed shooting teams, and there was much encouragement of target practice as a patriotic exercise. The theory was that to prevent the need for a large standing army, American civilians should be good shots. If there were a war, citizens would be ready to enlist in the army, which would not have to spend a long time teaching them how to shoot.[208] NRA targets and marksmanship training manuals were adopted by the U.S. Army and Navy.[209] Government and nongovernment

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206. A.C. Gould, Modern American Rifles 7 (1891).

207. *Id.* at 28-30.

208. Rose, at 199-202; Russell S. Gilmore, *"Another Branch of Manly Sport": American Rifle Games 1840-1900, in* Guns in America: A Historical Reader 105 (Jan E. Dizard et al., eds. 1999).

209. James B. Trefethen, Americans and Their Guns 103 (1967).

efforts to promote rifle marksmanship would become even greater in the early twentieth century. *See* Ch. 8.B.2.b.

But target shooting was not just for males who might one day join the military. The NRA "feminized target shooting by opening the door for women to participate in large numbers." By "stressing . . . the patience and temperance needed to succeed, the NRA made it possible for women to be on an equal footing in this arena." Many rifle clubs welcomed women members, and "the overall tone of the sport was not military, but increasingly feminine." Laura Browder, Her Best Shot: Women and Guns in America 66-67 (2006). Firearms advertising of the late nineteenth and early twentieth centuries often featured women using rifles or shotguns for recreation. The ads treated women as typical consumers, without need for advertising copy about why a particular gun or activity might be especially suitable for females. *Id.* at 3-11.

By 1891, rifle accuracy had improved so much that the typical shooting match used targets at 200 yards. Gould, at 195. What was expert-level shooting at the beginning of the nineteenth century was now standard for an ordinary firearms user.

7. Shotgun Shooting

While the NRA and others were promoting rifle marksmanship, a separate development was increasing the popularity of shotgun sports. By the latter nineteenth century, rifles and handguns all fired a single conical projectile—the bullet. In contrast, shotguns fire several or many small spherical projectiles, called *shot*. Descendants of the *fowling pieces* discussed in Section A.2, shotguns are well-suited for bird hunting, and for self-defense at short range. (If the shotgun is loaded with a single large projectile, a *slug*, it can also be used for land-based hunting of mammals, such as deer.) In the latter nineteenth century, sportsmen found a method in which they could use their shotguns more often, without attempting to kill birds on every shot.

Instead of birds, the targets were glass balls, thrown into the air. The glass balls simulated the flight of a bird. Later, glass balls were replaced by brittle flying clay disks, which are sometimes called "clay pigeons." The clay disks gave rise to the sports of skeet shooting and trap shooting. In the latter twentieth century, *sporting clays* would become popular; the basic system of shotguns and clay disks is the same, but sporting clays are thrown in more irregular and challenging patterns than skeet or trap.

E. THE TWENTIETH AND TWENTY-FIRST CENTURIES: REFINEMENTS

As in eighteenth-century Great Britain, the twentieth century and the early twenty-first century in the United States saw improvements in firearms quality, but no great changes in firearms technology.

1. Manufacturing and Affordability

By the first half of the twentieth century, firearms were very affordable. In the early nineteenth century, the finest maker of flintlock shotguns was Old Joe Manton of London. A "strong, plain gun" from Manton cost hundreds of dollars. By 1910, a modern shotgun, "incomparably superior, especially in fit, balance, and artistic appearance" to Manton's cost about ten dollars.[210] A basic rifle suitable for plinking tin cans or bottles could be had for five dollars.[211]

Improved metallurgy was one reason for higher quality and much lower prices. Early in the nineteenth century, gun barrels were usually made from iron. In the late nineteenth century, barrels were made from Damascus steel—iron and steel strips twisted and welded together. Barrels made of fluid steel took over in the early twentieth century. They cost less to make, and were stronger and better able to withstand the higher pressures created by smokeless powder.[212]

Machines now made many parts of the firearm, but not everything. Shotgun barrels were still hand-finished by specialists.[213] Custom gun making—once the only kind of gun making—was now a small part of the market. As of 1910, "ninety-nine guns in the hundred are ordered by mail or bought ready made."[214]

2. Semi-Automatics

a. Handguns

The semi-automatic firearm was invented in 1885, and the first commercially successful semi-automatic handguns appeared in the 1890s. Section D.3. Semi-automatic pistols were superior to revolvers in accuracy, effective range, and ammunition capacity.[215] Revolvers were, and remain, superior in reliability.[216]

In 1911, Colt's Manufacturing brought to market a semi-automatic pistol that many people still consider to be the best defensive handgun ever created. Designed by John Moses Browning, the greatest firearms inventor of all time, the Colt Model 1911 won the War Department's competition to design a new and more powerful military sidearm.[217] Able to fire eight shots without reloading, the Colt 1911 and its .45 caliber round were well-suited for stopping formidable adversaries. More than

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210. Charles Askins, The American Shotgun 21-22 (1910). For more on Manton, see Kings of the Trigger: Biographical Sketches of Four Famous Sportsmen (Tony Reid ed., 1901). Ten dollars in 1913 is approximately equal to $250 in 2021.

211. Sharpe, at 493.

212. Askins, at 25-28.

213. *Id.* at 31.

214. *Id.* at 128.

215. A.L.A. Himmelwright, Pistol and Revolver Shooting 6 (rev. ed. 1930).

216. *Id.* at 8.

217. For more on Browning, *see* Nathan Gorenstein, The Guns of John Moses Browning: The Remarkable Story of the Inventor Whose Firearms Changed the World (2021); John Browning & Curt Gentry, John M. Browning, American Gunmaker: A Illustrated Biography of the Man and His Guns (1964).

Colt 1911 semi-automatic pistol, with seven-round magazine. This specimen was manufactured in 1918, and used by the U.S. Army in World War I and World War II. The openings in the magazine side are "witness holes," so that the user can see how many rounds are in the magazine when loading it.

a century later, the 1911 and its imitators retain a strong place in the market, in a variety of calibers, and often with greater ammunition capacity. The 1911 became the standard handgun used by the U.S. military until it was displaced in 1985 by the Beretta 9 mm pistol.[218]

b. Long Guns

Early in the century, companies such as Remington and Winchester introduced a variety of popular semi-automatic rifles and shotguns.[219] Semi-automatic long guns are superior to long guns that use a manual action (e.g., lever, pump, or bolt) in two important respects. First, they can fire somewhat faster. Second, semi-automatics are more accurate for the second and subsequent shots. To work the bolt on the bolt-action rifle (or a pump or lever on other rifles), the user must take his eyes off the target. Moreover, moving the bolt will move the rifle at least slightly. Training a user to be consistently accurate with a semi-automatic takes less time than training for a bolt action. *Id.* at 1.

Accordingly, in 1900 the Ordnance Department began work on finding a semi-automatic rifle for adoption.[220] The project took 36 years. Given that semi-automatic rifles for the civilian market were abundant, why did the infantry semi-automatic take so long?

Semi-automatics have inherent weaknesses. The complexity of the operating mechanism (the *action*) makes it more vulnerable to malfunction than simpler guns.[221] This is true even under ideal conditions, and all the more so under the hard usage typical of an infantryman's rifle. The Ordnance Department needed a semi-automatic that could function reliably in all environments, including exposure to blowing sand, freezing, and days of rain. Even in the worst conditions, the rifle had to be able to fire many rounds without needing to be cleaned. Basic disassembly for cleaning had to be very simple, so that it could be performed in a

218. Primarily as part of a deal by which the Italian government would accept the controversial placement of intermediate-range nuclear missiles in Italy, in exchange for a very lucrative American military contract for the Italian company Beretta.

219. *See, e.g.*, Julian S. Hatcher, Hatcher's Book of the Garand 14-15 (1948). Major General Julian Hatcher was Technical Editor of the NRA's magazine, *The American Rifleman*. His brother James was one of the three inventors at the Springfield Armory responsible for creating the Garand rifle.

220. Scott Duff, The M1 Garand, World War II, at 2 (2d ed. 1996).

221. Sharpe, at 572.

foxhole. The rifle had to have the fewest possible number of parts, to make field repair straightforward. The rifle could not be too heavy, because soldiers might be carrying it for weeks at a time. And it had to be easily manufactured rapidly and in large quantities.[222] These multiple objectives were at odds with each other. For example, heavier weight (e.g., sturdier stocks, thicker barrels) improved durability but contradicted the weight limit.

Although the civilian semi-automatic rifles of the early twentieth century were perfectly suitable for sports or personal defense, they were not rugged enough for the military, so the Army stuck with the 1903 Springfield bolt-action rifle.[223] The .30-'06 deer rifle is an heirloom in some families.[224] Although a venerable sporting gun, it was based on the standard U.S. infantry weapon.

Close-up of the action of the 1903 Springfield. The bolt is operated by the handle that has a large ball at the end. To eject an empty shell casing, the user moves the handle up and then back. To load a fresh round, the user then moves the handle forward and down. The box magazine, which is not pictured, attaches at the bottom of the rifle, in front of the trigger guard.

During the first third of the twentieth century, citizens purchased semi-automatic rifles, and firearms manufacturers continued to innovate for the civilian market. Progress with semi-automatics on the civilian side fueled technical innovations on the military side. Miniter, at 18-19. To meet federal needs, private experimentation was encouraged. The American Inventors Act authorized sale of

222. Hatcher, at 1-109.

223. *See* Joe Poyer, The Model 1903 Springfield Rifle and its Variations (4th rev. ed. 2013).

224. 30 caliber, cartridge invented in 1906.

Ordnance Department material to private inventors who were working on designs they hoped to submit to the Army.[225] Later, the Educational Orders Act of 1938 gave military contracts to private firms so they could gain experience in mass production of military arms.[226]

John C. Garand had started learning about guns when he was ten years old, working at his brother's shooting gallery. He was employed by machine tools companies, served in the National Guard, and submitted a rifle design to the government. Although his rifle was not adopted, Garand's impressive design led to him being hired in 1919 to work at the Springfield Armory's semi-automatic project.[227] The M1 Garand was officially adopted in 1936. It was fed by an eight-round clip.[228]

During World War II, the Springfield Armory produced 3.5 million M1 Garands, and the Winchester Repeating Arms Company made half a million.[229]

This M1 Garand was manufactured in 1952. The clip has not been inserted.

225. 33 Stat. 276 (1904).

226. Duff, at 43.

227. Hatcher, at 27-31; Duff, at 3.

228. A *magazine* is a closed container for ammunition, usually a box or tube. A *clip* holds several rounds of ammunition by the base, is usually made of stamped metal, and has no moving parts. Firearms invented after 1950 do not use clips. A magazine contains a spring that helps push the next round of ammunition into the firing chamber.

The Garand's biggest weaknesses were the small size of the clip, and that a partially empty clip (e.g., with three rounds left) could not be removed and replaced with a full clip.

229. Duff, at 123. Post-World War II production was 1.4 million, by Springfield Armory, International Harvester Corp., and Harrington & Richardson Arms Co. *Id.* at 124. In 1968, Secretary of Defense Robert McNamara closed the Springfield Armory. The other original federal armory, at Harpers Ferry (Part C.1), had gone out of business after the Confederates captured it in 1861, and took all its machinery to Norfolk.

As soon as the Garand entered combat in 1942, it proved itself under the most difficult conditions—from the steaming jungles of the South Pacific, to the deserts of North Africa, to the bitter cold of the far north.[230] The semi-automatic gave American soldiers a great advantage over their adversaries, who mostly used bolt-action rifles.[231] More American soldiers came home from the war, and more fascist soldiers did not, because of John H. Garand. General George S. Patton called the M1 Garand "the greatest battle implement ever devised."[232]

Some military personnel, such as paratroops, needed a smaller, lighter rifle. For them, the M-1 Carbine was developed by Winchester and adopted by the military in 1941. It uses 15- or 30-round magazines. Notwithstanding the similar name, it is structurally different from the M1 Garand.

M-1 Carbine. This specimen was used in 1944-45 in Pacific Island campaigns against what the Japanese called Dai Nippon Teikoku, the "Empire of Great Japan."

3. Post-World War II

a. Muzzleloaders

Some of the greatest firearms advances of the latter twentieth century were for muzzleloaders. Because of improvement in firearms parts quality, muzzleloaders with in-line ignition became common. For in-line ignition, the nipple that holds the percussion cap is inside the receiver, not outside. Such muzzleloaders had existed since the early eighteenth century, but the necessary close fit for the parts made them far too expensive for ordinary consumers. Newly

230. Joe Poyer & Craig Reisch, The M1 Garand 1936 to 1957, at 7-8 (1995).

231. *Id.*

232. Letter from Lieutenant General George S. Patton, Jr., Commander, 3rd Army, to Major General Levin Campbell, Jr., Chief of Ordnance, War Department (Jan. 26, 1945) *reprinted in* Duff, at 107.

invented blackpowder substitutes, such as Pyrodex, made muzzleloaders much cleaner and easier to use. Although a 2021 revolver or semi-automatic pistol is not all that different from the models of 1899, the 2021 muzzleloader has come a long way.

As for the old-fashioned flintlock, it is more widely available and affordable than ever, thanks to do-it-yourself kits for assembling premade parts, introduced in the 1970s.[233]

b. Manufacturing and Materials

During World War II, manufacturers learned how to use *casting* to create components by pouring steel into molds rather by cutting it. After the war, William Ruger became a leader in applying casting to the citizen firearms market. The Sturm, Ruger Company was also a leader in adopting computer numerical controlled (CNC) machining.[234] These manufacturing innovations facilitated the production of more complex firearms with closer-fitting parts.

Because of new manufacturing techniques, such as semisolid metal casting and metal injection molding, firearms have become more user friendly. Newer guns are much easier to disassemble for cleaning or repair than earlier ones. They are also more easily modified to fit the user. Changing the grips on a handgun to match the user's hand size, or swapping scopes for different applications (e.g., target shooting vs. hunting) is simple on many modern firearms. So is adjusting the weight of the trigger pull to match the user's preference.[235]

Improvements in metallurgy, such as the invention of titanium alloys, have made guns lighter, stronger, more durable, and more accurate. Today, a high-quality firearm (at the upper end of the price range) bought at a store can match the quality of a firearm customized by an expert gunsmith a few decades ago.

Compared to revolvers, semi-automatic pistols have more intricate parts, and there are more ways for malfunctions to occur. Thus, the manufacturing improvements that made parts to tighter tolerances were especially beneficial to semi-automatics. That is one reason why, over the past half-century, semi-automatics have gradually displaced revolvers as the most common handgun.

The first firearm to use plastics was the 1959 Remington Nylon 66, which had a synthetic rather than a wood stock. The company that turned plastics into something entirely normal on a modern firearm was Glock. In 1963, Austrian engineer Gaston Glock created the Glock company at a factory near Vienna, in Deutsch-Wagram. Initially, Glock manufactured plastic and steel products, including curtain rings. After developing expertise in products combining plastic with steel, Glock became an Austrian army supplier of field knives, machine gun belts, practice hand grenades, and entrenching tools.

In the early 1980s, the Austrian army asked many companies to submit bids to manufacture a new duty pistol. Although Glock had never made firearms before, it won the contract for what became the Glock 17 pistol. The Glock was the first handgun to make extensive use of polymers.

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233. Toby Bridges, Muzzleloading 20-59 (2000).
234. Miniter, at 193-94.
235. *Id.* at 200-10.

Most parts of the Glock 17 were still made of metal: the slide, the barrel, the trigger assembly, the magazines, and so on. But the frame was synthetic. The frame is the biggest part of the gun; it is the structure that contains all the other parts. The Glock's polymer frame weighed only 14 percent as much as a steel frame, yet was stronger. The stronger frame helped the gun absorb recoil better, thus improving accuracy and comfort for the user. The much lighter frame also made the Glock more comfortable to carry or wear for extended periods.

Even without the plastic, the Glock would have been a major innovation. Nobody had ever made a modern full-sized pistol with so few parts. The Glock was easy to disassemble and reassemble for cleaning. Compared to other pistols of the time, it was less likely to jam or misfire because of lack of cleaning. The gun was also extremely sturdy, and resistant to cracking or other damage even after firing thousands of rounds of ammunition. The Glock polymers also do not rust, and are generally more durable than metal.

After being adopted by the military and law enforcement in Austria, the Glock 17 found a world-wide market. Norway was the first NATO country to adopt it. In 1985, Glock opened an office in Smyrna, Georgia, the first of many Glock offices around the world.

Glock 17 semi-automatic 9 mm pistol. Named "17" because it was Gaston Glock's 17th patent. Later Glock model numbers also follow the patent sequence. By coincidence, the original Glock 17 held 17 rounds.

The company aimed its initial promotions at the law enforcement market. The light weight and other improvements made the gun naturally attractive to police officers. Glock offered very generous terms to adopting agencies, including buying the agencies' former service handguns. As law enforcement agencies adopted the Glock, other citizens could see that the newfangled guns were reliable and effective for self-defense. American citizens have always looked to law enforcement officers for good examples of appropriate arms for keeping the peace. That was true for the 1873 Colt "peacemaker" revolver and over a century later for the Glocks. Today, many common firearms use polymers.

Further reading: Paul M. Barrett, Glock: The Rise of America's Gun (2013).

c. Magazines and Ammunition

The first semi-automatic handgun to become a major commercial success in the late nineteenth century, the Mauser C96, had an optional 20-round magazine. In the first half of the twentieth century, some manufacturers produced handguns with standard magazines holding more than double the ammunition of a typical revolver—most notably the 14-round Browning Hi-Power of 1935. Greater ammunition capacity

became more common starting in the early 1980s, once the double-stack box magazine was perfected. The double-stack magazine holds the ammunition in two parallel columns, and feeds alternately from each column. As a consequence, many handguns now have standard manufacturer-supplied magazines of 21 rounds or more.

Box magazines in general now have more reliable springs and sturdier lips (where each round of ammunition feeds from the top of the magazine into the chamber of the firearm); because of better magazines, semi-automatics have become less likely to misfeed ammunition.[236]

In appearance and structure, twenty-first century ammunition is similar to ammunition from a century before. Yet quality has improved substantially, as manufacturers have tested ballistics with increasing precision, improved formulas for gunpowder and primers, and refined bullet shapes for better performance.

d. The Right Gun for the Individual

While the word "ergonomics" was coined in 1949, the concept had long been part of firearms technology. For example, mounting a long gun on the shoulder rather than the chest made it easier for the user to aim accurately, and so did the long sight radius of the Kentucky rifle. Ergonomic progress in the latter decades of the twentieth century was strong. Handgun grips became easily replaceable and customizable to better fit the individual user. Some grips could even be molded to exactly match the user's hand. Forward grips on long guns created a better point of contact for stability, compared to the user simply holding the gun's fore-end with her non-trigger hand. Adjustable stocks allowed a user of any height to buy a gun off the rack and have a stock that was just the right length—an advantage that had once belonged only to British aristocrats who could pay for a bespoke long gun.

After World War II, the U.S. domestic shortage of ammunition and new firearms during the war helped create much growth in home gunsmithing and home manufacture of ammunition (*reloading*). Ch. 8.F. The home tools available in 1949 were superior to what was available before the war. The tools have continued to improve, allowing consumers to more easily customize their guns and ammunition, including developing particular ammunition loads tailored for specific purposes such as target competitions or hunting certain game.

In an age where personal preferences reign, it is not surprising that the best-selling firearm in American history is a rifle built on the AR platform. The AR ("ArmaLite Rifle") platform is discussed in Chapters 15.A and 20.D.2.ii. The most famous AR is the Colt's semi-automatic AR-15.[237] But most AR rifles today are not AR-15s. The patents have expired, but Colt still owns the trade name "AR-15," so the typical modern AR usually has a different name despite still being referred to generically as an AR-15. Most twenty-first-century ARs are built for customization, starting with adjustable stocks. All components are easy to swap out and replace with aftermarket substitutes. ARs come with rails that make it easy to mount a scope on top, a laser pointer underneath, and many other options. The ARs are the Mr. and Mrs. Potatohead of firearms.

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236. Kopel, *The History of Firearm Magazines*, at 861-64.

237. That is, ArmaLite's 15th model.

e. Sighting and Computers

In the last two decades, the most important change in firearms has been the adoption of miniaturized lights and electronic optics, such as red dots or holographic sights. As of 1990, many firearms were not even compatible with supposedly "gimmicky" electronics. Today, many guns can be purchased directly from a dealer with electronic optics and light mounts as standard equipment. Battery improvements and miniaturization have made the sighting devices stronger, lighter, and more durable. Firearm-mounted lights enhance defensive safety. Many a confrontation has ended peacefully when the aggressor noticed a red dot on his torso. The lights also help the home defender ensure that the targeted person is really is an intruder. For beginning sport shooters, red dots and holographic optics simplify marksmanship and foster early success.

For traditional glass scopes, manufacturing improvements have led to dramatic increases in affordability and sophistication.

Computing power is now widely available to the general public. For the average firearms user, the result has been better made guns, but the gun itself still operates like a gun from the pre-computing age.

The place today where one is most likely to find guns being used in conjunction with computers is the shooting range. Handheld computers attached to scopes help long-distance rifle shooters adjust their aim precisely to account for wind, elevation differences, and so on. Computer-aided chronographs allow handloaders to determine which combination of ammunition components produces optimal velocity. Handheld chronometers have replaced stopwatches for handgun users timing their speed between shots. Ear muffs with internal computers allow for normal conversation and can even amplify voices, and then block sound in milliseconds when a gun is fired; as a result, instructors and students can hear each other better, while range safety and hearing protection are improved.

Small cameras made to be mounted on firearms are becoming more common. Hunters can record their hunts, and competitive shooters can review videos to improve their technique. At present, however, cameras are a high-end aftermarket accessory. Unlike polymer or titanium alloy frames, they are far from ubiquitous. Chapter 15.D discusses some other computer technologies that might—but have not yet—become very common for firearms.

F. CONCLUSION

The fifteenth century saw the replacement of crude hand cannons with matchlocks. The sixteenth century brought in the wheellock, repeaters, and finally the proto-flintlock (snaphaunce). The successful yet expensive innovations of the seventeenth century, such as the self-loading seven-shot handgun or the 30-shot rifle, were the technological foundation for the most common firearms of the twenty-first century.

The eighteenth century from start to finish was a flintlock century. New flintlocks, such as the Pennsylvania-Kentucky rifle, were made to fit their environments. While the flintlocks of 1800 often looked much like the flintlocks of 1700, the newer models were safer, more reliable, and more accurate.

The manufacturing revolution of the nineteenth century, incubated by the U.S. government, changed everything. By the 1830s, an average person could own a repeating handgun and by the 1860s, a 16- or 18-shot repeating rifle firing metal-cased ammunition. The most typical American firearm of the twenty-first century is a gun that became common in the 1880s and 1890s: the centerfire semi-automatic pistol with a detachable box magazine.

The twentieth century was like the eighteenth—a period of refinement of existing designs. The 1911 Model semi-automatic pistol on a gun store shelf today is mechanically almost the same gun that was first sold over a century ago. Yet today's model may have a polymer frame, a double-stack 13-round magazine, a customized grip, and internal parts that fit better than those of the early twentieth-century version. Like flintlocks during the eighteenth century, modern firearms during the twentieth century were improved by many small changes in components.[238]

Whereas revolvers once outnumbered semi-automatic pistols, the reverse is now true, as semi-automatics have improved in reliability. The use of polymers often makes modern guns appear different and more futuristic compared to their late nineteenth- and early twentieth-century antecedents.

In 1957, British firearms historian Robert Held declared: "Although the *age* of firearms today thrives with ten thousand species in the fullest heat of summer, the *history* of firearms ended between seventy and eighty years ago. There has been nothing new since, and almost certainly nothing will come hereafter."[239] As he put it, any modern bolt-action is "essentially" an updated version of the Mauser bolt-actions of the 1890s or the Mannlicher bolt-actions of the 1880s. "All lever-action rifles are at heart Henrys of the early 1860s," and all semi-automatics "descend from" the models of the 1880s.[240]

No firearms improvements since 1900 have come close in importance to the invention of the flintlock, nor to many inventions of the nineteenth century. Computers might change all that one day, but not yet. In another line of development, *gauss guns* or *coil guns*, are powered by electromagnetism rather than gunpowder. After a century of prototype stages, the first Gauss gun is slated to enter the consumer market in late 2021. It is about as powerful as a strong air gun or a weak .22 caliber firearm. The announced cost is $3,775.[241]

For the time being, the guns you can find today in a gun store are better versions of the guns from the days of your great- and great-great-grandparents.

NOTES & QUESTIONS

1. While acknowledging that the industrial age had made very good firearms very affordable, arms historian Robert Held lamented that the "skill and craftsmanship—one may say the art—of gunmaking has vanished." No longer

238. For example, many but not all modern semi-automatics have eliminated the hammer and replaced it with a small *striker* to hold the firing pin. The triggers on striker-fired guns have lower pull-weights, and so are easier to shoot, especially for beginners.

239. Held, at 186.

240. *Id.* at 185.

241. Brett Tingley, *Preorders for This Electromagnetic Rifle Are Being Taken for $3,775*, The-Drive, Aug. 6, 2021.

did master gunsmiths like Old Joe Manton produce exquisite flintlocks by hand. According to Held, in the Britain of 1956, "there are not two dozen men" who "could make a gun by hand, let alone as well as was demanded of an apprentice" of the old masters. In the United States, "not two dozen . . . could build a rifle out of a maple tree and two bars of pig iron, as was expected of any Pennsylvania riflesmith about the time of Bunker Hill." Held, at 186.

Would it be better if more people today could manufacture a firearm from a maple tree and pig iron? From other home workshop methods? If craft making of modern arms became more common?

2. *Presses and arms.* In the United States Constitution, two technologies are expressly singled out for special protection, "the press" and "arms." While "the freedom of the press" includes more than just the freedom to own printing presses, it surely does include the freedom to own and use presses and their modern equivalents.

Computer word processing, and many other improvements in typesetting and printing, have driven down the time and the cost of production of printed material. Mimeograph machines and then photocopiers made small offices or homes capable of printing sizable quantities of material for public distribution.

The above changes might be roughly comparable to changes in firearms, but nothing in firearms compares to the Internet revolution that began in the late twentieth century and continues today—as an average person in New York City or Nairobi can now instantly access an unimaginably large quantity of "printed" material.

The democratization of presses and arms is celebrated by some persons as fulfilling the ideals of the First and Second Amendments. Information and speech are a form of power, including in their ability to encourage violence. So, too, of course, are arms. The more widely distributed the power, the better, say some. Other people point to the misuse of these forms of power, and observe that in modern times, misuse has become all the more harmful because of technology. Libels that once might have been disseminated only to the readers of a newspaper in one city can now travel round the world in seconds.

The democratization advocates counter that as harmful as such power can be in too many hands, concentrating such power in the hands of the government or an elite can be even more harmful.

Taking into account what you have read in the preceding chapters of this textbook about the past and present of the United States and the world, and considering your own moral views and other knowledge, has the democratization of communication power and physical power been overall harmful or beneficial? How can harms be reduced and benefits increased?

3. *George Orwell.* Two months after the United States used the atomic bomb to force unconditional surrender by fascist Imperial Japan, George Orwell wrote about the democratizing and anti-democratizing effects of different types of arms:

> It is a commonplace that the history of civilisation is largely the history of weapons. In particular, the connection between the discovery of gunpowder and the overthrow of feudalism by the bourgeoisie has been pointed out over and over again. And though I have no doubt exceptions can be brought forward, I think the following rule would be found generally true: that ages in which the dominant weapon is expensive or difficult to make will tend to be ages of despotism, whereas when the dominant weapon is

> cheap and simple, the common people have a chance. Thus, for example, tanks, battleships and bombing planes are inherently tyrannical weapons, while rifles, muskets, long-bows and hand-grenades are inherently democratic weapons. A complex weapon makes the strong stronger, while a simple weapon—so long as there is no answer to it—gives claws to the weak.
>
> The great age of democracy and of national self-determination was the age of the musket and the rifle. After the invention of the flintlock, and before the invention of the percussion cap, the musket was a fairly efficient weapon, and at the same time so simple that it could be produced almost anywhere. Its combination of qualities made possible the success of the American and French revolutions, and made a popular insurrection a more serious business than it could be in our own day. After the musket came the breech-loading rifle. This was a comparatively complex thing, but it could still be produced in scores of countries, and it was cheap, easily smuggled, and economical of ammunition. Even the most backward nation could always get hold of rifles from one source or another, so that Boers, Bulgars, Abyssinians, Moroccans—even Tibetans—could put up a fight for their independence, sometimes with success. But thereafter every development in military technique has favoured the State as against the individual, and the industrialised country as against the backward one. There are fewer and fewer foci of power. Already, in 1939, there were only five states capable of waging war on the grand scale, and now there are only three—ultimately, perhaps, only two. This trend has been obvious for years, and was pointed out by a few observers even before 1914. The one thing that might reverse it is the discovery of a weapon—or, to put it more broadly, of a method of fighting—not dependent on huge concentrations of industrial plant.

George Orwell, *You and the Atomic Bomb*, Tribune (London), Oct. 19, 1945. Do you agree with Orwell's assessment of the effects of different weapons up to 1945? Does Orwell's analysis mesh with the history of resistance movements after 1945? What, if any, changes in firearms, firearms manufacture, or other technologies since 1945 have increased or reduced the ability of common people to resist a powerful industrial state?