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The Second Amendment and Global Gun Control

Joseph Bruce Alonso ^{FNal}

This article explores the interplay between the international law involved in global gun prohibition efforts and the domestic law of the United States. Joseph Bruce Alonso is an attorney in Marietta, Georgia. This Article is based on a paper which received first prize in the NRA Civil Rights Legal Defense Fund student lawyer essay contest in 2002.

INTRODUCTION

The right to bear arms carries a unique significance in American law and culture and now faces conflict with international gun control. Left unchecked, international gun control will compromise a fundamental human right. This Article explains the United Nations' recent efforts at international gun control and how those efforts conflict with the American right to bear arms.

The first part of this Article describes international law and United States domestic law, and analyzes the interaction between the two legal schemes.

The second part details the July 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects. The second part also examines the United Nations Convention Against Transnational Organized Crime, and the Convention's Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. Finally, the second part discusses the International Criminal Court.

The third part explains how conflicts between international law and a sovereign state's law are resolved, and focuses on how global gun control conflicts with the United State's legal and cultural right to bear arms.

The fourth part predicts how proposed international gun controls will infringe upon the American right to bear arms.

The Second Amendment's Right to Bear Arms is intended to foster self-defense in all its forms as a human right. The right to bear arms, or lack thereof, alters the political balance between individuals, private groups, governmental organizations, local sovereigns (such as the states in the United States and the

Lander in Germany) and federal sovereigns (such as the Federal Government in the United States). Gun ownership, as well as the lack of gun ownership, has far reaching consequences. The effects of international gun control are global and will have an enormous impact on the rights and political power of individuals, as well as on sovereign states, global regions, supranational authorities and perhaps a quasi-world government. Conflicts between international law human rights of the United States should be anticipated and avoided.

I. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW

Defining the relationship between international law and the domestic law of sovereign nations, often referred to as “municipal law,” presents novel legal questions. Municipal law and international law stem from different forms of authority. The differences in form and source can make the systems incompatible.

Municipal law is explicit, in that the law is passed by a sovereign and applied to citizens within an enclosed system. Enclosed systems establish the method of creation, form, and legal weight of all law promulgated within the system. Questions of legislation drafting, dispute resolution, legislative interpretation and enforcement of legislation are answered according to the system.

Conversely, international law is not passed by a sovereign but rather stems from an agreement between sovereign states. Until recently, international law resembled contract law between nation states absent any common superior or independent body for adjudication and appeal in cases of disagreement.¹

Some commentators define traditional international law as governing “relations between independent States. The rules of law binding upon sovereign States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .”² However with the rise of New International Law,³ “international law’s modern emphasis on human rights has increasingly concerned itself with the regulation of a state’s relationship with its own citizens, an area of regulation traditionally understood as exclusively within the sovereignty of individual nation-states.”⁴

Analysis of international law by traditional standards is

difficult and is open to debate. International law does not have an equivalent enclosed system. Essential aspects of predictability and even legitimacy change over time. The continuous change in structure has created serious faults in international law. The legal weights, method of passage and dispute resolution are not established in a uniform way. Such simple aspects as to whom the particular law applies, and the shape of jurisdiction change without warning.

Agreements between sovereign States take a variety of forms. Breach of international agreements and irreconcilable disagreements were traditionally dealt with in the same manner as other disagreements between sovereign states. For decades, sovereign states adhered to treaties out of convenience and moral obligation. When a sovereign state no longer wanted to abide by the treaty, it simply stopped and faced the discontent of the other member sovereign states. With the creation of the League of Nations, and then the United Nations⁵, international law changed dramatically. The United Nations evolved into a kind of supranational authority. Now, with more international organizations, agencies, courts and even “peace keeping” troops, treaties are increasingly “enforced.”

A. The United States Constitution

The United States Constitution is the “supreme law of the land.”⁶ All laws in the United States are born out of the Constitutional system. The United States Constitution sets out three branches of government: the legislative, executive and judicial. The Legislative Branch passes legislation⁷; the Judicial Branch settles disputes and interprets legislation; the Executive Branch enforces legislation and holdings of the Judicial Branch. Issues of execution and adjudication are usually settled prior to enacting of legislation.

Forms of United States municipal law include constitutional law, federal and state legislation, executive orders, administrative rules and regulations, and case law. Each of these laws holds a predetermined status. Legislation can be repealed and amended. Court cases may be overturned. Supreme Court cases may be overruled by subsequent Supreme Court cases. Even the United States Constitution can be amended by a process specified within the document.⁸ A predictable hierarchy dependent on precedent solves most legal problems such as creation of laws,

enforcement of laws, jurisdictional issues and conflicts of laws. An appeal process resolves disputes. In the United States, the Supreme Court has the final say on the meaning of the Constitution.

The United States Constitution provides for treaties in Article II, Section 2, stating that 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.” The United States Constitution further gives federal courts jurisdiction over cases “arising under” treaties in Article III Section 2.⁹

B. International Law

International law has two primary sources: treaties and customary international law. Arguably, neither of these sources adheres to the American principles of self-determination, representative government, or separation of powers.¹⁰

The high rate of change in the administration of international law makes analysis difficult. For example, in the United States, the Constitution was drafted, debated and adopted as a constitution. Few, if any international instruments are given such attention by those over whom the instruments are binding. Additionally, instruments may take on a role in international law that was not intended when the instrument was drafted. For example, the President of the French Republic, Jacques Chirac stated in September of 2000 “The Charter of the United Nations has established itself as our ‘World Constitution.’ And the Universal Declaration of Human Rights adopted by the General Assembly in Paris in 1948 is the most important of our laws.”¹¹ This analogy to a constitutional system may be attractive, and even desirable, but is inaccurate.

1. Treaties

“Treaty” is the term used for the variety of explicit agreements between sovereign states. The Vienna Convention defines “treaty” as “an international agreement concluded between states in written form and governed by international law.”¹²

Due to the duality of municipal law and international law, a treaty is not considered in effect simply upon signing. Sovereign

states and international bodies respect that a signing state representative must submit the final treaty to the domestic authority for approval, typically a legislative branch. In the United States, acceptance of a treaty is ratification by the Senate. By signing, a sovereign state does indicate an intention to ratify or at least consider and abide by a treaty. The Vienna Convention stipulates, “A State is obliged to refrain from acts that would defeat the object and purpose of a treaty when . . . it has signed the treaty . . .”¹³ If after signing, a sovereign state determines it will not ratify the treaty, the sovereign state is obligated to revoke its signature and make its intentions known.

In 1969, the Vienna Convention on the Law of Treaties was drafted to set out general rules of international law for the drafting and implementation of treaties.¹⁴ The Vienna Convention creates a scheme similar to contract law.

2. Customary International Law

Customary international law is one of the terms used to describe implied legal tenets that bind parties. Customary international law is often founded on the expectation that states will continue to follow a pattern of behavior. The Statute of the International Court of Justice, Article 38, cites “international custom, as evidence of a general practice accepted as law.”¹⁵ The most striking characteristic of customary international law is that it can be nonconsensual.¹⁶ A state may observe a practice with no intention of obligating itself to follow that practice in the future. The key to customary international law is determining when a pattern of activity becomes legally binding. Not surprisingly, questions of “legally binding” customary law typically arises in the context of disputes.

A more controversial creation of international law is a customary international law that is binding because of its international acceptance, regardless of the actions of the sovereign state in question. In other words, customary international law may legally bind a sovereign state that has never made an affirmative act of acquiescence. If a practice becomes widespread in the international sphere, international organizations and international courts can declare that the practice is binding on all states.

There is great controversy over what provides evidence

of customary international law. Evidence may include the behavior of sovereign states involved, written instruments that demonstrate the sovereign states' intent, and legal writings such as court decisions and articles written by legal scholars. Increasingly, the recommendations of international organizations are used as evidence of customary international law even when the international organization has not been delegated *any* legislative or rulemaking power.

In the United Nations Charter, the General Assembly of the United Nations is authorized to "initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification."¹⁷

This scheme is problematic to those who believe in the separation of powers and in representative government.¹⁸ The United Nations, an international organization, creates and accredits the bodies responsible for these studies. For example, regarding the "Small Arms" conference and subsequent Programme of Action, the General Assembly requested the Secretary-General to conduct a study. The Secretary-General appointed "governmental experts" to assist him in conducting this study.¹⁹ Those "non-governmental" organizations that wish to take part must be accredited by the United Nations.²⁰ The same governmental or non-governmental groups play a role in drafting the instrument of the convention. The results of these studies are increasingly being used as evidence of customary international law.

C. Conflicts between Treaties and The United States Constitution

1. Conflicts between Treaties and Municipal Law

Two theoretical approaches have been used to analyze conflicts between international law and municipal law: the "dualist approach" and the "monist approach." The dualist approach views both international law and municipal law as occupying two separate spheres. Under this approach, international law does not affect the domestic legal order. The monist approach "views the international legal order and all

national legal orders as component parts of a single ‘universal legal order’ in which international law has a certain supremacy.”²¹ The United States follows a dualist approach. The dualist approach is becoming problematic as treaties and domestic laws are increasingly addressing the same subject matter. A further complication is the growing use of international courts to settle these matters.

In the case where a treaty conflicts with municipal law, an international court will hold the international law as overriding, while a municipal court may hold the municipal law as overriding. For example, if a treaty conflicts with the United States Constitution, the United States Supreme Court will hold that the treaty is not binding because it violates the United States Constitution. If the same conflict came before an international court, the international would hold that the treaty was binding. These competing legal systems are on a road to conflict.

2. International Courts and United States Municipal Law

International courts such as the International Criminal Court and the International Court of Justice will look to international law in applying legal rules. The Vienna Convention recognizes the general international law principal of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”²² The Vienna Convention further states, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²³ Most importantly, the Vienna Convention addresses potential conflicts between an effective treaty and a municipal constitution stating that “a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”²⁴ When the party affected is a citizen or even a corporation, rather than the state in which the citizen lives, the same would hold true. Thus, an American citizen who is protected by the Second Amendment could not assert this right as a protection in an international court.

3. United States Constitution and Treaties

The United States Constitution clearly anticipates the United States federal government entering into treaties, but does not appear to have anticipated the extent to which treaties would have domestic ramifications. The U.S. Constitution, Article VI, Section 2, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;²⁵

At first glance, one might conclude treaties are equal in weight to the United States Constitution because both are the “supreme law of the land.” Both the United States Constitutional structure and the United States case law illustrate that this view is untenable.

a. Constitutional Structure

The United States constitutional structure holds the Constitution superior to treaties. The procedural adoption methods of legislation, treaties, and of amending the Constitution demonstrate that treaties are equivalent to legislation. Thus, as legislation that violates the Constitution is invalid, treaties that violate the Constitution are invalid as well.

United States legislation requires passage by a majority of the House of Representatives and of the Senate and signature by the President.²⁶ Treaties tend to be drafted and passed in the reverse order, however. The Executive Branch conducts international relations. When the President deems appropriate, he may sign onto a treaty with another sovereign state. For the treaty to be effective, the President must submit it to the Senate, which may then ratify the treaty by a two-thirds vote.²⁷

A variety of conclusions may be drawn from the difference in procedural adoption of legislation and treaties. Approval by the President is necessary for both treaties and legislation. Where passage by the two bodies of the Legislature is necessary for the adoption of legislation, only the Senate’s approval is needed for adoption of a treaty. Removal of the House from the procedure of ratifying treaties removes the part of the Legislative Branch intended to represent United States citizens according to

population.

The most significant structural difference is the branch that drafts the document. Legislation is drafted by legislators whereas treaties are drafted (or at a minimum a final version approved) by the President. This is a strong indication that the drafters believed that the subject of treaties would primarily be relations between states and would not directly affect the rights and obligations of citizens.

The method of amending the Constitution is expressly provided in the Constitution. Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislature of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

Adopting such a stringent method of amending the Constitution would not make sense if the President and the Senate could change the Constitution by simply adopting a treaty.

b. United States Case Law

The Supreme Court of the United States held that the United States Constitution is superior to treaties. Any treaty that violates the Constitution is void and unenforceable. In *Reid v. Covert*,²⁸ the Court stated: “This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”²⁹ The Court further held:

Article VI, Supremacy Clause of the Constitution declares: “This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme

Law of the Land.” There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates, which accompanied the drafting and ratification of the Constitution that even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision [make] it clear that the reason treaties were not limited to those made in “pursuance” of the constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.³⁰

In *Geofroy v. Riggs*,³¹ the United States Supreme Court held:

The treaty power, as expressed in the constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent

Notably, treaties do not inherently override legislation.

In *Whitney v. Robertson* the Supreme Court held:

By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be

the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other...³²

A variety of conclusions may be drawn from the Constitutional structure and the case law. First is that the protections contained in the Bill of Rights cannot be infringed by treaties. Just as the United States federal Government and state governments cannot violate people's rights through legislation, the United States government may not do so through treaties. The United States President may revoke or breach a treaty and the Congress may pass legislation that voids a treaty.

It is the United States government's job to ensure that no foreign political body usurps the authority of the United States government. Although Congress may delegate power to bodies such as administrative agencies, such delegations are subject to the Constitution, as interpreted by the United States Supreme Court. The United States government may not grant power to a foreign polity to violate the rights of United States citizens.

The United States Constitution mandates that U.S. courts will hear cases arising in the United States.³³ The United States Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³⁴ More importantly, the United States Constitution says:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a party; - to Controversies between two or more States; - between Citizens of different States;- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens

thereof, and foreign States, Citizens or Subjects.³⁵

In other words, the United States judiciary shall hear all cases arising in the United States, whether under color of state law, federal law, constitutional law, or treaties. The American judiciary also hears all cases involving United States citizens and foreign “States, Citizens or Subjects.” In *Ex Parte Milligan*, the United States Supreme Court held that United States citizens are entitled to a trial by a domestic civil court.³⁶ The Supreme Court held, “One of the plainest constitutional provisions was . . . infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.”³⁷ Assertion of jurisdiction over a United States citizen for a case arising in the United States by an international court is arguably a usurpation of the United States’ political power and sovereignty.

If a case arose before the United States Supreme Court in which an American citizen was alleged to have violated a treaty, the citizen could argue that the treaty violated the United States Constitution and that the treaty was thus unenforceable. The United States Supreme Court would make the decision, and because the Court is the final arbiter of the Constitution, no appeal would be available to any party.

Those treaties that directly alter a United States citizen’s rights and obligations and subject her to potential suits abroad should be carefully scrutinized by the President and Senate and should require enabling legislation to go into effect. The United States government must amend the Constitution if it wishes to adopt a treaty that would violate the United States Constitution.

When United States citizens are subject to suit under international agreements either in a domestic or international court, treaties are equivalent to legislation and the process for adoption should reflect that of legislation.

II. GLOBAL GUN CONTROL

Global gun control has been at the forefront of international thinking and has recently found outlets for the creation of substantive international law. These laws apply to the international sphere and also require states to implement stricter gun control laws domestically. The Secretary-General of the United Nations submitted a report to the Millennium Assembly

of the United Nations³⁸ clearly stating his view on the role of international law and gun control. *The Report of the Group of Governmental Experts, entitled "Small Arms"* summarized the Secretary-General's comments³⁹:

[T]he task of effective proliferation control in the field of small arms and light weapons is made far harder than it needs to be because of irresponsible behavior on the part of some States and lack of capacity by others, together with a lack of transparency that is characteristic of much of the arms trade. He concludes that these weapons need to be brought under the control of States, and that States should exercise such control in a responsible manner, including exercising appropriate restraint in relation to accumulations and transfers of small arms and light weapons.⁴⁰

A. Scope of "Small Arms and Light Weapons" and "Illicit Trafficking"

Several arms control treaties that relate to nuclear weapons and national defense have been passed and signed by the United States. These treaties relate to weapons owned by governments and do not significantly affect the rights and obligations of citizens within sovereign states which are party to the treaty, nor do these treaties subject United States citizens to suits in international courts.

More recently, movements have been made to address international problems of smaller weapons. Often these problems include internal instability and fighting as well as criminal activity. The language used to describe the arms in these discussions is often military-related. The language also tends to include "explosives" and "ammunitions." Without reading the definitions of such terms as "small arms," "military arms," and "light weapons," one may conclude that the proposed agreements would apply to machine guns, anti-aircraft missiles and other weapons that in the United States are typically reserved for government ownership. In reality, however, the definitions of "small arms" are so expansive that one wonders what exactly is excluded from these definitions and why phrases such as "military" are so often used. Often the phrase "weapons" and "arms" applies to all guns, including pistols,

revolvers, shotguns and rifles used for hunting.

Likewise, terms such as “illicit arms” and “illicit trade” are used. Upon first impression “illicit” appears to describe gun smuggling or trafficking to criminals. When one analyzes the documents, one finds that use of such words, as “illicit” and “illegal” are at best amorphous. What qualifies as “illicit” or “illegal” varies greatly and is open to change and re-definition by those employing the term. At worst, “illicit” is simply a description intended to paint all arms transactions in a negative light.

For example, *The Report of the Group of Government Experts* established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small Arms” defines “Small Arms and Light Weapons” and “Illicit Trade.” The definition of “Small Arms” reads “The category of small arms includes revolvers and self-loading pistols, rifles and carbines . . .”⁴¹ “Illicit Trafficking” is “understood to cover those international transfers in small arms and light weapons, their parts and components and ammunition, which are unauthorized or contrary to the laws of any of the States involved, and/or contrary to international law.”⁴²

Under this set of definitions, “Small Arms” and “Light Weapons” include all guns. “Illicit Trafficking” includes all those transactions that are international in scope and that violate law, whether it be the municipal law of a state involved or a treaty or customary international law, whatever they may turn out to be. The phrase “contrary to international law” is particularly expansive considering much of the law is in the drafting phase and the ease with which it can be changed.

Furthermore, the desire to end all private gun ownership worldwide is a final goal of many international law actors. This desire is often hidden or lightly shrouded, but is sometimes flaunted. On July 16, 2001, at a meeting of non-governmental organizations (“NGOs”) at the United Nations Conference on the Illicit Trade in Small Arms, Amparo Mantilla De Ardila of the Fundacio’n Gamma Idear from Colombia said: “We must overlook the differences between the licit and illicit trade in small arms and light weapons. Weapons are almost always associated with injuries and death. Whoever possesses such arms not only uses them for self-defense, but also for assaults.”⁴³

B. Conference On Illicit Trade In Small Arms

One goal of global gun prohibition movement came to fruition in the summer of 2001 in the form of a conference in New York City. On December 15, 1999, the General Assembly of the United Nations, through resolution 54/54 V requested that the Secretary-General of the United Nations conduct a study to determine “the feasibility of restricting the manufacture and trade of such weapons to manufacturers and dealers authorized by States, which will cover the brokering activities, particularly illicit activities, relating to small arms and light weapons, including transportation agents and financial transactions;” and to submit the same at a conference to be held in 2001.⁴⁴ On July 9-20, 2001 this report, *The Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small arms”*⁴⁵ (“The Report”) was submitted to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (“The Conference”). A preparatory committee for The Conference drafted a document entitled “Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects” (“The Draft”).⁴⁶ The Draft set out a plan of action, whereby those sovereign states adopting the Programme of Action would through municipal and international law institute greater control over guns.

Between July 9, 2001 and July 13, 2001, The Conference held a general exchange of views and statements of attending sovereign states, international organizations and United Nations organizations.⁴⁷ On July 16, 2001, The Conference heard statements from NGOs.⁴⁸ After limited negotiation (focusing primarily on concerns of the United States), the Conference edited and finalized the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (“The Programme”). On July 20, 2001, The Conference adopted “the orally amended draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects contained in document A/CONF.192/L.5/Rev.1.”⁴⁹ The municipal and international laws prescribed by The Programme should be heavily scrutinized because they potentially violate the Second Amendment of the United States Constitution.

1. The Presence of the United States at The Conference

On July 9, 2001, John R. Bolton, Undersecretary of State for Arms Control and International Security Affairs, spoke at the Plenary Session. Bolton expressed concern over the domestic legal ramifications of The Draft. Citing the U.S. Attorney General, Bolton explained, “the Second Amendment protects an individual right to keep and bear arms.” He then listed those aspects of The Draft that the United States could not support. Among others, these aspects included “measures that would constrain legal trade and legal manufacturing of small arms and light weapons” and “measures that prohibit civilian possession of small arms.”⁵⁰

Bolton presented the official position of the United States Government, and explained why the United States government was constitutionally precluded from giving support to The Programme in its draft form.

After alteration to address US concerns, the final version of The Programme was adopted. The President of the Conference submitted a short letter scolding the United States and requested that the letter be included in The Report to be sent to the General Assembly. He explained in his letter, “While congratulating all participants for their diligence in reaching this new consensus, I must as President, also express my disappointment over the Conference’s inability to agree, due to the concerns of one State, on language recognizing the need to establish and maintain controls over private ownership of these deadly weapons and the need for preventing sales of such arms to non-State groups.”⁵¹

Thus, although the approved Programme is in closer adherence with the Second Amendment than The Draft had been, the goal of The Convention, the United Nations, the sovereign state participants and the drafters of The Programme is express and clear. As the convention continues to meet, its final goal of outlawing private gun ownership contradicts the right of United States citizens to keep and bear arms.

2. Agenda

Since its conception, a focus of The Convention has been stricter gun controls that limit private gun ownership. This goal

presents difficulties for the United States, where the right to bear arms is protected by the United States Constitution and widely respected as a natural human right. The Report of the Group of Government Experts listed as “options/solutions” 1) “strengthening of national controls on the legal manufacture, acquisition and transfer of small arms and light weapons...” and 2) “prohibition of unrestricted trade and private ownership of small arms and light weapons specifically designed for military purposes, such as automatic guns.”⁵²

Goals to restrict private gun ownership create serious conflicts in the United States. Many sovereign states are in agreement to limit or eliminate private gun ownership and now face the task of implementation. In the United States, not only does no such consensus exist, but many United States citizens feel that the United States government has already, without the addition of gun control treaties, overstepped its bounds regarding the control of private gun ownership.

3. Documents

The Programme of Action is currently the primary international gun control law. The Programme is a treaty intended to assist member states in creating and implementing municipal and international law. The stated goal of these new laws is the eradication of the illicit trade in small arms. The treaty is open for signature by interested states.

The Programme of Action is divided into four parts. The first part, *The Preamble*, sets out in general terms the intent of The Convention. Among a variety of calls for intensified control of gun possession by sovereign states, manufacture and trade, the Preamble recognizes the importance of self defense: “the inherent right to individual or collective self-defense in accordance with Article 51 of the Charter of the United Nations.”⁵³ (For further discussion of Article 51, see Section III.) Thus, the scope, weight and definition of this “right” is not that of the United States Second Amendment but rather a right defined in the international law context. The following paragraph reaffirms the sovereign state’s “right to manufacture, import and retain small arms . . .”⁵⁴ Noticeably absent is any acknowledgement that private individuals have a right to own arms.

The second part, *Preventing, combating and eradicating the illicit*

trade in small arms and light weapons in all its aspects, is divided into national, regional and global measures. The second paragraph of the second part calls for sovereign states “to put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the . . . transit or retransfer of such weapons . . .”⁵⁵

Some of the more striking laws required by the national level section include:

A. To establish . . . national coordination agencies . . . responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects.⁵⁶

B. To establish or designate . . . a national point of contact to act as liaison between States on matters relating to the implementation of the Programme of Action.⁵⁷

C. 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.⁵⁸

D. To put into place and implement adequate laws . . . to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures.⁵⁹

Measures required at the regional level include, “information sharing among law enforcement, border and customs control agencies . . .”⁶⁰

One measure called for at the global level is, “To strengthen the ability of States to cooperate in identifying and tracing in a timely manner illicit small arms and light weapons.”⁶¹

The fourth part, *The Follow-up*, calls for a follow-up conference and a convening of sovereign States on a biennial basis to “consider the national, regional and global implementation of the Programme of Action.”⁶² The fourth part also calls for “examining the feasibility of developing an international instrument to enable States to identify and trace in

a timely manner illicit small arms and light weapons.”⁶³

These governmental controls on guns and the trade of guns are in many ways similar to proposals in the United States Congress which have been vigorously opposed and are unpopular. Americans who oppose additional domestic gun restrictions would be even more opposed to gun restrictions sanctioned by an even larger and less democratic entity.

4. Future

There is no indication that The Conference and its members are moving in a direction closer to that of the United States. Based on the intensity of disapproval aimed at the United States, one expects the politics will push in the direction of both municipal legislation and international law to end private gun ownership.

C. Convention against Transnational Organized Crime

The Convention on The Illicit Trade in Small Arms is paralleled by a second effort at global gun control. The second effort is an elaboration of The Convention against Transnational Organized Crime.⁶⁴ Ad Hoc Committees are drafting the gun control protocol attached to the original treaty. A ninth session convened in Vienna, June 5-16, 2000.

The Programme references the Protocol twice. The first page of The Report to The Convention on Illicit Small Arms states:

At the Global level two important processes are underway. First, the United Nations General Assembly process, supported by expert studies, has reached the stage of preparing for the United Nations Conference on the Illicit Trade in Small arms and Light Weapons in All Its Aspects, scheduled to be held in New York from 9 to 20 July 2001. In Vienna, under the aegis of the Commission on Crime Prevention and Criminal Justice, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime is working on a draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.⁶⁵

Paragraph 20 of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects reads:

Recognizing that the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, establishes standards and procedures that complement and reinforce efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects,⁶⁶

These two efforts are inseparable and are aimed at accomplishing the same two goals: global gun control and the eradication of private gun ownership. Strikingly, the Programme approvingly references the “standards” and “procedures” in the Protocol, which is still being negotiated.

1. The Convention

The web page of the United Nations Convention against Transnational Organized Crime states “[The Convention on Transnational Organized Crime] is the first legally binding UN instrument in the field of crime.”⁶⁷ It requires that sovereign states which are party to The Convention must pass domestic laws establishing four criminal offenses. These crimes are defined in a typically amorphous fashion that leaves the elements of the crimes open to interpretation and evolution. The four crimes are: 1) participation in an organized criminal group, 2) money laundering, 3) corruption, and 4) obstruction of justice. The opening web page of The Convention on Organized Crime reads, “It is hoped that upon ratification The Convention will emerge as the main tool of the international community for fighting transnational crime.”⁶⁸

Primary goals of the Organized Crime Convention, as stated on the web page under *After Palermo: an overview of what the Convention and Protocols Hope to Accomplish* are:

1. Boosting the exchange of information among nations on patterns and trends in transnational organized crime;

2. Cooperation with relevant international and non-governmental organizations;
3. Checking periodically on how well countries are implementing the treaty;⁶⁹

In the body of The Convention is the statement that one of the first protocols will be gun control.

2. The Protocol

The third optional protocol of The Convention on Transnational Organized Crime is under negotiation and deals with the illicit manufacturing of and trafficking in firearms. According to the web site, *this Protocol against the Manufacturing of and Trafficking in Illicit Firearms, Ammunition and Related Materials* intends to require states to act in the following ways:

1. Pass new laws aimed at eradicating the illegal manufacturing of firearms, tracking down existing illicit weapons and prosecuting offenders;
2. Cooperate to prevent, combat and eradicate the illegal manufacturing and trafficking of firearms;
3. Tighten controls on the export and import of firearms;
4. Exchange information about illicit firearms.⁷⁰

In hopes of furthering The Protocol, sovereign state parties are required to pass new laws. These include:

1. Criminalize the manufacturing and trafficking of illegal firearms;
2. Confiscate firearms that have been illegally manufactured or trafficked;
3. Hold information for ten years that is needed to trace and identify illicitly manufactured and trafficked firearms, including the manufacturer's markings, country and date of issuance, date of export, import or transfer of firearms;
4. Register and approve brokers for the manufacture, export, import or transfer of firearms;
5. Mark each firearm, when manufactured, with a serial number as well as the manufacturer's name and

location; and

6. Mark confiscated firearms kept for official use.

The Protocol also comments upon the transfer of illicit firearms. In hopes of preventing illicit trade, sovereign state parties are required to “adopt new controls includingRefusing to allow the transit, re-export, retransfer or transshipment of firearms to any destination without written approval from the exporting country and licenses from receiving”

The goals and required measures of The Protocol are related to those contained in the Conference on the Illicit Trade in Small Arms and Light Weapons and are equally problematic under United States law. The Programme, in its final form, focuses primarily on data collection and regulation. Alternately, The Protocol introduces the aggressive notion that violations of the date collection and regulation may be criminal and that sovereign states will be obligated to prosecute violations.

III. CONFLICTS BETWEEN INTERNATIONAL LAW AND UNITED STATES DOMESTIC LAW

The gun control measures created in The Conference on Illicit Trade in Small Arms and in The Convention against Organized Crime would at a minimum raise serious United States constitutional concerns. Both the Individual Rights and Collective Rights theories of the Second Amendment would place obstacles in the path of international gun control. The Individual Rights theory would create an individual civil right for United States citizens that could not be infringed upon by either domestic laws or international laws.

The Collective Rights theory, although a weaker protection against domestic laws, would still serve as a protection against infringement by authority outside of the United States. Many of those in the Collective Rights camp view the executive and legislative branches as protectors of the Second Amendment. Such a domestic legal and governmental order does not anticipate a mass disarmament by an international body. The ways in which the rights of private United States gun owners could be infringed are endless.

Clearly, a final goal of eliminating private gun ownership would violate the Second Amendment. Criminal enforcement of

data collection and the sharing of this information with other sovereign states, private organizations, supra-national organizations and international organizations and uniform marking and licensing of all transfers present constitutional problems.

The popularity of global gun control measures among many governments around the world is increasingly evident. The push for such gun control remains strong. These global gun control measures will go into effect in sovereign states that adopt the treaties. The United States has not adopted these treaties and is unable to do so because the treaties call for domestic laws or international laws that conflict with the United States Constitution.

The possibility of conflict does not stop there. There are a variety of ways that these gun control laws could affect the rights and obligations of parties within the United States. The first way is the possibility that the President of the United States signs one or both of these treaties. Signature by a United States President would indicate to the international community that the United States intends to abide by the gun control laws, with or without ratification by the Senate.

A second way these gun control laws could affect United States parties is in the event that gun control becomes a customary international law. Even if the United States did not sign on to either treaty, if the United States began to abide by the treaties, the United States may, in effect, be consenting to the treaties becoming customary international law. In the eyes of an international court, the United States, by following the treaties, is consenting to be bound by the treaties in the future.

To avoid accidental consent, the United States should expressly state that as a nation, the United States does not consent to the gun control treaties and that any activity consistent with the treaties is not intended to recognize the treaties' legal status. If the United States does not make such an express statement to the international community, the United States might, arguably, be expected to maintain any and all gun control measures that the treaties require.

A third way the gun control measures could affect United States parties is through nonconsensual customary law. Nonconsensual customary international law may arise as a result of international practice. This international practice may be evidenced by events not approved by the United States but

eventually held binding on the United States. For example, both the Conference on the Illicit Trade in Small Arms, the Conference on Transnational Organized Crime and ensuing Treaties have placed international gun control in the consciousness of the international community. In many ways, the international community is in agreement on gun control, with the exception being the United States. The respect and adherence by numerous countries to strict gun control adds weight to the notion that a common understanding of how sovereign states must deal with private gun ownership can be established with or without every country's consent.

Assuming that the United States gives express consent to global gun control or that gun control becomes customary international law, the global gun control will conflict with United States constitutional law. The question then becomes, which law will triumph?

The answer is simply: it depends. If a domestic United States Court hears the case, the treaty may be held invalid as violating the United States Constitution.

If however, an international court, such as the International Criminal Court or the International Court of Justice considers the question, the international law will take precedence. The party found in violation of the international law will be held accountable, perhaps criminally. The very notion of an American citizen standing trial in an international court remains controversial. Critiques of the International Courts have focused on jurisdiction and constitutional conflicts. In particular, American commentators focus on the lack of protection of the Bill of Rights in international courts.⁷¹

The United Nations Charter and the Universal Declaration of Human Rights contain significant elements of personal liberty owing to the Enlightenment tradition. The United Nations Charter, Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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.⁷²

Although Article 51 recognizes “the inherent right of individual or collective self-defense,” there are important limits. First, this “right” would only apply to sovereign states. Second, the Article requires a report to the Security Council. Third, the Article reaffirms the Security Council’s “authority” to “take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

Benoit Muracciole, from the Coalition Francais, asserted what might be a typical rebuttal to the assertion of Article 51 protects gun ownership, when he addressed a group of non-governmental organizations at the United Nations conference on the Illicit Trade in Small Arms.⁷³ In an emotional appeal he stated:

For a week now, some governments have cited Article 51 of the Charter on the sovereign rights of States to self-defense as the definitive reason for not taking concrete steps aimed at controlling the illicit trade in small arms and light weapons. But what will happen when there is no one left to defend and no State borders to protect because all our citizens have been killed by rapidly proliferating small arms?⁷⁴ We should all remember that before Article 51, the Charter elaborates certain other important principles, namely those that call for development and protection of human rights. Specifically, Article 26 calls for the establishment of an arms control regime.⁷⁵

Article 26 states:

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations

for the establishment of a system for the regulation of armaments.⁷⁶

The Universal Declaration of Human Rights also contains a submerged version of a right to rebellion in the third recital of the Preamble: “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.”⁷⁷ During the drafting convention and after extensive discussion and refinement, the right to rebel was relegated to the preamble and, like Article 51 of the United Nations Charter, most likely does not carry any explicit legal weight.⁷⁸

IV. CONSEQUENCES OF THIS CONFLICT

How might a conflict between U.S. and international law over guns arise in the future? To answer this question, let us begin by examining to whom a treaty might apply.

A. Jurisdiction

The contents of a Symposium entitled *The Rule of Law in the Global Village: Issues of Sovereignty and Universality*⁷⁹ held in Palermo to celebrate the signing of the U.N. Convention Against Organized Transnational Crime are telling. University of Florida Professor Winston Nagan introduced the theme and delivered a speech focusing on Sovereignty. In his speech he targeted traditional notions of sovereignty as dangerous, and he suggested that because organized crime is a danger to sovereignty, that same sovereignty should be sacrificed to international organizations.⁸⁰

Nagan said: “Organized crime is thus a clear and present threat to the sovereignty of the state when based on the authority of the people.” Nagan’s solution was “cooperative sovereignty” for which he did not provide a useful definition. He concluded: “there is a changing idea of the relationship of the international Rule of Law to the idea of state sovereignty. The expression of cooperative sovereignty in this kind of treaty is a vital and important constitutional principle of the new millennium.”

Nagan confronted the United States’ opposition to the

Rome statute which creates the International Criminal Court. He concludes the United States is “motivated by political factors as well as security concerns, it is also highly influenced by the recrudescence of the idea of ‘sovereignty’ and the concern that international obligations are corrosive of this idea.” When expansion of a court’s jurisdiction will conflict with fundamental freedoms of American citizens, such as the right to bear arms, the United States should be concerned.

Mark Gibney, of the University of North Carolina, offered an essay which stated the goal clearly:

It is within this context of changing notions of state sovereignty, but also changing ideas about our relationship and our responsibilities to others, that the principle of universal jurisdiction must be viewed. Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with either the crime, the alleged offender, or the victim.⁸¹

However shocking it may be to the American citizenry, Gibney accurately concluded, “one would be hard pressed to find a recent international criminal convention that does not provide for universal jurisdiction. Moreover, many of these conventions now mandate jurisdiction, rather than using the permissive ‘may’. In sum, we live in a world where the notion of universal jurisdiction is not only commonly accepted, but seemingly honored and promoted.” Gibney closed with a call for a “real system” of universal jurisdiction and an international civil court where individuals may bring suit against the sovereign state where they live.

The International Criminal Court is perhaps the best example of the ambitious jurisdictional reach of international courts. The Rome Statute of the International Criminal Court sets out the Preconditions to the exercise of Jurisdiction for that court in Article 12:

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

B. Involvement of a United States Citizen Absent an International Element

How might these hurdles be met involving United States citizens? Who may be a party to a suit arising out of these international gun control laws?

First: who might file a suit? One can imagine a member sovereign state to the treaties filing suit. Additional possibilities include foreign nationals, foreign corporations or international organizations. As an example, The Rome Statute of the International Criminal Court, Article 4, reads, “The Court shall have international legal personality. It shall have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”⁸² One may presume that adjudicating international criminal law is one of the court’s fundamental functions and that allowing a non-state party to file a complaint with international prosecutors necessary for that function.

Who might a suit be brought against? The most likely answer is a sovereign state; however, a suit might be brought against an individual, a corporation or another non-state entity. It is unlikely that the United States would be a party due to the United States’ unique position as the most powerful nation in the world. Yet United States citizens, corporations and non-state entities should not feel as protected. In an increasingly global world, even those actors located within the United States may have ties to member states or conduct that connects them to activities occurring in member states.

Assuming current international gun controls do not become customary international law, the gun controls are only applicable to persons who meet the international court’s jurisdiction as reached through the member states. The current international corporate structures demonstrate the complexities of just who is subject to international treaties.

One can imagine a member state freezing the assets of a

corporation or individual located in the United States until that individual or corporation abides by the international gun controls. Violations could include such simple acts as not making guns in accordance with international norms, not keeping internationally approved transactional histories of guns or even refusing to report data about gun ownership to an international organization, to a private organization or even to a foreign sovereign state.

This last element, the control of data, is the most sensitive and currently the most prominent. Once data are collected and handed over, data cannot be taken back nor is there any practical way to prevent the entity in possession of the data from sharing it with whomever the entity pleases absent an enforcement mechanism.

Endnotes

FNa1 Member Georgia bar 2002, J.D. Tulane Law School, 2002. B.A. Emory University, 1999. A.A. Oxford College of Emory University, 1997. The author would like to thank Professor Raymond T. Diamond for his help and support in editing this Article. The author would also like to thank Janice Alonso and Daniel Morgan for help in editing. Thanks also to my family, Bruce, Jan and Andrew, and to my Grandmother, Nell Barber, for their support.

1. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71, 79 (2000). For an analysis of the delegation of Federal Power to international organizations, including a synopsis of the change from traditional international law to “new” international law see Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1556-62 (1999).

2. S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 18 (Sept. 7).

3. Ku at 79, citing Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1556-62 (1999).

4. Ku at 79.

5. The U.N. Charter was signed in San Francisco on June 26, 1945.

6. US Const. art. VI, §2.

7. US Const. art. I, 1.

8. US Const. art. V.

9. U.S. Const., art. III §2, cl. 1, art. VI, § 2]

10. See Ku, at 77.

11. Jacques Chirac, “Universal Values,” The United Nations Millennium Summit 6-8, September 2000, at 6.

12. Vienna Convention, art. 2(1)(a).

13. Vienna Convention, art. 18.
14. Vienna Convention, U.N. Doc A/CONF.39/27 (1969) (signed at Vienna May 23, 1969; effective January 27, 1980; not effective for the United States.)
15. Mark W. Janis, *An Introduction to International Law* 42 (3d ed. 1999), citing Statute of the International Court of Justice, art. 38(1)(b), as annexed to the Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 3 Bevans 1153.
16. Janis, at 42-44.
17. *Id.* at 50-51 (citing U.N. Charter art. 13(1), 59 Stat. 1031 T.S. No. 993, 3 Bevans 1153, signed at San Francisco June 26, 1945; effective October 24, 1945).
18. An example of disproportionate representation by NGOs can be found in the summaries of statements made by NGOs. A UN “press release” on its second page quotes Mary Leigh Blek, head of the Million Mom March: “the United States’ position expressed during the ministerial segment represented ‘a minority view of a minority government’” and Ms. Blek “sought to set the record straight.” *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at page 1(a), (16 July, 2001). The UN press release quoted her again: “the head of the United States delegation to this Conference does not represent the thinking of the American public.” *Id.* at 10. Available at <www.un.org/News/Press/docs/2001/DC2792.doc.htm> Notably, the Million Mom March has since gone out of business as an independent organization, and has been absorbed by another gun prohibition organization.
19. United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001). See also Letter of Transmittal dated 9 February 2001 from the Chairperson of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small arms”, addressed to the Secretary-General, citing para. 14 of resolution 54/54 V.
20. A list of the NGOs that requested accreditation is available at <<http://www.un.org/Depts/dda/CAB/smallarms/ngolist.htm>>
21. Janis, at 86, citing H. Kelsen, *Principles of International Law* 553-588 (2d ed. Tucher 1966).
22. Vienna Convention, art. 26.
23. Vienna Convention, art 27.
24. Janis, at 27, citing the Permanent Court of International Justice in its 1932 opinion on the Treatment of Polish Nationals and Other Personas of Polish Origin or Speech in the Danzig Territories. 1932 P.C.I.J. Reports, ser. A/B, no.44, at 24.
25. U.S. Const. art. VI, § 1, cl. 2.
26. U.S. Const. art. I, § 7.
27. US Const. art. II, § 2.
28. Reid v. Colvert, 354 U.S. 1 (1957).
29. *Id.* at 17, 77 (1957). See, e.g., United States v. Minnesota, 270 U.S. 181, 207-08 (1926); Holden v. Joy, 84 U.S. 211, 242-43 (1872); The Cherokee Tobacco,

- 78 U.S. 616, 620-21 (1870); *Doe v. Braden*, 57 U.S. 635, 657 (1850); *cf. Marbury v. Madison*, 5 U.S. 137, 176-80 (1803).
30. Reid, *supra* note 28, at 16-17 (discussing the Virginia Convention of the adoption of the Constitution, 3 Elliot's Debates (1836 ed.) 500-19).
31. *Geofrey v. Riggs*, 133 U.S. 258, 267 (1890).
32. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). *See also Edye v. Robertson*, 112 U.S. 580, 598 (1884).
33. It should be noted that some international courts claim jurisdiction over United States citizens. This is seemingly in violation of the United States Constitution. Although relevant, discussion of the constitutionality of international courts is beyond the scope of this article. For scholarship addressing such a proposition, Kristafer Ailsieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999).
34. U.S. Const. art. III, § 1.
35. U.S. Const. art. III, § 2, cl. 1.
36. *Ex parte Milligan*, 71 U.S. 2 (1866).
37. *Id.* at 122.
38. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001) (established pursuant to General Assembly resolution 54/54 V of 15 December 1999, citing A/54/2000).
39. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 at para. 17 (2001).
40. *Id.*, citing A/54/2000, paras. 241 and 245.
41. *Report of the Group of Government Experts*, Annex I, Clarification of key terms, A/CONF.192/2.
42. *Id.*
43. *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at 2 (statement made on behalf of Fundacio'n GAMMA IDEAR from Columbia at the UN Conference on the Illicit Trade in Small Arms 8th meeting (AM), available at <<http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>>
44. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001)(note by the Secretary-General, A/CONF. 192/2).
45. *Id.*
46. U.N. Doc. A/CONF.192/PC/L.4/Rev.1
47. For a complete list of states by date and meeting, *see* U.N. Doc. A/CONF.192/15 at paras. 7-14.
48. *Id.* at para. 15.
49. *Id.* at para. 24.
50. John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, statement at the Plenary Session of the UN

Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 9 July, 2001 (available at <<http://www.un.org/Depts/dda/CAB/smallarms/statements/use.html>>)

51. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15 (statement by the president of the Conference following its adoption).

52. *Report of the Group of Governmental Experts*, *supra* note 45, at par. 31.

53. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15, Sec. I, para. 9.

54. *Id.* at § I, para. 10.

55. *Id.* at § II, para. 2.

56. *Id.* at § II, para 4.

57. *Id.* at Sec. II, para 5.

58. *Id.* at § II, para 9.

59. *Id.* at § II, para 12.

60. *Id.* at § II, para 27.

61. *Id.* at § II, para 36.

62. *Id.* at § IV, para 1(a-b).

63. *Id.* at § IV, para 1(c).

64. U.N. Doc. A/55/383 (available at <http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/38>).

65. *Report of the Group of Governmental Experts*, *supra* note 45, at para. 6.

66. Programme of Action, *supra* note 53 at Sec. I par. 20.

67. Available at <<http://www.undcp.org/palermo/theconvention.html>>

68. Available at <<http://undcp.org/palermo/theconvention.html>>

69. Available at <<http://undcp.org/palermo/sum1.html>>

70. *Id.*

71. See Kristafer Ailsieger, *Why the United States Should be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999); see also Lee A. Casey and David B. Rivkin Jr., *The International Criminal Court vs. The American People*, The Heritage Foundation, Backgrounder, No. 1249, (Feb. 5, 1999), available at <<http://www.heritage.org/library/backgrounder/bg1249.html>>

72. U.N. Charter, art. 51.

73. United Nations Conference on the Illicit Trade in Small Arms, U.N. Doc. DC/2792 at 11, 16 July 2001 (available at <<http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>>)

74. There is no indication of that Muracciole was being facetious or ironic in making such an implausible prediction.

75. United Nations Conference on the Illicit Trade in Small Arms, *supra* note 74.

76. U.N. Charter, art. 26.

77. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Preamble, 3rd recital (1999).

78. For an extensive discussion of the evolution of the right to rebel, see Morsink, *supra* note 77, at 302-20 (200).

79. Held 12 December 2000.

80. Winston Nagan, *The Rule of Law: Lofty Idea and Harsh Reality*, 12 December 2000, available at <<http://www.odccp.org/palermo/convmain.html>>

81. Mark Gibney, *The Rule of Law and Universal Jurisdiction*, available at <<http://www.odccp.org/palermo/convmain.html>>

82. Rome Statute of the International Criminal Court, 1998, art. 4.

A Billion Dollars Later: The Canadian Firearms Act, Revisited

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Canadian governments, for over 30 years, have too often indulged in ill-considered or extreme over-regulation to address ideological or emotional issues. When added elements of political expediency and social correctness ignore or distort reality and practicality in legislation, however, the results can be damaging and counter-productive. The following, from now eight years of hindsight, is an analysis of a classic example of pointless and destructive legislation and regulation.

INTRODUCTION

On December 5, 1995, the Canadian Liberal Government proclaimed Bill C-68, the *Firearms Act*, one of the most enduringly contentious acts in recent political history. The *Firearms Act* was a major escalation from earlier firearms acts, C-51 of 1977 and C-17 of 1991, each more restrictive than its predecessor. The act was zealously ram-rodged by then-Justice Minister Allan Rock in 1994-95; Parliamentary committee hearings and cross-country “public consultations” were window-dressing. There was no listening, only proselytizing, as obvious and basic flaws and problems were anticipated and predicted, and dismissed. The minister also promised guaranteed that the cost of C-68 would not exceed \$85 million, and that new licensing and registration fees would cover all costs.¹

On December 6, 1989, an insane misogynist named Marc Lepine in a mass shooting murdered 14 women students and then shot himself at L’Ecole Polytechnique, University of Montreal. Lepine had no prior criminal record, and possessed a Firearms Acquisition Certificate (FAC). There was general

agreement even at the time that no law, firearms licensing, or registration could have deterred such a psychotic attack, and a very slow police response was partly blamed for the number killed. In typical emotional over-reaction, however, that single event led to Conservative then-Prime Minister Kim Campbell introducing Bill C-17 in 1991 (passed Dec. 6), a severely tightened firearms law taking full effect in 1994.

Then in 1992, after C-17 had already been passed, came another mass murder at Concordia University, also in Montreal. A disgruntled or psychotic professor, Valery Fabrikant, shot and killed four male professorial colleagues, and then himself. As with the Lepine murders, the guns were blamed. The Fabrikant killings did not generate the extreme emotion of the earlier Lepine murders (which yet continues), but they were still another move toward stigmatizing guns and gun owners, and the marginalizing of the shooting sports in Canada. Another emotional and media-sensationalized crime, equal perhaps to that of the Lepine murders, then came with the sawed-off-shotgun murder of Georgina Leimonis, during a cafe hold-up in Toronto in April 1994. Coming just as C-68 was in the works, the media-created frenzy led Allan Rock to new heights of rhetoric, and to extreme suggestions for his developing legislation.

Legislation hastily drafted in an emotional climate, and in reactive response to isolated events often turns out to be poor public policy. So it was with C-68, the *Firearms Act*.

Yet another firearms law, following so soon on C-17 which had by then been in effect for only a few months, had not been mentioned in the Liberals' policy "Red Book," or in the 1993 election campaign. It first emerged from a statement by the new prime minister, Jean Chrétien, that he would like to see "far fewer guns in Canada," in the Liberal Party policy convention of May, 1994.² The new Justice Minister, Allan Rock, had already intended to introduce universal firearms owner-licensing and registration, a position the Liberals had earlier dismissed as pointless and too expensive in their 1976 policy convention. Rock, even preceding Chrétien, in late 1993 had commented that "the only people who should have guns in this country are police officers and soldiers".³ With that, Canadians had a clear statement of the prevailing political attitude.

A bit of understanding of Canada's British-derived parliamentary system is necessary here. First, as America's

immediate northern neighbor, Canada's population is about 30 million, roughly one-ninth that of the U.S., or less than California alone. There are 10 provinces (equivalent to states) and three territories, but all criminal law, including firearms law, is federal, not provincial. Like most British-derived systems, Canada has a cabinet form of government, though greatly distorted. The Prime Minister (PM), and a cabinet appointed by him, form the government and operate virtually as an elected autocracy. Without further confirmation or any oversights, the PM has sole control over all senior appointments, including cabinet ministers, senators, federal and supreme court judges, and senior civil servants. Thus the government is laden with patronage and party favoritism, and operates largely at the PM's dictates.

While there are also 301 elected Members of Parliament (MPs), they are responsible far less to their electorates than to their parties and party leaders. Canadian MPs have nothing even approaching the independence or influence of American congressmen/women, but are subject to rigid party discipline and, with rare exceptions, must vote the party-line on legislation. Thus ordinary MPs have little real influence on government, and within the governing party are merely rubber stamps for it.

Canada had tried general firearms registration twice before, in 1920-21 on a decentralized local and provincial level, and in 1940-45 on a national level. Neither had included owner licensing. The earlier attempt was repealed in 1921 for lack of compliance. The World War II order-in-council regulation, while it registered nearly two million guns, was extremely unpopular and rescinded when the war was ended.

And so, with governance by PM-cabinet autocracy, in spite of clear and explicit warnings about probable opposition and costs, C-68 was in preparation before mid-1994. Every mistake and failing of the *Firearms Act* that is now surfacing was clearly foreseen and predicted, but ignored or rejected, in 1994-95.

The *Act* was then passed in 1995 as a government-forced bill in a stacked-deck situation a few radical-feminist lobbyists, combined with an obstinately anti-gun Prime Minister and Justice Minister, and the "yes-master" vote of a Liberal-majority Parliament. All minority parties were opposed. Allan Rock, in dismissing criticism out of hand, in response to a House of Commons question arrogantly stated that "We govern by what is Right!"²⁴ C-68 thus emerged as the creature of just two politicians

with a political obsession but impervious to evidence or reason. Because of that, there was no apparent thought or concern either for lessons of experience or to downstream effects or implications. That mind-set remains.

The 1995 *Firearms Act* provided, in two stages, for the individual licensing of all firearm owners and, separately, for the federal registration of all firearms. Handgun registration, in place since 1934, had grown substantially erroneous and obsolete, and thus handgun re-registration (the onus on owners) was also required. For the first time a law criminalized, retroactively, the mere unlicensed possession of any firearm, as well as the possession of any unregistered firearm, regardless of whether the firearm or its owner had ever been involved in any active or overt crime.⁵

The *Act* provided as well for at-home locked firearms storage, as had C-17 previously, but also for at-home inspections. Included were nasties such as the retroactive criminalization, coerced or search-warranted at-home “inspections” including “taking” of “things” or “samples” (equaling search-and-seizure), compelled self-incrimination, reverse onus, and confiscations or compelled surrenders without compensation, some just beginning to be tested in the courts.⁶ Some of the law is vague or ill-defined, and is open to future regulations. C-68 also gives the Minister of Justice very wide and sole discretion to form and decree regulations, some of which go beyond the *Act* itself, without reference back to Parliament.⁷

The *Firearms Act* began life with its many critical flaws largely because Mr. Rock plowed ahead with little heed to advice or warnings. The Department of Justice had and has a attitude that participation in the shooting sports is at best a “questionable activity,” essentially anti-social or deviant behavior. This feeling is supported by the Prime Minister and has not changed through two succeeding Justice ministers. Thus the present Liberal government remains antagonistic to anything regarding firearms or the shooting sports.

As one of its greater flaws, C-68 proceeded from the extremely naive assumption that it could achieve or compel total public compliance. This ignored the experience of every other country which has tried universal private firearms licensing and registration.⁸ It also ignored the long-ingrained Canadian self-defense mechanism called “quiet non-cooperation,” a form of passive civil disobedience which often frustrates excessive

regulation or government intrusions. (Quiet non-cooperation, for example, is the root of Canada's estimated 15 to 20% of GDP in the underground economy.)

ACTUAL GOALS

Broadening out far beyond a focus just on "crime" or "public safety," C-68 also ventured off on a much wider sweep and more insidious course, becoming in effect a social-engineering law. The 1995 *Firearms Act* and its subsequent Regulations of March 1998, rather than a crime-deterrent law became largely a general and direct attack on the whole of the recreational shooting sports and its extensive support industry. Judging from the earliest Chrétien-Rock political statements, this seems to have been quite deliberate, not a manifestation of the "law of unintended consequences." Allan Rock had earlier commented on CBC television that C-68 procedures were being made as slow and convoluted as possible to discourage personal gun ownership.

C-68 and its regulations are laden with nuisance factors and newly imposed multiple gun-owner costs which have no credible rationale except as shooting sports discouragements and impediments.⁹

The new law retroactively created several new administrative crimes as it set out to bureaucratize and harass hunters, farmers and rural landowners, target shooters, and collectors. With high and multiple new user costs, complex over-regulation, direct personal intrusions, and criminal penalties, the *Act* focused substantially toward the wrong audiences for the wrong reasons. Thus it was guaranteed to arouse strong and relentless opposition, widespread civil disobedience, and long-lasting political antagonism. The Prime Minister, Mr. Rock, and the Liberal government had been well warned, but neither listened nor seemed to care.

FIREARMS NUMBERS IN CANADA

No one knew, or knows even today, how many gun owners or firearms there are in Canada. As a percentage of population, however, private gun ownership is probably half or a bit less than that in the United States, with guns and gun owners in some 20-25% of Canadian households. In 1974, Statistics

Canada estimated there were 11,186,000 firearms in Canada. Customs records indicate about five million-plus total imports (not including smugglings), about a quarter-million a year, since then. Deducting exports and seizures or losses, this indicates a probable total of at least 13 to 15 million firearms in Canada by 2000.

Based on phone-polling data, however, the government estimated in March, 1994, that there were 3.3 million gun owners owning just 7.4 million guns, averaging 2.24 guns per owner. Following on another Fall 2000, phone survey of 6145 households, the government then reduced its estimates yet again, to 2.46 million gun owners, with the number expected to decline to 2.3 million.¹⁰

Only some 60-70,000 firearms have been turned in to or seized by police since 1995. Thus by the government's own polls and estimates, if over 800,000 gun owners had supposedly disappeared in only the 1994-2000 six years, their nearly two million guns must have vanished as well, plus several more millions since 1974; but vanished to where? Dealer inventories, gun sales, or exports had not increased. As solid inanimate objects, guns also do not simply evaporate. The huge inconsistency in estimates remains officially unaddressed and unexplained.¹¹

The most logical answer is that as older hunters and shooters have given up the shooting sports, their guns have gravitated by sale, gift or inheritance to younger but perhaps fewer shooters. The Department of Justice as of 1998 was using an estimated average figure of slightly over two guns per owner. As license and registration hard figures emerged through 2002, however, it became clear that, though there may (or may not) be fewer gun owners than in 1994, each owner on average owned more guns. Surprisingly, as of April, 2002, registration-to-license ratios began coming in at roughly four guns-per-owner, nearly double all previous estimates. Thus while the number of gun owners was (perhaps) declining, gun ownership density had apparently increased.

Other independent polls and hard-figure estimates have suggested variously between 4.1 and eight million gun owners in Canada, of anywhere between 11 and 21 million guns. A Canadian Shooting Sports Association study of early 2001 estimated five to 5.5 million firearms owners; Gary Mauser estimated 4.5 million, and the National Firearms Association

estimated seven million.¹² Though the government firmly believes in its own survey figures, its gun owner and density estimates are only half of any others.

Thus, while there are no reliable hard figures, there is an emerging independent consensus of some 4.5 to six million owners of roughly 12 to 14 million guns in Canada. It becomes necessary here to settle on rough base figures for firearms ownership and gun numbers, in order to then estimate licensing and registration compliance. So, this article will base further figures on a mid-range estimate of five million owners of 13 million guns in Canada.

Telephone polls or surveys seem, at best, of questionable value here. Questions can be skewed or biased, and in response to privacy-intrusive or potentially socially-stigmatizing or self-incriminating queries from unknown phone questioners, people will often lie or decline response. The *Firearms Act* has in fact increased incentives to lie or to decline response, which may partly explain the difference between the government's 1994 and 2000 polls. Many polls also do not reveal the responder-refusal or question-refusal percentages. In any event, Canada per capita is generally considered the world's third or fourth most gun-owning country, behind only the U.S., Norway, and Switzerland. All indications also point to very substantial under-reporting or non-admission of firearms ownership, that hardly unique to Canada.

RATIONALES

The motivation for the *Firearms Act* was both ideological and political. It was emotionally inspired and politically-motivated social-engineering legislation pure and simple, a feel-good law to please urban left-liberal voters, but without any practical necessity or credible rationales. All evidence indicates C-68 was also a very deliberate move, not as a supposed crime deterrent, but far more broadly to discourage private gun ownership and related shooting-sports activities. This has been frequently denied at all federal government levels, but is the obvious intent and the clear effect none-the-less.¹³

The 1989 Lepine murders had generated a reaction in C-17 of 1991, but there had been no upward statistical spikes or trends in armed crime or homicide rates generally. Violent and gun-usage crime rates through the '90s were in fact declining.

Firearms accident rates had already been dropping steadily for decades, and firearms were and are at the bottom of the list of causes of death in Canada. Guns were involved in less than 2% of all reported crimes.¹⁴ Guns were also very low in polling responses of pressing public concerns. The previous firearms law, C-17 of 1991, was not yet fully in effect and too new even to be evaluated. Pre-existing law had included federal handgun registration since 1934, and long-gun five-year Firearms Acquisition Certificates (FAC), with police criminal records checks, since 1978.¹⁵ Well before C-68, Toronto police would not just record-check, but would personally interview FAC applicants at home, and would delay approvals even for unpaid parking tickets.¹⁶

C-68 was based on two ministers' personal biases and fixations. Thus the stated motives of "crime control" and "public safety" were invented and transparent fictions, for none fit known facts, statistics, or experience. The several million people and firearms now to be licensed, taxed, registered, regulated, and inspected were never those likely to be involved in "crime" or as threats to "public safety." They were, in fact, among the least likely.

The Prime Minister and Mr. Rock also ignored 20 years of academic studies and analyses in many countries, as well as decades of comparative crime statistics. Without exception, all of that extensive research and data has so far failed to show that broad or strict firearms controls or the prevalence of privately-owned firearms influence actual armed or violent crime rates.

Many countries with very restrictive or prohibitive gun-control laws, such as Brazil, South Africa, Russia, Jamaica, or Mexico, are also armed robbery and homicide world leaders. Others with fewer controls and very substantial private gun ownership, such as Norway, Finland, or Switzerland, have quite low crime rates. Still other countries with recently stiffened firearms laws, notably Australia and Britain, have since experienced sharply rising armed crime rates. The dogma that More-Guns-Equal-More-Crime, dissipates under even cursory examination. There are no Canadian correlations or cause-and-effect relationships that any study or long-term crime analysis has ever established between extents or densities of private firearms ownership and armed or any other crime rates.¹⁷ The evidence is not there, in Canada or elsewhere.

A few U.S. states and cities tried the universal licensing and

registration route in the 1970s and early 1980s. Some even tried total bans on private handgun ownership, notably Chicago, and Washington, D.C. All have found the firearms license-registration concept to be an overly-expensive, unenforceable and ineffectual failure, with high administrative costs and a zero effect on crime rates. There is, however, some considerable and growing indication that more open firearms laws, and more extensive private gun ownership, may of themselves actually be crime deterrents.¹⁸ Recent rising crime rates following extreme new firearms laws in Britain and Australia add credence to this.

Thus the Canadian *Firearms Act* lacked credibility and, particularly with its broad new ideological thrust against the shooting sports, touched off the high level and volume of opposition, quiet non-cooperation and open defiance, and an ever-growing cynicism toward government. The feeling among the fifth to quarter of the Canadian population who are gun owners and hunters or target shooters was simple. If my government distrusts me, as a peaceful taxpaying citizen, to the extent of treating me as a potential criminal and even to creating new crimes just for me, and consistently lies to me, then why should I trust it? Thus the whole firearms licensing-registration-criminalizing concept is both emotional and polarized, and has created a pervasive distrust of government as well as a real national urban-rural and east-west divisiveness. As a regionally fragmented country anyway, Canada does not need any of that.

COST-BENEFIT

As politically-driven legislation, the *Firearms Act* lacked advance cost-benefit study or analysis. There was no “due diligence” assessment. No preliminary studies were done on whether C-68 might be or even could be effective, in any direction, or could achieve any tangible benefits of crime deterrence or improved public safety. There were no studies on what its broader economic effects might be, or even whether the *Act* was constitutional (which much of it is not).

The only Canadian firearms law that has ever been officially reviewed or examined from hindsight, was a Department of Justice assessment, which was released in 1994. That study of the 1977 law C-51 came to no definite conclusions, and was criticized for bias and slanting.¹⁹ Thus no one in government knows, or even appears to care, whether any Canadian firearms

law has ever had any demonstrable deterrent or inhibiting effect on broader armed crime, homicide, or suicide rates. Comparisons of multi-decade recorded crime rates suggest they have made no difference whatever.

The Auditor General of Canada in 1993 had recommended an audit and analysis of the effectiveness of C-51 and C-17, stating that “no statistical basis” existed to justify C-17, and further recommended a “comprehensive evaluation.” Nothing happened and the recommendation was ignored, as planning immediately began on Allan Rock’s C-68. The government was uninterested in objective evaluations. As recently as a meeting of the Liberal-dominated federal Justice Committee on February 5, 2002, two MPs, Garry Breitkreuz and Vic Toews (both Canadian Alliance), moved again for a broad re-examination of the *Firearms Act*. First, their motion was somehow excluded from the meeting notice. Finally, the committee chairman, Andy Scott (Liberal) deferred the motion and declined even to accept it for a future agenda.²⁰

As a sop to shooters and hunters, Allan Rock in 1995 had also appointed a volunteer “User Group on Firearms” which, like the Auditor General and the opposition members on the Justice Committee, has made many common-sense recommendations. The “User Group,” however, like the original “public consultations,” is also window-dressing, manipulated by the government to give the impression of listening. In fact successive Ministers of Justice have remained deaf to most recommendations, even those pointing out sheer stupidities, and “User Group” recommendations are rarely adopted. The current Justice Minister, Martin Cauchon, has never even met with the “User Group.”

In contrast, a prime anti-gun crusader-lobbyist Wendy Cukier, president of her self-created Coalition for Gun Control (1991) seems to have unusually favored status and influence within the Department of Justice. As one of many indicators of the government’s attitude and intents Ms. Cukier in 2000 received a government award for her anti-gun efforts, and her Coalition receives tax-payer funded federal grants to further her crusade.²¹

CANADIAN FIREARMS CENTRE & COSTS

As with many Canadian government initiatives, C-68 led to a

new bureaucracy; in August, 1996, Allan Rock's Department of Justice formed the Canadian Firearms Centre (CFC), by 2002 grew to a staff of over 1800. Recently shifted from Justice to the Solicitor General, the CFC is the administrative arm of the firearms program, responsible for licensing and registrations.

A separate arm of the RCMP, the National Weapons Enforcement Support Team (NWEST), was formed in 1999, with eight staff and an advisory role of liaison with provincial and municipal police agencies responsible for actual enforcement. With now a staff of 60 and growing, NWEST became a federal direct enforcement agency carrying out its own operations, and seems destined to become an equivalent to the American Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE).

Aside from the CFC, and the RCMP's NWEST, the RCMP maintains a secretive national database called FIP, or Firearms Interest Police. FIP is supposed to be an early warning flag of people who some authority somewhere feels should perhaps not have firearms or licenses, and includes information going back five years. Inclusion in the FIP database can be for any reason, and comes from police incident reports. A bystander-witness at any event that in any way involves a gun, say witnessing a car accident where a car has a perfectly legal gun locked in the trunk, can also be entered in the FIP database.

The most dangerous aspect of FIP is that it is arbitrary and uncontrolled. It is open to input or retrieval access by any of some 900 law-enforcement agencies across Canada. There are no data-entry standards. There are also no quality controls, and thus no assurances whatever of the accuracy, validity, or veracity of any information that is entered into FIP. As what amounts to secret police activity, entries are unknown to the person being reported, but are commonly retrieved and used by police agencies. For a firearms license applicant, a FIP database entry can result in extra questioning or even license denial, for no reason known to the applicant.²²

The Justice Department CFC costs alone of the *Firearms Act* had reached a cumulative \$689,760,000 by November 2001, with another \$113.5 million allocated for 2002.²³ Mr. Rock's original \$85 million promise seems long forgotten. Since the CFC and its licensing and registration program appear entrenched for now, still strongly supported by the PM, the CFC has become another open drain for money. The Justice-CFC costs also do not

include any of substantial but unknown additional costs to other federal departments, to the Royal Canadian Mounted Police (RCMP), to Canadian Customs and Revenue (CCRA), to provincial governments and police agencies, to provincial prosecution, court and legal aid systems, or to municipal police. It is quite possible by now that the grand-total of all-government costs of the *Firearms Act* may already even approach \$2-3 billion. With many aspects that are either unrecorded or hidden, however, the true total costs remain unknown.

Licensing and registration fees received were minuscule compared to the galloping costs. In desperate hopes of stimulating greater compliance, the CFC mounted a huge “Get-Your-License-Now” print media, direct mail, and TV advertising blitz in 1999-2001. To encourage compliance, some license fees were reduced in 1999, and firearms registrations and ownership-transfers were made free for a time in late 2001. Original intents that fees would cover all costs have apparently died, for in January 2001, a 61-page government prospectus on fees was declared a “Cabinet Confidence,” and never released.²⁴

On December 3, 2002, the Auditor General (AG), Sheila Fraser, tabled in Parliament her annual report on government waste, mismanagement, and incompetence. The report, in examining the CFC (Ch.10), was scathing. Using such terms as “astronomical cost over-runs,” “outrageous and inexcusable,” and “appalling,” the AG accused the government of concealment of accounts to both her department and Parliament. She reported that concealment, and “impenetrable information”, had caused her to abandon the audit. The AG’s report was released the same week that the Department of Justice was asking Parliament for a supplementary \$72 million for the CFC for 2002, the sort of request usually approved without question.

The media, suddenly discovering what close observers had known for several years, shot into orbit for a few weeks. The PM and Allan Rock (as architect of the *Act*) went into a flailing defense mode, blaming the extreme CFC costs on everyone from Rock’s successor Justice ministers, to uncooperative provinces, to the “gun lobby,” to individual “gun owners” trying to sabotage the registry system with deliberate errors on forms. The PM’s and Mr. Rock’s performance was neither dignified or credible. The \$72 million supplementary request was quickly withdrawn, to avoid the potential embarrassment of refusal by

the PM's own Liberal MPs.

Allan Rock, as obsessive and arrogant as ever, when asked in a TV interview about a possible canceling of firearms registration, retorted "Over my dead body!" Paul Martin, the recent Finance minister and likely next PM, vowed "no more money" and "not another dime" until gun registry costs were controlled. The current Justice Minister, Martin Cauchon, on December 12, then announced he would continue financing the firearms program anyway (now illegally), even by diverting funding from other (unspecified) programs.²⁵

Auditor Generals' comments and recommendations do not have legal force any more than do those of parliamentary committees, and are often ignored by governments. Thus the AG's report on the CFC and firearms registry may emerge as just a short-lived teapot-tempest, soon forgotten. The report has, however, also exposed a much wider pattern of government non-accountability, fiscal incompetence, and possible political corruption. Several political patronage contracts are also under investigation by the RCMP, which may have longer-lasting effects, though the RCMP does not typically dig too deeply into government indiscretions.

BROADER COSTS & ECONOMIC DAMAGE

The broader costs to the shooting sports directly include everything from high licensing and multiple compliance costs to individuals, to gradually declining overall economic activity. Impeded by ever-rising regulatory costs and social-correctness pressures, the long-term people-activity level and financial trend for the shooting sports in Canada has been downhill ever since C-51 of 1977 with its originally \$10 long-gun acquisition certificates.

As of January 2001, with a new personal firearms-import form, a new \$50 visitor license fee, and a police records check, Canada also became a hostile tourist destination for thousands of U.S. hunters or competition shooters bringing their own guns. As a result, many tourist-dependent northern hunting-fishing lodges are now suffering financially or have closed. Unlike in the U.S., even antique-reproduction muzzle-loading muskets are classed as firearms in Canada, and now require owner-licensing and registration. The new regulation and fee had already, in 2001 and 2002, caused many cancellations by visiting American Civil

War historical re-enactment groups, and will likely end Canadian visits and demonstrations.²⁶

Many Canadian sporting goods retailers have also closed. Federal business licenses for retailers handling firearms and ammunition (similar to the American Federal Firearms License) are down from over 16,000 in 1979 to just fewer than 5000 by 1998. Two manufacturers have also closed, eliminating about 75 jobs each. Outdoor sports magazines are suffering as American and European gun and ammunition makers decide the shrinking Canadian market no longer justifies their advertising costs. Provincial hunting licenses issued are down to less than half of figures for 1978. For federally regulated migratory bird hunting (ducks & geese), 524,000 licenses were issued in 1978. By 2000 that figure was down to 191,000 licenses.²⁷

Many target shooting clubs have closed as well, due to unaffordable imposed costs. Newly required but often excessive and very expensive shooting range “improvements,” both outdoor and indoor, including many of doubtful necessity just for safety, became essential retroactively to receive newly required government range approvals.²⁸ Many financially weak or marginal clubs have been forced to mortgage if they could, or to close down.

Trying to assess the total negative economic impact of the *Firearms Act* is like trying to estimate the number of guns in Canada. Again, there are no reliable figures, but both domestically and from lost U.S. hunter tourism, the writer would guess a loss so far of at least \$4 to \$5 billion in shooting sports business activity. The *Act* financially discourages new and younger people from entering the shooting sports, and encourages older shooters to give up their pastimes.

The Department of Justice in 1999 finally did commission an economic-impact study on the *Firearms Act*, and a 115-page report was submitted to Cabinet in July 1999. That August it was classified, like far too many documents, as a “Cabinet Confidence,” and shelved.²⁹ “Cabinet Confidences,” virtually anything the government wants to conceal, are not released for 20 years, even to Parliament or elected MPs, and are exempt from “Access to Information” law requests. To such public information requests, an amazing amount of desirable information is also reported back as “unrecorded,” “unlocated,” or “unavailable.” Government secrecy, stonewalling, and fudging or fabrication of information and figures, have been a hallmark

of the *Firearms Act*. The Auditor General was quite correct.

CLASSES OF FIREARMS

Before 1995 there had been three classes of firearms in Canada, “unrestricted” long-guns (ordinary rifles and shotguns), “restricted” and registerable handguns since 1934, and “prohibited” full-automatic arms (machine-guns). The Firearms Acquisition Certificate, as a form of license, had been required since 1978 for the purchase even of long-guns, but not for possession alone.

The *Firearms Act* shifted over 60% of all handguns previously in the “restricted” category into the now-expanded “prohibited” class. All .25 and .32 caliber handguns, and all handguns with four inch or shorter barrels (under 105 mm) were declared “prohibited.” Some half-million-plus newly “prohibited” handguns registered before December 1, 1998 were grand-fathered to their pre-1998 owners (confiscation-in-place), but cannot now be sold or transferred except to other pre-1998 “prohibited” class owners. Those owners will eventually die out, leaving all “prohibited” class firearms to be surrendered or confiscated.³⁰ No compensation is provided for in the *Firearms Act*.

The value of those several hundred thousand registered but now “prohibited” handguns has, of course, been completely destroyed. The underground or “street” value of totally illegal and never-registered handguns is at least three times that of the same guns registered to a licensed owner. The *Firearms Act* has also seriously devalued even “unrestricted” ordinary shotguns and rifles which, because of all the shooting sports deterrents and discouragements, now sell in a very slow buyers’ market for about the same prices or less in Canadian dollars (= 71-72 cents U.S.) as they would in the United States in U.S. dollars.

An ever-growing list of long-gun models was also changed from “unrestricted” to “restricted” status, and some specific makes and models even to the “prohibited” category. Even air-guns capable of shooting any pellet at over 500 feet-per-second are now classed as firearms. Some million or more kids’ pellet-guns are thus now subject to owner-licensing and registration, though few owners are yet aware of that. Illegal possession charges are also now routinely made against air or CO₂ handgun owners.³¹

LICENSES

For unexplained reasons, C-68 included other critical flaws, in specifying staggered time deadlines for initial owner licensing and registration (separate procedures and applications) of existing firearms. Originally there were two classes of personal firearms licenses, both five-year renewables. During only 1998-2000 a Possession-Only (PO) license (one-page application form) was for people already owning firearms, but does not allow for acquiring additional guns. When the fee for that PO license was reduced from \$60 to \$10 in 2000, largely for estate-safety and personal liability purposes, many husbands submitted PO license applications for their wives, though their wives were not themselves gun owners. Under the locked storage provision of the *Act*, any unlicensed inhabitant of a household who has access to a gun cabinet (i.e., even knows where the keys are hidden) is also considered to be in illegal unlicensed possession.³²

The much more complex Possession & Acquisition license, for individuals only (seven-page application) is the successor to the post-1978 FAC. That license now requires one or two government safety courses and exams, depending on whether the license is to include only rifles and shotguns, or handguns as well. The P&A license is for more active hunters and shooters who might be buying or selling, and is now the only license that allows acquiring, registering, or even possessing guns. It is also required to buy any form of ammunition.

The *Act* requires P&A license applicants to pass one or two 50-question multiple-choice firearms familiarization exams, a one-time-only requirement. For those not already knowledgeable, the 12-hour firearms safety courses are required, either or both for long-guns and/or handguns, leading to the exams. There is considerable exam-question duplication. If the license application includes handguns, the applicant must offer a reason such as target shooting or collecting. Self or property protection, or hunting, are not acceptable reasons, and actually carrying a self-defense handgun on one's person is totally prohibited in Canada.

Though firearms safety training is an obvious key to reducing incompetent usage or accidents, actual on-the-range and live-fire shooting training is not a part of the CFC courses.

The courses and exams are perhaps a desirable move toward better shooting safety, but are overly long and duplicate many other courses and training programs.

There is no reciprocity. Unlike drivers', powerboat, or private pilots' licenses, no other training, certificates, licenses, or long experience are acceptable for firearms P&A licensing approval. There is also no organization license; the P&A is individual only. Shooting clubs or organizations such as scouts, cadets, schools, or summer camps cannot hold licenses or registrations, or their own guns, without additional firearms business licenses, another fee (\$125), and a possible risk to non-profit tax-exempt status. The absence of organization licenses is a strong discouragement to what could and should be beneficial youth training programs.

The P&A license application requires two personal references, asks very privacy-intrusive questions, and as a plum for the feminist lobbyists, must also be agreed and signed by an applicant's spouse or partner. The CFC or police conducting record checks also have the open-ended right to separately contact and question "whomever," including neighbors, co-workers, spouses, ex-spouses, or anyone co-habiting with the P&A applicant within the past two years.³³ Applicants with recent domestic break-ups, divorces, or acrimonious partners or ex-spouses are thus at risk of application refusals.

COUNTER-PRODUCTIVE RESULTS

Initial application for the simpler PO license was closed as of the end of 2000, with only renewals possible after that. That cut-off left gun owners with only the option of going the complex P&A license route: the textbook(s) (\$12 each), the weekend-long course(s) (\$120-140 each), the exam(s) (\$30 each), and the P&A license fee (\$60-80), plus separate gun registrations (\$18), firearms ownership transfer fees (\$25 each), and the cost of a solidly-lockable gun case or cabinet (\$50-1500).

The "quiet non-cooperation" option was just not bothering with all of the forms, appointments, time, hassles and costs. With the less than 50% compliance with licensing and registration, a majority of less active gun owners seem to have taken that not-bothering option, or may still remain unaware even that personal licensing is now necessary.

Holders of pre-2001 PO licenses must also register a firearm

or their license will not be renewed. PO licensees, probably some 300,000, who had not registered any gun before December 31, 2002, are now stuck in a non-renewable situation, with their guns unregistrable.

The unpublicized inclusion of most air guns within the definition of "firearms," though included in the *Act*, came only in November 2000 (effective January 1, 2001) just as Possession-Only license application was being closed.³⁴ There is no special or simplified license for air/CO₂ gun owners, who now require the same P&A license and registration as actual firearms owners.

Similarly, initial P&A licensing of all existing gun owners had a deadline of the end of 2001. New licensing will continue, though new licensees cannot register previously unregistered guns.. As of December 2001, 1.76 million owners were actually licensed, that grown to 1.88 million by April, 2002, with a three to one ratio of PO to P&A licenses.³⁵ Thus if the government's poll-based firearms ownership estimates (then 2.46m) of 2000 were even close to correct, compliance with licensing as of the 2001 deadline was roughly 72%. If, however, the best independent mid-range gun ownership estimates (4.5-6m) are closer to reality, the final deadline-date owner-licensing figures (then 1.93m) suggest that licensing compliance was at best about 35-38%. Again, no one really knows.

Without the prerequisite licenses, since January 1, 2002, some three to four million gun owners could not register their existing firearms. Shotguns in farmers' barns, or .22 rifles kept at lakeshore cottages, or forgotten World War II pistols stashed in attic trunks, or Christmas-present pellet-guns, those guns are now driven underground by the law itself. Their unlicensed owners are now stuck, considered as illegal-possession criminals, and their guns are closed out of the registration system even if they later secure P&A licenses.

Though not generally known, only recipients of probated inheritances (Sect. 112(2)(b)), as unlicensed owners of probably unregistered guns, can still sell or give away their guns. They can transfer the guns but only to licensed individuals or dealers, who can then still register them. After the end of 2001, a never-registered gun acquired even by a P&A license holder, from a still unlicensed owner, supposedly could not be registered. Until the registration deadline of Dec. 31, 2002, however, the CFC was still accepting registrations of previously unregistered guns. Since then, attempting to sell a so-far unregistered gun, even to a

licensed buyer, is a criminal act.

Unless earlier renewed, licenses are void as of expiration dates, and guns registered to them become illegal. A lapsed PO license cannot be renewed at all, and the holder of an expired P&A license must start the process over again. So too, anyone who neglects to renew her license before its five-year expiry, or even has a processing-delay gap between expiry and actually receiving a renewed license, automatically becomes an unlicensed owner and criminal, even if her guns are already registered. Thus anyone who has a license renewal refused or delayed for any reason, even by bureaucratic error, is immediately also in illegal possession even of her own registered guns, and would be subject to seizure and prosecution.

License renewal presently requires the same lengthy form as an initial application. Though the CFC now promises to send out advance renewal notices and forms starting in 2004, as motor-vehicle registration agencies do, there is no renewal grace period. Thus people will probably neglect and forget, creating more illegal firearms and owners. By apparent intent, nothing in the *Firearms Act* is convenient or user-friendly, and all onus is on registrants.

The cut-off of the PO license and the staggered licensing and registration deadlines created the self-defeating situation of reducing or preventing compliance. As many as a third to half of all firearms in Canada, as of January 1, 2002, had already gone into unregistrable underground and potential black-market status. Many more, perhaps totaling seven to eight million, followed on January 1, 2003.

The original political motives for the *Act* may have been to be to create as many newly-illegal firearms as possible, all then subject to seizures. The “User Group” and Canadian Police Association both identified the problem in 1999, and recommended solutions, all of which were rejected outright by then Justice Minister Anne McLellan in August 1999. The present Justice Minister, Martin Cauchon, has consistently refused the idea of a registration amnesty, to allow the registration of previously unregistered guns³⁶ Thus over half of all long-guns rifles and shotguns in Canada now remain with unlicensed owners, and unregistered.

Another intent of C-68 was for police agencies to be able to computer-check who owned guns and their owners’ locations. A seriously deficient or inaccurate database, however, is of little use

to anyone. With less than 50% compliance with licensing and/or registration, and an estimated 25+% error rate, the CFC database cannot provide full or reliable information, and becomes of little use.

Allan Rock's successor as Minister of Justice, Anne McLellan, crowed that one success of C-68 police-checks was preventing some 3-4000 (now 9000+) people from securing firearms licenses. Refusals, however, had been possible and had occurred regularly ever since C-51 introduced police record checks for FAC applicants in 1978, and for handguns ever since the first permits of 1892.

A further government selling point in its promotional efforts was that the firearms registry would more easily allow police to return recovered stolen guns to their owners. Nearly 90% of crime-use guns are smuggled into Canada, not stolen, and the vast majority are unregistered handguns.³⁷

To police, however, the locked-storage provision in the *Act* also raises the obvious question of just how a gun was stolen, and exposes the owner of the gun to a police charge of "unsafe storage." Beyond that, anyone still unlicensed and with an unregistered and now illegal gun would be most unlikely to report a theft and then risk additional charges of "unlicensed" and/or "unregistered" possession.. Although non-reporting of a gun theft is itself a crime, many gun owners would rather suffer their loss quietly than risk criminal trouble. When the gun owning crime victim is in more trouble than the thief, the law has created a strong disincentive to report thefts. Despite government claims that the *Act* has reduced gun thefts, it is more likely many stolen guns are now never reported.

The CFC has been a massively inefficient program. Plagued with endemic problems including an inadequate computer system, lost applications, a high error rate in applications, licenses and registrations, and many data-entry mistakes, CFC processing delays have sometimes over-extended the legal deadlines. In spite of the CFC staff of 1800, in 1999-2002 the time lag between application and license-issue had seldom been less than six months. For gun registrations, delays were three to five months, with a 2003 (to June 30) six-month CFC "grace period" following the end-of-2002 registration deadline. That was only to allow the CFC time to catch up with some 72,000 pre-deadline applications, but there was no extension of the registration deadline.

REGISTRATION / COMPLIANCE

The deadline set for registration of all existing firearms was December 31, 2002. After that only previously registered guns, to licensed owners or dealers, can be transferred and re-registered to new owners.

Compliance with registration, the most objectionable part of the *Act*, came only grudgingly. By mid-December, 2001, only 312,000 gun owners, less than 18% of the 1.76 million owners then licensed, had so far registered 1.9 million guns, including previously registered handguns. As registrations increased, by late April, 2002, 1,034,376 licensed owners had registered 3,725,195 firearms.³⁸ This included slightly over half of then-licensed owners but only 25-30% of the best estimates of firearms numbers.

Data also suggest a very large number of still-unlicensed owners, unknowing, negligent, or in deliberate civil-disobedience, and also that many licensed owners are probably registering some but not all of their guns. With the approach of the December 2002 registration deadline came a near collapse of the registration system. The simplest (and free) method of registering had been on-line, through the CFC website. From mid-November, however, coincident with the scandal of the AG report, registrants discovered that it was impossible to access the CFC website, leaving only mail applications with a \$18 fee were possible. Even telephone contact became impossible.

On December 30 the CFC computer and website “crashed” from overload of pre-deadline submissions, with an unknown number of last-minute registrations lost. That necessitated the 6-month “grace period” for processing the outstanding applications and letters of intent to register, but only those 72,000 sent by December 31. This was not a registration amnesty, and the December 31 deadline still held. As of January 1, 2003, the “crashed” CFC registration website was withdrawn, but restored in late January for “grace period” and transfer registrations through June 30, 2003.

Since 1998 the Department of Justice has so far had to declare nine amnesties or delays, and others will be necessary. Still, the PO and P&A licensing deadlines for owners of existing firearms had already passed. Thus, pending more amnesties, the *Firearms Act* as of January 1, 2002, had already managed to create

at least two to three million criminals (most of whom are probably unaware), all now potentially subject to firearms seizures and prosecution. Even at understated government figures, the *Act* as of 2002 also left several million guns now stranded in illegal and potential black-market status, unable to be registered because of their unlicensed owners.

COMPLIANCE AND EFFECTIVENESS

No country in the world has ever remotely approached full compliance with firearms owner-licensing and registration. Estimates for southern European countries, France, Italy, and Spain, are no more than 20-25%. Even in that most over-regulated of European countries, Germany, federal police estimate compliance with licensing and registration at probably not over 30-35%.³⁹ No one has any reliable estimate of the post-1934 Canadian handgun-registration compliance percentage, but that too was probably never greater than 50%.

There had been approximately 1,150,000 handguns registered in the nearly 70-year-old RCMP registration system, and perhaps another million never registered. Handgun ownership and registration, until 1998, had never before required a separate owner license. The old 1934 system had grown increasingly unreliable as people had relocated, or sold, given away or willed guns, or died, with no follow-up advice to the RCMP of owner or location changes. Many handguns, originally registered decades ago, have appeared for re-registration by present owners many years and owners removed from earlier and still recorded registrants. Thus the *Firearms Act*, in requiring the re-registration of all previously registered handguns, put the onus entirely on owners first to secure a new license, and then to submit a new re-registration form. Many owners of previously registered handguns, however, did not have or seek the newly-required license.

As of May 27, 2002, there had been 429,316 handgun owners previously registered in the old 1934 system, of which an unknown number were unlocated or deceased. Of those old-system registrants, only 124,941 held a new post-1998 PO or P&A firearms license. And, of those licensees, only 96,237 people had by then re-registered their handguns. Many did not know a new license, or the re-registration, was now necessary.

As of the end-of-2002 registration (and handgun re-

registration) deadline, about 511,000 handguns had been re-registered, or fewer than half of those previously recorded in the old system. All old-system handgun registrations, unless re-registered before December 31, 2002, then became void, and the guns illegal. Thus probably 60-70% of all handguns in Canada, those previously registered and otherwise, as well as crime-use smuggled guns, are now illegal and potentially black-market, and now cannot be registered.

In any event, the numbers of privately-owned firearms or owners, or the extent or strictness of gun-control laws, seem to have no measurable influence on armed or any other crime rates, in any country, anywhere. In Canada and the U.S., because of privately-run hunter-safety training programs, annual firearms accident rates are now less than 20% of those of the 1920s to 1950s.⁴⁰ Likewise, given so many possible motives and means, no law will or ever could affect suicide rates.

In the real world, no law can deter messianic terrorists, hard-core criminals, or occasional psychotics like Marc Lepine bent on serial or mass murder. Unless intercepted in advance, the truly determined or insane will usually find their means, for such people and events are simply beyond deterrence by any law. There are also many means for committing armed or violent crimes, so that firearms restrictions will often just cause substitution to knives, clubs, hammers or hatchets, but not deter violent crimes themselves.⁴¹ Particularly with emotional spousal, partner, or other known-assailant homicides, the majority of such events, probably few would be avoided just for lack of a gun.

Based on long-term international as well as Canadian experience, there is no reason to suppose that the extent or lack of compliance with the *Firearms Act* will make any difference at all to Canadian armed crime or homicide rates. In Canada there are no known cause-and-effect relationships between extents or densities of private or personal firearms ownership, and armed crime, homicide, or suicide rates. There is no factual support for the old stereotype that More-Guns-Equal-More-Crime. Thus the fact that over half of gun-owning Canadians have not sought firearms licenses, or simply did not or will not (or without licenses, now cannot) register their guns becomes quite irrelevant. Those people are not going to be contributing to armed crime.

The American border states of Maine, New Hampshire, and

Vermont, with far more guns per-capita but virtually no firearms restrictions including even of handguns, actually have slightly lower armed crime and homicide rates than adjacent Quebec and New Brunswick under the Canadian *Act*. In the west as well, the Canadian provinces of Saskatchewan, Alberta, and British Columbia all have higher armed crime and homicide rates than the lowly regulated, including handguns, adjoining U.S. states of North Dakota, Montana, and Idaho, all with far greater per-capita private gun ownership.⁴² In spite of the differences in firearms ownership density, Canada also has higher suicide rates than the U.S.⁴³

The British experience is even more illustrative of the non-relationship between the prevalence of privately-owned firearms and crime rates. British crime rates have been rising ever since the 1950s. The current Labor government has passed several Criminal Justice Acts, including two back-to-back 1997 firearms acts that, though with compensation, stripped the country of licensed and legal handguns. British reported crime rates have continued to escalate, to now about 98 per 1000 population per year, or more than double the U.S. reported crime rate of about 40 per 1000.⁴⁴ There are some 240 million guns, including about 70 million handguns, in the U.S. with its declining crime rate, while largely disarmed Britain has become the crime capital of the western world.

Other aspects of the *Firearms Act* are equally ineffectual or counter-productive. From his extensive research, Prof. Gary Mauser of Simon Fraser University in B.C. estimates about 60,000 cases of firearms-usage self-defense (though half against animal attacks) in Canada each year.⁴⁵ Numerous media-reported self-defense cases have also occurred where defending robbery, break-in, or burglary victims, even without a shot being fired, have then been charged with the *Firearms Act* catch-all crimes of “unsafe storage,” “careless use,” or “threatening,” and the cases have actually gone to trial.⁴⁶ “Unlicensed” or “unregistered” possession can now be added to the previous catch-alls.

While there is narrow provision for justifiable self-defense in the Canadian *Criminal Code*, practical means for self-defense are prohibited. Self or property defense is not a permissible reason to acquire or own, much less carry, a handgun. Since non-lethal defenses such as mace, pepper-spray, tear gas, or stun/taser guns are also “prohibited devices” in Canada, successful self-defense incidents are typically not reported to

police unless an event attracts attention. Canadian governments maintain rigid monopolies on crime control, allowing no competition. Thus self or property defense, or aiding in another's defense, even without injury, is not a socially-correct response in Canada, and can very easily be a criminal offense.

Canadian police also have a habit of laying charges first, and leaving prosecutors and the courts to sort it out. It now emerges, however, that most police and many prosecutors, defense lawyers, and even judges, do not know much about or understand the convoluted *Firearms Act* and its attendant Criminal Code amendments. That has led to situations of erroneous charges and prosecutions, uninformed or confused lawyers pleading legally-innocent clients guilty to avoid trial, and wrongful convictions. The few defense lawyers who now more or less specialize in firearms cases have taken on a secondary role of educating prosecutors and judges.⁴⁷

END-GAME

All of the staggered licensing and registration deadlines finally converged on December 31, 2002, with the closure for registration, to licensed owners only, of all pre-existing guns. As of that deadline-date 1,934,214 gun owners held licenses, including 67,362 older FACs which were still valid. Strangely, however, only 1,415,622 of those licensees had registered any guns. This leaves 518,592 people who presumably already own guns, and are known to own guns since they went through the procedures of securing licenses, but who still have registered nothing. As of January 1, 2003, these people are all now in illegal possession, and some are also no doubt in deliberate civil disobedience. The perhaps 300,000 with only PO licenses, but no gun registrations recorded to them, also risk non-renewal of their licenses. If we use the conservative mid-range estimate of five million actual gun owners, then the pre-deadline owner-licensing compliance rate has emerged at about 37%.

To the only 1.4 million licensed owners who had registered any guns at all, according to the CFC, 5,893,447 firearms were registered as of the December 31, 2002, deadline. Another 72,000 late applications or "intent-to-register" letters (those not lost) awaited processing during the "grace period." Based on an estimate of 13 million registerable guns in Canada (including air/CO₂ guns and non-exempt antiques), this would indicate a

registration-compliance rate of around 45%.⁴⁸

The government deliberately created this situation, in spite of many and detailed warnings. When the costs of the licensing-registration program are already under extreme criticism, however, the government is hardly in a position to begin arresting and prosecuting three to four million people. In the end, enforcement of the *Act*, and particularly its purely administrative crimes of non-licensing or non-registration, is likely to be sporadic, as responses to complaints or other specific events. Local jurisdictions do not have the finances or police resources to take on such massive new functions as sweeping firearms license-registration checks or at-home secure-storage inspections.

Thus the administrative crimes of “unlicensed” and “unregistered” possession will probably join the list of other measures that are unenforceable in their own right, and be used along with “unsafe storage” and “careless use” as lesser add-ons to other more serious charges. Still, no matter how a law or regulation is written, that is no guarantee of how it may be interpreted or acted upon by individual police, prosecutors, or judges. Police always respond to “gun calls,” no matter how frivolous or innocent, so arrests often include unnecessary or excessive force. A real danger to gun owners and shooters may well be frivolous and over-zealous charges and prosecutions, and defending crime victims being treated as criminals.⁴⁹

CONCLUSIONS

What has the *Firearms Act* achieved? The CFC bureaucracy alone has cost close to a billion dollars so far, and steadily rising. Has the *Act* measurably decreased armed crime or homicide or suicide in Canada? Hardly! Just as the earlier C-51 and C-17, it has had no apparent crime-deterrent effect, except now to create a few million passive administrative criminals and newly underground firearms. It has also encouraged great popular distrust and evasive “quiet non-cooperation,” and discouraged reporting to police of firearms thefts, self-defense incidents, and other minor crimes.

The billion-dollar CFC license-registration database will be of limited value many police agencies now agree. There is also general agreement that, in spite of attempts to correct applicant and registry mistakes, probably about 25+% of the database

remains erroneous.

The primary objections and opposition to the *Firearms Act* focus not so much on gun-owner licensing, but primarily on firearms registration, also the most expensive part of the CFC program. Few gun owners now greatly object to licensing of individuals, which was inherited from the FAC introduced in 1977. Few object to the course-exam prerequisite for a license or to the secure-storage requirement, both continued from C-17 of 1991. Universal firearms registration, particularly ordinary rifles and shotguns, air guns and many antiques was the prime new mandate of C-68. Registration is widely considered as too intrusive, a tax-grab in its registration and transfer fees, and pointless for any crime-deterrent or public safety purpose. Attendant with registration, the draconian new Section 102-105 provisions for warrantless at-home “inspections,” search-and-seizure, and compelled self-incrimination, are seen as unconstitutional and as abrogations of common-law civil rights and liberties. Professor Ted Morton of the University of Calgary has identified well over a dozen constitutional violations included in the *Firearms Act*, all of which call strongly for Supreme Court challenges.⁵⁰ It would appear that the drafters of the Act devoted little if any attention to existing law and precedent that, collectively, make up Canada’s constitution.

In a diverse country like Canada, an incomplete and ineffectual firearms registration system cannot work for another reason; its inherent creeping obsolescence. As has occurred over 70 years of the old handgun registry, people relocate or die without further advice to the registration authority. Guns, as small portable objects, get relocated or passed on to others. Governments can require as they like, but benign neglect or “quiet non-cooperation” are more powerful forces in Canada than most people realize.

Every database of people, from income taxes to magazine subscriptions, has the same problem of entries who have disappeared. Unlike magazine subscriptions, however, firearm registrations cannot just be deleted without knowing what became of the firearms and their owners. Thus even with periodic attempted updates, any firearms registry, no matter how reliable it might once have been, will become ever less current or accurate with the passage of time. So too, on the front line of police or game warden checks, who’s to know? Firearms licenses indicate only the licensee’s name, but not an address, while

registration slips cover guns alone but indicate neither the owner's name or address.

Criticism has taken eight years to spread to the mainstream media, and even then has focused largely on costs, not the *Act's* concepts, rationales, or substance. What ultimately may happen as a result of the December 2002, teapot-tempest over the Auditor General's criticism of escalating costs remains uncertain. Certainly the shooting sports opposition has been invigorated by the AG criticism, and passive acceptance is being granted. Media attention, political infighting, and major court challenges will extend well into the future. Having finally emerged on the political radar screen, the *Firearms Act* is back to uncertain status, including increasing discussion and even some Liberal politicians' and media calls for scrapping of the registration program.⁵¹

There has, however, so far been no basic change of attitude under the Liberals. The Justice Minister has declared he will continue funding the CFC and licensing-registration program, if necessary by diverting money from other programs or "contingency" funds. Parliament, Canada's elected representatives, is apparently irrelevant.

Changing the *Firearms Act*, however, would require not just administrative re-adjustments (which have been continuous), but major substantive changes that go right to its basic motives and rationales. Perhaps the first question, which of course will not be asked, is simply "Does Canada even need a Firearms Act?" Finance Minister John Manley has recently called strongly for greater economies, efficiencies, and cost-controls in government programs. Yet the Liberal government remains so deeply mired in its socially-correct ideology that, in spite of all criticism, it persists in pouring money into a demonstrably wasteful program that is not just ineffectual, but counter-productive and destructive.

The government could quite easily correct some of the more disastrous creations and results of the *Act*. There is still no sign yet, however, by either the PM or in the Department of Justice, of a willingness to listen, much less the political will to think beyond the social and political-correctness paradigm.⁵²

The *Firearms Act* and its predecessors have harassed, discouraged, and angered the several million participants in recreational shooting sports activities. In that sense it has been quite successful. Impediment and discouragement of the

shooting sports was and is, after all, the *Act's* obvious though unstated and oft-denied intent.

Another new social-correctness bill, C-10B, will soon deliver not only hunting and fishing, but livestock farming and medical research into the hands of animal-rights activists. And, in United Nations Economic and Social Council, Canada, with Japan, continues as a prime international promoter of ever-greater private firearms ownership restrictions.⁵³ Canada, of course, already has a very black name in the U.S. hunting and fishing media.

Canadian governments ever since 1977 have chosen compulsion and restriction, with social-correctness typically taking precedence over common-sense, and with a continuing erosion of individual rights. The *Firearms Act* is destroying several billion dollars of the Canadian tourism and recreational sports industry economy, apparently only for the reason that two Liberal ministers and some obsessed feminist lobbyists did not happen to like guns. This misconceived exercise has ignored three to four centuries of common law, the *British North America Act* of 1867, and the *Constitution Act* of 1982. It has managed to create new and retroactive victimless crimes. In undermining popular respect for the rule of law and the police who uphold it, the *Firearms Act* has also stimulated fear and distrust of government among gun owners, hunters, and target shooters, and fueled the conditions for legal challenges, frivolous or over-zealous police activity and prosecutions, and appeals that will rumble through the courts for decades.

The *Firearms Act* over its eight years has achieved, and extremely expensively, absolutely nothing except negative and counter-productive effects and results. Economically destructive, and ineffectual in preventing or reducing homicide, armed crime, or suicide, the *Act* remains a broad-front and heavy-handed political assault and campaign against a large and multi-faceted recreational sports activity and a quarter of the Canadian population. This has occurred, in spite of all the denials, because the present government considers all shooting sports pastimes as politically or socially-incorrect, or as has been stated, as “questionable activities.”

EPILOG

On the heels of the Auditor General's report of December

3, 2002, and the resulting media storm, on January 3, 2003, Robert Runciman, Ontario Minister of Public Safety and Security, opened another front. Runciman called publicly for an immediate suspension of the registration aspects of the *Act*, pending completion of the AG's audit and a broad cost-benefit analysis. Runciman's announcement was immediately joined by the Ontario Attorney General, by Justice ministers of Alberta and Saskatchewan, and within the week by eight of the ten provinces. Alberta, Manitoba, Nova Scotia, Ontario, and Saskatchewan have all refused to prosecute *Firearms Act* administrative licensing and registration offenses in provincial courts unless they are attached to other real gun-usage crimes.⁵⁴

On January 8, 2003, Federal Justice Minister Martin Cauchon then held a press conference in Ottawa. In spite of both the Auditor General's report, and the opposition from eight of ten provincial Justice ministers, he again reiterated the standard government line. "As far as I'm concerned, [firearms] licensing and registration are here to stay. What we are doing here is establishing in our Canadian society a culture and values."

Cauchon also announced two new consultant contracts totaling \$152,000, one to examine the financial aspects of the *Firearms Act*, and the other the management and administration of the CFC.⁵⁵ Both consultant's reports were tabled in Parliament on February 3, 2003, under opposition pressure and with little media attention. Completely unmentioned was any hint of an objective and thorough cost-benefit and effectiveness analysis of the *Act* itself.

On June 5, 2003, the government, through the Standing Committee on Justice, again underscored its long-standing aversion to any objective examination or assessment of the *Act*. In that June 5 meeting MP Gary Breitkreuz again moved for an examination of the *Act*. In an almost insulting manner, it appears that every Liberal member of the committee came prepared in advance, offering varied excuses, to defeat the motion. With superficial discussion, the motion was defeated and once again denied inclusion in the Justice Committee's agenda.⁵⁶

The *Firearms Act* is now under fire from many directions. Opposition from sports shooters is still increasing, now joined by most provincial governments. Even some Liberal MPs, getting increased face- to-face criticism from their constituents, are also now having doubts.

In federal spending estimates for 2003-04, the Ministry of

Justice CFC has been allocated \$113 million, plus an additional \$59 million supplement for the remainder of 2002-03. Using threats of party discipline and even a snap election, the Prime Minister coerced Liberal MPs into passing the \$59 million supplement on March 25.⁵⁷ One of the new reports for the Department of Justice recommends some efficiencies, and increased user fees, but also projects the continuing cost of the licensing-registration/CFC program at another \$541.4 million over the next 10 years.⁵⁸

The ultimate resolution, if there is one, can only be political. Another federal election will be due in 2004. Of the *Act's* two prime proponents, Prime Minister Chrétien has announced his retirement, and on January 14, 2003, Allan Rock withdrew from his aspirations to become Liberal Party leader. The Liberal Party leader, and PM, will change in November 2003. Having finally gained wide media attention, the *Firearms Act* is more contentious than ever, also certain to continue as a major issue in the next Federal election campaign.

Politically, the Liberal government has painted itself into a corner. On one hand, it has now created, apparently deliberately, some three to four million administrative criminals, all subject to uncompensated gun seizures and possible fines or prison sentences. If the government chose to pursue seizures and prosecutions of every unlicensed and/or unregistered gun owner, judicial systems would collapse of overstress and costs.⁵⁹

Though Canadian gun owners are not numerous enough in most areas to provide a solid electoral margin, they do comprise a strong swing vote. Thus the *Firearms Act*, politically, is ultimately counter-productive to the Liberals, just as C-17 (1991) was to the Conservatives (defeated) in the 1993 election, and C-51 (1977) before it was to the Liberals (defeated) in 1979. Nonsensical firearms laws appear to carry a considerable vote-loss potential among the gun owners and sports shooters directly affected, but attract little interest or vote-gaining potential among non gun-owning voters. Having spent nearly a billion dollars, and continuing unabated, on what was and is really an ideological obsession, the Liberal government will now be stuck with the political fallout.

The on-going saga of the Canadian *Firearms Act*, now at a Federal government vs. a Provincial and gun owner stand-off, has reached not so much *finis et exeunt* as an intermission. The present Liberal government has an established track-record of

poorly rationalized legislation ram-rodged through Parliament largely on political or social-correctness grounds. The *Firearms Act* is not the first or latest example. The *Act* will no doubt be maintained in some form, though parts of it such as long-gun registration may well be eliminated or altered, perhaps though unlikely through the Liberals finally discovering reality and common-sense, or through a change of government, or through court decisions yet to come. Thus the debate will continue, and it is too soon to speculate on how the dust may finally settle.

NOTES

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1. Personal observation. The writer attended several Allan Rock “public consultations” plus two Justice Committee sessions, and saw the process in action. The \$85 million promise came as a statement from Allan Rock in the House of Commons, 16 Feb 1995 (*Hansard*, 16 Feb 1995), and was presented to the Standing Committee on Justice as “Financial Framework for Bill C-68,” 24 Apr 1995. It was reiterated in Department of Justice, JUS 686, “Facts about the Firearms Bill,” Jun 1995. That estimate was revised in 1996 to a \$119 million gross cost, with only a \$2 million net cost after fees received. The Liberal government, in propagandizing new programs, has a habit of severely underestimating both administrative and regulatory costs. Most government information following is courtesy of the Dept. of Justice, Garry Breitkreuz, MP, and Research Branch, Library of Parliament.
2. *Globe and Mail*, 23 May 1994; *National Post*, 22 Apr 1999. In varied venues the Prime Minister has repeated this intent several times since.
3. Allan Rock to Standing Committee on Justice, 10 Mar 1994. In 1994 Rock also proposed a total ban on privately owned handguns, and a ban on private firearms possession and of at-home gun storage in cities. *Globe and Mail*, Editorial, 19 Apr 1994; article 21 Apr 1994; *Toronto Star*, 22 Sep 1994. Rock had been well advised even by senior Dept. of Justice staff of the negative implications of C-68; he decided to proceed anyway. *Globe and Mail*, 8 June 1995. Dept. of Justice to Rock, Briefing Paper, 4 Mar 1994. *National Post*, 14 Jan 2003.
4. House of Commons Question Period, 7 Dec 1994. In the passage of C-68, the government in 2nd and 3rd readings invoked closure of debate three times, denied standing to some 300 organizations to appear at Justice Committee hearings, disciplined nine Liberal MPs for opposition to the bill, and ultimately had to appoint four new Liberal tame-vote senators to assure Senate passage. The writer had submitted a 12-page brief for the Royal Ontario Museum in Mar 1995, but was among those denied standing to appear.
5. Research Branch, Library of Parliament, 17 Mar 1995. Maximum penalties for the made-in-Ottawa administrative crimes of unlicensed possession were

five years in prison, and even with a firearms license, 10 years for failure to register.

6. C-68, Sections 102-104. See also note 50. *Toronto Star*, 20 Jul 2002. In June, 2000, on an appeal from Alberta, the Supreme Court of Canada in a rare unanimous 9-0 ruling upheld federal government jurisdiction for C-68, confirming an earlier narrow (3-2) Alberta Court of Appeal decision of Sep 1998. There remain suspicions that the unanimous Supreme Court decision was pre-determined, made before the appeal was heard. On 19 July 2002 the Ontario Court of Appeal in a 3-0 decision struck down Section 117.04(1) of the Criminal Code, which had provided for police search and seizure as “wholesale fishing expeditions” for firearms. The court also commented that the *Firearms Act* suffers from “incurable overbreadth.”

7. C-68, Sections 117-119 (5 pages).

8. Auditor General of Canada, 2002 Report, Ch. 10. David Kopel, *The Samurai, The Mountie, and the Cowboy*, Prometheus Book Press, 1992.

9. Nuisance and hassle-factors include overly lengthy, complex and intrusive application forms; manufactured inconveniences; inconsistent definitions; multiple fees and costs; the splitting of the former safety course and exam into two (doubling the time and expense); non-reciprocity for licensing; the exclusion of many 19th century antique guns from antique-exemption; the exclusion of organizations or clubs from holding licenses/registrations; the inclusion of air (pellet) guns as firearms; the suspension of Possession-Only license applications, 3rd-party verifications for transfers, exclusion of spousal or family transfers between P&A and PO licenses; limited inheritance rights; and the Section 102-104 open-sesame for at-whim inspections. None of these and many other provisions or omissions have any valid purpose except to create artificial difficulties for hunters and target shooters.

10. The 1994 poll was pre-C-68, while the 2000 poll came after C-68 was in force. The difference is evident. The best estimates of numbers are Gary Mauser, “The Case of the Missing Canadian Gun Owners”, paper presented to American Society of Criminology, Nov 2001, and Allan Smithies, “How many Canadian Gun Owners are there?”, *Canadian Shooting Sports*, Apr 2001. Mauser figures about 4.5 million gun owners, and Smithies about 5-5.5 million. For the fall 2000, further reduction of government estimates, see Letter, Maryantonette Flumian, CEO, CFC, to the writer, 19 Mar 2001. The writer leans toward the higher mid-range of independent estimates, of some 5-6 million owners of around 13-15 million guns, because of the inclusion of most air/CO₂ guns, and because most reproduction muzzleloaders and many earlier 20th century and antique guns going back to the 1850s remain subject to owner licensing and registration. In recent press comments the government gun-ownership figure has been reduced to 2.3 million.

11. Mauser, “Missing Gun Owners,” 2001; Garry Breitreuz, MP, News release, 11 Dec 2001.

12. Canadian Shooting Sports Assn., “Information Update,” 1 Mar 2002; Smithies, 2001; Mauser, 2001.

13. Flumian letter (note 10), “The intent of the firearms legislation has never been to make firearms ownership difficult and onerous. . . The government has also attempted to keep the licensing and registration fees as low as possible. . .” In contrast, Joyce Malcolm (note 44) wrote (letter, 23 Nov 2002) “I remember

being in [Toronto] when that act was going through Parliament and hearing a government spokesman [Rock, on TV] boast that the procedures had been purposely made as slow and convoluted as possible to deter people from being able to own guns, a rare bit of bureaucratic honesty.”

14. The RCMP and most police agencies in recording include only firearms actually “used” or materially involved in a crime, while Statistics Canada includes any guns even “present” at a crime scene, actually involved or not. Thus distorted government figures for “firearms crime” can be 3 or 4 times greater than RCMP and police figures.

15. Ontario Handgun Assn., *The Canadian Firearm Control Debate*, 1994, and Gary Mauser & Taylor Buckner, *Canadian Attitudes Toward Gun Control*, The Mackenzie Institute, 1994. The 1934 handgun registration law has never been post-evaluated for crime-deterrent effects.

16. *Globe and Mail*, 7 Oct 1994; also writer personal experiences.

17. *Firearm Control Debate*, 1992; Kopel, 1991; *The Economist*, 22 Jun 2002; Daniel Polsby, “The False Promise of Gun Control,” *Atlantic Monthly*, Mar 1994.

18. Polsby, 1994; John Lott, *More Guns, Less Crime*, Univ. Of Chicago Press, 1998; Gary Kleck, *Point Blank: Guns and Violence in America*, Aldine, 1991; Paxton Quigley, *Armed & Female*, St. Martins Press, 1989; *The Economist*, 30 May 1998; “ILA Report,” *American Rifleman*, Aug 2002. Thirty-six U.S. states now have handgun “right to carry” laws. Kleck’s and Lott’s studies have been controversial, but more recent statistics on armed crime reductions in “right to carry” states appear to support their contention that criminals do not like to risk getting shot by crime victims. Thus extensive private gun ownership may well be a crime deterrent in its own right.

19. Gary Mauser and Dennis Maki, “An Evaluation of the 1977 Canadian Firearms Legislation,” *Applied Economics*, Dec 2002; Garry Breitkreuz news release, 6 Jan 1996. A 1995 Dept. of Justice commissioned study, by Prairie Research Associates, Winnipeg, was released in a very condensed and sanitized version..

20. Standing Committee on Justice, Minutes of Proceedings, Meeting No. 60, 5 Feb 2002. Just as Auditor General reports, the PM and government are free to change or ignore parliamentary committee reports and recommendations, and often do.

21. Letter, User Group to Anne McLellan, 23 Apr 1998 Also letter, Anne McLellan to Canadian Police Assn., 15 Aug 1999. Also response to Breitkreuz ATI request, 30 Aug 2001. Wendy Cukier in Oct 2000 was awarded a Governor General’s Meritorious Service Cross for her efforts. Her colleague, Chantale Breton, director of Cukier’s CGC, was then appointed to a senior position with the CFC. Both moves were seen as insults by shooting and hunting organizations, and in Jan 2001 caused a suspension of discussions with the Department of Justice.

22. Dept. Of Justice, “Staffing Levels Associated with the Firearms Program,” 12 Mar 2001. N.W.E.S.T., *Bulletin*, Canadian Shooting Sports Assn., May 2003. FIP, Privacy Commissioner of Canada, “Firearms Report,” Aug 2001; Auditor General’s Report, 2002, Ch. 11; Letter, George Radwanski, Privacy Commissioner, to Garry Breitkreuz, MP, 17 Jan 2003.

23. Treasury Board report to Senate Committee on National Finance, 21 Nov 2001. In Nov 2002 the Minister of Justice requested a \$72 million supplement

for 2002, but the request was withdrawn because of opposition even from Liberal MPs. Including allocations and supplementaries to May 2003, total federal costs are about \$975,000,000, not including unknown enforcement costs.

24. Department of Justice, Canadian Firearms Program, “Net Expenditures by Fiscal Year, 1995-96 to 2000-01.” Net revenues through fees have been considerably less than 10% of expenditures.

25. Auditor General of Canada, *Annual Report*, 2002; *Globe and Mail*; *National Post*; *Toronto Star*, 3-28 Dec 2002, and continuing. Toronto has four daily newspapers, two of them national, of varied political and editorial persuasions. Thus coverage and commentary was unusually wide-ranging.

26. Canadian Customs and Revenue Agency (CCRA), “What you need to know about bringing firearms into Canada” (visitor brochure and license/registration application). Testimony on economic damage, by Donna Feralie to Northern Ontario Liberal Caucus, Feb 1998. Letter, Anne McLellan to Garry Breitkreuz, MP, 1 May 2001, stating that “this new legislation does not change our goal to attract hunters to Canada.”

27. Canadian Wildlife Service and RCMP figures. The manufacturers, casualties of high tax and regulatory costs, were Lakefield-Mossberg of Lakefield, Ont. and Winchester-Cooey of Coburg, Ont. There are now no Canadian makers of “unrestricted” rifles and shotguns. As one result of discouraged hunting activity, geese have become nuisance birds, deer-car collisions have risen sharply, and people-bear problems are increasing. This is not all just a result of firearms laws. Certainly the new Puritanism emerging over the past few decades, from militant feminism and smothering political-correctness, to anti-hunting/fishing animal rights activism, to an increasingly biased media, has negatively stigmatized the shooting sports and been a strong influence behind most recent firearms laws.

28. *Firearms Act Regulations*, March 1998, Shooting Clubs and Shooting Ranges. Two federal-provincial approvals are required, plus municipal approvals. (The writer’s shooting club alone has spent some \$40,000 on range “improvements,” after 45 years accident-free, and new requirements continue to emerge.)

29. Breitkreuz, refusals of ATI requests.

30. *Firearms Act*, Sections 11-12.

31. Sect. 84(3)(d) defines a firearm as shooting a projectile at over 500 feet-per-second. As of March 2000, the RCMP composed a list of 286 different air gun models classified as firearms, and only 59 as “deemed non-firearms.” Since most compressed air and CO₂ guns shoot ordinary lead pellets at under 500 fps., the RCMP tested with extreme light-weight pellets, which of course achieved higher velocities. Those light-weight pellet tests became the basis for the “firearms” definition list. The air guns as “firearms” definition list has never been publicized, and most owners and dealers are unaware of it.

32. Spousal application for PO licenses was a common practice in 2000, with one or more of a husband’s guns then registered to the wife. The PO license is not renewable in the absence of registrations recorded to it.

33. *Firearms Act*, Sect. 54, and P&A license application form. From 1994 to 1998 a single course and exam covered both long-guns and handguns. The courses/exams were separated in the Regulations of 1998.

34. Letter, CFC to PO licensees, 11 Jun 2002. RCMP, list of air gun models with muzzle velocities of over, and under, 500 fps., 16 May 2002. There is no mention of chronographed velocity tests being conducted with special light-weight pellets. For someone getting into any of the shooting sports for the first time, and buying a first .22 rifle or a used shotgun, the personal regulatory costs can equal or be five or more times the cost of the actual firearm. A teen-ager wanting a .22 target rifle could probably afford the rifle, but not the total of associated procedural costs.
35. Dept. of Justice, "Firearms Licenses by Province as of April 20, 2002". Justice Committee Minutes of 5 Feb 2002.
36. Letter, Anne McLellan to Canadian Police Assn., 15 Aug 1999. Breitreuz newsletter, 22 Oct. 2002
37. John Thompson, *Misfire: The Black Market and Gun Control*, The Mackenzie Institute, May 1995
38. Department of Justice, "Guns Registered as of April 20, 2002," 16 May 2002.
39. *National Post*, 27 Apr 2002; Breitreuz, "Open Letter," 1 Aug 2002. The 30 Dec CFC computer "crash" was admitted only in early June 2003. *National Post* and *Toronto Star*, 4 June 2003.
40. Gary Mauser, *Gun Control is not Crime Control*, The Fraser Institute, 1995. Firearms accident rates began a steep decline with the introduction of mandatory hunter-safety training in the 1950s and 1960s. Shooting accidents are very rare on private civilian shooting ranges, but more common on police and military ranges.
41. Polsby, *Atlantic Monthly*, Mar 1994. Polsby treated at length the economics of crime and the concept of economic and crime/suicide means substitution.
42. J. Scott Kappas, *Guide to the Firearms Laws of the Fifty States*, Covington KY, 2002 edition.
43. Mauser, 1995. For suicide, successive firearms laws in Canada seem to have accomplished only substitutions of means, but with no reductions of overall suicide rates.
44. *The Economist*, 22 June 2002; Wayne LaPierre, "Gun Control's End-Game," *American Rifleman*, Oct 2002; Joyce L Malcolm, *Guns and Violence; The British Experience*, Harvard, 2002. Britain, which had only four gun-usage crimes in 1954, had 7362 such crimes in 2001, and 9974 in 2002 (*National Post*, 24 Jan 2003). Also, Email, from Melbourne police constable Ed Chenel, 5 Dec 2002. Australia in 2000-2001 bought in 640,381 firearms at a cost of over A\$500 million. Since then Australian homicides have increased 3.2%, assaults by 8.6%, and armed robberies by 44%. Many, perhaps most, minor crimes that neither necessitate medical attention or generate insurance claims, are never reported to police
45. Mauser, *Canadian Attitudes*. . . , 1997; also "Armed Self-Defense: The Canadian Case," *Journal of Criminal Justice*, 1996. Personal carrying of handguns in Canada is limited to police and armored-car guards.
46. Most such cases result in dismissal or acquittal, but at substantial defense costs to crime victim-defendants. In Ontario alone there are about 3500 "unsafe storage" charges each year, though many are add-ons to more serious charges.

47. Writer conversations with police officers and defense attorneys. In Canada even a minor *Criminal Code* conviction results in a lifetime criminal record.

48. David Austin, CFC, “Canadian Firearms Program Statistics”; also Breitkreuz, “Number of License Holders and Guns Registered as of 4 Jan 2003.” Compared with estimates, the exact deadline-date (31 Dec 02) figures are:

Estimated number gun owners in Canada: 5,000,000
 Possession-Only Licenses: 1,307,992
 Possession & Acquisition Licenses: 553,192
 Firearms Acquisition Certificates (still valid): 67,362
 Minor’s Licenses: 5,668
 Total of all licenses, 1,934,214
 Estimated licensing compliance percentage: 37%
 Estimated number, firearms in Canada, all types: 13,000,000
 Licensees with guns registered: 1,415,622
 Licensees without guns registered: 518,592
 Handguns in old (since 1934) registry (approximate): 1,150,000
 Handguns re-registered: 433,222
 Re-registration compliance: 38%
 Handguns previously registered; not re-registered: 700,000+
 Total guns registered, (incl. air/CO₂, & antiques): 5,893,447
 Estimated registration compliance percentage: 45%
 Ratio, registered guns to licensees: 4.16

49. Canadian Shooting Sports Assn. *Bulletin*, Oct 2002; *National Post*, 2 Jun 2000; 19 Jul 2000; 7 Sep 2002; Editorial 8 May 2003; *Toronto Sun*, 8 Mar 1998, & *ad infinitum*.

50. Morton, Ted, “How the Firearms Act (Bill C-68) violates the Charter of Rights and Freedoms.” Saskatoon, 5 Oct 2002.

51. *National Post*, Editorial, 28 Nov 2002; 2 Jan 2003. All political parties except the Liberals oppose the *Firearms Act* or major parts of it.

52. Following the 2002 Auditor General’s report, ex-Finance Minister and PM-in-waiting Paul Martin commented that “I voted for gun control. I share its goals.” *Toronto Star*, 7 Dec 2002. Justice Minister Martin Cauchon, as a Chrétien loyalist likely speaking on instructions, gave the official word that “The principles of the program and our commitment to them remain unchanged.” *National Post*, 13 Dec 02. This, plus Allan Rock’s “Over my dead body!” comment (note 25), indicates there is no change in the long-standing government attitude or intents.

53. *Small Arms Review*, Jun 2002; Canadian Shooting Sports Assn. *Bulletin*, Oct 2002; *National Post*, 8 Jul 2003.

54. *Globe and Mail*; *National Post*, 4-8 Jan 2003, 4-5 Jun 2003; *Toronto Star*, 4-5 Jun 2003. Regular government justifications as “Canadian culture” and “Canadian values” are overused clichés, and are really synonymous with Liberal Party thinking or policy.

55. *Globe and Mail*; *National Post*, 9-10 Jan 2003.
56. Standing Committee on Justice, Minutes of Proceedings, 5 Jun 2003.
57. *Globe and Mail*, 19 Mar 2003; *National Post*, 26 Mar 2003. This has raised suspicions that firearms-related activities of the Dept. of Justice, Solicitor General Dept., and the Commons Justice Ctee., are all on instructions from the PM.
58. Hession Report, *National Post*, 22 Feb 2003.
59. Library of Parliament report. Prosecuting 100,000 non-compliant gun owners could cost up to \$982 million. *National Post*, 25 Mar 2003.

INSTRUMENTALITY AND WOUNDS IN CIVILIAN VERSUS CIVILIAN HOMICIDES IN SAVANNAH: 1896 TO 1903 & 1986 TO 1993

Vance McLaughlin

This article compares the weapon used to commit “civilian versus civilian” homicide in Savannah for two time periods: 1896 to 1903 and 1986 to 1993. The Article investigates changes in the type of weapons used in homicide, the type of firearms used in homicide, and wound patterns of firearms homicide victims. The use of handguns in homicide rose from the first time period to the second. Formerly the Director of Planning for the Savannah, Georgia, Police Department, Vance McLaughlin is an associate professor of Sociology, Social Work and Criminal Justice at the University of North Carolina-Pembroke.

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INTRODUCTION

A central claim made by advocates of further restrictions on the ownership of firearms by civilians is that the enactment of additional laws, will reduce the use of firearms by criminals. This Article measures the homicides that took place in Savannah, Georgia, in two eight-year periods with ninety years in-between. The focus is on the instrument in these homicides. Because gun control laws are much more stringent and pervasive in the second eight-year period than in the first such period, we may find what, if any, effects the gun control laws have had on homicide.

I. DATA SOURCES

A. Municipal Reports for Savannah

Early in my research, I came across arrest reports by the Savannah police that had been submitted to the mayor to be included in his Municipal Report for Savannah. In addition to arrests for homicide, the Municipal Reports included arrests for

assault and striking, assault and cutting, assault and shooting, and assaults with intent to murder, all of which were divided by race. The assault and shooting category was not included for the years 1902 and 1903.

B. *Savannah Morning News*

A full set of the local newspaper, the *Savannah Morning News* (SMN) from 1896-1903 was available at the Georgia Historical Society. I felt that the commission of a homicide would have been newsworthy and some mention would be made in the newspaper. I also felt that the examination of each page of print for nine years (I included 1904 for the purpose of including the aftermath of anything occurring earlier) would be the most time-consuming part of the project, so I would finish it first. The newspaper review would be unlikely to miss a homicide because a report on the commission, capture, grand jury proceedings, trial, and sentence would usually be reported on different days of publication. This supposition proved to be correct. The information was recorded on data sheets.

C. Health Officer's Report

After recording all the information gleaned from the SMN, I looked at the Municipal Reports. Health Officer's Reports were available for six of the eight years. The report did not include homicide as a category in 1899 and was left out completely in 1902. The yearly Health Officer's Report separated homicides by month, race of victim, and type of homicide.

D. Health Department Death Certificates/Registrations

The Chatham County Health Department would not let me view the death certificates or registrations, but did verify my information or add information that they had, that I was unsure about. The data provided were proper name, date of death, instrument of death, race, and sex. In some cases, the registration of death had been recorded, but without issuance of a death certificate.

E. *Savannah Tribune*

One potential source of corroborating information did not provide enough information to be useful. The *Savannah Tribune* was a newspaper established in 1875. It was the “Black” newspaper and its editor was John Deveaux. The only known repository of issues of this newspaper is at Savannah State University. The full year of 1896, April 1897 to December 1898, 1901, 1902, and 1903 were available for viewing. There were some issues omitted from each year. After examining each year, I found that there was very little reported concerning homicides. The focus of the paper was primarily on statewide and national events. The three main subjects were support of the Republican Party, denouncement of lynching, and black troops in Savannah. John Deveaux was a leader of one of the companies of these troops that were organized under the state’s charter.

E. Data Sources: 1986 to 1993

There were four different sources that were used to identify homicides in the eight years from 1986 to 1993. These were the computer list generated by the SPD, homicide briefings, a computer list generated by the homicide investigation unit, and the homicide case files.

1. SPD Computer List

The SPD Computer List contained the case number, names, race, and sex of subject and offender, date of commission/discovery of homicide, and room permitting, a basic classification (domestic, robbery, etc.). In approximately 15% of the cases, the disposition was also listed.

2. Homicide Briefings

I initially thought the single page homicide briefing was available for each homicide that occurred. This briefing consisted of the case number, date, names, race, sex, and age of subject and offender, and a synopsis of what happened. I found out that in two of the years examined, when the bodies began to stack up between the Thanksgiving and Christmas seasons in 1990 and 1991, investigators did not write the single-page

homicide briefing.

3. Homicide Case Files

The Savannah Police Repository moved offices in 1995 and when I talked to the custodian officer, she informed me that everything was in boxes. I was assured that all the homicides were there, but the records were not filed in a systematic manner.

The homicide case file was my main source of data for the 1986-1993 era. The following checklist was used by investigators for the SPD:

- a. Case Incident Report
- b. Investigator's Supplementary Report (dictated)
- c. Additional Reports-Officers/Detectives
- d. Crime Lab Reports/Pathology/Latent Fingerprint Report
- e. Statements of Witnesses
- f. State o suspect(s) and waiver
- g. Evidence/Property Report Forms
- h. Arrest, Search Warrants and/or Permission to Search
- i. Arrest/Booking Report
- j. Criminal Record/F.B.I. Report
- k. Arraignment Sheet
- l. Witness Worksheet and Continuation
- m. Crime Scene Sketch and Composites
- n. Investigator's Crime Scene Checklist/Miscellaneous Information
- o. Street Canvass (Vehicles/Neighborhood) Check List.
- p. Photographs Take/Photo Lineup
- q. Notes/Miscellaneous Information
- r. Supervisor's Review and Direction Work Sheet
- s. Investigator's Case Activity Summary
- t. District Attorney's file attached
- u. In the event this case is plea bargained, do you want to be contacted? Yes/No

It must be stressed that not all of these items were completed in most homicides. The police are only going to spend their time on information that will point to the guilty person and help in his or her prosecution. The most helpful item

was the Investigator's Supplementary Report. This included the relevant facts from the Case Incident Report and then discussed the ongoing investigation. These two items were always available.

There were other items that were found in the case files on a sporadic and random basis, such as jury lists, high school records, military records, psychological tests, and hearsay.

II. DETERMINING CAUSE OF DEATH

Currently, to complete a death certification, a pathologist must determine the cause, mechanism, and manner of death. The cause of death is the injury that has actually brought about the death of the individual. If a victim is stabbed and dies two weeks later of an infection in the abdomen, the underlying cause of death would have been the stab wound. The mechanism of death may refer to a sequence of physical events or to pathophysiologic changes in the individual that led to his death. For instance, ventricular fibrillation can be caused by a coronary disease or by electrocution, but the effect on the body is similar. The manner of death may be classified as homicidal, accidental, suicidal, or natural. The manner of death may be the most controversial decision the pathologist makes (Wetli, Mittleman, Rao, 1988).

According to Allen (1986), criminologists assess the extent of physical harm resulting in a violent crime in three ways:

- 1) determining whether the victim requires hospitalization;
- 2) identifying the location and number of wounds the victim suffered; and
- 3) if a firearm was used, analyzing the firearm caliber and location of wounds to assess the overall injury.

Allen chastises these criminologists who confuse the concept of injury. He writes that "An injury is the '...deformation of tissues beyond their failure limits, resulting in damage of anatomic structures or alteration in function' (Committee on Trauma Research, 1985)" (p. 142). Allen feels that criminologists have tried to mix various schemes of classification that do not make sense. He suggests using the Abbreviated Injury Scale (AIS) developed by the American Medical Association to classify

automobile injuries. The two challenges in using the AIS are that most of the death causing wounds are penetrating objects (bullet or knife blade) and medical personnel dealing with aggravated assaults and homicides would have to utilize the AIS.

III. INSTRUMENTALITY

This study investigated five types of causes of death: gunshot wounds, incised wounds, blunt trauma, asphyxia, and explosion. Gunshot wounds, incised wounds (cutting), and blunt trauma constituted all causes of death from 1896 to 1903. From 1986 to 1993, there were six homicides by asphyxiation and one by explosion. A short discussion of each of the five methods of homicide follows, including the advantages and disadvantages of each from the perpetrator's perspective. Asphyxia and explosion are presented first because they are so rare.

A. Asphyxia

A total of nine homicides caused by asphyxia were encountered in this study. According to Spitz (1980), asphyxia falls into four categories. Three of these categories were encountered in this data. These were compression of the neck, obstructing the airway, and exclusion of oxygen. Six of the asphyxia deaths were committed by males and three of the perpetrators were never identified.

Compression of the neck can occur manually (with hands) or with a ligature, such as a rope or wire. Of the four female victims of this type of asphyxia, three were killed by the hands of their perpetrator. The fourth female victim died when a scarf was used as a ligature around her neck.

Five victims were killed by an exclusion of oxygen. A female victim had a pair of panties in her throat and a male victim had a sweater tied across his mouth, after receiving a severe beating. A female victim was first smothered with a pillow, while bound, and then stabbed ten times in an attempt to confuse the investigators. A female victim was suffocated by unknown means. One male victim, an infant, died when from an exclusion of oxygen from a purposely-set fire.

The only advantage to asphyxiation is that many times there is no blood transfer (between perpetrator and victim) and that it can be performed without a weapon. The disadvantage is that

usually the victim must be smaller and weaker than the attacker for the attacker to have any real chance at success. A skillful person, who is well trained, can strangle a victim very efficiently. These types of strangulations did not occur in Savannah.

B. Explosion

While “explosion” is not a scientific category because death may result from, for example, shock or loss of blood, it is sufficient to dispose of the one incident in the data. The male victim opened a package containing a pipe bomb.

The advantage of using an explosive device is that the perpetrator does not have to see the victim and can be separated from the crime by time and distance. The disadvantage is that many components of explosives are traceable and an unintended victim can set the explosive device off. If the bomber attempts the crime more than once they usually establish a pattern which becomes a “signature” to those who investigate these types of homicides.

C. Firearms

Firearms, in general, are largely made of metal; they fire a projectile that is powered by gunpowder. Firearms are generally broken down into three categories: rifles, shotguns, and handguns. Rifles and shotguns are shoulder-mounted weapons and come in a variety of types. Handguns are divided into the category of revolvers and automatics.

The majority of firearms that were used in homicides in Savannah, when identified, were handguns. In the era from 1896 to 1903, only revolvers had been in existence long enough to be widely available. A revolver has a cylinder and usually holds five or six cartridges. A double action revolver, which most were, would raise the hammer as the trigger was pulled and the cylinder would rotate. The hammer would then strike an unfired cartridge. In the era from 1986 to 1993, both revolvers and automatics were used. Automatics are pistols that actually fire semi-automatically. This means that every time the trigger is pulled, the hammer falls on a cartridge that is fed from a magazine, and the cartridge is then “automatically” ejected, and a live round is substituted in the chamber.

The bullet from a firearm causes damage by its impact on

the body and subsequent destruction of body material. It is almost impossible to predict what type of damage will be done because of a number of factors: size and power of cartridge, distance from shooter to victim, direction the bullet hits the body, point of entrance to the body, the direction the bullet takes within the body, and size, shape, and composition of the bullet.

The trajectory of the bullet, which is governed by laws of physics, can have high predictability until it actually enters the body. The amount and density of muscle tissue, the size of the person, and his posture at the time of impact affect the outcome. The differential combination of these factors yields even greater variability or possible outcomes. If a bullet hits a bone, it may be deflected out of the body, may follow the bone to its final resting place, or break the bone as it penetrates.

Moreover, the bullet can cause damage in a number of ways. First, it can destroy body tissue. It can also sever arteries, puncture vital organs (heart, brain), and if powerful enough, produce an exit wound which pulls blood and tissue outside of the body. One victim shot with a 9mm handgun twenty-four times walked out of the hospital a week later. Other victims shot once with a .22 handgun have died immediately. Of all the factors affecting the lethality of the bullet, placement is the most important.

While firearms have been improved in the last ninety years, some of the technological advances may be irrelevant to homicide. For instance, if handguns with higher magazine capacities are not used as murder weapons, or if they are used, but only when three or four shots contained in the magazine are fired, the added "firepower" is meaningless.

There are a number of challenges the investigator may encounter involving deaths by firearms. It should also be noted that the cause of death may vary, even when the same weapon is used. A victim can be shot in the heart and die immediately or shot in the leg, hitting the femoral artery, and bleed to death slowly. Homicide detectives must answer four questions when investigating death from gunshots:

1. Was death due to a gunshot wound or to an injury by some other instrument?
2. If by a gunshot wound, from what distance was the firearm discharged?

3. From what direction were the shots fired and what was the position of the body when hit?
4. Was it an accident, suicide, or murder?

Many homicide researchers have no familiarity with firearms. This has been problematic when it comes to precise measurement of the use of firearms in violent crime. On the other hand, criminalists have specific training in this area.

Gunshot residue, the projectile, and cartridge can provide vital information. Gunshot residue can include decomposed primer, propellant, projectile coating, projectile, and traces of what was in the gun barrel.

The projectile shot from a firearm with rifling (one that has lands and grooves, producing striations on the projectile) may, like a fingerprint, yield a unique signature.

The cartridge case contains a headstamp on the bottom that includes the caliber and manufacturer. In some cases, the indentation of the firing pin on the cartridge's primer may reveal the type of firearm used. If the gun is recovered, the firing pin and ejector marks on the cartridge can be matched (Wrobel, Millar, & Kijek (1998). In some cases, fingerprints that were on the cartridge cases that were fired can be discovered, though on an inconsistent basis (Migron, Hocherman, Springer, Almog, & Mandler (1998). The Bureau of Alcohol, Tobacco, Firearms and Explosives has recently deployed investigative equipment that can sometimes identify the type of firearm that has been fired by using the empty cartridge case, if that case has been automatically ejected. The following are some challenging areas:

1. Shotguns

Shotguns may be the most lethal firearm used in homicides in America. Most murders are committed at close range, which means that the full force of the shotgun blast is taken by the victim.

Shotguns can be loaded with a slug (which is one large projectile) or with shot (lead balls). The size of the shot determine how many can be loaded in each caliber of shotgun shell. These go from the largest type of double 0 buckshot to #9 birdshot. Many physicians who are unfamiliar with shot size refer to all shot as "buckshot" (called this because deer hunters use it). If the researcher knows the size of shot used on the

victim, he may be able to make some scientific calculations about how many times the shotgun was fired. For example, if the autopsy report says that there were 16 pellets in the body, this may mean the victim was shot once with #9 shot or three times with double 0 shot. If the shot is identified correctly and has impacted the victim in different patterns, the distance could be estimated. This is especially true if the gun has been recovered and the type of choke (the amount of spread the barrel has been made to give to the pellets) is known.

2. Handguns

A major problem is if a .357 magnum revolver has been identified as the murder weapon, many researchers record that the victim has been killed by a .357 magnum bullet. This is not necessarily so. A .357 magnum can shoot both .357 cartridges and .38 special cartridges. The converse is not true. A .38 special revolver cannot shoot .357 magnums. The cartridges must be examined. Even when bullets are retrieved from the victim, most .38s are indistinguishable from .357 magnum bullets. To further confuse the subject, there are now some automatic pistols that shoot these cartridges. A .357 magnum cartridge is more powerful than a .38.

3. Cartridges

Even when an investigator has the spent cartridges, he cannot be sure that they have been loaded consistently with the headstamp. The headstamp on the bottom of the cartridge case usually identifies manufacturer and caliber. Much of the ammunition used in the United States has been reloaded using used cartridge cases.

It is not just academics that have difficulty in dealing with firearms-related issues. Collins & Lantz (1994) evaluated the amount and type of misinterpretation of gunshot wounds(GSW) at a hospital trauma center. They wanted to ascertain mistakes made by the trauma specialists (TS). They had a total of 271 gunshot wound deaths, but eliminated those where the projectile did not leave the body. This left 125 fatalities of which 46 had records of treatment by a trauma specialist. The researchers said:

A total of 15 erroneous interpretations involved the

number of projectiles, while 16 misinterpretations involved entrance and/or exit wound determinations. In seven cases (29%), a compounded error occurred where the TS incorrectly recognized the qualitative aspects of the wounds or made an inaccurate assessment of the number of GSW's causing magnification of error (p. 96).

It should be noted that surgeons, just like police officers who arrive at a crime scene, have as their first duty the preservation of life. If a wounded person is brought to the emergency room, the surgeon will not be worried about "how the assault occurred" but in preserving the victim's life. An entrance/exit wound will be deformed when a surgeon begins to probe for the bullet. This is not to say that each group, police, researchers, and surgeons cannot do better.

Firearms offer a number of advantages to the perpetrator over other instrumentalities. The first advantage is that the extent of the wound that a firearm generates is independent of the perpetrator's size, strength, or physical condition. The second is that the suspect can fire this weapon at some distance from the victim. A third advantage is that most firearms allow the shooter to fire more than one shot rapidly, thus increasing the chance of disabling the victim.

A chief disadvantage of firearms is that the illegal possession of them is punishable by law. A convicted felon is not allowed to own any firearm and the possession is usually a reason to revoke parole or probation. A second disadvantage is that when a firearm is used, it may be traced back to the shooter. Currently, all modern firearms must have a serial number affixed to their frame. Third, the shooter will have unburned powder on his hand and ballistics can be used to trace the bullet back to the gun from which it was fired. The fourth disadvantage is in the carrying. If one is carrying the firearm concealed, it can be problematic to do on a daily basis, especially in warm climates. The last disadvantage is the loud noise generated by a firearm discharge.

D. Incised Wounds

Spitz (1980) defines a "cut" as a wound that is longer than it is deep and a "stab" as a wound that is deeper than it is long.

Knives are the primary weapon used to cause incised wounds. In a stabbing, the knife enters the body and penetrates a vital organ. The victim can bleed to death internally. In a cutting wound, the knife blade is dragged along the body and a slash can be seen. Many victims of knife attacks may be covered with blood, but may have only superficial knife wounds, the knife having only penetrated the first layers of skin. Other slashes that are deeper and directed can be fatal. Knives can also have blades that are rusty or have been used in such a way that they cause fatal infection in the victim.

Knives have a number of advantages. First, they are very concealable because they are so flat. Second, they do not have to be reloaded to continue the attack. Third, they can be found in any kitchen or any home. Fourth, the sale of knives is basically unrestricted and knives have no serial numbers. The disadvantages of knives is that the perpetrator will have to be almost within arm's length of the victim to make contact. Second, modern forensics can identify the knife type and thrust, based on the wound and there will be blood on the actual weapon. In many cases, this blood will be transferred to the perpetrator. Third, depending on the defensive capabilities of the victim, the perpetrator may need some skill to carry out his attack.

E. Blunt Trauma

Spitz (1980) includes tears, shears, and crushes as types of blunt force injury. Blunt trauma can be caused by an object (metal bar, vase, etc.), hands, or feet.

The advantage of blunt trauma as a weapon is that hands and feet are always available and that wherever the attacker is usually there is some object that can be picked up and used. The disadvantage is that the use of blunt trauma relies a great deal on the strength and fury of the perpetrator. A second disadvantage is that the perpetrator must be close to the person and blood may be transferred to the object that struck the victim. The third disadvantage is that the victim may be able to survive the attack and do the perpetrator harm (especially if the victim is armed with a gun or knife).

The type of blunt trauma most often been fatal is one that causes a skull fracture. The fracture is usually caused when a perpetrator hits the victim in the head with an object.

Sometimes, if the victim is on the ground, and the perpetrator kicks his head, a skull fracture will result. A punch usually does not initially cause a skull fracture, unless the injury results from the head hitting the floor or another object as the victim falls.

TABLE 1

Instrumentality of Savannah Homicides, (1896 to 1903) & (1986 to 1993)

Suspects	Black Male Victim		Black Female Victim		White Male Victim		White Female Victim	
	1896-1903	1986-1993	1896-1903	1986-1993	1896-1903	1986-1993	1896-1903	1986-1993
Black Male	43 (43%) 24 GS 12 IW 7 BT	133 (56%) 104 GS 16 IW 12 BT 1 A/S	14 (14%) 7 GS 3 IW 4BT	28 (12%) 14 GS 8 IW 4 BT 2 A/S	7 (7%) 4 GS 3 BT	15 (6%) 11 GS 1 IW 2 BT 1 A/S	0 (0%)	6 (3%) 1 GS 2 IW 1 BT 2 A/S
Black Female	3 (3%) 1 GS 2 IW	15 (6%) 5 GS 9 IW 1 BT	5 (5%) 4 IW 1 BT	6 (3%) 2 GS 3 IW 1 BT	0 (0%)	0 (0%)	0 (0%)	0 (0%)
White Male	8 (8%) 7 GS 1 IW	7 (3%) 6 GS 1 XP	0 (0%)	0 (0%)	14 (14%) 8 GS 4 IW 2 BT	7 (3%) 3 GS 4 BT	2 (2%) 2 GS	3 (1%) 1 GS 1 IW 1 BT
White Female	0 (0%)	0 (0%)	0 (0%)	0 (0%)	1 (1%) 1 GS	0 (0%)	0 (0%)	0 (0%)
Unknown	3 (3%) 2 GS 1 BT	10 (4%) 10 GS	0 (0%)	6 (3%) 1 GS 1 IW 1 BT 3 A/S	1 (1%) 1 BT	2 (1%) 2 GS	0 (0%)	1 (0%) 1 GS
TOTAL	57 (57%) 34 GS 15 IW 8 BT	165 (68%) 125 GS 25 IW 13 BT 1 A/S 1 XP	19 (19%) 7 GS 7 IW 5 BT	40 (19%) 17 GS 12 IW 6 BT 5 A/S	23 (23%) 13 GS 4 IW 6 BT	24 (10%) 16 GS 1 IW 6 BT 1 A/S	2 (2%) 2 GS	10 (4%) 3 GS 3 IW 2 BT 2 A/S

101 civilian versus civilian homicides occurred during 1896 to 1903. 241 civilian versus civilian homicides occurred during 1986 to 1993.

to 1993. 237 of these homicides are represented above (the two homicides not utilized involve GS's: hm on bm; and bm on om).
GS=gunshot wound; IW=incised wound; BT=blunt trauma;
A/S=asphyxiated/strangled; XP=explosion

That medical care has vastly improved over the last 90 years no doubt impacts the outcome of many violent assaults. The speed with which emergency medical units arrive on the scene, their competence, the speed of transport to a hospital, the modern techniques of surgery, and the post-trauma care given have all improved greatly. It is impossible to speculate precisely how high the homicide rate would be in Savannah from 1986 to 1993 if those victims of aggravated assault had been treated by the medical community of 1900. Grossman (1995) quotes James Q. Wilson as saying that if trauma care was the same as it was in 1957, the murder rate would be three times as high. Who can estimate the difference of ninety years?

IV. PARTICULAR TYPES OF WEAPONS USED

This section examines the weapons used with more specificity. The examination is conducted to see if there is a difference in the type of weapon used within the categories of firearms, incised weapons, and those causing blunt trauma.

Table 2 illustrates the type of firearms used in homicides in Savannah from 1896 to 1903.

TABLE 2
 CITIZEN VERSUS CITIZEN HOMICIDE VICTIMS,
 TYPE OF FIREARM USED (1896 TO 1903)

Firearm	B/M victim	W/M victim	B/F victim	W/F victim
Unspecified Gun	4	0	0	0
Revolver	21	9	4	1
.32 revolver	3	2	1	0
.38 revolver	3	1	1	0
.44/.45 revolver	0	1	1	1
Shotgun	2	0	0	0
Total	34	13	7	2

Of the 101 civilian homicides committed in the earlier era, 56 were caused by firearms. Of these 56 firearms, 49 were specifically identified as a revolver. It must be remembered, that

the most modern handgun at this time was a revolver. In addition, some of these may have been “cap and ball” revolvers. Revolvers that chambered fully loaded cartridges were first widely marketed in the 1870’s.

Table 3 illustrates the type of firearms used in homicides in Savannah in the later era.

TABLE 3
 CIVILIAN VERSUS CIVILIAN HOMICIDE,
 TYPE OF FIREARM USED
 (1986 TO 1993)

Firearms	B/M victim	W/M victim	B/F victim	W/F victim
Unspecified Gun	10	2	0	1
Handgun (HG)	1	0	0	0
.22, .25, .32 HG	37	4	5	0
.380, 9mm, .38, .357 HG	55	8	10	2
.40, .44, .45, 10mm HG	2	0	1	0
Rifle	6	1	0	0
Shotgun	14	1	1	0
Total	125	16	17	3

Of the 161 homicides perpetrated with firearms, 127 were specifically mentioned as a handgun. The above handguns were grouped in three classes by caliber, instead of by revolver or automatic. A sizeable majority of the handguns used were revolvers.

V. WOUNDING PATTERNS

Wounding patterns are of interest for a number of reasons. First, as criminal investigators, we can learn much about the method in which the homicide was committed, which assists the prosecutor in preparing for trial. Agencies with a Behavioral Science Unit, such as the FBI, use wound patterns at part of their overall profiling procedure. Second, homicide researchers can also try to establish certain relationships based on the type, number, and position of wounds.

Wounding patterns may also be a subject from which we can get a clearer understanding of the extent of the improvement in medical care and its effect on homicide. If we had exact data

from two different time periods on all aggravated assaults and homicides, we could examine those wounds that caused death and those that were treated successfully by physicians. We could then try to discern how much difference in homicide rates is due to improved life-saving by health care professionals.

A. Challenges in Interpreting Wounding Patterns

Unfortunately, knowing the number, type, and position of wounds does not always tell us as much as we “think” it should about homicide. If there is more than one wound, we may identify the wound that caused death, but in a number of cases with multiple wounds, more than one is lethal.

Anthropologists Rhine and Curran (1989) examined an old skull that had multiple gunshot wounds. Not only were they able to identify entrances, exits, and trajectory, but also they were able to determine the sequence of bullet impact. This was possible because a bullet hitting a hard and large surface like the skull, produces a fracture. A fracture that stops at another fracture must have occurred later than the first fracture. This is the same as when police officers find two bullet holes in a window. Investigators can easily tell which bullet hit the victim’s head first.

There are some questions that we can ask about changes in wounding patterns. First, is there any difference between wounds in the earlier era and the later era, when similar weapons are used? Second, are there certain types of wounds that are common in specific types of homicide? Third, are there wounds that caused death in the past, that do not cause death in the modern era, possibly because of better medical treatment?

B. Number of shots/hits

This data from both eras are problematic because the number of reported shots may have been determined by the statements of witnesses and/or suspects, by the number of empty cartridges found in the revolver, by the number of empty cartridges found at the scene (if an automatic was used), or by other measurements.

As noted above, even modern pathologists have problems determining entry and exit wounds. For example, two perpetrators acted out a scene from the film noir classic *The*

Killers (whether by accident or by design). In the film, Burt Lancaster plays the Swede, who double-crossed the members of his gang. He started a new life and then heard that two gunmen were in town looking for him. Instead of leaving town, he stayed in his room, waiting to be killed. The two gunmen kicked open his door, pulled out six shot revolvers and emptied them into him. The real-life Savannah event occurred as follows:

The victim was in his house, high on drugs. Two unknown gunmen entered, carrying .38 caliber revolvers. They emptied their guns into him and left. He was a drug dealer, and the police, after a thorough search of the house, found cocaine, heroin, penicillin V and naproxen. The victim's unfired gun was found next to him. The rumor floated that the victim owed money on a drug deal and was going to talk to the police, which prompted a murder contract.

The medical examiner counted 13 entry wounds on the body. He either had not seen the movie or counted an exit wound as an entry wound.

Forensically difficult situations also occur when the subject fires at a number of people and only one dies, or when he fires at the murder victim, and misses some shots because of poor marksmanship. There were few such cases; they were quantified as accurate for hits on the murder victim, and any misses were also attributed to shots which missed the murder victim. The following example occurred in the early era:

A drunken husband came home and got into verbal conflict with his wife. Another woman, who lived in the same house, had just come in with her husband. The perpetrator fired twice into his wife's hand and she ran out of the room screaming. She ran into the other couple's room and hid in the closet. Her husband followed, and seeing the outline of a woman in the dark, fired twice, killing her. He then realized the victim was not his wife and shot his wife through the closet door, hitting her in the breast.

The real target of the husband's anger was his wife, who ended up wounded. The inadvertent victim just happened to be there. This case, while unusual, was counted as two shots and two hits on the victim.

In the earlier era, of the 56 incidents in which the murder weapon was a firearm, there were 8(14%) incidents that did not have an estimate of both shots and hits. This subgroup included 3 cases with 1 hit, 2 cases with 2 hits, 2 cases with 3 hits, 1 case

with 2 shots and unknown hits. In the 48 remaining cases there were 99 shots and 72 hits. This means that the average number of shots per incident was 2.02 and the average number of hits was 1.5.

In the later era, of the 159 incidents in which the murder weapon was a firearm, 34(21%) incidents did not have an estimation of both shots and hits. This subgroup included 12 cases with 1 hit, 8 with 2 hits, 6 with 3 hits, 1 with 4 hits, 1 with 8 hits, 2 with an unknown number of hits, and 3 only identified as a "gun" death. In the 115 remaining cases there were 347 shots and 247 hits. This means that the average number of shots per incident was 3.01 and the average number of hits was 2.15.

Blackman (1997), in his article discussing validity and reliability problems in homicide research and conducted under the rubric of "epidemiology studies," makes the following comment:

Most shootings involve small numbers of rounds per firearm (Police Academy Firearms and Tactics Section, 1994, p.9) and small numbers of entry wounds (Hutson, Anglin, & Pratts, 1994; Kellerman et al., 1996; Ordog, Wasserberger, Balasubramanium, & Shoemaker, 1994; Webster, Champion, Gainer, & Sykes, 1992), so that, despite reported increases in the number of such wounds (Webster et al., 1992), there is no credible evidence that changes in ammunition-feeding mechanisms or firearm magazine capacity are factors in the amount of severity of violence or injury. Criminological research confirms that magazine capacity is not yet a factor even in multiple shootings (Etten & Pettee, 1995, pp. 175-176).

CONCLUSION

It would seem that based on the above data that medical care has had a positive effect on reducing homicides between the two eras. There was an increase in the use of firearms during the second era, primarily because firearms usage is endemic to the illegal drug trade. The caliber of the handguns may have increased somewhat, and modern powder increased the velocity of some rounds. In addition, in those cases where homicide resulted from gunshot wounds, incised wounds, or blunt trauma,

there was a substantial increase between the two eras in the number of wounds to cause death.

One datum that is impossible to collect is in both eras how many victims of an aggravated assault were treated with calculable wounds in both eras and recovered from these wounds. This would certainly provide a more definitive picture of the improvement in medical care.

It also seems that the murder rate for Savannah would have been lower for the modern era if it were not for the drug trade, which in 1991 gave Savannah the highest murder rate in the nation. Among black males, it could be said that the murder rate per capita was almost the same. It is possible that the increased efficacy of medical care nullified the deadly effects of involvement with illegal drugs.

Fifty-five percent of the homicides committed in Savannah between 1896 to 1903 were perpetrated with firearms and 88% were specifically identified as handguns. From 1986 to 1993, 67% of the homicides were committed with firearms and 79% were specifically identified as handguns. In the earlier era, there were no laws regulating the possession of firearms except it was illegal to carry one concealed. In the modern era, many laws regulate the sale and possession of firearms are legal statutes. It would seem that factors besides the "law" affect the instrumentality of homicides in Savannah.

REFERENCES

- Allen, R.B. (1986). Measuring the Severity of Physical Injury Among Assault and Homicide Victims, *Journal of Quantitative Criminology*, 2, 139-156.
- Blackman, P.H. (1997). A Critique of the Epidemiologic Study of Firearms and Homicide, *Homicide Studies*, 1, 169-189.
- Collins, K.A. & Lantz, P.E. (1994). Interpretation of Fatal, Multiple, and Exiting Gunshot Wounds by Trauma Specialists, *Journal of Forensic Sciences*, 39, 94-99.
- Cook, P.J. (1991). The Technology of Personal Violence, in M. Tonry (Ed.), *Crime and Justice* (Vol. 14, pp. 1-72). Chicago: The University of Chicago Press.
- Grossman, D. (1995). *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, New York.
- Migron, Y., Hocherman, G., Springer, E., Almog, J., & Mandler, D. (1998). Visualization of Sebaceous Fingerprints on Fired

Cartridge Cases: A Laboratory Study. *Journal of Forensic Sciences*, 43, 543-548.

Rhine, J.S. & Curran, B.K. (1990). Multiple Gunshot Wounds of the Head: An Anthropological View. *Journal of Forensic Sciences*, 35, 1236-1245.

Spitz, W.U. & Fisher, R.S. (1980). *Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*. Springfield, IL: Charles C. Thomas.

Wetli, C.V., Mittleman, R.E., & Rao, V.J. (1988). *Practical Forensic Pathology*. New York: IGKAU-SHOIN Medical Publishers, Inc.

Wrobel, H.A., Millar, J.J., & Kijek, M. (1998). Identification of Ammunition Residues and Other Cartridge Related Materials-A Preliminary Model Using .22 Caliber Rimfire Ammunition, *Journal of Forensic Sciences*, 43, 324-328.

The Highest Possible Generality: The Militia and Moral Philosophy in Enlightenment Scotland

J. Norman Heath

The debate in the mid-18th century over whether Scotland should be allowed to participate in the English militia revealed a profound ideological split among political thinkers of the time. On the one hand, militia critics such as Adam Smith saw man as essentially an economic creature motivated by selfishness. Militia advocates, in contrast, emphasized the importance of social connections based on reciprocity and on shared values of virtue. Norman Heath is a leading authority on the history of American militia law, and is author of "Exposing the Second Amendment: Federal Preemption of State Militia Legislation," which appeared in volume 14 of the Journal.

I. INTRODUCTION

Eighteenth century armies did little to encourage morality or intellect among the ranks. The ordinary soldier was expected to do nothing more than respond robotically with well-practiced motions to a few rudimentary signals. Armies withstood the effects of individual soldiers being idiots or reprobates, so long as the soldiers met the basic requirement of standing in line while being shot at. Good character among the officers might influence the men, but bravery or acuity among the men could not remedy the deficiency in officers. Such norms, while they met the practical requirements of nations, tended to contradict two themes of Enlightenment thought: movement of order within the system was strictly unidirectional, and standing armies respected no essential characteristics inherent in all levels of constituency. Because moral philosophers of the time sought to create government institutions that were representative of the character and interests of society, some intellectuals questioned the propriety of the military arrangements of the day. These philosophers did not attack the internal structure of armies, but rather recommended maintaining a citizen militia in order to diminish the army's prominence in society. They believed that militia promoted a healthy interchange of qualities between

citizens and government. This sentiment in favor of militia reached its greatest expression among a group of Scottish literati in the second half of the Eighteenth century.

Most readers of this Journal know of the militia as a subject of debate among the framers of the U.S. Constitution and Bill of Rights. Some readers, however, may not have read of a slightly earlier debate, which took place among the famous Scottish social philosophers. The authors and ratifiers of the U.S. Constitution were almost certainly aware of Scottish interest in the subject, for Adam Ferguson, Adam Smith, and their Edinburgh colleagues were the preeminent social scientists of that day. "They were a powerful influence in Edinburgh, in Scotland, in England, on the continent, and in the United States," writes Lynee Lewis Gaillet. Ronald Hamowy holds the view that "The Scottish writers were authors of international repute, numbering among them many of the most important intellectuals of the eighteenth century. All educated Englishmen on both sides of the Atlantic-indeed, all educated Europeans-were familiar with their writings."¹

II. THE SCOTTISH MILITIA DEBATE BEGINS

At the outbreak of the Seven Years War in 1757, the British Parliament passed a militia act. The act provided for training and arming limited numbers of citizens in each of the counties of England. Scotland was excluded under the militia act, and in fact the Highland counties of Scotland had been disarmed by Parliament in 1725. But after 1757, a group of Edinburgh intellectuals known as the "Moderates" began lobbying earnestly that Scotland should be included in the militia of Britain.² They drafted a proposed bill, and forwarded it to Parliament to be advanced by Scotland's representatives there.³

While the merits of militia versus standing armies had been debated before in England, the Scottish militia proposal was overshadowed by historical circumstances that were particular to that country. The crowns of England and Scotland had been unified since 1603, when upon the death of Elizabeth I the Stuarts had claimed the throne. The two nations thereafter had separate parliaments, but shared a monarch. This arrangement continued following the Glorious Revolution, though the Stuarts had been deposed in favor of William and Mary. In 1707, by the Act of Union, the Scottish Parliament, seeing commercial

advantages in a closer relationship to England, dissolved itself and placed Scotland under the British Parliament. In return, the British Parliament accepted 45 Scottish representatives in the Commons, and 16 in the House of Lords. The Highland clans of Scotland, however, were militaristic and largely Catholic, and continued to agitate for the return of the Stuarts. Periodic rebellions were raised by these Jacobites (so named after the Stuarts, because “James” was a corruption of the Latin name *Jacobus*). The last and perhaps the most serious such rebellion occurred in 1745, and involved assistance by the Catholic monarchy of France. When the Scottish Moderates began to agitate for inclusion in the British militia the following decade, they found themselves in an uphill battle to prove the advisability of Parliament arming Scotsmen as it did Englishmen. Equally as daunting, the Moderates had to convince fellow Scots that militia service was a right worth seeking.

At first, there seemed to be no organized opposition to the pro-militia Moderates, whose two most public representatives were Adam Ferguson and the Reverend Alexander Carlyle.⁴ They published a sizable body of pro-militia literature in the form of pamphlets, but met with little reply. Nevertheless, the 1760 militia bill failed, as did a similar bill two years later. Neither garnered the clear support of even the Scottish caucus in Parliament. The Moderates continued through the 1760s to agitate for a militia, unsuccessfully, without any clearly expounded opposition. It was not until the mid-1770s that arguments *against* the militia, other than those concerning Jacobitism, began to be publicly circulated. When the militia debate began in earnest, it brought the attention of some of the greatest social thinkers of the Enlightenment to a subject that raised difficult problems.

III. THE SCOTTISH ENLIGHTENMENT

Scottish Enlightenment thought was characterized by the creation of what is now called social science. This new science was not merely descriptive, but was also prescriptive. Adam Ferguson, Adam Smith, David Hume and others sought not merely to accurately describe human nature, but to define institutional arrangements by which innate human tendencies could be harnessed for the good of society. The military institutions of state became a focal point for the varied considerations of the Scottish philosophers. These

considerations generally began with the recognition that commercial societies created surpluses of wealth. Wealth was an abstract representation of the overall power of the society. The military represented the power of the society in *tangible* form. But armies and navies were not organic institutions; they were created with wealth. So paradoxically they comprised second-level abstractions, artificial representations of the manpower of the society as a whole.

The Scottish philosophers observed that man had a natural impulse to feed, clothe, and shelter himself as best possible. They also recognized that the aggregate effect of this impulse when humans formed large modern societies was to create a surplus of wealth. They agreed wealth was a good thing. The disagreement arose over whether the military was best created from this surplus wealth, without the direct participation of the citizens, or whether military defense was such a fundamental function of society that it should be undertaken directly by the citizens themselves.

The militia debates thus raised the question of whether societies existed primarily to create prosperity, or whether societies existed as a forum for broad participation. This question, of the social significance of subordinating social participation to the creation of wealth, was a subtext of the militia debates of the 1770s and 1780s that neither party wanted to confront. Militia opponents hesitated to admit that they valued wealth above civic participation. Militia advocates were at pains to deny that civic participation interfered with the creation of wealth.

IV. CONTRAST WITH THE ENGLISH MILITIA DEBATE

Decades before, in 1697-98, the English had held a very lively debate over the propriety of keeping a standing army, and the advisability of relying on militia. Some of the arguments raised in this controversy resurfaced in the later Scottish debates. But the Standing Army Controversy of 1697-98 was of a different nature than the agitation for a Scottish militia in the latter half of the eighteenth century. The earlier controversy came in the aftermath of a prolonged contest for power between Parliament and the Crown, in which a major point of contention was control of the military. Critics likened standing armies to imperial guards and janissaries, and feared maintaining a military

institution that would be susceptible to misuse by a ruling clique. To concentrate military power in an army, then to concentrate control of that army in one governmental body, created constitutional difficulties which were not only problematic in theory, but which England had experienced in practice over the second half of the seventeenth century.

The debate of 1697-98 therefore focused on the constitutional issue of preventing misuses of military power. The two most prominent antagonists in this debate were John Trenchard, who wrote *An Argument Shewing that a Standing Army is Inconsistent with a Free Government*, and Daniel Defoe, who penned the rejoinder, *An Argument Shewing that a Standing Army with the Consent of Parliament is Not Inconsistent with a Free Government*.⁵ Trenchard undertook to show that standing armies were by their very nature an unacceptable threat to the societies that maintained them. Defoe argued that such armies were necessary, and could be legitimately held in check with the proper governmental safeguards. But even Defoe implicitly accepted that standing armies were less than wholesome institutions. The general distinction between the two arguments thus rose out of the willingness or unwillingness of the parties to yield principle to necessity. The crux of the issue lay in identifying and justifying the nature of the power retained by the people of England, and that held by the state.

Governmental power was represented by the Sword and the Purse, the sword being the military and the purse revenue. Trenchard argued that the people should be in actual possession of both forms of power. Defoe claimed that by retaining control of the purse through their representatives in Parliament, the people would have virtual control of the military, even if the army itself were at the command of the Crown. Thus, Trenchard supported the idea that both forms of power should be broadly distributed, and Defoe maintained that one power should be distributed and the other centralized.

The 1697-98 English controversy differed from that of eighteenth century Scotland; in the latter, the principle of equality was violated, the power of the sword being shared with the people of one part of the kingdom, but withheld from the Scots. Defoe's England under a standing army was internally consistent; the people of the realm were equally subject to the Crown, and shared equally in control of the purse. By contrast, the militia act of 1757, passed by the Parliament of the United Kingdom but not recognizing the Scots, was not uniform or

internally consistent.

While there was little direct connection between the Moderates and the Standing Army Controversy of 1697-98, there was a tenuous connection in the form of Andrew Fletcher of Saltoun. Fletcher, a Scots patriot who later opposed the Union of 1707, had weighed in on the standing army controversy with *A Discourse on Government with Relation to Militias*. He identified the dangers of a standing army as being not circumstantial but inherent:

And since in our time most princes of Europe are in possession of the sword, by standing mercenary forces kept up in time of peace, absolutely depending upon them, I say that all such governments are changed from monarchies to tyrannies. Nor can the power of granting or refusing money, though vested in the subject, be a sufficient security for liberty, where a standing mercenary army is kept up in time of peace: for he that is armed is always master of the purse of him that is unarmed.⁶

Fletcher vehemently opposed the Union of the Parliaments in 1707 on grounds of national sovereignty, and remained an admired figure in Scotland through the eighteenth century. But while the Edinburgh Moderates of the mid-Eighteenth Century might have privately shared Fletcher's repugnance of professional armies, they eschewed the argument that a standing army was a dangerous and illegitimate institution. To have so argued would have called into question their loyalty to the government that maintained the British army.

To see Scotland armed, the Scots had to avoid any appearance of rebelliousness. Instead, with the greatest felicity for the ruling powers of Britain, the Moderates lobbied for Scotland to be included in the British militia, not as a check on the army, but as an exercise of self-sufficiency. They characterized participation in the militia as a demonstration of loyalty to the Union, on the grounds that it allowed Scotland to pull its own weight. Furthermore, since Scotland participated politically in the Union by sending representatives to Parliament, it seemed consistent that Scots should participate militarily in the same fashion as their brethren to the south. The final difference between the anti-standing-army writers of 1697-98 and the

Moderates was that the earlier writers opposed a standing army out of genuine fear of imbalancing the constitutional system of a single state, while the Moderates advocated a Scots militia so that two states would be equal in principle. More importantly, the Moderates urged a militia for reasons of social morality.

V. VISIONS OF THE GREATER GOOD

Moral philosophers on both sides of the Scottish militia debate claimed to be interested in the greater good. But the debate, as it began to be elaborated in the 1770s, was characterized by a disinclination to identify the exact nature of this greater good. The most prominent and highly regarded arguments against a militia were presented in part of Adam Smith's 1776 *Inquiry into the Nature and Causes of the Wealth of Nations*. Smith did not address his arguments specifically to the Scottish militia proposals, but his contemporaries considered those portions of his text as representing a pronouncement by Smith on the current controversy.⁷

Smith maintained that society was best served by arrangements that provided for the greatest prosperity, and argued that the militia was not a useful part of those arrangements. He allowed that the militia was virtuous in principle, but in practice a hindrance. Much of his chapter "Of the Expense of Defense" was devoted to declaiming the superiority of a standing army to a militia system, both in the field and during peacetime. Smith emphasized that, whatever its theoretical advantages, a militia would be a detriment to prosperity.

The Moderates also expressed desire for prosperity, but argued that it could be achieved by methods that were more idealistic than Smith's. But the Moderates clearly attached less importance to wealth than did Adam Smith. Alexander Carlyle, in *Letter to His Grace the Duke of Buccleugh On National Defence*, disputed Smith's criticisms of militia as being financially and militarily inefficient, but offered,

The clamour that is sometimes made about the danger of the martial spirit to agriculture and manufactures is unjust, and if listened to will prove fatal to our empire . . . [b]ut if there should be some small interference, it is surely better to be a little less rich and

commercial, than by ceasing to be men, to endanger our existence as a nation.⁸

Literature from both sides of the debate carried the assumption, implicit in the above passage, that militia participation might inhibit commercial activity. The Moderates took pains to muster practical justifications for the institution, but shrank from open declarations that the methods by which wealth was created took precedence over prosperity itself.

Militia advocates and militia opponents argued as though they sought the same ends by different means, but in fact they differed in the nature of their visions of what the greater good really was. In Smith's conception, the significance of the means of creating prosperity was subordinate to the end purpose of generating wealth, hence his advocacy of social arrangements which he acknowledged were sometimes demeaning to men.

Smith argued that human nature made the pursuit of self-interest the most direct means to prosperity, and that prosperity was the end purpose of government. By contrast, the Moderates insisted that the greater good was served by creating wealth by means that were philosophically admirable. They argued that these more wholesome methods were consistent with human nature, or could be made so.

Underlying these opposing views was the fundamental question of whether the means to prosperity themselves constituted "happiness." On analysis, in Smith's vision happiness was found in receiving the benefits of prosperity, almost without regard to how men created that prosperity. In his account of the stages of social development, men in primitive societies created their own wealth, and consequently, there was little wealth to share. But in commercial societies, the system as a whole created a surplus of wealth; each man therefore had less invested in the creation of his own share. The commercial economy thus broke the nexus between effort and reward, or at best made it indirect. Some men would labour and receive little, while others worked not at all and were wealthy. But the sum total of wealth was far greater than possible in the primitive economy, and presumably all people would benefit to some degree.

VI. THE WHOLE VERSUS THE SUM OF THE PARTS

Smith's rejection of the equivalence of participation with

benefit harbored an implication foreign to most Enlightenment thought. It emphasized a discrepancy between the operation of the constituent parts and the operation of the whole. In so doing, it placed limits on the extent to which the character of the constituent elements defined the character of the whole. One man could make pinheads all day, every day, with no knowledge or awareness of the making of pin-points, or the packing, shipping, selling, or use of pins. The number of pins thus produced would be greater than that made by craftsmen working individually. Such an enhanced result meant that the industrial system was more than the sum of its parts; the economy had a super-existence, above the total capacity of the individuals participating.

But in most Enlightenment thought, each constituent element was in some sense a monad: inherent in it was some seed of a universal order. Ernst Cassirer writes that in the transformation of Renaissance to Enlightenment thought,

Nature is elevated to the sphere of the divine and seems to be resolved into the infinity of the divine nature, but on the other hand it implies the individuality, the independence and the particularity of objects. And from this characteristic force, which radiates from every object as a special center of activity, is derived also the inalienable worth which belongs to it in the totality of being. All this is summed up in the word “nature,” which signifies the integration of all parts in to one all-inclusive whole of activity and life which, nevertheless, no longer means mere subordination. For the part not only exists within the whole but asserts itself against it, constituting a specific element of individuality and necessity. The law which governs individual entities is not prescribed by a foreign lawgiver, nor thrust upon them by force; it is founded in, and completely knowable through, their own nature.⁹

The seminal force “radiated” by constituent parts in Adam Smith’s vision of society existed as a passive rather than as an active principle; the unifying principle in Smith’s vision was the *receipt* of prosperity. On the face of it, his system relied on the impulse of men to create wealth, but in fact Smith’s system was constructed around the desire of men to *receive* wealth. Contributions to prosperity in Smith’s system trickled up and

down more or less predictably, but because of this passive operating principle, contributions of character did not. The industrial output of Smith's pin-makers percolated upward, but if any aspect of character went with it, it could only have been avarice. The good character of the pinhead maker could not influence society, but the venal character of society was expected to influence the behavior of the pinhead maker. In this, Smith lacked a sense of salutary reciprocity.

For the pro-militia Moderates, the fundamental benefit of a militia *lay in reciprocity*. By contrast with Smith, the Moderates saw an *active* principle as defining the function of individuals in society. They thought it the role of citizens to infuse human virtues into the institutions of state, and expected the reinforcement of those virtues *by* the institutions of state back to the people. Enrolled in the militia, the people would provide the raw material in the form of bravery, and the state would put that virtue to exercise. Citizens from a variety of trades and stations would be called together, armed, and trained. Virtues like valour and loyalty, probity and sobriety would be encouraged by exercising them in drill. The nation would subsequently be guarded from external threats by the militia, but more importantly society would be organically infused with vigor, discipline, pride, and an enhanced sense of order. Citizens would contribute meaningfully to the state, and the state would resonate virtue back to the citizenry in a reciprocal, self-reinforcing scheme.

Such reciprocity was implicit in the Enlightenment belief that certain rules of order are inherent at all levels of constituency. Laws that applied at the lower levels of constituency necessarily defined the character of the higher levels. This fundamental view underpinned the belief that God and nature were best understood by studying the particulars of nature, for instance by studying the effects of light through a prism, then extrapolating upwards to discover universal natural law. Adam Ferguson wrote that human knowledge of the natural world consists, "at most, in general tenets derived from particular observations and experiments."¹⁰ Higher laws were discernible from lower-order phenomenon, precisely because those laws were universal. Ferguson and others assumed that such laws applied also to human institutions.

Movement of order in such an empirical perspective was necessarily reciprocal, though the information moving in each

direction was of a somewhat different nature than that moving in the other. Information moving *up* the hierarchy from below operated on the micro-scale; large elements were infused with the character of their constituent parts. Information moving *down* the hierarchy from above was on the macro scale; the larger elements influenced the behavior, but not the material nature, of the lower elements. For example, the nature of atoms and molecules in a watch define the metallic properties, and in some ways determine the design, of the watch as a whole. But the overall design and operation of the watch governs the relative position and function of the innumerable molecules within.

Examining the political condition of the militia in Scotland by these criteria reveals an unnatural arrangement. Here, movement of character from the bottom up was stifled at two borders of constituency: the boundary between individual and state and the (metaphysical) boundary between Scotland as a subdivision and Great Britain as a whole. Carlyle, in his *Letter to His Grace the Duke of Buccleugh On National Defense* alternated repeatedly between declaring martial spirit to be an attribute of the citizens transferable to the state, and declaring it to be an attribute to be inculcated *by* the state *to* the citizens. On behalf of the citizens he wrote, "Of the natural strength of a nation, bravery is as essential a part, as industry, or numbers of men. Nothing is truly inexhaustible, but the virtue, constancy, and spirit of a warlike people," But elsewhere Carlyle referred to militia as "troops of a nation, where *by means of good government*, the minds of men have still retained some degree of force and elevation."¹¹ By refusing to include the counties of Scotland in the militia, Parliament had impeded this reciprocal transfer of virtue. Carlyle hoped the revolution in America might inspire Parliament both to avail itself of the bravery of the Scots and at the same time to amplify among his countrymen the martial virtues:

I entertain some fond hopes, that the present crisis may kindle the latent sparks of public virtue in their breasts, as well as rouse the brave and generous people of England: and that they will concur in reforming, improving, and extending the militia over the whole kingdom: or fall upon some better method, for preserving the warlike spirit of the people, and training them to arms.¹²

Carlyle also harped on the harm Britain did both itself and the Scots by not effectively employing them in its military institutions:

I am certainly informed, that in Scotland at this moment the warlike ardor has seized the common people, and that they are not only raising large sums by subscription in the great cities, to levy soldiers for the army, but that manufacturers of the most expert kind, who can earn four times a soldier's pay, are enlisting by the scores. And when their masters remonstrate against their folly, "Our time is now come," say they, "and we must serve our king and our country." I glory in the spirit of my countrymen, whilst I lament that it has been so long trampled upon.¹³

While noting the affront also felt by the gentry of Scotland at the refusal of Parliament to grant them the right to arms as militia, Carlyle admitted that Scottish national pride should be a "small consideration" and added that, "It is the interest and security of Britain, it is the freedom, importance and dignity of the whole empire, that should be the objects of every general and permanent institution."¹⁴ By refusing the great body of Scots an opportunity to participate in the common defense, the Scots were deprived of the chance to exercise their valour, and the percolation of their good character upward to the national character of Britain, or to the character of Scotland, was blocked. However, the influence of Britain downward to Scotland, and of the state down to the individual, continued to operate.

Adam Smith's economic theories, where they omitted the militia, failed to respect the natural tendency toward reciprocal movement of order. Smith recognized the power of greed, and its ability to influence, and be influenced by, government. His plan to harness material self-interest as a motive power for social good was reciprocal insofar as it employed a characteristic of lower level constituent material (people) to define the necessary parameters of a higher-level design (state). Subsequently the higher-level structure would influence the behavior of the constituent parts. But in Smith's model, not all values would move reciprocally. While economic impulses moved reciprocally between citizen and state in Smith's view, he left the martial energy of the citizen stifled, in spite of his recognition of its

value:

Even though the martial spirit of the people were of no use towards the defence of the society, yet to prevent that sort of mental mutilation, deformity, and wretchedness, which cowardice necessarily involves in it, from spreading themselves through the great body of the people, would still deserve the most serious attention of government, in the same manner as it would deserve its most serious attention to prevent a leprosy or any other loathsome and offensive disease, though neither mortal nor dangerous, from spreading itself among them, though perhaps no other public good might result from such attention besides the prevention of so great a public evil.¹⁵

Valour was a characteristic of the citizenry that Smith had no clear way of transmitting from citizen to state, or from state to citizen. Smith constructed a social model around the single human tendency toward self-interest. But while some attributes might be stronger than others, human character consists of more than one trait. These various characteristics themselves are constituent elements comprising the whole of human nature. A system like Smith's, which emphasized one human impulse to the exclusion of others, and which ignored the latter's tendency to shape and be shaped by the whole, was philosophically inconsistent. Smith recognized the need to allow for other human attributes than self-interest, but failed adequately to explain how these should play a part in commercial society. Smith's own writing on education is in tension with what he wrote in his chapter on national defense:

That in the progress of improvement the practice of military exercises, unless government takes proper pains to support it, goes gradually to decay, and, together with it, the martial spirit of the great body of the people, the example of modern Europe sufficiently demonstrates. But the security of every society must always depend, more or less, upon the martial spirit of the great body of the people. In the present times, indeed, that martial spirit alone, and unsupported by a well-disciplined standing army, would not perhaps be sufficient for the defence and security of any society. But where every

citizen had the spirit of a soldier, a smaller standing army would surely be requisite. That spirit, besides, would necessarily diminish very much the dangers to liberty, whether real or imaginary, which are commonly apprehended from a standing army. As it would very much facilitate the operations of that army against a foreign invader, so it would obstruct them as much if, unfortunately, they should ever be directed against the constitution of the state.¹⁶

Smith gave cursory recognition to the problem of inculcating virtue through public education, but offered no clear means by which the virtues taught by government to the people could themselves be created in government, if they did not first come from the people.

VII. THE NATURE OF VIRTUE

David Hume did not participate publicly in the militia debate, but the influence of his philosophical skepticism was surely felt by the others. In seeking to identify intrinsic “good,” Hume distinguished between the natural and artificial virtues of man. The “natural” virtues, such as generosity and benevolence, Hume considered to be inherently good, while “artificial” virtues, like justice and allegiance, which were attached to human social constructs, were good only to the extent that they proceeded from systems that proved advantageous to man.¹⁷

Hume’s natural and artificial virtues correspond respectively to “jurisprudential” and “civic” liberties. Jurisprudential liberties are those representing freedom *from* the impositions of society. Civic liberties consist of freedom *to* participate in society.¹⁸ The “God-given” jurisprudential rights to live, to speak, to associate, like Hume’s natural virtues, are intrinsic to man and do not rise from societies.

Civic rights, like Hume’s artificial virtues, are not inherent to man but arise from his institutions. Adam and Eve, for example, had the natural virtue of love, but not the artificial virtue of justice; similarly, they had a jurisprudential right to speak but no civic right to vote. In Hume’s natural/artificial duality, voting would be a good only to the extent that that the democratic process proved beneficial to man.

Participation in the militia seemingly falls under the head of

a civic, or “artificial” right, and would constitute a virtue only if the militia system served proved advantageous to society. The Moderates were therefore obliged not only by politics but by philosophy to show that the militia was not merely admirable in concept, but actually served the common good. This they attempted by describing the salutary effect of military training on character as well as the benefits to society of military preparedness.

But while the natural/artificial duality seems at first to present militia service as a mere artifact of human institutions, the distinction may not be so simple. Participation in the militia can be seen as both a civic right of participation *and* as a jurisprudential liberty, an expression of the sovereignty of the citizens and their “natural” right to possess the means of their own liberation from despotism.¹⁹ Further complicating the distinction, militia drill married “artificial” virtues, like allegiance to the exercise of other virtues like valour, which Alexander Carlyle identified as being “natural”: “Valour which is the merit of a soldier, is natural to man in a sound state of body and mind . . .”²⁰ Carlyle also designated the bravery of the citizens a natural as opposed to an artificial strength of Scotland:

I call the natural strength of a nation, the extent and fertility of its land, the numbers, industry, and the bravery of its people. And I call the artificial, foreign trade, paper credit, and a navy. For however necessary the latter may be to the grandeur and dominion of a state, they are only like the ornaments of a building, which may be spared or destroyed, and yet the fabric remain safe and secure: But the former are like the essential parts of an edifice, which, if you remove, certain ruin must ensue.²¹ [emphasis original]

Militia service could therefore be seen as a “natural” virtue, a civic right, *and* a jurisprudential liberty. While opponents of the militia identified objections by the citizens to the burdens of service as being a practical disadvantage of the institution, they did not claim that citizens had a jurisprudential right to be free of such duty. In this, they yielded the moral high ground of natural and civic rights to the Moderates.

By contrasting the “artificial” strengths of foreign trade and paper credit with the “natural” strengths of bravery and industriousness, Carlyle cast an aspersion that leaves little doubt

as to his admiration of virtue above wealth. Ambivalence toward commercial activity was common in the pro-militia pamphlets. Pro-militia pamphleteers sometimes described wealth and luxury as enervating and emasculating. They presented citizen arms-bearing as being simultaneously an economical means of defense that would contribute to prosperity, and yet a prevention of the deleterious effects of excessive prosperity. While this can be viewed as a contradiction, it was more an expression of a desire for a self-balancing system; decadence would be held in check with martial discipline, and self-indulgence balanced with civic participation.

VIII. THE SCOTS' LOYALTY

The Scottish militia controversy was argued primarily by philosophers and with speculative arguments, and as such the episode might be treated as exclusively intellectual history. But the militia debates of the Eighteenth century were not ivory-tower fantasies. They were part and parcel of the historical events of the period. The armed uprising of 1745 provided strong arguments against a Scottish militia on grounds of possible rebellion, but the Seven Years War cast a friendlier light on the proposed expansion of the institution, both because Highlanders were being very effectively employed in the regular army, and because the Scottish coast could not otherwise be adequately defended from French raids.²²

George Dempster confronted the question of Highland loyalty in *Reasons for Extending the Militia Act to the Disarmed Counties of Scotland*. Dempster undertook to prove that only a small minority of Highlanders had willingly joined the Jacobite uprising of 1745 in support of Charles Stuart. He drew attention to the fact that Highlanders had in large numbers enthusiastically joined the British army to fight the French in the Seven Year's War. But more fundamentally, he argued that entrusting the Highland Scots with their own militia would have the salutary, reciprocal effect of increasing their attachment to government:

It is a maxim in domestic life, that to discover strong suspicions of a wife, or a servant, is the certain way to render the former unfaithful, and the latter dishonest. The same holds in political government. The suspicions and distrust which former administrations discovered of

the Highlanders, certainly cherished their prejudices, and caused them to rebel. Let them be treated as good citizens, and they will become such.²³

“Let them be treated as good citizens, and they will become such.” The line neatly sums up half the Moderate case for the militia; good government would lead citizens to virtue. The other half of the argument was that the militia would percolate virtue upward from the citizens to government.

The American Revolution, on balance, may have tended to support the arguments of Scottish militia advocates. Besides the necessity of defending the Scottish coast from possible French raids, the presence of Highland regiments fighting England’s war in America proved that Scots were loyal to the Crown and of martial disposition. However, the great trouble the American colonial militia presented to British rule in America may have somewhat offset the comforting example of the Highland regiments. The colonial militia showed that militia could be effective, but also showed that they could present an internal threat. Also, while the Highland regiments did place arms in the hands of Scots, those troops were sent overseas where they could perpetrate no Jacobite mischief.

IX. PATRICK FERGUSON AND THE BREECH-LOADING RIFLE

One Highland soldier in America was Maj. Patrick Ferguson (either a cousin or a family friend of Adam Ferguson, depending on the authority). According to Adam Ferguson, Patrick Ferguson was the anonymous author of some of the best pro-militia pamphlets.²⁴ But Patrick is best remembered today by American historians as the inventor of an innovative breech-loading rifle. His activities during the Revolutionary War were so close a material approximation of certain Moderate ideals that his story bears relating.

At the time, almost all armies issued smoothbore muzzle-loading muskets, which were slow to load and of very poor accuracy. These technical deficiencies were compensated for by massing together well-drilled troops. Each individual soldier in such an army was unlikely to do much damage to the enemy, but a formation of such soldiers could produce a significant amount of firepower. Adam Smith’s observations on militia were

predicated on this military model:

Before the invention of firearms, that army was superior in which the soldiers had, each individually, the greatest skill and dexterity in the use of their arms. Strength and agility of body were of the highest consequence, and commonly determined the state of battles. But this skill and dexterity in the use of their arms could be acquired only, in the same manner as fencing is at present, by practicing, not in great bodies, but each man separately, in a particular school, under a particular master, or with his own particular equals and companions. Since the invention of firearms, strength and agility of body, or even extraordinary dexterity and skill in the use of arms, though they are far from being of no consequence, are, however, of less consequence. The nature of the weapon, though it by no means puts the awkward upon a level with the skilful, puts him more nearly so than he ever was before. All the dexterity and skill, it is supposed, which are necessary for using it, can be well enough acquired by practising in great bodies.²⁵

Patrick Ferguson, himself a superb marksman, questioned this military orthodoxy which reduced, in typical Smithian fashion, each soldier to the equivalent of an unskilled pinhead-maker. The “great bodies” described by Smith substituted massed fire for *aimed* fire. Maj. Ferguson deployed to America with a special company of 100 men, armed and trained with the simple but workable breech-loading rifle of Ferguson’s own invention.

The rifled barrel of Ferguson’s new weapon imparted a stabilizing spin to the bullet and greatly improved accuracy. Rifling itself was familiar technology, but rifled weapons were slower to load than smoothbore muskets and military authorities considered them suitable only for hunting, or for special, highly-trained individual soldiers, the equivalent of artisans.

By technical means, Ferguson overcame the rate-of-fire disability of rifles, and founded an infantry unit in which each man was a trained and efficient shooter. Ferguson not only increased the potential efficiency of infantry as units, but re-defined the role of the individual soldier within the unit, from an atom with no individual significance who was required only to

point his weapon in the general direction of the enemy, to an efficient marksman capable of choosing and striking individual targets. Such a transformation of the individual within the group echoed the values expressed in the pro-militia literature. The group would elevate the individual, and the individuals would collectively elevate the group.

Manufacturing technology of the day might not have allowed for the complete re-arming of the British army with Ferguson's rifle, but it might have produced a significant number of the weapons. However, the elevation of the individual within the army, from drone to marksman, was inconsistent with military philosophy of the time, and in spite of its clear technical superiority, Ferguson's innovative weapon was abandoned after his untimely death, which occurred while Ferguson raised and trained Loyalist militia in South Carolina. It was alongside his Loyalist militia that he died, his body riddled by aimed fire from rifle-wielding Patriot militia, at the Battle of King's Mountain in 1780.²⁶ A Highlander and regular army officer, Patrick Ferguson not only wrote in favor of a pan-British militia, but lived and died for it.

X. THE MILITIA AND A BALANCED SOCIETY

In assessing the pro-militia arguments of the Scottish Enlightenment, we should distinguish between the nationalist pursuit of equality, and the philosophical search for equilibrium. The Moderates, while obliged to forward practical arguments for a militia, and enthusiastic about philosophical arguments for a militia, also peppered their pamphlets with references to a "national affront," an "insult" by which Scots were prevented from bearing arms. Unequal treatment under British law was a stirring motive for a Scottish militia. But given the lukewarm support for a militia even among Scots themselves, it seems this affront was not taken too seriously by other than the Edinburgh literati.²⁷

It was as a matter of philosophical equilibrium, not political equality, that the exclusion of the Scots from the militia was most offensive to moral philosophers. This is why the loudest objections came from philosophers and not yeomen; they were philosophical objections.

Enlightenment thinkers sought to identify a natural equilibrium to the universe. All elements of creation, from atoms

to planets, were perceived to exist in a state of harmony, in a system that was self-balancing. God the Creator merely wound the watch, and the universe operated by self-regulating movement.

Philosophers expected that Man's creations should conform to this same ideal. Institutions of government should have checks and balances. Inequality was accepted as part of nature; some individuals would invariably be more intelligent or healthy or prosperous than others. But institutions should exhibit some self-regulating, self-balancing qualities. Complications that could not be eliminated were to be kept in check by counterbalancing tensions.

For example, following the 1745 rebellion, the pseudonymous Methuselah Whitelock proposed eliminating further Jacobite agitation by a clever if improbable proposal: he recommended that the House of Hanover should cede its patrimony in Germany to the Stuarts, who would in turn relinquish their claims to the British throne. This would not only close the claims of the Stuarts, it would eliminate concerns in Parliament over the foreign interests of the Hanovers, who retained private holdings on the continent.²⁸ Theoretically, it would have been a tidy, self-contained, counterbalanced resolution of tension, yielding compound benefits, one of which was the reduction of the standing army. This kind of tidiness appealed to Enlightenment thinkers.

Philosophers following in the wake of Newton and the new physical sciences sought to understand every object of study as a balanced, self-maintaining system operating under fixed laws which could be discerned from studying the constituent elements of the system:

The path of thought then, in physics as well as psychology and politics, leads from the particular to the general; but not even this progression would be possible unless every particular as such were already subordinated to a universal rule, unless the from the first the general were contained, so to speak embodied, in the particular.²⁹

They sought to generalize from the laws that governed the behavior of lower-level constituents, to define the laws by which the universe operates. In empirical fashion, they sought the

highest possible generalities. A law that governed only the falling of an apple would be of little interest. But if the law was general, also governing the motion of the moon relative to Earth, and Earth to Sun, then it was of the greatest interest. Natural systems were expected to conform to universal principles.

A system of defense, such as Britain's, which failed to employ its own brave citizens and instead relied on Hessians, did not meet philosophical standards. It contained extraneous parts in the form of unused resources, and required external support. Such a system lacked the qualities expected of any good design. It was an ad hoc institution, not subject to generalized principles. It was not self-contained, self-sufficient; there was nothing of the eternal in it. No matter how expedient it might be, it was unnatural.

Government policy is rarely formulated to address the concerns of intellectuals over philosophical consistency. Accordingly, the Scottish philosophers, whose idealism and patriotism were sincere, diluted their writings with arguments demonstrating the practical advantages of militia. On this they were at something of a disadvantage. While their opponents could rarely muster a strong philosophical argument against the militia, they could raise legitimate questions of the practicality of such an institution.

There were two practical objections to the militia. The first was that it was ineffective. Adam Smith and others argued that no militia of marginally trained citizens could contribute meaningfully to national defense. Specialization, as in all other trades, was required in the military.

The second objection to the militia was that it was economically ill-advised. To require citizens to abandon their productive work and engage in military training would result in a decline of prosperity. Further, militia opponents claimed, such an effort would not result in reduced government spending, since the militia would require the same equipment as an army, but in greater quantity. To make things worse, because the militia could not do the job of an army, the government would eventually have to spend money on an army as well.

A less frequently stated concern was the reluctance of the citizens themselves to participate in the militia. Alexander Hamilton, an adherent of Adam Smith's theories, reiterated the anti-militia arguments in *Federalist* No. 29:

The project of disciplining all the militia of the

United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent, would be unwise: and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.³⁰

Alexander Carlyle devoted most of *A Letter to His Grace the Duke of Buccleugh On National Defence* to a refutation of Adam Smith using Smith's own arguments. Smith allowed that once in the field for one or two campaigns a militia became the equal of a standing army. Smith also conceded that standing armies themselves were recruited from the ranks of tradesmen and labourers. Carlyle therefore criticized Smith for ascribing a certain magic to the very name of a standing army, and for referring to successful militia as armies, and unsuccessful armies as militia.

The Moderates, unlike John Trenchard and Andrew Fletcher, were not opposed to standing armies, at least publicly. Instead they argued that Britain should have both militia and army. In event of war, the militia could be rapidly integrated into the army, reducing the expense and danger of a frantic and delayed mobilization. And while the militia occasionally

interfered with the productive work of tradesmen, the employment of the same men in a standing army entirely removed them from productive labor, and required their support by the state.³¹ While the Moderate's primary motivation for a Scots militia was idealistic, they were also compelled to justify it in practical grounds, and they found the basis of several supporting arguments even in Smith's own text.

The utilitarian arguments in favor of a militia were slightly strained, but the Moderates were at least able to make such arguments. The anti-militia writers, by contrast, could never adequately answer the Moderates with arguments of principle. The only possible such argument against the militia was on grounds of jurisprudential liberty; militia duty was burdensome and objectionable to citizens. But even this argument was weak, and weakly advanced. It was hardly a principled argument against civic participation to say that citizens objected to it. To do so would be to argue that citizens were unfit. Such an argument would militate for absolutism on the French model.

XI. THE DEBATE IN AMERICA

It is difficult to gauge the extent to which American statesmen of the period read the Scots, and to what extent the Americans viewed questions relating to the militia as social philosophy, or as governmental science, or as politics. Certainly Alexander Hamilton read *Wealth of Nations*. Thomas Jefferson's library, while atypically large, included works by almost all the major Scottish authors.³² James Madison's 1782 purchasing recommendations to Congress included books by Adam Ferguson, Frances Hutcheson, William Robertson, David Hume, John Millar, and Adam Smith. Americans not only imported books by Edinburgh scholars, but re-published them: Ferguson's *Essay on the History of Civil Society* was published in Philadelphia in 1773. William Robertson's *History of the Reign of Charles V* had also been published in Philadelphia before the Revolution, in 1770. James Beattie's *Elements of Moral Science* was published in Philadelphia in 1782 (a copy of Beattie's *Essay on Truth* appears in the background of a 1786 portrait of Benjamin Rush, and thus was "reproduced" if not published in Philadelphia!). Hutcheson's *Introduction to Moral Philosophy* was published in Philadelphia in 1788, and Smith's *Wealth of Nations* in 1789.³³

Besides being a publishing center, Philadelphia seems to

have been a port of entry for Scottish arts, letters, and sciences, in part because of the activities of Benjamin Franklin.³⁴ Franklin had been given the keys to the city of Edinburgh in 1759, and had extensive contacts with the Edinburgh literati over the years. He stayed with David Hume in Edinburgh and Lord Kames in Berwickshire. He met and dined with Adam Ferguson and Adam Smith on more than one occasion, as well as many of their colleagues, including William Robertson and John Millar.³⁵ He probably knew Alexander Carlyle from London circles. His business partner in his Philadelphia printing concern, David Hall, was also an Edinburgher. Franklin encouraged other Philadelphians, including Benjamin Rush, to study in Edinburgh, where, he said, “there happens to be collected a Set of as truly great Men, Professors of the several Branches of Knowledge, as have ever appeared in any Age or Country.”³⁶

An especially powerful Scottish influence in America was former Edinburgher John Witherspoon, first dean of the College of New Jersey (later Princeton University) and later a signer of the Declaration of Independence. Benjamin Rush helped secure Witherspoon’s appointment. Witherspoon’s American students included James Madison and Aaron Burr, and his teaching is said to have exerted a strong influence on Madison’s Federalist writings. Another signer of the Declaration, James Wilson, was also a native-born Scot. His approach to constitution-making is said to have been inspired by the writings of Thomas Reid.³⁷

The other locus of Scottish influence in America lay in Virginia and the surrounding tobacco country. Scottish companies dominated the tobacco economies of Virginia and Maryland. Tens of millions of pounds were shipped yearly to Scotland, on Scottish ships, brokered by Scottish financiers, whose company “factors” were ubiquitous in the region.³⁸ The fortunes of Scotland and Virginia were closely bound, with Scottish companies carrying large debts for Virginia planters. “I think it self-evident, that Glasgow has almost monopolized Virginia and its inhabitants,” wrote William Lee to a fellow plantation owner in 1771.³⁹ Professor Jacob Price writes of the tobacco trade, “For many a Virginian, this must have meant that mail, news, reading matter, ideas, religion, politics came to him via Glasgow. This could not have been without some effect.”⁴⁰

On the Scottish side, social scientists, especially Adam Smith, witnessed the growth of commercial society partly because they watched the growth of fortunes made on the

Virginia trade.⁴¹ The same 1707 Union that subordinated Scotland to the British Parliament also gave her desperately-needed mercantile access to the colonies. In effect, the Scots had traded their right to a militia for a tobacco franchise. The Revolution disrupted this trade, but it largely rebounded after the war. Patrick Henry, himself born to Scottish immigrants and related to Edinburgh scholar William Robertson, complained in a 1785 letter to Thomas Jefferson of the continuing influence of Scottish firms in the Chesapeake tobacco trade: “We are much disappointed in our expectations of French and Dutch traders rivaling the British here. The latter engross the greatest share of our trade, and was it not the Irish bid up our produce, the Scotch would soon be on their former footing.”⁴²

Virginians were thus not ignorant of developments in Scotland. William Grayson raised the question of the Scots militia at the Virginia ratifying convention:

As the exclusive power of arming, organizing, &c. , was given to Congress, they might entirely neglect them; or they might be armed in one part of the Union, and totally neglected in another. . . . He wished to know what attention had been paid to the militia of Scotland and Ireland since the union, and what laws had been made to regulate them. . . . the militia of Scotland and Ireland are neglected. I see the necessity of the concentration of the forces of the Union. . . . But I object to the want of checks, and a line of discrimination between the state governments and the generality. ⁴³

The American debates on the Constitution and Bill of Rights paralleled in important ways the Scottish social science discourse. The Moderates sought to identify and to establish a proper relationship between the individual and government, as well as between Scotland as a subdivision and Britain as a whole. In quite the same way, the framers and ratifiers of the U.S. Constitution struggled to define the position of individuals relative to the state and federal governments, and the position of the state governments relative to the national government. The historical anxieties that influenced Americans in their debates over the Constitution and state militia were the same ones that informed Scottish social science. Britain’s chronic conflicts over religion, succession, and economy comprised the historical

foundation of both debates. Scottish tension over the Act of Union and the subordinate position of Scotland in the commonwealth closely resembled American tension over the ratification of the Constitution and the subordination of states to the federal government.

XII. WHAT WAS REALLY AT STAKE

The Moderates of Edinburgh objected to the national insult of being excluded from an important institution of Britain. They frequently pointed out the subordinate position in which this placed Scotsmen relative to Englishmen:

However the dark and interested politicks of a particular period may endeavour to huddle up a period like this, the impartiality of a future day will not fail to lay before posterity so remarkable a transaction. Nothing could conceal from the observation of posterity that while the inhabitants of England were armed, those of Scotland were not. As notorious would it have been, that the friends of Scotland in vain applied for an equal participation of that privilege which distinguished between the freeman and the slave.⁴⁴

But in examining the Scottish militia debates, one questions whether the Moderates objected more to unequal treatment under the law, or to society being made subject to a commercial regimen that reduced people to inert particles. They sought a civic right, but not on a universal basis, for the English militia was one of limited, not universal enrollment. What the Moderates really sought was a meaningful and philosophically consistent role for the citizenry in a system of state and economy that had outgrown the people whom it was founded to benefit. To deny citizens the opportunity to defend their nation was to deny that it was *their* nation.⁴⁵ Non-participation made a man a knave in every sense of the word. It demeaned the character, and so doing poisoned the well from which government itself drank. It was both cause and effect of an ignoble government.

The opponents of a Scots militia were never as vocal as the advocates, and it is difficult today to identify precisely why the militia proposals did not gain wider support. John Robertson identifies as the most likely reasons the general objections voiced

by Adam Smith, and those expressed in 1783 by an anonymous pamphleteer in *Reasons Against a Militia for Scotland*.⁴⁶ They were: the disruption that militia service might impose on commercial activity and the finances of state; the supposed military deficiencies of the institution; and the fear of insurrection by the Scots if armed.

Of the first of these objections, legitimate arguments could be made on either side.

The second objection was contradicted by Parliament's own maintenance of militia among the counties of England.

And of the third, George Dempster observed of the Highland regiments in 1760:

The same men who, fifteen years ago, threatened to overturn the constitution of their country, are now fighting in defence of its rights and possessions . . . By the confidence which his Majesty has reposed in them, they are from being rebels converted at once into good citizens; and what was formerly the weakness of Great Britain is now rendered no inconsiderable addition to its strength.⁴⁷

It was this salutary reciprocity, this tendency of good government and good citizenship to reinforce each other, that interested the Moderates. As philosophers, they hoped to see human institutions arranged to meet the same design values that were evident in the rest of Creation. This idealistic measure of government struggled to compete with a Smithian model in which institutions were judged by their propensity to increase the flow of wealth, rather than the virtues of citizenship.

END NOTES

1. Lynee Lewis Gaillet, *Scottish Rhetoric and its Influences* (Mahwah: Laurence Earlbaum Assoc., 1998), 6; Ronald Hamowy, "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America*," *The William and Mary Quarterly* 3rd Series, Vol. XXXVI, No. 4, 505. See also Winifred Bryan Horner, *Nineteenth-Century Scottish Rhetoric: The American Connection* (Carbondale: Southern Illinois University Press, 1993), esp. at 171-76, discussing Scottish influence in 18th Century America.

2. "Moderates" because they adopted a moderate position on reforms within Scotland's Presbyterian Church. Most of them had training as clergymen. For a time the pro-militia literati also composed a loose group called the "Poker Club." Later, they were identified with the "Select Club," which composed a

broader intellectual circle. See Arthur Herman, *How the Scots Invented the Modern World* (New York: Crown, 2001), 68-69, 163-64.

3. John Robertson, *The Scottish Enlightenment and the Militia Issue* (Edinburgh: John Donald Publishers, 1985), 8, 81. Robertson's book is the most comprehensive on the Scottish militia debate, and the present author wishes to acknowledge his debt to Robertson's work.

4. *Ibid.*, 8.

5. John Trenchard, *An Argument Shewing that a Standing Army is Inconsistent with a Free Government and absolutely destructive to the Constitution of the English Monarchy* (London: 1697); Daniel Defoe, *An Argument Shewing that a Standing Army with the Consent of Parliament is Not Inconsistent with a Free Government, etc.* (London, E. Whitlock: 1698).

6. Andrew Fletcher, *A Discourse of Government with Relation to Militias* (Edinburgh [?]: 1698), re-printed London, 1732.

7. See especially Alexander Carlyle, *Letter to His Grace the Duke of Buccleugh* (London: J. Murray, 1778). Other pamphlets, like *Reasons Against a Militia for Scotland* (Edinburgh: 1783) so clearly echo Smith that the connection might fairly be assumed. Robertson claims on the basis of private correspondence that Smith actually favored the idea of a Scots militia, 237-244.

8. Alexander Carlyle, *Letter to His Grace the Duke of Buccleugh on National Defence*, 46-47.

9. Ernst Cassirer, *The Philosophy of the Enlightenment* (Princeton: Princeton University Press, 1951), 41.

10. Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger, (Cambridge: Cambridge University Press, 1995), 8.

11. Carlyle, *Letter . . . on National Defence*, 54, 42. [emphasis added]

12. *Ibid.*, 56.

13. *Ibid.*, 57-58.

14. *Ibid.*, 59-60.

15. Adam Smith, "Of the Expense of Institutions for the Education of Youth," *Wealth of Nations*, Book V, Chapter I, Part III, Article 2.

16. *Ibid.*

17. See *Cambridge Dictionary of Philosophy*, 2nd Edition, (Robert Audi, ed.: Cambridge, Cambridge University Press, 1999), 402.

18. Robertson, 12.

19. *Ibid.*

20. Carlyle, 41.

21. Alexander Carlyle, *The Question Relating to a Scots Militia Considered, In a Letter to Lords and Gentlemen Who Have Concerted the Form of a Law for that Establishment* (London, J. Tower, 1760), 11.

22. Robertson, 109.

23. George Dempster of Dunnichen, *Reasons for Extending the Militia Acts to the Disarmed Counties of Scotland* (Edinburgh, Hamilton and Balfour 1760), 19-20.

24. Robertson, 117.

25. Smith, *Wealth of Nations*, Book V, Chapt. I “Of the Expense of Defense.”
26. See Lance Klein, “This Barbarous Weapon” (*Muzzle Blasts Online*, Vol. 5 No. 1, February/March 2000), <<http://www.muzzleblasts.com/vol5no1/articles/mbo51-1.htm>> (last accessed June 2003). The online article is a pre-publication excerpt of what is claimed will be the first biography of Patrick Ferguson since 1888.
27. *Ibid.*, 182.
28. Methuselah Whitelock (pseudonym), *The Peace Offering: An Essay Shewing the Cession of Hanover to be the only Possible Means for Extinguishing the Present Rebellion* (London, L. Raymond, 1746).
29. Cassirer, 21.
30. “Publius” (Alexander Hamilton), “Concerning the Militia” (New York, The Daily Advertiser, 1788).
31. Carlyle, *Letter to His Grace the Duke of Buccleugh*, 39-45.
32. Hook, 41
33. Andrew Hook, *Scotland and America* (Glasgow: Blackie, 1975), 38-42, 78-79; Andrew Hook, “Scottish Thought and Culture in Early Philadelphia,” *Scotland and America in the Age of the Enlightenment*, ed. Richard B. Sher and Jeffery R. Smitten (Princeton: Princeton University Press, 1990), 229.
34. Hook. “Scottish Thought,” 227-41, Deborah C. Brunton, “The Transfer of Medical Education: Teaching at the Edinburgh and Philadelphia Medical Schools,” in Sher and Smitten supra; Anne McClenny Krauss, “James Bremner, Alexander Reinagle, and the Influence of the Edinburgh Musical Society on Philadelphia,” *ibid.*
35. Hook, *Scotland and America*, 18-22; Herman, 204, 217.
36. Hook, *ibid.*, quoting Franklin 15:530; Herman 204, 216.
37. Herman, 204, 208, 219, 221-225; Thomas P. Miller, “Witherspoon, Blair, and the Rhetoric of Civic Humanism,” in Sher and Smitten, *Scotland and America*, 109; Hook, “Scottish Thought,” 238.
38. Jacob M. Price, “The Rise of Glasgow in the Chesapeake Tobacco Trade, 1707-1775,” *William and Mary Quarterly*, 3rd Series, Vol. XI No. 1, 1954; See also John Butt, “The American War of Independence and the Scottish Economy,” *Scotland, Europe, and the American Revolution*, ed. Owen Dudley Edwards and George Shepperson (New York: St. Martin’s, 1976), T.M. Devine, “The American War of Independence and the Scottish Economy,” [same title as previous cite], *ibid.*
39. Herman, 138, quoting William Lee to Landon Carter.
40. Price, 198.
41. Herman, 140, 195.
42. Herman, 200; T.M. Devine, “The American War of Independence and Scottish Economic History,” *Scotland, Europe, and the American Revolution*, 63-64, citing *Jefferson Papers* VII:509.
43. David E. Young, *The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792* (Ontonagon: Golden Oak Books, 1995), 424, quoting *Elliot’s Debates*.
44. Carlyle, *Letter . . . on National Defence*, 6.

45. See Ferguson, *Essay on Civil Society* at 251: “Liberty is a right which every individual must be ready to vindicate for himself, and which he who pretends to bestow as a favour, has by that very act in reality denied.”

46. Robertson, 233; *Reasons Against a Militia for Scotland* (Edinburgh, 1783).

47. Dempster, 18.

Wrongs and Rights: Britain's Firearms Control Legislation at Work

Derek Phillips

Great Britain's gun control laws are extremely severe and difficult to understand. This article examines a new "Guidance" document from the Home Office, which tells police how the law should be applied. Topics covered include various aspects of handgun prohibition, expanding ammunition prohibition, and long gun licensing. Derek Phillips is Legislative Advisor for the Office of Legislative Affairs, in Cambridge, England.

"The subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." Thus the English Bill of Rights of 1689. But the Bill of Rights is a statute and as a statute, it can be, and has been, amended by subsequent statutes.¹ From the early years of the twentieth century, successive Firearms Acts have regulated the possession of firearms and ammunition and these later statutes may be taken as having overridden the Bill of Rights.²

So it is that in the United Kingdom, the lawful possession of firearms is subject to legislative control, implemented by an administrative system in the hands of 52 separate police forces. To some degree these forces are autonomous, and—despite their coming under the purview of a single government department, the Home Office³—tend to behave accordingly. Some inconsistency in administration is therefore inevitable.

To reduce the likelihood of inconsistency, for some years now the Home Office has published advice on the manner in which it believes the Firearms Acts should be enforced. This takes the form of a formal memorandum addressed to chief officers of police (but also available to the public) on their firearms licensing function: *Firearms Law: Guidance to the Police*, a substantial document.

In the closing days of 2001, the Home Office published on the Internet a new *Firearms Law: Guidance to the Police*.⁴ The pre-existing version had—as the Home Office itself reminds us in its Introduction to the new *Guidance*—been overtaken by legislation: four new Acts, four Orders, one set of Regulations and another of Rules within only a decade. The administrative effect of this flurry of law-making was so to unsettle licensing departments as

to introduce delay to the licensing process.

More law, more guidance: on antiques; historic pistols; fitness to be entrusted with a firearm; ‘good reason’; the shooting of birds and animals; the EC ‘Weapons Directive’.⁵ With thirteen appendices, which include two useful documents—a list of obsolete calibres (which clarifies the definition of an antique firearm) and a tabular ‘ready-reckoner’ to unravel the law relating to young persons, the new *Guidance* is not only bigger than ever before—and, at 210 pages, it *is* big—but is genuinely more helpful to both police and public. Helpful if for no other reason than its intention to encourage consistency embraces the concept of conformity: in the past, there were reports of licensing departments citing previous Home Office *Guidance* when convenient but disregarding it (as having no legal authority)⁶ when it was not. Henceforth, ‘The Secretary of State and the Scottish Ministers [i.e., ‘the Government’] attach great importance to the consistent administration of the Acts, as does the Association of Chief Officers of Police.’ Moreover, whereas

chief officers of police are the ultimate authority responsible for the administration of the legislation in their force area, and it may be necessary to depart from the guidance when each case is assessed on its merits and the circumstances justify such a course of action ... chief officers for the force concerned will need to be able to justify their decision (1.6).⁷

Inevitably, guidance which seeks to interpret will stray into the realm of administrative policy; so it is that this document serves a purpose useful to the student of firearms control legislation: that of revealing the day-to-day workings of a control system which the Home Office admits to be so ‘complex and highly specialised’ as to require comprehensive training even to understand (1.5).

I. HUMAN RIGHTS

To appeal a decision which flows from administrative policy is difficult; but now there is the Human Rights Act 1998.

The implications of this Act will emerge over time but already this much seems clear: the right to a fair hearing (Article 6) would encompass an administrative process which might *lead*

to court proceedings. Moreover, certain administrative decisions against which no appeal has been possible hitherto⁸ may be open to test in court; redress for delays in processing licensing applications is now a possibility. Although the Act is enforceable only against public authorities, the actions of an individual within a public authority may create that liability necessary for enforcement. Now there's a thought.

That some injustices effectively built into the licensing system may now at last be open to challenge was recognised, albeit somewhat deferentially, by the statutory Firearms Consultative Committee (FCC) in 2002:⁹

We recommend that these problems [i.e., the implications of a right to a fair trial and appeals against administrative decisions] are drawn to the attention of the Secretary of State (12.4); The whole question of appeals needs to be reviewed ... and we recommend that this should be done when a suitable legislative opportunity next arises (15.10).

There was no need for such coyness: it is the remit of the FCC to advise the Secretary of State directly.¹⁰

It may be argued, and no doubt will be, that as the licensing authority, the police have an obligation under the Human Rights Act to protect the public by not authorising those who may be a danger—and those who carried out the shootings at Hungerford and Dunblane are cases in point—to possess firearms.¹¹

Meanwhile, those who may be tempted to challenge the *Guidance* are advised by the Home Office that both legislation and *Guidance* are 'consistent with the terms of the Human Rights Act' (1.9). Time—and no doubt litigation—will tell.

II. THE BANNING OF PISTOLS

In 1997, the UK moved pistols ('short firearms' in the relevant Act) into the prohibited category. For 'historic pistols', special provision was made to enable them to remain unprohibited; and certain people who need pistols in the course of their work (e.g., veterinarians) may still be authorised to possess prohibited pistols.¹² Real life had demanded exemptions and exemptions brought delicious nonsenses. Let us begin with 'historic pistols.'

A. Historic Pistols

It was the wish of Parliament that historical research into pistols worthy of preservation and study should continue. The 1997 Act distinguishes between those historical pistols (essentially of pre-1919 manufacture) which may be kept at home for study or display as part of a collection, and those others, of particular rarity, aesthetic quality, technical interest or historical importance, which may be kept only at sites designated by the Home Office. First, collections:

The collection will usually need to be established and substantial before a firearm certificate is granted. The police will not normally grant a certificate for a single gun to begin a collection, unless there is very strong evidence that this will, in a short period of time, form part of a considerably larger collection (9.17[v]).

Remember that without a firearm certificate one may not lawfully even begin the process of acquiring a firearm; very ‘Catch-22’, as is:

Owners would normally be expected to produce supporting evidence, for example a letter from a national museum or relevant society or interest group that the collection was of genuine historic value (9.17[ii]).

This requirement presumes the value to the historical record of every firearm in existence to be already known, which is absurd. Moreover, since we may take it that ‘Owners would normally be expected to’ is code for ‘Owners must’, the *Guidance* reader might suppose national museum staff undertake home visits in the normal course of their work. They do not. But to continue:

Guns owned by lesser-known figures would not generally benefit from [the ‘historical importance’] exemption, unless they had a significant campaign history ... An exemption [sic] to this would be if the

owner was involved in events of historic importance . . .
(9.21[iii])

—which is to presume that to be ‘lesser-known’ at one point in time is to be historically insignificant forever. An important purpose of historical research is to establish significance (*inter alia*, by provenance); the purpose of making special provision for historic firearms is to allow that process to continue. Were this advice to be followed, the historical record would suffer—contrary to Parliament’s wish—as it would from this:

... guns manufactured after the Second World War will be less likely to be held to be of historic interest in themselves, in as far as they are more likely to have *survived in numbers*. (9.21[vii]).

‘Numbers’ applies to rarity, not historical interest; nor does one rule out the other.

Second, ‘aesthetic quality’. The *Guidance* definition:

firearms that differ significantly from factory standard in a way intended to enhance their appearance (9.22)

—which is to load the word ‘aesthetic’ rather—

... A Victorian pistol with elaborate decoration might fall within this category ... Note should also be taken of the case ... in which a modern presentation gun was held not to be of ‘aesthetic quality’ (9.23).¹³

It would seem, therefore, that age confers aesthetic quality. In another context and for some of us, a comforting thought; but in this, indefensible.

Third, technical interest...

it may be taken that the intent of section 7(3) is to preserve firearms of especial rather than common technical interest. (9.25)

It most certainly may not. The Act itself has ‘particular rarity, aesthetic quality or technical interest’;¹⁴ ‘particular’, therefore, modifies only ‘rarity’. In any event, something which exists in quantity can also be interesting.

And so to ‘rarity.’

Section 7 [of the Firearms Act] provides that the firearm must be of particular rarity, rather than merely uncommon. (9.27)

And so it does. The inclusion of ‘particular’ here in the wording of the Act—drafters’ semantic scaffolding which has no place in finished legislation—is unfortunate, for taken with the *Guidance*, it creates three categories for licensing administrators: ‘uncommon’, ‘rare’ and ‘particularly rare’, the boundaries between which are a matter for individual perception and, therefore, grounds for dispute.

B. Veterinarians

Now for veterinarians.

The humane killing of animals is a specialised subject, perhaps, but one which by requiring the authorisation of an otherwise prohibited item (a pistol) is a matter of some delicacy for a licensing officer. Home Office unease shows in advice which is less than entirely helpful:

For pistols and slaughtering instruments under section 3 of the 1997 Act, a .32 single (or two) shot pistol is suitable for most circumstances, though larger calibres may be considered if the applicant has to deal regularly with large or dangerous animals (for example, horses, water buffalo, bison, Highland cattle or larger deer species) (13.36).

Two points, the first practical: (i) in many cases it is the age of a beast, rather than its size, which determines the penetrative capability required and (ii) what if larger animals are encountered infrequently but encountered nevertheless, for example, in road traffic accidents? Here ‘policy’, or perhaps politics, appears to intrude, for the *Guidance* continues:

Adapted conventional handguns are not generally considered suitable for humane *dispatch* (13.36; emphasis added).

By whom, we wonder; not, we understand, by those who speak with authority on the subject. But more to the point, what is a licensing department to make of this nod, which is a good as a wink? One must assume that adapted conventional handguns should never be authorised for this purpose, or at least that every possible obstacle should be placed in the way of such an application succeeding.

Reluctance to sanction for slaughtering pistols chambered for cartridges more powerful than .32ACP compels the use of centre-fire rifles—which are hardly risk-free close-quarter slaughtering instruments.

III. EXPANDING AMMUNITION

The 1997 Firearms Act which prohibited pistols also prohibited expanding bullets.¹⁵

Political intent did not, however, survive the resulting collision with reality. From the outset, exemptions from this prohibition had to be written into the Act, not least because deer hunters are required by (other) laws to use expanding bullets¹⁶ (which the Home Office itself explains ‘ensure a quick, clean kill’ [3.16]). Target shooting, which may, but generally does not, require expanding ammunition, was not included in the exemptions. For those handloaders whose rifles are chambered for obsolete military cartridges, the resulting prohibition is hugely inconvenient.¹⁷

Although exemptions allow expanding ammunition for deer hunters and some others, the exemptions cannot extend to those who need such ammunition for shooting *abroad*. But first, some background.

Shooting grounds expect the hunter to arrive prepared; safari operators require expanding ammunition to be used for lion and the other dangerous ‘big cats’, as do the Zimbabwe National Parks. There are few gun shops in Africa: Tanzania, for example, has none and ammunition has to be privately imported. Gun shops are not to be found at African airports: a trip to town whilst changing from a public carrier airline to a private charter flight is scarcely practicable. In Ethiopia, Italy, Mongolia, Russia and the countries previously of the Eastern Bloc, whilst one is permitted to import ammunition as a tourist hunter, purchase of further amounts is not allowed; a hunter from the UK would find it difficult to buy ammunition on his arrival.

But given the variety of chamberings and ammunition

natures in current production the visiting hunter would be unlikely to find expanding ammunition from the manufacturer and of the bullet weight and design for which his rifle either has been regulated by its maker or previously zeroed by the hunter himself. On grounds both of animal welfare and of safety it is important that he should. On the matter of expanding ammunition for use abroad, the Home Office advice is as admirably clear as the legislation is absurd:¹⁸

Due to the terms of section 9 of the 1997 Act, expanding ammunition may not be authorised [i.e., one is forbidden to buy] in connection with use abroad (13.35).

Applicants wishing to possess expanding ammunition [to zero a large calibre rifle for big game hunting abroad] ... should be refused (3.32).

This nonsense is a failing not of the *Guidance* but of the legislators: the case against prohibiting the means to humane killing—expanding ammunition—was made when the Bill which was to become the Act was in draft, but rather than abandon the prohibition, the Government preferred to keep it and introduce exemptions intended to nullify its effect.

The fly in the ointment is that there are territorial limits to UK legislation. Those same limits which deny a chief constable in the UK the authority to direct how a firearm should be used in, say, Zambia also prevent him from authorising the possession of expanding bullets for big game shooting to be conducted other than in the UK. A UK citizen may therefore possess a big game rifle for use abroad, but not zero it or practise using the expanding ammunition to be used on animals not indigenous to the UK.¹⁹

The consequences are grimly predictable: either as a result of shots misplaced (through incorrect zeroing or lack of practice) or taken with the only ammunition which big-game hunters may possess in the UK—non-expanding ammunition which is more likely to wound than kill swiftly—animals will suffer and hunters will be at risk.

III. FIREARMS CERTIFICATES

A. 'Good reason'

The Bill of Rights having been overridden, possession of a firearm is now a state-granted privilege, the symbol and actuality of which is the *Firearm Certificate*.²⁰ Its grant depends upon an applicant being able to convince the licensing authority—the police—of his good reason to do so. In this context, however, 'good reason' has a special meaning, where 'good' means 'acceptable to those who issue firearm certificates'. The concept of 'good reason' thus defined stands at the very centre of the UK licensing process.

The 'good reason' requirement by extension has come to mean that licensing officers match the firearm applied for to its intended purpose, for that purpose constitutes the applicant's 'good reason'.

As an aid to this process, the *Guidance* offers a table which pairs rifle cartridges and quarry (13.15). A blunt instrument, of course, but as a starting point for negotiation, preferable to wrangling over exterior ballistics tables.

The Home Office, however, like Homer, sometimes nods:

For the smaller deer species (Roe, Muntjac and Chinese Water Deer) .243 calibres [sic] are optimal (13.29).

The Roe is not a small deer. This Home Office requirement *de facto* that rifles of the 6 mm class be used for Roe (unless the applicant can satisfy the police that he intends also to shoot Red, Sika or Fallow) will surprise some experienced hunters. Moreover, the 9.3 Mauser²¹ is listed as *not suitable* for deer, boar 'and other similar sized quarry' but *suitable* for lion, elephant, buffalo, bear, 'etc.' which, remember, are not deserving of expanding bullets. Big-game hunters might care to seek a second opinion.

The maintenance of 'good reason' by frequency of use of a firearm is a burden recently invented for the target shooter. 'Six times a year' was becoming a new orthodoxy. The *Guidance* suggests a less tiresome régime, modified by circumstances:

Target shooters may be expected to use their firearms

fairly regularly, say three or more times a year (13.46).

Those who do not, should have their explanations ready.

The Home Office acknowledges that engaging in shooting competitions, formal or otherwise, is not necessary to establish ‘good reason’; moreover, the police are advised that participating in shooting disciplines developed locally may be accepted as ‘good reason’ for possessing a firearm—provided they are of long standing (13.46). Fair enough, all of it; but that it has to be said at all, says much.

B. Antiques

Antique firearms possessed as curiosities or ornaments are not subject to control by firearm certificate. The Home Office, however, takes the view that even occasional firing of an antique firearm requires that its possession be authorised by firearm certificate, even though that firearm is held primarily for its historical value or as an object of study.

Since curiosity invites inquiry and inquiry of a firearm may reasonably be expected to include the need to explore the manner of its working, it may be questioned whether occasional firing is incompatible with ‘curiosity’ status.

C. Security

The present position with regard to security illustrates well the process of ‘administration creep’. Time was, and it was not so very long ago, that police forces were at pains to point out to certificate holders that *security is your responsibility*. And so in truth it remains, for the police have no statutory power to dictate security measures.

Indeed, the Home Office itself is clear on this point: the Firearms Rules 1998 require that firearms and shotguns ‘must be stored securely at all times (except in certain circumstances) so as to prevent, so far as is reasonably practicable, access to the guns by unauthorised persons’ but ‘do not ... prescribe the form of safekeeping or security’ (19.7). Nor are there ‘statutory provisions on how this duty should be discharged’ (19.5).

But as any inventive bureaucrat knows, there is more than one way to skin a cat: if the police are not satisfied with an applicant’s security measures, then (advises the Home Office) a

certificate may (assume in all senses) be withheld. Accordingly, there follow some forty-one paragraphs on risk assessment, levels of security and the siting and fixing of security devices,

Once the *advisability* of keeping a firearm secure becomes statutory obligation, alarming consequences follow. Take that pitfall for the unwary, ‘constructive possession’:

The term ‘unauthorised access’ has been held to include the constructive possession that can occur where persons other than the certificate holder have access to the keys for security devices ... Knowledge by an unauthorised person of the location of the keys or to the combination to the locks may lead to a breach of the statutory security condition. In the case of *Regina v Chelmsford Crown Court, Ex parte Farrar* (2000) it was agreed that deliberately providing information of the whereabouts of the keys was an offence (19.17).

A firearms security package within a dwelling may *include* a code-activated alarm, and that code must be known to occupants other than the certificate holder; thus quite where the limits of lawful knowledge should be drawn is unclear. It is clear from the *Guidance*, however, that lawful possessors of firearms in the UK who disclose to their non-shooting spouses (for example) the location of the keys to the firearms cabinet commit an offence.

IV. THE LONG TERM

The shooting community in the UK has generally welcomed this latest *Guidance* as a means to ending the administrative delay brought by the flurry of legislation since the last *Guidance* which had (one hears) so mesmerised some licensing departments as to render them incapable of productive administrative activity. Also welcome is the insistence upon consistency of practice between police forces (1.4), and that each licensing application should be assessed ‘on its merits’ (1.6).

That is all well and good; but consider for a moment the wider picture. Without its Schedules, the Firearms Act of 1968 (still the principal act, although much amended) occupied but 32 (small) sides of paper. Leaving aside the question of the social benefit of the legislation, the wording of that Act was clear enough to require no gloss. Subsequent political meddling has left a body of legislation which the Home Office feels requires

210 (large) sides of interpretation and guidance in its application.

In Britain, every conceivable aspect of lawful firearms ownership, use and transfer is tied down, regulated, supervised and interfered with. It is with some justification that politicians assert that UK firearms legislation is among the toughest in the world. The assertion, however, is disingenuous. Controls on those *who are prepared to submit to control* are strict; controls on those who are not, are non-existent.

As if to drive home the point, the UK is now suffering growing firearms crime. Figures recorded by the police show that for the past four years firearms-related crime has risen year on year. Over the past year (2002), Government figures suggest a 35% rise in recorded crimes involving firearms, a 32% rise in deaths caused by shootings and, most telling of all, that the increase is mainly driven by a rise in the use of pistols, now identified as used in 70% of robberies.²² Pistols were, of course, ‘banned’ by the Firearms Act 1997.

And here is the heart of the matter. The 1997 Act which dispossessed a relatively small number of licensed pistol shooters did not make pistols vanish: the number of pistols which at the time of the ban coming into force never had been licensed (i.e., the ‘illegal pool’)—sufficient for all conceivable UK criminal requirements not just for decades but for centuries to come—were untouched by the ban.²³ Nor did the importation of unregistered firearms, especially those from eastern Europe, cease in 1997.

The 1997 Act, however, was completely effective in banning the pistol licence. Following the Act, pistols (with those few exceptions considered above) could only be possessed unlawfully. And so they are. Today in England, Scotland and Wales, the only people (save very few) with pistols are criminals—a few by design, the majority by definition. If control by registration is as effective as its proponents claim, then to have removed the means to registration suggests a certain cynicism at the heart of the legislative process.

Nevertheless, ‘tough’ legislative regulation, so evidently ineffective in achieving the purpose claimed for it, continues as a policy: the political reaction to rising firearms crime figures is to propose yet further measures concerning airguns and imitation firearms.²⁴ But then the expansion of gun regulation in the United Kingdom has long been driven by political displacement activity.

Were they ever truly serious?

1. Notably the Juries Act of 1825 and the Accession Declaration Act of 1910. Justification for the possession of a firearm for defence was effectively disallowed by administrative means from 1946.
2. Richard Munday gives full reasons for a contrary view <<http://www.cybersurf.co.uk/johnny/dunblane/munday.html>>
3. An institution less cosy than its title might suggest, the Home Office is for England and Wales the equivalent of an interior ministry.
4. <www.homeoffice.gov.uk/pcrg/firearms.policeguide.pdf>. A printed version is also published by Her Majesty's Stationery Office.
5. The 1991 EC Directive on control of the acquisition and possession of weapons (91/477/EEC).
6. Which indeed it does not: 'It must be stressed that this is not a definitive statement of the law but a cohesive explanation of the often complex area of firearms licensing' (1.2). Note, however, that although *guidance issued by the Home Office/Scottish Executive or the ACPO/ACPOS* [Association of Chief Police Officers for England, Wales and Scotland] *has no legal standing and is thus open to challenge ... such guidance will often reflect the existing case law and previous decisions by the Courts* (21.9).
7. The numbers in brackets refer to paragraphs in the *Guidance*.
8. For example: firearm certificate conditions imposed by the chief officer of police; a refusal to designate a site where 'historic pistols' may be used; a refusal by the Home Office to 'approve' a shooting club
9. Firearms Consultative Committee Eleventh Annual Report. London: The Stationery Office, 2002, 12.4; 15.10. The FCC is a statutory body, created by the legislation which followed the shootings at Hungerford in 1988, to advise Her Majesty's Government on matters relating to firearms
10. Firearms (Amendment) Act 1988, s.22(5)(a) and (c).
11. See, for example, Her Majesty's Inspectorate of Constabulary *Inspection Manual 2002*: 'Inspection Protocol for Firearms Licensing', 3.
12. Prohibited firearms may be possessed only with the sanction of Secretary of State. Pistols (other than muzzle-loaders) are prohibited but providing they fulfill certain criteria which establish them as 'historic', that special permission is unnecessary and normal licensing procedures apply.
13. *Kendrick v Chief Constable of West Midlands Constabulary* (2000).
14. Section 7 (3)(a).
15. The *Guidance* explains that it is now *unlawful to manufacture, sell, transfer, purchase, acquire or possess ... any ammunition which incorporates a missile designed or adapted to expand on impact* (3.2).
16. For example, the Deer Act 1991, Schedule 2 (5).
17. Fortunately for target shooters, the status of the bullet which has a core inserted from the front is addressed: *... care must be taken to distinguish between match target hollow point ammunition, which has a tiny hole at the front for manufacturing purposes, and true hollow point. Match hollow point rounds, such as the Sierra Match King, are not prohibited, neither are flat-nosed bullets designed to be used in tubular magazines* (3.16).

18. Its foolishness was recognised by the FCC more than two years ago: 'In the light of the general ban on handguns, the Government should consider whether the ban on expanding ammunition serves any useful purpose and, if not, its repeal and we so recommend.' (FCC Ninth *Annual Report* [1999], 9.6).

19. This was evident to the FCC long before the *Guidance* appeared. The FCC doubted that 'the exemptions provided in the 1997 Act extend to the possession of expanding ammunition for the lawful hunting abroad of game animals other than deer' (Ninth *Annual Report* [1998], 9.4). Indeed, the prohibition of expanding ammunition is unlikely to have been Parliament's intention: Lord Williams of Mostyn, answering for the Government and citing s.10 of the 1997 Act, confirmed that there would be no need for legislation to permit the continued possession of expanding ammunition for the purpose of the humane killing of animals. It would seem that he assumed the continued authorisation of expanding ammunition for the stated purpose to have been desirable (*Parliamentary Debates*, 21 January, 1997, Col. 616).

20. This specifies each firearm authorised by description and serial number. Also specified are the quantities of ammunition appropriate to each firearm which may be acquired and held.

21. The 9.3 x 62 mm, presumably: a general-purpose medium-bore, dimensionally similar to the .35 Whelen.

22. 'Summit over 35% gun crime rise', *The Guardian*, 10 January, 2003.

23. Back-of-the-envelope arithmetic: assuming 3,000 incidents annually, 2 million unregistered firearms (estimates of 4 million have been suggested) would be sufficient to provide an illegal pool for 600 years. Not all unregistered firearms find their way into criminal hands, of course; but then the 'illegal pool' is constantly topped-up by *inter alia*, imported weapons.

24. Home Office News Release 006/2003.

Christians and Guns

Carlo Stagnaro

In this article, Carlo Stagnaro elucidates the morality of personal and collective self-defense, from a Roman Catholic perspective. He argues that the Bible, Christian tradition, and the example of Saints all support the right and duty of self-defense. Carlo Stagnaro is Fellow of International Policy Network (which is based in London), and is co-editor of the Italian libertarian magazine Enclave. In 2003 he was awarded the St. Gabriel Possenti Society Honor Medallion.

“Do not think that I have come to bring peace upon the earth. I have come to bring not peace but the sword.”
(Matthew 10: 34)

“Hence it is evident that virtues perfect us so that we follow in due manner our natural inclinations, which belong to the natural right. Wherefore to every definite natural inclination there corresponds a special virtue. Now there is a special inclination of nature to remove harm, for which reason animals have the irascible power distinct from the concupiscible. Man resists harm by defending himself against wrongs, lest they be inflicted on him, or he avenges those which have already been inflicted on him, with the intention, not of harming, but of removing the harm done.” (Thomas Aquinas, *Summa Theologica* II-II, 108, 2)

I. INTRODUCTION

Many Christians believe that the faith in Jesus is incompatible with the use of lethal force, either for defensive or aggressive purposes. They also claim war is always wrong, and peace is a value in itself. Generally speaking, they condemn any form of reaction to aggression, both in the private (self defense) and the public (just war) sector. They also would make the use of guns by private citizens illegal, and usually support any form of gun control or even a ban on privately owned handguns. Finally, they believe guns are evil in themselves, no matter who the

owner is, what her or his intentions are, and why she or he owns a gun.

In this Article I address the question of whether a Christian has the moral right to keep and bear arms and to use them for self defense. First of all, I briefly examine the Scriptures in order to find God's and Christ's statements concerning weapons. Then, I look at the Christian tradition, especially Roman Catholic tradition.

I do not make any utilitarian argument. My goal is not to show that freedom to own guns, as opposed to gun control, works. Rather, I make a moral case for private gun ownership. My main points will be the following:

Self defense is legitimate in the eyes of God, since it is a way to protect His gifts, including life, liberty, and property, against predators. Self defense is an individual's right in general, but in particular cases it may even be a duty—when, for example, one is responsible for someone else's life, liberty, and property. The same criteria by which it is possible to define individual self defense apply to a broader context—that is, “just war.”

One should recognize that violence does exist. Regardless of what Christians think or do, violence is a feature of human nature. And criminals, aggressors, and tyrants exist as well. So, asking whether self defense is legitimate is equal to asking what behavior Christians should adopt when faced with such violent types as criminals, aggressors, and tyrants.

Why does violence exist? Because of original sin. As a sinner, man can sometimes commit unjust acts. The first question, then, is whether sin depends on man, or if it depends on environment, so to speak. If the right answer is the latter, then gun control *might* be a sound, rational way to minimize the effects of aggressive violence, leave aside eliminating it. Unfortunately, as Andrew Sandlin puts it, “elimination of guns does not guarantee the elimination of the problems gun control supposedly solves. The problem is not six-shooters; the problem is sinners. Eliminating guns won't solve *that* problem...The proximate (civil) solution to gun-related violence is stiffer (biblical) penalties for harming humans and property—whether by guns, knives, axes, spray paint, or computers. The *ultimate* solution to gun-related violence is the transformation of

individuals by the Gospel of Jesus Christ.”¹

The Italian political scientist Gianfranco Miglio agreed on this, within a broader argument about the growth of government. His point was that certain Christians have lost the concept of sin (especially original sin), and therefore they tend to postulate no personal responsibility in crime:

“I can’t suffer, or understand, the ‘social Catholics.’ They seem to teach God how He should have made humans. They don’t admit men’s evilness: to them, the culprit is ‘the society’...They hate America, the free-market, the whole West that has been created by Christianity.”² He added:

[R]adical democracy’s Christianity is to a certain extent merely formal: because here political postulates seem to be separated from the religious premises which generated them, and while the former are taken in, the latter are refused...And the largest most important principle, which was arbitrarily pulled away from the body of Christian politics, was the theory of sin. That—as surely more than one reader does already know—is not an arid topic of moral theology, but rather the precious premise of a realistic and, at the same time, refined interpretation of human nature and its free, eternal swinging between good and evil.³

So, men can freely choose evil, and even be pleased with it. Evil is not merely a consequence of environment (or “things”), but a choice; it is inherent in the human soul—the “dark side of humanity” so to speak—and we will never be able to get rid of it, because we are made of good and evil. Eliminating the latter is not possible without eliminating the former—that is, destroying ourselves.

Neither God the Father nor Christ ever said that sin is about things. They, as well as all, the Saints, always pointed out that sin—and therefore Salvation—concerns what one does by virtue of one’s own free decisions, that is by one’s own will. Are people strong enough to own guns, and use them only for legitimate purposes? *That* is the problem. After all, there is no virtue in not committing a sin because you were forced to act in such a way. There is no virtue in not robbing what you cannot rob, and no virtue in not doing what it is impossible for you to do.

Moreover, if one believes in God, one also must believe there are some values of a superior order. One must believe that

Truth (in capital letters) does exist, and that it is worthy fighting for, and even dying for. On the other hand, if one believes peace or non-violence is more important than Truth, one necessarily can not hold that Truth is really true. Therefore, one's faith in God seems weaker than it should be.

One point should be made: My specific task in this essay is to deal with the question of whether a Christian has a right to keep and bear arms and, more generally, to defend himself or others against aggressive violence. However, I will often quote the theory of "just war." The reason is that, until recently self-defense was held as an obvious prerogative of free individuals, including Christians. So much more speculation was dedicated to the harder problem of war than to the simpler issue of self-defense. Anyway, from the theory of just war it is possible to infer a theory of self-defense, while it would not be possible to reason the other way around.

In fact, when one recognizes a right of a community (say, to wage war), one must necessarily recognize that same right of individuals, because a community is no more than a sum of individuals, and communitarian rights are no more than the sum of individual rights within the community. For example, one may stand for private production of domestic security and foreign defense and, at the same time be anti-war; or one may criticize centralized law enforcement and, notwithstanding, support the right to keep and bear arms.⁴ But one may not stand for a heavily armed government and, at the same time, oppose private gun ownership! Of course one may well refuse this point, as many actually do; but in doing so, one crosses the border of orthodox Christianity, and it is not within the scope of this paper to give a universal answer to all of the objections against the right to self defense. I will deal only with the possible objections from a Christian (and especially Roman Catholic) point of view.

II. THE SCRIPTURES

In the Old Testament there is no evidence of God denying the right to use arms for self-defense. Indeed, many godly men own and use arms for legitimate purposes. The legitimacy of such purposes is often sanctioned by God Himself, who also orders His followers to wage war against pagans and other enemies of His.

The first case of homicide in the Bible is Cain killing Abel

(Genesis 4).⁵ He may well have used a knife or a rock or whatever. When faced with God, God banished him, and did nothing about the weapon used to murder Abel. “The point is,” says Larry Pratt, “the evil in Cain’s heart was the cause of the murder, not the availability of the murder weapon. God’s response was not to ban rocks or knives, or whatever, but to banish the murderer.”⁶

In order to rescue Lot, the son of Abram’s brother, Abram took a sort of armed militia and attacked the kidnappers:

The victors seized all the possessions and food supplies of Sodom and Gomorrah and then went their way, taking with them Abram’s nephew Lot, who had been living in Sodom, as well as his possessions. A fugitive came and brought the news to Abram the Hebrew, who was camping at the terebinth of Mamre the Amorite, a kinsman of Eshcol and Aner; these were in league with Abram. When Abram heard that his nephew had been captured, he mustered three hundred and eighteen of his retainers, born in his house, and went in pursuit as far as Dan. He and his party deployed against them at night, defeated them, and pursued them as far as Hobah, which is north of Damascus. He recovered all the possessions, besides bringing back his kinsman Lot and his possessions, along with the women and the other captives. (Genesis 14: 11-16).

We are shown told that violence may be a legitimate reaction, when it is the only way to establish justice and repair torts.

Educating Israel about wise and good behavior, God says also: “If a thief is caught in the act of housebreaking and beaten to death, there is no bloodguilt involved. But if after sunrise he is thus beaten, there is bloodguilt” (Exodus 22: 1-2). This point is very clear. One may always react against aggression; one may also kill a predator, if he enters one’s house by night. Things are different if the sun has already risen. In fact, by night the householder cannot be sure the thief will not harm him or his loved ones; by day, instead, one may understand the real intentions of the felon and thus the defensive reaction may well be weighted accordingly.

A bit later, God adds: “You shall not wrong any widow or orphan. If ever you wrong them and they cry out to me, I will

surely hear their cry. My wrath will flare up, and I will kill you with the sword; then your own wives will be widows, and your children orphans” (Exodus 22: 21-23). It is God himself who advocates the right to defend the innocents; the unjust aggressor will pay for having violated God’s law.

“You shall not kill,” then, is to be intended as “You shall not murder.” In other words, the commandment does not apply when one kills in order to defend his life, the life of his loved ones, or his goods. Rather, a rational criterion to understand the commandment is what Murray N. Rothbard calls “the non aggression axiom”: “that no man or group of men may aggress against the person or property of anyone else.”⁷

When the people of Israel lose their faith in God and begin worshipping other gods, they abandon arms: “New gods were their choice; then the war was at their gates. Not a shield could be seen, nor a lance, among forty thousand in Israel!” (Judges 5: 8). This seems to suggest that unarmed people are unwise and far from God.

Also, gun control is among the harms the King will inflict on Israel, if they choose to be subjects rather than free people:

The rights of the King who will rule you will be as follows: He will take your sons and assign them to his chariots and horses, and they will run before his chariot. He will also appoint from among them his commanders of groups of a thousand and of a hundred soldiers. He will set them to do his plowing and his harvesting, and to make his implements of war and the equipment of his chariots. He will use your daughters as ointment-makers, as cooks, and as bakers. He will take the best of your fields, vineyards, and olive groves, and give them to his officials. He will tithe your crops and your vineyards, and give the revenue to his eunuchs and his slaves. He will take your male and female servants, as well as your best oxen and your asses, and use them to do his work. He will tithe your flocks and you yourselves will become his slaves. When this takes place, you will complain against the King whom you have chosen, but on that day the Lord will not answer you. (1 Samuel 8: 11-18).

In 1 Samuel 13: 19-22 we are told that God’s people would

have been better off if they had armed themselves:

Not a single smith was to be found in the whole land of Israel, for the Philistines had said, “Otherwise the Hebrews will make swords or spears.” All Israel, therefore, had to go down to the Philistines to sharpen their plowshares, mattocks, axes, and sickles. The price for the plowshares and mattocks was two-thirds of a shekel, and a third of a shekel for sharpening the axes and for setting the ox-goads. And so on the day of battle neither sword nor spear could be found in the possession of any of the soldiers with Saul or Jonathan. Only Saul and his son Jonathan had them.

While Israel abandons faith in God, God allows them to be disarmed by the Philistines.

Nehemiah goes even further, and provides an example of God-given right to keep and bear arms: “Neither I, nor my kinsmen, nor any of my attendants, nor any of the bodyguard that accompanied me took off his clothes; everyone kept his weapon at his right hand” (Nehemiah 4: 17).

In the words of Rev. Anthony Winfield, “The example of Nehemiah is a case study of how a person can totally trust in God for protection yet still be allowed to take reasonable precautions... Devout Jews and Christians are not unspiritual or lacking in faith if they choose to arm themselves. The story of Nehemiah is an irrefutable example of how one can indeed have faith in the God of protection yet simultaneously bear arms as an extra precaution.”⁸ Indeed, sometimes arming oneself may be a duty—because trusting in God but not providing any defense for oneself could be seen as an act of tempting Him.

In the Psalms and the Proverbs, we are given several indications that God does approve owning and using arms for legitimate purposes. The following list is only a brief selection of them:

Defend the lowly and fatherless; render justice to the afflicted and needy. Rescue the lowly and poor; deliver them from the hand of the wicked. (Psalms 82: 3-4)

Blessed be the Lord, my rock, who trains my hands for battle, my fingers for war. (Psalms 144:1)

Let the faithful rejoice in their glory, cry out for joy at their banquet, With the praise of God in their mouths, and a two-edged sword in their hands, To bring retribution on the nations, punishment on the peoples, To bind their kings with chains, shackle their nobles with irons, To execute the judgments decreed for them-- such is the glory of all God's faithful. (Psalms 149: 5-9)

Rescue those who are being dragged to death, and from those tottering to execution withdraw not. If you say, "I know not this man!" does not he who tests hearts perceive it? He who guards your life knows it, and he will repay each one according to his deeds. (Proverbs 24: 11-12)

Like a troubled fountain or a polluted spring is a just man who gives way before the wicked. (Proverbs 25: 26)

Ezekiel warns that "[I]f the virtuous man turns from the path of virtue to do evil, the same kind of abominable things that the wicked man does, can he do this and still live? None of his virtuous deeds shall be remembered, because he has broken faith and committed sin; because of this, he shall die" (Ezekiel 18: 24).

All in all, there is no evidence in the Old Testament that God dislikes arms; of course, while all references are to such arms as swords and axes, they should be regarded as general statements, since at that time there was no gun or rifle or modern weapon whatsoever. But God also seems to appreciate His people taking arms to defend themselves and to oppose God's enemies.

One could argue that, while the Old Testament is some sort of warmonger's textbook, the New Testament suggests a rather pacifist, weak, non-violent way of life. Actually, Jesus was peaceful rather than pacifist. He came on Earth and showed how the Son of God may suffer; yet He still remains the Son of God. In fact, one could cite the Sermon of the Mount, when Christ told: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, offer no resistance to one who is evil. When someone strikes you on (your) right cheek, turn the other one to him as well" (Matthew 5: 38-39). The reference here is to Exodus 21: 23-25: "But if injury ensues, you

shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”

Jesus’ invitation to “turn the other cheek” can hardly be regarded as a dismissal of legitimate self-defense. First of all, a slap on the cheek is more likely to be seen as an insult than as an aggression. Moreover, Christ seems to refer to vengeance rather than self-defense. Jesus says love is better than hatred, and that vengeance can never be the solution. On the other hand, He does not say self defense is bad. This would lead to the rule of the stronger over the weaker, of the bully over the gentle person. And, while inviting us to turn the other cheek, He *does not* invite us to turn the *other’s* cheek, which precisely is the effect of gun-control laws.

In fact, while self defense is an individual right, vengeance is in the hands of God. As St. Paul puts it, “do not look for revenge but leave room for the wrath; for it is written, ‘Vengeance is mine, I will repay, says the Lord.’” (Romans 12: 19).

Finally, while Christ in the Sermon of the Mount seems to change Old Testament laws, a while before He had pointed out that:

Do not think that I have come to abolish the law or the prophets. I have come not to abolish but to fulfill. Amen, I say to you, until heaven and earth pass away, not the smallest letter or the smallest part of a letter will pass from the law, until all things have taken place. Therefore, whoever breaks one of the least of these commandments and teaches others to do so will be called least in the kingdom of heaven. But whoever obeys and teaches these commandments will be called greatest in the kingdom of heaven. (Matthew 5: 17-19).

So, should we think that Jesus was so stupid as to contradict what he had said before? No. Of course Jesus was not stupid, nor did he intend to contradict Himself or His Father. The “turn the other cheek” phrase simply does not apply to self-defense; rather, it applies to vengeance or insults. Jesus said that God will take the burden of establishing justice, while godly people are supposed to face the problems of life with their hearts filled with mercy and pity. After all, if Jesus really meant that His followers should not resist aggression, then a question arises. After the

second slap, should the devout Christian turn the first cheek again, and then the second one again, and so forth until the slapper is tired?⁹

Jesus also said that “When a strong man fully armed guards his palace, his possessions are safe” (Luke 11:21) and, “But now one who has a money bag should take it, and likewise a sack, and one who does not have a sword should sell his cloak and buy one” (Luke 22: 36). Once again, should we think that Jesus had no memory of what he had said? Rather, we should understand that arms (including swords, axes, handguns, machine guns, tanks, or nuclear bombs) are mere objects, and any problem is not about inanimate objects. The real source of problems, including criminal aggressions, thefts, and illegitimate use of lethal force, is that men are poor sinners.

When Jesus is arrested, Peter takes the sword and cuts off an ear of one officer of the Sanhedrin. Then Jesus rebukes him with these words: “Put your sword back into its sheath, for all who take the sword will perish by the sword. Do you think that I cannot call upon my Father and he will not provide me at this moment with more than twelve legions of angels? But then how would the scriptures be fulfilled which say that it must come to pass in this way?” (Matthew 26: 52-54).

According to John, His words are: “Put your sword into its scabbard. Shall I not drink the cup that the Father gave me?” (John 18: 11). So, it is obvious that Christ did not rebuke Peter for the mere use of a sword. The point here is that the sword is not intended for defending the Son of God. If only He had wanted, legions of angels would have helped Him escape arrest. Peter’s sword is rather intended to defend his mortal life and the lives of his loved ones—and Jesus is consenting to being arrested because that is the way God chose to sacrifice Him and, by way of Him, give humans a chance to obtain Salvation, through the Grace of God and wise and godly behavior.

In fact, “A thief comes only to steal and slaughter and destroy; I came so that they might have life and have it more abundantly. I am the good shepherd. A good shepherd lays down his life for the sheep” (John 10: 10-11). So, thieves and murderers are among us. Jesus came here to rescue us from our sins. As He did, so we are supposed to do: especially those who have responsibility over others—such as fathers or husbands. They, as shepherds, must protect their sheep—that is, their loved ones. They have to be ready to give up even their own

lives to defend them. And, sometimes, protecting one's sheep may imply hunting wolves.

As Jesus said, "No one has greater love than this, to lay down one's life for one's friends" (John 15: 13). St. Paul goes deeper in his first letter to Timothy: "And whoever does not provide for relatives and especially family members has denied the faith and is worse than an unbeliever" (1 Timothy 5: 8). Taking care of your loved ones is a duty rather than a right or a choice. And not doing it would be either criminal or presumptuous. Criminal, if you do not take care of them because of fear or indifference. Presumptuous, if you do not do it because of an excessive trust in God. "Trust in God" does not mean that one should expect God to solve any problem; it does not imply that, if you are a lazy man who does not want to find a job, God will provide free lunches every day. "Trust in God" means that whatever happens is part of a Greater Plan which no human eye may see, yet exists and works and will lead to His greater glory.

Not being armed for self defense (and not locking doors, not providing any way to protect your life and the lives of others) would not be "trust", but betrayal of the faith in God. Christ warned us: "You shall not put the Lord, your God, to the test" (Matthew 4: 7). If one does not take any measure against predators, and indeed one supports and campaigns for and even enforces laws which prevent people from doing so, then one is vexing God.

As Jeff Snyder puts it, "Although difficult for modern men to fathom, it was once widely believed that life was a gift from God, that to not defend that life when offered violence was to hold God's gift in contempt, to be a coward and to breach one's duty to one's community."¹⁰ The same was said by the Italian father Giorgio Giorgi, who preached a sermon which inflamed the debate in his country. If faced with a criminal, he said, "I might let him kill me. Indeed, if I killed a bandit, I should presume to send him to Hell, because he's not in the Grace of God. So it would be better for me to die, because, theoretically, I should always be in the Grace of God, given my job. But the father of a family is not a priest. He has the right, and before it the duty, to defend his wife, his children, and his property."¹¹

III. THE TRADITION

The Scriptures seem quite clear about weapons and self

defense. Individuals have a God-given right to defend themselves, and even the duty to protect the life and the welfare of their neighbors. The tradition—that is, the thought of theologians and philosophers—rightly acknowledged this point.¹² Indeed, an entire doctrine of legitimate defense and just war has evolved, and it has focused on *intentions* of he who kills an aggressor. The point is, in order to be considered legitimate the act of killing must be a response to an actual and proportional danger or aggression. To use the words of Boston T. Party, “Lethal force is valid *only* against a *reasonably* perceived imminent and grievous threat. The jury must agree that your assailant had the opportunity, capability, and motivation to imminently cause you at least grievous bodily harm. You shoot to *stop—not* to kill. Any kill is *incidental*.”¹³ This includes, of course, any effort directed towards helping others, and any reaction taken while it was difficult to estimate the real intent of the evildoer—that is, for example, finding a thief in your house by night, as Exodus 22: 1-2 explicitly admitted.

The theory of legitimate defense and just war is as old as Catholicism itself. St. Girolamo pointed out that “it is not cruel, he who slits cruel people’s throat.”¹⁴ St. Augustine elaborated a first doctrine of the just war. He thought that war was God’s means to punish bad people and to test good ones. Therefore, behind them there is always Providence.¹⁵ The end of the good Christian must always be justice and liberty; and this end may be pursued even by violence, if there is no other way. In fact, peace without justice and liberty is an “unjust peace,” as opposed to the “tranquility of order.”¹⁶ Indeed, not only does one have the duty not to engage in evil, but one should also prevent evil from happening if possible; in the words of Pope Pelagius I, “Only he who force to do evil is a persecutor; instead, he who punishes a committed evil or prevent committing evil is not one who persecutes, but one who loves.”¹⁷

One of the most unique aspects of Medieval Catholicism was the orders of knighthood. The most prominent “ideologue” of this concept was St. Bernard of Clairvaux. His *Liber ad milites Templi* was conceived as a manual for those willing to join the Crusades. Crusades themselves were seen as an act of pity; they gave a chance of redemption both to the non-believers of the Holy Land, and to those European people who had given up their own faith. He wrote:

But the Knights of Christ may safely fight the battles of their Lord, fearing neither sin if they smite the enemy, nor danger at their own death; since to inflict death or to die for Christ is no sin, but rather, an abundant claim to glory. In the first case one gains for Christ, and in the second one gains Christ himself. The Lord freely accepts the death of the foe who has offended him, and yet more freely gives himself for the consolation of his fallen knight.¹⁸

Even St. Francis of Assisi, often regarded as a pacifist *ante litteram*, took part in Crusades, and never condemned them.¹⁹

A major contribution to the doctrine of legitimate self defense and “just war” came from St. Thomas Aquinas. He holds the principle that over physical health, one must keep spiritual health, and so must be ready to stand fast for Christ and for the good of Christians—including, of course, one’s loved ones. Like St. Augustine, he remarked that peace is not a value in itself; there are other values which are worthy fighting for, including liberty, honest people’s welfare, and private property.

Question 64 of his *Summa Theologica II-II* deals with the problem of killing. Particularly, article 7 asks whether “it is lawful to kill a man in self defense.” In response, Aquinas quotes Exodus 22: 2, regarding the right to kill a thief by night. Then:

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 defense 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 defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense 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

defense.’ Nor is it necessary for salvation that a man omit the act of moderate self defense 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, as stated above, it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, 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.²⁰

So, St. Thomas provides a strong justification for self defense.

Aquinas’ positions have remained a cornerstone of Christianity until today.

St. Robert Bellarmine also pointed out that the first reason why an individual may be legitimately be killed is so that “bad guys don’t harm good ones, and innocents aren’t oppressed by evildoers: this is why all very rightly agree, that homicides, adulterers, and thieves are killed.” Bellarmine’s other two reasons are that all have to learn from the punishment of few (deterrence) and that those who are killed may even benefit from their own death, because this will prevent them from engaging in further sins.²¹

St. Alphonsus Liguori further elaborated these positions but he remained within the borders marked by St. Thomas. He said: “It is allowed to kill the unjust aggressor (*cum moderamine inculpatae tutelae*) not intending the homicide, but the defense of one’s life, when it can’t be saved otherwise [...] It is not allowed to prevent the aggressor killing him before aggression, unless aggression is sure, and there is no way to avoid it.”²²

In 1823, father Antonio Rosmini noted:

He who, being able to be the peaceful owner of something—for example, life—aggresses against somebody else’s life in such a way that the person aggressed against cannot defend himself without depriving the aggressor of his life, operates in such a way as to endanger his own life. We can say that this

aggressor throws his life away himself, and that he expressly surrenders his holy property. Thus he who takes the life of the unjust aggressor as the only way to save his own, takes that life with the express consent of the owner.²³

It seems, therefore, that there is almost no doubt the Catholic tradition allowed the right to self-defense and sometimes even recognized it as a duty. Absolute pacifism and nonviolence, indeed, are clearly in contrast with the teaching of the Church. So, the question is, why do so many Christians hold such positions and even charge those who stand for an opposite view as violent and cynical? Italian theologian father Gianni Baget Bozzo suggested that it may be the consequence of “a doctrinal and spiritual event: they have removed the Biblical God of rage, and have reduced the Gospel to the love of the neighbor. So the utopia of not using force...has become a secular religion.”²⁴

IV. RECENT STATEMENTS

The history of Christianity seems to have little to do with gun control, pacifism, and nonviolence. Indeed, the Roman Catholic Church has always been the protagonist of heroic acts, including the Crusades to free the Holy Land and the Insurgents’ rebellion against Napoleon.²⁵ For almost two thousand years, the Church stood for individuals’ and communities’ right to defend themselves against aggression. Predators were regarded as evil persons who should be treated with mercy and pity. The life, liberty, and property of the innocent are more important than the life, liberty, and property of criminals because the latter, in the very moment they chose crime instead of honesty, renounced their own rights to the same extent they ignored other people’s just rights.

This point was so clear to Christians that Pope St. Pius X dealt with it in his 1905 Catechism in just a few lines. He wrote:

411. *Q: What does the Fifth Commandment: Thou shalt not kill, forbid?*

A: The Fifth Commandment, Thou shalt not kill, forbids us to kill, strike, wound or do any other bodily harm to our neighbor, either of ourselves or by the

agency of others; as also to wish him evil, or to offend him by injurious language. In this Commandment God also forbids the taking of one's own life, or suicide.

412. *Q: Why is it a grave sin to kill one's neighbor?*

A: Because the slayer unjustly invades the right which God alone has over the life of man; because he destroys the security of civil society; and because he deprives his neighbor of life, which is the greatest natural good on earth.

413. *Q: Are there cases in which it is lawful to kill?*

A: It is lawful to kill when fighting in a just war; when carrying out by order of the Supreme Authority a sentence of death in punishment of a crime; and, finally, in cases of necessary and lawful defense of one's own life against an unjust aggressor....

421. *Q: What does the Fifth Commandment command?*

A: The Fifth Commandment commands us to forgive our enemies and to wish well to all.

422. *Q: What should he do who has injured another in the life of either body or soul?*

A: He who has injured another must not only confess his sin, but must also repair the harm by compensating his neighbor for the loss he has sustained, by retracting the errors taught, and by giving good example.

Then two world wars came, and their devastating effects in Europe led the Church to partially revise its position on just war, although not on self defense. While in the past the war could be just and aggressive at the same time (for example, in order to rescue a town or a region conquered by the enemy), due to the impact of modern weapons (which supposedly cannot be "selective", that is: cannot distinguish between belligerents and non-belligerents) the concepts of "just" and "defensive" war have tended to congeal.

Still, the individual right to self-defense not been rejected. Pope Pius XII was sure that both individuals and people have the right to protect themselves. Moreover, as Roberto de Mattei put it, "an individual may renounce to exercise that right for

himself; but government has the duty to protect the common good of its citizens, which is not only physical and material goods, but also the heritage of values and principles which constitute society, such as man's fundamental rights and liberties and, first of all, Christian faith and morality. The importance of such goods, especially spiritual ones, as faith, justice, and liberty, fully justifies their defense by force against unjust aggression."²⁶

The Second Vatican Council confirmed this point: "Certainly, war has not been rooted out of human affairs. As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been exhausted."²⁷ Although neither the *Gaudium et Spes*, nor any other Second Vatican Council document mentions private defense, there is no reason to doubt that the Church holds the same position as ever on this issue—otherwise the Concilium would have taken a clear position, which indeed would have created several doctrinal problems. From the fact that Council confirmed that war may be just and even due, we may infer that self-defense, and defense of loved ones, are legitimate and even due as well.

This same line of reasoning belongs to Pope John Paul II. In fact, he has been very careful in distinguishing just from unjust use of lethal force—both in private and public matters. As a former priest in a communist country, he knew the hatred of those atheist regimes, which regarded religion as the opium of the people. So he had to deal with an unjust aggressor of individual and religious freedom; this gives him an even greater insight.

In the *Evangelium Vitae* (1995), the Pope reaffirmed the traditional view on self defense:

[T]o kill a human being, in whom the image of God is present, is a particularly serious sin. *Only God is the master of life!* Yet from the beginning, faced with the many and often tragic cases which occur in the life of individuals and society, Christian reflection has sought a fuller and deeper understanding of what God's commandment prohibits and prescribes. There are in fact situations in which values proposed by God's Law seem to involve a genuine paradox. This happens for example in the case of *legitimate defence*, in which the right to protect one's own life and the duty not to harm someone else's life

are difficult to reconcile in practice. Certainly, the intrinsic value of life and the duty to love oneself no less than others are the basis of *a true right to self-defence*. The demanding commandment of love of neighbour, set forth in the Old Testament and confirmed by Jesus, itself presupposes love of oneself as the basis of comparison: 'You shall love your neighbour *as yourself*' (Mark 12: 31). Consequently, no one can renounce the right to self-defence out of lack of love for life or for self. This can only be done in virtue of a heroic love which deepens and transfigures the love of self into a radical self-offering, according to the spirit of the Gospel Beatitudes (cf. Matthew 5: 38-40). The sublime example of this self-offering is the Lord Jesus himself. Moreover, 'legitimate defence can be not only a right but a grave duty for someone responsible for another's life, the common good of the family or of the State.' Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.²⁸

Accordingly, the new version of the official Catechism of the Roman Catholic Church is almost as clear on self defense as St. Pius X's was. Particularly, Numbers 2263-2265 deal with self defense:

2263. The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing. "The act of self-defense can have a double effect: the preservation of one's own life; and the killing of the aggressor... The one is intended, the other is not."²⁹

2264. Love toward oneself remains a fundamental principle of morality. Therefore it is legitimate to insist on respect for one's own right to life. Someone who defends his life is not guilty of murder even if he is forced to deal his aggressor a lethal blow:

If a man in self-defense uses more than necessary violence, it will be unlawful: whereas if he repels force with moderation, his defense will be lawful... Nor is it necessary for salvation that a man omit the act of moderate self-defense to avoid killing the other man, since one is bound to take more care of one's own life than of another's.

2265. Legitimate defense can be not only a right but a grave duty for one who is responsible for the lives of others. The defense of the common good requires that an unjust aggressor be rendered unable to cause harm. For this reason, those who legitimately hold authority also have the right to use arms to repel aggressors against the civil community entrusted to their responsibility.

Finally, the well noted Catholic author Vittorio Messori summarized the issue of pacifism, defining it as a sort of post-Christian heresy:

I believe that the essential and often forgotten virtue of Christians is realism. As a man of faith, I know that Jesus has promised only one Heaven, but not on this earth. Therefore, I do not trust in prospects for peace or a brotherly world, because I do believe, to the contrary, in the consequences of original sin. Jesus Himself clearly states that he came not to bring peace, but war and divisiveness. Pacifism is a post-Christian ideology which has nothing to do with Christianity. The realist Christian knows that he will always have to deal with war, since he lives in an ever-changing world that is full of evil and sin. The Christian's duty is to attempt to limit the damage.³⁰

One may dream of a world without war, violence, and crime. But that world is not our world. Therefore, any policy designed on the behalf of such a belief is doomed not only to fail, but to a devastating collapse. The idea of abolishing traditional institutions, and of building a "better" world or an earthly heaven, actually brought the rise and fall of the most hellish history the world had ever seen, with the national-socialist and communist regimes.

So, we have a two thousand year long tradition which never expressed any doubt on the existence of a right to self-defense. It is true that the Christian tradition never talked about the right to keep and bear arms, but the likely reason is that such a right has ever been held as inherent in the right to self-defense. Indeed, it would be naive to give the right to protect one's life, liberty, and property on the right hand, while taking out the only means to enforce that very right (privately owned weapons—today, guns) with the left hand. What we are actually making is therefore an *a fortiori* argument: since the right to self defense is granted and recognized, how could the Catholic Church deny the right to own the necessary means to exercise that right, without falling into contradiction? Of course, the burden of proof (*if* Christians really should be able to defend themselves, but without using and even owning weapons) should be on those who stand for a counter-intuitive and anti-logic position.

Moreover, the Christian long held as truth that rebellion against tyrants is legitimate—and the evidence shows that the more people are armed, the less a tyrant is likely to get the power, as the American Founding Fathers well understood.³¹

V. TOLSTOY'S CRITICISM

Most Catholic authors recognized the righteousness of he who defends himself, his loved ones, and his properties by the use of proportionate, lethal force. Among them, we may mention Gilbert K. Chesterton³² and John Ronald Reuel Tolkien.³³ They, along with many others, acknowledged that peace or tranquility cannot be seen as values in themselves, or as more important values than dignity, liberty, and faith. In other words, they were aware of St. Augustine's warning against false peace, as opposed to the "tranquility of order." They held that, faced with evil, one should not avoid resisting it. Indeed, they stood for heroic resistance—and virtually took the same role as St. Bernard of Clairvaux had taken so many centuries before. That is, they incited honest people not to accept an alleged trade-off between liberty and peace—which is the very same position as expressed by Benjamin Franklin. We could say that, according to Christian thought, those who give up their liberty in order to get temporary and apparent peace, deserve neither, and eventually do not maintain either.

A major criticism against the traditional view of self defense

came from Leo Tolstoy. His argument relies on the “turn the other cheek” and “resist not evil” passages. According to the great Russian author, Jesus’ words imply a total refusal of violence: there is no exception to this precept. As Jeff Snyder remarks, “Not for a ‘just’ war, not for retribution, not for justice, not even for self defense at the time of assault.”³⁴ Tolstoy uses seriously the Sermon of the Mount in order to support his position.

However, it is not methodologically correct to take only one part of the Gospels, without regard for the remaining chapters of the Gospels, the Old Testament, and the tradition of Roman Catholic Church. Indeed, at least for Roman Catholics, the Holy Seat is moved by the Holy Ghost, and it would be quite a disingenuous God who on the one hand took an absolutely pacifist position, and on the other hand pushed his Church to go to the Crusades or to impose the death penalty, or merely to stand for the right to use lethal force in self defense. (And, as we have seen, this is a very clear and long tradition.)

Tolstoy writes that “To submit means to prefer suffering to using force. And to prefer suffering to using force means to be good, or at least less wicked than those who do unto others what they would not like themselves.”³⁵ This is a strong point, for him, to oppose the very foundation of government: “ruling means using force, and using force means doing to him to whom force is used, what he does not like and what he who uses the force would certainly not like done to himself. Consequently ruling means doing to others what we would not they should do unto us, that is, doing wrong.”³⁶ But this is a naive point. While government may be a monopolist of violence on a given territory, and therefore it may be viewed as a danger for individual liberty, free individuals should be left free to defend their own rights by opposing force against force. If they did not do so, eventually they would maintain no freedom at all, and soon an even worse government would arise—in the hands of criminals. This is precisely what history teaches to those who have eyes to see and ears to hear.

To summarize with the words of Boston T. Party, “Christians are not to hate and curse their enemies, but to love and pray for them. However, that does not mean that we are to passively allow them to kill and maim us.”³⁷ In other words, forgiving our enemies does not imply letting them do whatever they want.

If you agree with Tolstoy, you may turn the other cheek

once, twice, or how many times you like. But you are wrongly imposing your beliefs on others if you advocate such measures as gun control, whose principal, if not only, effect is to turn the others' cheeks thousand of times each year. What Jesus was forbidding is vengeance, not self defense or legitimate use of force. Indeed, Jesus himself used force at least once, when he threw the moneychangers out of the temple—and also he built a whip of plaited rush-ropes (see Matthew 21: 12 and 11: 15-16). Should be Christ himself be held as a sinner or a criminal? Actually, “Don’t go to war over a mere slap is the lesson here,”³⁸ and it is a reasonable lesson.

Jesus’ position on “resist not evil” and “love your enemy” is to be seen as a part of his “eleventh commandment”: “Love your neighbor as yourself” (Luke 10: 24; see also Romans 13: 8 and Galatians 5: 14). But to love one’s neighbor as oneself, one should love oneself in the first place. What does then mean to “love oneself”? First of all, it necessarily means not to despise God’s gifts, the most important one being life. Furthermore, who is one’s neighbor when, say, a predator is going to use force against an innocent? Is the neighbor the predator, or rather the innocent? It is really hard to say the former, both in the light of Jesus’ teaching, and common sense—that is, one’s conscience.

VI. ST. GABRIEL POSSENTI

The Roman Catholic Church never condemned the mere possession of weapons; it focused on the personal responsibility of aggressors—that is, sinners. Consistent with this approach is the existence of Patron Saints for several arms-related groups. St. Elmo is patron saint for ammunition workers, St. Sebastian for archers, St. Maurice for armies and swordsmiths, St. Adrian of Nicomedia for arms dealers, St. Barbara for artillery gunners, St. Martin of Tours for cavalry, St. Hubert for hunters, and St. Michael the Archangel for paratroopers and security forces, to mention a few of them. What is lacking from this list is a Patron Saint for handgun shooters; i.e., a Saint who is supposed to be regarded as the “special guardian” of all those who have to deal with handguns for work, self defense, or a hobby.

After a long search, John Michael Snyder, a former Jesuit seminarian and a former associate editor of *The American Rifleman* (an official monthly journal of the National Rifle Association), found the needed Saint: St. Gabriel Possenti. He was an Italian

Passionist seminarian who, in 1860, rescued his own village (Isola del Gran Sasso, Italy) from a gang of former soldiers and non-commissioned officers of the Piedmontese army. They were in the South on the behalf of the general Giuseppe Garibaldi, who conquered the South and the Center of Italy and gave them to the Piedmontese King. At the time we are talking about, he had just defeated the Papal Army of the Blessed Pope Pius IX near Pesaro.

St. Gabriel Possenti, had a feeling that something wrong. He asked the monastery rector if he could go to the town to see if he somehow could help the people and obtained consent to do so. Here is Snyder's account of what happened:

As Possenti raced into town, he saw a sergeant literally about to rape a young woman. To the sergeant's surprise, Possenti yanked the soldier's handgun out of his holster and ordered him to unhand the woman. Possenti did the same to another sergeant, also a would-be rapist. The two of them, dumbfounded, let the woman go. When the other soldiers in the band of about 20 heard the commotion, they rushed toward Possenti, thinking they easily could make short shrift of this slightly built, cassocked theology student. One of them apparently made some sneering remark about him attired in his cassock. At that moment, a lizard ran across the road. The marksman Possenti took aim, fired, and killed it with one shot. It was then that he turned his weapons toward the advancing gang, surprised and shocked by this amazing demonstration of handgun marksmanship. Possenti ordered the terrorists to put down their arms, which they did. He ordered them to put out fires that they had started, which they did. He ordered them to return the property that they had taken from the villagers, which they did. He then ordered the whole lot of them out of town at gunpoint. They left, never to return. The Isolans then accompanied Possenti back to his monastery in triumphant procession, naming him the 'Savior of Isola'.³⁹

So, St. Gabriel Possenti may well be regarded as a bright example of how a good Christian (indeed, a Saint) may use guns to do good: to protect life, liberty, and property of a small community of believers.

When Snyder realized these facts, he founded the St. Gabriel Possenti Society, Inc.⁴⁰ in order to get St. Gabriel Possenti officially designated as the Patron Saint of handgunners. On the one hand, he met some resistance, especially from those members of the Church who are more affected by “politically correct” thinking and therefore are led to ignore or even repudiate a two thousand-year-old position on legitimate use of force. On the other hand, he could find several comrades on the path of just recognition of the right and the duty to keep and bear arms in order to deter would-be criminals. In fact, a crime (such as a theft, a burglar, a rape, or a murder) is an offense not only to the victim, but also to God himself. Since men are made “in His image and likeness” (see Genesis 1: 26), infringing men’s rights is like denying the divinity of God. This was very clear to St. Gabriel Possenti, and this is likely to be the reason why he decided to intervene and rescue the young woman and the village.

After all, if there is no right to self defense, then it follows that the world eventually belongs to those who are willing to use force and violence in the first place: aggressors both private (criminals) and public (tyrants). This is certainly not God’s design for humanity, as it is possible to human eyes to see that Great Plan. Indeed, there is no evidence in the Word of God (that is, the Bible) that honest people should not defend themselves with any means proportionate to the aggression. And St. Gabriel Possenti shows how a Saint may use guns to do good, in conscious and complete righteousness.

VII. FINAL THOUGHTS

Addressing the theology of liberation, Cardinal Joseph Ratzinger said that “an error cannot exist if it doesn’t contain a core of truth. Actually, the bigger is the core of truth, the more dangerous is the error.”⁴¹ So, with regard to unconditional nonviolence, the question is, what is the truth which makes such error so pervasive and attractive to many Christians and even nonbelievers? Probably, the truth is that Jesus was extremely clear about avoiding violence as much as possible, and even making it unlawful, under God’s law, to engage in vengeance. This does not imply in any sense that it is also unlawful to defend oneself or others against crime and aggression.

After all, if things were as “Christian pacifists” say, we

should wonder how almost all those who had faith in Jesus, including such major theologians as St. Augustine of Hippo and St. Thomas Aquinas, could be so far from the “real” and “correct” interpretation of God’s word—which, actually, never condemns, neither explicitly nor even implicitly, the use of defensive force. Moreover, no government (except perhaps some tyranny) has ever dared to officially rule out self-defense—in fact, tyrants found it safer and more effective, from their point of view, to prevent people from owning guns rather than openly destroying any basis of their natural, pre-political right to protect themselves and their goods.

As Jorge Leonardo Frank summarized it all:

Legitimate defense is a juridical institute of universal character, which has been recognized by all the legislations worldwide, so largely that the Pope John Paul II, in the encyclical *Evangelium Vitae* (the Gospel of Life) of March 25, 1995, defines it clearly as “the right to life and the duty to preserve it.” And as for the “human rights,” he adds that, if the respect is due to the life of all, including criminals and aggressors, with even more reason it should be kept in mind the life of defenseless victims.⁴²

Self defense is not only an important principle of the Christian religion, but also common sense.

It is no surprise, then, that the American Founding Fathers gave so large space to self defense in general, and to right to keep and bear arms in particular. It makes no sense to advocate liberty in any aspect of society, but to forbid people to defend that liberty. Liberty relies on right to self defense, and self-defense relies on the right to keep and bear arms. And there is probably nothing more American (and, through America linked to the best and true European heritage) than ordinary people owning guns for their own defense.

In fact, both the Holy Scriptures and the Roman Catholic (and Christian in general) doctrine agree on this, that anyone must be left free to arm himself and provide for his own defense. And this is exciting, because it shows how the defense of the right to keep and bear arms is on behalf of a two millennia tradition, while the efforts to control guns (and by way of them to control people) are signs of a dangerous modernity—the same danger which produced national-socialism and communism. So,

advocates of the right to keep and bear arms are eventually advocates of the true, Western and Christian tradition. Defending individual liberty, and the means to protect it, is a way to serve God.

ENDNOTES

1. Andrew Sandlin, "Hamartiology and Gun Control", *The Christian Statesman*, Vol. 140, No.1, 1997, <<http://www.natreformassn.org/statesman/97/hamargun.html>>
2. Gianfranco Miglio, quoted in Giorgio Ferrari, *Gianfranco Miglio. Il giacobino nordista*, Casa Editrice Liber Internazionale, Milan, 1993, p.143.
3. Gianfranco Miglio, *Il nerbo e le briglie del potere*, Il Sole 24 Ore, Milan, 1988, p.24.
4. See Gustave de Molinari, "The Production of Security", *Occasional Paper #2*, Center for Libertarian Studies, New York, 1977; Hans-Hermann Hoppe, "The Private Production of Defense", *Journal of Libertarian Studies*, Vol. 14, No.1, 1998, <http://www.mises.org/journals/jls/14_1/14_1_2.pdf>
5. All Biblical quotations, including Old and New Testament, are from the New American Bible.
6. Larry Pratt, "What Does The Bible Say About Gun Control", *The Christian Statesman*, Vol.140, No.1, 1997, <<http://www.natreformassn.org/statesman/97/bibgunctrl.html>>
7. Murray N. Rothbard, *For a New Liberty. The Libertarian Manifesto*, Ludwig von Mises Institute, Auburn, AL, 2002, <<http://www.mises.org/rothbard/newliberty.asp>>, p.22.
8. Rev. Anthony L. Winfield, *Self Defense and the Bible* (Arlington, Va.: St. Gabriel Possenti Society, 1994), p.11.
9. I owe this point to an observation of Mr. Thomas Schmidt.
10. Jeffrey R. Snyder, *Nation of Cowards* (Lonedell, Missouri: Accurate Pr., 2001), p.16.
11. Stefano Lorenzetto, "Io ho dalla mia l'angelo custode ma voi sparate, sparate, sparate. Intervista con don Giorgio Giorgi", *Il Giornale*, December 19, 1999, p.18.
12. Tradition is almost as important as the Bible in order to understand the Catholic position on many issues. "With particular regard to the Roman Catholic Church, the Gospel is God's revelation, together with the Old Testament, Church's Fathers, and Church's teaching. In order to see what Christianity says about war, it makes no sense to refer only to the Gospel." Dag Tessore, *La mistica della guerra. Spiritualità delle armi nel cristianesimo e nell'islam*, Fazi Editore, Roma, 2003, p.8.
13. Boston T. Party, *Boston on Guns & Courage: Proven Tools for Chronic Problems* (Austin, Tex.: Javelin Pr., 1998), p.2-8.
14. Girolamo, *Super Esaiam*, XIII.
15. Augustine, *De Civitate Dei*, I, 1 and IV, 17.
16. *Ibidem*, XIX, 13.

17. Pelagius I, *Epistola II*.

18. Bernard of Clairvaux, *Liber ad milites Templi*, III.

19. For a history of Crusades, and more generally to understand the reasons behind the confrontations between Christianity and Muslim world, see Alberto Leoni, *La Croce e la Mezzaluna* (Milano: Edizioni Ares, 2002).

20. Thomas Aquinas, *Summa Theologica*, II-II, 64, 7.

21. Robert Bellarmine, *Disputationes de controversiis Christianae religionis*, II, 3, chap. 21.

22. Alphonsus Liguori, *Theologia moralis*, VIII, 143 and 145.

23. Antonio Rosmini Serbati, “Del rispettare le proprietà” (edited by Alberto Mingardi), to be published in *élites*, No. 2, 2003.

24. Gianni Baget Bozzo, “L’abolizione della politica”, *RagionPolitica.it*, February 18, 2003, <<http://www.ragionpolitica.it/testo.1096.html>>, See also Michael Whitcraft, “Armed and Unarmed”, *The American Society for the Defense of Tradition, Family and Property*, April 21, 2003, <http://www.tfp.org/TFPForum/TFPCommentary/armed_and_unarmed.htm>

25. See Harry W. Crocker III, *Triumph. The Power and the Glory of the Catholic Church* (Roseville, Calif.: Prima Pub., 2001).

26. Roberto de Mattei, *Guerra santa, guerra giusta. Islam e cristianesimo in guerra*, Piemonte, Casale Monferrato (AL), Italy, 2002.

27. II Vatican Council, *Gaudium et Spes*, No. 79.

28. John Paul II, *Evangelium Vitae*, No. 55.

29. Thomas Aquinas, *Summa Theologica II-II*, 64, 7.

30. Carlo Stagnaro, “Interview with Vittorio Messori”, *LewRockwell.com*, January 15, 2001, <<http://www.lewrockwell.com/orig2/stagnaro1.html>>

31. Stephen P. Halbrook, *That Every Man Be Armed. The Evolution of a Constitutional Right* (Oakland, Calif.: Independent Institute, 1994); Idem, *Target Switzerland. Swiss Armed Neutrality in World War II* (Boulder, Colo.: Capo Pr., 1998); Idem, “Nazi Firearms Law and the Disarming of the German Jews”, in *Arizona Journal of International and Comparative Law*, Vol. 17, No.3, 2000, pp. 483-535. See also Pierre Lemieux, *Le droit de porter des armes* (Paris: Belles Lettres, 1993); Idem, *Confessions d'un coureur des bois hors-la-lois* (Montréal : Varia, 2001).

32. “A child’s instinct is almost perfect in the matter of fighting. The child’s hero is always the man or boy who suddenly and splendidly defends himself against aggression”, Gilbert K. Chesterton, “*Boyhood and Militarism; Literature and Science*”, in *The Collected Works, Vol. 27* (Ft. Collins, Colo.: Ignatius Press, 1986).

33. “The aggressors are themselves primarily to blame for the evil deeds that proceed from their original violation of justice and the passions that their own wickedness must naturally (by their standards) have been expected to arise. They at any rate have no right to demand that their victims when assaulted should not demand an eye for an eye or a tooth for a tooth,” John Ronald Reuel Tolkien, *The Letters of J.R.R. Tolkien* (London: Harper Collins, 1995), p. 243.

34. Jeff Snyder, “Words We Do Not Want To Hear”, *LewRockwell.com*, September 21, 2001, <<http://www.lewrockwell.com/orig/snyder2.html>>

35. Leo Tolstoy, *The Kingdom of God Is Within You* (Lincoln, Neb.: Univ. of Nebraska Pr., 1984), p.243.

36. *Ibidem*, p.242.

37. Boston T. Party, "My answer to Tolstoy's 'unconditional nonviolence'", <<http://64.177.53.248/ubb/Forum1/HTML/001050.html>>

38. *Ibidem*.

39. John Michael Snyder, *Gun Saint* (Arlington, Va.:Telum Associates, 2003), pp.2-3. See also Paolo Tagini, "San Gabriele Possenti", *Armi Magazine*, March 12, 2003, <http://www.armimagazine.it/~armimaga/artman/publish/article_40.shtml>

40. See <<http://www.gunsaint.com>>

41. Joseph Ratzinger, "Alcune osservazioni preliminari", reprinted in Vittorio Messori, *Rapporto sulla fede*, Mondadori, Milano, 1993, p.185.

42. Jorge Leonardo Frank, "Legítima Defensa", <http://www.legitimadefensa.com.ar/qe_leg_def.htm>

Legal Scholarship 2003

Joshua Samuel Kirk

This article summarizes firearms law and policy articles published in law reviews during the past year. Joshua Samuel Kirk is a law student at the University of Virginia School of Law. He wrote this article as a project for the Mortimer Caplan Public Service Center.

BRANDEIS LAW JOURNAL

John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, Volume 40, No. 3, Spring 2002, pp. 659-725. Argues against the modern relevance and value of the Second Amendment. Criticizes the originalism defense of Second Amendment rights.

BUFFALO LAW REVIEW

Jack Trachtenberg, Comment, *Federalism, Popular Sovereignty, and the Individual Right to Keep and Bear Arms: A Structural Alternative to United States v. Emerson*, Volume 50, No. 1, Winter 2002, pp. 445-482. First discusses the district court's decision in *United States v. Emerson*, 46 Supp. 2d 598 (N.D. Tex. 1999), which interpreted the Second Amendment as protecting a personal right to bear arms. Next, the article explores the nature of our constitutional system, and then supports the claim that the Second Amendment's right to keep and bear arms protects the individual citizen, as well as the collective body of the people. The author concludes that the right to keep and bear arms is a fundamental liberty of the individual, embodied in and protected by our constitutional framework, and based on principles of federalism and popular sovereignty.

DAYTON LAW REVIEW

Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, Volume 28, Fall 2002, pp. 35-60. Argues that after more than 60 years of silence, the Supreme Court should apply the Second Amendment to the states through the Fourteenth Amendment. Moreover, upon incorporation, the Supreme Court must establish the proper standard for judicial review of federal, state, and local gun control regulations.

DUKE LAW JOURNAL

Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, Volume 52, No. 1, October 2002, pp. 113-178. Argues that Locke's theory of the social contract, which was widely accepted by the Founders, generates paradoxical conclusions concerning the government's authority over civil disobedients. Because of this Lockean paradox, auxiliary constitutional rights (including the Second Amendment right to keep and bear arms), whose purpose is to protect civil disobedience, are likewise paradoxical. Supporters of these rights are anarchistic and their critics are authoritarian. In the end, as long as we continue to accept the Founders' Lockean view that government authority is limited by reserved moral rights, we will never be able to reject or accept auxiliary constitutional rights.

GONZAGA LAW REVIEW

Mathew R. Kite, Student Note, *State v. Radan: Upsetting the Balance of Public Safety and the Right to Bear Arms*, Volume 37, No. 1, 2001-02, pp. 201-225. Examines the history of state regulation of the right to bear arms, particular in Washington and Montana. Also, the article examines and comments on the decision in *State v. Radan*, 143 Wash. 2d 323 (2001), in which the Washington Supreme Court addressed the balance between public safety and a felon's right to possess a firearm.

HARVARD JOURNAL OF LAW AND PUBLIC POLICY

David A. Klinger and Dave Grossman, Symposium on Responses to the September 11 Attacks, Who should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America, Volume 25, Spring 2002, pp. 815-834. Considers the likelihood of a significant reassessment of American gun laws and the interpretation of the Second Amendment in light of the threat posed by terrorists from abroad, suggesting that civilian weapon possession could conceivably reduce the degree of damage done in some active shooter attacks.

HOUSTON LAW REVIEW

Erik Luna, The Sixth Annual Frankel Lecture, Commentary, *The .22 Caliber Rorschach Test*, Volume 39, No. 1, 2002, pp. 53-131. Discusses how the battle over guns and gun control is one

of symbolic politics with two distinct cultures vying for superior social status and recognition. Also argues that this ongoing struggle between the pro-gun and anti-gun cultures seems to affect, sometimes subtly, the way the Second Amendment is interpreted in legal scholarship.

Jonathon Simon, The Sixth Annual Frankel Lecture, Commentary, *Guns, Crime, and Governance*, Volume 39, No. 1, 2002, pp. 133-148. Claims gun control advocates share with gun rights advocates a commitment to lethal violence as the defining problem of American governance, although they differ as to the policies and technologies that should be used in addressing this problem. Proposes a different kind of politics, one that would protest not simply guns but the whole range of social technologies and practices that sacrifice civic virtue in the name of personal security against lethal violence. Argues that we must reverse the perception that violence frees its potential victims of all responsibilities for the well-being of others or from the burdens of collective survival, and that politics must remind people of the securities that emerge from social solidarity.

Robert Weisberg, The Sixth Annual Frankel Lecture, Address, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, Volume 39, No. 1, 2002, pp. 1-51. Explores the successes and failures of advocates in the American gun debate to create a logical and consistent way of discussing the issue, while avoiding the intellectual and moral embarrassments and the hypocrisy that this subject all too often encourages. Furthermore, experiments to see what happens when we expect Second Amendment arguments not only to be consistent with constitutional ideologies generally, but also what happens when both sides in the gun controversy are forced to reconcile their views of guns and the Constitution with some broader conception of American legal and civic values.

INDIANA LAW JOURNAL

William L. McCoskey, Student Note, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, Volume 77, No. 4, Fall 2002, pp. 873-908. Argues that the weight of academic authority suggests that the Second Amendment should be afforded the full protection that other fundamental rights in the Bill of Rights enjoy, and that courts should thus be

suspicious of improper attempts to restrict Second Amendment freedoms, as they are of threats to other individual rights under the Constitution. Also, municipal lawsuits against the gun industry have the potential to infringe the rights of Americans to keep and bear arms. In light of the Fifth Circuit's decision in *Emerson* (recognizing that the amendment protects an individual right to keep and bear arms) and the Supreme Court's decision in *Sullivan* (holding that common law tort claims should not be allowed to infringe our constitutional rights), courts should restrict the ability of municipal plaintiffs to infringe Second Amendment rights through massive litigation against the gun industry.

LAW AND CONTEMPORARY PROBLEMS

Akhil Reed Amar, Symposium on Enduring and Empowering, The Bill of Rights in the Third Millennium, *Second Thoughts*, 65 Law & Contemp. Prob. 103, Spring 2002, pp. 103-111. Considers the meaning of the Second Amendment, both at the time of the Founding and today. After a close analysis of the text and its history, concludes that both sides of the gun debate (gun controllers who seek to read the amendment very narrowly, and gun owners and their supporters, who read the amendment in a broad libertarian way) are wrong. Suggests that modern and realistic gun control is not necessarily contrary to what the Founders envisioned, and thus should not be opposed on constitutional grounds.

Brannon P. Denning and Glenn H. Reynolds, Symposium on Enduring and Empowering, The Bill of Rights in the Third Millennium, *Telling Miller's Tale: A Reply to David Yassky*, 65 Law & Contemp. Prob. 103, Spring 2002, pp. 113-123. Replies to an article by David Yassky which had appeared in the *Michigan Law Review*. Provides a critique of the part of Yassky's theory that dismisses *United States v. Miller* as providing the basis for an individual rights interpretation of the Second Amendment. Claims that from the perspective of gun control proponents, *Miller* is at best agnostic on the question of the Second Amendment's guarantee of an individual right.

LOYOLA LAW REVIEW

Oskar M. Perez, Student Comment, *United States v. Emerson: The Decision that Will Potentially Force the Supreme Court to Finally*

Decide Whether the Second Amendment Protects the State or the People, Volume 48, No. 2, Summer 2002, pp. 367-385. Relates the facts of the *Emerson* case, and explores the history and cases leading up to this opinion. Also, discusses the steps the *Emerson* court took to reach its decision, and analyzes the importance of this opinion, including the effects it may have in subsequent cases dealing with the Second Amendment.

NORTH CAROLINA LAW REVIEW

Jean Macchiaroli Eggen and John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, Volume 81, No. 1, December 2002, pp. 115-210. Argues that courts have been too reluctant to apply tort liability to gun manufacturers. Suggest that it is possible and necessary to fashion a rule of liability that will call irresponsible gun manufacturers to account, and that doing so will not amount to absolute liability against the gun industry. Offers a test for judging whether a class of guns should be considered defectively designed, one that should hinge on whether the impugned gun is a “manifestly unreasonable” design.

Stephen E. Ryan, Recent Developments, *Guns and Dictum: Is the Fifth Circuit’s Finding of an Individual Right Under the Second Amendment Dictum or Holding?*, Volume 81, No. 2, January 2003, pp. 853-877. Analyzes the *Emerson* decision to determine whether the finding there that the Second Amendment protects an individual right to keep and bear arms was a holding, or merely dictum. Concludes that the decision in *Emerson* is holding under either a descriptive or prescriptive analysis, and thus constitutes precedent in the Fifth Circuit.

NORTHERN KENTUCKY LAW REVIEW

Katrina R. Atkins, Symposium Issue, Student Note, *Defining the Duty of Gun Manufacturers in Hamilton v. Beretta U.S.A. Corp.*, Volume 29, No. 4, 2002, pp. 853-878. Explores the relationship between gun manufactures and the victims of gun shootings, particularly whether gun manufactures owe a duty of care to third parties who are injured by their products. Describes the facts and procedural history of *Hamilton v. Beretta U.S.A. Corp.*, in which the court held that gun manufacturers have no duty to market firearms in a reasonable manner. 750 N.E.2d 1055 (N.Y. 2001). The note also articulates the framework for defining duty by examining the historical and contemporary theories on this

subject, and proposes a framework for examining the duty of gun manufacturers to market their products in a socially and legally acceptable way.

Saul Cornell, Symposium Issue, *“Don’t Know Much About History” The Current Crisis in Second Amendment Scholarship*, Volume 29, No. 4, 2002, pp. 657-681. Argues that Second Amendment Scholarship is in the midst of a crisis in that the two dominant interpretations, the individual rights and the collective rights models, no longer seem capable of accounting for the complexity of the historical evidence about the meaning of the right to bear arms. The article discusses how we arrived at this crisis, and then proposes a new paradigm for the Second Amendment. This involves adopting the dominant understanding of the right to bear arms in the Founding era, that the Second Amendment is a civic right. Such a right could not be claimed by everyone, but only those members of the polity who were deemed capable of exercising it in a virtuous manner.

Richard E. Gardiner, Symposium Issue, *The Second Amendment and the U.S. Courts of Appeals*, Volume 29, No. 4, 2002, pp. 805-825. Reviews the published decisions of the federal appellate courts and finds that, while two of the thirteen federal courts of appeals have held that the Second Amendment guarantees a so-called (and oxymoronic) “collective” right, three federal courts of appeals have held that the right is individual, three have decisions going both ways, four have issued opinions which are somewhat uncertain, and one remains silent. Additionally, while the U.S. Supreme Court has never issued an opinion directly addressing the individual or “collective” dispute, it has just as clearly never suggested that the right is anything other than individual.

Stephen P. Halbrook, Symposium Issue, *The Freedmen’s Bureau Act and The Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment*, Volume 29, No. 4, 2002, pp. 683-703. Addresses what the author believes is the most telling and dramatic, but most neglected piece of evidence of the Framers’ intent regarding the incorporation of the Second Amendment through the Fourteenth Amendment. Explains that the same two-thirds of Congress that proposed the Fourteenth Amendment to the United States Constitution in 1866, also

enacted the Freedmen's Bureau Act, which declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and...estate...including the constitutional right to bear arms..."

Kenneth D. Katkin, Symposium Issue, Symposium Introduction, *The Second Amendment Today: Historical & Contemporary Perspectives on the Constitutionality of Firearms Regulation*, Volume 29, No. 4, 2002, pp. 643-655. Explains generally why the Second Amendment poses difficult interpretive problems, and discusses the basic arguments of each side in the ongoing gun debate.

David B. Kopel, Symposium Issue, *What State Constitutions Teach About the Second Amendment*, Volume 29, No. 4, 2002, pp. 827-851. Examines the text of the forty-four state constitutions which guarantee a right to arms and finds that in forty-two of those states, language identical or similar to the federal Second Amendment exists and has been consistently interpreted as guaranteeing an individual right. Therefore, it is simply perverse to suggest that words, which from century to century and from state to state have had such a widely-shared meaning in state constitutions, should have an entirely different meaning when the same words appear in the federal constitution.

Jennifer J. Mabry, Symposium Issue, Student Note, *The Three R's: Reading, Writing, and Rifles? How the Kentucky Supreme Court Lessened Penalties for Students Who Bring Guns to School in Darden v. Commonwealth*, Volume 29, No. 4, 2002, pp. 879-895. Examines gun control legislation in Kentucky with regard to juveniles who possess weapons on school grounds and the punishment that should be imposed on them. Provides a summary and analysis of the Gun Free School Zones Act of 1990, the subsequent legislation introduced in Kentucky, and the accompanying court in interpretation in *Darden v. Commonwealth*, 52 S.W.3d 574 (Ky. 2001).

Mathew S. Nosanchuk, Symposium Issue, *The Embarrassing Interpretation of the Second Amendment*, Volume 29, No. 4, 2002, pp. 705-803. Argues that ultimately, the unsubstantiated and imprecise pronouncements that Attorney General Ashcroft has made regarding the Second Amendment make it hard to predict how the Justice Department's embrace of an expansive

individual right will unfold in litigation and policy decisions by the Department. Furthermore, the Attorney General's actions in this regard may have dangerous real-world implications that will be measured in increased death and injury from firearms.

SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL

Christopher E. Smith & Madhavi McCall, *Constitutional Rights and Technological Innovation in Criminal Justice*, Volume 27, Fall 2002, pp. 103-127. Examines the tensions between technological innovations and the protection of individual rights, and explores the challenges American courts face in applying constitutional law to emerging issues in contemporary society. Illustrates the challenge of applying originalism to technological change in the context of criminal justice with a hypothetical interpretation of the Second Amendment's "right of the people to keep and bear arms."

ST. JOHN'S JOURNAL OF LEGAL COMMENTARY

Robert Hardaway, Elizabeth Gormley, and Bryan Taylor, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, Volume 16, Winter 2002, pp. 41-164. Explores the reasons for the United State Supreme Court's refusal to resolve the meaning of the Second Amendment, and provides the basis for a reasoned decision clarifying the right to bear arms under this amendment. Also examines the public policy aspects of Second Amendment applications.

TEXAS LAW REVIEW

Robert J. Cottrol, Book Review, *Creative Uncertainty*, Volume 81, No. 2, December 2002, pp. 627-654. Reviews Lawrence M. Friedman's book, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002). Relates that Friedman's exploration of law in postwar America runs through a familiar syllabus of the legal issues of our time, including gun control.

TULANE LAW REVIEW

Brandon M. Diket, Recent Developments, *"Your" Right to Bear Arms: The Fifth Circuit Reexamines the Guarantees of the Second Amendment with Regard to Individual Rights: United States v. Emerson*, Volume 77, No. 1, November 2002, pp. 283-296. Discusses the Fifth Circuit's decision in *Emerson*, as well as cases leading up to

this decision. Suggests this holding, which was a departure from the accepted collective rights interpretation of the Second Amendment, may force the Supreme Court to clarify its ambiguous holding in *United States v. Miller*, 307 U.S. 174 (1939), and finally address the Second Amendment's application in modern society.

UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW

Gil Grantmore, *The Phages of American Law*, 36 U.C. Davis L. Rev. 455, January 2003, pp. 455-504. Explores the Fifth Circuit's decision in *United States v. Emerson* in a larger legal and real-world context, including consideration of the constitutional implications of treating gun ownership as a protected individual right, and a discussion of the empirical underpinnings of the individual right theory.

UNIVERSITY OF TOLEDO LAW REVIEW

Brain Spittler, Student Note, *Halliday v. Sturm, Ruger & Co.: The Gun Exception to Strict Product Liability*, Volume 34, No. 2, Winter 2003, pp. 373-399. Discusses the Maryland state court decision in *Halliday v. Sturm, Ruger & Co.*, in which the court made it clear that the failure to incorporate a safety device in the design of a gun does not make the risk-utility test applicable in determining whether a gun is defectively designed. 770 A.2d 1072 (Md. Ct. Spec. App. 2001), *aff'd*, 792 A.2d 1145 (Md. 2002). Argues that because previous courts have limited the finding of a defective product to product malfunction, consumer expectations, and failure to incorporate a safety device, the court in *Halliday* in effect took away the ability of a plaintiff to recover damages for injuries sustained from a properly functioning handgun.

VANDERBILT LAW REVIEW

Charles C. Sipos, Student Note, *The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms*, Volume 55, No. 4, May 2002, pp. 1297-1340. Argues that the 2000 settlement agreement between Smith & Wesson and the U.S. Department of Treasury, the U.S. Department of Housing and Urban Development, and representatives from thirteen states, counties and cities, represented a dangerous privatization of law that created a private solution to a clearly public problem. Claims that this agreement implicitly undermined the ability of

legislatures to make law on the issues covered therein, and explicitly precluded the courts from doing so. Includes discussion of cases related to the agreement, and suggestions concerning the potential impact of the agreement on future gun control legislation and litigation.

WILLIAM AND MARY LAW REVIEW

James Lindgren and Justin L. Heather, *Counting Guns in Early America*, Volume 43, No. 5, 2002, pp. 1777-1842. Examines probate inventories for gun ownership in the seventeenth and eighteenth centuries and finds figures that substantially contradict the assertions of Michael Bellesiles in *Arming America: The Origins of a National Gun Culture*. These contrary findings include the fact that during this era, there were high numbers of guns in America, guns were much more common than swords or other edged weapons, women owned guns, and the majority of gun-owning estates listed no old or broken guns.

YALE LAW JOURNAL

James Lindgren, Book Review, *Fall from Grace: Arming America and the Bellesiles Scandal*, Volume 111, No. 8, June 2002, pp. 2195-2233. Reviews Michael A. Bellesiles's *Arming America: The Origins of a National Gun Culture* (New York: Alfred A. Knopf, 2000). Discusses the book itself, both in terms of the early praise it received from historians, and the scandal that later erupted once the alarming discrepancies between the book and its sources were discovered.

Survey of Federal Right to Keep and Bear Arms Cases since 2000

William L. McCoskey & Wayne Warf

This article summarizes leading Supreme Court and Federal Court of Appeal cases since 2000 which affect the right to keep and bear arms. William McCoskey is a Chicago attorney and author of "The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry," 77 Indiana Law Journal 873 (Fall 2002). Wayne Warf is an attorney in Bloomington, Indiana.

I. INTRODUCTION

The past three years have seen a number of legal developments that affect the constitutional right of Americans to keep and bear arms. The federal appeals courts have issued holdings that continue to define the legal status of the right to keep and bear arms ("RKBA"). A handful of these cases will undoubtedly prove pivotal in any future consideration by the Supreme Court of the scope of the Second Amendment¹ and of the right of Americans to exercise their RKBA.

This Article summarizes federal case law that has at least some bearing on the right of Americans to keep and bear arms. Most of the cases do not directly consider the Second Amendment itself; instead, most of the cases address other issues that have some impact on RKBA. For example, several cases address indirect forms of "gun control," such as lawsuits against the gun industry or local bans on gun shows. As noted below, some of these cases have more importance and long-term significance to the RKBA than do others.

The summarized cases were decided at the federal circuit (appellate) court level. The federal circuit courts play an important role in interpreting the law, and, until the Supreme Court again considers the matter, in interpreting the applicability of the Second Amendment and scope of the RKBA. The case summaries are organized by circuit and include only those cases decided since January 1, 2000.

II. A BRIEF PRIMER ON THE FEDERAL CIRCUIT COURTS OF APPEALS

There are twelve federal circuit courts of appeals² organized regionally and covering the fifty states and U.S. territories, such as Puerto Rico, the U.S. Virgin Islands, and Guam. The circuit courts³ hear appeals from the federal district courts, which are trial courts. The circuit courts also hear appeals from federal administrative agencies. The Supreme Court is the nation's highest court, and it hears appeals from lower courts, including both federal and state courts. In order for the federal circuit courts to hear appeals, certain jurisdictional requirements must be met.⁴

As a general matter, legal holdings issued by a circuit court of appeals have force within the states comprising the geographic area of that particular circuit. Federal circuit courts are bound by Supreme Court precedent, but not by the holdings of sister circuit courts of appeals. For example, a case decided by the Fifth Circuit on a particular legal issue would not constitute binding legal authority on a First Circuit court hearing an appeal on the same issue. The First Circuit would, however, be bound by Supreme Court on the issue. The First Circuit could look to the Fifth Circuit case as persuasive authority on the legal issue (especially if there is no Supreme Court or First Circuit precedent to guide the First Circuit's decision), but it would not be obligated to follow the Fifth Circuit precedent. The First Circuit's decision in the case would then be binding in the region encompassed by the First Circuit, but not on the states encompassed by the other federal circuit courts.

III. KEY CASES ORGANIZED BY COURT

A. United States Supreme Court and the Department of Justice⁵

While the Supreme Court has not extensively addressed the Second Amendment or the RKBA since 1939,⁶ several matters having some relation to the right to keep and bear arms have come before the Supreme Court in recent years. Paradoxically, with regard to the RKBA, what the Supreme Court did *not* do in these cases was important.

In 2002, the Supreme Court was asked to review two circuit

court cases that involved legal challenges of federal statutes based in part on Second Amendment grounds. These cases, *Emerson v. United States*⁷ and *Haney v. United States*,⁸ are discussed in greater detail below.⁹

The Supreme Court declined to review the merits of either case. Perhaps more important than the Court's decision to decline review of the cases was the position taken by the Department of Justice with respect to Emerson's and Haney's petitions. Solicitor General¹⁰ Ted Olson, on behalf of the U.S. government, urged the Court not to review the cases.¹¹ While Olson argued that neither Emerson's nor Haney's Second Amendment rights were violated by the statutes in question, Olson also stated the official position of the DOJ (and thus the U.S. government) with respect to the Second Amendment. In a move greatly celebrated by those supporting the RKBA and denounced by gun control advocates, the Solicitor General officially espoused the U.S. government's view that the Second Amendment protected the right of individuals to keep and bear arms. The views set forth in the Solicitor General's legal briefs reflected DOJ's official stance¹² with respect to the Second Amendment and the RKBA.

Because the Supreme Court declined to review the merits of *Emerson* or *Haney*, the Court left standing the respective decisions and what the decisions have to say about the RKBA (see discussions of *Emerson* and *Haney* below).

In another action with potentially significant impact on the RKBA, the Supreme Court declined to hear oral arguments in *Department of Justice v. City of Chicago*,¹³ and remanded the case back to the Seventh Circuit for consideration of the effect of a recently-enacted Congressional law. The Court had originally agreed to hear the case, which involved an appeal by the BATFE and the federal government of a lower court ruling granting the City of Chicago access to BATFE gun tracing records. Because a new Congressional bill appeared to foreclose access by Chicago or other non-federal law enforcement entities, the Court declined to hear arguments and returned the case to lower courts for further proceedings.

The case originally came about as a result of Chicago's efforts to sue the gun industry. The government of Chicago for its high rate of violent crime, despite the fact that the city has some of the most restrictive gun laws in the nation. Chicago sought access to the BATFE's gun tracings and multiple handgun purchase records in the hopes that the records would

provide evidence to Chicago in its lawsuit.

The federal district court and a Seventh Circuit panel agreed with Chicago that such records should be available under the Freedom of Information Act, and that there was minimal risk of invasion of privacy for law-abiding gun owners or of compromising law enforcement investigations.¹⁴ The BATFE appealed the decision to the Supreme Court, and the Court initially granted review.

While the case was pending before the Supreme Court, however, several members of Congress drafted and passed appropriations language which banned expenditure of federal funds to provide records access such as the access sought by Chicago. The lawmakers cited privacy reasons and the danger of compromising criminal investigations.

B. District of Columbia Circuit¹⁵

In *Second Amendment Foundation v. U.S. Conference of Mayors*,¹⁶ the D.C. Circuit rejected an effort to restrict municipal suits against gun companies. The Circuit Court considered an appeal by Second Amendment Foundation (SAF) following a dismissal of its case in the district court.

SAF, along with several firearm consumers and organizations, brought suit in federal district court against the mayors of U.S. cities that had filed suits against gun manufacturers and retailers. SAF and the other plaintiffs alleged that the mayors had conspired to bring the suits en masse for the purpose of bankrupting or otherwise bringing financial harm to lawful gun manufacturers and retailers. The district court, without reaching the merits of SAF's complaint, dismissed the suit on jurisdictional grounds. On appeal, the D.C. Circuit agreed with the district court that SAF was not able to establish that the D.C. district court had jurisdiction over the defendants, and thus the dismissal was appropriate.

Putting aside the jurisdictional issues, SAF appears to have had a legitimate basis for the suit. There is much evidence, including on the U.S. Conference of Mayors web site, to support SAF's argument that the mayors and their respective cities acted in a concerted effort to flood the gun industry with lawsuits. There is also evidence that the mayors hoped that manufacturers and retailers, as a result of pervasive litigation, would be forced to raise prices, curtail production, or even cease production

altogether. Such effects would, of course, directly affect the ability of law-abiding citizens to acquire arms for protection or any other lawful purpose.

C. First Circuit¹⁷

In *Gun Owners' Action League v. Swift*,¹⁸ the First Circuit rejected a challenge to a Massachusetts law restricting so-called "assault weapons."¹⁹ In doing so, the court let stand the state's restrictive weapon licensing scheme.

The plaintiffs²⁰ sued Massachusetts for a 1998 gun control law²¹ that, among other things, created a licensing system for "large capacity weapons." The licensing requirement applied to individual gun owners and to gun clubs possessing or storing "large capacity weapons." One provision of the law prohibits shooting at human-shaped or human image targets at certain gun clubs.

The plaintiffs sued in federal court, arguing among other things that the law was unconstitutionally vague and that it violated freedom of expression. The plaintiffs did not challenge the law as a violation of the Second Amendment. The district court dismissed the suit for several reasons, including that the case was not ripe²² for adjudication. The district court also concluded that even if ripe, the challenges were not meritorious because the Massachusetts law did not violate the Constitution.

The First Circuit agreed with the district court that the case was not ripe for review, especially given that there were administrative clarifications of the statute pending. In addition, the court rejected the challenge to the provision banning the use of human-shaped targets. The court concluded that target-shooting was not a constitutionally protected form of expression. The court also found that the target ban was "content neutral," meaning that the state of Massachusetts was not seeking to target free expression by banning use of human-shaped targets. The First Circuit affirmed in full the dismissal of the plaintiffs' case.

D. Second Circuit²³

In *Hamilton v. Beretta U.S.A. Corp.*,²⁴ the Second Circuit rejected the notion that gun manufacturers should be liable for criminal acts committed with firearms.

Hamilton came to the Second Circuit on appeal from a

federal district court in which a jury found that several gun manufacturers had negligently marketed or distributed their products. The alleged negligence of the gun manufacturers was found to have caused injury to the plaintiffs, a group of crime victims and surviving family members. The jury awarded the plaintiffs nearly \$4 million, and the court entered judgment against the gun manufacturers. The result was widely hailed as a landmark legal victory by antigun activists.

The gun manufacturers appealed the case to the Second Circuit, arguing that the district court improperly expanded the reach of negligence law in its rulings with respect to the duty of the gun manufacturers to exercise reasonable care in the marketing and distribution of guns. In other words, the district court ruled that gun owners were legally responsible for the criminal misuse of their products.

The Second Circuit applied New York state law in reaching its decision. The court found that the manufacturers had no duty, with respect to victims of gun violence, to exercise reasonable care in manufacture and distribution of guns. The court concluded that such a duty would extend to a very large class of potential plaintiffs, and at any rate no action on the part of the manufacturers could be directly linked to the harms suffered by the plaintiffs. In addition, the manufacturers were not in a position to take reasonable steps to prevent the harms suffered by the plaintiffs. Put another way, the Second Circuit recognized that the gun manufacturers could not be held responsible for the harm resulting from misuse of their products by criminals.

E. Third Circuit²⁵

Like the Second Circuit, the Third Circuit weakened the ability of plaintiffs to sue the gun industry. In *City of Philadelphia v. Beretta USA Corp.*,²⁶ the Third Circuit heard the appeal of a federal court dismissal of a negligence lawsuit against Beretta and other gun manufacturers.

The plaintiffs, made up of the City of Philadelphia and a number of civic organizations,²⁷ made arguments similar to those of the Hamilton plaintiffs described above. In other words, the plaintiffs asserted claims of public nuisance, negligence, and negligent entrustment against the gun manufacturers. The gist of the plaintiffs' complaint in the district

court was that the defendant gun manufacturers were negligent in the marketing and distribution of handguns, allowing the guns to fall into the hands of criminals and children, thereby causing Philadelphia to incur costs associated with preventing and responding to gun violence and crime. Unlike the *Hamilton* case, which concerned private plaintiffs suing the gun industry, this case involved big city governments and special interest groups suing the gun industry for alleged negligence.

The district court dismissed the case on grounds of standing (with respect to the organizational plaintiffs) and on the merits with respect to the city of Philadelphia, finding that the city's claims were barred by Pennsylvania's Uniform Firearms Act ("UFA") and other Pennsylvania laws. The UFA, like similar state laws elsewhere, limits the power of municipalities within the state to sue gun manufacturers for the production or distribution of firearms, except for in limited circumstances such as breach of warranty.²⁸

On appeal, the Third Circuit affirmed the district court's dismissal of the organizational plaintiffs for lack of standing. As to Philadelphia's claims, the court followed an analysis similar to the reasoning employed by the Second Circuit in *Hamilton*. The Third Circuit dispensed with the plaintiffs' public nuisance claim, relying on reasoning from an earlier case that likewise affirmed the dismissal of a lawsuit against gun manufacturers.²⁹ The court declined to allow such a claim, stating that "to extend public nuisance law to embrace the manufacture of handguns would be unprecedented nationwide for an appellate court."³⁰ In addition, the court noted that even if public nuisance law extended to gun manufacturers, the manufacturers do not have sufficient control over their products, and thus the manufacturers cannot be responsible for criminal acts committed with guns.

In evaluating the plaintiffs' other negligence claims, the Third Circuit extended part of its analysis with respect to the plaintiffs' failed public nuisance claim. In specific, the court agreed with the district court that there was a weak causal connection between any alleged conduct of the gun manufacturers and the injuries allegedly suffered by the plaintiffs as a result of such conduct. The court explicitly recognized that there are many "links" in the causal chain between the gun manufacturers and the alleged injuries to the plaintiffs. The court also agreed with the district court that the manufacturers had no legal obligation to protect citizens from the "deliberate and unlawful use of their products." In upholding the dismissal of all

of the plaintiffs' claims, the Third Circuit concluded that tort liability should not "be assessed against gun manufacturers when their legally sold, non-defective products are criminally used to injure others."

In a separate decision, the Third Circuit rejected a challenge to New Jersey's "assault firearm"³¹ statute. In *Coalition of N.J. Sportsmen v. Whitman*,³² the Third Circuit affirmed without comment the dismissal of a constitutional challenge to the New Jersey gun control statute. The plaintiffs' constitutional arguments were similar to those in *GOAL v. Swift* (see above). Again, the plaintiffs did not challenge the New Jersey law under the Second Amendment.

F. Fifth Circuit³³

Within the past several years, the Fifth Circuit was home to a crucially important RKBA case. In 2001, the court handed down perhaps the most significant Second Amendment case in the history of RKBA jurisprudence. While it is true that there are some Supreme Court cases that consider Second Amendment, none are rich in detail. The Fifth Circuit, however, in *United States v. Emerson*,³⁴ explicitly held that the Second Amendment protects an individual right to keep and bear arms. In so holding, the court engaged in a detailed analysis dwarfing all previous discussions of the Second Amendment in any court case, federal or state.

In *Emerson*, the Fifth Circuit heard the federal government's appeal following the dismissal of its case against Timothy Joe Emerson, who was charged with violating federal gun law.³⁵ Emerson, as part of a messy divorce proceeding, had been placed under a domestic restraining order. By being subject to such an order, under federal law, Emerson was barred from possessing firearms or ammunition. The federal government subsequently prosecuted Emerson for possession of arms and ammunition while under the restraining order.

The district court dismissed the government's case against Emerson because, among other things, the federal law at issue violated Emerson's Second Amendment right to possess firearms. The district judge engaged in a thorough analysis of the history and purpose of the Second Amendment and concluded that the amendment guarantees an individual RKBA. The judge's conclusion was contrary to the holdings of several other federal

courts.³⁶ The judge further concluded that Emerson's rights were violated because his Second Amendment rights were taken away without due process of the law when the Texas court issued the restraining order without any particularized finding that Emerson in fact posed a threat to his family. Thus, the judge dismissed the charges against Emerson.

The DOJ appealed the case to the Fifth Circuit. In an extraordinary opinion, the Fifth Circuit overruled the district court dismissal of charges against Emerson. In doing so, however, the Fifth Circuit affirmed the district court's view that the Second Amendment protects an *individual* RKBA.

The court thoroughly analyzed *United States v. Miller*,³⁷ the most recent Supreme Court case to consider the Second Amendment. The court also undertook a detailed analysis of the text of the amendment, looking at contemporaneous sources and historical treatises to evaluate the extent of the amendment's protections. The Fifth Circuit concluded that the Supreme Court in *Miller* did *not* declare that the Second Amendment guarantees only collective right to keep and bear arms.³⁸

The court explored the meaning of the words "militia," "people," "keep," and "bear" in the amendment. The court concluded that these words reflected the Founders' intent that the Second Amendment protect the rights of individuals to keep and bear arms. Other courts, for example, had erroneously read the word "militia" to mean an organized official military organization such as the National Guard. The Fifth Circuit, however, determined that the word "militia" in the Second Amendment was consistent with the contemporaneous usage of the term to describe individuals capable of bearing arms for the defense of the country against tyrannical governments and foreign invaders.

The Fifth Circuit also looked at writings and speeches from the time period in which the Second Amendment was being debated and drafted. These writings made it clear that the amendment was intended to protect the right of individuals to keep and bear arms. Although the competing draft versions of the Second Amendment contained a number of variations in wording, all were based on the premise that an armed citizenry was a necessary check on potential tyranny by the federal government or foreign invaders. The Fifth Circuit concluded that the drafters recognized and intended that such an armed citizenry, or militia, be made up of individual citizens, not an organized military organization.

Having rigorously evaluated the text, history, and purpose of the Second Amendment, the Fifth Circuit agreed with the lower court that the amendment protects an individual RKBA. Unfortunately for Mr. Emerson, however, the Fifth Circuit held that although the amendment protects an individual RKBA, that right, like others protected in the Bill of Rights, is subject to reasonable regulation by the government. Thus, the court concluded, the federal law under which Emerson was indicted was not an unreasonable restriction of Emerson's RKBA, and the court remanded the case back to the district court. Emerson attempted to appeal his case to the Supreme Court, but the Court, at the urging of the federal government, declined to hear his case (see discussion in Supreme Court section above).

The ruling, although confined to the states within the Fifth Circuit, contains a detailed and logical exploration of the Second Amendment that will be difficult for other circuit courts to ignore in future cases. Should the Supreme Court ever hear another Second Amendment case, the detailed and thorough *Emerson* decision may prove critical in presenting the arguments in favor of the RKBA.

G. Sixth Circuit³⁹

In *Olympic Arms v. Buckles*,⁴⁰ the Sixth Circuit considered whether the Violent Crime Control and Law Enforcement Act of 1994 ("the Act")⁴¹ was constitutional. The Sixth Circuit held that the Act was not unconstitutional and thus upheld a federal gun-control statute.

The Act, more commonly known by its misleading "Assault Weapon Ban"⁴² title, is a federal law banning certain types of politically incorrect weapons, namely semiautomatic rifles that cosmetically appear identical to military weapons, but in function and lethality are no different from hunting or sporting rifles with a comparatively harmless appearance. A number of gun manufacturers, retailers, and private citizens sued the BATFE, alleging among other things that the Act classifies weapons in an irrational manner in violation of the equal protection guaranteed by the Due Process Clause of the Fifth Amendment. Notably, the plaintiffs did not challenge the Act on Second Amendment grounds.

The federal district court dismissed the original claim, and the plaintiffs appealed to the Sixth Circuit. The Sixth Circuit

noted that there were conflicting views in the federal courts about whether the Equal Protection Clause protects against inappropriate classifications of things as opposed to people. The court also noted that Sixth Circuit precedent did not recognize a fundamental right to individual weapon ownership, and therefore the plaintiffs are not members of a class protected by the Equal Protection Clause. The court concluded that the Act's provisions, in identifying certain weapon types and features to be banned, was not irrational, and upheld the dismissal of the plaintiff's case.

H. Ninth Circuit⁴³

The Ninth Circuit recently decided two key RKBA cases nearly back-to-back. In the first case, *Silveira v. Lockyer*,⁴⁴ the Ninth Circuit took an antigun stance and held that the Second Amendment guarantees a collective, not an individual, RKBA. In *Nordyke v. King*,⁴⁵ decided a few months after *Silveira*, a different three-judge panel of the Ninth Circuit rejected an individual rights view of the Second Amendment because the court was bound by Ninth Circuit precedent. However, the *Nordyke* court also took the *Silveira* panel to task for inappropriately expounding its view of the Second Amendment. In addition, one judge of the *Nordyke* panel, in a concurring opinion, expressed his view that *Silveira* and the Ninth Circuit precedent cases were wrongly decided. Instead, the judge argued, the Ninth Circuit should adopt the Fifth Circuit's reasoning in *United States v. Emerson* and hold that the Second Amendment protects an individual RKBA.

In *Silveira*, the Ninth Circuit considered a challenge to California's Roberti-Roos Assault Weapons Control Act ("AWCA"),⁴⁶ yet another "assault weapon" ban. The plaintiffs challenged the law on a number of grounds, including the Second Amendment. In deciding the case, the court recognized that a previous Ninth Circuit case, *Hickman v. Block*,⁴⁷ adopted the view that the Second Amendment guarantees only a collective RKBA. Instead of deciding the Second Amendment issue on *stare decisis* grounds, however, the court concocted a thin justification⁴⁸ to expound its views on the scope of the Second Amendment's protections.⁴⁹

The *Silveira* court first considered the text of the Second Amendment and, not surprisingly, concluded that the words "militia" and "bear" are military in meaning, and thus the

amendment was only intended to apply to a collective right held by state-controlled, organized militias. The court downplayed any significance of the words “the people” or “keep” in the Second Amendment.

The *Silveira* court, like the *Emerson* court, analyzed contemporaneous writings to divine the intent of the drafters of the Second Amendment. In stark contrast to the *Emerson* court, however, the *Silveira* court purported to find little in the historical record to indicate that the amendment was intended to support an individual RKBA. In sum, the *Silveira* court concluded that the amendment only protected the right of the states to arm their militias, not the rights of an individual to privately own guns. Therefore, the court held, the plaintiffs had no standing to bring a Second Amendment claim against the AWCA.

Only a few months following the *Silveira* decision, a different Ninth Circuit panel issued the *Nordyke* decision.⁵⁰ The *Nordyke* case, following closely on the heels of *Silveira*, was remarkable in that it strongly criticized the *Silveira* decision for unwarranted exploration of the Second Amendment.

Nordyke involved a challenge to a county ordinance banning guns and ammunition on the county fairgrounds. The ordinance effectively banned gun shows, which had previously been a regular event at the county fairgrounds. The plaintiffs, gun show promoters, challenged the ordinance on First and Second Amendment grounds. The *Nordyke* court quickly dispensed with the plaintiffs’ First Amendment claim.

Turning to the Second Amendment claim, the *Nordyke* court noted that the plaintiffs made reference to the *Emerson* case as support for their argument that the Second Amendment guarantees an individual RKBA. The *Nordyke* court recognized that *Emerson* was a thoughtful and persuasive analysis of the Second Amendment. The court noted that it might be inclined to adopt *Emerson’s* approach if not for the fact that the panel was bound by Ninth Circuit precedent that squarely held the Second Amendment as protecting only a collective right.⁵¹ As such, the court concluded, the plaintiffs had no standing to bring a claim under the Second Amendment because Ninth Circuit precedent clearly held that the amendment’s guarantees are collective, not individual, in nature.

In dispensing with the plaintiff’s Second Amendment arguments, the *Nordyke* panel took the *Silveira* panel to task for

its unnecessary and unpersuasive exposition on the Second Amendment. In fact, the *Nordyke* panel wrote, the *Silveira* panel's broad digression in reexamining the Second Amendment was improper and did not constitute binding legal authority for the Ninth Circuit.

One of the *Nordyke* panel judges went even further in his criticism of *Silveira*. The judge⁵² wrote a special concurrence in which he agreed that the court was bound by Ninth Circuit precedent and therefore that the plaintiffs' Second Amendment challenge failed. The judge continued, however, that the Ninth Circuit precedents were wrongly decided and that the circuit would be well advised to dispense with its faulty precedents and to embrace the individual rights view as espoused by the Fifth Circuit in *Emerson*.

The judge then conducted a short exploration of Second Amendment precedent and history in a manner tracking the *Emerson* court's analysis. He took issue with the *Silveira* court for giving short shrift to the words "the people" and "keep" in the amendment, arguing that the *Silveira* court sidestepped the plain meaning of these words in order to reach its flawed conclusion. The judge concluded that the Second Amendment clearly protected the rights of the people, not the rights of militias, and the RKBA is a fundamental liberty upon which the security of the nation depends.

The final chapter in the *Silveira* story came shortly after the *Nordyke* opinion issued. The plaintiffs, having lost their case before the *Silveira* panel, petitioned for *en banc* (full bench) review of the panel's decision. *En banc* review entails a rehearing by all active judges in the circuit of an original three-judge panel's decision. A majority of the circuit's active judges may grant a petition for *en banc* review. Unfortunately for the plaintiffs, a majority of the eligible Ninth Circuit judges voted to deny *en banc* review of the *Silveira* panel's opinion declaring that the Second Amendment did not guarantee an individual RKBA.

While the denial of *en banc* review was not unexpected, several judges in the minority wrote scathing dissents from the order denying *en banc* rehearing (a total of six judges, including two judges from the *Nordyke* panel, either wrote or joined in the dissents). One dissenter, Judge Alex Kozinski, took issue with the *Silveira* panel's disregard of the plain language of the Second Amendment protecting an individual RKBA: "Judges know very well how to read the Constitution when they are sympathetic to the right being asserted. . . . But as the [*Silveira*] panel

demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there." Judge Kozinski also argued that the Second Amendment's guarantee of an individual RKBA is a "doomsday provision" which is essential in protecting against tyranny.

Another dissenter, Judge Andrew Kleinfeld, wrote over thirty pages criticizing the *Silveira* panel's reasoning. Judge Kleinfeld's dissent systematically refuted each of the *Silveira* panel's conclusions concerning the wording of the Second Amendment, such as the panel's reading of the "people" as conferring rights upon collectives, not individuals. Judge Kleinfeld noted that the panel's methodology had stripped away one of the amendments of the Bill of Rights from twenty percent of the American population (those living within the states of the Ninth Circuit) by judicial fiat. The remainder of Judge Kleinfeld's dissent faulted the *Silveira* panel for its selective review of the history surrounding the drafting and ratification of the Second Amendment, for incorrect reading of the Supreme Court's *Miller* case, and for an over-narrow interpretation of "militia" as a exclusively an organized, state-controlled military entity.

The dissents from the denial of *en banc* review of *Silveira* are important for several reasons. First, the dissents identify and refute the analytical failings of the *Silveira* panel's opinion. Second, the dissents themselves read well as persuasive scholarly writings in support of the view that the Second Amendment protects an individual RKBA. Third, several of the judges writing or joining dissents are strong liberals, yet they defended the individual rights view of the Second Amendment.

I. Tenth Circuit⁵³

In *United States v. Haney*,⁵⁴ the Tenth Circuit considered a challenge of the federal statute banning private possession or transfer of machine guns manufactured after 1986.⁵⁵ Haney, convicted for possession of two unregistered machineguns, appealed his conviction on several grounds, including that the federal statute violated the Second Amendment.

The Tenth Circuit rejected Haney's Second Amendment claim, applying its own circuit precedent that the Second Amendment does not protect an individual RKBA. The Tenth

Circuit, interpreted the Supreme Court's *Miller* case as holding that the amendment serves no purpose other than to preserve the effectiveness and assure the continuation of state militias. The Tenth Circuit did so with minimal analysis of *Miller* or of the history or purpose of the amendment itself. Because Haney was not a member of a state or governmental "militia," the court concluded, Haney's prosecution for possession of unregistered machineguns did not violate the Second Amendment. Haney's subsequent petition for Supreme Court review was denied, as discussed above.

While the *Haney* decision in no way can be read as a victory for individual RKBA, the decision is important as an example of the conclusory manner in which some federal courts read Second Amendment case precedents and shy away from an in-depth analysis of the amendment's place within the Bill of Rights.

ENDNOTES

1. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."
2. The federal circuit courts are numbered one through eleven, with the twelfth circuit court being the D.C. Circuit. The full official designation for the numbered circuits is: the United States Court of Appeals for the [First, Second, D.C., etc.] Circuit. Hereinafter, the circuit court designations are abbreviated (First Circuit, Second Circuit, etc.).
3. Federal circuit courts typically hear arguments and decide appeals in three-judge panels. In rare instances, a full panel comprising all active judges in a circuit court will hear decide a case on appeal (en banc). The Supreme Court, of course, has nine Justices.
4. Generally speaking, for a federal court to hear a matter, the matter must arise under the federal Constitution, statutes, laws, or treaties. A detailed description of federal jurisdiction is well beyond the scope of this article.
5. As explained in the text, the Supreme Court is the highest court in the land, and its decisions bind the lower courts. The Department of Justice prosecutes cases on behalf of the United States.
6. See *United States v. Miller*, 307 U.S. 174 (1939). For more about *Miller*, see the discussion in the Fifth Circuit section and accompanying footnotes.
7. 270 F.3d 203 (5th Cir. 2001), *reh'g denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002).
8. 264 F.3d 1161 (10th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).
9. Although not discussed here, the Supreme Court also declined to review a lower court decision upholding New Jersey's "assault firearm" statute. The case is discussed in the Third Circuit section below.

10. The Solicitor General is the U.S. government's chief advocate, who argues the government's position before the Supreme Court. Even in cases in which the United States is not an actual party, the Supreme Court may ask the U.S. government for its view on a particular issue, and the Solicitor General presents this view to the court in both briefs and through oral argument. The Solicitor General is sometimes referred to as the "tenth justice" of the Supreme Court because he so often interacts with the Court and because he has the great potential to affect the way in which cases are decided by the Court.

11. See Brief for the United States in Opposition to Certiorari, *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001) (No. 01-8780); Brief for the United States in Opposition to Certiorari, *Haney v. United States*, 264 F.3d 1161 (10th Cir. 2001) (No. 01-8272).

12. Attorney General John Ashcroft, in a memorandum dated November 9, 2001, set forth the official view of the Department of Justice with respect to the Second Amendment. The Attorney General, as the head of the DOJ, directs that organization and sets overall policy with respect to prosecutions. Mr. Ashcroft explicitly states in the memorandum that DOJ's official position is that the amendment protects the rights of individuals to keep and bear arms, although the right is subject to reasonable regulation. Mr. Ashcroft endorsed the view adopted by the Fifth Circuit in *United States v. Emerson*, discussed below.

13. No. 02-322.

14. See *City of Chicago v. Dep't of the Treasury*, 287 F.3d 628 (7th Cir. 2002), cert. granted, 123 S. Ct. 536 (U.S. Nov. 12, 2002) (No. 02-322), vacated as moot, 123 S. Ct. 1352 (U.S. Feb. 26, 2003) (No. 02-322).

15. The D.C. Circuit technically covers only the geographic confines of Washington, D.C. This is misleading, however. Because the D.C. Circuit hears many cases regarding federal regulatory agencies, the D.C. Circuit's power extends far beyond Washington, D.C. Because the court decides so many cases involving the federal government, its decisions have nationwide impact. As a consequence, the D.C. Circuit is often referred to as the second-highest court in the land after the Supreme Court, but it is technically on a par with the other eleven circuit courts of appeals.

16. 274 F.3d 521 (D.C. Cir. 2001).

17. The First Circuit encompasses Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.

18. 284 F.3d 198 (1st Cir. 2002).

19. For more about the fiction of "assault weapons," see the Sixth Circuit section below.

20. The plaintiffs included gun dealers, private individuals, and several corporations, including the Gun Owners' Action League ("GOAL").

21. 1998 Mass. Acts ch. 180 §§ 1080 (codified in Mass. Gen. Laws ch. 140).

22. As a threshold matter, a matter must be "ripe" before a federal court may rule on it. Generally speaking, ripeness means that a plaintiff must have suffered an injury (or will suffer imminent injury) before he can seek relief in federal court.

23. The Second Circuit encompasses Connecticut, New York, and Vermont.

24. 264 F.3d 21 (2d Cir. 2001).
25. The Third Circuit encompasses Delaware, New Jersey, Pennsylvania, and the Virgin Islands.
26. 277 F.3d 415 (3d Cir. 2002).
27. These civic organizations (“organizational plaintiffs”) included a number of antigun advocacy groups.
28. As of this writing, there are several bills pending before Congress that would bar or strictly limit these sorts of lawsuits against the gun industry.
29. *See* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001).
30. *City of Philadelphia*, 277 F.3d at 421.
31. See the Sixth Circuit section for more on the misuse of the terms “assault firearm” or “assault weapon.”
32. 263 F.3d 157 (3d Cir. 2001) (table), cert. denied, [CITE].
33. The Fifth Circuit encompasses Louisiana, Mississippi, and Texas. The Fifth Circuit originally also encompassed Alabama, Florida, and Georgia. Because its caseload became unmanageable, the Fifth Circuit was split in 1981; Alabama, Florida, and Georgia were placed within the newly formed Eleventh Circuit.
34. 270 F.3d 203 (5th Cir. 2001), *reb’g denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002).
35. Emerson was charged with violation of 18 U.S.C. § 922(g)(8).
36. Almost without exception, the federal courts which have ruled that the Second Amendment does not support an individual RKBA have done so in a conclusory fashion and without any meaningful attempt to analyze rigorously Supreme Court precedent or the history and purpose of the amendment.
37. 307 U.S. 174 (1939).
38. Reduced to its essence, *Miller* stands only for the proposition that possession of a sawed-off shotgun may be banned in the absence of any evidence that such a weapon bears a reasonable relationship to the preservation or efficiency of a well regulated militia. Other courts have assumed with minimal analysis that *Miller’s* holding means that the Second Amendment does not protect an individual right to keep and bear arms. The *Emerson* court disagreed with this conclusory view, as discussed in the text.
39. The Sixth Circuit encompasses Kentucky, Michigan, Ohio, and Tennessee.
40. 301 F.3d 384 (6th Cir. 2002).
41. 18 U.S.C. § 922(v)(1) (making it “unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon”). The Act defines “semiautomatic assault weapon” by list of named weapon types, as well as by weapons containing certain features, such as a folding stock, a bayonet lug, or a flash suppressor. *See* 18 U.S.C. §§ 921(a)(30)(B)-(D). The term “semiautomatic assault weapon” is an oxymoron. *See* discussions in footnotes.
42. The term “Assault Weapon” is a misnomer, yet the media and antigun politicians routinely use it to describe semiautomatic weapons having an appearance similar to military weapons. Actual assault weapons such as those used in the military are typically capable of fully automatic or burst fire; that is, with each pull of the trigger, the weapon will continue to fire its ammunition

until expended or until the burst (usually three rounds) is complete. Semiautomatic weapons can fire only one round with each pull of the trigger. Fully automatic weapons have been restricted since the National Firearms Act (NFA) was enacted in the 1930s, and may only be possessed by private citizens in certain states, and only after completing rigorous federal licensing paperwork and paying a special tax. No fully automatic weapon manufactured after May 19, 1986 may be registered by a private citizen. Thus, “assault weapons” were effectively banned from private ownership well before the so-called “Assault Weapons Ban” of 1994, which merely banned weapons with a politically incorrect appearance.

43. The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam. The Ninth Circuit is the nation’s largest judicial circuit, and it has a well-deserved reputation as the most liberal of the circuits. Recently, some congressmen and scholars have proposed splitting the Ninth Circuit in the same way that the Fifth Circuit was split in 1981.

44. 312 F.3d 1052 (9th Cir. 2002).

45. 319 F.3d 1185 (9th Cir. 2003).

46. Cal. Penal Code § 12275. The AWCA has provisions similar to, but even more restrictive than, the federal “Assault Weapon” discussed earlier.

47. 81 F.3d 98 (9th Cir. 1996).

48. Rather than merely following the precedent of *Hickman v. Block*, the court decided that the recent *Emerson* decision, as well as the newly expressed position of the DOJ, made it “prudent” to explore the Second Amendment and the merits of the plaintiffs’ arguments in depth. See *Silveira*, 312 F.3d at 1066. In other words, Judge Stephen Reinhardt, the author of the *Silveira* opinion and a well known activist liberal judge, took it upon himself to respond to the well-reasoned *Emerson* case, despite the fact that his panel was bound to follow the precedential *Hickman* case.

49. Judge Frank Magill concurred in the result but did not join in Judge Reinhardt’s analysis of the Second Amendment.

50. Judge Diarmuid O’Scannlain wrote the *Nordyke* opinion.

51. A three-judge panel does not have the authority to overrule circuit precedent. Only the circuit sitting en banc (all active circuit judges) may overturn such precedent.

52. Judge Ronald Gould wrote the special concurrence.

53. The Tenth Circuit encompasses Colorado, Nebraska, New Mexico, Oklahoma, Utah, and Wyoming.

54. 264 F.3d 1161 (10th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

55. 18 U.S.C. § 922(o).

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