







Journal on Firearms and Public Policy

VOLUME 18

The Journal on Firearms and Public Policy is the official publication of the Center for the Study of Firearms and Public Policy of the Second Amendment Foundation.

Editor

David B. Kopel, J.D.
Independence Institute

Publisher

Julianne Versnel Gottlieb
Women & Guns Magazine

Intern

Andrew Michael Gottlieb
Second Amendment Foundation

Board of Advisors

Randy E. Barnett, J.D.	Edward F. Leddy, Ph.D.
David Bordua, Ph.D.	Andrew McClurg, J.D.
Sue Whimmershoff-Caplan, J.D.	Glenn Harlan Reynolds, J.D.
Brendan Furnish, Ph.D.	Joseph P. Tartaro
Alan M. Gottlieb	William Tonso, Ph.D.
Don B. Kates, Jr., J.D.	Eugene Volokh, J.D.
Gary Kleck, Ph.D.	James K. Whisker, Ph.D.

The Second Amendment Foundation sponsors this journal to encourage objective research. The Foundation invites submission of research papers of scholarly quality from a variety of disciplines, regardless of whether their conclusions support the Foundation's positions on controversial issues.

Manuscripts should be sent in duplicate to: Center for the Study on Firearms and Public Policy, a division of the Second Amendment Foundation, 12500 N.E. Tenth Place, Bellevue, Washington 98005 or sent via email to jhv@saf.org.





This publication is copyrighted ©2006 by the Second Amendment Foundation. All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without written permission except in the case of brief quotations embodied in critical articles and reviews.

The Second Amendment Foundation is a non-profit educational foundation dedicated to promoting a better understanding of our Constitutional heritage to privately own and possess firearms. For more information about Foundation activities, write to: Second Amendment Foundation, James Madison Building; 12500 N.E. Tenth Place; Bellevue, Washington 98005. Telephone number is (425) 454-7012. Additional copies of this publication may be ordered for \$10.00 each. Please see www.saf.org for more research materials.

This publication is distributed to academia and the book trade by Merrill Press, P.O. Box 1682, Bellevue, Washington 98009.





Journal on Firearms & Public Policy

Volume 18

Fall 2006

**Small Arms Control
and the United Nations**

Kate Buchanan et al. 9

**Post Modernism and
the Model Penal Code
v. The Fourth, Fifth, and
Fourteenth Amendments—and
the Castle Privacy Doctrine
in the Twenty-First Century**

David I. Caplan and Sue Wimmershoff-Caplan 41

**The Consumer Federation of America's
Case for Gun Safety Regulations**

Howard Nemerov 169

**The Firearms Safety and
Consumer Protection Act**

Dennis B. Wilson 206











Small Arms Control and the United Nations

By Cate Buchanan et al.

In the international campaign for gun control, one of the most respected and influential organizations is the Centre for Humanitarian Dialogue, a foundation in Geneva, Switzerland, which works on a wide variety of disarmament and peace issues. This article presents an edited version of two chapters from the CHD's monograph Missing Pieces: Directions for reducing gun violence through the UN process of small arms control. The first part of this article addresses national regulation of small arms, while the second part examines issues of gender regarding small arms misuse and control. The full monograph is available at the CHD's website, www.hdcentre.org.

The co-authors of this article are Cate Buchanan, Centre for Humanitarian Dialogue; Wendy Cukier, SAFER-Net Canada; Adele Kirsten, Institute for Security Studies; Emile LeBrun, consultant; Lora Lumpe, Amnesty International USA; Michael Flood, Australian Research Centre in Sex, Health and Society, La Trobe University; and Jessica Galeria, Viva Rio.

Keywords: Small arms control, United Nations, gun violence, gender roles.

The majority of the global stockpile of small arms and light weapons is in the hands of private individuals.¹ As these guns are routinely misused, or stolen or otherwise leaked into the illicit trade, it is imperative that gun ownership by ordinary citizens be adequately regulated and limited at the national level (referred to here as “civilian possession laws” or “national arms control”).

In the last decade, several countries—including Australia, Brazil, Cambodia, Canada, Sierra Leone, South Africa, and the UK—have undertaken significant reforms to regulate and limit gun ownership by citizens. The prime minister of Thailand has put forward a proposal to make the country gun-free in five to six years,² and many other governments—including those of Argentina, Belgium, Benin, Botswana, Burkina Faso, El Salvador, Guatemala, Jamaica, Jordan, the Occupied Palestinian Territories, the Philippines, and Uruguay—are currently in the process of strengthening laws and policies.





Such reform is propelled mainly by local realities: massacres with small arms that provoked widespread public outrage in Australia, Canada, and the UK; alarming levels of random and/or organised armed violence in Brazil and Thailand; and post-war or democratic transitional processes in Cambodia, Sierra Leone, and South Africa. These efforts have also been informed and reinforced by work at the international and regional levels, which increasingly has implied or explicitly called for more careful regulation of civilian ownership of small arms and light weapons.

The discrepancy between progress at the national level and debates on this issue in the UN process on small arms is significant. The July 2003 First Biennial Meeting of States to Consider the Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects in July 2003 (BMS 2003) threw this in to strong relief,³ with 69 out of 103 governments (67 per cent) voluntarily highlighting civilian possession policies in their national reports and statements.⁴

Several factors contributed to this relatively high level of focus on the issue. Firstly, many governments recognise a connection between armed violence and the uncontrolled, or loosely controlled, trade in and possession of small arms.⁵ There is also growing awareness that most of the problems posed by weapons availability and misuse are 'civilian'—that is, most guns are owned by civilians, and most victims of gun violence are civilians. Finally, there remains widespread acknowledgement amongst governments that civilian-held firearms are an important contributor to the illicit trade in and misuse of weapons through theft, careless storage, and deliberate private sale.⁶

The first part of this Article highlights the human security issues and analyses the types of measures that countries are incorporating into their national legislation in order to combat gun violence, gun trafficking, or instability. It tracks the trend around the world toward greater restriction on civilian gun possession and identifies best principles for effective national regulation.

HUMAN (IN)SECURITY: CIVILIANS AND GUN VIOLENCE

The Small Arms Survey estimates that 60 per cent of the global





stockpile of 640 million guns are in civilian hands—including those of farmers, sporting shooters, criminal gangs, armed insurgents, collectors, private security guards, and private citizens of all ages.⁷ The role of civilian-used guns to undermine human security is well documented.

- Civilians are the principal victims of gun violence, with an estimated 200,000–270,000 people losing their lives to gun homicide or suicide in countries “at peace” each year—about twice as many than die directly in situations of war.⁸
- Worldwide, there are four gun homicides for every gun suicide. In North America and Europe, however, gun suicide rates surpass those of firearm homicides.⁹
- Injury, rape, robbery, and kidnapping committed with guns affect countless civilians around the world annually.¹⁰ Arming can escalate violence, which fuels fear, which can in turn lead to further arming.
- The majority of users and abusers of guns globally are men.¹¹ They are also the primary victims of gun violence, particularly males between the ages of 14 and 44 years.¹²
- While women account for a substantial proportion of victims (especially of intimate partner violence), they account for a relatively small percentage of users.¹³
- Guns often fall into the hands of young people, contributing to suicides, interpersonal violence, and accidental deaths.¹⁴ This is particularly concerning as the World Health Organisation (WHO) reports an “alarming increase” in suicide among young people aged 15 to 25 years worldwide.¹⁵

Some nations have high levels of civilian weapons possession and alarming rates of gun violence. For example, the public in South Africa owns six times as many guns as the police and military.¹⁶ In Brazil, while the number of legally registered firearms (including those privately held by military and police personnel) is estimated at about seven million, the actual number of guns in private hands is





believed to be closer to 15.6 million.¹⁷ These countries have among the highest firearms homicide rates in the world.

A USEFUL FRAMEWORK: THE PUBLIC HEALTH APPROACH

A key aim of exercising greater control over civilian possession is to reduce the risks associated with small arms misuse and to prevent death and injury. A public health approach to gun violence includes isolating and controlling the cause of injury—in this case, small arms.

The relationship between gun ownership and gun death is complex. As with any social policy issue, proving a causal relationship between widespread gun availability and gun violence is difficult, hampered by a lack of complete and reliable data and an inability to screen out mitigating factors.¹⁸ On balance, however, empirical evidence supports the notion that making guns more difficult to obtain legally can help reduce certain types of violence, particularly those that are impulsive.¹⁹ In particular, the presence of guns in the home has been shown to influence rates of suicide, accidents, intimate partner violence, and family murders.²⁰

RIGHTS-BASED ARGUMENTS: STATE RESPONSIBILITY

A compelling human rights case for careful regulation of civilian-held guns has also been put forward by the UN Special Rapporteur on Human Rights and Small Arms, Barbara Frey. She has noted that under international human rights law, States are required to exercise due diligence to protect people within their territory from abuses, even when these are committed by private persons. It is not unreasonable to suggest that this would require that minimum safeguards and controls were in place on the ownership and use of guns.²¹ The State itself may be liable if it fails to investigate and prosecute massacres or take reasonable steps to regulate guns in order to protect citizens from homicides, suicides, accidents, a pattern of intimate partner or family violence, and/or organised crime.

THE ILLICIT TRADE AND NATIONAL ARMS CONTROL

Regulation of civilian access to small arms is central to efforts to curb international gun trafficking. There are two principal ways in





which this connection can be demonstrated.

1. Widespread theft of civilian firearms: Holding gun owners responsible

“Illicit” firearms nearly always start out as legal weapons—that is, legally manufactured and legally sold. Worldwide, however, diversion of firearms from their legal owners to illegal purposes through loss or theft is a significant source of black market arms. The Small Arms Survey estimates conservatively (due to the absence of data from most countries and many regions of the world) that at least 1,000,000 firearms are stolen each year, with the majority of these taken in small-scale burglaries from private homes.²² In South Africa, loss and theft from civilian owners is the single largest source of illegal arms:²³ each year, 20,000 guns are stolen from civilian owners, most of which are handguns.²⁴

2. Substitution and the need for harmonisation of laws

Jurisdictions that do have strict (or relatively strict) controls over civilian possession of arms find those controls undermined if guns can be easily and illegally imported from nearby places with less strict controls. In Canada, for instance, a country with moderately strict laws, it is estimated that half of all handguns recovered in crime are illegally imported from the US, where laws are laxer.²⁵ Guns originating in the US also account for approximately 80 per cent of the arms recovered in crime in Mexico and most of the illegal firearms recovered in the Caribbean.²⁶ According to the Organisation of American States (OAS), Mexican territory is now a major conduit for gun trafficking from the US: “Criminal organisations located along the northern border maintain a flow of guns to the drug producing regions of South America”.²⁷

Similarly, in Southern Africa, Botswana’s restrictive gun policies (and low armed crime rate) have been compromised by neighbouring South Africa’s (previously) more permissive policies.²⁸ The country’s police commissioner cited cross-border arms flows as contributing to a recent rise in armed crime: “We collect a lot of firearms at the South Africa–Botswana border. It doesn’t occur to some visitors to leave their gun behind when they visit our country. They don’t





understand how you can live without carrying a firearm”.²⁹

EMERGING STANDARDS

Several multilateral processes have encouraged greater national arms control. Most significantly, in May 1997, 33 countries sponsored a resolution in the UN Commission on Crime Prevention and Criminal Justice that emphasised the importance of State responsibility for effective regulation of civilian possession of small arms, including licensing owners, record keeping for guns, safe storage requirements, and appropriate penalties for illegal possession.³⁰ This effort culminated in 2001 in the adoption of a protocol on small arms trafficking—the *Firearms Protocol*.

Despite some shortcomings, the *Firearms Protocol* criminalises illicit trafficking, and necessitates that guns be marked at the point of manufacture, import, and transfer from government into private hands. States are also required to consider establishing a system of regulating arms brokering. In April 2005, the 40th ratification triggered the process of the Protocol entering into force. It will be the first legally-binding international agreement on small arms control.

REGIONAL ACTION

In growing recognition that the cross-border movement of arms is directly related to how well States regulate their internal stockpiles, regional security agreements increasingly include provisions calling for careful regulation of small arms in the hands of civilians. The most relevant agreements include the European Union (EU) *Joint Action* (1998), the *Bamako Declaration* (2000),³¹ the *Nadi Framework* (2000),³² the Southern African Development Community (SADC) *Firearms Protocol* (2001), the *Andean Plan* (2003),³³ and the *Nairobi Protocol* (2004).³⁴

The *Nairobi Protocol* is one of the most specific on the regulation of civilian gun possession. One of its objectives is to “encourage accountability, law enforcement and efficient control and management of small arms held by States Parties and civilians”. Each of the 11 East African States that ratify it will be responsible for incorporating into their national law:

- prohibition of unrestricted civilian possession of small





arms;

- total prohibition of civilian possession and use of all light weapons and automatic rifles, semi-automatic rifles, and machine guns;
- regulation and centralised registration of all civilian-owned small arms in their territories;
- provisions for effective storage and use of civilian-held firearms, including competency testing of prospective owners;
- monitoring and auditing of licences held and restriction of the number of guns that may be owned by individuals;
- prohibitions on pawning or pledging of small arms; and
- registration to ensure accountability and effective control of all guns owned by private security companies.

In addition, States Parties agree to encourage the surrender of illegal guns by civilians and to develop local, national, and regional public education programmes aimed at encouraging responsible ownership and management of guns.

POST-CONFLICT TRANSITION EFFORTS

More generally, the UN, regional bodies, and various countries have actively promoted the regulation of civilian firearms possession as part of post-conflict transitions. Cambodia and Sierra Leone are prime examples of nations recovering from lengthy civil wars where a large number of civilians were armed; the governments of both have recognised that disarmament, demobilisation, and reintegration (DDR) programmes must be followed by and consolidated with strong gun control laws.³⁵

APPROACHES TO NATIONAL ARMS CONTROL

As noted, a number of countries have initiated and/or implemented significantly more restrictive gun control policies in the past decade. There is wide variation in the approaches being taken,





but national arms control laws in most countries are based on a combination of the following: prohibiting/restricting certain *uses* of guns; prohibiting/restricting certain *users* of guns; and prohibiting/restricting certain guns.³⁶

1. Prohibiting/restricting certain uses of guns

Defining “legitimate” use

Definitions of “legitimate purposes” for small arms possession vary depending on culture and context. Only a few countries, such as Brunei Darussalam, Luxembourg and Malaysia, have a total prohibition on civilian gun ownership; others – like Japan, China and Great Britain – severely restrict civilian possession. Most countries allow ownership for hunting or pest control on farms, and some allow possession of certain types of weapons for sport, target shooting or “collection”.

More controversial is the notion of self-defence as a legitimate reason for gun ownership. On the one hand, responsibility for protection against violence should rest with State authorities, and if everyone armed themselves for this purpose it is unlikely that societies as a whole would be safer. On the other hand, where violent crime is rampant, and State authorities weak or ineffective, many people do feel an acute need to arm themselves for protection. While an outright rejection of the self-defence rationale for ownership is problematic, so too is an assumption that such a rationale is acceptable in all or even a majority of cases.

Safe storage

Safe storage requirements are designed to reduce the risk that weapons will be stolen or used impulsively. Typical safe storage measures include unloading the gun, separating it from its ammunition, and the use of locked containers and trigger locks. In Indonesia, all guns licensed for shooting and hunting must be stored and used at a shooting club.³⁷

Carrying guns in public

Some countries place restrictions on the conditions in which guns may be legally carried, such as the designated “Firearm Free





Zones” in South Africa.³⁸ The cities of Bogotá and Cali in Colombia have both experimented with bans on the carrying of handguns on holidays and weekends with some success.³⁹ Brazil’s disarmament law prohibits all civilians from carrying firearms in public (an exception is made for civilians who need to carry a weapon to perform their jobs, e.g. security officers or hunters).

2. Prohibiting/restricting certain users of guns

Most countries screen and license potential owners, impose age restrictions, and undertake background checks. However, there are significant differences in approach. Some nations require formal safety training, whereas others also require the provision of references and waiting periods before purchase. Different categories of users are singled out to be restricted or prohibited from acquiring guns.

Convicted criminals

In most countries, being found guilty of a serious crime, such as murder, drug trafficking, or acts of terrorism, disqualifies an individual from acquiring guns in the future. In Canada, the law provides broad grounds for refusal: “A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, ...ammunition or prohibited ammunition”.⁴⁰

Violence in the home

Given the particular role of legally owned guns in the murder, injury, and intimidation of women and children in the home,⁴¹ several countries have instituted screening mechanisms to prevent gun acquisition by those with a history of family violence, whether or not it resulted in a criminal conviction. Canada requires current and former spouses to be notified before a gun licence may be issued. South Africa and Australia have specific prohibitions on issuing licences to those with a history of family violence. In the US, federal law makes it a criminal offence to possess a gun while subject to an intimate partner violence restraining order and 11 US states have laws that prevent individuals with a history of intimate partner





violence from purchasing or possessing a firearm.⁴²

Youth

Most countries prohibit the acquisition and ownership of guns by young people, although the age restrictions and type of guns vary. Many countries prohibit ownership of firearms until the age of 18. In South Africa, firearm owners must be 21 years of age. However, a licence can be issued if there are compelling reasons, such as the youth being a dedicated hunter or sportsperson.⁴³

Serious mental illness

Because of the potential risks, particularly for suicide, many countries will refuse access to a small arms licence to individuals with a history of serious mental illness. However, given privacy and doctor-patient confidentiality, information about mental illness is often difficult to obtain. In Canada, applicants are asked questions that referees must verify. In Australia, health practitioners who have reason to believe that a patient should not be allowed to have a gun licence are required to report their concerns to police. In Austria, a psychological test is required before a handgun licence is issued.⁴⁴

3. Prohibiting/restricting certain guns

Most countries prohibit the civilian possession of firearms whose inherent risk outweighs their utility.

Military assault rifles

A 2004 survey of 115 countries showed that of 81 respondents, 79 banned civilian possession of military assault rifles, although the definitions varied. Only Yemen and Kenya did not report specifically banning some or all military weapons.⁴⁵ Some of the nations prohibiting civilian possession of automatic weapons include Austria, China, Colombia, Guatemala, Hungary, India, Indonesia, Laos, Latvia, Malaysia, and Peru.⁴⁶

Some countries go farther and prohibit civilian possession of selective-fire military assault rifles, which can be converted from semi-automatic to fully automatic fire.⁴⁷ Many also ban civilian possession of semi-automatic variants of fully automatic firearms





because of their lethality and limited utility for civilian purposes. For example, Argentina, Australia, Bangladesh, Canada, the Czech Republic, France, Guyana, Lithuania, New Zealand, and the UK prohibit selective-fire and some semi-automatic military assault rifles, although definitions vary.

Handguns

Access to handguns is frequently banned or severely restricted, given their concealable nature and prevalence in criminal violence.⁴⁸ Some countries, such as Botswana and the UK, have completely banned civilian handgun ownership.⁴⁹ Others, such as Australia and Canada, allow handguns only for professional security guards and for target shooters who can prove that they are regularly involved in pistol sports.

Safety devices

One US state (New Jersey) passed a law in December 2002 mandating that only handguns that are personalised (“smart handguns”) will be available for purchase in the state.⁵⁰ Personalised guns can use a range of technology, including unique biometric data, such as fingerprints and retina scans, to permit firing only by their authorised user.

Record keeping and registration of firearms

Record keeping and registration of small arms help prevent diversion to illegal markets. They also support the efforts of law enforcement to trace guns, investigate crime, and support criminal prosecution. Most nations have some method of registering guns in the hands of their citizens. Yet inconsistencies exist; for example, Austria and New Zealand require the registration of handguns, but not rifles and shotguns.⁵¹

The level of information required and the tools used also vary considerably. Mexico requires that owners are licensed and all guns registered.⁵² Thailand provides a good standard by requiring that the gun itself should be marked to indicate the province of registration and a number.⁵³ Some jurisdictions have even begun to introduce ballistics testing as part of the record-keeping process. For example,





Maryland and New York State in the US have laws requiring all new guns to have ballistics tests before they can be sold.⁵⁴

Regulating the sale and possession of ammunition

Ammunition controls are an integral part of comprehensive control measures and play an important role in reducing the impulsive use of certain types of guns, particularly by young people. Most countries regulate the sale of ammunition and many require that it be securely stored, defining the conditions under which ammunition may be held, and often making its purchase conditional on possession of the appropriate licence. Some nations, such as South Africa and the Philippines, limit the amount and type of ammunition that an individual may purchase or possess.

The following examples demonstrate several approaches taken by societies regarded as “peaceful” and those recovering from war.

Cambodia

On 27 April 2005, the Cambodian National Assembly passed the Arms Law prohibiting private possession of a firearm without a licence. While the details of implementation have still to be worked out, the government is aiming for a “gun free” society, and obtaining a firearm licence will be extremely difficult. Self-defence will not be considered a legitimate reason to receive a gun licence, and there will be tough regulations on owning guns for “sporting” purposes. For example, the government announced that the public shooting range in Phnom Penh will be closed under the law. The law will be followed by a three-month amnesty for weapons collection, advertised through a national awareness-raising campaign.⁵⁵

Australia

Prior to 1996, all eight Australian states licensed gun owners, but only five actually registered all guns. The murder of 35 people in Port Arthur, Tasmania in April 1996 was the catalyst for improved national arms control. Within weeks, prompted by public and media pressure, all state and territory governments committed to pass nationally uniform laws including:





- registration of all firearms;
- stronger licensing provisions, including proof of genuine reason to own any gun; uniform screening, including a five-year prohibition on owning firearms for anyone convicted of intimate partner or family violence or subject to a restraining order; a safety course requirement; a minimum age of 18; a 28-day waiting period on each purchase; and strict storage guidelines;
- a ban on semi-automatic rifles and shotguns;
- improved controls on the trading of firearms, including the requirement of a separate permit for each gun; and
- a ban on private and mail order sales of small arms.⁵⁶

The new laws were phased in between mid-1996 and mid-1998, and a one-time tax levy funded the government's buy-back of newly banned guns from their owners. The law resulted in the world's largest weapons collection and destruction exercise to date, with 700,000 guns taken out of circulation.⁵⁷

RECOMMENDATIONS

There is a growing international tide of support for the strengthening of small arms control measures, including the regulation of civilian-held guns, in global efforts to address the *illicit trade in small arms in all its aspects*. The following recommendations are areas where broad-based international agreement on best practices might be achieved.

1. States should place an emphasis on rigorously reviewing their national regulations on arms possession and use, as well as the implementation of existing laws.

Laws and policies should be brought into conformity with the recommendations laid out in the 1997 Resolution of the UN Commission of Crime Prevention and Criminal Justice.⁵⁸ These include licensing, registration, and safe storage requirements, among others—all of which would help reduce misuse and diversion of





legal firearms to illegal markets. In addition, States should seriously consider the importance of passing federally uniform, rather than sub-national, arms control laws. Doing so would impede arms trafficking from lesser to more regulated provinces.

2. Promote gun owner responsibility by registering firearms.

Individuals permitted to own firearms must be responsible for them. Development of systems of accountability should also be agreed, with losses reported and investigated quickly. States could agree to hold individuals accountable for weapon loss through serious disciplinary action. International support for safe storage facilities and awareness-raising campaigns could help societies move from a culture of “rights” for gun owners to one of “responsibility” for ensuring that society is not harmed with their weapons.

3. Define minimum criteria for private ownership of guns by introducing a national system of licensing.

At a minimum, criteria for acquiring guns should include the capacity to handle a gun; age limit; proof of valid reason; and a security screening based on criminal records or history of violence, including intimate partner violence. Licences should also be required to acquire ammunition.

4. Prohibit civilian possession of military-style rifles, including semi-automatic firearms that can be converted to fully automatic fire and semi-automatic variants of military weapons.

This measure has been effectively implemented in countries such as Canada and Cambodia, and in 2004, East African governments signed the *Nairobi Protocol*, which binds State Parties to “the total prohibition of the civilian possession and use of all light weapons and automatic and semi-automatic rifles and machine guns”.

5. Ensure that national measures are harmonised with other efforts to prevent violence against women.

Women face particular risks from gun violence in their homes





at the hands of their intimate partners, and access to guns is a major risk factor for femicide. National regimes should include specific clauses that prohibit access to guns if the person seeking to own a gun has a history of violence, particularly against intimate partners or family members.

6. Support the appointment of disarmament advisors to peace processes and UN missions to examine opportunities to improve national gun laws.

There is little doubt that the success of peace processes is enhanced by effective DDR. Along with weapons collection, however, it is critically important that nations recovering from war examine national gun laws to update and harmonise as necessary to encourage norms of non-possession, and reinforce accountability and the rule of law.

WOMEN, MEN AND GUN VIOLENCE: OPTIONS FOR ACTION

The term gender has become a synonym for women when gender actually refers to the socially constructed roles, behaviours, and attributes of men *and* women in a given society (as opposed to “sex”, which is biologically determined). Applying a gender perspective to the small arms issue—understanding the different ways that *men, women, boys, and girls* engage in, are affected by, and respond to gun violence—is key to developing effective solutions to the problem.

This section explores two key concepts—gender equity and gender specificity—as they impact gun violence. A gender equity approach implies working with both men and women to *reduce risks* and *bolster resilience* to insecurity and violence. Gender specificity means examining the different impacts on men and women of armed violence—and then developing programmes that take into account these particular risks.

DIFFERENTIATED IMPACTS FOR WOMEN AND MEN

A growing global effort to collect information on gun violence that is broken down into age, ethnicity, and sex is helping challenge some over-generalisations that hinder more refined understanding





of the impacts of small arms misuse. These include statements like “80% of the victims of armed violence are women and children”.⁵⁹ This claim may be true in some contexts, particularly recent wars in some African nations; but in general, it is primarily men—young, poor, socially marginalised men most of all—who are killed or injured from gun violence.⁶⁰ Men are also more likely to commit gun violence: in almost every country, a disproportionate percentage of gun owners and users are men.⁶¹ Statistics from situations of war and peace show that:

- over 90 per cent of gun-related homicides occur among men;⁶²
- boys are involved in 80 per cent of the accidental shootings that kill about 400 children and injure another 3,000 in the US each year;⁶³ and
- Of those who commit suicide with a gun, 88 per cent are men and 12 per cent are women.⁶⁴

Although women are not the majority of homicide victims, when they are killed—and it is overwhelmingly men who kill them—guns are often a preferred weapon. Studies on the murder of women (referred to here as “femicide”, or “intimate femicide” if the perpetrator is a current or ex-partner, or a rejected would-be lover) show that guns can be a lethal element in displays of men’s power over women. In South Africa, one murdered woman in five is killed with a legally owned gun.⁶⁵ Some 50 per cent of women murdered each year are killed by men known intimately to them—four women a day, or one every six hours.⁶⁶ The intimate femicide rate was estimated at 8.8 per 100,000 female population 14 years and older, the highest ever reported on the murder of women anywhere in the world where it has been studied.

UNDERSTANDING GENDERED EFFECTS

The misuse of small arms affects communities on many levels, making it challenging to quantify who is worst harmed by the ready availability and misuse of guns. Improved data collection is one part of bridging this knowledge gap. Small arms researchers and analysts can play a more active part in the collection of sex-disaggregated





data on who is killed and injured by firearms and under what circumstances. As gun violence does not always result in death, but generates a range of indirect impacts, it is important that research be complemented with qualitative analysis to provide a fuller picture of the breadth of the effects of gun violence on women and girls, men and boys.

It is critical to note that women are subject to a disproportionate range of non-fatal threats due to the misuse of small arms, often commensurate with their low status or lack of legal protection in many contexts: peace or war, developed or developing nations.⁶⁷ Accounts from both war zones and “peaceful” communities illustrate the risks to women and girls from gun violence or the threat of it: “They took K.M. who is 12 years old, in the open air. Her father was killed by the Janjawid in Um Baru, the rest of the family ran away and she was captured...more than six people used her as a wife (raped her); she stayed with the Janjawid and the military for more than 10 days”.⁶⁸

Small arms and light weapons do not necessarily have to be fired to pose a serious security threat and are often used to threaten and intimidate. Gun “brandishing” (prominently displaying, waving, or otherwise drawing attention to the weapon) is a common form of intimidation, especially against women: “He would take the gun out of his pocket and put it over there. It would be right in front of me. He didn’t point it at me, he just let me know it was there”.⁶⁹ Globally, multiple, or “family” murders (including of women and children) appear to be more common where guns are used in the home to intimidate and perpetrate intimate partner violence. A high percentage of these murders conclude with the suicide of the perpetrator.⁷⁰

CHOICES AND ACTION

A common but unhelpful stereotype in analysis of armed violence identifies women as *victims* (often with children), while men are seen as violent *perpetrators*. Clearly, not all men are violent or pro-gun (just as not all women are naturally suited for conflict resolution), and research and policy attention is needed to better understand why many men and boys choose *not* to engage in gun violence. In order to improve the effectiveness of policies and programmes to prevent





gun misuse, additional research is needed on those who seek to “do the right thing” and avoid violent behaviours, as well as on the ways that women and girls may sustain, encourage, or commit gun violence.

1. Men, masculinities, and guns

Across cultures, the largest number of acts of violence are committed by men. This behaviour appears to be the product of society and history rather than biology: men’s near monopoly of gun use can be seen as a manifestation of a lifetime’s socialisation into violent expressions of manhood and cultures in which male gun use is regarded as the norm.⁷¹

In times of war, men and boys are actively encouraged and often coerced into taking up the roles of combatants. In countries characterised by violence, war, or high levels of gun possession, young men may use guns as part of a rite of passage from boyhood into manhood. Guns may also be positively associated with manhood in contexts where their use was valued and encouraged as part of a widely supported liberation movement, such as the AK-47 as a symbol of the anti-apartheid struggle in South Africa.⁷² Even in peacetime, boys may be socialised into a familiarity and fascination with guns, or gun-like toys.⁷³ In the US, where boys are the most frequent victims of accidental shootings, studies show they neither learn to distinguish toy guns from real ones, nor can resist touching a gun if they find it by accident.⁷⁴ Research among young men involved in organised armed violence in ten countries finds that carrying guns is seen as an effective means of gaining status and respect.⁷⁵ Soldiers, snipers, other gun users, and armed male role models in television, film, and violent computer games are often cult heroes, with guns routinely glorified in the popular media.⁷⁶

Men dominate both the formal security sectors of States, such as the military and police, as well as non-state armed groups, gangs, and militias.⁷⁷ It is also important to think about *which* men are most vulnerable to taking up arms. It is usually poor, marginalised men who take up badly paid and unprotected jobs in the informal security sector,⁷⁸ end up in armed gangs, and are recruited or volunteer to fight wars. From Boston to Bangkok, men are using guns “in order to prove their masculinity, or to defend their masculine honour, or





to challenge others".⁷⁹

In wartime, many men make significant efforts to stay out of the fighting and go to great lengths to protect their families. The number of combatants and people involved in violence has in fact been relatively low in recent conflicts. Even in settings where gang involvement by young people may be prevalent, the vast majority of young men do not participate in gang activities, and when interviewed, most young men in these settings say that they fear gangs and gang-related violence.⁸⁰ It is important to understand why *and* how large numbers of young men do not use arms and violence, and actively oppose such violence.

A number of promising programmes are being implemented to shift rigid and sometimes violent attitudes about being a man. "Men As Partners" in South Africa⁸¹ works in collaboration with the military, unions, and schools to engage men in alternative views about manhood, as does the Conscientizing Male Adolescents' project in Nigeria and the "Program H" initiative in Latin America and India⁸². Another striking example is the "White Ribbon Campaign"⁸³, started in Canada in the early 1990s after a man who had not been accepted into a graduate programme in Montreal entered a classroom and killed fourteen female students. The campaign—of men speaking out against violence against women—is now active in some 30 countries worldwide.

2. Women's multiple roles

Although much of their work goes unrecognised, women play multiple roles in times of war and unique roles in the aftermath. Though women have been largely excluded from formal security policy making, there are many examples of women working at the local level to build peace, prevent violence, and encourage disarmament all over the world. The US Million Mom March⁸⁴, the Israeli Women in Black⁸⁵, the Sierra Leonean Mano River Women's Peace Network⁸⁶, and the Bougainvillean Inter-Church Women's Forum are just a few examples.

In Brazil, by contrast, interviews with young women reveal how they can facilitate men's use of violence by hiding or transporting guns, drugs and money, ferrying messages to criminals in prison, or acting as a lookout for police or rival gangs. They also subscribe to





the image that a gun-toting man is sexy and desirable: “Sometimes guys will even borrow guns, just to walk around with them, to show off for the girls.... They use them because they know that pretty girls will go out with them”.⁸⁷ This is significant, given that in 2001, 24 young men in Rio de Janeiro city were killed with a gun for every one woman who died the same way.⁸⁸ One highly effective civil society effort to address the problem in the country resulted in the 2001 “Choose Gun Free! It’s Your Weapon or Me” campaign, which aimed to encourage women not to condone male violence.

3. National gun laws and consequences for safety

Improving national gun laws can have important and positive consequences when analysed from a gender perspective. Following the world’s largest peacetime massacre by a single gunman in May 1996, Australia’s laws were harmonised and improved by mid-1998.⁸⁹ The resulting laws included a ban on the ownership of semi-automatic and pump-action rifles and shotguns, and clauses prohibiting civilians from owning a range of weapons. There was also a five-year minimum prohibition against owning guns for those who are subject to restraining orders or have been convicted of any violent offence. In some states, prohibitions of up to ten years are being issued. Registration of small arms was regarded as essential for police to be able to effectively remove weapons in situations of intimate partner violence and enforce prohibition orders.

The new law included a buy-back component that resulted in the collection and destruction of one-fifth of the entire national gun stockpile. As tools to murder both men and women, guns are now simply less available, a phenomenon that may also be contributing to a reduction in the overall homicide rates, as would-be killers substitute guns with other, less lethal, weapons.⁹⁰ From 1996 to 2001, the gun homicide rate for women dropped 65 per cent, compared to a 54 per cent drop for men. During the same period, the overall gun death rate for women (including suicides) dropped 56 per cent, compared to a 40 per cent reduction for men.⁹¹

4. Building gender-aware programmes

Policy analysts, researchers and programme planners often





speak exclusively to men about finding solutions to security problems, from how to undertake disarmament, demobilisation, and reintegration (DDR) to the need to find alternatives to oppressive policing. Researchers and planners (who are themselves mainly men) often fail to consider the implications of both men and women's roles in fighting forces, do not design consultation processes to involve women, or do not recognise existing anti-violence activities usually led by women. The gender-blind approach has entrenched the misconceived notion that women have no interest in, knowledge about, or influence over attitudes to gun use and possession, or disarmament.

Sierra Leone provides an example of the impacts of this failure. While the UN Mission in Sierra Leone (UNAMSIL) was initially praised as “a success and a model for [a] robust and successful mandate that moved from peacekeeping to sustainable peace building”, for “a successful disarmament and demobilization programme”, and for its ongoing work in reintegration, the mission is now known to have initially failed women and girls involved in fighting forces.⁹² Determining who qualified to join the programme was a complex process, which UNAMSIL tackled by collecting basic information from combatants that included identifying the person's commander, a test in which a weapon was dismantled and reassembled, and strict guidelines on what qualified as a weapon. Eligibility requirements almost guaranteed the exclusion of females, especially girls, who were rarely eligible for the “one person, one weapon” approach. The results of this approach are difficult to assess because reliable figures are unavailable, but one estimate suggests that while at least 10,000 women are thought to have been associated with armed groups, of the 72,490 demobilised adult combatants, only 4,751 were women; and of the 6,787 children, a mere 506 (7.46 per cent) were girls.⁹³

As in other places, Sierra Leonean women and girls associated with fighting forces report being forced to hand over their guns to their commanders and claim that these guns were then sold on to civilians who reaped the benefits, which included material support, retraining, and placement in reintegration programmes. The ease with which girls and women were intimidated was compounded by the fact that first-hand information often did not reach them. For the most part, the girls are now living on the streets in Freetown,





and report high levels of drug and alcohol addiction, depression, frustration, and violent rage, which have also been directed at the authorities.⁹⁴

In 2002, UN Secretary-General Kofi Annan observed:

In order to be successful, DDR initiatives must be based on a concrete understanding of which combatants are women, men, girls, and boys. Recent analyses of DDR processes from a gender perspective have highlighted that women combatants are often invisible and their needs are overlooked.⁹⁵

The Secretary-General has offered regular updates on how the UN is implementing its commitment to gender mainstreaming. Areas of progress include the appointment of ten full-time gender adviser positions in 17 peacekeeping operations and in the Department of Peacekeeping Operations (DPKO), new standard operating procedures on DDR in which gender issues are taken into account, the development of more gender-sensitive approaches to early warning efforts, and a proposal to further advance gender-equitable participation in all aspects of the elections process.⁹⁶ Investment in training and institutional support would further help advance these processes.

RECOMMENDATIONS

Adopting a gender perspective to our understanding of the phenomenon of gun violence is crucial to designing and implementing strategies to reduce the widespread human security impacts it produces. We can no longer afford to remain in the dark about the complexities of how men and women view, use, and misuse guns, and how those attitudes and behaviours translate into risks and vulnerabilities. States should make a number of bold and essential steps to mainstream gender considerations into small arms policymaking:

1. Fully meet existing international norms relating to gender and gun violence.

There are numerous international standards that protect women's rights to equality, non-discrimination, and to protection





against gender-based violence. International law places obligations on States to prevent and punish violence against women, and, where they fail to take adequate steps to do so, it may amount to a human rights violation, even when such violence is perpetrated by private actors. The prohibition of discrimination implies that women must be treated equally in all realms of social, political and economic life, and women's equal and full participation in decision-making concerning protection against gun violence is the surest means to ensure their concerns are addressed.

2. DDR programmers and planners should give particular attention to Article 13 of Security Council Resolution 1325.

It calls on “all those involved in the planning for disarmament, demobilisation and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants”. This call to action ranges from those who study DDR programmes to those who implement them, and additionally can include greater consideration of the gender composition of teams working on DDR processes for the UN and governments.

3. *Direct attention to young men as a group particularly vulnerable to gun violence.*

Evidence clearly suggests that young men are exposed to a range of risks that can be mitigated at different levels by governments and NGO (non-governmental organisations) activity through targeted programming and early intervention to tap into positive, non-violent models of manhood. A small number of interventions have begun to work with young men to question some of the traditional norms related to manhood that may encourage various forms of violence, including use/ownership of firearms. In addition to educational opportunities and meaningful employment opportunities for low-income young men, there is also a need for gender-specific attention to how boys are raised and comprehensive efforts—involving governments, civil society, families, and communities—to promote non-violent models of manhood.





4. Restrict the acquisition of guns and ammunition by those who commit intimate partner or family violence.

Standards are required to ensure that perpetrators of intimate partner violence—and those particularly at risk of perpetrating it—do not have access to guns. That means legal prohibitions on gun ownership for abusers and that record keeping and other supporting mechanisms should be in place to enforce them. Law enforcement should have the authority and mandate to confiscate guns on the basis of likely threat, not prior conviction of intimate partner violence. International standards should be agreed to encourage such laws at a national level.

5. Train law enforcement officials to better understand the small arms issues related to the prevention of gender-based violence.

Local law enforcement officers are often the first to respond to, and intervene in, instances of gender-based violence (including homophobic attacks). Police must therefore be trained to enforce laws such as prohibitions on the ownership of firearms. Law enforcement officers also need to be accountable for the safety and appropriate use of their own guns, particularly if such guns are not stored between shifts in police stations.

6. Include the perspectives of men and women in the development of policies to prevent gun violence.

Male decision makers dominate research and policy on small arms control and violence prevention. States can develop mechanisms, such as panels, consultative committees, and recruitment processes to ensure that women (the suggested international minimum is 30 per cent) are involved in decision-making and other activities that inform security policies, such as changes to national gun laws, or disarmament and development activities. In addition, gauging the opinions of civil society actors, particularly women's organisations, is important given the low priority often accorded to their views and expertise.

7. Consolidate what is already known, identify gaps, and generate more information.





Increasing our knowledge of the impacts of small arms (mis)use on men and women, and girls and boys and making it accessible is the most effective way to inform better policy. It is critical that this information be disaggregated by sex in order to develop the most accurate picture possible of quantitative impacts. Countries can include appropriate categories into existing information collection efforts. In addition, qualitative studies are also important to further investigate the roles of men and women in war, cultural norms about the demand for guns, and issues related to intimate partner violence. Those countries with capacity can consider supporting this type of action-oriented research and policy development.

ENDNOTES

1. "Small arms" generally refers to grenades, assault rifles, handguns, revolvers, light machine guns. "Light weapons" generally refers to anti-tank and anti-aircraft guns, heavy machine guns, recoilless rifles. The terms guns, firearms, small arms and weapons are used interchangeably throughout this Article.
2. *Small Arms Survey 2004: Rights at Risk*, Oxford University Press, Oxford, p. 71.
3. WorldNetDaily.com (2003), "UN seeking global gun control? Conference moving toward plan that would regulate US arms". Posted 16 July. Available at: www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33584. See also Browne, Marjorie Ann (2005), "The United Nations and 'Gun Control'", Congressional Research Service Report for Congress, 7 April. Available at: www.usembassy.it/pdf/other/RS22108.pdf
4. UN Institute for Disarmament Research and Small Arms Survey (2004), *Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Analysis of the Reports Submitted by States in 2003*, UNIDIR/2004/25, UN, Geneva.
5. See, for example, statement of Australia at BMS 2003. Available at: disarmament2.un.org/cab/salw-2003/statements/States/Australia.pdf
6. See, in particular, statement of Belgium at BMS 2003, available at: disarmament2.un.org/cab/salw-2003/statements/States/Belgium.pdf; and that of Mexico, available at: disarmament2.un.org/cab/salw-2003/statements/States/Mexico.pdf
7. *Small Arms Survey 2002: Counting the Human Cost*, Oxford University Press, Oxford, p. 79.



8. *Small Arms Survey 2004*, p. 175.
9. *Small Arms Survey 2004*, p. 175.
10. See, for example, Louise, Christopher (1996), *The Social Impacts of Light Weapons Availability and Proliferation*, Discussion Paper, UN Research Institute for Social Development, Geneva, p. 2; International Committee of the Red Cross (1999), *Arms Availability and the Situation of Civilians in Armed Conflict*, ICRC, Geneva; Small Arms Survey (2001), *Humanitarianism under Threat: The Humanitarian Impacts of Small Arms and Light Weapons*, Small Arms Survey, Geneva; Beasley, Ryan, Cate Buchanan and Robert Muggah (2003), *In the Line of Fire: Surveying the Perceptions of Humanitarian and Development Personnel of the Impacts of Small Arms and Light Weapons*, Centre for Humanitarian Dialogue and Small Arms Survey, Geneva; and Centre for Humanitarian Dialogue (2003), *Putting People First: Human Security Perspectives on Small Arms Availability and Misuse*, Geneva.
11. See, for example, Rothman, Emily et al. (2004), "Batterers' use of guns to threaten intimate partners", *Journal of the American Women's Medical Association*, Vol. 60, Issue 1.
12. World Health Organisation (2002), *World Report on Violence and Health*, WHO, Geneva, pp. 274–275
13. See, Farr, Vanessa and Kiflemeriam Gebre-Wold (eds.) (2002), *Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns*, BICC Brief No. 24, Bonn International Centre for Conversion, Bonn; IANSA Women's Network at: www.iansa.org/women; and Amnesty International (2005), *The Impact of Guns on Women's Lives*, Amnesty International, Oxford.
14. In the US, juveniles (age 9–17) committed nearly 10 per cent of all crime involving guns that were investigated in 1999; youth (age 18–24) committed another 34 per cent. Together, these age groups accounted for 57 per cent of all gun homicides in the US in 1998. US Bureau of Alcohol, Tobacco and Firearms (2000), *Crime Gun Trace Reports, 1999*, Washington, DC, p. 3.
15. See www.who.int/mental_health/prevention/suicide/suicideprevent/en/
16. South African civilians own 3.7 million firearms, while the police and army have 567,000. Gould, Chandre and Guy Lamb (2004), *Hide and Seek: A Report on the Southern Africa Research Programme on Small Arms and Light Weapon*, Institute for Security Studies, Pretoria.
17. **Or 17.3 million firearms if law enforcement and military institutional stockpiles and inventories are included.** See Fernandes, Rubem César et al. (2005), "Where, whose and what: Mapping small arms holdings", in: *The*



Small Arms Factor in Brazil, ISER, Rio de Janeiro. Available in English and Portuguese

18. US National Academy of Sciences (2004), *Firearms and Violence: A Critical Review*, Washington, DC. This report cites a lack of adequate data to either prove or disprove the efficacy of firearms laws—both permissive and restrictive ones.

19. Hemenway, David (2004), *Private Guns, Public Health*, University of Michigan Press, Ann Arbor, Michigan; Cukier, Wendy (2002), “More guns, more deaths”, *Medicine, Conflict and Survival*, Vol. 8, pp. 367–379. As with most rules, exceptions might exist. For example, Yemen seems to have a high rate of firearm ownership but a moderate rate of reported gun deaths. It is possible, however, that this anomaly is due to incomplete information. See *Small Arms Survey 2003: Development Denied*, Oxford University Press, Oxford, pp. 169–189, and particularly pp. 179–180.

20. Hemenway, David and M. Miller (2000), “Firearm availability and homicide rates across 26 high-income countries”, *Journal of Trauma*, Vol. 49, Issue 6, pp. 985–988.

21. Frey, Barbara (2002), *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*, Working Paper submitted in accordance with Sub-Commission decisions 2001/120, para. 46.

22. The estimated figures for annual US gun theft alone are 500,000–1,820,000. *Small Arms Survey 2004*, pp. 60–61.

23. Chetty, Robert, ed. (2000), *Firearm Use and Distribution in South Africa*, National Crime Prevention Centre, Firearms Programme, Pretoria, p. 45.

24. Gould (2004), *Hide and Seek*, p. 200.

25. Francis, Geoffrey (1995), “Illicit firearms in Canada: Sources, smuggling and trends”, *Royal Canadian Mounted Police Gazette*, Vol. 57, Issue 2, pp. 22–24

26. In the first eight months of 2003, Mexican officials reportedly asked the US government to trace more than 17,000 US-origin guns recovered from crimes in Mexico. Grillo, Ioan (2003), “Illegal arms pervasive in Mexico and most obtained from the US”, *Houston Chronicle*, 12 October 2003.

27. Organisation of American States (2002), *Evaluation of Progress in Drug Control 2000–2002*, OAS, Mexico, p. 8.

28. Botswana does not issue handgun licences to individuals; the only people who can possess and carry firearms are serving members of the police and defence force. Hunters are subject to strict control, with only 400 li-



censes issued annually, by lottery—200 for shotguns and 200 for rifles.

29. Gun Control Alliance (South Africa), *Facts and Figures—Botswana: A Lesson for South Africa*. Available at: www.gca.org.za/facts/briefs/09botswana.htm

30. UN Commission on Crime Prevention and Criminal Justice, Sixth Session (1997). The resolution was sponsored by Angola, Australia, Botswana, Brazil, Brunei, Burundi, Canada, Colombia, Croatia, Fiji, France, Gambia, Germany, Greece, Haiti, Italy, Japan, Lesotho, Malaysia, Mexico, Morocco, the Netherlands, the Philippines, Poland, Qatar, South Korea, Romania, the Russian Federation, Saudi Arabia, Sweden, Tanzania, Thailand, and Tunisia.

31. *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons*. Available at: www.smallarmssurvey.org/source_documents/Regional

32. South Pacific Chiefs of Police Conference and Oceania Customs Organisation (2000), *Towards a Common Approach to Weapons Control* (“Nadi Framework”), Nadi, 10 March. Available at: www.smallarmssurvey.org/source_documents/Regional

33. OAS (2003), *Andean Plan to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, OAS Decision 552, 25 June 2003. Available at: www.comunidadandina.org/normativa/dec/D552.htm

34. The countries that negotiated the agreement are Burundi, the Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Seychelles, Sudan, Tanzania, and Uganda. For the text of the agreement, see www.saferfrica.org/DocumentsCentre/NAIROBI-Protocol.asp

35. On Cambodia, see the European Union’s Assistance on Curbing Small Arms and Light Weapons in the Kingdom of Cambodia (EU ASAC) at: www.eu-asac.org/and_cambodia/cambodia_small_arms.html; on Sierra Leone, see www.undp.org/bcpr/smallarms/docs/proj_sierraleone.pdf

36. Based on Zimring, Franklin (1991), “Firearms, violence and public policy”, *Scientific American*, November, pp. 24–30.

37. Cukier, Wendy et al. (2003), *Emerging Global Norms in the Regulation of Civilian Possession of Small Arms*, SAFER-Net, Toronto (updated in 2004).

38. South Africa, Firearms Control Act (No.60 of 2000), Section 140.

39. Villaveces, Andres et al. (2000), “Effect of a ban on carrying firearms on homicide rates in two Colombian cities”, *Journal of the American Medical Association*, Vol. 283, pp. 1205–1209.

40. Canada, Firearms Act (1995), chap. 39. Available at: www.laws.justice.

gc.ca/en/F-11.6/59627.html

41. Hemenway, David et al. (2002), “Firearm availability and female homicide victimization rates across 25 populous high-income countries”, *Journal of the American Medical Women’s Association*, Vol. 57, pp. 100–104.

42. Richardson, Vigdor, Elizabeth and James Mercy (2002), “Disarming batterers: The impact of domestic violence firearm laws”, in Jens, Ludwig and Philip Cook (eds.), *Evaluating Gun Policy: Effects on Crime and Violence*, Brookings Institution, Washington, DC. However, the commission of a violent misdemeanour does not always result in the abuser’s guns being surrendered.

43. South Africa, Firearms Control Act, chap. 5: Competency Certificate, sec. 9 (5) (a) and (b).

44. Cukier et al. (2003), *Emerging Global Norms*.
45. Cukier, Wendy (2005), *The Feasibility of a Global Ban on Civilian Possession of Military Assault Weapons*, Report prepared for the Small Arms Working Group of the Peacebuilding and Human Security: Development of Policy Capacity of the Voluntary Sector Project for the Canadian Peacebuilding Co-ordinating Committee.

46. Cukier (2005), *The Feasibility of a Global Ban*.

47. From a public safety perspective, there is little difference between fully automatic and semi-automatic military assault. A fully automatic AK-47 fires 20 rounds in 2.4 seconds, a semi-automatic Norinco AK-47 takes 4.6 seconds. See Cukier et al. (2003), *Emerging Global Norms*.

48. UN (1998), *International Study on Firearm Regulation*, p. 33. Available at: www.uncjin.org/Statistics/firearms

49. UN (1998), *International Study on Firearm Regulation*.

50. The law mandates that only personalised handguns will be available for purchase *three years* after they become commercially available. See State of New Jersey (2002), “McGreevey Signs Law Requiring Childproof Handguns”, press release, December 22. Available at: www.njstatelib.org/NJLH/lh2002/govmess/ch130gov.htm. See also Eisenberg, Anne (2005), “Ready, aim, ID check: In wrong hands, gun won’t fire”, *New York Times*, 6 January.

51. This information was taken from SAFER-Net country profiles for Australia, Austria, Germany, India, and Japan. Available at: www.ryerson.ca/SAFER-Net

52. SAFER-Net (2001, last update), country profile: Mexico. Available at: www.ryerson.ca/SAFER-Net. Accessed 10 March 2004.

53. SAFER-Net (2001, last update), country profile: Thailand. Available at: www.ryerson.ca/SAFER-Net. Accessed 10 March 2004.

54. Boesman, William and William Krouse (2001), *National Integrated Ballistics Information Network*. Available at: www.boozman.house.gov/Uploaded-Files/SECOND%20AMEND%20-%20Ballistic%20Fingerprinting.pdf
55. Email communication with David de Beer, project manager of the EU's Assistance on Curbing Small Arms and Light Weapons in the Kingdom of Cambodia (EU ASAC), 3 May 2005.
56. Australasian Police Ministers' Council, 10 May 1996 and 17 July 1996, Consolidated Resolutions Relating to Legislative Issues.
57. *Small Arms Survey 2004*, p. 184.
58. See UN Commission on Crime Prevention and Criminal Justice, Sixth Session (1997), *Firearm Regulation for the Purpose of Crime Prevention and Public Health and Safety: Draft Resolution II*, E/CN.15/1997/21. Available at: www.uncjin.org/Documents/6comm/21_2e.pdf
59. See, for example, UN (1997), *Report of the UN Panel of Governmental Experts on Small Arms in pursuance of GA Resolution 50/70B*, A/52/298, 27 August, p. 2.
60. WHO (2002), *World Report on Violence and Health*, p. 25.
61. In terms of gender, this trend is generally reflective of other forms of interpersonal violence as well. For example, studies show that boys are more likely than girls to carry guns to school, to have been in a fight, and to have witnessed violence outside the home. See WHO (2002), *World Report on Violence and Health*.
62. WHO (2002), pp. 274–275.
63. Jackman, Geoffrey et al. (2001), “Seeing is believing: What do boys do when they find a real gun?”, *Pediatrics*, Vol. 107, June, pp. 1247–1250.
64. *Small Arms Survey 2004*, p. 178.
65. Mathews, S. et al. (2004), “Every six hours a woman is killed by her intimate partner”: *A National Study of Female Homicide in South Africa*, Medical Research Council Policy Brief, Medical Research Council, Cape Town, pp. 1–4.
66. Mathews, S. et al. (2004), “Every six hours a woman is killed by her intimate partner”; See also “South African spouse killings epidemic.” May 24, 2005. Available at: www.cnn.com/2005/WORLD/africa/05/24/wife.killings.reut/?section=cnn_world
67. See, for example, Hemenway, David et al (2002) , “Firearm availability and female homicide victimization rates across 25 populous high-income countries”, *Journal of the American Medical Women's Association*, Vol. 57, pp. 100–104; See also the WHO Multi-Country Study on Women's Health and Domestic Violence against Women. Available at: www.who.int/gender/vi-

olence/multicountry/en/

68. Amnesty International (2004), *Lives blown away: Crimes against women in times of conflict*. Amnesty International Publications, London, p. 1. Available at: web.amnesty.org/library/Index/ENGACT770752004

69. See Rothman, Emily et al (2005), “Batterers” use of guns to threaten intimate partners”, *Journal of the American Women’s Medical Association*, pp. 62–68.

70. Walsh S. and David Hemenway (2005), “Intimate partner violence: Homicides followed by suicides in Kentucky”, *Journal of the Kentucky Medical Association*, Vol. 103, pp. 667–670.

71. The literature suggests that the biological differences between boys and girls affect their health and development in a more limited way than differences due to gender socialisation. See Barker, Gary (2000), *What About Boys? A Literature Review on the Health and Development of Adolescent Boys*, Department of Child and Adolescent Health, WHO, Geneva; Enloe, C. (1998), “All the men are in the militias, all the women are victims: The politics of masculinity and femininity in nationalist wars”, in L. Lorentzen and J. Turpin (eds.), *The Women and War Reader*, New York University Press, New York and London, pp. 50–62; Goldstein, J (2001), *War and Gender*, Cambridge University Press, Cambridge.

72. Barker, Gary and Christine Ricardo (2005), *Young Men and the Construction of Masculinity in sub-Saharan Africa: Implications for HIV/AIDS, Conflict and Violence*, Background document prepared for the World Bank.

73. Cheng, T et al (2003), “Community norms on toy guns”, *Pediatrics*, Vol. 111, Issue 1, January, pp. 75–79.

74. Jackman, G.A. et al (2001).

75. Dowdney, Luke (2005), *Neither War nor Peace: International Comparisons of Children and Youth in Organised Armed Violence*. IANSA, ISER, Viva Rio. Available at: www.coav.org.br

76. Connell, R (1985), “Masculinity, violence and war”, in P. Patton and R. Poole (eds.), *War/Masculinity*, Intervention Publications, Sydney; Myrntinen, H. (2003), “Disarming masculinities”, *Disarmament Forum*, UNIDIR, Vol. 4, pp. 37–46.

77. Connell, R (2000), *The Men and the Boys*, Allen & Unwin, Sydney, pp. 213–214.

78. Mazali, Rela, “The gun on the kitchen table: The sexist subtext of private policing in Israel”, in the forthcoming UN University and Swisspeace book on gender perspectives on small arms and light weapons availability



and misuse.

79. Connell, R (2000), *The Men and the Boys*; see also Dolan, Chris (2003), “Collapsing masculinities and weak states—a case study of northern Uganda”, in: Francis Cleaver (ed.), *Masculinities Matter!*, Zed Books, London and New York.

80. Barker, Gary (2005), *Dying to Be Men*.

81. See www.engenderhealth.org/ia/wwm/pdf/map-sa.pdf

82. See www.promundo.org.br

83. See www.whiteribbon.ca

84. See www.millionmommarch.org

85. See www.womeninblack.net

86. See www.marwopnet.org

87. Jessica Galeria, interviews with young women aged 14-21, Complexo da Maré, Rio de Janeiro, January 2004.

88. Data from DATASUS (2000), Brazilian Ministry of Health database, analysed by ISER for “Choose Gun Free! It’s Your Weapon or Me” campaign documents.

89. One man killed 35 people and wounded another 17 with two high-powered semi-automatic rifles—a .223 calibre AR-15 and a .308 calibre FN-FAL.

90. A 1999 study of intimate femicide in Australia between 1989 and 1998 shows that guns were used in 23.3 per cent of cases, with knives and sharp objects being used 36.6 per cent of the time. Mouzos, Jenny (1999), *Femicide: The Killing of Women in Australia, 1989–1998*, Australian Institute of Criminology, Canberra.

91. Mouzos, Jenny and Catherine Rushforth (2003), “Firearm related deaths in Australia, 1991–2001”, *Trends and Issues in Crime and Criminal Justice*, Vol. 269, November, Australian Institute of Criminology, Canberra.

92. Thusi, Thokozani (2004), “Learning from Sierra Leone”, Institute for Security Studies Monograph No. 98, chap. 3. Available at: www.iss.co.za/pubs/Monographs/No98/Chap3.htm

93. These figures are reported in Mazurana, D. et al. (2002), “Girls in fighting forces and groups: Their recruitment, participation, demobilization and reintegration”, *Peace and Conflict*, Vol. 8, Issue 2, pp. 97-123. A more recent study notes that “the number of women combatants has not been tallied” and these figures could not be supplied by the National Commission on DDR. See Miller, Derek and Daniel Ladouceur (2005), *From research to road-*





Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*

David I. Caplan** and Sue Wimmershoff-Caplan***

This article examines the right to use deadly force against home invaders, and how that right was eroded in the late twentieth century by two forces: 1. postmodernism, a nihilistic anti-philosophy which bemoaned social order and celebrated criminality; and 2. the Model Penal Code, whose legal reforms forced crime victims, even in the home, carefully to calibrate their responses to home invaders. The article argues that an absolute right of home defense was clearly recognized by the common law. The article provides the most detailed scholarly exposition ever published of the root cases of the common law right of home defense, and of how those cases controlled common law treatment of the subject, even in the twentieth century. The authors also point out the parallels between the common law right of home defense and Jewish law on the same subject, as set forth the Book of Exodus, and as elaborated by rabbinic commentators. Tracing the influence of the common law in the American colonies and then the American republic, the authors argue that the Fourth and Fifth Amendments to the U.S. Constitution incorporate the protection of an absolute right of home defense. This is an edited version of an article which originally appeared in volume 73, number 4 of the UMKC Law Review (Summer 2005) in a symposium issue, "Armed Standoff: The Impasse in Gun Legislation and Litigation."

Keywords: justification, Model Penal Code, post-modernism, home defense, Fourth Amendment, Fifth Amendment

I. PROLOGUE

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter.





not enter; all his force dares not cross the threshold of the ruined tenement!¹

A law-abiding woman living alone is suddenly awakened and confronted in her bedroom by a serial rapist. She reaches for her pistol only to find it locked and unloaded as state law requires. She is raped and stabbed. Finally the rapist leaves. The woman manages to dial 911, but bleeds to death on her bedroom floor.

Suppose that, contrary to the state law, she had kept a loaded firearm in her nightstand, resisted the rapist, and shot and killed him when he turned his back to her. She could then face conviction under firearm control laws for having illegally possessed the firearm. She would also face prosecution for using force that was not “immediately necessary for the purpose of protecting [herself] against the use of unlawful force by [the rapist] on the present occasion.”²

How did the criminal law deviate so far from the common law that even a freed medieval serf³ had greater rights to possession of personal arms for self defense than many Americans today? Does the United States Constitution have room for state laws that casually impose legal demands for human sacrifice upon totally blameless crime victims? Do such laws “shock the conscience”⁴ and cry out for a federal remedy?

To answer these questions, one must mine seven centuries of English common law to excavate the fundamental principles undergirding the law of self-defense in the home. For hundreds of years, judges in England and the United States were well grounded in the castle doctrine. Its precepts were the touchstones for which common law jurists consciously or reflexively reached in cases involving the special status of home defense.

In the face of seven centuries of entrenched common law experience, postmodernists, in the moral torpor of deconstructionism,⁵ have subverted the fundamental principles that had previously assured the home as a complete sanctuary and fortress against criminal attack. Postmodern legal deconstructionism became fashionable in the last third of the twentieth century, and spurred many states to embrace Model Penal Code (“MPC”) type departures from the common law. Those withdrawals from the common law and American colonial law heritage shook the foundations of, and all but demolished, that sanctuary.





At the time of the framing of the United States Constitution, all common law authorities upheld the unvarnished, absolute, unqualified right to keep arms in the house for home defense against thieves and stranger-intruders.⁶ This Article shows how and why this right is inextricably enmeshed with the home privacy castle doctrine.⁷ The castle doctrine and the right to have arms to defend that sanctuary are “fundamental” and “implicit in the concept of ordered liberty” as described in *Palko v. Connecticut*.⁸ Consequently, these are bedrock fundamental rights that are embedded in the core of the Fourth Amendment and substantive due process of law.⁹ The due process clauses of the Fifth and Fourteenth Amendments protect these rights, as they stood at the time of the framing, from deprivations, infringements, erosion, or chilling by either the federal or the state governments—whether by legislative, executive, or judicial acts or decrees.¹⁰ In a variety of contexts, the U.S. Supreme Court has held that the common law at the time of the framing of the United States Constitution sets minimum standards for Fourth Amendment privacy rights.¹¹ This Article also illustrates that, while in the last half of the twentieth century the United States Supreme Court was actively elaborating upon the umbras and penumbras¹² that emanate from the absolute home-castle-privacy doctrine, the Model Penal Code,¹³ as well as similar caselaw and statutes, were actively dismantling and undermining the very foundations of the Court’s home-privacy umbras and penumbras. Post-Hurricane Katrina the country has reaped the whirlwind of that dismantling and undermining in the total disintegration of human dignity to say nothing of individual human rights. The chaos, anarchy and barbarism that attend the collapse of civilization followed.¹⁴

II. THE ROOTS OF PRIVACY: THE CASTLE DOCTRINE

A. The Fourth Amendment, the Payton Decision, and the Titanic Influence of Lord Coke on American Law

1. Constitutional Importance of the Legal Training of Colonial Lawyers in England and of the Contents of Colonial Libraries

The U.S. Supreme Court’s leading decision in *Payton v. New York*¹⁵ was a capstone of seven hundred years of legal evolution, stretching from the present all the way back to fourteenth century precedents.





In *Payton*, the Court traced the roots of the Fourth Amendment classic home privacy rights.

A prime consideration of the *Payton* Court was the long radiance emanating from the castle doctrine, fructifying the original individual rights and freedoms articulated in the common law at least as early as the fourteenth century. These rights were firmly embedded in American law at the time of the framing of the U.S. Constitution.

American pre-revolutionary common law of course derives wholesale from England. An eminent array of colonial lawyers were trained in British common law, which was the legal system transported to the colonies.

Between 1760 and the American Revolution, more than one hundred colonial lawyers were admitted to the Inns of Court in London;¹⁶ several of them later attended the 1787 constitutional convention and signed the Constitution.¹⁷ These delegates included John Rutledge, “one of the most influential at the Constitutional Convention.”¹⁸ The English legal education—comprising case reports and common law treatises—of these colonial lawyers, who later became the Founders and the participants in the 1787-1788 debate on ratification, informs our understanding of their legal outlooks and mindsets.

The *Payton* Court reviewed the contents of colonial libraries and the authorities used by colonial courts. Quoting a work by the noted legal historian and constitutional law authority A. E. Dick Howard as the source of its information, the Court noted that a study of the contents of approximately one hundred private libraries in colonial Virginia revealed that “the most common law title found in these libraries was Coke’s *Reports*.”¹⁹ The Court also utilized a second study mentioned by Howard, by Rodney L. Mott, which revealed that “of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791,²⁰ Coke’s *Institutes*,²¹ were located in twenty-seven of the forty-seven libraries. It was by far the most common treatise on law or politics found in these colonial libraries.²² The *Payton* Court further noted that the second most common title, Grotius’ *War and Peace*, was a poor second; it was found in only sixteen of the libraries.²³ Even Locke’s *Two Treatises of Government* appeared in only thirteen libraries.²⁴

The Mott study alluded to in the *Payton* opinion,²⁵ indicated



that Dalton's *Country Justice*²⁶ was second in the list of common law treatises. Dalton's work was in thirteen of the inventoried colonial libraries,²⁷ not far behind Grotius' *War and Peace*, which was not a common law treatise. Dalton's *Justice* enjoyed more than twenty editions in the course of the seventeenth and eighteenth centuries; the Massachusetts General Court ordered two copies in 1647.²⁸ The authority that colonial courts cited the most often was Coke's *Institutes*.²⁹ Other works cited by these courts included Bacon's 1786 *Abridgment*,³⁰ Viner's 1741-1743 *Abridgment*,³¹ Rolle's 1668 *Abridgment*,³² Brooke's 1586 *Abridgment*,³³ Hawkins's 1728 *Abridgment*,³⁴ and Blackstone's 1765-1769 *Commentaries*.³⁵ Hawkins's *Abridgment*, as its title implies, was a two-volume summary of Hawkins' earlier two-volume *A Treatise of the Pleas of the Crown*.³⁶ *Hawkins's Treatise* was inventoried in colonial libraries such as the Newport, Rhode Island, Public Library (1750 inventory), the 1757 catalogue of the Library Company of Philadelphia, and the 1764 catalog of books listed in the Laws of the Redwood Library Company. It was in the library of John Adams³⁷ (1790 inventory). Hawkins' *Treatise* was advertised for sale by the Boston bookseller Henry Knox in his 1773 catalog of imported books.³⁸ Hawkins's *Pleas of the Crown* was in the curriculum of law courses given in several law offices prior to the framing of the United States Constitution.³⁹

In addition to the foregoing, the 1757 catalogue of the Library Company of Philadelphia⁴⁰ included a copy of Hale's two-volume treatise *History of the Pleas of the Crown*,⁴¹ and the 1790 inventory of the Library of John Adams⁴² indicated that Adams had two copies of this work. A study of private colonial libraries in Virginia revealed that the second-most frequently found volume of reports was that of Sir George Croke.⁴³ Croke's reports of *Cook's Case*⁴⁴ and of *Cooper's Case*⁴⁵ are conspicuous in American understanding of the castle doctrine at the time of the framing of the U.S. Constitution.⁴⁶ Pre-1787 Americans studied *Pulton's De Pace Regis et Regni*⁴⁷ which Yale College listed in its 1743 catalogue.⁴⁸

The colonial legal profession also resorted to *Foster's Crown Law*,⁴⁹ and *Burn's Justice of the Peace*,⁵⁰ all of which were comprehensive treatises on criminal law. Colonial lawyers following Coke's advice were conversant with the following early additional works among others strongly endorsed by him: Fitzherbert's *Abridgment*,⁵¹ and two works

by William Staunford.⁵² Coke advocated that familiarity with Staunford and Fitzherbert, “are most necessary and of greatest Authority and Excellency in penetrating the common law.”⁵³ Colonial lawyers also studied *Lambard’s Eirenarcha*⁵⁴ if they followed Blackstone’s recommendation.⁵⁵

2. Titanic Influence of Lord Coke on American Law

Edward Coke is the colossus of the common law. The commanding prominence of Coke’s works in both colonial libraries and colonial decisions was appreciated by the *Payton* Court. *Payton* gave great, if not conclusive, weight to Coke. Coke was “widely recognized by the American colonists ‘as the greatest authority of his time on the laws of England,’” proclaimed the *Payton* Court.⁵⁶ The views on privacy expressed by Coke as well as works mentioned in the Mott study, and the views of additional common law authors available to the Framers of the U.S. Constitution will be explored in this Article.

Most eminent common law authorities who wrote within a century after Coke’s *Institutes* copied and published his words nearly verbatim. These additional commentators were in concordance with Coke’s views on the castle doctrine, many of them embellishing upon, clarifying, and explaining the reasons for his views.

The protean influence of Coke upon the Framers is obvious from the omnipresence of his *Institutes and Reports* in colonial libraries.⁵⁷ It is clear as well from the extensive deference of treatise writers to Coke’s works.⁵⁸ This influence cannot be overestimated. His prodigious case reports and commentaries had seminal importance in informing and shaping the thinking of Englishmen on both sides of the Atlantic.⁵⁹ A 2004 accolade typifies the monumental esteem accorded Coke and his accomplishments to this day:

He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurispudent to whose writings one turns for a statement of what the common law held on any given topic. His discussion of a phrase from Magna Carta,⁶⁰ *nisi legem terrae*,⁶¹ is one of the earliest commentaries to give a deeply constitutional resonance to the phrase “due process of law.” For his defense of liberties and property rights, for his assertion of judicial



independence, for his active, careful role in adjusting law to the demands of litigants and the interests of society, few figures have deserved more honor.⁶²

3. The Fourth Amendment, *Payton* and Lord Coke's Four Root Castle Doctrine Cases

The bedrock of the Fourth Amendment was inspected by the *Payton*⁶³ Court. The common law castle doctrine is that bedrock.

The American castle doctrine was founded upon a portion of Coke's report of a 1603 decision, *Semayne's Case*.⁶⁴ *Semayne*, in turn, relied upon four root fourteenth century common law cases. These were originally reported in Law French, the legal parlance in England in the medieval era.

A half-century earlier than Coke, the first three cases had been singled out as core cases and highlighted by William Staunford, a scholar and jurist who wrote in Law French. Coke praised Staunford's work as "most necessary and of greatest Authority and Excellency."⁶⁵ In his treatise on criminal law,⁶⁶ originally published in 1557, Staunford discussed the security aspect of the castle doctrine and the individual right one's home as one's castle.⁶⁷ After reciting and discussing the facts of the first three root cases referred to by Coke, Staunford recorded the portentous *maxim*: "ma meson est a moy come mon castel [my house is to me like a castle]"⁶⁸ which has echoed and reverberated down seven centuries in an unbroken line.

The *Payton* Court quoted from and again confirmed the place of *Semayne's* case in the American Constitutional scheme.

Thus, in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603), the court stated: "That the house of every one is to him as his castle and fortress, *as well for his defense against injury and violence*, as for his repose; . . . and the reason of all this is, because domus sua cuique est tutissimum refugium."⁶⁹

The *Payton* Court reconfirmed that the castle doctrine is part and parcel of ordered liberty in American law:

The common-law sources display sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that





a “man’s house is his castle,” made it abundantly clear that both in England and in the Colonies “the freedom of one’s house” was one of the most vital elements of English liberty.⁷⁰

In support of the castle doctrine, the *Payton* Court also invoked John Adams, the eminent colonial lawyer, jurist, and founder:

“Now one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle.”

This Article will discuss the four root castle doctrine cases cited in the *Payton* decision⁷¹ which constitutes the original taproot from which the castle doctrine with all of its branches burgeoned. The cases will be discussed in the following order:

- (1) 3 E. 3. Coron. 305, also known as F. Coron 305 (1330);⁷²
- (2) 3 E. 3. Coron. 3305, also known as F. Coron 330 (1330);⁷³
- (3) Y.B. 26 Ass. Pl. 23 (1353);⁷⁴
- (4) 21 H. 7. 39 (1499).⁷⁵

These four cases are the ur-text for the castle doctrine. They are constantly cited by case reports, scholars, and other common law authorities, both before and after the framing of the U.S. Constitution. Legal authorities continue to cite them as controlling on the subject of using force, especially deadly force, in defense of habitation.

B. Coke’s Root Castle Doctrine Cases

1. The Castle Doctrine: Coke’s First Root Case

Coke’s first root case, decided in 1330, has been translated by a modern authority as follows: “It was presented that a man killed another in self-defense in his own house. It was asked [by the court] whether the man who was killed had come to rob the householder, for in such a case a man may kill even if it is not [necessary] in self-defense.”⁷⁶

In this first root case, the English court articulated the unqualified sanctity of and privacy in, the home by holding, as a modern au-





thority states: “The owner of a house may lawfully kill one [a thief] who enters the house to rob him.”⁷⁷ From then on, if not earlier, the common law would not allow juries or judges to second-guess the householder in the throes of an alarm precipitated by a housebreaker.⁷⁸

The first root case also demonstrates that the key threshold question was whether it appeared to the householder that the intruder “had come there to rob the householder.”⁷⁹ If robbery appeared to the householder to be the housebreaker’s intent, then “in such a case a man may kill even if it is not [necessary] in self-defense.”⁸⁰ Coke’s interpretation of the second and third root cases, which is equally applicable to the first, is definitive.⁸¹ “He who kills a man *se defendendo* [in self-defense] . . . by the common law shall forfeit his goods: but he who kills one that would rob him and spoil him in his house shall forfeit nothing.”⁸²

The first root common law case was such a mother-lode of common law that it was cited directly or indirectly as controlling in practically all major common law criminal law commentaries prior to the framing of the Constitution.⁸³

2. Coke’s Second Root Case on the Unrestricted Right to Home Privacy

The second of the four root cases, 3 E. 3 Coron. 330,⁸⁴ cited in *Payton*,⁸⁵ translated from the Law French reads:

It was presented that thieves entered a man’s house intending to rob him. The servant of the house killed one of the thieves and cut off his head. [Judge] Louth said that the servant did well and that he would receive from the law nothing but good; for even though he should be arraigned of the killing, if the facts were found as stated he would be acquitted by judgment.⁸⁶

This case again illustrates that the common law’s urgency that housebreakers be disabled. A householder’s slaying of home-breakers removed a “threat to the entire community.”⁸⁷ The householder had no way of knowing if the housebreaker was armed or not. The common law supported the use of deadly force to terminate the crime. The occupant was urged to resist the housebreakers, whether



or not it appeared on the spot or after the fact that the offender was armed.⁸⁸ The second root case was also cited as controlling law in most common law commentaries prior to the framing of the U.S. Constitution.⁸⁹

3. Attempted Home Attack: Deadly Force Right Absolute to Thwart Home Invasions Confirmed in Coke's Third Root Privacy Case and Commentaries and in Other Common Law Authorities

The third root case,⁹⁰ decided in 1353, translated from the Law French,⁹¹ completely supported a householder's rushing out of his home to dispatch someone who was attempting to, but had not yet, set his home afire. The court laid down the absolute right to use deadly force against an attempted arsonist. That protective right safeguarded the home and simultaneously spared society from house burnings that could ignite community-wide conflagrations. This third root case was also seminal; most common law scholars prior to the framing of the Constitution relied upon it.⁹²

The absolute, unqualified right of householders to protect home privacy against attempting house intruders was confirmed by Parliament in a 1532 statute. The statute, passed to confirm existing common law, emphasized that attempts at housebreaking were intolerable:

[I]f any evil disposed person or persons do attempt feloniously to rob or murder any person or persons . . . in their . . . dwelling places, or . . . do feloniously attempt to break any dwelling house, . . . should happen . . . to be slain by him or them that the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house which the same evil doers should attempt burglary to break [and] if the said person so happening in such cases to slay any such person, so attempting to commit such murder or burglary . . . be indicted or appealed of⁹³ or for the death of any such evil disposed person or persons, [then] the person or persons so indicted or appealed of . . . shall be thereof and for the same fully acquitted and discharged in like manner as the same person or persons should be, if he or they were



lawfully acquitted of the death of the said evil disposed person or persons.⁹⁴

On its face and as interpreted by the courts, the statute approved householders' use of deadly force against an attempting unknown intruder, even if he had not yet broken into the home.⁹⁵

Coke believed that the 1532 statute was needed to cover cases of resisting attempted burglaries and attempted highway robberies because the actual events could appear murky to the fact-finder.⁹⁶ Other authorities, including Hale, Lambard, and Dalton, maintained that the statute was necessary to clarify the law concerning attempted highway robbery but not attempted burglary, as they considered the latter issue settled.⁹⁷ They opined that Coke's third root case had already justified the use of deadly force to resist an attempted attack on the home.⁹⁸

Numerous common law authorities cited the 1532 statute as controlling⁹⁹ and merely declaratory (in affirmation) of the common law.¹⁰⁰ As late as its 1964 edition, the standard text *Russell on Crime*, concerning justifiable homicide continued to utilize the following language: "In these cases, he is not obliged to retreat, and *may not merely resist the attack where he stands, but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable.*"¹⁰¹ Astoundingly, Russell's language nearly identically tracks, the 1532 statute's wording "so happening in such cases to slay . . . reflecting over four centuries of unbroken common law precedent."¹⁰² This ingrained common law standard for self-defense in the home remained the law of England until 1967.¹⁰

4. Defending the Castle with Armed Family and Friends: Coke's Fourth Root Case

The fourth root case, relied upon by Coke and the U.S. Supreme Court in *Payton*, was originally decided in 1499 and reported in 1506.¹⁰⁴ This case endorses a householder gathering armed friends and neighbors at his home to meet a threat of simple assault, even if the threat is from a known person and at a future time. *Semayne's Case* as cited by *Payton* confirmed armed home defense. An authoritative translation reads:





If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man's house is his castle and defense, and where he has a peculiar [special] right to stay.¹⁰⁵

This case protected the right of a householder to gather family, neighbors and friends in the home for defense, even upon merely hearing of a possible future intrusion.¹⁰⁶ The fourth root case was fundamental for home defense and was cited in most all law books relied upon by the American colonists as a controlling authority in the common law.¹⁰⁷

Coke interpreted the fourth root case as supporting the right to keep arms in the house for home defense as part and parcel of the castle doctrine:

And yet in some cases a man may not only use force and arms, but assemble company also. As any man may assemble his friends and neighbors, to keep his house against those that come to rob him, or kill him, or to offer violence in it, and is by construction excepted out of this Act [the 1328 Statute of Northhampton]¹⁰⁸ . . . for a man's house is his castle, & domus sua cuique est tutissimum refugium;¹⁰⁹ for where shall a man be safe, if it be not in his house?

Arma in armatos sumere jura sinunt. [And the laws allow arms to be taken against an armed foe.]¹¹⁰

But he cannot assemble force, though he be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this Act [the Statute of Northhampton].¹¹¹

Coke cites in the margin of this passage, *inter alia*, the first, second, and third root cases discussed above, demonstrating the inher-





ent linkage and consequent identity between the right to use force in defending one's home and the right to keep arms suitable for that purpose.¹¹² The fourth root case, along with Coke's comments on it, corroborates that when the common law speaks of "safeguarding" a person, the safety measure is not limited to using bare hands but includes having and using arms as well.

C. Public Policies Underpinning the Root Castle Doctrine Cases

1. The Castle Doctrine Philosophy

A man's house is his fortress for peace, privacy and quite repose. This common law philosophy, which underpins the four root cases, is a maxim robust and vital from the medieval to post-modern eras. Without this basic building block of civilization, it is easy to get lost in well-intentioned platitudes that result in the pictures described in the Prologue and which traumatized the United States in the aftermath of Hurricane Katrina.¹¹³

All legal systems have underlying assumptions generalizing the types of human behavior society seeks to prevent and which if overtly performed, punish.¹¹⁴ The Common law system was simply a human attempt to control behavior with language, and to compel obedience.¹¹⁵ "English common law rested upon broad principles just described. It is a refraction of the struggle to achieve social ends; the satisfaction of social desires."¹¹⁶ Blackstone's work was one of the main "conduits"¹¹⁷ through which the English criminal law took root in American jurisprudence. Blackstone was greatly influenced by natural law.¹¹⁸

John Locke, the father of "Liberalism," was a foremost synthesizer and popularizer of natural law:¹¹⁹

And that all men may be restrained from invading others' rights and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, . . . would . . . be in vain. If there were nobody [who] . . . had a power to execute that law, and thereby preserve the innocent and restrain offenders.¹²⁰

This elementary, first and foremost responsibility of govern-





ment is to protect the innocent from criminal attack, *i.e.*, “keep the peace,” without which “any system of law or government becomes untenable and impossible.”¹²¹ Government’s first and most important welfare program is to secure the physical survival of its members.¹²² The government takes to itself the punishment and takes it out of the hands of the relative of the accused, as was primitive practice:

[B]y the right he hath to preserve man-kind in general, may restrain, or, where it is necessary, destroy things noxious to them, and so may bring such evil on any one who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and by his example others, form doing the like mischief.¹²³

The common law’s objective was to line up all its presumptions in favor of civilized society, the body politic. A stranger intruder was considered by natural law to be an attacker of society because:

a thief . . . I may kill, when he sets on to rob me but of my horse or coat; because the law which was made for my preservation where it cannot interpose to secure my life from present force, which if lost is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want to a common judge with authority puts all men in a state of nature; force without right upon a man’s person, makes a state of war, both where is, and is not, a common judge.¹²⁴

Unfortunately the United States has recently undergone a graphic relearning of the verities of Locke’s natural law insights. Even without criminal mayhem, a crime-terrified citizenry cowering behind triple locked doors and windows, cannot be happy, free, or assets to themselves and the community at large. They cannot exercise their constitutional rights. A terrified public flees the source of their terror, leaving behind blight, decay and neglect. Even one stranger intruder into a home is a broken window of the edifice of





civilization, a chink in the levee that the common law was hyper-vigilant about eliminating on-the-spot.

The common law judges were not cavemen. The common law, matured and mellowed over seven centuries was keen on protecting ordinary citizens, and was ever conscious, as many persons are now, post-Katrina, that thugs and brigands must be given no quarter, the veneer of civilization being extremely thin.¹²⁵ In twenty-first century United States many efforts to curtail criminality have been met with deconstructionist-inspired objections¹²⁶ that keeping the peace, either by private citizens or the government, stanches social change, is a reversal of progress, is anti-American and anti-civil rights,¹²⁷ or is impossible.

There were reports that a little girl had her throat cut in the aftermath of anarchy following Hurricane Katrina; another was reportedly raped on the floor of the New Orleans Superdome.¹²⁸ The legal philosophical question presented is whether the law will see such crimes from the perspective of the slasher and rapist or from the viewpoint of the child victims bleeding and dying on the New Orleans Superdome floor. This is the basic legal issue the common law wrestled with. To borrow a phrase from the medieval Jewish scholar Hillel, everything else is commentary. It is true that the slasher and rapist themselves were likely an abandoned children growing up in a crack house, possibly raped and surely brutalized themselves. Yet, should such a scarred and pitiable life context shift the law's viewpoint from the victim to that of the attacker? The answer to that question has to be no, if standards of humanity are to be maintained. It is of course repulsive to have to execute or sentence to long prison terms, young persons in the prime of life who never had any of life's advantages or even humane treatment. The sheer waste of human potential is staggering. Until recently the law has not been concerned with what disposition will make the academic and the legal profession comfortable; it is about what needs to be done so the Superdome horrors are not repeated. Perhaps the common law solutions are harsh; however the New Orleans experience shows that they are only time-tested proven solutions available today.

The common law has been criticized for legitimizing vengeance and being retrograde, bloodthirsty, ridiculous and racist. Yet, when the above stated horrific criminality is kept firmly in mind, it is ob-





vious the classic common law rules are the only safeguards for the preservation of civilization for the progeny of today's populace.

2. Housebreaker as a Mortal Threat to Occupant and to Civilized Society

Coke's four root castle doctrine cases were templates for the common law's canonization of the home's special status as an absolute refuge, retreat, and safe haven from criminal attacks by intruding strangers. Coke stated:

As if a thief offer to rob or murder B . . . in his house, and thereupon assault him, and B defend himself . . . in his house, and thereupon assault him, and he defends himself; [and] kills the thief, this is not felony.¹²⁹

Coke employed the term "thief" in a "broadened sense as a synonym for scoundrel."¹³⁰ The common law conclusively and automatically presumed that an unknown intruder intended from the beginning of his act of breaking-in, that if confronted he would kill the occupant in order to consummate his crime.¹³¹ A stranger, housebreaker was presumed to be an out-of-control robber or murderer.

Thus, in *Semayne's Case*,¹³² the court stated that "if thieves come to a man's house to rob him, or murder, and the owner . . . kill any of the thieves in defence of himself and his house, it is not felony."¹³³

Coke used the term "thieves" in connection with justifying the use of deadly force to thwart a house-thief. He apparently meant to convey the idea that the thief expected and would plan at the outset, that the instant the householder would become aware of his presence in the householder's home, she would not stand idly by but would confront him.¹³⁴ Coke demonstrates his philosophy by referring to a 1349 case, later named *Memorandum*¹³⁵ in the margin of his *Institutes*, as well as by citing the Latin version of *Exodus* 22¹³⁶ but he uses the Latin "vir" [man] rather than the fourth century Vulgate's "fur" [thief] to describe the home-breaker.¹³⁷ When the identity and intentions of any intruder was not known to the householder, the latter could lawfully presume that the former was a dangerous felon who came to rob.¹³⁸

Attempts to violate home integrity were considered a public menace, and in 1532¹³⁹ Parliament enacted a statute to confirm the





common law on attempted housebreakings:

[I]f any evil disposed person or persons do attempt feloniously to rob or murder any person or persons . . . in their . . . dwelling places, or . . . do feloniously attempt to break any dwelling house, . . . should happen . . . to be slain by him or them that the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house which the same evil doers should attempt burglarly to break [and] if the said person so happening in such cases to slay any such person, so attempting to commit such murder or burglary . . . be indicted or appealed of¹⁴⁰ or for the death of any such evil disposed person or persons, [then] the person or persons so indicted or appealed of . . . shall be thereof and for the same fully acquitted and discharged in like manner as the same person or persons should be, if he or they were lawfully acquitted of the death of the said evil disposed person or person.¹⁴¹

At the time of the framing of the United States Constitution, the common law conclusively presumed that an unknown home-breaker came to rob and could be expected to murder the householder.¹⁴²

3. Common Law Wall of Separation Between Justifiable and Excusable Homicide

a. Justifiable Homicide

Justifiable and excusable are the dichotomous classes of common law non-felonious homicide. The common law recognizes as justifiable the necessary killing of another in the performance of a legal duty, or the exercise of a legal right, where the slayer is not at fault.¹⁴³ “[I]f thieves come to a man’s house . . . and the owner . . . kill . . . any of the thieves in the defense of himself or his house it is not felony.”¹⁴⁴

In his *Institutes*, Coke described the common law ideas pertaining to justifiable homicide:

Some [justifiable homicides] without [retreating] to a wall, etc., or other inevitable cause. As if a thief offers to rob or murder B either abroad or in his house, and thereupon



assault him, and B defends himself without any giving back, and in his defense kills the thief, this is not a felony for a man shall never give way to a thief, &c.¹⁴⁵

Coke clarifies this presumption by citing the Latin version of *Exodus* 22.¹⁴⁶ As Blackstone succinctly observed, “it is clear that where I kill a thief that breaks into my house, the original default can never be upon my side.”¹⁴⁷

From 1330 on, if not earlier, the common law would not allow juries or judges to second-guess a householder in the throes of a housebreaking alarm. “Homicide is justifiable In defense of house or goods; as if I kill a man who sets my house on fire; or a thief who . . . comes to rob me.”¹⁴⁸

Announcement in plain sight of the occupant of the nature and purpose of the would-be entrant is required by the castle doctrine.¹⁴⁹ If a home-approacher did not extend this reassurance, the common law encouraged the occupant to move into position to ward off the worst possible outcome, such as by taking a firearm in hand.¹⁵⁰

Any rupture or breakage on the outside of the home, especially at the apertures, triggered the occupants’ right to use any available means, including deadly means to meet the threat. One version of the law stated that if anyone even “feloniously attempted to break any dwelling house”¹⁵¹ such touching triggered whole array of individual’s rights and also responsibilities to the community. The outhouse¹⁵² was included in the legal definition of the occupant’s premises but a detached barn was not.¹⁵³ Modern confirmation of the home sanctity and privacy has been extended to public phone booths which are not, of course, owned or rented by the user.¹⁵⁴

The castle doctrine means that the threshold of the householder may not be crossed.¹⁵⁵ This ancient right to ward off home invaders did not require the occupant to wait until the homebreaker actually put his feet across the threshold of her house before taking decisive action.¹⁵⁶ If any part of the physical body of the criminal attacker obtruded into the householder’s premises, her individual right to defend her home was clearly activated.

For instance, in a thirteenth century case an intruder made holes in several walls of an abode.¹⁵⁷ He then stuck his head through one of the openings although his feet remained outside the house. The frightened occupant was adjudicated “justified” in killing the intrud-



er. The occupant's privacy zone was off limits to all but those on the premises by invitation (guests, repair persons, delivery persons). *Payton v. New York*¹⁵⁸ reemphasized that the U.S. Supreme Court "has not simply frozen into constitutional law those . . . practices that existed at the time of the Fourth Amendment passage."¹⁵⁹ Therefore, nowadays, a "break" in the perimeter of a home would probably include cutting telephone wires or disabling a security alarm system.¹⁶⁰

No retreat in the slightest degree of any manner or description was ever prescribed for occupants facing a housebreaker by the common law. Coke declared that a person in his home did not have to "give back."¹⁶¹ That terminology means that the householder under attack was not under obligation in any way, shape or manner to accommodate the housebreaker, no matter what the housebreaker's age or condition.¹⁶² The common law's attention was riveted on the frightened, invaded householder and solely upon the invaded householder.

Abandonment of the "place of refuge" was unthinkable in common law jurisprudence.¹⁶³ In cases of a murderous though non-robbery assault in the home there was also no retreat mandate. Coke stated: "an occupant could legitimately dispatch a housebreaker" without inevitable cause.¹⁶⁴ Whatever means an occupant utilized to stop a housebreaker in his tracks were applauded by the common law which never Monday morning quarterbacked home defense. Evacuation of abode to accommodate a felonious intruder was totally unheard of:

When a man is indoors and is assaulted by persons who have no authority, he cannot [be required to] leave his house to get away from them, nor may They justify the assault . . . the law wills that every man shall be as safe and sound in his own house as he shall be in the king's presence.¹⁶⁵

The occupant was not expected to accommodate the threat in any fashion, but to confront it. The doctrine of no-retreat-from-the-home is another facet of the castle doctrine. Any retreat requirements in the common law were limited to situations of spontaneous domestic fights and disputes among people who were keeping company with one another and have nothing to do with the castle





doctrine as applied to home invaders. Judge Cardozo nailed it:

It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his grounds and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.¹⁶⁶

As discussed below, the MPC's squeamish "higher morality" mandating "necessity" to dispatch a stranger-intruder-housebreaker are devastating to householder's security.¹⁶⁷

A justifiable homicide was a surety against serial criminals. It was a component of citizenship and considered to be a salutary community service. The duty to arrest felons, stemming from time immemorial can also be found in a medieval book known as *Fleta*, which was probably written in the early fourteenth century. Fleta wrote:

In order that all men may enjoy sure peace, it has been enacted that all are to be ready, at the order of the sheriff and at the [hue and] cry of the countryside, to purse and arrest felons, . . . and the king will deal grievously with him who does not do this.¹⁶⁸

Hawkins elaborated on the victim's duty to her community:

As to the first Point it seems clear, That all Persons whatsoever who are present when a felony is committed, or a dangerous Wound given, are bound to apprehend the Offender, on Pain of being fined and imprisoned for their Neglect, unless they were under Age at the Time.¹⁶⁹

A person who slew a home-breaker was considered by the common law to be "an executor of the peace," by contributing to public safety, public peace, public comfort, and public convenience.¹⁷⁰

The common law always protected and stood by a householder who slew a home-breaker—the householder in such instances was "therefore to be totally acquitted and discharged, with "commendation rather than blame."¹⁷¹ A justifiable homicide protected future victims. Dispatching a violent felon was considered to be not only a prerogative of the victim but also a duty of citizenship and a wel-





come service to the community.

A 1749 American summary of justifiable homicide reads: “Homicide is justifiable In defense of house or goods; as if I kill a man who sets my house on fire; or a thief . . . comes to rob me.”¹⁷²

The views and language expressed in the American *Conductor-Generalis* track those of Staunford and Coke. Before the time of the framing of the Constitution, in addition to English treatises and caselaw known to the colonists, treatises published in America had clearly also demarcated the common law’s massive wall of separation between justifiable and excusable homicides.¹⁷³

b. Excusable Homicide—and the Two Safety Checks on the Use of Fatal Force

[A]lthough the life of man is a thing precious and favoured in law, so that although a man kills another in his defense, or kills . . . without any intent, yet it is a felony . . . for the great regard which the law has to a man’s life.¹⁷⁴

Spontaneous fights, disputes and brawls among people who associated with one another were placed by the common law in a distinctive disfavored category. The common law took a very dim view of fatalities occurring in fights and brawls.¹⁷⁵

Pure self-defense¹⁷⁶ or excusable homicide rules were totally different from those for justifiable homicide. The overriding factor in the common law’s philosophy regarding non-felonious combatants was that they were both considered to be “loyal”¹⁷⁷ and “valuable.”¹⁷⁸ They were contributing to the social order as workers, artisans, clerics or soldiers. They might have lashed out at each other in a moment of anger or be out of their right minds during and after a bout of drinking. Paramountly, they were not habitual criminals or even a first offender staging an atrocious attack—a housingbreaking. They were part and parcel of society. They were not “unconnected to society’s moral values,”¹⁷⁹ “anti-linked”¹⁸⁰ to them, or committing “fashionable”¹⁸¹ atrocities. They were not foisting chaos and criminality on the community. This bottom line relevant to any social architecture is to draw a bright line between the segment of the population which is partaking in the social order and those who are warring with it.

In medieval terms, this was recognized by pronouncing the com-





batants and incidentally deceased “true” citizens. The sovereign had “contempt”¹⁸² for the killings of his most-of-the-time responsible and productive subjects.

The common law was scrupulous, even fanatic, to preserve the lives of combatants, regardless of who or what provoked the altercation, so long as the contention was not a violent felony situation like housebreaking. No matter what degree of poverty disease, previous condition of servitude, race, ethnicity, gender, or sexual orientation of the deceased, the common law held the slayer to strict accounting.

i. The Retreat Requirement—The First Safety Rule to Prevent Excusable Homicide

The persons threatened in a brawl or fight that did not involve another felony such as housebreaking was required to retreat. He had to attempt to get out of the way or away from the threat as far as he possibly could: “Se defendendo [In pure self-defense]. This homicide is excusable . . . and he must give back as far as he can without endangering his own life.”¹⁸³

Giving back here meant to give ground or move away from the adversity. Only if he had his back to wall, or was facing a body of water, could he wield injuring force.

ii. The Second Safety Check on Excusable Homicides

In an ordinary brawl or confrontation, the killer’s escalation to deadly force had to have been necessary. The level of force used had to match the nature of the threat so that if the attacker could have been overcome by other than fatal means, the slayer would not be excused.

Even after retreating to an impediment like a wall or a ditch, the common law still did not permit the use of deadly force by brawling or simply hot-tempered combatants: “Se defendo [In pure self-defense]. This homicide is excusable, but then it must be done only upon an inevitable necessity.”¹⁸⁴

The common law required formal court applications from those who wanted to be excused from manslaughter convictions demonstrating to the court that the deadly force escalation was appropriate to the nature of the threat. The level of force used had to match the nature of the threat. It had to be for “inevitable cause.”¹⁸⁵ If





the attacker could have been overcome by other than fatal means, the slayer would not be excused and would be guilty of manslaughter. Especially if the confrontation escalated to deadly violence, the slayer would have the burden of showing the court that the fatality was absolutely necessary in self-defense. The slayer had to demonstrate to the court that the adversity could not have been tempered by any non-fatal means.

The third fundamental distinction was that even if a fatality was entitled to be excused, the slayer was obliged to make a court application to the King for a pardon. “[L]e Roy ad un home de son realme occide . . . pur ceo cause il conviant aver son charter de le Roy.”¹⁸⁶

To be released from jail, the slayer needed a pardon.¹⁸⁷ In medieval times, pardons typically came at a price, sometimes quite high, or on condition of serving in the military for a while; consequently, the king was often favorably disposed to granting pardons.

The fourth distinction was also major, and again illustrated that the philosophical separation between excusable and justifiable homicide was a difference in kind and not degree. Even though pardoned, the slayer in self-defense incurred punishment. The rationale of forfeiture was that it was compensation to the king for having lost a productive subject. This rationale, of course did not apply at all to justifiable homicides which concerned those considered to be public menaces and who were committing outrages upon society.

Frequently, the king took possession of all the homicide's lands and chattels.¹⁸⁸ No doubt the procedure helped keep the king's peace, because subjects knew that if they participated in deadly brawling, their lands and possessions might be escheated to the crown.

Most states never followed the English practice of forfeiture for excusable homicide, and by the Civil War none of them did so.¹⁸⁹ On the federal level, one of the first orders of business of the framers of the U.S. Constitution¹⁹⁰ and the first Congress¹⁹¹ was to ensure that federal forfeitures would never be enacted.

The bright line distinguishing moral culpability in “excusable” homicides as opposed to “justifiable” homicides established in English common law can be found in a contemporary dictionary. The *Shorter Oxford English Dictionary* defines “excusable homicides” as those “incurring blame, but not criminal liability because in self-de-



fence or by misadventure,” “justifiable homicides” as those “incurring neither blame nor criminal liability because in the execution of one’s duty.”¹⁹² Nevertheless, because of the abolition of forfeiture for excusable homicide early in American history, the terms “justifiable” and “excusable” have been used interchangeably.¹⁹³ Modern American criminal law discussions continually indiscriminately interchange the terms “justification” and “excuse,” thereby missing constitutionally vital and public policy distinctions. For example, a leading contemporary criminal law treatise,¹⁹⁴ citing and quoting *Exodus 22:1*,¹⁹⁵ recognizes it as the source of Western civilization’s right of householders to dispatch stranger intruders, but then proceeds to equate justification with self-defense,¹⁹⁶ thereby missing crucial distinctions having prime public policy and constitutional importance, particularly concerning home defense.

iii. Right to Have Arms in Home Suitable to Repel Attacks:
Part and Parcel of Privacy and Castle Doctrines

If a householder does not have appropriate arms for self-defense, her home hardly constitutes her “fortress,” let alone her castle for “defense against injury and violence.”¹⁹⁷ A thirteenth century decision, *Alice and Richard’s Case*, involved housebreakers coming to Alice’s house, in which Richard “killed one [and] cut off another’s head,”¹⁹⁸ indicating that he or she had previously possessed an edged weapon in the house. This case was decided in 1221, only six years after King John’s Great Charter of Liberty (1215), which presupposed that all free subjects possessed arms.¹⁹⁹ Moreover, the second root case similarly states: “The servant of the house killed one of the thieves and cut off his head.”²⁰⁰ Both cases indicate prior possession of the ordinary personal arm of the day, a sword.

Inherent in the right to use deadly force to defend one’s home, one’s castle,²⁰¹ is the right to have suitable and effective means to do so.²⁰² In modern times, effective self-defense implies a handgun; long-guns can also be very effective and likewise implied, but in some homes they may be unwieldy or awkward to use. The householder must have the discretion, since she is in the best position to judge. “[No] hand-carried weapons commonly used by individuals . . . for personal defense [can] logically be excluded from this term [‘arms’].”²⁰³

A constitutional right implies the ability to have and effectuate



that right.²⁰⁴ The well established home-defense right, which was the law when the Constitution was written, necessarily includes ordinary hand-held firearms to preserve a meaningful right. Requiring hand-held firearms to be locked away, trigger-locked, “personalized,”²⁰⁵ or requiring that ammunition be kept separately from the firearm interferes with emergency use. Constitutionally protected home defense necessarily includes keeping firearms loaded so as to be quickly available and hence effective in time of pressing need.

Even in ordinary self-defense cases not involving home defense, several state courts as well as federal circuit courts have carved out an exemption allowing convicted felons to lawfully possess a firearm on a temporary basis. Despite provisions in federal and state firearm statutes flatly prohibiting convicted-felon-possession of firearms without any exceptions,²⁰⁶ courts read an emergency exception into the statutory schemes.²⁰⁷ These cases emphasize the fundamental importance of possessing arms for self-defense, especially in the home. If courts give convicted felons an emergency privilege, then ordinary householders logically have a permanent right.²⁰⁸

D. Castle Doctrine Home Privacy Confirmed by Other Common Law Cases and Authorities

1. Presumption of Continuing Attack Underpins Leading Fourteenth Century Case’s Approval of Use of Deadly Force by Homeowner to Arrest Apparently Disengaging Felon

At common law, a householder’s right to dispatch an unknown home-breaker did not suddenly evaporate when the perpetrator seemed to disengage. In a 1349 case, later styled *Rex v. Compton*²⁰⁹ by modern scholars, the court tacitly presumed that although the culprit might appear to be leaving, if afforded the opportunity he might resume his attack or escape to prey upon others. Therefore, the court supported the victim’s use of deadly force to capture a housebreaker seeming to leave the scene. Justice Thorpe stated the law in that case as follows: “And in many other cases [such as slaying manifest felons] a man may kill another without impeachment, as if thieves come to rob him, or to burgle his house, he may safely kill them if he cannot take [capture] them.”²¹⁰ The attacker could have feigned his flight in order to gain an advantage or call upon an accomplice.





The right to use deadly force did not disappear instantaneously upon the perpetrator's appearing to flee, reappear upon his resumption of the attack, and then again instantaneously disappear upon his flight, and so forth. This decision, *inter alia*, encouraged the victim to use deadly force to capture a housebreaking felon fleeing from the scene and was considered controlling by eminent common law authorities as a case of justifiable, and not merely excusable, homicide.²¹¹

In a passage on armed robbers outside the home—which applies with even greater force to unknown housebreakers armed or unarmed, especially in the kinds of situations described in the Prologue to the present Article — Professor David Hume, Professor of Law of Scotland, Edinburgh, again writing in 1797, graphically described the issues facing the victim in such cases:

But it were quite unreasonable to exact the same temperance [as in pure self-defense] and moderamen tutelæ [moderation of defense]²¹² There is in such a case no manner of possible or imputable wrong on the part of the person assailed, for which he should make amends by retreating: In duty to himself, he is rather called on, instantly, and without shrinking, to stand on his defense, that the assailant may not continue to have the advantage of him, but be terrified from the farther prosecution of his felonious purpose. To what greater lengths he may carry the attempt, or what other means he may have prepared to accomplish his end He is entitled to suppose the worst of that which has been begun in so base a fashion; and, by the law of nature, has therefore [the] right to put himself in security by the only certain means, the instant slaughter of the assailant; who is no true man, that his innocent victim should contend with him on equal terms, but a great criminal,²¹³ taken in the commission of a known felony, and the fit object therefore of immediate and summary justice.

It seems also to be true . . . [and] it may even be maintained, that though the assailant give back on the resistance, yet the innocent party is not for this obliged immediately to desist, (since it may be a feigned retreat, in





order to call associates, or to renew the assault with better advantage), but may pursue and use his weapons, until he be completely out of danger.²¹⁴

Hume maintained that in justifiable homicides, the lives of attacker and victim “are not, in these circumstances, of equal value in the estimation of the law.”²¹⁵ He concluded that the victim need not expose herself to dangers occasioned by constrictive justification rules or be concerned with the welfare of attackers.²¹⁶

Another common law authority, Michael Foster, likewise flatly declared that a victim of a dangerous felony, such as of a house-breaking by an unknown invader, need not retreat. Moreover she may pursue the perpetrator until she finds herself “out of danger, and if in a conflict between them [she] happens to kill, such killing is justifiable.”²¹⁷ In such cases, Foster maintained that the right of self-defense “is founded in the law of nature, and is not nor can be superseded by any law of society;”²¹⁸ therefore, “nature and social duty cooperate,”²¹⁹ as she has a public duty to arrest the felon. If she kills him while he is leaving the scene, it is justifiable homicide.²²⁰

The common law’s design protecting householder’s use of deadly force was in no way dependent upon the sentencing practices of bygone eras. Deployment of deadly force by householders repelling intruders was not considered to be merely a precipitate consummation of the inevitable. Executions pursuant to court judgments, though more common than today, were far from preordained. Foster pointed out in 1762 that to assume the fleeing felon would receive capital punishment when caught constituted “a presumption against fact.”²²¹ Excerpting almost verbatim from Coke’s report of *Faxley’s Case*,²²² Foster’s support for the slaying of departing fleeing felons centers on the idea that dangerous criminals should not remain at large, free to continue to endanger society.²²³ After the capture and conviction, all felons were not actually punished with death at the common law even in its early stages. They could, for instance, suffer the milder punishment of “outlawry” and depart the realm with their lives, or get royal pardons by serving in the military, which occurred quite often when the Crown needed troops.²²⁴

The public policy embedded in the common law on arresting fleeing dangerous felons was cogently summarized in 1927 by the North Carolina Supreme Court: “Ordinarily the security of person





and property is not endangered by a [non-violent offender], while the safety and security of society require the speedy arrest and punishment of a [dangerous] felon.”²²⁵ The court stressed that a person attempting to arrest a dangerous felon, in order protect herself from physical harm, should not be “required, under such circumstances, to afford the accused equal opportunities with [her] in the struggle.”²²⁶ She “need not therefore engage with the felon on equal terms.”²²⁷ Earlier, the Illinois Supreme Court had similarly articulated the fundamental principle that “[t]he safety of the public is endangered while such felon is at large.”²²⁸

2. Resisting a Burglar with Deadly Force Placed on Par with an Officer’s Overcoming Resistance to Lawful Arrest

The same unrestricted power of lawful arrest by a law enforcement officer using deadly force against a resisting felon²²⁹ applied to a householder’s slaying of a housebreaker, according to another continually cited case decided in 1349²³⁰ and later titled *Memorandum* by scholars. An authoritative casebook on criminal law translated it as follows:

Where a man justifies the death of another, as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found, the justices let him go quit without the king’s pardon; it is otherwise where a man kills another by misfortune’, etc.²³¹

The case put home privacy rights on a par with the duty of the king’s officers to arrest felons. Dispatching an overt criminal intruder by a householder was considered as being “on behalf of the law.”²³² This case was a touchstone; numerous common law authorities cited it as controlling.²³³

The stricture *moderamine inculpae tutelae* [with the moderation of blameless defense],²³⁴ limiting a person to using the minimum defensive force needed for the occasion, appears in Coke’s *Institutes*—but in connection only with an altercation between a landlord and his tenant in arrears of rent payments.²³⁵ This stricture is not found anywhere in Coke’s treatments of home defense.

The grim dangers inherent in the presence of housebreakers





were pointed out by David Hume:

[T]he thing [house-breaking] is done with that contrivance and deliberation, to which none but the practiced offender is equal; and in thus venturing his person to take the thing from within the very sanctuary assigned for keeping it, and notwithstanding all the obstacles contrived for its safe detention, he shows a resolute and daring spirit, from which even the inhabitants of the house, or any who shall try to seize or stay him in his purpose, must, by reasonable inference, be held to be in danger of their lives and persons.²³⁶

Professor Hume further defined the issues at stake here in the following stark terms:

Nor is it necessary that the felon have carried his assault so far, as clearly to show which of these several felonies [breaking into a house to steal, to commit murder, rape, . . . or to set fire to the house] was his purpose, if either he has entered the house, or has broke the safeguard of the building, so that he may enter when he will, and is in the act, or immediate preparation so to do. Because this is an assault of so bold and so deliberate a nature, and in which [he] has already so much the advantage, as warrants those within to dread the worst designs, and such as are not to be prevented but by superior force; as well as that all they can do on this sudden alarm is no more than sufficient to put them on an equal footing with the felon, who comes cool and prepared for the adventure. Tenderness for the life of another may indeed suggest to one to make trial, by cries or otherwise, to deter him from his purpose, before proceeding to the use of higher means. But how commendable soever this generosity in those who have sufficient presence of mind to employ it; still it is what the law cannot absolutely enjoin, or hold a person to be culpable for omitting. The main consideration in all such cases is the alarm, surprise, and danger of the true man, who . . . in his place of surest refuge, . . . finds his safeguard broken, and his person in the power of a felon, who thus





has a favorable opportunity to accomplish his purpose, and escape unknown.²³⁷

3. The Right to Keep Arms at Home, as Read into the 1328 Statute of Northhampton Banning Going Armed in Public

The 1328 Statute of Northhampton²³⁸ literally banned the carrying of all arms in public. Common law judges, however, had read in the limitations that all indictments under the 1328 statute specify not only that the offense had taken place outside the home, but also that the manner of carrying the arms had terrorized the public.²³⁹ Viner's *Abridgment* recited a view typically held at the time of the drafting of the U.S. Constitution: "Tho' a Man may ride with Arms, yet he cannot take [two] with him to defend himself even tho' his Life is threatened [if he would go outside his home]."²⁴⁰ Coke's *Institutes* and other common law authorities stressed that, for an indictment under the statute to be valid, it had to recite, "In quorundam de populo terrorem [to the terrorization of certain of (our) people]."²⁴¹ English case law prior to the drafting of the U.S. Constitution mandated that a conviction be supported by evidence of terrorization of the public.²⁴²

The 1328 Statute of Northhampton has special importance for Fourth Amendment purposes because the Framers were well versed in common law commentaries, interpreting the 1328 Statute as covering only the carrying of arms to terrorize the community and not applying it to peacefully having ordinary firearms at home. The statute, as well as caselaw applying it, did not encroach upon but validated the Fourth Amendment right of the people to possess ordinary personal arms in their houses.²⁴³

Twentieth century federal appellate cases have frequently misapplied the common law prohibition against causing public panic outdoors with weapons. For example, a 1976 a Sixth Circuit Court of Appeals decision, involving the mere possession of a firearm in the home, quoted a 1942 Third Circuit Court of Appeals decision²⁴⁴—which also involved the mere possession of a firearm in the home—stating "[w]eapons *bearing* was never treated as anything like an absolute right by the common law."²⁴⁵ But, as shown above, the common law indeed treated *keeping* certain weapons at home as an





absolute right.

4. Common Law Decisions Preserving the Individual Right to Keep Arms at Home Read into the Game Laws

During the reign of Queen Anne (1702-1714), Parliament passed the Game Laws.²⁴⁶ Taken literally, these laws would have banned the private possession of all implements that could be used to kill game, including guns. Nevertheless, in 1722 King's Bench excluded the simple possession of a firearm from the 1705 Game Law, because a person might keep a gun "for the defense of his house."²⁴⁷

In 1738, King's Bench again refused to apply the Game Laws to household possession of firearms, holding that the mere keeping of such arms was no offense under the game laws;²⁴⁸ Judge Page noted "these Acts restrain the liberty which was allowed by the common law."²⁴⁹ Further, in 1752, King's Bench decided that even the lord of a manor could not recover in trover a servant's gun merely because the servant kept it on the lord's premises.²⁵⁰ The court reasoned that "as a gun may be kept for the defense of a man's house and for divers other lawful purposes"²⁵¹ the indictment had to allege that the gun had actually been used for killing game.²⁵²

The drafters of the American Constitution were familiar with the narrow reading of the Game Laws by the common law courts animated by their concern for the safety and security of householders. As noted above,²⁵³ colonial libraries contained many of the legal treatises referred to in this Article, including Viner's *Abridgment*, which explicitly cited and summarized the 1738 game-law case.²⁵⁴ Prior to the framing of the American Constitution, English courts were vigilant in guarding the common law right to keep firearms for defending the home, even as the Game Laws threatened the possession of such arms.

5. Mistaken or Accidental Homicides Inside the Home

The common law had such deference and respect for the privacy of householders that even when a householder mistakenly believed a stranger intruder was in her home, the law protected her. If a person wrongly thought to be a felonious intruder by a householder had conducted himself with the least negligence so as to produce alarm or cause the householder to form a mistaken impression that a felony





was about to occur, then the householder could wield deadly force. Mistaken homicides of the wrong person, or of innocent persons, by a householder in her own abode were treated by the common law as excusable if a wrongly supposed intruder had committed the least negligence. This point was illustrated in *Levet's Case*²⁵⁵ in which a household servant had secretly hired the deceased Frances Freeman to help out. Late at night, the servant informed householder William Levet that she thought thieves had broken in.²⁵⁶ The case was summarized in Hale's *History of the Pleas of the Crown*:

[Levet] rising suddenly, and taking a rapier ran down suddenly; Frances hid herself in the buttery,²⁵⁷ lest she should be discovered; Levet's wife spying Frances in the buttery, cried out to her husband, "Here they be, that would undo us." Levet runs into the buttery in the dark, not knowing Frances, but thinking her to be a thief, and thrusting with his rapier before him hit Frances in the breast mortally, whereof she instantly died.²⁵⁸

The court held that the death was not even manslaughter—Hale stating that the court had ruled that it had been “neither murder, nor manslaughter, nor felony [but justifiable].”²⁵⁹ Hale questioned whether the slaying should not instead have been ruled excusable because it was done “per infortunium” [by misfortune or misadventure].²⁶⁰ Hawkins believed that Levet had not shown even the “Appearance of a Fault”²⁶¹ and accordingly classified the homicide as justifiable. It can be argued, especially under modern views of negligence, that Levet appeared to be guilty of acting in undue haste, hence, with at least negligence if not recklessness. On the other hand, Frances had acted with negligence in hiding late at night in the buttery. The decision exonerating Levet from any punishment indicates that his act had been ruled justifiable, simply because he had committed the homicide “without intention of hurt to [an innocent person]”²⁶² and the slaying had occurred in Levet's own home.

The general policy of excusing or at least justifying homicide in cases of home mistakes or accidents was explained by Michael Foster. In connection with an accidental homicide occurring in the home—where the householder discharged his pistol while examining it, wrongly presuming that it could not fire—Foster stated:





It is not the part of judges to be perpetually hunting after forfeitures *where the heart is free from guilt.*

....

Accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations. And in such a case the forfeiture of goods rigorously exacted would be heaping affliction upon the head of the afflicted, and galling an heart already wounded past cure.²⁶³

Levet's Case demonstrates that the common law excused, if not justified, a homicide by mistake occurring within the confines of one's own home in every case or at least when the deceased had contributed to the homicide in the slightest.²⁶⁴ The common law cut off any liability to the other party, especially in one's home, one's refuge.²⁶⁵ This branch of the castle doctrine thus has constitutional gravitas.²⁶⁶ However, the Model Penal Code disregards it.²⁶⁷ The Code, for example, fails to impose the duty of the highest degree of care on person approaching a dwelling to do circumspectly and transparently to manifest to the occupant that the approacher is present for legitimate reasons only.

6. Attack Inside the Home with Known Non-Felon

If in a spontaneous dispute a householder was attacked inside the home by a person known in advance not to be a felon and the home occupant killed his opponent because it became necessary to save his own life, the rules were complex. They were similar to the rules outside the home except that the householder had no obligation to retreat.²⁶⁸ The fatality could be excusable homicide or manslaughter, depending upon the circumstances.²⁶⁹ If the slaying was not needed to save his life without retreat, then the slayer could be guilty of manslaughter.²⁷⁰

7. Fights Outside Home with Known Non-Felon

In a spontaneous altercation outside the home with a clearly known non-felon, again the rules were complex, but here a person was required to retreat as far as possible with safety to himself before using deadly force.²⁷¹ If, after retreating as far as possible he killed





his opponent, the slayer would be guilty of excusable homicide.²⁷² If he killed his opponent without retreating when he could have done so, then he would be guilty of manslaughter, but not murder provided that the slaying had not been premeditated but had occurred during a spontaneous dispute.²⁷³ Blackstone informs us that the rules governing the difference between excusable homicide and manslaughter were quite complex²⁷⁴ resulting in a division among the authorities in certain instances.²⁷⁵ These rules concerning retreat requirements outside the home were designed to prevent unnecessary injury among contending non-felons. They have often been imported to require retreat from-room-to room in confrontations between overt criminals and householders, skewing the law in favor of felonious attackers.²⁷⁶

8. Altercation with Known Claimant of Right of Entry to Dwelling or with Trespasser

The common law did not permit a homeowner to use deadly force against a person who had a colorable claim to enter the home. When a person claiming title (“un que pretend title”) known to be non-felonious together with a group of his associates tried to enter a home, and one of them shot an arrow into a home to gain entry, and the householder nevertheless killed him, the householder was found guilty of a felony (manslaughter at the time of the case).²⁷⁷ The same outcome would follow if an intruder was a law enforcement officer, or was any other non-felon known to the homeowner to be trying to get back his goods under a claim of right: the householder could also lawfully use non-deadly force to resist the intrusion.²⁷⁸ If the householder knew that a trespasser did not approach to commit a felony or under any claim of right, then again the householder could use only non-deadly force; but if the intruder resisted, the householder could lawfully escalate her use of force.²⁷⁹

Although the king’s officers were barred from entering a private home at will, the householder was required to admit them if they satisfied the legal prerequisites such as obtaining a warrant.²⁸⁰ On the other hand, if a law enforcement officer sought entry but did not follow proper procedures, the householder then had a limited right to resist. *Cook’s Case* involved a bailiff breaking in to a home. The bailiff had a warrant only for a civil case, which did not allow home-





entry by force. The householder saw the bailiff and knew him to be a law officer, but nevertheless killed him. The court found the householder guilty of manslaughter but not murder, the bailiff having committed an unlawful act in attempting to break into a home without a warrant pertaining to a criminal case:

[H]e ought not to break open the house, for that is not warranted by law; . . . and everyone is to defend his own house Yet [the judges] all held, that it was manslaughter, for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter²⁸¹

But here [the judges] held clearly, that it was manslaughter, because he, seeing and knowing him, shot at him voluntarily and slew him. Whereupon they all resolved, it was not murder, but homicide only.²⁸²

This case demonstrates that the common law allowed force, but not deadly force, to resist an officer whose identity and intentions the householder knew, while the officer was illegally breaking into his home. If a householder used deadly force without its use being necessary to thwart the illegal entry, he was guilty of manslaughter. *Cook's Case* also indicates that if the slaying of the officer by the householder had not been necessary, but instead by accident or mistake (here mistaken identity), then the householder would not have been guilty of manslaughter but of excusable homicide.

E. Interplay Between the Second Amendment and the Absolute Common Law Right to Keep Ordinary Personal Arms at Home

As previously discussed, the common law drew a bright line between the right to have arms in the home as opposed to wantonly carrying them in public—the former being an absolute right—but the latter being a qualified right that government may regulate. In the context of the Second Amendment, this distinction between the absolute, unqualified right to keep arms—as opposed to the qualified right to carry them—provided the basis for the decision of the United State's Supreme Court in the 1939 *Miller* case.²⁸³

The Court in *Miller* relied solely on an 1840 Tennessee case²⁸⁴ for





its central holding that the Second Amendment protected the individual right to possess any and all arms suitable for militia service.²⁸⁵ The Court held that the Second Amendment guarantees private possession of arms whose possession “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.”²⁸⁶ The Tennessee case had emphasized that, under that state’s constitutional provision for the right to keep and bear arms, “The citizens have the unqualified right to keep [militia arms] . . . as being intended by this provision. But the right to bear arms is not of that unqualified character.”²⁸⁷

The continued private possession by individual citizens, who comprise the unorganized militia,²⁸⁸ of ordinary personal arms enables them to gain proficiency in their use of these arms. In case of emergency, these individuals can join governmentally sponsored organized militias. Especially in cases of emergencies, these citizens can be more quickly and more fully trained for active duty. Privately keeping and practicing with ordinary personal firearms as “an unqualified right”²⁸⁹ enables them to more quickly gain proficiency with heavier arms, such as stinger missile launchers, upon joining governmentally sponsored militias and thereby further contributes to “the preservation or efficiency of a well regulated militia [and] assure[s] the continuation and render[s] possible the effectiveness of such forces.”²⁹⁰ The questions of what other and further personal rights and privately owned arms are protected by the Second Amendment, as well as the origin and further meanings of the Amendment, fall outside the scope of this Article.²⁹¹

III. NINETEENTH AND EARLY TWENTIETH CENTURY AMERICAN AUTHORITIES CONFIRMING THE RIGHT TO KEEP ARMS AND TO DEFEND THE HOME

A. Fourth Amendment Discussions by Judge Thomas M. Cooley and Henry Campbell Black Confirming Common Law Deadly Force Rules

The Fourth Amendment is based upon the privacy of the home and the right to exclude others. Judge Thomas M. Cooley, writing on the origin of the Fourth Amendment in his influential nineteenth century work, *The General Principles of Constitutional Law*, stated:





[The Fourth Amendment is most commonly violated] in a disregard of that maxim of constitutional law which finds expression in the common saying that every man's house is his castle. The meaning of this is that every man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not only against private individuals merely, but against the officers of the law and the state itself.²⁹²

Judge Cooley added, “[I]n general, the owner may close the outer door against any unlicensed entry, and defend it even to the taking of life if that should become necessary.”²⁹³ Judge Cooley referred to all unwanted unlawful intrusions, even by a known non-felon, such as a landlord; hence he included his proviso limiting the use of deadly force to cases in which “if that should become necessary.”²⁹⁴ The Fourth Amendment, as developed from common law standards on unwanted intrusions by unknown housebreakers, specifically protects the absolute right to use any degree of force to get rid of housebreakers, whether the degree of force used was later considered to have been necessary or not. Judge Cooley was cited and quoted by the *Payton* Court²⁹⁵

Henry Campbell Black, in his *Handbook of American Constitutional Law*, echoed Judge Cooley's views on the right to privacy protected by the Fourth Amendment.²⁹⁶ He wrote:

SEARCHES AND SEIZURES

155. The fourth amendment to the federal constitution

Security of the Dwelling.

It was the boast of the English common law that “every man's house is his castle.” Such, therefore, is the jealous care with which the law protects the privacy of the home, that the owner may close his doors against all unlicensed entry and defend the possession and occupancy of his house against the intruder by the employment of whatever force is necessary to secure his privacy, even, in extreme cases, to the taking of life itself.²⁹⁷



Here again the limitation to “necessary” force applied to all unwanted illegal entries, whether or not being attempted by a person known in advance to be a non-felon. Other authorities later echoed Cooley’s and Black’s views on the right to use deadly force to defend home privacy from unwanted unlawful invasions.²⁹⁸ Home privacy has a special status.

B. Nineteenth Century Pre-Civil War American Criminal Law Authorities Confirming Right to Use Deadly Force for Home Defense

Modern authorities upholding the right to use deadly force for home defense are legion and well known.²⁹⁹ Perhaps less known is that nineteenth century pre-Civil War authorities, in addition to pre-Revolutionary War English authorities, relied upon the 1532 statute³⁰⁰ for affirming that right, though not mentioning the Fourth Amendment in this context. These authorities serve to show the intent of the drafters of the Fourteenth Amendment, and hence demonstrate the meaning of the Due Process Clause contained in this Amendment.

1. Russell’s Treatise on Crimes

The highlights of common law authorities on the castle doctrine were set out in the American editions of Russell’s two-volume *Treatise on Crimes*.³⁰¹ It restated the right to have arms in the home as part and parcel of the castle doctrine, emphasizing that “no one will incur the penalty of the statute [of Northampton³⁰²], for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man’s house is his castle.”³⁰³ Russell quoted the 1532 Statute of Henry VIII and commented, “But although the statute only mentions certain cases, it must not be taken to imply an exclusion of other instances of justifiable homicide which stand upon the same grounds of reason and justice.”³⁰⁴ He also cited and discussed such cases as *Levet’s Case*³⁰⁵ and *Ford’s Case*,³⁰⁶ and contrasted the legal definitions of justifiable and excusable homicide based on such authorities as Hale’s *History of the Pleas of the Crown*,³⁰⁷ Hawkins’s *Pleas of the Crown*,³⁰⁸ Foster’s *Crown Cases and Crown Law*,³⁰⁹ and Blackstone’s *Commentaries*.³¹⁰ In addition, Russell stipulated that the 1328 Statute of Northampton



did not ban even public wearing of arms unless done in such a manner as “to terrify the people; from which it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons.”³¹¹

2. Bishop’s Criminal Law

In his 1858 treatise on criminal law, which went through seven editions during his lifetime and was kept up-to-date until 1923, Joel Prentiss Bishop discussed the castle doctrine.³¹² Under the subheading “*Defense of the Castle*”³¹³ he quoted Hale’s summary of the three points made in *Cook’s Case*,³¹⁴ confirming that nineteenth century pre-Fourteenth Amendment drafters were fully conversant with the well-established common law axiom that before a householder could be convicted of any crime for dispatching a housebreaker, the prosecution had to prove that she knew his identity and non-felonious intentions.

3. Wharton’s Criminal Law

Francis Wharton (1820–1889) published nine editions of his treatise on criminal law. It is kept up-to-date with supplements to this day.³¹⁵ Wharton undertook an extensive discussion on justifiable, as opposed to excusable, homicide.³¹⁶ He asserted that dispatching serious criminals on the spot was an imperative. In addressing the issue of resisting attempts to commit certain crimes, he stated: “where an attempt is made to commit . . . burglary on the habitation, the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. Here, likewise, nature and social duty co-operate.”³¹⁷ Wharton’s language quite closely tracks that of Foster’s eighteenth century treatise on criminal law.³¹⁸ Wharton also reiterated Foster’s formulation of justifiable homicide in the following terms:

A [woman] may repel force by force in the defense of [her] person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on [her]. In such a case [she] is not obliged to retreat, but may pursue [her] adversary till [she] find [herself] out of danger; and if, in a conflict between them [she] happeneth to kill, such killing is justifiable. The



right of self-defense in cases of this kind is founded on the law of nature, and is not, nor can be superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force.³¹⁹

Wharton also quoted from and discussed the 1328 Statute of Northampton.³²⁰ He concluded that under this statute one cannot excuse wearing arms in public merely by alleging that somebody threatened him if he would go outside to meet the threat and that he wears it for the safety of his person, nevertheless that the gist of the crime of going armed in public was doing so in a manner calculated to terrorize “good citizens.”³²¹ He also concluded “it is clear that no one incurs the penalty of the statute for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man’s house is his castle.”³²²

4. Other Pre-Civil War Nineteenth Century American Treatises

Another and oft-cited pre-Civil War American treatise was Dane’s nine-volume *General Abridgment and Digest of American Law*.³²³ In it, Dane paraphrased almost verbatim a portion of Foster’s treatment of justifiable homicide, including the phrase “happens to kill.”³²⁴ This language tracked the 1532 statutory phrase “happening in such cases to slay.”³²⁵ Dane’s treatise also cited and summarized the facts and holding of *Cooper’s Case*, the case that had dealt with a home break-in by a person known to the householder to have murderous intentions.³²⁶ Dane noted that the court had exonerated Cooper and had held the slaying to have been “justifiable homicide pursuant to [the 1532 statute] made in confirmation of the common law.”³²⁷

Yet another and oft-cited pre-Civil War treatise, East’s two-volume *Pleas of the Crown*,³²⁸ originally published in London in 1803 and re-published in Philadelphia in 1806, quoted from the 1532 statute 24 Hen. 8, c. 5,³²⁹ and noted that the same rule of justifiable homicide included “breaking in the daytime.”³³⁰ East also opined that although the 1532 statute mentions only certain situations of justifiable homicide, “it must not be taken to imply an exclusion of any other instances of justifiable homicide,” and cited inter alia the third



root case in support of this conclusion and as controlling law.³³¹ He explained the distinction between justifiable as opposed to excusable homicide on the following basis: “[J]ustification is founded upon some positive duty; excuse is due to human infirmity.”³³² East cited many authorities for the duty to use one’s “best endeavours”³³³ to apprehend a fleeing felon and “if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.”³³⁴ East opined that the slaying described in *Levet’s Case*³³⁵ was probably only excusable, but he noted that Hawkins believed that it was justifiable.³³⁶

Still another pre-Civil War American treatise, a ten-volume edition of Matthew Bacon’s treatise titled *A New Abridgment of the Law*, cited and summarized the 1532 statute 24 Hen. 8, c. 5, as well as cited and summarized the views of Hale and Hawkins on justifiable homicide.³³⁷ This treatise enjoyed several editions during the pre-Civil War period.

Finally, a six-volume 1811 American edition of *Jacob’s Law Dictionary*³³⁸ cited, inter alia, as controlling law both *Cooper’s Case*³³⁹ and 22 Assize pl. 55.³⁴⁰ This work’s entire exposition on the justification rules³⁴¹ explicitly relied upon such sources as those authored by Coke,³⁴² Hale,³⁴³ Hawkins,³⁴⁴ Staunford,³⁴⁵ Crompton,³⁴⁶ and Dalton,³⁴⁷ as well as the 1532 statute of Henry VIII.³⁴⁸ In particular, this work reiterated the common law rule that shooting at game even by a person not qualified to do so by the Game Laws³⁴⁹ and accidentally killing someone was not manslaughter but was excusable.³⁵⁰

C. Justice Oliver Wendell Holmes’ Twentieth Century Decision in Support of the Home Possession of Firearms and Use of Deadly Force

Although not specifically invoking any clause of the Constitution, in an opinion written by Justice Oliver Wendell Holmes, Jr., the Court held that in a case in which a state game act prohibited any alien from possessing a shotgun or rifle, the act was not unconstitutional because the prohibition did not “extend to weapons such as pistols.”³⁵¹ The Court’s rationale was that pistols “may be supposed to be needed occasionally for self-defense.”³⁵²





IV. THE RIGHT TO PRIVACY, EXPANDED BY JUSTICES WARREN AND BRANDEIS

As early as 1670, John Ray's popular *Collection of English Proverbs* foreshadowed one of the core ideas in the landmark article *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis.³⁵³ Ray wrote: "A mans house is his castle. Jura publica favent privato domus [Public laws favor the privacies of a house.]"³⁵⁴ The Warren and Brandeis article presented an argument for extending the common law's presumption of an individual's "right to life"³⁵⁵ and its later "recognition of man's spiritual nature, of his feelings and his intellect" to create a new right: protection from the mental stress and emotional travail caused by unwanted publicity of events in one's home.³⁵⁶ Warren and Brandeis explicitly based this new idea of personal privacy upon several doctrines: (1) the "right to life";³⁵⁷ (2) "what Judge Cooley calls 'the right to be let alone'";³⁵⁸ (3) "the right to enjoy life";³⁵⁹ and (4) the common law's recognition of "a man's house as his castle, impregnable . . ."³⁶⁰

Judge Cooley had introduced the doctrine of the right to be let alone in the context of freedom from physical assaults—to be free of suddenly being put "in fear, [creating] a sudden call upon the energies for prompt and effectual resistance. . . [and] a shock to the nerves."³⁶¹ Nothing could more aptly describe the plight of a woman beset by a rapist in the privacy of her own bedroom as described in the Prologue.

As had been stated by Judge Cooley,

The right to one's person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed. But the attempt to commit a battery involves many elements of injury not always present in breaches of duty; it involves usually an insult, a putting in fear, a sudden call upon the energies for prompt and effectual resistance. There is very likely a shock to the nerves, and



the peace and quiet of the individual is disturbed for a period of greater or less duration.³⁶²

Warren and Brandeis based their entire argument upon these ideas—the right to life, the right to enjoy life, Judge Cooley’s right to be let alone, and the common law castle doctrine—as being fundamental to an ordered society. Warren and Brandeis urged that home privacy principles be extended to include a cause of action against unwanted publicity, such as public disclosure in the newspapers of activities taking place within the confines of the home. Freedom from the mental turmoil caused by media gossip was part and parcel of castle doctrine, they thought. These legal concepts of emotional sanctity, integrity, and especially home privacy are very much alive today of course, having been constitutionalized many times.³⁶³

The common law castle doctrine pertained to resisting physical assaults in the home. If the privacy principle, which safeguards emotional serenity, does not also guarantee actual physical existence and physical inviolability in the home, can the right to remain free of unjust mental disturbance survive in a vacuum? If the common law castle doctrine, particularly as formulated by Coke and approvingly quoted by the U.S. Supreme Court in 1980³⁶⁴ is abandoned, the more rarified right to satisfy “intellectual and emotional needs in the privacy of his own home”³⁶⁵ might well collapse into an empty shell or would become a fragile castle delicately built in the air.

V. THE RIGHT TO KEEP ORDINARY PERSONAL ARMS IN THE HOME AS PART AND PARCEL OF ORDERED LIBERTY IN THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS

The U.S. Supreme Court in *Planned Parenthood v. Casey*³⁶⁶ reviewed a number of its prior substantive due process decisions, noting that the “most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.”³⁶⁷ The Court has never accepted the view that “liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution.”³⁶⁸ In support of this doctrine, the Court cited a number of its precedents,³⁶⁹ notably *Griswold v. Connecticut*,³⁷⁰ which had dealt specifically with home privacy. The *Griswold* Court reaffirmed the right to privacy that it had upheld

in *Boyd v. United States*³⁷¹ by stating, “The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”³⁷² The *Griswold* Court added: “Various guarantees [in the Bill of Rights] create zones of privacy.”³⁷³ In *Planned Parenthood* the Court went further and declared in no uncertain terms: “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter,”³⁷⁴ adding:

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Three years earlier, in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), we referred to a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁷⁵

The *Planned Parenthood* Court reiterated the second Justice Harlan’s dictum in *Poe v. Ullman*³⁷⁶ that “the full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”³⁷⁷ Among these specific guarantees listed by Justice Harlan, the *Planned Parenthood* Court reiterated “the right to keep and bear arms.”³⁷⁸

After reviewing a number of substantive due process decisions, the Court in *Roe v. Wade*³⁷⁹ laid down the criteria for determining whether an individual right falls within the constitutionally protected zone of privacy as a fundamental right or is implicit in the concept of ordered liberty.³⁸⁰ Here, the Court noted, “These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy.”³⁸¹

The Court also referred to privacy rights in *Mapp v. Ohio*.³⁸²

Seventy-five years ago, in *Boyd v. United States*, 116 U.S. 616, 630 (1886), considering the Fourth and Fifth Amendments as running “almost into each other” on the facts before it, this Court held that the doctrines of those Amendments “apply to all invasions on the part of the



government and its employees of the sanctity of a man's home and the privacies of life."³⁸³

In 1969 the Court invalidated a state statute prohibiting the possession even of clearly pornographic materials in the home, stating, "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."³⁸⁴ Four years later the Court explained that the 1969 decision had been based "on the narrow basis of the privacy of the home, which was hardly more than a reaffirmation that a man's home is his castle."³⁸⁵ The use of force, including deadly force, to defend home-privacy against house thieves surely reflects "an exercise of basic constitutional rights in their most pristine and classic form."³⁸⁶

In order to see whether the possession and use in the home of ordinary personal firearms, suitable for successfully resisting dangerous housebreakers, come under the umbra of federally protected rights as a consequence of the substantive aspects of the Due Process Clauses of the Fifth and Fourteenth Amendments absorbing or incorporating the Fourth Amendment, an analysis of protected personal privacy rights is crucial. An examination of state court decisions interpreting their state constitutional provisions for the right to keep arms is highly relevant, as the U.S. Supreme Court often employs state law trends in seeking answers to federal constitutional questions.³⁸⁷

"The right of defense of self, property and family is a fundamental part of our concept of ordered liberty,"³⁸⁸ declared the Ohio Supreme Court in 1993. The court added: "To deprive our citizens of the right to possess any firearm would thwart the right that was so thoughtfully granted by our forefathers and the drafters of our Constitution."³⁸⁹ The Ohio Supreme Court categorically declared: "[G]iven the history of our nation and this state, the right to possess certain firearms [in the home] has indeed been a symbol of freedom."³⁹⁰

In 2003, the Wisconsin Supreme Court in *State v. Hamdan*³⁹¹ underlined the validity and importance of the 1993 Ohio Supreme Court decision discussed above, declaring, "As the Ohio Supreme Court stated, 'The right of defense of self, property and family is a fundamental part of ordered liberty For many, the mere possession of a firearm in the home offers a source of security.'"³⁹²





The *Hamdan* court went on to expound upon the meaning of that security in the context of the constitutional right to keep arms as follows: “If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of [her] private residence.”³⁹³

The Wisconsin Supreme Court in *Hamdan* further noted that a law that forbids the concealment of a pistol “in a nightstand within reach of the homeowner’s bed . . . is simply not enforced in this situation.”³⁹⁴ The *Hamdan* court also approvingly noted that an Oklahoma appeals court had recently reaffirmed the principle that “a citizen enjoys a common law right to carry a concealed weapon in the citizen’s own home.”³⁹⁵ The *Hamdan* court also approvingly quoted from cases in Maryland, Indiana, and Oregon that had distinguished on constitutional grounds the distinction between the right to keep at home concealed arms as opposed to carrying them outside, and had excluded keeping at home from flat bans on carrying arms without a license.³⁹⁶ After considering various public policy and constitutional aspects of the right to keep arms, the Wisconsin Supreme court in *Hamdan* summed up these considerations as follows: “Based on the foregoing considerations, we conclude that a citizen’s desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one’s home or privately owned business.”³⁹⁷

In 2004, explicitly on the basis of the branch of the castle doctrine permitting no retreat when attacked in one’s home, the Rhode Island Supreme Court declared in no uncertain terms, “Of course, . . . one has an absolute right to keep firearms in one’s home.”³⁹⁸ The Rhode Island Supreme Court distinguished between this absolute right to keep arms in the home, “the *sine qua non* of the individual right”³⁹⁹ under the Rhode Island constitution, from the qualified right to carry them concealed outside the home. In particular, the court upheld a statutory requirement of a license to carry a pistol or revolver concealed upon the person in public places. The statute required a “proper showing of need”⁴⁰⁰ for such a license; and the court held that granting the license could be discretionary with the licensing officials without a due process hearing.⁴⁰¹ More recently, the Oregon Supreme Court adhered to a line of its decisions start-





ing with its 1980 decision in *State v. Kessler*⁴⁰² that had upheld an individual right to keep any and all ordinary personal arms, including firearms, under the Oregon constitution's provision for the right to keep and bear arms.⁴⁰³ The Oregon Court rejected the prosecution's contention that the term "right of the people" contained in that constitutional provision limited the right to a collective right of the "community as a whole."⁴⁰⁴

These state cases,⁴⁰⁵ especially when combined with the above-discussed *Payton* decision,⁴⁰⁶ along with its ramifications in the common law, compel the conclusion that there exists an absolute right to keep at the very least ordinary personal firearms in the home as a matter of due process of law.

VI. INTELLECTUAL INFLUENCES ON THE MODEL PENAL CODE'S LIMITATIONS ON HOME DEFENSE, AND TWENTIETH CENTURY CULTURAL CLIMATE PROMOTING THEIR WIDESPREAD ACCEPTANCE

The Model Penal Code—first promulgated in 1962⁴⁰⁷ and widely adopted in one form or another in the last third of the twentieth century⁴⁰⁸—was devised independently of the constitutional and common law considerations summarized above; so it is pitted and marred with constitutional and public policy blemishes insofar as lawful self-defense by home occupants is concerned. The Code imposes upon all crime victims, including those living quietly in their homes, a rule and duty of meticulously careful reaction to, and imperturbable forbearance of, criminal intruders. It insists that the householder precisely guess the possible intentions of such marauders, even if the householder hears her front door crashed down, or wakes up to find a strange man hovering over her bed. These departures from the common law—imposing on a crime victim the requirement of other-worldly virtue and calm circumspection even upon the sudden appearance of a stranger in her bedroom or "in the presence of an uplifted knife"⁴⁰⁹—interestingly echoed medieval canon law concepts.

One of the foremost exponents of canon law (church law) on the legally permissible use of deadly force was Henri de Bracton, a thirteenth century cleric and judge.⁴¹⁰ Bracton's clerical ideals as expressed in his magisterial mid-thirteenth century work, *De Legibus et Consuetudinibus Angliae* [On the Law and Customs of England],⁴¹¹





when applied to temporal affairs, “set an extremely high standard, one much too severe to supply a suitable model for the secular authorities to adopt” for the common law justification rules.⁴¹² Canon law was concerned with “divine forgiveness.”⁴¹³ Church authorities did not consider every homicide to be sinful, “yet there was need to do penance for [every] slaying” regardless of justification.⁴¹⁴

Church law on justification was addressed to the issue of “whether one in lower orders was thereby debarred from promotion, or a priest incurred demotion: was the slaying such that he could no longer fitly minister at the altar.”⁴¹⁵ This standard was designed to guard appropriate clerical inhibitions against blood-shedding but was not meant to govern ordinary secular human affairs.⁴¹⁶ Nevertheless, from time to time during the past hundred years or so, churchly standards were wrested out of their original context applying to priests and other clerics and found their way into many criminal law treatises, court decisions, and statutes, effectively watering down the right to home defense.⁴¹⁷ Bracton was a major judicial exponent of applying priestly self-defense inhibitions to lay persons.⁴¹⁸ While he did not distinguish self-defense against unknown housebreakers from thieves outside the home,⁴¹⁹ there appears to be no recorded case in which he applied clerical self-defense restrictions to defending against unknown housebreakers. The Model Penal Code’s design, in this respect, was a philosophical throwback to canon law constraints on the employment of deadly force by clerics. The Model Penal Code uniformly applies similar restrictions to all self-defense in the home, almost totally suppressing the common law right to the safety and quiet privacy of habitation.⁴²⁰

The Model Penal Code drafters, Professors Herbert Wechsler, Louis Schwartz, and Sanford Kadish, saw their role not as codifiers of existing law but as reformers, inventors, and imparters of a claimed “enlightened morality.”⁴²¹ They had no patience with natural law and natural rights,⁴²² “nonsense on stilts” in Bentham terms.⁴²³ Professor Wechsler⁴²⁴ was lauded by his peers for being a “monumental force in shaping the criminal law,” and for having “transformed” the criminal law.⁴²⁵ Professor Schwartz saw the Code’s mission as “constrain[ing]” punishment,⁴²⁶ and Professor Kadish thought the Code’s purpose was “controlling the exercise of discretion by those who exercise power.”⁴²⁷ The mindset of the





Code's drafters was displayed by Kadish, who saw the Code architects as liberal "humanitarians" in the spirit of the legal reform advocate and utilitarian Jeremy Bentham (1748-1832).⁴²⁸ Kadish noted approvingly that Bentham had a "strong antipathy to the common law."⁴²⁹ Codifiers of the common law, whom Kadish thought did "nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries,"⁴³⁰ were caricatured by him as "profoundly conservative, . . . legitimized vengeance, [and] bloodthirsty."⁴³¹

An "ideal" model code should accomplish a complete "rewriting" and "radical restructuring" in contradistinction to [merely] a "consolidation" of existing law, insisted Kadish.⁴³² He dismissed previous American criminal law codification attempts for "not propos[ing] a radical rethinking" as not being sufficiently "daring," and stigmatizing them for having had "limited aspirations" and simply "rearranging the attic."⁴³³ By contrast, he pronounced the Model Penal Code a "root and branch . . . rethinking [and] reformulation" in collaboration with other disciplines toward a "more just . . . criminal law."⁴³⁴ He commended the subterfuge employed by contemporary English codifiers, who were under political pressure not to deviate from the common law because of its popularity, "in doing a very sophisticated job" in making their codification "seem" to be "if not be, a comprehensive statement" and spoke ruefully about the "hostility [and] apathy" that often greeted well-intentioned refashioning of the common law.⁴³⁵ Kadish believed that if a criminal code was to serve one of its major political purposes of "controlling . . . those who exercise power,"⁴³⁶ it required "subtlety and complication" not conducive to "easy and quick comprehension."⁴³⁷

Model Penal Code proponents deemed it to embody "the best of current social science knowledge"⁴³⁸ and found the level of acceptance of the Code's ideas "stunning."⁴³⁹ They asserted that their greatest achievement was not codification but their "intellectual contribution" to the criminal law.⁴⁴⁰ They triumphed in their successful dismissal of "fundamental premises of the criminal law"⁴⁴¹ in favor of an "agenda" of "doctrinal correctness."⁴⁴² They achieved their "crusade to eradicate . . . ancient concepts"⁴⁴³ and satisfied their quest for an "academically satisfying recitation of theory."⁴⁴⁴

The ideological engine that drove the widespread acceptance of



the Model Penal Code's onslaught on crime victims' deployment of deadly force, as well as of similar restrictions decreed by statutes and case law, was rampant with the philosophy of deconstruction.⁴⁴⁵ Developed and popularized chiefly by Jacques Derrida (1930-2004) and Michel Foucault (1926-1984),⁴⁴⁶ deconstructionist philosophy was transdisciplinary.⁴⁴⁷ Both of these philosophers' writings were peppered with frontal attacks on Western judicial systems. Such arrangements were considered to be post-colonial⁴⁴⁸ bourgeois hierarchical oppressive power structures that "privileged" or imposed a false order on society, and deconstructionists agitated for subversion of that hegemony from within.⁴⁴⁹

Deconstruction had a profound impact in the United States. One of its founders, Jacques Derrida, was active in the United States starting in 1956.⁴⁵⁰ Derrida was the "principal exponent of . . . deconstruction [and] one of the leading figures in poststructuralism and postmodernism,"⁴⁵¹ and urged juridico-political revolutions in his law review piece, *Force of Law: The Mystical Foundation of Authority*.⁴⁵² At the core of Derrida's deconstructionist thought was the credo that the "religion of capital" and bourgeois mentality must be subverted and dismantled.⁴⁵³

Foucault viewed the twentieth century legal system as the handmaiden of modern capitalism.⁴⁵⁴ He believed the existing capitalist and social structure required a "punitive Utopia which would be economically and socially invaluable. . . . [T]he model for this may be seen in the military camp. . . . It permeated and remains visible in spheres like urban development . . . and the control of criminals."⁴⁵⁵ Sociology Professor Roy Boyne, Vice-Provost of the University of Durham, Queen's Campus, Thornaby, England, summed up Foucault's views on criminals:

The delinquent is not the author of a criminal act pure and simple, rather the delinquent is a life, a collection of biographical details and psychological characteristics. The delinquent is also "an object" in a field of knowledge, a field patrolled by experts—jurists, but also psychologists, social workers, in short a whole series of professional biographers, whose task has been to change the reference point of criminality from the act to the life.⁴⁵⁶

Deconstruction theory insisted that the state itself is a criminal



enterprise because all logical systems were deemed to be merely constructs for the powerful to maintain their hegemony, the legal system being a prime example of such a construct.⁴⁵⁷ Because all rational, hierarchical systems—particularly the justice system—simply manifest power relations, to the deconstructionists, there can be no clear good and evil.⁴⁵⁸ “[R]esponsibility, sensitivity, justice, law—these were all empty ideas, tokens of ideology, repressive, misleading, pernicious.”⁴⁵⁹

Deconstruction, freighted with sensitivity toward the offender—the “Other”⁴⁶⁰—and coupled with a panoply of newfound constitutional and statutory rights of overt criminals, rapidly became entrenched toward the end of the twentieth century.⁴⁶¹ The notion of the criminal as a new Nietzschean man, even heroic, pervaded the writings of Foucault and Derrida, and became fashionable.⁴⁶² At the same time that criminals were being portrayed sympathetically as heroes, they were also championed both as victims of a patriarchal power system and guerilla fighters battling against an oppressive justice system which they were correctly subverting.⁴⁶³

Most American intellectuals did not label themselves deconstructionists or consciously subscribe to deconstructionist dogma.⁴⁶⁴ Nevertheless, undermining capitalism and preoccupation with fringe elements of society had long been prevalent in circles entertaining existentialist, Marxist, and Maoist ideals. These themes were amplified by deconstructionist philosophy which insinuated itself into almost every intellectual field.⁴⁶⁵ It did so both directly and indirectly by filtering through cross-disciplinary interfaces, as illustrated by the effects of philosophy, psychiatry and social sciences on the legal community.⁴⁶⁶

Deconstructionist motifs underlay the notion that “society is responsible for creating the injustices in which crime can percolate.”⁴⁶⁷ Sociological chatter—describing a “bad social environment” as influencing criminal activities and abandoning “terminology rooted in concepts of evil” and “archaic verbiage suggesting evil and wickedness”—became mainstream.⁴⁶⁸

The temper of the times was suffused with deconstructionist fancies even though individual intellectuals popularizing such notions—as, for instance, that the criminal was heroic and admirable—would not necessarily identify with deconstructionist philosophy.



Smitten with the notion that “transgression”⁴⁶⁹ was the path to break the shackles of the existing order, the American literati embarked upon a love affair with criminals, adopted convicted murderers as pets and commemorated their lives in print, while questioning the arrogance and presumptuousness of the legal system that had judged them.⁴⁷⁰ The novelist Norman Mailer wrote a thousand-page tome identifying with the serial murderer, Gary Gilmore, whom he befriended.⁴⁷¹ A national best-seller, it was discussed in a law review in connection with the “[m]oral regeneration” of criminals.⁴⁷² The cossetting of killers was not confined to the Left; the conservative William F. Buckley Jr., also had his favorite serial murderer, William Smith.⁴⁷³ The best selling chronicle of the 1971 Attica prison riot, *A Time to Die* by Tom Wicker, an editorial writer for the New York Times, was a sympathetic and nuanced portrait of the prisoners, and celebrated the “solidarity” of the rioting felons.⁴⁷⁴

Deconstructionism infiltrated the legal community and spawned Critical Legal Studies jurisprudence.⁴⁷⁵ This movement adopted Foucault’s and Derrida’s ethos clothed in legal jargon, maintaining that the existing order is neither “natural” or “necessary,” but “the most important intellectual restraint on progressive social change.”⁴⁷⁶ Convinced they were crusading for “a more humane, egalitarian and democratic society,”⁴⁷⁷ the Critical Legal Studies school “trashed”⁴⁷⁸ evolved common law jurisprudence as an undesirable “social product.” Like the Model Penal Code enthusiasts, they distained Blackstone⁴⁷⁹ and were shot through with a strong dose of nihilism.⁴⁸⁰ They embraced violence as means of bringing about their vision of a better democracy.⁴⁸¹ Using the hermeneutic method⁴⁸² of interpretation, they endeavored to discover the deep structures⁴⁸³ of law, the better to undermine the “central ideas of modern legal thought” and successfully put their conception of a more perfectly democratic law in its place.⁴⁸⁴

The canon of Critical Legal Studies is that the “claims to rationality of current legal practice and legal theory are baseless,”⁴⁸⁵ “contingent [and] indeterminate.”⁴⁸⁶ “Most critical legal scholars believe that our society can become just only if transformed according to the insights of socialism, syndicalism, or radical feminism.”⁴⁸⁷

Swept along by the high tide of Deconstructionism, many lawyers and judges began to view the value of the lives and emotions



of innocent crime victims on the same plane with, and equivalent to, the lives and feelings of their felonious attackers, as typified by the following excerpts:

[M]any criminals have experienced exceptionally harsh lives: abusers frequently were abused as children [O]ther persons have committed crimes after a psychologically traumatic event “generally outside the range of human experience.” . . . Many urban offenders, especially the young ones, are not only unconnected to society’s moral values but, as Robert Nozick puts it, are “anti-linked” to them.

The brutality and senselessness of many crimes makes most of us unwilling to search . . . for an explanation of the wrongdoer’s aberrant behavior Exceptionally compassionate persons . . . refuse to make moral judgments about wrongdoers without placing their actions in their richest factual context. [T]hey search the criminal’s often tragic life for the factors that shaped his character or they take note of the social circumstances, including economic inequality, in which the wrongdoing occurred. The victimizers, they conclude, are also victims.⁴⁸⁸

These remarks—contained in a *Rutgers Law Journal* Symposium issue commemorating the twenty-fifth anniversary of the Model Penal Code—illustrate how criminal-friendly attitudes informed the mindset of the legal profession in effectuating the tectonic shift of presumptions of peaceful intentions from innocent crime victims to confirmed criminals.⁴⁸⁹ The issues of causation and proper post-conviction treatment aside, such sympathetic approaches spilled over to inhibit meaningful self-defense by crime victims and equated the value of the victim’s well-being with that of the predator. Many present-day legal treatises on criminal law, following the lead of the Model Penal Code, interchange the original crime victim with the original criminal: the person resisting attack becomes the “actor” while the criminal remains a “person.”⁴⁹⁰ The ordeal of a householder confronted by an unknown housebreaker and the human right of such a victim in her own home to repel the attack by any means necessary is given short shrift.





Professor Joshua Dressler lamented the fact that the focus on offenders' sociological backgrounds soon morphed from being a sentencing factor to a movement for a growing array of affirmative defenses to criminal acts.⁴⁹¹ He discussed *Manchild in Harlem*, by Claude Brown, an article that appeared in the *New York Times Magazine* in 1984, commenting, "Manchild," one observer of the urban street criminal has written, "is a product of a society so rife with violence that killing a . . . robbery victim is now fashionable."⁴⁹² The notion that leniency should be extended to a murderer of an unresisting robbed convenience store clerk gained currency.⁴⁹³ The stated rationale was that the killer lacked free choice in the matter because of his bad social environment and because of a ghetto vogue for "killing a . . . robbery victim."⁴⁹⁴

The proposition that society has robbed offenders of free will is also an artifact of deconstructionism. The well known physician and psychiatric therapist, Thomas S. Szasz, described Foucault's Rivière study in the following terms: "A spell-binding account—not only of the murder of a family by a 'madman,' but also the murder of free will and responsibility."⁴⁹⁵

The Model Penal Code crusade was launched prior to the dissemination of deconstructionist ideas in both intellectual and popular culture. Nevertheless, the Code's reformist and visionary concern and good will toward offenders, even inside the homes of their victims, played into the deconstructionist moral ether prevailing in the United States toward the end of the twentieth century, accelerating the "stunning" acceptance of its criminal friendly provisions.⁴⁹⁶

VII. CONSTITUTIONAL AND FUNDAMENTAL PUBLIC POLICY DEFECTS IN THE MODEL PENAL CODE'S HOME-DEFENSE RESTRICTIONS

For centuries the hallmark of the common law was that it was developed for the protection of, and from the perspective of, the victim of crime, as previously described in this Article.⁴⁹⁷ During the late twentieth century—in the moral quagmire of deconstructionism, postmodernism, and under the direction of the MPC's "doctrinal correctness"⁴⁹⁸—criminal law was restyled and accommodated the outlook of predators. The life "context"⁴⁹⁹ of felons was validated as worthy as the physical life and emotional integrity of his quarry. The special doctrine of the home castle was silently





jettisoned by much of American jurisprudence, setting the stage for appalling denouements like those posited in the Prologue.

A. The Model Penal Code Represents a Radical Departure from Its Antecedents: The Common Law and Biblical Law

Common law commentators—from seventeenth century (Coke), to eighteenth (Blackstone), to contemporary (Fletcher)—have referred to the Bible and Jewish law in their discussions of permissible use of deadly force. Medieval common law justices, as well English and American judges and legislators until recently, focused on the well-being of crime victims, experientially and instinctively, as did the ancient rabbis of the Talmud. For millennia the Jewish view has been in tune with the physiological needs of crime victims, and in many respects parallels English common law on the question of self-defense. In his introduction to Maimonides' *Book of Damages*, Rabbi Touger explains that the Jewish laws of damages as explicated by Maimonides “teach fundamental principles regarding respect for our lives, our persons, and our property, reflecting how the judgments within are . . . active, spiritual principles that point toward the refinement of ourselves and our society.”⁵⁰⁰ Basing himself on the Hebrew Bible⁵⁰¹ and the Talmud,⁵⁰² Maimonides wrote on the law of breaking into a home in the following definitive terms in his renowned work *Mishneh Torah* [The Second Torah]:

7. When a person breaks into [a home]—whether at night or during the day —license [permission⁵⁰³] is granted to kill him. If either the homeowner or another person kills him, they are not liable. The license [permission] to kill him applies both on the Sabbath and during the week; one may kill in any possible manner.⁵⁰⁴ This is [all implied by Exodus 22:1], which [literally] reads: “He has no blood.”

8. [The license mentioned above] applies to a thief caught breaking in or one caught on a person's roof, courtyard or enclosed area, whether during the day or during the night. Why does the Torah mention “breaking in,” because it is the general practice for thieves to break in at night.⁵⁰⁵

Thus, the codification of Jewish law by Maimonides laid down standards of justification identical to those of the common law.





B. The Code Does Not Comport with Modern Biological Knowledge

Modern biological knowledge supports the social desirability of common law justification rules on using deadly force in the home. In response to sudden attacks by a stranger, the victim can almost “actually feel adrenaline jetting into action.”⁵⁰⁶ Her fright-fight reaction pumps the fighter’s adrenaline molecule ($C_9H_{13}NO_3$) in copious quantities into her bloodstream, but the adrenaline does not dissipate instantly when the attack ceases.⁵⁰⁷ As with any human response, adrenaline dissipation times vary from individual to individual, as does the chemically induced compulsion to kill for survival.⁵⁰⁸ Yet the Model Penal Code makes no allowance for these innate wide variations; instead it insists that the victim must not grossly deviate from “the standard of care that a reasonable person would observe in [her] situation.”⁵⁰⁹

Fueled by postmodern sensibilities, much current criminal law, adopted from the Model Penal Code, imposes upon victims the duty of nuanced self-control while affording the criminal attacker an unlimited range of first-options with every presumption of benign intent and of cessation of attack. It forces the victim into a macabre psychological minuet with her attacker; she must put herself into his mind from moment to moment to divine his intent.

C. The Code Restricts Victims to Using Only Non-Negligent, Proportionate Force Even Against Dangerous Home Intruders

In their zeal to be “fair” and “compassionate” to offenders, many states have adopted the justification rules of the Model Penal Code or similar approaches. They have required by statute, case law, or both that a householder exercise precaution against using excessive force. She must not use force in any amount more than that for which she can later articulate the existence of facts justifying her belief that such force was “immediately necessary to protect [her]self against the use of unlawful force” even when she uses that force against a clearly felonious home intruder.⁵¹⁰ Since the victim does not know in advance the criminal background of her attacker, it cannot enter the justification equation even though it has great relevance to his physical movements and body language. Deadly





force is prohibited unless she (non-negligently)⁵¹¹ believes that such degree of force is “necessary to protect [her]self against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”⁵¹²

It is one thing to say that the life of a burglar is not completely without value; it is quite another to say that the law must judge the victim by the same standards as the overt criminal during a confrontation between them. The victim on the spot is best able to judge the criminal’s voice, movement, and body language. After the fact, however, she may not have the ability to recall or articulate precisely the basis for her belief in the necessity for using force against him. The common law did not cast a suspicious eye on the victim of a crisis thrust upon her, as is the tendency of the Model Penal Code and many jurists in this postmodern era.⁵¹³ Rather, the common law conclusively presumed that the victim of a housebreaker was blameless.⁵¹⁴

The Model Penal Code requires that a burglary victim being attacked even in her own home not use any protective force in excess of what she “non-negligently” believes is “essential to relieve [her] peril.”⁵¹⁵ The Code further specifies that if her belief in the existence of any justifying facts was based upon mere “negligence,” then she is guilty of “negligent” homicide.⁵¹⁶ A law that commands victims to cease and desist from further resisting the culprit immediately upon his apparent (and possibly merely temporary) turning of his back, does not comport with modern endocrinological knowledge. Such a law empowers criminals to subject victims of their choosing to terrorization and then to complex tests on the law of “non-negligent”⁵¹⁷ use of force. The victim’s use of force too soon, or too much, lands her in bankruptcy court or jail; and force too little, or too late, lands her in the hospital or the grave.

In addition to the hazy requirement that all actions by the victim must be “non-negligent,” the Model Penal Code adds insult to injury by requiring that the degree of force used satisfy its ambiguous test of being “immediately necessary” to protect the victim from harm.⁵¹⁸ By contrast, the Code insists upon precise standards rather than the ephemeral standard of negligence or recklessness when dealing with the provision justifying the use of deadly force by police for effectuating arrests. The official commentaries to the Code state: “To





leave the matter [of justification of deadly force] to an assessment of recklessness or negligence, . . . was deemed to leave the rule that ought to govern law enforcement in too vague a state.”⁵¹⁹ Although the authors of this Article do not recommend that police standards be applied to civilians, this comment on the Code’s precise police-arrest provision demonstrates that “negligence” and “recklessness” constitute vague standards. By stark contrast, the common law at the framing of the U.S. Constitution conclusively presumed that the use of deadly force against a burglar was automatically justified without further inquiry.⁵²⁰

A major linchpin of the Model Penal Code’s restrictions on justifiable deadly force was its fixation on the chance that the victim might conceivably injure the wrong person. Outside the home such a concern may have some merit; it is not an issue when the victim’s own home is invaded by a dangerous intruder. The common law considered such homicides to be excusable.⁵²¹

In its concentration on preventing mistakes and preserving the life of even an overt, dangerous felon, the Model Penal Code upturned settled law and lost sight of the original social purpose of criminal law: protecting law-abiding persons from criminal attacks. Although the Code grants a crime victim in her own home the circumscribed privilege “to use defensive force to prevent an assailant from going to summon reinforcements,” in the same sentence it conditions this prerogative upon her non-negligently formed belief that facts exist “that it is necessary to disable him to prevent an attack by overwhelming numbers.”⁵²² Query: How in the world is she to non-negligently ascertain such facts in order to non-negligently form such a belief of such necessity?

D. Resisting an Unknown Housebreaker Under the Code

1. Requires Retreat from Room to Room and Within a Room

The common law did not expect, let alone require, a law enforcement officer to retreat when faced with any resistance. Coke stated in his *Institutes*, in the paragraph immediately following the one reciting the rules for justifiable deadly force: “So if any officer, or minister of justice, that hath lawful warrant, and the party assault the officer or minister or justice, he is not bound by the law to give





back [retreat].”⁵²³ The 1353 *Memorandum* case discussed above⁵²⁴ put a householder utilizing deadly force against a burglar on a par with an officer resorting to deadly force against one who was resisting a lawful arrest. The common law did not expect a householder, faced with an unknown home-breaker in her home, to retreat within a room, let alone from room-to-room.

Justifiable defense of the home by “the owner of [the] house, or any of his servants, servants, or lodgers, etc.” was defined in Hawkins’s Abridgment, with which the Framers were well acquainted.⁵²⁵ Hawkins detailed: “And it seems that in all these cases one may justify killing the assailant without giving back *at all*.”⁵²⁶ Even Professor Joseph H. Beale, to whom the drafters of the Model Penal Code gave great deference and reliance regarding MPC justification rules on retreat from a murderous attack, had written: “It follows, therefore, that one may stand [her] ground and repel a murderous assault by one who is already in the [dwelling] house, even one rightfully there.”⁵²⁷ Yet, the Model Penal Code, as part of its standards for judging the necessity of using deadly force, while not requiring retreat “*from the home*” tacitly does require retreat in the home from room to room, and within a room.⁵²⁸

2. Prohibits the Use of Deadly Force if Attacker Appears to Be Withdrawing

The Model Penal Code flatly bans a crime victim using deadly force against an allegedly retreating attacker, even if he is still in her home,⁵²⁹ unless she is assisting a police officer on the scene.⁵³⁰ “The M.P.C. never permits a private citizen, acting on [her] own to use deadly force to effectuate an arrest.”⁵³¹ The Code reached this total ban by first limiting the situations in which peace officers could turn to deadly force to arrest fleeing felons, basing the new police curbs on two main propositions:

The common law rules in the arrest cases also created difficulties The arrest rules were broader than those that evolved to justify the use of deadly force to prevent the commissions of felonies. . . . As a result of these difficulties and the awareness that the reckless use of firearms by peace officers can create a social problem of no mean proportions.⁵³²





The Code's official Commentaries then defended its flat ban on private citizens having recourse to deadly force but was silent on the castle doctrine and the special receptivity of common law toward disabling burglars and aborting homebreaking. The Code expressed the following broad rationale, which does not remotely apply to a crime victim's use of deadly force to apprehend dangerous intruders in her own home:

Where the purpose to be served is the apprehension of persons to answer criminal charges, it has seemed important, in an age of firearms, to restrict the use of the use of deadly force to situations where official personnel are involved, or at least are believed to be involved.⁵³³

Immobilizing a private citizen, by forbidding her to use deadly force to effect an arrest in her own home unless she is under direction from a peace officer, defies logic. It also lacks empathy for the true victims of crime, the next victims, and lacks deference to the U.S. Constitution.

To objections that the Code's ban contravenes the public policy imperative against leaving dangerous felons at large, the official response of the Code's commentaries was phlegmatic: "No perfect principle of limitation can be formulated."⁵³⁴ Query: Do we need any limitation when it comes to a householder incapacitating a home-breaker fleeing from her own home aside from not intentionally harming someone else? Why should the law leave her fate to the indeterminate intentions of her adroit attacker for the sake of preventing the remotest possibility of damage to a bystander—or if she survives, to the tender mercies of the police, prosecutor, or jury as the Code's commentaries suggest? The Code's edict against using deadly force to arrest a dangerous fleeing home invader in order to arrest him, prevent further depredations, and speedily surrender him to justice, once again seems "wholly irrational."⁵³⁵

E. The Model Penal Code Does Not Acknowledge the Lack of Universal Police Presence in Democracies

Even with the most modern cutting-edge technological equipment, police forces in a democracy are not omnipresent and are not able to be effective everywhere at once to protect victims or apprehend criminals. Police have no constitutional duty to protect any in-





dividual person, even a person who has called 911.⁵³⁶ In *DeShaney v. Winnebago County Department of Social Services*,⁵³⁷ the Court spelled out that neither the federal nor state governments have any affirmative constitutional duty to protect the life, liberty or property of a private citizen from private wrongdoers: “But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”⁵³⁸ Recently, in a 7–2 decision, the U.S. Supreme Court held that, even though a state statute apparently made police enforcement of a restraining order against her estranged husband mandatory, a mother did not have a Fourteenth Amendment property interest or entitlement to such enforcement of the restraining order.⁵³⁹ Therefore, as a representative of her deceased three daughters, she could not successfully sue the city or the police under the federal civil rights laws in an action for damages against them, even though she proved that the police failed to promptly respond to her repeated reports that her estranged husband had taken their daughters in violation of the order, and as a result had murdered them sometime during his violation of the order.⁵⁴⁰

Serial housebreaking rapists and robbers are at large, and not merely in tiny numbers. The police cannot apprehend the bulk of such violent offenders before commission of a second, third, or even fourth and fifth, horrific crimes.⁵⁴¹

F. The Model Penal Code: Unconstitutionally Vague in Its Restrictive Treatment of Home Defense

The New York Court of Appeals long ago put the issue of imposing vague standards in home-defense situations in the following apt terms:

[I]t would only be by the use of unnecessary or wanton violence and the infliction of unnecessary or wanton injury to the person of the criminals, that the [burglary-victim] could become a wrongdoer. Without undertaking to define the boundary line which separates the law and authorized, from the unauthorized and illegal acts of individuals in the protection of property, the prevention of crime and the arrest of offenders, it is enough that the law will not be astute in searching for such line of demarcation, as will





take the innocent citizen, whose property or person are in danger, from the protection of the law, and place [her] life at the mercy and discretion of the admitted felon. They will not be made to change places upon any doubtful or uncertain state of facts.⁵⁴²

In cases of house-robberies, the facts are always doubtful and uncertain, just as they are in any emergency situation, especially those involving violence and surprise. As every law professor who has tried the experiment knows, five eye witnesses will give five widely differing stories of the precise sequence of events confronting a householder weighing instantaneous decisions to shoot or not to shoot. Victims of crime face a terrible dilemma not of their own making. Any house-robbery automatically satisfies the New York Court of Appeals test of “any doubtful or uncertain state of facts.”⁵⁴³ A victim-conscious law requires the house robber to take his chances on, and assume the risk of, the speed and intensity of his victim’s autonomic nervous system, as well as the speed of her system’s termination of her adrenaline hormone survival secretions to, and their elimination from, her bloodstream.⁵⁴⁴

The Code’s proponents themselves admit that the issue of negligence is “vague.”⁵⁴⁵ Every first-year law school student learns that different juries will return widely different verdicts in negligence cases upon the same set of facts. As to the Code’s requisite for justifying using deadly force, an immediate threat of “serious bodily injury,”⁵⁴⁶ the official proponents of the Code themselves acknowledge that the term is “somewhat open-ended.”⁵⁴⁷

A procedural due process issue is triggered by the critical vagueness problem inherent in the Model Penal Code’s deadly force strictures. The issue of vagueness has been defined by the U.S. Supreme Court in the following terms: “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”⁵⁴⁸ The Court has repeatedly explained: “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”⁵⁴⁹

Even in connection with civil tort law—in particular, with vague or no standards for awards of punitive damages—the Court has dis-





approved of delegation of this “basic policy matter to individual juries ‘for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’”⁵⁵⁰ A householder in extremis needs clear and well defined standards in advance: after-the-fact comes too late, fatally too late.

In addition to vagueness, The Model Penal Code also suffers from an overbreadth problem. The issues of overbreadth and vagueness have been explained by the Court in the following terms:

In a facial challenge to the overbreadth and vagueness of a law,⁵⁵¹ a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.⁵⁵² If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.⁵⁵³ A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.⁵⁵⁴

The Court added a point applicable to the issues at hand: “Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it *threatens to inhibit the exercise of constitutionally protected rights.*”⁵⁵⁵ By reason of its innovations and inroads on the common law, the Model Penal Code’s justification rules as applied to resisting householders—and similar statutes and court decisions, as well as prohibitory firearm laws⁵⁵⁶—inhibit exercise of a major privilege of the U.S. Constitution and one of the most ancient major privileges of civilization concerning the use of deadly force in the home.

The Model Penal Code’s blind eye toward utterly innocent crime victims was foreign to the common law. Nevertheless, fueled by the dioxin of deconstruction, the Code’s contrivance of an equal legal plane for both criminal attacker and his victim gained widespread popularity and sanction among academia bench, and bar, especially





toward the end of the twentieth century.⁵⁵⁷ Adoption of MPC-like justification rules by many states confirmed the seismic shift in the legal presumptions of the criminal law away from victim-oriented principles that had been established at the time of the framing of the Constitution. The Model Penal Code's refitting of the common law advantaged the original felonious attacker—endowing him with legally protected options of escalating and de-escalating violence at his unfettered discretion without fear of serious immediate consequences.

VIII. CONCLUSION

In the sixteenth century, common law authority Roger Yorke elaborated upon the fear and terror robbers produce in their victims:

Note that if a man takes something from my person, even if it is only a penny, this is robbery. . . . because where he takes anything from my person it is robbery. . . . because of the fear which was caused to the party who was robbed—even if he took only a penny It is otherwise of felony [larceny], for there he must take twelve pence at least. Felony is where he takes goods feloniously and supposes in his mind that no one perceives this felony which he has committed; so that felony is always committed by stealth and not in the same way as robbery is done. Thus there is a distinction.⁵⁵⁸

John Locke explained why he would subject a robber, even outside the home, to the laws of war:

§ 18. This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life, any farther than, by the use of force, so to get him in his power, as to take away his money, or what he pleases, from him; because using force, where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away every thing else. And therefore it is lawful for me to treat him as one who has put himself into a state of war





with me, i. e. kill him if I can; for to that hazard does he justly expose himself, whoever introduces a state of war, and is aggressor in it.

§ 19. And here we have the plain difference between the state of nature, and the state of war, which however some men have confounded, are as far distant, as a state of peace, good will, mutual assistance, and preservation, and a state of enmity, malice, violence, and mutual destruction are from one another But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war: and it is the want of such an appeal [that] gives a man the right of war even against an aggressor, though he be in society and a fellow-subject. Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen [solely by stealth] all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defense, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case, where the mischief may be irreparable. Want of a common judge with authority puts all men in a state of nature: force without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge.⁵⁵⁹

In his *De Doctrina Christina* [The Christian Doctrine], the pioneer crusader for press freedom John Milton went further and wrote that robbers are not entitled even to the laws of war: "There is, however, this difference between a robber and a national enemy, that with the one the laws of war are to be observed, whereas the other is excluded from all rights, whether of war or of social life."⁵⁶⁰ Outlawing handguns, requiring trigger-locks or that firearms be unloaded in the home—or mandating home use of any other device rendering handguns unsuited for quick emergency use—constitute barriers to





the human right of self protection that Locke and Milton championed. The Model Penal Code's obstructionist stance on self defense gainsays the essence of their philosophy anchored in the common law and the U.S. Constitution.

John Wilder May, in his *Law of Crimes*, called justifiable homicide "in the interest of the safety and good order of society."⁵⁶¹ Clark & Marshall's *Treatise on the Law of Crimes* stated: "In justifiable homicide the slayer was regarded as doing what was right, and no fault whatever was imputed to [her]."⁵⁶²

The Wisconsin Supreme Court philosophized:

Many times it pays and pays in solid rewards to follow the advice of Buddha when he urged: "Let a man overcome anger by love; let him overcome evil by good," or to follow the advice . . . "Resist not him that is evil, but whosoever smiteth thee upon thy right cheek, turn to him the other also." But we have not arrived at such happy age.⁵⁶³

The hard-wired instinctive human responses of a person beset by traumatic home intrusions and put in fear for her life and sanity have been toyed with by academics, courts and legislatures. They have tried to manipulate the natural response to homebreaking, enabling frightening aggressors to become the victim's judge, jury and executioner. In the survival context that she faces, deadly force restrictions and firearm bans turn good and evil upside down.⁵⁶⁴

Are we so far removed from the human experience crystallized since fourteenth century case law and sixteenth century statutes, which constitutionally underpin the defense of habitation, that their principles can be dismissed as retrograde vestiges of a more violent age? In 1967, England enacted a criminal law revision, which precluded the use of deadly force against even armed house robbers.⁵⁶⁵ Since then, England has been plagued with not only a wave of home burglaries but also some sensational attacks upon home occupants, because of the chilling effect on home defenders imposed by a vague reasonableness standard. Even more shocking, resisting home dwellers have themselves been convicted of felonies, including murder, and have served jail sentences for "assaulting" their attackers.⁵⁶⁶

During the past several years, England and Wales, with a com-





bined population of only 60 million, suffered more than a million burglaries each year.⁵⁶⁷ The United States population is nearly five times greater (approximately 290 million); in 2003, its burglaries numbered 2.15 million,⁵⁶⁸ less than one-quarter of the British rate. A legislative attempt to restore the English right of home defense has been met with denunciations that such a proposed measure was a “ludicrous, brutal, unworkable, bloodstained piece of legislation.”

“It cannot possibly be suggested,” British government attorneys have argued, “that members of the public cease to be so whilst committing criminal offenses.”⁵⁶⁹ Here we see in pernicious practical application the outcome of laws that accommodate the well-being of criminals or even place their lives on par with that of their prey. Britain has embraced such concepts, and taken the modalities embodied in the justification rules of the Model Penal Code to their logical conclusions—outlawing self-defense, and criminalizing resisting crime victims.⁵⁷⁰

Has postmodern society arrived at a new apotheosis of fairness? Should it continue to extend such fastidious solicitude toward “members of the public” who are physically and emotionally burglarizing, raping and murdering peaceable householders? Should the law continue to abhor real world defense of home and family? It appears that our morally obtuse relativistic deconstructionist mentality has shifted the onus for the bloody consequences of criminal attack from the attacker, and become careless with the blood of the victim.

If the scenarios described in the Prologue do not shock the conscience, it would be impossible to locate a constitutional sense of fairness and justice in our postmodern sensibilities. The “enlightened morality”⁵⁷¹ of the Model Penal Code regarding justification is a travesty on the Fourth, Fifth, and Fourteenth Amendments. The common law justification rules at the time of the Framing are not just an historical curiosity. They illuminate the convergence of constitutional and moral requisites, and point the way to restoring that noble palladium of Anglo-Saxon civilization and bedrock constitutional liberties—the sacrosanct right of even the humblest and poorest citizen to the undisturbed peace and security of her habitation. Can American civilization and its constitutional jurisprudence



muster the vitality and the will to reassert their moral authority on behalf of crime victims?

ENDNOTES

* Judge Coffey's dissent in *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271-80 (7th Cir. 1982), inspired many of the ideas in this Article. That case upheld the constitutionality of a Morton Grove, Illinois, ordinance that flatly banned the possession of a pistol even in the home. No Fourth or Fourteenth Amendment issues were raised by the parties to that case. Recently the Illinois legislature overturned the type of local ordinance involved in *Quilici*. See *infra* note 564.

The authors wish to thank Priscilla Chenoweth, Bernice G. Rosenthal, and David Kopel for their patience and extremely helpful comments and suggestions. All errors remain the sole responsibility of the authors.

** B.S. (physics), Worcester Polytechnic Institute; M.S., Ph.D. (mathematical physics), Purdue University; J.D., New York University.

*** B.A., Tufts University; J.D., New York University.

1. *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

2. MODEL PENAL CODE § 3.04(1) (1962); see also *id.* § 3.06(1). “[N]early forty states have recodified their criminal laws, using the [Model Penal Code as the lodestar.” Richard G. Singer, *Foreword* to Symposium, *The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519, 519 (1988). “The Model Penal Code has become a standard part of the furniture of the criminal law. In large measure it has become the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes that have followed in its wake.” Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 521 (1988).

3. The laws of Henry I provided: “Anyone who emancipates his slave shall . . . bestow on him free ways and open doors, and shall place in his hands a lance and a sword or whatever are the arms of freemen.” LEGES HENRICI PRIMI [LAWS OF HENRY THE FIRST] 243, c. 78, 1 (L.J. Downer ed., Clarendon Press 1972). This provision of the *Leges* was derived from the laws of the Ripuarian (or Riparian) Franks. *Id.* at 394 (Downer's *Commentary* on c. 78). Such an emancipation procedure was observed in England well before the 1066 Norman Conquest. JOHN RICHARD GREEN, *A SHORT HISTORY OF THE ENGLISH PEOPLE* 59 (Alice Stopford Green ed., American Book Company 1916).

4. *Rochin v. California*, 342 U.S. 165, 172 (1952). The following tests for violations of the Due Process Clause of the Fourteenth Amendment: were established by *Rochin*: “shocks the conscience;” “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples;” or run counter to the “decencies of civilized conduct.” *Id.* at 169-73; see also Jeffrey Blum et al., Comment, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R.—C.L. L. Rev. 713 (1980).

5. The term “deconstructionism” is also denoted “deconstruction.” Deconstructionism is included in the more general categories of postmodernism and poststructuralism, all laden with the white male’s burden of guilt for the West’s colonial enterprises, and all anti-capitalist, as discussed below. Deconstructionism’s mission is to dismantle Western bourgeois capitalist hierarchical systems, particularly judicial systems. For further discussion of the ramifications of the Deconstructionist intellectual tidal wave, see *infra* Part VI.

6. As used hereinafter, the term “stranger-intruder,” “housebreaker,” or “home-breaker” means a home intruder whose identity and/or intentions the householder does not know in advance, and hence whom the common law conclusively presumed posed a mortal danger to the householder.

7. The Court lasered in on the importance of “preserving the privacy and the sanctity of the home.” *Payton v. New York*, 445 U.S. 573, 588 (1980).

8. After reviewing the holdings of a number of decisions, the Court in *Roe v. Wade* declared: “These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.” *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

9. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

10. In *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005), a 2-1 split panel upheld the dismissal of a challenge to the District of Columbia’s ban on the private possession of a firearm in the home, even a long gun such as

a shotgun, without a locking mechanism—specifically a trigger lock. The court’s decision was based solely on the ground that the plaintiffs were not threatened with immediate criminal prosecution and thus lacked standing. The plaintiffs in that case challenged the trigger-lock requirement only on the basis of the Second Amendment; therefore, that case does not pertain to the Fourth Amendment approach of this Article. This Article focuses upon other topics including the Fourth, Fifth, and Fourteenth Amendments’ impact upon a trigger-lock requirement in the home and upon restrictions on keeping and using arms suitable for preventing and resisting home invasions by strangers.

11. *See, e.g.,* *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (“In reading the [Fourth] Amendment, we are guided by ‘the traditional protections . . . afforded by the common law at the time of the framing.’”) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)).

12. *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

13. The Model Penal Code, an academic product, was undertaken by the American Law Institute after World War II. Its chief architect was Professor Herbert Wechsler. *See, e.g.,* Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?* 19 RUTGERS L.J. 539, 539-40 (1988); *see also* Herbert Wechsler, *Codification of the Criminal Law in the United States; The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968). Like other, previous codifications in England, the Model Penal Code (hereinafter MPC) deviated considerably from the common law. *See infra* Part VII and notes 238, 334, 396 and accompanying text.

14. Alessandra Stanley, *Cameras Captured a Disaster but Now Focus on Suffering*, N.Y. TIMES, Sept. 2, 2005, at A1 (“‘There is nobody in charge.’ . . . [There is] despair and lawlessness in and outside the convention center. ‘It’s a complete free-for-all.’ . . . CNN and Fox News split the screen . . . [with] images of stranded refugees, looters, and a bare-chested man, knee-deep in water, battering a store window with a baseball bat [A]fter three days, Hurricane Katrina still looked nothing like what American are used to seeing. The morning began with reports of people shooting at rescue helicopters ‘It’s a scene out of another country’ At times, the scenes on television were so woeful they looked as if they could have been filmed in a former Soviet republic or Haiti. . . . ‘This is not Iraq, this is not Somalia,’ said Martin Savidge of NBC. ‘This is home.’”).

15. 445 U.S. 573 (1980).

16. *See, e.g.,* A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE*;

MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 125 (1968).

17. ROBERT G. FERRIS & JAMES H. CHARLETON, THE SIGNERS OF THE CONSTITUTION 204, 209, 213, 221 (1986).

18. *Id.* at 210.

19. *Payton*, 445 U.S. at 594 n.36 (quoting HOWARD, *supra* note 16, at 118-19 (citing George K. Smart, *Private Libraries in Colonial Virginia*, 10 AMERICAN LITERATURE 24 (1938))).

20. *Payton*, 445 U.S. at 594 n.36 (quoting HOWARD, *supra* note 16, at 118-19 (citing RODNEY L. MOTT, DUE PROCESS OF LAW 89 (1926))). Mott noted that “in the colonies a wide circulation was given to other authorities which were based quite largely, if not entirely, upon [Coke’s] *Institutes*.” MOTT, *supra* at 20.

21. EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND*. Except as specifically noted, this Article will cite Part III (Vol. 3) of the second edition, published in 1648. The first edition of Part III of Coke’s *Institutes* was published in 1640; the first edition of Part I was published in 1628; and the first edition of Part II was published in 1642. This Article will cite only the first and third Parts. Coke also is known as Sir Edward Coke.

22. *Payton*, 445 U.S. at 594 n.36.

23. *Id.*

24. *Id.* (quoting Howard, *supra* note 16, at 118–19 (citing MOTT, *supra* note 20, at 89)).

25. MOTT, *supra* note 20, at 89, *cited in Payton*, 445 U.S. at 594 n.36.

26. MICHAEL DALTON, *THE COUNTRY JUSTICE* (photo. reprint 2003) (1618). Unless otherwise indicated, the present Article will use the 1618 edition. Dalton’s *Justice* was issued in dozens of editions spanning two centuries. Beginning around 1690 the spelling of the title of this treatise changed from *Country Justice* to the modern *Country Justice*.

27. MOTT, *supra* note 20, at 89 n.9.

28. Max Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies*, in 2 LAW: A CENTURY OF PROGRESS 1835–1936, at 421–22, 431–32 n.52 (1937).

29. MOTT, *supra* note 20, at 89 n.10.

30. MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* (Dublin, L. White 5th ed. 1786). Mott lists Coke’s *Institutes* as having been



cited 294 times and Bacon's *Abridgment* on 172 occasions. MOTT, *supra* note 20, at 89 n.10.

31. CHARLES VINER, *A GENERAL ABRIDGMENT OF LAW AND EQUITY* (Cornhill, England, Geo. Strahan et al. 1741–1743).

32. HENRY ROLLE, *UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY [AN ABRIDGMENT OF SEVERAL CASES AND RESOLUTIONS OF THE COMMON LAW]* (London, A. Crooke et al. 1668).

33. ROBERT BROOKE, *LA GRAUNDE ABRIDGEMENT* (London, Richarde Totyl 1586). Robert Brooke's name has the variant spellings Broke and Brook.

34. WILLIAM HAWKINS, *A SUMMARY OF THE CROWN-LAW, BY WAY OF ABRIDGMENT OF SERJEANT HAWKINS'S PLEAS OF THE CROWN BY THE SAME AUTHOR* (London, E. and R. Nutt, and R. Gosling 1728) [hereinafter *HAWKINS'S ABRIDGMENT*].

35. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (photo. reprint 1979) (1765-1769).

36. WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* (photo. reprint 1973) (1716–1721) [hereinafter *Hawkins, PLEAS OF THE CROWN*].

37. See FERRIS & MORRIS, *supra* note 17, at 33. Few men contributed more to U.S. Independence than John Adams, the “Atlas of American Independence” in the eyes of fellow signer Richard Stockton. A giant among the Founding Fathers, Adams was one of the coterie of leaders who generated the American Revolution, for which his prolific writings provided many of the politico-philosophical foundations. Not only did he help draft the Declaration, he also steered it through the Continental Congress. The subsequent career of Adams—as a diplomat and first Vice President and second President of the United States—overshadows those of all the other signers except Jefferson.

38. See TREVOR H. COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 204, 211, 223 (1965); *The Laws of the Redwood-Library Company* 4 (Newport, Samuel Hall 1765) (apparently printed a year after adoption of the laws); *A Catalogue of Books, in CHARTER, LAWS, AND CATALOGUE OF BOOKS OF THE LIBRARY COMPANY OF PHILADELPHIA* 17 (Philadelphia, B. Franklin & D. Hall 1757).

39. See, e.g., CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 181 (1911) (showing that the law offices of Judge Parker in Ports-



mouth, N.H., and/or Charles Chauncey in New Haven, Conn., included *Hawkins's Pleas of the Crown* in reading lists prescribed for apprenticing would-be lawyers prior to the Framing).

40. *A Catalogue of Books*, *supra* note 38, at 17.

41. MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (photo. reprint 2003) (1736). This work should be distinguished from Hale's earlier and briefer one-volume work titled *Pleas of the Crown: or, a Methodical Summary of the Principal Matters Relating to that Subject*, which this Article will not cite. A way of distinguishing citations to these two different works is that citations to the two-volume work usually indicates which volume is being cited.

42. COLBOURN, *supra* note 38, at 211.

43. Smart, *supra* note 19, at 48.

44. Cook's Case, Cro. Car. 537, 79 Eng. Rep. 1063, W. Jones 429, 82 Eng. Rep. 225 (K.B. 1640). The report of *Cook's Case* in Croke's *Reports* includes a discussion of an earlier case known as *Levet's Case*. The report of *Cook's Case* in W. Jones, however, does not mention *Levet's Case*. For a discussion of *Cook's Case* and its importance to the castle doctrine, see *infra* notes 229, 255, 259, 262, 266, 278, 280-282, 314 and accompanying text. For a discussion of *Levet's Case* and its importance to the castle doctrine, see *infra* notes 255-262, 264, 266, 281, 305, 335, 521 and accompanying text.

45. Cooper's Case, 79 Eng. Rep. 1069 (K.B. 1640). For references to, and discussion of, *Cooper's Case* see *infra* notes 77, 100, 326, 339 and accompanying text.

46. For a comprehensive listing of works found in colonial libraries and book dealers, see COLBOURN, *supra* note 38, at 199-232.

47. FERNANDO PULTON, DE PACE REGIS ET REGNI [ON THE KING'S AND KINGDOM'S PEACE] (photo. reprint 1978) (1609). In addition, *Pulton's* treatise was prescribed in law courses given in Judge Parker's office in Portsmouth, N.H., and/or Charles Chauncey's office in New Haven, Conn. See, e.g., Simeon E. Baldwin, *The Study of Elementary Law, The Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 3 n.* (1903); see also WARREN, *supra* note 39, at 181.

48. A CATALOGUE OF THE LIBRARY OF YALE-COLLEGE IN NEW HAVEN 41 (New London, T. Green 1743).

49. MICHAEL FOSTER, CROWN (CASES AND) CROWN LAW 298 (photo. reprint 1982) (1762). The full title of Foster's work is *A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 in the County of Surrey and of other Crown*



Cases. To which are added discourses upon a few branches of the Crown law. But this work is almost universally known by the shorter title(s) given here. The Framers were very familiar with this work. See, e.g., Warren, *supra* note 39, at 163, 164.

50. RICHARD BURN, JUSTICE OF THE PEACE, AND PARISH OFFICER (1755).

51. ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT [THE GRAND ABRIDGMENT] (London, Richarde Totyl 3d ed. 1577). For a further indication that the American colonists also knew of and used the works of Anthony Fitzherbert, see MOTT, *supra* note 20, at 88.

52. WILLIAM STAUNFORD, LES PLEES DEL CORON [THE PLEAS OF THE CROWN] (photo. reprint, 1971) (1557); WILLIAM STAUNFORD, AN EXPOSITION OF THE KING'S PREROGATIVE (1567). The latter work went through at least five editions or reprintings after the first one. The former work similarly was issued in at least five editions or reprintings after the first one; it was highly respected in the legal profession, and was the first attempt to give a systematic account of the English criminal law. See PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 325 (1925). Part 3 of Coke's *Institutes*, often referred to as Coke's *Pleas of the Crown*, relied substantially upon Staunford's *Plees del Coron* especially in Coke's discussions of homicide.

53. [Preface] *To the Reader*, in 3 Coke Rep., printed in 2 THE REPORTS OF SIR EDWARD COKE at fol. ivb (London, George Wilson ed., J. Rivington et. al. 1777), and in The Third Part of the Reports of Edward Coke at fol. ivb (London, E. and R. Nutt, and R. Gosling 1738) (preface not printed in the English Reports, Full Reprint, even though appearing in an English translation of Coke's report published as early as 1610 with unnumbered pages). Here Coke's Reports spell Staunford's name as Stamford. Coke also took note of Staunford's *Prerogative of the King* and praised Staunford as a "Man excellently learned in the Common Laws; whose Posterity prosper at this Day." [Preface] *To the Reader*, 10 Coke Rep., printed in 5 The Reports of Sir Edward Coke, *supra*, at fol. xixa (preface not printed in the English Reports, Full Reprint, even though appearing in an English translation as early as 1618 with unnumbered pages).

54. WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE (3d ed. 1588). Lambard's Eirenarcha enjoyed at least a dozen editions from 1581 to 1619. See, e.g., Winfield, *supra* note 52, at 329. The second or third edition contained more explanatory material than the first.

55. 1 BLACKSTONE, *supra* note 35, at 343 (recommending that the stu-





dent peruse “Lambard’s *eirenarcha*”).

56. *Payton v. New York*, 445 U.S. 573, 596 (1980) (quoting HOWARD, *supra* note 16, at 118-19).

57. *See supra* notes 19–22 and accompanying text.

58. *See also* MOTT, *supra* note 20, at 89 (“Another conspicuous fact was the tremendous influence of Sir Edward Coke. . . . [W]e find in the colonies a wide circulation given to other authorities which were based quite largely, if not entirely, upon the Institutes.”).

59. Allen D. Boyer, *Introduction to LAW, LIBERTY, AND PARLIAMENT—SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE* xiii–xiv (Allen D. Boyer ed., 2004). For further recent comments on the authoritative influence of Coke, see Steve Sheppard, *Introduction to 1 The Selected Writings and Speeches of Sir Edward Coke* xxix–xxxi (Steve Sheppard ed., 2003).

60. Chapter 39 of Magna Carta (1215) provided: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

61. Translation: “except by the law of the land”—the final phrase of Chapter 39 of Magna Carta (1215).

62. Boyer, *supra* note 59, at xiv. The National Archives and Records Administration maintains a website containing more information on the importance of Lord Coke’s views of the law in general, and their profound connection to the American experience in particular at http://www.archives.gov/exhibit_hall/featured_documents/magna_carta/legacy.html (last visited Mar. 18, 2005).

63. *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980).

64. 77 Eng. Rep. 194 (K.B. 1603). Coke’s original report, 5 Co. Rep. Fol. 91 a, indicated that *Semayne’s Case* had been decided in the regnal year of “ii Mich. Jac. Reg.”—that is, the autumn term of the second year of the reign of King James. Given that James I acceded to the throne in March 1603, it would seem that Coke assigned the decisional year of this case to be 1604. Nevertheless, since the *Payton* Court gave 1603, this Article will also use 1603.

65. [Preface] *To the Reader*, *supra* note 53 (capitalization modernized); *see also supra* note 53 and accompanying text.

66. STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fols. 14a-14b. Some editions of Staunford’s treatise appear to contain misprints in



connection with the third root case; they make reference to “29 lib. ass. P. 23” instead of “26 lib. ass. P. 23.” The third volume of Coke’s *Institutes* apparently recognized this error by including the correct citation as well as the incorrect citation. 3 COKE, *supra* note 21, at 56. Perhaps Coke retained the original incorrect citation out of respect for Staunford.

67. STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fols. 14a-14b. The common law justification rules protected home occupants from even attempted housebreakings, day or night. Blackstone explained that the 16th century statute, 24 Hen. 7, c. 5 (1532), mentioned *night time* only to indicate its extension of justifiable homicide to merely “attempting to break open a house” at night even without an attempt to steal, and that the statute reached “breaking open of any house *in the day time*, [if] it carries with it an attempt of robbery also.” 4 BLACKSTONE, *supra* note 35, at 180. For a discussion of the 1532 statute, see *infra* notes 94–103 and accompanying text.

68. For a similar translation, see Radin, *supra* note 28, at 425 (quoting STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at 14b).

69. *Payton*, 445 U.S. at 596 n.44 (quoting *Semayne’s Case*, 77 Eng. Rep. 194, 196 n.(c) (K.B. 1603)) (emphasis added). The Latin phrase at the end of the passage has been translated as “To every man his own house is his safest refuge.” BLACK’S LAW DICTIONARY 575 (4th ed. 1957).

70. *Payton*, 445 U.S. at 596-97.

7.1 *Id.* at 596 n.44.

72. 1 FITZHERBERT, *supra* note 51, at fol. 218a, pl. 305 (citing 3 Edw. 3 [1330]). The letter “F” at the beginning of the alternative citation indicates Anthony Fitzherbert.

73. Fitzherbert’s *Abridgement*, like all early abridgments, was a compilation of abstracts and sometimes full-texts of decided cases, without case names, collected under subject matter headings such as *Corone & Pleees del Corone and Trespas* [Trespass]. The heading *Corone & Pleees del Corone* corresponds to matters in which the Crown has an interest and modern criminal cases that carry titles such as “Rex v. _____,” “The Queen v. _____,” “State v. _____,” or “People v. _____.”

74. See, e.g., BOOK OF ASSIZES, at fol. 123a, pl. 23 (1561); BOOK OF ASSIZES, at 123, pl. 23 (1679); 1 BROOKE, *supra* note 33, *Corone & matters del Corone*, at fol. 178a, pl. 100 (referring to Y.B. 26 Ass. Pl. 23).

75. Y.B. Trin. 14 Hen. 7 (1499), *reported in* Y.B. 21 Hen. 7, fol. 39, Mich., pl. 50 (1506).

76. 97 SELDEN SOCIETY, THE EYRE [CIRCUIT COURT] OF

NORTHHAMPTONSHIRE 1329-1330, at 183 (Donald W. Sutherland ed., 1983); *see also* FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW 565 n.1 (1927) (providing a similar translation).

77. 98 SELDEN SOCIETY, THE EYRE OF NORTHHAMPTONSHIRE 1329-1330, at 822 (Donald W. Sutherland ed., 1984). *See* the same source, *id.* at 875, for a concordance of Fitzherbert's Abridgement, *supra* note 51, with the reports and translations found in 97 SELDEN SOCIETY, *supra* note 76.

Although this modern interpretation as well as the original version of the case speak in terms of only the "owner" of the house, by the time of the framing of the U.S. Constitution other common law cases made clear that any lawful occupant had the same privileges in this situation. *See* Cooper's Case, 79 Eng. Rep. 1069 (K.B. 1640) ("lodger or sojourner"); *Ford's Case* (ca. 1630), *summarized in* Kelyng, J. 51, 84 Eng. Rep. 1078 (K.B. ca. 1630) (marginal note stating "possessor of a Room in a Tavern" omitted in the version printed in *English Reports, Full Reprint*). For an indication that the Framers possessed *Kelyng's Reports*, *see* WARREN, *supra* note 39, at 164.

78. *See, e.g., Alice and Richard's Case* (Worcestershire Eyre, 1221), *reprinted and translated in* 53 SELDEN SOCIETY, ROLLS OF THE JUSTICES IN EYRE FOR LINCONSHIRE (1218-1219) AND WORCESTERSHIRE 1221, at 557-58 (Doris M. Stenton ed., 1934) (acquittals for slaying housebreakers); *see also Dhutti's Case, printed in* THREE EARLY ASSIZE ROLLS FOR THE COUNTY OF NORTHUMBERLAND, 88 PUBLICATIONS OF THE SURTEES SOCIETY FOR THE YEAR 1890, at 94 (W. Page ed., Durham, Andrews & Co. 1891) (40 Hen. 3 [1256]) (printed only in Latin, no printed translation available) ("Postea testatum per juratos et villatas propinquiores quod non percussit eum nequiter, immo quod credebatur ipsum esse latronum, ideo inde quietus." [Afterwards it was testified by the jurors and neighboring villagers that he did not pierce him [through the forehead] wrongfully, nay rather that he believed him to be a thief, for that reason he is then and there acquitted.]).

For a summary of *Dhutti's Case*, *see* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 478 (2d ed. reissued 1968) (full acquittal for slaying an unknown housebreaker). Professor Thomas A. Green correctly states that Maitland had asserted that full acquittal in *Dhutti's Case* was an unusual one and that the defendant "was fortunate." THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 82, n.50 (1985), *citing* 2 POLLOCK & MAITLAND, *supra*, at 78 n.3. However, in support of his view that the outcome was uncommon, Maitland *ad loc.* cites solely a case of an outdoor, not an

in-home slaying—namely, *William de Tysington's Case*, Staffordshire Assize Roll, 21 Edw. 1, translated in 6 COLLECTONS FOR A HISTORY OF STAFFORDSHIRE, PART I, at 258 (The William Salt Archaeological Society, ed.) (London, Harrison and Sons 1885) (1293). Joseph H. Beale calls *Dhutti's Case* “a strong case [for justifiable homicide]in the same eyre [circuit court].” Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 567, 568 n.7 (1903). The Model Penal Code’s official comments cited this article of Beale’s several times in support of its restrictive justification rules, including quoting from it at length in its main text. MODEL PENAL CODE AND COMMENTARIES, PART I, General Provisions §§ 3.01 to 5.07, at 53 n.4, 54 & n.53 (Official Draft and Revised Comments) (1985) [hereinafter MPC COMMENTARIES]. For a further discussion of the MPC’s reliance upon and approval of Beale, see *infra* note 527.

79. 97 SELDEN SOCIETY, *supra* note 76, at 183 (citing 3 E. 3 Cor. 305 (1330)).

80. *Id.*

81. Lewis Bowles’s Case, 11 Co. Rep. 79b at 82b, 77 Eng. Rep. 1252, 1257 (1615) (citing 3E. 3 Corone 330 and [Y.B.] 26 Ass. 23). In this report, Coke cites the second and third root cases decided in the fourteenth century. Coke believed that forfeiture for killing would-be highway robbers was imposed before passage of the 1532 statute, 24 Hen. 8, c. 5, as discussed *infra* at notes 94-103 and accompanying text.

82. *Bowles's Case*, *supra* note 81 (citing “3 E. 3 Corone 330. & [Y.B.] 26 Ass. 23, &c.” the “&c.” here referring to other physical impediments such as the sea or a ditch); see COKE, *supra* note 21, at 55-56.

83 COKE, *supra* note 21, at 56, 161, 220 (citing and translating into Latin the passage contained in *Exodus* 22:2-3). For a discussion of the numbering scheme of *Exodus*, see *infra* note 136.

Most eminent common law authorities who wrote within a century after Coke’s *Institutes* copied and published his works nearly verbatim. For a description of Coke’s dominating influence, see *supra* notes 19-22 and 56-62 and accompanying text.

Other common law treatises cite this first root case as controlling. See, e.g., RICHARD CROMPTON, L’OFFICE ET AUCTHORITIE DE JUSTICES DE PEACE fols. 21b, 22a (photo. reprint 1972) (1584); Dalton, *supra* note 26, at 220, 221; 1 Hale, *supra* note 41, at 486; 1 HAWKINS’S ABRIDGMENT, *supra* note 34, at 77-78 (indirectly citing the first root case by indicating that homicide is justifiable “where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any Felony in it.”); 1 Hawkins’ Pleas of the Crown, *supra* note 36, at

71; Lambard, *supra* note 54 at 238, 257; Pulton, *supra* note 47, at fols. 121a, 122a (photo. reprint 1978) (1609); STAUNFORD, AN EXPOSITON OF THE KING'S PREROGATIVE, *supra* note 52, at fol. 46a (1567) ("But so shall not [need a pardon] he that kills one that would rob him in his house . . .") (spelling and capitalization modernized); STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14a. The Framers were familiar with the existence of this work. *See supra* note 53.

84. 1 FITZHERBERT, *supra* note 51, at fol. 218b, pl. 330.

85. Payton v. New York, 445 U.S. 573, 596-97 (1980).

86. 97 Selden Society, *supra* note 76, at 199.

87. GREEN, *supra* note 78, at 85.

88. FOSTER, *supra* note 49, at 298 (citing a case in which a householder's stabbing an unarmed thief assaulting the householder was ruled justifiable).

89. 3 COKE, *supra* note 21, at 56, 161, 220; CROMPTON, *supra* note 83 at fol. 21b; DALTON, *supra* note 26, at 220; PULTON, *supra* note 47, at fol. 121a (where again "303" appears as a misprint for "330" especially since Pulton, *supra* note 47, at 126a, recognized that the "303" case involved the year-and-a-day statute-of-limitation rule, Pulton apparently having copied Coke's wrong citation); 1 HALE, *supra* note 41, at 487, 493; LAMBARD, *supra* note 54, at 238; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14a. Hawkins's *Abridgment* indirectly cited this second root case as controlling law by including a discussion of justifiable homicide as that which happens "where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any felony in it." 1 HAWKINS'S ABRIDGMENT, *supra* note 34, at 77-78; *see also* 1 HAWKINS'S PLEAS OF THE CROWN, *supra* note 36, at 71 (similar language). Bacon's *Abridgment* likewise indirectly cited this second root case as controlling law. BACON, *supra* note 30, at 675 ("It is clear, that the killing of a person in the defense of a man's . . . house . . . is justifiable . . . as, where . . . the owner of a house, or any of his servants, or lodgers, etc., kills one who attempts to . . . commit in it murder, robbery or other felony . . .").

90. Y.B. 26 Ass., Pasch (1353), pl. 23, *printed in* BOOK OF ASSIZES (1679), *supra* note 74, at 123, pl. 23, *and in* BOOK OF ASSIZES (1561), *supra* note 74, fol. 123a, pl. 23.

91. The translation runs as follows:

Note that in an indictment for felony the defendant put himself upon the country [chose a jury trial by his countrymen rather

than trial by battle]. And it was found that he was in his house and the man whom he killed and others came to his house in order to burn it, etc., and surrounded the house but did not burn it [mes ils ne faisoient ceo], and he left forth, etc., and killed the other, etc. And it was adjudged that this was no felony.

FRANCIS P. SAYRE, *supra* note 76, at 565 (italics and brackets in Sayre's translation). Sayre *ad loc.* assigns it the title "Anonymous" and ascribes the decisional year of this case as 1532. Thomas A. Green assigns it the year 1353. GREEN, *supra* note 78, at 83 nn.54 & 56. We adopt the year 1353 by reason of the kind of calculation shown in *infra* note 209.

92. BACON, *supra* note 30, at 675; 1 BROOKE, *supra* note 33, at fol. 178a, pl. 100; 2 BURN, *supra* note 50, at 2 ("If a man come to burn my house, and I shoot out of my house, or issue out of my house, and kill him; it is not felony"); 3 COKE, *supra* note 21, at 220, 221; CROMPTON, *supra* note 83, at fol. 21b; DALTON, *supra* note 26, at 220; 1 FITZHERBERT, *supra* note 51, at fol. 215b, pl. 192; 1 HALE, *supra* note 41, at 39, 487, 488, 493; 1 HAWKINS'S ABRIGMENT, *supra* note 34, at 77-78 (indirectly citing this third root case as controlling law by including in his explanation of justifiable homicide that which happens "where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any Felony in it"); 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 71 (similar language and explicitly citing the third root case); PULTON, *supra* note 47, at fols. 121a, 121b, 122a; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14a.

93. An appeal was a private accusation, brought typically in a public court, by the victim of a felony or by the victim's next of kin. *See, e.g.*, GREEN, *supra* note 78, at 5, 9, ll. For a discussion of the lack of usefulness to the next of kin of such private accusations, see *infra* note 388.

94. 24 Hen. 8, c.5 (1532) (Eng.), *reprinted in* STAUNFORD LES PLEES DEL CORON, *supra* note 52, at fol. 14b (spelling modernized).

95. A householder would never be penalized, only encouraged in cases of justifiable homicide as occurs, for example, when the deceased housebreaker's intent was unknown in advance. For a more detailed discussion of this point, see, for example, the discussion *infra* at notes 143-173 and accompanying text.

96. 3 COKE, *supra* note 21, at 220. Attempted burglary was one in which the apparent house breaker had not yet entered the house, such as by sticking his head or foot inside the home although he had broken one or more building walls or windows. *See, e.g., id.* at 247.

97. 4 BLACKSTONE, *supra* note 35, at 180; 2 BURN, *supra* note 50, at 1;

CROMPTON, *supra* note 83, at fols. 21b, 22a; DALTON, *supra* note 26, at 220 (stating that homicide in such cases was “no felony but justifiable by the Common Law, before the Statute 24 H. 8. cap. 5.”); FOSTER, *supra* note 49, at 275–76; 1 HALE, *supra* note 41, at 486–87; LAMBARD, *supra* note 54, at 238; PULTON, *supra* note 47, at 121a, 122a; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14b.

98. See the discussion of the third root case at *supra* notes 90–92 and accompanying text, in particular with reference to 1 Hale, *supra* note 41, at 486–87.

99. See, e.g., 2 BURN, *supra* note 50, at 1CROMPTON, *supra* note 83, at fols. 21b, 22a; DALTON, *supra* note 26, at 220; FOSTER, *supra* note 49, at 276; 1 HALE, *supra* note 41, at 487–88, 491, 493; 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 71; PULTON, *supra* note 47, at 121a, 122b; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14b.

100. See, e.g., Cooper’s Case, 79 Eng. Rep. 1069 (K.B. 1640); FOSTER, *supra* note 49, at 276.

101. 1 J.W. CECIL TURNER, RUSSELL ON CRIME 435 (photo. reprint 1986) (12th ed. 1964).

102. 24 Hen. 8 c. 5 (1532) (Eng.).

103. “A person may use such force as is reasonable in the circumstances in the prevention of crime” Criminal Law Act, 1967, Section 3 (1). For a discussion of the legal meaning of this provision, see *Rex v. Cousins*, 1982 Q.B. 526 [1982], 2 All E. R. 115 at 117–18. For a discussion of the baleful practical impact of the legislation saddling householders with the burden of using only “reasonable” force when attacked by an overt criminal, see *infra* notes 506–509 and 565–566 and accompanying text. For a discussion of a failed nineteenth-century attempt by a royal commission to have Parliament impose a similar standard in such cases, see *infra* note 212.

104. Y.B. Trin. 14 Hen. 7 (1499), reported in Y.B. 21 Hen. 7, fol. 39a, Mich., pl. 50 (1506).

105. JOSEPH H. BEALE, A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW 569 (2d ed. 1907).

106. Since breaking into a home by a known person for the anticipated purpose of a non-fatal beating constituted a merely non-felonious trespass, Fitzherbert reported this case in the chapter *Trespas*. 2 FITZHERBERT, *Trespas* [Trespass], *supra* note 51, at fol. 214a, pl. 246. On the other hand, since going in public places with a large number of armed people constituted a riot or at least a rout, Brooke reported this case in his chapter *Riots &*

Routs and Assemblies. 2 BROOKE, *Riottes & Routes, and assemblies*, *supra* note 33, at fol. 224b, pl. 1.

107. *See, e.g.*, 2 BROOKE, *supra* note 33, at fol. 224b, pl. 1; 3 COKE, *supra* note 21, at 56, 161, 162; 2 FITZHERBERT, *supra* note 51, at fol. 214a, pl. 246; 1 HALE, *supra* note 41, at 445, 484, 487, 493, 547; 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 136, 158; LAMBARD, *supra* note 54, at 188; PULTON, *supra* note 47, at fols. 121a, 122a; 19 VINER, *supra* note 31, at 235. Hawkins' *Abridgment* indirectly cited this fourth case by stating the law as follows: "It is no offence to assemble my friends in the defence of my house against those who threaten to do me a violence in it; for my house is my castle. Neither is it any offence to arm my self in order to suppress dangerous rioters . . . for the public good requires it." 1 HAWKINS'S ABRIDGMENT, *supra* note 34, at 158 (spelling and capitalization modernized).

108. 2 Edw. 3, c. 3 (1328). For a discussion of the 1328 Statute of Northhampton, see *infra* notes 238-245 and accompanying text.

109. Translation: "To every man his own house is his safest refuge." BLACK'S LAW DICTIONARY 575 (4th ed. 1951).

110. Coke took this maxim from Ovid's *The Art of Love, Book III*. OVID, THE ART OF LOVE, AND OTHER POEMS 153 (J.H. Motzley trans., Harvard University Press, rev. ed. 1939).

111. 3 COKE, *supra* note 21, at 161-62.

112. *See id.*

113. Patrick O'Driscoll, 'The Looters, They're Like Cockroaches,' USA Today, Sept. 2, 2005, at 3A ("As scenes of fire, gunshots and looting exploded near downtown Thursday, residents of one of the city's grand, oak-lined neighborhoods stood guard against deadly threats in the night. The Carrollton neighborhood is less than 3 miles from the Louisiana Superdome, where thousands of refugees from Hurricane Katrina grew hostile as they waited for buses to be evacuated. 'Last night, I heard some of the gunshots. And I've heard stories that (the looters) are better armed than the police.' . . . There was no ignoring the nearby mayhem . . . 'There's a body floating there around the corner, with five shots in his head,' . . . 'And there's two others around up there.' . . . Armed law enforcement officers came to the neighborhood for the first time Thursday. A convoy of vehicles from the East Baton Rouge Sheriff's Department and the Louisiana Department of Wildlife and Fisheries brought motorboats down the avenue to rescue dozens of people trapped at the water-logged northeast end of the neighborhood. All the officers were armed, many with



shotguns and automatic rifles Other residents prepared to continue their stand in a beloved neighborhood of stately old homes near the Tulane and Loyola university campuses ‘We need some order, civil order. Maybe now, now that the guys in riot gear showed up.’ . . . ‘I’m afraid to leave until the National Guard arrives’ A ‘free-for-all’ of looting broke out nearby on Canal Street after the storm passed . . . and stores such as Macy’s and the Pottery Barn were stripped bare. . . . [S]quatters have broken into nearby hotels and taken up residence. . . . [A householder] fled his Garden District home Wednesday after two nights of scaring off thieves with a borrowed handgun. . . . ‘The last two or three days, the things I’ve seen, it’s absolutely terrifying that people can do the things they’re doing I could never have imagined the absolute disregard for life or property that’s going on.’”).

114. WILLIAM L. CLARK & WILLIAM L. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 10 (7th ed. 1967).

115. *Id.* at 6, 16.

116. *Id.* at 20.

117. *Id.* at 5.

118. See the inside front cover of JOHN LOCKE, *OF CIVIL GOVERNMENT: SECOND TREATISE* (Russell Kirk intro. 1955) (1690).

119. RUSSELL KIRK, *Introduction to Locke*, *supra* note 118, at ix.

120. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

121. See CLARK & MARSHALL, *supra* note 114, at 14.

122. Lary Edler, *Race, Class, Culture and Katrina*, *INVESTORS BUSINESS DAILY*, Sept. 9, 2005, at A14.

123. See LOCKE, *supra* note 120, at 7-8.

124. See *id.* at 16-17.

125. *Anarchy in New Orleans*, *LONDON DAILY MIRROR*, Sept. 3, 2005, at 5.

126. See *infra* Part V.

127. The Model Penal Code would cause social problems of no mean proportions. See, e.g., *Bloom v. City of New York*, 357 N.Y.S.2d 979, 981 (N.Y. Sup. Ct. 1974) (“In the instant case the plaintiffs allege that the city by its officials encouraged and permitted the looting and destruction of plaintiffs’ property, prevented the plaintiffs from protecting their property





and assured them that they would receive police protection. The complaint then alleges that the defendant stood by and permitted the looting and destruction to occur.”); John Podhoretz, *An Obscene Charge; Left’s Vile Bid to Blame Racism for Relief Bungling*, N.Y. Post, Sept. 7, 2005, at 31 (“Indeed, the very confused rapper Kanye West, after accusing the president of failing to care about black people because he thought the early response was too slow, then turned around and said the administration’s efforts to save the suffering remnant of New Orleans from the predatory gangs that had taken over was an effort to kill black people. West’s remarks have been praised in many quarters on the liberal left.”).

128. James Dao & N.R. Kleinfield, *More Troops and Aid Reach New Orleans; Bush Visits Area; Chaotic Exodus Continues*, N.Y. TIMES, Sept. 3, 2005, at A1.

129. 3 COKE, *supra* note 21, at 56. Here, Coke cites not only the 1349 *Memorandum case*, discussed *infra* at notes 231-233 and accompanying text, but also *Rex v. Compton*, Y.B. 22 Ass. 55 (1349), discussed *infra* at notes 209-211, as well as the 1532 statute, 24 Hen. 8, c.5, which abolished the forfeiture penalty for dispatching attempted highway robbers. *See, e.g., supra* notes 94-103 accompanying text.

130. RONALD N. BOYCE & ROLLIN M. PERKINS, *CRIMINAL LAW & PROCEDURE* 1112 (8th ed. 1999).

131 For clarity and brevity, as used hereinafter the term “home-breaker” or “unknown intruder” will refer to all home invaders or attempted home invader invaders whose identity was known to the householder (like a janitor’s relative) had no legitimate reason for physically touching i.e. or attempting to manipulate the locks, or “break” into the home or for his presence across the threshold of the occupant’s premises.

132. 77 Eng. Rep. 194 (K.B. 1603).

133. *Id.* at 195, *quoted in* *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980).

134. The Jewish law on housebreakers is predicated upon this same concept. *See infra* notes 500-505 and accompanying text.

135. 3 FITZHERBERT, *supra* note 51, at fol. 217a, pl.261 (22 Edw. 3, Trin. [13490]). *See infra* notes 231-233 and accompanying text for a discussion of this 1349 *Memorandum case*, which placed resisting a burglar with deadly force on a par with an officer’s or minister of justice’s overcoming resistance to a lawful arrest.

136. 3 COKE, *supra* note 21, at 220. In regard to justifiable homicide, Coke cites *Exodus 22*, “Si effringens vir domum sive suffodiens fuerit inventus,





& accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.” *Id.* King James translation: “If a thief be found breaking up, and be smitten that he die, there shall be no blood be shed for him.” Douay-Rheims translation: “If a thief be found breaking open a house or undermining it, and be wounded so as to die, he that slew him shall not be guilty of blood.” The Douay-Rheims translation adds the phrase “or undermining it” as an interpretative tool to indicate an alternative meaning of the Hebrew word **נמתטת** found in the Hebrew Bible *ad loc.* See also *infra* notes 500-505 and accompanying text for a discussion of the biblical presumption that a house-thief is a robber, (that is, one who takes property from another by putting the owner in fear, and an intrusion into the home puts the occupants in fear).

The chapter and verse numbering of the verse to which Coke refers corresponds to the Hebrew Bible’s *Exodus* 22:1; but these correspond to *Exodus* 22:2 in the English translations of the Geneva, Douay-Rheims, and King James versions. The first translation of the Bible into English was the Geneva translation in the year 1560, decades before the Douay-Rheims translation (1582-1609) and the King James translation (1611). For convenience and simplicity, hereafter the Geneva, Douay-Rheims, and the King James versions are referred to as the “English Bible” since all known English translations, except for all the Jewish versions, use the same numbering of the verse in question. However, all Hebrew bibles and their translations use the chapter and verse numbering *Exodus* 22:1.

137. 3 COKE, *supra* note 21, at 220. The Hebrew Bible at *Exodus* 22:1 describes the housebreaker as **תטת**, vowelized in modern printed Hebrew bibles as **מתטת**, which transliterates into “haganef” [“the thief”]. The word “ganef” has found its way into modern English dictionaries where it is described as having derived from the Hebrew and the Yiddish. See, e.g., WEBSTER’S THIRD INTERNATIONAL DICTIONARY 934 (3d. ed. 1993).

138. According to William Staunford, only if the non-felonious intent of the intruder is known (“est conu”) in advance to the occupants were the above presumptions changed. STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol 30a.

139. Statute 24 Hen. 8, c.5 (1532) (Eng.).

140. *Id.*

141. *Id.*, reprinted in STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 14b (spelling modernized).

142. For a further discussion of the issues involved here, see BOYCE & PERKINS, *supra* note 130, at 1122.





143. See CLARK & MARSHALL, *supra* note 114, at 468, 469.

Homicides classed justifiable at common law include those where a person: (1) convicted of a capital offense, sentenced to death by a court of competent jurisdiction, is executed by the proper officer in accordance with such judicial order; (2) is necessarily killed, either by a peace officer or by a private person, in order to prevent him from committing a felony by violence or surprise; (3) is necessarily killed, either by a peace officer or by a private person, in suppressing a riot; (4) is necessarily killed in effecting an arrest for a felony committed by him, or in preventing his escape after he has been arrested and is in custody; (5) who is feloniously assaulted and who is himself without fault, kills his assailant to save himself from death or great bodily harm.

Id.

144. *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980) (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)).

145. Here, Coke refers to *Semayne's Case*, as well as, *inter alia*, the four root cases which were cited by the Supreme Court in *Payton* in its excerpt from *Semayne's Case*.

146. BLACKSTONE, *supra* note 35, at 182, 187-88

147. COKE, *supra* note 21, at 220. Regarding justifiable homicide, Coke here cites *Exodus 22*, “Si effringens vir domim sive suffodiens fuerit inventus, and accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.” King James translation: “If a thief be found breaking up, and be smitten that he die, there shall be no blood be shed for him.” Douay-Rheims translation: “If a thief be found breaking open a house or undermining it, and be wounded so as to die, he that slew him shall not be guilty of blood.” The Douay-Rheims translation adds the phrase “or undermining it” as an interpretative tool to indicate an alternative meaning of the Hebrew word **נמתט** found in the Hebrew Bible *ad loc.*

148. C. JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 162 (New York, J. Parker, 2d ed. 1749) (capitalization and spelling modernization.)

149. *Payton*, 445 U.S. at 579.

150. “[A] person invaded in this sudden manner cannot know, nor is obliged to consider in such a moment” to what greater length he may a carry the attempt. 1 DAVID HUME, COMMENTARIES ON THE LAW OF





SCOTLAND, RESPECTING CRIMES 213 (Edinburgh, Bell & Bradfute, 2d ed. 1818); 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, WITH A SUPPLEMENT BY BENJAMIN ROBERT BELL 218 (photo. reprint 1986) (4th ed. 1844) (“He is entitled to suppose the worst of that which has been begun in so base a fashion; and, by the law of nature, has therefore [the] right to put himself in security by the only certain means, the instant slaughter of the assailant . . . his innocent victim should [not] contend with him on equal terms.”).

151. *Payton*, 445 U.S. at 596 n.44 (quoting *Semayne’s Case*, 77 Eng. Rep. 194, 194 n.(c) (K.B. 1603)).

152. *Id.*

153. *Id.*

154. *Id.* at 591 n.33.

155. *Id.* at 590.

156. *Payton*, 445 U.S. at 590.

157. *Dhutti’s Case*, 40 H. III (1256) (printed only in Latin in THREE EARLY ASSIZE ROLLS FOR THE COUNTY OF NORTHUMBERLAND, *supra* note 78, at 94 (no printed translation available; author’s version and translation of an excerpt).

158. 445 U.S. 573 (1980).

159. *Id.* at 597 n.32.

160. *Id.*

161. COKE, *supra* note 21, at 56.

162. *Id.*

163. BOYCE & PERKINS, *supra* note 130, at 1122 & n.49 (citing Beale, *supra* note 78, at 572). For a discussion of the retreat question, including the requirement to retreat from room to room, see *infra* Part VI.D.1.

164. Coke refers to *Semayne’s Case*, as well as, *inter alia*, the four root cases which were cited by the Supreme Court in *Payton*, 445 U.S. at 596 n.44, in its excerpt from *Semayne’s Case*.

165. *Rex.1 v. Slingesbie*, K.B. Hil. 1488, translated in 155 SELDEN SOCIETY PUBLICATIONS, REPORTS OF CASES BY JOHN CARYLL, PART 1, 1485-1499, at 5 (J.H. Baker ed., 1998).

166. *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

167. See *infra* Part VI.



168. 1 *Fleta* Cap. 24 (“Of Keeping the Peace”), translated in 72 SELDEN SOCIETY, FLETA. VOL. II, PROLOGUE, BOOKS 1 AND 2, at 61 (H. G. Richardson & G. O. Sayles eds., 1955). For more data on *Fleta*, see CHRISTOPHER TYERMAN, WHO’S WHO IN EARLY MEDIAEVAL ENGLAND 1066–1272, at 353 (1996); and Theodore F.T. Plucknet, A Concise History of the Common Law 265 (5th ed. 1956). *Fleta* relied heavily upon Bracton, who preceded *Fleta* by around a generation.

169. 2 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 74; see also 4 BLACKSTONE, *supra* note 35, at 289 (similar language); 1 HALE, *supra* note 41, at 489 (similar language).

170. GREEN, *supra* note 78, at 81 n.49 (citing a 1334 case acquitting the defendant and labeling him “ut executor *pacis*”). RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979), provides that an interference with a public right is unreasonable where “the conduct involves a significant interference with the public health, the public safety, the public comfort or the public convenience.” For a recent case using this standard for judging that the mere sale of firearms in the Chicago area under a dealer’s license does not constitute a public nuisance, see *City of Chicago v. Beretta U.S.A. Corp.*, 84 N.E. 2d 1699 (Ill. 2004).

William Lambarde pointed out that whereas housebreakers terrorize the public, the use of deadly force to defend the home is socially beneficial since it protects the homeowner and acts a deterrent by causing “the more terror against offenders.” LAMBARD, *supra* note 54, at 236–37.

171. 4 BLACKSTONE, *supra* note 35, at 182.

172. PARKER, *supra* note 148, at 162 (capitalization and spelling modernized).

173. CLARK & MARSHALL, *supra* note 114, at 470. A late nineteenth century hornbook nicely clarifies the issue involved here, namely the distinction between homicides in pure self-defense as opposed to with justification: “The principle of justification is broader than the mere idea of self-defense.” WILLIAM L. CLARK, HANDBOOK OF CRIMINAL LAW 147 (St. Paul, Minn., West Publishing Co. 1894). The basis of justifiable homicide rests in the right and obligation to prevent a felony, such as in defense of the home not as property but as in prevention of a felony. *Id.* at 145.

174. *Payton*, 445 U.S. at 596 n.44 (quoting *Semayne’s Case*, 77 Eng. Rep. 194, 194 n.(c) (K.B. 16603).

175. BOYCE & PERKINS, *supra* note 130, at 1112.



176. BLACKSTONE, *supra* note 35, at 173, 189 (labeling pure self-defense as “se detendendo” as did other commentators).

177. STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 15a. The deceased was a “loial home” [loyal or law-abiding man]. *See also* LAMBARD, *supra* note 54 at 255.

178. CONDUCTOR GENERALIS 213 (Woodbridge, N.J., James Parker 1765) (no author given for this edition).

179. Joshua Dressler, *Reflections on Excusing Wrongoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 685 (1988); *see also id.* at 672-86.

180. *Id.* at 685.

181. *Id.*

182. DALTON, *supra* note 26, at 221.

183. *See also* Keilwey (or Keilway), pl. 27, tol. 108a, fol. 108b, 72 Eng. Rep. 273, 274 (1327?-1491?).

184. PARKER, *supra* note 148, at 162 (capitalization and spelling modernized.)

185. *Id.*

186. *Keilwey*, 72 Eng. Rep. at 274 (Author’s translation: “. . . because the king has suffered the death of a subject of the realm . . . for that reason, it is proper that he have a pardon from the king . . . before he may be delivered from prison.”).

187. POLLOCK & MAITLAND, *supra* note 78, at 479 (*deserves* but needs a pardon).

188. Time immemorial English practice had provided that the Crown would not retain beyond a year and a day the lands of convicted felons, but that the felon’s land would thereafter be returned to the lord (grantor) of the land. During that year and a day, however, the Crown was entitled to waste: all the land’s trees would be uprooted, all gardens destroyed, all meadows ploughed up, and all buildings leveled. When at last the landlord entered into possession of the escheated land, he would find a desert, and not a prosperous manor. This destructive procedure had its justification in the idea that the landlord had used poor judgment in choosing a felonious grantee. It served as an incentive for future grantors to examine the credentials of honesty and trustworthiness of prospective grantees before granting them lands. *See e.g.*, WILLIAM SHARP MCKECHNIE, MAGNA CARTA 337 (photo. reprint 1958) (2d ed. 1914); WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 307 (1965).





Chapter 32 of *Magna Carta* (1215) restored the grantor's right of return that King John had abused by not giving back the forfeited lands after lapse of the year and a day.

189. 1 JOEL BISHOP, COMMENTARIES ON THE COMMON LAW 533-34 (Boston Little Brown 1856).

190. U.S. CONST. art. III, §3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

191. An Act for the Punishment of Certain Crimes, ch. 9, §24, 1 Stat. 112, 117 (1790).

192. SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1259 (5th ed. 2002).

193. JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 261-62 (1934).

194. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998).

195. For a translation and discussion of this biblical verse, see *infra* notes 501-502 and accompanying text.

196. FLETCHER, *supra* note 194, at 132-33. “For example, if the force used in self-defense against an aggressor is both necessary and reasonable, injuring the aggressor is justified and therefore lawful.” *Id.* at 133.

197. *Payton v. New York*, 445 U.S. 573, 596 & n.44 (1980) (quoting approvingly from *Semanye's Case*, 77 Eng. Rep. 194 (K.B. 1603)).

198. *Alice and Richard's Case* (1221), reprinted in 53 SELDEN SOCIETY, *supra* note 97, at 558.

199. Chapter 61 of the Great Charter of Liberties (*Magna Carta*) provided for a temporary lawful armed uprising, under certain specified circumstances. The uprising would be conducted and directed by the entire community of the land led by a committee of 25 barons elected by all the barons. To be legal, the temporary uprising could have only the limited purpose and objective of coercing the monarch to cure a grievance(s) presented by the committee to the Crown in a petition for a redress of grievance(s) that had not been cured within 40 days after presentation of the petition. After correction of the grievance to the satisfaction of the committee of the 25 barons, chapter 61 provided that all the barons and their followers would terminate the uprising and resume their obedience to the Crown. MAGNA CARTA, cl. 61 (1215); see also David I. Caplan & Sue





Wimmershoff-Caplan, *Magna Carta, in GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW* 371, 371–376 (Gregg Lee Carter ed., 2002) (discussing clause 61 of Magna Carta and its implications).

200. The decision also came down forty years after the 1181 Assize of Arms, which allowed and required all free subjects to possess ordinary personal arms. For the text of the 1181 Assize of Arms, see, for example, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS* 85 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).

201. The word *castle* in medieval times meant “fortified residence.” *ENCYCLOPEDIA ENCARTA, Castle, available at* http://encarta.msn.com/encyclopedia_761578135/Castle.html??partner=orp (last visited Mar. 18, 2005).

202. For a discussion of when a constitutional right necessarily implies the means to make it an effective constitutional right, with particular emphasis on the right to possess firearms for self-defense, see Victoria Dorfman & Michael Koltonyuk, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 *TEX. REV. L. & POL.* 381, 389–400 (1999).

203. *State v. Kessler*, 614 P.2d 94, 100 (Or. 1980) (referring to “arms” as contained in the Oregon constitution). For a further discussion of the *Kessler* case and its ramifications, see David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 *DET. C. L. REV.* 789, 818–22 (1982).

204. Dorfman & Koltonyuk, *supra* note 202, at 391-92, 400-01.

205. Personalization of a firearm requires that (1) a battery, and (2) software for analyzing fingerprints, palm-prints, or other signature—any one of which is notoriously unreliable—be connected to the firearm. *See also* Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 *CONN. L. REV.* 157 (2001).

206. *See, e.g.*, Dorfman & Koltonyuk, *supra* note 202, at 397-400.

207. *See id.* For an in-depth discussion of the right to have firearms in general as an indispensable means for self-defense, see *id.* at 392-401.

208. *See id.* at 400-01.

209. Y.B. 22 Ass. pl. 55 (1349), *printed in, e.g.*, *BOOK OF ASSIZES* (1679), *supra* note note 74, at 97, *and in* *BOOK OF ASSIZES* (1561), *supra* note note 74, at fol. 97b, *translated in* *BEALE*, *supra* note 105, at 500; *SAYRE*, *supra* note 76, at 563. Common law scholars often abbreviate this case as





Y.B. 22 Assize 55 or simply 22 Ass. 55 signifying 22 *Livre des Assises* [*Book of Assizes*] pl. 55. Here the number “22” signifies the 22nd regnal year of Edward III. Different writers assign this case different dates. Beale *ad loc.* assigns it the year 1347. Sayre *ad loc.* assigns it the year 1348. By contrast, a more modern work on the subject assigns it the year 1349, which this Article adopts. GREEN, *supra* note 78, at 83 n.54.

210. 22 Assize pl. 55, as translated in Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 440 (1976).

211. See, e.g., BLACKSTONE, *supra* note 35, at 289; 1 BROOKE, *Corone et matters del Corone*, *supra* note 33, at fol. 177b, pl. 87; 3 COKE, *supra* note 21, at 56, 221; 1 FITZHERBERT, *supra* note 51, at fol. 214b, pl. 179; 1 HALE, *supra* note 41, at 489; 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 69, 70; LAMBARD, *supra* note 54, at 347; PULTON, *supra* note 47, at 120b, 121a; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at fol. 13a; 15 VINER, *supra* note 31, at 519.

Even the thirteenth century Henri de Bracton (or Henry of Bratton)—whose views on justifiable deadly force were quite restrictive—opined in connection with resisting or fleeing outlaws found outside their designated areas: “For it is a just judgment that he who has refused to live by the law should perish without law and without judgment.” 2 Henri de Bracton, *De Legibus et Consuetudinibus Angliæ* [Henry Bracton, *On the Laws and Customs of England*] 363 (Samuel E. Thorne ed. & trans., 1968) (ca. 1250). For more on Bracton, see *infra* notes 410-412 and accompanying text.

212. Alternative translations: control of protection, control of defense, moderation of protection.

The 1879 *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (appointed in 1878) took the breathtaking position that *moderamine tutela* applied at common law to all cases of defense, including home defense. Curiously, the report went about it in an indirect route. On the topic, it first stated:

We take it one great principle of the common law to be, that although it sanctions the defence of a man’s person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last



principle will explain and justify many of our suggestions. It does not seem to have been universally admitted [footnote omitted]; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognized as the law in [the] future, but that it is the law at present. But as this is in the nature of an argument, we have thought it better to print it as a note. (See Note B to this Report.)

Criminal Code Bill [c. 2345.], Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences in 20 REPORTS FROM COMMISSIONERS, INSPECTORS, AND OTHERS: TWENTY-SEVEN VOLUMES 1, 11 (British Parliamentary Reports 1878–1879), reprinted in 6 IRISH UNIV. PRESS SERIES OF BRITISH PARLIAMENTARY PAPERS 393, 379. The report goes on to state in its Note B:

The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. *Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam* [It is permitted to resist force by force, doing with the moderation of blameless defense, and not to accomplish revenge, but to prevent harm.]—Co. Lit., 162a. And when the violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

Id. at 45, reprinted in 6 IRISH UNIV. PRESS SERIES OF BRITISH PARLIAMENTARY PAPERS 413. Although the 1878 English codifiers conceded that their restrictive approach to the issue of deadly force justification, in particular regarding thwarting a housebreaker, was not “universally admitted” even in 1878, they totally overlooked Coke’s first three root castle doctrine cases. They relied upon only Coke’s discussion of the rules on excusable deadly force in cases of disputes between landlord and tenant that Coke dealt with in the first volume of his *Institutes*. The Commissioners never mentioned the extensive discussion of justifiable deadly force and especially the first three root castle doctrine cases contained in Coke’s third volume of his *Institutes*. Incredibly, the commissioners were relying solely upon the *wrong volume* of Coke’s *Institutes*.

Parliament refused to adopt the recommendation of the commission to codify the criminal law in accordance with the report, or to adopt any codification for that matter. See, e.g., Kadish, *supra* note 2, at 531–33.

213 The term “foul criminal” was used here in later editions of the same work. See, e.g., 1 HUME, COMMENTARIES ON THE LAW OF



SCOTLAND, RESPECTING CRIMES, *supra* note 150, at 213; 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, WITH A SUPPLEMENT BY BENJAMIN ROBERT BELL, *supra* note 150, at 218.

214. 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, *supra* note 150, at 324–25.

215. *Id.* at 306.

216. *Id.*

217. FOSTER, *supra* note 49, at 273 (spelling and capitalization modernized). For the language “happening in such cases to slay” contained in the 1532 statute that Foster was paraphrasing, see *supra* note 94 and accompanying text.

218. *Id.* at 273.

219. *Id.* at 274.

220. *Id.* at 271.

221. *Id.* at 272 (capitalization modernized).

222. “Interest reipublicæ ne maleficia remaneant impunita, & impunitas semper ad deteriora invitat.” Foxley’s Case, 5 Co. Rep. 109a, 109a, 77 Eng. Rep. 224, 225 (K.B. 1597). Authors’ translation: “It is in the public interest that malefactors not go unpunished, and lack of punishment always invites deterioration.” Coke pointed out that if the victim of a theft did not pursue the thief to apprehend him fleeing from the scene, then the property owner forfeited his goods to the Crown. *Id.*

223. FOSTER, *supra* note 49, at 272 (“ne Maleficia remneant impunita.”). *Tennessee v. Garner*, 471 U.S. 1 (1985), held that arrests using deadly force by law enforcement officers to arrest non-dangerous felons, such as burglar fleeing from an empty home, were unconstitutional despite the fact that common law standards at the framing would dictate otherwise. The decision treats a different topic from the focus of the present Article because it dealt with an officer’s arrest of a presumably non-violent felon.

224. Legal escapes for convicted felons from condign punishment were the rule and not the exception. In the records of Pleas of the Crown for the year 1256, of 77 convicted murderers, only four received any punishment, in one case the murderer went into exile, and “in the remaining 72 cases the murderers escaped with the “slight punishment of outlawry.” William Page, *Preface to Three Early Assize Rolls for the County of Northumberland*, 88 PUBLICATIONS OF THE SURTEES SOCIETY FOR THE YEAR 1890 at xviii–xvix (1891). The punishment of “outlawry” meant forfeiture of





all the convicted felon's property and that if he was found outside certain regions of the country, typically only outside regions of the country where bandits controlled, anyone could capture him and kill him if he resisted; if captured, he could be hanged merely upon proof of the outlawry. *See, e.g.*, PLUCKNET, *supra* note 168, at 430-31. In the same Northumberland Assize roll, there were recorded "78 cases of burglary, theft, etc., in twelve of which cases the felons were hanged, in fourteen they abjured the realm, and in the remaining 52 they escaped with only the punishment of outlawry." Page, *supra*, at xviii-xvix. Moreover, benefit of clergy, the ability to read or recite the "neck verse" in the Bible (*Psalms* 51:1) enabled convicted felons to escape the death sentence at least for a first offence. In a famous example from literature, Shakespeare has Romeo sentenced to banishment from Verona for killing Tybalt:

And for that offence Immediately we do exile him hence:
 I have interest in your hate's proceeding,
 My blood for your rude brawls doth lie bleeding:
 But I'll amerce you with so strong a fine
 That you shall all repent the loss of mine:
 I will be deaf to pleading and excuses;
 Nor tears nor prayers shall purchase out abuses:
 Therefore use none: let Romeo hence in haste,
 Else, when he's found, that hour in his last.
 Bear hence this body and attend our will:
 Mercy but murders, pardoning those that kill.

WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 2.

225. *Holloway v. Mosher*, 136 S.E. 375, 376 (N.C. 1927).

226. *Id.* at 377.

227. *Id.*

228. *People v. Klein*, 137 N.E. 145, 148 (Ill. 1922).

229. Here the arrest refers to an arrest under a proper warrant as opposed to the situation in *Cook's Case*, 79 Eng. Rep. 1063 (K.B. 1640). "[S]eeing him and knowing him shot at him voluntarily, and slew him: whereupon they all resolved, it was not murder, but homicide [voluntary manslaughter] only." *Id.* at 1064. In case the identity and lawful intentions of the housebreaker were known, then the householder would be guilty of murder. *Id.*

230. 22 Edw. 3, Trin., fol. 217a, pl. 261. Different authorities give slightly different dates for this case, probably because of two complications: (1) regnal year as opposed to calendar year, and (2) Julian calendar as opposed to Gregorian calendar, as well as the decisional term (court session). In



his renowned casebook, Professor Beale assigns this case the year 1347. BEALE, *supra* note 105, at 533. Professor Francis B. Sayre in his casebook on criminal law likewise assigns it the year 1347. SAYRE, *supra* note 76, at 562. A more modern work on the subject assigns it the year 1349, which this Article adopts. See GREEN, *supra* note 78, at 83 n.54.

231. BEALE, *supra* note 105, at 533. Here the “etc.” at the end of the case probably refers to pure self-defense.

232. GREEN, *supra* note 78, at 80 (“*pro lege*”).

233. 3 COKE, *supra* note 21, at 56, 221; CROMPTON, *supra* note 83, at fol. 21b; 1 HALE, *supra* note 41 at 489; LAMBARD, *supra* note 54, at 238; PULTON, *supra* note 47, at fol. 120b; STAUNFORD, LES PLEES DEL CORON, *supra* note 52, at 14b.

234. For an alternative translation, see BLACK’S LAW DICTIONARY 1155 (4th ed. 1957) (“regulation of justifiable defense”).

235. 1 COKE, *supra* note 21, at 162. Coke used this term in his section titled “Of Rents” contained in the first volume of his *Institutes*, and not in his chapter titled “Of Homicide” contained in the third volume of his *Institute*—thereby clearly indicating the completely different set of rules pertaining to landlord-tenant relations as opposed to the rules concerning a householder confronting an unknown housebreaker. For Professor David Hume’s similar use of the term, in the context of not requiring only moderate defensive force for home defense, see *supra* note 212 and accompanying text.

236. 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIMES 128 (Edinburgh, Bell & Bradfurte 1797). In 1822 Hume was appointed to the position of Baron of the Exchequer.

237. *Id.* at 328-29.

238. 2 Edw. 3, c. 3 (1328).

239. Rex v. Knight, 3 Mod. Rep. 117, 118, 87 Eng. Rep. 73, 74 (K.B. 1686) (“go armed to terrify the King’s subjects”). As early as 1718, colonial lawyers cited cases from *Modern Reports*. See, e.g., WARREN, *supra* note 39, at 160 n.1.

240. 19 VINER, *supra* note 31, at 235 (indicating that both Dalton’s *Country Justice* and Hawkins’ *Pleas of the Crown* had cited the fourth root case in support of this doctrine). Blackstone emphasized that a conviction under the statute, or under the common law on banning riding with arms, required a showing that the accused had been “terrifying the good people of the land.” 4 BLACKSTONE, *supra* note 35, at 148. Hale and Hawkins

specified that intent to terrorize the public was a key element of the offense of carrying arms in public contrary to the Statute of Northhampton and the similar common law offense. 1 HALE, *supra* note 41, at 487; 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 135-36 (stating that in the exposition of the Statute of Northhampton and the common law offense described in it, “the following points have been holden: . . . that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people”).

241. 3 COKE, *supra* note 21, at 158. Coke wrote *ad loc.* that “the writ grounded upon this statute [of Northhampton] saith, In quorundam de populo terrorem [To the terrorization of certain of [our] people].” The authors are grateful to the Selden Society for its help in translating the word “quorundam” and explaining that it is the genitive plural of “quidam” (with the common medieval substitution of a middle *n* for what in classical Latin would be an *m*).

In quoting the Statute, Dalton’s *Justice* inserted the word “offensively” immediately after the phrase “or go armed” whereby the rendition of the opening statutory clause was “If any person shall ride, or go Armed offensively” DALTON, *supra* note 26, at 30; *see also* MICHAEL DALTON, OFFICIUM VICECOMITUM, THE OFFICE AND AUTHORITY OF SHERIFFS 29 (1682) (restricting the statute to cases in which the accused would “go or ride armed offensively . . . in affray of the Kings people”). Colonial lawyers possessed this work. *See, e.g.*, WARREN, *supra* note 39, at 133.

Richard Burn relies upon 3 COKE, *supra* note 21, at 158, for the principle that the offense known as an “affray,” which was a terrorizing act and included going armed in public and in a terrorizing manner, cannot take place in “a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.” 1 BURN, *supra* note 50, at 12; *see also* 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 134 (similar language). Common law commentators likewise held that statute required the elements of carrying “dangerous and unusual weapons, in such a manner, as is apt to cause a terrour to the people, which was an offence at common law.” 1 HAWKINS’S ABRIDGEMENT, *supra* note 34, at 157; *see also* 1 BURN, *supra* note 92, at 13 (similar language); 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 136 (similar language).

In *State v. Bentley*, 6 Lea (74 Tenn.) 205 (1880), the Tennessee Supreme Court decreed that an indictment for going armed in public must allege that the defendant terrified at least one person.



242. *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). For a further discussion of *Knight's Case*, see, for example, Caplan, *supra* note 203, at 794-95. For a further discussion of the meaning of the Statute of Northampton, see *supra* notes 108-111 and *infra* notes 238-245 and accompanying text. See also *State v. Huntly*, 25 N.C. 418, 422-23 (1843) (“[I]t is to be remembered that the carrying of a gun *per se* constitutes no offense For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry a gun. It is the wicked purpose—and the mischievous result—which essentially constitute the [common law crime of arming oneself] with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people.”).
243. U.S. CONST. amend. IV. For the text of the Amendment, see *supra* note 9.
244. *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942).
245. *United States v. Warin*, 530 F.2d 103, 107 (6th Cir. 1976) (emphasis added). Compare this with *supra* notes 239-242 and accompanying text.
246. 5 Ann. c. 14 (1705); 15 Ann. c. 14 (1714). Earlier, very restrictive game laws had been enacted under Charles II (1160-1685) and James II (1685-1688), intending not only to preserve the game but also to disarm the people. These laws were overridden by the 1689 English Bill of Rights. For details on these restrictive laws, see Caplan, *supra* note 203, at 796-97.
247. *Rex v. Filer*, 1 Strange 497, 497, 93 Eng. Rep. 657, 657 (K.B. 1722) (upholding conviction for keeping a [hunting] dog as opposed to keeping a gun). The Framers were familiar with *Strange's Reports*. See, e.g., WARREN, *supra* note 39 at 164, 185.
248. *The King against Gardiner*, 95 Eng. Rep. 386 (K.B. 1738). *Viner's Abridgment* cites this case. 14 VINER, *supra* note 31, at 3.
249. *Gardiner*, 95 Eng. Rep. at 388.
250. *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752).
251. *Id.* at 787 (Denison, J., concurring) (“it is not alledged that, the gun had been used for killing the game.”).
252. *Id.*
253. See *supra* Part I.A.1.
254. 14 VINER, *supra* note 31, at 3 (“Whether [under the statute 4&5 Anne for the Preservation of Game] keeping a Gun barely without using, or Intention laid, is within this Act it seems not.”) (citing *Gardiner*, 95 Eng. Rep. 386).
255. The facts of *Levet's Case* are known from the summary thereof given





by Justice William Jones sitting on the bench in *Cook's Case*. See *Cook's Case*, 79 Eng. Rep. 1063, 1064 (K.B. 1640). Earlier, Justice Jones had sat on the bench in *Levet's Case* and hence knew its facts first-hand.

256. *Id.*

257. A buttery is a place “where provisions (orig. liquor) are kept.” 1 THE SHORTER NEW OXFORD ENGLISH DICTIONARY at 308 (4th ed. 1993).

258. 1 HALE, *supra* note 41, at 42-43 (spelling and punctuation modernized). Almost identical language is found in another section of Hale’s *History of the Pleas of the Crown*. See *id.* at 474.

259. *Id.* at 43, 474. The court in *Levet's Case* had held: “and whether it were manslaughter, . . . it was resolved that it was not; for he did it ignorantly without intention of hurt to the said Frances: and it was there [in *Levet's Case*] so resolved.” *Cook's Case*, 79 Eng. Rep. at 1064.

260. 1 HALE, *supra* note 41, at 474.

261. 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 73.

262. *Levet's Case*, narrated in *Cook's Case*, 79 Eng. Rep. at 1064.

263. FOSTER, *supra* note 49, at 264 (capitalization modernized).

264. *Id.*; see also *Dhutti's Case*, *supra* note 78.

265. The reason for this rule apparently was that the slayer was attempting to perform a public service, though by mistake. See also GREEN, *supra* note 78, at 90 (noting that the allegation, by defendants accused of homicide, that the deceased “had been foolish, reckless, or at fault runs through the largest and, for legal theory, the most important class of cases identifiable as resulting in acquittal for misadventure”); *id.* at 89 (noting that the “deceased’s behavior—contributory negligence, as it were—had become a matter of great concern [by the late fourteenth century]”); *id.* at 95 (pointing out that early on the common law insisted upon “strict rules of self-defense” against “an attempted murderer” [outside the home] but not imposing such rules upon a slayer of “a burglar or robber”).

266. The fact pattern of *Cook's Case*, where no mistake had occurred, involved another branch of the castle doctrine but similar to that of *Levet's Case* which indeed involved mistake and which *Cook's Case* narrates. The justices sitting on *Cook's Case* were clearly focused on the castle doctrine.

267. At least one scholarly commentator has illuminated the source of the MPC’s mistaken approach to home defense: “Those in charge of drafting the Code were in error when they assumed that defense of the habitation is a ‘purely property concept.’” BOYCE & PERKINS, *supra* note 130, at



1153 (internal quotations taken from Model Penal Code 39 (Tent. Draft No. 8, 1958)).

In many self-defense cases, the common law assumed that the deceased had “slain himself” because of his contributory negligence and that therefore the slayer did not need a pardon. Green, *supra* note 78, at 123 & n.74 (citing Staunford, Les Plees Del Coron, *supra* note 52, at fol. 16a). Staunford *ad loc.* has a marginal note reading “Felo de se. Luy mesme” [self-killing, by his own voluntary act]. Surely we can say that a home invader slain by the householder had chanced his life and had “slain himself” by his own actions.

Even shooting at birds or a target and accidentally killing a person in doing so was excusable homicide at the common law. See, e.g., 4 BLACKSTONE, *supra* note 35, at 182 (listing among excusable homicides those resulting “where a person qualified to shoot a gun [at wild game], is shooting at a mark, and undesignedly kills a man”) (citing 1 HAWKINS, PLEASE OF THE CROWN, *supra* note 36, at 74); 1 BROOKE, *supra* note 33, at fol. 180a, pl. 148 (citing, under chapter *Corone*, Y.B. 6 Edw. 4 [ca. 1428] fol. 7); FOSTER, *supra* note 49, at 259 (“For if it was a barely *Malum prohibitum*, as shooting at Game by a Person not qualified by Statute-Law to keep or use a Gun for that Purpose, the Case of a Person so offending will fall under the same Rule [of excusable homicide] as that of a qualified Man.”); 1 HALE, *supra* note 41, at 472 (likewise citing Y.B. 6 Edw. 4 fol. 7b); 1 HAWKINS, ABRIDGMENT, *supra* note 34, at 80 (listing among excusable homicides those caused by “a Gun discharged at wild Fowl”); 1 HAWKINS, PLEASE OF THE CROWN, *supra* note 36, at 74 (citing 1 BROOKE, *Corone*, pl. 148, and Y.B. 21 Hen. 7, fol. 27b, at fol. 28a, Trin., pl. 5 (1505)). Surely slaying a housebreaker has at least as great public utility as does shooting at birds or a target, and should be considered justifiable. Target shooting can serve a public purpose, enables gaining and maintaining firearms proficiency, the better to perform a public service in constraining felons with accuracy, and assisting authorities to maintain civil order during times of public disasters and emergency. Familiarity and facility in using firearms also enables a citizen to efficiently serve in the military. See also *infra* Part I.E.

268. See CLARK & MARSHALL, *supra* note 114, at 494-95 (stating that the rule that a person who is assaulted without felonious intent . . . is bound to retreat . . . does not apply where a man is assaulted in his own house, even though by doing so he might manifestly secure his safety, but he may stand his ground and take his assailant’s life if it becomes necessary”) (citing 1 HALE, *supra* note 41, at 486).

269. See, e.g., 4 BLACKSTONE, *supra* note 35, at 183-86; 1 HALE, *supra* note 41, at 479-85.



270. *See, e.g.*, 4 BLACKSTONE, *supra* note 35, at 183-86; 1 HALE, *supra* note 41, at 479-85.

271. *See, e.g.*, 4 BLACKSTONE, *supra* note 35, at 184-85; 1 HALE, *supra* note 41, at 479-82.

272. *See, e.g.*, Daver's Case, 78 Eng. Rep. 169, 169 (K.B. 1623).

273. 4 BLACKSTONE, *supra* note 35, at 184-85; 1 Hale, *supra* note 41, at 482; *see also* 3 COKE, *supra* note 21, at 55 ("As if A be assaulted by B, and they fight together, and before any mortal blow [is] given A giveth back [retreats], until he comes unto a hedge, wall, or other strait, beyond which he cannot pass, and then in his own defence, and for safeguard of his own life kills the other: this is voluntary and yet no felony and the jury that finds, it was done *se defendendo*, ought to find the special matter [special verdict].") (spelling partially modernized).

274. 4 BLACKSTONE, *supra* note 35, at 183-86.

275. *Id.* at 185-86 & nn.u-v (noting the opinions of Hale and Hawkins regarding one feature of excusable homicide). In cases involving deaths of non-felons, as occurred during fights between neighbors or in drunken brawls—even if the slayer was not the initial aggressor and had retreated as far as possible with safety, and the killing was absolutely necessary to save the life of the attacked slayer—the killing was only excusable homicide and constituted a felony, and hence certainly not justifiable or encouraged. *See, e.g., id.* at 186-87. The common law justification rules, of course, developed centuries before Blackstone's time. As noted by Blackstone, excusable homicide was a common law felony but was non-capital; petit larceny was also a non-capital common law felony. *Id.* at 97. At any rate, at the time of the framing of the U. S. Constitution, the issue of unavoidable or "inevitable" necessity did not arise in situations involving unknown housebreakers, nor did the issue of using excessive force against them.

276. *See also infra* Part VI.D.1.

277. Harcourt's Case, CROMPTON, *supra* note 83, at fol. 21a. The justices recommended, however, that the prisoner Harcourt be pardoned. *Id.* *See also* 1 HALE, *supra* note 41, at 485-86, for a discussion of *Harcourt's Case*. Because one of those outside Harcourt's house was claiming title, Hale explained that Harcourt "was in no danger of his life from them without." *Id.* at 486. It would also seem that those claiming title were known as such to the inhabitants of the house.

278. Cook's Case, 79 Eng. Rep. 1063, 1064 (K.B. 1640) ("seeing him and knowing him shot at him voluntarily, and slew him: whereupon they all resolved, It was not murder, but homicide [voluntary manslaughter] only");



1 HALE, *supra* note 41, at 485, 486. The court in *Cook's Case* suggested that the householder should have first tried to use non-deadly force. *Cook's Case*, 79 Eng. Rep. at 1064.

279. *See, e.g.*, 1 HALE, *supra* note 41, at 485.

280. *Cook's Case*, 79 Eng. Rep. at 1063 (noting that in a criminal or other case in which the Crown has an interest, then the officer “is duly executing his office, by serving the process of law”).

281. At this juncture, Justice Jones narrated his recollection of the facts in *Levet's Case* which involved mistake. For a discussion of *Levet's Case*, see *supra* notes 255-262 and accompanying text.

282. *Cook's Case*, 79 Eng. Rep. at 1064.

283. *United States v. Miller*, 307 U.S. 174, 177 (1939).

284. *Aymette v. State*, 21 Tenn. (2 Hum.) 119, 122–23 (1840).

285. *Miller*, 307 U.S. at 177.

286. *Id.* The term “well-regulated” had, and still has, several meanings including fine-tuned, as is used in connection with a well-regulated pianoforte or a well-regulated clock.

287. *Aymette*, 21 Tenn. at 124.

288. Recently the Court has recognized the existence of the “unorganized militia [and] all portions of the ‘militia’—organized or no.” *Perpich v. Dep't of Defense*, 496 U.S. 334, 341, 352 n.25 (1990).

289. *Aymette*, 21 Tenn. at 124. In 1871, the Tennessee Supreme Court elaborated upon the meaning and scope of “keeping arms” found in Tennessee’s state constitutional provision protecting the right to keep and bear arms as follows:

It necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

Andrews v. State, 50 Tenn. 165, 178 (1871).

290. *Miller*, 307 U.S. at 178.

291. For a clear case upholding an individual right to keep ordinary personal arms under the Second Amendment standing alone, see *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).



292. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 210 (1880).

293. *Id.* at 211.

294. *Id.*

295. *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980).

296. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 435–36 (1895). Black was also the author of the original *Black's Law Dictionary*.

297. *Id.*

298. *See, e.g.*, E. McLain, *Constitutional Guarantees of Fundamental Rights* 53, in 11 MODERN AMERICAN LAW 237 (1914).

299. *See, e.g.*, BOYCE & PERKINS, *supra* note 130, at 1109–12, 1148–54. “Those in charge of drafting the [Model Penal] Code were in error when they assumed that the defense of the habitation ‘is a purely property concept.’” *Id.* at 1153 (internal quotations taken from MODEL PENAL CODE § 316 (Tent. Draft No 8, 1958)).

300. Statute 24 Hen. 8, c. 5 (1532) (Eng.). For a discussion on this statute, see *supra* Part I.B.3.

301. WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS (Boston, Cummings, Hillard & Co., 2d Am. ed. 1831) (only starred paging indicated in this edition).

302. 2 Edw. 3. c. 3 (1328). For a discussion of this statute, see *supra* notes 238–245 and accompanying text).

303. 1 RUSSELL, *supra* note 301, at *272.

304. *Id.* at *549–50.

305. *Id.* at *550–51. For a discussion of *Levet's Case*, see *supra* notes 255–262 and accompanying text.

306. 1 RUSSELL, *supra* note 301, at *551. For a summary of the holding in *Ford's Case*, see *supra* note 77.

307. 1 RUSSELL, *supra* note 301, at *538–52 (citing 1 HALE, *supra* note 41).

308. *Id.* at *538–52 (citing 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36). Russell noted that in addition to Hale's *History of the Pleas of the Crown*, Hawkins's *Pleas of the Crown* was “another book of great authority.” *Id.* at *551.

309. *Id.* at *538–52 (citing FOSTER, *supra* note 49, *passim*).





310. *Id.* at *538-47 (citing BLACKSTONE, *supra* note 35, *passim*).
- 311.. *Id.* at *272.
312. 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 366-67 (Boston, Little, Brown 1858).
313. *Id.* at 366.
314. *Id.* at 366-67 n.1. In identical language Hale summarized the three points in his *History of the Pleas of the Crown*. See 1 HALE, *supra* note 41.
315. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 389 (Philadelphia: J. Kay, Jun. and Brother, 2d ed. 1852). The latest edition of this work, the fifteenth, was edited by Charles E. Torcia and published in four volumes ending in 1996; it is kept up-to-date by pocket supplements. FRANCIS WHARTON, WHARTON CRIMINAL LAW (Charles E. Torcia ed., 15th ed. 1993-1996).
316. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, *supra* note 315, at 357-58.
317. *Id.* at 389. Wharton took this almost verbatim from Foster, *supra* note 49, at 274.
318. FOSTER, *supra* note 49, at 273.
319. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, *supra* note 315, at 385.
320. *Id.* at 726-27 (citing 2 Edw. 3, c. 3 [1328]). For a *further* discussion of this statute, see *supra* notes 238-245 and accompanying text.
321. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, *supra* note 315, at 727.
322. *Id.* at 727 (citing 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 136).
323. NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW (photo. reprint 1979) (1822-1829).
324. *Id.* at 224.
325. For the text of the 1532 statute, 24 Hen. 8, c. 5, see text accompanying *supra* note 94.
326. 7 DANE, *supra* note 323, at 225 (citing Cooper's Case, 79 Eng. Rep. 1069 (K.B. 1640)).
327. *Id.*
328. EDWARD HYDE EAST, PLEAS OF THE CROWN (photo. reprint 1987) (1803) (republished with same pagination in Philadelphia by P. Byrne,





1806).

329. 1 EAST, *supra* note 328, at 272.

330. *Id.* at 273.

331. *Id.* at 272.

332. *Id.* at 221 (emphasis omitted).

333. *Id.* at 298.

334. 1 EAST, *supra* note 328, at 298. It is notable that here East used the term “overtaken” apparently to explain the meaning of earlier usages of the term “taken” in the context of arrests of felons fleeing from the scene of the crime. *Id.*

335. For a discussion of *Levet's Case*, see *supra* notes 255-262 and accompanying text.

336. 1 EAST, *supra* note 328, at 275 (citing 1 HAWKINS, PLEAS OF CROWN, *supra* note 36, at Ch. 28, s. 27 [p. 73]).

337. 7 BACON, *supra* note 30, at 210.

338. GILES JACOB, THE LAW-DICTIONARY (T.E. Tomlins ed., Philadelphia, P. Byrne & New York, I. Riley 1811).

339. 3 JACOB, *supra* note 338, at 304 This work also reiterated the rule that if any one shoot at any wild fowl upon a tree, and the arrow kills any one by accident, then he would be guilty only of “misadventure” which was excusable homicide. *Id.* at 323. For a discussion of the constitutional import of this rule, see *supra* note 267 and accompanying text.

340. 3 JACOB, *supra* note 338, at 303. For a discussion of 22 Assize pl. 55, see *supra* note 210 and accompanying text.

341. 3 JACOB, *supra* note 338, at 301-35.

342. 3 COKE, *supra* note 21. For a discussion of the importance of Coke's works see *supra* notes 56– 62 and accompanying text.

343. HALE, *supra* note 41.

344. HAWKINS, PLEAS OF THE CROWN, *supra* note 36.

345. STAUNFORD, LES PLEES DEL CORON, *supra* note 52.

346. CROMPTON, *supra* note 83.

347. DALTON, *supra* note 26.

348. Statute 24 Hen. 8, c. 5 (1532) (Eng.). For a discussion of this statute and its importance to the Framers, see *supra* notes 94–103 and accompanying text.



349. For a discussion of the common law courts' interpretation of the Game Laws insofar as keeping a firearm by a person not qualified by these laws to do so, see *supra* notes 246–254 and accompanying text.

350. 3 JACOB, *supra* note 338, at 325.

351. *Patsone v. Commonwealth of Pennsylvania*, 232 U.S. 138, 143 (1914).

352. *Id.* Soon after the *Patsone* decision, a *Harvard Law Review* article stated that that “the legislature [is] powerless . . . as to the simple possessing or keeping weapons [at home].” Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 Harv. L. Rev. 473, 476 (1915). Lucilius A. Emery served as Chief Justice of the Maine Supreme Court from December. 14, 1906 until his retirement on July 26, 1911. See Maine Supreme Court Justices, Chronological List, available at <http://www.state.me.us/legis/lawlib/judge-c.htm#Chief> (last updated Nov. 21, 2002).

353. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

354. JOHN RAY, A COLLECTION OF ENGLISH PROVERBS 106 (1670), translated in BURTON STEVENSON, THE HOME BOOK OF QUOTATIONS, CLASSICAL AND MODERN 936, col. 1 (10th ed. 1967).

355. Warren & Brandeis, *supra* note 353 at 193. To Warren and Brandeis, the right of ordinary persons to life and the judicial system's duty to safeguard that life were so indispensable and obvious, that they did not feel the need to give a source or explanation for their “right to life.”

356. *Id.*

357. *Id.* (internal quotes omitted).

358. *Id.* at 195 n.4.

359. *Id.* at 193.

360. Warren & Brandeis, *supra* note 353 at 193.

361. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (Chicago, Callaghan & Co., 1880).

362. *Id.*

363. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973).

364. See *supra* Part II.A.3, discussing the castle doctrine as articulated by the Supreme Court in *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980).

365. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (Fourth Amendment as incorporated by the Fourteenth Amendment invalidates state statutes



banning the home possession of even rank pornographic materials).

366. 505 U.S. 833 (1992).

367. *Id.* at 847.

368. *Id.*

369. *Id.* at 847-48.

370. 381 U.S. 479 (1965).

371. *Boyd v. U.S.*, 116 U.S. 616 (1886).

372. *Griswold*, 381 U.S. at 484.

373. *Id.*

374. 505 U.S. at 848.

375. *Id.* at 951.

376. 367 U.S. 497, 543 (1961).

377. *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (quoting the second Justice Harlan) (internal quotation marks omitted).

378. *Id.*

379. 410 U.S. 113 (1973).

380. *Id.* at 152.

38.1 *Id.* (internal citations omitted).

382. 367 U.S. 643 (1961).

383. *Id.* at 646-47.

384. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

385. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 66 (1973) (internal quotes omitted).

386. *Hurley v. Irish-American Gay Group Boston*, 515 U.S. 557, 568-69 (1995) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (characterizing the right to participate in a march); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969) (characterizing the right to march) (internal quotation marks omitted)).

387. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 952 (1992) (insufficient trend to demonstrate that right to abortion is fundamental).

388. *Arnold v. Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) (concealed firearm carrying statute unconstitutional as applied). This case repeats the oft-cited reference to the fact that the privilege to defend oneself “has been recognized in both a civil and criminal context since about 1400 in



England.” *Id.* (citing WILLIAM PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 124 (5th ed. 1984)). Apparently Wigmore originated this idea. See John H. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441, 446 & n.4 (1894) (“In civil actions of trespass . . . in 1400, and ever since, the plea [of self-defense] is accepted as a complete defence [no forfeiture].”). As implied by Wigmore himself, in cases involving even deadly force against burglars, the plea was accepted as a complete defense much earlier than 1400. *Id.* (citing *inter alia* FITZHERBERT, *supra* note 51, at pl. 261 (a case of justifiable homicide discussed *supra* at notes 230-233 and accompanying text). Although in medieval times the next of kin of a homicide victim could have a right of “appeal of felony,” this right had little chance of success even in excusable homicide cases. NAOMI HURNARD, *THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307*, xi (1969) (“the notion that the bereaved family [of a victim of self-defense or mischance] had a moral right to some form of compensation was soon obliterated”). Not until passage of Lord Campbell’s Act—The Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.)—and its 18th century equivalents in the United States did a deceased’s estate have a right of action against any slayer. See, e.g., EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW* 307 (1913). This is not to say that a statutory right action for a deceased’s estate is facially unconstitutional, but only as applied to estates of attempted home-breakers. The argument here is that because such a right of action was unavailable prior to the framing of the Fourth Amendment, the Fourteenth Amendment absorbs or incorporates such unavailability and at the same time protects the constitutional rights of householders in this respect just as it does in so many others. Besides, the 1532 statute, 24 Hen. 8, c. 5, cut off any right of the next of kin of an attempted housebreaker to sue the householder by way of an “appeal” of the death of the housebreaker. See *supra* note 93 and accompanying text for the meaning of an “appeal” and the 1532 statute’s cutting off such an “appeal” in such cases.

For a translation of the 1400 case, see for example, *Chapleyn of Greye’s Inne*, in JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* 106 (1910). Rolle classified this 1400 case under the subheading *Trespas. Assault & Battery, Que voilt etre bon cause de Justification de battery [What would be good cause of Justification of battery]*. 2 ROLLE, *supra* note 32, at 547. The 1400 case involved the use of non-deadly force by way of a pre-emptive strike.

389. *Arnold*, 616 N.E.2d at 169-70.

390. *Id.* at 170.

391. *State v. Hamdan*, 665 N.W. 2d 785 (Wis. 2003).



392 *Id.* at 805 (ellipsis in original) (internal quote taken from *Arnold v. Cleveland*, 616 N.E.2d at 169-70).

393. *Id.* at 808.

394. *Id.* at 809 n.34.

395. *Hamdan*, 665 N.W.2d at 805 (citing *Gilio v. State*, 33 P.2d 937, 941 (Okla. Civ. App. 2001)).

396. *Id.* at 805 (quoting approvingly *In re Colby H.*, 766 A.2d 639, 646–50 (Md. 2001); *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958); *State v. Stevens*, 833 P.2d 318 (Or. App. 1992)).

397. *Id.* at 807.

398. *Mosby v. Devine*, 851 A.2d 1031, 1043-44 n.7 (R.I. 2004).

399. *Id.* at 1042.

400. *Id.* at 1047, 1049 (quoting the statutory language),

401. *Id.* at 1051.

402. 614 P.2d 94, 100 (Or. 1980); *see also supra* note 203 and accompanying text.

403. *State v. Hirsch*, 114 P.3d 1104 (Or. 2005).

404. *Id.* at 1110.

405. *See also* David B. Kopel, *The Licensing of Concealed Handguns for Law Protection Support from Five State Supreme Courts*, 68 ALBANY L. REV. 305 (2005) (discussing these and other recent state cases interpreting state constitutional provisions on the right to keep and bear arms, as well as related issues).

406. *Payton v. New York*, 445 U.S. 573 (1980), discussed *supra* Part II. A.3.

407. *See, e.g., Kadish, supra* note 2, at 521.

408. *See, e.g., BOYCE & PERKINS, supra* note 130, at 1112.

409. *Brown v. United States*, 256 U.S. 335, 343 (1921) (Justice Oliver Wendell Holmes declaring, “[d]etached reflection cannot be demanded in the presence of an uplifted knife”).

410. “Nearly all of what Bracton had to say about justifiable and excusable homicide was derived from Civil [Roman] or Canon Law, or both.” Hurnard, *supra* note 388, at 69-70.

411. For more on Bracton’s *De Legibus*, *see supra* note 211.

412. HURNARD, *supra* note 388, at 68.

413. *Id.* at 69.





414. *Id.*
415. *Id.*
416. *Id.*
417. *See, e.g.,* GREEN, *supra* note 78, at 81 n.52.
418. *See, e.g., id.*
419. *Id.*
420. *See infra* Part VI.
421. MPC COMMENTARIES, *supra* note 78, at 34 (avowed purpose of Code’s drafters was to encourage “members of the community not to employ force when immediate emotional reaction might support its use but enlightened morality would reject it.”).
422. *See supra* notes 118-124 and accompanying text.
423. Kadish, *supra* note 2, at 522.
424. Low, *supra* note 13, at 539.
425. Richard S. Singer & Geoffrey C. Hazard, Jr., *Model Penal Code Conference Banquet Remarks And Responses*, 19 RUTGERS L.J. 855, 860 (1988).
426. Model Penal Code Conference Transcript-Discussion One, Nov. 5, 1987, 19 RUTGERS L.J. 569, 572 (1988) [hereinafter *MPC Transcript*].
427. *Id.*
428. Kadish, *supra* note 2, at 522-23, 527, 532.
429. *Id.* at 527.
430. *Id.* at 532.
431. *Id.* at 531.
432. *Id.* at 532.
433. Kadish, *supra* note 2, at 536.
434. *Id.* at 537.
435. *MPC Transcript*, *supra* note 426, at 571.
436. *See* Kadish *supra* note 2, at 572.
437. *Id.*
438. Frank J. Remington, *The Future at the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns*, 19 RUTGERS L.J. 867, 867 (1988).
439. Kadish, *supra* note 2, at 538.



440. *MPC Transcript*, *supra* note 426, at 570.

441. Low, *supra* note 13, at 539.

442. Franklin E. Zimring & Gordon Hawkins, *Murder, The Model Code and the Multiple Agendas of Reform*, 19 RUTGERS, L.J. 773, 773-774 (1998).

443. Singer & Hazard, *supra* note 425, at 859.

444. Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 579 (1988).

445. Deconstruction philosophy, prevalent in the United States and other Western nations in the last third of the twentieth century, was prefigured by the moral relativism inherent in Nietzsche and his intellectual progeny. *See, e.g.*, JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* 177, 179, 188, 218 (1993).

446. Michel Foucault was a passionate advocate of the amoral. *See, e.g., id.* at 201. Foucault had a lifelong obsession with death, suicide, drugs and sadomasochistic eroticism—even under the mounting threat of AIDS in the 1980s. *Id.* (on front-to-rear dust jacket).

447. Jack Trotter, *Michel Foucault in 1 WORLD PHILOSOPHERS AND THEIR WORKS* 667, 673 (John K. Roth ed., 2000).

448. Theresa A. Galboldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944 (2002); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000).

449. *See, e.g.*, MORAG PATRICK, *DERRIDA: RESPONSIBILITY AND POLITICS* 136 (1997).

450. Derrida's philosophical studies were considered "distinguished enough to earn him a scholarship at Harvard University in 1956, which marked the beginning of his . . . association with the American intellectual community." Ron West, *Jacques Derrida, in 1 WORLD PHILOSOPHERS AND THEIR WORKS, supra* note 444, at 466. He taught at Johns Hopkins University, Yale University, and the University of California at Irvine. *Id.*

451. Jeffrey L. Geller, *Jacques Derrida in 1 WORLD PHILOSOPHERS AND THEIR WORKS, supra* note 444, at 265. Deconstruction had a profound affect on almost every area of scholarship, impacting: "[d]isciplines as diverse as historiography, philosophy, political theory, geography, art history, literary criticism, sociology, and linguistics." *Id.* The anti-establishment thrust of deconstructionist cannon was parallel to similar anti-western standards of thoughts in the early 20th Century Dadadist movement. The Dada name was found in a lexicon—it means nothing. This is the

meaningful nothing, where nothing has any meaning. THE NORTON DICTIONARY OF MODERN THOUGHT 196 (1999). The advent of Deconstruction reprised the anti-establishment, nihilist bourgeoisie-baiting Dadaist movement. 8 THE DICTIONARY OF ART 434 (1996) (“Western Europe is still shit, but from now on, we want to shit different colors”). The rise of pop art reflected the neo-Dadaist movement. *Id.* at 439.

452. Jacques Derrida, *Force of Law: the Mystical Foundation of Authority*, 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990).

453. PATRICK, *supra* note 449, at 136.

454. *See, e.g.*, Michel Foucault, *Panopticism (From Discipline and Punish)*, in *The Foucault Reader* 210, 211 (Paul Rabinow ed., 1984).

455. ROY BOYNE, FOUCAULT AND DERRIDA: THE OTHER SIDE OF REASON 110 (1990).

456. *Id.* at 116.

457. PATRICK, *supra* note 449, at 84, 132, 151; Miller, *supra* note 445, at 200-05.

458. The conceits of deconstructionists were prefigured in the earlier works in the fields of mathematics and physics. For example, in symbolic logic it had been known for a long time that nobody can prove the consistency of logic because paradoxes cannot be avoided. *See, e.g.*, Kurt Gödel, *Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme*, MONATSCHEFTE FÜR MATHEMATIK UND PHYSIK (B. Meltzer trans., 1931), in ON FORMALLY UNDECIDABLE PROPOSITIONS OF PRINCIPIA MATHEMATICA AND RELATED SYSTEMS (1962); ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, *PRINCIPIA MATHEMATICA* (1910). The development of symbolic logic in the twentieth century has been profoundly influenced by Kurt Gödel. *See* Stick *supra* note 476, at 398 n.282.

459. MILLER, *supra* note 445, at 202.

460. BOYNE, *supra* note 455, at 82. “[M]odern thought is advancing toward that region where man’s Other must become the same as himself.” *Id.* at 84 (internal quotes omitted). Foucault “was underneath it all concerned with finding a conception of the self, and a conception of knowledge that was (to borrow Nietzsche’s phrase) ‘beyond good and evil.’ . . . A sense of outrage does . . . permeate [Derrida’s] work, and the object of Derrida’s resolutely theoretical attacks is the dishonest certitude that informs Western traditional rational thought. [H]e can expose the furtive assumptions which underlie its arrogance.” *Id.* at 91.

461. *Brewer v. Williams*, 430 U.S. 387 (1977) (suppressing incriminating



statements and evidence obtained by a police officer from defendant after the officer had stated to him during a drive to arraignment that they should stop and locate the murdered girl's body because her parents were entitled to a decent burial for the girl, and defendant directed the police to the girl's body); *Coolidge v. New Hampshire*, 403 U.S. 44 (1971) (search warrant of murder suspect's car invalidated); *Griffin v. California*, 380 U.S. 609 (1965) (guilt inference from defendant's failure to testify regarding reasonably known facts violates due process); *Massiah v. United States*, 377 U.S. 201 (1964) (incriminating statements elicited by law enforcement deprived defendant of right to counsel); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (oral waiver of counsel by confessing juvenile insufficient).

462. *See generally* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1984); *see also* I, PIERRE RIVIÈRE, *HAVING CUT THE THROATS OF MY MOTHER, MY SISTER, AND MY BROTHER: A CASE OF PARRICIDE IN THE 19TH CENTURY* (Michel Foucault ed., Frank Jelinek trans., University of Nebraska Press, 1982) [hereinafter I, PIERRE RIVIÈRE]. This last work reproduces the written confession of a 19th century French peasant who killed his six-month pregnant mother, sister, and brother with a pruning hook. *Id.* It also includes a reprinting of the medical and legal records of the crimes, as well as contemporary newspaper accounts and subsequent legal proceedings—all collected by Michel Foucault, who also wrote a Foreword to the book and included his Note on "Tales of Murder." *Id.* Foucault pronounced the multiple murders a "glorious crime," and declared that the murderer "sought glory." *Id.* at 209-10. Foucault extolled Rivière's written confession as a thing of "beauty." *Id.* at 199.

Professor James Miller, Director of Liberal Studies at the New School for Social Research, has summarized the thinking of Professor Foucault:

Popular justice would be best served . . . by throwing open every prison and shutting down every court. Instead of . . . rendering judgment according to laws, it would be better simply to . . . let the popular "need for retaliation" run its course. Exercising their power without inhibitions, the masses might resurrect a certain number of ancient rites which were features of pre-judicial justice.

MILLER, *supra* note 445, at 205 (internal quotes taken by James Miller from MICHEL FOUCAULT, *Sur la Justice Populaire* [*On Popular Justice*], in *LES TEMPS MODERNE* [Modern Times] 359-60 (1972), and from *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* 6, 29 (Michel Foucault ed., 1980).





To Foucault, deaths on the battlefield and in cold-blooded killings are morally equivalent:

Murder it is that makes for the warrior's immorality (they kill, they order killings, they themselves accept the risk of death); murder it is that ensures criminals their dark renown (by shedding blood, they have accepted the risk of the scaffold).
Murder establishes the ambiguity of the lawful and the unlawful.

Id. (emphasis added).

463. *See, e.g.*, Patrick, *supra* note 449, at 106, 144, 151; *see also* Miller, *supra* note 445, at 165, 189, 202.

464. Trotter, *supra* note 447, at 673.

465. Deconstructionist ideas were reflected in diverse fields of scholarship such as “[h]istoriography, philosophy, political theory, geography [and] sociology.” *Id.* at 667.

466. *See* Remington, *supra* note 438, at 538; *see also* Dressler, *supra* note 179, at 672-86 (referring to James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 253-261 (1985); Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders [DSM-III]* 236 (3d ed. 1988); and Robert Nozick, *Philosophical Explanations* 382-384 (1981) in formulating his comments).

467. Dressler, *supra* note 179, at 686.

468. Gainer, *supra* note 349, at 575.

469. BOYNE, *supra* note 455, at 80.

470. *See, e.g.*, TRUMAN CAPOTE, *IN COLD BLOOD, A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES* (1965). The book recounts the savage murder of four members of the Cutter family by blasts from the muzzle of a shotgun serially held a few inches from each of their faces. The killers, Eugene Hickock and Perry Edward Smith, were hanged for their crimes on a gallows in the Kansas State Penitentiary in 1965. *In Cold Blood* includes Capote’s narration of the crime with special empathy for the murderers. Capote recounted the grisly specifics in exquisite detail, skeptically reexamining every shred of the overwhelming evidence of the guilt of the convicted killers. The book enjoyed numerous printings, the latest one being by Random House in 2002, was a Book of the Month Club selection, and declared a “masterpiece.” *Id.* at inside left-hand dust cover. *In Cold Blood* earned Truman Capote “solid literary acclaim” and even in 2004 was considered to be an “artistic triumph.” Daniel Mendelsohn, *The Truman Show: How Truman Capote Became a Legend in His Own Time*, N.Y. TIMES BOOK REV., Dec. 5, 2004, at 16.



In the 1970's, William F. Buckley reported this conversation with Mr. Capote regarding celebrity killers:

“Well, . . . what do you think? Was he guilty?”

“Oh yes,” Capote giggled . . . “I’ve never met one who wasn’t.”

William F. Buckley, Jr., *Back to Prison (The Protracted Life of Edgar Smith)*, in WILLIAM F. BUCKLEY, JR., *RIGHT REASON: A COLLECTION SELECTED BY RICHARD BROOKHISER* 185, 186 (1985).

471. NORMAN MAILER, *THE EXECUTIONER’S SONG* (1979).

472. Dressler, *supra* note 179, at 690; *see also id.* at 690 n.98 (quoting from Mailer’s book).

473. *See* Buckley, *supra* note 470, at 186 (“my protégé”).

474. TOM WICKER, *A TIME TO DIE* (1975).

475. Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 *STANFORD L. REV.* 623 (1984), in Symposium, *Critical Legal Studies*, 36 *STANFORD L. REV.* 1 (1984); J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461-490 (1984); Note, ‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship’, 95 *HARV. L. REV.* 1669 (1982).

476. John Stick, *Can Nihilism be Pragmatic?* 100 *HARV. L. REV.* 332, 335 n.9 (1986).

477. Kennedy & Klare, *supra* note 475, at 461.

478. *Id.*

479. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFFALO L. REV.* 205 (1979). Kennedy postulates that the Commentaries are: “an instrument of apology—an attempt to mystify both the dominators and the dominated by convincing them of the ‘naturalness,’ the ‘freedom’ and the ‘rationality’ of a condition of bondage.” *Id.* at 210; *see also* Kadish, *supra* note 2, at 530; *MPC Transcript*, *supra* note 426, at 569.

480. *See* Stick, *supra* note 476, at 333 n.2 (citing Sanford Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 *HARV. L. REV.* 1466, 1468-1470 (1983), and Sanford Levinson, *Law as Literature*, 60 *TEXAS L. REV.* 373 (1982).

481. Symposium, *On the Necessity of Violence for Any Possibility of Justice*, 13 *CARDOZO LAW REV.* 1081 (1991).

482. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 *S. CAL. L. REV.* 136 (1985).



483 Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

484. *Id.* at 563.

485. Stick, *supra* note 476, at 335 n.9.

486. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

487. *See* Stick, *supra* note 476, at 400.

488. Dressler, *supra* note 179, at 684-85.

489. For example, the Model Penal Code does not presume that a householder has reason to believe that an intruding stranger-housebreaker is a felon who threatens death or great bodily harm to the lawful occupant. *See* MODEL PENAL CODE § 3.04 (1985).

490. *See id.* §§ 3.04, 3.07; *see also* SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 499 (3d ed. 1975); LLOYD L. WEINRAUB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS 203 (1980).

491. Dressler, *supra* note 179, at 672-73, 680.

492. *Id.* at 685 n.84 (citing Claude Brown, *Manchild in Harlem*, N.Y. TIMES MAG., Sept. 6, 1984, at 36, 44).

493. Dressler, *supra* note 179, at 713-15.

494. *Id.* at 685 (internal quotes omitted).

495. I, PIERRE RIVIÈRE, *supra* note 462, at back cover.

496. *MPC Transcript*, *supra* note 426, at 570.

497. *See supra* Parts II & III.

498. Zimring & Hawkins, *supra* note 442, at 774.

499. Dressler, *supra* note 179, at 685.

500. Rabbi Eliyahu Touger, *Introduction* to MAIMONIDES, MISHNEH TORAH [THE SECOND TORAH], SEFER NEZIKIN [BOOK OF DAMAGES] at 8 (Rabbi Eliyahu Touger ed. & trans., 1997). Maimonides is also known as “The Rambam,” which is an abbreviation for Rabbi Moses ben Maimon. *Mishneh Torah* is his codification of Jewish law. It has had hundreds of super-commentaries written on it.

501. *Exodus* 22:1–2 (Hebrew Bible numbering, English Bible numbering being 22:2–3) states: “If the thief is found breaking in and is smitten and dies, there is no blood-guiltiness for him. If the sun shone upon him, there is blood-guiltiness for him”



502. The rabbis of the Talmud did not read literally the clause concerning the sun shining upon the intruding thief. They held that the clause “if the sun rose upon him” cannot be taken literally because the sun did not rise only upon the burglar. TALMUD BAVLI [THE BABYLONIAN TALMUD], 2 TRACTATE SANHEDRIN 72a4–72b1 (The Shottenstein Edition, Mesorah Publications, Ltd. 1994). In Jewish law, the time of day was irrelevant and the householder had a religious duty to defend herself preemptively by killing the intruder. “If it is clear to you as the sun that the intruder is at peace and surely will not kill you if you try to resist, do not kill him—but if it is not clear that he is at peace with you, then kill him.” *Id.* at 72a4. For an authoritative table of the Talmudic presumptions favoring the occupant in case the intruder’s intentions are unknown, see *id.* at 72b1 n.2. These rules were based upon the idea that the intruder puts the occupant at presumably lethal risk, and therefore the Torah tells the occupant: “If someone comes to kill you, anticipate him and kill him first.” *Id.* at 72a2.

Rashi (Rabbi Solomon ben Isaac (1045–1105)) was “the greatest commentator.” THE RISHONIM [THE FIRST ONES]: BIBLIOGRAPHICAL SKETCHES OF THE PROMINENT RABBINICAL SAGES AND LEADERS FROM THE TENTH–FIFTEENTH CENTURIES 124 (2d ed. 2001) [hereinafter RASHI, COMMENTARY]. He explained that because breaking-in was for the purpose of theft:

It is as if [the thief] is already dead . . . for surely he knows that a person cannot restrain [herself] and remain passive when [she] sees [him] taking [her] property in [her] presence. Thus the thief came with the understanding that if the owner of the property were to stand up against him—he would kill [her].

Id. at 277. Maimonides (1135–1204) was very familiar with Rashi’s commentary.

Blackstone wrote: “So the Jewish law, which punished no theft with death makes homicide only justifiable, in case of *nocturnal* housebreaking” BLACKSTONE, *supra* note 35, at 180–81 (emphasis added) (translating *Exodus* 22:2). He was mistaken. It is true that some medieval rabbis—such as Ramban (Rabbi Moses ben Nachman Gerondi, known as Nachmanides or Nahmanides (1194–ca.1270)), Rashbam (Rabbi Samuel ben Meir, 1083–1174) and Ibn Ezra (Rabbi Abraham Ibn Ezra, 1089–1164)—interpreted *Exodus* 22:2 literally as limiting permitted slayings of a burglar to nocturnal thieves. See 2 THE BOOK OF EXODUS 365–365a (Judaica Press, 1997), and NEHAMA LEIBOWITZ, STUDIES IN SHEMOT (EXODUS) PART II MISHPATIM—PEKUDEI (EXODUS 21,1 TO END [OF EXODUS]) 374–76 (Aryeh Newman trans., World Zionist Organization, 1983). However, their views did not prevail. See, e.g., 19 RABBI ADIN



STEINSALTZ, THE TALMUD, TRACTATE SANHEDRIN, PART V 53 (1999) (the *Halakha* [Jewish Law] on slaying thieves breaking into a home agrees with the views of Maimonides). To the same effect is the entry under “burglary” in THE OXFORD DICTIONARY OF THE JEWISH RELIGION 143, 512 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., Oxford University Press, 1997).

503. Authors’ interpolation based upon the fact that, for instance, the authoritative Artscroll® translation of the Talmud translates the equivalent Aramaic word as “permitted” where it appears in TALMUD BAVLI [BABYLONIAN TALMUD], 2 TRACTATE SANHEDRIN 72b2 (1994) (“That you are permitted to put him to death with any [method of] execution by which you are able to put him to death”).

504. Rashi posited that the householder may use a sword, or shoot an arrow or throw a stone at him. Rashi, Commentary, *supra* note 502, at 72b2 n.17 (author’s interpretation; no translation available).

505. MAIMONIDES, MISHNEH TORAH, [THE SECOND TORAH, (A CODIFICATION)], SEFER NEZIKIN [BOOK OF DAMAGES], *Hilbot Geneivah* [*Laws of Theft*]. 9:7-9, at 150 (Rabbi Eliyahu Touger ed. & trans., 1997).

506. Edward N. Luttwak, *Death by Adrenaline*, WALL ST. J., Nov. 18, 2004, at A18.

507. *Id.*

508. *Id.*

509. MODEL PENAL CODE § 2.02(2)(d) provides as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

Id. Query: How can a person act as a “reasonable person” in the situations presented *supra* in the Prologue?

510. MODEL PENAL CODE § 3.04(1). This vague standard of “immediately necessary” enables jurors to second-guess the home defender. It fails to recognize that its criterion is a “dangerous innovation: Certainty





is the mother of repose, and therefore the law aims at certainty.” *Walton v. Tyron*, 21 Eng. Rep. 262, 262 (K.B. 1753). Here the *Walton* court was paraphrasing Coke’s “certainty [is] the mother and nurse of repose and quietness, and [is] not like the waves of the sea.” 2 COKE, *supra* note 21, *Proeme* [Preface]. Lack of certainty in the law of justifiable homicide prior to the 14th century had the following socially undesirable human consequences: (1) *meticulosi* [meticulous ones] who felt needless guilt and fled in panic, and (2) those who fled from justice *pre timore* [in the face of fear] because, although the homicide was genuinely justifiable, they worried that they had used “excessive” force in capturing the fleeing felon. See HURNARD, *supra* note 388, at 135. The Statute 24 Hen. 8, c. 5 (1532) put an end to any remaining ambiguity regarding justifiably killing would-be burglars. See HURNARD, *supra* note 388, at 92.

511. The Code provides that a homicide committed as a result of a belief negligently or recklessly formed constitutes a negligent homicide or manslaughter, respectively. MPC COMMENTARIES, *supra* note 78, at 36. The Code further muddles this ephemeral gauge by declaring that a person acts negligently when, inter alia, she “should be aware of a substantial and unjustifiable risk” and that her conduct involves a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” MODEL PENAL CODE § 2.02(2)(d). Question: How can the law expect a person to be aware of “a substantial and unjustifiable risk” when confronted by an unknown housebreaker? See *supra* Part VI, demonstrating the Byzantine complexity of the Code’s negligence standards as applied to confrontations with unknown housebreakers. The basic problem here is that the drafters of the Code attempted to sweep every situation under a single generalization in their enthusiasm for unification. In suppressing the use of force to prevent or thwart dangerous home attacks, the Code muddies the previously well-settled, victim-protecting jurisprudence. The common law justification rules governing pure self-defense in brawls and fights are totally distinct from those special rules pertaining to home preservation. Yet, the MPC decrees that even in a habitation any defensive force must be “immediately necessary.” MODEL PENAL CODE § 3.04(1) & (2); see also MPC COMMENTARIES, *supra* note 78, at 38 (“The law that governs the use of defensive force should be in a single rule, not varied when the case is viewed as one of self-defense or one of crime prevention.”); SINGER, *supra* note 2, at 520. By contrast, common law judges eschewed such oversimplifications which elided the castle doctrine.

512. MODEL PENAL CODE § 3.04(2)(b). The Model Penal Code requires that all justifiable deadly force must be “necessary to protect [her]self against death, serious bodily injury, kidnapping or sexual intercourse





compelled by force or threat.” *Id.* According to the Code, deadly force can be justified only by an “Apprehension of Serious [physical] Injury.” MPC COMMENTARIES, *supra* note 78, at 47. “To give the law a measure of precision, force is divided into two categories, deadly and moderate. Force threatening only moderate harm may be inflicted by way of defense against any harm apparently threatened, while deadly force may be employed only by way of defense against . . . serious harm.” *Id.* at 47-48.

513. Speculations regarding the possibility “of the promiscuous use of firearms,” even by victims who have never been convicted, or so much as suspected, of a crime, drive many contemporary prohibitions on employment of deadly force. *Commonwealth v. Klein*, 363 N.E.2d 1313, 1320 (Mass. 1977).

514. BLACKSTONE, *supra* note 35, at 187. “But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side.” *Id.*; *see also* *Ruloff v. People*, 45 N.Y. 213, 220 (1871) (“[T]he law will not be astute . . . [to] take the innocent citizen . . . from the protection of the law, and place [her] life at the mercy and discretion of the admitted felon. They will not be made to change places upon any doubtful or uncertain state of facts.”).

515. MPC COMMENTARIES, *supra* note 78, at 35.

516. *Id.* at 36. “If the actor was reckless or negligent as to the existence of circumstances that would justify [her] conduct, [she] should then be subject to conviction of a crime for which recklessness or negligence, as the case may be, is otherwise sufficient to establish culpability. Negligence in this context would permit a conviction of negligent homicide rather than purposeful murder, while recklessness would permit a conviction of manslaughter.” *Id.*

517. Hereinafter, the term “non-negligent” will be used in connection with the Model Penal Code approach to justification as a short-hand for the Code’s demand that for justifying the use of force the “actor” must form, in a non-negligent manner, her belief as to the immediate necessity for the use of the degree of force that she actually used.

518. MODEL PENAL CODE § 3.04(1).

519. MPC COMMENTARIES, *supra* note 78, at 118-9.

520. *See supra* Parts I.C-I.E.

521. *See supra* notes 255-262 and accompanying text for a discussion of *Levet’s Case*.

522. MPC COMMENTARIES, *supra* note 78, at 40. By stark contrast,





Professor David Hume accorded the victim the presumption that retreat by the dangerous felon was “in order to call associates, or to renew the assault with better advantage.” 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, *supra* note 150, at 324-25. For the context of this presumption, see the fuller quote in the main text accompanying *supra* note 214.

523. 3 COKE, *supra* note 21, at 56.

524. See *supra* notes 231-233 and accompanying text.

525. 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 34, at 77.

526. 1 HAWKINS'S ABRIDGMENT, *supra* note 34, at 78 (emphasis added). Hawkins refers to his section on arrests by officers and ministers of justice in the same language as Coke. In turn, this language was taken from *Mackalley's Case*, in *Killing of a Sergeant*, 9 Co. Rep. 61b, 77 Eng. Rep. 828 (K.B. 1610).

527. Joseph H. Beale, Jr., *Homicide in Self-Defence*, 3 COLUM. L. REV. 526, 541 (1903). The MPC's deference to and dependence upon Beale is illustrated by the official MPC commentaries' reliance upon Beale on the issue of retreat in the face of a murderous assault. Beale, however, clearly was writing solely about situations occurring out-of-doors. See Beale, *supra* note 78, at 581, *cited and quoted in* MPC COMMENTARIES, *supra* note 78, at 54 & n.53. The MPC comment *ad loc.* correctly quotes Beale, but out of the context of home invasions or robbery, as follows: “A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands.” MPC COMMENTARIES, *supra* note 78, at 54 (quoting Beale, *supra* note 78, at 581). The MPC commentary continues: “To the argument that the retreat rule cedes the field to any group of bullies prepared to make a show of deadly force, the answer has been that the proper and sufficient remedy is not a trial of strength but rather a complaint to the police.” MPC COMMENTARIES, *supra* note 78, at 54 (incorrectly citing page 681 of Beale's article instead of page 581). Beale's “proper and sufficient remedy of complaint to the police” does not fit situations of home intrusions and does not serve as a basis for justification rules in these cases. On other aspects of its justification rules, the MPC relies upon Beale's *Columbia Law Review* article. See, e.g., MPC COMMENTARIES, *supra* note 78, at 39 & n.8, 50 & n.39.

528. MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (emphasis added). “[T]he actor is not obliged to retreat from his dwelling . . . unless he was the initial aggressor . . .” *Id.*





529. MODEL PENAL CODE §§ 3.07 (2)(b)(ii). The approach of the Model Penal Code regarding the use of firearms for arresting felons fleeing from the scene derives from its avowed considerations in a completely different context where a ban on the use of deadly force makes sense; departing from the common law, for example, could be recommended in certain other situations, as the Minnesota Supreme Court explained:

It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm.

State v. Gardner, 104 N.W. 971, 975 (Minn. 1905) (quoted approvingly in BOYCE & PERKINS, *supra* note 130, at 1134). Such situations do not remotely apply to shooting an apparently fleeing burglar still in the home or in immediate flight therefrom.

The Minnesota Supreme Court was interpreting the requirement to retreat in cases of pure self-defense and was not intending to relax the no-need-to-retreat-in-the-home rule. BOYCE & PERKINS, *supra* note 130, at 1134. The reasoning of the Minnesota Supreme Court would militate in favor of, and not against, the use of a firearm by a homeowner to arrest a felon leaving her home. In flatly banning the use of deadly force by a homeowner to arrest an apparently withdrawing housebreaker fleeing immediately after perpetrating a felony such as robbery or rape, the Model Penal Code § 3.07 would seem to have it backwards.

530. MODEL PENAL CODE § 3.07 (2)(b)(ii) (permitting justifiable deadly force to arrest only if, inter alia, “the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom [she] believes to be authorized to act as a peace officer”). In *Commonwealth v. Klein*, 363 N.E. 2d 1313 (Mass. 1977), the court suggested that calling the police before shooting a fleeing felon would satisfy the requirement that a police officer be on the scene. But suppose, as in many if not most situations, there is no time or opportunity to call the police or they do not arrive immediately. Black-letter rule: “Firmly established in the common law of England was the privilege to kill a fleeing felon if he could not otherwise be taken [or overtaken], a privilege extended to the private person as well as to the officer, and not dependent upon the existence of a warrant for the felon’s apprehension.” Boyce & Perkins, *supra* note 130, at 1093 (internal citations omitted).





531. ARNOLD H. LOEWY, *CRIMINAL LAW IN A NUTSHELL* 78 (2d ed. 1987).

532. MPC COMMENTARIES, *supra* note 78, at 114-15.

533. *Id.* at 116.

534. *Id.* at 122 n.31.

535. *Warden v. Hayden*, 387 U.S. 294, 302 (1967). In *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980) (citing *Warden*, 387 U.S. 294), the Court noted:

There are important differences between the common law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime [citation omitted], the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence.

In *Warden v. Hayden*, the Court had justified its departure from this common law distinction regarding the kinds of property subject to seizure on the following grounds: “Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same “papers and effects” may be “mere evidence” in one case and “instrumentality” in another.” 387 U.S. 294, 302 (1967). The *Payton* Court further noted that its past decisions had extended the prohibitions of the Amendment to protect against invasion by electronic eavesdropping of an individual’s privacy in a phone booth not owned by him, “even though the earlier law had focused on the physical invasion of the individual’s person or property interests in the course of a seizure of tangible objects.” *Payton*, 445 U.S. at 591 n.33 (citing *Olmstead v. United States*, 277 U.S. 438, 466 (1928)).

536. In 1998 the U.S. Supreme Court held that: (1) a police officer does not violate the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender; and (2) only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. *Sacramento v. Lewis*, 523 U.S. 833 (1998); *see also Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982) (“There is no constitutional right to be protected by the state against being murdered by criminals or madmen.”). Prison officials, however, have an Eighth Amendment constitutional duty “to take reasonable measures for the prisoners’ own safety.” *Washington v. Harper*, 494 U.S. 210, 225 (1990).





Further, a military policeman has a legal duty to protect the president and vice-president, but the police have absolutely no legal duty to protect law-abiding homeowners. *Saucier v. Katz*, 533 U.S. 194 (2001).

537. 489 U.S. 189 (1989).

538. *Id.* at 195. The *DeShaney* Court elaborated:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." [Citations omitted.] Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

....

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

Id. at 195-96. For a collection and synopsis of other Supreme Court cases similarly absolving governmental authorities from any duty to protect citizens from harm, see Dorfman & Koltonyuk, *supra* note 202, at 393, n.73.

539. *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that a State statute providing for "mandatory" enforcement of restraining orders does not give rise to a federal Due Process liberty or property interest or a federal entitlement to such enforcement).

540. *Id.* In particular, the mother sued under section 1983 of the federal civil rights laws, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes



to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . to the party injured in an action at law.

42 U.S.C. § 1983 (2002).

541. *See, e.g.*, *Garner v. Tennessee*, 471 U.S. 1 (1985). In that case, Justice O'Connor made the point that Department of Justice statistics showed that: “[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars.” *Id.* at 26-27 (O'Connor, J., dissenting) (citing Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985)). She added:

During the period 1973-1982, 2.8 million such violent crimes were committed in the course of burglaries. . . . With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene [because law enforcement efforts after-the-fact fail to result in the arrest of so many violent burglars]. *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967).

Id. at 27. Sadly, Justice O'Connor's concerns remain valid.

542. *Ruloff v. People*, 45 N.Y. 213, 220 (1871).

543. *Id.*

544. *Luttwak*, *supra* note 506, at A18.

545. MPC COMMENTARIES, *supra* note 78, at 119.

546. MODEL PENAL CODE § 3.04(2)(b).

547. MPC COMMENTARIES, *supra* note 78, at 34.

548. *United States v. Nat'l Dairy Corp.*, 372 U.S. 29, 32-33 (1963).

549. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). This case was quoted approvingly in *Wright v. New Jersey*, 469 U.S. 1146, 1148-49 (1985), *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982), and *Sewell v. Georgia*, 435 U.S. 982, 986 (1978).

550. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 46 (1991) (internal quotes taken from *Grayned*, 408 U.S. at 108-09).

551. The Court added in a footnote:

A “facial” challenge, in this context, means a claim that the law is invalid in toto—and therefore incapable of any valid



application. In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.

Hoffman, 455 U.S. at 495 n.5 (internal citations omitted).

552. The *Hoffman* Court explained in another footnote:

In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 495 n.6 (internal citations and quotes omitted).

553. The *Hoffman* Court further stated that “vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” *Id.* at 495 n.7 (internal citations and quotations omitted). The same applies to vital Fourth Amendment protected rights, as this Article explains.

554. *Id.* at 494-95.

555. *Id.* at 499 (emphasis added).

556. *See, e.g., Seegars v. Aschcroft*, 297 F. Supp. 2d 201 (D.C. 2004), *aff’d sub nom. Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005) (refusing, solely on grounds of lack of ripeness, to allow a challenge to prohibitory firearm possession law in Washington, D.C.).

557. *See, e.g., Seegars*, 396 F.3d 1248.

558. ROGER YORKE’S NOTEBOOK (ca. 1513–1535) *in* 120 SELDEN SOCIETY 182 (2004).

559. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 107–08 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). *Compare* 1 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767–1773, at 399 (Thomas M. Curly ed., 1986) (explaining the rationale for justifiable homicide in the following terms: “for in this case as authority cannot protect [her], there is not time for appeal to society”). Robert Chambers was the second Vinerian professor at Oxford; William Blackstone was the first.

560. JOHN MILTON, DE DOCTRINA CHRISTIANA [ON THE CHRISTIAN DOCTRINE], BOOK II, *translated in* 17 THE WORKS OF





JOHN MILTON 129 (Frank Allen Patterson ed., Columbia Univ. Press 1934) (1660). Another translation runs as follows: "There is, however, one difference between a thief and an enemy against whom one is fighting. With the enemy the law of war ought to be observed, but in dealing with the thief there is no law either of peace or of war that one needs to keep." 6 COMPLETE PROSE WORKS OF JOHN MILTON 687 (Don Marion Wolfe, gen. ed., Yale Univ. Press 1953) (1660).

561. JOHN WILDER MAY, THE LAW OF CRIMES 137 (photo. reprint 1985) (1881). Three editions of this treatise were later edited and published posthumously.

562. CLARK & MARSHALL, *supra* note 114, at 470.

563. *Smith v. Bristol*, 84 P.2d 757, 762 (Wyo. 1938).

564. Responding to the popular revolt against upside-down jurisprudence, the Illinois legislature, overriding the Governor's veto, recently passed legislation effective November 19, 2004, prohibiting a homeowner who uses a firearm for lawful home defense from being prosecuted under any local ban on possession of the firearm. The legislation, S.B. 2165, became Public Act 93-1048, 720 ILL. COMP. STAT. 5/24-10, which is § 24-10 of the Illinois Criminal Code. The statute explicitly provides that it is an affirmative defense to a violation of a municipal ordinance that prohibits, regulates, or restricts the private ownership of firearms if the individual who is charged with the violation used the firearm in an act of self-defense or defense of another. The legislation was inspired by the case of Hale DeMar of Wilmette, Illinois, who shot a burglar who had broken into his home and was fined \$700. The prosecutor had called DeMar's use of deadly force justified; DeMar was prosecuted solely for the failure to have renewed his firearms ID card. *See, e.g.*, Robert VerBruggen, *Self-Defense vs. Municipal Gun Bans*, REASON, June 2005, at 40.

565. Joyce Lee Malcolm, *Where I Come From, Our Homes Are Still Our Castles*, SUNDAY TELEGRAPH, Oct. 31, 2004, at 25.

566. *See, e.g.*, JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (2002). Reviewing Dr. Malcolm's book, David Wootton, Professor of Intellectual History, Queen Mary, University of London, states that her book contains "a significant and respectable case against gun control." *Guns and Violence: The English Experience*, available at http://www.hup.harvard.edu/reviews/MALGUN_R.html (last visited Mar. 18, 2005).

A 1999 report to the Home Office states:

In most burglaries with entry, force was used to gain entry, but in a fifth



(22%) the offender entered via an open window or unlocked door. In a quarter (25%) of burglaries someone was at home and aware of what was happening. In a tenth (11%) of burglaries violent or threatening behaviour was used. Victims were emotionally affected in 87% of all burglaries.

Tracey Budd, *Main Points, Nature of Burglary in BURGLARY OF DOMESTIC DWELLINGS, FINDINGS FROM THE BRITISH CRIME SURVEY* (Issue 4/99), available at <http://www.homeoffice.gov.uk/rds/pdfs/hosb499.pdf> (last visited Mar. 18, 2005). Victims do not report all burglaries, of course, for many reasons including the feeling based upon past experience that reporting a burglary is futile. For example, recently a sixty-year-old Gloucestershire woman whose house was burglarized seven times claimed that the police had not even investigated a single one of the crimes. She had a nervous breakdown and, after her recovery, purchased an air rifle, since Britain now bans the home possession of even home defense firearms. The police advised her not to take the law into her own hands. For the online BBC report of these stories, see http://www.htvwest.co.uk/news/01_11_november/burgled_gun.shtml (last visited Mar. 18, 2005).

For another example, English farmer Tony Martin, a victim of multiple previous burglaries, was convicted of murder for killing one burglar and wounding another. Although the murder conviction was reduced to manslaughter, Mr. Martin had to serve jail time and was denied early parole allegedly because the parole board believed that he posed a danger to other house-thieves. See, e.g., *Martin Loses Parole Appeal*, GUARDIAN UNLIMITED, May 8, 2003, available at <http://www.guardian.co.uk/martin/article/0,2763,951953,00.html>. (last visited July 4, 2005).

567. HOME OFFICE CRIME STATISTICS 41, available at <http://www.crimestatistics.org.uk/output/Page55.asp> (last visited Mar. 18, 2005).

568. UNIFORM CRIME REPORTS, *Crime in the United States—2003*, Table 1, available at http://www.fbi.gov/ucr/cius_03/xl/03tbl01.xls (last visited Mar. 18, 2005). David Kopel has convincingly demonstrated the effects of Britain's prohibitory firearm possession laws in fostering and promoting home invasions. David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345 (2001). He also shows that the presence of a firearm in American homes serves as a potent deterrent to these invasions. See, e.g., *id.* at 348-64; see also GARY KLECK, *POINT BLANK, GUNS AND VIOLENCE IN AMERICA* 140 (1991) (establishing a basis for some of Kopel's conclusions).

569. See MALCOLM, *supra* note 566, at 25.

570. *Id.* at 181-87.

571. MPC COMMENTARIES, *supra* note 78, at 34.



The Consumer Federation of America's Case for Gun Safety Regulation

By Howard Nemerov

In Buyer Beware: Defective Firearms and America's Unregulated Gun Industry, the Consumer Federation of America argues that firearms in the United States are not subject to safety regulation, and that substantial injury to consumers results. This Article responds to the CFA monograph. The Article argues that accidental deaths from firearms are very low, that firearms are safer and more effectively regulated than many other common consumer products, including automobiles.

Howard Nemerov is the developer of the neuromuscular physical therapy discipline called the Nemerov Method, based on 18 years of clinical analysis and practical research. He was a software engineer prior to entering the health field. He writes and speaks frequently on firearms policy issues. This article is based in part on a book he is currently writing.

Keywords: Consumer Federation of America, Consumer Product Safety Commission, gun safety, accidents

A new approach to gun control is to promote gun safety. The theory is that:

- guns have a series of defects that make them unpredictably dangerous,
- firearms manufacturers operate in an unregulated environment that makes them irresponsible and insensitive to the need for more safety,
- guns should contain certain features that would make them safer, and
- more regulatory oversight is required to assure these safety features are implemented to protect us from these unethical manufacturers.





Gun rights advocates respond that placing the “safety” devices on guns would render them inoperable in an emergency, and therefore the gun safety movement is just another ploy to disarm the civilian population. Guns perform their greatest utility in an emergency moment of need, say the gun rights proponents, and criminals will not abide by laws requiring safer guns. If the proposed safety features make it more difficult to defend against a sudden attack—because deactivating mandatory trigger locks or computerized biometric locks would take so much time—are they really about safety? If the end result endangers law-abiding gun owners, only criminals have increased safety. Gun-rights advocates also claim that thorough training and education is the most effective way to avoid or reduce accidents.

Gun safety advocates counter that guns are inherently dangerous; safety training alone does not work, and guns need further regulation by a government agency whose purpose is to protect consumers from dangerous products.

I. ENTER THE CONSUMER FEDERATION OF AMERICA

The Consumer Federation of America is an organization comprised of “some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people” which, according to CFA, “enables CFA to speak for virtually all consumers.”¹

In early 2005, CFA released a study entitled *Buyer Beware: Defective Firearms and America’s Unregulated Gun Industry*. The study makes a case that “every year many gun owners and bystanders are killed or injured by defective or hazardously-designed gun.”² In *Buyer Beware*, CFA states:

The gun lobby maintains that unintentional shootings generally occur as a result of carelessness on the part of the gun owner. Firearms industry marketing is replete with messages about “responsibility” that emphasize the importance of owner behavior without mentioning the potential dangers of the product.³





CFA continues:

While consumer education does play an important role in injury prevention, no amount of user instruction can eliminate the risks associated with product defects in design or manufacture.⁴

CFA makes a very good point, which we will discuss later in this Article. For now, consider 10-year trends in the rates (per 100,000 population) of various unintentional causes of death. From 1992-2002:

- There was a nearly insignificant decrease in the motor vehicle death rate.⁵
- Drowning deaths decreased 26%.
- Poisoning rates more than doubled.
- Accidental suffocation rates increased as well, up 21%.
- Accidental firearms deaths *decreased* 53%.

By 2002, the rate of accidental death involving a firearm was 0.26 per 100,000 population, or about one accidental death per 400,000 people. Compare this to the rates for the other causes:

- Poisoning – 6 persons per 100,000, or 23 times the firearms rate.
- Drowning – 1.2 per 100,000; nearly 5 times the firearms rate.
- Motor Vehicle – 15.8 per 100,000; over 60 times the firearms rate.
- Suffocation – 1.9 per 100,000; over 7 times the firearms rate.

(See Table 1 for additional data.)

CFA's "Product Safety" and "Child Safety" web pages contain no studies, brochures, or publications regarding deadly household





products such as household chemicals, swimming pools, and plastic bags.⁶

Buyer Beware continues:

Despite the fact that firearms kill nearly twice as many Americans as all household products combined, no federal agency has the necessary authority to ensure that guns do not explode or unintentionally discharge when they are dropped or bumped. This is unique.

Exactly how many victims are killed or injured each year by defective firearms is unknown.⁷

The claim that “firearms kill nearly twice as many Americans as all household products” is true only if one narrowly defines exactly what can be considered a household product, and only if one broadly interprets “kill.” Also, mixing intentional and unintentional deaths confuses the reader by linking firearms homicide—a violent, intentional crime—with firearms accidents.

For the year 2002, the latest for which final data are available, the National Center for Injury Prevention and Control reports there were 49,293 homicide or suicide injury-related deaths; of these 28,937, or 58.7%, were by firearm. So guns do result in more than half of all injury-induced homicides and suicides. But these are intentional deaths, which means that they are either criminal or purposefully self-inflicted, and not the result of product defect. Indeed, you can make the case that these deaths prove that guns function as designed; criminals certainly think so, or they would not use guns as a tool of their trade.

However, if one adds in unintentional injury-related deaths, firearm-related death drops to 19% of the total. If one looks at *only* unintentional injury-related deaths, firearms represented 0.7% percent of the total. Meanwhile, motor vehicles comprise 42.5% of all unintentional deaths, and 29.2% of all murder, suicide, and unintentional deaths, 50% more than firearms. See Table 2.

Because CFA does not differentiate between intentional self-harm and accidental death, it sidesteps the question of how altering civilian firearm accessibility would impact suicide rates. Nor does CFA ask if a person intent on self-harm would simply find the most convenient tool available. For example, Australia and the United





Kingdom saw no decrease in their suicide rates the four years following their gun restrictions, while the U.S. suicide rate dropped 12% despite increasing numbers of civilian firearms. See Table 3.

The blurring of the lines between accidents, intentional violence, and self-inflicted injury encourages a perspective in which personal responsibility is no longer a consideration. Such a perspective encourages a legal environment in which the manufacturer of any inanimate product becomes the target of wrongful death suits.

CFA also sidesteps the question of whether criminals would stop killing people if guns were made “safe.” As Dr. Martin L. Fackler, a leading firearms wound ballistics expert, notes:

When anti-gun activists list the number of deaths per year from firearms, they neglect to mention that 60 percent of the 30,000 figure they often use are suicides. They also fail to mention that at least three-quarters of the 12,000 homicides are criminals killing other criminals in disputes over illicit drugs, or police shooting criminals engaged in felonies. Subtracting those, we are left with no more than 3,000 deaths that I think most would consider truly lamentable.⁸

Since CFA mentions the word “safety” 344 times in *Buyer Beware*, we will address the issue of safety, but first, keep in mind that a person of evil intent could use many “household products” to kill another human being. In 2002, over 3,000 deaths were attributed to cutting instruments, drowning, fire, poison, and suffocation. See Table 4. Thus, accident prevention safety concerns are irrelevant when the intention is homicidal, as the criminal will avoid or circumvent any and all safety features to accomplish his or her goal. Safety concerns are only an issue when considering unintentional (accidental) deaths that arise from the intended use of a product assumed to be non-defective.

What is the Consumer Federation of America doing to address the imminent and omnipresent dangers of the “household products” that are causing the highest numbers of accidental deaths?

II. Is Motor Vehicle Safety Being Properly Addressed?

The National Center for Injury Prevention and Control lists firearms as the 15th leading cause of unintentional death. Poisoning





is the second leading cause, suffocation fifth, drowning sixth, and fire/burn seventh, with motor vehicle accidents topping the list.

In 2002, motor vehicles caused a total of 45,579 deaths. Sixty of these were homicide and 112 suicide, leaving 27 deaths of undetermined intent.⁹ This means that there were 45,380 unintentional, or accidental, deaths. Consumer Federation of America's stated concern is to curtail sales of potentially defective, commonly-used products that result in unintentional death, and motor vehicles are such products. The CFA links to an associated site called Regulate Guns, which discusses the need for the Consumer Product Safety Commission (CPSC) to have oversight on firearms. Regulate Guns states:

More than 30 years ago, the United States made prevention of deaths from motor vehicles injuries a national priority. As a result, the death rate from motor vehicle crashes was cut nearly in half.¹⁰

The claim is correct: from 1966 to 2003, the motor vehicle traffic fatality rate decreased 43.4%.¹¹ But when we compare motor vehicle death and injury rates to those from firearms accidents, using the earliest and latest data available online from the Centers for Disease Control, we find that between 1979 and 2002:

- Accidental deaths from motor vehicles dropped 34%, but
- Accidental deaths from firearms dropped 71%.
- Accidental injuries from motor vehicles dropped 19%, but
- Accidental injuries from firearms dropped 84%.

Firearm safety has improved at a far faster rate than motor vehicle safety, despite CFA's claim of the government making it a priority to prevent motor vehicle deaths. This does not encourage confidence that a government program could do any better with gun safety, since voluntary safety education has been more successful than federal regulation. Nor do these statistics bode well for "gun safety" advocates. Since CFA is content that safety issues have been properly addressed with motor vehicle regulation, it should follow that because accidental firearm death has decreased twice as fast, and accidental firearm injury about 4.5 times as fast, as the corresponding motor vehicle rates, there is even less of a need for more





firearms regulation. See Table 5.

The CPSC admits on its own web site that the National Highway Traffic Safety Administration (NHTSA) is the government agency with jurisdiction over motor vehicles.¹² Thus, CFA is implicitly declaring that despite not being regulated by the CPSC, having a different government organization dedicated to the product's oversight is a satisfactory assurance that consumer safety concerns are being properly addressed. CFA's satisfaction is borne out by the fact that there is only one reference to motor vehicles listed on their site,¹³ as opposed to about 50 for guns.¹⁴ The main point to remember is this: If the CPSC says another government agency is sufficient for oversight on a product, this is acceptable to the Consumer Federation. Later in this Article, current governmental regulatory and oversight agencies under which firearms manufacturers operate are examined.

The NHTSA, overseer of the automotive industry's safety standards, confirms that motor vehicle crashes are the leading non-disease cause of death in 2002.¹⁵ NHTSA preliminary estimates show there were 6,328,000 million motor vehicle crashes in 2003,¹⁶ with 42,643 people losing their lives, and another 2,889,000 million people injured, with 313,000 of those injuries resulting in incapacitation.¹⁷ In alcohol-related crashes, 17,013 persons were killed and 275,000 injured, 39.9% and 9.5%, respectively, of the victim totals.¹⁸

Drunk driving could be considered an intentional or premeditated crash, as the driver must spend time and money getting drunk prior to getting into the vehicle and operating it, knowing that such behavior is dangerous. Drunks with cars killed 76% more people in 2003 than did criminals with firearms, as the FBI reports there were 9,638 intentional firearm murders that year.¹⁹ For 2003, the CDC reports there were over 46 times as many motor vehicle injuries (intentional plus accidental) as all firearm injuries, and nearly 160 times the unintentional firearms injuries. Firearms accounted for 0.2% of all injuries, while motor vehicles caused over 10%. See Table 6.

III. CFA-APPROVED REGULATION DOES NOT ERADICATE PRODUCT DEFECTS

No matter who is in charge of regulating automobile safety, lots of dangerous vehicles slip through the regulatory net. Here is a par-





tial list of recent automobile recalls, all covering issues which had the potential for causing injury or death:

Ford has announced a safety recall for a part that could cause fires underneath the hoods of several popular Ford pickup trucks and SUVs. But consumer advocates and lawyers representing several Texans whose vehicles were destroyed say the problem extends beyond the models recalled.²⁰

Ford is recalling nearly 360,000 Ford Focus cars to fix a potential problem with their rear door latches. The problem involves about 358,857 vehicles from the 2000-2002 model years and stems from a build-up of corrosion around the rear door latches which can eventually prevent them from ensuring the doors are secure.

“If not latched properly, the door may open while the vehicle is in motion,” NHTSA said.

The Focus has set new recall records since its introduction. This is the tenth safety recall conducted in the U.S. There have also been several defect investigations.²¹

General Motors is recalling 717,000 minivans because of a problem with the power sliding door. Passengers could hurt their arms or wrists, the automaker said.²²

General Motors Corp. is recalling 155,465 pickups and sport utility vehicles – including the Hummer H2 – because of possible brake malfunctions, the automaker and federal safety regulators said Thursday.

NHTSA said a pressure accumulator in the braking system could crack during normal driving and fragments could injure people if the hood was open. The crack also could allow hydraulic fluid to leak, which could make it harder to brake or steer and could cause a crash.²³

The National Highway Traffic Safety Administration said the North American division of problem-plagued Mitsubishi was recalling 65,436 of its mid-sized Endeavor SUVs, built between 2004 and 2005, because their parking brakes may fail.





NHTSA also said the Chrysler group was recalling 43,180 of its Pacifica SUVs because some may experience intermittent or eventual total failure of their halogen headlamps.²⁴

Despite regulatory oversight by the NHTSA, including the CFA's much-favored ability to issue recalls, hundreds of thousands of dangerously defective automobiles are sold each year. Sometimes these defective products result in litigation for wrongful death and injury. Despite the CFA-accepted regulation, motor vehicle crashes result in far more deaths and injuries than firearms. The high death rate exists notwithstanding mandatory consumer education (drivers' education) and ongoing anti-drunk-driving advertising. Nevertheless, Consumer Federation of America is satisfied that motor vehicles are properly regulated, and has not called upon the Consumer Protection Safety Commission for additional regulation.

IV. FIREARMS REGULATION UNDER THE CONSUMER PRODUCT SAFETY COMMISSION

Currently, the Consumer Product Safety Commission is forbidden by federal law to impose restrictions on firearms. The CPSC is comprised of three politically-appointed administrators who, if they were anti-gun, could regulate civilian gun ownership out of existence by creating product safety standards so stringent as to make it impossible for civilians to own functioning firearms. Consider what happened when the CPSC got involved with air guns.

In 1993, CPSC initiated an investigation into two of Daisy Manufacturing's air rifles, based upon a complaint that there were dangerous defects. Ten years later, after rancorous and expensive litigation, both parties reached a settlement. There were four basic points in the settlement to which Daisy and CPSC agreed:

- "Add warnings related to the hazards associated with these air guns, including misfeeding and failure to load BBs as part of its \$1.5 million safety campaign."
- "All BBs manufactured by Daisy will contain a label or insert on the package, which will be apparent to all users accessing BBs."





- “Submit performance issues to the appropriate ASTM [American Society for Testing and Materials] committee for the purpose of developing standards related to the propensity of air guns to fail to load, feed or fire BBs.”
- “Submit the issue of age appropriateness for air guns that fire projectiles in excess of 350 feet per second to the appropriate ASTM standards committee.”²⁵

Point 1 of the agreement forced Daisy to accept responsibility for extreme, intentional consumer misuse of their product. In a dissenting opinion, Mary Sheila Gall, one of the commissioners, stated:

Even Complaint Counsel’s expert could induce lodging in the magazine of the Model 880 air rifle only by using BBs that were grossly out of specification in their dimensions or by loosening a screw in the receiver of the Model 880.

Similarly, a laboratory modification to a gun in order to induce lodging is of interest only if the modification is reasonably likely to occur when such guns are in the hands of consumers. Even Complaint Counsel’s expert concluded that the experiment in screw loosening that led to BB lodging in the laboratory was unlikely to occur in the hands of consumers. Therefore, like the issue of out-of-specification BBs, the laboratory example of BB lodging is simply irrelevant in the Commission’s determination over whether the Model 880 is a substantial product hazard. Without evidence of BBs lodging in the magazine in a manner likely to be encountered by consumers, the Commission cannot find that this characteristic of the Model 880 constitutes a substantial product hazard.²⁶

In other words, in order to demonstrate the gun’s defect, basic product design considerations had to be willfully ignored, or the gun had to be partially disassembled prior to use, another willfully malicious act intended to make the air rifle unsafe.

Point 2 is interesting because the first two parts of the safety warning are “(1) Always point the gun in a safe direction; (2) Always treat every gun as if it were loaded...”²⁷ The first safety rule is





copied verbatim from the National Rifle Association's safety rule 1, while the second is another NRA basic safety rule.²⁸ The NRA is an independent, non-regulatory organization that strongly and consistently promotes responsible use, and its gun safety rules are considered the industry standard.

Points 3 and 4 are particularly interesting, as the CPSC creates a standard that acknowledges certain issues are best left to independent experts. In this case, the CPSC relies on the American Society for Testing and Materials, a voluntary standards development organization whose mission is to promote public health and safety and help produce more reliable products.²⁹ The mission is accomplished via participation of their international membership:

Standards developed at ASTM are the work of over 30,000 ASTM members. These technical experts represent producers, users, consumers, government and academia from over 100 countries.³⁰

Therefore, by promoting the CPSC, the CFA effectively supports the CPSC policy of relying upon an independent group of experts to help create safe design standards. This concept, that the Consumer Federation's prize regulatory organization (CPSC) can designate independent organizations to create safety standards, is also a very important point to remember when covering the existing regulatory standards for firearms later in this Article.

There are some other issues in this settlement which should concern the firearms industry as well as gun owners. Hal Stratton, Chairman of the CPSC, wrote:

Based upon the evidence adduced in the case, I am not at all sure the CPSC complaint counsel would prevail on the merits of the case. Should the complaint counsel fail in their efforts to prove their case, consumers would obtain no benefit from a long and costly legal proceeding...

Although I do not consider it determinative in itself, I have also taken Daisy's financial condition into consideration. From a review of the extensive financial documentation that we requested and received from Daisy, it is clear that Daisy is in a "precarious financial" condition as alleged. It is less clear to me the role this proceeding has played in Daisy's financial





condition. I believe the CPSC action may now be a factor in Daisy's financial condition, but I do not believe it is the only factor. Nevertheless, when considered with the other reasons to settle this matter, a settlement would provide certain immediate benefits to consumers, which they would not receive if Daisy becomes insolvent or this litigation drags on for years.³¹

Here we have an admission by the CPSC that litigation is expensive for firearms manufacturers, to the point that it may place them in a "precarious financial condition." Since most firearms manufacturers are small to medium-sized businesses without large corporate deep pockets. Litigation has the potential to quickly bankrupt such businesses, causing job loss that spreads into local economies like a rock thrown into a pool. See Table 7.

Chairman Stratton continued:

Throughout its 30-year history, the Commission consistently found that regulating this product would not enhance safety. Rather, the Commission has continuously made the determination to work with voluntary standards organizations to improve the safety standards of these products...

The Commission has never found that air rifles, or any model of air rifle, constitute a substantial product hazard.³²

It is curious that the CPSC admits a "consistent" history of finding air rifles safe, and that voluntary standards have been sufficient to keep the rifles safe. Commissioner Gall found that:

"The Commission's actions have done serious and unjustified damage to the reputation and business prospects of a company whose product represents no substantial product hazard."³³

Finally, Chairman Stratton stated in his Analysis of Facts:

Loading, feeding, and firing problems may not be best addressed by singling out a particular air gun or air guns for a corrective action, but by submitting these issues to the appropriate ASTM Subcommittee for the development of voluntary standards.

Even though BB lodging may occur, the link between lodging





and injuries is not at all clear... It is apparent that if BB lodging injuries occur, they are relatively rare, which goes to the issue of whether the defects alleged in the complaint, as a legal matter, constitute a substantial product hazard.

All of the injuries that can be attributed to the guns at issue in this case were preventable. They all involved either someone pointing the gun at someone and pulling the trigger or playing with the gun in an inappropriate manner—all in violation of widely known and accepted safety rules for the use of guns.³⁴

There are three important points being made here:

- The CPSC call for voluntary standards is repeated.
- Chairman Stratton admitted grounds for pursuing litigation for alleged defects are weak, as there is no clear proof that there is a “substantial product hazard.”
- He admitted that all of the injuries in this case were in fact the responsibility of the gun owner, and that if consumers followed “accepted safety rules” they could have prevented these injuries.

These points—voluntary standards, no clear proof of substantial product defect, and user error—are exactly the ones that the Consumer Federation of America condemns firearm manufacturers for promoting; CFA allege that the points are merely a cover for a tacit admission that guns are inherently, dangerously defective.

V. A FEW CASES OR A VAST CONSPIRACY?

The Consumer Federation of America released another report claiming that “Many firearms contain defects in design or manufacture making them likely to unintentionally discharge.”³⁵ The report actually proves that the existing structures of industry regulation and product liability litigation work.

For example, the report discusses a Sturm, Ruger single action revolver considered dangerous for its unintentional discharges. The manufacturer voluntarily stopped making the revolver in 1972 and replaced it with an upgraded model designed to prevent such accidental discharges. They document how the manufacturer saw a de-





sign flaw and corrected it over 30 years ago. CFA discusses another model of single-action revolver that accidentally discharged after falling out of the holster and hitting a rock. The case resulted in a court settlement, which proves that the legal system works in a case where the gun was proven to be defective.

The Excam Derringer is another pistol considered by the Consumer Federation to be “of poor construction and therefore prone to unintentional discharge.” The Consumer Federation reports the company has been successfully sued for this defect. Lorcin Pistols is also reported to have been manufacturing “junk guns” that accidentally discharged. The report states: “In 1996 Lorcin announced it was filing for bankruptcy to protect itself from at least 18 pending liability suits.” A Remington hunting rifle was reported to be defective, resulting in unintentional discharge. The report states: “In 1994 a Texas jury awarded \$15 million in punitive damages to a hunter who shot himself in the foot when a Remington Model 700 rifle discharged without the trigger being pulled.”

The above examples all prove that the legal system works, and that manufacturers who produce substandard products will be held accountable.

The report ends with an analysis report of Glock pistols, and an incident in which “the 3-year-old daughter of a District of Columbia police officer unintentionally shot and killed herself with her father’s service pistol.” The sad attempt at using tragedy to further the cause of gun control should embarrass the Consumer Federation of America: had the officer been practicing all the safe gun handling and storage procedures he was taught in police academy, his daughter never would have had access to a firearm, loaded or not.

CFA would rather intentionally group product defects with user errors than point out that professionals who have been trained in gun handling and safety do not always behave responsibly. As we saw with automobiles, owner irresponsibility is a far greater danger than real or alleged product defects.

Far from demonstrating the need for further regulation of firearms, the case studies show that a responsible manufacturer usually discontinues manufacturing a questionable design to avoid the risk of expensive product liability judgments.





VI. ARE GUNS UNREGULATED?

Consumer Federation of America alleges that firearms are insufficiently regulated, and as a result, they present a substantial hazard to consumers and the public at large. Continuing with CFA's *Buyer Beware*:

Pro-gun organizations such as the Sporting Arms and Ammunition Manufacturers Institute, Inc. (SAAMI) suggest that focusing on user education is all that is needed to reduce firearm accidents...

Although the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) licenses manufacturers, dealers, and importers, it has no general safety authority, such as the power to set safety standards or institute recalls.³⁶

The CFA has one point, in that the ATF has only the authority to “to ensure that the firearms dealers are complying with the requirements of the Gun Control Act of 1968 and other federal firearms laws.”³⁷ However, as to CFA's reliance on issuing recalls as a way to improve design safety, there are two points to remember:

- Automobiles may be recalled after hundreds of thousands of dangerously defective units have been released into the general population. This hardly shows how the regulatory ability to recall has made cars safer.
- CFA and other “safety” organizations have provided no evidence that there is any significant number of defective firearms sold, a questionable justification for the need of a regulatory agency with the authority to recall.

It is hard to consider CFA's firearms safety claim when another government agency is not satisfactorily performing its job. The CFA's own criteria are in play here: they promote the Consumer Product Safety Commission as the solution to dangerous products. The CPSC operates according to three important guidelines:

- The CPSC does not need to act when another government agency provides sufficient oversight on a product.
- Independent expert organizations can create satisfactory





safety standards.

- Voluntary standards are an essential part in creating safe products.

Therefore, by supporting the CPSC, Consumer Federation implicitly supports CPSC decision-making processes for determining proper safety standards.

The ATF has certain regulatory authority that is greater than the NHTSA, as its powers can be exercised without notice. The ATF can enter a retailer's establishment unannounced, and the business owner has no right of refusal either on the premises or in their home, should the ATF wish to inspect their private residence. As one retailer wrote in an email interview:

“Persons who hold FFL's [Federal Firearms License, required by ATF for any firearms business] give up their Fourth Amendment rights to search and seizure. The authorities can knock at my [home] door, come to my business, my car or any other property I own and search same without a warrant.”³⁸

The ATF also has the authority to perform unannounced audits and inspections on distributors and manufacturers.³⁹ An ATF public information officer confirmed that the Bureau can perform one unannounced site inspection per year under normal circumstances, but may show up unannounced at any time if a criminal investigation is under way.⁴⁰ Thus, suspected violations to federal law involving manufacturing or sales can be investigated immediately, any time, with no legal right of refusal for the business owner.

NHTSA inspections are limited to probable cause related to “an occurrence associated with the maintenance or operation of a motor vehicle or motor vehicle equipment resulting in personal injury, death, or property damage.”⁴¹ The NHTSA's authority is strictly reactive, responding to a suspected defect which resulted in injury, death, or property damage. This means that, regarding federal regulations, firearms manufacturers are already held to a tougher inspection standard than the CFA-approved automobile regulation.

This partially satisfies CFA's first criterion: Another government agency is sufficient for oversight on a product. Further control over product quality comes from a coalition of private standards and in-





spection organizations, plus market-induced pressures from government law enforcement agencies.

The Consumer Federation of America report disparages the Sporting Arms and Ammunition Manufacturers Institute (SAAMI) for emphasizing user education and responsible use.⁴² The SAAMI web site's main technical page states: "SAAMI is an accredited Standards Developer for the American National Standards Institute (ANSI)."⁴³ The technical page elaborates:

As an accredited standards developer, SAAMI's standards for industry test methods, definitive proof loads, and ammunition performance specifications are subject to ANSI review and various ANSI criteria.

According to the American National Standards Institute, "Approval of an American National Standard requires verification by ANSI that the requirements for due process, consensus, and other criteria for approval have been met by the standards developer."⁴⁴

So it is not the firearms manufacturers who set product quality standards, but an independent organization. Also, there are opportunities for input from many other agencies during the standards development process. Part of the ANSI standards process involves approval by the U.S. Customs Service, the Federal Bureau of Investigation, the National Institute of Standards & Technology, the Royal Canadian Mounted Police, and the Association of Firearms & Tool Mark Examiners.⁴⁵ These organizations together satisfy CFA's second criterion: Independent expert organizations can create satisfactory safety standards. Nor are standards set once and forgotten. As SAAMI states:

It is ANSI and SAAMI policy that every five years the standards be revised or reaffirmed. Even if the standards remain the same, they must go through the approval process outlined above. Simply stated, the standards accepted by ANSI and promulgated by SAAMI are reviewed and accepted by outside experts, and every five years the validity of the standards are re-affirmed.⁴⁶

ANSI also schedules audits with the participating manufactur-





er.⁴⁷

Furthermore, if a firearms manufacturer wants to do business with the government, the manufacturer must adhere to the SAAMI/ANSI standards:

The U.S. military, the Federal Bureau of Investigation, and many other state and local agencies frequently require that their suppliers manufacture to SAAMI specifications. SAAMI is the only trade association whose member companies manufacture and set standards for high-performance law enforcement ammunition.⁴⁸

These lucrative government contracts provide incentive to satisfy the rest of CFA's first criterion by virtue of being large, influential consumers.

The Association of Firearms & Tool Mark Examiners (AFTE) is "an international organization dedicated to the advancement of one of the finest disciplines of Forensic Science...Firearm & Toolmark Identification."⁴⁹ The organization began in 1969 with a core group of 35 police and civilian forensics experts. It conducts annual training seminars, and now has about 850 members.⁵⁰ AFTE explains:

The organization is formed exclusively for charitable, scientific, educational, and testing for public safety purposes; and to improve and elevate the quality, integrity, and public image of the scientific crime laboratories... (Emphasis added)

One of the specific goals of the AFTE is "To engage in the testing of firearms, components, ammunition and examiners for the benefit of public safety."⁵¹ The AFTE code of ethics states:

It is the duty of any person practicing the profession of firearms and toolmark examination to serve the interests of justice to the best of his ability at all times. He will use all of the scientific means at his command to ascertain all of the significant physical facts relative to the matters under investigation. Having made factual determinations, he must then interpret and evaluate his findings. In this he will be guided by experience and knowledge which, coupled with a serious consideration of his analytical findings and the application of sound judgment, may enable him to arrive at opinions and conclusions pertaining to the





matter under study. These findings of fact and his conclusions and opinions should then be reported with all the accuracy and skill of which the examiner is capable.

In carrying out these functions, the examiner will be guided by those practices and procedures which are generally recognized within the profession to be consistent with a high level of professional ethics. The motives, methods and actions of the examiner shall at all times be above reproach, in good taste and consistent with proper moral conduct.⁵²

The Shorter Oxford English Dictionary (OED) defines “integrity” as:

- “The condition of having no part or element taken away or lacking; undivided state; completeness” and
- “The condition of not being marred or violated; unimpaired or uncorrupted condition; original state; soundness.”

OED defines “defect” as: “The absence of something essential to completeness; a lack, a deficiency.” These two words—“integrity” and “defect”—are antonyms, conceptual opposites. Therefore, when the AFTE inspects “testing of firearms, components, ammunition,” they are looking to detect and eradicate defects, and thus insure proper manufacturing standards are employed to produce properly-working products.

If a firearms manufacturer wants to remain profitable, to be free from meritorious negligence and product defect litigation, and to have access to lucrative government contracts, the manufacturer must maintain the highest standards of product quality. The manufacturing standards and processes must be transparent to all parties involved with standards and processes development. The gun maker must be open to inspections, and participate in regular reviews of manufacturing standards and processes, by a number of different types of organizations. This is multi-layered quality control:

- Three independent non-governmental standards oversight organizations; (CFA's criterion 2);
- Voluntary participation by the manufacturer (CFA's third criterion);





- A government organization dedicated to enforcing federal firearms laws, plus a number of powerful, interested government law-enforcement organizations who represent lucrative business opportunities for the gun-makers. (CFA's criterion 1)

VII. THE UTILITY ARGUMENT

When pointing out the differing regulatory results and safety records between cars and guns, you will likely get a response along the lines of: "But automobiles are useful; guns just kill people. Cars help us in our everyday life."

Those who need a firearm to protect themselves find it extremely useful in difficult situations. In *Armed Resistance to Crime*, Gary Kleck and Marc Gertz address the issue of the usefulness of firearms, concluding that "gun defenders appear to face more difficult circumstances than other crime victims, not easier ones."⁵³ This was based upon their defensive gun use survey, where they found:

Although the gun defenders usually faced unarmed offenders or offenders with lesser weapons, they were more likely than other victims to face gun-armed criminals. This is consistent with the perception that more desperate circumstances call forth more desperate defensive measures. The findings undercut the view that victims are prone to use guns in "easy" circumstances which are likely to produce favorable outcomes for the victim regardless of their gun use.⁵⁴

While victims face multiple offenders in only about 24% of all violent crimes, the victims in our sample who used guns faced multiple offenders in 53% of the incidents.⁵⁵

Kleck and Gertz estimated firearms were used defensively 2.1-2.5 million times a year, based upon a one-year recall period for survey respondents.⁵⁶ Their estimates of annual defensive gun use over a five year period reflect findings of similar surveys, where the number of defensive gun uses ranged from 1.5-1.8 million per year.⁵⁷

When asked about their perceived likelihood that a victim would have died had they not used a gun for protection, 14.2% responded that somebody "probably would have," while 15.7% said somebody "almost certainly would have" died.⁵⁸ Using the more conservative





estimates above of 1.5-1.8 million defensive gun uses per year, this means it was likely that between 235,500 and 282,600 lives “almost certainly” were saved annually by defensive gun use and another 213,000 to 255,600 lives were “probably” saved. The result may sound extreme, but as Kleck and Gertz note:

If even one-tenth of these people are accurate in their stated perceptions, the number of lives saved by victim use of guns would still exceed the total number of lives taken with guns.⁵⁹

In the survey, Kleck and Gertz found that 5.5% of defenders were injured during a violent encounter with their attackers. The U.S. Department of Justice 2003 Crime Victimization Survey estimated that in 2002, there were 213,250, or 38.5%, of robbery victims injured, and that 338,930, or 32.4%, of aggravated assault victims were injured.⁶⁰ Compared to defensive gun users, the overall injury rate for robbery victims was seven times greater, and the aggravated assault injury rate was almost six times greater. The data suggest that 280,000 injuries (140,711 aggravated assault plus 91,832 robbery) injuries avoided in 2002.

In *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, an analysis of crime victimization surveys, Michael Rand found that from 1987-92, crime victims who resisted with other weapons suffered injury 2.5 times as often as those who resisted with a firearm.⁶¹

In *Victim Costs and Consequences*, Miller, Cohen, and Wiersema of the National Institute of Justice spent two years studying the financial costs (in 1996 dollars) of various crime categories. They concluded: “Personal crime is estimated to cost \$105 billion annually in medical costs, lost earnings, and public program costs related to victim assistance.”⁶²

Beyond tangible costs such as medical care, the authors found: “Including pain, suffering, and the reduced quality of life increases the cost of crime to victims to an estimated \$450 billion annually.”⁶³

Therefore, using the study’s average costs per incident, defensive gun use during an assault has the potential for saving over \$3.9 billion in annual medical costs, lost productivity, public services, property loss, and quality of life, while defensive gun usage during



a robbery could save another \$1.9 billion.⁶⁴ These amounts assume each crime incident where a defensive firearm was successfully deployed is downgraded from a completion plus injury to an attempt with no injury. See Table 8.

It is also interesting to note that the authors of *Victim Costs and Consequences* consider drunk driving to be a violent crime, stating: “Drunk driving is illegal. This study considers it a violent crime when a drunk driver maims or kills innocent victims or damages their property.”⁶⁵

Using the DOJ estimates, the costs to society for DWI-caused deaths in 2003 was nearly \$68.1 billion. Compared to the estimated costs of firearm-related death—mostly intentional murder by criminals—at \$35.7 billion, drunk driving fatalities cost us about \$32.4 billion more in 2003.⁶⁶ To put this amount in perspective, \$32 billion is roughly equivalent to the gross national product of the 60th wealthiest country in the world.⁶⁷ See Table 9.

There is significant social utility in civilian ownership of firearms, not only in lives saved and injuries avoided, but in a massive reduction in the cost of crime to society in terms of productivity and quality of life.

VIII. WOMEN, RAPE PREVENTION, AND SELF-DEFENSE

There is one more category of violent crime that is unique in its ability to completely violate, humiliate and dehumanize a person. The costs to society in terms of lost work, medical care, and social services can be calculated in a sterile vacuum of hard numbers, but the hidden costs of damage to the human spirit and family relationships are incalculable. Would not any reasonable person be willing to do anything legally and morally possible to reduce the incidents of rape?

In *Determinants of Completing Rape and Assault*, Alan Lizotte sought to determine if rape had unique properties that differentiated it from other forms of assaultive violence. He analyzed data from the National Crime Survey, compiling over 13,000 cases of rape and assault that occurred in 26 cities from 1972 through 1975. By comparing rape to assault, he was able to create a more definitive qualitative analysis of the crime of rape. He found that resisting assault was not a successful strategy:



The data suggest that the best method of resisting assault is not to resist with force. Men and women who resist assault with force seem to fare much worse than those who do nothing to resist and those who resist without force.⁶⁸

However, his findings on resisting rape were opposite:

Resisting rape with force decreases the probability of a completed victimization. For assaults, resisting without force and doing nothing as equivalent: on average they neither raise nor lower the probability of completion.

For rape, however, resistance without force is better than doing nothing at all. In other words, for rape, resisting with force and resisting without force both decrease the probability of victimization. Further, women who resist rape with a gun or knife dramatically decrease their probability of completion.⁶⁹

In *Rape and Resistance*, Kleck and Sayles examined stranger rape incidents recorded in the National Crime Surveys from 1979 to 1985. They concurred that the most effective method for lowering rape completion rates was for the victim to resist with a weapon,⁷⁰ and that such resistance did not create “any significant additional risk of other injury.” On the other hand, they found some correlation between additional injury and “unarmed forceful resistance or threatening or arguing with the offender.”⁷¹ In other words, if you are going to resist, use a weapon.

In *Judged Effectiveness of Common Rape Prevention and Self-Defense Strategies*, Furby, Fischhoff, and Morgan surveyed comparably-sized groups of women, men, and rape experts to determine effective preventative and self-defense strategies. They concluded:

Consensually effective strategies included threatening the man with a gun, poking the assailant's eyes, kicking him in the groin, and screaming, in roughly that order.

Women, men, and experts all attributed greater effectiveness to physically assertive strategies than to less assertive ones.⁷²

Both women and men respondents rated defensive gun use as the most effective strategy once the assault was under way. The only physical resistance strategy rape experts rated higher than defensive



gun use was poking the assailant's eyes.⁷³ While this sounds good in theory, it means the assailant is already in physical contact, and since men are generally bigger and stronger than women, the assailant will most likely be in control of the situation at that point.

Rape experts surveyed in *Judged Effectiveness of Common Rape Prevention and Self-Defense Strategies* also agreed that the three most effective prevention strategies are for a woman to appear confident and strong (63.3% reduction), stay vigilant (64.1%), and participate in frequent public awareness programs (60%).⁷⁴ The authors calculate: "Pursuing the three strategies judged by the experts to be least effective should reduce the risk of assault by 73% (i.e., $1 - [(1 - .326)(1 - .365)(1 - .374)]$)." ⁷⁵

Using the formula, the three *most* effective strategies would reduce the risk of sexual assault 94.7%. The effective strategies of confidence, vigilance, and public awareness are taught in many defensive firearms classes, as well as in martial arts classes. Combine the effective behavioral strategies with a tool that can halt the assault before the attacker comes within grappling and striking distance, appears to be highly effective at preventing rape.

Using the same formula from the analysis of the costs of aggravated assault and robbery, we find that if all potential victims had employed the successful strategies outlined in *Judged Effectiveness of Common Rape Prevention and Self-Defense Strategies*, there would have been an additional \$11.6 billion saved annually in medical costs, lost productivity, public services, property loss, and quality of life. See Table 10.

Despite the data, there is a belief among many some persons that physical means of resistance only provoke the attacker to greater levels of violence. For instance, the U.S. State Department recommends "It may be more advisable to submit than to resist and risk severe injury or death."⁷⁶

Quinsey and Upfold found, however, that "victims resisted more strongly when they were being injured. There was, in fact, no association of victim resistance and the probability of later injury."⁷⁷

After examining the 1984 Victim Risk Supplement, Kleck and Sayles studied sequence of events in assaults, robberies, finding that only in a small minority of cases did the victim resist before being injured. They concluded: "In short, the time sequence of injury and



resistance in the overwhelming majority of assaults and robberies is inconsistent with the resistance-provokes-attack thesis...⁷⁸

Kleck and Sayles referred to the issue of resisting during attempted rape, concluding: "Taking into account the evidence concerning the causal/temporal order of injury and self-protection, the findings are consistent with the view that injury to the victim can provoke her to take self-protection action..."⁷⁹

Kleck and Sayles also found: "Completion rates for all specific forms of self-protection are substantially lower than for nonresistance, with the lowest rates, 0 percent, associated with resistance with a gun or knife."⁸⁰

Guns not only save lives, they save money, they save families, they save relationships, and they save the sanity of our society. As Dr. Fackler, states:

Consider the implications of the fact that firearms save many more lives than they take. That means decreasing the number of firearms would actually cause an increase in violent crime and deaths from firearms.⁸¹

CONCLUSION

The Consumer Federation of America points to gun fatalities, almost all of which are suicides or homicide by criminals, to make the case that guns are too dangerous to exist among the general population. But to look at firearm-related deaths without a statistical context makes it impossible to determine just how dangerous guns are. The Consumer Federation of America pays little notice to motor vehicle deaths, although motor vehicle mortality is far greater than firearms mortality, and firearms accidental death rates have declined far more steeply than have automobile accidental death rates. Contrary to what the CFA claims, firearms in the United States are stringently regulated by three different organizations according to the model which the Consumer Product Safety Commission considers optimal. Nor does CFA acknowledge the benefits of civilian gun ownership in terms of lives saved and injuries avoided.



Table 1: Unintentional Deaths, Selected Categories⁸²

Category	1992		2002		% Change in Rate
	Total	Rate (per 100k)	Total	Rate (per 100k)	
Poison	7,082	2.76	17,550	6.09	+120.7
Drowning	4,186	1.63	3,447	1.20	-26.4
Motor Vehicle	40,982	15.98	45,380	15.76	-1.4
Suffocation	4,062	1.58	5,517	1.92	+21.5
Firearms	1,409	.55	762	.26	-52.7

Table 2: U.S. Injury-Related Deaths—2002⁸³

All	161,249
Unintentional	106,742
Homicide	17,638
Legal intervention	384
Suicide	31,655
Undetermined intent	4,830
Firearm	
All	30,242
Unintentional	762
Homicide	11,829
Legal intervention	300
Suicide	17,108
Undetermined intent	243
Motor Vehicle	
All	45,579
Unintentional	45,380
Homicide	60

Legal intervention	N/A
Suicide	112
Undetermined intent	27

	1995	1999/2000	Change
UK	7.4	7.5	1.4%
USA	11.9	10.4	-12.6%
AUS	12.0	12.5	4.2%

Cut/Pierce	2,074
Drown	72
Fire/Burn	134
Poison	63
Suffocation	679

	1979 Death Rate	2002 Death Rate	% Change	1993 Injury Rate	2003 Injury Rate	% Change
Firearm	.89 ⁸⁶	.26 ⁸⁷	-70.8	40.5 ⁸⁸	6.51 ⁸⁹	-83.9
Motor Vehicle ⁹⁰	22.70	14.93	-34.2	1,222	993	-18.7

Overall	
All	29,237,747
Unintentional	27,127,477
Assault	1,639,772
Legal intervention	59,371
Self-harm	411,128
Firearm	
All	65,834
Unintentional	18,941
Assault	42,505
Legal intervention	702
Self-harm	3,687
Motor Vehicle	
All	3,033,466
Unintentional	3,026,595
Assault	4,425
Legal intervention	885
Self-harm	1,562

Units	<100	100-999	1,000-9,999	10,000-100,000	>100,000	Totals
Pistol	29	9	15	15	1	69
Rifle	121	38	21	11	5	196
Shotgun	23	7	6	3	3	42
Totals	173	54	42	29	9	307

	Assault	Robbery
Number of Victims	1,045,610	554,310
with injury	338,930	213,250
Pct w/Injury	32%	38%
Kleck, Gertz Inj. %	57,509	30,487
Reduction	281,421	182,763
Annual Reduction	140,711	91,382
Cost per injury	24,000	19,000
Cost, no injury	2,000	2,000
Cost adjustment	22,000	17,000
Annual Savings*	\$3,095,631,000	\$1,553,485,500
2002 \$ Conversion	1.147	
2003 \$ Conversion	1.173	
Average ⁹³	1.160	
2002/2003 Savings	\$3,898,948,925	\$1,956,615,831

* Initial savings amount based upon 1993 dollars. Final amount is calculated using conversion factors to adjust for inflation.

	DWI Deaths	Firearm Deaths
Number of Victims	17,013	9,638
Cost per injury	3,180,000	2,940,000
Annual Savings*	54,101,340,000	28,335,720,000
2002 \$ Conversion	1.147	
2003 \$ Conversion	1.173	
Average	1.160	
Converted Savings	\$68,140,667,101	\$35,668,854,723

* Initial savings amount based upon 1993 dollars. Final amount is calculated using conversion factors to adjust for inflation.

Table 10: Rape Reduction 2002/3 ⁹⁴	
Number of Victims	223,290
Reduction	211,456
Annual Reduction	105,728
Cost per injury	87,000
Annual Savings*	9,198,319,905
2002 \$ Conversion	1.147
2003 \$ Conversion	1.173
Average	1.160
Converted Savings	\$11,585,288,914

* Initial savings amount based upon 1993 dollars. Final amount is calculated using conversion factors to adjust for inflation.

ENDNOTES

1. Consumer Federation of America: About CFA. <http://www.consumerfed.org/backpage/about.html>
2. Consumer Federation of America, *Buyer Beware: Defective Firearms and America's Unregulated Gun Industry*, February 2005, page 4. http://www.consumerfed.org/buyerbeware_report.pdf
3. *Ibid.*, pages 4-5.
4. *Buyer Beware*, page 5.
5. National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS Leading Causes of Death. <http://webapp.cdc.gov/sasweb/ncipc/leadcaus10.html>
6. Consumer Federation of America: Product Safety. <http://www.consumerfed.org/backpage/psafety.cfm>
Consumer Federation of America: Child Safety. <http://www.consumerfed.org/backpage/csafety.cfm>
7. *Buyer Beware*, page 5.
8. Martin L. Fackler, "Firearms in America: The Facts," *NewsMax*, Dec. 25, 2000. <http://www.newsmax.com/archives/articles/2000/12/23/225251.shtml>
9. WISQARS Fatal Injuries.

10. Regulate Guns Home Page. <http://www.regulateguns.org/>
11. National Highway Traffic Safety Administration, *Traffic Safety Facts 2003: A Compilation of Motor Vehicle Crash Data from the Fatality Analysis Reporting System and the General Estimates System*, Table 2, page 15. <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2003F.pdf>
12. *Report Unsafe Automobiles, Tires, Trucks and Motorcycles*, Consumer Product Safety Commission web site. <http://www.cpsc.gov/tires.html>
13. Consumer Federation of America: Auto Safety. <http://www.consumerfed.org/backpage/asafety.cfm>
14. Consumer Federation of America: Guns. <http://www.consumerfed.org/backpage/guns.cfm>
15. Rajesh Subramanian, National Highway Traffic Safety Administration, *Motor Vehicle Traffic Crashes as a Leading Cause of Death in the United States, 2002*, Jan. 2005, page 2. <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809831.pdf>
16. *Traffic Safety Facts 2003*, Table 2, page 44.
17. *Ibid.*, page 86.
18. *Ibid.*, page 92.
19. FBI, *Uniform Crime Reports 2003*, Table 2.12, Murder Circumstances by Weapon. http://www.fbi.gov/ucr/cius_03/xl/03tbl2-12.xls
20. "Ford Recalls Fire-Prone Trucks," *Consumer Affairs News*, January 27, 2005. http://www.consumeraffairs.com/news04/2005/ford_f150_recall.html; "Houston Lawyers Sue Ford Over F-150 Fires," *Consumer Affairs News*, January 31, 2005. http://www.consumeraffairs.com/news04/2005/flaming_fords_suit.html.
21. "Ford Focus Recall," *Consumer Affairs News*, February 7, 2005. http://www.consumeraffairs.com/recalls04/2005/ford_focus.html
22. GM Recalls Chevrolet, Oldsmobile, Pontiac Minivans, *Consumer Affairs News*, December 23, 2004. http://www.consumeraffairs.com/recalls04/gm_minivans.html
23. "Associated Press, GM recalls 155,465 pickups, vans and SUVs for brake problem," *Auto Insider*, Feb. 10, 2005. <http://www.detnews.com/2005/autosinsider/0502/10/01-86233.htm>
24. "Mitsubishi Recalls SUVs, Chrysler Recalls Pacificas," *Consumer Affairs News*, Mar. 4, 2005. <http://www.consumeraffairs.com/recalls04/2005/mitsubishi-chrysler.html>
25. Statement of Chairman Hal Stratton Regarding the CPSC v. Dai-



- sy Manufacturing Co., Docket No. 02-02, Consumer Product Safety Commission settlement against Daisy Manufacturing, pages 4-5. <http://www.cpsc.gov/CPSPUB/PREREL/prhtml04/04033stratton.pdf>
26. Statement of the Honorable Mary Sheila Gall on Proposed Consent Agreement and Order Submitted by Daisy, Consumer Product Safety Commission, Nov. 14, 2003, pages 2-3. <http://www.cpsc.gov/CPSPUB/PREREL/prhtml04/04033gall.pdf>
27. Stratton, page 5.
28. National Rifle Association, *NRA Gun Safety Rules*. <http://www.nrahq.org/education/guide.asp>
29. ASTM Mission Statement. <http://www.astm.org/cgi-bin/SoftCart.exe/NEWS/Mission2.html?L+mystore+jrps1141+1111869970>
30. About ASTM International, Overview. <http://www.astm.org/cgi-bin/SoftCart.exe/ABOUT/aboutASTM.html?L+mystore+jrps1141+1111869923>
31. Stratton, page 2.
32. Stratton, page 3.
33. Gall, page 1.
34. Stratton, page 4.
35. Consumer Federation of America, *Dangerously Flawed Firearms That Could be Recalled Under The Firearms Safety and Consumer Protection Act*. <http://www.consumerfed.org/Firearms.pdf>
36. *Buyer Beware*, page 5.
37. Statement of Michael D. Gullede, Director, Evaluation and Inspections Division, U.S. Department of Justice Office of the Inspector General, before the House Committee on Government Reform Subcommittee on National Security, Emerging Threats and International Relations, Aug. 2, 2004. <http://www.usdoj.gov/oig/testimony/0408/index.htm>
38. Phone and email conversation with firearms retailer, Mar. 24, 2005.
39. Phone conversation with Inge Jones, Procurement and Licensing Manager, Heckler-Koch USA, on Mar. 24, 2005. Phone conversation with US firearms manufacturer, Mar. 24, 2005.
40. Phone conversation with Public Information Officer at BATF Washington Field Office, Mar. 24, 2005.
41. 49 U.S. Code § 30166(a).
42. *Buyer Beware*, pages 4-5.





43. Technical Publications, Sporting Arms and Manufacturers' Institute.
<http://www.saami.org/>

44. Ibid.

45. Ibid.

46. Ibid.

47. 2004 ANSI Compliance Form, Jan. 2004, page 2. <http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2004%20Compliance%20Form/comply2004.doc>

48. Ibid.

49. Association of Firearms & Tool Mark Examiners Home Page. http://www.afte.org/index_forum.php

50. Association of Firearms & Tool Mark Examiners History. http://www.afte.org/AssociationInfo/a_history.htm

51. Association of Firearms & Tool Mark Examiners Bylaws. http://www.afte.org/AssociationInfo/a_bylaws.htm

52. Association of Firearms & Tool Mark Examiners Code of Ethics. http://www.afte.org/AssociationInfo/a_codeofethics.htm

53. Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," *Journal of Criminal Law and Criminology*, vol. 86, issue 1, 1995, page 175. <http://www.saf.org/LawReviews/KleckAndGertz1.htm>

54. Ibid.

55. Ibid., page 176.

56. Ibid., Table 2, page 184.

57. Ibid., Hart and Mauser surveys, Table 1, page 182-3.

58. Ibid., Table 3, page 185.

59. Ibid., pages 180-181.

60. Shannan M. Catalano, *National Crime Victimization Survey 2003*, Bureau of Justice Statistics, U.S. Department of Justice, Sept. 2004, Table 2, page 3. <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv03.pdf>

61. Michael Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ-147003, Bureau of Justice Statistics, U.S. Department of Justice, Apr. 1994. <http://www.ojp.usdoj.gov/bjs/pub/ascii/hvf-sdaft.txt>

62. Ted A. Miller, Mark R. Cohen & Brian Wiersema, *Victim Costs and Con-*



sequences: A New Look, National Institute of Justice Research Report, US Department of Justice, Jan. 1996, page 1. <http://www.ncjrs.org/pdffiles/victcost.pdf>

63. Ibid.

64. Ibid, Table 2: Losses Per Criminal Victimization, page 9.

65. Miller, Cohen & Wiersema, page 6.

66. Ibid., Table 3.8, Appendix A.

67. Countries of the World, Gross National Product Distribution – 2003. <http://www.studentsoftheworld.info/infopays/rank/PNB2.html>

68. Alan Lizotte, “Determinants of Completing Rape and Assault,” *Journal of Quantitative Criminology*, Vol. 2, No. 3, 1986, page 213.

69. Ibid, page 214.

70. Gary Kleck and Susan Sayles, “Rape and Resistance,” *Social Problems*, Vol. 37, No. 2, May 1990, page 154.

71. Ibid, page 157.

72. Furby, L., Fischhoff, B., & Morgan, M. “Judged Effectiveness of Common Rape Prevention and Self-Defense Strategies,” *Journal of Interpersonal Violence*, Vol. 4, No. 1, Mar. 1989, page 59.

73. Ibid., page 57.

74. Ibid., pages 50-51.

75. Ibid., page 52.

76. U.S. Department of State, Bureau of Diplomatic Security, *Sexual Assault: Reducing the Risk and Coping with an Attack*, August 1994, page 8.

77. Vernon Quinsey and Douglas Upfold, “Rape Completion and victim injury as a function of female resistance strategy,” *Canadian Journal of Behavioral Science*, Vol. 17, No. 1, 1985, page 46.

78. Gary Kleck and Susan Sayles, *Rape and Resistance*, page 157.

79. Ibid.

80. Ibid., pages 157-8.

81. Martin L. Fackler, “Firearms in America: The Facts,” *Newsmax*, Dec. 25, 2000. <http://www.newsmax.com/archives/articles/2000/12/23/225251.shtml>

82. National Center for Injury Prevention and Control, *WISQARS Fatal Injuries: Mortality Reports*, Centers for Disease Control. <http://webappa.cdc.gov/sasweb/ncipc/mortrate.html>

83. Ibid.

84. World Health Organization, *Suicide rates for United Kingdom 1950-1999*, 2004. http://www.who.int/mental_health/media/en/373.pdf

World Health Organization, *Suicide rates for United States 1950-2000*, 2004. http://www.who.int/mental_health/media/en/374.pdf

World Health Organization, *Suicide rates for Australia 1950-2001*, 2004. http://www.who.int/mental_health/media/en/281.pdf

85. National Center for Injury Prevention and Control, *WISQARS Leading Causes of Death*. <http://webapp.cdc.gov/sasweb/ncipc/leadcaus10.html>

86. Centers for Disease Control, *Table HIST001. Deaths for 113 selected causes by 10-year age groups, race and sex: United States, 1979-98*, Nov. 8, 2001, page 685. <http://www.cdc.gov/nchs/data/statab/hist001.pdf>

87. National Center for Injury Prevention and Control, *WISQARS Injury Mortality Reports, 2000 – 2002*, Centers for Disease Control. <http://webapp.cdc.gov/sasweb/ncipc/mortrate10.html>

88. Centers for Disease Control, *Nonfatal and Fatal Firearm-Related Injuries – United States, 1993-1997*, Nov. 1999, Table 1. <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4845a1.htm>

89. National Center for Injury Prevention and Control, *WISQARS Nonfatal Injury Reports*, Centers for Disease Control. <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>

90. National Highway Traffic Safety Administration, *Traffic Safety Facts 2003: A Compilation of Motor Vehicle Crash Data from the Fatality Analysis Reporting System and the General Estimates System*, Table 2, page 15.

91. National Center for Injury Prevention and Control, *WISQARS Nonfatal Injury Reports*, Centers for Disease Control. <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>

92. Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Annual Firearms Manufacturing and Export Report, Year 2002*, Jan. 8, 2004.

93. Robert Sahr, *Consumer Price Index (CPI) Conversion Factors: 1800 to estimated 2015 to Convert to Dollars of 1996*, Oregon State University. http://oregon-state.edu/Dept/pol_sci/fac/sahr/cv1996.xls

94. This table is based on *Victim Costs Victim Costs and Consequences: A New Look*, Table 2, page 9; and *National Crime Victimization Survey 2003*, Table 2, page 3.





NEMEROV

CFA'S CASE FOR GUN SAFETY REGULATION





The Firearms Safety and Consumer Protection Act

By Dennis B. Wilson

Senator John Corzine and Representative Patrick Kennedy have introduced legislation called the Firearms Safety and Consumer Protection Act. This article contrasts the proposed Firearms Act with the current federal law covering consumer safety for other products. The article demonstrates that, in contrast to the Consumer Product Safety Act, the proposed Firearms Act has essentially no due process protections, and no guidelines to encourage government actions less drastic than prohibition and confiscation. The author suggests that the Firearms Act, although it uses some consumer safety language, is best understood as an effort to give the Attorney General the unlimited authority to ban any or all firearms.

This article is an abridged and edited version of the author's longer article, "What You Can't Have Won't Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act," 53 Cleveland State Law Review 225 (2005), and is reprinted with the author's permission.

Dennis Wilson is an Adjunct Professor of Business and Public Policy at St. Michael's College in Colchester, Vermont. Because Mr. Wilson, a former employee of the Consumer Product Safety Commission, wrote this article in his official capacity, this article is in the public domain and may be freely copied or reprinted. The views expressed in this article are not necessarily the views of the Commission.

Keywords: Firearms Safety and Consumer Protection Act, Consumer Product Safety Act, administrative regulation.

I. INTRODUCTION

Federal safety regulations for articles sold to the general public have been a feature of U.S. law for over one hundred years.¹ Yet firearms have been subject to only limited federal safety regulation. The issue of federal safety regulation for firearms is complicated by the vigorous debate over limitations on private firearms ownership; and proposals to regulate the safety of firearms tend to be evaluated in light of how they might affect the private ownership of firearms.





Advocates of private firearms ownership are generally suspicious of proposals to subject firearms to safety regulation. Subjecting firearms to safety regulation would mean giving some government official the authority to ban firearms with certain characteristics deemed to be “unsafe,” and this power could be used to ban firearms that advocates of private firearms ownership believe are legitimate for private persons to own.²

Persons favoring safety regulation of firearms, on the other hand, point out that most other items of commerce are subject to safety regulation, yet those products remain in the marketplace. Such persons point to the tragic accidents involving firearms, especially accidents involving children. They also point to the presence or absence of various devices or features designed to enhance the safety of firearms.³ Resistance to safety regulations on the part of advocates of firearms private ownership, in their view, causes needless deaths and injuries based on unfounded fears that safety regulation will lead to prohibition.

This article examines one legislative proposal to subject firearms to federal safety regulation, the Firearms Safety and Consumer Protection Act of 2003 (Firearms Safety Act)⁴ and compares it with the law that has been applied to seek to ensure the safety of other consumer products for over thirty years, the Consumer Product Safety Act (CPSA)⁵. The comparison will demonstrate that the genuine objective of the Firearms Safety Act has little to do with the safety of firearms in the hands of consumers, but the Act is merely an excuse to hand virtually unlimited power over the firearms industry, and possibly some authority over firearms owners, to the Attorney General. Defenders of private firearms ownership are, therefore, quite justified to be suspicious of legislative proposals purporting to regulate the safety of firearms.

II. DESCRIPTION OF THE FIREARMS SAFETY AND CONSUMER PROTECTION ACT OF 2003

Senator Jon Corzine (D-N.J.) was the principal sponsor of the Firearms Safety Act, along with Representative Patrick Kennedy (D-R.I.) in the House of Representatives.⁶ In a joint press release Senator Corzine and Representative Kennedy stated that they had introduced the Firearms Safety Act “to apply to firearms health and





safety standards similar to those that apply to virtually all other products sold in America.⁷⁷ Senator Corzine stated that poorly manufactured, cheap quality guns pose a threat and that there was no regulatory mechanism to recall defective guns or require warning labels. He gave specific examples of magazine disconnectors and loaded chamber indicators as safety features that he believed would make firearms less likely to be involved in an accident.

The Firearms Safety Act delegates to the Attorney General both the authority and the duty to promulgate regulations governing the design, manufacture, and performance of, and commerce in firearms products.⁸ Proposed regulations must be made final within 120 days and the Attorney General must consider petitions to issue, amend or repeal regulations.⁹ The Firearms Safety Act gives the Attorney General the authority to prohibit the manufacture, sale or transfer of a firearm product that has been manufactured, imported, transferred, or distributed in violation of a regulation.¹⁰ The Attorney General may order manufacturers and dealers to provide notice to the public, or to repair, replace, refund the purchase price, or otherwise recall a firearm product that the Attorney General finds poses an unreasonable risk of injury to the public, does not comply with a regulation, or is defective.¹¹ The Attorney General is given the extraordinary authority to issue an order prohibiting the manufacture, importation, transfer, distribution or export of a firearm product “if the Attorney General determines the exercise of other authority under this Act would not be sufficient to prevent the [firearm] product from posing an unreasonable risk of injury to the public.”¹² The Attorney General has the authority to impose both civil and criminal penalties for violations of the Act or regulations, to seek injunctive enforcement of the Act, and to bring an action to restrain the distribution of “imminently hazardous firearms.”¹³

Manufacturers of firearm products must test those products to determine whether they conform to the pertinent regulations, certify that conformity, and inform the Attorney General whenever they intend to manufacture a new “type” of firearm product.¹⁴ Firearm products must be accompanied by detailed labels.¹⁵ Commerce in firearm products that do not conform to regulations or otherwise in violation of an Attorney General order is prohibited, as is stockpiling of firearm products in the interval between the time a regulation





is promulgated, and the time that it takes effect.¹⁶

The Firearms Safety Act creates a private action for damages for persons “aggrieved” by violations of the Act, or regulations or orders promulgated under it.¹⁷ The Act also provides for private enforcement by any “interested person.”¹⁸ Compliance with the Act or with regulations or orders promulgated under its authority is not a defense in an action brought under State law, and the failure of the Attorney General to take an action is not admissible in any civil action involving the liability of a firearms manufacturer or dealer.¹⁹

There are, finally, a number of miscellaneous sections of the Firearms Safety Act. The Act has no preemptive effect and states and localities are free to maintain their own firearm safety laws and regulations, as long as they are more restrictive than those of the Attorney General.²⁰ Agencies of states, their political subdivisions, the Federal Government itself, and officers and employees of those agencies acting in their official capacities are exempt from the prohibitions of the Act.²¹ Finally, the Attorney General must collect certain information about firearm-related deaths and injuries and about the firearms industry, make that information available, and make an annual report to Congress.²²

III. COMPARING THE FIREARMS SAFETY ACT AND THE CONSUMER PRODUCT SAFETY ACT

A. Justification

This section compares the Firearms Safety Act with the CPSA.²³ Comparing the Firearms Safety Act to the CPSA as administered by the Commission is justifiable.²⁴ The CPSA and its administration by the Consumer Product Safety Commission (Commission) have been generally supported for over thirty years by the public, Congress, the regulated community and the advocacy groups that are interested in and seek to influence Commission activities.

The Commission has been criticized for doing too little to protect the consumer and too much to harass industry.²⁵ But objective evidence suggests that the Commission has done a reasonably good job of administering the CPSA to protect the public against the risks that Congress has instructed the Commission to address.

Congress has not amended the CPSA since 1990.²⁶ In addition to





general Congressional acceptance of the legitimacy of Commission operations, the Office of Management and Budget's Performance Assessment Rating Tool awarded the Commission a relatively high (83 percent) assessment among the 20 percent of Federal programs rated for fiscal year 2003.²⁷ The Commission itself has described its own accomplishments,²⁸ although those claims might be dismissed as self-serving. It is, therefore, fair to compare the Commission's statutory structure and authority with those of the Firearms Safety Act.

B. Point by Point Comparison

This section compares the CPSA and the Firearms Safety Act on a number of key points:

1. The official responsible for the interpretation and enforcement;
2. The stated objectives;
3. The procedures and findings required for rulemaking, with special attention to the role of voluntary standards and the preemptive effect of federal regulations;
4. The criteria of, procedures required and remedies available for recalls;
5. The circumstances under which expedited remedies may be sought;
6. Information gathering and reporting requirements;
7. Civil and criminal penalties;
8. The applicability of laws, regulations and orders to government entities and government officials;
9. Testing, certification, labeling, and prior notice;
10. Disclosure of information to the public; and
11. Private enforcement and remedies.





1. The Responsible Official

The Firearms Safety Act assigns the responsibility for firearms safety to the Attorney General. The selection of the Attorney General as the person (and the Department of Justice as the institution) to develop the regulations for and to enforce the Firearms Safety Act reflects an obvious policy choice on the part of its sponsors. Any commission is different from an office such as that of the Attorney General. A *majority* of commissioners must agree in order for a commission to take action.²⁹ The necessity to obtain a majority provides some assurance that both regulatory and enforcement decisions will be thoroughly considered. Moreover, the Consumer Product Safety Commission is an independent regulatory Commission,³⁰ subject to less direct political interference than is the office of the Attorney General.³¹ The Commission also has an explicitly partisan division: only three of its members may be affiliated with the same political party.³² All of these characteristics of the Commission serve to insulate it somewhat from partisan political pressures and help to ensure that regulations and enforcement decisions reflect a genuine desire to address a product safety problem. Almost none of these constraints apply to the Attorney General.

2. Objectives

Most of the objectives of the Firearms Safety Act and the CPSA are similar. The objectives of the CPSA are as follows:³³

1. Protect the public against the unreasonable risk of injury associated with consumer products;
2. Assist consumers in evaluating the comparative safety of consumer products;
3. Develop uniform safety standards for consumer products and minimize conflicting State and local regulations; and,
4. Promote research and investigation into the causes and prevention of product-related deaths, illnesses and injuries.

The objectives of the Firearms Safety Act track these four CPSA objectives, but with one significant change and one significant addition. The Firearms Safety Act states as among its objectives:³⁴





1. Protect the public against the unreasonable risk of death and injury associated with firearms and related products;
2. Develop safety standards for firearms and related products;
3. Assist consumers in evaluating the comparative safety of firearms and related products;
4. Promote research and investigation into the causes and prevention of firearm-related deaths and injuries; and
5. Restrict the availability of weapons that pose an unreasonable risk of death or injury.

Objective number two differs significantly from its CPSA counterpart. The CPSA objective states not only that the Commission should develop safety standards for consumer products, but that it should seek to minimize conflicting state and local regulations. The Firearms Safety Act has no similar objective and it explicitly does not limit the effect of State and local firearms safety regulation, as long as such regulation is more stringent than the regulations developed under the Firearms Safety Act.³⁵

Another objective appears in the Firearms Safety Act that is absent from the CPSA: restricting the availability of weapons that pose an unreasonable risk of death and injury.³⁶ While the provisions of the CPSA and the powers available to the Commission certainly imply that it will have the effect of restricting the availability of consumer products that pose an unreasonable risk of death or injury, Congress has never stated such an explicit objective.

The decision of the sponsors of the Firearms Safety Act to confer no preemptive effect for the Attorney General's safety regulations, and to state an express objective of limiting commerce in firearms, demonstrates a probable objective beyond mere safety: restricting commerce in firearms.

3. Rulemaking

The CPSA grants to the Commission and the Firearms Safety Act grants to the Attorney General the authority to promulgate enforceable rules governing the products within their respective jurisdictions. But the Commission's authority, while considerable, is





constrained by the form that regulations may take, by the procedures that the Commission must follow, and by the findings that the Commission must make in order to support regulations. By contrast, the authority granted to the Attorney General by the Firearms Safety Act is very wide, its exercise is not subject to any procedures set forth in the legislation, and it requires no specific findings.

a. Necessity to Promulgate Regulations

One major difference between the CPSA and the Firearms Safety Act is immediately apparent: the Attorney General *must* promulgate regulations governing firearms safety,³⁷ while the Commission *may* promulgate consumer product safety standards.³⁸ The fact that the Commission has jurisdiction over so many products³⁹ requires it to set priorities and establish procedures for deciding upon which products it should focus in its rulemaking and enforcement activities.⁴⁰ No such dilemmas confront the Attorney General. The Firearms Safety Act *requires* safety rules for all firearms and firearm products and these regulations *must* cover the design, manufacture and performance of firearms and firearm products.⁴¹ Given the wide variety of firearms, ammunition, associated products, and the variations in commerce in all of them, the Firearms Safety Act assigns the Attorney General a full program of regulation. The fact that the Firearms Safety Act *requires* regulations for firearms, while the CPSA has never required regulations for consumer products⁴² is another example that the probable intent of the sponsors is to limit commerce in firearms under the pretense of safety.

b. Form of the Regulations

Regulations for consumer products promulgated by the Commission must be in the form of a performance standard, in the form of warnings and instructions, or some combination of these.⁴³ By implication, therefore, the Commission may not promulgate a consumer product safety that contains design or material requirements; the regulation must consist of a test that the consumer product must pass, possibly coupled with warnings and instructions on the product's label or packaging inserts, or possibly on the product itself. This requirement reflects Congress's desire that the Commission not be too prescriptive in its consumer product safety regulations.⁴⁴



That provision of the CPSA contrasts dramatically with the requirement of the Firearms Safety Act that the Attorney General prescribe regulations not only for the performance of firearms, but also for their design and manufacture, and for commerce in firearms.⁴⁵ The Attorney General would specify every aspect of how firearms are designed and manufactured, how they perform and where and how they are sold.

In light of the fact that the Commission has operated for over twenty years with a requirement that it limit itself to specifying consumer product performance in safety regulations, the delegation of such broad power over firearms to the Attorney General indicates yet again the intent of the sponsors of the Firearms Safety Act that that power be used to limit commerce in firearms to the greatest extent possible.

c. Procedure to Promulgate and Findings Required to Support Regulations

The intent of the sponsors of the Firearms Safety Act to grant the maximum authority possible to the Attorney General becomes starkly apparent in examining the Act's regulatory procedures and required findings. The Firearms Safety Act specifies no procedure for the Attorney General to follow to issue regulations under his or her authority. The Administrative Procedure Act (APA)⁴⁶ would, by its own terms, require rulemaking carried out under the authority of the Firearms Safety Act to be conducted under the APA's general notice and comment procedure,⁴⁷ with judicial review under the "arbitrary, capricious and abuse of discretion" standard.⁴⁸

The only findings that the Attorney General must make to support the regulations are that the regulations are reasonably necessary to reduce or prevent unreasonable risk of injury resulting from the use of firearms and firearm products.⁴⁹ The fact that only 120 days may elapse between the time that the Attorney General proposes regulations under the Firearms Safety Act and the time that they must be issued in final form⁵⁰ indicates that almost all of the work in developing a regulation will have to be done *before* the public is informed of what the proposed regulations will say.⁵¹

In contrast to the bare minimum procedures required for rule-making of the Firearms Safety Act, the procedures required by the



CPSA to promulgate a consumer product standard and the findings necessary to support that standard are more complicated and more detailed. The Commission commences rulemaking under the CPSA with an advance notice of proposed rulemaking (ANPR) which must:⁵²

1. Identify the product and the nature of the risk associated with the product;
2. Include a summary of each of the regulatory alternatives that the Commission is considering, including voluntary standards;⁵³
3. Include relevant existing standards and the reasons why the Commission believes that they may not eliminate or adequately reduce the risk of injury;
4. Invite the submission of comments concerning the risk of injury, the regulatory alternatives being considered and other possible alternatives for addressing the risk;
5. Invite the submission of an existing standard or portion of a standard as a proposed mandatory standard; and
6. Invite the submission of an intention and plan to develop a voluntary standard to address the risk of injury.

When the Commission moves beyond the stage of the ANPR, it continues rulemaking by the preparation of a notice of proposed rulemaking (NPR).⁵⁴ The findings required by an NPR are so specific and detailed that they are referred to as a “preliminary regulatory analysis.”⁵⁵

1. A preliminary description of the potential costs and benefits of the proposed rule, including costs and benefits difficult to quantify monetarily and who would likely receive the benefits and who would likely bear the costs⁵⁶;
2. A discussion of why a standard submitted to the Commission in response to the ANPR was not published in whole or in part as the proposed rule;





3. A discussion of why the Commission believes that a voluntary standard will not, within a reasonable time, eliminate or adequately reduce the risk of injury; and

4. A description of reasonable alternatives to the proposed rule, with a cost benefit analysis of each alternative, and an explanation of why the alternatives should not be published as a proposed rule.

The Commission must make even more findings and conduct even more analyses before it may promulgate a final rule. It must consider “relevant available product data, including the results of research, development, testing and investigation activities.”⁵⁷ It must also consider and make findings concerning the following:⁵⁸

1. The degree and nature of the risk of injury the rule seeks to eliminate or to reduce;
2. The approximate number of consumer products or types or classes of consumer products to be covered by the rule;
3. Why the public needs the consumer products covered by the rule and the probable effect that the rule will have on the utility, cost or availability of those consumer products; and
4. How to achieve the rule’s⁵⁹ objective while minimizing adverse effects on competition, and also minimizing the disruption or dislocation of manufacturing and other commercial practices consistent with safety.

But the Commission’s task is still not finished. It must take the findings that have just been described immediately above and prepare a final regulatory analysis, putting the factors considered in the preliminary regulatory analysis in final form.⁶⁰ The Commission must also make the following findings and include them in the rule:⁶¹

1. The rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the consumer product subject to the rule;
2. The rule is in the public interest;
3. If the rule creates a banned hazardous product,⁶² why no





feasible safety standard would protect the public adequately;

4. If there is a voluntary standard covering the risk of injury covered by the mandatory standard, compliance with the voluntary standard would not be likely to eliminate or adequately reduce the risk of injury, or it is unlikely that there will be substantial compliance with the voluntary standard;⁶³

5. The benefits of the rule bear a reasonable relationship to its costs; and,

6. The rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury that the rule is designed to address.

In addition to these requirements of the CPSA, the Commission is subject to some government-wide requirements relating to the effect that a rule will have on small business entities and on other government entities,⁶⁴ and to other government-wide statutory rulemaking requirements.⁶⁵ The Commission must find that it is in the public interest for the effective date of the rule to be greater than 180 days or less than 30 days after promulgation,⁶⁶ and it may limit stockpiling.⁶⁷ Product safety rules are subject to judicial review by a Court of Appeals and may involve additional data, views and arguments presented to the Commission. To sustain the rule, the reviewing court must make an affirmative determination that the Commission's findings are supported by substantial evidence on the record taken as a whole.⁶⁸

The contrast between the simple procedure and very elementary findings that the Firearms Safety Act requires and the elaborate procedures and detailed findings required by the CPSA could hardly be more dramatic. The contrast is even more compelling because of the fact that the Firearms Safety Act requires rulemaking on a technically complex product where the social costs and benefits are controversial.⁶⁹ The failure of the sponsors of the Firearms Safety Act to use even some of the procedures that the Commission has used with reasonable success for at least twenty years, demonstrates that the intent of the bill lies more in the suppression of commerce in firearms than in making firearms safer.

The Firearms Safety Act contains one truly extraordinary grant



of authority to the Attorney General. Section 102(c) of the Firearms Safety Act authorizes the Attorney General to prohibit the manufacture, importation, transfer, distribution or export⁷⁰ of a firearm product by order if the Attorney General determines that “the exercise of other authority under this Act would not be sufficient to prevent the product from posing an unreasonable risk of injury to the public.”

This section is unusual for a number of reasons. It appears in the same section of the Firearms Safety Act as does the Attorney General’s authority to order recalls, and not in the rulemaking section.⁷¹ It is not, therefore, clear whether the Attorney General is required to follow any rulemaking procedures whatsoever before exercising this authority.⁷²

The exercise of such largely standardless authority, especially in the absence of any type of notice and comment rulemaking, would probably test the limits of the Constitutional right to due process of law.⁷³ It would also test the limits of Congress’s ability to delegate its authority to regulate interstate commerce to an administrative agency.⁷⁴ Finally, the section grants *affirmative* authority by virtue of its implied or express *absence* in other parts of a statute, standing on its head the normal rule that a delegation of authority, even though it may be implicit, must still be tied to some affirmative grant of authority.⁷⁵

All of these observations support further the premise that the objective of the Firearms Safety Act is not safety, but rather the granting to an executive branch official of the maximum authority possible to regulate the firearms industry and suppress commerce in firearms.

d. Deferral to Voluntary Standards

Yet another stark contrast between the Firearms Safety Act and the CPSA is their respective treatment of voluntary standards.⁷⁶ The approach taken by the Firearms Safety Act is simple: the Attorney General promulgates mandatory regulations.⁷⁷ By contrast, as noted in the previous section,⁷⁸ the Commission is required at numerous points in the rulemaking process to conduct analyses and make findings about the existence and effectiveness of voluntary standards.⁷⁹

When the Commission finds that there is a voluntary standard



that would eliminate or adequately reduce the risk of injury, and if the Commission finds that it is likely that there will be substantial compliance with the voluntary standard, the Commission is legally disabled from promulgating its own mandatory standard.⁸⁰ The Commission may not promulgate a mandatory standard in the event it makes those findings, even if there was no voluntary standard when the Commission began its own rulemaking.⁸¹

The fact that the Firearms Safety Act contains no requirement that the Attorney General defer to voluntary standards developed by private standards-setting organizations is especially significant because a well-developed body of voluntary standards and a system for considering changes to those standards already exist. The Sporting Arms and Ammunition Manufacturers Institute (SAAMI), formed at the request of Congress, has been in existence since the mid-1920's and has developed a large body of voluntary standards and a system accredited by the American National Standards Institute (ANSI) for considering and making changes to those voluntary standards.

According to both SAAMI and ANSI policy, every five years the SAAMI standards must be revised or reaffirmed through a canvassing process that includes government agencies such as the Federal Bureau of Investigation and the U.S. Customs Service, and also non-SAAMI member companies and interested parties such as the U.S. National Institute of Standards and Technology. Changes to standards must also be made by the same canvass process. The U.S. military, the Federal Bureau of Investigation and many other state and local agencies frequently require that their suppliers manufacture to SAAMI specifications.⁸²

The fact that the sponsors of the Firearms Safety Act required the Attorney General to promulgate mandatory standards, rather than incorporating the system of consideration of and deferral to voluntary standards used by the Commission successfully for over 20 years, demonstrates again that the real intention of the Firearms Safety Act is not firearms safety, but handing virtually plenary power over the firearms industry to an Executive Branch official.

e. Preemption of State and Local Regulations

Yet another demonstration of the intent of the sponsors harass and cripple the firearms industry lies in the fact that the Act does





nothing to minimize state and local firearms safety regulation that might conflict with regulations issued under the Firearms Safety Act. The Firearms Safety Act provides that it has no preemptive effect for any state or local law, unless the state or local law is “inconsistent” with any provision of the Firearms Safety Act.⁸³ Inconsistency, however, is defined to exclude a state or local law that is of *greater* scope, or imposes a penalty of *greater* severity than the prohibitions or penalties imposed by the Firearms Safety Act (emphasis added).⁸⁴

Not only will the firearms industry find itself subject to plenary control by the Federal Attorney General, it will also find itself subject to state legislatures, state administrative agencies, and local governments imposing more stringent requirements. The firearms industry potentially gets the worst of both worlds: one Federal “gorilla” imposing a nationwide set of requirements, and dozens of State “monkeys” all imposing their own inconsistent requirements.⁸⁵

The contrast between the approach taken by the Firearms Safety Act and the CPSA to preemption is dramatic. A mandatory consumer product safety standard explicitly preempts any inconsistent state or local laws or regulations that deal with the same risk of injury.⁸⁶

There are two exceptions, but they are limited in scope. A state or local government may set safety standards that result in a higher level of protection from a risk of injury when the consumer product in question is for the use of that government itself.⁸⁷

The second exception requires a state or local government to apply to the Commission itself for a rule allowing an exception. The Commission may allow the exception only if it finds that the proposed State or local requirement provides a significantly higher degree of protection from the risk of injury than does the Commission’s own rule, and that the different requirement does not unduly burden interstate commerce.⁸⁸ The Commission has never granted such an exemption and applications are almost never submitted.⁸⁹

The inconsistency of the Firearms Safety Act with the CPSA on the issue of preemption reveals once again that the sponsors of the Firearms Safety Act had objectives other than safety. In contrast to a system of preemption that has worked well for over thirty years for consumer products, the sponsors of the Firearms Safety Act chose a completely different approach that subjects the firearms industry to the maximum possible inconsistency between the Federal and State





systems. It is hard to justify why a firearm that is adequately safe according to Federal regulations in one state is not safe in another state. If, however, the objective is maximum harassment of the firearms industry, leaving state and local governments free to impose inconsistent regulations makes a good deal of sense.

4. Recalls and Enforcement

Unenforced regulations are of only hortatory effect, a fact recognized by the Firearms Safety Act and the CPSA. But, as was the case with rulemaking, the recall authority granted to the Attorney General by the Firearms Safety Act is wider and its exercise is subject to fewer restrictions than that exercised by the Commission, consistent with an objective of granting the Attorney General plenary and unconstrained power over the firearms industry.

a. Prospective Violations

The Firearms Safety Act authorizes the Attorney General to issue various types of orders in certain circumstances. The Attorney General may issue an order prohibiting the manufacture, sale or transfer of a firearm product which the Attorney General finds has been manufactured, imported, transferred or distributed in violation of a regulation prescribed under the Act.⁹⁰

This authority also extends to instances where the Attorney General finds an intent to import, transfer or distribute a firearm product in violation of the regulations.⁹¹ The Firearms Safety Act gives no guidance about how the Attorney General would establish intent. There is no comparable grant of authority to the Commission under the CPSA. While it is certainly unlawful to manufacture for sale, distribute or import a consumer product that violates an applicable consumer product safety standard, or which has been declared to be a banned hazardous product,⁹² the Commission's remedy would be to proceed in court to obtain an injunction to restrain persons from distributing the products in question,⁹³ or to work with the Customs Service to refuse entry to imported products.⁹⁴ The sponsors of the Firearms Safety Act used the concept of prior restraint to grant more authority to the Attorney General than Congress has granted to the Commission.



b. Recalls

i. Criteria

Not all problems with products are discovered before distribution, and one of the most important sources of authority that an agency concerned with products can exercise is an ability to force some entity in the chain of distribution to notify consumers that there is a problem with a product and to take some other action.⁹⁵ Both the Firearms Safety Act and the CPSA confer recall authority, although, as has been the case with every other provision of the Firearms Safety Act, the authority that it grants is broader and constrained by fewer standards than that granted by the CPSA.

The Firearms Safety Act empowers the Attorney General to issue a recall order if the Attorney General finds that the firearm product poses an unreasonable risk of injury to the public, does not comply with a regulation prescribed under the Act or is defective.⁹⁶

The second of these three tests is relatively straight-forward: the failure to conform to a regulation. The other two are, however, more amorphous.

The first test, “poses an unreasonable risk of injury to the public,” appears to replicate the criteria that the Attorney General is instructed to use to promulgate regulations in the first place.⁹⁷ If the regulations, once promulgated, do not cover the purported risk, how could the Attorney General plausibly argue that a particular characteristic now poses an unreasonable risk of injury to the public? It is not unusual for manufacturers to take regulations into account when they design and manufacture products; and regulators usually take into account potential variations in a product when they write regulations. If the Attorney General believes that a particular firearm characteristic constitutes an unreasonable risk to the public after the regulations are in force, the proper response should be to seek amendments to the regulations, subject to notice and comment rulemaking.

The existence of recall authority tied only to a finding of unreasonable risk, of course, makes such an exercise unnecessary. It is totally consistent an objective of giving as much authority as possible over the firearms industry to the Attorney General.

Exactly the same comments apply to the third circumstance (defective) under which the Attorney General may order a recall. The



Firearms Safety Act provides no definition of the term “defective,” nor does it offer guidance how a firearm product could conform to regulations but nevertheless be defective.⁹⁸ Like the rest of the recall authority of the Firearms Safety Act, amorphous criteria for ordering recalls is perfectly consistent with the objective of constituting the Attorney General as a “firearms czar,” even if it has little to do with safety.

All of the three tests under the Firearms Safety Act lack other requirements that the Commission must establish in order to recall a consumer product under its CPSA authority. The Commission may order a recall if it finds that a product represents a “substantial product hazard.”⁹⁹ By contrast, rulemaking requires only a finding of “unreasonable risk.”¹⁰⁰ The use of a different standard to establish when the Commission may order a recall than when it may promulgate a rule¹⁰¹ indicates a congressional intent that a different level of hazard was required for the Commission to order a recall, a distinction in which the sponsors of the Firearms Safety Act took no interest.

In order to make a determination that a product constitutes a substantial product hazard, the Commission must make a number of findings. It must first find that the product in question either fails to comply with an applicable consumer product safety standard, *or* is defective.¹⁰² After having made one of those findings the Commission must make the *further* finding that the failure to comply with the standard, or the defect, creates a substantial risk of injury to the public.¹⁰³

Alternative one of the first part of the requirement is relatively straight-forward, although always subject to questions of proof; either the product conforms to an applicable consumer product safety standard or it does not.

The second alternative is more subjective, since the CPSA provides no definition of the term defective.¹⁰⁴ If there is a voluntary standard, the Commission’s task is almost as easy as if there were a mandatory standard; in practice the Commission need only prove the existence of the voluntary standard and that the product fails to conform to it in a manner that impacts safety.¹⁰⁵ If there is no pertinent voluntary standard that applies to the product the Commission’s task is more difficult, since it must prove that the product fails





to conform to some requirement that adversely impacts safety.¹⁰⁶

The CPSA's second requirement for the Commission to order a recall, "creates a substantial risk of injury to the public," also creates some difficulty for the Commission, although at least the CPSA gives some guidance¹⁰⁷ about the criteria that the Commission should consider in making its determination: pattern of defect, number of defective products distributed in commerce, the severity of the risk, or otherwise.¹⁰⁸ The CPSA, therefore, establishes a much higher threshold of product hazard to justify a recall than does the Firearms Safety Act.

ii. Procedure for Ordering Recalls

Basic due process requires that some type of procedure be followed before a public official can issue an order compelling a private person to take action. The Firearms Safety Act takes a minimalist approach to procedures that must be followed for the Attorney General to issue a recall order: there are none.¹⁰⁹ By contrast, the CPSA specifies that the Commission must follow the Administrative Procedure Act and hold a hearing before it may order a recall.¹¹⁰

The failure of the Firearms Safety Act to even mention the Administrative Procedure Act is, of course, completely consistent with a goal of providing the Attorney General with as much authority and as little accountability as possible over the firearms industry.

iii. Recall Remedies

Once an agency has found that there is a product defect that presents some sort of hazard to the public, it must also decide what the manufacturer, other entities in the chain of distribution, and the agency itself ought to do about it. Many of the remedies contained in the CPSA and the Firearms Safety Act are similar, but where they differ, the Firearms Safety Act confers more authority and grants greater discretion to the Attorney General than the CPSA grants to the Commission.

aa. Notice

The first option is simply to warn the public against the hazard. Both the Firearms Safety Act and the CPSA empower the Attorney





General and the Commission, respectively, to require manufacturers and other persons in the chain of distribution to provide notice,¹¹¹ although the CPSA requires that the Commission make a further finding that such notification is in the public interest.¹¹² The CPSA is also more specific about the ways that notice may be provided:¹¹³

1. Public notice (generally a press release but on some occasions by paid advertising);¹¹⁴
2. Notice mailed to manufacturers, distributors or retailers;¹¹⁵ and
3. Notice mailed to each person to whom the product was delivered or sold.¹¹⁶

bb. Repair, Replace, Refund

Both the Firearms Safety Act and the CPSA recognize that simple notice to consumers of a safety problem may be inadequate to protect the public. Both the Act and the CPSA, therefore, empower the Attorney General and the Commission respectively to compel manufacturers and other entities in the chain of distribution to take further actions. There are, however, significant differences between the Act and the CPSA that, not surprisingly, operate to the disadvantage of the firearms industry.

In addition to the authority to compel a manufacturer or a dealer to give notice of a safety problem, the Firearms Safety Act authorizes the Attorney General to order a manufacturer or dealer to do the following:¹¹⁷

1. Bring the firearm into conformity with pertinent regulations;
2. Repair the firearm;
3. Replace the firearm with a complying like or equivalent product;
4. Refund the purchase price, less an amount based on reasonable use if the firearm is over one year old;
5. Recall the firearm; or





6. Submit to the Attorney General a plan to implement an action ordered by the Attorney General.

The CPSA authorizes the Commission to do require a manufacturer or person in the chain of distribution to do the following:¹¹⁸

1. Repair the defect or bring the product into conformity with an applicable consumer product safety rule;
2. Replace the product with a like or equivalent product does not contain the defect or which conforms to an applicable consumer product safety rule; or
3. Refund the purchase price of the product, less a reasonable allowance for use if the product has been in the possession of the consumer for one year or longer.

The remedies available to the Attorney General under the Firearms Safety Act include one remedy not normally available to the Commission¹¹⁹: the “recall” of a firearm from the stream of commerce.¹²⁰

What the sponsors of S.1224 believe to be a “recall” that would not involve the repair or replacement of, or a refund for, the firearm is not apparent from either the text of the Act (since recall is not a defined term) or their statements in introducing the bill. Its use, however, may empower the Attorney General to devise some sort of remedy above and beyond the remedies available to the Commission when it seeks to recall defective products.

One possibility might be a recall that imposes some charge to consumers. The CPSA specifically states that no charge shall be made to any person, other than a manufacturer, distributor, or retailer, who takes advantage of a remedy under a recall order and that such persons are entitled to reimbursement for reasonable and foreseeable expenses.¹²¹ The lack of such a section in the Firearms Safety Act creates the possibility that the Attorney General might order a recall that imposes some costs on consumers.

In addition to granting the Attorney General an authority that is beyond those granted in the CPSA, the Firearms Safety Act also omits one important protection granted to manufacturers, distributors and retailers by the CPSA. The person to whom an order under Section 15 of the CPSA is addressed may elect the remedy: repair





the product, replace the product, or refund the purchase price.¹²²

The lack of such a right of election could lead, for example, to an Attorney General's order that a manufacturer conduct a very expensive repair on older model firearms, when refund would be a more economically rational solution. It might also result in an order requiring replacement when a simple repair would be adequate for safety.

An Attorney General not well disposed to the private ownership of firearms would have every incentive to order refunds (which require the return of the product to claim the refund) with the least allowance possible for "reasonable use." Such refunds would have the effect of removing as many firearms as possible from private ownership. They would also give firearms owners a substantial financial incentive to return the firearm, with the cost borne by the recalling manufacturer. The manufacturer on the receiving end of such an order would have only a claim of lack of constitutional due process upon which to base a challenge to the order.

It is also possible that the Firearms Safety Act might be interpreted to extend even to sales of recalled firearms in the hands of private persons, a remedy the CPSA does not make available to the Commission. Section 201(f) of the Firearms Safety Act makes it illegal for any *person* to offer for sale or distribute in commerce a firearm product that does not conform to the regulations prescribed by the Attorney General, or in violation of *an order issued under the authority of the Act* (emphasis added). Insofar as the Firearms Safety Act seeks to make illegal the sale or transfer of a firearm that does not conform to regulations, it is similar to the provisions of the CPSA.¹²³ The situation may, however, be different in the case of products and firearms that have been the subject of recalls. It is not unlawful for a private person to sell or otherwise transfer a consumer product that is the subject of a recall order of the Commission.¹²⁴ Similarly, the authority of the Attorney General to conduct ordinary recalls is limited to orders directed to manufacturers and dealers.¹²⁵

The extraordinary authority conferred by Section 102(c) of the Firearms Safety Act¹²⁶ is, however, not limited to manufacturers and dealers. The Attorney General might issue an order forbidding any "transfer or distribution" of a firearm under the authority of this section, including transfers between private individuals.¹²⁷ The pos-





sibility of making otherwise lawful sales of firearms illegal by means of an *order*, rather than by legislation or even regulation, is yet one more example of the extreme measures that the sponsors of the Firearms Safety Act went to give the Attorney General plenary authority over the firearms industry and even over private citizens who own firearms.

5. Expedited Procedures

Both the Firearms Safety Act and the CPSA recognize that the ordinary processes of recall may be inadequate to protect the public and both provide for expedited procedures. The standard to implement such expedited procedures is, however, much less under the Firearms Safety Act than it is under the CPSA. Section 12 of the CPSA¹²⁸ authorizes the Commission to proceed in U.S. district court against “imminently hazardous consumer products.” Such products are defined as products which present an imminent and unreasonable risk of death, serious illness or severe personal injury.¹²⁹ If the Commission can establish that a product is an imminent hazard, the U.S. district court may order temporary or permanent relief as may be necessary to protect the public from the risk: the seizure of the product, notice to the public, recall, the repair or replacement of, or refund for, the product.¹³⁰

The Commission must, however, begin rulemaking to establish regulations for products that are the subject of an imminent hazardous product action.¹³¹ In addition to its authority to proceed against imminently hazardous products, the Commission has the authority to apply to a U.S. district court to restrain distribution of a product when the Commission has filed an administrative complaint seeking to declare the product a substantial product hazard.¹³² Such an action, however, grants the court authority only to restrain distribution of the product and does not include the authority to order notice, repair, replacement or refund. Moreover, a preliminary injunction granted by the court may last only so long as the administrative proceeding seeking to declare the product a substantial product hazard continues.¹³³

Like the CPSA, the Firearms Safety Act contemplates the possibility of expedited enforcement procedures. Section 303 of the Act gives the Attorney General the authority to bring an action in





U.S. district court to restrain the manufacture, distribution, transfer, import or export of an imminently hazardous firearm product. This is similar to the authority that the court has under Section 15(g) of the CPSA, but is not as far-reaching as the authority granted to the court under Section 12.

The threshold to obtain expedited relief is, however, much lower in the case of the Firearms Safety Act than the CPSA. An “imminently hazardous firearm product” means only that a firearm poses an unreasonable risk of injury to the public and that “time is of the essence.”¹³⁴ “Unreasonable risk of injury” is, of course, precisely the standard that the Attorney General applies both for rulemaking and for “ordinary” recalls.¹³⁵ The imminent hazard proceeding authority, therefore, seems likely to be used simply when the Attorney General is in a hurry.

Nor is there any requirement in the Firearms Safety Act that the Attorney General begin a rulemaking proceeding concerning the type of firearm products that were the subject of the imminent hazard proceeding. Since one objective of the Firearms Safety Act is most likely the removal of as many firearms as possible from commerce and private ownership, the sponsors evidently felt no need for regulations permitting the sale of some reasonably safe version of the firearm products that were the subject of the imminent hazard proceeding.

6. Penalties

Both the CPSA and the Firearms Safety Act recognize that members of the regulated community may not always comply with the law and that penalties may need to be imposed. There are, however, differences in the circumstances under which penalties may be imposed, and those differences make it more likely that members of the firearms industry will be subjected to penalties than will industries regulated by the Commission.

The CPSA contains both civil and criminal penalties.¹³⁶ Persons who sell, offer for sale, distribute in commerce or import consumer products that do not comply with a consumer product safety standard, or which are banned hazardous products are subject to civil penalties.¹³⁷ These civil penalties, may, however, be imposed only in cases where the manufacturer, distributor or private labeler of the





product had actual knowledge that the distribution was a violation, or if that person had received notice from the Commission that the distribution would be a violation.¹³⁸ Imposition of a criminal penalty requires both a knowing and willful violation, coupled with receipt of notice of noncompliance from the Commission.¹³⁹

In contrast to the civil penalty provisions of the CPSA, the Firearms Safety Act contains no scienter requirement at all for the imposition of a civil penalty.¹⁴⁰ The apparent imposition of strict liability is yet another example of the intent of the sponsors of the Firearms Safety Act to subject the firearms industry to the maximum amount of government authority. The Firearms Safety Act's imposition of criminal penalties more closely tracks that of the CPSA in that it requires that notice from the Attorney General be received. Even here the scienter requirement is "knowingly," rather than the higher "willfully" standard contained in the CPSA,¹⁴¹ yet another example of the evident intent of the Firearms Safety Act sponsors to be as harsh as possible on the firearms industry.

7. Reporting

In addition to conferring on the Commission the authority to recall products, CPSA Section 15¹⁴² imposes a major reporting obligation on the regulated community. Manufacturers, distributors and retailers of consumer products must report to the Commission when they "obtain information which reasonably supports the conclusion" that such product:¹⁴³

1. Fails to comply with an applicable consumer product safety standard;
2. Fails to comply with a voluntary standard in reliance upon which the Commission has terminated rulemaking;
3. Creates a defect which could create a substantial product hazard; or
4. Creates an unreasonable risk of serious injury or death.

Manufacturers, distributors and retailers are excused from making such reports only when they have "actual knowledge that the Commission has been adequately informed" of the defect, the fail-





ure to comply, or the risk.¹⁴⁴ The Commission has developed interpretive regulations to assist manufacturers, distributors and retailers to understand their reporting obligations,¹⁴⁵ and many of the civil penalty cases in which the Commission has obtained a judgment or which have been settled have been for violations of this reporting requirement.¹⁴⁶ In addition to the reporting requirement of Section 15(b), Section 37 of the CPSA¹⁴⁷ creates an obligation under certain circumstances for manufacturers to report product liability lawsuits involving death or grievous bodily injury that have been settled or which have been the subject of a judgment for the plaintiff.

The Firearms Safety Act creates no similar obligation for manufacturers or dealers to disclose failures to conform to regulations, other safety problems, or court judgments or settlements to the Attorney General. This difference is one of the few instances in which the CPSA is actually more severe on industry than is the Firearms Safety Act. Perhaps the sponsors of the Firearms Safety Act simply overlooked these obligations of the CPSA when they drafted their own bill. One other explanation is that reporting of genuine safety concerns by a manufacturer or dealer was of no interest to the sponsors of the Act.

8. Applicability to Governments

Federal, state and local governmental entities purchase and use consumer products. Many governmental entities also purchase and issue firearms as weapons for law enforcement personnel.¹⁴⁸ Government entities have a considerable interest in preserving the safety of their employees, both for public efficiency and humanitarian reasons; therefore they have an interest in purchasing and using only safe consumer products and safe firearms. The approach taken by the CPSA and the Firearms Safety Act towards governmental entities is, however, fundamentally different.

Section 26(b) of the CPSA¹⁴⁹ contains a limited exemption for states and their political subdivisions. Such entities may have safety requirements that are inconsistent with a consumer product safety standard if the requirement is for the use of the state or the political subdivision and if it provides a higher degree of protection than does the Commission-issued standard. This section provides an option for state and local governments when they play the role of





consumers: they are free to choose a product that is safer than the minimum requirements set by a consumer product safety standard.

The Firearms Safety Act takes a completely different approach to state and local government purchases of firearms. Section 202 of the Act states simply that the prohibitions of Section 201 do not apply to any department or agency of the United States, of a state, of a political subdivision of a state, or to any official conduct of an officer or employee of such a department or agency.

Despite the convoluted phrasing of the exemption,¹⁵⁰ its intent is easily discernible: government entities may purchase firearm products that do not comply with the mandatory regulations specified by the Attorney General, or which have been recalled by the Attorney General, or which may even have been the subject of an imminently hazardous firearm product proceeding.

There is no conceivable reason that law enforcement personnel should have access to “unsafe” firearms.¹⁵¹ But if the genuine objective of the Firearms Safety Act is to hand plenary authority over the firearms industry to the Attorney General, it is perfectly consistent to exempt governmental entities and their officials from its requirements. What concern do the sponsors of the Firearms Safety Act have about concealability, large ammunition capacity and larger, more lethal ammunition, if such items are in the hands of politically reliable police or regulatory authorities? And what need do such persons have for magazine disconnectors and loaded chamber indicators, which the sponsors of the Firearms Safety Act believe must be present in firearms sold to the general public? The attitude of the sponsors of the Firearms Safety Act is fully consistent with many other restrictions on firearms ownership that apply to mere private citizens, but not to the exalted officials of government.¹⁵²

9. Testing, Certification, Labeling and Prior Notice

Both the CPSA and the Firearms Safety Act contain sections concerning testing, certification and labeling of consumer products and firearm products respectively. The CPSA requires that manufacturers and private labelers of consumer products that are subject to mandatory standards provide a certification that the product conforms to the standard.¹⁵³ Section 201(a) of the Firearms Safety Act creates a similar obligation on the part of manufactures to test and





certify that their firearm products conform to the regulations promulgated by the Attorney General.¹⁵⁴ The labeling requirements also resemble each other.¹⁵⁵

The Firearms Safety Act, however, contains a requirement that a manufacturer provide notice to the Attorney General that the manufacturer intends to manufacture a new type of firearm product and a description of the product,¹⁵⁶ a requirement that has no corresponding section in the CPSA. The Firearms Safety Act provides no definition of the term “type,” raising the possibility that it could be interpreted to include virtually any modification to a manufacturer’s product line, with civil penalties sought for failure to report such modifications, the grounds that the constitute a new “type” of firearm or firearm product.¹⁵⁷

10. Information Disclosure to the Public

Providing information to the public about safety hazards and how to use products safely is one of the ways that any governmental agency concerned with safety seeks to fulfill its mission. Both the CPSA and the Firearms Safety Act charge the Commission and the Attorney General, respectively, with educating the public about the hazards associated with the use of consumer products and firearms, respectively.¹⁵⁸ Both the Commission and the Attorney General are subject to the Freedom of Information Act (FOIA).¹⁵⁹ The CPSA, however, contains a specific exception to FOIA that protects members of the regulated community from premature disclosures of information about the safety of their products that might prove damaging in the marketplace. Section 6(b) of the CPSA¹⁶⁰ requires the Commission to perform a number of steps before it can release information about product safety that would permit the public to readily ascertain the manufacturer or private labeler to which the information pertains:¹⁶¹

1. The Commission must give the manufacturer or private labeler thirty days notice of its intent to release the information and also give the manufacturer or private labeler an opportunity to comment on the proposed release;
2. The Commission must take reasonable steps to assure that the information that it proposes to release is accurate,





including procedures to ensure such accuracy, and to determine that disclosure is fair under the circumstances and reasonably related to effectuating the purposes of the CPSA;

3. If the Commission does release the information it must, at the request of the manufacturer or private labeler, include the comments or other information submitted by the manufacturer or private labeler in response to the information that the Commission proposes to release;

4. If the manufacturer or private labeler objects to the release of all or a portion of the information the Commission must notify the manufacturer or private labeler of its intent and give the manufacturer or private labeler ten days notice;

5. If the Commission gives the manufacturer or private labeler the notice required above, the manufacturer or private labeler may bring an action in U.S. district court to enjoin the Commission from releasing the information.

There are a number of exceptions to the elaborate procedures set forth above; mostly relating to situations in which the Commission has already taken action concerning a product.¹⁶² There are also requirements for retractions in the event that the Commission finds it has made a mistake in a previous release.¹⁶³

The approach of the Firearms Safety Act towards information disclosure is different from that of the CPSA. Section 401(b) of the Act requires the Attorney General to collect and maintain current production and sales figures for licensed manufacturers of firearms and break those production and sales figures down by the model, caliber, and type of firearm produced by the licensee, including a list of the serial numbers of such firearms. The Firearms Safety Act not only contains nothing resembling the protections of CPSA Section 6(b), but affirmatively requires the Attorney General to make public the information collected by this section.¹⁶⁴ The obvious potential of such public release of information to harm the competitive prospects of firearms manufacturers¹⁶⁵ probably troubled the sponsors of the Firearms Safety Act not in the slightest.





12. Private Enforcement and Remedies

Both the CPSA and the Firearms Safety Act specify what effect actions taken or not taken under both acts will have on civil actions for damages. Both the CPSA and the Firearms Safety Act also provide for enforcement by persons other than the Commission and the Attorney General, respectively. As is the case with so much else in the Firearms Safety Act, its provisions are much more onerous to the regulated community than are similar sections of the CPSA.

The CPSA states that compliance with consumer product safety standards, or with other Commission orders or rules, does not relieve a person from liability at common law or under a state statute.¹⁶⁶ Moreover, the failure of the Commission to take any action or commence a proceeding under the CPSA is not admissible in litigation at common law or under a state statute that relates to that consumer product.¹⁶⁷

The Firearms Safety Act has a similar section on civil liability,¹⁶⁸ but it also contains a separate section that gives any person “aggrieved” by any violation of the Act or the regulations specified by it to bring an action in U.S. district court for damages, including consequential damages.¹⁶⁹ The Act does not define the term “aggrieved,” evidently leaving it to case law to sort out which private citizens will be permitted to harass the firearms industry under the Act, but it does give the court the discretion to award a prevailing plaintiff, although not a prevailing defendant, reasonable attorney’s fees.¹⁷⁰ It also makes clear that its remedy is in addition to any remedy provided by common law or under Federal or State law,¹⁷¹ including the separate right that the Firearms Safety Act gives “interested persons” to bring actions to enforce the Firearms Safety Act.¹⁷² Since civil actions seeking to impose liability on the firearms industry or individual firearm manufacturers have become one mechanism by which anti-gun groups have sought to cripple the firearms industry,¹⁷³ the Firearms Safety Act would give such plaintiffs one more count to state in their complaints.

The CPSA explicitly permits interested persons (including individuals, nonprofit, business and other entities) to bring actions to enforce consumer product safety rules or an order issued by the Commission under CPSA Section 15, and authorizes the court to award reasonable attorney’s and expert witness fees.¹⁷⁴





The Firearms Safety Act has a similar section.¹⁷⁵ The CPSA, however, permits such private enforcement only where the Commission or the Attorney General has failed to exercise a “right of first refusal” after notice given by the prospective plaintiff,¹⁷⁶ a limitation not present in the Firearms Safety Act.¹⁷⁷

The failure to give the Attorney General a right to take over such actions raises the possibility that the Firearms Safety Act will be enforced in inconsistent ways in different judicial districts and circuits, and would make Attorney General opinions interpreting the Act and regulations under it of much less influence.

IV. SUMMARY

The true objective of the Firearms Safety Act is apparent when one compares it to a law that, whatever its flaws, has been reasonably successful in reducing the number of deaths and injuries associated with consumer products. To summarize the most important findings:

1. The Firearms Safety Act assigns its entire regulatory program to a single law enforcement official rather than to a regulatory commission.
2. The Firearms Safety Act does nothing to harmonize any conflicting state safety regulations and even promotes inconsistent regulation.
3. Rulemaking under the Firearms Safety Act is conducted under the most basic notice and comment with a preposterously short time period between proposed rules and final rules.
4. Regulations contemplated by the Firearms Safety Act are extremely prescriptive, leaving the firearms industry the least room for innovation.
5. There is no requirement that the Attorney General consider, let alone defer to, voluntary standards, despite the fact that SAAMI has developed a detailed set of such standards at the request of Congress for three quarters of a century.
6. The Firearms Safety Act confers extraordinary authority





on the Attorney General through a delegation of authority by negative implication that leaves the Attorney General free to do almost anything he or she pleases in the name of firearm safety.

7. There is no procedure specified in the Firearms Safety Act for recalls and the election of remedies section central to the recall structure of the CPSA does not exist.

8. The level of hazard that justifies regulations, recalls and expedited “imminent hazard” proceedings under the Firearms Safety Act are difficult to distinguish, raising the question of why the Attorney General would seek to publish regulations at all, and not just proceed with a series of recall and imminent hazard actions.

9. The Firearms Safety Act completely exempts governments and governmental officials from its application, an almost inconceivable exemption if the true objective of the Firearms Safety Act is safe firearms.

10. The Firearms Safety Act creates an entirely new private cause of action for persons “aggrieved” by violations of the Act, and also allows for private enforcement without any sort of right on the part of even the Attorney General to take over cases to try and have some type of consistent interpretation.

Supporters of the Firearms Safety Act seek to make a virtue out of the loose to non-existent procedures and standards of that Act. The Violence Policy Center, for example cites certain aspects of the Commission’s procedure in contending that the Commission should not have jurisdiction over firearms.¹⁷⁸

There are two assumptions implicit in such arguments. The first is that firearms regulations are unlikely to be justified if the Commission followed the procedures required by the CPSA. The second is that CPSA procedures are not justified, because firearms are so much more dangerous than other consumer products that standards of regulation that apply to consumer products ought not to be applied to firearms. It is, of course, just as plausible to contend that the political significance of firearms as weapons (“arms” in the language





of the Second Amendment) is sufficiently great that the government should be particularly scrupulous about any regulation purporting to be for the purpose of safety regulation.

In response to the second argument, the Commission has experience in dealing with products that pose safety hazards of the magnitude of firearms. As noted earlier in this article, there is no doubt that firearms can be dangerous. In 2000 there were 776 deaths from accidental discharge of firearms, and an additional 230 deaths from the discharge of firearms where the intent could not be determined.¹⁷⁹ The number of deaths from the accidental discharge of firearms could, therefore, be as high as 1006, although a more reasonable estimate is 783.¹⁸⁰ There were an additional 23,237 non-fatal injuries that year associated with unintentional firearms discharges.¹⁸¹ There are an estimated 200 million firearms in the United States, including 65-70 million handguns. Between 60 and 65 million Americans own firearms, of which 30-35 million own handguns.¹⁸²

But the Commission has examined hazards of this magnitude. For example, the Commission staff estimates that there were 740 deaths and 125,500 injuries associated with the use of all-terrain vehicles (ATVs) in 2003. (In 2004 the estimated number of injuries rose to 136,100).¹⁸³ The Commission estimates that there are approximately 5.6 million ATVs in use.¹⁸⁴

Another product associated with large numbers of deaths and injuries is the ignition of upholstered furniture. The Commission staff estimates that in 1998 (the last year for which data are available) there were 420 deaths and 1,080 injuries associated with the 6,200 fires in upholstered furniture started by either small open flames or smoldering cigarettes. The Commission staff also estimates that there are approximately 400 million pieces of upholstered furniture in the U.S.¹⁸⁵

The figures for ATVs and upholstered furniture demonstrate that the Commission is experienced in examining risks of the magnitude posed by the accidental discharge of firearms. The most plausible explanation, therefore, for reticence of the advocates of the Firearms Safety Act to entrust firearms safety regulation to the Commission is their fear that the procedures that the Commission must follow and the findings that the Commission is required to make under the CPSA would not support the onerousness of regu-





lation that they would like to impose on the firearms industry.

V. CONCLUSION

Congress has historically left firearms safety to a combination of voluntary standards and the civil tort system. Firearms certainly pose a risk, from accidental discharges, suicide, and criminal misuse and the public has become increasingly risk averse. But the U.S. tradition of private firearms ownership,¹⁸⁶ supported and protected by an effective lobbying organization, has successfully resisted placing firearms in the category of consumer products subject to safety regulation. The resistance has been bolstered by declining injury and death rates due to accidental firearms discharges for the past seventy years.¹⁸⁷

The proponents of the Firearms Safety Act seem persuaded that the “safest” firearm is one in hands other than those of a private citizen.¹⁸⁸ Granting the Attorney General virtually plenary authority over the firearms industry can limit consumer choice in firearms and may substantially increase both the economic and “hassle-factor” cost of owning firearms. But, in the point of view of the proponents of this legislation, that is as it should be. Firearms confer capabilities on their users, to the extent of their skill with the firearm and their judgment in using it. The proponents of the Firearms Safety Act do not trust private citizens to use firearms either skillfully or wisely; hence they are better off, or “safer,” without firearms. It is true that legislation resembling the Firearms Safety Act is not likely to be enacted by the U.S. Congress anytime soon, but there are state legislatures that may be more receptive to legislation of this nature. Persons who hold a higher opinion of the levels of skill and judgment of their fellow citizens ought to recognize legislation such as the Firearms Safety Act as “gun control” with a different title.

ENDNOTES

1. Aircraft safety is covered by the Federal Aviation Act of 1958, Pub. L. 85-726, Aug. 23, 1958, 72 Stat. 731, now codified at 49 USCA §§ 44701-44672 (2003). The safety of food, drugs and cosmetics is covered by the Federal Food, Drug and Cosmetics Act, June 25, 1938, ch. 675, 52 Stat. 1040, codified at 21 USCA §§ 301-397 (1999). The safety of automobiles is governed by the National Highway Traffic Safety Administration Authorization Act





of 1991, Pub. L. 102-240, Title II, Part B, Dec. 18, 1999, 105 Stat. 2081, codified at 49 USCA §§ 30101-30308 (2003). The safety of herbicides and pesticides is governed by the Federal Insecticide, Fungicide and Rodenticide Act, June 25, 1947, ch. 125, 61 Stat. 163, presently codified at 7 USCA §§ 136-136y (2003). The safety of household chemicals and children's toys is governed by the Federal Hazardous Substances Act, Pub. L. 86-613, 74 Stat. 372, July 12, 1960, 15 USC §§ 1261-1278 (2000). The safety of consumer products in general is governed by the Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207, October 27, 1972, 15 USCA §§ 2051-2085.

2. D. Kopel, "Treating Guns Like Consumer Products," 148 U.Pa.L.Rev. 1213, 1242-1246 (2000). D. Kopel and T. Wheeler, "Guns v. Teddy Bears," National Review On-Line, Jan. 13, 2004, <http://www.nationalreview.com/kopel/wheeler-Kopel200401130846.asp>. "Gun Violence Folly," *Washington Times*, August 7, 2003.

3. For example, in introducing the Firearms Safety and Consumer Protection Act of 2003 (S.1224), Senator Jon Corzine referred to magazine disconnectors and loaded chamber indicators as safety features that he believed to be desirable requirements for firearms. "Corzine, Kennedy Call for Gun Safety," Press Release dated June 10, 2003. Website of the Honorable Jon Corzine.

The Consumer Federation of America has also advocated magazine disconnectors and loaded chamber indicators for handguns, as well as "safety locks" to make guns child-resistant. It has criticized the design of the old model Ruger Blackhawk single-action revolver as dangerous, as well as design characteristics of certain Remington Model 700 bolt action rifles. The Consumer Federation of America has, however, mixed its safety message with complaints that some guns are unsafe because they are too concealable, too large and powerful and resemble military weapons too closely. Consumer Federation of America, "Health and Safety Standards for Everyday Products and Safety Standards that Could be Applied to Guns," <http://www.consumerfed.org/products/pdf>.

4. S.1224 introduced on June 10, 2003 by Senator Jon Corzine (D-N.J.). The House companion bill was H.R.2403, introduced by Rep. Patrick Kennedy (D-R.I.). Neither bill saw any action in the 108th Congress and Rep. Kennedy introduced an identical bill (H.R.711) in the 109th Congress on February 9, 2005.

5. Pub. L.92-573; 86 Stat. 1207, Oct. 27, 1972. Codified at 15 USC §§ 2051-2084 (2000).

6. Neither Senator Corzine nor Representative Kennedy have been favorable to private firearms ownership. For example, Senator Corzine intro-



duced legislation that would deny the Department of Justice funds to advocate a view that the Second Amendment to the Constitution protects an individual right to keep and bear arms, as opposed to a collective right. “Corzine Bill Would Disarm Gun Crusade: Prohibits Use of Taxpayer Dollars to Misrepresent Long-Settled Meaning of the Second Amendment,” Press Release of the Honorable Jon Corzine, February 12, 2003. http://corzine.senate.gov/press_office/record.cfm?id=190296 See also, “Corzine Blasts Ashcroft For Overshooting on Right To Bear Arms,” Press Release of the Honorable Jon Corzine, May 8, 2002, http://corzine.senate.gov/press_office/record.cfm?id=186701

In the case of Representative Kennedy, his website cites statistics purporting to establish that “[G]uns kept in the home are 43 times more likely to kill a family member than to kill in self-defense,” and “[T]he presence of a gun in the home triples the homicide in that home. . .” Such rhetoric, aside from the logic problems (guns have no family members nor do inanimate object defend themselves, and a phrase such as “triples the homicide in that home” makes no sense whatsoever), indicates that Representative Kennedy is no friend of private firearms ownership. His website goes on to mention that, in addition to his sponsorship of the Firearms Safety Act, Representative Kennedy is a primary sponsor of The Gun Buyback Partnership Grant, H.R. 278 and touts his participation in gun “buyback” program. Finally, Representative Kennedy’s website mentions in participation in the “Million Mom March,” and his cosponsorship of legislation that he claims will strengthen enforcement of existing gun laws. http://www.house.gov/patrick-kennedy/issues/law_enforcement.html.

7. “Corzine, Kennedy Call for Gun Safety,” Press Release dated June 10, 2003. Website of the Honorable Jon Corzine.
8. S.1224, § 101(a). Firearm products include firearms, firearms parts, and “nonpowder firearms.” S.1224, § 3(a)(3).
9. S.1224, § 101(b) & (c).
10. S.1224, § 102(a).
11. S.1224, § 102(b).
12. S.1224, § 102(c).
13. S.1224, §§ 301-303, 351.
14. S.1224, § 201(a) & (b).
15. S.1224, § 201(c).
16. S.1224, §§ 201(e)-(g).
17. S.1224, § 304.



18. S.1224, § 305.

19.S.1224, § 306.

20. S.1224, § 502.

21. S.1224, § 202.

22. S.1224, §§ 401 and 402.

23. The CPSA specifically exempts firearms and ammunition from the jurisdiction of the Consumer Product Safety Commission (Commission) by excluding them from the definition of “consumer product.” CPSA § 3(a)(1) and § 3(a)(1)(E), 15 USC § 2052(a)(1) and § 2052(a)(1)(E) (2000). For a discussion of the involvement of the Commission with firearms, ammunition and related products, *see* Wilson, What You Can’t Have Won’t Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act,” 53 *Cleveland State Law Review* 225, 232-238 (2005).

24. Most persons and groups favoring safety regulation of firearms compare firearms to products regulated by the Commission. Consumer Federation of America, for example, mentions Federal safety regulations for refrigerators and freezers, cribs, children’s sleepwear, meat and poultry, and automobiles in endorsing the Firearms Safety and Consumer Protection Act. <http://www.consumerfed.org/products.pdf>. The first four products mentioned are subject to regulations by the Commission. Another organization, “Regulateguns.org” mentions that the Commission has the authority to regulate 15,000 consumer products, but not firearms. <http://www.regulateguns.org/default.asp> By contrast, the Violence Policy Center has opposed Commission regulation of firearms in favor of safety regulation by the Bureau of Alcohol, Firearms, Tobacco and Explosives, but the basis for the opposition is the regulatory process which the Commission must use. http://www.vpc.org/fact_sht/treascp.htm

25. A criticism that the Commission is relatively ineffective to alleviate product hazards is contained in M. Felcher, *It’s No Accident, How Corporations Sell Dangerous Products*, 119-39, 154-199 (2001). A criticism that the Commission harasses the regulated community is contained in T. Holt, *The Rise of the Nanny State, How Consumer Advocates Try to Run Our Lives*, x-xiv, 54-55 (1995)

26. The last reauthorization of the Commission was the Consumer Product Safety Improvement Act of 1990, Pub. L. 101-608, 104 Stat. 3110, November 16, 1990. Subsequent legislation has imposed labeling requirements for toys, games, marbles and small balls. Child Safety Protection Act, Pub. L. 102-267, 108 Stat. 722, June 16, 1994. For a recitation of the circumstances that led to this legislation *see* House Conf. Report No. 103-500, pp. 10-11.



27. U.S. Consumer Product Safety Commission 2005 Performance Budget, Feb. 2004, p. iv.

28. *Id.* pp. iv, v, xiv-xvii.

29. Section 4 (a) of the CPSA (15 USC § 2053(a)) establishes the Commission as a five member Commission although it has been operating with only three members since the mid-1980s for budgetary reasons. The Chairman of the Commission is the principal executive officer of the Commission and exercises all the executive and administrative functions of the Commission. Even these functions are, however governed by general policies of the Commission. CPSA § 4(f); 15 USC § 2053 (f) (2000)).

30. CPSA § 4; 15 USC § 2053(a) (2000).

31. The Attorney General may be removed from his or her office at will by the President. U.S. Const. Art. 2, § 2, cl. 2 provides that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint officers of the United States. This authority has been construed to authorize the removal of such officers. *Bailey v. Richardson*, 182 F.2d 46, 51 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1950). In the case of the Commission, however, only the Chairman may be removed from the office of Chairman by the President without cause. *Memorandum to Senate Committee on Commerce, Science, and Transportation from Morton Rosenberg, Specialist in American Public Law, American Law Division re: Power of the President to Remove the Chair of the Consumer Product Safety Commission*, Congressional Research Service, August 1, 2001. A Chairman removed from the office of Chairman continues to serve as a commissioner. A commissioner may be removed from the office of commissioner only for neglect of duty or malfeasance of office, but for no other cause. CPSA § 4(a); 15 USC § 2053(a) (2000).

32. CPSA § 4(c); 15 USC § 2053(c) (2000). Because the Commission has had only three commissioners since the mid-1980s, in practice this requirement has meant that only two commissioners may be affiliated with the same political party.

33. CPSA § 2(b)(1)-(4); 15 USC § 2051(b)(1)-(4) (2000).

34. S.1224, § 2(1)-(5).

35. *See* note 83 through note 89, and accompanying text, *infra*.

36. S.1224, § 2(5).

37. S.1224, § 101(a).

38. CPSA § 7(a); 15 USC § 2056(a).

39. The Commission estimates that it has jurisdiction over approximately 15,000 products. U.S. Consumer Product Safety Commission, *2002 Annual*



Performance Report p. ii.

40. The Commission's policy on establishing priorities for Commission action is set forth in 16 CFR § 1009.8 (2003). The seven criteria cited in the regulation are: frequency and severity of injuries, causality of injuries, chronic illness and future injuries, cost and benefit of Commission action, unforeseen nature of the risk, vulnerability of the population at risk, and probability of exposure to the hazard.

41. "Firearm" not only means the normal sense of the word as a device that uses the combustion of a chemical propellant to impart velocity to a projectile, but also air rifles. S.1224, § 3(a)(7). The term "nonpowder firearm" is an oxymoron, since a firearm uses combustion to initiate the flight of a ballistic missile. Sporting Arms and Ammunition Manufacturers Institute glossary of firearms terms. www.saami.org "Firearm product" includes not only firearms, but also firearm parts, ammunition, and locking devices designed to prevent the accidental discharge of a firearm. S.1224, § 3(a)(2) & (3).

42. Congress has acted occasionally to require regulations for or to ban outright certain products: butyl nitrate (Pub. L. 100-690, § 2404; 15 USC § 2057a), isopropyl nitrates and other nitrates (Pub. L. 101-647; 15 USC § 2057b), walk-behind power lawn mowers (Pub. L. 97-35, § 1212; 95 Stat. 724, Aug. 13, 1981), lawn darts (Pub. L. 100-613; 102 Stat. 3183, Nov. 5, 1989), automatic garage door openers (Pub. L. 101-608, § 203; 104 Stat. 3110, Nov. 16, 1990; 15 USC § 2056 Note), bicycle helmets (Pub. L. 103-267, § 205; 108 Stat. 722, June 16, 1994; 15 USC § 6004) and lead-lined water coolers (Pub. L. 100-572, § 1462; 42 USC § 300j-22). Given the vast number of products within the Commission's jurisdiction, this represents a surprisingly small number of products for which Congress has decided that there *must* be regulations.

43. CPSA § 7(a); 15 USC § 2056(a).

44. Congress removed the Commission's option to specify design requirements by the passage of the Consumer Product Safety Amendments of 1981, Pub. L. 97-35, title XII, Subtitle A; 95 Stat. 703, Aug. 13, 1981.

45. S.1224, § 101(a).

46. Administrative Procedures Act, 60 Stat. 237 (1946), as amended by 80 Stat. 378 (1966), 81 Stat. 54 (1967), 88 Stat. 1561 (1974), 90 Stat. 1241 (1976),

47. Administrative Procedure Act § 553; 5 USC § 553 (2000). The constitutional requirement that no person be deprived of life, liberty or property without due process of law (U.S. Const. amend. 5) would also require regu-





lar procedures for rulemaking, but they would not exceed those required by the Administrative Procedure Act. *Sierra Club v. Costle*, 657 F.2d 298, 392-93 (D.C. Cir. 1981). The Firearms Safety Act would also be subject to some government-wide statutory and executive order requirements for rulemaking.

48. Administrative Procedure Act § 706(2)(A); 5 USC § 706(2)(A) (2000).

49. S.1224 § 101(a).

50. S.1224 § 101(b).

51. By contrast, approximately twenty months elapsed between the time that the Commission first proposed regulations for dive sticks and the time that those regulations were issued in final form. 66 *Fed. Reg.* 13645-13652, March 7, 2001. In the case of infant beanbag cushions, the time elapsed was also twenty months. 57 *Fed. Reg.* 27912-27916, June 23, 1992. Both of these were relatively simple products and the rulemakings were relatively straightforward. Rulemaking for complex hazards may take a great deal of time. For example, the Commission commenced rulemaking on the hazard of small open-flame ignition of upholstered furniture in 1994. After approximately nine years of work on the subject, the Commission voted to reissue its advance notice of proposed rulemaking to include the hazard of smoldering (cigarette) ignition of upholstered furniture. 68 *Fed. Reg.* 60629, 60629-32, October 23, 2003.

52. CPSA § 9(a)(1)-(6); 15 USC § 2058(a)(1)-(6) (2000).

53. For a discussion of the Commission's consideration of voluntary standards, see notes 76 through 82 and accompanying text, *infra*.

54. CPSA § 9(c); 15 USC § 2058(c).

55. CPSA § 9(c)(1)-(4); 15 USC § 2058(c)(1)-(4) (2000).

56. The Commission's economic staff generally follows the procedures laid out in Office of Management and Budget Circular No. A-4 ("Regulatory Analysis," September 17, 2003) when conducting cost-benefit analysis.

57. CPSA § 9(e); 15 USC § 2058(e).

58. CPSA § 9(f)(1)(A)-(D); 15 USC § 2058(f)(1)(A)-(D) (2000).

59. CPSA § 9(f)(1)(D); 15 USC § 2058(f)(1)(D) (2000) uses the term "order," but in the context of the subsection it is clear that the requirement applies to the consumer product safety rule being promulgated.

60. CPSA § 9(f)(2)(A)-(C); 15 USC § 2058(f)(2)(A)-(C) (2000).

61. CPSA § 9(f)(3)(A)-(F); 15 USC § 2058(f)(3)(A)-(F) (2000).



62. The Commission may declare a product to be a banned hazardous product if it finds that no feasible consumer product safety standard would protect the public from the unreasonable risk of injury associated with the use of the product. CPSA § 8; 15 USC § 2057 (2000).

63. The requirement to defer to voluntary standards is one of the most central features of rulemaking under the CPSA. For a discussion of the circumstances under which the Commission must defer to voluntary standards, see notes 76 through 82, and accompanying text, *infra*.

64. Section 602 of the Regulatory Flexibility Act (15 USC § 602) requires all Federal agencies to publish a regulatory agenda in the Federal Register two times a year, and to consider in their rulemakings the effect that the rules will have on small businesses and on other governmental entities. Additionally, Executive Order 12866, issued on September 30, 1993, requires all agencies, including independent agencies such as the Commission, to publish an agenda of regulatory actions expected to be under development or review by the agency during the next twelve months.

65. If the Commission is promulgating a “major rule” within the meaning of Congressional Review Act (Pub. L. 104-121, Tit. II, § 251, March 29, 1996; 110 Stat. 868; 5 USC §§ 801-808 (2000)), which is defined as having an overall annual impact on the economy of \$100 million or more, the Commission must obtain OMB’s concurrence on whether it is a major rule, and it must then transmit the rule to the General Accounting Office for its review and possible repeal by Congress. The Commission is also subject to the National Environmental Policy Act (Pub. L. 91-190, Jan. 1, 1970; 83 Stat. 852), but has made a general finding that consumer product safety rules have no significant environmental impacts. 16 CFR Part 1021 (2003).

66. CPSA § 9(g)(1); 15 USC § 2058(g)(1) (2000).

67. CPSA § 9(g)(2); 15 USC § 2058(g)(2) (2000).

68. CPSA § 11(a)-(c); 15 USC § 2060(a)-(c) (2000).

69. J Lott, *More Guns, Less Crime, Understanding Crime and Gun Control Laws* 97-116 (2d ed. 2000). The author estimates the savings in lives and injuries from laws permitting the lawful carry of concealed handguns. *See also*, J. Malcolm, “Gun Control’s Twisted Outcome,” *Reason*, November 2, 2002, pp. 20-25.

70. How the export of a firearm *from* the U.S. could constitute a threat to the safety of firearms’ users *within* the U.S. is not a subject that the proponents of S.1224 have chosen to explain. Section 18(a) of the CPSA (15 USC § 2067(a) (2000) provides explicitly that it does not apply to exports unless the Commission makes an affirmative finding that the product in



fact distributed in the U.S. or that even its export presents an unreasonable risk of injury to consumer within the U.S. .

71. The recall provisions of the Firearms Safety Act appear in S.1224 § 102(a) & (b), and are discussed in greater detail in notes 95 through 127 and accompanying text, *infra*.

72. S.1224, § 101(a). Examples of the situations under which advocates of the bill believe that the authority might be exercised are “trigger activators that allow semi-automatic firearms to mimic the fully automatic fire of a machine gun,” and “specific firearms proven to be disproportionately associated with homicide, suicide or involved in unintentional injuries.” Consumer Federation of America, “Health and Safety Standards for Everyday Products and Safety Standards That Could be Applied to Guns,” <http://www.consumerfed.org/products.pdf>. Since homicide and suicide are volitional acts having little or nothing to do with the safety of a firearm, the prohibitive intent of this section is clear, at least as evidenced by the statements of some of its advocates.

73. Depending on the nature of the order issued by the Attorney General under the authority of this section, it might violate the Constitutional prohibition against deprivation of life, liberty or property without due process of law (U.S. Const., amend. VI) or against a bill of attainder or ex post facto law (U.S. Const., art. 1, § 9, cl. 3).

74. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), in which the Supreme Court held unconstitutional a delegation of authority to the President to prohibit the transportation of oil produced in excess of the amount permitted by State laws or regulations, and *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935) which held unconstitutional a delegation of authority to the President to approve codes of fair competition. The rationale of both these cases has been called into doubt (*U.S. v. Frank*, 864 F.2d 992 (3d. Cir. 1988)) but they remain good law. A challenge to an order issued by the Attorney General under the authority of this section would be especially interesting because it concerns a product (“arms”) given special mention by the Constitution. U.S. Const. amend. 2.

75. The normal rule of delegation of authority to administrative agencies is that it must be expressed or implied by *positive* law. 3 *Sutherland, Statutes and Statutory Construction* §§ 65:1 and 65:2 (2001) (emphasis added). In a delegation of administrative authority the legislature must define: (1) what is to be done; (2) the instrumentality which is to accomplish it; and (3) the scope of the instrumentality’s authority by prescribing reasonable administrative standards. *Id.* § 4:2. Section 102(c) of the Firearms Safety Act contains very little resembling reasonable administrative standards to guide the Attorney



General. There is nothing similar to this section in the CPSA.

76. The term “voluntary standard” is somewhat ambiguous, as detailed in note 79.

77. S.1224, § 101(a).

78. See notes 39 through 75 and accompanying text, *supra*.

79. The term “voluntary standard” is not defined by the CPSA. In declaring the effective date of a voluntary standard, the CPSA refers to final approval of the organization or other person which developed the standard. CPSA § 9(b)(2); 15 USC § 2058(b)(2) (2000). In practice, voluntary standards mean standards set by private standards-setting organizations, such as the American National Standards Institute (ANSI), ASTM International (formerly the American Society for Testing and Materials) and Underwriters Laboratories (UL). These organizations operate largely through a consensus process in which Commission staff participate as non-voting members of various committees and subcommittees when safety is involved.

80. CPSA § 7(b)(1); 15 USC § 2056(b)(1) (2000). The subject of when a voluntary standard would eliminate or adequately reduce the risk of an injury addressed by the standard, and when it was likely that there would be substantial compliance with a voluntary standard was discussed in greatest detail in connection with the Commission’s adoption of voluntary standards covering bunk beds. Memorandum dated December 16, 1998 from Commission General Counsel Jeffrey S. Bromme re: Bunk Beds—Notice of Proposed Rulemaking—Legal Memorandum, pp. 3-5, 13-23. Statements of the Honorable Thomas H. Moore and Mary Sheila Gall dated December 2, 1999 on publication of a final rule addressing entrapment of children in bunk beds.

81. The ability of private standards setting bodies to react to Commission rulemaking was shown best in the examples of chain saws, all-terrain vehicles and baby walkers. In all three cases the Commission began rulemaking but terminated it after the Commission found that the voluntary standards would be adequate to adequately reduce the risk of injury and that there would be substantial compliance with the voluntary standards. For baby walkers, see 67 *Fed. Reg.* 31165, 31165-66 (2002); for ATVs see 56 *Fed. Reg.* 47166, 47168-70 (1991); and for chain saws see 50 *Fed. Reg.* 35241, 35241-35243 (1985).

Another case in which the industry has clearly responded to Commission rulemaking is the safety regulation of infant cribs. The Commission published an ANPR on December 16, 1996 (61 *Fed. Reg.* 65996 (1996)) that specified performance tests designed to assure that crib slats would not disengage from the side panels. The industry responded by developing a



voluntary standard that ASTN International concerning that risk. “Specification for Full Size Baby Cribs,” ASTM F1169-99.

Yet another example is the issue of baby bath seats. The Commission published an ANPR on October 1, 2001 (66 *Fed. Reg.* 39692 (2001)) that specified performance tests designed to reduce the possibility that an infant would drown while being bathed in such a device. The Commission followed that decision with a subsequent decision on December 29, 2003 to publish a NPR specifying a rule. 68 *Fed. Reg.* 74878 (2003). The industry responded by developing a voluntary standard. ASTM F 1967-04.

82. <http://www.saami.org>.

83. S.1224 § 502(a). The section is oddly worded in that it refers to “conduct” with respect to a firearms product. Many State and even Federal laws make conduct with a firearm criminal, regardless of whether the firearm involved is “safe” or not. One wonders whether the sponsors of the Firearms Safety Act intended to confer such wide powers on the Attorney General that the regulations would cover many common criminal acts (e.g., robbery, aggravated assault) that often involve firearms.

84. S.1224 § 502(b).

85. During service with the House Energy and Commerce Committee and with the Commission, the author frequently heard representatives of industries regulated by the Commission state in support of Commission regulations that they would prefer to deal with one Federal “gorilla” rather than dozens of state “monkeys.”

86. CPSA § 26(a); 15 USC § 2075(a). Not all claims of preemption are sustained. *E.g., Chemical Specialty Manufacturers Ass’n v. Allenby*, 958 F.2d 941, 949-50 (9th Cir. 1992), *cert. denied*, 504 U.S. 825 (1992) (holding that California Proposition 65 was not preempted by the FHSA). *Accord, People ex re. Lungren v. Cotter & Co.*, 53 Cal. App.4th 1373, 1392-93, 62 Cal Rptr.2d 368, 381-82 (Cal.App. 1 Dist. 1997).

87. CPSA § 26(b); 15 USC § 2075(b). For example, a State government might prescribe a different standard for walk-behind lawn mowers when State employees will be using the mowers.

88. CPSA § 26(c); 15 USC § 2075(c). Commission regulations governing such applications are set forth in 16 CFR §§ 1061.1—1061.12 (2003).

89. The Commission has received only one application under CPSA § 26(c). In 1981 the Commission adopted a consumer product safety standard for unvented gas-fired space heaters. The Commission received twenty-three applications from state and local governments asking for exemptions from the standard. The Commission eventually revoked its own mandatory stan-



dard, making the applications moot. “CPSC Revokes Its Mandatory Standard for Unvented Gas-Fired Space Heaters,” Commission Press Release #84-051, August 16, 1984.

90. S.1224, § 102(a).

91. S.1224, § 102(a).

92. CPSA § 19(a)(1) & (2); 15 USC § 2068(a)(1) & (2) (2000).

93. CPSA § 22(a)(1)-(3); 15 USC § 2071(a)(1)-(3) (2000). Such products are subject to condemnation in U.S. district court. *Id.* § 22(b)(1) & (2); 15 USC § 2071(b)(1) & (2) (2000).

94. CPSA § 17(a); 15 USC § 2066(a) (2000).

95. Other Federal agencies dealing with products have the ability to force recalls: the National Highway Traffic Safety Administration (automobiles and associated equipment), the U.S. Coast Guard (boats and associated equipment), the Food and Drug Administration (food, drugs, medical devices, vaccines, blood and plasma products, cosmetics, pet and veterinary products), the U.S. Department of Agriculture (meat, poultry products, eggs) and the U.S. Environmental Protection Agency (pesticides, fungicides, rodenticides and vehicle emissions). <http://www.recalls.gov>.

96. S.1224, § 102(b).

97. S. 1224, § 101(a) says that the regulations must be reasonably necessary to reduce or prevent unreasonable risk of injury.

98. *Black's Law Dictionary* (Rev. 4th Ed.) defines “defective” as “lacking in some particular which is essential to the completeness, legal sufficiency or security of the object spoken of.” *The American Heritage Dictionary of the English Language* defines “defective” as “lacking perfection; having a defect; faulty.”

99. CPSA § 15(c) & (d); 15 USC § 2064(c) & (d) (2000).

100. CPSA § 9(f)(3); 15 USC § 2058(f)(3) (2000).

101. The criteria which the Commission must use for rulemaking is discussed *supra*. The basic criterion is that the rule must be reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with a product.

102. CPSA § 15(a); 15 USC § 2064(a) (2000).

103. CPSA § 15(a); 15 USC § 2064(a) (2000).

104. For common definitions of the term “defective” see fn. 98, *supra*. Commission regulations also define defect as a flaw, fault, or irregularity that causes weakness, failure or inadequacy in form or function, and contain a

further discussion and examples of defects. 16 CFR § 1115.4 (2003).

105. The Commission has no mandatory standards for hair dryers, but it has conducted 26 recalls of hair dryers since May 21, 1979 based on failures to conform with Underwriters Laboratories *Household Electric Personal Grooming Appliances (UL 589)* standard. *See, e.g.,* “CPSC, Light Distribution Inc. Announce Recall of Hair Dryers,” *CPSC Recall Alert*, March 9, 2004; “CPSC, Fromm International-Solis® USA Announce Recall of Hair Dryers,” *Commission Press Release #04-080*, February 10, 2004; “CPSC, Remington Products Co., LLC Announce Recall of Hairdryers,” *Commission Press Release #01-111*, Mar. 21, 2001.

Similarly, the Commission’s mandatory standards for cigarette lighters cover only child-resistance (16 CFR §§ 1210.1—1210.20 (2003)), but the Commission has conducted recalls based on lighters failure to comply with ASTM F-400. *See, e.g.,* “CPSC, Halpern Import Co. Announce Recall of Cigarette Lighters,” *Commission Press Release #00-189*, September 28, 2000; “CPSC, Shine International Trading Co. Inc. Announce Recall of Cigarette Lighters,” *Commission Press Release #00-005*, October 14, 1999 (the recall also involved failure to comply with mandatory child-resistance requirements); “CPSC And New York Lighter Announce Cigarette Lighter Recall,” *Commission Press Release #96-024*, November 17, 1995.

Finally, the Commission has no mandatory standards for carbon monoxide detectors, but it has conducted a number of recalls for failures to comply with Underwriters Laboratories Standard 2034. “CPSC, Kidde Safety Announce Recall of Carbon Monoxide Alarms,” *Commission Press Release #99-082*, March 19, 1999; “CPSC Warns of Failures with Home Gas Sentry Carbon Monoxide Detectors distributed by Staley Solar & Stove,” *Commission Press Release #96-181*, August 6, 1996; “CPSC Warns Of Failures With Sinostone Carbon Monoxide Detectors,” *Commission Press Release #96-061*, January 19, 1996. There is no example of a manufacturer contending seriously that the failure to conform materially to a safety-related portion of a voluntary standard did not constitute a defect.

106. The best example of the difficulties that the Commission can face when it brings a case not based on a failure to conform to a mandatory or voluntary standard is *In re Daisy Manufacturing Company*, involving allegations against certain air guns.

107. The criteria for determining “substantial risk of injury to the public” technically appears only in connection with a product defect (CPSA § 15(a)(2); (15 USC § 2064(a)(2) (2000)) and not in connection with a failure to conform with a mandatory standard (*Id.* § 15(a)(1); 15 USC § 2064(a)(1) (2000)), but there is no prohibition against using such criteria and, in



practice, the Commission applies the same criteria to both circumstances in determining whether there is a substantial risk of injury to the public.

108. CPSA § 15(a)(2); 15 USC § 2064(a)(2) (2000).

109. S.1224 § 102(b) states merely that the “Attorney General may issue an order requiring the manufacturer of, and any dealer in, a firearm product to” take steps associated with a recall. The constitutional requirement of due process of law and the government-wide requirements of the Administrative Procedures Act would require the Attorney General to hold some type of hearing before ordering a recall. U.S. Const. amend. V; Administrative Procedures Act §§ 554, 556 & 557 (5 USC §§ 554, 556 & 557 (2000)).

110. CPSA § 15(c), (d) & (f); 15 USC § 2064(c), (d) & (f) (2000). The Commission’s regulations for the conduct of such hearings are set forth in 16 CFR § 1025.1—1025.68 (2003).

111. S.1224 § 102(b); CPSA § 15(c); 15 USC § 2064(c) (2000).

112. CPSA § 15(c); 15 USC § 2064(c) (2000).

113. CPSA § 15(c)(1)-(3); 15 USC § 2064(c)(1)-(3) (2000). These mechanisms of notice are not set forth by way of limitation and the Commission now generally requires that manufacturers with sites on the world-wide web post notice of their recalls for a time on that site.

114. Most of the Commission’s recalls that are negotiated voluntarily with the manufacturers are accompanied by press releases. Examples of paid advertising included the settlement of the all-terrain vehicle litigation. (Consent Decree, §J.2 in *U.S. v. American Honda, et al.*, Civil Action No. 87-3525, (D.D.C) April 28, 1988) and the second recall of certain General Electric dishwashers agreed to in 2001 (CPSC No. RP990036 General Electric Appliances Division, *Amendment to Settlement Agreement*, Section 2(v), December 12, 2000.).

115. It is hard to imagine the circumstances under which notice would have to be mailed to the manufacturer of a product, since the manufacturer is almost always in charge of the recall. Notifying distributors and retailers is, however, essential to removing recalled products from the chain of distribution.

116. This remedy is limited to those circumstances in which a manufacturer, distributor or retailer knows the addresses of the purchasers. This knowledge may be high in the case of mail order or Internet sales, but may be almost nonexistent in the case of sales of inexpensive items by retailers.

117. S.1224 § 102(b). The remedies are phrased in the disjunctive, but since the last remedy requires a plan for implementing “any action” required by





an Attorney General's order, it appears that the sponsors of the Firearms Safety Act probably intended for the Attorney General to have the authority to fashion an order including one or more of the specified remedies. Moreover, virtually any of the other remedies described in the Act would necessarily involve notice.

118. CPSA § 15(d)(1)-(3); 15 USC § 2064(d)(1)-(3) (2000).

119. The recall remedy is available to a district court when the Commission has brought an action seeking to declare a product an "imminently hazardous consumer product." CPSA § 12(b)(1); 15 USC § 2061(b)(1) (2000). No case law explaining the difference between a "recall" and the ordinary "repair, replace and refund" remedies of the CPSA has been developed.

120. The Firearms Safety Act also has a remedy of bringing the firearm into conformance with pertinent regulations. S.1224, § 102(b)(2). The sponsors do not explain just how this remedy would differ from a repair remedy, and it raises the possibility that the Firearms Safety Act could be interpreted to require retroactive changes to firearms even in the absence of a defect requiring a repair.

121. CPSA § 15(e)(1); 15 USC § 2064(e)(1) (2000). The Commission did agree to a recall in the case of dishwashers manufactured by General Electric in which consumers received a rebate against the purchase of a new dishwasher. Consumers obviously had to pay the balance of the price of the new dishwasher. "CPSC, GE Announce Recall of Dishwashers," Commission Press Release #00-006, October 18, 1999. That recall was, however, later modified to give consumers the option to rewire their existing dishwashers at no charge. "CPSC and GE Announce Free Repair Supplement of Rebate Program for Recalled Dishwashers: Recalled Units Still Being Used, Creating Risk of Fire," Commission Press Release #01-054, December 14, 2000.

122. CPSA § 15(d); 15 USC § 2064(d) (2000). The Commission does have the authority to require that a person subject to a recall order to submit a plan acceptable to the Commission describing how it will carry out the remedy that it has elected. *Id.* The Commission may also reopen a case if it finds that the execution of the remedy is not protecting the public adequately. 16 CFR § 1025.58 (2003).

123. CPSA § 19(a)(1) & (2) (15 USC § 2068(a)(1) & (2) (2000)) makes it unlawful for any person to offer for sale or distribute in commerce any consumer product that does not conform to an applicable consumer product safety standard or which has been declared to be a banned hazardous product. The Commission has never sought to collect a civil penalty from a private person based on a single sale of product that did not conform to





a mandatory standard or even in the case of a product that was a banned hazardous product. Even in the case of manufacturers, distributors and private labelers, establishing a violation of the CPSA requires a showing of actual knowledge that the product did not conform, or a notice from the Commission that distribution would be a violation. CPSA §§ 19(a)(1) & (2), and 20(a)(1) & (2); 15 USC §§ 2068(a)(1) & (2), and 2069(a)(1) & (2) (2000).

124. CPSA § 19(a)(5) (15 USC § 2068(a)(5) (2000)) makes it unlawful to fail to comply with an order issued under Section 15 (c) or (d) of the CPSA. Those subsections, however, authorize the Commission to issue orders only to manufacturers, distributors and retailers.

125. S.1224, § 102(b). The authority of a court entering an order in cases involving imminently hazardous firearms is similarly limited to manufacturers and dealers. S.1224, § 303.

126. For a discussion of the procedural and substantive difficulties associated with this section see *supra*.

127. Presumably the order would be phrased so as to permit a transfer to the manufacturer or dealer for purposes of implementing a repair, replace, refund or recall order, although there is no explicit requirement in the subsection that it do so.

128. 15 USC § 2061 (2000).

129. CPSA § 12(a); 15 USC § 2061(a) (2000).

130. CPSA § 12(b)(1); 15 USC § 2061(b)(1) (2000). The term “recall” is not defined in the CPSA. The other remedies clearly track those available to the Commission. CPSA § 15(c) & (d); 15 USC § 2064(c) & (d) (2000).

131. CPSA § 12(a); 15 USC § 2061(a) (2000).

132. CPSA § 15(g)(1); 15 USC § 2064(g)(1) (2000).

133. CPSA § 15(g); 15 USC § 2064(g) (2000).

134. S.1224, § 3(a)(6).

135. For a discussion of the standards used for regulations and for recalls, see *supra*.

136. Civil and criminal penalties are set forth in CPSA §§ 20 & 21; 15 USC §§ 2069 & 2070(2000) respectively.

137. CPSA §§ 19(a)(12), 20(a)(1); 15 USC §§ 2068(a)(1) (2), 2069(a)(1) (2000). These are not the only grounds for which the Commission can assess a civil penalty under the CPSA. See CPSA § 19(a)(3)-(11); 15 USC § 2068(a)(3)-(11) (2000).





138. CPSA § 20(a)(2)(A) & (B); 15 USC § 2069(a)(2)(A) & (B) (2000).

139. CPSA § 21(a). 15 USC § 2070(a) (2000).

140. S.1224, § 301(a)(1).

141. S.1224, § 351.

142. 15 USC § 2064(b) (2000).

143. CPSA § 15(b)(1)-(3); 15 USC § 2064(b)(1)-(3) (2000).

144. CPSA § 15(b); 15 USC § 2064(b) (2000).

145. 16 CFR §§ 1115.1-1115.15 (2003).

146. The Commission obtained summary judgment for failure to report incidents of an exploding juicer in *United States v. Mirama Enterprises, Inc.*, 185 F.Supp.2d 1148, 1158-59 (C.D. Cal. 2002) *aff'd* 387 F.3d 983 (9th Cir., 2004), resulting in a civil penalty assessment of \$300,000. In fiscal year 2002 the Commission obtained negotiated civil penalties, consent decrees or judgments for failure to make required reports in six cases, resulting in civil penalties of \$2.975 million. Negotiated civil penalties, consent decrees and judgments in all regulated products cases also numbered six cases, but resulted in penalties of \$895,000. *U.S. Consumer Product Safety Commission 2002 Annual Report to Congress*, pp. G-3 - G-13.

147. 15 USC § 2084 (2000)

148. While most firearms are carried by local police, state police and federal police such as the Federal Bureau of Investigation or Secret Service, many persons might be surprised to learn the number of Federal agencies that have some persons authorized to carry firearms. *See generally*, D. Kopel and R. Racansky, "Day-Dream Believers: What if government had to obey anti-gun laws?" National Review Online, July 30, 2002, <http://www.davekopel.com/NRO/2002/Day-Dream-Believers.htm>.

149. 15 USC § 2075(b) (2000).

150. The scope of the exemption is not precisely clear since S.1224, § 201(a), (b), (c), and (d) apply to manufacturers, dealers and importers. These activities are usually carried on by contractors for the government. The exemptions of S.1224, § 201(e), (f), and (g) apply to persons, which would include government entities in their role as firearms consumers.

151. Since many police officers take their firearms home with them, the exemption would have the effect of putting not only the government officials, but also their families (and especially children) at risk if the true objective of the Act were safety.

152. A complete discussion of law enforcement exemptions to gun laws



applicable to the general public is beyond the scope of this article. For a critique of such exemptions, see D. Kopel and R. Racanksy, "Day-Dream Believers," *supra*, and J. Snyder, "A Nation of Cowards," 113 *The Public Interest* 40, 46-48 (1993).

153. CPSA § 14(a)(1); 15 USC § 2063(a)(1) (2000).

154. In the case of consumer products the manufacturer's certification need only be delivered as far as the retailer. CPSA § 14(a)(1); 15 USC § 2063(a)(1) (2000). In the case of firearms products the certification must be to each person to whom the product is distributed. S.1224, §§ 201(a)(3) and 201(c)(5).

155. CPSA § 14(c) (15 USC § 2063(c) (2000)) authorizes the Commission to require a label containing: (1) the date and place of manufacture; (2) a suitable identification of the manufacturer; and (3) a certification that the consumer product meets all applicable consumer product safety standards. S.1224, § 201(c) requires: (1) name and address of the manufacturer; (2) name and address of the importer; (3) model number of the firearm product and date of manufacture; (4) a specification of regulations applicable to the firearm product; and (5) the required certificate.

156. S.1224, § 201(b).

157. "Firearm product" includes firearm, firearm part, nonpowder firearm and ammunition. S.1224, § 3(a)(3).

158. CPSA § 2(b)(2) (15 USC § 2051(b)(2) (2000)) states explicitly that one of the purposes of the CPSA is "to assist consumers in evaluating the comparative safety of products." In addition, CPSA § 5(a) requires the Commission specifically to (1) maintain an Injury Information Clearinghouse to collect, investigate, analyze and disseminate injury data and information; (2) conduct studies and investigations of deaths, injuries and diseases resulting from accidents involving consumer products; (3) assist private and public organizations in the development of safety standards. S.1224, § 401(a) similarly requires the Attorney General to coordinate with the Secretary of Health and Human Services to collect, investigate, analyze and share with other government agencies circumstances of deaths and injury associated with firearms, and to conduct studies of the costs and losses resulting from firearm-related deaths and injuries. In addition, the Attorney General is required to research and study the safety of firearm products and how to improve that safety. *Id.* § 401(b)(2). The results of these studies are to be made available to the public. *Id.* § 401(c).

159. Pub. L. No. 89-487; 80 Stat. 250 (1966), *codified by* Pub. L. No. 90-23 (1967) at 5 USC § 552 (2000). In general FOIA creates an obligation for a Federal agency to disclose information that it has at the request of the



public, unless a specific exemption exists authorizing it not to disclose the information.

160. 15 USC § 2055(b) (2000). Section 6(a) of the CPSA (15 USC § 2055(a) (2000)) contains a separate exemption for trade secret or confidential business information.

161. CPSA § 6(b)(1)-(3), (6); 15 USC § 2055(b)(1)-(3), (6) (2000). Section 6(b) of the CPSA applies to FOIA requests. *Consumer Product Safety Commission v. GTE Syhania*, 447 US 102, 108-111 (1980).

162. CPSA § 6(b)(4) & (5); 15 USC § 2055(6)(b)(4) & (5) (2000).

163. CPSA § 6(b)(7); 15 USC § 2055(b)(7) (2000).

164. S.1224, § 401(c).

165. It is not clear whether the general statutory prohibition on release of private trade secret information codified in 18 USC § 1905 (2000) would apply to the Firearms Safety Act.

166. CPSA § 25(a); 15 USC § 2074(a) (2000).

167. CPSA § 25(b); 15 USC § 2074(b) (2000).

168. S.1224, § 306.

169. S.1224, § 304.

170. S.1224, § 304(a).

171. S.1224, § 304(b).

172. S.1224, § 305.

173. *The Protection of Lawful Commerce in Firearms Act*, (Pub. L. 109-92, 119 Stat. 2095), signed by President Bush on October 26, 2005, was supposed to end most such actions, but at least one subsequent judicial interpretation suggests that it may not. *City of New York v. Beretta USA Corp.*, 2005 U.S. Dist. Lexis 30363 (2005).

174. CPSA § 24; 15 USC § 2073 (2000).

175. S.1224, § 305.

176. CPSA § 24; 15 USC § 2073 (2000).

177. S.1224, § 305(a).

178. Violence Policy Center, "The Treasury Department is Better Equipped than the Consumer Product Safety Commission to Regulate the Gun Industry," http://www.vpc.org/fact_sht/treasep.htm. The specific procedures cited by the Violence Policy Center are: (1) the necessity to issue an Advance Notice of Proposed Rulemaking; (2) the necessity to defer to voluntary standards in certain cases; (3) the necessity to conduct cost-



benefit analyses; and (4) the restrictions on public release of information imposed by CPSA § 6(b).

179. National Center for Health Statistics, *National Vital Statistics Report*, Vol. 50, No. 15, p. 69 (2002).

180. Normal Commission practice is to allocate unknown causes in the same percentage as known causes. In this case since the overwhelming percentage of deaths from firearm discharges are suicide and homicide only a few of the unknown causes would likely be from accidental discharge.

181. Centers for Disease Control, National Center for Injury Prevention and Control, "Unintentional Firearm Gunshot Nonfatal Injuries and Rates per 100,000" <http://webappa.cdc.gov/cgi-bin/broker.exe>. That number dropped to 17,579 in 2002, the last year for which injury figures are available. (Death data typically lag two years behind injury data because of different methods of collection.)

182. National Rifle Association Firearms Fact Sheet 2004, citing Bureau of Alcohol, Tobacco, Firearms and Explosives. <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83>.

183. U.S. Consumer Product Safety Commission, "Annual Report: All-Terrain Vehicles (ATV)-Related Deaths and Injuries," September 28, 2005, pp. 7-9.

184. U.S. Consumer Product Safety Commission, *All-Terrain Vehicle 2001 Injury & Exposure Studies*, January 2003.

185. 68 *Fed. Reg.* 60629, 60630-31 (2003).

186. For a discussion of the origins and history of the American tradition of private firearms ownership, see D. Kopel, *The Samurai, the Mountie and the Cowboy* 303-73 (1992). For a discussion of the constitutional basis for private firearms ownership, see S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* 55-88 and 99-154 (1994).

187. Since 1930 the annual number of accidental deaths associated with firearms use has decreased 75%. Among children, fatal firearms accidents have decreased 91% since 1975. The per capita rate of accidental deaths associated with firearms use has declined 91% since its all time high in 1904. *National Rifle Association-Institute for Legislative Action 2004 Firearms Facts*. [Http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83](http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83), citing National Center for Health Statistics and National Safety Council.

188. Ironically, the point of view of the proponents of the Firearms Safety Act is best summarized by an author who strongly favors the private ownership of firearms. Lt. Col. Jeff Cooper (USMC-Ret.) stated: "[I]f a person felt that safety were the first consideration in handling weapons, he



WILSON

FIREARMS SAFETY & CONSUMER PROTECTION ACT

would never handle one. . .” J.Cooper, *Cooper on Handguns* 84 (1974). Col. Cooper continues his sentence, however: “[a]nd thus achieve the dubious felicity of placing himself in greater danger from his foes than from his own weapons.” *Id.* The proponents of the Firearms Safety Act have no doubts about the felicity of consumers deprived of firearms in the name of safety.





Quantity Discounts

Journal on Firearms & Public Policy

Give a copy to everyone you know!

Now is the time to get this book into the hands of every American. Order 25, 50, or 100 copies. Send them to your friends. Put one in your local and school libraries. Mail one to everyone you know.

DISCOUNT SCHEDULE

1 copy	\$10.00	25 copies	\$175.00
5 copies	\$45.00	50 copies	\$300.00
10 copies	\$85.00	100 copies	\$500.00
	500 copies		\$2,000

ORDER YOURS TODAY!

Call 425-454-7012 or use the coupon below.

Second Amendment Foundation
James Madison Building
12500 N. E. Tenth Place
Bellevue, WA 98005

Please send me _____ copies of Journal on Firearms and Public Policy. Enclosed is a check or money order for \$_____.

Please charge my VISA MC AMEX Discover

Number _____ **Expires** _____

Signature _____

Name _____

Street _____

City _____ **State** _____ **Zip** _____

Phone(_____) _____ **Email** _____ @ _____







Quantity Discounts

Journal on Firearms & Public Policy

Give a copy to everyone you know!

Now is the time to get this book into the hands of every American. Order 25, 50, or 100 copies. Send them to your friends. Put one in your local and school libraries. Mail one to everyone you know.

DISCOUNT SCHEDULE

1 copy	\$10.00	25 copies	\$175.00
5 copies	\$45.00	50 copies	\$300.00
10 copies	\$85.00	100 copies	\$500.00
	500 copies		\$2,000

ORDER YOURS TODAY!

Call 425-454-7012 or use the coupon below.

Second Amendment Foundation
James Madison Building
12500 N. E. Tenth Place
Bellevue, WA 98005

Please send me _____ copies of Journal on Firearms and Public Policy. Enclosed is a check or money order for \$_____.

Please charge my VISA MC AMEX Discover

Number _____ **Expires** _____

Signature _____

Name _____

Street _____

City _____ **State** _____ **Zip** _____

Phone(____) _____ **Email** _____ @ _____





